



Virtual trial – virtually the same

A LOOK AT PRACTICAL LESSONS LEARNED IN COMPLETING A VIRTUAL TRIAL

After completing my first virtual trial, many have asked if I would do it again. The answer is, absolutely. But before going forward, there are several items you should prepare for in advance of trial. Our trial was a damages-only case on a personal-injury matter, but these tips should apply to any trial.

Be aware of your surroundings

Keep in mind where you are sitting during trial. The jury will see your background, so keep it simple and clean. Too much going on will take your jurors' attention away from you.

Lighting is also critical. Consider purchasing a halo lamp or other light source instead of using whatever is already in your room. Check it several times throughout the day over Zoom prior to starting trial. Adjusting the settings in Zoom can also assist you with getting your lighting just right. Also, when checking your lighting, see how your clothes reflect on Zoom. I found my black attire kept translating as dark blue when my camera was tilted at a certain angle.

Sound matters: microphones and speakers

I started trial using Bluetooth ear buds for my microphone and speaker. This was a *big* mistake. I typically used them during depositions and thought they would be fine. But in depositions you can start and stop for technical issues. Trial is not the place for technical difficulties. In the middle of trial, my Bluetooth connection started acting up and I found myself scrambling to switch to my laptop audio. This was less than ideal as the laptop microphone was not picking me up very well. Thankfully, it was not my witness, and the judge was patient at the sidebar when he could barely hear me. I purchased a Yeti Nano microphone that night, which worked great for the rest of the trial along with my laptop speakers. I highly recommend *only* using wired connections for critical items like this.

Once you have your microphone, test it out. There can be several glitches, like the microphone cutting in and out or developing an echo, until you have the settings down. Checking this all out on a Zoom session before trial is essential.

Wi-Fi connection

Prior to starting trial, ensure your Wi-Fi network speed is adequate to support your Zoom trial. It likely is, but you need to consider who else will be using the network at the same time. If several people in your home will also be online during trial, you may need to either increase your internet speed or have people refrain from using the Wi-Fi during the trial, or at least limit music or video streaming during trial. Another suggestion is to hardwire into your computer to lessen the chance of connection instability.



Available backups

I highly recommend having a backup laptop or computer available and back-up all your work to the cloud or an external hard drive. On the eve of trial, my laptop, which was virtually brand new, stopped working properly. I had to purchase a new one, which seemed fine until the first day of trial. Another lesson learned, if you switch laptops or computers, test Zoom on each device. I had to uninstall and reinstall Zoom so it started working properly.

Zoom basics

When using Zoom for trial, there are certain settings you should be aware of so your jury can hear and see you and your witnesses. First, if you are using any video with sound during trial, make sure you share your computer sound when playing audio. This will ensure your jury has clear sound. I also recommend asking the judge to have the jury use the side-by-side view so they can see you or your witness along with any exhibits when you share your screen. Finally, request that the jury pin the witness so they can see the witness testify, versus a speaker or gallery view.

You should also make sure you have the most up-to-date Zoom version downloaded. The current version allows you to view up to 49 participants at once (click the arrow next to the video on the bottom left to find this setting). The current version

also allows you to move participant boxes around so you can organize your jurors and other participants as you see fit. These options come in handy during voir dire and throughout the trial.

Preparing witnesses

When you prepare your client and witnesses, keep in mind all the previous recommendations regarding sound, Wi-Fi and background. Also test your client's lighting. The defendant in our trial had very poor lighting. His background was very dark, which made him look unwelcoming. We had our client test locations before starting trial to make sure her background was not distracting and that she had sufficient light so the jury could see her. You should also consider appearance and what your client is wearing. Remind them that even though they are testifying virtually, they are still appearing in court. The defendant in our case wore a Patagonia jacket most of the trial, and if he had been my client, I would have had him change immediately.

Voir dire

The first day of trial, potential jurors filled out hardship forms, technology forms, and a juror questionnaire. The technology form not only gave them instructions on how to use Zoom and the best Zoom settings, as described above, but also confirmed they had internet and access to a tablet or computer. You do not want anyone on a phone as it limits what they can see and do on Zoom. If jurors lack that technology, you will have to decide if you want to provide tablets or laptops as well as hotspots. We only had two jurors with issues and given we started with almost 80, both sides agreed to let them go. If we had more jurors with limitations, we may have taken a different approach. You want to keep in mind you may be limiting your jury pool.

The remainder of the trial took place with the jurors at their homes via Zoom. The judge, attorneys and parties were always virtual only. I highly recommend a questionnaire as this really helped streamline voir dire. We received the

questionnaire responses along with the order of the jurors on day one, so we had plenty of time to review prior to voir dire starting on day two.

When you begin the actual voir dire, put your jurors in order by moving the video boxes around, as described above. Start with at least the first 18, and more likely the first 25-30, if you can order them quickly. It can be a task given how many people you are looking through. I also recommend having at least one or two extra people on Zoom to help watch the jury and take notes. At our trial we had three people total, two attorneys and a paralegal. Our paralegal did a good job scanning jurors throughout the multiple Zoom pages and taking notes. One advantage to Zoom is that you can actually watch more than just the 18 in the box.

