



Tips and tricks:

Electronic briefing, hearings, mediations and conferences

TECHNOLOGICAL OPTIONS AVAILABLE FOR ELECTRONIC BRIEFING, HEARINGS, MEDIATIONS AND CONFERENCES ENSURE PRODUCTIVE, EFFICIENT AND PROFESSIONAL ENGAGEMENT IN REMOTE LEGAL PRACTICE.

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SNAPSHOT

- Electronic briefs should contain everything that a hard copy brief would contain and should be organised in a consistent and logical manner.
- Traditional formalities and etiquette should be observed during remote court hearings.
- With a little flexibility, as much can be achieved with effective use of technology as has traditionally been achieved with in person conferences and mediations.



The advent of the COVID-19 pandemic and the attendant government restrictions and working from home requirements have led to a rapid and significant uptake in remote legal practice and the use of technology for briefing counsel and participating in events such as court hearings, conferences and mediations. These developments have served to demonstrate that all aspects of legal practitioners' work, including court hearings, conferences with clients, counsel and opponents, and resolution-based events such as round table conferences and mediations, can be undertaken remotely, with a bit of technological adjustment.

While some practitioners have been embracing the use of technology in this regard for a some time, many are using such technology for the first time, and there has been significant variance in the extent to which remote practice has been embraced within the legal profession.

Electronic briefing

While not universal, there was widespread resistance to electronic briefs (eBriefs) in pre-COVID-19 Victoria. There is little doubt that this was driven primarily by the preferences of barristers. However, as a consequence, some instructing solicitors have been unsure as to how best to eBrief a barrister.

Since the onset of the recommendation (and subsequent direction) that "if you can work from home, you must work from home", delivery of hard-copy briefs has become problematic, with many barristers working from home and clerks' offices operating with reduced staff.

With COVID-19 restrictions, particularly where court events are conducted remotely (addressed below), eBriefing is proving an important option. It eliminates the need for printing/copying (which may be difficult where solicitors and administrative law firm staff work from home), physical delivery and, on the part of the barrister working from home, storing the physical brief and subsequently returning it.

The most important thing to bear in mind is that an eBrief is just a brief. There should be no difference in content just because it's being delivered in a different format. There are three main ways in which to deliver an eBrief (ordered from best to worst, in the authors' opinion):

- using a dedicated eBriefing platform, one example of which we discuss below
- using a cloud-storage platform (such as Dropbox, OneDrive, Google Drive or iCloud Drive) and sending a link
- attaching files to an email.

A dedicated eBriefing platform can take care of most of the matters which we address below, meaning less work for the instructing solicitor. It

can also enable the barrister to easily annotate and search the brief. Such a platform involves the solicitor uploading files straight into the system, typically through a web browser, with no need to email documents or links.

A cloud-storage platform is more a "dumb" storage solution. It provides a basic file system whereby the solicitor can set up folders in which to store documents. However, it avoids the need for email attachments, instead allowing the solicitor to send a link to the barrister.

An email (or multiple emails) with individual files attached should be used only as a last resort. It is, most of the time, a barrister's nightmare, as there is a high risk of files (or entire emails) being missed, and it leaves the barrister to do the heavy lifting on collating/organising the brief, taking time away from the preparation of the case.

We recommend that solicitors adopt the following practices for all eBriefs:

- use a dedicated folder for each category of document for which you would have a divider/tab in a hard-copy brief
- use Portable Document Format (PDF) for all documents. This will ensure the documents can be opened on any device. You cannot assume that your barrister has the same operating system or software as you do
- make your PDFs searchable, if possible. This makes it easy for the barrister to electronically annotate documents, search documents (or the entire brief) for keywords and copy text from documents (eg, if quoting from a document in a case outline)
- use a consistent file-naming convention. We suggest starting the filename with the date of the document in YYYY-MM-DD format, followed by a useful description of the document (eg, 2020-07-02 Affidavit of Jane Doe.pdf or 2020-02-14 Letter to Solicitor enclosing discovery.pdf)
- include an electronic index to the brief (preferably with hyperlinks to the individual documents) to allow the barrister to confirm that all documents have been received.

