

Appearing remotely – advocacy tips

Introduction

1. *“For tomorrow’s lawyers, appearance in physical courtrooms may become a rarity. Virtual appearances will become the norm, and new presentational and advocacy skills will be required. I am not suggesting that virtual courtrooms will be pervasive in the short or medium term. But they will become commonplace in due course, I have little doubt.”¹*
2. COVID_19 has meant that “virtual” court-rooms have become the new (but hopefully temporary) norm more quickly than expected. The current state of the technology is a significant impediment to effective advocacy. Notwithstanding that impediment, we can still be persuasive advocates. But we must identify the challenges of appearing remotely and think about how to overcome them.

The challenges – barriers to communication

3. The technology failing
4. Engaging with the listener without being able to:
 - i. Establish eye contact
 - ii. Read body language
 - iii. Get a feel for what is happening in court
5. Reduced effectiveness of techniques such as:
 - i. Hand movements
 - ii. Changes in tone and pace
6. Challenges in tendering or referring to documents
7. Capturing the emotion of a case – appearing remotely is clinical and impersonal

So...

8. When you can, attend in person BUT ONLY if – (most importantly) you feel it is safe, and; the Court allows it², and; your employer permits it.³

¹ Susskind R, *Tomorrow’s Lawyers: An Introduction to your Future* (OUP, 2013) p xiii quoted by Hon CJ Warren M, *Embracing technology: the way forward for the courts*, (2015) 24 JJA 227 at 229.

² E.g see p2. Chief Magistrate’s Memorandum No. 9 which does not stop you from physically appearing but compare the District Court circular dated 20 April 2020.

³ In-house Legal Aid NSW lawyers should be guided by Legal Aid NSW policies and directions in relation to attending court.

Appearing remotely – some “do’s and don’t’s”

1. DO written submissions or a written outline of your submissions
 - i. Length - be concise. For a Local Court short matter - no more than 3 pages⁴
 - ii. Style
 - a. DON’T extract slabs of case law
 - b. DO identify the principle, the source, and the page/paragraph number
 - c. Use simple language and short sentences
 - d. Understate
 - iii. Structure – adapt to your case
 - iv. Apply the “because” test
 - v. See examples of written submissions as a guide
2. DO supplement your written submissions with oral submissions
 - i. Always turn up (remotely or physically)
 - ii. Refer to the written submissions but don’t repeat them
 - iii. Focus on the most important parts of the case and encourage a discussion⁵
3. DO appear with the same formality as you would when physically appearing
 - i. Dress
 - ii. Location – somewhere quiet and a professional backdrop
 - iii. Etiquette
 - iv. Stand or sit – be guided by the Court. If you have a choice, choose what is comfortable
 - v. If in doubt about the Court’s practices, ask
4. DO test the video connection and program (if you can)
5. DO watch the screen e.g. DON’T read your notes
6. DO speak with the listener in mind
 - i. Speak slowly

⁴ *Chief Magistrates Memorandum (No. 9)*, 9 April 2020 at [27]

⁵ Hon J Kirby, *The future of appellate advocacy*, (2006) 27 Australian Bar Review 141 at 145

- ii. Be concise
 - iii. Simple language
 - iv. Be interesting
7. DO interact with the listener
- i. Pause
 - ii. A conversational style
 - iii. Ask the occasional question and respond to questions
8. DON'T carry on when your opponent (or the bench) says something you think is outrageous
- i. Everyone can see you
 - ii. You will look like a goose
9. DO provide the Court with a tender bundle – see Daniel Pace presentation
- i. Index
 - ii. Paginate
 - iii. Book-mark PDF's
 - iv. Don't over-do it
10. DO refer to documents – see Daniel Pace presentation
- i. Formally identify and tender documents sent electronically
 - ii. Refer to your index and use page numbers
 - iii. If you are technologically savvy, share the screen
11. DO talk to your opponent before court
12. DO prepare with performance in mind – appearing remotely may mean more, not less, preparation

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