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The Voice

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This Week's Feature



Preparing Witnesses by Videoconference

By Michael A. Gross

Social distancing policies are requiring many attorneys to practice law remotely. Attorneys are learning to adapt to this new environment along with their clients. Many attorneys have some experience taking depositions by video. However, remote preparation of a client requires some additional knowledge and skill. There are some real advantages to remote witness preparation. Learning how to be more effective at preparing witnesses remotely can actually translate into having a witness who is more successful in their videotaped depositions. Importantly, as attorneys, we must be aware of various ethical and practical considerations involved with any client videoconference.

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- Effects of the COVID-19 Crisis on Jurors' Attitudes and Decision-Making, June 10, 2020, 12:00–1:00 pm CDT

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Quote of the Week

”Reading is grist. Reading is bliss.”

—[Nora Ephron](#) ([May 19, 1941-June 26, 2012](#)).

This Week's Feature

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Social distancing policies are requiring many attorneys to practice law remotely. Attorneys are learning to adapt to this new environment along with their clients. Many attorneys have some experience taking depositions by video.

However, remote preparation of a client requires some additional knowledge and skill. There are some real advantages to remote witness preparation. Learning how to be more effective at preparing witnesses remotely can actually translate into having a witness who is more successful in their videotaped depositions. Importantly, as attorneys, we must be aware of various ethical and practical considerations involved with any client videoconference.

We have been preparing witnesses by videoconference for the past two years. As the largest group of attorneys exclusively dedicated to witness preparation, we have experienced both the advantages and limitations of remote preparation. The advantages include having the benefit of assessing a witness by video and seeing how the witness will appear to a jury when the video deposition is played during a trial. The witness will also experience what it is like to be in front of the camera and have the opportunity to get real-time feedback on how he or she appears and performs on video. As for the actual preparation process, it will require more planning and execution up front to get a better prepared witness. Here are some steps that you should consider when you prepare your client or witness remotely.

Planning Before the Prep

Your witness needs to have a computer or tablet that can access the conferencing platform that you use. (We have typically used Zoom or GoToMeeting.) He or she will need to download the application in advance, and it should be tested before the actual day of the prep. If there are issues with video or audio quality, the witness may need to change to a room with better internet speeds.

The witness will also need a secure and private environment to maintain the attorney-client privilege. The only other individuals attending the preparation session should be the attorney, or attorneys, and the client. Any nonattorney attending remotely, or a room that is not private, may jeopardize the integrity of the attorney-client privilege.

The witness needs to have in his or her possession any documents that the witness needs to reference during the prep. The witness should have electronic access to those documents in advance, or you should send hard copies beforehand for the witness to use. You should consider the manner in which the documents will be presented to the witness during the deposition and mimic that approach.

Both the attorney and the witness need to dress professionally and be groomed. The witness should know in advance that the preparation is not an informal chat but rather an important meeting that should be treated as if it were the actual deposition.

The attorney should send a letter explaining the process to the witness in advance of the preparation session, and the expectations should be sent to the witness well before the video session so that he or she can prepare for the actual session. Included in the letter should be instructions to review any and all relevant documents in advance of the preparation session.

The attorney should practice and be comfortable using the remote-access platform and be capable of using the tools that the platform provides, such as whiteboards and screen sharing.

There needs to be a written agenda or outline to make the session efficient and directed. It is more difficult for a witness to stay engaged and concentrate while looking at a computer screen than it is when the attorney and witness are together in the same room. The attorney who prepares beforehand and has an agenda to follow will make the witness more engaged and more effective in the end.

In medical malpractice cases, the law firm needs to have signed, in advance of the session, a "HIPAA Business Associate Agreement" with the videoconferencing platform. Both Zoom and GoToMeeting have these agreements, and your account will automatically be configured for HIPAA requirements. Failing to have the agreement in place may jeopardize the patient-privacy protections required by HIPAA.

Before starting the videoconference session, the attorney needs to ensure that the videoconference is secure. At a minimum, the session should be password protected. In

addition, the attorney should host the meeting (and remain the only host) and have the sole ability to admit and expel attendees; lock the meeting; and control screen sharing, whiteboard access, chat access, and the transmission of documents. All of these security measures will minimize the chance that an unauthorized person can join the meeting.

