

A REMINDER OF BEST PRACTICE FOR REMOTE HEARINGS

CIVIL WATCH - PRACTICE NOTE

As part of Goldsmith Chambers' Civil Watch series, Ian Cain of Goldsmith Chambers has used his personal experiences and published judicial guidance to present a reminder of best practice for civil remote hearings for all court users during the Covid-19 pandemic and beyond.



THE NEW NORMAL?

1. HM Courts and Tribunal Service 'HMCTS' estimates that the number of cases heard each day in England and Wales with the use of audio and video technology increased from under 1,000 in the last week of March 2020 to approximately 3,000 by mid-April 2020. At this time, 90% of hearings were taking place remotely.¹ On 1 July 2020, the Court Service announced that the use of the Cloud Video Platform, which had been used in the Crown and Magistrates' Courts, was to be extended in the Civil Courts.
2. Though an initial period of trial and error during the first national Covid-19 lockdown, the judiciary, HMCTS and professional and lay court users have established that all short, interlocutory, or non-witness applications can be heard remotely without the attendance of the parties in person. Additionally, some cases requiring live evidence from witnesses have also been found to be suitable for remote hearings, allowing the civil justice system to continue to function during the national lockdowns.
3. Preparation is key to ensuring that remote hearings are efficient and effective. The Equality and Human Rights Commission found that "*opportunities to identify impairments and make adjustments are lost or reduced when a defendant appears in court by video-link rather than in person*".² Therefore, it is crucially important to ensure that all of the parties involved in a remote hearing understand what they are required to do before and during the hearing.
4. The Judicial College have been quick to highlight that whilst "*[remote hearings] are by no means the new normal, no doubt they will continue to have a place in the future*".³ With the third national lockdown imposed in December 2020 and

¹ [Courts and tribunals data on audio and video technology use during coronavirus outbreak - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/courts-and-tribunals-data-on-audio-and-video-technology-use-during-coronavirus-outbreak)

² Equality and Human Rights Commission interim report on video hearings and their impact on effective participation: 'Inclusive Justice: A system designed for all'. [April 2020].

³ [Good Practice for Remote Hearings \(judiciary.uk\)](https://www.judiciary.uk/good-practice-for-remote-hearings/)

no clear date for when the present lockdown will be lifted, it is worth reminding ourselves of the best practice for remote hearings for all parties to ensure that remote hearings are being used in the most effective and efficient way to ensure that justice is delivered.

BEFORE THE HEARING: USING THE REMOTE HEARING SYSTEMS AND TECHNOLOGY

5. In advance of the remote hearing, the Court should let you know the format of the hearing. The method by which all hearings, including remote hearings, are conducted is always a matter for the Judge, operating in accordance with applicable law, Rules and Practice Directions. In particular, the Court will determine in advance whether the hearing is to be in public or private and if the hearing is to be recorded.
6. If the remote hearing is taking place by telephone, you will receive a call either from the Court directly or from a conference provider (such as BT Meet Me) at the allocated time for the hearing. If the hearing is to take place via video then the log-in details for the hearing, usually via Skype for Business⁴ or the Cloud Video Platform 'CVP'⁵, will be sent through to you in advance of the hearing via email.
7. Therefore, it is of vital importance to ensure that the Court has the correct contact details (including telephone number and email address) of the hearing advocate, the instructing professional client and the lay client for all of the parties. During one of my the first remote hearings, 20 minutes was wasted due to the Defendant's representative providing a switchboard number rather than a direct number for a telephone conference which eventually resulted in the hearing being adjourned due to a congested list and a lack of court time. Therefore, you should ensure that direct numbers are provided to allow parties to be contacted quickly.
8. If you are using a mobile phone for the telephone hearing, make sure that you have a good reception where you will be taking the call and have plenty of charge on your device. You may wish to consider using a speaker phone or headphones to allow you to have your hands free for making notes, typing, or navigating case bundles. Avoid setting your device to the highest volume, since this is likely to cause feedback when you are speaking. Even if you intend to use a computer during the hearing, it is always worth having a pen and paper to hand just in case as you would not wish to be hunting for them during the hearing.
9. If the hearing is to take place via video, an established quirk of the CVP is that it works best on Google Chrome and multiple issues have been reported with the use of Safari on apple devices, including where people can be heard but not seen on the CVP. You must ensure that you have a good internet

⁴ [Download Skype to join a court hearing - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/download-skype-to-join-a-court-hearing)

⁵ [How to join Cloud Video Platform \(CVP\) for a video hearing - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/how-to-join-cloud-video-platform-cvp-for-a-video-hearing)

connection, that you have downloaded the most recent version of your internet browser, that your device is plugged in and that the camera and microphone are working properly. If using the CVP or Skype for Business, the microphone, camera and speakers can all be tested within the software before the hearing commences.

