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Trial in the Time of Covid

Fresh off a four-week bench trial with my partner, Norm Finkel – conducted entirely on Zoom – I want to share some of my impressions that will hopefully help inform clients' decisions as we navigate our way through this new COVID-era legal environment.

As most clients know, even though live court appearances are largely on hold, courts are still functioning, and cases are still proceeding. We are filing new lawsuits weekly, conducting discovery, taking depositions, filing motions, and participating in hearings, arbitrations and, yes, trials.

Most clients have become comfortable with depositions and motion hearings conducted by Zoom. But the question of going to trial and presenting live testimony and documentary evidence by video still leaves a certain understandable uneasiness for many clients. After all, litigation is both a time consuming and expensive investment, and the idea that your case and your investment will be decided by video can create considerable pause.

So here were a few of my concerns heading into trial on a very complex commercial matter that had been pending since 2015 and involved two-trips to the appellate court.

Reading the Judge

The biggest concern for me as a courtroom attorney heading into a Zoom trial was my ability to read the judge who, because this was a bench trial, would decide both the law and the facts. As an advocate, I need to get a feel for my audience. When questioning a witness, understanding whether the judge is grasping the testimony and the narrative I am trying to tell and whether it's being received positively or negatively is crucial. Litigators need to make adjustments on the run, no matter how well they've planned their examination. So the judge's body language, head nods, blank stares, and all manners of facial expressions provide important sign posts. Would my ability to read the judge be lost in video transmission?

Though nothing substitutes for in-person interaction, a Zoom trial provides a few advantages. To understand how, it's important to get a sense of what our Zoom courtroom looked like.

The judge appeared in her courtroom on the bench. My clients and co-counsel set up a conference room twenty miles from the courthouse with a counsel's table, a witness stand, and a lectern like you see in a real courtroom. Our opponents convened in a conference room of their own with a similar arrangement.

In front of us, we placed a 60" monitor, and we had four different cameras in our room. One showed a close-up of the witnesses as they testified from our location, one showed counsel's table, one was trained on the lectern behind which we stood as we questioned witnesses, and one showed the entire room, as was required, to ensure

that no one in the room could be signaling witnesses. Again, opposing counsel had a similar setup. As a result, we could see around ten views simultaneously on a 60" monitor, including closeups of each witness, the attorneys examining the witness, and of course, the judge. And like a live trial, a court reporter was present, albeit on screen in her office.

The closeup of the judge, from her torso up, was the same angle you get in court, but the closeup actually made reading her body language easier. In fact, the setup had one distinct advantage over a live trial. In a courtroom, it is nearly impossible to question a witness and read the judge at the same time for the very simple reason that you can look only in one direction at a time, either at the witness or the judge. But with a video trial, the judge and the witness appear on the same screen, and you can see both as you conduct your examination.

Conducting Examinations

The second concern I had was my ability to effectively cross-examine adverse witnesses who would be testifying by video in our opponent's conference room. When examining a hostile witness, a certain physicality comes into play. An effective cross-examiner will control the pace of the questions and answers. Because witnesses generally have less experience in this battle, they are usually somewhat nervous. My concern was that not being face-to-face, I'd lose the intimidation factor. As it turned out, the adverse witnesses seemed just as nervous as in person. In fact, my co-counsel's cross-examinations of our opponents' expert witnesses were some of the best I've seen. The Zoom trial also allowed us to take live video-testimony from two witnesses in Europe.

Introducing Documentary Evidence

The third concern I had was how would we handle the documentary evidence in a case involving over 600 exhibits, many of them hundreds of pages long. Surprisingly, presenting documentary evidence at the trial was quite easy.

Each side had prepared, exchanged, and delivered to the court exhibit binders well ahead of trial. When it came time to introduce an exhibit during an examination, all parties, witnesses, and the court not only had physical copies of the documents, but they were shared on the video as well. In this regard, nothing at all was lost from an in-person trial.

After four weeks, I came away certain that Zoom trials can be very effective – not just trial-like, but a trial in every sense of the word. And like many bench trials, it ended without a decision at the close of the trial. Instead, the judge asked the parties to present proposed findings of fact and conclusions of law. A ruling is not expected until the end of October. The more things change, the more they stay the same.



The Proliferation of Website Accessibility Claims

Firm Changes

In August, we moved from our long-time office location at 222 S. Riverside Plaza to 300 S. Wacker Drive, 15th Floor, Chicago, IL 60606. In addition to our move, we also re-branded ourselves as Schoenberg Finkel Beederman Bell Glazer, LLC (SFBBG). We were formerly known as Schoenberg Finkel Newman & Rosenberg, LLC (SFNR).

Case Success Stories

SFBBG attorneys Richard M. Goldwasser and Matthew P. Tyrrell scored a decisive victory in the U.S. Court of Appeals for the Seventh Circuit when the Court affirmed a six-figure judgment entered in the Northern District of Illinois in favor of firm client Beauty Enterprises, Inc., a leading distributor of beauty products.

