INTERIM GUIDELINES ON CONDUCTING NONJURY TRIALS BY USE OF REMOTE VIDEO

Advocacy in the 21st Century Committee

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INTERIM GUIDELINES ON CONDUCTING NONJURY TRIALS BY USE OF REMOTE VIDEO[1]

The American College of Trial Lawyers recognizes the impact COVID-19 is having on the judges' and lawyers' ability to do the important work of resolving disputes among citizens. Many jurisdictions are considering or using remote video to conduct nonjury trials. While use of video pretrial depositions during trials has taken place for decades in the United States, and remote video has been used occasionally to accommodate the needs of a witness, the concept of a trial conducted by remote video was, if not unheard of, certainly not within the vast majority of judges' and lawyers' experience before March 15, 2020.

The College believes that courts and lawyers should strive to preserve the traditional formality and solemnity of the courtroom, even in remote judicial proceedings. Fostering these traditional elements we hope will maintain public trust and respect for the judicial system and the outcomes of proceedings, in the face of a new format that will appear more unstructured and informal. The College further believes this can best be accomplished if courts adopt, by order or rule, a comprehensive set of procedures to govern remote trials and that these be available to attorneys, parties, and witnesses, the media and the public at large. Thus, the ACTL Task Force on Advocacy in the 21st Century was charged with gathering policies, procedures and orders from the United States and Canada in an effort to (a) assemble the wisdom and experience of others on the use on remote video in nonjury trials; and (b) prepare and share a summary of it for the common good. The College also believes that the success of remote proceedings will be achieved most effectively and efficiently through the parties' and the courts' concert effort to work together.

The Task Force specifically acknowledges and applauds the efforts of the E-Hearings Task Force of The Advocates' Society, the Ontario Bar Association, the Federation of Ontario Law Associations and the Ontario Trial Lawyers Association for their creation of "Best Practices for Remote Hearings" (May 13, 2020). (https://preview.tinyurl.com/ydyk9lkc). This paper is recommended for judges and trial lawyers in Ontario and, indeed, includes information that will benefit judges and lawyers in the remainder of Canada and the United States.

This Interim Guideline endeavors to focus the Bench and Bar's attention on issues that must be considered in conducting nonjury trials, in whole or in part, by remote video. Not all of these issues are applicable to every remote video trial, but it is suggested that each of them bears consideration in every nonjury trial, to reduce the chance of error and confusion and increase the likelihood that the trial will proceed smoothly. In this way, not only is justice done but the process makes it appear that justice is done.

Thus, the College urges judges and lawyers to consider the following points when creating a plan for a nonjury trial which includes the use of remote video. The College acknowledges that,

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1 This document was developed in response to the COVID-19 pandemic. It is meant to contribute to the ultimate development of "best practices" as courts and advocates adapt in an effort to ensure that Justice in the courtrooms of our two countries does not become a victim of the current economic and health crisis. Readers are (a) encouraged to provide feedback about their experiences with these and other ideas for addressing the issues identified in the Interim Guideline; and (b) continue to visit the College website to see the latest version of the document. Please email comments, orders, rules, etc. on this topic to advocacy@actl.com.

given the differences in the civil justice systems between Canada and the United States, not all points discussed are applicable to Canada.

1. A plan for a trial including the use, in whole or in part, of remote video should be set forth in writing and available to the parties sufficiently in advance of trial so they can be prepared to use it effectively.

Each video proceeding or argument should be the subject of a plan that addresses the particular requirements of the court, the parties, the witnesses and the nature of the evidence in the specific matter. This plan will be informed by the protocols of the court in question and aided by these guidelines. Some jurisdictions will develop, via court order or local rule, a standing protocol for use of remote video in nonjury trials. Some judges will not have the benefit of such a protocol and will have to develop one on a case-by-case basis.

In the event that no local rule or standing order addresses how a trial will be conducted in this fashion, the Task Force encourages the parties to address issues arising from the use of remote video in a pretrial conference, the results of which are memorialized in a written order pursuant to Fed. R. Civ. Pro. 16 (or the state or provincial law equivalent). The Task Force believes that a written order reduces the chance of error and confusion and increases the likelihood the trial will proceed smoothly.

