# POCKET GUIDE TO COMMON EVIDENTIARY ISSUES IN BANKRUPTCY IN THE TIME OF COVID-19

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## *FOUNDATIONAL REQUIREMENTS*

**The "on-the-bench" thumbnail:** Laying a foundation is all about providing enough background and context to give the evidence some meaning–to show that it is relevant. Proponents who offer evidence need to establish the "who, what, when, where" information about that evidence in order to demonstrate its relevance.

It is common to hear foundation objections when a party tries to admit photographs, conversations or recordings of some sort. Judges also hear foundation objections when the objecting party thinks the witness is testifying to something the witness knows nothing about.

There are also foundational issues involved with electronic evidence; these tend to be thorny. If a party attempts to admit an e-mail, or a web site, and the opposing party objects to foundation, the moving party might have to have some technical knowledge to be able to lay an appropriate foundation.

Great primer: Edward J. Imwinkelried, Evidentiary Foundations, published by LexisNexis. The book is older and out of print, but priceless–it contains actual scripts lawyers may use to lay foundations for just about everything one can imagine, including many types of electronic evidence.

**The actual rules:**

Fed. R. Evid. 104(a), *Preliminary Questions*
Fed. R. Evid. 401, *Definition of "Relevant Evidence"*
Fed. R. Evid. 402, *Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible*
Fed. R. Evid. 403, *Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time*
Fed. R. Evid. 602, *Lack of Personal Knowledge*

**COVID-19 takeaway:**

Foundation is even more critical now, when you may not be in the courtroom. Think about the foundation of every exhibit *before* you submit your

exhibit package to the court. Make sure that for each exhibit that needs a witness for authentication, you have that witness lined up and the witness can appear by videoconference. Try to obtain as many foundational stipulations as possible. If you don't really, *really* need an exhibit, consider skipping it.

## ***JUDICIAL NOTICE***

**The "on-the-bench" thumbnail:** In order for a judge to take judicial notice of a fact, it has to be a fact that is not subject to reasonable dispute, either because it is generally known within your territorial jurisdiction (such as the fact that a particular restaurant is located on a particular corner in the town where the court sits) or because it is capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned (such as that the prime rate of interest today is 3.25%).

The rule has a discretionary component–a judge *may* take judicial notice of a fact if she thinks that fact fits the rule's requirements. It also has a mandatory component–a judge *must* take judicial notice of a fact if a party asks her to do so, and provides her with the appropriate supporting information, provided that the judge gives any objecting party the opportunity to be heard on why such notice isn't appropriate.

Lawyers often ask the judge to take judicial notice of facts that are likely in dispute, such as the value of an asset or the existence (or absence) of a debtor's good faith. These are not the kinds of facts of which the rule allows us to take judicial notice.

Lawyers also ask judges to take judicial notice of "the schedules and statements in the debtor's court file." Judges may take judicial notice of the fact that on such-and-such a date, someone filed Schedules A-J bearing the debtor's name, and that those schedules contain certain representations. But when a judge takes judicial notice of the fact that Schedule I indicates that the debtor earns $2,000 per month, this does not mean that the debtor has proven that he does, in fact, earn $2,000 a month. All it means is that the judge officially has observed what anyone else who wished to do so could observe–that there is a document on file that says so, and that the parties do not have to waste time litigating whether there is a document on file that says so.

**The actual rule:**

Fed. R. Evid. 201, *Judicial Notice of Adjudicative Facts*

**COVID-19 takeaway:**

Because video hearings are exhausting, shortcuts are Good Things these days. But make sure you know and understand the rule so that you use the shortcut in the way it is meant to be used. If you want to invoke the mandatory portion of the rule, follow the steps—give the judge the supporting documentation and give the other side the opportunity to object or respond.

## ***CONTROLLING THE EXAMINATION OF WITNESSES***

**The "on-the-bench" thumbnail:** The judge has the authority to exercise reasonable control over examination of witnesses, in order to avoid wasting time, protect witnesses from harassment and make sure the lawyers are getting to the heart of the matter.

During direct examination, lawyers usually cannot use "leading" questions unless they are trying to set up the background for an issue. This is because a "leading" question is one that provides its own answer, and thus if the lawyer asks "leading" questions on direct, it is really the lawyer–not the witness–who is testifying. "Leading" questions are allowed on cross-examination.

