

# How Best to Handle Client Meetings, Document Signings, Hearings, Depositions, and Mediations in the Outbreak Environment

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*The start of 2020 has brought much change to all of our lives as the COVID-19 pandemic has grown and spread exponentially. In many communities around the state of Florida, the concept of attorneys working remotely from their homes became an unexpected reality, and did so nearly overnight, as leaders at all levels of our state government began requiring the closure of non-essential businesses in an effort to “flatten the curve” of the COVID-19 pandemic. Consequently, many Section members are struggling, both from the perspective of knowing what exactly is permitted and allowed in this dynamic environment that seems to bring new rules and regulations with each passing day, as well as from the perspective of knowing what their law firms need in order to quickly get up and running so that the attorneys and their support staff can work remotely from home while continuing to provide their clients with critically important legal services.*

On April 1, 2020, Governor Ron DeSantis issued the statewide Safer at Home Executive Order 20-91 (the “Safer at Home Order”), which allows only “essential activities and services” and (as amended) supersedes any conflicting official action or order issued by local officials in response to COVID-19. Examples of essential activities listed in the Safer at Home Order include attending religious services, taking care of pets and caring for a loved one or friend. Before the issuance of the Safer at Home Order, the Executive Committee of The Florida Bar Board of Governors took the position that law firms are essential businesses, either entirely or in limited circumstances, and requested that that any state, city and county protective pandemic protocols include a statement that law firms are essential businesses. While Governor Ron DeSantis’s statewide Safer at Home Executive Order 20-91 refers to essential services and activities, specifics were not provided regarding whether the provision of legal services would be considered one of those essential services or activities.

After signing his Safer at Home Order, Governor DeSantis said he had received questions about the meaning of essential activities under same. In response, the Governor has indicated that it is “less important what you do, than how you do it,” before going on to say that the goal is to avoid close contact with people outside your home to reduce the transmission rate. Consequently, and notwithstanding any of the best practices or other tips that are discussed herein, practitioners and other readers of this article are cautioned to carefully and frequently review relevant orders and other legal authority in order to determine whether their respective practices and work meet the mandates of the Safer at Home Order and any other rules, regulations, or orders impacting their respective communities.

This article is in no way intended to address whether and/or to what extent the provision of legal services constitute “essential activities and services” or whether attorneys and their support staff should work remotely.<sup>1</sup> Rather, the purpose of this

*continued, page 49*

article is to explore potential<sup>2</sup> best practices for members on the “death side” of the RPPTL Section, who focus on probate, trust, guardianship, estate planning, and/or advanced directives, whether for estate planning and/or transactional clients (i.e., the “Planners”) or probate/guardianship/trust administration and/or litigation matters (the “Litigators”).

Due to the widely varying concerns, implications, and considerations faced by Planners and Litigators as a result of the Coronavirus/COVID-19 pandemic, this article is broken down into three sections. The first and second sections examine potential best practices for the Planners and the Litigators, respectively. The third section is intended to be more generally applicable and contains links to government information and other official sources of information, articles, helpful videos, and other resources that Section members may find useful during this challenging period.

### **The Planners: Estate Planning Perspective**

This section focuses on how to conduct estate planning document signings, meeting all of the statutory formalities, and staying safe in the process during the COVID-19 Pandemic. This process is particularly difficult in Florida, where no emergency order or statute waives the requirement of *physical presence*. Given the state of affairs with coronavirus, attorneys throughout our state face the difficult question of how to conduct execution ceremonies of estate planning documents and advanced directives while simultaneously meeting the state required formalities, complying with the Safer at Home Order and other orders impacting their practices, and keeping themselves, their clients, and their support staff safe by maintaining proper social distancing. Many people are now worried about their safety and the safety of their loved ones and are looking to have their estate plan put together in the event something were to happen to them during this pandemic. As attorneys, we want to help, but we also want to ensure we do it as safely as possible, without exposing ourselves, our support staff, or our clients to too much risk.

In the state of Florida, *physical presence* “means being in the same physical location as another person and close enough to see, hear, communicate with, and exchange credentials with that person.”<sup>3</sup> Although the state of Florida passed House Bill 409 to allow remote online notarization, (1) the ability to utilize remote online notarization for testamentary and other estate planning documents does not commence until July 1, 2020, and (2) nothing has been passed to allow individuals to witness a document execution without being physically present. Furthermore, as of the date of drafting this article, no emergency order has been issued relaxing these formalities. This means that in order to execute testamentary documents individuals are required to be in the vicinity of the signor and the two witnesses (and the notary for Durable Power of Attorney).<sup>4</sup>

Administrative Order No. AOSC20-16 allows for witnessing and notarizing without being *physically present*; however, this only applies to administering oaths for depositions and legal testimony, not for wills and trusts.