Some of the above may at first appear to require advanced technological capabilities. However, provided that you can get each document into PDF with an appropriate file name, a dedicated eBrief platform can take care of the rest. One such platform is eBrief Ready¹ which has been widely adopted at the Victorian Bar. It is web-based, and works on all desktop operating systems as well as tablets and smartphones. From the solicitor's point of view, this platform has the following advantages over a cloud-storage system:

- the barrister can pre-configure their preferred folder structure into which the solicitor can sort

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files or, alternatively, the solicitor can set up an appropriate folder structure

- if your barrister's clerk/list is an "eBrief Ready List" and your barrister has requested it, you will, together with the clerk's booking confirmation email, receive a separate email with a link to an automatically created blank eBrief into which files are uploaded
- provided files are named with an appropriate file-naming convention (the platform contains guidance on this), the platform can automatically detect metadata such as filing dates
- it automatically makes PDFs searchable when they are uploaded
- it automatically generates a hyperlinked index to the brief, sorted by folder, which is automatically updated as new documents are uploaded to the brief
- it automatically notifies the barrister when new documents are added to the brief so there is no need to separately email the barrister when a new court document is filed or new correspondence is sent or received
- it can generate a court book (or appeal book) with a hyperlinked index
- if your briefed barrister becomes unavailable, the brief can be transferred to an alternative barrister with a few mouse-clicks.

We suggest that, as always, you will be best-served by maintaining an open line of communication with your barrister. This will ensure you can work together (and deliver eBriefs) in a way that suits each of you.

Virtual hearings

Since the commencement of the COVID-19 pandemic, the courts in various jurisdictions have been undertaking hearings either by telephone or by the use of videoconferencing technology such as Microsoft Teams, Zoom and Webex. In general, decisions are made by the various courts on a case by case basis as to whether a hearing is to proceed during the pandemic rather than being adjourned until an as yet unknown later date after face-to-face hearings have been resumed. Submissions are often invited from legal practitioners as to the suitability of the case for electronic hearing.

Once it is determined that a hearing is to proceed by electronic means, the courts determine the precise means by which this shall occur, including whether teleconferencing or videoconferencing technology is to be used. Although practice varies between the courts, in general practitioners will receive instructions either to dial in using a phone number and passcode or to log on to a videoconference platform using a link. Where videoconferencing technology is used, it is not necessary for practitioners or other participants other than the host (ie, the court) to have a paid subscription or any particular software. Access can be gained via a web-based platform.

For video hearings, persons other than those actually appearing, such as instructing solicitors and clients, can log in, but should be muted. The Court will usually advise whether



the judicial officer wants to be able to see clients and/or instructors. For telephone hearings, non-speaking participants can generally dial in, or they can be in a videoconferencing meeting with the person who is appearing, with the phone call on speaker (provided it doesn't cause feedback or otherwise disrupt the court hearing). Instructions can be taken and provided by email or instant-messaging (such as SMS, iMessage or WhatsApp) during the running of hearings, and by telephone or videoconferencing during breaks. It is a good idea to plan in advance between solicitor, counsel and client how communications will be managed.

A few tips the authors recommend keeping in mind include:

