



# GIVING EVIDENCE IN A VIRTUAL WORLD

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# GIVING EVIDENCE IN A VIRTUAL WORLD

**1** The decision as to how a hearing is conducted is a matter for the particular judge or panel, who will determine how best to uphold the interests of justice.

There are effectively four possible options:



Fully remote hearing with the judge(s) at their home or in their office /chambers;



Hybrid hearing with the judge(s) and some participants in court (with appropriate precautions) and others attending remotely;



Normal physical hearing in court (with appropriate precautions);



Hearing will need to be adjourned.

**2** Following the lockdown announcement made on 4 January 2021 the expectation in all jurisdictions was that hearings would proceed remotely unless an in-person or hybrid hearing is necessary in the interests of justice. This was confirmed in a statement issued by the Lord Chief Justice on 5 January:



Facilitating remote attendance of all or some of those involved in hearings is the default position in all jurisdictions, whether backed by regulations or not.

A similar statement was issued by the President of the Employment Tribunal in England & Scotland:



While tighter restrictions operate, however, the aim is for physical attendance at an Employment Tribunal venue in England and Wales to be the exception, and only where it is necessary in the interests of justice.

The Lord Chief Justice issued a further statement on 17 March 2021:



During this time, we have seen that technology has many advantages but, in some circumstances, it can also have the effect of slowing down work. Over the next few weeks and months as the number of people who have been vaccinated against COVID increases and restrictions begin to ease across England and Wales, it will be possible and desirable to increase attendance in person where it is safe and in the interests of justice. This will be important to maximise the throughput of work.

**3** Parties should not expect hearings to be adjourned simply because of difficulties caused by Covid-19. In *Re Blackfriars Ltd* [2020] EWHC 845 (Ch) Mr John Kimbell QC (sitting as a Deputy High Court judge) refused such an application. His judgment contains a detailed consideration of the provisions of the Coronavirus Act and regulations and concludes that there are strong arguments that, so far as is possible and is safe, proceedings (even lengthy civil trials) should continue.

**4** However, in considering the suitability of a remote or hybrid hearing, judges will consider issues such as:



- The nature of the matters at stake;
- any issues that the use of video/audio technology may present for participants in the hearing, having regard to individuals' needs;
- any issues around public access to or participation in the hearing.

**5** The fact that a hearing could be conducted in a way that is fair does not mean it necessarily should be conducted remotely. Johnson J in *AC v University Hospital Southampton NHS Foundation Trust* [2020] EWHC 1445 (QB) [29] decided that a hearing could fairly take place remotely but ought not do so unless a normal physical hearing was not possible.

**6** In *National Bank of Kazakhstan v Bank of New York Mellon* [2020] EWHC 916 (Comm) Teare J said:

“

The default position now in all jurisdictions must be that a hearing should be conducted with one, more than one, or all participants attending remotely ... it seems to me that having regard to the need to keep the service of public resolution of disputes going, it is incumbent on the parties to seek to arrange a remote hearing if at all possible.

**7** Note that in *Surrey Heath Borough Council v Robb* [2020] EWHC 1650 (QB) Freedman J considered submissions that a hearing should take place in person. He held that against the recent background:

“

The onus is on a party to draw attention to a requirement to have a hearing in Court and to provide reasons why it would not be just for the hearing to take place remotely

**8** In *Bilta (UK) Ltd v Tradition Financial Services Ltd* [2021] EWHC 36 (Ch) 10/1/21 Marcus Smith J, on an application to adjourn a four-week trial because three of TFS' witnesses wanted to give evidence in person to rebut Bilta's allegations of dishonesty, but had expressed strong reluctance during the dramatically worsening state of the pandemic to attend in person, reviewed the recent authorities and guidance. He concluded that giving evidence in person was the “gold standard” in cases involving allegations of dishonesty, proposed a regime for conducting the trial so as to allay the three witnesses' concerns, and refused the adjournment application. Those proposals included:

- using a “supercourt”;
- conducting the trial as a hybrid hearing;
- social distancing;
- a detailed trial timetable;
- allocation of breakout rooms;
- “Maxwell” sitting hours from 8:45am to 2:15pm;
- making car parking spaces available.


