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Trial By Webcam: Tips From A Firsthand Experience

By **Joel Neckers and Peter Herzog** (May 27, 2020, 5:32 PM EDT)

On May 20, lawyers from our firm, Wheeler Trigg O'Donnell LLP, and Wilkinson Barker & Knauer LLP completed an online bench trial using GoToMeeting. With more than \$1 billion at issue in the case, attorneys called 11 live witnesses over three days.

Even three months ago, the prospect of conducting a virtual trial appeared unimaginable, infeasible and undesirable. But as our recent experience shows, it wasn't, and it worked surprisingly well.

Our firm represented United Power Inc., a retail electrical cooperative, in an exit charge dispute with its generation and transmission cooperative, Tri-State Generation and Transmission Association Inc. before the Colorado Public Utilities Commission.[1] Just as the virtual trial was a first for all involved, the case is a matter of first impression with major implications for the electric power industry.

Any trial lawyer reading this is itching to get back in the courtroom. So are we. Nevertheless, having done this once, we all would do it again. Initially incomprehensible, it turns out that conducting trial by video is reasonable and relatively convenient.

If we have one key takeaway from this experience to share with future virtual trial lawyers, it is this: simplifying everything works better than anything. Here are some practical tips for going to trial virtually.

Do Not Try to Recreate the Courtroom "Experience"

Our firm has used its mock trial room to prepare its lawyers for trials and hearings. So, when we first started preparing for the trial, our instinct was to recreate the courtroom experience by way of video feeds, webcams, witness stands and podiums (with proper social distancing, of course).

Let's face it, there is a certain comfort level that anyone who tries cases has with standing at a podium or lectern and interacting directly with witnesses. This does not work well, however, in an online trial format.

First, with more than one webcam, speaker and microphone in the "courtroom," audio feedback is a huge problem. As a result, you don't want to put the witness and examining attorney in the same room in an attempt to simulate the courtroom experience. Our recommendation? Adapt to the platform, instead of trying to adapt the platform to the courtroom.

Rather than try to force a "regular" trial experience into an online platform, we popped in our AirPods and used our laptop webcams positioned on our desks or conference room tables. We tried various approaches (e.g. standing at a podium as one would in a physical courtroom), but the best solution we found was the simplest one: sitting at a desk with a laptop webcam. This allowed for a comfortable view of both witness and examiner.

Additionally, this positioning gives the attorneys direct access to electronic documents, allows for an



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easy (and now familiar) face-to-face conversation, and also allows attorneys to see how other participants (as long as they have their cameras on) are reacting to witnesses and examiners.

Second, although juries and judges expect a certain level of technological competence from attorneys, "low-tech" often proves most successful in a courtroom. Sometimes nothing is more effective than simple diagrams, charts or summaries drawn on a white board or easel during an examination.

Yet, as we experimented with these traditional methods to prepare for our virtual trial, we determined that these tools would be distracting and potentially ineffective. Rather than force the issue, we created simple PDF demonstratives to share on screen. Again, we adapted to the platform rather than trying to recreate the courtroom experience through the platform.

Third, establishing a connection with witnesses — both yours and theirs — is critical. Doing this effectively is one of the biggest challenges in a virtual trial compared to a normal courtroom experience. Again, adapt to the platform. Do not use a paper outline, because you will look down at it rather than into the camera.

Position your digital outline on a screen next to your laptop. No one sees you glancing slightly to the side, and you can scroll with a mouse, effectively creating your own teleprompter, while maximizing eye contact and connection with the witness.

Understand the Technology

Momentum and flow are critical in any witness examination. Achieving either, let alone both, is not easy in person and they are even more difficult when examining someone by video (particularly on cross). The following tips may help your experience run more smoothly.

First, ask for explicit instructions on how the trial will be conducted and what the expectations are. Ask to conduct a dry run with the participants. In our case, the judge not only conducted a pretrial conference, but he and his staff also worked with the parties the week before the hearing to test both the platform itself and the attorneys' abilities to function within the platform.

Second, in our trial we were fortunate to have a judicial assistant who was running the technology and handled everything flawlessly when it came to pulling up and presenting exhibits. Even with the best courtroom technologist at hand, however, one advantage to presenting from a laptop is the ability to have all of the documents preloaded onto your computer.

