

Virtual Hearings and Trials: A Look Back One Year Later

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In mid-March 2020, the practice of law changed in many fundamental ways — far greater than our collective shift to home offices, kitchens and spare bedrooms. And for litigators, this was especially the case. At the time, I had a bench trial set to commence less than a month later. Among the parties, we had a total of 10 lawyers and litigation support staff and 16 witnesses — not to mention client representatives, the Judge, the court reporter and the courtroom staff. Given the high-profile nature of the case, media were also expected to be present. Yet with the stroke of the Governor’s pen and the pronouncement of a mandatory 6-foot distancing requirement, there was suddenly no chance we were making it into a courtroom. None of the parties desired to delay the case, and so began our scramble to develop procedures for a virtual trial, largely from whole cloth. Six weeks later, we all found ourselves on Zoom — a platform I hadn’t even heard of before March — and over the course of eight days we successfully conducted our first virtual trial. My firm then handled three more over the course of the year.

A lot has changed since March 2020, not only with the Covid-19 pandemic (for which there is hopefully light at the end of the tunnel), but also with the conduct of virtual hearings (which are likely with us to stay). What follows are seven key takeaways from the virtual trials we’ve handled over the past year.

1. *Establish ground rules upfront and have them incorporated into an Order if possible.*

I will start with a basic tip but it is nevertheless an important one: just as you meet and confer in advance of discovery, meet and confer well in advance of the start of your virtual hearing so that you can establish the ground rules for the course of the proceeding and attempt to resolve any disputes before the first witness is sworn. Now that we are a year into pandemic life, there are several proposed forms of Orders you can find online to help you identify what topics you should cover. Don’t forget to check your Court’s website to see if they have their own template.

Counsel should be responsible for ensuring that not only they, but also their witnesses, are fully familiar with the remote platform to be used and have the necessary equipment to participate without undue delays or distractions. All participants must use best efforts to ensure they have clear video and audio transmission during the trial. In addition to having appropriate screens, microphones, and cameras, this also includes ensuring adequate Wi-Fi network speed; better yet, consider recommending (if not requiring) use of an ethernet hardwired connection instead of Wi-Fi to ensure a stable connection.

Documenting the basics with respect to witness handling is also prudent. Of course, there is no “pandemic exemption” to our ethical obligations as lawyers, but with virtual

hearings, there is also no direct, firsthand way to observe what a witness is seeing or if she is communicating with anyone else. Witnesses should generally be alone and should be instructed to make all reasonable efforts to prevent interruptions or distractions. (If counsel expects to be in the same room with a witness, this should be raised early so that any related concerns may be discussed and addressed.) Use of notes, cell phones, laptops or other devices during their testimony should be prohibited. Documents should not be available to the witness except as previously negotiated among the parties. (Allowing an expert to have a hard copy of her expert report, for example, may be prudent.)

Your Order or stipulation should also address how exhibits will be identified, exchanged and used, and how rebuttal or impeachment exhibits will be shared. Consider too whether you will need to use confidential information, including sealed exhibits, and if so, explore whether you can reach agreement on a protocol to propose to the Court for handling.

Finally, consider whether you need to set ground rules concerning independent recording and/or live-streaming of the hearing, as well as alternatives to in-person public and media participation. Given the technological issues potentially implicated by allowing non-participants to log in directly to the remote platform, these issues can be thorny and challenging to resolve, particularly for a case that has a high degree of public interest.

2. *Practice, practice, practice.*

Harvey Specter, the fictional litigator from the TV show *Suits*, had a number of great quotes, but one of my favorites is this: “The only time success comes before work is in the dictionary.” It is so true, and so fitting for how to approach a virtual hearing, particularly now that we have a year under our belts using virtual platforms in our legal practices. Indeed, now that most of us have had at least some virtual litigation experience (a deposition, oral argument, mediation, even if not a trial), expectations are different than they were in 2020. This is not brand-new territory anymore, and preparation is therefore all the more critical.

This includes not only getting yourself fully comfortable with the technology, but your witnesses too. Conduct at least one test session with each witness in advance; test audio and video equipment and settings, and do a run-through with exhibits if you anticipate using them with the witness.

During your witness prep, keep in mind that your witnesses, like you, have probably grown much more comfortable appearing on remote video-conferencing platforms over the past year. It is therefore increasingly important to spend the necessary time with your witnesses to ensure that they appear and communicate precisely how *you* think they should – not how *they* think they should. For example, during my trial last year, an expert witness for the other side chose, undoubtedly of his own volition, to use Zoom’s sunset background as his virtual background during his testimony. But unfortunately for him, what that meant was that as he was being questioned on very complex issues, his head and upper body blended in oddly with the palm trees in the background, their edges shimmering like an apparition.