10. In either telephone or video hearings, it is important that you are familiar with your devices, such as the mute/unmute buttons, how to turn the camera on/off and the volume controls. I have fallen foul of this myself, as prior to one remote hearing, it appeared that the webcam on my laptop had suddenly stopped working. It was only upon further investigation that I discovered that there was a button on my keyboard, which I had never noticed or used before, which blocked the video feed from my webcam even when it appeared to be 'live'.
11. Make sure that you have somewhere quiet and private to join the hearing which is free from interruptions or distractions. Whilst waiting for an in-person hearing at one court, I witnessed counsel appearing remotely via CVP have to apologise to the Court, and briefly leave the screen, so that he could loudly remind his arguing children that he was in a hearing and could not be interrupted. This acted as an important reminder to me that you must ensure that you let the people that you share a space with know that you are in a hearing and cannot be interrupted. You do not want to be in the embarrassing position of that particular barrister who was informed by the Judge that the Court could hear every word of him remonstrating with his children and he had given everyone a good laugh.
12. When appearing via video, you should dress as if you were attending the court in person. Dress professionally, but not in robes unless specifically asked to do so. Make sure that you can be easily seen, that the room you are in is well lit, avoid sitting with your back to a light source such as a window (as this can result in a silhouette) and try to have a plain background behind you which is not distracting. You should ensure that you appear in the centre of the screen and are close enough to the microphone so it can pick up your voice clearly. It is possible to request test video and telephone hearings to ensure that the technology, software and your working area is correctly set-up and working prior to the commencement of the hearing.
13. Finally, if you are not using it for the hearing, turn off your mobile phone or put it on flight mode so you do not get interrupted. All parties will need to log into or connect to the remote hearing in good time for the stated start time, so it is good practice to attempt to join the remote hearing shortly before the stated time to ensure that there are no connection issues.

BEFORE THE HEARING: CASE PREPARATION

14. Preparation for remote hearings is key, and the Judiciary of England and Wales noted that "*in the present circumstances, the court and the parties and their representatives will need to be more proactive in relation to all forthcoming*

hearings".⁶ In particular, if it appears that a particular format of remote hearing would not be suitable for a case, the Court should be advised of these concerns in writing, with the other parties copied in, along with an explanation as to what other proposal would be more appropriate, as soon as possible.

15. When determining if a remote hearing is the suitable hearing format for your hearing, you may find it useful to consider some of the following points:
 - a) A remote hearing taking place at home might occur alongside distractions which inhibit evidence, such as domestic violence, coercive control, and overcrowding: parties may not have a quiet private room, and there may be demands on their attention from pets, partner or children.
 - b) Changing the date or time of the hearing at short notice may cause extra difficulty with arrangements made to avoid interruptions.
 - c) Interpreter and Intermediary use may be problematic unless specific arrangements can be made.
 - d) Virtual hearings take longer, because of technical difficulties, slower communication and the need for more breaks due to the increased concentration required as well as often unsuitable seating arrangements and posture. Allow more time when fixing hearings.
 - e) Consider holding a case management discussion to decide whether holding a remote hearing can fairly proceed and what measures might be needed.⁷
16. Written submissions have a new level of importance to ensure that the hearing time is used as efficiently and effectively as possible. Therefore, parties should consider drafting written submissions, even in some cases/hearings where they would not usually be expected, in order to assist the Court and narrow the issues in advance of the hearing. If possible, the advocates should attempt to communicate with each other via telephone or email to narrow the issues as there will be no opportunity for 'robing room chats' to resolve any problems.
17. Use any written arguments to provide a clear road map of the key issues and how you expect to approach them. Do not, however, be tempted to shoehorn in a mass of material of secondary importance into the written argument. Give careful thought to which parts of the argument will require oral presentation or expansion, and how you are going to do that.⁸
18. The Judge will make directions on what documents need to be served and when, and it becomes even more important that these directions are followed to ensure that the remote hearing is effective. All parties must familiarise themselves with all of the relevant pre-hearing rules and guidance relevant to the particular jurisdiction.⁹