It is a common misconception that a leading question is a question that is susceptible to a single-word, affirmative or negative answer–*not true*. A leading question is a question which contains, or strongly suggests, its own answer. "Are you hungry?," while susceptible of a yes or no answer, is not a leading question. "You're hungry, aren't you?" is a leading question, because it tells the witness what the answer ought to be. The issue gets sticky when a lawyer asks an open-ended question which is so packed with information that she practically has answered the question for the witness: "You've told us that you signed the schedules without reading them, and that you never told your lawyer that your house was worth $300,000, and that you believe that your house is worth only $150,000 but that you don't have an appraisal or any other professional estimate of value—is your house worth $150,000?" It's an open-ended question, but it's clear that the questioner wants the witness to say "no." Leading?

Normally judges should limit the scope of cross-examination to the topics that the witness discussed on direct examination.

**The actual rule:**

Fed. R. Evid. 611, *Mode and Order of Interrogation and Presentation*

**COVID-19 takeaway:**

P.C. (Pre-COVID), a party could finish examining a witness and then, if the party forgot something, ask to recall that witness. The court could take parties out of order. Lawyers could have their witnesses show up at 10:00 for an 8:30 hearing because they knew that their witness would not hit the stand until 10:30 or later. D.C. (During COVID), it is critical to think through the order of witnesses, their availability and their ability to connect to the platform

well before the hearing. It may make sense to ask the judge for a pre-hearing or pre-trial status conference to discuss things like whether all the witnesses must join the hearing at the same time, whether the court will put non-testifying witnesses in breakout rooms or waiting rooms until it is their turn to testify, what will happen with witnesses who do not know how to access the platform, whether the court will allow a witness to be "recalled" once his testimony is over. Make back-up plans—if your witness suddenly drops off the video hearing, make sure you have his/her cell phone or home phone so you can contact the witness. If the witness will appear via laptop, make sure he/she also has a smart phone nearby, in case something goes wrong. Do trial runs with your witnesses, making sure sound and video work. Show them how the screen share function works. Make sure they have the exhibits that you're going to ask them about, so they're familiar with them. Just like we want things to go as smoothly as possible in the courtroom, we want things to go as smoothly a

## ***IMPEACHMENT***

**The "on-the-bench" thumbnail:** While it is counter-intuitive, a party may impeach his or her own witness.

A party may impeach with prior oral or written statements, and doesn't have to show the witness the statement unless opposing counsel demands it.

A party *cannot* introduce extrinsic evidence to prove that a prior statement was inconsistent *unless* the party gives the witness an opportunity to explain the evidence, or unless "the interests of justice" require it. (So if the witness says it didn't rain on June 5, the lawyer can't introduce a weather report for June 5 unless the lawyer has complied with the requirements of Fed. R. Evid. 613(b).)

Many lawyers aren't great at impeaching! Issues often arise around whether the prior statement really was inconsistent. If not, it doesn't impeach anything.

**The actual rules:**

Fed. R. Evid. 607, *Who May Impeach*
Fed. R. Evid. 613, *Prior Statements of a Witness*

**COVID-19 takeaway:**

Again, be prepared. If there are prior oral/written statements that you might want to use for impeachment, have them available to show via screen share. Make sure YOU or your staff know how to use the screen share function effectively—showing someone a document that purports to contain their signature but cutting off the signature portion at the bottom of the screen doesn't get you much in the way of impeachment.

## ***REFRESHING RECOLLECTION***

**The "on-the-bench" thumbnail:** The point of this rule is to allow a witness who *says he or she can't remember something* to refresh his or her memory. If the witness insists that he or she does remember something, but the lawyer thinks the witness is remembering wrong, the remedy is for the lawyer to impeach the witness, not to try to refresh recollection.

If a lawyer wants to use a document to refresh recollection, the opposing side is entitled to be able to see that document and cross-examine the witness on it, as well as to ask the court to excise any portions of the document that aren't relevant to the refreshing.

The document doesn't have to be admissible into evidence to serve as a refresher.

**The actual rules:**

Fed. R. Evid. 612, *Writing Used to Refresh Memory*
Fed. R. Evid. 802(5), *Recorded Recollection*

**COVID-19 takeaway:**

Even in the courtroom, lawyers struggle with this one, and it may be tougher on video. The proper way to refresh recollection P.C. was to ask the witness, "Is there anything I could show you that might help you remember?" The witness ideally would say, "Yes—if you could show me the schedule where I listed my income, that would help." You would then say, "Judge, may I show the witness what I've marked as Exhibit 27?" The judge says yes, you hand the witness the exhibit, ask him to review it *silently* then hand it back to you. You'd walk back to counsel table with the document, then say, "Mr. Witness, did that refresh your recollection?" The hope would be that he'd say, "Why, yes, it did! I made $42,374 last year." The *same process* is required on video, but instead of handing the witness the document, you put the document on the screen. You *still* need to advise the witness to read it to himself and let you know when he's finished. Once he lets you know he's finished, take the document down, *then* ask if he remembers.

