

ADVOCACY IN THE VIRTUAL SETTING

1. In an address to a gathering of Caribbean lawyers and law students in Kingston not quite a year ago, I reported on the progress to date on virtual courts. That is, the phenomenon by which courtrooms, rather than being a physical place, become instead a conceptual space in which to do justice.
2. At that time, the most advanced work on the subject, outside of China and Japan, where the concept had long progressed from dream to reality, was still being done in the United Kingdom. So, proudly then, as a show of my vast knowledge, I reported on the the first virtual court case in that country, a tax appeal, which was conducted in May 2018. In that case, the claimant appeared via a home laptop camera, an extremely patient judge sat in a London tribunal, and lawyers presented evidence from Belfast. Despite a few technical glitches, the exercise was generally adjudged a success and, as the report in the Guardian newspaper proclaimed the following day, "courtroom justice will never be quite the same again".
3. And, as recently as January this year, my mentioning this same report to a group of lawyers and judges in Georgetown, Guyana, produced decidedly sceptical oohs and aaahs.
4. But yet, look at us now! In no more than an anxious half a year, spurred on by the worldwide Covid-19 crisis, virtual court hearings have become the norm rather

than the exception throughout the region. In the court in which I sit, we haven't heard an appeal in the traditional format since the beginning of April. And, as my friend of many years, Dame Janice, will no doubt confirm, all appeals in the ECCA have also been conducted virtually over roughly the same period. The only significant unconquered frontier in this regard is jury trials. But I know that, even now as we speak, much thought is being given throughout the region to how jury trials may be accommodated within our new reality.

5. In short order, Practice Directions to govern the conduct of hearings in court were issued in all our jurisdictions. And in several places, including here in the OECS, these PDs have already been amended and updated, in some cases more than once, given the still unfolding contours of the pandemic.
6. So it is that, forced by dire circumstance, the future that the ever emerging technology has long promised us has finally arrived.
7. Against that background, today's historic conference, a further manifestation of the ongoing collaboration between the OECS Bar Association and the JEI, is timely. And it is right, I think, that this morning's opening session should be devoted to the topic of advocacy, which is a distinctly understudied component of the new dispensation.
8. To the advocate of the traditional school, the burden of persuasion in the virtual setting is fraught with challenges – particularly so to some (hopefully the few)

who, before all of this, were barely able to turn on their own cell phones. But, as tough a challenge as it may be, it is one which must be faced by all advocates who take their duty to their clients, and the concomitant duty to constantly hone their craft, seriously.

9. Happily, some dos and don'ts have already emerged and it is to a few of these that I want to devote the rest of my short time with you this morning. I claim no particular magic in any of these, and a short tour on the internet under the rubric 'virtual advocacy' is already yielding up some great tips.
10. So let's start with some don'ts. Although you may well be appearing from your living room and wearing shorts and slippers, don't allow the court to see anything but neat court wear draping the top half of your torso. Special measures inevitably lead to special problems this is the reason why the CCJ has felt it necessary to articulate a specific protocol for virtual hearings. In that protocol, attorneys-at-law appearing before the court are reminded not only to dress appropriately but to seek as far as possible to eliminate background noises and to mute or switch off cell phones and the like during hearings. In the court in which I sit, an amendment to the Practice Direction was sparked by the sight of a grandchild climbing into grandpa's lap, while he was in the middle of a spirited submission on what he considered to be a manifestly excessive sentence.
11. Other don'ts along similar lines include ensuring that the physical space from which you choose to make your submissions is, if not quite or anything like a

courtroom, reasonably fit for the purpose. I need not dwell on this. I am sure that you get my drift. (And this applies equally to judges working from home – avoid becoming the elephant in the Zoom, so to speak!)

12. More positively, here are some dos. I think you will find that, if adhered to, they will invariably prove to be beneficial:

- (i) Ensure that your written submissions, whether they be skeleton arguments or whatever, are succinct, well-written and properly formatted. Ideally, they should display all the features that make written material attractive to readers, especially those – like judges – who read for duty rather than for pleasure. At the end of the day, when the hearing is over, it is to the written material that the court will return when it comes to the assessment of how persuasive your advocacy has been.
- (ii) Be prepared. In the traditional setting, this involves knowing your case (and your adversary's) case inside out. That obviously remains the critical starting point. But now, you also have to take time to get comfortable with the electronic platform. Try to understand the basics of the particular system you will be obliged to use, be it Zoom, Microsoft Teams, or whatever. For video, make sure your background is not distracting and that the lighting is clear. If necessary, do a run-through with a colleague.
- (iii) Speak slowly and clearly. Before you launch into your argument, make sure everyone can hear you. If you are having connectivity issues, or have omitted to unmute your microphone, you want to know immediately, not after you've gone half way through your argument and the judge is still peering at you expectantly.

- (iv) Listen closely, not only to what the judge has to say, but equally importantly to what counsel on the other side is saying. Do not allow your mind to wander or zone out the way we all do sometimes when watching television or even a reasonably engaging movie.
- (v) As difficult as it may be in the virtual setting, try to gauge reactions to what you are saying to the court, particularly those coming from the judge/s. Be attentive to possible questions/interventions from the judge/s. And, if none is immediately forthcoming, pause to ascertain that it is in order to move on to your next point.
- (vi) Be ready to change gear if it appears that your primary argument isn't gaining any traction. Know your case so well that you can seamlessly move to your fallback position without appearing to be gasping for breath and clutching at straws in desperation.
- (vii) Be attentive to the hearing timetable. Court hearings in the virtual setting are invariably conducted under greater time pressure than traditional open court hearings. Hearings by videoconference are as exhausting for judges as they are for counsel. So, have a heart for the poor old judges. However, if you think midstream that you may need more time than you have been allocated, ask early for a short extension, rather than wait for the judge to pound the gavel on you. But, at the same time, once you realise you may be under pressure for time, begin immediately to find a way to tailor what's left of your presentation to fit into the time remaining.

13. It has already been recognised in many quarters that much of what we now characterise as the new normal will continue to be valid when we get over this extended hump, as surely we must. So, for instance, many kinds of interlocutory hearings, particularly the generally non-controversial ones like case management conferences, are ideally suited to either telephone or video hearings. I certainly hope that these will continue.
14. But, as Douglas Mendes SC, the President of the Trinidad & Tobago Law Association, put it so well in a recent webinar, I think we will also need to be careful not to make an abiding virtue out of necessity. However reliable the technological solutions may be, after all, there will always be room for open court hearings in appropriate cases. Open justice is a cardinal feature of our constitutional arrangements. Accordingly, proceedings which are conducted in courts that are freely accessible to members of the public (subject of course to any necessary security arrangements) play an important role in demonstrating to all who need to be assured, or reminded, that we are societies governed by the rule of law.
15. When it fully matures, therefore, I hope that the new normal will be an amalgam of the best of the old and the best of the new: an approach to the business of advocacy and adjudication that recognises that, while there remains much of value in tradition and continuity, there is usually nothing to fear in change.

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