

Ready for Your Close-up? Five Tips for Using Videoconferencing Technology at Trial

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From a technological standpoint, it is now relatively simple to present live video and audio testimony during a court proceeding of a witness located anywhere in the world. There are many advantages to presenting testimony in this fashion, but care must be taken to address potential appellate issues and preserve a clean record.

Advantages to presenting live testimony remotely. Presenting live witnesses remotely can reduce costs and simplify issues of witness availability. Rather than flying witness into town, and having them sit around waiting to be called, the parties can simply connect the witness when it is time to testify. Remote presentation can help facilitate testimony when there are medical or other issues that preclude travel. Two-way videoconferencing allows the fact finder to observe witness demeanor and evaluate credibility in much the same manner as traditional live testimony, and it allows for the protections of oath and cross examination. In addition, live remote testimony is more flexible than other methods of preserving testimony for trial, and questioning can be tailored to the issues as they develop during trial. Moreover, live testimony allows for inquiry by the judge or, where appropriate, the jury. **The following are five tips to more effectively utilize remote witness testimony at trial:**

1. *Research any constitutional, statutory, common law, and procedural requirements and take measures to address them*

The remote presentation of trial testimony may implicate the substantive rights of the non-movant including, in criminal cases, the Constitutional right of confrontation. For this reason, it is important to take into account applicable statutes and/or rules related to such testimony – including rules relating to filing deadlines and other requirements – together with relevant case law. Moreover, court permission is likely required. Federal Rule of Civil Procedure 43 provides generally that “the court

may permit testimony in open court by contemporaneous transmission from a different location,” but requires a “showing of good cause in compelling circumstances and with appropriate safeguards.” In one case under this rule, a court allowed remote testimony of Honduran plaintiffs but did not allow the same accommodation to domestic plaintiffs residing in nearby states. *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 480-81 (D. Md. 2010). In another, the court permitted remote participation on a Oregon witness in a Washington, DC proceeding. *Scott Timber, Inc. v. United States*, 93 Fed. Cl. 498, 500-01 (2010). Even if your jurisdiction does not require court approval, it is advisable to obtain it, and to do so long before trial.

2. Confer in advance with opposing counsel and obtain necessary court permission

As in all use of trial technology, it is important to make sure that to share your intentions with opposing counsel and, if possible, obtain their consent in advance. The earlier you know whether you can utilize this technology, the more time you have to prepare accordingly. Early agreement on whether and how a party may make use of such technology can resolve such issues, both in the trial court and for purposes of appeal. See *Buie v. Rivard*, No. 2:14-CV-11100, 2016 WL 2866401 (E.D. Mich. 2016) (finding waiver where defendant, through counsel, acquiesced to the two-way videoconferencing procedure). Further, in the absence of agreement, pretrial motion practice may allow the court to fashion a remedy to address legitimate objections.

3. Test the technology and have a plan for any witness exhibits

In advance of trial, make sure that you run tests to confirm that the technology works appropriately. Make sure that the witness’s equipment is functioning. If you are able, make arrangements with court staff to test the equipment in the courtroom. Consult a technician to make sure there is adequate bandwidth for live-streaming and that the display is bright enough to be easily seen by the judge and jury. If you plan to present exhibits through the witness, it is important to have a system to show documents to the witness. This could be as simple and preparing a binder of exhibits for the witness or having a videoconferencing system capable of transmitting the document electronically to the witness. Do not forget to address these issues with opposing counsel and the court in advance.

4. Do not lose sight of the appellate record

While it is important to make sure the remote testimony at trial is effective, it is equally important to maintain a clean record for appeal. If your client has any objection to limitations placed upon the remote testimony, make sure that the objection is specific and clear on the record. Also make sure that the out-of-court witness understands the purpose of the proceeding and is adequately prepared. Don’t forget to present the witness’s exhibits to the court for admission and to confirm that the testimony is audible to the court reporter. In many circumstances, it makes sense to wire the remote audio feed into the courtroom PA system. On occasion, there may be a short communication

lag, so it is important to take your time with questioning and instruct the witness to wait for the question to finish before beginning to answer. And of course, if you oppose use of remote testimony, be sure to make a record of the basis of your objection.

5. *Have a backup plan (and a backup plan for your backup plan)*

Hope for the best, but plan for the worst. Check and recheck the equipment and connection. Confirm and reconfirm the witness availability. And, to the extent you can, have a backup plan for the things that might go wrong. In case your laptop or projector fails, have second ones available. Bring an alternative data connection in case the courtroom internet fails. Most importantly, let the witness know how important being online when it is time to testify. As a last resort for essential witnesses, have an emergency plan in place to present the witness live if necessary. Courts are often unsympathetic to technical difficulties that interrupt or delay trial.

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