During the Preparation

Once the session starts, the physical separation between you and the witness may make it difficult to sense what the witness is feeling. The mere thought of testifying can produce anxiety, so it is important to address whether the witness has any anxiety directly. For some, the anxiety is the result of a misunderstanding about the litigation process. For others, they may have anxiety based on past experiences. Commonly, when asked, witnesses will express some fear or anger related to the litigation, and this may impair their ability to testify. To get the most out of them, you will need to address each concern by asking questions in a way that helps a witness deconstruct the problem and come to his or her own resolution. This process should continue throughout the session to make sure that your witness is gaining confidence.

Many problems with the way that witnesses testify are exacerbated on video. It is often very difficult to know when someone is finished speaking on video, so interruptions tend to happen more frequently. Moreover, since the witness is typically alone in a room during the videoconference, he or she may act more informally. This informality can result in rambling and indirect answers. The witness will need to develop discipline on video to succeed.

Accordingly, you must pay close attention to the way that the witness is answering your questions. Is the witness answering directly? Is the witness rambling on and on in response to a simple question? Is the witness interrupting you? Is the witness answering too quickly? Does the witness express doubt or lack confidence? If you see any problems in the way that the witness is responding to your questions, address them immediately. Don't wait until you practice cross-examination; start instilling discipline from the very beginning of the videoconference. Doing this will help the witness become an active listener—a critical skill for any witness.

Most of us grew up learning with visual aids. Using them during the videoconference presents some challenges but is effective when done the right way. A large Post-it Pad on an easel (or sticking the Post-it pages on the wall behind you) is a good tool to use. You can board questions and break them down, list critical issues, or create a timeline.

If you go this route, make sure that the Post-it Pad is close enough to the camera and that you write in a dark, bold, thick marker so that the witness can see it clearly. Alternatively, if you are using Zoom or GoToMeeting, there is a screen-sharing feature that includes the use of a virtual whiteboard. The Zoom desktop application will automatically save your whiteboards for you. If you use the Zoom iOS application on your iPad, or use GoToMeeting, though, you will need to take a photo of each whiteboard before you end the screen sharing.

As you practice cross-examination you will have an opportunity to see how your witness will look on video. There is plenty of multitasking involved. It is just as important to pay attention to how the witness looks on video as it is to evaluate the quality of the answer. To the extent possible, you will want to practice the same type of tactics that the plaintiff's attorney probably will use during the deposition—not just in the way that the plaintiff's attorney will ask questions, but also how the attorney will present documents, how the attorney will interrupt your witness during an answer, and what your witness should do if it happens—and any other techniques that you expect opposing counsel to use. Practicing even the small details will help reduce the witness's anxiety and give him or her the confidence to testify.

Closing Thoughts

The preparation of a witness in today's litigation environment will certainly require a new flexibility on the part of all parties involved. Videoconferencing has afforded us the ability to remain connected in a time when our health and safety depends on us physically distancing from one another. Attorneys who are willing to integrate remote witness preparation into their practice will benefit from less interruption to their normal workflow, the opportunity to stay connected to their clients, and a confident witness during a deposition.

Michael A. Gross is an AV-rated attorney who has litigated high-profile cases for 38 years. He is the managing director of **CogentEdge**, a group of attorneys who are trained to prepare witnesses in a highly structured, disciplined way to testify during depositions and trials. CogentEdge has a national practice and is regularly retained by defense counsel, insurance carriers, and law firms. Mr. Gross is a member of the DRI Litigation Skills Committee.

COVID-19

Taking Care of Each Other During a Pandemic

By Alex J. Hagan, DRI National Director and DRI for Life Chair

On March 20, my firm, like many others, officially closed its offices. All staff and attorneys began working from home. In the days preceding the firm's virtual transition, our IT department ensured that each firm member was equipped for this change, which we recognized could last for several months. Recognizing the importance of staying connected, firm management established daily video calls with various groups of staff and attorneys.

Like many others, March 20 marked the start of a dramatic change in my life. Travel stopped completely. The North Carolina Chief Justice entered an order (which was later extended) essentially staying all court activity and continuing all court deadlines limitations until June 1. Some federal courts issued similar extensions.

My commute changed from driving across the city to walking upstairs. My calendar soon filled with videoconferences with clients and attorneys, as everyone worked to adapt to circumstances. As more time passed, parties scheduled more video depositions, and courts scheduled video hearings.

In many respects, videoconferencing has made me feel even more connected to my colleagues. As an example, Emily Coughlin, Diana Averell, and I have transitioned our 2020 DRI Summit Steering Committee telephone calls to Zoom conference calls, which has enabled us to stay connected with DRI leaders across the country

The practice of law, like other professions, adapted.