Whereas in other jurisdictions you may be able to get away with video/Skype/Zoom/etc. signings, the state of Florida requires *physical presence* which includes being in the “same physical location as another person and close enough to see, hear, communicate with, and exchange credentials with that person.” So, where does that leave us? Below are two different options that are being tossed around.

### **Drive Up Signings**

One way of getting documents executed and meeting all required formalities would be by essentially conducting a Drive

*continued, page 50*



Herb Given and Yoshi Smith

Up Signing. The idea behind the “Drive Up Signing” would be for the individual executing the documents to be very familiar with the contents of the documents. Therefore, the client should have reviewed the documents thoroughly and asked any questions (telephonically or through email) prior to driving to execute them.

Additional preparation is required. You will not have the luxury of taking your client(s) through the documents page by page and directing them where to sign. Instead you should have a detailed instructional breakdown laying out on which pages each person (testator, witnesses, notary<sup>5</sup>) needs to sign for each document. In addition, have each signature page and line clearly marked for signature. If you have the ability, mark them with colored sticky strips to indicate who signs where. The instructional breakdown should include a key designating a color to each particular signor. For example:

- Testator = Blue Tab
- Trustee = Yellow Tab
- Witness 1 = Green Tab
- Witness 2 = Red Tab
- Notary = Purple Tab

Bring enough pens for each individual to have his or her own pen. I recently purchased a bulk pack of blue Bic pens for this purpose. The point is to reduce exposure to items touched by others. The client(s) (along with their witnesses) can then drive to your office parking lot. If the witnesses and client(s) are not already quarantining together, they should have the witnesses bring their own separate car(s) to the Drive Up Signing. Ideally all parties are wearing masks<sup>6</sup> and gloves. Have everyone roll down the windows so they are within earshot and can see each other signing, yet maintain a safe distance. Have each party sign the documents and then notarize each document as well. This Drive Up Signing concept only works if you yourself are a notary, have a staff member that is a notary, or the client brings a notary. Wait to notarize the documents after witnessing each party sign where he or she needs to sign. Then, after notarizing take pictures with your cellphone of each executed page for the client’s file. After all the documents are signed, they should be placed in a sleeve for the client(s) to take home for safekeeping. After the pandemic clears up, you should have your client make copies of all of the executed documents and either bring them to the office or mail them in so they can be kept in the firm records. As provided in fn 2, the only document required to be notarized is the durable power of attorney; however, if a notary is already present, the notary should continue to notarize the remaining documents.

This concept could work for home-bound clients as well. Assuming they can have witnesses meet at the house, you could drive to their house in order to have the documents signed. This would be the same concept as above; however, it would be done in the client’s parking lot or driveway. Avoid

going into the home if at all possible. If the individual is bedridden (and has capacity), contemplate doing the signing outside of the client’s bedroom window with the window open.

This concept could also work if your client is at a health care facility that is not completely closed off to visitors. It may take more planning and precautions, but if that is the case, perhaps a window signing, courtyard signing, or open-door signing may be conducted.

The benefit of this concept is that you can rest assured that the formalities are met and can still take enough precautions to avoid further spreading of the virus.

### **Mailing Documents**

As an alternative to drive-up execution ceremonies, you can mail the documents to the client with explicit instructions on how to conduct the signing ceremony. The onus is then on the client to follow the instructions explicitly to follow the formalities required under Florida law. This only works if the client(s) know a notary or feel comfortable driving to an open UPS store or bank. It is my understanding, as of the time of drafting this article, that some banks have remained open or at least allow members to make an appointment to come in.

In a perfect world (during this pandemic), Florida would issue an emergency order allowing signing ceremonies to occur over Zoom meetings. However, that has not happened, and people, particularly now, would like to get their estate plans put together.

### **The Litigators: A Whole New Normal**

The rapid spread of coronavirus throughout Florida communities and the ensuing COVID-19 pandemic has crippled courts across the state as judges, attorneys, and litigants try to achieve and administer justice under the laws of our state, while also balancing public safety concerns amid a pandemic, the likes of which this generation has simply never faced. In fact, as of April 3, 2020, four states have mandated the use of virtual hearings and nineteen states, including Florida, have issued orders to use them whenever possible and suspended administrative rules that might have prohibited their use. Consequently, and regardless of whether the provision of legal services constitutes one of the essential services or activities authorized by the Safer At Home Order, it is clear that the Litigators reading this article have been or will be impacted by the closure of courthouses, as well as facilities used for depositions, mediations, and other legal proceedings.

