

TO ZOOM OR NOT TO ZOOM? MINNESOTA TRIAL LAWYERS BEWARE



By Janel Dressen

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Effective June 6, 2022, the Minnesota Supreme Court enacted an Order Governing the Continuing Operations of the Minnesota Judicial Branch (the "Remote Court Order"). <https://www.mncourts.gov/About-The-Courts/NewsAndAnnouncements/ItemDetail.aspx?id=2104>. In effect, the Minnesota Supreme Court proclaimed that remote court is here to stay.

This announcement is the most significant change in the practice of law for trial lawyers in decades. Truth be told, as a trial lawyer and the CEO of a law firm made up of trial lawyers, I have many questions about this indefinite change. How will this impact our client's need to have "their day in court?" With minimal business trials, how will new lawyers gain experience in the courtroom? Is it possible that new lawyers may go years without seeing the inside of a courtroom? As a law firm, how do we train new and experienced lawyers for remote court? How do we set client expectations? Will the continuation of less formal, distant remote hearings impact case resolution? Do we need to put together our largely remote case differently than we would if we were in person for all court appearances?

While we consider answers to these questions,

what is clear is the immediate need to: (1) be knowledgeable about the Remote Court Order; (2) consider the implications of the Remote Court Order on all pending and to be commenced cases; (3) be intentional about the training provided to lawyers for remote court and in-person court and the differences in presentation and strategy; and (4) communicate to clients about what to expect. During the Minnesota State Bar Association annual convention on June 22, Minnesota Supreme Court Chief Justice Lorie S. Gildea delivered the annual State of the Judiciary address focusing many of her remarks on the Remote Court Order. See <https://www.mncourts.gov/About-The-Courts/NewsAndAnnouncements/ItemDetail.aspx?id=2127> (hereinafter "Chief Justice Gildea's Address"). Justice Gildea reported that "judges, court staff, attorneys, and litigants have told us throughout the pandemic that remote hearings should have a permanent role in the ongoing operations of our courts, even as the pandemic subsides." *Id.* Following that feedback, the Remote Court Order was born. Justice Gildea noted that many other states are "returning to their pre-pandemic status quo and bringing most or all of their hearings back into the courthouse." *Id.* Minnesota is not following course.

All Minnesota state court lawyers, civil and criminal alike, should be familiar with: (1) the Court's April 19, 2022 Order; and (2) the one CourtMN Hearings Initiative Policy (the "Policy"), both of which are available at <https://www.mncourts.gov/About-The-Courts/NewsAndAnnouncements/ItemDetail.aspx?id=2104>.

Under the Policy and Remote Court Order, "[t]he general rule of thumb is that most evidentiary hearings—that is, hearings where evidence is being presented or testimony is taken on issues in dispute—are held in person, while most non-evidentiary hearings are held remotely." See Chief Justice Gildea's Address. Statistically, 71% of the court's hearings are presumptively remote and of the proceedings that are presumptively in person, I suspect such proceedings occur less than 5% of the time in the history of a case; for e.g., trials. Despite the presumptions, judges have the authority to grant exemptions under "exceptional circumstances." The Remote Court Order defines what constitutes exceptional circumstances.

Since the onset of the COVID-19 pandemic, I have appeared in many remote hearings in Minnesota and elsewhere, participated in a mock remote jury trial with Hennepin and Ramsey

County judges and jurors, and served as counsel for a company in a complex business dispute over 16-days in a zoom trial. Based upon this experience, I offer the following non-exhaustive list of considerations when contemplating whether you prefer to be in person or remote:

- Efficiency and convenience

- Accessibility for all involved
- Complexity of the matter
- Use of documents/exhibits
- Court availability
- Client and witness comfort level and performance anxiety
- Lawyer, legal team, judge, and court staff comfort
- Safety concerns
- Client control
- More or less private- is the public or media more or less likely to login to a remote hearing or attend in person? Does it matter to your case?
- Less disruption and delay with remote proceedings if there is COVID outbreak
- Does opposing counsel's personality, presentation style and/or skills impact your decision?
- Does the client want/need to "see" the judge in person?
- Always "on" (in person) versus potentially not always "on" (remote)
- Are there presentation biases that can work for or against you or your client?
- Challenges of court staff and reporters
- Multi-tasking mentality when appearing remotely
- Zoom fatigue
- Generational differences and expectations

Janel Dressen is a trial lawyer and CEO of the Minneapolis law firm Anthony Ostlund Louwagie Dressen & Boylan P.A. She represents businesses and high net worth individuals in all aspects of business litigation and dispute resolution, with an emphasis on closely-held and private business disputes. Ms. Dressen has been honored as Attorney of the Year by Minnesota Lawyer, Attorney of the Month by Attorney at Law, a Notable Woman in Law by Twin Cities Business Magazine, Power 30 in Business Litigation by Minnesota Lawyer, Best Lawyer in America, and a Super Lawyer since 2016, including one of the Top 50 Woman Super Lawyers by Minnesota's Super Lawyers since 2019.