At home, my family of five, which historically was overscheduled and rarely all together at the same time, spent mornings walking our dog, days working from our respective work zones in the house, evenings walking our

dog again, and sitting and relaxing together. For the first time in a long time, our dog was in shape, and my family was enjoying each other's company without interruption.

I recognize that my experience during this pandemic is far from unique. However, I also recognize that many of our DRI members have had significant challenges

adapting to a work-from-home environment, and the associated isolation. Some of us have had school-aged children whose daily curriculum has now become the responsibility of the parents. Some of us have infants or toddlers who are not as willing to adapt to the virtual work schedule of their parents. Some of us have elderly parents or family members that require more immediate care. Some have dealt with the illness or loss of colleagues and loved ones.

Adding to all of the above has been the anxiety, fear, and loneliness some have felt as they have sheltered from home, away from friends, family, and coworkers.

Recognizing these new challenges, DRI for Life, the mission of which is to promote lawyer wellness and well-being,

got busy.

This month, DRI for Life created a free podcast for its members entitled "Working from Home, Homeschooling, and the Issues Both Present." In the podcast, DRI member Sara Turner moderated a discussion among fellow members Laura Eschleman, Stephanie Jones, Nick Garrard, and Ted Dunlap, as they shared their struggles and ideas for how to juggle their additional at-home roles on top of a legal career.

This week, DRI for Life recorded a podcast in which DRI member Susan Gunter interviewed Doron Gold, a



professional coach and psychotherapist, on dealing with increased stress and other mental health issues during the pandemic, practicing law in isolation, and the fear of the unknown.

Next week, DRI for Life, along with the DRI Law Practice Management Committee, will record a podcast entitled, “A Time of Loss, Dealing with Loss in Law Firms.” DRI members John Trimble, Diane Pumphrey, and Bryan Garcia will discuss handling the loss of a lawyer or valued employee.

Once completed, all of these podcasts will become available to DRI members at this location: <https://www.spreaker.com/user/show/dri>.

Many of you attended the DRI for Life webinar on lawyer stress hardiness last fall. That webinar remains relevant in these times and is [available for free download](#) to members

on the DRI On-Demand Programming site. In the coming months, DRI for Life will also host a webinar on mental health in the legal profession.

While these offerings cannot begin to address all of the issues that we are facing in this pandemic, it is nice to see so many DRI members coming together for each other.

When this will end, and how, is still unknown. In the meantime, it is reassuring to me to know that DRI has worked to equip our members with resources to help us weather the pandemic.

May we all stay well, may we all stay busy, and may we have the opportunity to see each other in the very near future. Until then, walk your dog.

And The Defense Wins

Keep The Defense Wins Coming!

Please send 250–500 word summaries of your “wins,” including the case name, your firm name, your firm position, city of practice, and email address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to DefenseWins@dri.org. Please note that DRI membership is a prerequisite to be listed in “And the Defense Wins,” and it may take several weeks for *The Voice* to publish your win.

Walter Judge



[Walter Judge](#), a partner in the Burlington, Vermont, office of **Downs Rachlin Martin**, assisting Shook Hardy & Bacon, achieved the dismissal of a purported consumer-fraud class action brought in Vermont federal court against ice cream maker Ben & Jerry’s.

In the lawsuit (the “happy cows” case), the nominal plaintiff, a Vermont clean-water advocate and former candidate for governor, alleged that the company’s “happy cows” and

“caring dairy farms” messaging on its product packaging and website misled consumers into believing that 100 percent of the milk and cream in the company’s ice cream came from dairy farms using special environmental and animal welfare practices promoted by the company, and consumers therefore paid a higher price to purchase Ben & Jerry’s products than they otherwise would.

On May 7, 2020, the U.S. district judge dismissed the complaint on the grounds that its allegations of consumer fraud were not plausible. The judge found that a reasonable consumer, seeing the phrase “happy cows” on the product packaging, and then going to the company’s website and reading a heading at the top of a page that explains the standards for a dairy farm’s participation in the company’s Caring Dairy program, would not interpret those words to mean that the company sources 100 percent of its milk and cream from “caring dairies”—much less that the consumer would do all of that web searching and interpreting as a prelude to making the in-store purchasing decision. The case name is *Ehlers v. Ben & Jerry’s Home-made, Inc.*, No. 2:19-cv-194-cr (D. Vt. May 7, 2020) (order granting motion to dismiss).

