

Tactical and Ethical Approaches for Remote Proceedings

BY: FRANCINE FRIEDMAN GRIESING



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griesing
MAZZEO LAW

ARIZONA ▲ FLORIDA ▲ NEW JERSEY ▲ NEW YORK ▲ OHIO ▲ PENNSYLVANIA

P 215.618.7320 ▲ F 215.814.9049 ▲ GRIESINGLAW.COM

Francine Friedman Griesing

Founder & Managing Member, Griesing Mazzeo Law

Fran Griesing is the co-founder of Griesing Mazzeo Law, LLC, a full-service women-owned law firm based in Philadelphia, Pennsylvania, with offices in Arizona, Florida, New Jersey, New York, and Ohio. She is a strategic advisor to executives and general counsel at the country's largest institutions, with over 40 years of experience representing clients in business transactions, commercial litigation, corporate matters, ethics and alternate dispute resolution. She has advised businesses and employees on issues related to employment and restrictive covenants. Fran serves as an arbitrator and mediator, primarily in commercial and employment disputes, and has extensive experience conducting proceedings remotely. She served as Chair of Litigation for the City of Philadelphia Law Department during the administration of Mayor Edward G. Rendell, former Governor of Pennsylvania. Fran is an honors graduate of Binghamton University and the University of Pennsylvania Law School.



Evolution of Litigation Practice and Ethical Issues

- How we used to practice over the past 40 years:
 - Lack of computers, laptops, personal devices.
 - Slower communications due to faxes and couriers v. scanning and emailing.
 - More face to face meetings and in person preparation in the past.
 - More lawyers and professional staff working on cases or deals collaboratively in the same space.
- Top factors to consider in how practice has changed:
 - Volume of Documents
 - Greater due to electronic communications.
 - Ease and challenges of Virtual Practice
 - Comfort of your home/office, but additional distractions and challenges to maintain confidentiality.
 - Facing Clients and Witnesses in Person v. Interacting Remotely
 - Are in person proceedings up close more/less reliable than on a screen?
- The traditional concepts of “face time” in the office, no longer apply. Will they return?
- The ABA Model Rules of Professional Conduct require us to keep up with these changes to be **competent under Rule 1.1.**

Why Do We Need To Be Concerned About This?

- Over the past few years, most lawyers have participated virtually in a range of proceedings – client meetings, depositions, witness interviews, hearings, arguments, arbitrations, settlement conferences, negotiations and mediation.
- I have participated as an advocate or as a neutral in most types of proceedings.
 - Observed a wide array of styles and systems, with varying results.
 - Many snafus with technology either due to connectivity, system or platform issues, human error and unfamiliarity with systems and processes; interruptions and distractions.
- Proceeding online is not going away.
 - Even when restrictions on close contact are reduced and ultimately end, remote work will continue.
 - Significant time and money savings when we don't have to travel to meet or interact.
- Increased risks of serious and embarrassing mishaps if we are not prepared or competent.
- Failing to be competent can lead to ethics violations, malpractice claims and job loss.

What is Unique about USCFC?

- This court has national jurisdiction. Judges can hear cases anywhere.
- There are also Special Masters to handle cases within their limited jurisdiction.
- The cases are not tried by a jury.
- The USCFC has its own Rules. Amended July 31, 2023.
- Cases are defended by Department of Justice.
- Court encourages ADR and early resolution through various means.
- “Guidance on Use of Videoconferencing in the Court” <https://www.uscfc.uscourts.gov/video-conferencing-guidance>

Scope Of Ethical and Professional Responsibilities

To be discussed:

- Evolution of the Litigation Process to Virtual
- The Pros and Cons of Virtual Proceedings
- Preparing for Virtual Proceedings
- Depositions – Before, During and After
- Court Conferences and Pre-trial Motions
- Trials and Arbitrations
- Mediation and Settlement Conferences

