

BY MICHAEL ADLER

# The Wi-Fi Witness

**COVID-19 normalized using live videoconferencing in trials,  
mostly in good ways.**

## **IN MAY 2020, THE ILLINOIS SUPREME COURT ENDORSED VIDEOCONFERENCING**

technology in civil trials (see Illinois Supreme Court Rules (ISCR) 45 and 241).<sup>1</sup> We recently implemented this new technology in a 2021 medical malpractice case and found that it is more cost effective, makes witness scheduling and trial preparation easier, and is more effective than prerecorded evidence depositions. Whether COVID-19 is still around or long gone, live remote witnesses via videoconferencing is a great tool for any Illinois trial attorney.

## **The legal basis**

Two years into the pandemic, hesitancy to allow remote conferencing systems has disappeared. A stipulation from the parties should be sufficient for the trial judge to permit witnesses by remote videoconferencing. In our 2021 trial, both sides had multiple out-of-state witnesses and agreed to remote live witnesses. The judge had no qualms either.

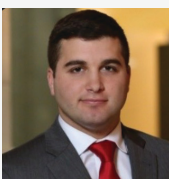
Should opposing counsel object or the judge request authority, there are a few things you can cite. Illinois Rule of Evidence 611 covers the “mode and order of interrogation and presentation.”<sup>2</sup> Rule 611(a) states:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.<sup>3</sup>

1. Illinois Supreme Court Amends Rules to Support Use of Remote Hearings in Court Proceedings, The Bar News (May 22, 2020), available at [law.isba.org/3NuNtku](http://law.isba.org/3NuNtku).

2. Ill. R. Evid 611.

3. *Id.*



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In 2020, the Illinois Supreme Court amended its rules in response to COVID-19 and specifically addressed the use of remote conferencing systems. The new ISCR 45 states: “The court may, upon request or on its own order, allow a case participant to participate in a civil or criminal matter remotely, including by telephone or video conference.”<sup>4</sup> New ISCR 241 covers remote video testimony at trial:

The court may, upon request or on its own order, for good cause shown and upon appropriate safeguards, allow a case participant to testify or otherwise participate in a civil trial or evidentiary hearing by video conferencing from a remote location. Where the court or case participant does not have video conference services available, the court may consider the presentation of the testimony by telephone conference in compelling circumstances with good cause shown and upon appro-

appropriate safeguards. The court may further direct which party shall pay the cost, if any, associated with the remote conference and shall take whatever action is necessary to ensure that the cost of remote participation is not a barrier to access to the courts.<sup>5</sup>

You can also cite the Illinois Supreme Court’s “Illinois Supreme Court Policy on Remote Court Appearances in Civil Proceedings.”<sup>6</sup> Under the Supreme Court’s new policy:

[t]he use of Video Conferences for testimony in civil trials and evidentiary hearings may be allowed for good cause and upon appropriate safeguards under Rule 241 (and Telephone Conferences may be allowed in compelling circumstances for

4. Ill. S. Ct. R. 45.

5. Ill. S. Ct. R. 241.

6. Illinois Supreme Court, Illinois Supreme Court Policy on Remote Court Appearances in Civil Proceedings, [law.isba.org/3wHCj2k](http://law.isba.org/3wHCj2k).

## TAKEAWAYS >>

- Even though Illinois Supreme Court Rules and the Illinois Rules of Evidence permit live videoconferencing of witness testimony during trial, strive to obtain buy-in from the other side and the judge.

- Form a checklist of the technology needed to perform live, remote witness testimony; practice at the office; and make sure the witness is comfortable with and has access to the required technology.

- Although downsides exist, the increased flexibility and cost savings experienced by using remote live witnesses are welcomed benefits of this technology.



**SHOULD YOU OPT TO PRESENT WITNESSES REMOTELY, REMEMBER THAT PROPER LIGHTING AND BACKGROUND ARE PART OF PRESENTING THEIR TESTIMONY. WHEN YOU PREPARE THE WITNESS, SHARE TIPS FOR SIMPLE BACKGROUNDS THAT PUT THE FOCUS ON THE WITNESS, NOT THE SPACE BEHIND THEM.**

testimony). Courts have wide discretion under both rules to allow Remote Court Appearances.<sup>7</sup>

Be sure to check your local circuit court's COVID-19-related general orders because there may be an order specifically endorsing the use of remote conferencing in some manner. For example, the 19th Circuit Court in Lake County published a set of rules called "Protocol for Remote Civil Bench Trials and Arbitration Hearings."<sup>8</sup>

### What you need

Putting on a live witness remotely takes a lot less technology and technological know-how than you think. Do not be intimidated.