Given the circumstances, I am sure the Judge gave him a pass; we were less than two months into our new Covid-19 lives, and frankly, we were all trying to just get through the trial as best we could. But the key message to take from that anecdote is this: the same level of grace is unlikely to be there again. Though you are not in a courtroom with all of its solemnity and authenticity, *you are still in court*. Don't for a second let your witnesses get lulled into thinking otherwise.

3. Remember it matters not only what you say, but how you say it.

Moving around in a courtroom as often been analogized to staging a play. How you stand, how and where you move, your spacing with the witness and the jury box, your body language. Needless to say, that becomes all the more difficult when you are relegated to a small square box. But that also means that it requires even more time, attention and forethought.

Spend time practicing with each of your witnesses on the platform being used so that you and the witness are comfortable with the technology and the way that each of you is coming off. Practice by pinning yourself and seeing how you appear and how you sound when you ask questions and when you speak. Think about what you want as a background for both you and your witnesses, in the same way as if you would if you were presenting a day-in-the-life video for use at trial. (And as noted above, don't use the sunset – or any other busy background for that matter!)

Think about not just what you wear, your lighting, your sound, and the angle and distance of your camera, but literally every little thing that will appear on the screen. Do you want your diplomas and awards displayed in the background? The guestroom bed may not be the best background, but what about those family photos in the home office? Could they help, hurt, or something else? There are many opportunities to curate your background, so think about it carefully.

Also remember that what appears on the screen is what the camera sees, and cameras have a set field of view. This means that if you want to look someone in the eye, you need to look directly into the camera, not to the image of the Judge or the witness in the box that appears on your screen. If you decide to use a standard computer monitor, strongly consider getting a camera mounted on top to assist with eye contact. Also determine if there is a way to hold your notes for questioning in a way that will avoid you needing to repeatedly look down or to the side. For me, this above all else was very unnatural. It takes practice – plain and simple. A second monitor also helps.

4. Plan for who you want to view and when.

Each remote platform has its own special features for viewing other participants, and both you and your witnesses need to be comfortable using whichever platform is used by the Court. Some allow you to pin only one person, some multiple persons, and some automatically pin the speaker (so-called “active speaker mode”). Think about who you want to be viewing when and

recognize that this could (and probably should) differ depending on what is happening at a given time.

When questioning your own witness, consider setting up your screen so that your Judge is front and center, which will allow you to observe her reaction to the testimony as it is coming in. Viewing the witness herself is arguably less important, though having her visible on the side or bottom of your screen can be helpful to observe how she is responding to your questioning.

Cross-examination is a bit different, and believe it or not, it is here where virtual trials can actually shine if you do it right. This is because in an ironic way, the virtual setting brings a level of intimacy that you cannot get in the courtroom: most witnesses will have the camera focused directly on them, and they will be relatively close to it, often so close that you see only from their mid-torso up, or possibly even just their face. Use this to your advantage. If you pin the witness so that she is your main focal point, you can see up close and personal the facial and other reactions of the witness as you question her. And, if you follow the prior tip and look straight at the webcam, suddenly the questioning can really start to feel as though there is no one else in the (virtual) room but you, the witness, and perhaps the Judge in the corner of the screen.

When your own witnesses are being examined, return to the approach you took for direct. Pin the Judge, keeping an eye on your witness to the side, so that you can assess how the Judge is reacting to the testimony as it comes in. This can be extremely valuable to inform your redirect. It can also help to identify what points need to be made, emphasized or de-emphasized with other witnesses and evidence, and/or during closing statements or post-hearing briefing.

5. Beware of “Zoom fatigue” and minimize it to the extent you can.

Many new phrases have entered our vernacular since the start of the pandemic, and “Zoom fatigue” is one of them. It is real – so much so that the peer-reviewed literature is now replete with articles from psychologists across the country who are studying the phenomenon, what causes it and what to do about it.

Many of the suggestions on how to combat Zoom fatigue are not particularly conducive to virtual hearings; a lawyer or witness cannot, for example, take an “audio-only” break during questioning, or simply get up and stretch when tired. But, there are a few things that can help.

First, if a colleague or co-counsel is handling the direct or cross of the witness on the virtual stand, consider going off video. Take the time to decompress without having to be hyper-vigilant about how you are comporting yourself in your own little square in Zoom’s grid view. (Yes –even when you are not speaking, you must assume that the Judge is looking at you when you are on video. Make sure to tell your witnesses this too; while on video, they must always comport themselves as if they are being intensely observed – from the mid-torso up. Needless to say, it’s not the time for watching Instagram videos or playing Solitaire on one’s phone.)

