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# *Virtual Hearings and Vanishing Trials: A Modest Proposal for Training New Business Litigators in the Virtual Era*

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By Douglas L. Toering and Ian Williamson

## **Introduction**

It's June 2022 at the semi-annual associate review, and this discussion occurs.

Partner: "You're doing an excellent job. Do you have any questions?"

Associate: "Thank you very much. Yes, two questions: I'm a fifth-year associate in the commercial litigation practice group. I've been to court only a few times and I was wondering: Did business litigators really used to go to court regularly in person? And when will I get to try a case?"

Partner: "Well..."

This illustrates a vexing problem. How can new litigation attorneys learn to argue motions effectively when many motions are now decided without a hearing?<sup>1</sup> How can new lawyers learn to try a case, when few civil cases go to verdict?<sup>2</sup> There are no simple answers, but this article will suggest various ways that newer commercial litigation attorneys can receive training in an era of virtual hearings, fewer hearings, and fewer and fewer trials. Overall, the focus needs to remain on training attorneys to argue motions and try cases – both in court and virtually.

Here, we will explore this problem and then propose solutions. Regarding the latter, we will discuss how law firms and corporate legal departments, the bench, and the bar could work together to train new business litigation attorneys in the virtual era. All of this is, of course, in the context of counsel doing what is best for the client.

## **The Issue: Fewer In-Person Hearings; Fewer Trials**

As a result of the Covid-19 pandemic, many (if not most) routine court proceedings now occur by Zoom. This includes status conferences, discovery motions, and other non-dispositive motions. In some cases, evidentiary

hearings occur by Zoom. Some bench trials are also occurring by Zoom. Legal proceedings (with the exception of jury trials, some bench trials, and some evidentiary hearings) are likely to continue to occur by videoconferencing after the pandemic.

There is also an increasing tendency in state and federal courts to dismiss cases on the pleadings and an increasing trend to decide motions without a hearing.<sup>3</sup> The result is fewer opportunities for new attorneys to argue motions (whether in court or by Zoom).

This article is not a criticism of the fact that there are fewer trials or that more hearings (and other legal proceedings) are occurring by videoconferencing. There are many reasons for the decline in trials, and that is not the focus of this article. And, of course, the decision whether to proceed to trial is the client's, not the lawyer's. Nor does the fact that fewer cases are being tried or that hearings are conducted virtually (or not at all) mean that judges or their staff aren't working hard. To the contrary, many, if not all, Michigan judges carry huge caseloads. It certainly is not the intent here to add to their heavy workloads.

That few cases go to verdict has been true for years,<sup>4</sup> but legal proceedings by Zoom are primarily a result of the pandemic. Virtual legal proceedings are becoming the rule rather than the exception, and many judges find this preferable, including the Michigan Supreme Court. Under a recent amendment to MCR 2.407(G), "trial courts are required to use remote participation technology (videoconferencing under this rule or telephone conferencing under MCR 2.406) to the greatest extent possible." Indeed, court proceedings by Zoom offer many advantages, primarily efficiency and convenience. Lawyers spend less time traveling and waiting in court, and so do clients.<sup>5</sup> That's a good thing, as time is literally money when it comes to legal services.

But this efficiency carries implications for the development of new attorneys. New attorneys have fewer opportunities to be in court and observe how motions are argued (the good and the bad), how to respond to a judge's questions, and how to modify one's argument depending on the judge's concerns.<sup>6</sup> And if motions are granted or denied without a hearing and with little reasoning, it is often difficult for counsel (or appellate courts) to know why the motion was granted or denied. The fact that business court decisions are posted at the Michigan State Court Administrative Office website<sup>7</sup> mitigates this concern to some degree. But orders resolving many routine motions are not posted there, of course, and even substantive motions may not result in reasoned or posted opinions. Newer attorneys also don't have the in-person contact with attorneys at the courthouse, where they can meet veteran trial lawyers, make connections that will help them advance their careers, and perhaps gain some informal insight into the reasoning behind a given judge's rulings.

At the same time, depositions are occurring virtually. Some mediations are too. So are some arbitrations. All this has the benefit of making attendance by the client, the lawyer, and witnesses easier. But when combined with the pandemic-related cancellation of many state bar and bar association social events, all of this means fewer opportunities for newer attorneys to have direct contact with judges, mediators, arbitrators, and opposing counsel.

Does this mean that nothing can be done to train new attorneys in the era of virtual hearings and vanishing trials? No—but it does mean that new approaches are becoming necessary to train business litigators to argue motions and to try cases, both in person and virtually. In order to succeed, newly minted business litigators must be equally adept in person and through a virtual presence.

