



Can You Hear Me Now?

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Learning the following lessons could mean that your trial by Zoom isn't a trial by fire.

Eight Things We Wish We Had Known Before Having a Trial by Zoom



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It is unclear how much longer the pandemic will complicate the civil justice system, but as more jurisdictions seek to unclog the dockets, courts will no doubt continue to use Zoom trials. Earlier this year, we

spent a week on trial in a complex, admitted-liability, medical malpractice case in Cook County, Illinois. From the feedback we received, this case was the most advanced Zoom trial that has occurred in the jurisdiction during the pandemic.

The trial proceeded via a Zoom video meeting hosted by the presiding judge. Counsel for the parties presented their case from conference rooms at their respective offices, which had been set up to mimic a courtroom in that counsel could be seated at a table yet stand up at a lectern during open and closing arguments and while examining witnesses.

The trial involved live testimony from eleven witnesses, who appeared via Zoom in their respective homes and/or professional offices.

1. Technical Considerations Are a Must

We have been in a Zoom-focused legal community since March of last year, and you have likely mastered a lot of the nuances of internet video streaming. However, for trial purposes, you must consider several technical issues.

First and Foremost, Do Not Use Wi-Fi.

Do not let your witnesses use Wi-Fi. If you can recommend it to the court, the judge should also not use Wi-Fi. Wi-Fi is going to fluctuate, have a glitch, or drop something at the wrong time. Several months ago, Mr. Motz was cross examining an expert during a *Daubert* hearing, and his Wi-Fi completely crashed; the panic trying to get back into a federal court hearing and then having to pick up a cross examination will age you years in a matter of moments. Using a hardwired internet connection instead of Wi-Fi will solve this issue. Other technical necessities include having a standalone 4K camera, sufficient room lighting, and a professional microphone. You do not want to be in a dark room, too far from the camera, unable to be heard, or unable to hear others.

On trial, we used a hard-wired internet connection, patched into our firm's video conferencing system in our main conference room, and used a professional-grade microphone for the whole room. We had no connectivity issues, the lighting was great, and the sound was so good that we had to be careful whispering at counsel table as the microphone picked up even light sounds.

2. Pretrial Rehearsal Is Highly Recommended

A Zoom trial is not like a normal Zoom meeting—there will likely be security features enabled to make sure that this “public” proceeding can run without issue, specifically: the involvement of waiting rooms and enabled passwords, and the court having complete control over the system. Several days before the commencement of our trial, we had a dress rehearsal with all of key players in the trial: the court, the clerk, trial counsel, the court reporter, and the clients.

Having a run-through forewarned us that screen sharing had to be reenabled so that lawyers could use exhibits each time one of these three events happened: (1) the virtual courtroom started, (2) there were sidebar breakout rooms, and (3) if the court's connection froze. During the pretrial run through, we were also able to work out issues with the court reporter's audio. Had we not worked out these issues in advance, they would have delayed the actual trial.

Another important aspect of the pretrial run-through was that our trial judge specifically asked to have other people join the Zoom meeting from laptops at random times so that the court could become accustomed to admitting participants and spectators during the proceedings without video or audio disruption; something that the trial judge never has to do during in-person proceedings.



We would also recommend using this test run to try out how to share and display exhibits and test any video clips that will be used during the trial. Streaming video does not always look the best (or work without lag) over Zoom and finding out if any issues exist before trial begins allows for the trial team to update exhibits to minimize potential issues.

Also, as part of your pretrial run-through, make sure your witnesses have neutral or professional looking setups. During our trial, our judge commented that one of the plaintiff's experts who appeared from a home office framed with wooden bookshelves had a great setup—he was perfectly centered in the screen, had great lighting, could be heard perfectly well, and had an orderly and professional background. Conversely, it can be distracting if the witness is in a cluttered environment with bold decorations and a pile of laundry in the background. Also, keep in mind that natural light may shift and/or intensify during a witness' testimony. If this is the case, you will want to make sure the witness is able to adjust and adapt (i.e., use drapes or blinds, turn off lights, or move slightly so as not to appear washed out on the screen). Lastly, practice tone and volume with your witness. If they seem loud—as if they are yelling on the Zoom call—or if they can barely be heard, that can distract from their overall testimony.

