

# Note accompanying Remote Advocacy Webinar

## *A practical guide to conducting hearings*

### **1. Introduction**

- 1.1. The aim of this note is two-fold; first to provide a brief update on where we are with court business, and second, to provide some practical tips and guidance on conducting remote hearings.
- 1.2. Links to all court guidance and practice notes can be found in the [Appendix](#) to this note.

### **2. Update on Court Business**

#### The Initial Reaction

- 2.1. In early March, Scotland had the first confirmed case of coronavirus. By 23 March the country was placed into lockdown for three weeks. By 25 March, business in the Court of Session, Sheriff Appeal Court, ASPIC and the remaining 10 “hub” Sheriff Courts were restricted to essential business only, with proofs and debates discharged entirely.
- 2.2. Shortly after came the discontent from practitioners of mothballing by the Courts and the SCTS response on 9 April. However, it was not until 21 April that the first Inner House hearing was conducted virtually. By 28 April the Sheriff Appeal Court (Civil) began accepting Notes of Appeal and by 11 May fixing procedural hearings. The 1 May saw the expansion of business in the Sheriff Courts to Ordinary, Family, and Commercial but limited to matters which could be progressed without the hearing of evidence. The 12 May saw the first virtual hearing in Inverness Sheriff Court. From 25 May 2020 ASPIC hearing opposed motions and procedural hearings by tele-conference. By early June we had our first virtual proof in the Outer House with eight witnesses giving evidence remotely over two days and submissions on the third day.

#### The Current Position

- 2.3. Both the Inner and Outer House of the Court of Session are now operating remotely. The Sheriff Appeal Court is now operating in a similar manner. On Monday the All Scotland Personal Injury Court (“ASPIC”) had its first virtual procedural and motions court with

virtual proofs due to commence from 4 August 2020. Virtual summary trials are commenced and High Court jury trials is also on the horizon. The Sheriff Courts, unsurprisingly considering the volume of business and number of courts are slowly progressing towards remote appearance – more so with procedural business than substantive hearings.

### **3. Introduction to Remote Hearings**

- 3.1. The concept of remote hearings appears to have already joined marmite, or peanut butter sandwiches, in the many things we either love or hate. The pilot scheme<sup>1</sup> for summary trials headed by Sheriff Principal Pyle, while commended by the bench has certainly come under attack from practitioners. If one takes together the experiences of the pilot scheme and the virtual hearings already conducted in the Inner House, Outer House, and Sheriff Court, the battle lines could be drawn between efficiency -v- the assessment of witnesses.
- 3.2. Turning first to efficiency, clear benefits of virtual hearings can be appreciated when one considers the attendance of vulnerable or elderly witnesses at evidential hearings. The potential savings both in terms of cost and time management by hearing the evidence of skilled witnesses remotely. It is clear that far less inconvenience is suffered by any party when a remote hearing is discharged rather than one requiring physical attendance. Furthermore, it is arguable that remote hearings tie more into the approach towards flexible working hours and working from home adopted by more and more businesses. The resistance of practitioners towards remote hearings appears focused on the assessment of a witness when giving evidence, particularly in assessing the witness's credibility and reliability. While much of the criticism comes from criminal practitioners, civil practitioners would be encouraged to consider how much of a witness's credibility and reliability is assessed non-verbally.
- 3.3. However, notwithstanding the marmite debate, practitioners should be discouraged from adopting an archaic view of “if it ain't broke, don't fix”. It would be entirely incorrect to suggest that the profession has never faced what could be described as an evolutionary step away from the well-known theatre of oral advocacy. Similar challenges were faced across the profession as written advocacy began to play a more dominant role, arguably there is still some confusion by practitioners and the Court as to the purpose and use of written

---

<sup>1</sup> [Summary Criminal Virtual Trial Pilot – The Way Ahead – A Strategic Plan](#)

advocacy – one need look no further than the relationship between Grounds of Appeal, Notes of Argument, and Written Submissions for an example. It would also be incorrect to state that we are hurtling towards an entirely unknown new sense of normality. The eliciting of evidence from witnesses by live-link isn't new. Neither is the lodging and use of electronic productions in commercial actions or Fatal Accident Inquiries.

