

Crossing the Line: Misconduct During Virtual Examinations

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Virtual discoveries and cross-examinations are part of the new normal in civil litigation. When examinations are conducted by videoconference, parties save significant travel costs and minimize the disruptive nature of attendances on their business and personal lives. However, when a witness is not physically present with lawyers for the examining party, the examining party and counsel must be wary of potential improper conduct “off screen” in the room where the witness is present, including attempts to influence or coach a witness.

The recent decision of the Ontario Superior Court of Justice in *Kaushal v. Vasudeva et al.* (2021 ONSC 440) (*Kaushal*) demonstrates that the Court is alive to this risk and may make appropriate orders including to sanction misconduct during an out-of-court cross-examination.

Background

In *Kaushal*, the underlying dispute concerned the ownership and operation of a restaurant franchise. The respondent, Mr. Vasudeva, was cross-examined by way of Zoom videoconference on an affidavit he swore in advance of a motion hearing. Mr. Vasudeva, his lawyer, and an interpreter were all in the same boardroom at the lawyer’s office. Each of Mr. Kaushal’s lawyer, Mr. Kaushal and the court reporter were in separate locations.

At the outset of the cross-examination, Mr. Kaushal’s lawyer asked and Mr. Vasudeva’s lawyer confirmed on the record that the only parties present in the boardroom were Mr. Vasudeva, his lawyer, and the interpreter.

The Zoom link remained active after the examination was complete and Mr. Kaushal heard the voices of Mr. Vasudeva’s wife and son, seemingly discussing what had occurred during the cross-examination. Mr. Kaushal recorded the discussion on his cell phone, and shared what he had heard with his lawyer. Mr. Kaushal’s lawyer rejoined the Zoom meeting to assert on the record that Mr. Vasudeva’s wife and son appeared to have been present during Mr. Vasudeva’s examination, which Mr. Vasudeva’s lawyer denied.

Subsequently, Mr. Kaushal moved to strike the affidavit of Mr. Vasudeva on the basis of his conduct during the cross-examination and on the grounds of abuse of process.

On the motion to strike, the interpreter gave evidence that Mr. Vasudeva’s wife and son were in the room

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during the examination. This was contradicted by Mr. Vasudeva who swore that his wife and son remained in the reception area of the law firm. In attempt to undermine the interpreter's evidence, Mr. Vasudeva also swore that he had been informed by his lawyer, that Mr. Kaushal's lawyer had threatened the interpreter if he did not give evidence that Mr. Vasudeva's wife and son were present during the examination.

Ultimately, the Court granted the motion to strike Mr. Vasudeva's affidavit, on the basis that his conduct amounted to an abuse of the court's process. The Court preferred the independent evidence of the court interpreter, and held that there was no merit to any suggestion that Mr. Kaushal's lawyer had threatened the interpreter.

Key Takeaways

It is clear from the *Kaushal* decision, that courts will not tolerate attempts to obstruct or undermine the integrity of examinations by videoconference. To mitigate the risk of abuses of the process by witnesses, examining counsel should confirm the identities of all persons present with a witness at the beginning and end of an examination, as well as what materials are in front of the witness. If the witness appears distracted during an examination, examining counsel should ask the witness what they are looking at and may request that a witness move their camera to pan the room.

Cassels is experienced in facilitating and managing electronic examinations and hearings. Our Litigation and e-Discovery teams have the knowledge and resources to assist.

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