

Tips For Presenting A Credible Witness By Videoconference

By **Christopher Green and Sara Fish**

Though many courts have moved multiple services to videoconferencing during the pandemic, most have been wary of conducting trials via video. Still, some courts have forged ahead into the realm of videoconferencing to help move the mounting backlog of trial matters toward resolution.

For example, in late May, the Collin County District Court in Texas held the first-ever jury trial over videoconference, conducting a summary trial, a one-day civil proceeding concluding in a nonbinding verdict, relating to an insurance claim dispute.[1] Jury selection was livestreamed on YouTube to maintain public access to the process. Jurors reviewed evidence during deliberation using Dropbox in private videoconference rooms. Of course, there were some technology issues and the court had to remind the participants that the virtual setting "made their duties no less important," but ultimately the presiding judge found "that this is a good way to resolve" potentially many civil trials.[2]

More recently, on June 11, the U.S. District Court for the Eastern District of Virginia concluded a patent infringement bench trial held via videoconferencing. During the trial, the court heard from witnesses located around the country via Zoom. The federal judiciary also recently issued recommendations for resumption of in-person jury trials that implicitly suggests videoconferenced jury trials will be needed in some places and at least for the short term until communities are ready to use the in-person guidelines.[3]

Trial lawyers continue to debate the merits of conducting such virtual trials,[4] but for now, given that courts are proceeding with trials (and numerous types of hearings) via videoconference, litigators should consider the new format's challenges now. As with all trial preparations, early planning and practice for a potential video witness presentation will help make you a more effective advocate should the moment arise.

Considering the current shift to videoconferencing, how will this change affect judges' and jurors' perception of your witnesses' credibility? Here are some considerations for litigators who are adapting the live theater aspects of their conventional courtroom skills to the proverbial "small screen."

The Credibility Conundrum

A primary concern is how to ensure the witness effectively conveys credibility. Though the same primary concern is present when preparing a witness for in-person courtroom testimony, achieving the same result poses very different challenges over video. As remote work has shown, shifting interactions with co-workers to videoconference is far short of a perfect analogue for face-to-face communication, and the real but sometime invisible transfer of meaningful information that accompanies it.[5]

Will the audience be able to effectively evaluate the credibility of a witness when not physically sitting in the same room together?



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On the one hand, the loss of the jury's ability to immediately, sensorially perceive a witness may decrease the jury's ability to evaluate testimony because many nonverbal but credibility-influencing cues are neither visible nor perceptible over video. Camera angles and video quality may obscure nervous tics such as foot tapping and fidgeting hands, or still other body language associated with trust, confidence, authoritativeness or veracity (or lack thereof).

On the other hand, decreasing the jury's ability to perceive these nonverbal cues may alternatively prompt jurors to focus credibility determinations more on the content of testimony and less on amateur psychological musings driven purely by appearances.

In fact, in a 2018 article published by the Journal of Tort Law, Aldert Vrij and Jeannine Turgeon argued that courts should stop using pattern jury instructions that instruct the jury to consider nonverbal behaviors in evaluating credibility, because research has shown "that rather than being a valid basis, nonverbal cues have little or nothing to do with a witness's truthfulness or credibility." [6] They further argued that:

In recent years, meta-analyses ... have concluded that nonverbal cues to deceit are faint and unreliable. ... Research examining people's ability to detect deceit by observing other people's behavior shows an equally bleak picture. [One] metaanalysis, which included the veracity judgements made by almost 25,000 observers, revealed an average accuracy rate of 54% in correctly classifying truth tellers and liars, barely above the chance level of 50%. [7]

Accordingly, a witness with involuntary nonverbal behaviors of the type often misinterpreted as indications of nervousness or uncertainty will gain advantage from the medium muting those signals. In fact, U.S. District Judge Henry Coke Morgan Jr., who conducted a recent bench trial in the Eastern District of Virginia over videoconferencing, said "that his 'ability to evaluate the credibility of the witnesses was probably improved by the format,' since he wasn't distracted by anything else happening in the courtroom and could focus on the witnesses and ask them questions as they testified remotely." [8]

Understanding individual witness demeanors and communication styles thus assumes paramount importance. Is your witness naturally soft-spoken? Do they invoke frequent hand gestures? Does their gaze shift as they talk? These tendencies may strike any given juror in any one of many ways. Given these complexities, how can you help the jury find your witness credible and compelling over video?

1. Master the Technology

Every litigator has observed courtroom presentations that were diminished by persnickety audiovisual equipment and unforced errors such as lawyers fumbling with projectors. Whatever your technology configuration, ensure it is stable and familiar to both you and your witness.

Practice beforehand as much as is needed, just as you would in an onsite trial "war room." Test your setup with each witness so that you may address jittery internet connections and low-quality microphones (consider providing loaner devices if feasible). Help your witness find a place where they can testify that does not suffer from (too many) external distractions, heavy shadow-inducing backlighting or poor acoustics.