ABA Model Rules – Issues in Remote Proceedings

- Competence
- Diligence
- Maintaining Communications
- Confidentiality and Privilege
- Professionalism towards court, opponents and counsel
- Overall professionalism – decorum

Embarrassing Mistakes With Ethical Consequences

- Rule 3.5 Impartiality and Decorum of the Tribunal
 - A lawyer shall not:
 - (d) engage in conduct intended to disrupt a tribunal [in any proceeding]. What is intentional?
- Pulled from the headlines
 - Lawyers smoking cigars and drinking wine during proceedings
 - Appearing in court while getting hair done
 - Lawyers in sleepwear, exercise attire, lounging in bed
 - Lawyers and parties driving during online proceedings
 - Lawyer in swimwear at the pool
 - Lawyers falling asleep while “in court” virtually
 - Doctor appearing in traffic court while operating on patient
 - Using profanity while failing to mute the computer
 - Carrying on side conversations with people at home
 - The cat on the screen in lieu of the lawyer

When The System Fails: ABA Model Rules 1.1, 1.3, 1.6, 3.2

- Technical Challenges (Visual/Audio/Internet Connection)
 - Participation depends on access and communication.
 - Need to rely on connectivity of system, reliability of platform used, capacity
 - Competing users overpowering system
 - Family members cutting off your link
 - Video call abruptly ends due to another account user starting a call
 - Video call hacking or interference
 - Disruption of video or sound for one or more participants
 - Noise in your home or outside; weather affecting reception
 - Watching family or pets in the background

External and Internal Disruptors



- **Confidentiality under Rule 1.6 and Protecting Attorney-Client Privilege**
 - The two concepts overlap, but are not identical.
 - Rule 1.6 is an ethical obligation and breach may lead to disciplinary action.
 - Privilege is an evidentiary rule protecting against compelled disclosure of confidential information shared by a client with counsel for the purpose of seeking legal advice.
 - Confidentiality under Rule 1.6 protects confidential information the lawyer learns in the course of representing a client; may be broader than privilege.
- **Cybersecurity - Outsiders disrupting the process**
 - Need to use passwords for access to internet, platform and sign in to proceedings.
 - Give one person control over who can enter the platform/proceedings.
- **Internal interference**
 - Interference due to internal issues – family or colleagues overloading system.
 - Family, roommates, neighbors access your log in credentials or overhear you in close spaces.

Pros and Cons of Remote Proceedings

Pros

- ▶ No overhead for office space
- ▶ Limited or no travel, more free time
- ▶ Personal space - you are comfortable
- ▶ Fewer expenses (transportation, food, business attire, etc.)
- ▶ Protection against health risks from exposure to others in close quarters

Cons

- ▶ Privacy hard to maintain in close area
- ▶ Visual and audio difficulties
- ▶ User issues (not familiar with technology and it's features)
- ▶ Distractions from family, pets, etc.
- ▶ Witness tampering (coaching, providing notes/script) is hard to monitor
- ▶ Credibility assessment over the screen

Our Duties Begin with Caring For Clients

- Rule 1.1 Competence
- Rule 1.3 Duty of Diligence
- Rule 1.4 Communications
- Rule 1.6 Confidentiality of Information

Rule 1.1 Competence

*A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation **reasonably necessary for the representation.***

- Comments on **Legal Knowledge and Skill.**
 - Requisite knowledge and skill, feasibility of referral.
 - **This includes knowledge and skill regarding the use of technology.**
 - May not need special training.
 - **Emergency** – may give advice in area in which lawyer does not have skill ordinarily required where referral or consultation or association with another lawyer would be impracticable.

Rule 1.3 Diligence

A lawyer shall act with *reasonable diligence and promptness* in representing a client.

- *Comments:*
 - [1] Pursue a matter despite “opposition, obstruction or personal inconvenience.”
Remote work conditions do not excuse failure to act diligently.
 - [2] Workload controlled “each matter handled competently.”
 - [3] Unreasonably delay leads to client anxiety and loss of confidence in counsel.

