



Lowenstein Sandler's Insurance Recovery Podcast: Don't Take No For An Answer

Episode 20 -
Litigating in the Virtual Word: Passing Fad or Wave of
the Future?

By [Lynda A. Bennett](#), [Michael A. Kaplan](#), and Robin
Goldfischer
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Lynda Bennett: Hi, welcome to Don't Take No for an Answer, an insurance recovery podcast. I'm your host, Lynda Bennett, Chair of Lowenstein Sandler's Insurance Recovery Group. Today, we're going to be talking about litigating in the virtual world. Within the last year and a half, the litigation world was turned upside down by the COVID-19 pandemic. Literally overnight courts were closed, contentious lawsuits were stopped in their tracks and parties knocking on the door of resolving their matters at mediations that had been planned months in advance were abruptly canceled. For a few months, judges and litigants alike were scratching their heads and trying to figure out how to maintain business as usual in a fully virtual environment, mediators were among the earliest adopters of zoom technology, pivoting their practices into TV land complete with virtual breakout rooms. Court reporters soon followed assuring litigants that depositions could take place over the virtual airways and screen sharing technology could be leveraged to maintain the surprise factor associated with using deposition exhibits.

And while courts were slower to transition to the virtual environment, largely owing to their far less sophisticated technology infrastructure. Judges too learned to be adept at using a variety of virtual platforms to conduct case management conferences, hearings, and oral arguments on dispositive motions. The one big gap in the legal process was figuring out how to conduct jury trials under the extreme conditions presented by the pandemic. Now, despite the remarkable resilience that all stakeholders to the litigation process demonstrated during these unprecedented and challenging times, the questions that we're going to discuss in today's episode revolve around whether these were or should be temporary fixes and whether the legal process will be forever changed as a result of COVID-19.

To explore these issues, I'm pleased to welcome my partner, Michael Kaplan, who is a seasoned litigator and trial attorney who used to be able to brag about his executive platinum frequent flyer status as a result of litigating matters all over the country. And our friend, Robin Goldfischer, Senior Vice President & General Counsel of the Valley Health System. Robin has been

managing outside counsel in handling a wide variety of complex litigation for more than a decade. And therefore is well positioned to give us the client perspective on what changes should stick and which ones should be 86ed. So welcome Robin and Michael. Very pleased to have you here today.

Robin Goldfischer: Good to be with you.

Michael Kaplan: Thanks Linda.

Lynda Bennett: All right. Let's start at the beginning. What's the thing about litigating a case in a fully virtual environment? Robin, why don't you lead us off.

Robin Goldfischer: So best thing clearly it's more cost-effective. You don't have the travel expenses. You don't have the travel time. No hotel stays for experts, meals, don't have to keep track of that. So from a purely economic vantage point, the virtual world has played well.

Lynda Bennett: So Mike, what's the counterbalance to saving the money, which is hard to dispute as Robin's getting beat up by her business folks to keep that litigation budget down. What are some of the consequences of the cost-savings?

Michael Kaplan: I think you're losing the ability to really be an advocate, I mean, I'm someone who believes that litigation is an art and the advocacy is something that you practice and I don't want to say perform, but something that you execute and advocacy via the virtual setting is very challenging. A lot of advocacy is based on reading cues that aren't necessarily spoken they're viewed and the inability to see people, how they're reacting to information or to gauge people's body language, to determine whether or not they're telling the truth where they're uncomfortable with the topic. You're losing all of that because people are literally in the case of depositions are sitting in their offices, likely wearing pajama bottoms and are very comfortable in their homes and you lose all of that. So that's, I think the highest level thing from a purely advocacy standpoint is you just lose the ability to be an effective advocate on so many different fronts.

Lynda Bennett: How to dress for your day, I guess that's what you say, Mike. So Robin, how do you strike that right balance between managing the litigation budget and knowing, what are you going to be instructing your outside counsel when they need to be in person versus when you'd prefer them to leverage the technology that's available now?

Robin Goldfischer: So I think it's all a matter of careful selection. Be it, certain things are easy to do via technology, for example, appellate arguments, arguing motions, where you don't have witnesses. And I would say that in some respects, having the technology has played well, because you can pin the judge to your laptop and you can watch his or her facial expression as your adversary is making their argument. And you can see what is, and is not playing well to an extent that you were not able to do if you were sitting in the fourth row of a courtroom, listening to the same motion. I would also argue that it makes it more accessible for general counsel to be present at important motions about having to get in the car and drive to Trenton or to New York City. So I think those are benefits.

I don't think it plays well in a matter where you have multiple witnesses testifying in court, for the reasons that Michael expressed. I think you have to be able to judge people's body language and demeanor. I think it's difficult to know if someone's sitting in their living room, whether there's somebody sitting at the side, coaching them that you can't say. So I believe it has a time and a place. I think we used it for all things during pandemic for obvious reasons. And I think now's the time to sit down and really determine the advantages and disadvantages based on the matter that you're dealing with.