DRI News

Upcoming DRI Elections

Four **Director Elected Nationally** seats on the DRI Board of Directors, plus the offices of **Second Vice President** and **Secretary-Treasurer**, will be filled at the [2020 DRI Summit](#) in Washington, D.C., October 21-24. To be considered for any position, a DRI member must first file a Declaration

of Candidacy form. For more information, please contact **Nancy Parz** at DRI headquarters: nparz@dri.org or **312.698.6224**. **Declarations are due by July 1, 2020. This deadline is not being postponed.**

In Memoriam

Linda M. Lawson



The DRI family was saddened to learn that long-time member **Linda M. Lawson** passed away on Saturday, May 16. Linda was the managing partner of the Los Angeles office of Meserve Mumper & Hughes LLP. She was a member of

the DRI Law Institute from 2005 to 2017, including service as chair from 2014 to 2016.

Information concerning a memorial and how to share condolences was not available at the time of this week's publication.

DRI Cares

New Orleans Law Firms Team Up to Provide L.I.G.H.T.

As New Orleans battles COVID-19, many of the city's prominent law firms are looking outside courtrooms and conference rooms for ways to help. Their new program, L.I.G.H.T (Lawyers' Initiative Giving Hospitals Thanks), has raised more than \$100,000 to feed front line healthcare workers and support New Orleans's renowned food and music industries.

"It began as a weekly brainstorming call among law firm leaders about how to protect employees, stabilize firms and ensure that legal services would continue unhindered. But when New Orleans became a hotspot, the consensus quickly pivoted from protecting our own people to helping the community as a whole," said Phelps Dunbar's Marshall Redmon, a founding member of L.I.G.H.T.

The group turned to [Krewe of Red Beans](#) and its [Feed the Front Line NOLA](#) project to turn money into meals. Donations allow the nonprofit to serve thousands of meals to healthcare workers in area hospitals. More than two dozen restaurants now count on daily orders to keep their doors open, while out-of-work musicians serve as delivery drivers. "The L.I.G.H.T. initiative is keeping our effort alive as our city enters the most crucial phase of our battle against COVID-19. All the hospital heroes will be fed like the champions they are, and our whole community is united in supporting them as they fight to save us," said Devin De Wulf, founder of the Krewe of Red Beans.

L.I.G.H.T., which now numbers 30 law firms, hopes to expand its support for essential frontline health-care workers



Upcoming Webinars

Preparing the Foreign-Born Witness for Testimony, May 21, 2020, 12:00–1:00 pm CDT



What is quite common in today's courtrooms is foreign-born, English-speaking witnesses whose role is to convey believable, persuasive (and critical) testimony to a panel of jurors. There is a misconception among trial attorneys and corporate counsel that the "language barrier" is the primary obstacle to effective courtroom testimony from foreign-born witnesses. The heart of the matter is that foreign-born witnesses are often very poor communicators in the courtroom, not because of the language barrier, but rather, because of deep cultural traits that hinder their ability to get their messages across to jurors.

With millions, if not billions, of dollars at stake in civil litigation matters, the unique verbal and nonverbal communication challenges associated with foreign-born witnesses can leave trial attorneys and their clients economically vulnerable in the courtroom. Therefore, as the country continues to diversify culturally, and the number of foreign-born witnesses continues to increase over time, trial teams will need to alter and supplement their witness preparation efforts.

This program will help explain who foreign-born witnesses are and in what types of cases their testimony is commonly seen. It will address the linguistic and cultural barriers that are likely to present themselves and will also offer practical advice about the key preparation steps that should be taken before a foreign-born witness testifies. [Click here](#) to register.

Litigation Against Nursing Homes/ALFs Following the COVID-19 Pandemic: Three Things to Do Now to Prepare, May 22, 2020, 12:00–1:00 pm CDT



As some states begin to reopen, senior-living providers are beginning a new phase of this pandemic: widespread litigation. The media continues to focus on senior-living communities, implying a connection between loss of life and quality of care. Many in the media are ignoring the disparate impact that the virus has on those with chronic medical conditions, the limitations created by the lack of widespread testing, and how the early federal response limited the options available to senior-living operators to change outcomes.

This session will focus on the three most important things that providers and their counsel need to do over the next 90 days to prepare for the next wave of litigation. We will cover the practical effect of state and federal immunity provisions and the need for a uniform response; review the current legal environment, including the new lawsuits filed against senior-living providers; and discuss the need to document the pandemic experience now. [Click here](#) to register.

