The Inns of Court College of Advocacy

Principles for Remote Advocacy

Introduction

The COVID-19 epidemic has forced courts and advocates to adapt at pace. Fortunately, we already have some experience to draw on. In civil and criminal courts, "paperless" working has already been taking place, so that advocates have begun to learn some of its challenges. In other areas such as arbitration and international litigation, there is already experience of remote hearings and cross-examination of distant witnesses by video. Courts and advocates have been building on these experiences, and rapidly gaining experience of the skills required to deal effectively with remote hearings.

This guide does NOT offer advice on the choice or use of different IT programs. In many cases the choice will have been imposed upon the advocate. The principal systems currently in use are Zoom and Skype for Business. Information on these programs is abundantly available.

This guide concentrates on the way in which advocates can most efficiently deploy their professional skills in communication and persuasion in the new working environment. It aims to distil existing experience into a set of principles that we hope will enable everyone to approach a remote hearing with confidence and do their job effectively.

Judges and advocates who already have experience with this practice consistently remark that effective remote advocacy depends not on new skills. It rewards the bedrock skills; a clearly articulated and logical case, supported by selective use of authority and documents, and focussed examination of witnesses. With careful preparation and attention to those core skills, it is possible to make remote hearings, in appropriate cases, highly effective. We hope these principles will help you do that.

The ICCA gratefully acknowledges the helpful commentary and guidance it has received, in preparing this document, from Rt. Hon. Lord Justice Bean, His Honour Judge Mark Brown, Rt. Hon. Sir Stanley Burnton, Professor the Hon. Clyde Croft AO SC, Neil Kaplan CBE QC, and individual members of the Bar of England and Wales.

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The 8 Principles

1. Liaise in advance

- Confirm with the court or tribunal which software is to be used. Confirm the scheduling, special arrangements and hearing protocols.
- It is essential to agree a bundle in advance and check it in advance with all parties.
- Familiarise yourself with pre-hearing rules and guidance relevant to the jurisdiction.
- Ensure that the tribunal has your up-to-date contact address and number. Please check practice directions on this point.
- Go to the latest advice and guidance from the judiciary across all jurisdictions in relation to the Coronavirus (COVID-19) pandemic.
- For a list of other useful links to UK court protocols and updates, see Appendix 1

2. Understand the technology

- Test the technology prior to the hearing, including the camera, microphone and sound settings. Know how to turn the camera on and off, how to mute the microphone and to adjust the volume.
- Be aware that sometimes the camera/video will be turned off and the sound muted by default when you join a hearing electronically.
- Decide how many screens you intend to use during the hearing. The minimum is two. Some advocates use three: one for video, one for notes/LiveNote and one for electronic documents.
- Join the hearing in good time before it is due to start to resolve any technological issues.
- In the event of a breakdown in communication, a protocol should be in place for anyone affected, including witnesses and third parties, to contact the court or tribunal by additional means to alert them to the problem, e.g. telephone, text, email.
- If something does go wrong (a critical participant drops offline, for instance, or some connection fails) pause until it is sorted out. There are some distractions, like people joining and leaving calls, that you may have to ignore. But you should not be afraid, if that happens, to go back and repeat a point or a question.

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- Should the technological problem concern the internet or Wi-Fi connection, it is helpful to have an alternative method of communication which is not reliant on either.
- If there is a technical failure that cannot be fixed, then the hearing may have to be adjourned. The hearing must be a fair hearing satisfying Article 6 of the ECHR.