# Rules and Practice Directions

**9** Specific rules and practice directions / notes have been introduced and will last for the duration of the crisis. See in particular:

- PD51Y (Video or Audio Hearings During Coronavirus)
- PD51ZA (Extension of Time Limits)
- PD32, Annex 3 (Video Conferencing Guidelines)
- Civil Justice Protocol Concerning Remote Hearings (Practice Note) [2020] WLR 1334
- Chancery Guide paras [21.100] and [21.101]

## Guidance

**10** There is a plethora of more general guidance available as well, both domestic and international. The best resource for UK guidance is the HMCTS website which contains a weekly operational summary which is updated every Friday around 5pm:

 <https://www.gov.uk/guidance/hmcts-weekly-operational-summary-on-courts-and-tribunals-during-coronavirus-covid-19-outbreak#contents>

**11** There is also a 'planning and preparation' page:

 <https://www.gov.uk/guidance/coronavirus-covid-19-courts-andtribunals-planning-and-preparation>

This includes sections on going to court during the crisis and assessing and managing risk.

**12** The Chancery Bar Association has produced a very useful list of links to guidance, protocols and PDs, which is updated as and when new documentation is produced and the Commercial Bar Association has produced useful guidance on remote hearings, which contains a specimen PTR checklist. The second edition, 23 June 2020, is current as at the date of this paper.

**13** For International Arbitrations, see the Seoul Protocol which includes detailed technical guidance, available at:

 [http://www.kcabinternational.or.kr/user/Board/comm\\_notice\\_view.do?BBS\\_NO=548&BD\\_NO=169&CURRENT\\_MENU\\_CODE=MENU0025&TOP\\_MENU\\_CODE=MENU0024](http://www.kcabinternational.or.kr/user/Board/comm_notice_view.do?BBS_NO=548&BD_NO=169&CURRENT_MENU_CODE=MENU0025&TOP_MENU_CODE=MENU0024).

**14** For advocates, it is worth looking at the Guidance produced by the Inns of Court College of Advocacy:

 <https://www.icca.ac.uk/wp-content/uploads/2020/04/Principles-for-Remote-Advocacy-1.pdf>.

**15** There is also an interesting website which shares experiences of developing remote alternatives to traditional hearings around the world:


 <https://remotecourts.org/>








# Open Justice


**16** Open justice is a fundamental principle in our courts and tribunals system. In considering the use of telephone and video technology, the judiciary must have regard to the principles of open justice. As now, judges may determine that a hearing should be held in private if this is necessary to secure the proper administration of justice. A range of measures will continue to support the principle of open justice:

 Access to open hearings if/where a public gallery is available, or a third party may join the hearing remotely.

 Transcripts for hearings in those jurisdictions where they are available now. Any party or interested person is able to request a transcript. Judges may direct that the transcript be made available at public expense where appropriate.

 With the permission of the judge, an audio recording of a hearing can be made available to be listened to in a court building.

 With the permission of the judge, in jurisdictions where this is already done, the notes of the hearing can be made available on request.

 Publication of the outcome of High Court and Court of Appeal hearings, orders or results.

 Publication of court and tribunals lists, in most instances online.

- ✉ Access to hearings and information to accredited media, such as the provision of listing and results information in Magistrates' Courts via email.
- 🎧 Requests to observe a hearing remotely should be made to the court in advance to allow for inclusion during the hearing set-up.

**17** Note that the recording of proceedings without permission amounts to a contempt of court. In *SLF Associates Inc v HSBC (UK) Bank Plc & Ors* [2021] EWHC 5 (Ch) Master Kaye pointed out that even taking photographs of participants in a remote court was unlawful.

## What Platforms are Being Used

**18** BTMeetMe is commonly used for teleconferencing. The Kinly Cloud Video Platform is being rolled out to civil and family courts and the Employment Tribunal. Skype for Business in the Commercial Court and Chancery Division but a move to Teams is likely. The Supreme Court is using Cisco Webex.

**19** Note that it should be possible to arrange a trial session (with witnesses, if necessary) to see which works best. This was done two days before the hearing in *Jones v Ministry of Defence* [2020] EWHC 1603 (QB). After testing both 'Skype for Business' and 'Microsoft Teams' the clear consensus in that case was that Microsoft Teams appeared to be the most accessible and the most stable.

## Tech Set Up

**20** A wired connection is safer and usually better than wireless one. Have a back-up plan in case your internet connection fails (eg tethering using a smartphone).

**21** It is worth investing in a high-quality external microphone (eg RODE-NT USB-C mic, Blue Yeti X external mic) and external webcam (eg Logitech C930). Certain headphones eg Apple AirPods have a good quality microphone built in. However not everyone likes to see counsel wearing headphones. In the hearings broadcast so far, very few participants have used headphones.



