

IMS Insights Podcast: Episode 22 - Helene Wasserman on Trends in Litigation Post-COVID

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IMS Legal Strategies

In this episode, we speak with Littler Mendelson Shareholder and former Litigation and Trial Practice Group Co-Chair, Helene Wasserman. Helene joins us to share the many ways in which virtual legal proceedings are advancing cases and benefiting litigants, the challenges of such proceedings, and the expectations for use of virtual mediations, depositions, and trials moving forward.

Teresa Barber: We touched on the notorious reputation that law firms, big law especially, has as being a little bit slow to adopt innovation and technology. You've mentioned a few positives that have come out of that. And I'm wondering if anything else has come to mind for you, and also what you think those unique challenges are that you've encountered in your own practice since COVID hit.

Helene Wasserman: Sure. I often joke. My husband has this saying about me, that I will find the pony in the biggest, deepest pile of horse manure. So it has been tough finding the pony during this pandemic. But I think the end result is that as a lawyer and as a legal community, we lawyers who have adapted and grown within the pandemic in the ways we practice law, I think that it's actually making us better lawyers. Because we are learning. We're adding skillsets. We're adding arrows to our quiver. Before 2020, I would've never thought that we would be, as the mainstream, taking depositions with everybody in a completely different location.

Barber: Right.

Wasserman: Occasionally, we've done that in the past, but some people are together. The party may be remote, but at least the lawyers may be together with the court reporter, et cetera.

Barber: Right.

Wasserman: But never would we have envisioned that there would be a need for that or doing mediations where everyone is in a different Zoom box on their screen. And yet, we develop skillsets because we have had to do that. You learn ways to read people differently. You can read people differently via a screen than you would in person.

Wasserman: Now, most people really would prefer to be in the same room with everybody at a deposition, and I can't say that I necessarily disagree that, that's the optimal way of being able to

read the person sitting across the table from you.

Barber: Right.

Wasserman: But we've had to proceed. We've had to go forward. And litigation has not been able to stand still. Our courts are sufficiently backlogged. It feels like a standstill, but we've had to move litigation forward. So the soft skills of being able to read people differently and communicate differently have been instrumental in being able to proceed. You learn more about people by seeing them in their natural habitat sometimes. Seeing-

Barber: It breaks down that formality in some conversations too, right?

Wasserman: Absolutely.

Barber: Yeah.

Wasserman: It absolutely breaks down the formality because people are in their comfort zone. And I find that I've sometimes actually gotten information at a deposition, for example, that I wouldn't necessarily have gotten had the witness been in my conference room sitting across the table from me.

Barber: Yeah. Yeah.

Wasserman: So there's a lot of that, in addition to the obvious one being learning the hard skills.

Barber: Right.

Wasserman: How to work Zoom, how to set up breakup meetings, how to make sure that you have enough bandwidth and all of the technical aspects of this that I would never have thought about necessarily needing to use on a day-to-day basis. So there's actually been a tremendous number of positives that I think in the long run have and will continue to make me and everyone else like me, better lawyers and able to better serve our clients.

Barber: Yeah. It's so interesting, because watching ... Littler was producing some really helpful, informative research last year as COVID hit. And that seems to be one way that you've helped clients address some of the needs that they've had, that they hadn't ever thought they would be encountering before.

Barber: What have you been seeing, what have you been doing and working on to just help keep your cases moving forward, make sure your clients are getting what they need? You mentioned the hard skills and the soft skills. How have you been helping them?

Wasserman: Well, Littler from day one, or I should say day minus 30, because it went on long before COVID, developed this tremendous taskforce. I am not part of the actual taskforce, but to be able to provide advice and counsel on COVID, and that has been instrumental to help our clients. But Littler devised early on, a virtual litigation planning group, which I have been a core member of. And what this core group basically was, was it was an interdisciplinary group.

Wasserman: Our CIO was on this group, our chief knowledge officer was on this group, director of litigation support, our E-discovery counsel. We had people from every discipline within the firm coming together to figure out, okay, we're learning the substance of everything so we can give our clients the substantive advice. But how about the litigation? Because so much of our practice is litigation. How do we go forward?

