

## **EFFECTIVE ADVOCACY BY TELEPHONE & VIDEO-LINK**

*Cairns Judiciary 2020-2021 CPD Series<sup>1</sup> Session presented by Henry J<sup>2</sup>  
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### **Introduction**

1. Prior to the COVID-19 pandemic the Court gave leave from time to time for advocates to appear by telephone or video-link in simple applications and procedural appearances such as mentions, reviews and directions hearings. Appearances by telephone or video-link in such matters has become commonplace during the pandemic. Prior to the pandemic it was rare for advocates to seek leave to appear by telephone or video-link in complex hearings in which substantial argument was likely to be required. Such appearances became more common during the pandemic. In some instances, the court even allowed appearances by telephone or video-link in hearings where viva voce evidence was to be adduced.
2. The incidence of advocacy by telephone and video-link will likely fluctuate, to some extent commensurately with fluctuations in COVID-19 related societal restrictions. However, in the long term it is very likely to remain higher than before the pandemic, the profession and the court now having raised an appreciation of the ease and utility of appearing by telephone and video-link. It is therefore timely to consider how you may advocate effectively by telephone and video-link.
3. In what follows I may refer generically to appearance by telephone or video-link as remote appearances. My references to video-link include digital video-conferencing.

### **The decision to appear in person or by telephone or video-link**

4. An important threshold decision for the advocate is the choice – if not removed by COVID-19 travel restrictions – of whether to seek and exercise a grant of leave to appear remotely. *Is it easier to persuade by appearing in person or appearing remotely?*
5. Surely it is the former:
  - presentation is simpler and there is less to go wrong, eg technical glitches, difficulty checking instructions;
  - you can see your audience; and
  - physical presence can enhance persuasive impact.
6. Generally speaking, the only advantage which remote appearances have over appearances in person is logistical convenience, particularly avoiding the time and cost of having to travel to and wait at court. *In what types of cases might the logistical convenience of appearing remotely trump the persuasive advantage of appearing in person?*
7. There is no one right answer because the degree of logistical convenience and the need to deploy full persuasive advantage may each vary from minor to compelling. Broadly speaking though, logistical convenience will trump persuasive advantage when the judicial decision to be made is unlikely to be materially influenced by the persuasive advantage of

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<sup>1</sup> The Cairns Judiciary CPD series is an annual professional development series conducted by Supreme and District Court at Cairns and sponsored by the Queensland Bar Association and Queensland Law Society.

<sup>2</sup> The Honourable Justice Jim Henry, Far Northern Judge, Supreme Court of Queensland. His Honour gratefully acknowledges the assistance of his associate Hannah McNeale in preparing this paper.

arguing the case in person. This will likely include most administrative appearances, although it is to be borne in mind some directions hearings and listing decisions may have so much riding on them that even minor persuasive advantage trumps logistical convenience. Simple applications and sentences are generally unlikely to turn on a difference in persuasive advantage between in person and remote appearances to the same degree as more complex or difficult applications and sentences. In hearings involving viva voce evidence on a contested issue, the advantages of appearing in person so far outweigh the advantage of appearing remotely that the latter ought only occur in cases of necessity.

### **Audio-visual is better than visual only**

8. *If you are going to appear remotely, which is preferable - telephone or video-link?*
9. It is no surprise that talking pictures, and later television shows, exceeded the popularity of radio shows. Compared to the telephone, video-link is a more multi-dimensional, more effective medium for audience engagement and thus for audience persuasion. It will be preferable to telephone unless the logistic convenience of appearing by telephone trumps the persuasive advantage and logistic convenience of video-link. It should be borne in mind in that equation that some forms of video-link carry the added advantage of allowing documents to be broadcast on screen.

### **Preparation**

10. As with advocacy when appearing in person, proper preparation for remote advocacy is critical. As with any form of advocacy, it is important to invest time in preparing the substance of what you will be advocating – marshalling and mastering the relevant law and facts – as well as engaging in performance preparation, preparing how you will perform as an advocate during the appearance.
11. In discussing performance preparation for conventional appearances, advocacy trainers focus upon an array of considerations. These include planning the substance of what you will say, planning how you will refer to props such as cases and exhibits and considering cosmetic persuasive elements such as your appearance, use of gestures, voice modulation and eliminating distractions.
12. The importance to performance preparation of the cosmetics of how you look and sound and the elimination of distraction is magnified in remote appearances because of the more confined means of communication at your disposal and the heightened odds of distractions, including technological failure. This informs much of what follows about preparing to advocate by telephone or video-link.