## ***LAY AND EXPERT WITNESS TESTIMONY***

I. Lay Witness Testimony

**The "on-the-bench" thumbnail**: Lay witnesses may give opinions on things (including the value of their own homes or businesses), as long as they testify from their own perceptions and experiences, and as long as they don't testify based on scientific or specialized knowledge. (Often lay witnesses–such as debtors testifying to the value of their houses–are not testifying from their own experiences. Bankruptcy judges, however, usually allow some leeway or flexibility here, because something seems wrong about refusing to allow a debtor to tell the court what she believes her own house is worth.)

**The actual rule**:

Fed. R. Evid. 701, *Opinion Testimony by Lay Witnesses*

II. Expert Witness Testimony

**The "on-the-bench" thumbnail**: If a party wants a witness to testify based on some sort of scientific, technical or specialized knowledge, the party first must disclose the person's identity, and the substance of the person's testimony, well in advance of the date the expert is scheduled to testify. The party must do so in a specific format, and within a specific time period.

Second, the party must get that person qualified as an expert. That means demonstrating specialized knowledge, skill, training or education.

Third, in order to get the expert's opinion admitted, the party must show that the testimony the proposed expert will give will be based on sufficient facts or data; that it is the product of reliable principles or methods; and that the witness has applied those principles or methods reliably to the facts in the case before you.

The expert, once qualified, may rely on hearsay or other inadmissible evidence in forming his or her opinion.

Many so-called "expert" witnesses in the bankruptcy world are hybrid witnesses. They may have specialized knowledge of some sort, but they also are fact witnesses in the case–the realtor who is trying to sell the debtor's home, for example. Also note that it is not unusual for bankruptcy litigants to try to qualify folks as experts who don't really need to be qualified–that realtor doesn't have to be qualified as an expert to testify to what steps she's taken to try to sell the house.

Finally, note that judges have a lot of discretion regarding whether to qualify an expert, and what weight to give that expert's testimony once he or she has given it.

**The actual rules**:

Fed. R. Evid. 702, *Testimony by Experts*
Fed. R. Evid. 703, *Bases of Opinion Testimony by Experts*
Fed. R. Evid. 704, *Opinion on Ultimate Issue*
Fed. R. Evid. 705, *Disclosure of Facts or Data Underlying Expert Opinion*
Fed. R. Civ. P. 26(a)(2), *Disclosure of Expert Testimony*

**The main cases:**

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)
Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999) (applies *Daubert* standards to all experts, not just scientific experts)

**COVID takeaway:**

This sounds maudlin and crass, but if you can, have back-up experts. These days, people get sick. People become unavailable because family members get sick, or they have to care for kids. Think about whether there is someone who can cover for your expert. Make sure that your expert has thoroughly reviewed his/her report before the hearing, because opposing counsel likely will use that to try to impeach.

## ***HEARSAY IN GENERAL***

**The "on-the-bench" thumbnail:** Anything that anyone says outside of the courtroom is hearsay–except a party-opponent's admission, which isn't hearsay (and doesn't have to be an "admission" in the sense of a confession of something the person would rather not have to confess). Hearsay isn't admissible, unless the proponent can convince you that the hearsay meets one of the exceptions found in Rules 803 (exception applies regardless of whether the declarant is unavailable) and 804 (exception applies only if the declarant is unavailable).

A common response to a hearsay objection is that the party isn't offering the alleged hearsay "to prove the truth of the matter asserted." If the statement is not being offered in order to prove the truth of the matter asserted in the statement, then it isn't hearsay.

This often begs the question, however–if the proponent isn't offering the statement for the truth, then why *is* he offering it? First look at what the statement asserts, then determine whether the proponent seems to be trying to get the statement in to prove that assertion. If so, the proponent *is* offering it for the truth, and it *is* hearsay unless there is an applicable exception.