Lynda Bennett: So, Mike, can you give us an example in your practice over the last 15 months where you've conducted a deposition or an oral argument in the virtual world where you feel like you've both had a benefit or a gain from doing that and give us an example where you felt like something was lost over the video screen?

Michael Kaplan: Yeah. So, I think from a beneficial standpoint, we are in the process of arbitrating a case now, and we have a very litigious adversary who was insisting on taking supplemental depositions and swore that he needed at least four hours to complete these supplemental depositions. And when we sat down to do it, he took 37 minutes. And so on the next episode of the podcast, we'll talk about how to properly estimate your deposition time, but that's not-

Lynda Bennett: That's beyond the scope, but don't take no for an answer my friend.

Michael Kaplan: Exactly. But from that standpoint, completely agree with the technology, because the witness was in Chicago, right? There would have been a flight out, a prep, all of those things. I completely agree with that notion. However, I also argued on behalf of the tort claimants committee and the Diocese of Camden bankruptcy case, in a very complicated motion about the bankruptcy bar date at the beginning of, I think it was February of this year where the bankruptcy court was using a program called court solution. So not Zoom, just pure telephonic argument. You could not see anybody. I think there were nine different lawyers arguing. It took five and a half hours, and you're not able to read the judge. You're not able to see your adversaries. We're talking all over each other and you took a five and a half hour hearing if it were in person, I'm guessing it would have been done before the longevity. And so-

Lynda Bennett: So that's just a waste of everyone's time and effort?

Michael Kaplan: Right.

Lynda Bennett: Yeah.

Michael Kaplan: Right.

Lynda Bennett: So how do you maintain also the element of surprise? So what were some of the techniques that each of you saw in the litigation's you're involved in where you're having a deposition? Now, when I take a deposition, there are certain documents I want to be able to slide that across at just the right time in the deposition to surprise or get a spontaneous reaction from the witness. So how do we manage around that in the virtual world, where we maybe

have to give the exhibits in advance so that people have them before the depth starts?

Robin Goldfischer: So I actually have a rather large case where there were multiple cases of exhibits actually, that were sent the night before they came sealed and needed to be opened on the screen.

Lynda Bennett: Where's the trust Robin? Where's the trust?

Robin Goldfischer: There's no trust. Let's be honest. So the element of surprise was certainly there when we opened these two cases of documents and saw them all neatly organized by number, no idea what was in them. And by the way, I think they use 10 of them out of two cases of documents over the course of a day. So killed a lot of trees.

Lynda Bennett: And put those needles in the haystack.

Robin Goldfischer: But I do think that it was effective because when they said, "Pull out file 10." And you pulled out file 10, and you were on the screen, they could gauge your demeanor. So I thought that was effective. Now we were dealing with professionals. If you were dealing with lay people, I don't know if it would have been quite as effective. As the element of surprise as you say with a lay person.

Michael Kaplan: Yeah, that's the exact method that we used in both depositions and in a trial. It just resulted in more than two boxes, it resulted in about 12. And we've made it use 15 of the exhibits Robin. So it wasn't much better.

Robin Goldfischer: I feel better.

Michael Kaplan: Yeah. Right? But truth be told, we needed to get the arbitrators, the exhibits for the trial. They wanted them hard copies, screen share is not an alternative. We can talk about that one if you want, but screen share is the worst dimension on demand.

Lynda Bennett: How do you really feel Mike?

Michael Kaplan: That was the PG version of how I feel about screen share, because you're putting a document up on screen-share and then you say, okay, to the witness read the document. And someone else is controlling the scroll, and you're just sitting there. So it's ridiculous, but I agree with Robin, the only way we came up with this is the exact way she described. Which is to ship in a sealed box, open it on camera. And by the way, the surprise only lasts until the first break, because in the first break they're flipping through all the exhibits anyway, to figure out what's in there. And then the surprise is gone.

Robin Goldfischer: Okay. We wouldn't do that, we were told not to do that. And afterwards, we walked the two cartons of documents, the documents that were not used to the shredder and shredded them as we were told to do. But I'm sure a lot of other people are doing just what you said.

Lynda Bennett: All right. Well, let's talk about technology for a second. Mike, since you brought it up, has it worked as seamlessly as the tech geeks told us it was going to?

Michael Kaplan: You mean when I was doing an oral argument last week or three weeks ago in Delaware, and the judge could see me, but not hear me? Absolutely. It worked seamlessly.

Lynda Bennett: Well, it's better than being a cat, I guess.

Michael Kaplan: Yes. Truth to be told it hasn't worked as seamlessly as it did, and sometimes it does. I mean, sometimes the very basic functions work well, but sometimes it doesn't. And part of the problem, is you have three or four prevailing platforms of technology and maybe your law firm or your hospital has bought the license for the enterprise version of one of them, but not all of them. And so when you're doing zoom, you've got the high speed broadband, super-duper connection. And when we're doing Microsoft teams, I'm connecting through aol.com. So the answer is no, but to that credit, if I'm being completely fair, I will say that at least my experience is that our people reacted quickly and try to stay on top of it, whether or not we've always been out front on everything. No, but we have never sat back on our hands and we're consistently trying.

