



THE VIRTUAL CIVIL TRIAL

VIRTUAL FALL CONFERENCE

Civil Program

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OVERVIEW

The pandemic significantly changed the way Ontario lawyers practise law and advocate for their clients. Few, if any, would ever have entertained the possibility of conducting an eight-week, Superior Court trial in a virtual format, however, this is exactly what we did during the fall of 2020. Since that time, Zoom trials have become increasingly common across the Province and this trend is expected to continue. Even after the pandemic ends, it appears likely that some elements of virtual hearings will continue. Indeed, the efficiencies the virtual format offers to our overburdened justice system are difficult to deny.

This informal paper is designed to offer counsel nuts and bolts information for matters proceeding to trial virtually. We offer a summary of our experience, and hope that the information will be of use to those who find themselves before a trial judge and his or her virtual dais.

RESOURCES

If nothing else, counsel should review the materials and Guide provided by the Ontario Superior Court of Justice.

The Court's publication, [At-A-Glance Guide to Virtual Hearings](#), is comprehensive and provides protocols for document naming, preparing for virtual hearings, and virtual courtroom etiquette. Guidance is offered to assist counsel in many matters including the preparation of witnesses and protocols such as how to object.

Before a matter proceeds, counsel are encouraged to develop a "Virtual Hearing Protocol", which addresses topics including the technology to be used, document management, and how to troubleshoot loss of internet connection. An "Information for Witnesses" handout form is provided to assist witnesses in preparing to testify in a virtual format.

PRE-TRIAL MEETINGS WITH THE JUDGE

Before trial started, all counsel had three separate meetings with the Trial Judge to discuss how the virtual trial was going to be conducted. These meetings were extremely helpful, especially because virtual hearings were still so new. We discussed, among other things, the following key topics:

- Where are the parties' lawyers going to set up their virtual courtrooms?
- Where will the Judge and court staff be stationed?
- How are we going to file documentary exhibits with the court (including the joint document briefs)?
- How are we going to file real evidence?
- Are we going to use a common document management system (as this was before CaseLines) – e.g. SharePoint or OneDrive?
- Are we to wear our gowns?

- Are we to rise when the Judge enters the courtroom?
- Where will the witnesses be testifying? Will that be left to the parties discretion?
- How are the business records to be used? Can counsel come to a written agreement on that issue?
- Setting up a practise session to make sure our cameras and microphones work and other technology works to the satisfaction of the court.

For those regions or jurisdictions that do not know their Trial Judge until the day of trial, we encourage counsel to write to the Trial Coordinator asking for a pre-trial meeting with the Judge to canvass these and other important issues.

During that meeting, you may wish to ask if the Trial Judge will be requiring the parties to use CaseLines. We have heard that in some cases and with some Judges CaseLines is not mandatory and other options can be discussed.

OUR OFFICE SET UP AND TECHNOLOGY USED

- We created our own physical courtroom at our office. We converted our boardroom (see attached picture and diagram below).
- Lawyers were at same table with plastic guard in between. Realistically, co-counsel ended up “bubbling”, so the guard was unnecessary. Guards were used when interviewing and having contact with witnesses etc.
- Some of our witnesses testified in our office via Zoom. Our witness box was more than 6 feet away. The witness box had its own computer from which the witness could log into Zoom.
- Our clerk, Natalie, was physically close at hand just outside courtroom (so that if she had to move around, she would not be seen on camera and be distracting to witnesses or judge)
- Natalie was always on Zoom with mic and camera off. Camera was off in case she had to make an urgent phone call (e.g. to a witness), greet a witness waiting to enter our physical courtroom, escort a witness into our courtroom, etc. We thought this may be distracting if her camera was on. The Judge may require all people present in virtual courtroom to be seen, however, at least initially.
- Double computer screens for lawyer and clerk so one screen could be used for documents or note taking and the other for trial viewing.
- We used a Jabra Evolve 65 head set with built in mic (see attached picture below). It has 14-hour battery life, can be plugged in, if needed, and has a 100 ft wireless range. Witnesses at our office had their own headsets. (We had two headsets so that they could be sanitized.)

