



Eastern Caribbean Supreme Court

PROTOCOL FOR VIDEO CONFERENCING AND REMOTE HEARINGS

INTRODUCTION

Video conferencing has become an integral part of the operations of many organizations today including the Eastern Caribbean Supreme Court (ECSC). There is already experience of remote hearings and cross-examination of distant witnesses by video in the Court. The principal system currently being used by the ECSC is Zoom but where necessary and possible other systems such as Skype for Business will also be considered.

This guide concentrates on the way in which advocates can most efficiently deploy their professional skills in communication and persuasion in the new working environment. It aims to distil existing experience into a set of principles that we hope will enable everyone to approach a remote hearing with confidence and do their job effectively. It is, of course, acknowledged that not everyone will have all the technical devices or the best private home office facility during a 'lockdown' situation and advocates may therefore need to adapt this advice to best fit their circumstances.

Similar to face-to-face hearings, there are protocols that should be observed so that hearings can be carried out successfully and efficiently. Below are some key practices that should be observed for video conference hearings.

The ECSC gratefully acknowledges the support from the Governors of the Inns of Court College of Advocacy for their permission in allowing the ECSC to adopt learnings from their policy in creating this protocol for the ECSC court users. The ECSC also acknowledges the guide on video conferencing etiquette published by CAJO which has also been useful in informing this Protocol.

1.0 LIAISE IN ADVANCE

- 1.1** Confirm with the court which software is to be used. Confirm the scheduling, special arrangements and any other special hearing protocols.
- 1.2** Confirm that you will be able to attend the conference at the scheduled time. Doing this will ensure the hearing is not delayed by waiting on participants that do not plan to attend.
- 1.3** It is essential to agree to a trial or hearing bundle in advance and check it in advance with all parties.
- 1.4** Ensure that the court has your up-to-date contact address and number.

2.0 UNDERSTAND THE TECHNOLOGY

- 2.1** Test the technology prior to the hearing, including the camera, microphone and sound settings. Know how to turn the camera on and off, how to mute the microphone and how to adjust the volume.
- 2.2** Ensure that the camera is positioned properly in order to capture the person speaking as though they are face-to-face with others in the meeting.
- 2.3** Be aware that sometimes the camera/video will be turned off and the sound muted by default when you join a hearing electronically.
- 2.4** Decide how many screens you intend to use during the hearing. This would depend on the facility being used particularly if there may be more than one person present, e.g. an attorney and their client.
- 2.5** Join the hearing in good time, at least 15 minutes before it is due to start to resolve any technological issues.
- 2.6** In the event of a breakdown in communication, a protocol should be in place for anyone affected, including witnesses and third parties, to contact the court by additional means to alert them to the problem, e.g. telephone, text, email or WhatsApp chat.
- 2.7** If something does go wrong (a critical participant drops offline, for instance, or some connection fails) pause until it is sorted out. There are some distractions, like people joining and leaving calls, that you may have to ignore. But you should not be afraid, if that happens, to go back and repeat a point or a question.
- 2.8** Should the technological problem concern the internet or Wi-Fi connection, it is helpful to have an alternative method of communication which is not reliant on either.
- 2.9** If there is a technical failure that cannot be fixed, then the hearing may have to be adjourned. The hearing must always be a fair hearing.

