

# The Advocate's Gateway

## CONTENTS

1.	Introduction	1
2.	Practical Issues Arising from the use of a Remote Link	2
3.	Acknowledgements	9

*The Advocate's Gateway is the owner or the licensee of all copyright in this document. All rights reserved. You may read, print one copy, or download this document for your own personal use. You may not make commercial use of this document, adapt, or copy it without our permission. Every effort has been made to acknowledge and obtain permission to use any content that may be the material of third parties. We will be glad to rectify any omissions at the earliest opportunity. Use of this Toolkit is subject to our terms of use.*

*The Advocate's Gateway toolkits aim to support the early identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair. Effective communication is essential in the legal process. The handling and questioning of vulnerable witnesses and defendants are specialist skills.*

*These toolkits draw on the expertise of a wide range of professionals and represent best practice guidance; they are not legal advice and should not be construed as such.*

## 1. INTRODUCTION

When a person who is vulnerable is to give evidence, consideration should be given to the use of live link including a 'remote' live link. In preparation for trial in the criminal courts, the court must take 'every reasonable step' to facilitate the attendance and participation of witnesses and defendants (e.g. Criminal Procedure Rules (CrimPR) 2020, as amended, rule 3.8 (3)(a) and (b)). One such step is to identify at the earliest opportunity those whose evidence would be best given via a remote link from a different court centre, police station, video-conferencing facility or any other suitable location. There is guidance in relation to 'video-conferencing' similarly in Part 32 of the Civil Procedure Rules.

Not every potential venue will be appropriate for each witness. For instance, it may not be appropriate for a child to give evidence from their home address or school if this will lead to them associating home or school with giving evidence of traumatic events. The views of the witness should be sought and expert advice taken from the parent, an intermediary or social worker as appropriate.

It should be noted that the use of remote links is not confined to vulnerable or intimidated witnesses. Provisions are available to enable witnesses to give evidence from abroad, for instance, or from a remote site where it is in the interests of the efficient and effective administration of justice for them to do so (Criminal Justice Act 1988, section 32; Youth Justice and Criminal Evidence Act 1999; Civil Procedure Rules, Part 32). A remote link may be needed for a number of very different reasons:

- the witness cannot leave their home (e.g. agoraphobia, extreme anxiety, physical disability);
- the witness cannot leave the residential setting (e.g. in a secure unit with 2:1 support);
- the witness cannot leave hospital (e.g. severe head injury, terminal illness, multiple health needs);
- the witness cannot travel the distance required;
- the witness is too fearful to be in the same building as the defendant(s), even with additional security or additional special measures (e.g. victim of domestic violence who has been moved out of the area for their own safety);

- the witness presents too high a risk to be contained safely in a court building (e.g. extreme violence to self, others or environment; risk of absconding);
- the needs of the witness cannot be met in the court building where the trial is being held (e.g. needing accessible bathroom facilities, rapid access to medical care beyond that which can be provided by the court);
- the witness is too disturbed or too young or otherwise too vulnerable for the experience of a court building to be tolerated, even with additional supportive measures.

Before a decision is made that a remote link is the appropriate method of a witness giving evidence, careful consideration needs to be given. Each witness must be considered individually.

The Equality and Human Rights Commission has provided points of principle which apply to all types of remote hearing which can again be found in the Equal Treatment Bench Book.

If a remote hearing is unavoidable, then advocates must take steps to take account of the following:

- It is harder to identify if someone is confused, disengaged or unable to pay attention if they appear only as a small figure on screen.
- Poor sound and image quality is hard for everyone, but can cause particular difficulties for those who are struggling to follow or participate.
- It can be particularly confusing or distressing for the individual to be unable to see the whole courtroom and everyone in it.
- The individual may be more isolated than if appearing in court and may find it harder to communicate with legal advisers.
- Video hearings make it harder to identify a mental disability if it has not already been flagged up.

In family cases please see *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583.

### **Women and Remote Hearings**

A woman who is heavily pregnant or has just given birth should not be expected to attend a court or tribunal unless she feels able to do so. This is likely to apply at least to the month before the birth and at least two months after the birth. Even a video or telephone hearing may be too difficult if the woman is looking after the baby on her own. This may mean that a hearing has to be adjourned. The Court of Appeal in *F (A Child: Adjournment)* added these points, with a reminder that the touchstone for case management is justice:

