



CPCS/CAFL Best Practices Guide for Conducting Video Hearings

(including Practice Tips & Legal Support)

By the CPCS Court Re-Opening Legal Issues Working Group and the CAFL COVID-19 Legal Response Team, with the assistance of many CPCS staff and private counsel (July 31, 2020)

Please note that this Guide is a work in progress. Video hearings are new to many of us at CAFL. We are learning more and more each week thanks to input from attorneys in the field as to what is happening in the courts, what is working, and what is not working. We will amend this Guide as we get more and better information from practitioners. Please feel free to send your comments and any proposed edits to Andy Cohen, Director of Appellate Panel, at acohen@publiccounsel.net.

Video Hearings – Top 12 Tips for Counsel

1. [Object to video hearing](#). Administrative and uncontested matters are well suited for hearing by video. But many hearings implicate such important due process rights that they should not be held by video. As to evidentiary hearings involving testimony, unless your client wishes to proceed by video, counsel should object to the video hearing and insist on an in-person hearing. If significant problems with audio/video occur during the hearing, object, move to vacate the hearing, and ask for an in-person hearing. If the client wishes to appear in person (or the court orders an in-person hearing) but counsel is not comfortable doing so, counsel should speak to their supervisor (if staff) or contact CAFL Trial Panel Support Unit to discuss options.
2. [Confirm your client’s technological and language access](#). Make sure your client has a [device](#) and [sufficient data](#) to access the hearing. A long hearing requires a lot of data, so your client may need unlimited data. If your client is incarcerated, in a hospital, or in a congregate care facility, arrange for video access for your client with the facility (or through the court, if it is willing). If your client needs an [interpreter](#) for any reason, arrange for one with the court.
3. [Help the client get familiar with the video platform](#). Make sure the client knows how to use the basic features of the video platform. Help the client with lighting and camera angle. Make sure the client has a quiet, private place in which to participate. Meet your client on the video platform before the hearing and practice.
4. [Prepare the client for the hearing](#). Prepare the client for the substance of the hearing. Agree on a signal for when the client needs a break or when one of you wants to speak confidentially.
5. [Confirm your own technological access](#). Make sure your computer and internet connection work; if necessary, get others in your household off of the network to ensure that you have enough bandwidth. Make sure you have a working link for the video hearing (if not, call the court).
6. [Prepare exhibits](#). Know your court/county rules governing submission of, and challenges to, exhibits. Generally, get exhibits from adverse/other parties as long before the hearing as possible, and file motions in limine ahead of time. Submit your own exhibits in advance per any governing rules. Keep your own hard copies.
7. [Prepare witnesses](#). Make sure the witness has a device and wi-fi/cellular service so they can access the hearing. Send a subpoena if necessary (or requested). Include instructions for logging into the hearing. Prepare the witness (in the ordinary course) and do a dry run

using the video platform. Tell them to contact you if they have trouble connecting to, or get dropped during, the hearing.

8. [Practice, practice, practice.](#) Play with the video platform functions, play with lighting and camera angle, do a moot court. Learn how to screen-share documents. Become a master of the video platform so that the inevitable problems that arise at a hearing don't confuse you.
9. [Confirm protocols with the court.](#) Confirm with the judge and the clerk how the court wishes to receive motions and exhibits; how the court wishes to handle objections; how the court will ensure proper conduct of witnesses; and how the court wishes to handle "dropped calls" or loss of audio/video.
10. [Ensure confidential communication at the hearing.](#) Confirm with the court and client how you and your client will signal the court for a needed break or a confidential communication, and make sure the clerk/host will put you in an unrecorded, private breakout room.
11. [Remember defensive advocacy.](#) Object, move to strike, and make offers of proof, just as with in-person hearings. Object if you or your client loses audio or video or gets dropped from the hearing, and move to strike testimony given during this time. If technical problems persist, move for a mistrial, to suspend the proceedings, or to hold the hearing in person.
12. [Debrief meaningfully with client.](#) The client may have to put up with a lesser form of justice, but the client can still have a gold-standard attorney. Make sure the client understood what happened at the hearing, felt heard at the hearing, and knows what will happen next.

All of this – and much, much more – is explained in detail below.

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I. Introduction

This guide is intended to help counsel in CAFL cases prepare clients and themselves for video hearings during the COVID-19 pandemic. This guide is *not* intended to serve as a basic Zoom instruction manual; there is an ample supply of how-to content online. For example, the Zoom Help Center has a number of quick-start guides and video tutorials at <https://support.zoom.us/hc/en-us> and <https://support.zoom.us/hc/en-us/articles/206618765-Zoom-video-tutorials>. In addition, YouTube has tutorials on Zoom basics, including:

- https://www.youtube.com/watch?time_continue=160&v=s5VU8cmEnTs&feature=emb_title.
- <https://www.youtube.com/watch?v=QOUwumKCW7M>
- <https://www.youtube.com/watch?v=sOJkffIN8O4> (on how to use Zoom on a phone, which is not the best way to access a hearing but may be the only format or device that a client can access).

Video hearings have many benefits. For example, during the current crisis, video hearings eliminate the need for close in-person contact; they can often be scheduled quickly; they can eliminate travel time to and from courthouses for clients and counsel (as well as the risk and cost of travel); they can eliminate long waits for clients and counsel at the courthouses; they can be done on a phone, tablet, or laptop, so that the client can step out for a hearing rather than miss an entire day of work; and they can facilitate counsel's use of out-of-state or out-of-country experts.

At the same time, video hearings present many technological and logistical difficulties for clients and counsel. This guide is intended to help counsel anticipate and prepare for – and therefore avoid – some of those difficulties. It is also intended to help counsel recognize when sudden or

unavoidable difficulties interfere with fundamental client rights so that counsel can object and preserve the record for appeal.

Because video hearings lack the gravity and formal surroundings of a courtroom, clients may perceive them as a “lesser” form of justice. Clients may believe that they are not heard meaningfully, or treated with dignity, in video hearings.¹ This perception of justice and fairness is just as important as actual justice and fairness. Accordingly, counsel must fight to ensure that all clients are treated – and perceive that they are being treated – with dignity, respect, and fairness when appearing in a video hearing.

Counsel should consider objecting to any video hearing at which a client’s substantial rights and liberty interests are at stake. This would include termination, permanent custody, and permanent guardianship trials; it would include temporary/emergency custody and visitation hearings; and it may also include hearings regarding placement, school stability, and services. Matters involving fundamental rights must be adjudicated in accordance with due process, which means they must be adjudicated as fairly and accurately as possible. To do so, judges must be able to hear – without the inevitable interruptions of frozen/dropped audio – witness testimony and questions from counsel. To adjudicate matters fairly and accurately, judges must be able to assess witness credibility by evaluating demeanor, tone, and body language; this is much more difficult in video hearings than it is in person.² And it is impossible in telephonic hearings. Accordingly, counsel should consider objecting to *any* evidentiary hearing being held by video (or telephone) where important client rights are at stake.³

¹ This may be particularly true for clients with cognitive limitations or developmental disabilities or for clients who distrust technology.

² *Cf. Edwards v. Logan*, 38 F. Supp. 2d 463, 467 (W.D. Va. 1999) (“Video conferencing . . . is not the same as actual presence, and it is to be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing. This may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion.”). Virtual hearings deprive factfinders of the ability to perceive, and fairly determine, the credibility of witnesses in several ways: “First, choices about camera shots influence perceptions of others. Second, video presentations always either strip some nonverbal cues from the communication or overemphasize them. Finally, video presentations do not replicate normal eye contact.” Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 Tul. L. Rev. 1089, 1108 (2004). In addition, factfinders lose the ability to assess credibility remotely based on the ability to see, or see clearly, facial cues and body language. See Richard D. Friedman, *Proposed Amendments to Fed. R. Crim. P. 26: An Exchange: Remote Testimony* (U. of Mich. Law School Scholarship Repository, Summer 2002).

³ See, generally, *Protecting Quality Representation in Video Court - A Practical Handbook for Wisconsin Defense Attorneys*, Wisc. State Pub. Def., Quality Indicators Work

On the other hand, some clients – such as those in other states or those who cannot risk losing a day of work waiting in court – might benefit from having a trial or evidentiary hearing held by video. Because of the current COVID-19 crisis, in-person hearings are not yet occurring in some courts; when they resume, they may not occur in a timely manner. Clients may choose a video hearing, regardless of a right to, or benefits of, an in-person hearing, because they want a hearing faster.

The decision to waive an in-person hearing and go forward with a video hearing belongs to the client; it cannot be made for them by the attorney.⁴ Counsel should discuss with the client the benefits and drawbacks of both forms of hearing. Before a video hearing on a matter implicating due process rights, counsel should ask the court to conduct a thorough colloquy with the client that demonstrates, on the record, a voluntary and intelligent waiver.⁵ The colloquy should cover the waiver of the client’s rights to be present and to have the assistance of an attorney who is in the same physical space (assuming that client and counsel are participating from different locations). Even with a valid waiver, counsel should reserve the client’s right to demand an in-person hearing later if the video hearing has technical problems that interfere with the client’s right to participate meaningfully.

Ultimately, clients deserve the right to choose, and counsel must be able to competently litigate CAFL matters both in person *and* by video. Counsel’s “comfort level” with the hearing platform cannot dictate the timing or type of hearing the client receives.

Finally, counsel must remember that the Rules of Professional Conduct and most CAFL Performance Standards are not suspended or relaxed during this period or for video hearings generally. For each case, counsel must:

- Consult regularly with the client, in person where possible;
- Investigate the facts;
- Research the law;
- File relevant motions;
- Subpoena relevant documents;

Group (Sept. 2005, 2010 ed.), available at:

<https://www.wispsd.org/images/AppellateFolder/templatesforms/QI.pdf> (“Wisconsin Video Guide”). “[V]irtual reality is rarely a substitute for actual presence and ... even in an age of advancing technology, watching an event on a screen remains less than the complete equivalent of actually attending it.” *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001).

⁴ See, e.g., *Commonwealth v. Caldwell*, 45 Mass. App. Ct. 42, 46 (1998) (citing *Taylor v. Illinois*, 484 U.S. 400, 417-18, n.24 (1988)).

⁵ See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (holding that “courts indulge every reasonable presumption against waiver of fundamental constitutional rights,” and waiver of such rights must be intentional and knowing).

- Appear in video hearings, as they would at in-person hearings;
- Dress and conduct themselves at video hearings as they would at in-person hearings;
- Be familiar with all court rules regarding video hearings;
- Possess the technology needed to participate in video hearings; and
- Have basic competency with the video technology that is being used by the court.

Counsel has an ethical obligation to handle all legal proceedings competently. Live courtroom skills do not necessarily or fully translate to video hearing skills. For many of us, this means attending trainings on the use of Zoom and other video platforms and practicing the skills necessary to handle such hearings competently.⁶

II. Foundational legal rights at stake

Video hearings threaten to abridge many of our clients' fundamental constitutional rights. Counsel must be extremely diligent and object whenever a judge issues an order or fashions a procedure that compromises the rights set forth below. The failure to object in a timely fashion risks waiver of issues on appeal. Even where the failure to raise issues at the trial level doesn't waive them on appeal, it often results in a stricter, less favorable standard of appellate review.

Substantive due process rights

Clients in CAFL matters have a liberty interest in family integrity.⁷ This includes the right to parent-child visitation.⁸ Because of the vital substantive due process rights at stake, clients in CAFL matters have a right to procedural due process.⁹

To obtain an adjudication and order for permanent custody, the state must prove a parent unfit by clear and convincing evidence.¹⁰ To terminate parental rights, the state must prove that the parent is unfit, and that termination of parental rights serves the child's best interests, by clear and convincing evidence.¹¹ To terminate visitation, the state must prove by clear and convincing evidence that visits harm the child or the public welfare.¹² In a private guardianship proceeding,

⁶ The Massachusetts Rules of Professional Conduct require that attorneys be conversant with technology. See Boston Bar Ass'n Ethics Committee, Pandemic Advisory (April 2020), available at: <https://bostonbar.org/docs/default-document-library/bba-ethics-committee-pandemic-advisory-april-2020.pdf>.

⁷ *Santosky, v. Kramer*, 455 U.S. 745, 753 (1982).

