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10 Hard-Earned Lessons Learned from a Virtual Arbitration

Our remote hearing is now complete, having included more than a dozen witnesses testifying over 10 very full hearing days, spread over two and a half weeks. Below are some hard-learned lessons shared from our trial team to yours.

By **Nicole Gueron, Melissa Holsinger, Allison Pincus, and Muriel Leung, Clarick Gueron Reisbaum** | August 26, 2020



Our team recently completed a complex arbitration before a panel of three arbitrators, all conducted over Zoom. This arbitration had been slated to begin in person in New York City on March 16, 2020. It requires no explanation why that did not occur. After deliberation and disagreement among the parties about how to proceed, the Panel reset the hearing date for mid-July, to be conducted entirely remotely.

The hearing is now complete, having included more than a dozen witnesses testifying over 10 very full hearing days, spread over two and a half weeks. Below are some hard-learned lessons shared from our trial team to yours:

1. It works: While it is a very different experience to try a case with team members and witnesses scattered across locations and time zones, it is absolutely doable and can be a very successful trial experience. Don't let fear of the unknown prevent your client from having her day in court sooner rather than later.

2. Get the fundamental tech right: A base level of high functioning technology is indispensable. A hearing or trial of this nature requires consistent, uncompromised Internet access for every single participant. If Internet access freezes, everything is delayed, everyone gets frustrated, and the factfinder loses the thread of the testimony. Similarly, if the intention is to use screen sharing technology to display exhibits, then it must function consistently or else the participants are distracted by looking for their paper exhibits and momentum is lost. Spending time and effort on lighting is also well worth it and difficult to get right. Invest in lighting and a high quality camera.

3. A Zoom trial is not a TV show: Beyond the fundamental level of technology described above, perfection is not required and a sense of humor goes a long way. We can all get used to each other's bookshelves or studies, and unimportant glitches like an occasional dog barking or phone ringing can lighten the mood productively. And sometimes less is more—in our case, some participants used virtual backgrounds that showed distracting gaps and backgrounds whenever that participant moved; we all would have been better off without them.

4. To review evidence, a belt and suspenders approach helps: Some exhibits (usually shorter ones) work well electronically, while others (especially longer documents) are easier for witnesses and arbitrators to review in hard copy. Other exhibits may include audio files or spreadsheets that are best viewed in native format. This requires planning and logistical coordination to ensure everyone who needs a hard copy gets one in advance.

5. Hide self-view: No one should watch themselves cross examine a witness. It's just plain distracting. In real life, we don't watch ourselves perform and there's no value add to watching remotely.

6. Prep with witnesses on the trial forum: Prep your witnesses on the forum you will use at trial and practice publishing exhibits together on the platform, so that everything is smoothed out before game day. For key witnesses, multiple prep sessions will increase everyone's comfort level.

7. Team communication is harder, but more vital than ever: Lawyers and paralegals always need something of a mind-meld at trial, but in this forum it's indispensable and even more challenging. This means that witness examination outlines should be very detailed and include exhibit numbers and internal page cites within the exhibit, so the examination can move seamlessly and the paralegal can follow the lawyer's lead as the examination proceeds. Improvisation is hard without eye contact; preparation and working off of the same document is the only way to prevent losing track of one another. Additionally, you must choose a way for your team to communicate in real time. With a physically separated team, no one can pass a note with the all-essential reminder of a topic missed or a brilliant question overlooked. Be sure to build in time for a check-in with your team in a break-out room before you utter the words "no further questions." It's also helpful to have a side channel (on a different technological platform to avoid potentially embarrassing mishaps!) for communication in real time. We used Microsoft Teams on our phones for real-time communication—essential topics only!

8. Go off screen as often as possible: If a teammate is handling the next witness, turn off your video and stretch, refocus, and rest your eyes. We all need breaks because it is very tiring to be watching a screen for eight to ten consecutive hours. Then, work as a team to avoid errors: remind each other to go off mute when

coming back from a break, and make sure everyone's icon is present even if not on screen. It is very frustrating to realize that someone is missing from the "hearing room" and have to pause or repeat portions of testimony.

9. Own the upsides: You can wear more comfortable clothes for your lower half that is off screen, although every team member should be dressed to appear on screen at a moment's notice. You can have unlimited snacks and drinks nearby at all times. You can call more witnesses and coordinate them more easily because the cost and logistics of witness travel are eliminated. We all missed standing up in a courtroom, but we tried to lean in to the benefits of the forum.

10. Trials are a team sport: Don't let physical separation destroy the positive team spirit of a trial. Build in times to check in with your team and your client after every trial day. It's entirely possible and surely more fun to function as a cohesive team, even when working from different places as long as you schedule time together as a group—even if it means extra hours over Zoom.

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