### **Minimise the risk and impact of technological failure**

13. Technological failure or defect is an ever-present risk. It cannot be entirely eliminated. You cannot control all of its potential causes but you do have some control, at least at your end of the call or link. *How can you minimise the risk and impact of technological failure or defect at your end?*
14. You can take the following steps:

- Liaise with the court to ensure you know how to connect with it, checking what programme you should be using and what the dial in arrangements are.
- Invest in and maintain effective devices and connection capacity.
- Familiarise yourself with the technology you will be using. Practise using it.
- Find your mute button. Practise using it.
- Ensure your speaker is working to ensure you can hear what is said in the courtroom. Consider reducing the risk of feedback by acquiring and setting up headphones for use during the appearance. In ear rather than over the ear headphones will be less visibly distracting to your audience.
- Do a test run of your connection with the court.
- Establish your connection early enough to give yourself the time to try and solve technical problems and have the connection in place by the time the court calls your matter.
- Plan for the event of technological failure. Ascertain what the court wants you to do if the line or link fails and needs to be re-established. Make sure you have means of contacting the court alternative to the device you intend to use for your appearance. Consider how you may access fallback remote appearance options if the one you plan to use fails.

### **The room where it happens**

15. Even if appearing by telephone, you should prepare to do so from a location free of distraction to you or your audience. *What qualities should that location have?*
16. It should be an enclosed room, allowing you to close the door and exclude non-participants. It should not be located near distracting background sound. Importantly, it should have an operating digital device, additional to the device you will use to connect with the court.
17. *Why is access to a separate operating digital device important?* You may need such access during your appearance for many reasons, including:
  - receiving and sending documents electronically for use in court;
  - engaging in background email communications with your instructor, your client, your opponent, the associate or other court staff;
  - accessing your electronically stored files as necessary; and
  - conducting unanticipated internet legal research on the run.
18. If you use the device via which you are appearing for such access, you risk unintended distraction from and interruption to your path of communication.

### **Preparing the shot**

19. Preparing the room, its equipment and your on-screen appearance for video-link requires consideration of your audience's perception of you. *What aspects of the set up might influence your audience's perception?*
20. Relevant aspects include:
  - Ensure your face is well lit. Avoid strong backlighting, including from windows, to avoid silhouetting and looking like an anonymous whistle blower in a current affairs interview.

- Avoid a visibly distracting background. These may range from unintended views of intimate possessions, to views of movement outside, to overly pretentious props. As to the latter, the object is not to accessorise the background to make you look well read or wealthy – if accessories in the background catch audience attention that means less attention on you and what you are saying. The object is to avoid background distraction.
- Also avoid distraction in the foreground. Think of the desk you are at as the bar table. Remove personal clutter from it. This includes plates and coffee cups. Limit your visible sustenance to a glass of water, just like in court. Turn off or remove sound generating items.
- Check your position within the screen, assuming the position you will be in when speaking (most court's allow practitioners to remain seated for remote appearances). The camera lens should be level with your eyes. Marginally higher is okay but you should avoid an obviously downward or upward angle – either angle can disconcert and distract the viewer. You should ensure your entire head and your shoulders are visible within the screen boundary. You should be close enough for your face and facial expressions to be easily visible on screen but not be so close as fill the screen in extreme close up – that too may disconcert and distract the viewer. Cinema's rule of two-thirds tells us your face need not be aligned dead centre or precisely front on to attract the eye of the viewer. Sitting slightly to one side is said to avoid you looking squat in the frame, like a North Korean newsreader, and allows you to angle your body to incorporate visible gestures and enhance communication.<sup>3</sup>
- Check your position relative to the microphone, ensuring it is close enough to catch your sound but not so close that sound will distort.
- Look the part. You are appearing in court. Dress as you should when appearing at court.
- Sit up, sit still and sit wholly in the chair, not on the edge of your seat. Minor movements like facial expression and gestures promote viewer interest but larger body movements are distracting. If you must use a chair which swivels or reclines, do not swivel or recline. If the chair squeaks with slight movement by you, use another chair, preferably a stationary one.
- Position your case materials and additional digital device within ready reach of your broadcast position for easy access during the appearance. Do not place files near the microphone lest they brush or bump it and interfere with sound.