⁸ *Custody of a Minor (No. 2)*, 392 Mass. 719, 725-26 (1984).

⁹ *Care and Protection of Robert*, 408 Mass. 52, 58 (1990).

¹⁰ See *Care and Protection of Ian*, 46 Mass. App. Ct. 615, 616 (1999).

¹¹ *Adoption of Luc*, 484 Mass. 139, 144 (2020).

¹² See *Custody of a Minor (No. 2)*, 392 Mass. 719, 726 (1984).

the guardian must prove – at both the initial guardianship stage and at a proceeding to remove the guardian – that the parent is unfit by clear and convincing evidence.¹³

In CRA cases, the petitioner must prove beyond a reasonable doubt that the child requires assistance. After adjudication, dispositional orders (both initial and extension), including custodial changes, need only be proven by a preponderance of evidence.¹⁴

Procedural due process rights

At its core, procedural due process means notice and an opportunity to be heard at a meaningful time and in a meaningful manner (that is, to participate meaningfully in the proceedings).¹⁵

- **Right to notice**

Parents in CAFL matters are entitled to notice of the proceedings “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action[.]”¹⁶

Just because a hearing is by Zoom, the link to which is emailed to counsel and to clients, does not mean that email notice is sufficient. Counsel must be diligent to ensure that the client has received the link and can access the Zoom hearing. Counsel must alert the court to any issues in technology or Internet access that effectively deny the client notice.

More important, email notice likely does not, by itself, satisfy the notice requirement for a given proceeding. Counsel must be diligent to ensure that in-hand notice – where required – is, in fact, delivered in hand, that any notice by mail was properly addressed and actually mailed, and that any publication notice (a) is proper, because in-hand (or other) notice was not possible, (b) is properly posted in the correct newspaper for the proper duration, and (c) has the proper content. At the initial removal and 72-hour hearing stages, email notice with a Zoom link isn’t really “notice” at all, because it doesn’t contain DCF’s allegations or the nature of the hearing to be held by video; it’s merely a method of granting the client *access* to the video hearing. The client’s use of the Zoom link might, however, show that the client had actual notice of the hearing.¹⁷

¹³ See *Guardianship of Kelvin*, 94 Mass. App. Ct. 448 (2018).

¹⁴ See *In re Angela*, 445 Mass. 55, 64-66 (2005).

¹⁵ See *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965).

¹⁶ *Armstrong*, 380 U.S. at 550; *Adoption of Holly*, 432 Mass.680, 685-86 (2000); *Adoption of Hugh*, 34 Mass. App. Ct. 346, 347-50 (1993).

¹⁷ See *Quinn v. Middlesex Elec. Light Co.*, 140 Mass. 109, 111 (1885) (by appearing at hearing without complaint as to the timing or nature of the notice, plaintiff waived any objection to notice); *Doten v. Doten*, 395 Mass. 135, 142-43 (1985) (defendant’s statement to court that particular date was not good for him showed actual notice of that hearing date).

- **Right to participate meaningfully**

Clients are entitled to participate in the proceedings in a meaningful manner.¹⁸ This right to meaningful participation includes the right to be present, the right to present evidence on the client’s behalf, the right to cross-examine witnesses,¹⁹ the right to an interpreter,²⁰ the right to make closing arguments,²¹ and (as set forth below) the right to counsel.²² The right to meaningful participation includes the right to rebut DCF’s adverse allegations – and in guardianship proceedings, the right to rebut the putative guardian’s adverse allegations – regarding parenting deficiencies.²³

In criminal cases, incarcerated clients generally have a right to be present at, and participate in, the hearing.²⁴ In CAFL cases, most clients are “habe’d” into court when they are incarcerated or detained in the Massachusetts state system. But in civil cases, the right to be present is not absolute. Due process mandates that clients held out of state (or in the federal system) have a right to participate by phone or video; when even that is not possible, the court may designate an alternative method of ensuring the client’s meaningful participation.²⁵

- **Right to counsel**

In CAFL matters, the right to counsel is statutory, *see, e.g.*, G.L. c. 119, § 29 (right to counsel in DCF-related matters, including care and protection proceedings, for children and indigent parents); G.L. c. 119, § 39F (right to counsel in CRA matters for children and for indigent parents in proceedings in which custody is at issue); G.L. c. 210, § 3 (right to counsel for children in termination proceedings); G.L. c. 190B, § 5-106(a) (conditional right to counsel for children in guardianship proceedings), and based in due process, *see Dep’t of Public Welfare v. J.K.B.*, 379 Mass. 1, 4 (1979) (right to counsel for indigent parents in termination proceedings); *Adoption of Meghan*, 461 Mass. 1006 (2012) (right to counsel for children and indigent parents in private adoption/termination proceedings); *Guardianship of V.V.*, 470 Mass. 590, 593 (2015) (right to counsel for indigent parents in guardianship-of-a-minor petitions); *L.B. v. Chief Justice*

¹⁸ *See Armstrong*, 380 U.S. at 550.

¹⁹ *Commonwealth v. Nwachukwu*, 65 Mass. App. Ct. 112, 120 (2005).

²⁰ *See Commonwealth v. Colon*, 482 Mass. 162, 172-174 (2019); G. L. c. 221C, § 2.

²¹ *See Herring v. New York*, 422 U.S. 853, 863-64 (1975); *Commonwealth v. Miranda*, 22 Mass. App. Ct. 10, 12 (1986).

²² *See Dep’t of Pub. Welfare v. J.K.B.*, 379 Mass. 1, 4 (1979).

²³ *Adoption of Mary*, 414 Mass. 705, 710 (1993).

²⁴ *See Illinois v. Allen*, 397 U.S. 337 (1970); *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Commonwealth v. Bergstrom*, 402 Mass. 534, 544-45 (1988).

²⁵ *See Adoption of Edmund*, 50 Mass. App. Ct. 526, 529-30 (2000); *Adoption of Whitney*, 53 Mass. App. Ct. 832, 836 (2002).

of the Prob. & Fam. Ct. Dep't, 474 Mass. 231, 241-43 (2016) (right to counsel for indigent parents in petitions to remove guardians and modification proceedings regarding visitation).

Parents and children also have the right to the effective assistance of counsel. *See Care and Protection of Stephen*, 401 Mass. 144, 149 (1987); *Adoption of Azziza*, 77 Mass. App. Ct. 363, 368 (2010).

The right to counsel is a key component of the due process right to participate in a meaningful manner.²⁶ That right may be abridged in many ways based on the inherent limitations of video hearings. It may also be abridged by judicial orders limiting attorney-client communications or orders otherwise limiting counsel's effectiveness. For example:

- the client or counsel may lose their audio connection, or may be “dropped” entirely, during a video hearing;
- the client may not be able to hear the judge or witnesses, rendering it impossible for the client to advise counsel about strategy;
- the judge might refuse to permit confidential communication between counsel and the client;
- the judge might order counsel to limit client conferences in such a way as to render it impossible to meaningfully consult;
- the judge may not be able to hear testimonial evidence or counsel's objections to that evidence; if counsel doesn't know what the judge has heard, or if counsel cannot object or get rulings on objections, counsel cannot function effectively.
- the judge might so limit counsel's time or opportunity to call, examine, or cross-examine witnesses that counsel cannot function effectively.

There are many other ways in which the court might interfere with effective attorney-client communication or effective representation during a video hearing.²⁷

²⁶ This right includes the ability “to give advice or suggestion” to counsel during the course of the trial “or even to supersede his lawyers altogether and conduct the trial himself.” *Snyder v. Commonwealth*, 291 U.S. 97, 106 (1934). “The defendant has unique knowledge which is important at all stages of the trial.” *Commonwealth v. White*, 37 Mass. App. Ct. 757, 762-63 (1994) (citation omitted). The client is therefore constitutionally entitled to advise and assist counsel at every critical stage of the proceeding. *See Robinson v. Commonwealth*, 445 Mass. 280, 285 (2005); *Snyder*, 291 U.S. at 106.

²⁷ The Supreme Court has repeatedly held that a defendant's Sixth Amendment right to counsel is violated if the defendant is unable to communicate with his or her counsel during key moments in his case. *See Riggins v. Nevada*, 504 U.S. 127, 144 (1992); *United States v. Cronin*, 466 U.S. 648, 659 n. 25 (1984) (“The Court has uniformly found constitutional error without any

Counsel must object in a timely fashion to any ruling or circumstance, such as a dropped or unclear audio or video line, that compromises the client’s right to counsel at a video hearing.²⁸

The right to counsel may be waived if the client “abandons” the proceedings.²⁹ Counsel must ensure that the client is not unfairly deemed to have abandoned the proceedings based on lack of access to a device or internet service (or based on faulty technology). Counsel must also explain to the client that the client’s failure to attend important video hearing dates might be viewed as abandonment of the proceedings, leading to loss of counsel. If the client’s failure to attend is due to the client’s lack of technology, counsel should explain this to the court and request a continuance or an in-person hearing.³⁰

Equal protection

Clients in substantially similar proceedings should be treated similarly. A client in one courthouse or county should not have different rights or fewer procedural protections than a client in a different courthouse or county.³¹

Many courts have their own rules governing video hearings. Minor procedural differences set forth in these rules do not raise equal protection concerns, but substantial differences might. For example, in some courts, witnesses may automatically be sequestered in their own “waiting rooms,” whereas they are placed “together” in other courts. In a given case, this may not matter;

showing of prejudice when counsel was ... prevented from assisting the accused during a critical stage of the proceeding.”); *Geders v. United States*, 425 U.S. 80, 91 (1976) (holding that trial judge’s order that counsel could not communicate with defendant during overnight recess in the middle of trial violated defendant’s Sixth Amendment right). While the right to counsel in CAFL cases is based on statutes and due process, the principles underlying the right to counsel are the same.

²⁸ In criminal cases, denial of the right to counsel during any “critical stage” of the proceedings is structural error requiring automatic reversal. *See Commonwealth v. Johnson*, 80 Mass. App. Ct. 505, 511 (2011). This may apply to the most important CAFL hearings, as well. But even structural errors can be waived. *See, e.g., Commonwealth v. Francis*, 485 Mass. 86 (2020). Thus, counsel must object in a timely fashion to any ruling that serves to compromise the client’s right to counsel at a video hearing.

²⁹ *Care and Protection of Marina*, 424 Mass. 1003, 1003 (1997).

³⁰ Roughly 29% of adults with household incomes below \$30,000 a year do not own a smartphone, and roughly 44% do not have broadband services; 46% do not have a traditional computer (46%). *See* Monica Anderson & Madhumitha Kumar, *Digital divide persists even as lower-income Americans make gains in tech adoption*, Pew Research Center: Fact Tank (May 7, 2019), available at: <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/> (last visited June 15, 2020).

³¹ Fourteenth Amend. to U.S. Constit.; article 1 of Mass. Decl. of Rights.

but in another case, it may be outcome-determinative. Counsel in the court with fewer/lesser procedural protections should object on equal protection grounds.³²

In addition, as a matter of equal protection, guaranteed by the 14th Amendment to the United States Constitution and Article I of the Massachusetts Declaration of Rights, the State must provide indigent litigants with expenses necessary to effectively defend against state action.³³

Equal protection may guarantee the client the right to access a computer, tablet, or phone, as well as internet access sufficient to participate fully in a video hearing, at the court's expense. *See section IV*, below.

Clients with limited English proficiency

Clients who do not speak English, or who are not sufficiently conversant to comprehend the proceedings, have important protections. Title VI of the Civil Rights Act of 1964 prohibits the court from discriminating against litigants because of their national origin, which includes their ability to speak, read, write, and understand English.³⁴ The court must provide language access

³² As another example, courts in some counties continue to have telephonic hearings even though video technology is available. Clients in those courts – who are receiving third-rate justice, where judges have no visual clues whatsoever to help them make credibility determinations, and where counsel cannot see the witnesses – should consider an appeal based on equal protection principles. *See Custody of Lori*, 444 Mass. 316, 321-22 (2005) (“Parents and children face the same substantive due process deprivations regardless of the court ordering the removal. Because the interests affected by rulings under [chapter 119 and chapter 210] are the same, the same protections should be provided. Furthermore, “[i]t is not to be lightly assumed that the Legislature would have intended to treat [parents and children facing removal of custody] differently depending upon which court [ordered the emergency removal of the child from the parents’ custody]” (citation omitted). Rather, emergency removal of children should be treated the same regardless of which court is issuing the order.”) (citations omitted); *Adoption of Donald*, 44 Mass. App. Ct. 857, 860 (1998) (same appeal period applies regardless of whether termination judgment entered by juvenile court under G.L. c. 119, § 26 or by probate and family court under G.L. c. 210, § 3).

