

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

PAUL R. WALLACE
JUDGE

NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0660

[REDACTED], 2020

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

RE: [REDACTED]
[REDACTED]

Dear Counsel:

The five-day bench trial in this matter is scheduled for [REDACTED], 2020, and will be conducted as a web-based video proceeding using CourtScribes and AgileLaw. Admission to the proceeding will occur via a virtual lobby moderated by CourtScribes. CourtScribes will admit all participants and attendees to the trial courtroom and has made arrangements for private virtual gathering/conference rooms for each side and the Court's staff.

The trial is an open proceeding. But due to the logistics required for admitting one to a virtual courtroom, only authenticated users—those who are involved in the trial or who have received permission through Chambers prior to trial—will be able to participate, attend, or observe. If the parties experience any difficulty in this regard,

please feel free to work with CourtScribes or Chambers staff to resolve it.

All attendees are asked to join the proceeding no later than ten minutes prior to the trial's scheduled start time on each of the five scheduled days. Trial will commence each day at 9:15 a.m. Trial days will conclude at approximately 4:30 p.m. The Court intends to take regularly scheduled 10-15 minute breaks during the trial (we'll attempt to do so about every 75-90 minutes) as well as a one-hour lunch recess.

The trial time allotted is to be split evenly between [REDACTED] and [REDACTED]. As instructed during our pre-trial conferences, counsel shall keep track of time; the Court will not be keeping time for the parties.

All attendees shall mute their lines upon joining the proceeding. During the trial, only (i) witnesses on the stand and (ii) counsel examining the witnesses, presenting argument, or otherwise addressing the Court should connect using video. Others must choose the "Audio Only" option or simply check the "Stop Video" function. Counsel will need to remember to unmute their lines when it is their turn to speak. In the event that counsel believes it is necessary to address the Court during another speaker's presentation (for example, to assert an objection or because of a confidentiality concern), counsel shall politely unmute themselves and state either "objection" or "excuse me." While counsel and attendees may use the private chat function at their discretion, the "Everyone" chat function shall not be used.

No participant or attendee may record the trial in any way.

Best practices for virtual proceedings are recommended: sit in a quiet place with reliable connectivity and test your equipment first. For those appearing by video, court attire is expected. Please remember, and remind your witnesses, that this is indeed a trial; all manner of courtroom decorum should be observed and all manner of regular trial courtroom conduct should be engaged.

For the attorneys—please conduct your arguments and examinations just as if you were in any other trial being conducted in a physical courtroom. That means trial decorum, focused questions, and, importantly, targeted and only necessary objections. A helpful suggestion is that you consider conducting your arguments and examinations from a standing position, as if in a courtroom, to maintain your

courtroom-like focus and orientation. As for witnesses—they should conduct themselves and observe the rules they would while on the stand and otherwise present in a physical courtroom. And for observers—the same respectful, quiet, and non-distracting behavior is expected in the virtual gallery as would be expected were they present just feet from the bench and bar of a physical courtroom.

Finally, I intend to engage in a brief colloquy with each witness before receiving her or his testimony. The colloquy will confirm that each is able to see and hear the other trial participants, that each appreciates he or she is giving trial testimony under the same oath used in any other courtroom, and that he or she does not have access to any computer, tablet, or other device during her or his testimony beyond the device the witness is using to connect to the CourtScribes trial platform.

There will be some further instruction on these matters when we commence trial on Monday. But counsel can be of assistance to the Court in reviewing these protocols and expectations beforehand, both among themselves and with any expected participants or attendees.

Thank you for your diligence and professionalism in bringing the case to this point. I look forward to presiding over the trial next week.

Very truly yours,

/s/ Paul R. Wallace

cc: All Counsel via File and Serve

June 09, 2020

ARTICLES

Preparing Your Witness to Testify at a Virtual Trial

Preparing a witness to testify over a remote platform requires that attorneys bring to bear even more of the same skills and resources that are required for effective witness preparation in a live setting.

By Ian M. Dumain


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Taking the witness stand and testifying at a trial can be one of the most stressful experiences in a person's life. This has been true for as long as there have been trials. Today, though, attorneys are for the first time confronting a new challenge in witness preparation: preparing witnesses to testify over remote video platforms. As set out below, preparing a witness to testify over a remote platform requires that attorneys bring to bear even more of the same skills and resources that are required for effective witness preparation in a live setting. And, fortunately, the limitations of remote platforms may actually help to short-circuit some witnesses' worst impulses.

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Leave Enough Time to Ensure the Witness Is Prepared for the Entire Experience

The most important controllable determinant of a witness's performance at a trial is the amount of time the witness and his or her attorney spend preparing. While there is no hard-and-fast rule, the amount of time you spend preparing a witness should be a function of the witness's role in the case and the anticipated length of his or her testimony. You should err on the side of caution.