#### **4. Preparation**

##### Webex

- 4.1. The courts at present, and likely for the foreseeable, are using Webex as a platform for remote hearings. A starting point, is to ensure you are familiar with [Webex](#); which does differ slightly from the Zoom platform we are becoming more accustomed with. Many of the features that we are now familiar with apply equally to Webex. In a Webex hearing you have the host, which will normally be the Clerk, and Attendees. Instead of the co-host facility on Zoom, on Webex the Clerk can pre-assign certain attendees as Panelists which provide additionally interactivity such as the ability to share your screen. While Webex has the break-out room facility (allows the creation of numerous private meeting rooms alongside the main meeting); the Courts have yet to utilise this function. Instead the Courts are using practice sessions which provide a separate meeting room to the room accommodating the hearing itself. The use of practice sessions varies between the Courts from placing witnesses while an objection is heard or for the use of adjournments. One piece of recurring feedback is the lack of facility to enter discussions or negotiations in advance of the hearing or alternatively the option of a post-hearing discussion with your opposite number and/or client. The Courts will hopefully utilise the break-out room facility to have a virtual waiting room in advance of the hearing and a similar room at the end of the hearing. However, in the meantime, practitioners should ensure that all discussions and negotiations have been concluded prior to the start of the hearing – arranging a meeting via Zoom with your opposite number or a meeting after would be a sensible workaround.
- 4.2. Practitioners are recommended to engage with the clerk in advance of the hearing. In the appellate courts a test appearance is organised up to a week prior to the hearing. In ASPIC, the Clerk will open a practice session shortly before the hearing is due to commence; before then moving to the live hearing with the proof commencing immediately.

### Devices

- 4.3. Ensure well in advance of the hearing that you are familiar with your devices and how you will use them during the hearing. If using a laptop, ensure it is charged and remains connected to power throughout the hearing. Elaborate headsets should be avoided and if using ear pods, be conscious that the battery may not last the full hearing. A separate webcam is highly recommended for reasons that will be discussed shortly. If conducting the hearing from home rather than a conference room, check the strength of your internet<sup>2</sup> and additionally set up a practice zoom call to test whether your internet strength is sufficient for constant video. Consider advising family members to turn their internet off i.e. phones, iPad etc for the duration of your hearing.

### Alternative communication

- 4.4. If you are instructing Counsel, consider how best to communicate with them during the hearing. Webex has a private messaging function, however you may feel more comfortable having a separate channel by WhatsApp or Microsoft Teams for the virtual tap on the shoulder.

### Electronic productions

- 4.5. A core bundle of electronic productions has been adopted however the practice does vary. What is consistent is that the entire bundle should be paginated from start to finish. The use of hyperlinks from the inventory itself to the production is expected by the Court of Session. The move towards electronic productions is welcome and practitioners would be encouraged to become familiar with PDF software for creating and editing PDF documents<sup>3</sup>.

### Witnesses

- 4.6. When faced with a hearing involving witnesses, practitioners are encouraged to liaise with witnesses in very early course. In addition to the electronic bundle, witnesses should also be sent hard copy productions. Practitioners should consider whether it would be beneficial to issue witnesses with a guide setting out what to expect from a remote hearing and issuing guidance. Such guidance could include advice on ensuring they have a suitable device to

---

<sup>2</sup> Simply type “internet speed test” into a search engine

<sup>3</sup> PDF expert or Adobe Acrobat Pro for two examples.

participate in the hearing and that they should be familiar with this in advance. Witnesses should be advised to ensure that they participate in the hearing in a private setting if possible and that they should be alone. They should be advised to ensure that they will not be interrupted while giving evidence and to ensure they avoid any distractions i.e. mobile phones, notifications etc. ASPIC's most recent guidance provides guidance on the instructions for witnesses<sup>4</sup>.

## **5. Presentation**

- 5.1. Practitioners should be familiar with the controls for Webex for muting and unmuting their microphones as the platform can mute Panelists automatically when moving from a practice session to a live session – this applies equally to the controls for speaker settings and muting for hearings conducted by telephone. Be mindful that there is often a delay from the end of one speaker to the next so allow a few seconds to pass before speaking – ensure witnesses are also aware of this.
- 5.2. The guidance to witnesses regarding distractions also applies to those conducting the hearing. Take steps to ensure others in the household know you are on a hearing and should not be disturbed. If applications are downloaded on your hearing device and mobile phone, ensure these applications are closed or muted to avoid any interruptions to the hearing.
- 5.3. Consider how you will access the papers and your notes during the hearing. It is important to have the Webex screen sufficiently large to allow you to watch all the parties, particularly witnesses and the Sheriff. If using solely a laptop, this may not afford sufficient space for notes and papers. This can be overcome either by the use of a large screen or second screen. Alternatively utilise a second device such as an old laptop or iPad. Whichever means is adopted, practitioners should consider how best to use their set up to maintain eye contact throughout. One method is to place speaking notes or papers at the top of the screen closest to the camera. This ensures you are able to access notes while giving the appearance of maintaining eye contact throughout – another benefit of remote hearings.
- 5.4. Specifically, practitioners should not underestimate the benefit of investing in a separate webcam. This improves the view of the speaker and allows you to sit further from the screen which in turn allows access to more of the screen without requiring you to turn your

---

<sup>4</sup> 9 July 2020 paragraph 6 (e)

head. It is also important to consider the lighting in the room<sup>5</sup>. Ultimately the aim is to present yourself in a manner which is as close to appearing in person as possible.