³³ *Britt v. North Carolina*, 404 U.S. 226 (1993); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Commonwealth v. Luciano*, 79 Mass. App. Ct. 54 (2010).

³⁴ *See* 42 U.S.C. §§ 2000d-2000d-7; *Lau v. Nichols*, 414 U.S. 563 (1974). *See generally, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, available at: <https://www.hhs.gov/civil-rights/for-individuals/special-topics/limited-english-proficiency/guidance-federal-financial-assistance-recipients-title-vi/index.html>.

services so that “Limited English Proficient” (LEP) clients and witnesses can communicate in court and with court employees, including court investigators and guardians ad litem.³⁵ For most clients and witnesses, this means that the court must provide interpreters.³⁶

The use of interpreters – and the efficacy of interpreters – can be problematic in video hearings. Contemporaneous interpretation can be hampered when the video platform “favors” one speaker over another, causing one speaker to “drop.” Counsel must instruct the client to let counsel know immediately if the interpreter’s audio is unclear, the judge’s or witness’s audio is unclear, or (as in in-person hearings), the client believes that the interpreter is inaccurate.

Counsel should be aware that the LEP client may have little access to a device or internet service. Census data show that only a little more than half of LEP households have a computer and any kind of internet access.³⁷

Clients who are deaf or hard of hearing

Deaf and hard of hearing clients may be unable to access, or fully access, video hearings. Poor video quality – including small pictures on the screen – may make ASL interpretation and/or lip-reading difficult or impossible. Poor or intermittent audio may make aural comprehension difficult.

Both state and federal law require state courts to “accommodate an individual with disabilities in order to provide [them] with access to the courts, including providing [them] with the same rights as other persons to give evidence.”³⁸ Disability is defined to include physical, sensory, cognitive, and psychiatric conditions, among others.³⁹ Counsel must be alert to the courts’ willingness – and ability – to accommodate the needs of deaf and hard of hearing clients.

³⁵ See 42 U.S.C. §§ 2000d, 2000d-4a.

³⁶ See generally Office of Court Interpreter Services, *Code of Professional Conduct for Court Interpreters of the Trial Court* (2009). The Supreme Judicial Court has promulgated standards for court interpreter services under G.L. c. 221C, § 7. These standards, including the *Code of Professional Conduct for Court Interpreters of the Trial Court*, are available on the Office of Court Interpreter Services website at <https://www.mass.gov/orgs/office-of-court-interpreter-services>.

³⁷ Albert Fox Cahn & Melissa Giddings, *Virtual Justice: Online Courts during COVID-19*, Surveillance Tech. Oversight Project, Urban Justice Center (July 17, 2020), available at: <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f11ee5cc2f36c756ea9620d/1595010663758/Online+courts+white+paper>.

³⁸ *McDonough, petitioner*, 457 Mass. 512, 514 (2010) (quotations omitted); see Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*

³⁹ See 29 U.S.C. § 705(9).

Arrange with the court for interpreters long before the hearing. If the client cannot use an interpreter, or cannot lip-read, based on the audio or video quality, counsel must object, ask for a recess, and problem-solve with the court.⁴⁰ If the court cannot resolve the problem, counsel should ask for an in-person hearing. If the court is unwilling to resolve the problem, or is unwilling to provide an in-person hearing, counsel should seek appellate relief.

Clients with a disability

Clients with a disability may have difficulty participating in video hearings. For example, a client who has difficulty sustaining attention (for any number of reasons) may need frequent breaks or shorter hearings. Many of our clients have experienced trauma, which may lead them to require breaks, or a support person by their side, when certain topics arise at a hearing. A client with a physical disability may need regular breaks or to move frequently during a hearing. Counsel should first discuss with the client whether they want to disclose the condition and seek accommodations. If the client wishes to do so, counsel should inform the court of the need for accommodations. If the client's disability cannot be accommodated in a video hearing, counsel should ask for an in-person hearing with appropriate accommodations. If the court is unwilling to accommodate the client's disability, or is unwilling to provide an in-person hearing, counsel should seek appellate relief. See generally, "Clients who are deaf or hard of hearing," above.

III. Inherent weaknesses of Zoom⁴¹

Because Zoom, like most videoconference technology, is an Internet-based program, it is susceptible to disruptions and "freezes" in audio and video feeds. In addition, users of the platform are affected differently for several reasons:

- Participants rely on different Internet services, with different bandwidth capabilities, to participate in the videoconference, those disruptions typically do not affect all participants in a similar fashion.
- The performance of the users' devices (as dictated by age, specifications, operating systems, etc.) vary, and impact audio and visual feeds during a Zoom conference unpredictably. Disruptions in one user's feed are not always perceptible to the other participants; even when they are perceptible, they may not be noticed immediately.
- Acoustics, speakers, and microphones are of variable quality, and are affected by the location of their placement and their quality/technical specifications. This can lead to varying audio experiences and comprehension by participants in the same conference.
- Lighting variations in the participants' different locations can impact the ability to see other participants.

⁴⁰ See <https://zoom.us/accessibility/faq#faq5> for closed-captioning on Zoom.

⁴¹ An affidavit covering the facts set forth in this section is available from Daniel Saroff, CPCS Chief Information Officer.

- The size of the screen of a user’s device will also impact their experience of the videoconference. Zoom can be used on a smart phone. The screens of phones released in 2019-2020 are about six inches in diagonal measurement; older phone screens are significantly smaller. Even on modern phones, due to the relatively small size of smartphones screens, this creates significant difficulty in both observing and interpreting the reactions or expressions or mannerisms of participants, which is key to social cueing.
- Zoom users typically use the webcam built into their device (computer or smartphone). The image of the user shown on the Zoom screen therefore depends on how close the user is to their device. Typically, if someone is sitting in front of a computer, other Zoom participants will see their head and part of their torso. If someone is using Zoom via a smartphone or other handheld device, other participants may see only their face. Also, the quality of webcams varies greatly between different devices.
- Users with a higher degree of technical experience or familiarity with Zoom will have a better quality experience and will be better able to adjust and make improvements during a video hearing.

In short, users with better technology, better and more reliable Internet access, and more familiarity with technology (especially Zoom) will have a better video hearing than others. Indigent clients with only basic technology will have an inferior experience.⁴² This is fundamentally unfair; the quality of the *courtroom* and *judicial evaluation* experienced by each client should never depend on financial wherewithal.

There are other inherent weaknesses in the Zoom program that affect *all* users and diminish users’ ability to fully comprehend the information communicated during the video hearing experience. Many of the physical and auditory cues we use both consciously and sub-consciously in communicating in face-to-face interactions are lost or impaired during a videoconference for a number of reasons, including:

- The transmission of audio during a videoconference results in the compression and clipping of speech. This degrades comprehension, especially for ESL or hearing-impaired participants
- The screen and the video camera are not fully aligned; typically they are off-set. Therefore, a person looking at the screen to watch other participants will not be looking at the camera. This might make it appear that they are not meeting other participants’ eyes – indeed, it is not possible for participants in a videoconference to actually look each other in the eye – which can be erroneously perceived as disengagement or dissembling.

⁴² See *Bearden v. Georgia*, 461 U.S. 660, 664 (1983) (“[T]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”) (citation omitted).

- Neither the video or audio feed during a Zoom videoconference is in “real-time” – there is a short delay, referred to as “latency.” This can cause participants to speak over each other, in violation of social norms. Latency can also cause delays in responses to questioning, which may be erroneously attributed to the participant rather than the technology.
- During a Zoom hearing, a participant sees not only the other participants but also their own image. This is distracting and makes maintaining attention to the proceedings more difficult.
- In non-virtual interactions, the body is positioned to indicate attention or participation or as a mode of expression (e.g., some people ‘speak’ with their hands). In Zoom meetings this positional attention, which is used to indicate things like investment, interest, honesty, openness, engagement, is lost because the video, due to lack of resolution can’t capture the subtleties, it’s limited frame of view (only part of the body is seen), and bodily position bears no representation to how people may actually be positioned. This creates perceptual dissonance.
- The way in which video images are digitally encoded and decoded through the Internet results in a variety of artifacts – byproducts of the technology itself – such as freezing, pixilation, blurring, or temporal separations between audio and visual. As the use of videoconferencing has exploded during the pandemic, users have noted how these disruptions, some of which can be subtle enough to escape, can “confound perception and scramble subtle social cues,” making participants “feel vaguely disturbed, uneasy and tired without quite knowing why.”⁴³

Together, these problems with Zoom (which are common to all videoconference platforms) render video hearings dangerous for clients. Video hearings should only be used for non-“critical stage” hearings – that is, hearings at which liberty interests and other substantial rights are not at stake – unless the client understands the limits of the technology and greater likelihood of an adverse outcome and nevertheless knowingly and intelligently chooses to proceed in this manner.

IV. Client access to video technology

Indigency

Many clients are indigent and lack access to the technology or confidential space needed to participate in video hearings. While more than 80% of adults in households earning \$30,000 to \$100,000 per year have broadband subscriptions at home, only 56% of adults earning less than

⁴³ Kate Murphy, *Why Zoom is Terrible*, New York Times (Apr. 29, 2020).

\$30,000 per year have home broadband.⁴⁴ Counsel must ask whether the client has access to a computer, tablet, cellular phone, or other mobile device that enables them to access the video platform. Further, does the client have access to the Internet or a wi-fi connection in a private place? And does the client have enough minutes of data necessary to access a hearing or an entire hearing? If not, counsel must ensure that the client is not prejudiced because of the lack of access.

If the client does not have access to the Internet or a device, counsel should consider filing a “motion for access,” asking the court to (a) allow the client to use a room in the courthouse with a computer and internet access, or (b) pay for a device or data access for the client out of court funds.⁴⁵ Further, there are several charitable organizations that may be able to help counsel obtain a device or Internet access for the client.⁴⁶

In addition to technology, counsel should ensure that the client can access the hearing platform prior to the hearing. The most common platform, Zoom, is free and fully functional for court hearing and training attendees; it is also free for computer one-to-one use. Counsel and clients can download Zoom for mobile devices and computers at <https://zoom.us/download>.

Remind clients to use their name when they register and on their profile so that the court will recognize them and move them from the virtual waiting room to the virtual courtroom. Importantly, clients will not receive the link for the hearing directly from the court; counsel must forward the link to the client. (Counsel should remember to remove the email addresses of all other attorneys and the court before forwarding the video hearing link to the client.)

Counsel should also consider whether clients have cognitive, physical, mental health, or other challenges that make it impossible for them to negotiate this process without counsel present with them. If a client is unable to negotiate this process without counsel, counsel should consider asking a family member, hospital staff, or a social worker⁴⁷ to assist the client.

Detention & Incarceration

⁴⁴ Mignon Clyburn & Jon Sallet, *Make broadband far more affordable*, Boston Globe (June 27, 2020) (citing the Pew Research Center), available at: <https://www.bostonglobe.com/2020/06/27/opinion/make-broadband-far-more-affordable/>.

⁴⁵ *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985) (“[J]ustice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake”).

⁴⁶ See, e.g., One Can Help, at onecanhelp.org.

⁴⁷ Counsel should consider filing a motion for funds to hire a social worker to assist the client.

Contact. For safety reasons, counsel may not wish to visit a DYS facility, a prison, or a jail in order to have in-person contact a client.⁴⁸ Nevertheless, counsel will still need to contact and prepare the client for hearings. Regular contact – in person, by video, and/or by phone, will foster positive client relations with detained and incarcerated clients.

Before calling a detained or incarcerated client, counsel must first determine if the client is being held by the Department of Corrections (DOC), a county house of corrections (HOC), or the Department of Youth Services (DYS).

