



Technology for Trial Attorneys During the Advent of Hybrid and Virtual Trials

By Victor A. Afanador

Lawyers litigate cases for an extensive period of time prior to entering a courtroom to present their evidence before an in-person judge and jury. The current COVID world has taught us that not everything can be in person and trial attorneys must now focus on ways to use technology to succeed in their presentations. Most courthouses, like the United States District Court for the District of New Jersey, highlight their capability to support courtroom technology.¹ Gone are the days, however, of using a lowly ELMO document projector that was introduced in 1988 to publish materials to the jury.² Technology and this pandemic have transformed our workplaces and forced the most conservative of industries to adapt in order to continue business.³



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As a result of the pandemic and the Coronavirus Aid Relief and Economic Security Act, previously underused video-conversation platforms such as Zoom, FaceTime, Skype, WebEx, and Microsoft Teams have now become office mainstays in our legal industry,⁴ and they have essentially replaced all in-person meetings and legal proceedings.⁵ Standing orders have been issued to outline the parameters of how proceedings can be conducted in these formats.⁶ The COVID-19 Pandemic has created a challenge in our industry with how to operate jury trials. We are now forced to confront our fears and adopt the technology to adapt the way we present our cases before a jury.

Many of our Superior Court of New Jersey Vicinages have commenced training on virtual trials as evidenced by several Continuing Legal Education classes being offered within the last year to prepare trial practitioners for the commencement of virtual jury trials. The training was a foreshadowing of things to come. On January 7, 2021, in a notice to the New Jersey State Bar Association, our Chief Justice of the

New Jersey Supreme Court, Stuart Rabner, issued an order commencing virtual jury trials by Feb. 1, 2021, in five vicinages with consent of all parties.⁷ On April 5, 2021, that order was extended to all counties in New Jersey.⁸ The Court, with the assistance of the Administrative Office of the Courts, has even issued a memo to the Assignment Judges and Civil Presiding Judges outlining best practices on electronic evidence in virtual civil jury trials.⁹

If there was ever a time to focus on the technology behind electronic discovery and electronic evidentiary presentations, it is now. The memo circulated to the bar by Glen A. Grant, Acting Administrative Officer of the New Jersey Courts, details the electronic formats that should be used in the presentation of evidence for documents, images, video and audio recordings.¹⁰ Thus, now is the time to grapple with our fears as trial attorneys and try something new in presenting your case to a virtual jury since everyone will be learning the new system. The Judiciary itself is aware that it makes little sense to start trials if the trial attorneys and litigants are not familiar with the new virtual or hybrid virtual system. The key is familiarity and a comfort level with the new jury trial system for the practitioners and judiciary.

The Virtual Tech Available

Depending on your budget, you can enlist the services of many technologically advanced litigation/trial support and court reporting companies to facilitate your presentation. The virtual deposition should be your first step in outlining your needs for trial preparation. Some of these companies can assist you in evaluating what new presentation avenues are available for you beyond the ELMO. Mike Bruzgis, Director of Business Development at TransPerfect, a litigation support company, stated in an interview, “We did not have to change a lot from how we were already set up.”¹¹ Prior to the pan-

dem, TransPerfect was already doing virtual depositions and providing document review support, and kept staffing contract lawyers to help reviewing documents through document review platforms.¹² Thus, “[w]hen COVID hit last year we converted reviews to an entirely virtual environment.”¹³

TransPerfect’s main concern was setting up everyone to work remotely and still provide their clients with expected security protections.¹⁴ Their professionals and IT department set up ways to ensure there are no security breaches of client information.¹⁵ They even created their own live time document sharing platform called TransCend that provides an attorney in a video deposition with “more robust control” over the exchange of exhibits with the witness in a virtual setting.¹⁶ This is less cumbersome than the screen sharing function on other video platforms, and it allows a witness to flip through the documents once they have been released just like in a live deposition or trial setting.¹⁷ This may be the type of technology that can assist the virtual jury trial setting once we are up and running.

