

### Advocacy in the Time of Pandemic

*Due to the Covid-19 pandemic there has been a stark rise in courts using remote technology to keep the justice system running, Sibby Salter and Samantha Ball consider the Inns of Court College of Advocacy (“ICCA”) eight principles of remote advocacy.*

Over the course of the Covid-19 pandemic, international collaboration has been widely discussed in the context of researching a vaccine and coordinating a response. In facing the challenges that the pandemic presents, lawyers have also found international collaboration to be a valuable resource in determining how to achieve best practice when dealing with cases remotely in virtual hearings.

In these unprecedented times lawyers will need to acquire additional skills and adapt those already developed. To assist advocates to be effective in this new working environment the ICCA have drafted a guide on principles for remote advocacy, which can be found at <https://www.icca.ac.uk/wp-content/uploads/2020/04/Principles-for-Remote-Advocacy-1.pdf>. In a recent webinar entitled “Advocacy in the Time of Pandemic”, hosted by the EUAM Ukraine, these principles were explored by civil and criminal practitioners in the context of a COVID landscape that has required advocates to adjust at pace.

This article will consider the ICCA’s eight principles of remote advocacy in light of practitioner insight on how to utilise the guidance. We have summarised parts of the ICCA guide as interpreted by the authors of this article and encourage readers to look at the full text of the ICCA guide. The key themes that emerged from the presentations were: undertake greater preparation, utilise written argument, be clear, concise and focused in your oral advocacy.

### Principle 1: Liaise in advance

With pressures on time and restricted opportunity to speak to your client, opponent or other services during remote hearings, it is essential to liaise in advance. In particular, identify any documents you will refer to in advance so others do not have to search for them when you are making your submissions. Ideally communicate and hold conferences in advance of the hearing date to make the remote hearing more effective.

It is important to avoid delays and know the details of how the court will operate. This will include ensuring your knowledge of any relevant guidance is current. Adjournments can result unnecessarily because not everyone has the papers they need, or the papers are not easily accessible, hindering case progression or resolution.

### Principle 2: Understand the technology

Engaging effectually with the technology is key to facilitating remote hearings. Every effort should be taken to ensure the system will work by testing it before the hearing, including the camera, microphone and sound settings. This will enable you to be confident that you can be seen and heard. Joining a hearing early will allow time to resolve any technological issues. Some advocates prefer to use multiple screens to enable them to have documents open on a separate monitor whilst participating in the hearing.

Integral to understanding the technology of remote video hearings is remembering that you are visible. Facial expressions can be seen on a screen just as they could be observed in a court room, and may be amplified when you are linked remotely and all the other participants can see is your upper body. It is important to be conscious of this so you maintain a professional demeanour. The virtual hearing should be an environment that mirrors, as far as possible, a physical court setting.

Having a back-up protocol will help in the event of a break down caused by a technological issue. In the event your internet connection fails, that back-up plan should not be reliant on

Wi-Fi. In those circumstances ensuring the Court can reach you by telephone may allow the hearing to continue or at least a message to be passed to the judge and the other parties.

There should be an agreed way for anyone involved in the hearing to contact the court or tribunal to alert them to a problem. If something does go wrong, it is important to pause until it is fixed. If the technical failure cannot be fixed, the hearing may have to be adjourned so that the parties have a fair hearing. If the difficulty can be resolved be conscious that submissions or questions may need to be repeated.

### Principle 3: Make sure all parties can be seen and heard

Remote hearings should be as close to a traditional hearing as possible. As well as adhering to a professional dress code you should have a neutral background which does not have a light source behind you, so that you can be seen clearly and without distraction. It is important to be conscious of where you position yourself in relation to the screen. Make sure you are not too close to the camera and that your head and upper body are visible. Keeping the door to the room you are in closed minimises external distractions or interference with the hearing.

Establishing a speaking protocol is beneficial as well as making sure that all participants, including interpreters and intermediaries, are aware of the protocol to avoid parties speaking over one another. Mute your microphone when you are not speaking having checked that you are audible when you want to be heard.

Be alert to whether participants appear to be having difficulty hearing the proceedings. It is fundamental to equitable hearings that all participants have adequate audio and, where required, visual connection. If your client is present, it is important to be attentive to their reactions so that you are satisfied they can see and hear. Understanding the constraints and limits of the technology is important in this context. In criminal cases, defendant participation and engagement present a challenge. In a physical courtroom you could move to the dock to take instructions. It is not as easy to privately communicate with your client during a remote hearing. The Video Meeting Room service where lawyers can join remote video calls with

their clients in certain prisons provides an avenue to speak to some remanded defendants. In civil cases one suggestion was having a separate telephone line open to your client. However, this creates a risk of not having the right parties muted or unmuted as well as the potential to distract from the hearing.

