

SOCIAL DISTANCE TRIALS

A requiem for the way things were back then ...



I was recently on a status conference in a matter in Houston when we were asked by the judge to resolve the question of how to try an attorney's-fees dispute when the plaintiff's lawyer insisted on giving live testimony rather than submitting the fees evidence to the court by affidavits. That sent us on a 5-day odyssey leading to the first "trial by Zoom" to the bench in Harris County.

I knew I had a very steep learning curve ahead of me – I needed to figure out what I didn't know so I could then learn what I needed to know. And fast. Below, I will share with you some tips I learned.



GET HELP

I got lucky. My first call was to my expert witness, Dwayne Newton. He not only was "available" to testify by Zoom (from his California quarantine location), but he was highly proficient. Having someone help you master Zoom is a big deal, so do not let your ego keep you from seeking help.

PLAN AHEAD

This process is new and takes time to get things to "work" before the actual trial. I reconfigured monitors and incorporated previously unknown hardware to make my setup work. It requires lots of front-end time for preparation, along with ample technological support if you're not computer-savvy.

ZOOM TOOLS

Use a "personal call" on Zoom to practice. But I also suggest preplanning calls with your witnesses and, preferably, a tech-savvy colleague who has "real" experience with the product. Rehearsing in the Zoom world is more ballet than lawyering and is essential.

Subject-matter expertise to practice:

- **Share Screen.** Means what it says. Unless you pick the correct "window" to share, when you have a document up on the share screen, everyone can see your entire desktop screen, not just the document. So, do not hit that Share Screen button until you are ready and be sure to "Stop Sharing" when you are ready to take it down.
- **Share tools.** There is a drop-down toolbar when sharing documents. That toolbar allows you to highlight, draw and do all kinds of neat tricks to make your presentation better. There is a "whiteboard" function that is really useful. But the markups created when presenting are not actually attached to the document – so it gets awkward to use this tool when moving from page to page or document to document.

- **More share tools.** You can save as screenshots any markups of documents as you go. You can create exhibits as you go and then offer them and send them to the clerk at the conclusion of the hearing (this is also helpful for depositions).
- **Other practical pointers.** Work out with your witness in advance how you want things to flow. If your witness is better at Zoom than you are, let the witness run the presentation – like asking the witness to “walk to the chalkboard” in a courtroom.

DOCUMENT MANAGEMENT

- **Exhibits.** Our judge did not allow us to use any document that was not exchanged and on our exhibit list – even for refreshing recollection or impeachment. Find out how your judge will handle these issues. You may have to reveal some strategies.



PRESENTATION

You still have an audience and maybe one much bigger than you think. In our case, the trial was live-streamed to over 2,000 other members of the “gallery” watching – including clients, friends, other lawyers, reporters and who knows what other stuck-at-home Perry Mason types.

- **Mind your manners.** While it is difficult to pick up on nonverbal clues with a headshot as your only visual, facial expressions are magnified. Fidgeting and walking around (off camera) simply do not work well in this environment.
- **Being heard.** Several quick points:
 - ➔ First, I used a headset because the judge had a hard time hearing me during our status conference. I suggest a Bluetooth headset, because there is no tether. Sacrifice looks for functionality.
 - ➔ Second, do not speak over others. Zoom only allows one speaker at a time. Preserving your record means more than making the right objections; it means making sure your objections actually are heard.
 - ➔ Third, silence all background noise – cell phones, computer calendar reminders, office phones and any other potential interruptions.
- **Being seen.** This is “your show.” You are the director, producer, lead actor and stagehand. Check the lighting, backdrop and camera angle beforehand. I suggest a solid background that fills the space behind you (as opposed to a solid-colored backdrop that only partially does so, which is a distraction) or an uncluttered one (yes, I had to clean my credenza).
- **Do not forget your witness.** Check with your witness on these points too – backdrop, microphone, clothing, lighting, Zoom skills, etc.



- **Being able to see.** This is not necessarily what you think.
 - ➔ Use an extra monitor. Use two monitors for your own presentation (one dedicated to sharing documents and one for seeing the court and witnesses).
 - ➔ Add another device to see what the court sees. We had instances when we assumed the witness (and court) could see documents we thought we were sharing, when we had not actually hit the Share button.
 - ➔ Two options — first, log in on another computer as a viewer or have an assistant “run” your presentation so it is that person who pulls up your documents, does the marking, etc.
- **Streamline.** I suggest highlighting or marking up your exhibits *before* trial. That way, you save time and avoid fumbling around. Use the Adobe features on the PDF files that were set up as our exhibits. The top right-hand corner of the document has a Comment button and drop-down menu of tools to highlight, draw, add arrows, etc. Then, save the document for later use.

WITNESS IDENTIFICATION

Someone must identify our witnesses for the record.

TIMING

Just like with most things we do, when lawyers estimate a time to complete a task, it typically takes twice as long. The technology is still a little clunky, and there are unforeseeable issues like dropped sound feeds or technical glitches in the feeds. And it just takes a little longer when the lawyers are transitioning in and out of PDF files and adding or erasing (or saving) document markups while trying to “move along” in their presentations. Eliminate any extraneous materials on the front end but plan to spend more time than normal.

STRATEGY

We all thrive on courtroom drama, but we are still professionals. Here are a few things to address up front:

- **Witness communication.** If one side invokes the rule excluding witnesses, take steps to ensure that the witness does not have access to any communication from any third party viewing the proceedings or otherwise does not stream the proceedings. The Zoom Waiting Room feature may be the ticket. Other thoughts on this subject:

- **Witness coaching.** This is different. This technology allows communications *while* the witness is testifying. Zoom features private “chat” communications between individual participants. So does the Microsoft Teams app. One can easily send “chat” messages between witness and counsel while on camera, and no one would know. A witness can easily have a separate device in front of him or her that would allow a means of separate communication. Reminder: Cell phone text chimes during examination create suspicion, even if they are entirely innocent.
- **Demeanor.** Physical demeanor is magnified when the camera is close by. Eye rolls, headshakes and physically moving away from the camera when stressed or feeling challenged are more visible and can create awkward moments — like when our judge commented that one witness seemed harder to hear on cross than he did on direct.
- **Stage presence.** I have never been more aware of my physical reactions when I was *not* the one asking questions. Not only did I feel awkward looking at the camera but also down or away from the camera at first. It really is just like being in the presence of the jury in the courtroom — only magnified with the camera only a few feet away from your face, and a “live-stream” audience to boot.



Despite the steep learning curve, this was a good experience. I was forced to get comfortable with a technology I did not know and did not plan to get to know, because I at least hoped that all of this was just temporary.

But the truth is socially distanced law practice is not going away. As things currently stand, most Texas counties are not expecting to call juries through July, and that sounds optimistic. Getting jurors to show up may be problematic even if the courts reopen.

On the other hand, judges and lawyers are growing accustomed to using Zoom or other, similar platforms for hearings and depositions. Many judges prefer the virtual hearing process. Distance-based hearings are here to stay regardless of whether or not things return to “normal.”

Things are also changing with our clients. They are working from home and going to meetings online, and they are not going back to their former work practices. Perhaps more important, our clients will lose interest in paying us to go across the country to interview witnesses, attend hearings or take depositions now that the genie is out of the bottle. We can practice law by social distancing, and we lawyers will have to justify wanting to meet our witnesses, experts or even perhaps judges in person. The technology is cheap, quick and efficient, and we lose very little in the translation (well, sort of).

Just think — it is not all that bad to be able to make it home for dinner either.