

10 Lessons From ITC's First-Ever Unfair Import Virtual Trial

By **Stefani Shanberg, Veronica Ascarrunz and Karl Johnston** (November 3, 2020, 4:34 PM EST)

The U.S. International Trade Commission is charged with concluding Section 337 investigations involving unfair import practices — which most commonly involve allegations of patent infringement — "at the earliest practicable time."^[1]

To carry out that mission during the pandemic, the ITC announced on July 20 that it had selected WebEx Meeting as its secure Federal Risk and Authorization Management Program, or FedRAMP, certified video teleconferencing platform to conduct proceedings involving confidential business information while the commission building is closed.

Following that selection, the ITC's administrative law judges issued individual orders regarding how trials via WebEx would proceed. Being the ITC, it was then off to the races. There are currently 10 Section 337 trials scheduled to take place via WebEx before the end of the year.

The ITC's first trial was held in Certain High Density Fiber Optic Equipment and Components Thereof^[2] before Administrative Law Judge David Shaw. It took place from Oct. 21-26. Each day, the trial attracted around 70 participants, including counsel for complainant and respondents, Office of Unfair Import Investigations staff, witnesses, and corporate representatives. The trial was a technological success. That did not happen by chance. It took an enormous amount of preparation and planning on the part of all involved.

Remote trials and remote participation in trials are likely to be a part of the practice of law for the foreseeable future. In some ways, remote proceedings are efficient and effective. In others, they may leave a trial lawyer wanting. Our cross-office trial team recently participated in the ITC's first-of-its-kind trial conducted remotely via a WebEx videoconference. Here are our thoughts on what made the trial a success and best practices for future remote proceedings.

1. Set yourself up for success.

You may think that television stations have been conducting remote interviews with clear video and audio for decades, so it should not be difficult for law firms to follow suit. Think again. It is much harder than it looks. This virtual courtroom showed the wide range of setups.



Stefani Shanberg



Veronica Ascarrunz



Karl Johnston

Our team was spread across the country, with members in firm offices in New York, Washington, D.C., and San Francisco, and others in home offices. We set up our workstations with multiple dedicated computers: the WebEx computer, the presenter notes computer, the computer for the court reporter's real-time feed and the computer for redundancy or miscellaneous activities, including trial team chats and meetings. We carefully placed a webcam exactly at eye level for each presenter. The notes computer was below the webcam. The WebEx computer monitor was above and behind the webcam.

For video, an external webcam is a must. Built-in webcams lack quality and do not permit necessary adjustments. While a trial lawyer is used to the flexibility of looking at the judge, at the witness and down at notes, far less movement is tolerable via videoconference.

The right lighting and background are also critical components of a nondistracting setup. Natural or well-balanced light in front of the presenter is great. A bright source of light behind the presenter is not. As for sound, we recommend a well-positioned and carefully calibrated external microphone. Perhaps surprisingly, we cannot recommend headset microphones. They are clear, but they pick up too much, including distracting sounds like breathing and swallowing.

Finally, by now we are all aware that virtual backgrounds are highly distracting. We like the use of matching screens for all members of the trial team to create a vision of cohesion among lawyers spread out around the country.

2. Become best friends with your firm's information technology team.

Connectivity and bandwidth are key. Most lawyers cannot optimize either without a lot of help from the IT department. We recommend using a stand-alone computer that is hard-wired via ethernet for the dedicated videoconference computer. This eliminates the extra processing and memory requirements of other programs running in the background, as well as Wi-Fi connectivity concerns. If possible, use a computer that is free of bloatware and any unneeded programs that tax memory and processing power.

Likewise, redundancy is key. To the extent possible, have a second computer located either as part of the same setup or in a nearby second setup should anything happen to the main computer. Many firms use virtual private networks, Citrix and other secure networking solutions, and adjustments may be necessary to accommodate a days-long virtual trial with very heavy bandwidth demand. Computers without sufficient processing power and memory may also need to be upgraded for prime time.

3. Communicate with your trial team.

Veteran trial lawyers may miss furiously passing sticky notes, but the virtual setting offers numerous — and often more efficient — means of communicating amongst teams. A secure open text chat on Skype or Slack during the trial allows lawyers, paralegals and support staff to quickly and effectively discuss the proceedings, strategize as seamlessly as in hallway conversation and troubleshoot technical problems.

