

PUBLICATION

"ZOOM-ing" In on Virtual Trials: Four Key Considerations for Success

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COVID-19 has touched nearly every aspect of personal and professional life. The legal profession has not been spared, with nearly every court in the country implementing systems to reduce the number of in-person court appearances. While some cases are being postponed, others are moving forward utilizing virtual meeting platforms, such as Zoom, which allow the parties to present their case remotely.

Virtual trials present new challenges and requirements for practitioners. Many, if not most, courts have issued general orders adopting their own particular protocols to address health and public safety concerns. Predictably, procedures vary from court to court, but certain considerations are relevant for practitioners preparing for any virtual trial. Below are four practical considerations based on our various experiences.

1. Presenting Exhibits: Ask Ahead

An obvious complication of a virtual trial is the ability to present a witness with hard copy exhibits during examination. The virtual trial eliminates a practitioner's ability to physically present hard copies of exhibits to a witness, and practitioners should allow adequate time – much more than usual – to determine the most efficient way to present exhibits. For example, in a recent virtual trial, both parties' exhibits were combined into one rolling, searchable PDF document. When examining a witness, the attorney specified the page range of the PDF document to be referenced during witness examination, and the designated court officer presented those pages of the document to the witness and the parties. This method of presentation required preparing references not only to the combined PDF page numbers but to the specific location on the page of a particular document for each reference. It is also advisable to ensure that the PDF is fully searchable and/or has been adequately formatted so that the desired information can be easily found. Additionally, you should determine whether the attorney or the court will be in control of the document as it is being presented, as we have seen both approaches in practice.

Practitioners should also give careful consideration as to how impeachment evidence will be presented. Barring specific guidance from the court, it is advisable to save potential impeachment evidence in a manner that allows easy access so that the practitioner or an assistant can quickly send the necessary documents to the court when necessary. But seek guidance from the court in advance as to the court's preference in presentation. In two different recent virtual trials, the respective judges preferred different methods. In one trial, the court preferred impeachment evidence be presented to the law clerk during trial before use; in the other, the court preferred the practitioner simply use the Zoom "presentation" mode for presenting the evidence (without prior review). The takeaway here is to ask in advance so that the practitioners can prepare their exhibits ahead of time for a successful presentation.

2. Preparing the Remotely Testifying Witness

Even among the most experienced witnesses, it is rare to find one who has participated in a virtual trial.

It is important to prepare witnesses on the unique aspects inherent in such trials, including, among other things:

- The method the witness will use to dial-in to the court for video and audio purposes;
- The witness's location during the trial;
- Protocol for trial questioning; and
- General etiquette considerations.

Practitioners should be sure to conduct multiple test runs of the virtual trial platform with witnesses to make them comfortable with the system and ensure they have adequate remote or wireless connections. Also, consider audio. Using "computer audio" when using some virtual meeting platforms may cause feedback. If possible, dial in on a phone for audio purposes. And, on a related note, if the witness is using a cell phone, be sure the phone is fully charged and that the witness is close enough to an outlet to plug it in if necessary.

While it may seem obvious, practitioners should remind witnesses to use a room or area of their home or office that insulates them from unnecessary noise or other distractions, such as other members of the home or office wandering in and out of camera view or ambient noise from an un-muted phone. Depending on the court's instructions and remote platform viewing capabilities, the witness may still be viewable on camera, even when not actively participating, and should be instructed to avoid any conduct that might be distracting to other participants. Also, avoid customized "backgrounds." In one recent experience, the judge was unamused when the opposing party's witness appeared virtually from what appeared to be a Caribbean island.

Perhaps most importantly, discuss with witnesses the potential for lag time between an attorney's question and the transmission of that audio to all trial participants. Practitioners should advise witnesses to briefly pause before answering any question to ensure that no objections are raised by any party. In the same vein, practitioners should be especially vigilant and ready to quickly object so that the witness does not rush to answer before the objection can be noted.

3. Avoiding "Technical Difficulties"

While it is likely that the court will provide some type of practice session before the trial, practitioners should spend as much time as necessary familiarizing themselves with the platform so that they are able to address any unforeseen issues that may arise during the course of the trial, whether that is how to re-establish connection to the platform in case it drops or having back-up methods of broadcasting video or audio in case the primary method fails during trial. Creating familiarity with the platform is key, particularly in the event a practitioner needs to advise his client or witness on its proper use.

4. "ZOOMed In": The Pros and Cons of the Virtual View

One of the more limiting aspects of virtual trials is the difficulty assessing the credibility and demeanor of a witness remotely. Not only is it more difficult to observe a witness's body language through a narrowed camera view, but a witness sitting comfortably at home or in office is more relaxed and may be less likely to answer questions forthrightly and succinctly. After all, the comfort of one's home is very different than testifying next to an elevated platform and a judge in dark robes. Even more concerning, remote presentation allows a witness to surreptitiously refer to documents outside of camera view. Credibility determinations before a trial court are often deciding factors not only for trial courts but for appellate courts reviewing a record for appeal, and practitioners should be especially mindful of the trial participants' ability to view and assess witness demeanor during examination in a virtual trial.

On the other hand, platforms such as Zoom present a unique opportunity to litigants and the court alike in examining not just the witness but all participants simultaneously. Unlike the typical courtroom presentation, the virtual trial's consolidated view of the active witness (and potentially others), opposing counsel, and the judge affords a practitioner the chance to examine each question and corresponding response's effect on all these participants at the same time. The insights gleaned from this unique vantage point may help to reveal useful information like opposing counsel's soft spots or the judge's interest in the topic at hand. Of course, if

the attorney is actively questioning a witness, it will be difficult to take in and synthesize this information, so it is advisable to have a colleague taking note of these views. Along the same lines, practitioners and their witnesses should be cognizant of not broadcasting any information to the opposing side through their on-screen behavior.