If the client is being held in a DOC facility, counsel’s updated phone number must be on file at that facility, especially if counsel will be calling from a cellular phone.⁴⁹ Once this is done, counsel can call (M-F, between 9:00 a.m. and 5:00 p.m.) and ask the facility to arrange for a call with their new or existing client. Facilities will generally set this call up within 24 hours, and will give counsel a specified time window (*e.g.*, between 9:00 and 11:00 a.m.; between 1:00 and 4:00 p.m.; between 7:00 and 9:00 p.m.).⁵⁰ If counsel calls after 5:00 p.m. on weekdays or

⁴⁸ Unlike HOC facilities and other DOC facilities, the Mass. Treatment Center does not have a no-contact room that would allow counsel to speak with clients in person with a Plexiglas protective barrier.

⁴⁹ Attorneys can change their telephone numbers on the PIN list of inmates in DOC custody during the pandemic. Attorneys requesting to change their telephone numbers must call DOC’s Office of Investigative Services (OIS) at 508-958-3668, which will be staffed on Mondays through Fridays from 8:00 a.m. to 3:00 p.m. Attorneys should provide their old telephone number, the new telephone number, and the name(s), DOC commitment number(s), and current housing facility (facilities) of their clients. The contact person in OIS for this process is Officer Thomas Perry. OIS staff will make the requested changes and notify the facility, who will then notify the inmate. If, after completing this process, there are any difficulties with the change in number, attorneys should contact Assistant Deputy Commissioner Pat DePalo at: Patrick.Depalo@MassMail.State.ma.us.

⁵⁰ <u>Facility</u>	<u>Contact #</u>	<u>Off-Hours # (ask for Shift Comm.)</u>
Boston Pre-Release	617-822-5000 x 6125	617-822-5000 x 6135/6100
Lemuel Shattuck Hosp.	508-889-2742	617-971-3384
MCI-Cedar Junction	508-660-8000 x 111	508-660-8000 x 201
MCI-Norfolk	508-660-5900 x 424	508-660-5900 x 477
Pondville Corr. Ctr.	508-660-3924 x 303	508-660-3924 x 311
Old Colony Corr. Ctr.	508-279-6836	508-279-6836
Mass. Treatment Ctr.	508-279-8150	508-279-8301
MCI-Concord	978-405-6100 x 418	978-405-6100
MCI-Shirley	978-425-4341 x 4122	978-425-4341
MCI-Framingham	508-532-5100 x 322	508-532-5100 x 396

anytime on weekends, counsel should ask for the Shift Commander. Counsel should provide the Shift Commander with time windows that they can receive a return call. Inmates are then given the message that they need to call their attorney during that time window and are allowed access to the unit phone.

To arrange for the DOC-held client's presence at a video hearing, counsel must call the facility, give the Shift Commander the court date and hearing time, and explain that the client must be present via video. The client should also be able to arrange this with their facility caseworker as well. There is a slightly different procedure for clients at the Mass. Treatment Center⁵¹ and federal detainees held at MCI Cedar Junction.⁵²

The process for contacting clients in county HOCs varies by county. Counsel may need to reach out to the designated staff at the facility, identify their client, and explain when counsel is available to accept the inmate's call. Currently, [Barnstable County](#), [Bristol County](#), [Berkshire County](#), [Dukes County](#), [Essex County](#), [Franklin County](#), [Hampden County](#), [Hampshire County](#), [Middlesex County](#), [Norfolk County](#), [Plymouth County](#), [Suffolk County](#), and [Worcester County](#) protocols and points of contact are available online. Clients housed at HOCs are more likely to be able to access video conferences with the court, since bail reviews at these facilities have been done via video pre-pandemic. In many counties, counsel need not contact the facility to ensure the client's participation; the clerk will set everything up.

The process for contacting clients in DYS custody varies by facility. Counsel should contact the clinician assigned to the client in order to arrange confidential phone or video conferences. DYS is generally more flexible in dealing with counsel than DOC or HOC facilities. Key contact information for counsel is available on MyGideon at:

[https://www.mygideon.org/Massachusetts Committee for Public Counsel Services/CPCS Cri](https://www.mygideon.org/Massachusetts_Committee_for_Public_Counsel_Services/CPCS_Cri)

NCCI-Gardner	978-630-6000 x 100	978-630-6000
North Eastern Corr. Ctr.	978-371-7941 x 1209	978-371-7941
S. Middlesex Corr. Ctr.	508-875-2887 x 4100	508-875-2887 x 4100
Souza Baran. Corr.Ctr.	978-514-6500 x 6103	978-514-6500

⁵¹ As of July 1, 2020, the Mass. Treatment Center has set up a process to allow experts to interview clients by video. Rooms will be available Monday through Friday from 8 a.m. to 11 a.m. and from 1 p.m. to 4 p.m. To schedule a meeting, counsel is advised to email Donna.Swanson@doc.state.ma.us with a cc to Susan.Plant@doc.state.ms.us at least two days in advance. According to the DOC Legal Department, rooms with videoconferencing capability also will be available to attorneys for client communication on a first-come first-served basis.

⁵² For federal detainees held at MCI Cedar Junction, counsel should contact Vanessa Rideout at the Federal Unit as the Correctional Program Officer from 8:30 p.m. - 3:00 p.m., M-F, at (508) 660-3000, x 106, or by email at Vanessa.Rideout@doc.state.ma.us.

[minal Defense Resources/Post Conviction/GCL Revocation and DYS Advocacy/Department of Youth Services.](#)

Counsel should to speak with any detained/incarcerated clients well in advance of the video hearing. Counsel must ensure that the facility housing the client has a secure, confidential room for a video hearing and that the client is allowed to access it. Counsel should review all of the substantive material regarding the hearing (as counsel would if the hearing were in person) and also explain the video hearing process. In addition, counsel should advise the client regarding proper dress, demeanor, camera angle, and other “Zoom tips” discussed above. Counsel must keep in mind that there will be less freedom for an inmate to adjust their setting, clothing, or privacy while detained/incarcerated. If necessary, contact the staff identified in the facility and explore what accommodations can be made.

Further, counsel must be able to confer with the detained/incarcerated client at any point during the video hearing in a breakout room using the video platform. If that is not possible, counsel should ask facility staff to make available to the client a private phone line, in addition to the video conference line, so that the client can have confidential attorney-client communications during the hearing. Instruct the client how to turn off their camera and mute the audio before speaking with counsel.

If private attorney-client communication is not possible with the detained/incarcerated client using the video platform, counsel should consider attending the hearing with the client in the attorney interview room (consistent with current CDC⁵³ and DPH⁵⁴ guidance) if the facility is open to attorney visits. If counsel will be traveling to the facility, check ahead of time regarding what materials (legal papers and technology) may be brought to the facility. Counsel may need to secure permission for certain materials in advance from the superintendent.⁵⁵

V. Preparing the client

Notice to the client

As noted above, clients are entitled to notice of the proceeding as a matter of due process. At the beginning of care and protection cases, they are entitled to notice as set forth by G.L. c. 119, § 24 and Juvenile Court Rule 5. The fact that the hearing is by video, rather than in-person, has no bearing on statutory and constitutional rights to notice. An email summons to a client,

⁵³ See <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>.

⁵⁴ See <https://www.mass.gov/info-details/covid-19-public-health-guidance-and-directives>.

⁵⁵ See 103 CMR 486, available at: <https://www.mass.gov/doc/cmr-486-attorney-access/download>.

particularly a client without reliable technology, is not sufficient notice.⁵⁶ An email Zoom invitation is no notice at all.

The court might ask counsel to serve notice on the client or represent to the court that the client has received actual notice. Counsel should not do either of these things absent express direction from the client. If the petitioner cannot show that proper notice was given to the client, counsel should seek a continuance and ensure that the petitioner (or the court) provides service by alternative means likely to give the client notice.⁵⁷

Client meetings before the hearing

Counsel should communicate with the client as much as possible in preparation for the hearing. If the client is not present at the time of counsel's appointment (which will be the norm before in-person hearings resume), counsel should work with the court in order to get client contact information.

First impressions are important, and in-person initial meetings (following safety guidelines) are strongly recommended.⁵⁸ If the initial meeting is by video or by phone, counsel should ensure that the client understands the importance of confidential communication. Encourage the client to speak to counsel without others in the room. Warn the client about the limits of attorney-client confidentiality in the presence of third parties. Ask the client about their preferred name and pronouns.

Choosing to meet in person during the COVID-19 state of emergency is a personal decision for each attorney. Public health guidelines suggest that outdoor meetings present less risk of virus transmission. If meeting indoors, consider spaces where counsel can open windows, wear a

⁵⁶ For example, G.L. c. 119, § 24 states that the Court must provide notice of a care and protection petition by personal service on parents. Under the statute, publication notice is only permissible if personal service is not possible; email notice is not even contemplated.

⁵⁷ *James v. Townsend*, 104 Mass. 367, 372 (1870) (If “no personal service is made on him, or if the service is defective or insufficient, by reason of mistake as to the place where the summons ought to have been left, the court, upon suggestion thereof by the plaintiff, is required to order a continuance and further notice to the defendant. And in any case in which the defendant does not appear, the court may, in their discretion, order the action to be continued and further notice given to him in such manner as the court may direct... Presence within the Commonwealth, without proper service of process or notice, does not give jurisdiction to the court.”) (internal quotations omitted). Of course, if counsel is in communication with the client and the client wishes to have the hearing immediately, counsel may waive the client's right to proper notice.

⁵⁸ CAFL currently gives discretion to counsel whether to meet in person with clients during the pandemic. But it still requires client contact.

mask, and maintain physical distancing. Try to ensure that the meeting is as private as possible. Also, consider gathering preliminary/background information via video conference and reserve in-person meetings for the most sensitive aspects of the interview.

Spend time with the client discussing communication during the video hearing, including signals to counsel about confusion, the need for a break, and the need for confidential communication. See [Client Communications Strategy](#) below.

Set up a post-hearing de-briefing session with the client. With video hearings, counsel loses the ability to meet the client in the lobby after the hearing in order to explain what happened, answer questions, and allow the client to vent if the hearing did not go well. A post-video-hearing meeting is essential for client relations.

Substance of hearing

Counsel should prepare a client for the substance of a video hearing in the same way counsel would prepare the client for an in-person hearing. Because some clients will not process information as well by phone or video as they would in-person – especially since counsel cannot easily share documents with, or take notes for, the client – counsel should budget extra time to explain the proceedings. Counsel should (respectfully and delicately) ask the client to repeat back key information, and then have the client explain it in the client’s own words, to ensure that the client understands. Simply asking the client, “Do you understand this?” is not helpful; some clients will say that they understand in order to please counsel or to mask a lack of comprehension.

If counsel is meeting with the client via videoconference, use the “share screen” function to look at documents together.⁵⁹ Alternatively, send the client documents via email (if the client has email) or by mail.

Note that, for some clients, maintaining concentration for extended periods of time on the phone or over video may be challenging. Instead of long calls, consider making several shorter calls over a couple of days (if time permits).

Nature of a Zoom hearing

Counsel should prepare the client about the nature of a Zoom hearing and – for clients who have some familiarity with in-person court hearings – how it differs from an in-person hearing.

⁵⁹ Consider scanning and saving all of the court documents so you have a full organized PDF of the discovery.

Explain to the client that the hearing is not “only” a video conference, like a video call to friends or family; it is a courtroom on the screen. The video hearing must be treated with the gravity of an in-person hearing.

Counsel should explain whose images will appear on the screen – including the judge, clerks and other courtroom personnel, lawyers, and parties – noting that For the Record (FTR), the recording software, will get its own box on screen.

Counsel should tell the client:

- Not to speak during the hearing except when questioned by counsel or the judge or otherwise invited to speak. The client must become familiar with the “mute” function.
- To signal counsel, using the method agreed upon, when the client wishes to communicate or needs a break from the hearing. (See [section V](#), below).
- Not to use the “chat” function with counsel or anyone else, unless the court has set up a confidential “chat” function for counsel and the client. Note that the “host” of the virtual hearing (the Court) may be able to view all “chat” conversations, even those that say “private,” after the hearing ends. (It is far better for counsel to ask the court to set up a confidential breakout room with the client. (See [section V](#), below)
- To maintain a “neutral” (but engaged and interested) face to the extent possible during the hearing, because every participant in the hearing can observe the client’s face during the hearing.