3.0 MAKE SURE ALL PARTIES CAN BE SEEN AND HEARD

- 3.1** As far as possible the online hearing should emulate a traditional hearing. This advice applies to attorneys and witnesses alike.
- 3.2** Establish a speaking protocol at the outset. This may involve participants, when introduced, acknowledging the introduction by raising their hand rather than speaking. This is preferable to a brief nod which may not be visible on small thumbnail videos.
- 3.3** You must not record a court hearing but be prepared to remind the judge to record the hearing.
- 3.4** When not speaking, mute your microphone. All participants should do this when not speaking.
- 3.5** When it is your turn to speak, remember to unmute your microphone. Speak directly into the microphone.
- 3.6** Identify yourself before you begin speaking. This is especially important if the device being used for the video conference does not include a camera.
- 3.7** Where multiple devices are in use, all should be muted and only one unmuted when required.
- 3.8** Attorneys should avoid using headsets (combined over-ear headphones and microphone), since online hearings should emulate in-person hearings as closely as possible. However, the use of discreet in-ear headphones is usually permissible and can assist with preserving the confidentiality of proceedings. When in doubt, seek the guidance of the court in advance.
- 3.9** Avoid setting your device to the highest volume, since this is likely to cause feedback when you are speaking.
- 3.10** Encourage participants to raise their hand when wishing to interrupt a speaker, or otherwise use a facility to do this on the software provided. If necessary, wait for a pause or an opening in the discussion before addressing the Court. As far as possible only one person should speak at a time.
- 3.11** Prepare witnesses for the taking of the oath or affirmation. Email the form of words to witnesses in advance of the hearing and make sure they have any book they require to take an oath.
- 3.12** Third parties, such as interpreters, or intermediaries may be required to assist witnesses. During the Coronavirus (COVID-19) pandemic, third parties are likely to be remote from those they are assisting. Issues regarding discreet and separate channels of communication between them will need to be resolved by the court in advance of the hearing.
- 3.13** When third parties are used to assist witnesses, this adds to the risk of participants speaking over one another. Third parties should be reminded of speaking protocols where necessary.
- 3.14** It is imperative that all participants have good audio and visual contact including defendants attending online while in custody.
- 3.15** Maintain eye contact with the camera. This will ensure you appear to be looking at your audience. The thumbnail image of the person you

are speaking to may be at the bottom of the screen, when the camera on your device is above the screen. If this is so, it will give the appearance that you are looking down or away from your audience.

- 3.16** Ensure that you are clearly visible by maintaining a reasonable distance from the camera, to show your head and upper body. If you are too close your image may blur and fill the screen. If you are too far you will appear distant and detached from the hearing.
- 3.17** Remember that your camera is on. Therefore, act as though you are always being seen by everyone in the hearing. Participants sometimes forget that the camera is on, especially when distracted by reading e-mails or trying to multi-task during a video conference call. Avoid distractions and making inappropriate actions while on Camera. Some cameras zoom in and out depending on the movement of the subject. This should be avoided.
- 3.18** If you are using the camera on your laptop, typing when you are visible is liable to cause the camera (and your image) to shake. Try to use a separate keyboard or a separate camera mounted away from the laptop.
- 3.19** Remember that others are watching even if you cannot see them. In cases involving multiple participants, thumbnail video images may appear on screen, but these thumbnails often move off screen to allow participants to see the face of the person talking, or the document being shared. Observers may also be present. As such, often there are people present at the hearing who are not visible.
- 3.20** Ensure that you are well lit by natural or artificial light. Avoid sitting with your back to a window or other light source. This can result in only your silhouette appearing on screen.
- 3.21** Ensure that your background is appropriate for a hearing. A neutral background is best. Avoid revealing personal or distracting items, such as photographs, ornaments and paintings. Having bookshelves and office-friendly paintings and photographs on the wall is acceptable. The background should not be untidy and distracting. The camera may show more of the room than you expect. Some devices allow for computer generated backgrounds. If using one of these please ensure that the background is neutral and not distracting.
- 3.22** Close the door to the room in which you are appearing. This will prevent unwanted visitors, sights and sounds from interfering with the hearing. This and the use of the mute button will suppress the noise of coughs, sneezes, doorbells, coffee machines, dishwashers, dogs barking, typing, rustling of papers etc.
- 3.23** Dress professionally, but not in robes unless specifically asked to do so and appear as if attending the court in person. Wear clothing suitable for court appearances. Additionally, it is not sufficient to wear a work top and a casual bottom as sometimes you may be required to get up suddenly.

- 3.24 Most hearings take place with parties seated. If in doubt, check with the court. If you prefer to stand, adjust your camera accordingly.
- 3.25 Limit yourself to a glass of water as you would when appearing in an actual court.
- 3.26 If the hearing is by audio only, ensure that all videos are turned off, except where the court gives the direction for a video to be on.

