

STATE ETHICS COMMISSION

Guidelines for Remote Adjudicatory Proceedings

On March 10, 2020, Governor Baker declared a state of emergency in the Commonwealth as a result of the COVID-19 pandemic. Given the ongoing pandemic, and to safeguard against the spread of COVID-19, the State Ethics Commission (“Commission”) will be conducting adjudicatory proceedings remotely using Zoom. These Guidelines provide guidance to Commission staff, counsel, and the parties, on how to prepare for and conduct remote hearings and remote depositions in compliance with the Commission’s Rules of Practice and Procedure, 930 CMR 1.00.

I. Initiation of the Adjudicatory Process

1. The adjudicatory process is initiated with the filing of an Order to Show Cause by the Commission’s Enforcement Division. *See* 930 CMR 1.01(5). An attorney in the Commission’s Legal Division is assigned to serve as Legal Advisor to the Presiding Officer and the Commission. The Commission selects one of its members to serve as the Presiding Officer.

2. Once the Presiding Officer has been selected, the Legal Advisor will send a Notice of Pre-Hearing Conference (“Notice”) and Scheduling Order to the parties via email. The Notice will state that the pre-hearing conference will take place remotely via Zoom and provide the information needed to join the conference via Zoom, including a Zoom link and a list of devices which can be used to access Zoom (desktop, laptop, smartphone, or tablet).

3. The Legal Advisor will also notify the parties that if any participant is unfamiliar with Zoom, he/she/they should contact the Legal Advisor for assistance, including a brief test videoconference with the parties, prior to the pre-hearing conference.

4. The Commission’s Public Education and Communications Division will post notice of the pre-hearing conference in the calendar of events on the Commission’s website. If the pre-hearing conference will be conducted using Zoom Webinar, the corresponding Zoom information will be posted on the website. If the pre-hearing conference will be conducted using Zoom Meeting, the Commission’s telephone conference line will be provided to the public.

II. The Pre-Hearing Conference

1. The Public Education and Communications Division shall assign one of its staff members to manage Zoom (and the telephone conference line if Zoom Meeting is being used) during conferences and hearings and to assist the Presiding Officer and the Legal Advisor in this regard.

2. The videoconference will commence 15 minutes early so that participants can be onboarded as they appear.

3. Only the parties, their counsel, the Presiding Officer, and the Legal Advisor may participate in the videoconference. Participation via video is required. If the pre-hearing conference is conducted using Zoom Webinar, the public will be able to view the proceedings,

but will not be seen or heard. If the pre-hearing conference will be conducted using Zoom Meeting, the public will be able to attend the pre-hearing conference via audio only (i.e., with the Commission's dial-in telephone number) and will not be heard. Commission staff who are not working on the case may attend a conference or hearing in the same manner as the public.

4. During the pre-hearing conference, the Presiding Officer will ascertain whether the parties have any objection to conducting the adjudicatory hearing remotely. It shall be in the discretion of the Presiding Officer whether to hold the hearing remotely or in person. If the adjudicatory hearing will be held in person, the Presiding Officer in his/her/their discretion may order that the hearing take place at a location other than the Commission's office in Boston, if a suitable location is available. *See* 930 CMR 1.01(10)(b). Any in-person hearing will be subject to the Commission's health and safety protocols for its office or the equivalent.

5. Prior to the pre-hearing conference, the parties should have a basic familiarity with Zoom (i.e., how to activate microphone, camera, etc.). Both the Legal Advisor and/or Public Education and Communications Division staff will provide any necessary assistance to the parties to make sure that they are not having audio or video issues when using Zoom.

6. Prior to the pre-hearing conference, the Legal Advisor should communicate with the parties regarding logistical matters to avoid any technical problems during the conference including, the following:

- a. All parties have the Legal Advisor's direct line and/or cell number.
- b. All parties send the Legal Advisor a contact phone number where they can be reached on the day of the pre-hearing conference, if necessary.
- c. All parties write down the dial-in telephone number on the Zoom invite and meeting number to use as a back-up in case there are any connectivity problems.
- d. All parties are provided with the Commission's telephone conference line as a second back-up in case there are connectivity problems.
- e. Counsel and/or the parties are encouraged to have an alternate device to log into and use Zoom in case they have a problem with their primary device.
- f. Counsel and/or the parties are encouraged to have a headset available if necessary, in case any issues with background noise develop. In the event of background noise, participants will be expected to "mute" their microphones unless speaking, or use a headset.

