

Lawyer Ethics in the Virtual Courtroom

By: Gideon Christian

The COVID-19 pandemic has radically altered the way we live, work, and play. As will be examined below, it has altered the way lawyers conduct litigation. By mid-March 2020, the justice system in Canada (and in most other jurisdictions around the world) was scrambling to change its default ways of doing business – from the service of court documents to hearing of matters before the courts. Within a very short timeline, the courts and the legal profession quickly became open to doing things in a way they have long resisted.

Practice directions emerged overnight permitting parties to electronically file and serve documents. Virtual hearing became the default mode of court hearings in many jurisdictions during the early stage of the pandemic. On March 19, 2020, the Lord Chief Justice of England and Wales issued a directive that, “[t]he default position now in all jurisdictions must be that hearings should be conducted with one, more than one or all participants attending remotely.”

Soon, in-person hearings gave way to e-person hearings using innovative videoconferencing technologies like [Zoom](#), [WebEx](#), [Teams](#), [Skype](#), [GoToMeeting](#), [BlueJeans](#), [CourtCall](#), etc. For many in the legal profession who were previously familiar with these technologies, the transition was very smooth. For the [Luddites](#) who were forced to embrace the change, the transition turned out to be (to their amazement), not as difficult as they had previously thought. They have discovered that legal technology is no rocket science after all.

The fact, though, is that the COVID-19 pandemic has let the legal technology genie out of the bottle. It will never fit back, and this is fortunate, because so much has changed. There is no going back to the “good old days” – whatever was good about those days. Electronic hearings in virtual courtrooms will revolutionize our judicial system in ways we never imagined. Rather than waiting for things to return to normal so that we can go back to practicing law the way we used to, every reasonable lawyer should prepare and brace up for an exponential growth in the use of technology in their practice. There will be increased use of electronic hearings in the resolution of civil disputes whether by mediation, arbitration or litigation. For civil litigators I say, get used to it.

As lawyers, the shift from in-person to e-person hearings in virtual courtrooms has not lessened our ethical obligations. On the contrary, it has raised our duties, especially as litigators. There are novel professional and ethical duties that arise from the change that has been imposed on us by the COVID-19 pandemic. While some of these duties arise expressly from our existing code of professional conduct, some others can be implied from it. Below, I will examine some of these.

Technological Competence

All provincial and territorial codes of professional conduct impose a duty of competence on lawyers. A competent lawyer “has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement” (Federation of Law Societies of Canada, Model Code of Professional Conduct, [Rule 3.1](#) (Model Code)). The duty of competence is fundamental to ethical lawyering. A lawyer who lacks competence does disservice to the client and brings discredit to the profession (Rule 3.1-2 [15], Model Code)). While a competent lawyer is not required to know everything about the law, they must be skilled and knowledgeable in the matter undertaken on behalf of the client. This will inevitably include skills and knowledge in the use of the tools needed to efficiently and effectively perform the tasks undertaken on behalf of the client.

This is where technological competence comes into the equation. In recent years, we have witnessed the continued development of legal technologies that dramatically reduce the cost of legal services. [Predictive coding technology](#) is being used to substantially lower the cost of eDiscovery document review in litigation. And as discussed above, tele- and video-conferencing technologies are increasingly being used to conduct hearings. Even in a world without COVID-19, the use of these technologies can result in cost efficiencies for the client – reducing lawyer’s travel and accommodation costs which are subsequently billed to the client.

In the COVID-19 era, these technologies have become a household tool for legal practice. They are primary and efficient means of meeting with clients and opposing parties and conducting questionings and hearings. In light of the current state of legal practice and our justice system, can we still factually assert that lawyers who lack skills and knowledge in the use of these technologies are competent lawyers?

The Federation of Law Societies of Canada (the umbrella body of all the territorial and provincial law societies) had late last year adopted a 2017 proposed amendment to the Model Code of Professional Conduct to explicitly impose a duty of technological competence on lawyers in Canada.

The [amendment to rule 3.1-2\[5A\] of the Model Code](#) provides that “[t]o maintain the required level of competence, a lawyer should develop and maintain a facility with technology relevant to the nature and area of the lawyer’s practice and responsibilities.” This amendment, which predates the COVID-19 pandemic, has become more necessary than ever. The Law Society of Alberta amended its [Code of Conduct](#) (LSA Code) on February 20, 2020 – specifically Rule 3.1-2, Commentaries 5 and 6 – to reflect this obligation. The fact that some [38 states](#) in the United States have already adopted this duty in their codes of conduct goes further to show its relevance to lawyers and the profession.

