Advocacy and Vulnerable Witnesses

Post Workshop Questions and Answers

1. What should the intermediary do, what recourse does the intermediary have, if the court (judge) strays from the criminal procedure rules (by not 'actively' involving the intermediary at the GRH)?

   The Criminal Procedure Rules 2020, rule 3.8(7) provides that where directions for appropriate treatment and questioning are required, the Court "must":

   (a) invite representations by the parties and by any intermediary; and

   (b) set ground rules for the conduct of the questioning.

   Rule 3.9(2)(a)(ii) provides that at a Ground Rules Hearing (GRH) the parties and intermediary must "actively assist the Court in setting ground rules and giving directions". Rule 3.9(2)(b)(i) provides that the Court "must discuss proposed ground rules and directions with the parties and any intermediary" and (ii) "set ground rules for the conduct of questioning of the witness or defendant, as applicable".

   The GRH is a "discussion" to which intermediary should contribute and raise any concerns or issues when considering what ground rules are necessary. Intermediaries and advocates should actively assist the Court in setting appropriate ground rules as much as the Court should invite representation and discussion.

   By the time of the GRH, the Judge will be familiar with the case and the issues, and will have seen any video-recorded evidence given by the witness in question and, importantly, read the intermediary report together the proposed list of questions and formed her or his own view about whether the length, structure and wording is appropriate for the witness in question. In circumstances where the questions have already been refined and agreed between the advocates and the intermediary in advance of the GRH, which should normally happen as the Court will have set a timetable prior to the GRH, the intermediary might not be asked to contribute extensively to the discussion around the proposed ground rules and the GRH itself might be very short.

   In other cases where the proposed ground rules are being considered in more depth or where the intermediary would like, for example, to make some suggestions for the use of models or plans or other aids to help communicate a question or an answer, the intermediary should not feel that they can only participate in the discussion when, and if, asked to do so.

The problem perhaps is a practical one. GRH are conducted in open Court and hearing tends to take the familiar format of a Court hearing. Intermediaries might be sitting somewhere at the side of the Courtroom (or be appearing on CVP), and Judge might also assume the advocates will bring any concerns or suggestions which the intermediary has to their attention.

It is easier to participate in the discussion, and to be invited to make representations, if the intermediary is placed near the advocates so they are in the Judge's line of sight. Asking the advocate, the usher or the Court clerk before the hearing if the Judge will permit the intermediary to sit in one of the rows behind the advocate is the best way to do this. This way the intermediary can easily attract the attention of the Judge or speak to one of the advocates whenever they have a concern or suggestion. This is more difficult where the intermediary is appearing on CVP or is sitting in some other part of the Courtroom, but again the intermediary can hold up their hand and the Judge or one of the advocates will eventually notice.

The extent to which input from the intermediary and advocate is necessary will vary from case to case, bearing in mind also the fact that the intermediary will have already written their detailed report and made a number of recommendations.

2. What should the intermediary do if the judge does not consider/ratify the proposed questions at the GRH (and simply asks the prosecutor, "Have the questions been reviewed and agreed?").

The Judge will have read the intermediary report and the proposed questions before the hearing, as these will have been submitted in advance and in accordance with any timetable in place. The Judge will say if she or he does not consider any the questions to be appropriate or are too long or needs to be rephrased. Where the Judge asks Prosecution Counsel if the questions have been reviewed and agreed, the Judge is inviting any concerns or issues which Prosecution Counsel or the intermediary have to be brought to the Court's attention. If there are no such concerns, and the Judge is also content with the proposed questions it will not be necessary to go through the questions individually at the GRH.

In most, if not all cases, the advocates and intermediary must work together to refine to questions to a length, structure and form which they are all agreed with before the GRH takes place. That might involve a lot of work for the intermediary and advocates, but it is most likely to produce a list of questions which are

appropriate to the communication needs of the witness and be of more help to the Judge when considering what other rules and directions are required to ensure participation of vulnerable witnesses and defendants in the proceedings.

3. In Jai's experience where are RIs generally asked to sit/stand at a GRH? I am often told by court staff to sit in the public area and have had to stand up and alert the judge to my presence just before he declares the GRH finished between himself and counsel. It sometimes seems that judges are not always expecting the RI to be there?

   In cases involving a vulnerable witness and the use of an intermediary, the Judge will have made directions for a GRH to be held and for the intermediary to attend that hearing.

   There is no particular place in the Courtroom where the intermediary is to sit at a GRH. However, since an intermediary is not a witness, they are not required to be in the witness box for the GRH (see the Ground Rules Hearing Checklist, section 1: Facilitating the Role of the Intermediary). In my last few cases the intermediary has been sat in the row behind the advocate, in the public gallery, or has appeared by CVP.

   This is an important issue which can affect the way in which the intermediary is able to participle in the GRH. Advocates and the intermediary should introduce themselves to each other before the GRH, and the advocate should then also introduce the intermediary to the Judge. As I have already said, asking the advocate, the usher or the Court clerk to ask the Judge if she or he will permit the intermediary to sit in one of the rows behind the advocate will ensure that the Judge knows the intermediary is present and make it easier for the intermediary to participate in the GRH and for the Judge to ask for their assistance.

4. Has Jai ever been through an experience where the court has been confused about the respective roles of interpreter and intermediary?

   I have not experienced this. The role of an intermediary is completely different to an interpreter and is not to translate either the question to the witness or their answer. However, intermediaries do repeat the witnesses answer or help clarify the witnesses evidence by, for example, asking the question in a different way or paraphrasing the answer given, which is helpful.