⁶ [Civil Court guidance on how to conduct remote hearings | Courts and Tribunals Judiciary](#)

⁷ [Good Practice for Remote Hearings \(judiciary.uk\)](#)

⁸ [Principles-for-Remote-Advocacy-1.pdf \(icca.ac.uk\)](#)

⁹ [Coronavirus \(COVID-19\) advice and guidance | Courts and Tribunals Judiciary](#)

19. You should make sure that you have any documents that you will require for the hearing in place beforehand. In particular, you will need to give consideration as to how you will navigate these documents during the course of the hearing. If you are using a paper bundle, make sure that you have it in front of you, that the bundle is not too close to the microphone (so the rustling of paper cannot be heard) and have space for it within your working area.
20. Even when using a paper bundle, the parties should prepare an electronic bundle of documents and an electronic bundle of authorities, if necessary, for each remote hearing for the Court. Each electronic bundle should be indexed and paginated and should be provided to the Judge's Clerk, court official or to the Judge (if no official is available), and to all other representatives and parties well in advance of the hearing. Electronic bundles can be prepared in .pdf or another format. They must be filed on CE-file (if available) or sent to the court by link to an online data room (preferred), email or delivered to the court on a USB stick.
21. If using an electronic bundle and the hearing is to take place via video, many advocates will either use two screens to allow them to access electronic documents whilst appearing remotely or make use of the 'split-screen' functionality of many modern computers. Some advocates believe that they need at least three windows open during a hearing - one for the hearing itself, one for the bundle and one for their notes.
22. Due to their nature, it can be very difficult for last minute documents to be served and shared prior to, or during, remote hearings. Therefore, it is important to avoid this wherever possible and ensure that you have the relevant email addresses for the other parties and Court/Judge before the commencement of the hearing. It is worth investing in good PDF software (such as Acrobat DC or PDF Expert) which allows you to produce hyperlinks, split documents, highlight words/sections and stick Post-it notes on electronic bundles to make them easier to navigate during the hearing.
23. Before the hearing, it is important to remember to set up and agree a mechanism for taking instructions during the hearing. Messaging services, such as Facebook Messenger, the WhatsApp Desktop app and email have all been used effectively to allow advocates to obtain instructions during remote hearings.

DURING THE HEARING

24. It is vitally important to remember that it is a criminal offence to record court proceedings without permission so the remote hearing should not be recorded.¹⁰ The Court will make a recording and the transcript can be obtained if required at the conclusion of the hearing. Many civil hearings take place in private, and the Judge may ask you to confirm at the beginning of the hearing

¹⁰ CPR 39.9

that there are no unauthorised persons with you or that can overhear the hearing.¹¹

25. The Court will ensure that all of the expected parties are in attendance for the remote hearing and the Judge will usually start by formally introducing all of the participants for the court record. The Judge will often outline the purpose of the hearing and outline what will happen during the course of the hearing, including the order in which they expect to hear from each of the parties. Be aware that sometimes the camera/video will be turned off and the sound muted by default when you join a hearing electronically and you may need to unmute yourself when you first address the Judge.
26. 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 and witnesses. This connection delay may lead participants to believe a person has finished speaking before they have done so and is liable to result in participants inadvertently speaking over one another.
27. During the course of the hearing, you should not interrupt other participants when they are speaking as the Court will ensure that everyone is given the opportunity to speak. Follow the directions of the Judge, as they will indicate who they wish to hear from and when. Unlike in Court, you cannot 'watch the Judge's pen' to see when they have finished noting things down, so it may take longer than usual to go through your submissions.
28. When you are talking, ensure that you are looking directly at the camera or the Judge's video instead of your own as this can be incredibly distracting to you. Remember to unmute your microphone before attempting to speak and ensure that you are speaking directly into it. Unless you are told otherwise, your camera should remain turned on at all times during video hearings. Therefore, it is important to remember that when your video is on, you can be seen by all other participants so do not read emails, start online shopping or do other things during the hearing.
29. It is best practice to keep yourself on mute until you are invited to speak by the Judge to ensure that there is no background noise or feedback which could affect the sound during the hearing. During one of my remote hearings, the Judge had to be informed of a loud echo that could be heard during the hearing. It transpired that the noise was caused by the sound of the CVP hearing on the Judge's laptop being picked up by the court's microphones and relayed back through the court speakers. This was easily resolved by the Judge muting himself once he had finished talking and did not have a lasting affect the hearing.
30. If you are going to be giving evidence during the hearing, you may be asked to give an oath or affirmation to promise to tell the truth. If you are giving an oath