Counsel should recognize that some clients, particularly those without a high degree of English proficiency, may have difficulty processing information in a video format. Other clients, including those with attentional challenges and mental health issues, may find it difficult or exhausting to process information without the ability to read body language and other non-verbal cues. For those clients, additional breaks might be necessary, and counsel may need additional time to explain to the client what is happening. With the client’s permission, counsel should explain to the court that a given client might need accommodations in the form of additional breaks or time away from the screen so as to fully process the hearing.

Counsel should also recognize that it is difficult to assess the client’s emotions after a video hearing; counsel cannot see and assess the client’s body language or de-brief with the client in the lobby after the hearing. Counsel must take time to arrange a confidential post-hearing de-briefing session with the client.

Client communications strategy

- **Signals, methods, limitations**

Confidential attorney-client communications during a video hearing can be complicated. Counsel must make sure that the client understands the importance of confidential communication during the hearing, the manner of requesting it, and the manner of accessing it.

For example, counsel and the client may agree to text each other if they wish to have a confidential communication. (Be careful – communicating by text during a video hearing may be distracting for counsel, especially if counsel is conducting an examination or taking notes. It may also be distracting or annoying for the judge, who will see some aspect of the exchange. It may be better to limit the texting to a *signal* for confidential communication, which will occur in another fashion.) Alternatively, counsel and client may agree on a physical signal (hand raising, raising an index finger) that the client can use if you need to confer. Tell the judge at the start of any proceeding that you intend to use this signal during the hearing. Be sure that the clerk/host will put you and your client (including any supports who might be asked to join) in a zoom “breakout” room when you request it. Counsel must remember to ask for an interpreter, if needed, to accompany counsel and the client into the breakout room. Be aware that you might not be able to use the platform to indicate you are ready to return to the hearing. Consider asking the clerk/host to check in every 2-3 minutes (or so) to see if you are ready to return. Ideally, you will have somebody in the “courtroom” to ensure that there is no improper communication between the judge and the other lawyers or parties.

In addition, counsel may wish to set up a system where counsel asks the judge for a brief recess and then texts the client in order to set up a brief, confidential phone call. Remember to mute the microphone and turn off the camera – and to tell the client to do the same – during such calls.

In a CRA case where the parent is unrepresented, counsel should also ensure that the client’s family/support has a means of requesting consultation with counsel and/or the client.

Remember that communication with clients about and during video hearings – including merely agreeing on a method and signal – may be complicated by the client’s history of trauma, substance use disorders, cognitive limitations, and language barriers. Discuss possible problems or limitations with the client prior to the hearing.

- **Confidentiality considerations**

The client can have friends, family, or professional supports – including social workers, nurses, hospital staff, or foster parents – assist them in setting up the video hearing, but the client should be alone for any confidential pre-hearing attorney-client communications. The presence of persons not part of the legal team will, in most circumstances, render client communications no longer confidential.

As discussed in [section V](#) below, the client should also be alone when testifying. Remember, however, that many of our clients lack private space that is appropriate for a video hearing. For child clients in congregate care, or for adult clients in hospital or residential treatment programs,

counsel may need to speak to facility staff to ensure that the client can appear on video alone, without being overheard.

Direct & cross

Preparing the client for direct and cross on video is similar to preparation for an in-person hearing. However, some aspects of the video examination process might be disconcerting to the client (and to counsel). Questions in a video hearing do not come from lawyers at specific counsel tables; they come from a random box on the screen/monitor. Counsel should explain to the client what each attorney looks like, whom that attorney represents, and what position or role that attorney's client has in the litigation.

Instruct the client to look into the device's camera, not the face on the screen, when answering questions. The judge may view the client as distracted or less trustworthy if the client is looking to the side, not at the camera.

Remind the client to speak more slowly than usual so that, even if the bandwidth is poor, the judge can hear every word. Remind the client that, if they did not hear the question or did not understand it, they must say so; they must not guess. If the client is being impeached, or their recollection is being refreshed, with a document on the screen, they must review it carefully and, if necessary, ask for additional time to do so if the image isn't clear.

Time lags on video hearings make objections a tricky business. Instruct the client that, if they hear (or see, depending on the instructions to counsel) an objection, to stop speaking immediately; the court will instruct them whether to continue. Practice this during a dry run.

Remind the client that they cannot use notes, document, or anything else to help them testify, and they cannot have a "support person" next to them without express permission of the court. For further information about witness conduct, see [section VII](#) below.

The client's technology preparation

Video hearing platforms are complicated, and they may be particularly difficult to use for clients with mental health issues, developmental delays, or language comprehension issues. Counsel should be prepared to review the points below several times with each client. If the client, due to age or disability, is not capable of using the technology (or understanding counsel's advice about the technology), counsel should consider asking a trusted family member to assist the client.⁶⁰ Of course, in most cases, those family members should not be in the same room as the client, or listening in on attorney-client communications, once the client understands the video technology.

Counsel should practice with each client well ahead of the hearing in order to ensure the client's technological competence and effective presentation. Counsel should explain to the client that

⁶⁰ See Mass. R. Prof. C. 1.14(b) & Comments.

video hearings on Zoom are very different from video chats on popular apps, such as WhatsApp and FaceTime.

- **Working device**

Counsel must confirm that the client has a working device – a phone, tablet, or computer – with which to participate in the virtual hearing. (See also [section IV](#) above). For telephonic participation, the client need only have a working phone. (See [section V](#) regarding the limits and dangers of telephonic hearings and the client’s telephonic participation in video hearings.) For video participation, the client’s device must have a working camera and a working microphone. Unfortunately, many indigent clients lack devices suitable for video participation in video hearings.

If the client does not have a device, or the device lacks a working camera or microphone, counsel can insist on an in-person hearing. In the alternative, counsel should file a “motion for access,” asking the court to (a) let the client use a room at the courthouse with a computer and internet access, or (b) pay for a device and data out of the court’s own funds.

Note that the invitation to a Zoom hearing is via email. The link can also be copied and pasted into a text/SMS message. However, be sure your client has the ability to receive the link (a working email address, phone number, Facebook Messenger account, iMessage, WhatsApp, etc.).

- **Working and reliable wi-fi/cellular service**

Counsel must ensure that the client has working and reliable wi-fi or cellular service to use during the virtual hearing.

If the client does not have a device that can connect to the Internet for a video hearing, counsel can work with the client to find another location with reliable, free wi-fi and a private space, such as a nearby library, for the client to attend the hearing.⁶¹

If the client is using wi-fi, urge the client to ensure that no one else on the network is streaming videos, doing online gaming, or otherwise web-browsing. If the wi-fi is not working, suggest that the client re-start the device or the router.

If the client needs a computer at a public library, or needs wi-fi access at the library, the client should ensure that the room used is private. It may be helpful if counsel contacts the library (with the client’s permission) to request a private room. If local libraries are not open, they may still have publicly accessible wi-fi available in their parking lots. Some other government

⁶¹ Certain non-profit organizations like One Can Help may be able to assist the client in obtaining their own device and Internet access at their home.

building parking lots may also have publicly accessible wi-fi, but the client should ask permission well ahead of time to park in the lot.

If the client is accessing the video hearing at a fast food restaurant or coffee shop in order to use free or low-cost wi-fi, the client should choose the quietest possible spot, use headphones, and keep on “mute” when not speaking. The client must also let counsel know where she is so that counsel can explain likely distractions and noises to the court.

Finally, indigent clients may have very limited data plans or need to purchase additional minutes. Counsel should explore with the client whether the data plan provider will, as a charitable measure, give the client additional or unlimited minutes, at least temporarily. If that is not possible, counsel must ensure that the court deciding the matter understands that the client has insufficient minutes or data for a hearing (or for the duration of a long hearing). In such cases, counsel should ask the court to allow the client to use a room in the courthouse with a computer and internet access. Alternatively, counsel should file a “motion for access” (not an ICCA funds motion), asking the court to fund the client’s access to a phone, tablet, or computer, as well as internet access. Court payment for such access is, in many respects, no different than court payment for interpreters or ADA accommodations. Finally, if the client cannot access the hearing by video for any reason, counsel can move for the court to hold an in-person hearing.

- **Use of the video hearing platform - basics**

Counsel must ensure that the client knows how to use the video platform. Have the client test the video platform (www.zoom.us/test), and walk the client through the platform’s various features. Explain how to use the camera, the microphone, the muting function, and other features. Do a dry run or practice hearing with the client, testing the platform’s functions.

Explain to the client that the device should be set for “gallery view” so that the client can see everyone participating in the hearing. Note that gallery view may be limited to only a few participants on phone screens, and certain phones may not support gallery view at all. If the client cannot access a gallery view that includes all participants, note this for the record. Consider requesting an in-person hearing and/or access to the appropriate equipment.

In addition, counsel should share the “Zoom basics” YouTube links in the [Introduction](#) and the “Handout for Clients to Prepare for Zoom Hearings,” *see* [Addendum II](#), with each client before the hearing.

- **Use of the video hearing platform – advanced**

Counsel should work with the client to ensure more than just a working connection, sound, and picture. With a little work, counsel should be able to help the client make a good impression on the judge, too.

Name. Counsel should make sure that the client knows how to change their name on the screen to reflect the name the Court will recognize; otherwise, the court will lose critical time in identifying the parties in order to admit them to the hearing from the virtual waiting room. The Zoom Help Center has specific instructions for how a client can change their screen name by entering and editing their profile information, <https://support.zoom.us/hc/en-us/articles/201363203-Customizing-your-Profile>.

Background. If the client is using their real background, ensure that the client removes clutter, art, or objects that might subject the client to judicial scrutiny. Most clients will not have the technological ability to use a fake or stock background, and some courts disable this feature. If the client does have that ability and the feature is not disabled, counsel should teach the client how to adjust the background.⁶² A fake or stock background of a courtroom is best. Beaches and vacation spots may suggest that the client is not taking the matter seriously. If the client is using a fake background, counsel should make sure that the client's face does not appear fuzzy or distorted.

Lighting. The client must set the proper lighting. Insufficient lighting may make the client look menacing; lighting that is too bright in front of the client might make it hard for the court to see the client's facial features. Further, the client should not have bright lights right above the client's head (halo effect) or bright windows behind them, which will make their faces too dark for the court to distinguish features.

Camera angle. The right camera angle is necessary to show the client most favorably and to reduce the judge's negative implicit biases.⁶³ Assessments of trustworthiness have been shown to be linked to camera angle; eye-level filming results in the most trustworthy assessment.⁶⁴

⁶² Incarcerated and hospitalized clients, as well as those in residential programs or congregate care facilities, will have little choice or control as to the background, lighting, or camera angle for their presentation or image on the screen. With this in mind, counsel should nevertheless make every effort to help the client make the most favorable presentation possible.

⁶³ See *Commonwealth v. Bergstrom*, 402 Mass. 534, 549-550 (1988) ("In reality ... the camera unintentionally becomes the juror's eyes, necessarily selecting and commenting upon what is seen.... Composition, camera angle, light direction, colour renderings, will all affect the viewer's impressions and attitudes to what he sees in the picture. ... [T]he picture conveyed may influence a juror's feelings about guilt or believability. For example, the lens or camera angle chosen can make a witness look small and weak or large and strong. Lighting can alter demeanor in a number of ways, misshaping features or, if directed from below, giving witnesses an evil or sinister cast.").

⁶⁴ Andreas M. Baranowski & Heiko Hecht, *Effect of Camera Angle on Perception of Trust and Attractiveness*, 36(1) *Empirical Studies of the Arts* 90–100 (2018) ("[A]ctors were rated as most trustworthy when filmed from eye-level, and less so when the camera was lowered or raised[.]"). This effect is so pervasive that even corrective judicial instruction has not been

Suggest that the client sit at a table or desk, or stand. The client can boost the device/camera to eye-level by using books, boxes, or similar materials.

- **Client presentation and behavior while on camera**

Counsel must discuss with the client the importance of dress, tone, decorum, and demeanor. Clients should dress and conduct themselves as if they were appearing for an in-person hearing. (See also [section VII](#) regarding opportunity for incarcerated clients to dress in court-appropriate civilian attire.) If the client lacks air conditioning and cannot dress in long sleeves, counsel should inform the court.