The remainder of this paper works under the assumption that no local rule or administrative order addresses the use of remote video for nonjury trials and the judge (with input of counsel) is tasked with the responsibility of preparing one. If jurisdictions do have local rules or administrative orders in place, this paper may be of help in offering supplemental assistance. For ease of reference, the procedures to be followed concerning the use of remote video will be referred to as the "Plan."[2]

Especially in the early days during the use of remote video technology, courts and counsel need to work together develop the Plan and then communicate during the trial about whether modifications need to be made to it. In multi-day trials, it would be prudent for the court and counsel to confer at the beginning or end of each trial day to determine what changes, if any, need to be made to the Plan and address other trial-related issues.

2. The Plan should identify the remote video platform and the identity of the court's employee who will be (a) available to answer questions about how the platform works; and (b) responsible for managing the remote video component of the trial.

Several platforms are available to facilitate the use of remote video. Likewise, court reporters often have remote video platforms that the court may choose to use and permit the court reporter firm to manage the video. The Plan should identify which platform will be used by the court. Especially in the early days of use of this technology, courts need to be prepared to work with lawyers and, especially, self-represented parties to facilitate an understanding of how to use the

2 The issues raised herein can also serve as a resource for judges or committees appointed to draft an administrative order or local rule governing the use of remote video in their jurisdiction, including its use in nonjury trials.

court's platform. Ideally, these instructions should be in a publicly available written or video format prepared for those who do not have the benefit of technology knowledge or skill. Likewise, lawyers utilizing remote video need to learn how to use the technology in general and, in particular, the platform used by the trial court.

It is also important that the person in the courtroom responsible for managing the remote video platform during the trial be identified in the Plan (hereinafter "Video Manager"). and that person's duties be spelled out in the Plan (or in a standing court order).

3. The Plan should include (a) a time for starting the trial; (b) an earlier time for all counsel and video manager to be on-line and on-camera so that any technology issues can be identified and corrected before the official start time for the proceedings; and (c) instructions from the court concerning frequency and timing of breaks in testimony.

It is important that the parties and the Video Manager sign on to the video platform before the official court start **time** to ensure that the technology is working. It is also important for the court to give the parties advance notice of when breaks likely will occur, understanding that the use of remote video may necessitate more frequent breaks in order to help the court and the parties remain attentive during the proceedings.

4. The Plan should advise whether the court will be recording the procedures via the remote video platform and, if so, whether and how some or all the proceedings can be accessed by the parties during the trial.

Remote video platforms typically allow the session's host to record the proceedings. If the court chooses to record the proceedings, the parties should be so advised.

If the court chooses to record the proceedings, it must decide whether the recording will display the witness, all participants on video, and/or any items displayed to the court using screen sharing or other presentation features. Counsel and the parties should be consulted on these issues and advised of the court's decision following that consultation.

Furthermore, if the court intends to record the proceedings, it must decide (a) whether it will allow a party to request some or all of the proceedings from the court's manager; (b) if so, whether all other parties should be advised of the request; (c) the timing and scope of a proper request; and (d) any charges and payments related to being provided with the court's recording of some or all of the proceedings.

For example, assume at the end of a trial day Party A asks for a download of the video recording of Party B's two-hour direct examination of Witness X earlier that day, to aid Party A in preparing for cross-examination of Witness X the next day, or some other use. Should Party A be able to get access to this testimony? Should Party B (or the other parties, if any) be advised of Party A's request? If Party A is permitted to access it, should the Video Manager be required to find and download only the portion of the day's recordings sought by Party A or simply download the entire day's recording, putting the burden on Party A to identify the testimony in question? Should Party A be required to provide a USB if it wants the information downloaded? At what time of day can the

request be made? Should the court permit the Video Manager to be called "after hours" with such a request? Assume a document or information has been designated by the court as "confidential." How does that affect accessibility to the video and how it must be treated by the parties? These and other questions on this issue should be addressed in the Plan. There are several reasonable alternatives to properly address these types of issues, but the Task Force believes that confusion and claims of unfairness can be avoided if the written Plan address these issues in advance.