Wasserman: So we did everything from interviewing vendors to figure out who were the best vendors for us to recommend our clients to use for various aspects, for mediations and for depositions and such. We developed best practices internally to be able to train our lawyers on what the best practices are, to be able to represent our clients in this virtual environment. We've done podcasts of our own. We've done a lot of internal interviews. We've had a lot of open mic sessions where our lawyers come together to share what the positive has been, what they've learned, what they want to share with everyone else.

Wasserman: So when you think of a firm as large as ours, our planning group, a small subset has really reached out to the entirety of the firm and has gotten input from everybody who does litigation virtually, to figure out how we can best continue and improve our skills, which does nothing other than make us better lawyers to be able to better represent our clients.

Barber: One hundred percent. That's really a comprehensive approach. And we've seen the benefit, too, just I think, pulling that group of diverse stakeholders together to help monitor and to help make sure there's a client focus on how you're responding and how you're preparing practitioners to serve clients in their practice.

Barber: The research, too. Some of the research was looking at remote mediations, and I know that there were some really fascinating observations. And I'm hoping you would share some of the things that you found most interesting and most useful from that work.

Wasserman: Well, remote mediations are an interesting animal because, typically, you like to be in the same environment and you like to keep people locked in their rooms so that you can finally break a deal. Obviously, that's not been happening. So we've had to go into mediations, and we've done the mediations as we've all done them in various remote boxes, and everybody is in their breakout room and the media goes back and forth.

Wasserman: And a lot of people were very, very reluctant at first to try this because they're really used to the table-pounding and all of that. But in reality, what we found during some of our research is that more than 80 percent of the mediations that we have done virtually, the cases have resolved actually at the mediation or immediately or shortly thereafter the mediation—despite everyone's consternation about the process.

Wasserman: And of the percentage that didn't settle, I went back and spoke with people—and we did some more studies and determined that a lot of mediations—people thought that the mediations wouldn't have resolved anyway. People came to the mediation with unrealistic expectations, and it likely would not have resolved even if everyone was in the same locale at the same time. And some people still did think that the mediation process via electronic, via video was a hindrance. But it was a very, very small percentage that thought that it was a hindrance.

Wasserman: And this study was done early on, and some of those issues have resolved over time. I will tell you that I've had numerous conversations with mediators and people who do the mediation professionally. They love the process. I can't think of a single mediator that I've spoken with—and I've

done lots of these mediations during the pandemic—I can't think of a single mediator who is looking forward to, or even wants to go back to, doing them in person.

Barber: How interesting.

Wasserman: The mediators find them to be much more efficient because people can do what they need to do during the breaks. And then they just come back on the screen. And then they can go back to doing what they need to do during the breaks. And the mediators generally have found it to be a more efficient way of getting a response. And I got to tell you, clients aren't at all disappointed about the fact that they don't have to fly across country, spend basically three days, to deal with a one-day mediation.

Wasserman: Because they have the date of travel, the day of the mediation, and then the day to travel back East or back to wherever home might be. So there are a lot of efficiencies, both from a cost-savings perspective, there's not all the travel, and from a time-saving perspective that really have led us to believe that in more cases than not, virtual mediations are the way to go.

Barber: It's very interesting. That is very interesting. And then, so thinking about these remote mediations, thinking about remote depositions, and remote hearings, and remote arbitrations, adoption has grown for those events since the pandemic. And certainly, I know you've been working on and thinking about, and providing guidance on some of these unique considerations that need to be brought in for those situations.

What are the best ways to prepare? What are your tips?

Wasserman: Well, in terms of preparing for particularly, depositions for example, because when you're dealing with hearings, there's a whole different set of rules. Because you're dealing with whether it's a judge, or an arbitrator or something, so we'll talk about depositions.

Barber: Okay.

