

Observations from a Virtual Patent Infringement Trial before the ITC

A Practical Guidance® Article by
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This article discusses 10 lessons learned from the authors' recent experience conducting a virtual trial in a patent case before the International Trade Commission (ITC). An ITC case is tried to an administrative law judge (ALJ). For an overview of ITC actions involving patent infringement allegations, see [ITC Section 337 Investigations in Patent Infringement: Overview](#).

Since the ITC announced in July 2020 that it would conduct hearings for Section 337 investigations via its FedRAMP-certified WebEx platform, a small handful of remote hearings have been held before several ALJs. Best practices that inform all remote work include ensuring that all team members have reliable, redundant internet connections and appropriate audiovisual equipment. However, as virtual trials are not yet commonplace in many forums, we present the following observations from our recent virtual trial experience.

Our team represented one of the respondents in a Section 337 hearing, November 16–19, 2020, one of the first hearings to be held during the ongoing COVID-19 pandemic. Each day, trial teams for the complainant and four respondents, the Office of Unfair Import Investigations staff, witnesses, and corporate representatives, gathered before the ALJ—a total of nearly 60 participants and attendees. The entire event ran very smoothly, both technologically and procedurally, and much credit is due to the ITC and its technology platform.

For our part, our trial team of attorneys and support staff chose to conduct the trial (including all pretrial preparations) from our own individual home workspaces. Obviating the need for travel, with associated risks and necessary safety precautions, while reducing expenses proved to be an advantageous approach. Based on our experience, we offer the following 10 lessons that may help to facilitate successful remote proceedings.

1. **It is unnecessary—and may be disadvantageous—to gather in the same place for a virtual trial.** We came to this conclusion for the following reasons:

- Many workplaces have been fully remote for the better part of 2020. Comfort and familiarity with workspaces and tech equipment may result in fewer hiccups than dropping into a completely new workplace just before trial.
- Feedback from microphones in the same location can be disruptive. Having multiple counsel, and potentially a witness, trying to listen and speak in the same conference room can lead to echoes and other sound problems.

- It is important to test a sound and video setup before going live with it at the hearing. Perhaps counterintuitively, this may be more easily accomplished with all your participants using the equipment with which they have become familiar over the last months, rather than gathering in one location and hoping that a recently configured setup works correctly on day one of the trial.
- 2. Retain an outside vendor to manage exhibits and demonstratives, just as you would in an in-person trial.** A technical vendor will have greater facility in screen sharing for cross-examination or presenting direct testimony. Use of a skilled vendor avoids the need for each attorney from each party to understand how to share and navigate documents.
 - 3. Choose an effective means of communicating quickly with your far-flung trial team and witnesses.** We chose Slack, as it allowed us to tailor communications easily to the appropriate audiences:
 - While communicating internally via our firm’s instant messaging system and with witnesses via email and text could have worked, we opted to use Slack for its greater flexibility. We made the switch prior to trial, during our preparations, and continued to use Slack throughout the proceedings.
 - We set up Slack “channels” with different participants and permissions, allowing us to streamline communications and file sharing within the trial team (including co-counsel at a different law firm), our witnesses, our technology consultant, and directly with one another, all within one convenient hub.
 - We created channels for our firm, our firm plus co-counsel, and separately for the lawyers and each of our witnesses. Of course, Slack also provides for direct messages between individuals.
 - 4. Encourage witnesses—not just attorneys—to become familiar with the technical setup for the trial.** Note the following considerations:
 - As fact witnesses will be excluded from the trial until it is time for them to testify, witness preparation should try to simulate the setup of the actual trial.
 - It is important to walk through how documents will be displayed and how the witnesses can use the platform’s settings to optimize their view of the documents, as well as participants. For example, on WebEx, it can be helpful for witnesses to use the zoom function to enlarge an exhibit for legibility.
 - 5. Use a photography studio type pop-up backdrop to achieve a consistent presentation.** We found as follows:
 - It was preferable for each lawyer appearing on camera, and each witness, to have the same bland, gray background. This avoids any distraction due to personal items or activity in the background.
 - Virtual backgrounds can cause distracting visual effects and potentially can degrade the performance of a participant’s computer and, therefore, are not recommended.
 - 6. Circulate cross-examination materials a little bit ahead of time and provide a password at the start of cross-examination.** We recommend this for the following reasons:
 - The courtesy of providing a cross “book” will likely be expected.
 - If possible, the materials may be attached to an email circulated concurrently with the beginning of the examination.
 - But in many instances, we found that the materials were too voluminous to attach to an email. In such cases, we used a secure FTP site that could be accessed quickly and easily once a password was provided.
 - Use of FTP sites is preferable to certain other file-sharing platforms. None of the participants (including the judge) will appreciate it if the proceedings have to be halted so that someone can sign up for a new file-sharing service to download exhibits.
 - 7. Consider how to enforce time limits.** This is important for the following reasons:
 - Trials are often conducted according to a “chess clock.” Time is precious, and allocations of time to specific issues or witnesses need to be made (and negotiated among parties) carefully.
 - Enforcing agreed-upon time limits when no two people are physically in the same room can be challenging. Counsel on the same side of the “v” should devise ways to communicate with each other and a way to monitor and enforce those allocations.
 - In a live courtroom setting, you can pass a note or tap a lawyer on the shoulder when time is up. A more creative approach is needed for a virtual trial.
 - In our case, we designated a timekeeper who would let us all know when time was up. The trick was how to let the relevant attorney know his or her time was up without being unduly disruptive to the proceedings. We came up with the following method:
 - o We had the timekeeper set their background to be a sign that said “Time.”
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- o Then, with 15 seconds remaining on the clock, the timekeeper would turn on their video feed, so that the attorney in question could see that his or her time was up.