More advance preparation will lead to a smoother trial overall. You definitely do not want to be testing your exhibits for the first time on the day of trial.

3. Be Ready for Technical Issues

You think you have covered everything with the court, the court reporter, the witnesses, and opposing counsel, and... things will still go wrong.

During the defense opening statement, screen sharing for exhibits failed to work for a few minutes. This simple, unexpected technical glitch could have disrupted the entire opening statement, but having faith in our trial paralegal, we resolved the glitch with a minimal amount of fuss. However, the lesson was learned, and for the remainder of the trial, both parties tested screen sharing before beginning any witness examination. The same sort of unexpected technical issues can occur when

microphones stop working for witnesses, Zoom crashes, or the court's internet goes out.

Opposing counsel in our trial also had a minor issue with unwanted audio feedback related to the positioning of an air vent. It took a bit of trial and error to figure out exactly which party was causing the unwanted background noise and how to eliminate it. In addition, the judge initially suggested that opposing counsel change their lighting because counsel was appearing slightly washed out due to excessive lighting. A simple repositioning of the lectern and turning off certain conference room lights resolved the issue. In addition, we found there was sometimes a thirty-second delay when the judge would reconnect after a pause in the proceedings or returning from a breakout room, during which none of the other Zoom participants could hear us.

Do not panic, work through the technical issues, and be willing to pick back up from where they started. Also, communication with the judge, witnesses, and opposing counsel is key. It is important that even if something goes wrong with your audio, you can either use the chat feature in the Zoom or waive your arms to alert others that you are having a technical issue.

4. Remember, This Is Still a Trial, and You Are Always on Camera

The prevalence of Zoom in all aspects of pandemic life has led to a softening of formalities. Lawyers (and judges) are out of practice for behaving like trial advocates. In addition, not physically being in a courtroom loses many formalities, for instance there is no court deputy declaring "all rise" and "you may be seated" as the judge takes and leaves the bench. In addition, you do not feel the eyes of your peers when they are silent Zoom observers with disabled audio.

And while a spirited back and forth exchange with opposing counsel is tolerated during a deposition, that is not appropriate in a normal trial. In addition, in a deposition, counsel frequently will ask the court reporter to read back a question or an answer. However, in a trial, permission to have the court reporter interact with the parties is a permission that should be granted by the judge. As our trial progressed, both sides were guilty of falling short of the normal formalities required

at trial. The court, thankfully, was understanding, and the admonishments for both sides were good natured. Over the course of a week, both sides adapted and fell back into more acceptable courtroom demeanor.

During a Zoom trial, it is important to remember that you are on camera and to keep your facial expressions in check—just like when you are in the courtroom. For example, everyone will see if you are sighing or visibly upset, or if you are resting your head on your hands and appearing bored. It can be easy to forget these types of things when not physically in the room with the judge and opposing counsel. Conversely, the camera can be a nice tool to see whether you are in fact keeping a neutral face and a dress rehearsal for when we return to in-person trials.

One of the conscious steps that we took to increase the trial atmosphere is that we set up our conference room like a courtroom—complete with counsel table and a lectern. This setup helped formalize the trial and helped the defense avoid some of the bad Zoom habits developed over the last thirteen months of lockdown.

5. Zoom Examinations Are Not the Same as In-Person Witness Examinations

By now, most lawyers should be well acclimated to taking depositions via Zoom. However, like depositions, a trial examination done via Zoom does not allow for the same level of witness control that trial lawyers are used to when standing in the courtroom. You do not get the same level of connection with a witness when you are staring into a camera (or looking offset to the screen), it is more difficult to read a witness's body language and non-verbal cues and, for cross examination, it is much more difficult to cut off an opposing expert who has been primed to fight. There is also a different rhythm to a trial exam conducted via videoconference for a variety of issues—a bad internet connection, poor camera quality, an ineffective microphone, objections, the opponent or court asking for things to be repeated—all affect the exam flow. In addition, you lose some of the intimidation factor a witness would typically face physically being in a room with multiple parties.