### **Possible Solutions: What Law Firms, the Bar, and the Bench Can Do**

#### *Law Firms*

Legal proceedings by videoconferencing and fewer trials will continue to be the rule rather than the exception. As many judges have said, "Zoom is here to stay." Given this, what can law firms, the bar, and the bench do to pro-

vide training to new business litigators? The answer is: "A lot." As mentioned, the training should be for both in-person proceedings and those done virtually.

At the law firm level, law firms (or corporate legal staffs) can better take advantage of the opportunities that already exist to help train their associates. For example, when there are opportunities for partners to go to court for motion hearings or status conferences, consider inviting a newer attorney to accompany the partner. Even if the hearing is by Zoom, consider including the associate. When depositions are scheduled in a case, think about asking the new litigator to prepare for the deposition and attend the deposition with the partner—or, maybe let the associate take the lead on the deposition with the partner second-chairing. The same is true for mediations and arbitrations. Consider asking a newer attorney to attend. This is true whether the hearing, mediation, or arbitration is in person or done virtually. Of course, unless this adds value for the client, the firm will need to "write off" this time as associate development. A contingency fee or other fixed fee case does not pose the same concern about writing off time as an hourly case.

The firm may be doing much of this already, of course. As mentioned, if it is a case that does not justify two attorneys to attend a hearing, deposition, and so forth, then the firm will have to "write off" the time for the new attorney and charge it internally as "associate development"—but the reduced time commitment obtained through virtual practice should justify looking for these opportunities more frequently as in-person opportunities decrease.

Recognizing that virtual legal proceedings are the wave of the future, there are other ways firms can help train new business litigators by leveraging virtual technology. For example, newer attorneys can watch the partner prepare for an oral argument on a summary disposition motion via Zoom without being physically present. Firms can conduct mock trials via Zoom with the new attorney observing a partner conduct direct or cross examination. Then give the associate the opportunity to do the same. Virtual technology also allows for recording of the mock argument or trial for subsequent discussion and critique. The critique would include not only the substance of the argument or examination, but also how the attorney appears on

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a screen. This will be an advantage to both new attorneys and experienced litigators alike. Mock trials done virtually also makes finding mock jurors easier.

Firms can also consider establishing their own in-house “business litigation bootcamp.” Seasoned trial partners can present 20- or 30-minute segments in regular meetings to demonstrate techniques for direct or cross examination and other trial practice. New attorneys could be given fact patterns for in-house mock trials at their firms. As part of this, they would draft their own opening, direct or cross examination, and closing and then present this to select partners and staff at the firm.

Former New York City Mayor Ed Koch was famous for asking, “How am I doing?” Anyone who appears in court (or for a deposition, mediation, or arbitration) should ask colleagues the same. Part of that will be, “How do I come across on Zoom?” Mannerisms that may present well in a courtroom might not on a screen. Or said differently, just because someone is effective in court doesn’t mean that he or she will be equally effective by Zoom. Again, this applies to both veteran trial lawyers and new litigators. In fact, experienced litigators should be open to critique by newer lawyers who may be more familiar with, and more comfortable with, virtual connection and presentation after growing up with applications like FaceTime, Vine, SnapChat, TikTok and others.

As is becoming more common, the authors have a mock courtroom in the office; they have used this for a bench trial by Zoom that occurred over various days in September and October 2020 and for evidentiary hearings and arguments on significant motions. They also use this for mock trials and preparation for oral arguments. With fewer attorneys being in the office full time and virtual proceedings on the rise, firms without significant additional space can consider consolidating a few offices and converting them into a mock courtroom. Even a single spare office can be outfitted with proper lighting and webcams, a podium, reliable Internet, and a large-screen TV to help approximate a courtroom “feel” so that newer attorneys aren’t consistently arguing motions from their desks.

Pro bono is another possibility.<sup>8</sup> Firms might ask a new attorney to try a landlord-tenant or a collection case, for example. These cases often do not involve a great deal

of time, and they may provide hands-on, in-court trial experience to new attorneys that is increasingly difficult to obtain otherwise.

Also, trial experience need not always come from within the firm. Occasionally, the lawyer who has the client relationship and has worked up the case is, for whatever reason, unable to try the case. Or maybe that lawyer needs additional trial counsel. If litigators make it known to lawyers from other firms that their firm is available to help try cases, whether in person or virtually, opportunities may arise for a partner and a newer business litigator to get into court or to try a case virtually.

Finally, the new business litigation lawyers need to be involved in all of this. For example, a new attorney (with consent of the supervising partner) could be the one to get out the word at the firm and elsewhere that he or she is available to try cases and looking for opportunities to do so.

### *The Bar*

Litigators are, of course, generally familiar with the various trial training seminars done through various bar associations,<sup>9</sup> NITA,<sup>10</sup> and others. These have their place. So do books and articles (the ABA’s *Litigation Journal* is excellent.) Can more be done? Yes, especially for newer business litigators.

