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Trial Advocacy is (Mostly) the Same Online: Lessons Learned from a Virtual Patent Trial

The COVID-19 pandemic has required courts to adapt to new ways of providing access to justice. We have first-hand experience with this new reality.

We started what was intended to be a four-week patent trial in the Federal Court on March 9, 2020. While the COVID situation was unfolding in real-time, our trial was otherwise proceeding normally. The first week went slightly faster than expected, and we finished the first week of evidence by Thursday around noon. At the end of the court day on Thursday, our hope was to continue in-person the following week. However, by noon on the following day, all parties and the court had concluded that the hearing would have to be adjourned because of the pandemic.

When it became apparent that the pandemic would not merely be over quickly, the trial judge ordered the parties to continue with a virtual trial. So that is what we did. In late May and early to mid-June, we did a further three weeks of trial over Zoom. During that time, the Court heard from eight expert witnesses and six fact witnesses who were each examined in chief and cross-examined.

Given that there will likely be an increased number of virtual court hearings over the coming months, here are our top takeaways for hearings proceeding virtually.

A virtual trial is still a trial

It is important to remember that a virtual trial is still a trial. While many things are different, the key elements of the trial remain the same. It is still important to be clear and persuasive. It is still important to help the judge as much and as well as possible. It is still important for your witnesses to present well and for the court to feel the trial is running smoothly and efficiently. The way you accomplish those things may be somewhat different, but the overarching rules of trial advocacy remain the same.

That being said, there are many new things to think about

Though a virtual trial is still a trial, there are a whole host of new things to think about when one is conducting a virtual trial. In addition to all the things you would usually worry about, you

have to think about things like how witnesses will sound and look testifying remotely. You have to be satisfied that witnesses will not cheat the system and communicate with people during cross-examination (which is much easier to do virtually than when a witness is in court). The management of documents also becomes much more complicated.

All of these issues can be worked out. In our case, the parties agreed to a virtual trial protocol that was then adopted by the court as the rules of the game for a virtual trial. This virtual trial protocol included a variety of topics, including a common understanding as to how documents would be managed, a common set of guidelines for witnesses and counsel to help ensure everyone could be seen and heard appropriately, best practices to ensure that internet connectivity could be maintained, and other general best practices for conducting a virtual trial. This type of protocol is absolutely necessary as the rules for virtual trials are being worked out.

A collegial relationship with opposing counsel also helps a lot

It is extremely useful to have a collegial relationship with opposing counsel when one is conducting a virtual trial. In our case, we were lucky enough to have opposing counsel who were professional and civil and were happy to work in a collegial manner to try to address the logistical aspects of the trial. In the absence of such collegial relationship, the virtual trial would have been much more difficult. The alternative would have been a much higher degree of case management from the court.

Certainly, either a cooperative relationship between counsel or heavy-touch case management will be required in order to make a virtual trial a reality, at least before there are generally well-established norms for how virtual trials are supposed to be conducted.

Document management is a whole new ball-game

Management of documents raises new issues, both in terms of how to get them to witnesses and how to show them to the Court.

For example, we had considered at length whether we would use screen share functionality to actually show all trial participants a document, or whether we would circulate a document for everyone to have their own copy to look at.

We ultimately opted for the latter, largely because using screen share functionality would make it difficult to observe the other players in the trial. We wanted to be able to see our trial judge to make sure he was following along with the witness, as well

as our opponent, and doing so would have been difficult had we used the screen share functionality. In some cases, the use of the screen share functionality might outweigh those considerations, but in our case, we decided it did not.

Where you do the virtual trial from matters

We had to think long and hard about where we conducted the virtual trial from. We considered the possibility that every member of our trial team would participate from their own homes, but we ultimately decided to conduct it from the largest boardroom at our firm, where all trial team members could maintain an appropriate distance from one another.

The reason for this was not so much the need for us to communicate: the reality was that most of our communication during the trial was on a separate chat using Microsoft Teams. Rather, the reason we decided to conduct it from our office was the likelihood of a more stable internet connection and fewer interruptions from children and pets. In the absence of children and pets, and assured of a good internet connection, a trial from home might be possible. However, in our situation, we decided it was not workable. It was also helpful to be able to quickly confer at breaks without having to get on a call or video-chat.

The technology platform matters

Not all videoconferencing platforms are created equal. We ultimately did our trial using Zoom because of the functionality we had available. We also found that the connection was very stable. In fact, we found it had a less glitchy connection than some other platforms we had tried, even over the same internet connection.

A virtual trial worked for us, but it won't work for every case

Finally, the nature of the witnesses will determine whether a virtual trial is feasible. In our case, all the witnesses were either current or former employees of the parties, or expert witnesses. None of the witnesses being called appeared under summons, nor were any of them hostile. Indeed, in the case of our opponents, all of their fact witnesses testified from a boardroom at their corporate head office. This worked out well.

These arrangements meant it was entirely possible for us to ensure the witnesses had the appropriate technology they needed. At a minimum, that meant a computer with at least two screens (one to show the video of the trial participants, and one to look at documents), a good quality internal or external microphone, and a good quality internal or external webcam. Given the nature of our witnesses, this was all relatively easy to arrange. If our witnesses had been different, ensuring an

appropriate tech set-up might not have been nearly so easy. All in all, our experience with a virtual trial was a positive one. For expert-heavy cases, they seem to us to be entirely appropriate, particularly if all parties and the trial judge are relatively tech-savvy and willing to accommodate the bumps that will invariably arise.