5. The Plan should set forth a procedure for the submission of exhibits before trial and the use and creation of exhibits during trial.

Most jurisdictions have a local rule or custom concerning the exchange of exhibits before trial. A trial involving remote video raises additional issues that should be addressed as part of the Plan. What follows is a list of those issues, as well as some suggestions on how to address each issue.

a. Pretrial exchange of exhibits. As indicated above, many local rules of court and scheduling orders have a deadline for the parties to exchange exhibits. This rule should apply in nonjury trials to be conducted by remote video.

b. Use of exhibit notebooks. Although it is anticipated that the screening-sharing function of the remote video platform will be used to refer to exhibits during the trial, it is suggested that both the court and the parties will want and need access to paper copies of the exhibits during the course of the proceeding. Thus, it will be helpful if the parties create an "exhibit notebook" that contains all of the exhibits each party expects to offer during the course of the trial.[3] The scheduling order should establish a deadline for the parties to work together and create a joint notebook with the anticipated exhibits. The exhibits should be pre-marked with proposed exhibit numbers and placed behind tabs bearing the exhibit number, so they can be quickly found. Additional tabs should be included in the notebook for additional exhibits that may be offered at trial. Two copies of the joint notebook should be provided to the court on a stated date before the trial – one copy for the judge and one copy for the Video Manager. Another copy should be delivered to the court reporter.

The front of the exhibit notebook should contain an index of the documents in the notebook. The index should indicate whether the parties stipulate to the admissibility of the exhibit and an appropriate place for the parties, the court, and the court reporter to indicate whether the document was admitted into evidence during the trial. The index will allow the court, the parties, and the court reporter to readily find referenced exhibit during the trial and promptly determine whether a proposed exhibit was, in fact, admitted into evidence. The court reporter should be responsible for holding the "official" exhibits admitted into the record.

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3 Some with advanced skills in the use of document management software may bristle at the idea of using a paper management system for exhibits. Of course, the court and the parties can elect to use documents in digital format only. However, the Task Force believes that many people, especially self-represented parties, may not have the skill or confidence to use anything other than paper documents. Likewise, the computer screen available to a witness might not be of sufficient size to adequately see or manage a given document, especially given the stress of being in a trial, on camera, and under oath. A trial, particularly one by remote video, is not the place to learn how to manage digital documents.

c. Screen sharing. At the pretrial conference, counsel should notify the court if they intend to use PowerPoint or any other presentation software during opening or closing statements and request the opportunity to use screen sharing controls during their presentation. Counsel or a witness who wants to make a presentation using screen sharing during the presentation of evidence should ask the court for permission to do so.

d. Acceptable file format(s) for exhibit or demonstrative aid submissions. Among the variety of different file formats available, many may be inaccessible without specialized or proprietary software. The court, all counsel, and all witnesses must be able to access materials exchanged using the in-meeting file transfer feature of the video platform. At the pretrial conference, the parties should indicate the types of evidence or other materials that might be submitted (*e.g.,* scanned documents, audio recordings, video recordings, etc.). The Plan should include designated file formats for each type of evidence. It is counsel's responsibility to confirm that all exhibits or other electronic files introduced by that counsel comply with the court's file format requirements. Common file formats that may be considered include .PDF (fpr text, scanned documents, and images), .jpeg or .jpg (for images), .mp3 (for audio), .wav (for audio), and .mp4, .mpg, or .mpeg (for video).

e. Documents created during testimony. If a document is created during the testimony, or if markings are placed on an exhibit during testimony and a party wants to offer the created or marked document into evidence, the party shall move to introduce the document into evidence in the traditional fashion. Then, using the "in-meeting file transfer" feature of the platform, that party should send a copy of the document to each party, the court, the Video Manager, and the court reporter. Counsel and self-represented parties shall confirm on the record that each received a copy of the uploaded document. The court reporter will mark any such exhibit with a number following the pre-marked numbers and, at any appropriate time, will print the document and add it to the official exhibit notebook.