### **Team preparation**

21. Prepare to be able to communicate with your instructor or client during the appearance.
22. If they will be in the same room, consider where they should be in the room. It will likely be distracting if you position them sharing the screen with you, so when they must be on screen (eg. a defendant being sentenced) move them out of screen view. It will of course assist if they remain close to pass you notes and case materials.
23. If they will be at another location, arrange a means of communicating with them during the appearance, other than with the device you are using for the appearance.

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<sup>3</sup> M Westwood *From zero to zoom : Expert tips for mastering the video call*, The Australian 1 January 2021.

### Your advocacy in court

24. As with any form of advocacy it is the substance of what you say which counts most. Advancing structured, concise and clear submissions which go to the real issues is important in all forms of advocacy in the law. However, it is especially important during remote appearances because of the distractions and communication limitations of remote advocacy. You may not be able to control a technical hiccup, but you can control what you say and how you say it.
25. Problems you cannot control often arise in remote appearances. Your patience will be tested. Be patient. Do not exhibit frustration.
26. *What other strategies might the advocate deploy during oral submissions to adjust for the disadvantages of remote advocacy?* Strategies to include:
- Look at the camera lens. Think of it as your audience's eyes. One tip, credited to the National Institute of Dramatic Art, is to stick some googly eyes either side of the lens to remind you to focus on it.<sup>4</sup> Of course, you may look elsewhere from time to time, indeed you may need to check notes. However, whether advocating by video-link or in person, it is antithetical to persuasion to keep your attention down, reading through notes rather than looking at your audience.
  - Avoid informality: The lack of the court's immediate presence at the advocate's end during a remote appearance detracts a little from the air of gravitas you are conscious of when in court. This can result in some advocates drifting into a tone or demeanour of informality or over-familiarity. Avoid the tendency to informality, remembering your remote appearance is still an appearance in court.
  - Avoid exaggerated emphasis: Another inclination to guard against is a tendency of some advocates in remote appearances to become overly emphatic, excessively repetitive and sometimes even a little shrill. It is off-putting conduct, detracting from the merit of the argument being advanced. It may of course be the advocate is like that all the time. But it may be such conduct results from the afore-mentioned disinhibiting lack of gravitas. Perhaps it results from frustration at the absence of the normal signs that the court is following the argument. Perhaps it results from a belief that such emphatic conduct is necessary to overcome the disadvantage of lack of direct presence. Whatever the reason, it is bad advocacy and to be avoided. None of this is to suggest you ought not adjust your advocacy to try and minimise the disadvantages for advocacy of remote appearances. However, perhaps counter-intuitively, there is less, not more call for theatrical emphasis during a remote appearance. You might be remote from court but the vision of you is closer than normal and the sound generally louder. The distinction is rather like the distinction between the grandiosity of stage acting and the subtlety of movie acting. Many great stage actors did not enjoy cinema success because they could not dial back the vaudeville for the closer audience of the camera lens.
  - Slow the pace: Consider adjusting your usual speech patterns by speaking a little slower and pausing a little more often and a little longer. Slowing down the pace gives the court a better chance to follow what you are saying, notwithstanding distractions such as transient lapses in effective sound transmission.

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<sup>4</sup> M Westwood *From zero to zoom : Expert tips for mastering the video call*, The Australian 1 January 2021.