Rule 1.4 Communications

(a) A lawyer shall:

- (1) **promptly inform the client** of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) **reasonably consult with the client** about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) **promptly comply with reasonable requests for information**;^{*} ...

Challenges of communicating with client if in different locations during proceedings.

^{*} Comment [4]: If prompt response not feasible, lawyer or staff **acknowledge receipt and specify when response can be expected**.

Rule 1.6 Confidentiality Of Information



- a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
- b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: to prevent an array of bodily and financial harm, to seek advice about lawyer's own performance, to comply with law or court order and to prevent conflicts.
- c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

This requires special efforts when we share devices and workspace working remotely.

Confidentiality And Privilege Are Hard To Maintain



- Cybersecurity is the lawyer's responsibility; need to safeguard your passwords and access to internet and systems.
- Need to have reliable backup for system and alternative forms of access.
- Protect confidentiality when you live with others who can overhear your conversations with clients.
- Prepare for challenges of shared devices, shared work spaces when family is also at home from work or school.

Obligations To Others

- Rule 3.1 Meritorious Claims and Contentions
 - A lawyer shall not bring or defend a proceeding, or assert or controvert an issue unless “basis in law and fact”
- Rule 3.2 Expediting Litigation
 - A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.
 - Requires counsel to avoid using pandemic and closures to have unnecessary delays.
 - Obligation to work with counsel to move matter along virtually if unable to do things in person.
- Rule 3.3 Candor to the Tribunal
 - Lawyer shall not knowingly make false statement to tribunal or fail to correct material false statement made.
 - This also applies to not urging delay without a genuine good cause just to take advantage of the situation.
- Rule 3.4 Fairness to Opposing Party and Counsel - A lawyer shall not:
 - a) unlawfully obstruct another party's access to evidence,
 - b) falsify evidence, or
 - c) knowingly disobey an obligation under the rules of a tribunal.
- Rule 3.5 Impartiality and Decorum of the Tribunal
 - A lawyer shall not engage in conduct intended to disrupt a tribunal.
 - This calls into question how we look and our surroundings.

Duty Of Competence: Preparing For Online Proceedings

- Mastering Technology
 - This is an essential part of our **ethical obligations to remain competent under Rule 1.1** as discussed later.
 - You do not want to attempt to join a proceeding or participate without knowing how to work the system easily.
 - Lack of comfort with system distracts you from the substance of the proceeding or leads to costly mistakes, such as **waiving privilege or revealing confidential information in violation of Rule 1.6.**
- Contingency Plan / Plan B, C, etc.
 - If we have learned anything this year, it is that things can go wrong despite the best plans. When we are relying on so many new things, facing new challenges, we need to have a back up plan if our proceedings are disrupted for any reason. E.g., have a backup device such as tablet or phone.
- Audio/Visual Issues – What do people see and hear when you are in the proceedings?
 - Review how we are being perceived or what others can see or hear from us when online.
 - Dress for success even in our home. **Rule 3.5 requires respect for the tribunal and Rule 8.4(d) bars conduct that is “prejudicial to the administration of justice.”**

Mastering Technology Is Required Under The Rules

- Expectations of lawyers using technology existed even before recent events.
 - Our **obligation to be competent under Rule 1.1 includes a duty to be facile with technology** or have the appropriate team support is greater than ever.
 - If we are expected to participate in depositions, hearings, conferences, trials, mediation and transactions and settlements remotely over a screen, we need to know how to do so or are letting our clients down as well as exposing ourselves to ethics violations and/or malpractice claims.
 - You do not want to participate without knowing how to work the system.
 - Inexperience leads to embarrassing mistakes and distracts from the proceedings.
 - E.g., You can be overheard if you are not on mute or if the system is still recording.
- Do a practice run in advance to assure connection works and you know how to use it.
 - Confirm that meeting invitation has a working link to access the proceeding; understand how to block your video and mute your audio, understand how to share screen to avoid sharing confidential information; practice how to control documents and how to highlight, enlarge, etc.
 - Look at what others are seeing on the screen – you, your surroundings and background.

