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REPORT

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REMOTE BENCH TRIALS: KEY CONSIDERATIONS IN PREPARING AND CONDUCTING THEM



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Trial lawyers have been sorely tested in all respects during the last year.

Most courts closed in mid-March 2020 for almost all purposes, followed by halting re-openings for limited purposes as the year progressed. Civil jury trials all but disappeared.

After participating in one of the last civil jury trials in the Los Angeles Superior Court on the eve of the statewide shutdown, I handled one of the first “all video” bench trials in that court beginning in late December 2020. The uncomfortableness of that early-pandemic jury trial was supplanted by the ease and efficiency of the bench trial.

Although the future of remote jury trials is uncertain, my positive experience with this video trial—seven days over several weeks—makes clear to me that many judges, lawyers and parties will want to continue having them in the post-pandemic environment. In my view, video trials should be embraced for their advantages, not feared for their uncertainties.

Here is what I learned about the critical aspects and best practices of successful video trials.

Buy-In

The first issue, of course, is getting buy-in from the court and the parties. In our case the judge was very interested in handling one of the first all-remote bench trials in the Los Angeles County Superior Court and then being able to report on his experience to his colleagues. Indeed, he initiated the idea of a fully remote trial, provided we could agree on a technology platform other

than the system being used by the court for hearings, which did not provide for exhibit management. Recognizing the issues in the case could not be fully resolved short of appeal, both sides wanted to get the bench trial going so the case could be sent on its way to the appellate court. And we had no difficulty agreeing on the technology—we had been using the same court reporting service, which was marketing a proprietary video trial platform based upon its video deposition technology with which we had already become comfortable.

Obtaining buy-in will obviously be more difficult when the judge is not interested or technically proficient, or when one side does not really want prompt resolution of the case. Dragging a reluctant party along will make everything more difficult, although far from impossible.

Technology

Vendor Engagement

As already mentioned, both sides agreed to use the technology offered by the court reporting firm that had been successfully handling our remote depositions. We asked the vendor to make presentations to each side about how it would work, and we then all got together on a video call so that both sides could ask questions at the same time.

The basic video technology was familiar to most of us from our months in lockdown. The exhibit sharing was handled by a separate program that was somewhat less intuitive than the video technology, but allowed each side to have a private folder of exhibits that it could use or not use. Exhibits could be shown to witnesses and opposing counsel, and if admitted into evidence could be moved to an admitted exhibits folder.

The next step was to arrange for a demonstration of the technology for the judge and his clerk to get their sign-off. Our vendor went to the courtroom and spent several hours with the judge and clerk to make sure they were both comfortable with and trained on the technology. An important issue raised by the judge was how to provide for public access; it was quickly

solved by his decision to broadcast the proceedings on a screen in the courtroom.

We then had a video conference among the judge, clerk, counsel and the vendor to discuss any final issues. We made two important decisions at that time. The first was to use the vendor's "concierge service"; the second was to provide the court with binders of hard copy exhibits for easy reference during the trial.

Concierge Service

As most lawyers who handle complex trials know, it is important to have someone during a trial who has responsibility for managing the presentation technology. That person can be a paralegal, a junior lawyer or an independent courtroom presentation specialist. Sometimes the parties agree to share a presentation specialist.

In this case, we decided to use our own staff to organize and call up exhibits, but also to take advantage of a "concierge service" offered by the vendor. This was a person completely steeped in the vendor's technology but with a client service demeanor, who could be available to us on either an hourly or a daily basis. After meeting her, both sides agreed to retain her on a daily basis for the entirety of the trial, a decision with which the judge was pleased.

That was a good decision: After the trial, all of the lawyers agreed she was critical to the smooth functioning of the trial. She had full access to, and control of, the video and exhibit programs, and she could make adjustments on the fly. Perhaps most importantly, before any witness was to be called, she would contact that witness to make sure the video connection was stable and the witness could access the exhibits. She participated in every minute of the trial. Her work included coordinating breakout rooms for the opposing teams.

Exhibits

The exhibit sharing program generally worked well, and we and our witnesses were all trained on it by the vendor. Nevertheless, the judge had requested notebooks containing hard copy exhibits, and we also provided both ourselves and our witnesses with them. This facilitated quickly flipping between documents, which was where the computer program struggled.

Technology / Home Office

After prompting by our vendor, the lawyers on our side took hard looks at our own home technology. This included our internet connections as well as our lighting, sound, background

and display capability. For relatively minimal cost, I acquired a high-quality camera and microphone that I could position so that when I looked at my computer screens it appeared I was looking directly into the camera. I also bought a large second monitor and a source of diffuse lighting that removed most glare. Having a second monitor is essential to participating in the video session while simultaneously reviewing documents. I then reoriented my home office desk to remove all backlighting (a common problem) and improve the background. We went through the same exercise with our principal witnesses. After that was done, we all wondered why we had not paid more attention to video presentation during the hundreds of sessions we had participated in up to that time.