For lawyers in provinces and territories yet to adopt the duty of technological competence, you need not wait for your provincial or territorial law society. Take immediate steps to acquire vital legal technology skills and knowledge that will set you apart from the crowd. The COVID-19 pandemic will create many successful law practices along with many failures. And I make bold to predict that lawyers who will emerge successful from this pandemic will be predominantly

those who have expended time and resources to build their legal technology skills, knowledge and resources. So, take the time to innovate your legal practice, otherwise you will be left behind. Familiarise yourself with (among others) virtual courtroom technologies, because the virtual courtroom is here to stay.

Civility - Courtesy and Good Faith

The success of remote hearings in virtual courtrooms will inevitably require the cooperation and professionalism of all parties in the proceedings, including counsel and their clients. A lawyer has a duty to “be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings” (Rule 5.1-6 LSA Code). Notwithstanding the adversarial nature of the proceeding, a lawyer must act in good faith and cooperate with opposing counsel at all stages of the virtual proceedings – including, but not limited to, preparation and conduct of the proceedings in the virtual courtroom. A lawyer should consent to reasonable requests from opposing counsel relating to trial dates and time (especially where the party’s witnesses live in a different time zone), adjournments (in cases of technical difficulties, e.g. connectivity), and waivers of procedural requirements that may not be prejudicial to the interest of their client, especially where such waivers may be necessary to accommodate hearings in a virtual courtroom setting. Counsel should resist any urging from their clients to act in an unreasonable and uncooperative manner.

The duty of courtesy and good faith also obligates lawyers to avoid sharp practice and not take advantage of slips or mistakes by the opposing party that do not go to the merit of the case or that are not prejudicial to the rights of the client (Rule 7.2-3 LSA Code). The virtual courtroom environment is still new to most lawyers. While some lawyers might be sophisticated in their knowledge and use of the technology, many others are still struggling to develop their technological skill set. For the latter group, it should be expected that their learning process will be characterised by slips and mistakes. It will be unethical for lawyers to take advantage of such slips or mistakes by opposing counsel (that does not go to the merit of the case) to secure benefits to which their clients are clearly not entitled. Always remember that your client has no legal entitlement to a benefit founded on error (Rule 7.2-3[3] LSA Code).

Advocacy

Oral advocacy in a virtual courtroom presents new challenges to lawyers. Many lawyers have before now built their oral advocacy on a theatrical courtroom environment characterised by pomp and drama. With all the physical space in the physical courtroom, the lawyer has much room to dramatize. This dramatic environment may be lost in the virtual courtroom where the lawyer is subject to very limited space – they must remain within the limited scope of the camera or microphone. This changed environment imposes a professional obligation on the lawyer to develop new advocacy skills necessary to “represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect” (Rule 5.1-1 Model Code). A lawyer’s theatrical fireworks in a physical courtroom when re-enacted in a virtual courtroom may come off as a terrible blast. On a positive note though, the restricted environment in a virtual courtroom may actually enhance the dignity, decorum, and

courtesy in the courtroom and reduce the theatrical drama of which laypersons have often been critical of physical courtroom trials.

When acting as an advocate, the lawyer is openly and necessarily partisan and generally not obligated to assist a party adverse in interest. That notwithstanding, counsel should seriously consider their professional obligations when engaged in litigation involving a non-lawyer self-represented litigant. The obligation to clearly inform the self-represented litigant that you do not act for them remains even in a virtual courtroom setting. This is even more important as the act of preparing for the virtual courtroom proceeding may result in frequent communication between the lawyer and the self-represented litigant which may erroneously lead the latter to believe that lawyer may also be acting in the interest of the self-represented litigant.

In [Best Practices for Remote Hearings](#), developed by the joint E-Hearings Task Force of The Advocates' Society, the Ontario Bar Association, the Federation of Ontario Law Associations, and the Ontario Trial Lawyers Association, they recommended that in dealing with self-represented litigants in virtual courtroom environment, counsel should:

- (i) not take advantage of a self-represented litigant's unfamiliarity with rules of practice and procedure, and, if practicable, point them to sources of information and advice to help them understand their obligations, including duty counsel services, where available;
- (ii) where possible, consider providing other assistance (including technical assistance) to a self-represented litigant when doing so will not prejudice or conflict with their client obligations, will move the case forward, and will not result in significant costs; and
- (iii) be alert to the potential for self-represented litigants to be "left behind" during a remote hearing, and take reasonable steps to ensure that self-represented litigants are following the proceeding.

eHearings in the Best Interest of the Client

The virtual courtroom is a revolutionary by-product of the COVID-19 pandemic. There is no doubt that the virtual courtroom holds great benefit for the justice system. For the client, it may represent some great savings in legal costs and efficient adjudication of their matters. But this does not mean that the virtual courtroom is suitable for all cases. Cases that are heavily reliant on the demeanour of the witnesses, or cases built on physical (as opposed to electronic) evidence are not really suitable for the virtual courtroom environment.