Having A Contingency Plan For Problems

- If technology fails, which it likely will at some point, know what to do to salvage the situation.
- Failure to prepare can amount to **ethics violations under Rules 1.1, 1.3, 1.6 and potentially others** and lead to malpractice.
- Best to prepare in advance:
 - Exchange cell numbers with participants; create system for calling/texting if you drop off unexpectedly.
 - Keep track of who is on the call/platform and note if someone drops off.
 - If possible, have more than one device available to access the proceeding, such as a laptop, tablet or phone; you may not get the full visibility, but that is better than being completely cut off.
 - Use both hard copy and electronic copies of critical documents, to use with witnesses, court and others.
 - If documents are essential, consider secure ways to provide them in advance of the proceeding such as sending sealed envelopes in advance to open on screen.
 - Make sure the documents are legible and can be easily read on the screen and manipulated as needed.

Controlling Your Background And How You Present

- We don't realize how much we are sharing and revealing about ourselves when we get on virtual calls where people can see and hear us and what is around us.
- Do trial runs in advance so you see what they see about your setting.
 - Look at the lighting, can you be seen clearly, do you need a better camera?
 - What else is visible on the screen? What can people see that you don't want to share (photos, messy desk, personal papers)? Don't risk violating Rule 1.6 on confidentiality.
 - Should you use a virtual background and what should that be?
- What can they hear and how are you doing your audio?
 - Are you using the computer audio, head sets or ear pods?
 - What can others hear in the background?
 - Be sensitive to the mute/unmute function. These skills are required under Rules 1.1, 1.3 & 1.6.
- How do you look?
 - Do you look like you care about what you are doing and are prepared or out of context?
 - What happens if you stand up with camera is on? Will you reveal more than you expect?

Depositions: Competence (1.1), Diligence (1.3), Confidentiality (1.6)

- Preparation before anything
- Notice of Deposition
- Ground Rules
- Witness Instructions (disputes over right to counsel, witness coaching)
- Handling Exhibits
- Breaks
- Objections/Privilege

Competent And Diligent Preparation

- Preparation even before the notice goes out or you respond to a notice.
- Notice of Deposition
 - Check latest court and judge rules re remote depositions.
 - Try to work out protocols with opposing counsel; may be required by local procedural or civility rules.
 - Make sure the Notice is clear as to platform and logistics; where the witness will appear and where everyone else will be located; specify that it will **be video recorded, not just on video**, and that court reporter and questioning attorney may be in different locations than the deponent or deponent's counsel (who may or may not be in the same place).
- Preparation
 - Anticipate challenges.
 - Engage court reporter sophisticated in remote depositions; check on rules regarding swearing in witnesses and location of court reporter under applicable rules (Is same state required)?
 - Do a technical trial run.
 - Make sure witness has the equipment, laptop, audio, camera and internet capacity needed.
 - Prepare your witness (if defending) for what to expect.
 - Check the background and presentation for you and your witness. **It may be shown to the court on video.**

Getting started with Deposition

- Make sure all other programs are closed on your computer to **avoid disclosing confidential information inadvertently and breaching Rule 1.6 or waiving privilege**.
- Be clear with counsel as to what is meant by **“usual stipulations”**.
- In addition to the customary witness instructions, **competence requires** you consider adding to the deposition instructions before substantive questioning:
 - Is anyone else in the room with you?
 - If anyone else comes into the room at any time, please let me know.
 - Are you looking at anything other than the screen upon which the deposition is being taken (e.g., a notepad, cellphone, documents, papers)? Are devices turned off?
 - Are you able to see and hear me clearly?
 - Unless I instruct you otherwise, please do not look at anything else while we are on the record.
 - Answer all questions by yourself. Do not look to anyone or anything else for help in answering questions. If you cannot answer a question by yourself, let me know.
 - You agree not to communicate with anyone else, besides me, in any way while we are on the record? This includes not checking email, text messages, or any other forms of communication.