5. Recently the local CPS have been overrun with work so communication hasn't been as efficient as usual. One of the repeated problems I've experienced is getting the names of the defence advocates. Any suggestions about how I get this information without stressing the CPS paralegals out? I should add that the issue is being compounded by the courts not convening GRHs sufficiently in advance of the S.28s/trials so I'm not able to track down the proposed XX before the GRHs.

   The CPS, advocates and Courts are under considerable pressure at present. The timetabling of a s28 case from the first hearing in the Crown Court (the PTPH) to the s28 hearing is very short, and in between these hearings the Prosecution has to serve its evidence on the defence and make any disclosure required. The Defence then has to read and watch all the evidence, take full instructions from their client (who might be in custody) draft a defence statement and any other relevant applications, propose edits to the video recorded evidence as well as prepare their list of questions. It is usually not possible to allow any more time between the GRH and s28 hearing without delaying the cross-examination.

   The Court's timetable will include dates by which the Defence advocate should draft their list of questions and the prosecution should respond, including with the views of the intermediary and any suggested changes. The first draft of questions should therefore be sent to the intermediary by the CPS who can also provide contact details for the Prosecution and the Defence advocate. As I have said, the process works best when the advocates and the intermediary are able to refine and agree the questions, subject to any views of the Judge, before the GRH.

   Ideally the Defence advocate should also send their draft list of questions to the intermediary whose email address will be at the front of their report. Where this does not happen, I am afraid the only way for the intermediary to obtain contact details for the Defence advocate is through the CPS caseworker.

6. If the judge refuses to order reviewing questions in advance, would you as counsel be able to say that it would assist you?

While the process of drafting, reviewing and refining questions is of assistance to the advocate, and we can ask the Judge to make an order to this effect, it is the responsibility of the Judge to control the questioning of the vulnerable witness or defendant and to ensure they are able to give the best evidence they can (see **R v. Lubemba** [2014] EWCA Crim 2064, paragraph 44). The Judge can achieve this in a number of different ways, of which reviewing the proposed questions in advance, is one. It is for the Judge to decide what is appropriate and necessary in each case.

Rule 3.8(3)(b) provides that in order to prepare for the trial, the court must take every reasonable step "to facilitate the participation of any person, including the defendant". Rule 3.9(2)(b)(i)(ii) provides that the Court "must… set ground rules for the conduct of questioning of the witness or defendant, as applicable".

The Judge is entitled to take the view that special measures and ground rules concerning the manner and duration of questioning, for example, will be sufficient in a particular case and given the vulnerability and communication needs of the witness. In another case the Judge might give directions about the type of questions that advocate can or cannot ask. The Judge also has a duty to intervene if an advocate's questioning is confusing or inappropriate (see **R v. Lubemba** [2014] EWCA Crim 2064, paragraph 44).

The Judge's duty is to the witness or defendant and ensure that they are able to participate in the proceedings and give their best evidence; the convenience to the advocate of reviewing the questions in advance is a secondary consideration.

7. Why do advocates write down/tick off the answers the witness gives after each question during a S.28 (given that it's being recorded) - it can really stress vulnerable people out!

Even where there has been a GRH, the questions have been agreed in advance and the witness's cross-examination is being recorded, the dynamic nature of the trial process is not lost. What the witness will say in answer to a question and whether the answers given might give rise to further questions which will need to be discussed between the Judge, intermediary and advocates afterwards, or to re-examination by the Prosecution advocate is not known. Any further questioning, if it is to take place, should happen while the witness is at Court and the recording facilities are available.

Sometimes, for example, the Judge might not have heard the answer given by the witness and will ask the advocate to repeat the answer.

It is not practical or possible for the advocate or Judge to conduct the s28 hearing, and to deal with any issues which might arise, without having an accurate note of the evidence which has been given.

Some advocates do find it easier to keep track of the questions they have asked by ticking them off as they go along when they are continuously looking up from their papers to the witness who is on the video-link. I expect when this is done, it is as much to ensure the process is as smooth as possible for the witness.

Where the intermediary has a concern that the witness might feel stressed out at seeing the advocate writing down the answers or ticking off the questions, the intermediary could raise this either at the GRH or even before the recording of the cross-examination starts. There may be ways to address the concern, such as by adjusting the camera so the advocates papers cannot not be seen.

8. I was reviewing defence questions with the defence counsel and the prosecution counsel was also present and helpful. The defence had hardly addressed the child's ABE evidence. He said he had been on the training for vulnerable witnesses and thought that he was not allowed to question their evidence as part of putting the case for defendant. I tried to explain that he was supposed to, but it was the manner of questions - not leading, repetitive, tag etc. Prosecution counsel agreed with this. Has Jai or anyone else come across this?

   I have not come across this. I hope and expect this to be a rare case where the Defence advocate had simply misunderstood what was permissible and appropriate. The vulnerable witness training does not teach advocates that they should not put the Defence case to the witness; it is, as would be expected, focused on the questioning techniques and the manner and duration of the questioning. Where there is a reason that the advocate should not put her or his case to the witness in its entirety, this has to be discussed at the GRH and, if the Judge agrees, a direction relieving the party of their duty to put their case must be made (see Rule 9.8(7)(b)(ii)).

   I found the vulnerable witness training to be very useful, but it is not enough on its own. I have to continuously refer back to the Advocates Gateway toolkits, the caselaw and the intermediary report which has been prepared in the case to equip myself to conduct the cross-examination properly and ensure I discharge my duty to the Court and my client.