Second, stop looking at yourself. Seeing yourself as you are participating in a trial is entirely unnatural and, though you may not realize it, it can be incredibly stressful and draining even for the most self-confident of litigators. So, particularly if you are new to virtual hearings, consider simply turning the default, self-view feature off so that you do not need to see yourself in your own video display (but others can still see you). Rely on your colleagues to let you know if something is off with how you are appearing.

Third, remember your audience. This is really nothing new for trial attorneys, who have always faced the challenge of keeping the fact-finder engaged and paying attention throughout the case. But Zoom introduces new challenges that simply cannot be discounted, and just as you get tired staring at a screen for hours on end, so too does your Judge. Take the time to carefully think about how to address this. Can you agree on stipulations of fact or law before the start of the trial? Can you stipulate to the authenticity and admissibility of exhibits?

Consider also how you order your witnesses. Can you call your most important witnesses on in the morning, and save the less significant ones for later in the day? Can you place a long witness between two short ones? Can you call a particularly dynamic witness after a long but necessary line of dull or tedious questioning of a witness? Finally, for a bench trial, consider whether you need to do live direct examination at all. In one of our virtual trials, we reached agreement with opposing counsel that the direct testimony of all fact witnesses would be handled by sworn declaration, and the experts' written reports would serve as their direct. That left cross-examination and redirect for the live portion of the trial, which significantly reduced its length and cut into the fatigue factor in a fairly significant way. Of course, this approach wouldn't be appropriate in every case – but it is an example of an alternative approach that should at least be considered in your trial preparation.

6. Plan for how you will use and display exhibits, but don't forget about the paper.

Exhibits are important in virtually every litigation, and having trial presentation software to organize, use and display exhibits is incredibly helpful. Indeed, with this software you can do as much if not more with exhibits in a virtual hearing as in a courtroom. That said, be careful not to overdo it. Share your screen to display exhibits as necessary to guide your witness or to control the adverse witness and obtain key admissions, then get them down as soon as you are done. Otherwise, the default view for most trial participants will mean that the document continues to take front and center on their screen, with your witness relegated back to a small box in the Brady Bunch-like grid on the participants' screens.

if you need a witness to annotate an exhibit on Zoom, think through how you will do that far in advance, as it is not as simple as handing her a marker and having her mark up a large poster-board exhibit. I would typically discourage giving any witness control over an electronic exhibit on Zoom, preferring to have my litigation support team maintain exhibit control. But depending on the arrangements you make with opposing counsel and the Court, it may become necessary for this purpose. If so, return to the second tip in this article – *practice, practice, practice*. Note that Zoom has its own annotation tools, as well as a whiteboard feature, which a

witness can use to draw a diagram or other depiction that can then be offered as a demonstrative exhibit.

Lastly, unless you have a technologically savvy Judge who expresses a clear preference for working with only electronic documents, don't forget about good old-fashioned exhibit binders. Providing the Judge a paper set of your exhibits, just as you would in a courtroom, is in most cases crucial to enable the Judge to have quick access to any exhibit or portion thereof at any given time – whether during the trial or afterwards. I've also found it very helpful to have my own full set of exhibits in hard copy in my office so that I can refer to them as necessary during the course of the virtual hearing.

7. Find a workable alternative to the courtroom sticky note.

One of the greatest challenges in trying a virtual case while social distancing is the inability to have your co-counsel, client and experts physically in the room with you. Gone is the sticky note or half-sheet of paper ripped from a legal pad and passed to counsel's table or the lectern. But not is all lost; you just need to develop a plan for communicating.

At our firm, we've used text strings for this purpose, which in general has worked quite well. But, if you choose to adopt this approach in your cases, it is very important to try to limit comments to notes that you would hand to someone in the courtroom. In practice, this is a real challenge for many of us given how frequently we communicate by text and how quick it is to fire off a text on your cell phone. And once one person starts using the text string as a way to offer color-commentary or play-by-play on the testimony as it is coming in, the text string that was initially intended to be useful to the questioning lawyer suddenly becomes a significant and dangerous distraction. The rule should therefore be that you should not send a text during a witness examination that you would not write on a sheet of paper and hand to the questioning lawyer in a courtroom.

If you elect to use the text string approach, consider also appointing one trusted member of your team to serve as the point person to receive texts and determine what is forwarded to the questioning lawyer and what is not. If desired, a second text string that does not involve the questioning lawyer could also be used to more freely communicate among team members who are not in the hot seat.

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Comment 8 to Rule 1.1 of the Model Rules of Professional Conduct states that “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” Covid-19 has brought new meaning and import to this provision, particularly for trial lawyers. But as with anything, if you take the time to educate yourself on the new technologies that have emerged, and practice until you are proficient, you will find that you can adapt just fine. After all, trial lawyers are performers – and now is finally your opportunity to be on the (small) screen.