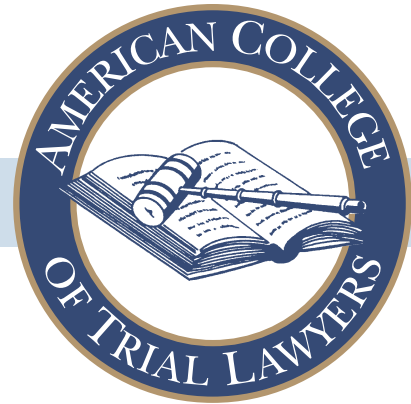




Overarching Principles Applicable to Civil Trials

Task Force on Advocacy in the 21st Century

Approved by the Board of Regents
September 2020

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OVERARCHING PRINCIPLES APPLICABLE TO CIVIL TRIALS¹

1. In general, trials should be conducted in-person in a public forum that allows real-time access to the public. Witnesses, litigants, their lawyers, the judge and in jury trials, the jury, should be in the same room for the entirety of the proceedings, except for those times during jury trials when the jury is deliberating or when an in-chambers conference is appropriate. Courts and courthouses should be designed and configured to safely conduct in-person trials, even in times of public health crises, and to use video communication platform(s) where appropriate.

2. Courts should embrace the use of technology to facilitate the resolution of disputes. Courts are encouraged to monitor the efforts of those already undertaking such efforts, and to experiment with new methods of dispute resolution that will improve access to justice while advancing the goals of just, speedy, and inexpensive resolution of disputes.

3. Subject to the considerations set forth below, the appropriate use of a video communication platform² for witness examinations in a trial may be employed in situations that are not inconsistent with Principle No. 1. Video communication may assist in enhancing fundamental principles of the administration of justice, such as procedural fairness or access to justice, if used appropriately.

For example, one or more witnesses in a trial should be able to testify via a video communication platform with the consent of the parties. Furthermore, after appropriate notice, one or more witnesses in a civil trial could be permitted to testify using a video communication platform, even over the objection of a party, if the trial judge determines it is in the interest of justice to do so.

Relevant factors would include the importance of the witness's testimony; whether witness credibility is expected to be at issue; the witness's ability to travel to the courtroom; the witness's health and economic circumstance; the costs attendant to the witness's personal appearance; the witness's responsibility for the care of others who have a health or other legitimate issue that impacts the witness's ability to be physically present; whether the case is being tried to the judge or to the jury; the location of the venue and the impact of geography on the ability of the parties and the witnesses to economically participate in the proceedings; and any other factor deemed relevant under the circumstances.

4. To the extent that a video communication platform is used in whole or in part in the disposition of cases, courts must ensure that the public has prior notice of the proceeding and can see and hear what is happening in court proceedings, either through in-person public access or real-time video transmission to a readily accessible source.

5. Courts should work with other governmental agencies (e.g. libraries) to have computers (with video communication capability) available for use by *pro se* parties, self-represented litigants, and those who lack access to the technology so that they can participate in the justice system.

¹ This paper addresses only civil trials. Trials of criminal cases raise numerous constitutional issues that impact the rights of defendants, victims and the public in the United States and Canada (and indeed different issues in each country) and will be addressed separately.

² A "video communication platform" is video conferencing software that allows people in different places to come together on a single platform and interact with one another visually and audibly in real-time. There are many such platforms, including Zoom, GoToMeeting, Microsoft Teams, Bluejeans Meetings, and more.

6. The use of a video communication platform should be encouraged for hearings on pretrial civil matters (especially those not involving the taking of evidence) where it can promote efficiency and cost savings, such as whenever it enhances scheduling and case management issues. Such use is also encouraged for pretrial and interlocutory motions in civil cases that are not document or fact-intensive, unless the nature of the motion requires otherwise for a fair hearing of the issues.

7. In-person oral argument by counsel in pretrial civil matters should be generally permitted. Video communication platforms may facilitate scheduling of arguments and allow them to be presented at reduced client expense, and thus may be an appropriate alternative, particularly in less complex matters.

8. In-person oral arguments by counsel on appeal should be generally permitted and are preferred. Video communication platforms may facilitate scheduling of arguments and allow them to be presented at reduced client expense, and thus may be an appropriate alternative, particularly in less complex matters.

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