

COMMONWEALTH OF MASSACHUSETTS

**COMMISSION ON JUDICIAL CONDUCT
SUPREME JUDICIAL COURT**

**CJC TEMPORARY EMERGENCY ORDER ON
PROTOCOLS FOR REMOTE FORMAL HEARINGS**

In light of the public health concerns regarding COVID-19 and the actions previously taken by the Supreme Judicial Court and the Governor in connection therewith, including the Supreme Judicial Court's July 7, 2020 Order granting the Commission on Judicial Conduct (CJC) authority to elect to conduct any proceeding virtually, the CJC issues the following order on protocols regarding the conduct of remote formal judicial disciplinary hearings held pursuant to CJC Rule 10.

Preliminary Matters:

On July 7, 2020, the Supreme Judicial Court authorized the CJC to conduct formal disciplinary hearings via remote teleconferencing. The court further authorized the CJC to issue temporary rules for such hearings. The rules are set forth herein:

As used herein, references to the "hearing officer" shall refer to the hearing officer appointed by the Supreme Judicial Court to preside over a formal judicial disciplinary proceeding, pursuant to CJC Rule 8.

Until the Supreme Judicial Court revokes its July 7, 2020 Order, remote disciplinary hearings are authorized in accordance with the following procedures, effective as of the date of these protocols.

1. **Conduct of Hearings:**

- a. Hearings shall be conducted using remote videoconferencing technology under the auspices of the CJC. It shall be the responsibility of the parties to ensure the ability of their respective witnesses (to the extent necessary) to participate remotely using such technology, and to provide the CJC, by email to cjcpresrelease@cjc.state.ma.us, the names, addresses, telephone numbers, and email addresses of all witnesses who are expected to testify, at least seven days prior to the first day of the scheduled hearing.
- b. The CJC and/or the stenographic company employed by the CJC for the formal hearing shall be the meeting organizer for the videoconference hearing.

2. **Display Name:**

Each person appearing remotely must confirm that the device used to participate in the remote teleconference is "named" and associated to them. Any person who does not do so may

be excluded in the sole discretion of the hearing officer.

3. Public Access; Persons to be Excluded from the Physical Hearing:

In the interests of public health and safety, members of the general public and the media shall not be permitted to be physically present during any hearing. Except for any impounded portions of a hearing, the public (including the media) may attend remotely. Questions about remote public and media access, including requests to attend remotely, shall be directed to the CJC attorney assigned to the case. The CJC will make reasonable arrangements for remote public access to the public portions of hearings. All members of the public and media shall be required to mute their videoconferencing equipment at all times.

The hearing officer, in his or her sole discretion, may exclude from remote participation any member of the public or media whose behavior is deemed disruptive to the proceedings or who refuses to remain muted. This decision shall not be appealable.

4. Conduct of the Hearing; Stenographer:

As before the COVID-19 State of Emergency, all CJC judicial disciplinary hearings will be transcribed. A stenographer may perform transcription services remotely.

5. Swearing Witnesses:

A witness may be sworn by the stenographer or any other notary public in the presence of the witness. If no notary is available to swear in a witness in person as provided by Mass. General Laws chapter 222, then a remote notary may administer the oath to witness using the procedures outlined in chapter 71 of the Acts of 2020.

6. Examination of Remote Witnesses:

- a. After being sworn in, each remote witness shall, at the beginning of the examination, be questioned about the following: (1) where they are physically located; (2) who is physically in the room with them; (3) what materials and devices they have with them; (4) what is currently on their screen or screens; and (5) whether they are in communication with any persons other than those conducting their examination. At the completion of their examination, witnesses will be asked whether any of the answers to these questions have changed during their testimony. If there are recesses (during the day or at the completion of a day), the witness will be asked the same series of questions at the beginning and end of each session.
- b. Unauthorized communications, including but not limited to private “chats” or other virtual meetings or communications between any counsel and a witness while testifying, or ex parte communications between one counsel and the hearing officer, constitute a violation of Mass. R. Prof. C. 3.5, and 8.4(c), (d) and (h), and is strictly prohibited.

- c. Private communication between co-counsel through the text exchange available in the videoconference platform shall be permitted at all times. Private communication between a represented party and his/her counsel by text exchange shall be permitted at all times, except while that represented party is testifying. Private communication between the Hearing Officer and the stenographer by text exchange shall be permitted at all times during a hearing.

7. Sequestration of Witnesses:

No provision of the Rules of the CJC or S.J.C. Rule 3:09 specifically authorizes or permits the sequestration of witnesses. In light of the logistical difficulties of admitting and excluding witnesses and the general public, sequestration will only be allowed by order of the hearing officer upon motion and for good cause shown with specificity. A general request for sequestration will not be granted.

8. Exhibits:

- a. The parties shall work to assemble a set of agreed and contested exhibits that they may seek to introduce during the formal hearing, with lettered exhibit numbers, in digital form, by a date set by the hearing officer prior to the formal hearing. That set of exhibits will then be provided to the hearing officer prior to the formal hearing.
- b. The parties are encouraged to send (electronically or hard copy) in advance of their testimony any agreed exhibit to witnesses who may be asked to refer to it during their testimony.
- c. Before inquiring of a witness concerning a contested exhibit, counsel shall give advance notice to the hearing officer, opposing counsel, and the meeting organizer of the exhibit letter of the contested exhibit and wait for the hearing officer's instructions before proceeding further. If there is an objection to the proposed exhibit, the document cannot be shown or quoted to the witness until after a ruling by the hearing officer.
 - a. All proposed agreed and contested exhibits must be scanned in advance and emailed to the opposing counsel and/or the meeting organizer.
 - b. If an exhibit is admitted into evidence, the stenographer shall, as in the usual course, affix an exhibit number sticker to the digital copy entered into evidence, and after the conclusion of the hearing, then provide numbered exhibits to the parties along with the transcript of the hearing.
 - c. A document may be used to refresh the recollection of a witness (or for impeachment) without being offered into evidence. However, before inquiring of a witness

concerning such a document, counsel examining a witness about a document shall identify the document to counsel and the hearing officer.

9. General Considerations:

- a. Any matter not explicitly covered by this Temporary Emergency Order will be subject to an order of the CJC Chair, who shall have discretion to resolve procedural issues as they arise. To the extent not covered by this Temporary Emergency Order, the Rules of the CJC shall apply, and if necessary, be adapted for use in remote hearings.
- b. An audio visual recording of the proceedings shall be made solely by the stenographic company employed by the CJC. No other party shall record video and/or audio of these proceedings. Unauthorized recordings of virtual proceedings are impermissible. No participating attorney or witness may record the proceedings. No other person involved in the proceeding or viewing it as a member of the public shall record the proceeding.
- c. Counsel may request, and the Hearing Officer may grant in his/her discretion, a recess from the hearings, and upon request, parties will be placed in private chat rooms.

For the Commission on Judicial Conduct,
Per order of the CJC Chair,

Julie J. Bernard^{HVN}

Julie J. Bernard, Chair

Date: July 10, 2020