f. Documents used for impeachment purposes. Some jurisdictions do not require a party to disclose documents that may be used to impeach a witness; others require pretrial disclosure. If pretrial disclosure is required, the documents will be a part of the exhibit notebook. If pretrial disclosure is not required, the Plan should indicate that when such a document is used, the party shall, through the use of the in-meeting file transfer feature of the platform, send a copy of the document to each party, the court, the court's remote video manager, and the court reporter. Counsel and self- represented parties should confirm on the record that each received a copy of the uploaded document. If the document is admitted into evidence, the court reporter will mark any such exhibit with a number following the pre-marked numbers and, at any appropriate time, will print the document and add it to the official exhibit notebook.

g. The need to exhibit true "original" documents. If a true "original" document needs to be entered into evidence, the original should be submitted to the court (as the trier of the facts) as part of its copy of the evidence notebook. Such a document should be clearly identified as a true "original." If the document is ultimately admitted into evidence, the court and court reporter can coordinate the inclusion of the true "original" into the official exhibit notebook maintained by the court reporter.

h. Oversize exhibits and physical objects. The Plan should (a) require counsel to advise the court at the pretrial conference if oversize (construction drawings or plans, spreadsheets, etc.) documents or physical objects either will be used as demonstrative aids or will be sought to be admitted into evidence; and (b) set forth a plan for utilizing such items during the proceedings and, if appropriate, admitting them into evidence and delivering them to the court reporter for inclusion in the official record.

i. Documents that were pre-marked but not admitted into evidence. It is not uncommon for a document or thing that was identified as a potential exhibit to not be admitted as evidence in the proceeding. At the close of the evidence the parties and court will confer and confirm which of the pre-marked exhibits were entered into the evidence; which, if any, were not admitted into evidence; and which additional documents not included in the original exhibit notebook were admitted into evidence. Documents included in the court reporter's notebook that the parties agree were not offered into evidence should be removed from the notebook and an appropriate statement should be made on the record. If a document was offered into evidence but excluded by the court, the document should be (a) removed from the exhibit notebook; (b) placed in an envelope designated for holding documents excluded from evidence by the court; and (c) a statement should be made on the record identifying each document placed in the envelope.

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For example, assume that prior to trial the parties pre-marked thirty trial exhibits, numbered 1 - 30. During trial, only 26 of those exhibits were offered into evidence; for whatever reason, the parties did not offer the other four pre-marked exhibits (nos. 10, 12, 18 and 22).

Assume further than two exhibits were created during trial, one of which was marked Exhibit 31 and the other Exhibit 32.

In addition, one pre-marked exhibit (19) was offered into evidence but excluded by the court.

Thus, at the end of the trial, the record should make it clear that (a) there were 27 exhibits entered into evidence into trial; (b) that pre-marked exhibits nos. 10, 12 18 and 22 were never offered into evidence and, therefore, are not part of the official record or considered by the court; and (c) pre-marked exhibit 19 is included in the record for identification purposes only and was excluded from evidence for the reasons previously stated.[4]

Both courts and lawyers should consider whether it is appropriate to utilize commercial video platforms often offered by court reporters. These programs may enhance the user's ability to effectively use exhibits and therefore enhance the presentation of documents and other evidence.

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4 The Task Force recognizes that there are multiple ways to handle exhibits. The inclusion of this method is not meant to imply that it is the only way or the "best" way to do so, but simply to demonstrate the issues that need to be taken into account for managing exhibits when all participants are not in the same place at the same time. Remote video complicates the management of exhibits.

6. The Plan should set forth a procedure for the use of depositions at trial.

Some depositions may be used as evidence at trial and, to the extent they will be used at trial for any purpose, the Plan should set forth a date for the court to be provided with the depositions (or, if permitted by local rule or custom, relevant excerpts thereof) so the court has ready access to them at trial. To the extent that a party intends to introduce depositions into evidence at trial, the court reporter should also be supplied with a copy of the deposition by a date specified in the Plan.

