



## ONE ESSEX COURT

### **A brave new virtual world?**

#### **Practical guidance for remote hearings**

1. This handout aims to provide a practical guide to remote hearings during the coronavirus pandemic. It is based on experience of remote hearings during the early weeks of the pandemic: both the first-hand experience of Anna Boase QC in appearing remotely in a three-day specific disclosure hearing, and information gathered about other remote hearings that have recently taken place.
2. The handout is split into two sections:
  - (1) A very brief overview of the relevant new guidance and law.
  - (2) Practical questions and tips.

#### **Guidance and law on remote hearings**

3. This section comes with two important caveats:
  - (1) The position on guidance is moving extremely quickly. This handout endeavours to be up-to-date as at 12 noon on 3 April 2020.
  - (2) The position is very different in different courts. This handout focuses on the Business and Property Courts, particularly the Commercial Court and the Business List of the Chancery Division.
4. The key guidance is the *Protocol Regarding Remote Hearings* as amended on 26 March 2020: [https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil\\_GenerallyApplicableVersion.f-amend-26\\_03\\_20-1.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/Remote-hearings.Protocol.Civil_GenerallyApplicableVersion.f-amend-26_03_20-1.pdf)
5. The *Protocol Regarding Remote Hearings* refers to changes to the Courts Act 2003 brought in by the Coronavirus Act 2020 and new parts of the CPR. The most significant parts of these are summarised below.

6. By s 55 and Schedule 25 of the Coronavirus Act 2020, the Courts Act 2003 has been modified for as long as the Coronavirus Act 2020 remains in force. In brief summary:
  - (1) S 85A of the Courts Act 2003 allows live-streaming (video or audio) of proceedings, at the direction of the court.
  - (2) Ss 85B and 85C of the Courts Act 2003 provides for various offences in respect of recording or transmitting such live-streamed proceedings or other proceedings taking place through a live video or audio link. This includes taking pictures of people participating in those court proceedings – including selfies.
7. PD51Y, which will remain in force for as long as the Coronavirus Act 2020 remains in force, also contains provisions on remote hearings during the pandemic.

### **Practical questions and tips**

*Will my hearing go ahead at all?*

8. This depends on the particular court in which the hearing is listed. In the Business and Property Courts (in particular the Commercial Court and the Chancery Division), the steer we have been getting so far is that you should not assume it will be easy to get an adjournment. Those courts want to continue ordinary routine business, even if it is document-heavy or involves multiple parties.

*What software will the court use?*

9. The main software is Skype for Business, although Zoom and Microsoft Teams have also been used (the last four days of the trial of National Bank of Kazakhstan v Bank of New York Mellon, which was the first live-streamed Commercial Court trial, took place on Zoom). Paragraph 13 of the *Protocol Regarding Remote Hearings* displays a desire to be flexible as to particular software.

*How do we go about making practical arrangements?*

10. The key is to contact the clerk of the judge as early as possible to make practical arrangements, such as what software will be used, who is responsible for recording, whether there will be livestreaming, etc. The judge's clerk will generally be responsible for organising those practical arrangements and (for example) circulating links to join Skype for Business meetings. That contact may take place between the judge's clerk and

counsel, with counsel passing on information to instructing solicitors, or directly between the judge's clerk and solicitors.

11. The courts are expecting a high degree of cooperation between parties and the court to make remote hearings work.

*Is the hearing in public or private?*

12. It is important to be clear about this given the consequences that flow from hearings in public (release from collateral use under CPR 31.22, for example).
13. Paragraph 3 of PD51Y provides that “*Where a media representative is able to access proceedings remotely while they are taking place, they will be public proceedings.*” The key question is whether a media representative is hypothetically able to access the proceedings, not whether any media representative in fact does so. Listing is making this clear on the Rolls Building cause list, using (today) the following rubric:

*The hearing will be available to representatives of the media, on their request, and therefore will be a hearing conducted in public in accordance with CPR PD51Y. It will be organised and conducted using Skype for Business. Any media representative (or any other member of the public) wishing to witness the hearing will need to do so over the internet and provide an email address at which to be sent an appropriate link for access. Please contact [comct.listing@justice.gov.uk](mailto:comct.listing@justice.gov.uk)*

14. If there are practical reasons why the media or the public cannot attend – i.e. reasons arising from the fact of the remote hearing, rather than the other reasons for a private hearing – the court can order that a hearing take place in private where it is necessary to secure the proper administration of justice (under either CPR 39.2(3)(g) or paragraph 2 of PD51Y). However, paragraph 8 of the *Protocol Regarding Remote Hearings* makes it clear that “*The principles of open justice remain paramount.*”

*What technical kit do I need for a video hearing?*

15. If possible, use a wired in rather than a wireless connection. If that's not feasible, make sure your wireless connection is as good as possible (consider buying a repeater for the space you're using for work).
16. Advocates should use a headset with a microphone if possible.

