

Tips For Effective Witness Cross-Examination In Remote Trials

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Writing for Law360's "Expert Analysis" column, Joy Odom, Lauren Zimmerman and Megan Larkin examine how attorneys can deliver memorable and effective cross-examinations during virtual trials.

(Excerpts from this piece were originally published in Law360)

As COVID-19 safety concerns persist, many courts have transitioned to remote proceedings to keep their dockets moving. And beyond just virtual status conferences and motion hearings, multiple courts have held, or are in the middle of, full remote bench trials in civil cases.

Remote trials pose a special challenge for lawyers who must cross-examine witnesses virtually. The courtroom contributes many elements — atmosphere, physical proximity, live confrontation and spectators, to name a few — which are diluted or absent altogether in remote proceedings. This altered landscape affects witnesses and lawyers alike.

Courtroom is theater, and a good cross-examination can be spellbinding. But the setting of a Zoom call can stifle much of what makes cross-examination exciting. The savvy cross-examiner must adjust to make the same truth-inducing impact on a witness during a virtual cross-examination as in a live setting.

Set yourself up for success — literally.

In an in-person courtroom setting, you would be conducting your cross-examination from the podium, facing the judge and the witness, with your team behind you. The setup is conducive to eye contact in that you can look easily from your outline to your witness and the judge. In a Zoom trial, you get to decide how to set up your "courtroom." Do so in a way that allows you to use the methods that work best for you.

Stand up if possible. Trial lawyers generally agree it is easier to perform better when standing up. And it's not just folklore, it's science.

Standing up improves concentration and gives you a wider vocal range. Movement also releases endorphins, which boost your alertness and energy. All these truths hold in the Zoom context.

If you can, set up a standing workstation and a sitting workstation, just as you would have in court. When listening to your adversary's exam, sit while you listen, take notes and interpose your objections. When it is your turn to examine the witness, move to your standing station. While it may initially feel awkward to stand with the up-close-and-personal camera angle, you will soon get used to it.

Standing up will help you get from placid conversation mode to dynamic cross-examination mode. Many of us are used to having friendly, seated discussions with colleagues over Zoom, not conducting adversarial witness exams. This can hamper your ability to get into the right mindset. And since we are used to sitting during depositions, it is easy to slip into a questioning style more suited to a deposition than a cross-examination if you situate yourself as you would in a deposition.

If you stand, you will feel more in charge of your space — and your exam.

Adapt your presentation methods.

On cross-examination, you likely rely on your physical presence, volume and body language to facilitate your control of witnesses — and to keep judicial interest. You need not sacrifice these tools altogether on the altar of Zoom. Instead, find videoconference versions that feel natural to you.

Instead of getting louder — which can play as petulant over video — use appropriate voice modulation to wake up listeners fatigued from hours of engagement in remote proceedings. Good voice modulation also conveys your confidence to your witness, which will make him more likely to follow where you lead.

But bear in mind that dramatics play even less well over videoconference than they do in a courtroom. Without the interpersonal connection and dynamics of a courtroom, an exaggerated high pitch or sharp tone can fall flat.

And while you may not be able to pace or walk away from your podium, as you may be used to, you can still use physical proximity to the camera for emphasis. Whether you have chosen to sit or stand, you can choose to lean toward the camera to make your presence more substantial — or lean back when the witness gives an answer no one should believe. Don't overdo it — if you get too close, it will look silly rather than commanding.

Step up your outline game.

Successful cross-examiners know that the key to a strong exam is a tight outline. That is never more essential than when the cross-examination is through videoconference.

Just as you may feel more relaxed over video, your witness likely will too. Prepare for game time by spending plenty of time with your outline in advance of the exam. You will need a strong command over the material so that you can pounce on witnesses' slip-ups and tightly control witnesses who ramble.

You will also want mastery over your outline so that you can look more at the witness on camera and less at the page. Part of the energy of a good cross-exam comes from the physical chemistry between the examiner and the witness.

Over video, without physical presence and the many atmospheric aids a courtroom lends, your cross can become antiseptic. You can reclaim some of the crackle in the air by making better eye contact on video. That is easiest done when you do not have to depend heavily on your notes.

Listen up.

You may be used to gauging multiple elements of a witness's performance during your exam. It's not just the words they are saying that matter; it's how the words are said. Facial expressions, body language and voice matter. These often-subtle cues to a witness's state of mind can help inform split-second judgments about whether to pursue a line of questioning, take a risk or move on.

Videoconferencing gives you some ability to assess these aspects of a witness's testimony, but it's not perfect. Conventional wisdom tells us that facial expressions are the least revelatory about a witness's inner state. Body language is a little more telling. And the voice betrays most of all.

Luckily, the voice is what you can assess best over Zoom. You may not be able to tell if the witness is nervously working his hands, but you can tell if he hesitates before he answers or if his voice becomes more high-pitched.

Prepare yourself for a different sensory experience over videoconference, and to zero in on the inputs you do get, such as the witness's voice.

Put on your poker face.

While the immersive courtroom experience may be absent over video, there are some parts that are amplified. One of these parts is the focus on you.

We all try to keep a straight face and avoid visibly reacting to what we hear in court. But even so, live proceedings give some degree of wiggle room. The presence of other participants and visual stimuli affords you cover to arch an eyebrow, put your head in your hand for a moment while you write, or perhaps even stifle a smirk. In a courtroom, you are just one of many things to look at; this gives you some flexibility with your facial expressions and posture.

Videoconferencing gives no quarter. Because remote proceedings can feel passionless and muffled, participants search harder for stimuli to break up the monotony. People watching takes on a whole new meaning. That means that your sneaky smirk no longer goes unnoticed; rather, when you are perpetually front and center, you become fodder for comment among your adversaries, the court and your witness.

You need not look vacant — indeed, some expressiveness on video conveys energy and alertness. But do monitor what you look like on screen and adjust accordingly. You may even find it helpful to task a team member to monitor you.

In conclusion, cross-examination over videoconference is certainly a challenge. But with a little extra planning and attention to the wrinkles a remote proceeding introduces, you can cross-examine your witness effectively and secure your key admissions.

Read the [full piece in Law360](#).

Attorney

- Lauren Zimmerman