Trial

Trial went fairly smoothly. We had no major hiccups in our virtual trial. We instructed each witness to log in to Zoom at a certain time. The court kept the witnesses in the virtual waiting room until it was their turn to take the stand. We did lose the court reporter once, so I suggest keeping your court reporter's video box somewhere you can see it. I also recommend putting your jurors in order each day, so you make sure you are not missing anyone. Also, if you log off or enter a breakout room, when you return to the trial room your jury will likely be scrambled again.

Witness testimony was also pretty easy. Our economist and life-care planner experts were permitted to share their screens and navigate their exhibits, which made their testimony run quite smoothly. For our medical experts, we encouraged the use of models to show the parts of the anatomy and the impact, which worked well.

Just as during an in-person trial, I always announced what exhibit I intended to show prior to showing it. In theory, this should be no different than when at trial and requesting to publish an exhibit or advising the opposing side what you are

going to show the witness. But you must pay attention to the other party's witnesses and what exhibits they are displaying.

During our trial, the defense expert inappropriately tried to take over the trial by pulling up documents that were not official exhibits. For example, the defense medical expert put articles on his screen and a random MRI not from our case. I immediately objected and had them pulled down. While this may seem obvious, one of the issues was that he was trying to show our doctor had a poor MRI compared to another random MRI he was showing. There was no way to determine if he had enhanced the MRI on his screen or doctored it in some way. I made that clear to the judge, and it was immediately gone. Be prepared.

For side bars, we used a breakout room. This worked out fine but can take up precious time, so, just like any other trial, try to resolve issues before trial or when the jury is not present. To streamline the process, have all counsel note in their Zoom name that they are counsel. This will help the clerk quickly identify who needs to be placed in the breakout room during a sidebar. We also had the clerk rename the jurors to include their numbers, which helped with ordering.

Our jury was very attentive for the most part. We had a sleeper once or twice, but nothing different than a normal trial. When we saw this, we would alert the judge during a break. He was also monitoring and typically would just make a general announcement to pay attention, which seemed to work. We did not have any issues with jurors doing other things, as far as we could tell. They all showed up every day promptly and acted appropriately.

Deliberations

The jury deliberated in a separate breakout room. Each juror was emailed a set of jury instructions and a copy of the verdict form. They also received all exhibits that the parties agreed upon, or the court ordered, in a single PDF. The emails were sent from our office on behalf

of the parties at the request of the court so as not to appear as it was coming from one side. During the deliberations, the court clerk remained in the breakout room with the jurors to make sure they were all in the room and deliberating, and in case there were issues or questions. Each time the jury had a question, the lawyers were emailed the question with the instruction to return to the Zoom meeting. We would then discuss the question with the judge just as if we had a question in a non-virtual setting. The court would then provide an email answer back to the jury.

At the end of deliberations, the foreperson printed the verdict form, filled it out, signed it, and then scanned and emailed it to the judge. The judge told us that his prior trial's foreperson did not have the same capability but was close to the court and drove over to fill out the verdict. We had planned to use DocuSign if this became an issue in our trial. Once the judge had the verdict, the attorneys were emailed, and everyone, along with the jury, returned to the main Zoom meeting room. The verdict was read, and the jury was polled.

Post-trial

At the end of trial, the judge advised the jurors that they could speak with us, and jurors often do talk with the attorneys post-trial. We reached out to each juror the following morning via email asking if they would be willing to speak with us. We received responses from around seven or eight, including the two alternates. We are still in the process of speaking with

everyone, but we found some useful information regarding the virtual format.

The jurors generally seemed fine with the virtual format. Most were happy that they did not have to commute, and they could fit work in after the end of the day. In our trial, our days were 8:30 a.m. to 1:30 p.m., with two 15-minute breaks. One juror did say that the longer days – we had a couple of full days – were tougher due to Zoom fatigue. Keep this in mind and see if you can structure an 8:30 a.m. to 1:30 p.m. schedule as you are almost getting the same amount of time as a full day, given you do not lose the hour to hour-and-a-half break for lunch.

Another important point one juror made was that everything is two dimensional. He wanted to be able to see our client and the defendant, especially because the incident involved the defendant picking up the plaintiff, without her knowing or agreeing, and running with her. He then fell and landed on top of her.

The juror said a live trial would have allowed him to see the difference in height and weight better. It also would have helped to see how our client moved, walked, shifted due to pain, and her weight gain due to inactivity from her injuries. The juror did say the pictures of our client before and after did help. This was extremely important as our client weighed 110 pounds at the time of the incident and had gained 65 pounds. The defense tried to claim in closing that she looked like she lost all the weight, which he based on seeing her over Zoom. This was not accurate at all, but remember, you

are very limited in what you can see in a Zoom video, so descriptions and pictures are key. Keep in mind the jurors' two-dimensional view when presenting evidence.

Wrapping it up

Preparation is key in a virtual trial, as it is in any trial. These are some basic steps to prepare yourself for a virtual trial, but by no means an exhaustive list. I know many will read this and think that a virtual trial is only good in limited instances, but ultimately it was little different than a live trial. The virtual trial also had some advantages, such as presenting witnesses via video deposition. It translated well as it was almost no different than a live witness being seen via Zoom. There was no indication any of the jurors gave less weight to a videotaped witness or lost interest any more than they would with a witness in the courtroom.

We should all consider pushing our courts and judges to move forward with virtual trials. If we do not, many of our clients will not see a courtroom until 2022.

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