Companies like TransPerfect have been assisting in Electronically Stored Information (ESI) discovery and deposition support services during the pandemic. In the past year, they have educated even more lawyers on practicing law remotely.¹⁸

Virtual and Socially Distant Courtrooms

The advent of the hybrid or virtual jury trial is yet another journey many of us have just started to embark upon as a result of COVID-19. Paul Null, II, partner of Precise, another litigation support services company, has found a way during the pandemic to help state Courts develop their virtual and socially distant courtrooms.¹⁹ In a conversation with Null, I learned that there are various ways to set up a courtroom that respects

social distance requirements, yet facilitate an in-person proceeding with a live jury.²⁰ However, this all depends on space and your courthouse real estate.

Precise has conducted a wide range of proceedings, including fully remote trials and arbitrations, socially distanced in-person jury trials, and hybrid remote courtrooms where the judge may be physically on the bench, but the witnesses and experts are remote.²¹ As expected, the technology is not free, with some permanent arrangements ranging from \$9,000–\$13,000 per courtroom.²²

Attorney Preparation

Despite these projects, many of us are wondering when the full online jury trials will really start and how do we, as trial lawyers, prepare for and present them. There are outlets available to foster dialogue on the subject, such as the Online Courtroom project.²³ This is a non-profit task force consisting of litigation support companies, trial consultants, and trial research individuals.²⁴ During the last year they have delivered free materials and presentations on how to navigate through a virtual trial process.²⁵ In fact, last November they hosted a free online summit.²⁶ Even some Vicinages, like Passaic County and its local Bar Association, have been on the forefront of the hybrid and virtual jury trial for over a year by educating their local trial attorneys on the available technology.²⁷ They have even prepared mock direct and cross-examination to take the sting out of a remote formal setting and provide confidence in practitioners. The result is that the technology was embraced by the judiciary and the bar.²⁸

The reality of the virtual jury trial is here, but we must recognize its limitations in keeping a jury’s attention and remaining persuasive in the process because “Zoom fatigue” is a real thing.²⁹ Trial attorneys need to be prepared and trained to present over video so as to avoid juries going into the...ZZZZZZZZ. ☹️

Endnotes

1. <https://www.njd.uscourts.gov/courtroom-technology>
2. elmousa.com/about/
3. forbes.com/sites/williamarruda/2020/05/07/6-ways-covid-19-will-change-the-workplace-forever
4. *Id.*
5. The United States District Court for the District of New Jersey Third Extension of Amended Standing Order 2020-06 Honorable Chief Judge Freda L. Wolfson found at https://www.njd.uscourts.gov/sites/njd/files/3d_Ext_Amended_SO_20-06%28CARES%20Act%29_Stamped.pdf; *see also* H.R. 748, CARES Act, Public Law 116-136
6. *Id.*
7. njcourts.gov/notices/2021/n210107a.pdf
8. *Id.*
9. *Id.*
10. *Id.*
11. Telephone interview with Mike Bruzgis, Director, Business Development Transperfect (January 12, 2021)
12. *Id.*
13. Telephone interview with Mike Bruzgis, Transperfect (January 12, 2021)
14. *Id.*
15. WebEx interview with Dan Meyers, President, Consulting & Information Governance for Transperfect (January 20, 2021).
16. *Id.*
17. *Id.*
18. Telephone interview with Mike Bruzgis, Transperfect (January 12, 2021).
19. Temporary install of complimentary projection screens to assist the socially distanced jury in viewing all exhibits, documents, photos, and video. Courtesy of Precise, Inc. (Eric Matlock)
20. Semi-permanent install in the Luzerne County Courthouse to facilitate socially distanced, in-person jury trial. Courtesy of Precise, Inc. (Paul Null)
21. *Id.*
22. *Id.*
23. onlinecourtroom.org/summit.
24. *Id.*
25. *Id.*
26. onlinecourtroom.org/summit
27. Telephone interview with the Honorable Sohail Mohammed, J.S.C., Presiding Judge of the Criminal Division Passaic County Vicinage (February 10, 2021); *See also* Passaic County Bar Association website of upcoming events found at passaicbar.org/Pages/Upcoming_Events/HYBRID%20JURY%20AND%20NON-JURY%20TRIALS%20AND%20VIRTUAL%20COURT%20PROCEEDINGS%2010-13-20%20FLYER.pdf.
28. Telephone interview with the Honorable Sohail Mohammed, J.S.C., Presiding Judge of the Criminal Division Passaic County Vicinage (February 10, 2021).
29. nationalgeographic.com/science/2020/04/coronavirus-zoom-fatigue-is-taxing-the-brain-here-is-why-that-happens.



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