It may be hard for the client to give the Zoom hearing their full attention despite the competing distractions in their room or house. But judges may perceive client distraction as indicative of lack of seriousness or indifference to the outcome. To this end, counsel must discuss with the client the importance of attending the video hearing in a quiet space without distractions. For example, to the extent possible, the client should:

- Not eat during the hearing.
- Have children and pets in another room. If children cannot be removed from the room, the client should use earbuds/headphones. The client should also use “mute” unless speaking.
- Ensure that televisions and radios are off.
- Ask others in the home to be silent during the hearing.

If the client cannot eliminate interruptions from children, pets, and others in the household, counsel should inform the court. Most judges are understanding about the difficulties of testifying from home, provided they are warned ahead of time. In addition, if competing sounds or interruptions are inevitable, the client must know how to use the mute function and turn it off only when speaking.

Warn clients of the natural tendency to look at one’s image and use it as a mirror; the client should not fix their hair or do their makeup. If looking at their own image is too distracting, counsel can explain to the client how to “hide” their own image.⁶⁵

sufficient to mitigate the prejudicial effect of camera perspective in mock juror scenarios. G. Daniel Lassiter & Andrew L. Geersa, *Videotaped Interrogations and Confessions: A Simple Change in Camera Perspective Alters Verdicts in Simulated Trials*, 87(5) *J. Applied Psych.* 867–874 (2002).

⁶⁵ Instruction for hiding the client’s image during testimony may be found at: <https://support.zoom.us/hc/en-us/articles/115001077226-Hiding-or-showing-my-video-on-my->

Finally, clients who are connecting to Zoom by phone cannot see their own image in Zoom, but everyone else can. Counsel must warn the client. Counsel should also explain that the client should stay in one location and focus on the camera. The client should not take the phone on a “walk” through the house, do chores, or take bathroom breaks without court permission. Clients should also be warned that they should not exhibit anger or hostility in facial or body movements, because the other participants can see it; clients should do their best to exhibit a neutral facial demeanor during the testimony of others (and while being cross-examined).

- **Special considerations if client has only telephonic access to hearing**

If the court insists on using telephonic, rather than video hearings, counsel should consider objecting as a matter of due process. Due process guarantees clients the right to meaningfully participate in the proceedings, the right to counsel, and the right to an unbiased fact-finder who can meaningfully perform the functions of a neutral arbiter. Each of these aspects of due process suffers when the parties participate telephonically, rather than by video (much less in person).

A judge’s ability to assess witness credibility is hampered if they can’t clearly see the witness’s mouth, eyes, and body language. Emotions such as laughing, crying, or even heavy breathing consistent with distress may be difficult to discern. Similarly, counsel’s ability to examine and impeach is hampered if counsel can’t see the witness.⁶⁶ Further, telephone hearings do not allow for the visual sharing of documents on a screen.

Nevertheless, there may be rare occasions when the client’s best interests are served by a telephonic hearing. For example, it might be preferable for the court not to see a particular client who, based on any of the complicating factors addressed above, does not present well or cannot remain calm during a hearing. In such cases, counsel should discuss the pros and cons of a telephonic hearing with the client. Counsel must not proceed with a telephonic hearing without the client’s express consent when a video (or live) hearing is otherwise available.

VI. Lawyer preparation

Video hearings are challenging, and preparation for video hearings take longer – and more planning – than for in-person hearings. Counsel must prepare not only for the substance of the hearing but also for the technological challenges of the hearing for counsel and the client.

Court/county-specific rules or guidelines

[display#:~:text=To%20hide%20your%20video%20from,menu%2C%20then%20choose%20Hide%20Myself.](#)

⁶⁶ See *Commonwealth v. Johnson*, 417 Mass. 498, 503 (1994); see also *Berry v. Kyes*, 304 Mass. 56, 57 (1939) (judge who has heard *and seen* the witness in best position to assess credibility).

Many courts and/or counties have specific rules governing virtual hearings. Counsel must obtain a copy of the rules and follow them. Ask to be put on court or CPCS email lists. Regularly consult the applicable court webpages and/or call the clerk for a copy of updated, written rules. Such rules supersede any specific instructional guidance in this manual.

Preparation of exhibits

Most courts and/or counties have their own procedures for the proffering, sharing, and admission of exhibits, and counsel must follow those procedures. Many clerks' offices will, upon request, offer guidance. Generally, counsel should scan and save all potential exhibits. Counsel should also save any emails by which counsel sent exhibits to the court and keep a list of exhibits filed.

Counsel should prepare a cover page for each proposed exhibit with the docket number, the case name, the proffering party's name, an identification number for the exhibit, and the name of the exhibit. For example, an exhibit might have a cover page with a title, "Docket No. 2017BO0038, *Care and Protection of Diaz Children*, Respondent Mother Sarah Diaz' Proposed Ex. 3, Substance Use Disorder Program - Certificate of Completion." In addition, each exhibit should have a header or footer with this information on it, including the page number. This information makes it much easier for judge to know what they are looking at, because they cannot simply pick up a document and rifle through it. Be thoughtful about naming exhibits; the names used by counsel may impact the judge.

Be sure to send exhibits (and motions or other pleadings) to the court well before the hearing. Most courts require that pleadings and exhibits be submitted electronically.⁶⁷ Review this process with the clerk well before the hearing.

In most courts, counsel is expected to confer with DCF and any other adverse parties prior to the hearing to stipulate to the admission of exhibits in advance where possible, with objectionable exhibits to be addressed by the judge. Stipulated exhibits are then pre-marked for admission to

⁶⁷ Pleadings can, for the time being, be electronically signed. Pleadings and exhibits can – and in certain cases must – be electronically filed. For more guidance, see recent SJC orders regarding electronic signatures and e-filing:

- Electronic signatures of attorneys and self-represented parties: <https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-updated-order-authorizing-use-of-electronic>.
- Email services of documents: <https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-order-concerning-email-service-in-cases-under>. (Note that this amendment to Mass. R. Civ. P. 5(b) may not apply in a given case, but many trial court divisions have similar rules; counsel must check.)

avoid having to do so during the hearing. To physically place the exhibits on the record, some jurisdictions then call for the original, stipulated exhibits to be delivered to the clerk's office prior to the Zoom hearing. Counsel should not let such procedures alter their normal practice regarding objections to documents or the contents of those documents; if counsel would object to the admission of evidence during an in-person hearing, they should object during a video hearing. If counsel must subpoena declarants in order to preserve an objection to hearsay within a DCF record, a court investigator report, or a GAL report, counsel must do so before the video hearing.⁶⁸

Courts may also have rules governing unstipulated documentary exhibits. Generally, Zoom has a "share screen" option that allows counsel to present a document (or a video) to the judge directly from counsel's screen. Practice this ahead of time; do not plan to figure it out for the first time at the hearing.

As for stipulated and unstipulated exhibits, counsel should make sure that all other counsel and the clerk's office have the correct documents. This is more than just a courtesy. Court time is a precious resource, and the clerks (and the judges) should not have to take their time sorting out discrepancies.

Preparation of witnesses

Many lay witnesses – including relatives, friends, and service providers – have the same serious barriers to video participation as clients do. For example, they may not have access to appropriate technology to access the hearing; they may not have an email address at which to receive a Zoom invitation; they may not be familiar with Zoom or another video platform used by the court; they may not, even with a subpoena, be able to miss work in order to participate; and they may not have a secure and confidential place to testify.

Courts usually place the burden of securing witness testimony on the party proffering that witness's testimony. For example, in child welfare cases, parents challenging hearsay statements in court investigator reports and DCF records must subpoena the declarants; if they do not, they waive any objection to the hearsay.⁶⁹ In the context of video hearings, where the declarant has no access to relevant technology, this burden is unfair. The client's right to rebut the State's adverse allegations cannot depend on counsel's ability to overcome a witness's financial and technological obstacles to participation. Counsel should move to strike hearsay in court

⁶⁸ *Adoption of Luc*, 484 Mass. 139, 144 (2020).

⁶⁹ *Adoption of Luc*, 484 Mass. 139, 144 (2020).

investigator reports, GAL reports, and DCF records if the declarant is unavailable based on technological impediments.⁷⁰

To address these concerns, the courts should (a) provide an online training manual that walks witnesses through the video technology step by step; (b) provide a secure room at the physical courthouse for witnesses who lack access to technology or a secure, confidential space; (c) demonstrate a willingness to continue hearings if counsel can show that the failure to produce a witness was related to any of the barriers identified above; and (d) strike hearsay when the declarant is unavailable for technological reasons.

The courts may have specific procedures for the examination and impeachment of witnesses. Counsel must follow these procedures, and must ensure that counsel's lay and expert witnesses are aware of them and how to follow them.

- **Lay**

Many lay witnesses will face the same obstacles to participation in a video hearing as clients face. Counsel must ensure that the witness has access to a device and the ability to connect to the Internet. Counsel must also ensure that the witness has some familiarity with the video platform. This will require advance contact with, and thorough preparation of, the witness.

See [section V](#) above for a full discussion of client preparation for a video hearing, much of which applies to preparation of witnesses.

- **Experts**

Counsel should not assume that expert witnesses have any greater knowledge of, or familiarity with, video hearings than lay witnesses. If an expert has testified in person at court before, but has never appeared in a video hearing, counsel must walk the expert through the process. If the expert is not familiar with the video platform, counsel must also walk them through the basics of video preparedness. Preparation of experts by video takes longer than preparation in person; counsel must budget more time.

- **Subpoenas for video hearings**

Subpoenas for video hearings should include a phone number for the witness to call for information. They should be accompanied by a letter explaining how the witness should "appear" by video link as well as the need to call the attorney issuing the subpoena to confirm

⁷⁰ *Id.*

their ability to participate. Counsel should provide the video link in the subpoena form itself or in the letter accompanying the subpoena.

Service of subpoenas for video hearings can be challenging. Many professionals are not working at their business addresses, and they may have no one available to receive a subpoena. Counsel may have to seek continuances when subpoenas are returned undelivered. No client should be prejudiced because a necessary witness is living or working at a different address due to COVID-19 safety concerns.

Counsel's preparation of technology and space

Counsel's duty of competency includes the duty to possess and competently use the technology needed for a video hearing. This means that counsel must have a working, reliable tablet or computer and reliable wi-fi or other Internet access. While most newer laptops have cameras, many stand-alone monitors – especially older ones – do not. The submission of exhibits requires the use of a scanner or scanning app for a phone. Accordingly, to be ready to participate in a video hearing, counsel may need to purchase a newer tablet or computer, a webcam, a scanner, and/or unlimited minutes for a data plan.

Well before the hearing, counsel should:

- Have the court's email address and other contact information
- Make sure the court has counsel's email address, phone numbers, and other contact information, as well as the client's email address (if any), phone numbers, and other contact information.
- When scheduling a matter with the court, ask for more time than would be required in an in-person hearing. Everything takes longer – often much longer – in video hearings.
- Inform the clerk of counsel's intention to screen-share documents. Some clerks may not know how to do this and will appreciate the heads-up so that they can prepare for the hearing.
- Make sure counsel's laptop/desktop camera and audio are working.
- Make sure counsel's Internet service is working and reliable.
- Have Zoom (or other applicable platform) downloaded on laptop/desktop to be used.
- Have Zoom (or other applicable platform) downloaded on other devices, just in case of equipment failure.
- Have cell phone numbers of other attorneys on case, so that counsel can text in case of equipment failure.
- Test headset if using one.
- Adjust lighting in advance. Try to avoid halos, glare, and weird shadows. This can be hard to fix at the last minute. Don't sit in front of a window.

- Choose an appropriate background. If counsel is participating from home, the judge, the client, and other counsel should not see counsel's bed, clown paintings, or massive VHS tape collection.
- If the hearing is telephonic (or if the computer audio is not working), plan to use a land line, not cell.
- Make the camera angle eye-level. An eye-level camera angle is important for the client's credibility, but it is also important for counsel's credibility.
- Line up (in a file or on the desktop) all documents counsel intends to use during the hearing.
- Ask the clerk how long before the hearing counsel should call in or click the Zoom link. Some courts want counsel to call in well ahead of time, but others do not (because counsel may be interrupting or intruding on another matter).
- Find out if certain witnesses have been – or can be – assigned different “call times.” Courts are often considerate of the schedules of medical and other “professional” witnesses and will give them a later entry time.
- Find out if witnesses will be placed in separate “waiting rooms.”
- To the extent possible, write out opening and closing arguments, at least in outline form. Video is not the space for rambling or thinking on one's feet.