One possibility is a “business litigation bootcamp.” For many years, the State Bar of Michigan’s Business Law Section has offered a “Business Bootcamp.” This has been well received and has helped to train many new business lawyers.

In a similar vein, the Business Law Section (perhaps in conjunction with the Litigation Section and ICLE) could offer a business litigation bootcamp. This would, of course, focus on substantive and procedural issues involving business litigation. But it would also address specific skills, such as taking and defending depositions; arguing discovery motions; handling more complex matters such as evidentiary hearings and Daubert hearings; mediation; arbitration; and trial practice—both in person and by videoconferencing. Indeed, part of the business litigation bootcamp itself could be done in person and part by videoconferencing.

Also, as part of the business litigation bootcamp, perhaps one or more of the business court judges could make a courtroom open for practice arguing motions, handling evidentiary hearings, and trial prac-

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tice (openings, direct examinations, cross examinations, motions for directed verdict or involuntary dismissal, closings, etc.) If the business court judge presided over this, it would be even more realistic. If not, a retired judge or an experienced trial lawyer could sit as the mock business court judge. If this can't be done in person, then perhaps it could be done virtually. The Programs Committee of the Business Law Section could work with the section's Business Courts Committee and Commercial Litigation Committee in establishing this "business litigation bootcamp." Local bar associations may be able to help. Law firms could support these programs either by sponsoring the program or paying for their attorneys to attend.

Another possibility is mentoring.<sup>11</sup> Senior trial lawyers who are semi-retired, recently retired, or who otherwise have extra time could mentor newer attorneys. This may consist of critiquing an oral argument or a mock direct examination. It would be best if this were done in person, but if that can't be arranged, then do it virtually — this allows the mentor to critique what the new attorney has done at a time convenient to the mentor.

And with so much litigation being conducted by videoconferencing, bar functions should seriously consider resuming in-person social events during periods when Covid infection rates wane. Many educational events will continue to be done by videoconferencing. That's generally good — it saves travel time and is more convenient, which probably leads to better attendance. But some events should still occur in person. Rubbing shoulders with other counsel, judges, arbitrators, mediators, and so forth is helpful to the professional development of business litigators.

#### *The Bench*

Here, we mean primarily trial court judges. As mentioned, trial judges could open their courtrooms for mock hearings or mock trials, either with a trial court judge (a business court judge or another circuit judge) presiding, or with a retired judge or a senior trial lawyer presiding. It would be preferable to do this in person. But if that can't occur, then it could be done by Zoom. Again, judges are very busy and have limited staff, so any such activity would need to recognize these limitations.

As to an appeal, perhaps a courtroom of the Michigan Court of Appeals could be

made available for a mock oral argument in a business case. Either a sitting court of appeals judge or an experienced business appellate lawyer could preside.

#### *Other*

Don't forget summary jury trials if the case is in the Macomb County Circuit Court (including the Macomb County Business Court.<sup>12</sup>) Again, the decision whether to try or settle is the client's, of course, but a summary jury trial might appeal to certain clients in certain situations.

In another situation, if the parties are unable to resolve a case through mediation but have succeeded in setting outside parameters, the parties might be interested in taking a case to trial subject to an advance "low/high" agreement. Here, the parties agree that no matter what the judge or jury decides, the plaintiff would receive no lower than X and the defendant would pay no more than Y. Assume the low/high is \$300,000/\$700,000. If the verdict is \$200,000, plaintiff gets \$300,000. If the verdict is \$500,000, plaintiff gets \$500,000. If the verdict is \$900,000, plaintiff gets \$700,000. Knowing that the risk is reduced, both parties may prefer to try the case, thereby creating an opportunity for newer business litigation attorneys to gain key experience while also appropriately advancing the client's goals.

This is not an attempt to create more work for judges and their staff. Rather, it is a reminder that other options may be available for clients who really do want a trial, whether that is in the courtroom or done virtually.

Of course, a trial in the business court is not the only option for a client who does want some kind of a trial. Arbitration may be a possibility. Another example is mediation followed by arbitration. For comprehensive information on a variety of alternative dispute resolution approaches, see *Michigan Judges Guide to ADR* (2015).<sup>13</sup>

#### **Conclusion**

This article is far from an exhaustive treatment of this subject, and it is not intended as such. Rather, the authors wish to spark more widespread discussion of the problem — how to train new business litigators in an era of vanishing trials and virtual (or no) hearings or other court appearances — and posit possible solutions. The readers may be able to identify more ways to train new business litigators. We welcome this. Virtual practice is the new reality, and there will not be a full

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return to pre-pandemic operating procedures even in a post-pandemic world.