In a separate matter conducted in June amidst not only the pandemic conditions but urban unrest, SFBBG attorneys Adam Glazer and Andrew Johnson successfully arbitrated on behalf of a corporate client in largely boarded-up downtown Indianapolis. The Firm's client faced claims totaling over \$2 Million in a 3-day hearing featuring multiple out-of-state witnesses testifying via Zoom, as well as in-person testimony from each of the corporate parties' principals. The Arbitrator, a former Justice of the Indiana Supreme Court, entered a finding of not liable on all counts, fully vindicating SFBBG's client.

Notable Publications

"Don't Need That Retirement Kitty Withdrawal? How to Give It Back." Published by *Forbes* in August. Contributor: [Bruce Bell](#)

"Mixed reaction to city's recently passed eviction notice ordinance." Published by *Chicago Daily Law Bulletin* in August. Contributor: [Michael Friman](#)

"Chicago Fair Workweek Ordinance in effect amid COVID-19 pandemic." Published by *Chicago Daily Law Bulletin* in July. Contributor: [Matt Tyrrell](#)

"Protecting Yourself From Creditors Out To Grab Your Money." Published by *Forbes* in July. Contributor: [Andy Holstine](#)

"COVID-19 prompts property tax deadline extensions across state." Published by *Chicago Daily Law Bulletin* in July. Contributor: [Terry Nader](#)

"Employee? Independent Contractor?" Published by *Club Business International* in July. Contributor: [Norm Finkel](#)

"Are False Accusations of Racism a Form of Defamation?" Published by *Law 360* in July. Contributor: [Phil Zisook](#)

Speaking Engagements

[Andrew Weissman](#) presented a webinar on October 2nd entitled "The New Subchapter V of the Bankruptcy Code: A New Way for Small Businesses to Reorganize."

On July 14, Partner [Adam Glazer](#) presented to the Mel Foster Company, a technology manufacturer's representative.

"Rep Contracts and Commission Payments Pre and Post COVID-19" discussed how the pandemic is affecting contract rights and obligations.

Welcome Aboard

SFBBG warmly welcomes aboard new corporate partner [Andrew Weissman](#).

Business and website owners are getting inundated with lawsuits claiming their websites are inaccessible to users with disabilities, and therefore violate the Americans with Disabilities Act ("ADA"). Title III of the ADA prohibits discrimination in places of public accommodation. Such claims, usually involving visually impaired persons, reach far beyond retail businesses, and are frequently directed at the food service, real estate, financial services, higher education, and entertainment industries.

The ADA and its implementing regulations are silent with respect to private business owners' website accessibility obligations, and although the U.S. Department of Justice has long promised to promulgate regulations that would clarify website and web application owners' responsibilities to the disabled public, those regulations have yet to issue. Further, since 2016, a series of plaintiff-friendly federal district and circuit court decisions have complicated the defense of these claims.

Experienced plaintiffs' counsel take advantage of the fact that these claims, often boilerplate in nature, are sympathetic-sounding, inexpensive to pursue and difficult to defend. A growing segment of the plaintiffs' bar has seized on the ADA and analogous state laws to file thousands of lawsuits alleging that private business websites are incompatible with screen-reading software used by blind and mobility-impaired users in apparent violation of public accommodation requirements. The plaintiffs, many of whom hold themselves out as ADA "testers", seek court orders directing the redesign of websites and mobile apps to comply with a set of industry best standards – the Web Content Accessibility Guidelines ("WCAG"), Version 2.0 or higher – and request that defendants pay their attorneys' fees.

The groundswell of ADA Title III accessibility litigation has produced inconsistency in district and circuit court decisions regarding the scope and

reach of the statute, including which businesses fall within the statute's scope. Currently, the First, Second and Seventh Circuit Courts of Appeal interpret the protections of the ADA broadly, and hold that Title III applies to website operators, regardless of whether the goods and services available on the website are also at physical locations available to the public. On the other hand, the Third, Sixth, Ninth, and Eleventh Circuits construe Title III more narrowly, limiting ADA-website accessibility claims to websites that bear a nexus to a physical facility. Recently, an appeal from a 2019 Ninth Circuit decision afforded the U.S. Supreme Court the opportunity to weigh in on this upsurge in litigation. The business community followed this appeal with great interest, but the Supreme Court declined to hear the case, preserving the current split among the circuits.

Historically, these claims were often "backburnered" by companies with more pressing legal and business challenges, who deemed them not worth the investment of significant defense costs. However, companies are increasingly recognizing that ADA website lawsuits are more than a mere nuisance, and should no longer choose to kick them down the road or ask their IT personnel to "handle." Instead, companies must proactively check their websites and take steps to ensure compliance with the WCAG 2.0 and general accessibility to the vision and hearing impaired. Many consultants specializing in website compliance can assist with such an audit. In addition, practical steps a company can take once a case gets filed include preserving all website data and consulting counsel experienced in this area who understand the current state of the law and are prepared to mount an aggressive defense.

For more information, please contact [Norm Finkel](#) at 312-648-2300 or at Norm.Finkel@sfbbg.com.

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