#### Principle 4: Know how to handle the documents

Again, preparation is key to handling documents effectually at a remote hearing. It is important to be have the document bundles prepared in advance and to provide a list of the key documents you want to rely on. The court should be told the relevant page numbers before the hearing if you will be referring to or relying on them. Any witnesses may need to be provided with a hardcopy of the documents. There can be advantages to being remote: beyond sitting in an environment that is more comfortable than a courtroom, you are in a position to have easy access to all your devices and papers.

It is imperative that all parties and the judge work from the same electronic bundle. If you are sharing documents electronically during a hearing make sure they are ready, unmarked with notes and that they can be displayed on the software being used. Ideally liaise with the other side to agree a bundle in advance of the hearing to avoid having to unexpectedly share a document with the court on screen.

Make sure your knowledge of any guidance on document handling is current. For example, in England and Wales there is recent High Court general guidance on PDF bundles. It is also important to make sure that any updates regarding the service of particular documents is current; including whether certain documents such as death certificates can be electronically filed where previously only production of a physical document would suffice.

#### Principle 5: Make the best use of written argument

In remote hearings, it is necessary to deploy written argument as a central tool to enhance submissions. It concentrates the minds of all parties and the judge and gives a hearing focus. Your argument is more likely to be easier to follow if it is set out in writing with thought given to which parts require oral elaboration or expansion. Your argument should be clear, structured and allow the judge to know where you are going.

If there is a digital system which all parties can access, it is best to upload a summary of any applications you wish to make. This will give the judge a summary of your application before the hearing and provides a roadmap. It will also give the judge time to digest the key points of your application and other parties to prepare a response. You should include any relevant statutes or case law you will refer to, as well as any other key documents.

#### **Principle 6: Be prepared, then be brief and to the point**

Careful and meticulous preparation underpins all good advocacy. This is even more pertinent when advocating remotely. More preparation ensures you are short, clear and have identified the salient points. Simplified arguments, derived from clear objectives, contribute to cogency. It takes confidence and careful preparation to make your best points not every point you can think of. This will focus your submissions on key issues and matters of substance.

Delivering focused submissions is also important because remote hearings are more tiring for both the judge and lawyers. Be mindful of this. Be short and precise and avoid complex sentences. Through good preparation, you will be able to anticipate what your opponent is going to say and what the judge may ask, so that you can respond effectively.

As regards advocacy tips for video hearings, remember that you are appearing on a small screen rather than being physically present in a large courtroom and adapt accordingly. Use your voice: change your tone, vary the pace, and pause between points to give the judge the opportunity to clarify a point or complete their note. The aim is to be as persuasive and authoritative as you would have been in a physical court while adapting delivery to techniques that lend themselves to a small screen.

When handling witnesses remotely your language should be precise and appropriate to the witness, questions should be kept short and address one fact or detail at a time to achieve clarity. Questions should go to the main issues, following clear objectives and structure. Make sure you do not interrupt the witness' answers as it may be harder to pick up on signs that they have ended their response, rather than merely paused, in a remote hearing. Listen carefully to the answers given and measure when the witness has finished speaking before starting the next question. Consider using signposts, telling a witness the topic you are about to ask about, to assist the court and the witness to focus on the substance of your questions.

### **Principle 7: Avoid overspeaking**

Avoiding overspeaking is more difficult in a virtual hearing than in a courtroom. It is essential not to talk over other participants so that everyone can be heard. Time management and brevity are critical; make every word count.

One particular challenge is assessing a judge's reaction. In a courtroom you can see if the judge is looking at a document or noting. Judicial intervention can be harder with remote communication where there is a delay between the video image of the person speaking and their voice being heard. You may need to build in pauses in your submissions when finishing a particular subject. You may also benefit by asking directly if the judge has questions at a convenient point. Headlining when you are moving on to a fresh topic can enable the judge to ask you about the point you have made before you change topics. If you are asked a question utilise the tone of your voice and come to a clear halt at the end of an answer to assist the court to follow when you have completed a response. Signposting your arguments, introducing them in advance, in a numbered list can add clarity and focus.

### **Principle 8: Maintain confidentiality**

This principle includes maintaining confidentiality in relation to what others can see and what they can hear. Organise your workspace carefully in advance to clear it of anything that is not related to the hearing and turn off communications that are not required for the hearing that you are conducting such as SMS and WhatsApp. Be careful when sharing your screen that others do not see anything they should not.

Communicating confidentially with a client during an on-line hearing presents particular challenges as the technology continues to evolve. Preparation beforehand to address anticipated issues can ameliorate the difficulties with taking instructions at the hearing.

### Conclusion

The eight principles identified in the ICCA guidance assist in how best to approach and conduct remote hearings. Although we are socially distanced from each other, technology has enabled lawyers to collaborate to further this advice and reinforce the attention required to core skills, recognising that, as lockdown eases, a greater use of remote hearing will be one legacy of the pandemic.

Sibby Salter  
Samantha Ball (Pupil Barrister)  
3 Temple Gardens