## 6. Persuasion

### Substituting the commute to court

- 6.1. A disadvantage of a remote hearing is that one loses the commute to court which can be used to get into the correct frame of mind. Dialling into a remote hearing five minutes after doing housework is unlikely to have the same effect. Consider allotting a short period of time before the hearing to go over your preparation and your submissions. Whether alone in a home office or pacing the patio, give yourself the opportunity you would have on the commute and waiting outside court to enter that frame of mind.

### Beware the background

- 6.2. Practitioners should consider their background which will be visible to other participants; particularly to witnesses. Aside from the obvious steps taken to ensure no confidential or personal material is visible, practitioners should be mindful of the effect their surroundings may have on others. A physical court room provides a neutral setting which in a way creates equality for all attending – more so now as we move towards retiring court dress. However, when conducting hearings from home, practitioners should be mindful of inadvertently creating social barriers; not everyone has a private study with a wall-to-wall bookcase. Furthermore, consider whether your background contains anything which may distract those viewing e.g. photographs, painting – anything with the potential to distract can impact on the persuasiveness of your submissions.

### The effect of remote hearings on witnesses

- 6.3. In addition to the effect that backgrounds may have on a witness, practitioners must be mindful of the effect that remote hearings may have on a witness's demeanour. The court is in essence entering the witnesses' own home. Some may struggle with the technology. Others may be participating in a hearing with a background they deem unsuitable; again, not all of us have a mahogany bookcase. Any one of these may cause the witness to appear nervous or uncomfortable regardless of the evidence they give. The takeaway is therefore to be mindful of the effect that remote hearings can have on a witness. Refrain from making

---

<sup>5</sup> <https://www.techsmith.com/blog/get-perfect-lighting-video/>

assumptions and acknowledge that observing visual cues will be more difficult. For this reason, remote hearings may not be suitable for the examination of lay witnesses, particularly when credibility is a live issue. Hybrid hearings, which hear the evidence of some witnesses in person and others, such as skilled witnesses and lay witnesses which credibility is not an issue, may prove to be a suitable compromise.

- 6.4. Surprisingly, despite seated, remote hearings are more tiring than appearing in person. Practitioners should also be mindful that while this may be your only appearance that day, the Sheriff may have presided over several. It is therefore important to ensure that your submissions are structured and delivered in a manner which can be taken in by the sheriff easily.

#### Structure of submissions

- 6.5. Remote hearings for some can be more intense and require increased concentration compared to appearing in person. For this reason, it is important that the structure of your submissions ensures that you take the court with you step by step. While acknowledging that practitioners will no doubt have their own style, a recommended style could comprise of (i) introduction, (ii) development, and (iii) conclusion. Within the introduction, in addition to the usual (who you act for, why the case calls etc) set out the order you will ultimately be inviting the court to make and advance a concise statement of why the order sought should be granted. Introduce the structure of your submissions, how many chapters and what they are. Once a solid foundation has been set, one can then look to develop each chapter; always presenting in accordance with the framework you have set out. For each chapter, it will assist the court if practitioners open and close each chapter separately. This can be achieved simply by highlighting the chapter to be discussed at the start and closing with a summary of the proposition to be taken from the chapter before moving to the next. Finally, end submission with a concise and persuasive summary tying your submission together before renewing your motion.

#### Delivery of submissions

- 6.6. Moving then to delivery, naturally it is important to speak slowly, vary tone, and utilise pauses for emphasis. Silence is perhaps more uncomfortable remotely, however practitioners should refrain from the use of fillers. We have all been taught to “watch the pen” however this becomes more challenging when the pen is barely visible. Remote

hearings for the non-speaker is in a sense like watching television. As a result, the Sheriff is more likely to maintain eye contact with you and therefore the phrase “watch the pen” can be easily revised to “watch the eyes”. In general, remote hearings attract less judicial intervention and therefore keeping a watchful eye on the Sheriff can also assist in getting a feel for how a particular point is being received. Practitioners would also be encouraged to check regularly that the Sheriff is with you; does he/she have that document, found that page etc – this may address a lack of intervention and ensure that the court is following your structure. There would be no harm in asking whether you can assist the sheriff on a particular chapter of your submissions before moving to the next.