3. Make sure all parties can be seen and heard

- As far as possible the online hearing should emulate a traditional hearing. This advice applies to advocates and witnesses alike.
- Establish a speaking protocol at the outset. This may involve participants, when introduced, acknowledging the introduction by raising their hand rather than speaking. This is preferable to a brief nod which may be imperceptible on small thumbnail videos.
- You must not record a court hearing but be prepared to remind the judge to record the hearing.
- When not speaking, press mute. All participants should do this when not speaking.
- When it is your turn to speak, remember to unmute your microphone. Speak directly into the microphone.
- Where multiple devices are in use, all should be muted and only one unmuted when required.
- Advocates should avoid using headsets in online hearings, unless required and the court or tribunal authorises you to do so.
- Avoid setting your device to the highest volume, since this is likely to cause feedback when you are speaking.
- Encourage participants to raise their hand when wishing to interrupt a speaker, or otherwise use a facility to do this on the software provided.
- Prepare witnesses for the taking of the oath or affirmation. Email the form of words to witnesses in advance of the hearing and make sure they have any book they require to take an oath.
- Third parties, such as interpreters, or intermediaries may be required to assist witnesses. During the Coronavirus (COVID-19) pandemic, third parties are likely to be remote from those they are assisting. Issues regarding discreet and separate channels of communication between them will need to be resolved by the court or tribunal in advance of the hearing.

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- When third parties are used to assist witnesses, this adds to the risk of participants speaking over one another. Third parties should be reminded of speaking protocols where necessary.
- Defendants in the Crown Court attending online in custody often have difficulty hearing the proceedings. It is imperative that all participants have good audio and visual contact.
- Maintain eye contact with the camera. This will ensure you appear to be looking at your audience. The thumbnail image of the person you are speaking to may be at the bottom of the screen, when the camera on your device is above the screen. If so, this will give the appearance that you are looking down or away from your audience.
- Ensure that you are clearly visible by maintaining a reasonable distance from the camera, to show your head and upper body. Too close and your image may blur and fill the screen, too far and you will appear distant and detached from the hearing. Some cameras zoom in and out depending on the movement of the subject. This should be avoided.
- Advise everyone to be mindful, if using Skype for Business, that the camera records a wider area than one sees on one's own screen.
- If you are using the camera on your laptop, typing when you are visible is liable to cause the camera (and your image) to shake. Try to use a separate keyboard or a separate camera mounted away from the laptop.
- Remember that others are watching even if you cannot see them. In cases involving multiple participants, thumbnail video images may appear on screen, but these thumbnails often move off screen to allow participants to see the face of the person talking, or the document being shared. Observers may also be present. As such, often there are people present at the hearing who are not visible.
- Ensure that you are well lit by natural or artificial light. Avoid sitting with your back to a window or other light source. This can result in only your silhouette appearing on screen.
- Ensure that your background is appropriate for a hearing. A neutral background is best. Avoid revealing personal or distracting items, such as photographs, ornaments and paintings. The camera may show more of the room than you expect.
- Close the door to the room in which you are appearing. This will prevent unwanted visitors, sights and sounds from interfering with the hearing. This and the use of the mute button will suppress the noise of coughs, sneezes, doorbells, coffee machines, dishwashers, dogs barking, typing, rustling of papers etc.

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- Dress professionally, but not in robes unless specifically asked to do so and appear as if attending the court or tribunal in person.
- Most hearings take place with parties seated. If in doubt, check with the court. If you prefer to stand, adjust your camera accordingly.
- Limit yourself to a glass of water as you would when appearing in an actual court.

