



FACULTY OF ADVOCATES

Response to Scottish Civil Justice Council's Call for Evidence on Modes of Attendance

The primary focus of this response relates to hearings in the Court of Session. While members of the Faculty of Advocates regularly appear in the sheriff court, there may be specific issues affecting solicitors that we are not best placed to address.

For the reasons given below, we consider that the default should be that hearings are to be conducted in person. That should be the default for all Court of Session hearings, regardless whether they are of a procedural or substantive nature. Virtual hearings should only take place at the joint request of the parties, or by order of the court; and a decision that a hearing is to proceed virtually should be taken at the latest by 12 noon on the working day prior to the hearing.

Question 1 – Is there sufficient guidance and clarity in the rules about holding a court hearing either in-person, virtually or by hybrid means? If not, what would be helpful?

While the court rules provide that a hearing at which only procedural business is to be considered is to be attended by electronic means (RCS 12C2(1)), in practice, physical attendance or hybrid hearings are ordered as a matter of course and without reference to RCS 12C.3 or 4. We are unaware of RCS 12C.3(3) routinely being complied with in circumstances where the court is considering altering the mode of attendance at hearings.

Although the rules default to virtual attendance for hearings involving only procedural business, there is a lack of certainty in practice regarding the mode of attendance for hearings. This is often determined at the last minute. That forces counsel, agents and often parties to attend Parliament House. If the hearing is ultimately a virtual one, alternative arrangements then require to be made. That is particularly problematic for solicitor advocates who have attended Parliament House for a possible in-person hearing as they don't have access to the Faculty's AV Rooms or the Lord Reid Building should that hearing become virtual. We are of the view that the rules should include a requirement that the mode of attendance for a hearing be determined and communicated by a set time before the said hearing. In our view, a deadline of 12 noon on the working day before the hearing would be appropriate.

There is no definition of "procedural business" in RCS 12 or anywhere else in the RCS. In context of the RCS as a whole, and as a matter of practice, "procedural business" can - and often is - interpreted in several different ways. For example, it can be taken to mean any hearing that is not the substantive hearing. We consider that a definition for this term is necessary.

Question 2 - Is the process for requesting a change to the mode of attendance straight forward or too complicated? If so, what would be helpful?

It is necessary to start from a position where it is clear what the mode of attendance is for a particular hearing. As outlined in our response to Question 1, the mode of attendance is often determined last minute, leaving little to no time to request a change.

Question 3 - With procedural business defaulting to being virtual, has this approach worked or has it been problematic or caused confusion?

It is not our experience that the default position is that procedural business is conducted virtually (see our response to Question 1 above). We are regularly being advised last minute what the mode of attendance will be. Certainty is essential and the current approach causes confusion.

Question 4 - Has there been or is there confusion about what a procedural hearing is and what is not?

As noted in our response to Question 1 above, there is no definition of “procedural business” in RCS 12 or anywhere else in the RCS. That causes confusion as the term “procedural business” can - and often is - interpreted in several different ways.

We consider that the definition of “procedural business” should be more restrictive than anything short of the substantive hearing. For example, the definition could exclude hearings which could determine the cause (e.g. opposed motions for summary decree/permission hearings in Judicial Reviews).

Question 5 - Have virtual hearings had a positive or negative impact on access to justice?

On balance, we consider that virtual hearings have a positive, albeit limited, impact on access to justice. A notable benefit is that they allow proceedings to be conducted more efficiently and cost-effectively for parties/agents who are based outwith the central belt. However, in our view, virtual hearings are inappropriate for certain types of proceedings, such as opposed motions. Any benefit that may be derived from an access to justice perspective is outweighed by the negative impact such hearings can have on the speedy resolution of disputes.

Question 6 - Have virtual hearings had a positive or negative impact on open justice?

One positive impact of virtual hearings on open justice is that, because physical attendance is no longer required, individuals who would not otherwise be able to travel to Edinburgh can still observe the proceedings. However, when the mode of attendance is not confirmed until the last minute, this benefit is undermined, and open justice is negatively affected. We consider that our suggestion in answer 11, below, would not have a negative impact on open justice, but that continuing with last minute changes to the mode of attendance might.

The “Scots Courts” website is difficult to navigate, which undermines the positive impact that virtual hearings could have on promoting open justice. It can be difficult to locate the link from which to observe certain hearings by WebEx. Further, if there is a last minute change to the mode of attendance, the court rolls may not be updated timeously which can result in the public/the press proceeding on the assumption that a hearing will be heard in Parliament House only to discover upon arrival that it has been moved to online.

Question 7 - Have you attended a court hearing by telephone? If so, can you provide feedback on your experience of attending a court in this way?

Given the availability of the WebEx platform, we are of the view that telephone hearings are unnecessary and should not be used. Our experience of them is unsatisfactory, with limited numbers of people being able to dial into the call. At times only the judge and counsel are able to be in attendance given technological limitations.

Question 8 - How do you find the WebEx platform for conducting virtual hearings and are there any improvements you would like to see?

Our experiences with the WebEx platform are generally positive and we consider it a stable platform for virtual hearings.

Question 9 - Should more use be made of hybrid hearings and if so, how do you envisage these working? By hybrid hearings we mean a hearing where the judge or sheriff is sitting in court, with the potential for everyone to attend in person, and one or more other participants attend remotely. Does it matter who is attending remotely (eg lawyer, witness, party)?

We consider that hybrid hearings can be beneficial. For example, in certain circumstances it is valuable to have a witness give evidence remotely.

In our experience hybrid hearings can work well when the judge and counsel are in the court, with the potential for agents, parties and other interested parties to attend remotely.

We do not consider that hybrid hearings are appropriate in circumstances where one party is a party litigant, attending remotely with the judge and counsel in the court.

Question 10 - Did you encounter any technical difficulties during a virtual hearing or a hybrid hearing? If so, can you provide details on how the issue was resolved and if you were able to meaningfully participate?

See answer to Question 8 above.

Question 11 - Overall do you support virtual attendance at court or do you feel that more civil business should return to being held in person? Please give reasons for your answer.

While there is a place for virtual hearings, we consider that the default position in the rules should be that hearings are to be conducted in person.

The primary issue at present is a lack of certainty. Some judges routinely order physical attendance or hybrid attendance as a matter of course and without reference to RCS12C.3 or 4. This is especially true in areas of practice where in-person attendance is typically the most suitable mode of attendance for a hearing, such as in the commercial and family courts.

Flexibility is important, as certain hearings are suitable for virtual attendance - for example, uncontroversial hearings where the parties are agreed on further procedure. The rules should allow parties to request that a hearing be conducted virtually or in a hybrid format. Similarly, the court should have the power to order a hearing to be virtual or hybrid. Any order changing the mode of attendance from in-person must be issued with sufficient notice to allow parties to prepare; as suggested above, a deadline of 12 noon on the working day before the hearing would be appropriate.

The discussions that take place before and after a hearing between counsel, agents and parties are often extremely important. Virtual attendance provides a barrier to those discussions.