Our voices could be heard clearly. We could hear witnesses at our office clearly. Feedback was limited significantly, if not entirely, when witnesses testified at our office.

- Used Logitech HD cameras perched on top of our screens for better resolution. Laptop cameras can be grainy. We thought it was better to be seen clearly.
- If you have a client who has a current scar or physical disfigurement that is important to the case, it is probably wise to invest in high quality camera.
- Sometimes when a witnesses was testifying from our office, there was some echoing and some minor lag in terms of when they were heard on Zoom. Ultimately, this was very manageable, and we got used to it. It was not distracting.
- Witnesses wiped down headset, computer, and screens when they were done. We would do it at the end of the day as well. We had plenty of wipes, sprays and sanitizer in the boardroom.

DOCUMENTS

Preparation & Formatting of Documents

- Joint document briefs were prepared as you would in a typical trial but in pdf
- Joint Briefs were tabbed as you would an affidavit of documents in pdf
- Planned exhibits were in pdf.
- Justice Nightingale personally wanted paper copies of the joint briefs. Paper copies sent to the Simcoe courthouse (where His Honour's office is located) and to Hamilton courthouse for filing.

Location of Documents

- While Justice Nightingale used paper copies, we used the pdfs at the office.
- Word documents for openings, closings, direct, cross, case summary, case theory, etc.
- All our documents (joint document briefs, planned exhibits and Word documents) were online on Sharepoint. They were accessible by us and our clerk.
- Very convenient because:
 - All documents could be accessed at same time

- All documents in same folder for everyone
 - Any changes made would be made for everyone and seen by everyone.
 - Changes almost instantaneous for viewing.
 - Trial team could work in office or from home online.
- We did not have a joint document sharing system for the court, Judge and lawyers to all access in this case. We proposed using OneDrive and Sharepoint, but that did not work for the collective. CaseLines will likely be the platform going forward, though there are some issues with this software, when large paginated and tabbed briefs are uploaded, which counsel should consider.

OPENINGS AND CLOSINGS

- Done in writing and provided to Judge’s Judicial Assistant by email. They were marked as lettered exhibits. Verbal openings and closings also provided.
- If you have strong physical presence, or strong voice, that presence may have that lost over camera. But you can be charismatic on “camera” regardless.
- Openings and closings given while seated. If you prefer to stand, could set up podium and have your screen and camera in front of you. You would just have to play with the distance and height to make sure you can be properly seen. Because we used headsets with microphones, our voices were very clear.

WITNESS PREPARATION

General Comments

- Make sure they are familiar with Zoom platform. If not, show them how to use it and what to expect to see. Conducting the preparation meeting over Zoom is an effective way to get the witness comfortable with the Zoom format. We tried to do the following with all our witnesses:
 - Check sound and microphone
 - Adjust speakers and microphone settings and volume
 - Share documents
 - Move the images of the participants to different locations or changing the viewing settings.
 - What it looks like to be placed in a waiting room
- If you plan to use an exhibit with the witness, practise how to do that. Ideally, send them the pdf for the meeting, teach them how to share their screen, and how to mark a pdf. In some circumstances, it is probably better that they navigate through the exhibit/planned

exhibit. Make sure the pdf is easily accessible to them on their computer for trial. Otherwise, you will share your screen with them which means they cannot mark it the pdf and you will have to do it based on their direction. Practice how directions will be given (see more below).

- Remind witnesses that they are still in a courtroom, just a virtual one. They must dress appropriately. Some witnesses did not seem to understand that they should treat this virtual trial just like it was in a physical courtroom.
- Zoom was very convenient for witness prep
 - Easier to prepare busy witnesses (e.g. treating or litigation expert) since this could be done at convenience of their home or office. They did not have to come to you or vice versa. No need to book a room at the hospital to see a doctor.
 - Easier to prepare witnesses out of town, province, country, etc. We had multiple witnesses from England and a witness from Wales and an expert from California. Get to hear and see them rather than just have a phone call. No need to go to them.