- Increase pauses: Increasing pauses also creates welcome opportunities for the judge to interrupt and ask a question. Often enough when in court you may make a submission and pause because you see the judge seems to be thinking on it, perhaps making a note about it or perhaps appearing poised to say something. Signals like that may be missed in remote appearances. The advocate may rush on and the judge will be distracted by the difficulty of mulling the last issue while the advocate is speaking of the next issue. Pauses give time for the bench to consider what you are saying and potentially enter into dialogue with you. They thus aid persuasion.
- Use overlapping submissions to restore continuity: In returning to your next point after an interruption by the court or a technological interruption, contextualise where you are up to. Repeating or summarising some of what you have already or more recently said – “overlapping” – will restore continuity to your submissions and enhance the court’s understanding.
- Pose an occasional question of the judge: A notoriously frustrating aspect of remote advocacy is the difficulty in reading the room, not seeing all that the judge is seeing and not seeing the judge’s subtle reactions. To better gauge how you are faring and how your argument is being understood you should ask an occasional question or make an occasional request of the judge. For example, “Would your Honour mind taking up my outline of argument at page two, paragraph five?” or “Your Honour, I fear my submissions continued for a while after the transmission was interrupted. Can you recall the topic I was on when your sound dropped out?”
- Do not fill the judge’s pauses: Doing so will distract the judge, possibly from a comment or query giving you the feedback from the bench you crave. Wait for the judge to speak. Do not be troubled that you may be waiting in vain, the judge will soon enough say something inviting you to continue.
- Do not interrupt: Overtalking invariably impairs effective communication and thus advocacy.
- Deploy the mute button: You should press mute when you will not be speaking for a prolonged period. It reduces feedback and the risk of distracting the court with unwanted sounds.

### **Effective use of a written outline of argument**

27. Some posit that the increase in remote appearances will prompt an increased reliance on the use of written submissions.<sup>5</sup> In my view it is more likely to prompt an increase in the use of written outlines of argument.
28. It is important to appreciate there is a distinction between a document which is simply an outline of the submissions you will be advancing during oral submissions and a document which is actually a written version of those submissions in full. The former is a “written outline of argument” and the latter is “written submissions”. I have written elsewhere about the disadvantages of written submissions, one of which is that they detract from, rather than enhance the delivery and understanding of oral submissions.<sup>6</sup>

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<sup>5</sup> R Todd et al *The remote courtroom: Tips and tricks for on-line hearings*, Dispute Resolution Update – Australia 20 April 2020.

<sup>6</sup> Henry J *Wanted : oral advocacy, apply at first instance*, QLS Modern Advocacy Series 20 June 2019 - <https://www.sclqld.org.au/judicial-papers/judicial-profiles/profiles/jdhenry/papers>; Precedent, Issue 160 September/October 2020.

29. Written submissions are only likely to carry special utility in the COVID–19 era in those cases where the pandemic provokes a need to proceed “on the papers”. However, there are advantages in the use of written outlines of argument in remote appearances involving lengthy or complex oral submissions.
30. It is inherently more difficult for the court to concentrate on and follow lengthy or complex oral submissions made by remote appearance rather than by appearance in person. That is an inevitable result of the heightened incidence of disruption and distraction, the lack of physical immediacy and the advocate’s difficulty in detecting cues as to the court’s understanding of, and reaction to, what is being submitted. A written outline of argument, if used effectively, will help overcome those obstacles to audience understanding.
31. *How might a written outline of argument be used effectively in remote appearances?* Tips include:
- The outline cannot be used effectively if there is discontinuity between it and the oral argument you advance. It should in fact be an outline of what you will be arguing.
  - Your oral submissions should follow the sequence of the written outline of argument, making it easier for the court to track and understand your oral submissions. Sometimes you will need to vary your planned sequence, for instance to answer a question from the bench. If you must deviate, be sure to point out where in the written outline you are deviating to.
  - Headline each new topic as your oral submissions come to it or return to it, telling the judge where it is in the written outline of argument.
  - While submitting on a particular topic refer occasionally to a particular set of words used in the outline about it, for example, “Your Honour will see at paragraph 3.2 of my outline I assert, “The court should apply the common law starting point as to who shall bury the deceased”.” In echoing short passages within the outline like this as you submit upon a topic you assist the court to focus, or refocus, upon the substance of your submission and its significance. A word of warning: keep the echo brief, judges detest the reading aloud of lengthy passages they can read for themselves.
  - If there is a breach in continuity, such as a line dropping out and being re-established, remind the court where you were in your oral submissions by taking the court to the relevant point in the written outline.
  - Do not overload your outline with annexures. It undermines the purpose and efficacy of the outline. If you do need to take the court to other documents do that separately.
  - In a matter of less significant complexity, in which an outline of argument is unnecessary, it may sometimes assist to provide a short document listing or mapping out the issues you will speak about. It can then serve as a touchstone to return the court to from time to time to remind the judge where you are at.