**The actual rules:**

Fed. R. Evid. 801, *Definitions*
Fed. R. Evid. 802, *Hearsay Rule*

## ***"HAIL, MARY" EXCEPTIONS–PRESENT-SENSE IMPRESSION AND EXCITED UTTERANCE***

**The "on-the-bench" thumbnail:** Both exceptions may be used whether or not the declarant is available.

For "present-sense impression" to apply, the witness' statement must be a statement describing the event or condition, made "while the declarant was perceiving the event or condition, or immediately thereafter."

For "excited utterance" to apply, there has to have been a startling event or condition, and the witness' statement has to have kind of erupted out of him or her in pretty much immediate response to that event or condition. If the statement was made a week–or an hour, depending on the circumstances–later, this probably isn't an "excited utterance."

Lawyers often confuse these two exceptions, and mis-use them.

**The actual rules:**

Fed. R. Evid. 803(1), *Present sense impression*
Fed. R. Evid. 803(2), *Excited Utterance*

***THE OFTEN-ABUSED "BUSINESS RECORDS" EXCEPTION***

**The "on-the-bench" thumbnail:** This exception may be used whether the declarant is available or not.

There are five (5) requirements that hearsay must meet in order to be admitted under the "records of regularly conducted activities" exception–

*–The record has to be made at or near the time of the activity to which it relates took place;*

*–It has to be made by a person with knowledge;*

*–It has to be kept in the course of a regularly-conducted business activity;*

*–It has to be the regular practice of that business activity to make the record; AND*

*–The person who has to prove all that must be the "custodian" of those records.*

The fact that somebody at a business wrote a letter to someone, or made a notation, or created a document, or kept a letter in a business file, does not make that letter or notation or document a "business record" (record of a regularly-conducted activity).

The issue frequently comes up regarding appraisal reports. Generally, an appraisal report is not a "business record" for anyone but the appraiser. Usually what the proponent *really* wants to get in is the appraiser's opinion of the value of the property–and that ought to come in through the appraiser, testifying as an expert. The opposing party can't cross-examine the appraisal report. Same thing with valuation reports. Hearing from the appraiser is particularly critical when you have competing appraisals.

**The actual rules:** Fed. R. Evid. 803(6), *Records of regularly conducted activity*

Fed. R. Evid. 803(7), *Absence of entry in records kept in accordance with the provisions of paragraph (6)*

## ***THE "PROPERTY RECORDS" EXCEPTION***

**The "on-the-bench" thumbnail:** Again, this exception is available regardless of the declarant's availability.

This exception applies to recorded documents like mortgages and deeds, as well as to statements in those documents. It does *not* make exception for just any old documents that may reference property (like, for example, a letter that tells the debtor that the bank is about to foreclose). (A question to consider–does this exception cover the promissory note?)

**The actual rules:**

Fed. R. Evid. 803(14), *Records of documents affecting an interest in property*
Fed. R. Evid. 803(15), *Statements in documents affecting an interest in property*

## ***THE "MISSING WITNESS" EXCEPTIONS***

**The "on-the-bench" thumbnail:** If a witness is "unavailable," that witness' hearsay is admissible under certain circumstances.

The first question to answer is whether the witness is, in fact, "unavailable." The rule is very specific; witnesses are "unavailable" only if:

–they are exempt by court ruling due to privilege,
–they refuse to testify despite a court order,
–they claim lack of memory *of the subject matter of the declarant's statement*,
–they are dead, or are too physically or mentally ill to testify, OR
–the proponent has been unable to obtain their attendance "process or other reasonable means."

If the witness *is* unavailable, his or her testimony is admissible if it was:
–Former testimony given at another, similar kind of hearing where there was an opportunity for cross-exam;
–A statement under belief of impending death;
–A statement which was, at the time the declarant made it, so far contrary to the declarant's pecuniary,

proprietary, criminal or civil litigation interest that a reasonable person in that position wouldn't have made it unless it were true; or

–A statement regarding the declarant's own family history.

**The actual rule:**

Fed. R. Evid. 804, *Hearsay Exceptions; Declarant Unavailable*

## ***THE MIS-NAMED AND MISUNDERSTOOD "CATCH-ALL" EXCEPTION***

**The "on-the-bench" thumbnail:** It isn't a catch-all exception, and it rarely ever applies. In particular, the hearsay has to be more probative than any other evidence the proponent might offer on the particular point, AND the proponent has to disclose it–as well as the identity of the witness testifying to it–to opposing counsel well in advance of trial.

