

Preparing Ourselves and Our Clients for Participation in Remote Hearings

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1. Since March 2020, social distancing guidelines have prevented Employment Tribunals and Civil Courts holding hearings face to face. The use of remote hearings has rapidly accelerated to ensure the continued operation of the justice system. As Employment Tribunals gear up to determine contentious matters via remote video hearings and as Civil Courts expand the use of remote hearings, [Caroline Musgrave](#) of Cloisters addresses how we can prepare our clients, parties and witnesses, and ourselves for the challenges remote hearings present in terms of effective technology, the home environment and participant conduct.
2. This blog draws on learning from three sources:
 - a. Between 1 May and 15 May 2020 the Civil Justice Council commissioned a rapid review of how court users are being affected by the move to remote video hearings ([The impact of COVID-19 measures on the civil justice system](#)). The report highlights many of the challenges that we will surely face such as unequal access to technology, differing home environments of participants, timetabling of a remote hearing and remote hearing etiquette.
 - b. The increased use of remote video hearings will not affect everyone equally. The Judicial College Equal Treatment Bench Book seeks to encourage participation in the judicial process by identifying and making adjustments for disabilities and other disadvantage. Opportunities to identify needs and make adjustments are reduced when a hearing is conducted by video link. The Committee have released the guide “Good practice for remote hearings” to offer practical advice to judges and any who appear before them be they defendant, party, witness or advocate ([Good Practice Guide](#)). The Guide shows readers what to expect of their judge and can be a useful resource if they experience a problem it addresses.
 - c. Finally, this blog highlights learning from colleagues who have direct experience of appearing as advocates and witnesses in Courts already relying on remote video hearings.

Effective use of Technology

3. Effective communication is at the heart of a fair justice system, ensuring that everyone understands and is understood. The rapid review received over 1000 responses from court users. Almost half of the 480 hearings described had technical difficulties. This leads to delay, frustration, stressed participants and lack of confidence in the judicial system. Frustration with technology can spill over into the demeanour of a key witness, the concentration of an advocate or a litigant’s ability to ensure they have said everything they want and need to say.

4. Some problems are unavoidable as we all get up to speed with the new normal. But there is much that can be done in advance to assist the smooth running of the case and so ensure a positive experience of the hearing. Practice runs to check technology and competence at using it are strongly advised. The following matters should be considered.
5. Participants will need access to a computer with video camera and a stable internet connection:
 - a. If clients do not have the necessary technology at home then consider whether you can offer a facility for them to use, such as a conference room they can access while maintaining social distancing.
 - b. Practice using the home set up with your client to build their confidence.
 - c. Are you able to offer IT support? If so, ensure that clients know who to call for help.
 - d. Check with the Judge at the start of the hearing as to how a participant can call back in if the connection is lost.
6. Judges are frequently using ebundles as they work remotely without access to hard copy bundles filed at Court. This doesn't necessarily mean that all participants have to use an ebundle. Many will find it easier to remain with hard copy. Things to consider when deciding the best document format for participants:
 - a. Do all participants have a computer or iPad to view an ebundle which is separate to the device from which they will connect to the hearing? Reviewing documents on a small phone screen while using a main computer screen for the call is far from satisfactory.
 - b. Are all participants confident with using pdf bundles? Ensure clients know how to use the index and tab system to navigate between pages.
 - c. If some participants will use hard copy and some electronic, check that the pagination is the same.
 - d. Ensure that the ebundle sent to witnesses is free from electronic notes in the same way that the witness table hard copy would be free from annotations.
7. The rapid review highlighted the difficulty of juggling multiple communication channels during a hearing such as a laptop streaming the hearing, the ebundle on an iPad and a phone receiving private communications from participants:
 - a. Ensure your clients have a means to communicate with you which is not dependent on the computer which is being used to stream the hearing or view documents.
 - b. Establish a means to communicate privately with counsel during the hearing and ensure participants know what it is. Bear in mind that emails and text messages may have a delay so you can not presume instant communication.
 - c. Consider whether one member of the team can be the conduit for any communication with counsel.