A final but very practical piece of advice as it relates to your home office set-up: Have a comfortable chair at the right height. Trial days tend to be long.

Witness Preparation

Witness preparation is really no different than normal except for the need to prepare the witnesses to speak to the camera effectively. Because of COVID, we did all of our witness preparation remotely, so were able to spend a good deal of time schooling the witnesses on the same issues as to which we had previously schooled ourselves: Internet speed, camera and microphone quality, lighting, and looking at the camera.

It is also critical to make sure witnesses understand they should be by themselves and leave their phones and tablets in a different room.

Cheating

Much has been written about trying to make sure witnesses being deposed are not being improperly coached, and most of us have developed our standard speeches for the start of depositions. We did not have to face those issues in our trial because of the nature of the case and the relationship between opposing counsel. It was apparent that all witnesses and their counsel were in separate buildings, and we had no basis to believe there would be improper coaching.

But in many cases that will not be true. Especially when pandemic restrictions are gone, witnesses and their lawyers may insist on being together, and the witnesses may refuse to confirm they have no phones or tablets with them. On top of that, the prior relationship among counsel may not instill confidence about the absence of coaching.

In those situations, it would be appropriate to ask the judge to issue pre-trial orders regarding the circumstances under

which testimony will be given, including witness sequestration if necessary.

I believe it would take a very practiced witness to hide the fact of being coached while under the microscope of a video camera focused closely on the witness's face. If there is reason to suspect a witness is being coached, however, it would be appropriate to ask the judge to order the witness to use his or her camera to show the room in which the testimony is being given and to show his or her phone.

The Trial

There are clear benefits to video trials outside of pandemic-related social distancing. Probably the most significant is time efficiency. For a trial in downtown Los Angeles, I would normally either have to spend two hours each day commuting in my car or move into a hotel for the duration of the trial. In addition, we would struggle to find a place to meet during breaks, and would suffer through bad lunches along with hundreds of others in a cramped cafeteria. If we were not in a hotel, we would have to drive back to our office at the end of the day to prepare for the next day.

This tedious routine was replaced with having breakfast at home; meeting the team in our video break-out room to discuss the upcoming morning; participating in the morning session; having lunch in my own home office while discussing the morning with the team in our break-out room; and then repeating the process in the afternoon. Having video break-out rooms into which we were automatically placed during breaks was a terrific time saver that also enhanced confidentiality. The entire trial experience seemed to be far less rushed than normal, all of which I believe is attributable to not having to travel anywhere. Yet I'm quite sure that this seven-day trial would have taken much longer if we had tried it in-person.

I have heard it said it is harder to connect with and evaluate witnesses by video than in person. I do not believe that is the case, and it certainly was not our experience in the bench trial. While I expect there will always be differences of opinion as to this issue, I believe the close-in view of witnesses on a video screen highlights every eye-dart and change in facial expression. This only enhances the viewer's ability to make credibility determinations. In one situation in our trial, the lack of credibility of one opposing witness became painfully apparent through changes in his demeanor—including the small beads of sweat that suddenly appeared but that probably would have gone unnoticed if he were on the witness stand in a courtroom.

One unanticipated benefit of the video trial was the ability to provide input to the examining lawyer—which in our case included not only the other three trial lawyers on the team but also several additional lawyers who were monitoring the trial. With an iPad right next to me open to a group chat among the lawyers, I was able to get immediate input on my questions and the witness's answers. This was far superior to the very distracting normal process of notes being handed up to the podium.

As a general matter, handling, showing and offering exhibits into evidence went smoothly, aided occasionally by the fact that the judge, lawyers and most witnesses had hard copies available. But, as noted above, the exhibit sharing software was not up to the task of moving quickly from one exhibit to another. That is an area where remote trial vendors need to improve, but I expect they will catch up quickly.

There were very few technical glitches during the trial. Credit for that goes to the technical support provided by the vendor and our concierge, who made sure witnesses and lawyers were ready to go at the right time. Probably the most severe technical problem during the trial was my own loss of an Internet connection near the end of the day during a heavy rainstorm. Fortunately I was able to reconnect relatively quickly by using my phone and the cellular service.

All in all, I felt the remote trial was a very good experience and would not hesitate to participate in another one or try a remote jury trial. The details and planning that went into it up front made all the difference.

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