**The actual rule:**

Fed. R. Evid. 807, *Residual Exception*

## ***THE DOCTRINE OF "INDEPENDENT LEGAL SIGNIFICANCE"***

This is a somewhat confusing, judge-made "exception" to the hearsay rule that is not specifically articulated anywhere in the rule itself. As discussed above, Rule 801(c)(2) defines hearsay as an out of court statement offered to prove the truth of the matter asserted. The "independent legal significance" doctrine–also sometimes called the "verbal acts" doctrine–provides that "[i]f the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." Advisory Committee Notes to subdivision (c) of Rule 801, 1972 proposed rules, citing Emich Motors Corp. V. General Motors Corp., 181 F.2d 70 (7th Cir. 1950), rev'd on other grounds, 340 U.S. 558 (1951). The doctrine "exclude[s] from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstances bearing on conduct involving their rights." Id. *See also*, U.S. v. Stover, 329 F.3d 859, 870 (D.C. Cir. 2003); Weinstein's Federal Evidence §801.11[3] (2d ed. 1977). This notion that certain out-of-court statements, such as contractual promises, have a function so powerful that the issue of whether they are true and reliable is irrelevant, can be difficult to apply. Be aware that it is out there, and may be applicable in situations involving contracts or other legal documents.

**COVID-19 takeaway:**

Not much of one. Hearsay rules are hearsay rules, even if some very learned judges have opined that they are outdated and should go the way of the dinosaur. Whether in the courtroom or on the screen, you need to know the hearsay exceptions and be prepared to defend any hearsay you want to have admitted, as well as be prepared to object to hearsay from the other side.

## ***AUTHENTICATING EVIDENCE***

**The "on-the-bench" thumbnail:** "Authentication" is a particular foundational requirement that helps assure that the evidence is what it purports to be. The proponent of the evidence must offer sufficient proof to show that the item is genuine.

Some sorts of evidence are "self-authenticating;" Fed. R. Evid. 902 provides a list. For others, the proponent has to offer some evidence to show that the item is what it purports to be.

Even if the proponent succeeds in "authenticating" the evidence, that does not necessarily mean that the evidence is admissible. It still may face some other bar to admission, such as hearsay, lack of relevance or the fact that its probative value is substantially outweighed by the danger of unfair prejudice.

**The actual rules:**

Fed. R. Evid. 901(a), *Requirement of Authentication or Identification; General Provision*
Fed. R. Evid. 901(b), *Illustrations*
Fed. R. Evid. 902, *Self-authentication*

**COVID takeaway:**

Be prepared for this ahead of time. Try to get stipulations to authenticity. If you can't, have the documents/witnesses ready. If you are going to have to have the bank VP testify that this is, in fact, the mortgage file that came to him, and that it had these allonges in it at the time, line him up and make sure he is able to connect to the platform.

## ***THE MYTHICAL "BEST EVIDENCE" RULE***

**The "on-the-bench" thumbnail:** There isn't a rule that says that a party has to offer the "best," or most probative, evidence available to it to prove its point. Nor is there a rule that says a party always must offer the original, and never a copy, of a piece of evidence.

The "original writing" rule–Fed. R. Evid. 1002–says that if a party is trying to prove the *contents* of a writing, recording or photograph, the party has to provide the original. (There's an exception for the contents of "public" records, and a provision for the admission of summaries of voluminous writings, recordings or photos.)

In spite of this, Fed. R. Evid. 1003 specifically states that a duplicate is admissible to the same extent as an original, unless there's a "genuine" question as to whether the copy is authentic, or under the circumstances it would be "unfair" to admit the copy instead of the original.

Distinguishing between "authentication" and "original writing:" An "authentication" objection goes to whether this truly is a receipt for clothes the debtor purchased at Macy's. An "original writing" objection says that if you want to use that receipt to prove that it really shows that the debtor bought a $3,000 jacket, you need to produce the original receipt, not a copy.

As with authentication, the fact that the evidence meets the requirements of the Original Writing Rule does not ensure that it is admissible. The proponent still may need to clear the hurdles of hearsay, Rule 403, relevance, etc.

**The actual rules:**

Fed. R. Evid. 1002, *Requirement of Original*
Fed. R. Evid. 1003, *Admissibility of Duplicates*
Fed. R. Evid. 1005, *Public Records*
Fed. R. Evid. 1006, *Summaries*

**COVID takeaway:**

Just because there's a pandemic doesn't mean that suddenly the myth of the best evidence rule becomes fact . . . .