3.2 (Expediting Litigation), 3.4 (Fairness Opposing Party & Counsel)

- Confirm that only the court reporter is recording and videotaping.
- Speak slowly and clearly as it is more difficult to make the record online.
- If you are using mute on your end, be ready to unmute so your objections are not lost.
- Consider using a **bold visual to reflect objections. Hold up a sign!**
- State protocol for dealing with interruptions or technical issues.
- State on the record if anything goes wrong with the process. **Rule 3.2 expediting litigation.**
- Handling Exhibits
 - Send documents in advance in a sealed envelope with agreement that seal not broken until you are on the screen and authorize it. **Rule 3.4 Fairness to opposing counsel.**
 - Make sure witness can read exhibits as they appear on the screen.
 - Consider using two screens – one to view witness and the other for exhibits.
- **We have a duty to keep up on the best practices to comply with our duty under Rule 1.1.**

Rule 1.6 Confidentiality & Attorney-Client Privilege

- During remote depositions issues may arise that impact ability to preserve client confidences and/or privilege.
- Breaks during testimony
 - Set up a process for breaks and privacy.
 - Do not use break rooms for talking with clients. Use a separate line of communication to be safe and make sure your devices are on mute and cameras off.
 - Be sure court reporter is not taping or recording during breaks.
- Objections/Privilege
 - Can be difficult to **hear objections** when people are talking simultaneously. Use a visual as well.
 - Witness and counsel must be reminded that they cannot consult once deposition begins except as to privilege issues; harder to control with remote depositions.
 - Ethical issue of not coaching witnesses during depositions (Rule 3.4 Fairness to Opposing Counsel and Party).

Motion Practice Related to Remote Depositions

- Check court and judge rules in advance about special protocols and whether appropriate to call court during deposition to address objections.
- Make sure you have a clear record of objections and instructions to witness not to answer so you have what is needed for a motion to compel testimony.
- Remember the court has more than a transcript; it can see how you act; be dressed for court so if judge later views the video you (and your client) present professionally.
- **Preparation and motion practice related to depositions in the remote setting implicates our duties under Rule 1.1 Competence, Rule 3.2 Expediting Litigation, Rule 3.3 Candor to the Tribunal, Rule 3.4 Fairness to Opposing Party and Counsel; and Rule 3.5 Impartiality and Decorum of the Tribunal.**

Virtual Court Conferences & Pre-trial Motions



- Court Expectations
 - Check the latest court rules on papers submitted and procedures.
 - Check your appearance and your setting; you may be sharing more than you think.
 - Do your best to protect against interruptions and distractions.
- Drafting Materials – to assure you comply with rules as to length, margins and easy to read.
 - Many courts have reading materials online and not in hard copy. Use links to cases and exhibits.
 - Consider ease of reading your brief; use headings and shorter paragraphs and sentences.
 - Use visual aids, such as bullets, italics and bold print.
- Presentation Skills
 - Do a trial run with the technology and check lighting and sound.
 - Record and video yourself and observe how you present on screen.
- Exhibits
 - Check exhibits has been submitted, they are legible, and that you know how to work with them.

Be Prepared for the Worst; Hope for the Best

- During the Pennsylvania federal court proceedings involving President Trump's challenge to block certification of the election results, the court felt the public should have access.
 - *Donald J. Trump for President v. Boockvar.*
- The Court limited physical access to the courtroom, but set up a call in number for the public to be able to listen in due to the "subject matter interest."
- The audio did not work properly and the proceedings had to be halted while the court staff dealt with technical difficulties.
- The Court system usually limits call to 200 callers; increased it to 4,000 and added another 4,000. System failed; it is unclear if it was more capacity than system could handle.