For Witnesses Not in the Same Room as You

- Ensure they will be in a private and quiet space, so that there are no babies crying, fax machines ringing, dogs barking, or cats jumping in front of the screen, etc.
- Make sure they know not to have anyone with them in the room while testifying
- Ensure they will be in a place with adequate internet connection
- Ask witnesses what kind of device they plan to use. Practise with that device. Check sound quality. Some witnesses just had a phone, and the sound quality was not the best. There may be nothing that can be done other than put them in an optimal position to be heard.
- Practise camera placement, especially if a witness is using Zoom on a phone. Make sure that the court will have a good view. They may need to hold their phone a certain way.
- Witnesses who want to swear on a Holy Book must have that with them. They are otherwise affirmed. One of our witnesses had his Welsh Bible with him.

For Witnesses in the Same Room as You

- We emphasized to witnesses testifying at our office that they had to answer our questions by looking at the computer screen and not at us in the room. When we were in the same

room with our witnesses, there was a tendency for them to look at us “in the flesh” instead of looking at us on the screen. The Judge is looking at them through the screen therefore they need to look at the screen.

- For witnesses who want to swear on a Holy Book either make sure you have it and if not, let them know that they must bring one. They are otherwise affirmed.

WITNESS TRIAL TESTIMONY

Direct Witness Testimony

- As already mentioned, witnesses testified either by Zoom in our boardroom or by Zoom at another location of their convenience.
- If they are testifying outside the office:
 - Have them confirm no one is in room with them; and
 - Consider having them show room to confirm they are alone.

Cross Examination

- But I like to stand up and do my cross! Some lawyers may like to stand up to do their cross. They may feel more comfortable with the podium (sometimes with the podium it's easier to look at your questions quickly and then focus on the witness). Some lawyers may feel like they think better on their feet. If that's the case, there should not be any issue with doing your cross this way. Have a podium available. Stand and do your cross. Just set up your computer screen and camera so that you can clearly see the witness and so that you can clearly be seen by other participants.
- Even virtually, we experienced the typical tension of the courtroom. One witness was declared adverse during the trial. The drama of a trial was not lost.

Objections

- We just stated “Objection” or “Your Honour” like you would in an in-person hearing.
- If the witness had to be excused, the witness would be placed in a virtual waiting room.
- For witnesses that were testifying in our boardroom, they would leave the boardroom.

- Opposing counsel just had their witnesses physical leave the room they were in because being placed in the virtual waiting room often altered the Zoom settings.

View of the Witnesses & Assessing Credibility

- There are many ways a Judge can assess the credibility of a witness beyond what they actually say. Tone of voice. Cadence of voice. Facial expressions. Where the witness is looking. The length and timing of pauses. Hand gestures and body movements. All the vocal elements are present in a Zoom trial with good sound quality. In many ways the Judge may get a better view of the witness's face via Zoom as the Judge can see the witness directly, as opposed to from above, behind and to the left or right of them as he or she would in a physical courtroom.
- Judges may not have the best view of hand gestures and body movements, however. For example, if you have a personal injury claim where the plaintiff has suffered a back injury, the Judge may not see the Plaintiff fidgeting in his or her seat because of discomfort or pain.
- Similarly, Judges and the rest of the participants may not have a good view, or any view at all, of the witnesses before they are seated in the box. For example, think of the Plaintiff who is seen for the first time using a cane or a walker in a personal injury case where the aid is important to the case. The Judge will not see the Plaintiff walking into the courtroom or walking to the witness box. It may be that the Judge will not have a good view of him struggling to sit down in the witness box. It may be that the Judge just sees some of the witness sitting down and otherwise just sees the witness when he is already seated.

Was the Magic of the Courtroom Lost?

