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Hot Mics and Live Video: Best Practice Tips for Remote Appearances

As we approach a second year of virtual meetings, depositions, court appearances and happy hour networking, this is a good time to pause and reflect on what works and what doesn't work in a remote law practice. While we are becoming comfortable in this new normal, the circumstances have raised a number of practical and ethical concerns for attorneys. Inadvertent screen shares and hot microphones have offered valuable lessons learned.

Here are ten best practice tips for mitigating risk during remote appearances.

1. Perform a 360 Degree View of Your Space

Literally perform a 360 degree view of your space. Consider where you are physically located within your home or office during the virtual appearance and how your surroundings reflect on you and your firm. Clients and third parties will see you and what is behind you. Nothing inappropriate or offensive should be displayed. Sometimes we see what we want to see and miss objects that may be professionally inappropriate. Consider asking your assistant, another attorney in your firm or even your parent to view your space for red flags that you may miss.

To maintain confidentiality, client secrets placed within your work area should not be within the view of your camera. Draft motions or settlement agreements within your reach are potentially within the view of the other virtual attendees. Wipe boards, case lists and calendars on the wall behind you are prime sources for improper disclosures. If your rear-facing camera is auto selected when the conference starts, what will attendees see?

Using a virtual background may mitigate the risk of sharing too much information. But understand that not all virtual conferencing platforms offer or allow backgrounds. If you will be using a new platform, research its capabilities and be prepared. Have a space ready nearby where you can move on short notice so your background is appropriate.

2. Mute and Be Mindful of Your Audio Surroundings

Always assume that your microphone is live. Even if your microphone is red and/or crossed out on the screen, assume that you can be heard. Sometimes I will say hello, my name and then ask if anyone can hear me three times just in case. If you have a connected monitor and you close the laptop, your microphone may still be live.

How many side conversations have you heard during video conferencing in which the person talking did not realize their microphone was live despite several warnings? As a host, you can mute others. That is one way to solve the issue. Just don't be the person who everyone hears. If you have to make or take a call during a video conference, go to a different room to do so, and mute yourself before you physically leave the room.

Also be cautious about background discussions. If another attendee is in the conference, but muted with their video turned off, they can still hear you if you are not muted. Be mindful of who else is in the room. Close your windows. Close your doors. When discussing client matters, ensure all listening devices such as Amazon Alexa or Google Home are turned off.

3. Practice Screen Sharing

When using screen share, share only the window that you intend to share. Do not share your entire desktop. Know how not to share screens inadvertently. Start a practice meeting from one device and join from a different device. You will have to mute both microphones to avoid feedback. See how your screen share looks on the second device. Are you sharing more than you thought? Also use the practice round to see what is visible in your background.

Close all other applications while you are using screen share, unless absolutely necessary to the call. That mitigates your risk. You can't share the screen of your inbox if it is closed. Be mindful of alerts that may pop up on your screen. To plan ahead, before the meeting, close all unnecessary tabs on your web browser and adjust the settings to disable the bookmarks view.

Check all filenames before sharing or uploading. When you use the screen share function, the name of the document may appear in the window of the PDF or image viewer. Don't name a shared document "proof that the plaintiff lied" if you don't want the other attendees to see that filename. A better approach is to use filenames that track the bates range for the document (e.g. DEFENSE 000100-000105) or the actual title of the document (e.g. Traffic Collision Report). This mitigates risk of disclosing work-product information and also identifies the source of the document.

4. Plan for Interruptions

Family and roommates should not be in the room with you when discussing confidential or privileged information. Make a plan to keep them out of the room when you cannot be interrupted. Tell them that you are in a conference and cannot be disturbed. Place a sign on your door to be clear. But also have a plan in place for how to respond when you are interrupted when your microphone and video are live. Remain calm, cool, and collected.

