

Professional Perspective

# Guidelines for Handling Exhibits in a Socially Distant Courtroom

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# Guidelines for Handling Exhibits in a Socially Distant Courtroom

Contributed by [Daniel B. McLane](#) and [Michael P. Pest](#), Eckert Seamans

Confronted with the prospect of an indefinite delay as Covid-19 continues to frustrate the progress of trials in the courts, we recently opted to proceed with a Zoom bench trial in the U.S. District Court for the Western District of Pennsylvania. This article offers guidance on navigating perhaps the most difficult aspect of a virtual trial—the remote use and handling of trial exhibits.

## Disseminating Exhibits Before Trial

The advance dissemination of exhibits is one procedural hurdle that counsel must clear before trying a case remotely. In a typical trial, the exhibits are present and immediately accessible by the attorneys, witnesses, judge and jury, all of whom are located in the same courtroom. A remote trial, however, presents a number of practical difficulties. For instance, the judge may, as he did in our case, direct the parties to provide to all witnesses in advance only the exhibits that they reasonably anticipate will be used during the trial. While this does not create a problem for witnesses that counsel intends to call on direct, such a directive might raise concerns with respect to the cross-examination of an adversary's witnesses. An attorney in this situation must face the issue of how to have all exhibits readily available to an opponent's witnesses without providing the opposing party with advance notice of potential avenues for cross examination.

## Presenting Exhibits During Trial

The manner in which exhibits are actually presented is yet another potential obstacle for counsel in a remote trial. Depending on the social distancing guidelines in effect in a particular area, one party's counsel and witnesses could be together in the same conference room, while the other party's counsel examines his or her witness by videoconference from across the country. This can lead to a disconnect between counsel and the court that could seriously impact the effective presentation of a party's case. This problem is compounded if the court does not utilize a platform that allows the parties to share a common computer screen to display exhibits that all participants can view simultaneously.

## Moving Exhibits Into the Record

Finally, exhibits that are moved into the record remotely still must find their way into the court's actual record for purposes of an appeal. The judge, for instance, might take notes on the hard copy exhibits provided to the court in binders in advance of trial, so those copies would not be entered into the official record. In that case, it is counsel's responsibility to ensure that remote exhibits are properly entered into the record at the conclusion of trial.

## How to Prepare in Advance

In order to avoid the countless logistical issues that can arise from the use of exhibits in a virtual trial, an attorney preparing for such a trial should consider addressing the following issues as far in advance of the remote trial as practicable:

- Propose a pre-trial order directing that all exhibits must be electronically uploaded and accessible for all witnesses and counsel several days in advance of the trial.
- The pre-trial order should also require all counsel to certify to the court that a pre-trial test was run to confirm the accessibility of the exhibits by all party witnesses and counsel during the trial.
- If the parties cannot reach an agreement on the use of electronic exhibits and opt to proceed with traditional paper copies in exhibit binders, an effort should be made to reach an agreement on the cost-sharing or cost-shifting of copying the exhibits and binders to be mailed in advance to each witness.
- Similarly, if a non-party is to testify remotely, the pre-trial order should require the parties to reach an agreement on providing copies of anticipated exhibits to that witness.

- Counsel should confirm with the court in advance of trial whether the platform utilized by the court allows for exhibits, pleadings and transcripts to be uploaded and viewed by all participants during the trial. The Zoom.gov platform utilized in our trial, for example, did not allow for external uploads, which necessitated the use of physical exhibit binders and extra laptop computers for the witnesses to view the exhibits.
- In order to ensure that exhibits moved into the record remotely make their way into the court's record, the parties should agree in a pre-trial order that the party who moves an exhibit into the record shall have the responsibility of filing that exhibit with the court, particularly any exhibits that have been highlighted or otherwise marked by a witness, at the end of the trial. The pre-trial order should also address the manner of filing the exhibits (i.e., hard copy vs. electronic) and any confidentiality issues.