8. If source code will be used, work out in advance how it will be presented to witnesses in the virtual trial. Note as follows:

- Sealed envelopes containing source code can be FedExed to adverse witnesses in advance, with the witness to open the envelope on camera during their examination.
- Alternatively, portions of hard copy source code files can be displayed on an Elmo connected to the virtual platform, or electronic copies of code can be shared on the WebEx platform.
- In our case, the parties used all three methods. Whatever method is preferred, we recommend including source code as a topic of discussion among counsel before trial—particularly if you envision needing to send hard copies to witnesses.

9. Evaluate what is and is not working well, and consider making adjustments after day one. Note as follows:

- It can be difficult to anticipate issues relating to the virtual setting, and it is important for trial teams to retain flexibility in their approach. Encountering the same problems repeatedly can be disruptive and frustrating to the court and other parties.

- For example, if using a central audio input source separate from individual computers results in difficulties when trying to quickly mute and unmute, then consider reverting to a more straightforward setup. If a background appears more distracting in the trial setting than anticipated, switch to a different background.

10. Prepare for a day in court. Take the following into account:

- Preparing for the unexpected is crucial in any trial, and remote trials are no different.
- Everyone present on the virtual platform should have the ability to quickly enable tested audio and video and present themselves as if in court. This includes appropriate attire—dressing for a day in court helps to keep the team mentally prepared and ready to appear on camera should the need unexpectedly arise.

Our experience shows that a virtual setting can provide a very effective way to conduct a trial. We send our appreciation to all whose efforts made the event not only possible, but also enjoyable and, we believe, a success.

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Ms. Goswami received a B.S.E. in Chemical Engineering from Princeton University in 2009 and obtained certificates (minors) in Engineering Biology and Materials Science. At Princeton, she was awarded the inaugural leadership prize in Materials Science and Engineering. She received a J.D. *magna cum laude* from New York University School of Law in 2012, where she was a Florence Allen Scholar, a Senior Editor of the *Journal of Intellectual Property & Entertainment Law* and was elected to the Order of the Coif. At NYU, she was awarded the Walter J. Derenberg Prize in Copyright Law.

Ms. Goswami joined Cravath in 2012. She served as a law clerk to Hon. Timothy B. Dyk of the U.S. Court of Appeals for the Federal Circuit in 2013. She rejoined Cravath in 2014 and was elected a partner in 2019. Ms. Goswami is a partner liaison to the Firm's South Asian Affinity Group and a member of the Firm's Diversity Committee.

In 2020, Ms. Goswami was selected to serve as a member of *Law360's* Life Sciences Editorial Advisory Board. She was also recognized in 2020 for her patent litigation work by *The Legal 500 US* and was named to *Benchmark Litigation's* "40 & Under Hot List." Recently, Ms. Goswami was appointed Vice Chair of the Federal Circuit Bar Association's Patent Trial and Appeal Board ("PTAB") and Trademark Trial and Appeal Board ("TTAB") Committee.

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