

# REMOTE HEARINGS: A PRACTICAL GUIDE TO CASE MANAGEMENT

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It is a brave new world. The lockdown brought about by the coronavirus crisis is forcing the hand of our infamously old-fashioned profession to adapt quickly or lose myriad court dates; leaving our clients without satisfactory and timely resolutions to their disputes.

In the weeks following lockdown, the family court, in particular, have taken the bull by the horns and released helpful guidance (The Remote Access Family Court, linked [here](#)). Though tailored to family law in general, it is nevertheless useful guidance for any practice area. The civil judiciary have now released the remote hearings protocol, linked [here](#), which provides 'basic guidance as to the conduct of remote hearings'. HMCTS have released the civil court listing priorities, linked [here](#), which can be of assistance in determining whether the matter can be dealt with as a remote hearing.

The aim of this article is not to re-tread the ground already covered by the senior judiciary, though it will undoubtedly touch on the same issues. This article is intended as a practical guide to case management: from determining the method of remote hearing to corraling witnesses, ensuring all parties have the same bundle (a problem not reserved to remote hearings) and facilitating 'court corridor negotiations'. It is intended as an *aide-memoire* for those of us on the front lines to assist in the practical and effective administration of justice for our clients.

For ease of reference, I have distilled the salient points into a Remote Hearing Checklist. It can be found [here](#). PDF copies of this article and the checklist are available on request.

The points I will address are as follows:

1. Which platform to use
2. Client management
3. Communication and co-operation

4. ADR
5. Instructions to counsel
6. E-Bundles
7. Remote Hearing Hygiene

### **Which Platform to Use?**

The platform to which the case is suited will depend upon the issues that need to be determined. Would it assist the Judge to see a particular witness giving evidence (this may be the case in matters involving allegations of dishonesty)? Is your client computer literate? What does your opponent think?

Of the utmost importance, too, is what the client feels most comfortable using. This is an unprecedented time for everyone but the novelty of the situation is enjoyed more by the legal profession and judiciary – clients are more at risk than ever of feeling side-lined. The client, if at all possible, should sign off on decisions relating to any upcoming remote hearing after full and considerate advice.

The current platforms recommended to the judiciary are Skype for Business/Kinly Cloud for video hearings and BT MeetMe for telephone hearings. If at all possible, it makes sense to select one of these solutions. Matters are made slightly more complicated in that Skype for Business is slowly being phased out and amalgamated with Microsoft Teams, which is currently a stand-alone videoconferencing suite. For the time being, it is advisable to download both SfB and Teams as both are likely to be used until they are finally completely combined.

Fortunately, it seems HMCTS accept that the current situation calls for a flexible approach and will use other platforms so long as they have appropriate security and can adequately facilitate the hearing. An even larger degree of communication and cooperation between the parties, their legal teams and the judiciary is required to ensure the hearing is conducted effectively on an appropriate platform.

Recording the hearing: Sir Andrew McFarlane's guidance currently states there is 'no difficulty with a host who is not the judge recording the hearing *provided* that host is a legal representative and provides to the judge a link to the recording immediately following the hearing.' However, at the time of writing, McFarlane's guidance conflicts with that of the

Remote Hearings Protocol, which states 'The parties and their legal representatives are **not** permitted to record the hearing'. This contradiction needs to be clarified by the judiciary, but until that time best practice in the writer's view is to contact the court early to discuss the method of remote hearing and the available recording options. It may be that formal permission of the court is required to reflect the reality of the recording situation based on the software used – though in the writer's view a formal application with the appropriate court fee should not be necessary to obtain it.

If the court grants permission (based on the realities of the software utilised for the remote hearing) for a legal representative to record the hearing, McFarlane's guidance makes the following points:

- Responsibility for conveying the recording to the court rests with the party hosting the hearing
- The files containing the recording should be conveyed to the court in a standardised format (this has not yet been identified by HMCTS)
- The file containing the recording should include the case number, identity of the judge and the date of the hearing
- Any recordings kept by legal representatives should be securely stored in a GDPR compliant manner – particular care should be taken if recording multiple hearings to avoid recording one case over another previously recorded case

Finally, *have a back up plan!* As we are all painfully aware, technology fails from time to time – whether due to human error or a glitch in the system. Whilst we all get used to this new way of working, it pays to have a Plan B in case the hearing cannot go ahead due to technological failures. Most firms and chambers have their own teleconferencing/videoconferencing systems that could be utilised in lieu of 'off the shelf' products. I recently attended a hearing in which the Judge used the judicial conference calling facility to invite both counsel, their respective clients, two witnesses and an expert (8 people, including the Judge): it worked perfectly.