Employers, Be Prepared: Top-Five COVID-19-Era Claims on the Horizon, May 27, 2020, 12:00–1:00 pm CDT



The current COVID-19 pandemic has seemingly changed the landscape of employment law overnight. As employers navigate their way through current and former employee situations related to COVID-19, it is certain that employee claims and litigation will arise. This course will outline five of the most likely types of claims that employers will see in this new environment. [Click here](#) to register.

Evaluating Talent: Best Practices for Screening and Onboarding New Talent, May 28, 2020, 12:00–1:00 pm CDT



This webinar is intended to walk participants through the hiring process, from the application stage to the hiring process to onboarding your new employee. The webinar will cover common mistakes and risks that you may not be considering when screening your applicants. We will also address common employment policies, such as noncompete agreements, and when you should consider them. In essence, the webinar will cover best practices for every step of bringing on a new employee. [Click here](#) to register.

Upcoming Webinars

Effects of the COVID-19 Crisis on Jurors' Attitudes and Decision-Making, June 10, 2020, 12:00–1:00 pm CDT



This presentation will explore the likely effects of the COVID-19 crisis on civil jurors' attitudes, beliefs, and decision-making processes from an evidence-based perspective. In addition to examining the psychological effects of COVID-19 on jurors, the presenters will discuss changes in jurors' attitudes toward corporations and corporate defendants and the influence that corporate responses to COVID-19 may have on juror decisions. Attendees also will learn how the COVID-19 crisis may affect jurors' expectations for, and perceptions of, key witnesses. Most importantly, this presentation will discuss strategies for successfully navigating and even capitalizing on this crisis to promote positive case outcomes. [Click here](#) to register.

DRI Membership—Did You Know...

Advocating DRI Membership Has Benefits for You

Are you interested in attending a DRI seminar or the DRI Summit, but do you need a little help to make those numbers work? What if DRI can put a seminar within your reach?

Did you know that that if you refer a new member to DRI and he or she joins, you receive a \$100 CLE credit, which can be redeemed for a DRI seminar or the DRI Summit? Bring on a second DRI member and that's another \$100 CLE credit. Bring on a third member—you get the idea.

That's money off the top of reduced DRI member registration fees. Instant savings for you and your firm.

You can easily save you or your firm more than the cost of your membership dues, connect your friends with the numerous benefits of DRI membership, and help their careers as well as your own. Use this [DRI Membership Application](#) and get started.

Yes, it's true! You can do well by doing good.

State Membership Chair/State Representative Spotlight

New York

State Membership Chair



Kimberly A. Connick, Senior Associate, Harris Beach PLLC

Areas of Practice: General liability, toxic torts, mass torts, and product liability.

DRI member since 2012.

Kimberly's experience with DRI: "By being an active member of DRI I have developed friendships with a wide and diverse network of attorneys all over the country. It is a wonderful complement to my practice because it provides opportunities to volunteer, present, publish, and collaborate with attorneys to plan and execute conferences."

Fun Fact: "I have a twin sister, and our parents did not find out that they were having twins until the day before we were born!"

Missouri

State Representative



Dana L. Frese, Executive Vice President-Claims and General Counsel,
Healthcare Services Group

Areas of Practice: Insurance law, litigation, and corporate law.

DRI member since 2003.

Dana's experience with DRI: "I am the immediate past president of the Missouri Organization of Defense Lawyers (MODL). I have been a board member of MODL since 2009. I have enjoyed attending the DRI annual meeting and DRI seminars and meeting excellent defense lawyers throughout the United States."

Fun fact: "I have run the Boston Marathon six times."

New Member Spotlight

Dimitrios A. Parhas, Mulherin Rehfeldt & Varchetto PC



Dimitrios A. Parhas is an associate attorney with **Mulherin Rehfeldt & Varchetto PC** in Wheaton, Illinois. Mr. Parhas's practice areas include civil litigation, insurance defense, subrogation, subcontractor default insurance subrogation, real estate, and bankruptcy. He is admitted to the bars for Illinois, the Supreme Court, and the Northern District of Illinois. In addition to DRI, is a member of the Kane County Bar Association and the Illinois State Bar Association.

Mr. Parhas completed his law degree at the Southern Illinois University School of Law in Carbondale, Illinois, with a specialty in business and transactional skills. Before becoming a practicing attorney, he was a teacher. Mr. Parhas has a M.Ed. from Jones International University in Colorado, with a major in instructional design and technology.

His favorite movie is *The Shawshank Redemption*, and his favorite book is *The Jungle* by Upton Sinclair.

Quote of the Week

"Reading is grist. Reading is bliss."

—[Nora Ephron](#) ([May 19, 1941–June 26, 2012](#)).