- A mother should not have to put forward medical reasons to justify her request to avoid such dates.
- It is not a solution to suggest a mother attends by remote video from her own home. She is entitled to attend in person if she wants to, and in any event, even remote participation can be stressful and would need her full attention.
- A general intention to allow breaks does not remedy the position if the hearing should not be taking place at all.
- A 'try it and see' approach is not appropriate in this type of situation.
- Account needs to be given to a mother's anxiety at the prospect of having to participate.
- Breaks should be allowed for breastfeeding or expressing milk, having checked with the mother as to the best timing. Ideally, use of a private room should be made available if desired.
- It may be possible to conduct a hearing with a baby or child in the court, provided the baby or child is not disrupting the hearing, e.g. by crying or making a noise. However, a hearing should not be conducted in the presence of a child unless the judge is satisfied that it is appropriate in all the circumstances for the child to see and hear the proceedings. Children under the age of 14 are not permitted in the public gallery or courtroom of a magistrates or crown court (other than as a defendant or witness), unless the court specifically allows them to be present. For example, it may not be appropriate where there may be information that might cause the child distress, anxiety or other harm.

### **Identifying the need for remote link at the earliest opportunity**

- In criminal cases the need should be identified at the first appearance in the Youth or Magistrates' Court and in advance of the Plea and Trial Preparation Hearing at Crown Court.
- Need should be based upon consultation with the witness and any carer/supporter, medical evidence and/or other agencies involved with the individual.
- Any application must contain as much information as possible in order to properly demonstrate why a remote link is necessary for the particular witness. The reasons for a remote link may be included in an intermediary report if there is one. The presence or not and identity of a witness supporter in the remote live link room should also be addressed at the earliest opportunity.

### **Pre-trial management**

Pre-trial management will be of paramount importance to ensure that use of the remote link is planned sufficiently in advance of the trial and so that all parties know with whom to liaise and what arrangements are in place.

- A remote link is an extension of the courtroom and therefore all steps must be taken to ensure the 'usual' courtroom procedures (taking the Oath, handling of exhibits etc.) apply.
- Use of a remote link is likely to require considerable planning, organisation and communication between a large number of agencies.
- There may be circumstances in which a pre-trial hearing should be held in order to discuss the practical procedures of administering the remote link, for instance, where the link is from an unusual location or the witnesses has particularly complex needs. All parties who may be involved in the planning and use of a remote link should attend the pre-trial hearings where possible. These may include:
  - ◇ trial advocates;
  - ◇ trial judge;
  - ◇ court staff;

- ◇ police officer in charge of the case;
- ◇ Witness Service;
- ◇ support/medical/security staff who may be required to be present with the witness while evidence is being given;
- ◇ registered intermediary.

Where there is an intermediary, the pre-trial hearing may usefully be combined with a ground rules hearing.

### **Identifying the location for a remote link**

- Some court centres have a dedicated site which may be used for a remote link.
- Not all courts have access to a network which will permit external links. However, local businesses/universities/chambers may be able to provide this service. Other courts, police stations, hospitals or the witness's home may also be appropriate, subject to the needs of the witness.
- Identify the reason the remote link is required and then which venue is most appropriate for the particular witness. Check that the location will have adequate facilities for that witness.
- If an appropriate location cannot be found in the vicinity of the court centre because there is limited or no access to video-conferencing, an alternative secure location will have to be found.
- Consider whether Skype, Zoom, Microsoft Teams or similar is appropriate: can a bridge (a device that connects two networks that are in geographically different locations) be set up to increase security and ensure the audio and visual link is of sufficient quality to enable the evidence being given to be heard and recorded on the court equipment? Some companies will do this at a fraction of the cost of using video-conferencing facilities.
- If contemplating an alternative location, ensure appropriate equipment – e.g. a personal computer or tablet device, internet connection, webcam, microphone and mobile telephone or landline connection – is available at the location.

- The court and bridging company are likely to need some notice in order to set up the bridge, so the need for this facility must be identified at the earliest opportunity.

#### ***Factors to consider when a location has been identified***

- The room from which the witness gives evidence should be secure and private with access to adequate facilities for the witness (such as a bathroom). There should be suitable access for medical staff, where the individual is known to have a pre-existing medical condition, in the event that urgent treatment or attention is required.
- The room should be large enough to accommodate the witness and any other people who may need to be present, e.g. a supporter, care staff, member of court staff.
- Check whether it is possible to communicate with the court from the remote link location – is there access within the room to a telephone? Is it possible to use a mobile telephone? Can communication be by email?
- Check whether there is any activity likely to be going on outside the room/location which may cause disruption, e.g. building work.
- Are there facilities within the room or nearby from which it is possible to obtain refreshments? If not, how is it proposed this will be done in the event the witness is required all day?
- Identify who will be available to ensure the affirmation is taken and to manage any exhibits. Will the judge or an usher administer the Oath? Can a member of the court staff attend? What arrangements can be made to ensure that exhibits which a witness is required to consider are at the remote site and what arrangements are in place to ensure that the exhibits are kept secure?

