

How to Stop Worrying About Zoom Trials and Learn to Love Litigating Online

“It benefits a lawyer to be more conversational than the stemwinder, old-style fire and brimstone type of oratory because you’re literally in the jurors’ face,” Alameda County Superior Judge Brad Seligman said during the second day of an online summit called “COVID, the Court, and the Future of the Jury Trial.”

By **Ross Todd** | December 01, 2020 at 07:30 AM



(Photo Illustration: Jason Doiy/ALM)

“Talent translates.”

That was the opening message from **Judge Lisa Rau** during the second day of an online summit put on last month by The Online Courtroom Project and the National Institute for Trial Advocacy called “COVID, the Court, and the Future of the Jury Trial.”

Just as actors must adapt their techniques to translate a role from the stage to the big screen, so too must lawyers and judges adapt from the courtroom to life inside the Zoom tile.

“We have no alternative unless we want justice to get infected by the virus as well,” said Rau, who moderated a panel of veterans of online trials: **Alameda County Superior Judge Brad Seligman** who transitioned an asbestos trial [from in-person to remote](#) after a juror came down with a fever earlier this year, **David Ongaro**, the managing partner of **Ongaro PC** in San Francisco, who tried [a separate 40-day mesothelioma trial](#) via Zoom in Alameda County, and **Administrative Judge Jennifer Bailey** of the 11th Judicial Circuit of Florida in Miami-Dade County, whose pioneering work on hybrid trials involving a mix of virtual jury selection and in-person proceedings we’ve [highlighted previously](#) in our “Holding Court” series.

All panel members agreed the virtual setting requires more preparation and test runs because of all the new technology involved and the potential for unanticipated problems. But they also agreed that jurors have by-and-large behaved every bit as well online as they have within the courthouse walls. Following testimony and evidence online, it turns out, is a lot like following evidence at the courthouse, without the hassle of having to find and pay for parking.

Bailey said the key to keeping things moving online is “logistics, logistics, logistics.” Picking up on Rau’s stage-to-cinema analogy, she said that lawyers

and judges need to think of ways to “take advantage of the online setting” and think of what they’re doing as “taking a stage play and making a movie out of it.”

“Lawyers are fabulous control freaks,” Bailey said. “Now’s the time to take that to your advantage,” she said, encouraging practitioners to ask judges what the contingency plans are in cases such as where lawyers or jurors experience connection issues. She said the online world doesn’t lend itself to ad hoc solutions, so it’s best to break down every step in trial beforehand to figure out what the procedures and solutions are going to be in order to minimize the threat of an unexpected derailment.

Ongaro said he and his trial team formed a bubble so they could communicate about what was going on each day and make changes on the fly. They worked together spaced out across two conference rooms with their client representative present. Although Ongaro was initially skeptical of online jury trials, he said it was mainly the fear of the unknown that he was concerned about. “You learn as you go. Well, that’s not a very comfortable position for a trial lawyer to be in or to put her client in,” he said.

The process meant he had to take more time with witnesses to prepare and to think through things that previously didn’t require attention. “Camera angles are important. Lighting is important. Audio is important,” Ongaro said. He also said that cross-examination required more forethought. The plaintiffs in his case emailed their cross-examination documents to witnesses, which meant the witness had to find the documents in their email and stare at a second computer screen during questioning. He and his team mailed documents to adverse witnesses with instructions that they remain sealed until the court ordered them to open them up. “That way they had a binder and they could follow along with our cross examination documents a lot easier and a lot cleaner,” he said. “I think for cross-examination for impeachment, I think it’s a much more challenging environment doing it via Zoom or remotely than it is in the courtroom.”

“From a trial attorney’s perspective, that’s the best part of the job where you get to get up and get after a witness,” Ongaro said, adding that it’s “much harder to do via Zoom.”

Seligman echoed the call for extra rehearsal time with witnesses. “There’s nothing more embarrassing for a lawyer than to be standing there with no

connection with no way to send a document and with the jurors with dead time on their hands,” he said. He also advised the audience that Zoom is a “cool medium not a hot medium.”

“It benefits a lawyer to be more conversational than the stemwinder, old-style fire-and-brimstone type of oratory because you’re literally in the juror’s face,” he said.

Seligman said that quality—having a head-on view of all participants—actually made it easier for him to observe the demeanor of witnesses. Normally, in the courtroom, they’re “nextdoor” to him sitting in profile, he said. And although he quipped his court is operating with “the very best technology of the 1990s,” he said that he and his colleagues are usually happy to implement technological upgrades that the parties bring to the proceedings themselves.

“The parties by agreement can enhance the technological experience,” he said.