7. Oath by a witness.

The traditional oath or affirmation should be administered on camera to each witness. In addition to the customary oath or affirmation, the court may wish to consider that each witness be advised, either by the court or counsel, that he or she:

a. Should not send or receive any text, email or other messages that concern in any way the subject matters of his or her testimony or that relate in any way to his or her role as a witness in the proceeding if such communications would be prohibited if the witness was appearing in-person in a courtroom.

b. Should not consult any social media site (Facebook, Twitter, Instagram, Linked In, etc.) for any purpose, from the beginning of his or her testimony until it is complete.

c. Should not discuss the subject matter of his or her testimony with any person, from the beginning of his or her testimony until it is complete (except with the witness's counsel, as appropriate, for purposes of discussions about whether a privilege should be invoked).

d. Should not consult any deposition or other document concerning the subject matter of the case, from the beginning of the testimony until it is complete, unless he or she does so at request of court or counsel in plain view of the court during the testimony on camera.

e. Should not take any action to turn off the camera or disrupt the internet connection between the camera/ computer and the court's platform, unless instructed by the court to do so.

f. Will keep a phone readily available to receive a telephone call in the event of a technological interruption during his or her testimony.

The precise rules given to witnesses need to be common-sense rules consistent with the nature of the case, the length of the trial, etc. The goal is to replicate, to the extent reasonably possible, the same rules that would apply to in-person courtroom testimony apply to situations in which witness is not physically present in the courtroom.

8. Attire of the parties, witnesses and counsel.

Each person participating in these proceedings who may appear on camera should dress as they would if they were attending court in person.

9. Appearance on Camera.

Each party or party's representative and each attorney who has a speaking role in the trial should have an individual camera and should be "on camera" during the entire time court is in session. (In cases where multiple lawyers will be examining witnesses or otherwise addressing the court, the Plan should address which lawyers will be "on camera" on each day or for each segment of the trial). Absent sufficient evidence to the contrary, each party and each lawyer who is "on camera" is deemed to have heard and seen all proceedings as if they were conducted in a traditional courtroom. Each person (including each witness) who will be appearing on camera during the trial should be required to share with each other participant and the court the cell or telephone number where they can be reached during the course of the trial. Likewise, every person (including every witness) appearing on camera should be required to keep the telephone near them during the time he or she in on camera.

Each witness must be "on camera" during the entirety of his or her testimony. It is the responsibility of the lawyer who intends to call a witness by remote video to ensure that:

a. the witness has a functioning computer equipped with a camera;

b. the witness has access to sufficient bandwidth to permit the camera and computer to interact with the court's video platform;

c. the witness has been instructed on how to use the camera, computer, and platform; and

d. the witness has been notified of the date and time of his or her expected testimony (which may of course be modified from time to time during the course of the proceeding, with reasonable notice to the witness). If counsel cannot ensure the foregoing, counsel needs to bring up the issue at the pretrial conference.

10. Loss of Internet Connection to Platform.

The court's Video Manager must monitor the platform to see if all persons who are supposed to be "on camera" are truly "on camera." If the manager sees that a person who should be "on camera" is not "on camera," he or she will immediately bring it to the attention of the court, the proceedings must be stopped, and the Video Manager or other person designated by the court will attempt to reach, by telephone, the person whose contact with the platform has been lost. Any counsel who becomes aware that a person who is supposed to be "on camera" is not on camera has a duty to promptly bring that information to the attention of the court. Any person who loses visual or audio connection with the platform must immediately call or text the Video Manager to alert the court and do so before attempting to reinitiate connection with the platform.

11. Responsibilities and Conduct of Counsel:

a. Counsel are expected to conduct themselves with the same level of professionalism, civility, and formality as they would if the proceedings were being conducted in

open court, except that counsel are permitted to remain seated during examinations and arguments to the court.[5] Likewise, counsel are expected to understand that the same rules of procedure and evidence apply to proceedings using remote video as would apply in a traditional proceeding.

b. If invoked by any party, the sequestration rule (Fed. R. Evid. 615 and analogous state and province rules and customs) applies to remote video proceedings just as it would if the proceedings were being held in open court.

c. Counsel must have the platform's microphone on "mute" unless he or she is examining a witness or speaking to the court.

