



The Pros and Cons of Virtual Appearances

A Trial Judge's Perspective

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In the wake of the COVID-19 pandemic, the world has adapted to greater use of technology for virtual communication and connection. This is particularly prevalent in the judiciary, where it has become commonplace for attorneys and parties to appear in many courts via virtual platforms rather than in person.

Although the pandemic has mostly left the forefront of society, virtual legal proceedings appear to be here to stay in Colorado. According to Chief Justice Directive 2303 (“Virtual Proceedings Policy”), parties may have the option to appear virtually in many types of

hearings at the court’s discretion. The following proceedings presumptively require an in-person appearance: jury trial, court trial, most criminal proceedings, extreme risk protection order hearings, termination of parental rights hearings, and civil show cause and contempt hearings. Most other hearings, largely in civil and domestic matters, are considered “presumptively flexible” and permit a virtual appearance unless the court finds good cause to require a party to appear in person. A judge or magistrate may still order any person to appear in person in court.¹

In addition to conducting virtual courtroom proceedings, judicial officers now live

stream real-time audio and video footage of certain proceedings to online audiences. Live streaming courtroom proceedings facilitates greater transparency in the justice system and increases access for viewers who may not be able to attend the proceedings in person. Live streaming also presents new challenges for maintaining the privacy of victims, ensuring witness sequestration, and preventing prejudice against accused defendants, as well as the logistical challenges of supplying and operating increased courtroom technology. And as of May 2023, all Colorado courts must make any criminal court proceeding conducted in open court available for remote public viewing in real time through an online platform, unless there are technological barriers or another exception applies.²

The Benefits of Virtual Appearances

Virtual appearances are positive in many ways, the first being the obvious convenience of attending court from one’s home or office. Virtual appearances overcome obstacles such as childcare, lack of transportation, and distance from the courthouse, and they save time for all involved. This is true for pro se parties, attorneys, and governmental agencies coordinating the

transfer and in-person appearance of inmates. It is significantly easier to present in-custody defendants by virtual “writ” with the inmate’s consent rather than scheduling transportation across jurisdictions. Virtual appearances also give victims an opportunity to observe and participate in proceedings when they may be intimidated from confronting the accused in person.

Perhaps the most positive attribute of increased virtual appearances is increasing access to justice. Virtual appearances eliminate attorney fees for traveling and waiting for the case to be called, and they give parties more options to hire nonlocal lawyers because they might not be dissuaded by in-person appearances at faraway courthouses. Language interpretation services are also more easily scheduled because of remote access. And ultimately, virtual proceedings continue to limit the spread of the COVID-19 virus and other illnesses through in-person transmission.

The Drawbacks of Remote Proceedings

However, as we head into this new frontier, we must keep in mind that virtual courtroom proceedings also pose significant drawbacks. First, remote proceedings reduce accountability. Virtual attendance creates an opportunity for parties to “appear” without subjecting themselves to active warrants or to create excuses for not complying with the terms of their court appearance, bond, or probation.

Second, remote technology increases the burden on judges and courtroom staff, which may distract from the substance of the proceedings. Judges and staff must activate and monitor participants in Webex, live stream criminal proceedings, and overcome any technological difficulties that arise while also considering the in-person parties present and the legal issues themselves.

Third, virtual appearances are not a perfect substitute for in-person communication. It is still commonplace for parties to forget to unmute themselves when speaking; fail to mute themselves, leading to “hot mic” moments; speak over one another or interrupt the judge; and encounter internet connection issues, causing

freezes and lags. Remote witnesses frequently struggle to review evidence and interact with attorneys during direct- and cross-examination.

Finally, remote appearances appear to have decreased the formality of court proceedings. Trial court judges continue to accumulate stories of litigants and counsel behaving poorly when they appear virtually. Parties can be less compliant with court orders and less cooperative with one another when they appear remotely, increasing the contentious nature of certain proceedings. Parties attend court virtually from inappropriate locations, such as riding on the bus or lying down in bed. At times, attorneys are casually dressed, fail to activate their camera, or are obviously multitasking during an ongoing court proceeding. A highly concerning trend is for counsel, parties, and subpoenaed witnesses to fail to appear for scheduled virtual court dates at all.


Virtual Court Best Practices

Given that virtual courtroom proceedings are an integral part of modern practice, what expectations should attorneys have for appearing in a semi-virtual trial court? The best practice for practitioners and parties is to treat a virtual court appearance with the solemnity and decorum expected from an in-person court appearance. Absent approval otherwise, all parties and counsel should always turn their cameras on. Ensure that you are in professional dress wearing what you would physically wear to court—no hoodies or T-shirts, please! Conduct your virtual court appearance in a remote environment where you have strong internet, clear audio, and no outside

distractions such as competing background noise or simultaneous meetings. Remember—you are still in court when appearing remotely.

Attorneys can facilitate better virtual court appearances by sharing these expectations with their clients. Firms that routinely have virtual appearances may consider converting empty offices or conference rooms into virtual hearing rooms where clients can join the proceedings by sitting in person with counsel who logs in virtually. This strategy allows for easy real-time conferral with the client and avoids difficulties when clients are unfamiliar with technology or court proceedings. A weak internet connection, shaky camera, and imprudent interruptions from parties appearing virtually can undermine the convenience and frustrate the purpose of the virtual hearing. Bar associations and other legal organizations can facilitate the adoption of these best virtual practices through mentoring.

Maintaining Excellence in Virtual Court

A final word of advice for legal practitioners in the world of virtual litigation: the professional rules of conduct and procedure are not relaxed simply because one may attend court remotely. A docketed hearing is *not* vacated unless the judge does so by order, even if the matter is not contested and the parties have reached general settlement terms. Plan to appear for all calendared hearings unless they are vacated. There are amazing, professional attorneys in this state; let’s keep the standard high as we increase remote appearances throughout our practice. 



Judge Christopher Zenisek is a district court judge in the First Judicial District, where he has served since January 2012. He presides over a docket of civil, criminal, and family law matters. Judge Zenisek serves on the First JD’s Leadership Team and on the Colorado Supreme Court Civil Rules and Rules of Appellate Procedure committees. **Rachael Willihnganz** is a Denver-area local and a graduate from the University of Colorado Boulder. In 2023, she graduated from the University of Denver Sturm College of Law and passed the Colorado bar exam. She is currently clerking for Judge Zenisek.

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NOTES

1. CRS § 13-1-132(2).
2. CRS § 13-1-132(3.5).