

PERSPECTIVE

Reflections on a Zoom Trial

BY ADAM M. FELSENSTEIN

On Jan. 26, 2020, I conducted the conclusion of a bench trial in an entirely virtual environment. The trial, a contractual dispute, began as a normal in-person proceeding prior to the COVID-19 pandemic. After the scope of the pandemic became evident, the parties agreed to conclude the trial over video conference. There was much to be learned from the experience with regard to the differences between in-person and virtual trials, be they civil or criminal, and how to best conduct them. This article shares some of these lessons I've learned through this virtual trial.

Failing To Prepare Is Preparing To Fail

As part of trial preparation, it pays dividends to go to the courtroom prior to the trial to get a sense of the environment and courtroom procedures. It is very helpful to know small details such as the location of the lectern, where displays will be located in relation to the judge or jury, and how the courtroom generally operates. This intelligence helps



ADAM M. FELSENSTEIN

to avoid any unwelcome surprises on the day of trial.

A virtual trial is no different. Prior to trial, do a dry run in the software environment with a colleague. This way, a lawyer can see how he or she appears to the finder of fact and ensure that all necessary technology is functioning as expected. It will also allow you to become conversant with the screen sharing functions as well as the location of necessary files and exhibits on your computer.

In this trial, the exhibits used for witness confrontation on cross-examination were shared with the witness by screen-share during the examination. Preparing for such a cross-examination entailed making sure any possible confrontation exhibit was scanned and organized in such a way that it could be located quickly even if the examination went

out of the anticipated order or ventured into unexpected territory.

During the rehearsal, I practiced screen-sharing such that I could be confident that the witness was seeing only the exhibit on display and notes or other files opened in other windows. Further, it helped to run through how to access exhibits so that you could do it fluidly and easily.

Be Mindful of Cadence And Environment

An in-person trial quickly settles into a rhythm. Lawyers get used to the speed and pattern of how opposing counsel asks questions, and ultimately learn how to time objections to land between the end of the question and the beginning of the answer. This is much more difficult to do on a video-conference. Lawyers have to be mindful of the fact that on video-conference, there can be a significant delay between when the speaker talks and when the other participants hear them. Getting into the cadence of the trial is substantially more difficult on video-conference and took far more concentration.

In equal measure, the lawyers must remember to speak even more slowly and deliberately than in an actual courtroom. It is often difficult for the court reporter to capture every word at an in-person proceeding. This is even more challenging on video-conference. Be cognizant of the fact the difficulty of the reporter's work is compounded by the virtual environment.

Witness Management

An in-person trial comes with a degree of circumstantial integrity. A lawyer can readily observe that the witness is not being coached or referring to notes. This is much more difficult on a video-conference due to the limited view of the witness.

In the early part of questioning, listen and watch the witness very carefully. Make sure that his or her eyes are trained on the screen, and not anywhere else. A lawyer can ask the witness during examination if there is anyone else in the room or whether there was anything on his or her screen other than the video-conference. If there are concerns, raise them immediately for the judge and make sure they are on the record for appeal.

An additional advantage of a rehearsal is to test to see which presentation and questioning techniques work best for a virtual courtroom. You may find that raising or lowering the tone of your voice is not particularly effective because the participants control their own volume. Further, because everyone

is seated body language is equally ineffective. Instead, you have to be much more deliberate and focused in questioning to produce an effective cross-examination.

Trial Management

Traditional trial lawyers were trained to try cases on paper and most courts are still not yet equipped for all-digital trials. It is not uncommon for lawyers to show up to a trial with binders of trial material with evidence submitted to the court on paper. Trying a case in a virtual environment created unique challenges to these time-tested methods and required creative solutions.

An in-person trial quickly settles into a rhythm. Lawyers get used to the speed and pattern of how opposing counsel asks questions, and ultimately learn how to time objections to land between the end of the question and the beginning of the answer.

Trial binders became digital folders and subfolders. Areas of cross-examination were given their own thematic folder. All documents were clearly labelled so as to ensure counsel could locate each document quickly and with a minimum of fuss. All documents were scanned in PDF and text-searchable for easy access on the fly.

One area that did not translate well to the virtual environment was the sidebar. Requesting a sidebar



put a significant strain on the court to organize breakout rooms while severely breaking up the rhythm of the trial. Instead, conversations about evidentiary issues occurred in view of the parties and the witnesses. Be prepared for this eventuality and only request a sidebar when it is absolutely necessary.

Finally, in a normal trial, you can easily conference with your client in a whisper or by passing a note. This is much more difficult in a video-conference. The chat function in the video-conference has the very real risk that an errant key stroke could result in the inadvertent publication of privileged information to everyone in the conference. Instead, set up a private text message or email exchange with your client so that you can pass notes and exchange ideas.

Trial under any circumstances is a crucible. In a virtual environment, it is even more challenging and requires considerable logistical preparation. However, with some forethought and planning, a virtual trial can proceed smoothly and effectively.

ADAM M. FELSENSTEIN *is a litigation partner in Tannenbaum Helpert's litigation and dispute resolution practice.*