

Civil Litigation

Remote hearings, examination of witnesses:
Practicalities

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(July 6, 2020, 8:27 AM EDT) -- Because of the current pandemic crisis, it appears from the emerging case law that remote hearings are deemed acceptable notwithstanding the various concerns. What then are best practices to ensure that ethical standards are met in remote hearings and examinations? We continue the list that we began in our first article in this series:

- Appropriate instructions/admonishments should be given to witnesses at the outset with respect to communications with other parties during their testimony, especially where some witnesses will be appearing remotely from the same office or household, and perhaps the witness should be required to give an undertaking as to his or her commitments in this regard. (The Alberta Civil Trial Lawyers Association, working together with other stakeholders, has issued an *Alberta Protocol for Remote Questioning* revised May 5, 2020, which appends a comprehensive undertaking for witnesses, including an undertaking that the witness will not communicate in any way with any party except for their lawyer outside of the remote examination);
- The judge or person in authority should view the physical room prior to the testimony of the witness to make sure they are alone in the room (This recommendation may impose hardships on vulnerable populations such as the family law client, many of whom take comfort in having their lawyer at their side in a courtroom setting);
- The witnesses should be in a separate virtual waiting room before joining the hearing to testify;
- Steps should be taken to confirm the identity of the witness before they testify;
- The witness should be administered an oath or affirmation;
- The witness should be placed back in the virtual waiting room while the hearing deals with an objection or a matter in voir dire;
- The hearing should decide at the outset how documents will be provided to the witnesses for examination;
- Counsel to the parties should jointly prepare an e-mail distribution list to which documents may be circulated during the remote hearing to facilitate the expeditious exchange of documents which may have been inadvertently left out, to circulate documents that a party wishes to put to a witness during examination, cross-examination or re-examination, or to circulate documents which need to be provided again to a witness who experiences difficulty in locating his or her own copy;
- To the extent that it is possible, all documents to be adduced in evidence by the parties should be assembled in one PDF document called a Joint Brief of Documents; otherwise the parties may assemble their own brief of documents;
- While the witness is giving evidence, the witness shall not review any documents or access any electronic resources other than those documents put to them in their examination or cross-examination, apart from their own sworn affidavits and such documents as they may ask and be permitted to review;

- While the witness is giving evidence, the witness shall not rely on any script or notes unless permitted by the court;
- There should be a protocol established at the outset as to how the exhibits will be marked and how they will be stored electronically;
- There should be a discussion at the outset as to whether expert witnesses will be allowed to attend the full hearing;
- There should be a discussion at the outset regarding how to facilitate an interpreter's participation in the hearing;
- If the witness otherwise requires the assistance of a third party during his or her testimony (for assistance with the technology, for example), permission to do so must be requested and granted before the witness' testimony begins.

Other best practices suggested by the article "Notes & Comment: Rule 43(A): Remote Witness Testimony and a Judiciary Resistant to Change" (2020), *Lewis & Clark Law Review* include:

- A "troubleshooting" session with the witness should take place prior to the hearing to make sure s/he is familiar with the technology and there will be no technological glitches;
- Having a notary public present with the remote witness to check the identification of the witness and to subsequently affirm that no one else was present when the witness gave testimony;
- Having the witness testify from a "remote media room" — a room with an appropriate courtroom appearance, with, for example, flags and a bailiff, to impress upon the witness the weight of testifying;
- The use of multiple cameras in a remote media room in order to better assess credibility and demeanour — with one camera transmitting a video of the witness' face, and a second camera transmitting a video of the witness' whole body.

Although videoconferencing has been allowed to some extent by the rules of most jurisdictions for many years, with this pandemic, remote hearings are still the "wild west." Hopefully, these suggested best practices will be helpful in shaping the way forward.

This is the second of a two-part series. Read part one: Remote hearings, examination of witnesses: Best practices.

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