

## Practical Tips for Conducting Virtual Discoveries

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As society continues to learn to adapt to our “new normal” of social distancing, the legal profession has made every effort to persevere and find innovative ways to ensure, to the extent possible, that access to justice is preserved. One way in which lawyers continue to keep the litigation process moving efficiently is by conducting virtual examinations for discovery.

Lawyers who, during the initial phases of social distancing, were resistant to moving examinations for discovery to virtual platforms, are now left with little choice after the decision of Justice Myers in *Arconti v. Smith*, 2020 ONSC 2782, wherein he ordered examination for discovery to be conducted by video-conference despite the plaintiffs’ objections.

Justice Myers, in his reasoning stated:

It’s 2020...We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.

It may be safe to say that conducting virtual examinations for discovery will continue to be “the norm” for the foreseeable future. Accordingly, Rogers Partners wants to share some of the practical tips and tricks we have learned over the past several months for smoothly conducting an examination for discovery on a virtual platform.

- 1) **Don’t rely on WIFI** – depending on the location of counsel and the witness, WIFI connections can be spotty, causing lag and freezing which interrupts the flow of questioning. When this happens, try switching to data on your smartphone or tethering same to your laptop.
- 2) **Discuss your witness’s set up with him/her beforehand** – make sure your witness knows they need to be alone, in an area with the least amount of interruption and background noise as possible, and **limit distractions to the extent possible**. It is near impossible for counsel to know for certain if the witness is referring to a

document or notes throughout the discovery.

Accordingly, in order to avoid suspicion of same, make sure your witness knows to not look at their phone during the discovery unless asked, and if using their phone's camera for the discovery to not sit in front of their computer as the natural inclination to look ahead may come across as the witness referring to documents on their computer.

- 3) **Put it on the record** – before beginning questioning, it is best to confirm some points on record that one wouldn't have to do for an in-person discovery, such as:
  - a. The witness is alone.
  - b. The witness is not going to reference any documents or notes during the discovery unless counsel directs him/her to same or ask the witness to confirm what documents they have in front of them, if any.
  - c. Some platforms (such as Zoom) allow for participants to video record a meeting – it is likely best to confirm that no participants, including the witness, will video record the examination. If the court reporter is video recording the discovery, confirm with counsel on the record that if the recording is to be obtained by counsel, prior consent for same will be obtained.
- 4) **Do a test run** – if your witness is not familiar with the platform you will be using for the discovery, do a test run with him/her beforehand so they are comfortable and time is not wasted during the discovery trying to sort out technological issues.
- 5) **Be mindful when using the share screen function** – some virtual platforms allow participants to share their screen during a meeting, which can be very convenient when putting documents to a witness. However, it is important to be alert to the fact you may be allowing other participants to see your personal notes or privileged documentation if same is open on your computer when you share your screen.
- 6) **Be clear about who you are addressing** – it is our natural inclination to use eye contact or body language to communicate to whom it is that we are speaking. This is obviously not as easily discernable using a web camera, so addressing whether you are speaking to counsel, the court reporter, or the witness, will avoid any confusion.
- 7) **Utilize the mute function and turn off video if you are not asking questions to the witness** – this cuts out background noise and eliminates and potential for confusion for the witness and court reporter regarding who is speaking.

We hope the foregoing is of some help as we continue to navigate our way through this new way of conducting litigation events and look forward to continuing to share our tips and tricks as we discover them.