4. Know how to handle the documents

- Download an app to enable you to mark up the bundles such as Acrobat DC or PDF Expert.
- Save and keep all your work (including prep and bundles) in a GDPR-compliant cloud NOT on your device. Whichever cloud you use, it is important to store documents systematically so you can find them easily.
- Keep a clean duplicate of your bundle, so that you have one clean bundle and one that is marked up. This way, if the judge asks for a document to be handed up, you have a clean copy.
- The numbers on the pagination can be quite small. Before a hearing, it helps to expand them (and change them to a bright colour) so that you can see them more clearly and move around the bundle more quickly.
- Use an agreed indexed electronic bundle of documents which can be referred to between relevant parties by section, page and paragraph number without the need to share the document on the screen or to hold up physical documents.
- Minimize the size of the hearing bundle. It is tempting, since the bundle is electronic, to include anything at all that might conceivably be relevant. Resist that temptation. Big files are harder to handle and cause all sorts of other problems (e.g. rejection by email filters). That goes for authorities, too, of course.
- Make sure you can find documents you need at speed. Advocates are advised to have a list of key documents, or a hyperlinked index. Bookmark critical documents. Make sure all references in your notes are absolutely accurate and precise and that references in the skeleton argument are to the pages in the electronic bundle, not some historic paper version.
- You must be able to provide, without delay, the reference to the documents to which you want to refer. Always give the reference, not just the description, and give people time to find the document.
- Make sure you can access two documents simultaneously (e.g. on different devices or windows). You will often need both to follow a document that someone else is referring to and find another document for your own purposes.

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- Do not let the difficulty in handling documents deflect you from using documents effectively. In civil cases, documents are often very important. If you have a point to make about a document you nearly always need to make sure that you, the witness, and the judge all have that document in front of them. Summaries are never as effective.
- If you unexpectedly need to share a document with the court or tribunal which is not in the electronic bundle, but which cannot be made visible to all observers by sharing on screen, agreement must be reached as to the appropriate channel of communication to be used, e.g. sending the document to the court or tribunal by email.

5. Make the best use of written argument

- Be aware that it is likely that rather more weight will fall on the written argument than it does in typical hearings.
- Use the written argument to provide a clear road-map of the key issues and how you expect to approach them.
- Use the written argument to provide a way of finding any key document, especially if you are dealing with a complex body of evidence. Recognise that it is harder to follow a remote presentation, and that the judge may well need an aide memoire that can be consulted before and after the hearing.
- Do not, however, be tempted to shoehorn a mass of material of secondary importance into the written argument. If anything, this is even worse when the oral hearing is compressed, because it is likely to leave your written argument disconnected from your oral presentation.
- Give careful thought to which parts of the argument will require oral presentation or expansion, and how you are going to do that.
- Mark documents in arguments for ease by agreeing a key with the other side e.g. [1/1/1] = bundle 1, tab 1, page 1.

6. Be prepared, then be brief and to the point

- Your preparation needs to be more meticulous than it would be for a normal hearing. In a remote hearing, time is at a premium. Remote communication has less impact and less subtlety than face-to-face communication. Much of what follows is general good advice for advocacy, but the requirement is heightened for remote hearings.

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- Write a more detailed script for submissions and cross-examination questions than you usually would.
- Anticipate questions that the judge is likely to raise, or points that your opponent may develop orally, and discuss them with your team in advance.
- For witness handling, make sure that your cross-examination is highly focussed on the main issues. Have clear objectives, and plan to achieve just those objectives. Expect the pace to be slower than you are used to. Do not rely on any cross-examination technique that depends on high pace or pressure.
- When questioning a witness, keep questions short, make sure each is a single question, and use clear questioning cues to show when a question is finished. Avoid multiple questions. Avoid questions which are simply statements and depend on inflection.
- Vulnerable witnesses do not achieve the same level of conviction on-line as they do, say, live behind a screen when the jury can see them. Please be reminded of the 20 Principles of Questioning vulnerable witnesses, available on the Inns of Court College of Advocacy website.
- Advocates must ensure that all witnesses are as comfortable as possible when giving evidence.
- Simplify your arguments as much as you possibly can, remembering that if you "lose the judge" you are less likely to notice that you have done so than you are in court.
- A lot of non-verbal communication (and aspects of "style") are lost when working remotely. Concentrate on the substance.
- Brevity and precision are key. In the event that either sound or video quality is interrupted during a question or submission, repetition may be required, a process far easier to complete with succinct questions or submissions.
- Aim to present your case in a low-key courteous and measured way. Be careful not to have too much mental overload during a hearing.
- Be prepared for the fact that remotely-conducted hearings are more taxing than a conventional hearing. Do not be shy of asking for breaks.

