

Litigators: Finding New Ways to Make Their Case

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“Learning how to be effective in front of a camera is very different, especially if there’s no audience that you can really see and get energy from,” said **Thomas Trent Lewis**, a former supervising judge for L.A. County Superior Court’s Family Law Division, where he oversaw about 75 departments from 2016 until his left the bench in December.



Gabriel

The rapid move to pandemic-driven online lawyering is pushing advocates accustomed to in-person performances — marked by pacing courtrooms, gesticulating, confronting witnesses, and reading the body language of judges and jurors — to search for effective substitutes when playing to computer screens on kitchen tables.

“It absolutely should be a reimagination,” said **Richard Gabriel**, a former president of the **American Society of Trial Consultants**, president of **Decision Analysis Inc.**, a West L.A.-based firm, and a founding advisory board member of the **Online Courtroom Project**, which recently concluded five months of studying online proceedings. “It’s a completely

different medium.”

“In courts, it’s a live theatrical performance,” explained Gabriel, a veteran of the **O.J. Simpson**, **Phil Spector** and **Whitewater** trials. “Online, it’s a camera performance. I’m not sure they need to go to (completely) Hollywood for it, but there’s elements of Hollywood and the theater that are important.”

The need to transition to remote skills has become increasingly pressing. L.A. criminal courts are set to resume trials in October with a new video platform option to supplement an existing dial-in system. Civil proceedings are expected to resume next year.



Silverstein

Online arbitrations and presentations to clients are pending. And in other parts of the United States and overseas, ongoing cases in courts are being conducted remotely.

L.A. lawyers have begun overhauling their on-screen capabilities, even altering their wardrobes and upgrading their home offices’ technology, design and lighting.

“We must adapt, or we get left behind,” said **Douglas Silverstein**, chairman of the **Los Angeles County Bar Association’s** litigation section, which is planning seminars on how



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Remote Sessions: Lawyers are getting schooled in how to be effective on screen because many legal proceedings are still not taking place at courthouses.

to conduct online trials. “Counsel who don’t adapt won’t be able to move their cases forward.”

Said Gabriel, “The better firms are doing this and should be doing this.”

Makeover classes

In September, **King & Spalding’s Glenn Solomon**, head of civil litigation in L.A., and **David Willingham**, who leads criminal defense in L.A., will offer the firm’s U.S. and overseas litigators a makeover class. It may be offered to colleagues outside the firm later.

“Los Angeles lawyers are doing work for companies that do work all over the United States,” said Gabriel, who advised during the **Enron** litigation. “So, not only do they have to be prepared to present in Los Angeles courts, but all over the country and internationally.”



Willingham

Even prior to the pandemic, L.A. lawyers had begun adopting new technologies, such as apps that simplify and enhance document presentation, both online and in person. Video arraignments and filming witness depositions were old hat. And family law courts had allowed witnesses, particularly those in other countries, to testify by screen, such as over **Skype**.

Still, litigators are used to billing for time traveling to, and waiting in, courthouses. Moreover, they fear having their fumbles filmed, said **Marvin Rudnick**, a retired Pasadena civil and criminal defense attorney and former federal prosecutor. So, they have only very recently begun envisioning changing themselves.



Solomon

Some counsel limit expectations. “Sure, there are things litigators can and should do to make their presentation look a little better than it would otherwise,” **Pamela Wechsler**, a former criminal and civil prosecutor turned producer and writer of the CBS courtroom drama “**Bull**,” said in an email. “But video trials ... will never look or sound like a network television show. It takes about five hours to film a five-minute scene in a television courtroom drama. There are about

a hundred people on set who make it happen. There’s professional hair and makeup artists, wardrobe consultants, set designers, prop masters, electricians and sound technicians, not to mention actors, film editors, a director and a writer.”

“You can write a brilliant closing argument or prepare a blistering cross-examination,” **Wechsler** added, “but I just don’t think it will land like it would if you were in the courtroom. You can’t really confront witnesses, you can’t make eye contact with anyone, and jurors won’t feel your passion in the same way.”

It’s the little things

Richard Clayman is an actor, writer and producer turned online presentation consultant who owns **Cloudwalker Films** in Mar Vista. In a recent virtual seminar for the **Beverly Hills Bar Association**, he suggested that the difference between winning or losing for a litigator can turn on being framed properly onscreen.

That includes ensuring that the top of the speaker’s head comes up to the top of the frame, rather than being centered and that the speaker looks at the computer’s camera rather than its screen, which is situated below the camera.

“If you look down at people, they don’t think you’re superior. They think you think you’re superior,” **Clayman** said. “And that’s not a good place to be. It’s like developing a muscle. It’s like working out. I had to do it, and I was an actor for a long time.”



Wechsler

Other elements that bear watching include hand movements. “Gesturing that may look like emphasis in the real world may look herky jerky online,” said **Emilio Varanini**, president of the **California Lawyers Association**.

Decision Analysis President Gabriel said there are many factors for litigators to consider.

“When do you lean into a camera? When do you pull out from the camera? When you show documents to a witness you’re trying to impeach; when do you take the document off the screen, so you can see the jurors to get their reactions?” he asked.

It may require a different approach, said the County Bar Association’s **Silverstein**, but at least today’s lawyers can find a precedent.

“Perry Mason seems to present himself fine on the screen,” **Silverstein** said of L.A.’s most renowned litigator. “So, I guess we’re going to have to get in line and do it as well.”

AT KING & SPALDING, CLASS IS IN SESSION FOR LAWYERS

For litigators shifting from a courtroom to a Zoom room, two Los Angeles-based partners at **King & Spalding** have compiled a set of useful guidelines.

Glenn Solomon, L.A. head of commercial litigation at the firm, and **David Willingham**, L.A. head of criminal defense, will be teaching these essential tips as part of classes they’re conducting across the law firm’s global offices. The course qualifies for Continuing Legal Education credit.

Solomon and Willingham agreed to share some of their most salient points:

- ▶ Every tick, face touch, snuffle, smirk, ear tug, head scratch, blink, snort, smile, frown and eye roll is magnified. So, sit further back from the camera, but not too far. De-emphasize the use of hands and moving around the room.
- ▶ Words matter more than body language.
- ▶ Elevate laptops to raise the camera’s height. Or better yet, use a separate camera on a tall stand. A high-quality camera and a fast broadband connection will reduce the chance of lag time. Have a backup connection ready in case the primary link goes out.
- ▶ Because a lawyer can’t physically pass notes to a client or signal them with a swift kick under the table, use text, email or chat programs for private interaction away from the main screen.
- ▶ To detect whether an opposing witness is reading from a script, texts or emails, look for roving eyes, a moving head or reflections in eyeglasses. Arrange for a second camera, even if it’s just an iPhone, behind the witness that is pointed at the witness’ screen.
- ▶ If a witness is in a later time zone, determine whether it’s better to have the witness testify early on in the day when the witness is sharper and the judge is less tired.
- ▶ Wear solids, not patterns, and have different colors in the background.
- ▶ Virtual backgrounds can create jitter. Invest in lighting that doesn’t come from above or reflect on the screen. Remove background distractions.
- ▶ Large exhibits, so effective in a courtroom, are lost when used in the background on a small screen. Instead, use screen sharing or, when money and resources permit, have computer experts set up monitors in the homes of the judge and witnesses.
- ▶ Short timeouts to strategize privately can be eaten up getting in and out of Zoom breakrooms, so have one open and waiting.