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May 3, 2021

Virtual Advocacy: Views from the Bench

On April 29, 2021, Canadian Lawyer held the webinar titled “Virtual Advocacy: Views from the Bench”. Justices Kathryn N. Feldman (Ontario Court of Appeal), David M. Masuhara (British Columbia Supreme Court), and Roger R. Lafrenière (Federal Court) joined Mediator and Arbitrator, Robin Dodokin, to share their views on how advocates can succeed and adapt in virtual proceedings. As lockdowns remain in place across the country, their advice was timely and valuable.

Competence with Technology Is Essential for Advocates

The panel opened with a discussion of how the courts have adapted to the virtual world, and how they expect counsel to adapt. Justice Masuhara commented that it is no longer acceptable to be a luddite. Counsel should aim to be a solution, not a problem, when it comes to using technology. And they should remember to keep in mind the technological capacities and competencies of the judiciary when they prepare for any type of virtual proceeding.

Counsel can and should take advantage of the screen-sharing functionality of virtual platforms. The Justices on the panel shared the following tips:

- The more voluminous the record, the more helpful it is to screen-share. It may not be necessary on a shorter motion.
- Compendiums can be effective when used well by counsel. A compendium can be organized in the order in which counsel intends to proceed through the argument, which minimizes the need to virtually flip through many documents.
- The judge has likely marked up their own copy of the materials. Give page references even when screen-sharing so that the judge may use their own materials if they want to do so.
- Be careful not to share your own annotations.
- Any materials shared with the court in PDF should be text-searchable (using OCR) and bookmarked. Make your electronic materials easy to use.

Virtual Platforms Can Be an Effective Tool for Alternative Dispute Resolution and Pre-trial Proceedings

Robin Dodokin shared her experience conducting virtual mediations and arbitrations. She advised that while virtual proceedings can still be very effective, it can take longer for the mediator to build rapport and trust with the parties without the ability to engage in casual conversation. She encourages parties to book a longer session if they are proceeding virtually.

Similarly, Justices Masuhara and Lafrenière agreed that it is much more difficult to take the temperature of a room in a virtual setting. While technology has taken away a lot of inefficiencies in the court system, it has also resulted in a loss of connectivity.

In any setting, be it court or an alternative process, it is important for counsel and parties to come prepared. Counsel should consider a procedural order for things like document sharing or technology failure protocols. Witnesses will have to be prepared to use the technology. Finally, a technology run through is desirable in most cases.

Civility Is More Important Than Ever

Each of the panelists agreed that the key to a successful virtual proceeding is civility. Counsel set the tone in this respect. In some proceedings, such as teleconference hearings, where it is hard for a judge to interject, the need for civility is heightened. Collaboration with the opposing party can also assist. For instance, the preparation of joint materials can assist the court in managing the volume of electronic materials they need to review.

Finally, Justice Masuhara commented on the need to not lose sight of the formality of the process. Counsel should take care to remember that they are in court, even though they may not physically be there.