This section focuses on the new normal faced by attorneys who handle uncontested probate and guardianship administrations and probate, trust, and/or guardianship litigation and includes potential best practices, tips, and other practical tools for the Litigators to use while unable to physically attend the hearings, mediations, and depositions that are the lifeblood of many of our practices.

*continued, page 51*

### **In-Person Hearings, Depositions, and Mediations**

On March 24, 2020, the Supreme Court of Florida issued an Administrative Order Regarding Covid-19 Emergency Measures in the Florida State Courts (Order AOSC20-17), which addresses the closures of courthouses and suspensions of dockets and calendars. This Order combined and extended temporary measures previously implemented in prior administrative orders, and also implemented “additional temporary measures essential to the administration of justice in Florida during the COVID-19 pandemic.”<sup>7</sup> More specifically, and as pertinent to RPPTL Litigators, the Supreme Court ordered as follows:

(1) Extended the order suspending all jury proceedings, jury selection proceedings, and civil and criminal jury trials;<sup>8</sup>

(2) Extended the order that all circuit and county courts shall continue to perform essential court proceedings, which includes, as pertinent hereto, hearings on petitions for temporary injunctions related to safety of an individual, hearings on petitions for the appointment of an emergency temporary guardian, and hearings to determine whether an individual should be involuntarily committed Baker Act or the Marchman Act;<sup>9</sup>

(3) Extended the mandate that “no proceedings or other court events other than essential proceedings and proceedings critical to the state of emergency or the public health emergency shall be conducted through in-person hearings;”<sup>10</sup> and

(4) Directed the chief judge of each judicial circuit to cancel or postpone court proceedings other than essential and critical proceedings unless the chief judge determines that other proceedings and events can be effectively conducted remotely without the necessity of in-person court appearances.<sup>11</sup>

The foregoing were extended from previous administrative orders through April 17, 2020, or as provided by subsequent order. On April 6, 2020, the Supreme Court issued Administrative Order AOSC20-23, which “extends, refines, and strengthens previously enacted temporary remedial measures,” and shall remain in effect until the close of business on May 29, 2020.<sup>12</sup>

Despite the foregoing general restrictions and prohibitions, the foregoing Order AOSC20-17 also expressly stated that it was not intended to limit the chief judge’s authority to conduct business or approve additional court proceedings or events that are required in the interest of justice, so long as risks to the health of the individuals and the public health are minimized, and concluded, “the constitutional right of access to the courts by the public must be considered by the presiding judge in all cases.” In other words, while proceedings other than the limited category proscribed by the Florida Supreme Court may not be conducted through in-person hearings, and the chief judges of each judicial circuit were directed to cancel or postpone court proceedings other than essential and critical proceedings, the

Court left a carve-out for local courts to conduct hearings if “the chief judge determines that other proceedings and events can be effectively conducted remotely without the necessity of in-person court appearances.”

In addition to extending the previously implemented social-distancing measures through May, Administrative Order AOSC20-23 also includes what are referred to as Guiding Principles. These Guiding Principles strengthen the dictates of the prior administrative orders and, again, makes clear, that the order is not intended to limit the “chief judge’s authority to conduct business or to approve additional court proceedings or events...that are required in the interest of justice, if doing so is consistent with protecting the health of the participants and the public health.” These Guiding Principles appear to strike a balance between the need to “maintain judicial workflow to the maximum extent feasible,” while also “protecting the health of the participants and the public health.”<sup>13</sup> The first principle states, “[t]he presiding judge in all cases must consider... the public’s constitutional right of access to the courts,” and the second directs chief judges in each circuit “to take all necessary steps to facilitate conducting proceedings with the use of technology” in order to maintain judicial workflow to the maximum extent feasible. However, the fourth principle goes on to make it abundantly clear that “Judges and court personnel who can effectively conduct court and judicial branch business from a remote location shall do so.”

In furtherance of the foregoing discretion for chief judges to allow proceedings without the necessity of in-person court hearings, the Supreme Court of Florida also issued Administrative Order AOSC20-16 (March 18, 2020), which (1) permits Court Reporters to remotely swear in a witness via audio video communication equipment, and (2) suspends all “rules of procedure, court orders, and opinions applicable to remote testimony, depositions, and other legal testimony. . . that can be read to limit or prohibit the use of audio-video communications equipment to administer oaths remotely.”<sup>14</sup> In light of the foregoing, the Litigators in the Section and their clients, subject to the discretion of the chief judge of their circuit, may be able to remotely conduct proceedings that are neither essential nor critical, albeit remotely and without the necessity of in-person court appearances.