The bottom line is this: it can be done – to do so requires a greater degree of proactivity, flexibility and creativity than before.

## Client Management

As touched upon above, the novelty of telephone/video hearings is acutely felt by those of us in the profession used to the ins and outs of legal proceedings. The same can't always be said for lay clients. After the dust had settled from the first weeks of remote hearings, it became clear that there was a gulf between the experience of some lay parties and their legal representatives. (Linked [here](#) and [here](#) are two articles on the Transparency Project which provide valuable insight into the lay perspective – they are a must read.)

It is of the utmost importance that appropriate time is taken to advise the client on the various remote venues on offer and what to expect from remote hearings. Particular emphasis should be placed on the client's questions, reservations and anxieties and enough time should be left before the hearing for counsel to make contact and take instructions. Best practice, in the writer's view, is to facilitate a 'dry run' with the technology some time before the day of the hearing. Arrange a date and time with the client to have a short (even 5 minutes could suffice) conference to check the software works and iron out any kinks in the system.

For barristers, it is important to remember that it is easier to gain trust and make clients feel at ease when they can see us, read our body language and have a face-to-face conversation. For many barristers, the first meeting with the client will be via telephone or Skype and so more time and deft interpersonal communication skills will be required to ensure our clients feel sufficiently supported.

The following guidance could be provided to lay parties to enable them to get the most out of a remote hearing:

- Make sure laptops/computers are plugged in
- Phones should be on aeroplane mode/switched off as in court usually. This is subject to any pre-agreed secondary lines of communication for the purposes of taking instructions
- Mute the microphone when not speaking
- Expect that there may be a slight time delay which might affect the way evidence is given in cross-examination
- Provide a short checklist to assist the client in logging in to the software
- Ensure there is adequate childcare so the hearing is not interrupted. If this is not possible ensuring so far as possible that interruptions are kept to a minimum

- Ensure that pets are kept out of the room
- Try to reduce external noise, particularly if living in a built-up area – consider closing windows
- Contact the advocate through other, pre-agreed, means if having connection problems

## Case Management Cooperation

These unusual circumstances require a greater degree of communication and cooperation between the parties. Cases should be managed proactively and an early call to the court should be made after liaising with your opponent. The listing should be pinned down and a proposed solution offered to the court. Court permission is still required for remote hearings and this should be obtained sooner rather than later. Each case turns on its own facts and it is attendant upon the legal professionals running the case to cooperate with each other to enable effective case management. This may mean a larger degree of lenience is required when it comes to technical breaches of the CPR – the bigger picture must be kept in mind. The court clearly supports this, and provision has been made for longer mutually agreed extensions of time where permission of the court is not required (56 days in place of the usual 28 days), see PD51ZA.

In particular, legal professionals should be alive to the issue of signatures and statements of truth. CPR Part 22 and FPR Part 17 are clear that a statement of truth must be signed. This may present a problem in verifying witness statements in particular, as firms are able to sign statements of case on a client's behalf. On 27 March 2020, Sir Andrew McFarlane made clear that the rules do not require a 'wet' signature. Indeed, case law<sup>1</sup> indicates that a printed name constitutes a valid signature. Whilst it is best practice to attempt to obtain the client's signature, it may very well be that as a result of the client's own lack of technological solutions, time or personal circumstances, witness statements go unsigned. Legal professionals in these circumstances should adopt a more flexible and pragmatic view in light of these ongoing difficulties – based always upon the circumstances of the particular case.

It is important in any event that a witness is appropriately questioned as to the truth of their witness statement in examination-in-chief. If the witness does not attend, this raises more difficulties. A novel solution might be to obtain an email from the client which states that they have read their witness statement and attest to the truth of its contents. Arguments will no

doubt be raised as to the weight to be attached to the statement, but given the current situation reasonable counter-arguments could be raised to support this approach.

## **ADR**

Given the current climate, there is more opportunity than ever for parties to engage meaningfully in alternative dispute resolution. Parties whose case is not suitable to be heard remotely should consider engaging in ADR to avoid a lengthy delay to a judicial resolution of their case. Anecdotally, it has been observed that the current crisis has forced individuals to reprioritise the things upon which they wish to spend their time. This is a perfect opportunity for effective mutually agreed solutions to be negotiated. 3PB can provide mediation as well as private FDRs all of which can be held remotely using Lifesize. Link [here](#).