- 22** It is generally advisable to have (at least) two screens – one to show participants and the other for the e-bundle (even if hard copy bundles are also being used).
- 23** Arrange in advance to have a ‘back channel’ available within the legal team (eg WhatsApp group, Slack, Evernote) though be aware of distracting effect for the advocate. Keep communication (with counsel, especially when s/he is addressing the court) to an absolute minimum.
- 24** Turn off notifications (completely, or at least audible notifications) for all other apps. It can be infuriating to hear bongs and beeps as emails, texts and WhatsApp messages arrive.
- 25** It will normally be the court which controls who is visible on the screen at any one time. However, counsel should at least be able to see (a) the judge(s) and (b) witness. It is also advisable to be able to see opposing counsel.
- 26** If a member of the court staff / a clerk has facilitated the remote hearing, their user ID / image may be shown by default even though they do not participate. Ask that they be removed otherwise they take up valuable screen space.
- 27** Non-speaking attendees should be on mute with their video turned off. Participants are advised to minimise or completely eradicate background noise. This can give rise to its own practical problems – what if you are at home with young children? Or have building work going on outside? If it is especially hot, participating in a remote hearing with the windows and doors closed can be stifling.
- 28** There’s an interesting observation about virtual hearings in the minutes of the recent English Commercial Court Users Group meeting - the style of advocacy is different as the Judge and the advocate seem to be in ‘a bubble’.
- 29** This may stem from the degree of intimacy created by virtual hearings. At an in-person hearing, there is a certain physical distance between the advocate and the judge. At a virtual hearing, participants are seen ‘up close’ and often in the informal setting of their own home. The lack of surrounding noise – people moving around, rustling through papers, taking instructions sotto voce etc - also creates a more intense atmosphere.



# Remote Witness Evidence

**30** Do not assume that remote hearings are not suitable for cases where the credibility of witnesses is at stake. Professor Richard Susskind, the IT adviser to the Lord Chief Justice, speaking to the House of Lords Constitution Committee, which is investigating the impact of Covid-19 on courts and online justice, said lawyers from around the world have reported that a full-screen view of a witness brought them closer to the ‘whites of their eyes’ and can be remarkably effective.

**31** Professor Susskind also observed that:

“

As a generality across the world, video systems seemed to have worked quite well with large, complex commercial cases. The judge will have the discretion to decide which hearing mechanism is appropriate ... But I do find it fascinating from the feedback that people are expressing surprise that from the video hearing you can get a real sense of the person’s credibility and their demeanour, by looking at them on quite a high-definition screen where the video is quite close to their face.

**32** This is borne out by recent UK experience. Commenting on a judge’s ability to assess witness evidence given remotely, Lieven J said in *SX (A Child)* [2020] EWHC 1573 (Fam), at para. 5:



I do not consider that my ability to judge the truth or otherwise of the evidence was materially hampered by the remote nature of the hearing. Although watching a witness via computer is different from doing so in court there are advantages as well as disadvantages. The witness appeared much closer and facial expressions were easier to pick up. The interaction between the cross examiner and the witness was surprisingly similar to that in court and, in my view, cross examination was as effective as would have been the case in court.

**33** This was also the experience of Richard Hermer QC, sitting as a Deputy High Court Judge in *Jones*, who observed:



I also found that the format removed distractions from peripheral vision that can apply in a court room and intensified attention on the witness and what they were saying.

**34** If witnesses are giving evidence remotely, consider where from. As John Kimbell QC noted in *Re Blackfriars*:



[I]t may well be preferable for witnesses to travel to a few locations as close as possible to their home, such as solicitors’ offices or other premises ... rather than to dial in from home without any assistance. That also will alleviate the anxiety that many people suffer from, including judges, when it comes to the moment of being dialled into proceedings and to being interrupted ... by unexpected household events.

**35** If witnesses are giving evidence from a separate location such as their home, pre-hearing ‘waiting room conferences’ are essential to make sure everything is working as it should be, to introduce them to counsel, to answer any questions they may have and generally to get them in the right state of mind.