The jury may forgive a few false starts and technical hiccups, but everyone's patience is limited to some degree. A disjointed presentation projects the opposite of competence in

not just your role as director of this video production, but as an advocate as well. At a minimum, you must not leave your witness to grapple with an unfamiliar medium on the big day lest you unintentionally induce credibility-eroding awkwardness or uncertainty.

2. Help Jurors Connect

Each juror joining the videoconference from their own devices, on various different internet speeds, may each have widely varying experiences in viewing the testimony. Though counsel will not be able to control each individual juror's potential technological problems, counsel could provide suggested connection instructions or guidelines to the court to provide to the jurors, which some courts have already begun using for other proceedings conducted over videoconference.[9]

3. Command the Camera

Counsel must assist each witness in tailoring her communication skills for the video setting specifically. For example, the witness will want to look directly into the camera while speaking, which will create a more direct presentation for the viewer, mimicking the experience of looking someone in the eye while speaking in person.[10] On videoconferences, most people have a tendency to focus on the other participants or their own faces on the video display, rather than looking into the camera, which could give the misimpression of disinterestedness or distractedness.

If you've presented video deposition testimony in lieu of live testimony, you've likely observed a witness engaging in similarly unflattering behavior. We once tested such a video clip in a mock jury exercise, where a witness with objectively impactful testimony was largely dismissed because he stared down at the document on the table before him while speaking. Be mindful of this trap of human nature when asking your witness to examine a critical document or other key piece of evidence on camera, and coach them not to fixate on it for a protracted period.

4. Find the Right Audio

The witness will also want to speak relatively slowly, clearly and project his voice as if speaking in a courtroom. A soft-spoken witness may appear unsure if not clearly audible over videoconference, but conversely a loud witness may come across as overly aggressive when amplified through a microphone and video.

For many witnesses, the temptation while sitting at a home office desk or kitchen table may be to speak in a soft conversational voice. Instead, the witness should practice articulating loudly and clearly to overcome any potential technical problems with the audio. This will help ensure the full content of her testimony is heard and prevent her answers from trailing off or wavering in and out, which could appear to convey lack of confidence or nervousness.

If the witness often speaks with his hands or has a demonstrative exhibit that will need to be viewed during her testimony, practice keeping hands, gestures and exhibits in the video frame when needed, but also keep in mind that unnecessary hand motions on the screen may be distracting. Ask the witness to practice using gestures only when needed for emphasis.

Also, as with any form of testimony, a witness should dress neatly and professionally and maintain attentive posture. The witness should pause after being asked a question before beginning the answer and wait until a question is completed before answering; this is

particularly important when on video due to the common lag in video transmission.

With the likelihood that more and more jury trials will be held by videoconferencing in the near future, establishing best practices now for effective, credible video trial testimony will ensure you are ready when it's time for the oath, camera and action.

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[1] Associate Press, "Texas Court Holds First US Jury Trial Via Videoconferencing," (May 23, 2020) available at <https://fortune.com/2020/05/23/texas-court-jury-trial-videoconferencing/>.

[2] Id.

[3] United States Courts, "Judiciary Issues Report on Restarting Jury Trials," (June 10, 2020) available at <https://www.uscourts.gov/news/2020/06/10/judiciary-issues-report-restarting-jury-trials>; report available at https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf.

[4] See, e.g., Paula Hinton and Tom Melsheimer, "The Remote Jury Trial is a Bad Idea," Law360 (June 9, 2020) available at <https://www.law360.com/articles/1279805/the-remote-jury-trial-is-a-bad-idea>.

[5] See [United States v. Williams](#), 641 F.3d 758, 764–65 (6th Cir. 2011) (overturning district court sentencing hearing because conducted over video conference noting, "[b]eing physically present in the same room with another has certain intangible and difficult to articulate effects that are wholly absent when communicating by video conference").

[6] Aldert Vrij & Jeannine Turgeon, "Evaluating Credibility of Witnesses-Are We Instructing Jurors on Invalid Factors?" 11 J. Tort L. 231, 232–33 (2018).

[7] Id.; see also Sara Landstrom et al., "Witnesses Appearing Live Versus on Video: Effects on Observers' Perception, Veracity Assessments and Memory," 19 APPLIED COGNITIVE PSYCHOLOGY 913, 914 (2005), abstract available at <https://onlinelibrary.wiley.com/doi/abs/10.1002/acp.1131> ("Moreover, observers were not better than chance in assessing veracity, regardless of presentation mode.").

[8] Ryan Davis, "After 5 Weeks, Zoom Patent Trial in Cisco Case Nears End," Law360 (June 11, 2020) available at <https://www.law360.com/articles/1281604/after-5-weeks-zoom-patent-trial-in-cisco-case-nears-end>.

[9] See, e.g., <https://www.mass.gov/guides/guide-on-the-use-of-video-conferencing-for-oral-argument-sessions>.

[10] Litigation Insights, "How Do I Present My Witness by Video Conference (aka: Skype)?," (Oct. 21, 2016) available at <https://www.litigationinsights.com/present-witness-courtroom-video-conference-skype/>.