## **2. PRACTICAL ISSUES ARISING FROM THE USE OF A REMOTE LINK**

#### ***Setting up the remote link***

- The court should liaise with the service provider to ensure the facility can be set up and works with sufficient clarity for the witness to be seen and heard and possibly recorded on the court equipment. The link must be tested in advance. Identify a named individual who will be responsible for this.
- Consider whether there should be a technician on stand-by in case the equipment fails at any stage during the proceedings. Consider what will happen if the link does fail – who will be responsible for re-establishing the link? Will the witness need to be taken elsewhere while the link is being re-established or if the link cannot be re-established?
- Who will be present to manage the link once it is up and running? Identify which court official will be present to administer the Affirmation, manage any difficulties and liaise with the court.
- Ensure there is a back-up plan.

#### ***Communication***

- Identify who will be responsible for communication between the remote link room and the court and how this communication will take place.
- Is it possible to communicate directly by telephone with those at the remote link location and, if not, what other arrangements are possible? For example, is it possible to communicate by email?
- Contact numbers/email addresses for those in attendance both at court and at the remote link site on the day should be exchanged in advance.

### ***Witness familiarisation***

- As is usual for live links, the witness should practise speaking and listening over the live link (Witness Charter 2013, standard 10). Victims are entitled to familiarise themselves with the venue where they will give evidence (Code of Practice for Victims of Crime 2015). Practising speaking and listening to questions over a remote link may be combined with the familiarisation visit, but beware of providing the witness with too much information in one visit. See also Chapter 2 paragraphs 81-84 Equal Treatment Bench Book 2022 as amended.
- If it is not possible to conduct a familiarisation visit (for instance, because the witness lives too far away from the location), consider whether there are other means of allowing the witness to see the room/location (for instance, by using photographs).
- Agree how and when the witness will meet the advocates and the judge before giving evidence. If it is not possible for the witness to meet these people in person, consider whether it is possible to send a 'who's who' document in advance, with photographs of the advocates and the judge.

### ***Scheduling the witness's evidence***

- Scheduling the witness's evidence will be even more important than usual as the link may only be available for a limited period of time and the witness may be waiting in an unfamiliar location.
- Agree a timed witness order in advance, ensuring where possible all preliminary points are finished when the witness is due to start. If possible, the judge and advocates should have a contingency plan in case there are problems. The timetable should ensure that the witness gives evidence at the optimum time for him or herself.

### ***Memory refreshing***

- Decide when, where and how this should take place on a case-by-case basis with the overriding aim of enabling witnesses to give their best evidence.

- Memory refreshing is an important part of witness preparation. The practice of giving a witness their statement on the morning of trial and expecting them to absorb all the information an hour before giving evidence is no longer an acceptable basis for witness preparation. Many witnesses will benefit from the opportunity of reading their statements in the week before the trial, albeit, in criminal cases, in the presence of a police officer.
- When in a remote location the witness supporter must have a copy of all the witness's statements in case they need to refresh their memory from them.
- If the witness's testimony had been recorded in an Achieving Best Evidence (ABE) interview then a transcript of the same needs to be in the remote location room for reference if needed.
- The trial advocates need to agree a list of documents that will be in the remote location room, this should be agreed at a preliminary hearing.
- Arrangements for memory refreshing should be canvassed and agreed at a preliminary hearing.
- If the witness had a video-recorded interview, in a criminal case, there is no obligation for the witness to watch the recording at the same time as the jury. The first viewing is often distressing or distracting and should be scheduled before the day of testimony (Equal Treatment Bench Book 2013, chapter 5, 'Children and vulnerable adults', para 39). Be aware that combining the viewing of a DVD with a court familiarisation visit may be 'information overload' for the witness.

### ***Exhibits***

- Arrangements will need to be made for all appropriate exhibits to be taken to the remote link location and returned once the evidence has been given. Identify who will be responsible for doing this.
- There may not be anywhere for documents to be securely stored and so arrangements may involve taking the exhibits to and from the location on the day the evidence is given.

- Consider whether the witness is able to physically hold/manipulate the exhibits and who will assist them with this if necessary.

