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# VIDEO-CONFERENCING – "IT'S 2020!"

As you know, the pandemic has eliminated in-person attendances for examinations for discovery and mediations. Out of necessity, video-conference has become the norm notwithstanding that in-person attendance is still viewed as the more fruitful medium. Having worked under these restrictions for the last several weeks, I must admit that video-conference is certainly not as bad as I expected.

Some parties have refused to agree to use video-conference and demand to wait for in-person attendance once in person attendance is once again permitted, which at this time still remains very uncertain.

Some have embraced the technology and benefits of video-conference while others have not. As one would expect, the Court has now weighed in. In *Arconti v. Smith*, 2020 ONSC 2782, Justice Myers was required to decide whether a party can be compelled to conduct an examination by video-conference or be allowed to wait until the restrictions are lifted to have the examination conducted in-person.

Justice Myers rejected the argument that video-conferencing was not an adequate medium, stating:

> *In other words, just as all litigators have had to learn how to deal with juniors conveying information during an examination or argument in court, there are ways to do the same thing with technology. I note that the Zoom technology, that is currently among the brands being utilized in this court, includes "breakout rooms" in which counsel can meet privately with colleagues and clients. We are learning new ways to do things and they feel less "good" because we do not yet have the same comfort with the technology that we have with our tried and true processes.*
> […]
> *In my view, much of the hesitancy and concern that led to the conclusions that the process is "unsatisfactory" or raises "due process concerns" stems from our own unfamiliarity with the technology. As noted above, it is just a tool. It does not produce perfection. But neither is its use as horrible as it is uncomfortable.*

He recognized the risk of impropriety, such as the prompting of a witness, but he held that "an amorphous risk is not a good basis to decline to use available technology".

Justice Myers' comments echo some practice directions issued by the Superior Court, advising the profession that upon the reopening; motions, applications and pre-trials may and likely will be held by video-conference.

Although *Arconti* involves a request for video-conference in the context of the COVID restrictions, the following passage in Justice Myers' judgment suggests that video-conferencing is here to stay:

> *"It's 2020". We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. 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.*

Considering the uncertainty as to when in person hearings and attendance will once again be allowed, not to mention the rules implemented once they are allowed, I expect that the use of video-conference will quickly become the norm.

## ABOUT THE AUTHOR

***Martin Forget*** *is a founding principal of the law firm Forget Smith. His practice deals with all aspects of advocacy on behalf of insurers, including commercial and homeowners' property and liability claims, subrogation, coverage disputes, motor vehicle litigation, product liability claims and fraud cases. Martin has extensive trial and appellate experience, including as lead counsel on numerous reported cases, both jury and non-jury. He may be reached at mforget@forgetsmith.com.*

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