With coordinated efforts by law firms (and corporate legal staffs), the bar, and the bench, we can and should work to assure that newer business lawyers are properly trained in pre-trial proceedings and trials themselves—both in person and virtually—even without access to the routine of in-person motion calls, hearings, and trials that contributed to many of our own development as business litigation attorneys. Where possible, the newer generation of commercial litigation attorneys should help drive this process. They are the ones who stand to benefit the most, as the reality of their experience as litigators will be an increasingly virtual landscape. The bottom line is that law firms and corporate legal staffs, the bar, the bench, and particularly newer attorneys should be creative in looking for ways to give courtroom experience to newer lawyers, both in person and virtually.

## NOTES

1. Judges in Michigan state courts use Zoom, so the article will discuss Zoom in that context. This is not a critique of, or a commentary on, any particular video-conferencing platform.

2. The most recent data from SCAO are that under 1 percent of civil cases filed in Michigan circuit courts go to verdict. Recent statistics may be found at: <https://www.courts.michigan.gov/4a5431/siteassets/reports/statistics/caseload/2020/statewide.pdf>. Trials are becoming “alternate dispute resolution” proceedings. In fact, the American Bar Association’s relevant section is its Section of Dispute Resolution.

3. Judges have the right to decide motions without a hearing. MCR 2.119(E)(3).

4. See, e.g., Richard L. Hurford, *What’s a Business Litigator to Do—The Vanishing Jury Trial and the Litigation Option*, 39 MI Bus LJ 31 (Spring 2019); Douglas L. Toering and Ian M. Williamson, *Business Courts in Michigan: Seven Years and Counting*, 99 Mich BJ 20 (Jan 2020); and Jeffrey Q. Smith and Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?* 101 *Judicature* 26 (Winter 2017).

5. For more on this issue generally, see Michigan State Court Administrative Office, Lessons Learned Committee, *Michigan Trial Courts: Lessons from the Pandemic of 2020-2021: Findings, Best Practices, and Recommendations* (June 29, 2021) (<https://www.courts.michigan.gov/4afc1e/siteassets/covid/lessons-learned/final-report-lessons-learned-findings-best-practices-and-recommendations-111921.pdf>); Joseph K. Grekin and Brandi M. Dobbs, *Zooming into the Future*, 42 MI Bus LJ 38 (Spring 2022); see Douglas L. Toering and Fatima M. Bolyea, *Touring the Business Courts: An Insight at the State Level*, 41 MI Bus LJ 11 (Fall 2021).

6. While many courts do broadcast proceedings publicly via YouTube or other means, associates at the office or working in home offices are not likely to spend time simply observing arguments in other cases rath-

er than actively working on their own cases and assignments.

7. <https://www.courts.michigan.gov/business-court-search/>.

8. The State Bar of Michigan recommends the following for pro bono service:

All active members of the State Bar of Michigan should participate in the direct delivery of pro bono legal services to the poor by annually:

1. Providing representation without charge to a minimum of three low income individuals; or
2. Providing a minimum of thirty hours of representation or services, without charge, to low income individuals or organizations; or
3. Providing a minimum of thirty hours of professional services at no fee or at a reduced fee to persons of limited means or to public service or charitable groups or organizations; or
4. Contributing a minimum of \$300 to not-for-profit programs organized for the purpose of delivering civil legal services to low income individuals or organizations. The minimum recommended contribution level is \$500 per year for those lawyers whose income allows a higher contribution.

<https://www.michbar.org/programs/atj/voluntarystds>. See also Gerard V. Mantese, “I don’t have time for pro bono,” *Michigan Lawyers Weekly* (July 20, 2020), <https://manteselaw.com/wp-content/uploads/2021/05/Mantese-Commentary-Gerard-Mantese-Michigan-Lawyers-Weekly.pdf>. If the firm does not support pro bono efforts, then the attorney should consider doing this on his or her own time, with consent of the supervising partner.

9. The State Bar of Michigan’s Negligence Law Section presents training seminars on a fairly frequent basis.

10. See also Robert L. Haig, *Business and Commercial Litigation in Federal Courts*, (5th ed); Federick L. McKnight and Michael H. Ginsberg, *Teaching Litigation Skills*, vol 7, ch 83.

11. The Oakland County Bar Association has a mentoring program and a pro bono mentor match program. <https://www.ocba.org/?pg=resources-for-new-lawyers>.

12. See Administrative Order 2015-1. See also <https://www.courts.michigan.gov/administration/court-programs/jury-management/summary-jury-trial/>.

13. <https://www.northernmediation.org/wp-content/uploads/2017/09/MI-Judges-Guide-to-ADR-Practice-Procedure.pdf>.



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