

## **Coping with Virtual Litigation** **By Lonny J. Rosen, C.S.<sup>1</sup>**

In the new world of social distancing, advocates across the country have had to adjust to the new reality of virtual advocacy, as have courts and tribunals. This has required the sometimes-rapid development of new skill sets to permit communication with clients and colleagues and the representation of clients before various courts and tribunals.

At the same time, advocates and all professionals have been learning to adjust to hurried and dramatic changes to where and how they work. Days at the office surrounded by colleagues have been replaced by days working alone interspersed with telephone calls and Zoom meetings; attendances at court and in hearing rooms have been replaced by teleconferences, videoconferences and written advocacy as replacement for, rather than supplement to, in-person attendances.

The Advocates' Society and other organizations have been here for us, providing all manner of newsletter updates, webinars, and case updates on the new reality of litigating from home and best practices for doing so. TAS has also covered topics related to mental health and wellness in programs, the Litigating @ Home webinar series, this newsletter, and fireside chats<sup>2</sup>. From mindfulness to fitness to encouraging us to maintain our social interactions, albeit virtually, there has been no shortage of advice on the mental health aspects of practising law while distancing.

I have not, however, seen much written or spoken about the intersection of these issues, or the mental health aspects of virtual advocacy, and a recent experience caused me to reflect on this. In the last week of April, our firm was engaged to represent a client before a tribunal in an urgent matter. The experience of preparing for and participating in that hearing made me consider five aspects of the intersection between virtual advocacy and wellness.

### **1. Advocates Need Hearings**

The hearing was to proceed by telephone, one week following our receipt of the Notice of Hearing. This immediately triggered sensations familiar to all advocates: excitement, stress, and a rush of adrenaline. What quickly followed was a sense of relief – relief that we would be back on our feet again. Most of our contested matters had been postponed following the declaration of a public health emergency, and it looked as if it would be a while before we had a contested hearing to litigate. Having had some time to reflect on this, I now realize how important it is that we advocates have the opportunity to practice our craft and to do what we have spent our careers doing and preparing to do – not only for the sake of our skills, but also for our mental health.

### **2. Virtual Litigation is Uniquely Stressful**

We immediately began researching and preparing for our hearing in the normal course: drafting our arguments, scheduling witness interviews, marshalling our documentary evidence and preparing for

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<sup>2</sup> If you missed Guy Pratte's Virtual Fireside Chat with Dr. David Goldbloom, you should give it a watch for its honest and practical approach to recognizing and coping with mental health issues in the profession, both generally and in the wake of Covid-19.

anticipated issues and challenges.<sup>3</sup> This immediately proved to be quite different than usual. The documents were all in electronic format and there were logistical challenges to overcome in preparing to take witnesses and the tribunal through these. Realizing that we would be questioning and cross-examining witnesses via telephone made preparing for this hearing particularly daunting.<sup>4</sup> The fact that we could not meet witnesses in person to prepare them to give evidence added an additional element of unfamiliarity and stress to the process. My greatest concern was having to advocate before panel members and cross-examining witnesses we could not see. Not only could we not detect their engagement or pick up on subtle cues, but we could not rely on our own body language, facial expressions, and non-verbal aspects of advocacy. This experience underscores a reality that will likely be a factor in virtual hearings for the next little while at least: the unfamiliarity of the process, coupled with not being physically present to detect and address problems as they arise. These changes make virtual advocacy, like all new experiences, stressful even for seasoned litigators.

### **3. Preparing for a Hearing in Isolation is Tough**

When my colleague called me late at night, anxious about a perceived poor and unpersuasive submission (in fact, it was none of those things), I recognized the feeling of frustration and despair many of us have experienced when preparing for a hearing. What was unusual was my colleague's sense of being all alone. Long nights at the office have been a feature of virtually every hearing I have done before this. Usually, other lawyers have been around, ready to offer an ear and sounding board to help process an issue, or simply a kind word of support when the stress mounts. Working alone at home, my colleague did not have this much-needed support system, and phone calls proved a poor substitute for pats on the shoulder. It is much easier in a shared physical setting to pop into a colleague's office for a chat. Reaching out by phone or email feels like a much more deliberate step, and people are less inclined to do it. From this experience, we have learned that when preparing for a hearing or simply working from home, it is important to maintain connections with a support network and to draw on that before the stress becomes overwhelming. It is incumbent upon us to virtually "check in" with our colleagues.

### **4. What Virtual Hearings are Missing?**

One benefit of virtual hearings is that you can focus entirely on the hearing without worrying about travelling to the courthouse/tribunal office, finding parking, schlepping documents, gowning/dressing appropriately, or even worrying about hair and makeup<sup>5</sup>. But for all of the convenience, virtual hearings lack some of what makes advocacy most fun—gathering as a team, making an entrance, connecting with colleagues, noting the face of decision makers when they're agreeing with your submission<sup>6</sup> or the face of a witness withering under a surgical cross-examination<sup>7</sup>, and perhaps the best part of all, sharing a celebratory (or compensatory) drink when it is all over. It is from these aspects of advocacy that advocates draw energy, which we can carry through to the next case. When all other participants are on a telephone line or in a small square on a computer screen, these little but memorable details are missing.

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<sup>3</sup> This was prior to publication of [Best Practices for Remote Hearings](#) by the Joint E-Hearings Task Force.

<sup>4</sup> In fact, we had limited hearing time available and therefore proceeded with submissions on the documents on a preliminary issue, leaving testimony for another day, if necessary.

<sup>5</sup> This is not really a big concern of mine but it is an issue for many advocates.

<sup>6</sup> This perception does not always reflect reality but it is enjoyable nonetheless.

<sup>7</sup> As above.

## **5. Planning and Preparation Can Overcome Unfamiliarity**

As with all our cases, we put in the hours and ran through the various contingencies, such that when the hearing started, we were prepared and confident. We compensated for not seeing the panel by using case references more sparingly and taking more time with the cases and documents referenced in our submissions. We paused between points and sought confirmation that everyone had the correct documents in front of them and that our submissions were understood. This experience served as a reminder of something relevant to litigating from home or in person—the importance of planning and preparation, and that through hard work and advocacy skills one can always overcome an unfamiliar setting or mode of advocacy.

If litigating from home is the new normal, hopefully we will find a way to recapture the fun and excitement of an in-person hearing. We will be more mindful of the challenges of new modes of proceedings and working alone. In the meantime, we can all adapt to virtual hearings – and plan to meet for a cocktail over Zoom!

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