Work with your witnesses well before trial to simulate a Zoom trial exam, as this

will hopefully reduce the chance of issues on the day the witness testifies. The last thing you want is to have a witness, mid-exam, walk with their laptop in hand from their home office on the second floor of their house to the basement just to be near the internet router and prevent their audio from cutting in and out! Also, recognize that exhibits that look fantastic on a projector screen in a courtroom may not work as well when simply shown on a computer monitor. In addition, you don't want to have your witness confused and unable to accept a request to join a breakout room if they perhaps join the Zoom meeting too early or the judge wants to give that witness privacy (for instance a witness may become emotional and want to take a private moment to compose him- or herself). These practice sessions with your witnesses and team will help minimize any issues and calm nerves during trial.

6. The Judge Is Also a Virtual Participant

Conducting a trial virtually does not allow counsel to approach the bench and provide the court with a copy of anything that supports a specific objection or argument. Deposition quotes and caselaw citations need to be prepared in advance so they may be displayed via screen sharing. This level of advanced planning is not always possible, especially while in the trenches of a trial and when a new issue arises; thus, workarounds are necessary. Provide the judge with everything that you will likely be using or needing to reference during the trial such as depositions, motions in limine, witness disclosures, key exhibits, and expert reports. However, it is also important to keep in mind that you should not ship multiple banker boxes of paper because the judge will likely never open and/or read through everything. Our trial judge had temporarily relocated to her lake home and specifically requested that we not send voluminous hard copy materials. The material sent to the judge must be user friendly and easily accessible. Even if not specifically requested, consider providing everything electronically (we found that sending from an iPad worked particularly well) that the court can easily navigate. For instance, you can have everything stored in a PDF reader application that allows

easy electronic transmission to the judge. If this is not an option, a small binder with only the most important material should be sent.

In addition, you should keep in mind that the judge may likely be viewing the Zoom call from his or her home—a location with less formality than would exist were the judge on the bench in chambers with a full courtroom gallery. It can be more difficult to keep the judge engaged in Zoom proceedings because staring at a computer screen is simply very different from physically being in the judge's presence.

7. Do Not Forget about the Court Reporter

This a reminder that there is someone hired to (and responsible for) transcribing everything for the record. The court reporter's job on Zoom is definitely more difficult when crosstalk occurs (or a really fast-talking witness testifies) and transcribing the record becomes a near impossibility when you also factor in the above-addressed technological issues.

You will also want to make sure you have the reporter on camera throughout the entire trial because you can see if the reporter is having difficulties transcribing the record. In our trial, one court reporter experienced some audio difficulties that were eventually resolved, but we were able to see that she was waving her arms and mouthing: "I can't hear you." It was also very important to make sure the court reporter was fully set up and ready to go before trial started each day. Also be prepared for more interjection from the reporter just getting the record down.

Some of the formalities and visual cues when a different attorney questions a witness can also sometimes be lost on the court reporter, so it is important to review the trial transcripts to make sure the court reporter has accurately identified the witnesses and attorneys who handled each aspect of the trial.

8. Use the Trial as a Training Tool

One of the best things about a Zoom trial is that it is very easy for your colleagues to observe the proceedings. Throughout the course of a weeklong trial, we had attorneys, paralegals, and support staff observe

substantial portions of the proceedings just to see how things were going. In normal times, it is difficult to justify droves of individuals travelling to the courthouse only to observe the trial team in action. In this situation, our entire firm could watch (or simply listen to) the trial proceedings as they did their own separate work. We were able to provide the invaluable opportunity to

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observe how a real trial actually occurs in practice to younger associates, paralegals, and other support staff members, who had never seen a trial and likely would have not been afforded that opportunity under normal circumstances.

Each day, we would send an email to our office with the Zoom link and attendance instructions (although the court had the ability to control this as well, we instructed them to turn off their cameras and audio so as to not disrupt the proceeding). Then, following the day's events, we were happy to answer questions and discuss trial strategy with those who attended. It was helpful to the attorneys conducting the trial to receive feedback from other staff and attorneys not as intimately familiar with the facts of the case. In addition, it was helpful to have our paralegals on the call so that they could hear how the microphone was picking up sounds and what could be seen on camera at counsel table. Trials are rare in normal times, so having the opportunity to share a Zoom trial with a larger audience will definitely help when in-person and other Zoom trials begin to pick back up again.