Respondents to [a survey conducted by DLA Piper, a global law firm](#), noted that complex commercial disputes may not be amenable to remote hearing in a virtual courtroom because of the need for detailed technical presentation and models at the hearing. It is important to study the nature of your client's case to determine whether it is really in their best interests to proceed by way of remote hearing in a virtual courtroom.

Having come to the conclusion that a virtual hearing is in the best interest of your client, it is important to carry the client along in the decision-making process. Remember that the case

belongs to the client and not to you as the lawyer. Hence, it is important to seek the consent of the client to proceed in a virtual environment. Electronic hearings are still relatively new to our justice system. To many clients, their idea of a trial is still the old default in-person process. They may have a legitimate expectation that their matter will proceed in that format. The clients may want to have their day in court and not in Zoom. If the client refuses to consent to a virtual hearing, the lawyer must comply with the client's directive (subject to the direction of the court) unless the client is so unreasonable that there is a serious loss of confidence between the lawyer and client, in which case the lawyer may withdraw from representation in accordance with the provisions for withdrawal in the appropriate code of conduct.

Communication in the Virtual Courtroom

Lawyers are generally free to communicate with clients in the courtroom as long as it does not interfere with the proceedings. Lawyers may need to communicate with their clients during the proceeding to assist in the client's understanding of the process. However, there are communications in courtroom settings that are not only unethical but legally prohibited. An example is where the client (as a witness) is being examined or cross-examined by the tribunal or opposing party. The lawyer for the client/witness is prohibited from interfering with or obstructing the examination or cross-examination. In a physical courtroom setting, the fact that the witness is in a witness box which is some distance away from the bar reduces the likelihood of a lawyer's inappropriate communication with the client/witness.

However, in a virtual courtroom setting, the client may be in much closer proximity to their counsel. For example, they may be sharing the same computer screen. This proximity may give rise to the tendency for counsel to communicate with their clients by whispering answers during the proceeding. The ethical duty against improperly influencing witnesses during examination or cross-examination also applies in a virtual courtroom. Such conduct is highly unethical and may give rise to professional discipline.

In *Law Society of Alberta v Adelowokan*, [2020 ABLs 3 \(CanLII\)](#), a lawyer was reprimanded for her conduct during an immigration hearing conducted by videoconference. During the course of the examination of the refugee applicant by the single-member panel, the lawyer on many occasions whispered answers which were taken up by the client and repeated to the panel member's questions. A virtual courtroom setting will result in lawyers being in closer proximity with their clients during questionings or examinations. Counsel must be cautious and avoid the tendency to engage in inappropriate communication with their clients that may obstruct proceedings and result in disciplinary actions.

Even in cases where communication with the client may be proper, lawyers need to be careful about the risks involved in using technology to communicate with clients in a virtual courtroom. For example, Zoom videoconference software provides a feature that enable participants to privately communicate. But what is not often understood is that private communications using this feature cease to be private at the end of the meeting. Once the meeting is over, the private communication forms part of the larger transcript. Hence, any solicitor-client communication using the private communication feature may lose privilege.

Virtual Courtroom Etiquette

Counsel has an ethical duty to treat the court with courtesy and respect. This obligation applies even in the virtual courtroom where counsel is still at all times subject to court etiquette and procedures. While various practice directions have exempted lawyers from robing when appearing in the virtual courtroom, these directions have not in any way excused lawyers from appropriate dressing in the virtual courtroom. By appropriate dressing, I mean appropriate from head to toe and not just from head to waist. There is a common tendency when using videoconferencing technologies to appropriately dress from head to waist. This is based on the notion that the camera will often focus on the upper part of the body only. While this may be true in many cases, [a change in the participant's physical position in relation to the camera may reveal parts of the body below the waistline.](#)

It is best for lawyers to conduct themselves appropriately at all times during the proceedings in the virtual courtroom. As a rule of thumb, always conduct yourself as if you are being watched even when your video is turned off or your microphone is muted. Adopting this principle will help you observe your duty of courtesy and respect for the court. It may also save you some avoidable embarrassment similar to the “[supreme embarrassment](#)” from a recent US Supreme Court teleconference proceeding. A participant in that proceeding flushed the toilet without muting their microphone, which was embarrassingly heard by all participants in the proceeding.

Conclusion

For a very long time, in-person presence in a physical courtroom was considered the ideal means for conducting hearings in litigation. Then came the COVID-19 pandemic, which altered the way we practice law. As a result, what was previously ideal is hardly attainable at the moment. We must innovate and adapt to the factual realities that have been imposed on us. In this quest for innovation, we must be conscious of our existing ethical and professional obligations as lawyers, while at same time being alert to new obligations that arise from a changed legal environment.

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