*What other prep should I do in advance of a video hearing?*

17. Do a test run the day before, to make sure you are comfortable with the software. In general you can go into the “*court room*” as soon as you receive the link from the clerk. You may want to do this in a small group so that you can also check for any audio problems or feedback.
18. Think about your background and test this beforehand, to see what is in view of the camera, whether you have adequate lighting, etc.

*Bundles*

19. Be in touch with the judge’s clerk as early as possible to find out whether the judge will need a paper bundle or is happy to use an e-bundle.
20. E-bundles need to be indexed and paginated.
21. The *Protocol Regarding Remote Hearings* says that the preferred method of sending e-bundles to the court is via an online data room (paragraph 26). We understand that it is not straightforward for the judges to pull bundles from CE-file, and that they prefer to also have a pdf sent separately.

*Video hearing etiquette – public-facing*

22. If you are not speaking, your microphone should be muted.
23. It seems to be normal for those not speaking to also turn off their video.
24. Try to ensure that:
  - (1) You will not (so far as possible) be interrupted by children, pets or deliveries.
  - (2) All your notification noises on any devices are off.
25. We have had reports of some increased informality in clothing, with some people not wearing suit jackets or ties. It may be wise to be cautious in this initially.
26. You do not have to stand when the judge enters, and submissions can be made seated (unless the individual judge expresses a different view).
27. Do not take pictures of yourself or others participating in a remote hearing: this is an offence under s 85C(2) of the Courts Act 2003.

28. Someone should keep an eye on whether the judge is on the video call – it is possible for them to drop off.
29. If you drop off the video call and cannot get back in, email the judge’s clerk and ask to be re-invited.
30. It may be necessary in using Skype for Business to stop and restart the recording every 45 minutes or so, to ensure that the recordings are not corrupted due to size or lost.
31. As no court staff are present, the court may be able to be flexible as to sitting hours.

*Communication among the team during the video hearing*

32. It may be useful to set up at least two WhatsApp groups for the hearing:
  - (1) One including all counsel and solicitors, for general discussion and seeking instructions.
  - (2) One including only counsel, as a digital substitute for juniors passing leaders post-it notes.
33. You may also consider having another video meeting attended by all solicitors and counsel that ran continuously on mute, so that during breaks the team can immediately speak. If you wish to do this, you should obtain a court order allowing this, given the terms of s 85C(2) of the Courts Act 2003.
34. If counsel wants to take instructions during the video hearing, he or she can do the virtual equivalent of asking to turn his or her back: ask the judge for permission to mute his or her audio feed, and then call instructing solicitors.

*Differences in submissions*

35. If the judge has only an e-bundle, you may find that he or she has done less pre-reading than normal, and be slower in opening documents.
36. Counsel may not be able to see the judge taking a note, so there may need to be more explicit communication around whether to move on to a new point.
37. It is much more difficult to “*hand up*” documents by emailing them, so try to ensure that any additional submissions or court aids are either not necessary (because the skeleton is complete) or provided in advance.

38. The judges have access to Westlaw (and Bailii) if they need to be referred to an authority that is not in the authorities e-bundle.
39. Although short, clear submissions are always desirable, this is even more so in a remote hearing.

#### *Witnesses*

40. In a recent public Court of Protection trial by video before Mostyn J, witnesses were asked by the judge: “*Do you swear or affirm to tell the truth, the whole truth and nothing but the truth?*” There was no requirement for the witness to have a religious book.
41. In Skype for Business, a witness may be “*highlighted*” while giving evidence, which means the witness cannot see the advocate or the judge, and the advocate cannot see the judge. This is a point to be taken into account both in explaining the process to one’s own witnesses and in preparing cross-examination.
42. You may want to ask the judge’s clerk for the opportunity to familiarise a witness with the relevant software before any trial or other witness action.
43. Skype for Business allows an advocate to bring up documents or play videos while cross-examining.

#### *Miscellaneous points*

44. Although potentially less relevant in commercial work, be aware that lay people and, in particular, litigants in person may find the slight increased informality of video hearings, and the insight into how lawyers and judges live (with the attendant markers of class, taste and income) exclusionary or less like “justice”. This was an issue in the recent Court of Protection trial mentioned above.<sup>1</sup> If there is a party or lay client in your case for whom this might be an issue, consider how to be sensitive to this possibility.

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<sup>1</sup> <http://www.transparencyproject.org.uk/remote-justice-a-family-perspective/>