

ADAPTING TO THE NEW NORMAL

APRIL 2020

INTRODUCTION

An update to our solicitors during the current Covid-19 crisis from the Personal Injury and Clinical Negligence teams at Guildhall Chambers

In case you missed the recent webinar by Kriti Upadhyay and James Bentley on preparing for remote hearings, you can still watch a recording of the webinar online [here](#). The slides are [here](#).

A copy of the draft protocol for remote hearings created by James Bentley is now on our website and can be found [here](#).

We will be sending out invites to more webinars over the upcoming days.

I have never been a fan of the idea of hot-desking. Or open plan offices. Or working from home. It would appear that our divine creator (or some careless virologist) had a different idea. So, I now find myself sharing a kitchen table (desk) with my wife (a criminal solicitor) and, if we are unlucky, the occasional “remote studying” teenager.

I miss the collegiate air of chambers, a particularly good coffee shop on Broad Street and a clear divide between work and home. I think we all wondered for a few days if the lock down would see an end to legal business in PI and CN for several weeks. It is fair to say many were in a state of shock to start with but the problem with most good lawyers is that they are determined, even if (and this continues to be true for most at the Bar) they have so far bucked the trend to go completely paperless.

But the reality is that most of us are well versed in remote working. We have been conducting telephone hearings for years. We have a fully-fledged electronic library. Ok, so we have had to change some things and the courts continue to struggle. But the reality is that we really have got back to business as usual, it’s just a bit unusual, that’s all. And that’s just as well because another reality is that the claims aren’t going away and the work has to be done at some point.

We are here to help: we have a new pupil on her feet (Sophie Walmsley) – we have a new silk (congratulations Selena!) - our systems are fully functional – we have good lines of communication with the Court Service – we can help you get hearings done (and avoid adjournment) – we have a [Twitter feed](#) to keep you abreast of further progress as it develops - and you can still just go ‘old school’ by ringing us up to bounce an idea or two. It really is that simple.

To assist you with all the changes we have assembled some key technical and practical guidance. We would welcome your feedback.

Gabriel Farmer

Are you remote hearing ready?

Kriti Upadhyay

We understand that many of you will be anxious at the moment about the number of hearings that are being adjourned by courts all over the country. While we are beginning to see some semblance of a return to normality as more courts are now set up to carry out hearings and even trials remotely, it will be some time before the HMCTS systems can cope with fuller lists in the middle of staffing issues, court closures and IT infrastructure concerns.

In our recent webinar I discussed some of the steps that we can all take to try to get more cases listed for remote hearings. PIBA have suggested that these hearings should be seen as the "*new normal*", and that we all need to spend time and effort mastering our remote technology skills, be proactive, co-operate with our opponents, and come up with practical solutions which are more likely to allow hearings to proceed. I could not agree with this more.

While the challenges of learning new technology might seem daunting at first, I sit here as proof that it can be done, as I put this update together for you using a professional PDF editing programme that I can honestly say I had never used until three weeks ago.

My top tips for convincing the court that your case should be listed for a remote hearing (particularly if it falls within the current civil listing priorities that you can find [here](#)) are:

- Check that all individuals who will need to attend the hearing **have the necessary technology set up** to do so, and are comfortable using it. Do a practice run with your client/expert/other witnesses. There is no point hounding the court to get a matter listed if in fact it won't actually be able to go ahead due to tech issues - your hearing might end up getting adjourned on the day.

- **Warn any witnesses** attending a remote hearing that these are still court proceedings, and that abusive behaviour, while of course not endearing them to the Judge, will strictly not be tolerated.
- **Contact the court where your hearing is due to be heard in good time, at least 1-2 weeks before the scheduled hearing date**, to sort out your housekeeping. If you are struggling to get a response through the usual channels, contact our clerk **Wendy Shaw** who has built up a network of essential/additional contact details for various courts over the years and may be able to help.
- E-file **one easy to use indexed and paginated electronic bundle** that is agreed between the parties: for more tips on how to create an e-bundle easily watch our recent webinar recording [here](#) and Sophie Walmsley's excellent tutorial with a few more tips using different software [here](#).

At a minimum, all of the above will require you to familiarise yourself with appropriate e-bundling software such as a PDF creator, video conferencing software, and secure document delivery software such as Mimecast. There are a lot of different software options, and what works better for you will depend on your individual IT systems and a whole host of other factors.