- a court hearing conducted remotely is still a court hearing. Other than standing up, which is generally not required, it is important to observe all court etiquette and formalities, including using formal address for the judge and other practitioners, and wearing professional attire
- practitioners need to ensure that they have adequate equipment including a computer or other device with a webcam, and a good enough microphone and speakers or earphones
- practitioners should ensure that there is nothing in the background they don't want the court or the litigants to see. Most videoconference platforms have "virtual background" functions, which can be useful for achieving this. A plain background is generally to be preferred over a picture or scenery
- court hearings should be conducted in a quiet space with no distractions and reasonable lighting
- a brief webcam test prior to the hearing to check both functionality and appropriateness of settings prior to each hearing is essential. It is frustrating for the court and other practitioners when a list is delayed because someone has not worked out the technology
- it is important to ensure the device being used has sufficient power and has noisy notifications switched off
- practitioners should ensure microphones are muted and cameras turned off before making or taking phone calls, standing up wearing non-court appropriate clothing, eating, drinking anything other than water, or otherwise engaging in conduct that would not be acceptable in a traditional courtroom
- particularly for telephone hearings, there will likely be other cases (and possibly many people) "on the line". As with a real courtroom, there could be another case running when you join the virtual courtroom and there could be other people listening when you talk
- in the case of a telephone hearing, avoid putting the court on hold as this will blast the court with hold music and prevent proceedings from continuing
- for a video hearing, participants will usually be "met" by the

judge's associate or a member of court staff in a virtual waiting room where appearances will be taken, and participants will be let into the virtual courtroom. Once all participants have arrived, the judge will enter the virtual courtroom and the matter will be called

- it is particularly important in the context of video hearings to be careful about conduct such as sighing or eyerolling as your face will be able to be seen clearly, and possibly very closely, on the screen seen by the judicial officer
- the chambers of the individual judicial officer will generally issue instructions in advance of the hearing as to how to provide documents to the court and the like. These should not only be read carefully but should also be passed on to counsel appearing
- documents are generally "handed up" or tendered by email to the judicial officer's associate (copied to all other parties) in advance, but it is important to read the instructions for the specific case. Some alternative systems, such as a shared Dropbox folder, have been used in some courts.

Initially, most of the hearings that were conducted electronically were procedural and interim hearings and appeals. However, increasing numbers of trials are being heard via videoconferencing technology. The Federal Court of Australia has released a helpful video snippet of a trial being conducted via videoconferencing, including a witness being sworn in remotely and giving evidence, to enable practitioners to see how a trial conducted via video might look in operation. That video can be found on the Federal Court website.

There have been some decided cases which provide judicial guidance as to when an adjournment to enable an in person hearing will be appropriate. Although there is no authoritative or binding principle, the courts appear to be leaning towards allowing hearings to take place remotely wherever that is realistically possible, particularly in light of the fact that it is not yet known when normal court operations will resume. One particularly useful case is *Capic v Ford Motor Company* (2020) FCA 486, a Federal Court case where an adjournment was denied and the case ordered to proceed via video, but where the judge specifically remarked that it had not been unreasonable to bring the adjournment application in the circumstances of the COVID-19 pandemic.

The use of telephone and video technology for conferences and mediations

Like court hearings, other events which would normally take the form of in person meetings can be conducted effectively using telephone and videoconferencing technology. There is a range of platforms available for videoconferencing, including but not limited to Microsoft Teams, Zoom, Facetime and Skype. Zoom in particular has the capacity for private breakout meetings, which makes it particularly suitable for use in mediations.

With such platforms, one person (for example, the mediator) is generally the "host" and is the only participant who requires a paid subscription. All other participants can attend and participate free of charge. All relevant platforms include options for muting, turning off video and the like, which can facilitate private discussions. It is important for practitioners to ensure that their microphones are muted and their cameras off if they are going to do or say anything that should not be heard or observed by other participants, particularly where privileged information is to be communicated. Documents can relatively easily be exchanged during or in advance of mediations or conferences via email or a shared cloud service such as Dropbox. With a little flexibility, as much can be achieved with effective use of technology as has traditionally been achieved with in person conferences and mediations.

Conclusion

The COVID-19 pandemic has led to an unprecedented acceleration in the use of technology in legal practice. While this has required significant adjustment on the part of courts, legal practitioners and clients, the available technology has much to offer in terms of flexibility and opportunities for remote practice both during the pandemic and into the future. ■

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1. <https://www.ebriefready.com.au/>.

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Yolandri, property buyer

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