4.0 KNOW HOW TO HANDLE THE DOCUMENTS

- 4.1 Prepare your hearing or trial bundles in accordance with the guidelines established by the ECSC.
- 4.2 It would be useful to have an application, such as Acrobat DC or PDF Expert, which allows you to mark up your bundles.
- 4.3 Save and keep all your work (including preparation material and bundles) in a location where it can be accessed while in Court. It is very important to store documents systematically so you can find them easily.
- 4.4 Keep a clean duplicate of your bundle, so that you have one clean bundle and one that is marked up. This way, if the judge asks for a document to be handed up, you have a clean copy to submit. Ensure that page numbers are clearly visible.
- 4.5 Use an agreed indexed electronic bundle of documents which can be referred to between relevant parties by section, page and paragraph number without the need to share the document on the screen or to hold up physical documents. Be familiar with page references in the electronic bundle so that they can be easily located by the judge and other parties. This saves time and avoids having to resort to the hard copy which may not be readily available and avoids the noise of rustling papers.
- 4.6 Minimize the size of the hearing bundle. It is tempting, since the bundle is electronic, to include anything at all that might conceivably be relevant. Resist that temptation. Big files are harder to handle and can cause all sorts of other problems (e.g. rejection by email filters). That goes for authorities, too, of course.
- 4.7 Make sure you can find documents you need quickly. Advocates are advised to have a list of key documents, or a hyperlinked index. Bookmark critical documents. Make sure all references in your notes are absolutely accurate and precise and that references in the skeleton argument are to the pages in the electronic bundle, not some historic paper version.
- 4.8 You must be able to provide, without delay, the reference to the documents to which you want to refer. Always give the reference, not just the description, and give others time to find the document.
- 4.9 Make sure you can access two documents simultaneously (e.g. on different devices or two windows). You will often need both to follow a document that someone else is referring to and find another document for your own purposes.

- 4.10 Do not let the difficulty in handling documents deflect you from using documents effectively. In civil cases, documents are often very important. If you have a point to make about a document you nearly always need to make sure that you, the witness, and the judge all have that document in front of them. Summaries are never as effective.
- 4.11 If you unexpectedly need to share a document with the court which is not in the electronic bundle, but which cannot be made visible to all observers by sharing on screen, agreement must be reached as to the appropriate channel of communication to be used, e.g. sending the document to the court and the other party or parties by email.

5.0 MAKE THE BEST USE OF WRITTEN ARGUMENT

- 5.1 Be aware that it is likely that rather more weight will fall on the written argument than it does in typical hearings.
- 5.2 Use the written argument to provide a clear roadmap of the key issues and how you expect to approach them.
- 5.3 Use the written argument to provide a way of finding any key document, especially if you are dealing with a complex body of evidence. Recognise that it is harder to follow a remote presentation, and that the judge may well need an aide memoire that can be consulted before and after the hearing.
- 5.4 Do not, however, be tempted to shoehorn a mass of material of secondary importance into the written argument. If anything, this is even worse when the oral hearing is compressed, because it is likely to leave your written argument disconnected from your oral presentation.
- 5.5 Give careful thought to which parts of the argument will require oral presentation or expansion, and how you are going to do that.

6.0 BE PREPARED, THEN BE BRIEF AND TO THE POINT

- 6.1 Your preparation needs to be more meticulous than it would be for a normal hearing. In a remote hearing, time is at a premium. Remote communication has less impact and less subtlety than face-to-face communication. Much of what follows is general good advice for advocacy, but the requirement is heightened for remote hearings.
- 6.2 Write a more detailed script for submissions and cross-examination questions than you usually would.
- 6.3 Anticipate questions that the judge is likely to raise, or points that your opponent may develop orally, and discuss them with your team in advance.
- 6.4 For witness handling, make sure that your cross-examination is highly focused on the main issues. Have clear objectives, and plan to achieve just those objectives. Expect the pace to be slower than you are used to. Do not rely on any cross-examination technique that depends on high pace or pressure.

