



Conducting Remote Hearings by Use of Remote Video

INTERIM GUIDELINES

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.

Task Force on Advocacy in the 21st Century

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American College of Trial Lawyers

The American College of Trial Lawyers is an invitation only fellowship of exceptional trial lawyers of diverse backgrounds from the United States and Canada. The College thoroughly investigates each nominee for admission and selects only those who have demonstrated the very highest standards of trial advocacy, ethical conduct, integrity, professionalism and collegiality. The College maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. The College strongly supports the independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings.

Task Force on Advocacy in the 21st Century

The purpose of the Task Force on Advocacy in the 21st Century is to develop and make available the College's expertise on the issues that will confront the administration of justice in a post-pandemic world, in particular those issues that impact the discovery component and trial of civil and criminal cases and oral arguments before appellate courts.

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Interim Guidelines for Conducting Remote Hearings by Use of Remote Video¹

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 hearings, a practice not within most 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. The College further believes this can best be accomplished if courts adopt, by order or rule, a comprehensive set of procedures to govern remote hearings 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 hearings; and (b) prepare and share a summary of it for the common good.

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 Guidelines endeavors to focus the Bench and Bar's attention on issues that must be considered in conducting remote hearings, in whole or in part, by remote video. Not all of these issues are applicable to every remote video hearing, but it is suggested that each of them bears consideration in every hearing, 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 actually 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 hearing which includes the use of remote video. The College acknowledges that, given the differences in the civil justice systems between Canada and the United States, not all points discussed are applicable to both jurisdictions.

Introduction

[1] The purpose of these interim guidelines is to begin to identify best practices for counsel in the conduct of remote hearings. A remote hearing is one conducted in whole or in part by

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remote means, such as video-conferencing or tele-conferencing. The focus of these guidelines is on hearings conducted by videoconferencing, although they may be adapted to tele-conferences as required.

[2] Hearings are court hearings, short of trial, which likely involve the admission of evidence, generally in the form of sworn evidence and documents, but may also involve viva voce evidence, in which case reference should also be made to the College's interim guideline on non-jury trials.² Hearings may involve such matters as applications for injunctions, contested interlocutory applications, and any other hearings calling for judicial adjudication. Hearings may well need to be heard urgently, in which case arranging and conducting them may pose logistical challenges for the courts and parties.

[3] The ACTL recognizes the urgent need to ensure continuing access to justice during the current pandemic. Holding hearings remotely may often be the only practicable means to resolve matters requiring adjudication. But not every matter is suitable for a remote hearing. Counsel should consider whether there are statutory, civil rules or other logistical reasons why a hearing cannot or should not be conducted remotely. Counsel should also ensure that remote hearings are conducted in a way that protects fundamental procedural and substantive principles of justice.

[4] Courts in both the United States and Canada are developing protocols governing the initiation, preparation for, and conduct of remote hearings. These protocols vary among different jurisdictions. Jurisdictions use different video platforms, establish different timelines for the preparation and organization of the hearing record, access to the record and case authorities during the hearing, and other logistical matters. Counsel must familiarize themselves with local rules and protocols to ensure the efficient, orderly and fair conduct of a hearing. The Courts are often active participants in the organizing and conduct of remote hearings through case management conferences or court protocols. Engaging collaboratively and proactively with the court is to be encouraged.

² Interim Guidance on Conducting Nonjury Trials Using Remote Video may be viewed at actl.com/advocacy.

[5] The current pandemic requires lawyers to adapt and innovate to serve the administration of justice. The ACTL calls on lawyers to respond to the current crisis by upholding principles of civility, collegiality, and cooperation and to bring those principles to bear in the organization and conduct of remote hearings. Further, the ACTL recognizes that the immediate challenges to the administration of justice offer an opportunity to innovate and improve for the longer-term access to justice in a manner consistent with fundamental principles of justice.

[6] The following guidelines incorporate common features of hearing protocols as they are being developed in the United States and Canada and offer guidance on best practices where protocols do not exist or are incomplete. The principal suggestion is that planning for, organizing, and conducting remote hearings require cooperation among all participants. Those arrangements should be set out in a hearing plan which may, where appropriate, be set out in a hearing order.

Hearing Plans

Organizing the hearing

[7] Counsel should collaborate to agree, where possible, on the issue(s) to be decided and the terms of the order sought.

[8] Counsel should attempt to narrow the issues as much as possible to facilitate an efficient and focussed hearing. Arrangements should attempt to streamline the hearing as much as reasonably possible by limiting the record and the volume of case or statutory authority. Areas of agreement should be clearly identified and Agreed Statements of Fact (known as Stipulated Facts in the United States) should be submitted, as a matter of course.