- d. Lay ground rules for participants as to what communication is permitted to encourage them to remain focused on the hearing rather than engaging in off line chatter.
- e. Turn notification sound effects off and disconnect linked devices so incoming message alerts do not distract during the hearing.
- f. Good communication during a remote hearing requires multiple devices and good comprehension skills. Not all clients have this so schedule calls during breaks to ensure they are satisfied with how matters are proceeding.

Home Environment

- 8. Practitioners and clients will now be joining the Tribunal room from their home environment with all its associated challenges and distractions. Remember Professor Robert Kelly back in 2017? His interview with the BBC went viral as he somehow retained his composure while his 4 year old daughter came trundling into view followed by the baby pushing in on a walker swiftly followed by his wife grabbing both with a horrified look on her face ([YouTube](#)). Two years on and we are now all facing the risk of a repeat show as our own home lives spill onto the screen of our professional world. There are steps we can take to prepare our home environment for a professional remote hearing.
- 9. One participant in the rapid review reporting dialling in to their court hearing from their car. Others use home offices or a kitchen table. Judgments can be unconsciously made about the participant with a well-stocked professional book shelf as a backdrop against the participant sitting in their son's bedroom with a wall of album cover posters. Consider neutralising the environment to prepare it for the hearing:
 - a. Aim for a quiet location in front of a plain wall.
 - b. Ensure there is sufficient table space for any bundles and notes.
 - c. Blur the background if the software being used allows it. If not, direct the camera away from distracting backgrounds towards a plain wall.
 - d. Direct lighting from the front rather than from behind so as ensure the participant is easily seen.
- 10. We all hope that our home environment is a private place of sanctuary. It is not necessarily somewhere we want exposed to our work or even less our disputes about work. Answering questions in a private space can add a layer of vulnerability to an already stressful encounter:
 - a. Consider where in the home the participant is able to freely participate in the hearing. If there is no such place, consider whether you can offer a conference room they can access while maintaining social distancing.
 - b. It can be difficult to discuss confidential professional matters, some stressful or upsetting, within ear shot of children or family members and in personal space. Using a headset with a microphone can reduce the risk that others will overhear details that the participant would rather remain confidential.

- c. Redirect the camera away from personal items or remove personal photographs from the walls or shelves in view of the camera. One social services witness spoke of the vulnerability she felt as the families she worked with on a professional basis were suddenly able to see into her bedroom. The feeling was heightened as she faced challenging cross examination by 5 barristers while she sat on her bed with pictures of her daughter in the backdrop. Several of the recommendations in this blog arise from her learning in readiness for her second remote court hearing.
11. Home environments are full of distractions and noise. For many there is an ongoing risk of invasion from a small person or a noisy pet but there are ways to reduce the risk of interruption:
- a. Headphones are a great way to block out family noise to enable better concentration on the remote proceedings. The microphone is close to the speaker's mouth and so less likely to pick up on the surrounding noises. It can be turned off when the participant is not speaking. Consider whether headsets can be provided to participants for the duration of a hearing as not all will have their own.
 - b. Bring a water jug and glass into the room for the hearing to avoid needing to go to and from the remote 'court room' and the family space all day.
 - c. Consider where participants will take breaks and lunch in advance. Would it assist to pre-prepare snacks, lunch and drinks both for the participants and for any other family members that need them so that witnesses aren't drawn into domestic tasks during breaks.
 - d. Provided social distance rules can be met, consider offering participants access to a work office for the duration of the remote hearing.
12. Home environments come with home life and home responsibilities. Participants in the rapid review spoke of the importance of considering the impact on those with caring responsibilities. It cannot be presumed that all participants are free to play their role in a remote hearing at the drop of a hat. Consideration should be given to the following:
- a. Discuss participant availability in advance making sure to take account of caring responsibilities.
 - b. Timetable the hearing. This can be done in liaison with the other side and presented to the judge as a suggestion at the outset of a hearing.
 - c. Encourage open and honest conversation. If a child has fallen down outside and is crying and the only other person who can help is the 12 year old sibling, it is quite understandable to request a break to assist. Remember that all participants dialling in from home will be facing domestic demands in one form or another and the Courts will need to accommodate that.