The morning of the hearing, especially if participating from home, counsel should:

- Check email to ensure that there are no changes to the hearing date and time.
- Assuming no changes to the date and time, find the video hearing link and make sure it works.
- Eliminate anticipated distractions during the hearing. To the extent possible, counsel should try to keep children, barking and tweeting pets, and other loud things away. Counsel should also make sure that the television is not on in the background.
- If using a laptop, plug it in so that the battery doesn't die in the middle of the hearing.
- Disengage other devices from wi-fi, if possible, if counsel has bandwidth problems.
- Dress for court. Avoid bright colors and bright whites; avoid bold patterns (which might create a strobe effect on camera).
- Have water handy.
- Turn off any audible beeping or ringing on counsel's email and other programs, if those programs are open during the hearing. Better yet, close any program that might beep or ring.
- Remember to *not* use the “mute” function during witness testimony if you must say “objection” to register one.
- Log into hearing early if court rules so require or the clerk so requests.
- Reach out to the client to confirm that the client is ready, that the client's technology is working, and how you will be confidentially communicating during the hearing.

- Be emotionally supportive of the client. Clients may be just as nervous, stressed, or angry – or more so – than before an in-person hearing.

Negotiation/settlement

Counsel must remember that “hallway conversations” cannot occur in the video hearing context. Any pre-hearing negotiation, including last-minute settlement talks, must occur well-before the hearing takes place. Counsel cannot expect private time in a chatroom or breakout room with opposing counsel for negotiation, and the court will expect counsel to be ready to start at the designated time.

Reviewing settlement documents, and getting signatures on those documents, can be challenging. Counsel must budget time for this process, particularly if the client does not have ready technological access. Counsel may have to meet with the client in person (safely) in order to enable the client to review, approve, and sign any settlement documents. Lawyer signatures can be made electronically, see [footnote 67](#). While the court may authorize counsel to sign for the client, counsel may prefer (or the court may insist) that the client sign. In such cases, counsel may need to secure an actual signature from the client or have the client download and use a signature app, such as [DocuSign](#), [HelloSign](#), or [Adobe Sign](#).⁷¹

Practice hearings/moots

Counsel should do a moot court using the video platform. During the moot court, counsel should examine a mock witness, make objections, and introduce evidence. The mock witness and mock opposing counsel should talk over counsel. This will enable the mock judge to offer feedback on the timeliness of counsel’s objections. It will also allow counsel an opportunity to hear whether certain statements by the mock witness or judge are “lost” when the microphone “favors” one speaker over another.

If a moot court is not possible, set up a test Zoom with a colleague in order to get familiar with the use and feel of the platform.

VII. Conduct of Hearing

Audio-visual check-in with court/test/dry run

⁷¹ For a review of signature apps, see Hannah Herman, *The 7 Best Electronic Signature Apps*, <https://zapier.com/blog/best-digital-signature-apps/> (Sept. 1, 2019).

As noted above, counsel should do a “dry run” with the client alone. In addition, the court may have a process for conducting a brief practice hearing to ensure that counsel and clients can connect with the hearing. If so, counsel should ensure that both counsel and the client participate in this process. During the test run, counsel should ensure that both counsel and the client are able to see and hear the judge, the clerk, other counsel, and other parties. Counsel should also ensure that the judge can see and hear both counsel and the client. Counsel should use this test run to identify any issues with connectivity, sound quality, and the environment of both counsel’s and the client’s “virtual” space.

If the court does not have a process for conducting a dry run in advance, counsel should at the outset of the hearing request that the court conduct a brief audio-visual check with each of the participants to ensure there are no issues with connection or technology. Prior to beginning any significant portion of argument or examination, counsel should also again confirm with the judge that they can both see and hear counsel. Counsel should also confirm that their audio setting is optimal for the judge (not too loud or not too soft). This allows both counsel and the judge to make adjustments to their audio settings prior to counsel beginning their argument or examination.

Preliminary considerations

Counsel must ensure that the client is “present” for the hearing. If the client is not present, counsel must object to the court proceeding with the hearing, unless the client has earlier instructed counsel to proceed without the client.

If the client has an unreliable Internet connection, counsel should explain this to the judge (so that they do not draw an adverse inference from a client’s sudden disappearance).

As preliminary considerations, counsel should:

- Object (both in writing and orally) to proceeding virtually if the client does not wish to do so or if, after consultation with the client, counsel determines that proceeding virtually would disadvantage the client.⁷²
- Make clear on the record that the client is agreeing to a virtual hearing for this hearing only and reserves their right to request an in-person hearing in the future.
- Object to any request by the judge that the client waive any rights related to the virtual hearing process. A client should not be required to waive any constitutional, statutory, or common law rights to participate in a virtual hearing. Clients should not be forced to

⁷² *Conducting Effective Remote Hearings in Child Welfare Cases*, Capacity Building Center for Courts: Children's Bureau's Child Welfare Capacity Building Collaborative, available at: https://www.acf.hhs.gov/sites/default/files/cb/covid19_conducting_effective_hearings.pdf, (April 16, 2020).

waive the right to raise issues that may unexpectedly arise during, or as a result of, the virtual hearing process.⁷³

- Ensure that the judge provides both a mechanism and/or sufficient opportunity for confidential attorney-client communication throughout the virtual proceeding. If the judge provides a breakout room, make sure that it is not recorded.
- Acknowledge the client's presence via videoconference at the start of the hearing and ask the client on the record if they can see and hear what is taking place in the virtual courtroom. Ensure that the client is both visible and audible to the judge.
- Ask that the judge confirm the procedure participants should use to notify the judge if there is an issue of technology or connection that prevents them from seeing, hearing, or otherwise fully participating in the virtual hearing. Be sure the client understands this procedure. If such an issue does arise, counsel should request a suspension of the hearing until the issue can be corrected.
- Ask the judge how they intend to handle sidebars/lobby conferences.
- Clarify with the judge the preferred process to make and record objections (orally, by gesture/raising hand, a combination of the two, etc.). Request that the judge accept "late" objections that were not timely made as a result of audio/video lag.
- Clarify with the judge the process for introducing exhibits and using documents to refresh recollection or impeach. Ask whether counsel should provide hard copies of exhibits to the court. And ask who will be redacting documents after rulings on motions in limine.
- Request at the outset of each virtual session that participants identify where they are and who is present in the room with them. For example, the DCF attorney should be required to identify that they are present in the courthouse with the judge.

Note any technological difficulties on the record and object whenever they prevent counsel or the client from seeing or hearing any part of the hearing. When technological difficulties are so significant they infringe on - or create the perception of infringing on - a client's due process rights and the principles of fundamental fairness, counsel should object to the hearing being held by video, move for a mistrial, and/or reserve the right to an in-person hearing at a later date.

Presentation tips

During the hearing, counsel should:

- Stand (if it is a short hearing), but keep the camera at eye level. If counsel wishes to remain sitting, don't slouch, lean back, look too casual, or lean forward threateningly.
- Make sure counsel's and the client's full names and faces are visible on the screen.

⁷³ *NAPD Statement on the Issues with the Use Virtual Court Technology*, Nat'l Ass'n for Public Defense (May 29, 2020), available at: <https://idc.utah.gov/wp-content/uploads/2020/06/NAPD-Virtual-Court-Statement-8.0.pdf>.

- Ask the judge to record and save the video and audio of the hearing, not just the audio. (The clerk – the host of the hearing – can record video by clicking a button, but many clerks will not do so unless requested.) This will ensure that, if the client, counsel, or witness is attempting to object or otherwise speak, but the platform mutes the speaker (or overrides that speaker in favor of another speaker), there is a record of the attempt for appellate purposes. A video recording will also memorialize observable conduct by the judge that might reveal bias.
- Ask the judge to remind all participants that they are prohibited from recording both the audio and the video of the hearing, absent an order granting them permission. (Such an order might be appropriate for the limited purposes of showing the client the hearing if the client cannot attend but wishes the hearing to proceed.)
- Identify him- or herself and the client clearly at the start of the hearing.
- Identify the nature of the hearing at the start, including all motions to be heard. This will help ensure that the judge and all participants are clear what is happening that day.
- Make sure that all participants are identified.
- Make sure all witnesses are present and identified.
- If witnesses are to be placed in breakout or waiting rooms, make sure that this occurs before the hearing begins. Ask if witnesses will be sequestered. If not, and if counsel wants them sequestered, move for it.
- Make sure the client can see and hear the proceedings.
- Make sure an interpreter is present if the client (or witness) needs one, that the interpreter speaks the client’s (or witness’s) language, and that the interpreter is sworn.
- If the client is in custody, make sure the client’s image, lighting, and dress do not prejudice the judge against the client. If the client is dressed in prison garb, object and ask for a recess so that adjustments can be made, including allowing the client to change into appropriate civilian clothing.⁷⁴
- If the client is in custody, have the sheriff’s deputies (or other officers) identify themselves.

⁷⁴ Cf. *Commonwealth v. Lacava*, 438 Mass. 708, 723-24 (2003); *Estelle v. Williams*, 425 U.S. 501, 512 (1976) (finding “the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes” based in part because “compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial.”); *State v. Rose*, 305 Conn. 594 (2012) (announcing a rule that the conviction of any defendant compelled to stand trial in identifiable jail clothes is reversible per se, without resort to harmless error analysis); *People v. Taylor*, 31 Cal.3d 488, 494 (2009) (defendant deprived of fair trial when the trial judge did not permit the defendant to dress in civilian clothes because the clothes were not first delivered to the jail). Presentation of the client in clothing that is not “prison garb” but is, nonetheless, highly inappropriate for a courtroom is also prejudicial.

- At hearings where the client has the right to appear in person (such as trials and other hearings at which important due process rights are at issue), ask the court to explain this right to the client and conduct a colloquy regarding the client’s knowing and voluntary waiver of this right.
- For any first experience in a tribunal, and after any change in trial court standing orders, ask the judge to explain if they have any specific instructions or ground rules for counsel regarding order or procedure.
- Determine whether the court will provide audio backup (*e.g.*, a conference line dial-in) if there are technological glitches and a party or counsel gets disconnected.
- Remember to always mute the audio and video during breaks.
- Look into the computer’s camera, not the faces on the screen. Check the camera angle and framing of the video. Consider “unpinning” your picture.⁷⁵
- On ongoing basis, check lighting (particularly if relying on natural light).
- Ensure no distractions or loud noise (pets, children, loud appliances or plumbing, outdoor noises from open windows, etc.). If children are present, counsel should use earbuds/headphones. Counsel must also ensure that they are on “mute” unless speaking.
- Identify him- or herself clearly each time counsel speaks.
- Not rattle papers, tap the desk, or tap the laptop. Such sounds are very loud in laptop and desktop microphones. Consider placing the laptop on a towel to reduce noise.
- Ask people to repeat themselves if counsel cannot hear (or believes that the client did not hear) an important point.
- Speak more clearly, a bit louder, and a bit slower than during a live hearing. If necessary, ask others to do the same.
- Be concise. People have shorter attention spans during video hearings, and arguments must be thought out ahead of time and delivered in a concise, organized fashion.
- Use signposts for argument. It is easier for participants to get distracted during video calls, so counsel must tell the judge, “I have three arguments why the witnesses must be sequestered in this case: first, . . .; second, . . .; and third, . . .”
- Be aware that there may be audio delays. Allow for pauses. This will also keep counsel from accidentally speaking over others.
- If gestures are planned, slow them down and make them more deliberate.
- Consider submitting anticipated arguments ahead of time in writing.
- Ensure that the clerk is recording any sidebars. *See* [section VII](#), below.
- If the hearing is ongoing and scheduled for another day, remind the judge to instruct the witnesses regarding sequestration (if sequestration was ordered), not doing “research,” and other rules regarding witness conduct.

⁷⁵ An explanation of, and instructions for, “pinning” and “unpinning” can be found at: <https://support.zoom.us/hc/en-us/articles/201362743-Pin-Video>.

