



2021 CLM Construction Conference

Sept 22nd – 24th 2021

San Diego, California

The Old Meets the New Meets the Old? How the Lessons of 2020 Can Interact with the Return to Normal for a More Economic Practice.

I. The Defense for Construction Defect Litigation Involves Aspects that Remain Consistent Regardless of Exigent Circumstances, Such as a Global Pandemic.

A. Case Assignment

Despite the beginning of a global pandemic and the world coming to a halt, litigation proceeded forward.

1. First Steps When Addressing a New Construction Matter from a Litigation Standpoint.

Communication remains an essential element from case assignment through completion of the litigation. ABA Model Rule 1.4(a)(2) provides that the lawyer shall reasonably consult with the client about the means by which the client's objectives are accomplished. In the setting of insurance defense, counsel is often placed in the tripartite relationship with the client and the claims professional. While this is not an ethics course, it is nonetheless crucial to reference the importance and the obligation for proper communication. One of the first steps when receiving a case assignment is communication with the client and claims professional concerning the facts of the dispute. Commonly, this has been accomplished through a series of phone calls or, depending on the location of the parties, in-person meetings.

2. Budgeting for the Defense.

As you learn the facts of the dispute, you can begin to budget for the defense. For instance, because of the nature of the claim, the claimant may require expert testimony to establish causation. With this information, we can then anticipate our own expert

needs to refute the testimony that we expect to hear. We can also anticipate motion practice to effectively position the defense. While experts represent a potentially large expenditure, it is important to consider the time needed for travel, depositions, and mediation. The nature of construction litigation lends to the situation where a project in Southern Texas involves a claims professional in California and a client in Alabama. As such, you must account for the time needed to visit sites, hotel stays, and time on the road. While it is difficult to levy every aspect of a defense that should be included in the budget for the purposes of this presentation, it is crucial to properly consider expenses when litigation involves parties that span state lines. The same considerations are pertinent even if the litigation involves parties located in a single state.

II. With All the Hardship 2020 Brought to Many Americans, 2020 Also Brought Important Lessons for Litigation and Claims Professionals. (30 minutes)

A vast number of Americans were faced with the prospect of remote work in March of 2020 as state-mandated lockdowns took America and the world by storm. While the viability of lockdowns is the subject of much debate, we nonetheless were forced to contend with the result of the lockdowns. Suddenly, remote desktops, Virtual Private Networks, and Zoom became the new normal for a significant number of Americans.

A. Remote work.

1. Litigation Personnel.

Faced with the prospect of remote work, many of us were forced to adapt to the 2020 world. For some, the transition was easy as their office was readily equipped for using services such as Zoom and for accessing files outside of the office. For others, the logistics of remote work presented a significant challenge.

a. Benefits.

One of the largest benefits that came with remote work is the cost savings associated with employees working from their residence. However, even as attorneys and staff returned to their offices, the cost savings remained in many instances. Depositions can effectively be executed via Zoom or a similar remote conferencing service. Similarly, many courts held proceedings via Zoom. Attorneys were no longer forced to take the time needed for travel to and from the courthouse, waiting in security lines and moving through multi-floor buildings attempting to locate the proper courtroom. While seemingly little expense may be attributable to the travel time associated with hearings, depositions, or even mediation, this time can significantly add up throughout the life of a case.

b. Areas of Concern.

While remote work provides the option for significant cost savings, it is difficult to maintain and run a remote workforce. A simple instruction through the office had to occur via email or a phone call as opposed to quickly stopping by an adjacent office. It is difficult to monitor staff while working remotely. Questions inevitably arise concerning an employee's ability to remain focused and work for the allotted time. These practical considerations are something that most employers will face when dealing with a remote workforce.

2. Claims Professionals.
a. Benefits.

As with litigation, claims professionals garner many of the same benefits from remote work. Cost savings from a litigation standpoint flow up to the claim's professional. Before 2020, a claims professional from New York may have been forced to spend three days on a trip to Texas to attend a mediation. However, the prospect of remote proceedings can allow that adjuster from New York the freedom to attend mediation in Texas via Zoom. This not only saves on travel expenses but allows time to be spent on other claims as opposed to being consumed by necessary travel time. Of course, mediation is not the only effective means that remote work has served to benefit the claim professional.

b. Areas of Concern.