III. **Remote Depositions**

1. Depositions in Commission proceedings are governed by 930 CMR 1.01(7)(c).

2. Given the continuing public health emergency, the Presiding Officer may determine, or the parties may agree, that depositions will be conducted remotely using videoconference technology.
3. The notice of remote deposition shall specify the information needed to participate in the remote deposition.
4. The parties and/or counsel are responsible for setting up the videoconference technology for any remote depositions.
5. Each person attending a deposition shall be visible to all other participants, their statements should be audible to all participants, and they each should strive to ensure that their environment is free from noise and distraction.
6. Any person who views or listens to a remote deposition, at any time during the deposition, shall be identified for the record.
7. The deponent and counsel may not confer while a question is pending, whether by text message, email, or the private chat function in the videoconference system, except for the purpose of determining whether a privilege should be asserted.
8. During breaks in the deposition, parties may use breakout rooms if the videoconference system allows. Conversations in breakout rooms shall not be recorded.
9. A court reporter will stenographically record the testimony, and the court reporter's transcript shall constitute the official record. The Presiding Officer may permit in his/her/their discretion that the deposition be recorded by other than stenographic means, in which case the court reporter may be given a copy of any video or other recording and may review the recording to improve the accuracy of the written transcript. *See* 930 CMR 1.01(7)(c)3.
10. The court reporter shall be permitted to administer the oath to the deponent as long as the court reporter can both see and hear the deponent.
11. The party that noticed the deposition shall be responsible for procuring a written transcript and/or video record of the remote deposition. The parties shall bear their own costs in obtaining a transcript and/or video record of the deposition.
12. The parties shall work collaboratively and in good faith to assess each deponent's technological abilities and to troubleshoot any issues in advance of the deposition. The parties shall also work collaboratively to address and troubleshoot technological issues that arise during the deposition and to make such provisions as are reasonable under the circumstances to address such issues.
13. The party or counsel who noticed the deposition shall consult with the deponent prior to the deposition to ensure that the deponent has the required technology. If the deponent does not have the required technology, the party or counsel shall endeavor to supply the

deponent with the technology prior to the deposition or shall make available his/her/their own resources for the deponent's use during the deposition.

14. The party or counsel noticing the deposition may introduce exhibits electronically during the deposition by using document-sharing technology, or screen-sharing technology, or by sending the document via email or regular mail to the deponent and all individuals on the record.

15. In a timely manner at the conclusion of the deposition, a deponent who receives hard copies of exhibits shall return the exhibits to the party or counsel who noticed the deposition.

IV. **Hearing**

1. Once the date and location of the remote adjudicatory hearing have been determined, the Presiding Officer will issue an order which will include the hearing date and time and the Zoom link.

2. For any witnesses that will need to be subpoenaed, the subpoena should inform the witness that the hearing will take place via Zoom and provide the Zoom link.

3. The parties, counsel, Presiding Officer, Legal Advisor, and witnesses will participate in the hearing via Zoom videoconference. The hearing will be transcribed by a court reporter who will also attend the videoconference. The transcription of the hearing by the court reporter will be the official record of the proceedings unless the Presiding Officer determines otherwise. The Presiding Officer may in his/her/their discretion permit the hearing to be audio/video recorded on Zoom.

4. Prior to the hearing, the Legal Advisor will instruct the parties how a document (i.e., pdf) is "shared" during the hearing. As exhibits are needed during the hearing, the proponent of an exhibit should share it with the other participants and navigate it as necessary. The Legal Advisor may, upon request of a party or counsel, control/navigate the exhibit.

5. Prior to the hearing, all parties should send the Legal Advisor the hearing exhibits via email. If files are too large, the parties may send the Legal Advisor the exhibits via One Drive. With the exception of videos and other comparable files, all exhibits should be in pdf format and pages should be numbered. In addition to providing the exhibits electronically, the parties will also follow the standard practice of providing the Legal Advisor with exhibit binders containing hard copies of the exhibits. Further, the parties must complete all redactions prior to the hearing, or the exhibits will not be accepted.

6. For each witness that the party intends to call, the party or counsel will be responsible for determining whether the witness has the ability to join the hearing through a device that allows them to participate via video and audio and, if not, arrange video access for the witness, and ensure they have the Zoom link for the hearing. Witness lists filed with the Presiding Officer should include the relevant information (i.e., John Smith has a mobile device

that allows him to participate via audio and video; his email address is JohnSmith@internetprovider.net). All witnesses must appear by video.

7. Prior to each hearing day, the party or counsel will provide each witness it expects to call that day with a timeframe during which the witness will need to be on stand-by to testify. Further, the party or counsel will contact the witness to join the hearing when their testimony is needed.

8. Prior to the hearing, the Legal Advisor should communicate with the parties regarding logistical matters to avoid any technical problems during the hearing, *see* II (6) above.

9. The Presiding Officer shall administer an oath or affirmation to all witnesses.

10. All participants should have their space organized so that all exhibits are within arm's reach while still being as close to the microphone as possible.

11. The videoconference will commence 15 minutes early so that participants can be onboarded as they appear.

12. After all anticipated participants have joined, the Presiding Officer will read the list of who is present, including how they are participating, and the party they represent, if applicable. At the beginning of the hearing and after each break, all participants should be reminded that there may be members of the public listening in and/or viewing the hearing, as applicable.

13. The Presiding Officer should remind all witnesses to speak clearly, articulating their words, and directly into the microphone. The Presiding Officer should also remind the parties that crosstalk is not permitted.

14. During breaks, participants should mute themselves and turn off their cameras. When resuming, the parties should turn their camera back on and unmute themselves.

V. **Best Practices for Participants during Adjudicatory Hearings and Remote Depositions**

1. Participants should consider using a solid background and having adequate and appropriate lighting. Any participant who uses a virtual background should ensure that the participant can be fully seen and that the virtual background does not “cut off” any part of the participant’s image on the screen.

2. Participants should minimize noise and distractions by muting the microphone when not speaking.

3. Participants should be mindful of audio echo or audio feedback and be ready to address that issue if necessary (the use of separate devices for audio and video connection, or for separate participants in close proximity, tends to increase echo).

4. Participants should position the camera at about eye level if possible and look at the camera when speaking.

5. It is useful to pause before speaking, in case there is any audio or video lag.

6. Participants should configure their desk and device so that they are at an appropriate distance to whatever device is being used as a microphone to avoid the need to “yell” at the other participants. Also, any items that a participant does not want other participants to view (e.g., family photographs) should be removed.

October 15, 2020