Wasserman: Initially, you got to deal with obviously, the baseline is the technology and making sure that your witness and everybody has the right technology, has enough bandwidth. They're not sharing the bandwidth with three children who are homeschooling, and a husband or a spouse, or wife who is working at home as well. So you've got to make sure that you've got sufficient bandwidth. And that you've got ... Let's go back. We're going to cut out the whole husband, wife, spouse. Let's leave it at the spouse.

Barber: Do you want me to ask you the question again?

Wasserman: Ask the question again.

Barber: Okay.

Wasserman: Thank you.

Barber: That's really interesting, Helene. And I'm also thinking about the various types of case resolution now moving remotely. So remote depositions, remote hearings, remote arbitrations, we've been talking a little bit about mediation. There's just been such growing adoption for those methods in a remote environment. What are the unique considerations, especially for remote depositions? I want to talk about that for a minute.

Wasserman: Well, remote depositions are, as I said, a completely new animal in many respects. The first baseline that you need to deal with, both for the attorney and the parties and the witnesses is the technology. Making sure that everyone has the correct technology, including bandwidth. Right now, we're dealing in an environment where there may be three children at home that are home studying, who need to have bandwidth, a spouse who needs to be working at home as well.

Wasserman: So the first things first, you need to make sure that the remote deposition can take place through the technology and the bandwidth, and make sure that that's covered. Then there are all sorts of things like making sure that when you're preparing your witness, that they are aware of their environment, where they are, what their background is, realizing that somebody like me will be asking them questions. And do you want them to see what books you have on your bookshelf?

Barber: Right.

Wasserman: And the personal items, because that lets the attorney asking the questions, learn a whole lot more about the person. Privacy issues, making sure that the deposition is in a private environment. A lot of people these days, especially working at home, want to have music in their office. So they may have their Alexa or their Echo, or whatever their device is for music.

Barber: Right.

Wasserman: But those things we know record what's going on in the room, so you want to make sure that there's none of that around. You need to make sure that people aren't inappropriately communicating. So you need to get a system in place. If your witness is the one that's being deposed, you need to get a system in place with that person that they know they're not communicating with you while they're being questioned. But during breaks, you can talk just like you could talk during breaks in a live deposition.

Wasserman: Similarly, making certain that the person whose deposition is being taken—if you're the lawyer taking the deposition, make sure that that person isn't inappropriately communicating with their attorney. Check to see where their eyes are darting. Does it look like they're looking at a chat screen? Making sure that all chat screens are closed. So there are a lot of privacy and ethical type issues that you don't necessarily need to think of when you're sitting in the same room with somebody. You can see if they seem to be passing notes between the witness and the lawyer because you're sitting across from them.

Barber: Right.

Wasserman: You can't see that if somebody is texting on a phone.

Barber: Right.

Wasserman: So you need to put the safeguards in place. A lot of that is with admonitions. A lot of that is with being observant as the person taking the deposition and just making sure that people are staying within the boundaries.

Barber: A whole new world.

Wasserman: A whole new world.

Barber: A lot that has had to be learned and really refined in the last year, really. Certainly, you know of some uniquely needed skills, hard skills and soft skills. What are your suggestions?

Wasserman: Well, the hard skills really are learning the technology.

Barber: Yeah.

Wasserman: Learning how to maneuver the technology, knowing the technology that is necessary. The soft skills—it's sometimes maybe difficult, or people perceived it to be difficult, to connect with people. It's a very different way of connecting with somebody via Zoom than it is in person with somebody. And that's a soft skill that people need to develop, the ability to read people. How do you read people? How can you tell whether what you're seeing on the screen is nervousness or something else?

Wasserman: So people often find it to be easier to read others if you're in the same room with each other. And those are the kind of skills that we've needed to develop and hone into more, now that we are living in a world where our communications with people—and our conversations, and our depositions, and mediations and what have you—are all done through that little webcam that is sitting right in front of my computer.

Barber: Right. A hundred percent. And a whole new set of factors for witness preparation, too.

Wasserman: Oh, absolutely. It's really interesting because you're used to looking at somebody in the eye, but very few people nowadays seem to be able to do that because there's a difficulty between looking at somebody on the computer screen. But the computer screen that you're looking at is not real. It's not going to show you looking at the eye because the camera is not where that is.