d. Counsel must be aware that one limit of current technology is that it is too easy for judges, lawyers and witnesses to speak over one another, creating difficulties in communication and adversely impacting the creation of an accurate transcript. Counsel should endeavor not to interrupt the court or others, speaking only when the court directs or when necessary to create a proper record.

e. Counsel should become familiar with the technology used for remote hearings, understand how it works and, where possible, have the necessary hardware and software to participate meaningfully. Hardware and software should be tested before the hearing so that any glitches can be identified and resolved.

f. Where is not possible for counsel to have or use technology for remote hearings, counsel should consider how they can facilitate a remote hearing using alternate tools or raise the issue with opposing parties and the court at the pretrial conference.

g. Counsel are expected to work with one another to ease any burden technology places on other counsel or another party and shall not use technological challenges or glitches to gain an advantage over another lawyer or party.

h. Counsel have the responsibility to ensure that his or her client (i) has technology available to participate and observe the trial; (ii) understands that the client shall have the mute button on at all times except when testifying or when asked a question by the court; and (iii) understands the circumstances under which the client can privately communicate with counsel during the proceeding and how to do that.

12. Submission of Documents (other than Exhibits) to the Court During Trial.

If it becomes necessary for counsel or an unrepresented party to offer a bench brief or case law to the court during the course of the trial, counsel may use the in-meeting file transfer feature of the video platform to send a copy of the document to each party's lawyer, the court, the Video Manager, and the court reporter. Likewise, the court and parties may choose to exchange such documents via email. Counsel and self-represented parties should confirm on the record that each received a copy of the transmitted document.

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5 In many jurisdictions, counsel must stand when addressing the court. This Interim Guideline purposefully relaxes that rule, only because requiring counsel to alternatively sit and stand impacts where the camera for counsel must be located. Re-locating the camera during the trial can lead only to delay and confusion.

13. Sidebar Conferences.

If it becomes necessary to have a side bar conference with the court, the Video Manager can establish a private room for that conference to occur. A sidebar conference is not part of the public proceedings.

14. Conferences Between Counsel.

If it becomes necessary for counsel to have a private conference with one another or their client during the court proceedings, counsel may ask the court for permission to have a private conference. If permission is granted, and assuming any security concerns are adequately addressed, the Video Manager may establish a private room for such a conference. Conversely, the court may permit counsel to interact with other counsel or their client via text message or cell phone.

15. Conduct of Parties While Court is in Session.

Each party or the party's representative will be "on camera" while court is in session. Each will have his or her microphone on "mute" during the proceedings unless he or she is being examined as a witness or he or she is asked a question by the court. Each party or party's representative must conduct themselves with the same dignity and courtesy as would be expected if the proceedings were being held in open court. It is the responsibility of counsel for the parties to explain these rules to their client or client's representative.

16. Addressing the Needs of Those with Disabilities.

Inquiry should be made before trial whether any party, lawyer or witness has a disability that prevents or impairs his or her ability to participate in a trial that includes the use of remote video. If so, the Plan should include provisions that will permit the person to fully participate in the proceedings as if they were being held in open court.

17. Self-Represented Parties.

If one or more of the parties is self-represented, the court should anticipate the need for additional training of the use of the video platform and on the development of the Plan.

18. Self-Represented Parties and Witnesses Without the Ability to Participate in a Nonjury Trial That Includes the Use of Remote Video.

Not everyone has adequate internet access or access to a device that includes a camera. The court should consider such economic issues in determining whether a nonjury trial using remote video is appropriate or what measures can be taken to permit the self-represented party or witness to have access to the necessary equipment and Internet.

19. Transparency.

The Task Force recognizes that "transparency" is an important issue to be addressed

in any Plan so as to ensure public confidence in the integrity of the trial processes and (among other things) avoid complaints by the press or others. Indeed, the Plan should address how the public and media can readily view the proceedings in real time, considering applicable law and procedures for media access generally. The Task Force does not offer specific recommendations on this issue at this time because it would be premature to do so until the experiences of various jurisdictions across the U.S. and Canada can be reviewed and evaluated.

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