- Perhaps somewhat, but Zoom was better than anticipated. There is a formality and solemnity to the courtroom. Lawyers and court clerks are in their formal and traditional gowns. Judges have their red sash with their robes and tabs, sitting high up on the dais with the Coat of Arms displayed in the background. Witnesses are in the box and not in an office or the comfort of their homes. Everyone is to rise as the Judge enters the courtroom. Lawyers bow upon entering and leaving the courtroom and as the Judge enters. Courtrooms can be intimidating. Much of this formality and grandeur is missing in a Zoom trial. Are witnesses more likely to take their affirmation or oath seriously in such a formal setting? Are they to take it more seriously in that kind of setting? Or are they more apt to make innocent mistakes because they are too nervous in such a venue?
- Some of the traditions can be recreated. Lawyers, Judges and clerks can wear their typical garments. Virtual backgrounds can show a courtroom backdrop with the crest.

- In our trial, it was very clear who the Judge was from Justice Nightingale's control of the courtroom and His Honour was the only one wearing the formal gowns and tabs. He ensured matters proceeded with formality and civility.

EXHIBITS

Filing Exhibits

- Joint Documents Briefs were filed in paper at the Hamilton Courthouse and sent to Justice Nightingale by courier (to his office at the Simcoe Courthouse).
- Other documentary exhibits (not in a joint brief) were in pdf. They were emailed to the court clerk for filing. The email was sent soon after the document was marked as an exhibit.
- Documentary exhibits also had to be sent to the Hamilton courthouse for filing. We used couriers or process servers. Because we had a longer trial, we sent documents at the end of every week. We were told in advance where to physically file the exhibits.
- Real evidence was also used in the trial. We kept our real evidence in our boardroom courtroom. We then filed it at the end of the trial using a process server to bring it to Hamilton courthouse.

Using & Marking up Documentary Exhibits or Intended Documentary Exhibits

- Using exhibits during a Zoom trial can interrupt the natural flow of your examination. It takes time to locate your document and share your screen.
- Ideally, if doing a trial with another lawyer, the other lawyer can have the documents ready in a folder and can share his or her screen when needed and can mark the exhibits as per the witness testimony.
- If we were sharing our screen and having a witness mark an intended exhibit (e.g. identifying a key location), we had to activate the Zoom cursor (Annotate & Spotlight functions), start our cursor in one location and ask the witness to tell us to move left or right, or up or down until we get to the location. We then used the features in Adobe to mark and label the location. It was finicky at first, but we managed to get it to work. A witness could not mark up a document that we were sharing, only we could.
- No originals were used (except maybe photographs). Everything was a copy. If an original document is essential to use, you will probably have to present that directly to the witness

and then file that original by filing it with the court using a process server (see more below on filing).

- Metadata was requested by opposing counsel as to the creation of a document, particularly when it came to photographs. Ensure that you have the original copy of the photograph.
- Virtual trials probably save money on exhibits. There is no need for big blown-up photographs or large treatment charts. Pdf the documents. Go through it with court by sharing your screen. Blow it up by zooming in. File the pdf as an exhibit (see more below on filing).
- Remember that if you are playing a video, you need to check the share sound and optimize for video clip settings on the Zoom hover bar while screen sharing.

Using Real Evidence

- We had real evidence in our trial. We used a halter, fly mask, lunge line and riding crop as real evidence. We had our client stand up off to the side and show the exhibits and in some cases use them. We took a camera perched on one of our computer screens, with permission of the court, and showed our client holding and using the equipment. For this to work, we had to change the mirroring setting on the webcam. This is found in the Video Settings in Zoom.
- Pictures were also taken of the real evidence, identified and filed as exhibits as well.
- While this was not an issue in our case, it may be problematic if you have a witness who will be handing real evidence in your possession but who cannot come to where you are located.
- It may also be problematic if one party has the real evidence and another party requires it for either direct or cross examination. The picture may suffice. Otherwise, the real evidence may have to be transported. These details should be thought of ahead of time and worked out as much as possible.