A practical consideration for any claim professional is managing your caseload. Because of the sheer volume of cases that claims professionals are required to handle, it can become difficult for a claim professional to have a consistent, in-depth knowledge of every claim. As such, claim professionals often rely on counsel for obtaining up-to-date information on the claim. Face-to-face communication can be crucial for understanding subtle points that can make a significant difference in liability. Remote work takes away the interaction that can provide a better understanding of the case. Gone were the days of discussing a claim in a conference room before mediation. While zoom offers a similar experience, personal interaction can remain tantamount for a proper evaluation of a claim.

B. Attending Remote Court Proceedings and Depositions.
1. Remote Depositions.

Depositions can effectively be completed remotely. Video conferencing platforms provide an easy avenue for attorneys to question a witness face to face without being in person. Preparation remains key as the attorney needs to present exhibits through an online platform as opposed to simply providing a paper copy of the exhibit. Remote depositions proved effective in disputes where multiple parties attend a deposition. For instance, before the pandemic, the deposition of a claimant's expert in a construction matter would need to be scheduled at a hotel conference room or at an office large

enough to accommodate all parties attending the deposition. It is economically efficient to present the witness remotely in litigation involving multiple parties. Thus, remote depositions present an effective and cost-saving measure to obtain testimony, but remote depositions are not without distinct problems.

2. Remote Motion Practice.

While depositions can be effectively performed via video conferencing, the effectiveness of motion practice remains a significant question. Because of the pandemic, many litigators were forced to argue motions on video conferencing platforms because courtrooms were closed for in-person attendance. In many ways, remote motion practice saves on the time and expenses associated with in-person attendance. A common theme that we see in construction litigation is multiple attorneys making an appearance for a single party because of different insurers providing a defense. Almost inevitably, there will be consolidation of defense counsel for economic purposes. For simple motions, such as an attorney withdrawing from representation, remote motion practice seems to act in its prime by allowing cost-effective appearance for all parties involved. As complexity increases, the viability of remote motion practice becomes questionable.

3. Trial.

Trials were few and far between in the age of the pandemic. At the outset of the pandemic, nearly all trial settings were continued simply because of unknowns surrounding the virus. Emergency orders eventually allowed for courts to hold trial virtually or in-person if the court followed appropriate safety measures. Trials that proceeded were often small personal injury claims or criminal matters. We have experienced that the parties in construction litigation are hesitant when it comes to the prospect of conducting a trial virtually. The cost savings with virtual trial remain in question as the necessary work may not offset any savings associated with avoiding in-person attendance.

C. Necessity for In-Person Attendance.

1. Site Inspections.

We have not found a viable alternative for in-person attendance for site inspections. In fact, the pandemic may have slightly increased the time for site inspections. Because of the pandemic, extra safety precautions often led to a limited number of parties being able to visit and observe a site at one time. Because construction litigation often involves numerous parties, safety concerns often extended the time of site visits so that all parties had a chance to observe the area. Additionally, destructive testing suffered similar displacements. For example, in a matter involving destructive removal and water testing around windows, only the Plaintiff's expert and the General Contractor's experts were permitted to observe the removal and the testing because of virus safety concerns. A

situation where subcontractors' experts are not permitted to view removal and testing makes it difficult to adequately protect the subcontractor's rights. Site inspections and testing require in-person attendance, and the virus in some instances increased the time and expense of inspections.

2. Defending Depositions.

Remote depositions present a cost-effective way for obtaining testimony in construction litigation involving numerous parties. However, defending a remote deposition creates some uncertainty. For instance, if the attorney defending the deposition experiences technical difficulties, the attorney may not hear an objectionable question or a question that calls for privileged material. A witness can feel somewhat alone as they questioned without anyone else present. Conferencing during breaks in a deposition can be challenging because it takes additional steps for the attorney to communicate with the witness. While it is possible to defend a deposition remotely, future practice may favor in-person attendance of the witness and attorney defending the deposition.

3. Complex Motion Practice or Motion Practice Requiring Testimony.

Complex and dispositive motions seem to strain the concept of remote practice. Video conferencing can be challenging when attempting to argue complex legal and factual points to a court. Presenting testimony and evidence remain challenging as it can be difficult to judge a witness's demeanor without seeing an individual in person. We have even encountered some courts that have refused to set hearings on dispositive motions and instead will consider motions via submission. The remote nature of the motion practice makes it easy for a court to defer ruling and can impact the effectiveness of your argument to the court. However, as with any general idea, there remain exceptions, and on a case by cases basis you may be able to effectively argue motions remotely.