### **Technology to Enable Remote Hearings, Depositions, and Mediations**

Even before the Coronavirus and COVID-19 pandemic, remote conferencing systems, such as LifeSize, and video-conferencing technology providers such as GoToMeeting, Zoom, Skype, and FaceTime were already being utilized with increasing frequency for virtual meetings and to conduct depositions and mediations. Now, with attorneys and law firms being forced to shift to remote operations, coupled

*continued, page 52*

with the foregoing relaxed rules regulating the use of audio-video communications equipment for court proceedings, virtual meeting technologies like those identified above can be valued tools for the Litigators who are trying to continue representing their clients and operating their law firms during these challenging times.

In addition to providing the ability to communicate through the use of audio and/or audio-visual equipment, many of these companies also offer features that are specifically designed for use by attorneys. For example, Zoom allows restricted access to a meeting by making use of the Waiting Room feature. When the Waiting Room feature is used, the individual “participants” who are seeking to join the meeting will be “parked” in a Waiting Room until the meeting “host” admits them. This feature allows judges, arbitrators, mediators, or any other designated “host” to decide who can enter the meeting and when. Similarly, Zoom meetings can also be set up to make use of virtual breakout rooms, a feature particularly useful for conducting mediations. When this feature is used, participants can be assigned to breakout rooms for caucuses, either in advance or as needed, by the mediator or other host after opening remarks and statements are made.

As an example of a Florida circuit that has allowed the use of audio-video conferencing technology to conduct proceedings without the necessity of in-person court hearings, the Seventeenth Judicial Circuit has provided its judges the ability to stream and host court proceedings via Zoom in order to facilitate court activities. In doing so, the Seventeenth Judicial Circuit’s Office of Court Administration also advises users new to Zoom to watch a number of instructional videos before getting started with Zoom, which are set forth in the section below. Similarly, the Seventeenth Judicial Circuit’s Office of Court Administration has also provided the following list of “Tips for Successful Hearings”:

- Dress in a soft solid color (like a black robe for judges). If a tie is worn, use a solid tie rather than one with a pattern.
- When speaking, remember to look directly at the webcam, not at the screen.
- Position the camera at your eye level or slightly above eye level.
- Be mindful of what is behind you, choose a solid neutral wall if possible.
- Check the lighting. Light from a window behind you might blind the camera, making you look dark. Light above you in the center of a room might also cast shadows. Ideally, position a lamp, or sit facing a window, where light is directly on your face. Also be aware that your monitor casts light that can make you look blue.

Moreover, the following are some practical tips from

practitioners and various service providers of video-conferencing technology that can be used when conducting depositions, mediations, and/or remote hearings:

Don’t use a speaker phone! Using speaker will make it hard for the court and other participants to hear you due to background noise, problems with rustling, and white noise.

To ensure clarity, participants should use microphones and headphones, if possible, and, try to conduct proceedings in a room with good acoustics.

If the acoustics are less than desirable and no other locations are available, try using fabric (such as rugs, drapes or pillows) to absorb the sound.

Check your lighting and background of your makeshift home teleconference facility. Have a good light source in front of you to light your face; avoid light behind you, which will darken your face.

Do everything possible to prepare beforehand and try to make sure the participants are properly set up with hardware, software and internet. If possible, make sure to have IT support on hand during the proceeding to handle any technical issues that may arise.

Make sure participants are fully and appropriately prepared, just as if he or she were to appear in court. This includes preparing participants insofar as listening to the court, maintaining professionalism and courtesy, being mindful of their appearance on camera, and being mindful about appropriate attire for witnesses/parties, as well as their body language, grooming, facial expressions, eye contact, and not speaking over anyone else!

Be patient with witnesses, patient with court staff, and patient with the bench. Remember, we are all in this together, and all of the actors in a judicial proceeding are dealing with their own concerns, whether child-care related, health related, finance related, or perhaps just dealing with the “new normal” that we all find ourselves navigating.

Close any non-essential applications during the proceeding as webcams generally use a great deal of your CPU.

Have your materials ready and know the rules! While you should try to have a copy of your hearing file, legal authority, and other documents, you also should be mindful of the requirements for making use of these at your remote proceedings. You need not only to have usable official documents and legal authority, many courts have implemented requirements for how to present, exchange, and make use of exhibits, demonstratives, and/or legal authority. Make sure that the way you plan to present is one that is approved for use in your particular proceeding and locality— in this new normal long gone are the days were you can prepare the night before and show up with just anything and hope to make use of it in court.