5. Practice with Clients

Prepare your clients to assess these issues before depositions. Perform a test run with clients before you present them for remote deposition. Ask clients to use the device they intend to use the day of the deposition. Counsel clients not to use their phone as their video conferencing device. Exhibits shared on phone screens are too small to be seen. Ask them to sit where they intend to sit for the deposition. Confirm that their plan works appropriately. Be sure they understand the technology and ensure that they do not share screens.

6. Update Your Deposition Outline

Add new questions and admonitions to your deposition examination outline. For example: Who is in the room with you? Let us know if anyone enters or exits the room, so the record can be updated. What documents are within your view? What applications do you have open on your devices? Don't text or chat with anyone while we are on the record. Watch the witness carefully to see if their behavior changes. Are they Googling their answers?

7. Be Vigilant During Court Appearances

For court appearances, mute when not talking. Do not interrupt the opposing counsel or judge. If permitted, stop your video if your matter is not being heard at the time. Here is a great tip from The Florida Bar "Best Practices for Professional Electronic Communication" guidebook: "While on a video conference, other participants can see you the entire time and are looking directly at you. Your facial expressions are perhaps under more scrutiny than in an in-person setting. Pay special attention to monitoring your emotions and expressing them appropriately when others are speaking." This tip is especially important during remote court appearances.

When your matter is called, ensure that your camera is framed well and you can be heard. After your appearance is concluded, leave the meeting and confirm that you are completely out of the meeting before you do anything else.

8. Protect Client Confidences

A key component of the ABA Model Rules of Professional Conduct 1.6 regarding confidentiality of information is that a lawyer must take reasonable efforts to prevent inadvertent or unauthorized disclosure of client information. This means that a lawyer must maintain a videoconferencing environment so that family members and roommates do not overhear privileged or confidential communications.

A lawyer is responsible to ensure that client meetings are confidential. Do not assume that your client is alone. Sometimes we forget that the walls have ears and that our children know more than we give them credit for. Your teenager is a risk of unauthorized disclosure; do not let them overhear your conversations. Also consider whether you or your client have distance learners within the vicinity. Even your kindergartener is a potential risk point because the parent of your child's classmate may overhear your discussions through their video conferencing meeting.

Many parents who are lawyers use smart home listening devices to remind their distance learners to transition to the next class. Do not do this if you discuss confidential or privileged information near the device. Big brother is listening and by using such devices you risk waiving privilege.

9. Train and Practice with Staff

ABA Model Rules of Professional Conduct 5.1 and 5.3 address the duties of supervising lawyers. This is where training is key. It is never enough that attorneys follow the ethical rules themselves. Now, more than ever, while we are working remotely, lawyers must ensure that staff members using video conferencing are following ethical rules too.

Staff members likely do not watch continuing legal education programs or read articles like this. Practice with your staff. Ensure that they understand the risks and comply with your instructions.

Consult with your staff to identify additional tips, tricks, and problems. They serve on the front lines of communications and firm technology and they may offer a perspective that you have not considered. My staff contributed valuable additional tips for this article.

10. Be Competent and Stay Informed

ABA Model Rules of Professional Conduct 1.1 states, in part: "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] further notes that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

Thus, a lawyer should understand the risks and benefits of virtual appearance technology. Consult the professional conduct rules and ethics guidelines operative in your jurisdiction as you continue to navigate through the waters of using video conferencing in your law practice.

The State Bar of California's Formal Opinion 2012-184 on Virtual Law Office is an oldie but a goodie. The Pennsylvania Bar Association's Formal Opinion 2020-300 and the New York County Lawyers Association Formal Opinion 754-2020 are two more recent resources.

Takeaways

My sibling taught me an important lesson learned in the Marine Corps. Prior Planning Prevents Poor Performance. Which leads to the key takeaways: Understand the technology. Plan Ahead. Practice. Be mindful of your video and audio surroundings.

A closing tip – Make sure your name displayed below your video is your real name and not something like Foxy 7.

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