As far as video or telephone conferencing software is concerned, we know that the courts are just starting to roll out their Cloud Video Platform, but we are seeing Judges use a whole range of platforms including Skype for Business, Microsoft Teams, BT MeetMe and ordinary telephone. If you are worried that a particular court may not be able to set up your remote hearing, I would urge you to be proactive and offer to set up the hearing at your end. Be clear when communicating with the court: an email explaining that the parties have agreed (for example) that this hearing can be held using Microsoft Teams, and are ready to set it up if the Judge approves, is hardly going to be badly received at the moment, and increases your chances of the matter going ahead.

I will end with a reminder that (despite everything I've said above) there is of course **no time like the present** to negotiate!

Case managing a remote hearing - how to ensure your hearing runs smoothly

James Bentley

The onus is on us

There are elements of the overriding objective that in my view, are particularly germane to remote hearings. The need to do justice 'at a proportionate cost' is the most obvious one, but so is the need to do justice 'expeditiously' and 'allotting it an appropriate share of the court's resources'. Making sure that your hearing can be done remotely (i.e. by telephone or video) potentially does both of those things.

Furthermore, the overriding objective is not some abstract principle that can be paid lip service but ignored in practice. Although there is a duty on the court to actively manage cases by making use of technology (CPR 1.4 (2) (k)), CPR 1.3 makes it clear that it is the duty of the parties to help the court further that objective.

So, what does that mean in practice?

That means taking a look at whether your specific hearing is suitable to be heard remotely, and what you can do to ensure that that happens. As mentioned within this bulletin, that is something that Chambers (both the clerks and members) is in a particularly good place to assist with.

It also means that if the matter is not suitable for a remote hearing, then perhaps you could think about if there at least parts of the said matter that can be dealt with remotely? This would include things such as - dealing with preliminary issues (if there are any), attempting to agree facts that are not (or should not) be in dispute, and exploring all avenues of ADR (see further Wendy Shaw's section on what Chambers/the team is doing to assist in this regard).

The problems

We are familiar with what the problems of hearings are. If not, then it does not take much imagination to think what they might be. These include (but are not limited to):

1. Poor Internet connection.
2. Lack of papers.
3. Interruptions from parties/witnesses.
4. Tampering/interference with evidence.

In my view, most of the above risks can be either prevented or significantly mitigated with proper case management.

The (potential) solution

The room for error is evidently less if everyone knows what the rules are before the hearing. With this in mind, you may want to consider requesting that the court adopt a protocol as to how the hearing itself should proceed. This is exactly what the court did in one case of mine, where the trial was adjourned the day before it was due to start. It will be listed for a remote hearing that will (hopefully) operate in accordance with a protocol I drafted and which the parties agreed.

The court adopted that protocol with the recital in the order 'UPON the Parties having familiarised themselves with and agreeing to abide by the instructions within the Appendix attached to this Order, and the Court having taken it into account in making this Order'. That recital does not mean that the protocol is binding but does mean that there is at least some judicial 'oomph' behind it!

This is not the place to reproduce the protocol in its entirety. A copy is available on the Chambers website [here](#).

For now, however, I hope that you will take away a few of points as regards its application:

1. Do not be put off by its length. Length does not equal complexity. Furthermore, the prescriptive nature of the protocol means there is (at least in theory!) less room for error.
2. It is a template only. It can be adjusted however you see fit for your specific case. However, it is a starting point.
3. Even if you/the court thinks there is no need to adopt a protocol of this type, then it at least serves as a helpful 'how to' guide when it comes to organising and running a remote hearing.

We're here to help

Our clerks are all set up to work seamlessly from home and to assist with your inquiries as usual, so please don't hesitate to get in touch with them.

We appreciate that being forced to work from home is not ideal for many, and some of you may also be facing heavier workloads than usual, while also missing the ability to just bounce ideas off your colleagues. We can help you by for example setting up remote workshops and file surgeries for you. We may also be able to help you with specific training needs.

We are also setting up an alternative adjudication process for lower value cases, where this can be done without burdening an already overwhelmed and understaffed court system further, allowing these cases to be resolved quickly and at low cost in the current climate.

Please get in touch with Wendy Shaw (wendy.shaw@guildhallchambers.co.uk) if you wish to discuss any of these initiatives further.

Useful Resources

[HMCTS Covid-19 Operational Guidance](#): daily/weekly summaries of HMCTS updates

[Online court services](#)

[Courts and tribunals tracker list](#): check which courts are currently open, closed, or remote hearings only

[HMCTS guidance](#) on telephone and video hearings during the outbreak

[HMCTS guidance](#): How to join telephone and video hearings

[Advice and guidance from the judiciary](#)

[APIL and FOIL Covid-19 best practice guide](#)

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