

PUBLICATION

Five Key Elements to Consider for Remote Hearings

Authors: Ty Kelly

April 01, 2021

Over the course of 31 days from September 9 to December 2, I participated in a complex and document-intensive contested case hearing before an administrative law judge – entirely by WebEx. Seven lawyers represented the 26 respondents, and five assistant attorneys general represented the proponent. The hearing saw nearly 125 witnesses called and more than 1,100 exhibits admitted into the record.

Remote proceedings present a host of new challenges for trial attorneys, and with this particular hearing, it was all hands on deck in our Baltimore office. Although we have been in this COVID-19 world for a year, it is likely that most of the witnesses, and perhaps even lawyers, may not have participated in a remote proceeding. Remote proceedings present a number of unique challenges for practitioners, judges, witnesses, and clients.

Below are several practice pointers based on our collective experiences.

1. Technology and Equipment

For three months, our effective participation in the hearing was completely dependent upon the available technology and connectivity. While it may seem like all you *really* need is camera and microphone access, that is just the beginning. The following are other things to keep in mind and, to the extent possible, address in advance:

- Make sure your witnesses have received and tested the remote video hearing access. Often, witnesses will need to download specific software or applications to access the remote platform (*i.e.*, Zoom or WebEx). Participants should also consult the tribunal's website to locate any specific instructions, technical or system requirements, and any other relevant information to pass on to witnesses.
- It should go without saying that participants, including witnesses, should test all audio and video equipment ahead of the hearing, but you might be surprised at how many times it became clear to us during the hearing that this did not happen. Also, you should test the equipment while using (or logged into) the applicable remote platform as functionality may differ.
- Participants – especially counsel – should have at least one back-up device available to use in case unforeseen technical or connectivity issues arise during the course of the proceeding (because they will).
- At Baker Donelson, we set up five socially distanced stations in a large conference room for each of us on the WebEx, so that we could collaborate and discuss the proceedings with the client, who was able to be present with us in the conference room. This took a great deal of time and effort to create.
- Make sure to have a team member available at all times to walk witnesses through connecting to the video hearing platform. Judges do not appreciate delays because witnesses are not ready to proceed.

No matter how much time participants spend familiarizing themselves with the remote platform and testing the equipment in advance, technical and/or connectivity issues *will* arise. When they do, keeping these things in mind will help you be ready to address them with as little interruption, and disruption, as possible.

2. Exhibits

Perhaps the most challenging aspect of our remote hearing was the efficient and effective use of exhibits. Of course, no one had the ability to physically present hard copies of exhibits to a witness; instead, we were largely at the mercy of WebEx's "share screen" feature. Here are a few things we recommend when it comes to presenting exhibits:

- Have all exhibits and other documents you intend to use as part of the proceeding saved in a specific location (at least one) that is readily and *locally* accessible. This will minimize having to navigate through multiple subfolders on your system to get to the exhibits, and also should help reduce connectivity issues. We found that what worked best for us was having a subfolder for each hearing day, which we then broke out by witness. All of the documents we intended to use with each respective witness were clearly labeled, saved, and accessible in that witness's subfolder.
- Establish who is going to be in charge of presenting the exhibits. For us, it usually came down to a matter of attorney preference – some of us liked to be the one to pull up the documents on our own during our line of questioning, and others liked to have someone else handle that side of the presentation. For the most part, we found both methods to be effective.
- Make sure to practice "sharing" your screen. Close out of all applications and pages unrelated to the hearing/trial. If you are not careful, you can "share" more than just the exhibit you mean to present. We had several examples of seeing lawyers' email and chats because they did not limit the application they shared.

3. Witnesses

It is critically important that you educate and prepare your witnesses for the unique issues they should expect while testifying. For example:

- Witnesses will need to plan to participate in the proceeding in a quiet place, free of distractions. And, unless approval is obtained, no one else should be in the room with the witness while he or she is testifying.
- Witnesses should sit or stand while testifying; they should not be moving around, driving a car (yes, we saw that), changing their clothes (we saw that, too), or otherwise distracted during their testimony.
- Advise witnesses that they should briefly pause before answering any questions to ensure that no objections are lodged by any party.
- Witnesses should be prepared to be flexible with timing. Even witnesses you expect will testify only briefly will take longer because it is a remote proceeding. We found it helpful to "schedule" our witnesses in two-hour blocks. For example, if we anticipated calling a witness at 10 a.m., we asked that witness to be prepared to be called any time between 9 – 11 a.m. It was not a perfect system and we were not on schedule every time, but we found it to be a good way to prepare the witnesses to be fluid and flexible with scheduling.

- Remind your witnesses that even though the remote nature of the proceeding may make it *feel* "less formal," they are still under oath while testifying and their credibility and demeanor are still being assessed. Thus, it is important that the witness be poised and display confident body language.

4. Examination

It may take time for some practitioners to adjust to new techniques and methods of witness examination via remote means. Be mindful that the questioning lawyer and the witness not being in the same physical space inevitably will create difficulties. For example, in a remote setting, it is more difficult to control a witness on both direct and cross examination. Here are some tips to help you deliver an effective examination from anywhere:

- Be slow, clear, and deliberate with your questions.
- To the extent you can, use exhibits wherever possible to help keep the witness on track.
- Stay especially focused and vigilant so that you are ready to object if appropriate.

5. Etiquette

Last but not least, consider the appropriate etiquette. For all intents and purposes, you should display the same level and degree of etiquette in a remote proceeding as you would for an in-person proceeding, and that starts with dressing as you would if making a physical appearance in court. In addition, remember that the remote nature of the proceeding likely will require you to be more mindful of certain things that may be second nature, or otherwise a nonissue, in an in-person proceeding, such as:

- Be especially careful of not talking over the judge, other counsel, or witnesses. This is a more significant problem with remote proceedings because of audio connections and the lag time after a question.
- Be mindful to mute your microphone unless you are asking a question. It is second nature to respond quietly to an answer or talk among your team, but all of that can be picked up on a remote platform.
- Identify yourself when beginning to speak (and after others have finished speaking).
- Look and speak directly into the camera; just like witnesses, counsel should be reasonably free from distraction while speaking or questioning a witness.