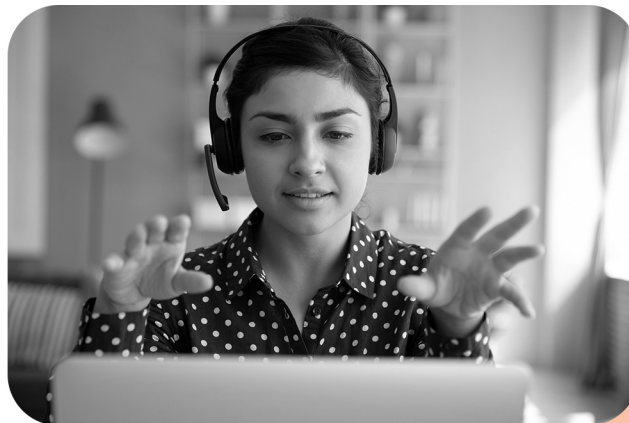
**36** If a witness wishes to give evidence on oath it will be their responsibility to have the appropriate Holy Book available. Judges should be more receptive than usual to the asking of a few additional uncontroversial questions in chief to the witnesses in order to take account of the unusual means of giving evidence.

**37** Andrew Baker J in the Commercial Court in *Navigator v Deripaska* [2020] EWHC 1798 (Comm) gave guidance about who should be present with a witness giving evidence from a remote location:

“

If a witness is to give evidence remotely, where he or she will be and who (if anyone) will be with them, and why, should be discussed between the parties in advance. That is always so, but especially it is so if the arrangement may be such that there could be interaction with the witness during their evidence that will not be visible to the court. Any arrangement other than that the witness will be on their own during their evidence should be approved by the court, in advance if possible, and parties should not assume that an arrangement will be approved just because (if it is) it is agreed between them. Sensible arrangements discussed and agreed in advance are likely to meet with approval if the court does not identify any difficulty of possible substance that the parties may have overlooked. But it must be for the court, not the parties, to control how it receives the evidence of witnesses called before it.

**38** The process of giving evidence remotely for long periods of time appears anecdotally to be even more demanding / tiring than giving evidence in person. There may also be other unavoidable distractions (particularly for those with caring responsibilities). Consideration should be given to scheduling more regular breaks than would normally be the case. The parties should also request breaks between witnesses in order to give and receive confidential instructions.



# In Person / Hybrid Hearings

**39** Measures are being adopted in all courts and tribunals to ensure adequate protection for those attending. For example, one-way routes, distance markers in common areas, conference rooms and toilets.

**40** In the court room itself, seats may well be allocated (with names on). Counsel will sit at a suitable distance apart, for example on opposite ends of benches or even on different benches, only one solicitor behind and again at a suitable distance. This can make taking instructions difficult. It should still be possible to set up a means of electronic communication (eg a WhatsApp group), as opposed to the traditional written note and tug on the gown. This should be explained to the judge at the outset.

**41** If a hard-copy bundle is being used, witnesses will probably be required to put on gloves (supplied by the court) before they take the oath and touch the bundle.

## What does this Mean for Witnesses?

**42** Lady Hale, recently retired President of the Supreme Court, suggests that one of the ‘sacred cows’ of the justice system is “our belief that a witness’ demeanour and body language can reveal whether he or she is telling the truth” (Rethinking the Courts (BBC Sounds), released 22 June 2020

 <https://www.bbc.co.uk/programmes/p08hg5q1>

**43** The more of a person we can see and experience (appropriately), the easier it is to build trust – if they are, in fact, trustworthy, of course. Human beings give signs reflecting their intentions and their emotional state through their bodies (non-verbal communication or body language).

- 44** We often think of body language as physical gestures and it certainly includes those at various levels: macro and micro expressions. These include facial expressions, breathing, and body movement. Other social cues are also relevant such as the distance between people, leaning in which might show we are focused and we care, smells (both body odour and selected perfumes etc), physical environment and appearance (including choice of clothing). We also give signals based on our tone of voice (paralinguistics). Even our gait can be surprisingly revealing.
- 45** Overall, the ‘naturalness’ and congruence of interaction is important in assessing human beings and building trust.
- 46** There are important differences for both witnesses and the court between witness evidence which is given in person and that which is provided remotely. A key difference: in a court setting a witness is some distance from the judge which means that judges will not be able to see witnesses’ facial expression as clearly as they can on camera. In contrast, the video generally only reveals from the upper torso to the top of the head. This means that cues that judges get from witnesses’ extremities such as foot tapping and hand wringing or movement, will not be available.
- 47** In practice this means that witnesses who are nervous and move their hands will simply be able to keep them ‘off camera’. They will also not have to worry about what they look like and how they handle their nerves when they are off-camera (as they would waiting to give evidence in a court room). This means that there will be more moments when they can relax and be less vigilant about their demeanour.
- 48** Facial expressions and micro-expressions, however, become more important and more visible to the judge. Also everyone sees the same thing: judge(s), and counsel get the same direct view of the witness.
- 49** Lady Hale asks “Could there be advantages in separating the witnesses and the cross examiner? Less intimidating and confusing?” It may be that the mere fact of not being in a court room makes the experience less stressful and intimidating. In Assurety’s experience, poor witnesses have a tendency to be drawn in by counsel during cross-examination, to forget about the judge, to be carried along by counsel’s pace and intensity.
- 50** A more minor point: the witness will not have to walk to the stand which can feel daunting. In addition to the witness being spared that stressful experience, the judge will be unable to get a sense of witnesses’ body language and gait as they move towards the stand.