### **Use of other documents**

32. It is important in preparing for any advocacy performance to consider what if any evidentiary documents or case authorities you should physically take the court to and plan how you will do it. Planning how to take the court to documents is especially important for a remote appearance because it is a logistically more challenging task.

33. *What should you do to use documents effectively during your remote appearance?* Tips include:
- Check before the appearance that the document is before the court. If you intend to refer to a recently filed document or one sent for filing which might not have arrived, check it has actually made it to the court file which will be before the judge. If it has not, then email another copy to the court. If you intend to refer to a document you have emailed to the court it is not enough to send the email. Pursue a response to confirm the document has been received and the recipient realises you will be referring the judge to it in court.
  - Only use a document if there is a purpose to it. Remote appearances already have enough unwanted distractions, do not add to them with unnecessary reference to documents.
  - If the document has not been filed and served then make sure your opponent has received a copy.
  - If referring to a document, having asked the judge to take it up, then check with the judge that the judge has it. There is no point in going further until the judge has the document. To do so will merely distract.
  - Once it is known the judge has the document, be precise about what you want the judge to view. Clearly identify what passage or part of the document you want the judge to read.
  - Do not read large slabs from the document. You could have done that without giving it to the judge.
  - Let the judge read what you have asked without interruption. The judge will prompt you when to speak again.

### **Examining witnesses**

34. The disadvantages already discussed are compounded when a remotely appearing advocate must examine or cross-examine a witness because it is a far more dynamic and interactive process than advancing submissions to a judge.
35. The courts and advocates already had some experience of those disadvantages pre-COVID-19 when it had already become common for some witnesses, particularly experts and children, to give evidence by video-link or telephone from another location. However, at least in those instances the advocate was in court, able to see and interact with the judge and other legal representatives as necessary during the process. The extent of disadvantage is so much greater when an advocate, appearing remotely, must examine or cross-examine a witness that such remote appearances will likely remain much rarer than other types of remote appearances.
36. In the event an advocate must appear remotely to examine or cross-examine a witness, almost all of the tips already given are relevant, albeit with adjustment to the context of questioning a witness rather than submitting to a judge.
37. *Which of them are of most importance?* They are all important but, translated to the context of viva voce evidence, perhaps the most important tips are:
- Have a ready line of communication to your instructor and client, via a device other than the one you are appearing on, in order to seek instructions during the appearance.



- Before the hearing give detailed attention to which documents or other exhibits you need to tender through or examine the witness about and thoroughly prepare the logistical arrangements needed for that to occur.
- Plan your examination or cross-examination to be as concise and brief as practicable, aiming to dwell only on factual matters of foundational importance to your case.
- Short questions.
- Speak slower, pause longer.
- No overtalking.

38. To those tips, which echo tips earlier given, I add two miscellaneous tips:

- If your side is the party calling the witness, a thorough pre-trial conference is more than ordinarily important, particularly in preparing for in-court questioning which the witness will easily understand.
- Have an agent at court and arrange for that person to be able to communicate with you during the appearance. Much happens in and around the courtroom when witnesses are testifying and even when they are arriving or leaving. Some of what happens is important as potential fuel for witness questioning or submissions to the court. Given you cannot be there to see what is going on, it is desirable to have a lawyer or some other observer for your side present at court when you are appearing remotely and examining or cross-examining witnesses.

## Conclusion

39. It will be apparent to you that much of my advice has adopted and amplified considerations important to any form of advocacy. This reflects the reality that while the advocate when appearing remotely must prepare for and cope with a logistically more demanding experience, effective advocacy remains the object. In that regard I agree and conclude with the following observations about the practice of remote advocacy in the UK Inns of Court College of Advocacy publication “*Principles for Remote Advocacy*” :

“Judges and advocates who already have experience with this practice consistently remark that effective remote advocacy depends not on new skills. It rewards the bedrock skills; a clearly articulated and logical case, supported by selective use of authority and documents, and focused examination of witnesses. With careful preparation and attention to those core skills, it is possible to make remote hearings, in appropriate cases, highly effective.”<sup>7</sup>

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<sup>7</sup> UK Inns of Court College of Advocacy *Principles for Remote Advocacy* <https://www.icca.ac.uk/principles-for-remote-advocacy-2/>; p 2.