- 6.5 When questioning a witness, keep questions short, make sure each is a single question, and use clear questioning cues to show when a question is finished. Avoid multiple questions. Avoid questions which are simply statements and depend on inflection.
- 6.6 Witnesses must feel enabled to give their best evidence. Provided that the technology functions properly and witnesses are given the same advice as other parties about presentation, sound and lighting, there is no empirical research to support the contention that vulnerable witnesses and children are less effective 'online' as opposed to being 'seen' by the court.
- 6.7 Attorneys must ensure that all witnesses are as comfortable as possible when giving evidence.
- 6.8 Simplify your arguments as much as you possibly can, remembering that if you "lose the judge" you are less likely to notice that you have done so than when you are in court.
- 6.9 A lot of non-verbal communication (and aspects of "style") are lost when working remotely. Concentrate on the substance.
- 6.10 Brevity and precision are key. In the event that either sound or video quality is interrupted during a question or submission, repetition may be required.
- 6.11 This is a process far easier to complete with succinct questions or submissions. Aim to present your case in a low-key courteous and measured way. Be careful not to have too much mental overload during a hearing.
- 6.12 Be prepared for the fact that remotely conducted hearings are more taxing than a conventional hearing. Do not be shy of asking for breaks.

7.0 AVOID OVER SPEAKING

- 7.1 In a remote hearing, a brief delay typically occurs between the video image of the person speaking and their voice being heard by the court and witness. This connection delay may lead participants to believe a person has finished speaking before they have, in fact, done so and is liable to result in participants inadvertently speaking over one another.
- 7.2 Do not interrupt. Let a speaker finish before speaking. Be especially careful not to interrupt a witness's answer or a judge's question.
- 7.3 When you are speaking, allow pauses for judicial questions. You may even want to invite them.
- 7.4 If you are speaking and become aware that someone else is trying to speak, pause to allow them to do so.
- 7.5 Do not fill pauses. Gaps between speakers (e.g. while waiting for a witness to answer) are more common with remote communication than when you are together in court.
- 7.6 If you feel compelled to interrupt and 'get to your feet', you may want to raise your hand to the court as an indication of wanting to do so.

8.0 MAINTAIN CONFIDENTIALITY

- 8.1** Organise your workspace carefully in advance. Clear it of anything that is not related to the hearing. As far as you can, turn off or close any communications channels that are not related to the hearing you are conducting (email, SMS, WhatsApp, etc.).
- 8.2** If you share your screen, be careful. When you share your screen, everything is visible online, including pop-up notifications, screensaver photographs etc. For safety's sake, ensure your screen is clear and that notifications are disabled. Documents can be shared without sharing your screen or better to be referred to in an agreed bundle.
- 8.3** You will probably want to communicate with your own team but consider how this is best done. Receiving a steady stream of emails and WhatsApp messages from many different people is not helpful. Agree how your team will communicate but ask for communication to be limited to what is really necessary and consider channeling all communications through a single team member who can act as a filter.
- 8.4** Taking instructions during an on-line hearing can create a serious technical problem. In the Magistrates Court, where resources are limited, taking instructions from a client in custody at any stage can be a serious problem. Even when the client is not in custody the handling of taking instructions is messy. It may be that some link, external to the on-line contact – perhaps by (secure) telephone or e-mail – needs to be utilized.
- 8.5** Be careful about private meetings. Some software allows the user to leave the main hearing and enter a separate virtual meeting 'room' to have a conference with, for example, a professional or lay client. You will have to be especially confident in using the software to exploit such breakout facilities securely and confidentially.
- 8.6** You may prefer, with the agreement of the court to conduct a separate private meeting by temporarily leaving the hearing and physically moving to another room to conduct a private conversation and / or muting your microphone and turning off your camera.
- 8.7** If you are calling a witness, make sure that someone has checked in advance that the witness knows how to operate the software, and to find documents.
- 8.8** Remember that witnesses must not be communicating with third parties while they are giving evidence and must not be consulting documents other than the agreed bundle without the Court's knowledge and permission. It is common to ask a witness to identify anyone who is in the room with them and to show a "wide shot" of the room at the beginning of their evidence to verify who is present.

REVIEW OF POLICY

The fast-changing nature of information technology, particularly as it relates to electronic communication incorporating aspects such as social media, requires that policies and procedures be regularly updated. The *Information Technology Manager and Information Services Manager* shall be responsible for coordinating the review of this policy on a semi-annual basis or as the need arises to ensure that it continues to meet the necessary legal and technological requirements and reflects current best practices.

Made this 5th day of May 2020.

Sgd.

Dame Janice M. Pereira, DBE
Chief Justice