#### ***Other documentation required for the witness***

- Consider when and how other documentation will be presented to the witness and what techniques will be used to question. It may be necessary for the defence to identify in advance those documents which they may require the witness to view.
- This should be considered by all parties and directions given at a pre-trial hearing.
- Consider in advance whether the witness may be required to draw a plan or sketch or mark a document during their evidence. Consider whether this can be done in advance. If not, how is it to be provided to the judge, advocates and jury?
- Realistic questioning of a remote link witness must be considered in advance and questions and styles adapted to fit. Questions about dimensions, sizes, lengths etc. that may be referenced by use of the court room will not work. Demonstration questions may be problematic due to camera angles.
- Both parties will need to consider their questioning of the witness by reference to where they are.
- The advocates should draw up an agenda of issues for the Judge to consider at a pre-trial hearing with the matters in this Toolkit in mind.
- Paragraph 11 of the Practice Direction on the Guidance for establishing and using live link and telephone facilities for criminal court hearings sets out the duties of advocates and professional witnesses when using live link.
- A remote link often causes feedback and/or a delay between speech and that speech being heard in the other location. For these reasons it is essential that questions are concise and focused. It would benefit advocates to speak more slowly than usual to compensate for this delay and to make their questioning easier to hear. An advocate must not interrupt a

person speaking over the link unless there is no alternative.

- Extra time must be afforded at the end of a witness's answer to ensure that the answer has been completed. It is common for an advocate to consider that a witness has finished speaking whereas in fact the witness has paused to consider the matter or there is a slight delay in transmission.
- In order to appear on the screen as focusing on the witness the questioner should look towards the top of the camera if using court equipment or over the top of their computer screen if using a laptop. This ensures that the questioner's head is in the best position. Positioning on the screen should be maintained.
- Subtle facial gestures are often lost in the transmission of live images from one court room to another. Should it be necessary for an advocate to smile then a slightly exaggerated movement will cause an accurate representation of the relevant gesture. Advocates should take care to ensure that they continue to visually engage with the witness over the video link. If it is necessary for the advocate to look elsewhere this should be signposted in advance, e.g. 'I just need to look at a map for a moment'.
- Using hand gestures over a video link can seem intimidating because of the position of the advocate on the screen and the relative size of the hands and the movement upon the screen. Try not to make such gestures.

#### ***Taking the Oath or Affirmation***

- It is not the responsibility of an intermediary or a supporter to administer the Oath or Affirmation.
- A member of court staff will need to be present to do so.
- Identify whether an oath or affirmation will be taken in advance.



## 3. ACKNOWLEDGEMENTS

This toolkit was updated by a working group of the Criminal Bar Association to whom The Advocate's Gateway are indebted for their efforts.

The toolkit summarises key points from research and guidance including:

- Criminal Procedure Rules 2020
- Criminal Practice Directions 2023
- Achieving Best Evidence in Criminal Proceedings
- Ministry of Justice – Witness Charter
- Judicial College – Equal Treatment Bench Book
- Re ML (Use of Skype Technology) [2013] EWHC 2091 (Fam)
- Re S (A Child) [2013] EWHC 1295 (Fam)
- CPS Legal Guidance on Special Measures
- Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court 2011
- CPS Guidance on Prosecuting Child Sexual Abuse cases
- CPS Legal Guidance on Rape and Sexual Offences
- Ministry of Justice, The Code of Practice for Victims of Crime

### FURTHER WORK FROM THE ADVOCATE'S GATEWAY

Visit <https://www.theadvocatesgateway.org/> for further resources published and shared by The Advocate's Gateway, including our internationally recognised Toolkits, case law updates and guidance on intermediaries.

**TOOLKIT 1:** Ground Rules Hearings

**TOOLKIT 1A:** Case Management in Criminal Cases

**TOOLKIT 2:** General Principles from Research, Policy, and Guidance

**TOOLKIT 3:** Planning to Question Someone with Autism

**TOOLKIT 4:** Planning to Question Someone with a Learning Disability

**TOOLKIT 5:** Planning to Question Someone with 'Hidden Disabilities'

**TOOLKIT 6:** Planning to Question a Child or Young Person

**TOOLKIT 7:** Additional Factors Concerning Children under Seven

**TOOLKIT 8:** Effective Participation of Young Defendants

**TOOLKIT 9:** Planning to Question Someone using a Remote Link

**TOOLKIT 10:** Identifying Vulnerability in Witnesses

**TOOLKIT 11:** Planning to Question Someone who is Deaf

**TOOLKIT 12:** Planning to Question Someone with a Suspected (or Diagnosed) Mental health Disorder

**TOOLKIT 13:** Vulnerable Witnesses in the Family Courts

**TOOLKIT 14:** Using Communication Aids

**TOOLKIT 15:** Witnesses and defendants with autism

**TOOLKIT 16:** Intermediaries: Step by Step

**TOOLKIT 17:** Vulnerable Witnesses in the Civil Courts

**TOOLKIT 18:** Working with traumatised witnesses, defendants and parties

**TOOLKIT 19:** Supporting Participation in Courts and Tribunals

**TOOLKIT 20:** Court of Protection