Participant Conduct

13. Professional clients spend time preparing their clients for their role in a hearing, reminding them to speak slowly, to watch the judge's pen, to direct their answers to the judge not counsel and to remember that their conduct while waiting to speak is as important as while on the witness stand. This advice now needs to be adjusted and supplemented to reflect the nuances of participation in a remote video hearing.
14. It has become a running joke that while we all rely on video conferencing, the nation now dresses for work in smart shirt and slippers. While there are advantages to being comfortable when participating in a court hearing, it can also lull the participant into a false sense of security:
 - a. Dress as you would for a normal court hearing – top half and bottom! Dressing professionally will put the participant into the right mental space to fully participate in the hearing.
 - b. Remote video hearings can feel more informal than in person hearings which can lead to offhand comments or being led down the wrong path. Stress to all participants that this remains a formal hearing.
 - c. Consider wearing a work name badge if it assists with feeling 'in character' as the professional person you are rather than the mum giving breakfast you were 20 minutes ago.
 - d. Encourage participants to watch proceedings from the start so as to be absorbed in what is going on when they come to give evidence rather than stepping in from their home life to work life without preparation.
15. Pre-hearing 'waiting room conferences' and post hearing debriefs remain as important as ever. The social services witness referred to previously spoke of her disorientation at being called by the judge when she expected her usual pre hearing conference with counsel. She tried to speak to counsel via text and was of course told that she couldn't do so while giving evidence:
 - a. Conduct pre-hearing conferences with clients to introduce them to counsel, help them focus their mind on the matters in hand and to answer any questions about what to expect at the hearing. The closer to the live hearing the better to help focus minds away from distractions and on to the task in hand.
 - b. Encourage participants to be sat ready for the start of the hearing in good time. It was unsurprising that the witness who ran in from the garden, throwing a smart jacket on top of gardening clothes, described finding it hard to concentrate on the hearing for the first few critical questions.
 - c. Remind participants that, just as in an in person hearing, they cannot communicate with anyone, including counsel or their colleagues, while they are giving evidence. Equally any observers must be reminded that they should not email or text witnesses while they are giving evidence.

- d. The post hearing debrief is often an important part of helping a participant process what has happened and what they have heard. Schedule such a call straight after the hearing.
16. The rapid review confirmed that participants prefer video hearing to plain audio however it remains difficult to gauge body language and ensure a smooth flow of conversation. Technical difficulties can compound the challenges:
- a. Participants are always told to speak slowly; this is even more important in remote video hearings.
 - b. Pause before speaking in case of a delay in the microphone switching from one speaker to another. Delays can make it difficult to respond to judicial intervention. If in doubt, stop speaking and wait until it is clear that all have finished and it is time to speak.
 - c. It is certainly more difficult to know when to speak without the visual cues that we usually rely on but it is important to try not to interrupt others. It can be obstructive in any situation but even more distracting when layered on to audio delays.
 - d. Depending on the number of participants, it might be necessary to 'pin' the judge and counsel so that images of the participants do not move around the screen as each takes a turn to speak.
17. Video hearings are reported to be more tiring than in person hearings. This may well affect the conduct of participants and the ability of a witness to communicate as well as they might in person:
- a. Encourage timetabling of evidence where possible.
 - b. Request frequent breaks.
 - c. Do not be tempted to overrun at the end of the day.

Conclusion

18. It is incumbent on practitioners to prepare ourselves and our clients for the unique challenges remote hearings present in terms of technology, the environment and participant conduct. Despite all of the challenges, remote hearings ensure that justice continues to be done during this unprecedented time. Readers can take heart that over 70% of respondents to the rapid review reported a positive or very positive experience of their remote hearing.
19. If your firm would like a training session or client briefing to assist in preparation for remote hearings then please contact Caroline Musgrave at cmusgrave@cloisters.com or the Cloisters clerks team by email: clerks@cloisters.com or by telephone: 0207 827 4000.

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