Competence (1.1) & Expediting Litigation (3.2)

- Coordinating with Pertinent Personnel at courthouse or arbitral forum in advance.
- Handling Witnesses
 - Be sure to give clear instructions at outset of questioning.
 - Note that there may be a lag between the answer and its transmission online.
 - Use exhibits during cross –examination to keep witness on track; difficult to control over video.
- Using Exhibits
 - Should be pre-marked jointly and hard and online copies should be distributed in advance.
 - Practice using the system to pull up exhibits, manipulate them, enlarge, highlight.
 - Be sure they are all legible and that you can share them without sharing other things on your screen.
 - Rebuttal Exhibits & Demonstrative Evidence need not be shared in advance, should be accessible.
- Objections During Testimony
 - Be careful about mute button as your objections may not be heard fast enough.
 - Be prepared to cite the evidentiary rule and your argument concisely and have the rules handy.

The Personal Factors

- How you and your setting present to observers
 - Clothing, as if in person; not just from the waist up.
 - Lighting and background, camera at eye level.
- How you sound
 - Identify yourself when you speak.
 - Don't talk over judge; be conscious of lags in audio.
 - Speak more slowly and clearly than in person.
 - Be careful about interrupting witnesses.
 - Use good quality head set or ear pods.
 - Don't make unnecessary noise/use mute option.
- Rule 3.5 Impartiality, Decorum of the Tribunal
 - Duty not to “engage in conduct to disrupt a tribunal” – does that extend to what people see?

Mediation and Settlement Conferences Online

- Lawyer advocates and neutrals both have ethical duties.
- Preparing for Sessions – format, opening statements?
- Ex Parte Settlement and Communication between Parties.
 - **Rule 4.2 Communication with parties represented by counsel.**
 - Reliance on neutral is greater when you are not in the same room or in the same building.
- Impact and influence on Clients and Mediator
 - Less pressure to settle when you can do other things during breaks and are not stuck there.
 - Do not know if the opposing client getting full import of what is happening or if they feel the same motivation to settle as if they were in person.
 - Not sure what is being filtered through counsel if mediator/settlement master/judge is only talking with counsel and counsel relays it to the client. Counsel can filter the message.
- Joint Sessions – better opportunity to encourage parties to work it out.
- “Ability to Leave” - easier for a party to end or disappear rather than put in the effort.

Practice Pointers

- Prepare, prepare, prepare – learn the rules of the court, judge and using technology.
- Control your appearance and your setting; eliminate distractions.
- Test the link and technology in advance.
- Have hard copies and electronic copy exhibits distributed in advance.
- Have a back up plan and alternate communication available.
- Test your exhibits – access, legibility, manipulation, sharing.
- Workout issues with opponent in advance and confirm in writing.
- Prepare your witnesses for the new reality.
- Have the applicable rules handy and ready to cite.
- Control your audio and video, mute and unmute.

Final Cautionary Reminders

- Remember that you are on screen, can be seen and heard. **Do not forget to MUTE!**
- Someone may always be filming or recording. **Turn the camera off!**
- Use a separate system for communicating during breaks.
- Always dress in a way that will not embarrass you. Instruct clients on appropriate attire.
- Save your personal activity for after business hours, and make sure your system is entirely off before you say or do anything that you do not want to share with others. Don't share your screen without closing all other fields first.
- **The Rules of Professional Conduct are the threshold. Our ethical obligations to uphold the profession extend beyond the rules, such as to Codes of Civility, court rules and common sense.**

Thank you!

ANY QUESTIONS?

Contact Information

Griesing **Mazzeo** Law
Francine Friedman Griesing, Esq.*
Co-Founder & Managing Member

D 215.618.3721 | **O** 215.618.3720

E fgriesing@griesinglaw.com

www.griesinglaw.com

*Admitted in AZ, NY & PA



griesing
MAZZEO LAW