

Parker McCay Blog

From Courtroom to Court Zoom-- Serving Justice Virtually during Covid-19

By Steven Goodell, Linda Galella on May 21, 2020

Recently, we became pioneers in the realm of a virtual trial. Our litigation was on a fast track -- it involved affordable housing and a challenge to a zoning ordinance. At the Court's urging, and with the consent of all counsel, we tried the case over three days in May, in a virtual courtroom on Zoom, with a live stream going out over the New Jersey Court's website.

At the end of the trial, the judge polled the five attorneys: What did we think? After all, this was one of the first actual trials on a virtual platform. All agreed that the proceedings went well, with only a few minor glitches, and that we were glad the Court could accommodate us in this age of social distancing.

The case was a bench trial, which streamlined proceedings, but we still had to decide how to handle exhibits, make objections, present expert and fact witnesses, and do all the things we take for granted when we're in a courtroom. The judge, the judge's court clerk and staff, and the five attorneys and seven witnesses were scattered across the state, appearing from their homes or offices. Only the judge was in the courtroom.

Based on our experience, here are some tips for an effective virtual trial:

CONDUCT A TRIAL RUN

Work with the court to arrange for a practice run or two with the selected virtual platform. A judge's administrator will likely be familiar with the chosen platform and be able to guide participants through some pilot testing. Understanding the technology allows participants to ask questions about the best ways to present and share information with the group during the trial. In our case, the attorneys were seasoned because just two weeks earlier, we had deposed the seven witnesses using Zoom.

SCAN INTO PDF FORMAT ALL DOCUMENTS AND EVIDENCE- PREPARE HARD AND SOFT COPIES OF DOCUMENTS

If the trial is virtual, the documentary evidence needs to be offered electronically as well as physically. It is critical to prepare all documents you might need during the trial in PDF format. Both plaintiff and defendants pre-marked and Bates stamped all documents. These documents included everything we anticipated using at trial — documents for direct, documents for cross, and documents (like expert reports) that might be needed to refresh a witness' recollection. In our case, the judge also wanted hard copies of the exhibits, so we sent them ahead of time in binders.

Since Zoom is a web conferencing platform, it allows users to “share” documents on the screen so that all participants can see them. Combining all of the documents into one file makes them easier to share during a trial.

DO NOT HESITATE TO USE DEMONSTRATIVE EXHIBITS

Since our case involved a challenge to a land use ordinance, maps were critical demonstrative evidence. We enlarged our maps and provided poster-sized copies to our adversary and to the judge prior to trial. These maps were also pre-marked, Bates stamped, and digitized.

HAVE A STRATEGY FOR COMMUNICATING WITH EACH OTHER

When co-counsel are in different locations, it can be difficult to consult with each other during a virtual trial. Plan ahead, and decide if you will communicate via text message, chat program, or email. Always make sure you have a communication strategy before your virtual trial gets started. Although we didn't use them, the Court also offered us Zoom “breakout rooms,” which would have allowed us to consult with co-counsel privately, off line.

REMEMBER, YOU'RE STILL IN COURT!

Personal appearance counts. Being on video feels different, but even in a virtual environment, you are still in court. Attorneys should dress as professionally as they would if they appeared in person. Because all parties can be seen on video through the web conferencing platform, all participants should be mindful of their facial expressions and posture. Most web conferencing technology allows users to temporarily pause the web camera for a short break as needed. It's easy to forget, when you are sitting at home, that you are actually in court. The Administrative Office of the Courts has issued a directive that all attorneys are to be professionally dressed for any virtual court appearances. Of course, the reality is that you can only be seen from the waist up for a virtual court appearance. So if you are wearing sweat pants or shorts with your shirt and tie or blouse and pearl necklace, remember to remain seated.

REMEMBER TO “MUTE” IF YOU ARE NOT SPEAKING

A best practice for conference calls, webinars, and video conferencing is to place yourself on mute when you are not speaking. This eliminates background noise from your line and allows a session with multiple participants to have good audio for all of the listeners. During a virtual trial it would be terribly disruptive and embarrassing to have sounds from your line or a witness’ line interrupt proceedings. Please remember to use mute if you are not speaking.

In order to avoid background noises, the best plan is to keep yourself on “mute” unless you are asking questions or planning on objecting. This allows the Court to have a clean recording. Background noises, like a barking dog or neighbor’s lawnmower, will be disruptive.

TECHNOLOGY ISSUES WILL OCCUR SO BE PREPARED FOR THEM

Allow for extra time when scheduling the virtual trial. Although a virtual trial saves time on the commute, precious time can be lost when technology issues occur. Because video web conferencing is new to many, and individuals are depending on different internet providers, time can be lost if connections fail or if anyone struggles to use functions of the tool.

The Court scheduled an extra day for our virtual trial since we were all sailing in uncharted waters. As it turned out, we needed the extra day. While some things were more efficient – for example, we did not have to drive to the courthouse, deal with parking, or walk outside for lunch – the inevitable technology issues did occur. Expect computer screens to freeze up, delays in computer transmissions, and even the occasional loss of internet. It is par for the course in a virtual trial. The solution is to allow extra time for these technology glitches.

MAKE SURE WITNESSES HAVE THE RIGHT EQUIPMENT AND ARE PROPERLY PREPARED

Advise witnesses to use equipment with appropriately-sized screens and either a built-in or after-market web camera. The court needs to see the witness on video to help assess credibility. Mobile phones are not recommended for virtual trials based on screen size. It is also important to advise witnesses to avoid distractions and disruptions by using a secure, private room, reviewing background scenery, and silencing phones.

Bottom line, we all have to play with the cards we have been dealt. Justice can still be served even though we cannot be in the same courtroom right now for a trial. We can keep the wheels of justice moving forward while satisfying due process. With some additional time and preparation, a full bench trial can be conducted via a virtual platform.

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