The only technology required is:

- 1) Wi-Fi access;
- 2) a monitor;
- 3) a remote conferencing platform;
- 4) a computer, smartphone, or other device for you and the witness; and
- 5) a remote screen-mirroring device.

Many courts are now fully equipped with remote conferencing systems and have been using them for their status conferences daily. Many counties have put federal and state pandemic relief funds to good use by modernizing one or more of their courtrooms to accommodate remote videoconferencing systems. For our 2021 trial, all we needed to do was provide our witnesses with the court's videoconferencing login information and

### ISBA RESOURCES >>

- Terry A. Mueller, *Remote Jury Selection & Keeping the Doors of Justice Open*, 109 Ill. B.J. 28 (June 2021), [law.isba.org/3yZy2wF](http://law.isba.org/3yZy2wF).
- Brad Taylor, *Law in the Time of COVID-19: Looking Backward While Moving Forward*, 108 Ill. B.J. 26 (May 2020), [law.isba.org/3gwjYS3](http://law.isba.org/3gwjYS3).
- ISBA, COVID-19 Information and Resources, [isba.org/covid19](http://isba.org/covid19).

when to log in.

If your courtroom does not have everything you need, the amount of technology you must bring is minimal. You most likely already have everything you need.

First, make sure you have Wi-Fi access for yourself. Most court clerks will warn you that it is not worth the risk of relying on the courthouse's Wi-Fi network. Many cell phones and tablets act as Wi-Fi hotspots. Or you can purchase a mobile hotspot for less than \$100.

You will need to have screen-mirroring hardware that enables screen sharing with your device and a monitor. Many attorneys already have one of these devices at home. This could be an Apple TV, Roku, Google Chromecast, or any other screen-mirroring device. The screen-mirroring hardware can connect to the monitor in the court with an HDMI cable and wirelessly to your computer. Be sure to practice at your office before the witness takes the virtual stand.

There are several free remote conferencing platforms available, such as Zoom, Google Meet/Google Hangout, Microsoft Teams, and Verizon BlueJeans. If you have not gotten comfortable with any of these platforms, download and test them before trial. More importantly, if your witness does not have experience with one of these platforms, make sure you practice with your witness either during your preparation meeting or the evening before. Helping your witness gain a comfort level with the technology is crucial to his or her ability to focus on the testimony itself.

You will need a laptop in the courtroom so that you can set up the meeting. The witness will also need a device with internet access to log into the meeting. One great thing about remote conferencing is that witnesses can testify with just their smart phones or tablets if they do not have access to a computer. With that said, one of our witnesses used a phone and it looked a little less professional than if the witness had sat in front of a computer. I would recommend telling your witnesses to testify from a computer in a place where they have reliable internet access and will not be disturbed. Make sure to remind your witness to have their device plugged in. Remote conferencing software can drain a battery before you are done with your questioning.

### Cost savings

Avoiding expenses for travel, hotel, and time for out-of-town experts makes good business sense whether you are a plaintiff wanting to reduce expenses to maximize recovery for your client or a defense attorney looking to impress an insurance analyst by saving them tens of thousands of dollars. Apart from travel costs, the expert also does not have to clear a full day for testifying and another day or two for travel. Instead, the expert bills you just for the actual time on the stand.

Should you opt to present witnesses remotely, remember that proper lighting and background are part of presenting

7. *Id.*

8. 19th Judicial Circuit, Protocol for Remote Civil Bench Trials and Arbitration Hearings, [law.isba.org/3yPVKvd](http://law.isba.org/3yPVKvd).

their testimony. When you prepare the witness, share tips for simple backgrounds that put the focus on the witness, not the space behind them.

## Flexibility

There is nothing that gives a trial attorney more heartburn than trying to make sure his or her expert witness will be able to take the stand on the day and time scheduled—particularly when that expert must be scheduled months in advance. Everyone must do their best to guess how long jury selection will last, how long opposing counsel will take, whether witnesses are on vacation or unavailable, and whether the trial will begin on the expected date.

Usually, trial attorneys first lock in their experts with the toughest schedules and build the remaining witness order around them. You almost never get to put your witnesses on in the order that best tells your case's story. Presenting live witnesses remotely reduces these scheduling headaches and allows you to present your case in a more-preferred order.