7. Avoid overspeaking

- In a remote hearing, a brief delay typically occurs between the video image of the person speaking and their voice being heard by the court/tribunal and witness. This connection delay may lead participants to believe a person has finished speaking before they have, in fact, done so and is liable to result in participants inadvertently speaking over one another.

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- Do not interrupt. Let a speaker finish before speaking. Be especially careful not to interrupt a witness's answer or a judge's question.
- When you are speaking, allow pauses for judicial questions. You may even want to invite them.
- If you are speaking and become aware that someone else is trying to speak, pause to allow them to do so.
- Do not fill pauses. Gaps between speakers (e.g. while waiting for a witness to answer) are more common with remote communication than when you are together in court.
- If you feel compelled to interrupt and 'get to your feet', you may want to raise your hand to the tribunal as an indication of wanting to do so.

8. Maintain confidentiality

- Organise your workspace carefully in advance. Clear it of anything that is not related to the hearing.
- As far as you can, turn off or close any communications channels that are not related to the hearing you are conducting (email, SMS, WhatsApp etc).
- If you share your screen, be careful. When you share your screen, everything is visible online, including pop-up notifications, screensaver photographs etc. For safety's sake, ensure your screen is clear and that notifications are disabled. Documents can be shared without sharing your screen or (best) referred to in an agreed bundle.
- You will probably want to communicate with your own team but consider how this is best done. Receiving a steady stream of emails and WhatsApp messages from many different people is not helpful. Agree how your team will communicate but ask for communication to be limited to what is really necessary and consider channelling all communications through a single team member who can act as a filter.
- Taking instructions during an on-line hearing can create a serious technical problem. In the Crown Court, where resources are limited, taking instructions from a client in custody at any stage is a serious problem. There are communication and confidentiality issues which have not yet been satisfactorily resolved. Even when the client is not in custody the handling of taking instructions is messy. It may be that some link external to the on-line contact – perhaps by (secure) telephone or e-mail – needs to be considered.

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- Be careful about private meetings. Some software allows the user to leave the main hearing and enter a separate virtual meeting 'room' to have a conference with, for example, a professional or lay client. You will have to be especially confident in using the software to exploit such breakout facilities securely.
- You may prefer, with the agreement of the court or tribunal, to conduct a separate private meeting by temporarily leaving the hearing and physically moving to another room to conduct a private conversation.
- When leaving a hearing, even if going to another room, ensure that the microphone is muted, and the video is disabled until you return. Alternatively, you should sign out of the meeting and sign in again upon returning.
- If you are calling a witness, make sure that someone has checked in advance that the witness knows how to operate the software, and to find documents.
- But remember that witnesses must not be communicating with third parties while they are giving evidence and must not be consulting documents other than the agreed bundle without the Court's knowledge and permission. It is common to ask a witness to identify anyone who is in the room with them and to show a "wide shot" of the room at the beginning of their evidence to verify that.

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Appendix 1

UK Court and Tribunal protocols and updates

- HMCTS Guidance on Virtual Courts - Telephone and video hearings
- HMCTS Guidance on remote access - Guide on Joining Court Hearings by Video Call or Phone
- Mr Justice MacDonald - Guidance on Remote Access Family Court- Remote Access Family Court (23 March 2020)
- Administrative Court - Covid 19 related arrangements - Administrative Court Office Notices (March 2020)
- FLBA user guides for video platforms - FLBA Video Conferencing/Remote Hearings (30 March 2020)
- HMCTS - List of list open, staffed and suspended courts - Courts and Tribunals Tracker List
- HMCTS - Guidance on changes to court and tribunal hearings - Changes to Court and Tribunal Hearings
- HMCTS Daily Operational updates (You can sign up for all updates)
- Main HMCTS Guidance - Courts and Tribunals Planning and Preparation
- HMCTS list of Priority Courts

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