# Gravitas vs Ease

## 51 “

There is a gravitas attached to a court room hearing: the formal architecture and courtroom layout, the elevated and distant seat of the judge, the familiar rituals and the sombre clothing. All are evidence of the seriousness and impartiality with which decisions are made.

said Lady Hale in Rethink, citing Celia Kitzinger:

## “

All are lost if everyone is appearing remotely on small screens from their own homes or offices: that feels more like a case conference than a judicial process.

## 52

In contrast, Lord Burnett of Maldon suggested before the pandemic, in 2018:

## “

Respect, confidence in the processes of courts and respect flow not simply from attending a court building. A perception of fairness, active participation, respect by the court and judge and for the participants, are fundamental underpinnings of confidence in public justice. The opportunities that greater use of technology, of greater ease of effective participation through video, provides, is one way in which we can enhance these factors, and, come what may, judges will ensure procedural fairness.

The Age of Reform, Sir Henry Brooke Annual Lecture 2018 for BAILII, 7 June 2018

 [https://www.bailii.org/bailii/lecture/2018/BAILII\\_Lecture\\_2018.pdf](https://www.bailii.org/bailii/lecture/2018/BAILII_Lecture_2018.pdf))

## 53

Whilst the gravitas of the court setting has a positive function in reminding the witness of the seriousness of the matter and the requirement for integrity, it is also stressful and unnatural for the witness. There are ways to countenance the gravitas point such as coming to a law firm well in advance of when witnesses are scheduled to give evidence, or making sure to transition and be in an appropriately professional setting at home. With a little effort, most witnesses will be aware of the gravitas of the proceedings and of their responsibilities. They may also be calmer and more comfortable in a less formal environment.

**54** Lady Hale believes that:



also he or she is deprived of all the usual ways of creating an atmosphere of trust, fairness and compassion: reassuring smiles, listening intently to what the parties are saying, assessing their level of anxiety and nerves.

It may be that those ways of reassuring witnesses are inhibited in virtual hearings. We are not, however, completely deprived of them. In addition, they are at least partially compensated for by the additional comfort of a non-court environment.

**55** Moreover, she adds a valuable word of caution for professionals for whom it is all too easy “to forget that the lay parties are there and listening if they cannot be seen. It is important, as professionals, to be aware that lay parties are there listening if they are.”

## Reflections of a Cross-examiner

**56** For an effective cross-examination the witness needs to be in full screen view (as per Professor Richard Susskind’s comments above). Otherwise, you are cross-examining a small part of a computer screen and the ‘whites of the eyes’ are microscopic.

**57** It is more difficult to get into a rhythm or ‘flow’ in remote hearings. The pace tends to be slower and the process is also more disjointed, with more frequent breaks and technical glitches. Witnesses also seem to be more relaxed when giving evidence from their own comfortable surroundings. For the less scrupulous witness, there is also a risk that they will use notes or even digital communications, such as WhatsApp, whilst giving evidence.

**58** The Judge also appears much more distant, particularly if there are multiple screens, or the witness is in full screen. This can lead to the decision maker being less visible.

**59** When giving evidence remotely the witness is also less incorporated into the team - time spent with a witness at court can be very helpful in understanding a point, or responding to something said by another witness. That opportunity is generally lost when parties are at a distance.

**60** The cut and thrust of the court room is perceived to favour the advocate over the witness and conversely, remote evidence appears to shift the balance a little more in favour of the witness. Whether this results in appreciable impact on the outcome of litigation remains to be seen.



# Concluding Thoughts

**61** Overall, there are pros and cons to remote hearings which you think even themselves out. Some aspects are simply different – neither better, nor worse. It seems, however, that the use of remote hearings, which is taking place at such speed merely as a result of Covid-19, is perceived as a success. This suggests that remote hearings will not only persist during the pandemic but also beyond, in some form at least. It is, therefore, essential to be prepared to work in more flexible ways now and in the future.

Assurety Training is the only witness familiarisation training company ranked No 1 by Chambers. We would be delighted to discuss your witness training needs.

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