### Written advocacy

- 6.7. Remember that submissions are in essence a presentation. To use the well-known phrase “You are painting a picture in the mind of the decision maker”. What is often missing is the tag-line “but in order to paint the picture, you first need to convey the information”. Consider submissions after a lengthy proof or a complicated motions hearing. With visual retention of information far exceeding auditory, why restrict yourself to conveying large amounts of information orally. As discussed earlier, the role of written advocacy and how best to utilise written advocacy as a substitute or supplement to oral advocacy is still something that the profession is adapting to. The lodging of full written submissions are perfectly suited and are encouraged by the courts for the disposal of motions. However, the lodging and then reading verbatim of full written submissions should be discouraged (there was a reason why this note was not issued in advance). It is impossible to prevent the court readings ahead and if the court is not reading with you, this will impact on the persuasiveness of your submissions. If the purpose is to supplement rather than substitute, practitioners would be encouraged to make use of outline submissions instead. Outline submissions comprise of the order sought, the structure i.e. chapter headings, and conclusion. Outline submissions can also include proposed findings in fact, chronology’s, updated valuations, and can be hyperlinked to the pleadings or other supporting material. Outline submissions provide only the essential information and act as a route map for the decision maker. This allows you to take the court on a journey, using the route map, from introduction, through the development of your submissions, and conclusion. Additionally, you can be sure that any essential information, additional to the order sought, why it should be granted, and the conclusion, is recorded accurately by the court and is there to be considered.

6.8. With the ability to share your screen, consider the benefit of sharing your PDF outline submissions which allows you to control the rate at which the court moves through the document. Alternatively, consider how a power point presentation could be used to similar effect. In a recent webinar hosted by the International Advocacy Training Council, practitioners from foreign jurisdictions demonstrated how photographs had been used via PowerPoint to depict the aftermath of an industrial accident compared to describing the event with words; the effectiveness was clear and simply illustrated “a picture paints a thousand words”.

## **7. Conclusion**

7.1. While it was accepted from the outset that remote hearings will not be received positively by all, it is hoped that practitioners will at the very least, recognise the potential benefits of remote hearings and that they can serve an important function in the future.

7.2. As the warnings of a “winter wave of coronavirus” is predicted, it is clear that remote hearings will play a necessary and essential role in keeping the wheels of justice turning for the near future. However, when normality eventually resumes, the investments made by the courts, firms, and practitioners, both in terms of technology and our ability to engage with technology should not be forgotten.

7.3. It was said recently by the Lord President “virtual courts and online services should, and now will, be viewed as core components of the justice system, rather than short-term, stop-gap alternatives to appearances in the courtroom”.

7.4. My own view, is that much of what we are now doing, such as the lodging and use of electronic documentation and the increased use of video technology represents the natural evolution of the justice system. Which, prior to March may have been restricted by the courts lack of technology, and everyone’s either inability to engage with technology or unwillingness to try.

7.5. Is there any reason why in some courts and inquiries we use electronic productions, very effectively, but in others we walk through the streets with a wheeled suitcase? Is there any reason why we have witnesses, particularly vulnerable or elderly, travelling across the country to give evidence? In an age where many firms move towards working from home or flexible working hours, is it reasonable to have agents attending court for straightforward motions hearings or procedural hearings.

- 7.6. Remote hearings cannot, and should not be viewed as a substitute for oral hearings entirely. Some hearings will require physical appearance, some may be effectively conducted remotely, others may require a hybrid approach.
- 7.7. To close it is perhaps best to simply echo the hopes of Lord Carloway – “what will emerge in time will, hopefully, be a progressive, desirable and reformed justice system, in which we will all have a role to play”.

Robert S Hovey  
Advocate  
Advocates Library  
Parliament House

15 July 2020

Appendix One – Links to court guidance (*updated 14 July 2020*)

**Court of Session**

[Court of Session Practice Note No 1 of 2020](#)

[22 June 2020 Guidance Note for Practitioners](#)

**All Scotland Personal Injury Court**

[9 July 2020 Guidance on the Conduct of Virtual Hearings](#)

[19 June 2020 Guidance](#)

[5 June 2020 Revised Guidance on Opposed Motions](#)

[15 May 2020 Guidance](#)

**Sheriffdom of Glasgow and Strathkelvin**

[Criminal Business No.19 of 2020](#)

[Civil Business No.18 of 2020](#)

**Sheriffdom of Grampian, Highland and Islands**

[Civil Business](#)

**Sheriffdom of Lothian and Borders**

[Civil Business](#)

**Sheriffdom of North Strathclyde**

[Civil Business](#)

**Sheriffdom of South Strathclyde, Dumfries and Galloway**

[Criminal Business](#)

[Civil Business](#)

**Sheriffdom of Tayside, Central and Fife**

[Criminal](#)

[Civil](#)