

Lawyering by video



By Sean FitzPatrick

Thick padded bulletproof vests on security guards. The buzz of a metal detector as a belt buckle sets off the alarm. The sound of heeled dress shoes clack, clack, clacking on the hard courthouse floor. Ding, the elevator up to the courtroom floor. Is that my opposing counsel waiting outside the Courtroom? Entering the courtroom with hushed voice so as not to disturb the hearing in progress. The panic of suddenly remembering to check the cellphone to make sure it is silenced. The strike of the gavel. May I proceed? These sights and sounds are part of what makes being a lawyer feel real to me. But lately, these things have been absent from the experiences of lawyers in New Mexico and around the country.

In February Richard Cravens wrote an article on Lawyering by video and we talked about what that meant in a podcast shortly after. It was in large part theoretical: I hadn't tried a case during Covid. But from February 8th to the 11th 2021, in Clayton New Mexico I was about to get a lesson in what it meant to try a case during covid.

Even though there are ups and downs, I am a trial junkie by nature. The feeling of being in trial is what feels like being a lawyer for me. Reminding the venire that something as important as a jury trial can bring everyone together during a pandemic for a common goal of justice. Standing up to make an opening and closing statement while looking each juror in the eyes to convey my message. The adrenaline of impeaching a witness on the stand live, in front of the jury. The trial in February felt real. And my clients had their day in Court, literally.

But even so, I would have rather done the case via video. Muffled voices through masks. Limited facial expressions. No conferring with Co-Counsel except through notes. Clients having to sit in the gallery, awkwardly trying to pass a note across the bar while maintaining six feet. But what really crystalized it for me: A juror asking the specific question after trial: "Why couldn't we have done this through video? At least we could have seen everyone's face".

As recalcitrant as the legal profession (and its lawyers) are to change, it is probably time to step into the modern era, if pandemic restrictions are going to continue to exist. I can't help but think about the Matrix when thinking

about lawyering by video. "If real is what you can feel, smell, taste and see, then 'real' is simply electrical signals interpreted by your brain."- Morpheus, *The Matrix*. Has being a lawyer during the pandemic become a simulacrum of the real thing? 'Phoning it in' is a derogatory term after all. But with more than 700,000 American lives ended because of a global pandemic, and no end in sight, maybe it is time to *dial it in* which oddly enough has the opposite connotation. And that is what Lawyering by video, if done right, has the ability to do.

A screen in every jurors hand? Why not? They are already used to obtaining information that way. Both parties used an ELMO (which we used at this trial). But wouldn't it have been better to 'push' it to individual tablets rather than the TV screen? There were jurors all the way in the back of the courtroom after all. Then, if admitted, automatically save the exhibit to each device. Because during Covid, having to compile, print, tabulate and distribute binders for each juror was difficult (and expensive since printer ink is one of the most expensive substances in the world, more so than human blood). There were no requests to approach the jury since they jury was scattered throughout the courtroom. The jurors had to squint. Don't get me started on all the interesting things that happen when you *force* people to engage in simple facial movements. (like the studies on when you make a person bite a pen, they become happier because it triggers the same muscles as smiling). What feeling does squinting invoke?

But I will get started on what I perceive the biggest pandemic problem related to lawyering by video: seeing a person's face. For better or for worse, people believe things about other people just by looking at their faces. Are they credible? Are they hostile? And people knowingly and unknowingly give information away in their own facial expressions while listening. I am no expert in body language or facial expressions. There are countless books on the subject including sub fields like chronemics (study of communicative role of time in nonverbal behavior), proxemics (study of space between people and role in communication), haptics (role of touch in communication) paralinguistics (how something is said rather than what is said), and many more. That is a lot of extra information that might be lost via video, but definitely lost when wearing a mask.

But what about the argument that all this extra information is not actually information, but noise? In Malcom Gladwell's book, *Talking to Strangers*, he points out a study titled "Human Decisions and Machine Predictions" by Jon Kleinberg & Himabindu Lakkaraju & Jure Leskovec & Jens Ludwig & Sendhil Mullainathan, in the *The Quarterly*

Journal of Economics, Oxford University Press, vol. 133(1) which examined bail decisions made by a judge versus what a computer algorithm would have done. When judges make decisions about bail, they have different sources of 'information': the Defendants record; argument from defense and prosecution; and the visual evidence of how the defendant looks including race ethnicity and gender. The AI algorithm only knew the current crime, prior history and age. The result? The computer handily beat the judges at predicting those who would reoffend, and accurately predicting those who did not. According to the study, using the algorithm could reduce crime "up to 24.7% with no change in jailing rates, or jailing rate reductions up to 41.9% with no increase in crime rates". And that is all without seeing the Defendant's face. But if you want proof that being able to identify a person's face is important, ask Robert Julian-Borchak Williams who was wrongfully arrested due to faulty facial recognition algorithm. <https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html>.

The legal profession might take a page out of the medical profession in striking a balance. Doctors don't need to open a patient up completely and expose them to infection like they used to. Laparoscopic surgery using the assistance



Clayton Courthouse

of a computer and camera decrease recovery times for patients. Why cant a zoom deposition be seen as a surgical deposition? You get in, depose someone in another state, and get out making it home in time for dinner. And given current facemask restrictions, wouldn't it be better to see the witnesses face during the deposition than be in person masked up? Wouldn't

it be better to instantly pull up credible documents for impeachment or to refresh a recollection? "I cant recall how many lanes there were on that road". Pull up google maps and share screen. Mr. Green can you see there are four lanes here? "I don't remember if it was raining that day". Pull up the National Weather Service Website. Ms. Jones, can you see that it was sunny and clear that day?

The trick is being able to do these things in the heat of the moment without hiccups or stalls. I embrace bitterly the idea that a lawyer's ability to argue a case may become dependent upon their ability to use computers. Shouldn't it be about story telling and argument? That is what makes me feel like a lawyer, and ultimately feeling like a lawyer makes me happy. But it sure is nice to not have to drive to the courthouse, fight traffic, try to find a parking spot, pay the meter, go through security, and worry whether you brought the exhibits to hand to opposing counsel and the judge. And to be honest, the legal profession has been computer dependent for some time now. So for now, I am practicing up in depositions and at hearings because I am one of those people who likes to see people's faces. Given the choice again, trial by video or in person, I think being able to see everyone's face may have been the better alternative, even if it doesn't feel as real.

Resource Shared by Mr. Fitzpatrick:

BlueJeans — Not Only for Casual Fridays Anymore

https://www.americanbar.org/groups/family_law/publications/newsletter/committee-corner/2020-2021/lpm-bluejeans/

Sean FitzPatrick is a graduate of UNM School of Law and is a sole practitioner at his firm FitzPatrick Law, LLC which he started in 2016. FitzPatrick's current practice area is civil litigation focusing on injury and insurance law in Albuquerque, NM. FitzPatrick worked as a prosecutor in Farmington, NM litigating a variety of felony and misdemeanor cases for a few years after law school. Outside of work, you can find FitzPatrick running, biking, or participating in other 'type 2' fun activities with his wife Eva and their son Liam.

