

May It Please The Camera: Zoom Trials Demand New Skills

By **Cara Salvatore**

Law360 (June 29, 2020, 3:41 PM EDT) -- As masses of legal work shift online, trial lawyers are turning on their webcams and realizing their old courtroom skills are no longer enough. But recent remote proceedings are already showing that online trials can actually work — with the right considerations.

Latham & Watkins LLP associate Corey Calabrese was one of the first lawyers in the nation to undertake trial proceedings on Zoom when she gave closing arguments in March in a voting rights trial in the Southern District of New York. Up until closings, the bench trial had been conducted the traditional way, in a courtroom.

When Calabrese found out the closings would happen over Zoom, she hunkered down to learn and practice the format with her husband, sitting in two different rooms of their house. Calabrese started to realize that the most important thing was to have everything set up so that she didn't have to break eye contact with the camera — ever. Every other task became meticulously organized around that goal.

"My script was inside a Word document open on my laptop, but I kept it scrolling. So I would only read the top three lines of the page before scrolling on," keeping her eyes pointed in the direction of the webcam right above the screen, she said.

Next to her laptop, she had a second computer screen, which held the PowerPoint she was screen-sharing with everyone on the call. Again, she had to be sure not to constantly look at it.

"I practiced scrolling, moving my hand over to flip my PowerPoint. I practiced the mechanics of moving my hand back and forth without having to move [my gaze] and fumble around," Calabrese said.

Because professional Zooming isn't complete without a gaffe, Calabrese had a visit from her corgi during closing arguments, something that would — probably — never happen in a courtroom. But it turned out the judge was a dog person, too, and things got back on track.

The monthslong nationwide shutdown of courts during the coronavirus pandemic appears to have prompted new acceptance of online court proceedings. As virtual trials become more widespread, pioneers in these cases have learned lessons that will help the increasing number of lawyers finding themselves staring at a judge through a webcam for the first time.

Matthew Pearson, a lawyer in Texas who took part in what appears to be the nation's first Zoom jury

trial a couple of weeks ago, had an experience on the opposite end of the spectrum from Calabrese's. He had approached the trial like any other, focusing on strategy.

But at some point after the trial started, "The logistics of putting on a Zoom trial really hit me," Pearson said. "We did pick a place in our office where we thought we had the best lighting. ... Other than that, we didn't think through many things."

Appearing from a conference room in his firm's office with just one lone screen on a laptop and his paralegal reaching over him to help change slides, Pearson soon realized he had some improvements to make for next time.

The second go-round, when it comes, will include at least one additional monitor, Pearson said, which he'll use exclusively for the faces of the jury. It's worth the real estate of a whole screen to be able to monitor whether jurors are paying attention and their reactions to what they're hearing, he said.

Seeing jurors and witnesses head-on, right up close, is an unexpected perk of Zoom trials, according to Judge Emily Miskel, who oversaw the technological aspects of the history-making Zoom trial in which Pearson appeared.

Being able to see the witnesses face-on instead of sideways, Judge Miskel said, vastly improves the main job of fact-finders — assessing credibility.

"In a real courtroom, they're sitting sideways to the witness and the witness may be 20 feet away, whereas on Zoom, the witness is right up close to them," she said. And she, as a judge, appreciated the direct view as well; she's used to looking at the sides of witnesses' heads.

The Texas trial used not one but two judges — one for regular judging functions and one for everything technological. Judge Miskel served in the latter role and said the role of tech maven will always be necessary in a jury trial online.

"Essentially what I was doing, I was being a high-tech bailiff," Judge Miskel said. She checked in jurors online, moved them to and from their virtual breakout rooms, and fixed cases of accidental participant muting, among other things.

Deliberations were a particular challenge, the judge said. Without printed exhibits physically sitting in front of them, jurors need a way to literally get on the same page. It's doable with enough coordination, but needs to be simpler, the judge said.

Though jury trials are still rare for the time being, bench trials by webcam have quickly become common; Judge Miskel said she's now up to a regular rate of a dozen a week.

In fact, advocacy by webcam is becoming important enough that it now warrants its own training courses.

To meet this need, the National Institute for Trial Advocacy has been conducting training for lawyers on trials by Zoom.

In a recent online session, NITA instructors told their students that Zoom demands separate skills and trial lawyers should start practicing them, because after the pandemic recedes, online proceedings

won't.

Making the biggest impact in a Zoom trial means erasing all other distractions, getting your lighting and posture right, and working even harder than usual to keep listeners engaged, instructors said.

"Every time you look down, you're disengaging," instructor Henry Brown, director of attorney training at Debevoise & Plimpton LLP in New York, told his students in a breakout session.

Being in a chair rather than on your feet also requires extra vigilance, according to Brown.

"When you are sitting, then the tendency — both in the way we use the notes and the way we deliver — does not add the kind of emotional cues that we're looking for," he said — confidence, power, self-assuredness.

Voice modulation also takes on greater importance in the online courtroom, said Annie Deets, a professor at Emory University and co-leader of the NITA course.

"Getting louder, getting softer, purposeful pausing, is even more important in this format," she said in an interview. "You have not that much time to grab people's attention live; I would say you have less attention remotely."

Deets said the instructors are also urging trial practitioners to use even more multimedia in a webcam proceeding, like audio clips and video clips. Whatever you do, she said, be more than just a talking head.

Instructor Angela Porter, of the Alternate Public Defender's Office in Los Angeles, concurred.

"Listen, if the world is going to change and we're all going to be advocating on screens now, I want to learn how to do it persuasively," Porter told her students.

"Having been accustomed to all this freedom in courtrooms that we might not see again," it's better to master Zoom and other online advocacy forums now, Porter said, "and not five years from now when it's clear we're not getting that freedom back."

--Editing by Aaron Pelc and Jack Karp.