Wasserman: There are some really high tech equipment out there, and very expensive equipment out there that I'm sure the news commentators who have all been doing this via Zoom, probably have on their computers. But there is equipment that you can look at the webcam and it's going to be where the person is.

Barber: Right.

Wasserman: But most of us aren't using that right now.

Barber: Yeah. Yeah. It's very interesting. And even jury selection. We saw Texas make history in 2020.

Wasserman: Oh.

Barber: So, can you talk to me a little bit about it...it's happened?

Wasserman: It has.

Barber: Yeah.

Wasserman: It has happened. I watched the jury selection of that Texas trial on YouTube. It was interesting. And there's a judge, at the moment I'm blanking on her name, but there's a judge up in Seattle, Washington, who has really taken the lead and has had several of these Zoom-based trials.

Barber: Yeah.

Wasserman: There was a big trial in Portland. I know recently there was just results of a large patent jury verdict that just came down. It is possible.

Wasserman: It requires a lot of technology, particularly on the part of the court to be able to do these because of all of the different ways of keeping people straight. Because you're going to have to have all of the different jurors. So you're going to have the jury selection, and then you're going to have to have all the jurors obviously watching. And it's a matter of what their technology is. So a true Zoom trial is not the easiest thing in the world. Although this judge in Seattle, Washington, she's become quite the trailblazer.

Wasserman: I've heard other situations. I've talked with some jury consultants during the course of the pandemic about what a trial is going to look like once actual trials do start, that may not be all Zoom. There might be some hybrid trials where you may have witnesses remote and jurors present. They talk about jury selection being done in large ballrooms, as a possibility, or larger courtrooms. People not being able to necessarily be members of the public watching trials because every seat in a courtroom, to be socially distanced, people would need to be far apart.

Wasserman: But then the question becomes, so are people getting more of a read on a witness who is sitting on a witness stand behind plexiglass with double layers of masks? Or are you getting a better read of the person if you see their full face, looking straight at the camera or straight at the picture on Zoom? And there's been some studies done, and people really do think that they like the Zoom better because at least they can look at the witness straight on, as opposed to being scattered across a courtroom. Maybe even looking only at the side of a witness that is now through plexiglass and a double layer of masks.

Barber: Right.

Wasserman: And once everybody gets two vaccinations, who knows what the future is going to bring?

Barber: Yeah. That's the curious thing. How much of this might be sticky? How much of this might persist?

Wasserman: I think that some of the things we've talked about earlier, as far as business and business allowing people to work remotely, I think that's going to stick. Some business may go to do it forever, others may only be now aware of the fact that they can have a greater, for example, greater talent pool by allowing people to work remotely. So I think that's going to stick.

Wasserman: I think that mediations, if you listen to any of the mediators, they truly believe it's going to stick. I think depositions may go into more of a hybrid mode because I think a lot of clients also like to be able to save the money. They would like to be able to be present, but they don't want to have to spend the money to be there. And it gives a lot of clients who may not have been attending a deposition, the ability to attend. As far as trials and hearings, as they say, the jury is still out.

Wasserman: I still think that the jury system is going to probably revert back to in-person juries and in-person jury trials with the proviso that I think, on some levels, there may be fewer excuses to not have witnesses present. Because I think now that we know that the technology exists, it's possible that some of the situations where we've been able to say, "Well, a witness can't attend because

they're somehow unavailable," they now may be able to be available.

Barber: Right.

Wasserman: So that's something that may stick a bit.

Barber: That's very interesting. And you almost mentioned—I've heard—I was speaking with our director of trial presentation the other day, and he mentioned the term digital bailiff. So just that role of maintaining order and all of the digital factors that are there and present.

Barber: So it's interesting to think that some level of that, so let's say the hybrid trial, where there are remote witnesses and everyone else is in person, still requires someone with their finger on the pulse of all of those digital factors.

Wasserman: Absolutely. And you have to deal with all of the factors, the security of the jury pool. And so there's a lot that goes into having a remote jury.

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