¹¹ CPR 39.2(3)(g)

on a holy text, you will need to make sure you have a copy of it with you beforehand. You will need to check that your witnesses are prepared to give the oath or affirmation prior to giving their evidence if required.

31. It is much harder during remote hearings to build a rapport with the Judge and with lay clients/witnesses, so consideration should be given as to the verbal and non-verbal clues given by the other participants. During a telephone hearing, you will not be able to take visual clues from the Judge as you would when in-person, so variations in tones of voice become more important.
32. There are rules about what you can and can't do in a court building and the same rules apply when you have your hearing remotely. As such, the best practice is to remember the etiquette of the courtroom, so:
 - a) only drink water from a clear glass;
 - b) do not eat;
 - c) do not smoke or use e-cigarettes;
 - d) do not leave during the hearing unless permitted to; and
 - e) always follow the court's instructions.
33. Technical issues happen, and if they arise then you should let the Court know as soon as possible. If you lose connection during the hearing, try to re-join as quickly as possible and call the technical support line if required. As noted by the Judiciary of England and Wales, "*it is inevitable that undertaking numerous hearings remotely will cause teething troubles. All parties are urged to be sympathetic to the technological and other difficulties experienced by others*".¹² If something does go wrong (a critical participant drops offline, for instance, or some connection fails) whilst you are talking, pause until it is sorted out.

DURING THE HEARING: ADVOCACY

34. Advocacy during a remote hearing needs to be handled differently compared to advocacy within a courtroom. For example, you cannot jump to your feet to challenge a point as you can in-person, so you may have to wait for a convenient moment before raising any issues or even resort to raising your hand to get the attention of the Judge.
35. Experienced Counsel will handle remote hearings with ease, and Counsel should be considered for most remote hearings. If representing a lay client yourself, there are some key points to remember when practicing best advocacy during a remote hearing:
 - a) Remote communication has less impact and less subtlety than face-to-face communication.
 - b) You may find it useful to write a more detailed script for submissions and cross-examination questions than you usually would.

¹² [Civil Court guidance on how to conduct remote hearings | Courts and Tribunals Judiciary](#)

- c) 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.
 - d) Advocates must ensure that all witnesses are as comfortable as possible when giving evidence.
 - e) When you are speaking, allow pauses for judicial questions. You may even want to invite them when appropriate.
 - f) 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.
 - g) Be prepared for the fact that remotely conducted hearings are more taxing than a conventional hearing. Do not be shy of asking for breaks.
36. For further information on Advocacy during remote hearings, the Inns of Court College of Advocacy have produced an excellent guide on the principles for remote advocacy which is highly recommended for all advocates undertaking remote hearings.¹³
37. During video hearings, advocates have the ability to share their screen in order to show photographs and other exhibits. Remember that when sharing your screen, the whole screen can be seen by the rest of the participants. This means that you should ensure that you do not have anything loaded that you would not want your opponents to see and you should ensure that all messaging applications are shut down before sharing your screen to ensure that there are no 'pop-up notifications'.

A LASTING LEGACY

38. Whilst the Judicial College is correct that remote hearings are not the new normal, they will certainly be one of the lasting legacies of the Covid-19 pandemic. Whether you like them or loathe them, remote hearings will continue to be used frequently during the national lockdowns. It is incumbent on all court users to adapt to remote hearings quickly as I firmly believe that many forms of hearings will continue to take place remotely following the end of the pandemic, even if they do not become the new normal.

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¹³ [Principles-for-Remote-Advocacy-1.pdf \(icca.ac.uk\)](https://www.icca.ac.uk/Principles-for-Remote-Advocacy-1.pdf)

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