[9] The extent a party is prepared to rely on its written submissions should be clearly communicated to the court in advance of the hearing.

[10] Arrangements should be made to identify and marshal the evidentiary record, including affidavits, documents and transcripts, in advance of the hearing. The parties should agree on the format of the evidentiary record and the way it will be made available to the court, for example, in searchable electronic form in advance. Where possible, the parties should agree to a Joint Book of Documents (known in the United States as a “stipulated exhibits”). Agreement should

be reached on the most efficient way to access the record during the hearing. The use of a condensed brief of documents, evidence, and authorities that will be referred to the court during the hearing should be standard practice.

[11] Platforms have shared screen capability which permits all participants to view a document simultaneously, but participants may also require private access to the record as well. An agreement should be reached, subject to court approval, about using shared screens.

[12] Where possible, common naming conventions should be used to identify documents to ensure a clear record.

[13] Many hearings involve private, sensitive, confidential, or other information that should not be disseminated publicly. The parties should collaborate to devise methods to ensure the hearing can proceed while protecting such information.

[14] Unless a local court rule or court order requires otherwise, Parties should agree on a time line for exchanging materials, the law, and any written arguments so that materials are prepared in advance of the hearing and there is no need to disrupt the hearing by attempting to introduce new materials while it is ongoing.

[15] Subject to court discretion, authorities should be available in electronic form and preferably hyper-linked from the written brief. (Applicable in Canada and in those jurisdictions in the United States where required by rule or order.)

[16] Logistical arrangements to ensure the presence and participation of the parties at the hearing, the stability of the platform, public and media access, and contingency plans in the event of technical problems all need to be in place before the hearing starts.

[17] Different jurisdictions will likely have different rules governing the recording, photographing, or transmission of a hearing. These rules must be respected, and lawyers have an obligation to ensure that their clients or witnesses understand those rules. Lawyers and parties should be prepared to give undertakings confirming their understanding of, and agreement to, these requirements.

[18] Those individuals participating in the hearing should ensure that their name and role is clearly visible on the screen.

The conduct of the hearing

[19] The hearing should be conducted in a manner that maintains and replicates, to the greatest extent possible, the formality, dignity and solemnity of a court proceeding. Remote participants should dress appropriately, select an appropriate setting without distractions, keep microphones muted unless speaking, and ensure that their behaviour, for example, in taking notes is not distracting—typing is often picked up on the audio feed.

[20] Parties should agree, subject to court direction, on a schedule for making oral argument. Only one person should speak at a time. Participants should agree on a means by which they can indicate to the court that they want to interject or make an objection. It is particularly important in hearings involving self-represented litigants that they can indicate when they do not understand the proceedings.

[21] Subject to court approval, parties should agree who is entitled to be visible on the video screen. Lawyers representing a party should be visible, although it may be appropriate that counsel without a speaking role are observers only. Parties, unless representing themselves, should be observers only, as should any members of the public or the media.

[22] Agreements should be made about how to deal with any disputes about the admissibility of evidence and the marking of exhibits to ensure a clear record for the hearing and how exhibits will be stored. The court should be advised of any potential evidentiary disputes in advance to permit their efficient and orderly resolution.

Practice tips

[23] Lawyers should remember that a virtual hearing is different from an in-person hearing. Lawyers need to take the time to become conversant with the technology and able to deal with technical problems if they arise.

[24] Lawyers need to ensure they are equipped with and can access all of the materials needed to conduct a hearing and can clearly direct other participants to specific material.

[25] Consideration must be given to how a lawyer can or ought to communicate with the client or support staff and co-counsel during the hearing.

[26] Multiple sources now provide tips on maintaining a professional ambience and etiquette during a videoconference, including such matters as camera angles, lighting, backgrounds, and how to speak during the conference. These sources should be consulted.

Self-represented litigants, persons unable to participate fully in remote hearings, and the duty to accommodate.

[27] A lawyer's professional obligations to self-represented litigants are augmented in the context of remote proceedings. Such persons may be technically challenged, lack access to technology, not have the necessary bandwidth to participate fully, or may have mental health or other problems that compromise their ability to participate fully. Lawyers are expected to use their best efforts in arranging or conducting remote hearings to accommodate these and other similar issues.

[28] Not all participants, whether witnesses, parties or counsel are able to participate easily or adequately in a remote hearing. This may be so because of health issues such as sight or hearing loss. Again, lawyers must accommodate these issues as much as reasonably possible.