## **Instructions to Counsel**

Aside from the usual instructions, barristers will require more contact information than usual. Contact details for the opposing barrister, the lay client and any witnesses should be obtained and, subject to the necessary consent, provided to counsel to ensure they have all the required information to take instructions and advise accordingly prior to the hearing. Barristers should be aware that time constraints and the lack of court ushers means that conference time should be utilised as efficiently as possible. This may mean arranging a teleconference 15 minutes to 30 minutes earlier than a usual in-person conference. Where possible, a time for a pre-hearing call should be agreed with any witnesses too.

Legal representatives and lay clients should also consider the available options to enable confidential discussions and instructions to be taken throughout the hearing. There appears to be a rise in technology offering 'break-out rooms' which act as virtual conference rooms in which confidential instructions can be taken or 'court corridors' where both counsel can engage in without prejudice negotiations. (3PB provide this service in our Remote Court Scheme, linked [here](#).) However, until this technology becomes more widespread it may be appropriate to set up a secondary line of communication to facilitate speedy and effective instructions and negotiations. This could be via email, instant messenger or an inbuilt private chat function in the videoconferencing software.

## E-Bundles

The word E-Bundle will no doubt already be giving some legal representatives the chills as the reality of collating various documents into one readable PDF document sets in. Thankfully, 3PB's [Steven Howard](#) has created some immensely helpful video guides for creating E-Bundles, linked [here](#).

There are various platforms on which PDFs can be managed and edited. Adobe Acrobat, PDF Expert and PDF Exchange Editor are particularly user friendly.

The most important (and basic) element of E-Bundles in the writer's view is ensuring they are paginated. Most PDF editing software includes a simple 'click to paginate' option. With some it is even possible to create links to other parts of the bundle – though time will no doubt be a factor in whether or not this feature can be utilised.

An interesting question that arises is whether the client or witnesses need the bundle for the hearing. There are differing views on this point and it will largely depend upon the nature of the hearing. If no evidence is to be given or there is to be limited evidence on a certain point, then only providing the witness with a copy of their witness statement may suffice. If, however, it is envisaged that cross-examination will entail traversing the whole bundle it may be best that the witness be provided with a copy.

Providing the client with a copy of the bundle is less problematic than doing so for any non-party witness. This is not a problem encountered in hearings in person as the bundle stays in the witness box when they finish their evidence. The same cannot be said for an E-bundle sent directly to the witness.

There are a number of ways around this problem. In the first instance, the witness should be given a copy of their witness statement and any attached exhibits. If the hearing is to be conducted using a suitable platform, it may be that the questioning advocate can 'screen share' in order to direct the witness to any areas of the bundle they do not have access to. Advocates should be aware, however, that any notes will be visible, as will any other aspects of their screen.

Another solution is to create a time-limited link to the bundle which expires at the end of the hearing. Most cloud based services offer the ability to organise permissions to view a

particular file. There are myriad document management services available and comparing their merits is best left to dedicated technology experts.

Oh, and *make sure all parties have the same bundle!* This should be resolved by way of increased communication between legal representatives. A proactive and cooperative approach is required to ensure every party is on the same page, both literally and figuratively.

## Remote Hearing Hygiene

Remote hearing hygiene relates to the way a remote hearing should be conducted on the part of the advocate. This relates in large part to videoconferencing hearings as there is arguably more to distract the other participants. The reader will note that some of these requirements echo the advice given to clients:

- Wear appropriate court attire
- Use headphones if possible, but seek permission from the court first
- Keep your background neutral
- Maintain the solemnity and formality usually adopted in court
- Ideally set up for the hearing in a closed off room so pets or family members can't cause a distraction
- If on a telephone hearing with multiple parties, it is useful to declare who you are before speaking unless it is obvious
- Mute yourself when you are not speaking, and remember to unmute before you speak
- There is no way to observe the 'judicial pen' – remember to talk at a reasonable pace and always check the judge has sight of the part of the bundle to which you are referring
- The same applies to the witnesses you are questioning – provide clear references to pages in the bundle and check the witness has sight of them before proceeding with the question

## A Final Word

This is an unprecedented and uncertain time. We all need to work together to ensure our work is done effectively and our clients are served properly. Proactivity, cooperation and communication are the watchwords in this regard. Aside from matters, that for regulatory



reasons, are reserved to either solicitors or barristers, we should each be helping one another to facilitate effective remote hearings. The clerks at 3PB are an incredible, hard-working bunch who pay handsomely for positive words to be written about them in their barristers' articles. They are always ready to assist in any way they can. I am sure I speak for my colleagues when I echo that sentiment on behalf of the Bar at 3PB.

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<sup>i</sup> *Bassano v Toft* [2014] EWHC 377 (QB)

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