## ***FINAL FOOD FOR THOUGHT***

– Few bankruptcy lawyers ever participate in jury trials. We are, therefore, often tempted to employ evidentiary shortcuts. It is worth recalling that:

* The Rules of Evidence are rules–just like the Federal Rules of Bankruptcy Procedure.

* The rules are designed to try to ensure, to the extent possible, that the evidence upon which we (the fact finders) rely in making decisions is as accurate and reliable as possible.

* Enforcing the rules of evidence helps to level the playing field.

* District and court of appeals judges are used to these rules, and enforce them in their own cases.

– Some handy resources to keep on your desk or in your briefcase, should you choose to do so, are:

Instant Evidence: A Quick Guide to Federal Evidence and Objections, by Timothy E. Eble. This laminated, spiral-bound booklet is a nice quick reference to the rules, common objections, and common motions. You may order the booklet from the National Consumer Law Center's web site, http://shop.consumerlaw.org/instantevidence.aspx.

Federal Rules of Evidence with Objections, Twelfth Edition, by Anthony J. Bocchino and David S. Sonneshein. This is a pocket-sized, spiral-bound NITA publication, organized by objection. Find it at www.lexis.nexis.com/nita, and click on "Publications."

Objections at Trial, Seventh Edition, by Myron H. Bright, Ronald L. Carlson and Edward J. Imwinkelried. Another pocket-sized, spiral-bound NITA publication. Find it the same place you find the previous resource.

Federal Trial Objections * Quick Reference Card * 2nd Edition. Yet another NITA publication, this one a laminated 8 ½ x 11 card dividing the rules into type of objection—form, relevance, response, type of question, etc. Again, you kind find it at the Lexis/Nexis NITA site.

While not strictly an evidentiary suggestion, in the days of COVID, there are many new considerations for lawyers to take into account for video hearings. Here are a few:

- Noise/distractions: Whether you are appearing from home or from your office, consider how to reduce noise and distractions—kids, spouses, partners, pets, ringing phones. Try to set up a location where you have as few of these kinds of distractions as possible. Urge clients and witnesses to do the same.
- Background: If you are not using a virtual background, try for a neutral, professional background (no kids' artwork on the fridge, no Insane Clown Posse posters, no unmade beds or shots of the bathroom). Urge clients and witnesses to do the same. If you are using a virtual background, make it a professional one—your office, or the front of the courthouse.
- Lighting: Being lit from behind causes viewers to see a dark, vague blob instead of your face. Try to be in a location where you can be lit from in front. Try to position yourself directly in front of the camera on your device, rather than looking down on it (and giving folks a view up your nose).
- Advising clients/witnesses: Many lay people appear on their phones, and they treat those appearances the same way they would if they were having a video chat with a friend or family member. Remind clients and witnesses that they should not appear from bed, or lying on a couch, or walking down the sidewalk, or driving their cars. They should not be smoking or eating or drinking. They should wear the same kind of attire they would wear if they were coming down to the courthouse (including on the bottom half of their persons). Let them know that they should interrupt if they cannot see or hear; plan ahead on a signal for politely interrupting. As noted above, have a Plan B if their device doesn't work. Have a communication plan.

There are also many new considerations for in-person hearings, and for everyone's safety, it is critical to work those out before you appear in the courtroom. Things to consider:

- How many people will the judge allow in the courtroom at a time?
- Will you need to have witnesses wait in a separate area before their testimony?
- Will the judge require all parties, including lawyers, to wear masks?
- Will witnesses be able to take down their masks while testifying?
- Will the court/judge require people to answer COVID questions before coming into the courtroom or courthouse? What if a witness/client/lawyer answers a question in the positive?
- How does the judge want to handle paper exhibits? Will he/she even allow paper exhibits?
- Will the judge allow lawyers to walk around the courtroom when questioning witnesses, or will he/she require lawyers to remain in their seats for social distancing purposes?

- Communicate with clients/witnesses frequently ahead of an in-person hearing. Encourage them to let you know if they have symptoms or have been exposed to an infected person.
- Communicate early with the judge if you have concerns about appearing in person, or if your clients or witnesses have such concerns.
- After an in-person hearing, advise clients and witnesses to contact you if they have symptoms or test positive. Share this information with the court—court staff will need to know for their safety.
- If you don't know, ask. Many courts have been thinking these things through for months, but that does not mean they have thought of everything.