During breaks, utilize video conferencing to substitute for war rooms. Chats and video conferences are also great for team bonding, though nothing can replace a working dinner together or drinks when a trial finally concludes. Of course, make sure you are muted if you remain connected to the virtual courtroom.

4. Less is more when it comes to exhibits.

Most video conferencing platforms automatically display share-screen content in a way that takes up a majority of the screen real estate and converts video participants to postage stamp size boxes. While this can be a great way to share exhibits, demonstrative evidence and transcripts for witness impeachment, take the documents down when not in use so that videos are more visible. Remember that the trial is an opportunity for the court to assess witness credibility. The court will be better able to do that if the witness is visible.

5. Don't turn on videos or audio in the virtual courtroom unless you would be standing up in the physical courtroom.

Turning on cameras and microphones is distracting and bandwidth intensive. Some courts have issued orders reminding lawyers that having video and audio on is akin to standing up in court. During trial, lawyers not actively arguing, examining a witness or presenting a witness should turn video off and mute microphones.

6. Protect confidential business information.

ITC trials typically involve highly confidential business information. Ensuring that this information remains confidential is of paramount concern. When switching from public to confidential sessions, we needed an alternative to turning around and looking at the gallery. And we needed an alternative to having those not under the protective order wait in the hallway. WebEx includes a participant view that displays the name of all attendees.

Rather than displaying just our names — or worse yet a telephone number — everyone used display names showing the party with whom they were associated and whether they were on the protective order. For example, naming conventions were "confidential business information-respondent-company name" before the full name of attorneys under the protective order, "respondent-company name" before the full name of company representatives, or just the full name of members of the public.

We had several confidential business information monitors who confirmed the status of all participants and could then quickly scan the participant list to ensure that only those entitled to view particular confidential business information attended particular sessions. Presenters announced that movement from the public to the confidential record and back just as would be done in the courtroom, and short breaks were taken to confirm authorized participants. Those who left the session could either join a break-out room or simply leave the meeting and rejoin at a later time.

7. Adapt to virtual witness binders.

Rather than passing physical binders, the parties agreed to exchange cross exhibits via email at the start of each examination. We found this to be quick and efficient. For larger files, it is also possible to send an encrypted zip file well before the examination starts and then send the password at the start of the questioning.

8. Use presentation mode.

With multiple dedicated computers and a days-long trials, it necessarily follows that some sit untouched for periods of time. On Windows computers, you can search for presentation settings and select the box

indicating you are currently giving a presentation. This will keep your computer from going to sleep, will turn off the screen saver and will silence notification sounds.

9. Prepare to present foreign witnesses.

Given that Section 337 of the Tariff Act concerns international trade, proceedings will inevitably involve foreign witnesses. While an ALJ's ability to swear in a witness in their courtroom goes without saying, questions involving swearing a witness testifying outside the U.S. should be resolved in advance of trial.

Be prepared to address these issues, perhaps making alternative arrangements for a witness residing in a country with a blocking statute and/or via a bench brief to address any concerns the ALJ may raise during the trial.

10. Practice, practice and practice.

As soon as we learned that the ITC had selected WebEx, our team began conducting all internal videoconferences via WebEx. We did the same for client meetings and witness preparation sessions, all with the eye of getting ourselves and our witnesses comfortable with the system. There was a lot to troubleshoot, so it is good that we started early. Closer to the trial, we ran all of our practice sessions from our trial presentation stations to troubleshoot those as well.

Take every opportunity given to you to practice — especially those that come from the court or its staff. In the weeks before the trial, the Office of Unfair Import Investigations held open houses, and the ALJ held sessions to practice on the WebEx FedRAMP platform.

There will be glitches along the way. Many of our initial practices were plagued with poor video quality, freezes and lost connections. But we were able take what we learned and strategize effective solutions along with our IT team. We endeavored to control everything we could.

There were, of course, issues outside of our control — e.g., high winds and power outages in the Bay Area during trial — but with a lot of advance preparation, we were able to minimize those potential issues in the virtual courtroom at least as well as can be done in a physical one.

Stefani Shanberg is partner, Veronica Ascarrunz is of counsel and Karl Johnston is an associate at Morrison & Foerster LLP.

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[1] 19 U.S.C. § 1337(b)(1).

[2] Certain High Density Fiber Optic Equipment and Components Thereof, Inv. No. 337-TA-1194.