III. We Can Integrate Lessons from 2020 Moving Forward to Create a More Efficient Practice (20 minutes).

A. Accounting for Remote Depositions/Court Proceedings.

Moving forward, there is some uncertainty as to whether courts will continue to utilize remote proceedings. As it currently stands, States are beginning to open, and more Americans are vaccinated and returning to everyday life. Even during the Pandemic, some courts in Texas held in-person hearings with the option to attend via Zoom. However, for the courts that remained open for in-person proceedings, in-person proceedings were strongly favored. Conversely, other Courts in Texas have refused to hold virtual hearings and instead have only considered motions via submission. It

remains to be seen the extent to which courts will continue to permit virtual attendance. However, with the prevalence of virtual proceedings, hesitancy to return to full in-person settings, and differences with individual court procedures, we can expect to see virtual court proceedings remain a reality. It will become very important to decipher the local rules and determine whether the Court will permit virtual attendance.

Attending virtual depositions will likely continue. Absent extreme circumstances, the parties will work together to schedule a deposition. Scheduling a deposition can be a significant task when a lawsuit involves multiple parties. However, the option to attend virtually as opposed to finding a date and time when all parties need to meet in a single location can alleviate common scheduling woes. At case assignment, one should consider the possibility of attending remote depositions.

Remote mediation can be effective in multi-party litigation. Mediation involving many parties took significant logistical planning to have enough room to properly segregate all parties. Virtual conferencing services allow for "breakout" rooms. This allows each party to be placed into a separate virtual room. By segregating parties into virtual rooms, the mediator can maintain confidence, and the parties can speak candidly with the mediator. As necessary, the mediator can reconvene all parties into a single room. While mediation costs may not experience a significant change, the freedom of virtual attendance can help to save the cost that a party would otherwise incur with having to attend mediation in person.

B. Necessity for In-Person Attendance.

Despite the practical use for remote work, it will likely be impossible to remove in-person attendance for all aspects of litigation. There will be the courts that will return to in-person attendance and will limit the ability to attend remotely. While the viability of trial over remote services remains a topic of staunch debate, when it comes to construction litigation, it seems that an in-person trial will be superior to a remote trial. As we all know, the odds of construction litigation reaching trial are slim, at best. These cases often settle before multiple parties are crammed into a courtroom for voir dire. However, it remains a possibility that litigation will ultimately reach a jury. With any trial, holding the jury's attention remains crucial. When liability hinges on the interpretation of a specification or whether the drawing clearly details critical transitions between dissimilar materials, holding the jury's attention is a present concern. However, presenting such an argument remotely to a jury raises significant concerns of whether you can adequately

hold the jury's attention. As such, in-person attendance for trial likely remains a necessity. Bench trials or arbitration hearings may be easier to complete remotely as the judge or arbitrator will likely be more in tune with the proceeding.

Similar issues arise when considering remote motion practice. As mentioned earlier, it is possible, if not advisable from a cost standpoint, for some motions to be set remotely. However, some motion practice can require numerous exhibits and complex arguments. When making an argument, it is often easier to speak directly with the court in person as opposed to remotely. There is a slight delay in the video and audio feed when working remotely. This delay can cause awkward breaks when the Court asks questions during an argument. Additionally, technical difficulties in these moments can stop an argument and force you to backtrack to properly build the argument. Presenting testimony remotely can present similar issues. In-person attendance can alleviate these concerns.

It may be advisable to consider defending deposition in person with your witness. Sitting with your witness during a deposition can help to alleviate anxiety associated with the deposition process. You will be able to hear what your witness hears, thereby addressing concerns that you miss an objectionable question because of technical issues.

C. Goals Moving Forward with what We Have Learned from 2020 and Implementing Those Lessons as the World Returns to Normal.

The challenges of 2020 proved that it is possible for legal proceedings to continue moving forward despite being forced to limit person-to-person contact. We can perform many aspects of our profession remotely. Factoring in the ability to work remotely can help to reduce the overall cost of defense. Of course, in-person work remains crucial and necessary for many aspects of this profession. We face continued uncertainty moving forward with the ever-looming threat of viral resurgence and a yearning to return to life as we once knew it. Moving forward, our profession needs to focus on refining the cost-effective defense. This requires a balance of remote and in-person attendance for cost savings.