OVERALL COMMENTS

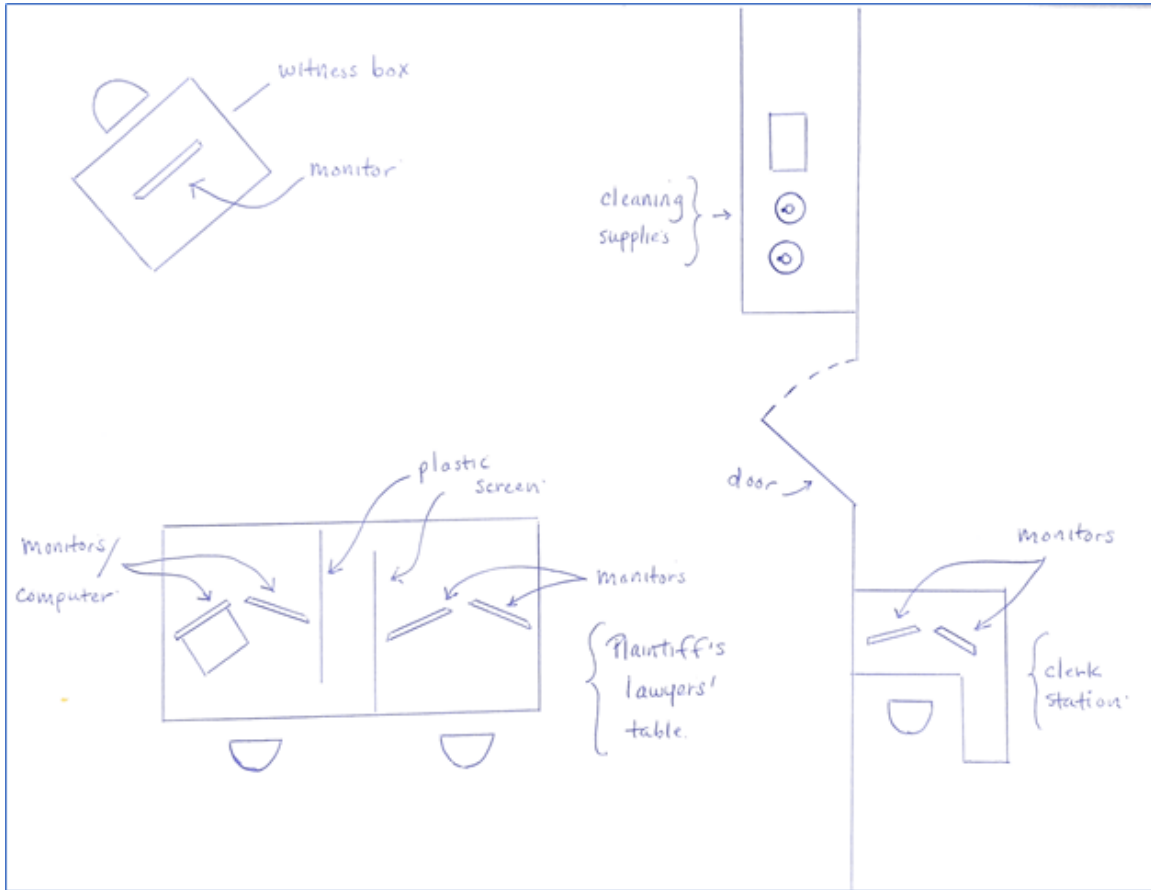
We hope that counsel will find the information in this summary to be of assistance.

On balance, we feel that virtual trials are certainly manageable. They offer counsel (and the clients we serve) the opportunity to have cases proceed. A virtual trial is definitely different from an in-person trial, but the traditional trial format and process were able to be replicated on-screen. There

were certainly aspects that were more convenient, though there were some drawbacks and there was a learning curve.

Overall, we were quite pleased with the process. It is reasonable to assume that post-pandemic trials will likely retain some aspects of virtual hearings, so it is wise to embrace the technology (don't be intimidated) and seize the opportunity to allow clients to have their cases heard, even during a pandemic.

Our Virtual Courtroom



Technology



Counsel Headsets – Jabra Evolve 65 - wireless



Witness Headsets - Logitech USB



Webcams - Logitech



Ring lights – if lighting is an issue

These are the items that we used during our trial. There are many other options, of course.

We do feel strongly that counsel require dual screens. One for documents/notes. The other for the Zoom meeting.

Remember that the most important thing is **what will be seen on screen**. There is no need to spend a fortune creating an expensive virtual courtroom, in our view.