To prepare your witness—and ease his or her mind to the greatest extent possible—you must do everything reasonably practicable to ensure that the witness feels prepared for the entire experience of testifying. What does that mean? The witness should, of course, be prepared on the substance of his or her own testimony. But the witness should also understand what the case is about, the parties' claims and defenses, the parties' themes, and how the witness's testimony fits into the broader picture. In addition, the witness should be prepared on the mechanics of testifying and handling documents.

Understand that Preparation Is About Listening Too

In preparing a witness to provide his or her discrete testimony, you should keep the following in mind: You do not know everything the witness knows, and the witness does not know everything you know. To avoid surprises during your witness's testimony, you must at the outset of your preparation ensure that the witness's version of the facts matches your understanding of the facts. If it doesn't—and it's an unusual witness who has nothing new to say about the underlying events—then you have to integrate the new information into your view of the case. Witness preparation is as much an exercise in listening as it is in speaking.

After you're confident that you know what the witness knows and the witness understands his or her substantive role in the case, you should work to ensure the witness provides the best version of that testimony. The *Restatement (Third) of the Law Governing Lawyers* provides that witness preparation may include, among other things, revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light, discussing the applicability of law to the events in issue, reviewing the factual context into which the witness's observations or opinions will fit, reviewing documents or other physical evidence that may be introduced, and discussing probable lines of cross-examination that the witness should be prepared to meet. Importantly, a "lawyer may suggest [a] choice of words that might be employed to make the witness's meaning clear."

Be Aware that Remote Platforms Can Aid Careful, Deliberate Testifying

In addition to working with the witness on the substance of his or her testimony, you must prepare the witness for the strange experience of giving testimony. As Daniel I. Small observed in his excellent guide *Preparing Witnesses* (ABA 1998), giving testimony is not a conversation. Yet, many inexperienced witnesses will treat testifying as if it were precisely that.

How is testifying different than a conversation? In a conversation, participants treat questions as prompts for a monologue. On the stand, a witness must treat a question as a question to be answered precisely on its own terms. In a conversation, participants avoid awkward silences, struggling to fill the space even if a topic is exhausted. On the stand, a witness should stop speaking as soon as he or she has answered the precise question posed. In a conversation, participants anticipate what their counterpart will say next, frequently interjecting while their counterpart is in mid-thought. On the stand, a witness must listen carefully to what the interrogator is asking and then respond carefully to the question that has been posed.

Fortunately, the limitations of remote platforms help to minimize some of the most dangerous elements of conversation from slipping into a witness's testimony. As anyone who has used a remote platform knows, simultaneous speaking leads to an unintelligible cacophony. For this reason, participants are reminded at each instance of simultaneous speaking that they should be diligent in waiting to speak until other participants are finished speaking. As a result, use of the platform can help a witness keep in mind that he or she must listen to the entire question before providing an answer.

Practice and Role-Play Using the Same Technology That Will Be Used at Trial

Honing the ability to provide effective testimony, like any skill, takes time and practice. After explaining to your witness all the ways that giving testimony differs from having a conversation, you should role-play with the witness so that he or she has practice in listening to the questions and answering them precisely. If circumstances allow, consider having a colleague perform a mock examination, which will more closely approximate the dynamic of being interrogated by an unfamiliar lawyer.

And just as marathoners observe the admonition "nothing new on race day"—meaning that they do not wear new shoes or eat new foods when they race—lawyers should ensure that when it's time to testify, the witness is totally familiar with his or her equipment, the trial technology, and his or her environment. You should prepare your witness using the same technology that will be used when your witness testifies. If the testimony will take place on a remote platform, then you should conduct your mock examination on the same remote platform—not by telephone. If documents will be handled electronically using particular software, then you should handle documents during your preparation using the same software.

Pay Attention to the Witness's Appearance and Limit Potential Distractions

Finally, as part "practicing in game conditions," you should make sure that the physical space where your witness will testify makes a good impression and does not distract attention from his or her testimony. How do you do this? Your witness should testify in a clean, uncluttered place that is free of extraneous noise and distraction. While some commentators have noted that appearing in front of bookshelves can help create a positive impression, you should consider whether there are any titles on the shelf that would

cause distraction or create a bad impression. Finally, the witness should come dressed for the occasion, as if he or she were appearing in the courthouse and not the home office.

Conclusion

Even if you follow all of the steps outlined above, you may not be able to alleviate all of your witness's stress. But you will increase the likelihood that, when upon leaving the stand, the witness will feel like he or she was up to the challenge of testifying because the preparation was thorough and even more challenging than actually testifying.

Ian Dumain is a litigation partner at Boies Schiller Flexner LLP.

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