*continued, page 53*

Test your settings before your proceeding to ensure that your proceeding goes off without interruption caused by otherwise avoidable technical issues.

Have a reliable phone with a full battery and a good signal and, when possible, try to use a landline to avoid the risk of having your call dropped mid-hearing.

In the section below are links to several other helpful pieces of information on the use of audio or audio-visual technology to conduct your legal proceedings. Moreover, the service provider of audio, audio-visual, and/or video-conferencing technology that you ultimately use may have additional resources available online or through your representative that you may find helpful to review before using the technology for the first time. Finally, some providers even have special pricing or waived fees in light of the COVID-19 pandemic,<sup>15</sup> so do your research and ask questions when deciding what solution is best for your practice and your clients.

### **Where to Find the Answers: Helpful Links**


President Franklin D. Roosevelt famously opined that “there are as many opinions as there are experts.” While the COVID-19 pandemic may be different in many ways from the difficult times that FDR guided our country through during World War II, this maxim is perhaps even more true today than it was nearly three-quarters of a century ago.

Reliable information is critical when dealing with a public health emergency. It is vitally important to get your information from verifiable, reliable official sources, such as the Centers for Disease Control, the Florida Department of Health, the Florida Bar, and the Supreme Court of Florida.

This article and what follows is not intended to provide a comprehensive overview of all available resources or court-specific information; rather, the authors have endeavored to provide a non-exclusive list of potential best practices, tips, and other resources to help practitioners navigate these challenging times and locate the ever-changing rules, regulations, administrative orders, and/or executive orders that have been implemented in response to the COVID-19 pandemic. The following link will re-direct you to a COVID-19 landing page that the authors have set up with a customized collection of links to official information and other resources that these authors found helpful:

<https://www.florida-probate-lawyer.com/probate/covid-19-legal-resources/>

It goes without saying that this Coronavirus/COVID-19 pandemic is having an enormous impact on everyone globally. Everyone is adapting and attempting to situate themselves to continue operating their respective businesses in this new normal. That being said, as things change, the above procedures and information may become obsolete, so please be sure to check official sources for the most up-to-date

information possible. This virus will come to an end, but your legal practice doesn't have to while we all navigate these challenges. It is the hope of this article's authors that this article becomes irrelevant and unnecessary as soon as possible. In the meantime, stay safe, and we hope these resources help! 



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### **Endnotes**

- 1 The Florida Bar website provides the following caution: “We stress that the absolute best course to take at this time is to work remotely using electronic communications and to avoid in-person contact as directed. When that isn't possible, you should follow the health and safety guidelines issued by national state and local health officials (posted on our [COVID-19 webpage](#)) concerning proper hygiene, social distancing, and other recommended protocols.”
- 2 The authors use the word “potential” as this crisis is novel to everyone involved and quite dynamic. The best practices may evolve and/or change altogether, depending on future legislative changes or emergency orders.
- 3 Fla. Stat. § 117.201(11).
- 4 See Fla Stat. §736.0403(2)(b); see also Fla. Stat. §732.502.
- 5 If you would like to limit exposure of the notary, do not notarize any documents that do not strictly require it. The only document that requires it is a durable power of attorney. Fla. Stat. §709.2015(2).
- 6 Although earlier articles and news from the CDC indicated that healthy individuals should not wear masks, there seems to be a change in guidelines, wherein everyone should be wearing a mask outside whether showing symptoms or not. However, given the shortage of medical masks such as the N95 masks, nonmedical masks are recommended. Mr. Gil ordered a set of cloth, reusable (machine washable) masks from Amazon.
- 7 See Administrative Order AOSC20-17 (March 24, 2020), at pages 1-2.
- 8 *Id.*, at page 2; see also AOSC20-13 (March 13, 2020), at page 2.
- 9 *Id.*, at page 2.; see also AOSC20-15 (March 17, 2020), at page 3.
- 10 *Id.*, at page 2.; see also AOSC20-15 (March 17, 2020), at pages 3-4.
- 11 *Id.*, at page 2.
- 12 This date will remain in effect “unless a different end date is indicated herein or as provided by subsequent order.”
- 13 See Administrative Order AOSC20-23 (April 6, 2020), at pages 2-3, s. l.
- 14 See Administrative Order AOSC20-16 (March 18, 2020), at paragraphs 1-3.
- 15 For example, Empire Legal Reporting will be waiving our Video Conference fees until June 1, 2020 when you order a court reporter for a deposition or other legal proceeding.