Unfortunately, litigators sometimes must abandon witnesses or take a last-minute evidence deposition because they cannot fit the witness into the schedule. At best, the testimony you wanted to get to the jury comes from a less-effective witness or via less-effective means. At worst, the loss of a witness results in a voluntary dismissal, directed verdict, or negative verdict.

In our 2021 case, we had to suspend the trial for several days due to a COVID-19 exposure. We had two out-of-state experts scheduled to go on those days. Fortunately, the experts were willing to testify the following week, but they did not have a free full day for travel and testimony. Instead of losing a standard-of-care expert and our causation expert and requesting a mistrial, we were able to put them on remotely.

As another example, we had an ISCR 213(f)(2) witness scheduled the first day of trial as the afternoon witness. After that day, she was out of town on vacation for the rest of the trial. But when opening

statements and the attorneys' examination of the first witness went longer than expected, it was clear the 213(f)(2) witness would not make the stand that day. Even though the treatise's testimony was only 15 to 30 minutes, it was important. Thankfully, we did not have to abandon the witness. The witness appeared remotely the next day while on vacation using a cell phone.

## Live witnesses are more engaging

Jurors sometimes lose focus or struggle to stay awake during recorded-evidence depositions. The worst part is that, due to the scheduling issues discussed above, our most important expert witnesses are the ones who often appear in this manner. You want your jurors fully engaged during your most important witnesses.

Our trial was interesting because witnesses testified via all three modes: 1) live in-person; 2) recorded-evidence deposition; and 3) live remote. By watching the jurors, we could see that the jurors paid more attention and were more attentive to the live, remote witnesses than the recorded-evidence depositions. The opportunity for follow-up questions in real time also enhanced juror engagement.

Having the witness live in-person with the jurors was certainly more effective than having jurors stare at a screen. But there were some advantages of having remote witnesses compared with in-person witnesses. Many courts have different COVID-19 safety rules regarding masking. At our trial, witnesses were required to either wear a mask or face shield. Really good witnesses can be just as effective in how they say something as what they say. This is equally true for poor witnesses. When you are effectively cross-examining an expert, you want the jury to see the expert's uncertain face and not allow the expert to hide behind a mask. When witnesses are remote, they obviously do not need to wear masks.

Remote witnesses do come with problems. Internet glitches and connection disruptions occurred during our trial. When this happened, the court

ONE GREAT THING ABOUT REMOTE CONFERENCING IS THAT WITNESSES CAN TESTIFY WITH JUST THEIR SMART PHONES OR TABLETS IF THEY DO NOT HAVE ACCESS TO A COMPUTER. WITH THAT SAID, ONE OF OUR WITNESSES USED A PHONE AND IT LOOKED A LITTLE LESS PROFESSIONAL THAN IF THE WITNESS HAD SAT IN FRONT OF A COMPUTER.

reporter read back the question and the answer up until the disruption, after which the witness continued. We also had one witness who could not figure out how to work the videoconferencing system and was continued to the next day. But these disruptions were very minor, and the jurors seemed unbothered.

## Live witnesses are more effective

Evidence depositions are taken before the trial—sometimes months or years before trial. Some issues that seemed important at the time of an evidence deposition may no longer be as important after motions *in limine* and testimony from other live witnesses. Imagine a scenario during which a prerecorded witness spends an hour on an issue that no longer matters and only a few minutes on the areas that have become primary points at trial. You may be frustrated that you are not able to bring that witness out or counter a certain issue with that prerecorded witness that you could have if they were live.

Moreover, no evidence deposition ever goes to the jury without being redacted and edited. Motions *in limine* and lunch-hour or after-hour hearings on objections may result in the court gutting large portions of testimony. The same objections may be raised with a live witness in real time, but your opponent

has not had the benefit of preparing a written motion armed with caselaw and hours of legal research as they would with a motion *in limine*. Also, attorneys may be more eager to make objections in pretrial motions but more reluctant to object in front of the jury for fear of offending the

jurors or looking as if they are hiding something.

### Conclusion

COVID-19 brought enormous disruptions to our legal system, but it also brought new opportunities to improve

our practices and enhance our flexibility. Remote conferencing is likely here to stay. Do not be afraid to be an early adopter of this new technology as you get back in front of juries. **EB**

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