For example, we knew that we would need to present certain trial and deposition transcripts as we examined various witnesses. So, for each examination, we designated one attorney to pull up the various documents in advance. Thus, we had everything ready to go as needed. All the examiner had to do was ask the judge's assistant to "please make Mr. Neckers the presenter."

We could then control the document presentation (e.g. calling out and highlighting text) while preserving the flow of the examination; we didn't have to wait for someone else to pull up the document. This is particularly effective when impeaching a witness.

Third, test everything. Test your video connection. Test your audio connection. Then test them again. And again. Then, know that something will go wrong, as it inevitably does in any trial, and be prepared to address it on the fly.

Fourth, set up your laptop or camera in a way that is comfortable and gives you easy access to documents. After all, at least one advantage of an online trial is that your setup is the courtroom.

Fifth, for direct examinations, put the examining attorney and witness in separate rooms. Even with the fastest internet connection, there is a slight audio and video delay. You will always be tempted to be face-to-face with your witness, but the examiner and witness will both be better served if they are not distracted by hearing the questions and answers live and then again over the audio feed, which could give the appearance of confusion.

Sixth, beware the microphone and camera. Remember that wireless or even wired headphones can

remain on when they should not be and pick up sound incredibly well (e.g., the recent U.S. Supreme Court "flush").[2]

Double-check that both the video and audio feeds are turned off after examinations and on breaks. Out of an abundance of caution, we also simply closed out of the hearing entirely on breaks to avoid any issues and then logged back in when it was time to return to "counsel table."

Finally, have a backup plan. Two examples come to mind. Wireless headphones can run out of batteries. Keep a backup set or, better yet, a wired headset nearby for when you inevitably forget to charge them. Second, we conducted one examination of a witness through a tablet. It worked perfectly for the entire hearing until, of course, the witness had to testify. We had a backup laptop at the ready, however, and were up and running within five minutes.

The Basics Still Matter

How do you evaluate witness credibility by webcam? The same way you would in a courtroom. Demeanor still matters. Presentation still matters. What the witness says still matters.

Of course, we drew on the experience of having conducted many depositions online over the past few months. Nevertheless, we still had some concerns about how best to conduct entirely online trial cross-examinations. Once the hearing started, however, it became apparent that the same trial techniques apply.

Witnesses who testify inconsistently can still be impeached. Witnesses with credibility problems — well, they still have credibility problems on a video feed. Witnesses with an agenda who want to stray beyond your question will try to do so, and you still must manage them as you would in a courtroom.

Remember, too, to keep examinations as tight and streamlined as possible. Even the best trial attorneys will wander in their examinations from time to time or become bogged down with a difficult witness on cross-examination. Getting back on point — and, more importantly, recapturing the attention of the trier of fact — can be more difficult by video. Other than raising or lowering your voice, there are fewer visual cues or movements you can make to signal that a major point is forthcoming or has been scored.

Thus, it is more important than ever to stay focused in a virtual courtroom. If you do need to recapture the audience's attention, try the same verbal cues and pauses you would in an ordinary courtroom.

Finally, remember that the rules still apply. There is, of course, the potential for a certain informality to invade any online proceeding, particularly when your "office" is your guest bedroom or kitchen table.

But a trial is a trial, and the traditional rules apply. Lawyers still make, and judges still rule on, objections. As always, be hypervigilant during examinations, because opposing counsel will try and try again to get in that piece of evidence the judge ruled inadmissible unless someone "opens the door."

Conclusion

We all want to return to a physical courtroom. Someday we will. There is no greater reward for a trial lawyer, after all, than obtaining a just result for a client after distilling our case down to the essence of what a judge or jury needs to hear. Until we return to something resembling the old normal, however, trial lawyers can use the new normal to efficiently and effectively achieve our clients' goals.

No travel, no schlepping boxes of exhibits and briefcases into the courtroom, and no worries about finding a place for lunch. Our webcams are ready for round two!

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Disclosure: The authors and contributors represented United Power in the case and trial discussed here.

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[1] The case is United Power Inc. v. Tri-State Generation and Transmission Association Inc., Proceeding No. 19F-0621E, before the Public Utilities Commission of the State of Colorado.

[2] <https://www.cnn.com/2020/05/06/politics/toilet-flush-supreme-court-oral-arguments/index.html>.

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