Robin Goldfischer: And I have to tell you that from our perspective, the few times we've done it, we have an IT department of 150 or 200 people. And we kept an IPT person sitting right outside the office. So if we hit a glitch, there was someone sitting there to help us. And we tried everything a day in advance, at least to make sure everything was working. We did everything we could to optimize the process, but it is not optimal clearly.

Lynda Bennett: Technology is great when it works, which is mostly not most of the time. All right. Screen fatigue. What about that? Is that a thing? Have you seen that either in depositions and or for trial or hearing work?

Robin Goldfischer: Absolutely. How many hours can you sit and stare at the screen and not lose your mind and not be distracted by your cell phone or your other email? And you need to get up and walk. At our normal deposition, you take more breaks. You really have to take in the breaks every hour, so people can move around. Otherwise you just become too lethargic. And I think it takes something out of your witnesses, testimony.

Michael Kaplan: Yeah. I've done multiple trials in my tenure at Lowenstein. And the one that we did, the arbitration we did last summer over, I think there were eight trial days, all virtual staring at what was a very big screen. I mean, it was a movie theater type screen just to reduce the screen fatigue. At the end of that trial, I was more tired than I have been after any other case that I have done. And I think it's just purely from the standpoint of staring at that screen all day, and then just silly things. The boxes are moving around. I mean, there are so many other factors and even with breaks, it's really very hard to concentrate. And it's just not as effective in my mind. You are wearing yourself down quicker and that's not good for the case.

Lynda Bennett: All right, let's talk about mediation before we wrap up here. I noticed in my practice that a lot of cases went into mediation mode, largely prematurely, but because the courts were closed, everybody just kind of pivoted to Sarah. Well, let's see if we can settle the case. And I'm curious to hear your experiences and insights into whether mediation can be done effectively in the virtual world, or is this something that as we all come out of our bunkers needs to get back to and across the table in person experience?

Robin Goldfischer: Well, I can start out by saying that I think it depends on a lot of factors, how well the mediator knows the attorney, how well the attorneys know each other, whether the parties need in-person attention to understand the process. Because a lot of the times the plaintiffs are newbies. They haven't been engaged in litigation before, and you just don't get the same impact on a screen as you do in an office with a mediator who's skilled at getting in there and building the trust that's necessary to effectively mediate. I also think in my experience, that cases get settled in the hallway between attorneys and not in the room with the clients. And I think that you lose that when you're virtual.

Michael Kaplan: I agree. I've settled more cases at the snack bar than probably anywhere else. And it's really the ability to go out and talk to the media and the other attorney and say, "Hey, listen, I'm in a jam here. I've got a problem. You need to help me solve this problem. And I'm willing to help you solve this problem." And when we get that kind of frank conversation, it's great because otherwise the alternative in the Zoom mediation world is, "Hey, can you kick your client out of the room? And I'll kick mine out of the room and we can have a conversation." And the first thing the client does when they come back in and say, "What'd you talk about?"

Lynda Bennett: Right, exactly. It's not the chance meeting on the way to the restroom anymore. Everybody knows exactly what's happened.

Michael Kaplan: Exactly.

Lynda Bennett: Yeah.

Michael Kaplan: But I agree with Robin, it's just not the same.

Lynda Bennett: Yeah.

Robin Goldfischer: Very hard to build rapport over a TV screen.

Lynda Bennett: Yeah. Well, and look, some of the mediations that I've done in the olden days pre COVID, there's a lot of benefit when you've reached that impasse of getting the two clients together in a room to talk about the business relationship if there's an ongoing business relationship there that you can leverage, or that has meant something prior to this dispute arising between the parties, there's a lot of benefits to that across the table in person contact and connection. And I would be remiss if I didn't share that the technology associated with mediations adds additional layers of complications. Early on, one mediation I did, the chat function is a great means of communication generally, but not when you're in an adversarial proceeding.

And you think that you're reaching out and chatting just the mediator saying, we're ready to make the next offer at X. And you actually chatted everybody which actually happened in one of my cases and mediators telling us, "Oh, don't worry. You'll definitely hear us before we come back into the room. We'll let you know." And here I am, the deep in a strategic conversation and the mediator pops up on the screen with no notice whatsoever. So I think there are additional sets of complications in the mediation context that will make it challenging.

And certainly I will be happy to return to the jams snack bar to get my cases settled. All right. Well, so thank you both Robin and Mike for sharing your insights today. I think that we have some pretty good positives and not so positives coming out of the technology that we all learned over the last 15 months. And would love to have you back at some point in the future, like maybe a year from now, we'll do a check-in and see what actually stuck and how much we went back to business. But thanks for joining us today on Don't Take No for an Answer, and look forward to seeing you next time.

Robin Goldfischer: Thanks.

Michael Kaplan: Thanks Linda.

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