Before the hearing ends, counsel should:

- Make sure with the clerk that all exhibits counsel offered in evidence were, in fact, admitted and given exhibit numbers. (The clerk might have missed something, or counsel’s audio might have blanked or delayed when offering an exhibit.)
- If the judge is taking the matter under advisement, ask if they want anything else from counsel (documents, additional memos of law); when the judge anticipates making a decision; and how counsel will be notified of the decision. Ask for time to submit proposed findings of fact and conclusions of law.
- Put on the record all technology failures that counsel is aware of, such as inaudible parts of the hearing and video failures. If counsel has objected earlier to having a video hearing, counsel should renew that objection, ask again for an in-person hearing, and/or request a continuance. Move for a mistrial or new hearing when appropriate.
- If the judge has entered an order at the close of the hearing, make sure the order has been entered on the docket and that counsel will receive a copy of the order.

Attorney-client communication

- **During hearing**

Attorney-client consultations must occur privately just as if they were done in person. When a client is testifying, the court must allow for frequent breaks in order to allow the client to confer confidentially with their attorney.⁷⁶ As noted in [section II](#) above, orders restricting counsel’s ability to regularly and confidentially confer with the client interfere with the client’s right to counsel.

Counsel must make sure that the client understands the importance of confidential communication during the hearing, the manner of requesting it, and the manner of accessing it. For example, the client should be reminded that the chat box feature, even though it has a “private chat” setting, should not be used for attorney-client confidential communication given how easily either counsel or the client could mistakenly send a message to all the participants. Instead, counsel may wish to arrange for a system in which the client texts counsel or signals counsel over Zoom that a check-in is needed. From there, counsel can either call the client privately, have the court provide a confidential break-out room, or make another arrangement for communication. Counsel must clear whatever method is chosen with the judge, so that they do

⁷⁶ *Bridging the Distance: Implementing Videoconferencing in Wisconsin*, Wisconsin Supreme Court Planning and Policy Advisory Committee, Videoconferencing Subcommittee, at 22 (Aug. 2017), available at <https://www.wicourts.gov/courts/committees/docs/ppacvidconf.pdf>.

not think that the client is distracted, disinterested, or rude. Counsel must remind the client to mute the microphone and turn off the video for a confidential discussion with counsel.

- **Breakout room for confidential communication**

On Zoom, a breakout room can be used for confidential communications. The host (the clerk or the judge) can admit counsel and his/her client (and an interpreter if necessary) into a “room” where a private conversation can occur. Counsel should ask the judge for a protocol – a formal request, a signal – to be placed in a breakout room for attorney-client consultation (or consultation with the family for a CRA matter).

Communications between counsel and the client are not supposed to be recorded in breakout rooms, and generally that doesn’t occur.⁷⁷ Before any hearing, counsel should confirm with the court that breakout room discussions are not, in fact, recorded or saved, and that they cannot be heard by the judge or other parties.

Because the “main room” is still recording during a party’s breakout room session, counsel should tell the client to remain silent. Alternatively, counsel can arrange with the clerk and the other parties to mute all other parties during another party’s breakout session.

Depending on the court, “chats” may be disabled during the Zoom hearing. Counsel should check with the clerk about this but should also tell the client not to use the chat function, just in case.

Counsel should also ensure that the client does not react, on camera, to any private communications with counsel (on the phone, by “chat,” or otherwise).

- **Problems with attorney-client communication**

During the hearing, counsel may lose connection with the client. If the communication gap is brief, counsel should request a brief recess to establish connection with the client. But if counsel loses connection with the client entirely, counsel should request a suspension of the hearing until counsel can reestablish reliable, confidential communication with the client. If the judge insists on proceeding with the hearing without the client, counsel should object and argue that this

⁷⁷ According to the *Michigan Judicial Institute Benchcard on Remote Proceedings during the State of Emergency* (Updated 4/28/20), “[c]ourts must enable confidential communication between a party and the party’s counsel In Zoom, a ‘breakout room’ can be used for this communication; there is no audio or video recording in a breakout room when using cloud recording.” Available at: https://mjieducation.mi.gov/training/RemoteProceedingsBenchcardResponsiveHTML5/#t=Remote_Proceedings_Benchcard.htm.

violates the client’s due process right to participate and the client’s right to counsel (because the client is not “present” to advise counsel).

Communication problems may not be related to inadequacies in the video platform or connectivity. What if the judge enters orders that unfairly and improperly limit counsel’s ability to communicate confidentially with the client during the hearing? If the judge proceeds without a means for confidential attorney-client communication or enters orders unreasonably limiting attorney-client communication, counsel should object. As discussed above in [section II](#), the judge’s refusal to allow regular, confidential attorney-client communication violates the client’s right to counsel and due process right to meaningfully participate in the hearing.

Humanizing the client

Video hearings can dehumanize the client.⁷⁸ In order to put a more human face on the client, counsel should ensure that the client is visible and can be heard by the court and that the client’s full name appears on the Zoom screen.

As noted above, assessments of trustworthiness have been shown to be linked to camera angle⁷⁹; eye-level filming results in the most trustworthy assessment.⁸⁰ This effect is so pervasive that

⁷⁸ Cf. *Criminal Court Reopening and Public Health in the COVID-19 Era: National Ass’n of Criminal Defense Lawyers Principles and Report*, at 10 (June 2020) (“[S]eparating an accused person from the jury by virtual mechanisms (or plexiglass or mask for that matter) dehumanizes the person on trial and reduces juror empathy. What is more, jurors participating virtually will be deprived of the complete panoply of non-verbal cues used to assess witness credibility. Nonverbal communication encompasses 55% of communication, including eye contact, facial expressions, and body movements.”). This dehumanizing effect applies at bench trials as well.

⁷⁹ *Commonwealth v. Bergstrom*, 402 Mass. 534, 549-550 (1988) (“In reality ... the camera unintentionally becomes the juror’s eyes, necessarily selecting and commenting upon what is seen.... Composition, camera angle, light direction, colour renderings, will all affect the viewer’s impressions and attitudes to what he sees in the picture.’ ... [T]he picture conveyed may influence a juror’s feelings about guilt or believability. For example, the lens or camera angle chosen can make a witness look small and weak or large and strong. Lighting can alter demeanor in a number of ways, misshaping features or, if directed from below, giving witnesses an evil or sinister cast.”).

⁸⁰ Andreas Michael Baranowski & Heiko Hecht, *Effect of Camera Angle on Perception of Trust and Attractiveness*, *Empirical Studies of the Arts* 2018, Vol. 36(1) 90–100 (“actors were rated as most trustworthy when filmed from eye-level, and less so when the camera was lowered or raised”).

even corrective judicial instruction has not been sufficient to mitigate the prejudicial effect of camera perspective in mock juror scenarios.⁸¹ Counsel should, in advance of any hearing, work with the client to ensure that the client's camera is set up at eye-level and that they have sufficient lighting, a neutral background, and a distraction-free environment.

Counsel should be sure to acknowledge the client's presence via videoconference at the start of each hearing and continue to remind the judge of the client's presence throughout.

Counsel should consider introducing visual aids to remind the judge of the client's humanity. For example, counsel might wish to introduce in evidence pictures and videos of the client, their family and home, and/or any other visual aid that would provide the court with a deeper human understanding of the client.

Interpreters

Many clients do not speak English. Many speak English but not well enough to understand complex in-court interactions. The client's language access – to counsel, to statements from the judge, to statements by witnesses, to written exhibits – is a vital component of meaningful participation. This is just as important in video hearings as in in-person hearings. See also [section II](#), above.

For all video hearings, counsel must ensure that the client and the client's witnesses have access to interpreters with simultaneous interpretation skills. In order to secure an interpreter for a video hearing, counsel must contact the clerk's office in advance to ensure that the court has requested the necessary interpreter. If the clerk has not done so, counsel may wish to contact the Office of Court Interpreter Services at (617) 878-0343, or <https://www.mass.gov/orgs/office-of-court-interpreter-services>.

Counsel should advise the client that, if the client cannot hear or understand the interpreter, the client must make this known to the court or counsel either verbally or by signaling with their hands.

Documents/exhibits – procedures, problems

Counsel should upload exhibits to their device in advance of the hearing. Counsel should also practice offering exhibits in advance. The court may have published procedures for sharing, marking, and offering exhibits. Under these procedures, most exhibits must be marked, shared,

⁸¹ G. Daniel Lassiter & Andrew L. Geersa, *Videotaped Interrogations and Confessions: A Simple Change in Camera Perspective Alters Verdicts in Simulated Trials*, J. of Applied Psychology, (2002) Vol. 87, No. 5, 867–874 (corrective judicial instruction was insufficient to mitigate the prejudicial effect of camera perspective on mock jurors' assessments of voluntariness or on their all-important final verdicts; only showing the interrogator reduced the effect).

and submitted well before the hearing. Counsel should become familiar with the court's procedures; they may change as the reopening process evolves. In the absence of such procedures, or if the system mandated by the court is unclear, counsel should address with the court and opposing counsel in advance how exhibits will be handled. Explain all of this ahead of time to the client and any witnesses counsel has called.

Because of the advanced-submission procedures common to many courts, judges will often have the exhibits before the hearing. The judge should not be reviewing proposed exhibits prior to their admission in evidence (unless, of course, counsel has no objection to the judge doing so or counsel has filed a motion in limine and the court must rule on it).

In the event counsel learns, during the course of the video hearing, that the judge has reviewed proposed exhibits before their admission in evidence, counsel should seek assurance that the judge will not consider the exhibits until they are properly admitted. If counsel believes that the judge's prior review of the proposed exhibits prejudices the client – for example, where they have reviewed prejudicial exhibits that they have later excluded – then counsel might consider filing a motion to recuse and seeking appellate relief.

Counsel may wish to print out all exhibits ahead of time (or to have all exhibits available on a separate computer or tablet during the hearing).

Client testimony

As discussed in more detail above in [section V](#), counsel should prepare the client in advance for both direct and cross-examination. Counsel should practice with the client to ensure that they are able to access the necessary technology, that their virtual environment is appropriate, and that they understand the nature of the Zoom hearing.

Counsel should recognize that some clients may have difficulty processing information in a video format and/or find it difficult or exhausting to process information without the ability to read body language and other non-verbal cues. For those clients, additional breaks might be necessary. With the client's permission, counsel should explain to the court that a given client might need accommodations in the form of additional breaks or time away from the screen to provide testimony.

As with in-person CAFL hearings, clients in video hearings with pending (or likely) criminal charges can invoke their Fifth Amendment right not to testify. The client's assertion of that right (or refusal or failure to testify generally) can result in the trial judge drawing a negative inference.⁸² Counsel must explain this to the client so that the client can make an informed

⁸² *Custody of Two Minors*, 396 Mass. 610, 616-17 (1986); *Care and Protection of Quinn*, 54 Mass. App. Ct. 117, 121 (2002).

decision about testifying. Counsel must also inform the client that, if they do testify, that testimony may be used against them in a subsequent proceeding.

If a client has pending criminal and civil matters and separate counsel for each matter, the lawyers must speak together, with the client, in order to ensure that the client can make a fully informed decision about testifying or not testifying.

Witnesses

- **Procedures**

Witness testimony presents numerous challenges in video hearings. Without the formalities of court, a witness may not understand the seriousness of providing false testimony. Counsel should ensure that the court faithfully administers the oath of affirmation prior to taking testimony from any witness.⁸³ Witnesses' faces should be clearly visible to the parties at all times. When counsel is unfamiliar with a witness, but the client is not, they should confer (via a private breakout room) to confirm the identity of that witness if it is in question.

Where witnesses need to be sequestered, they should be waiting in separate breakout rooms with only one witness to a breakout room. Judges should issue a sequestration order warning witnesses that they are not allowed to hear the testimony of other witnesses or to communicate with other witnesses about the content of their testimony throughout the hearing.

In video hearings, unlike in-person hearings, judges cannot easily monitor witness behavior. For example, while witnesses are participating in a Zoom hearing, it is possible for them to open a second window on their screen/computer monitor. Other participants in the Zoom conference have no way of knowing whether they have done so and, if so, what the other window displays. Accordingly, judges should issue warnings to witnesses that:

- They must not have another open window on their screen/monitor, or have any other open device visible, while testifying;
- They cannot do any research on their own while testifying;
- They must be alone while testifying, and cannot be coached or encouraged in any way by others;⁸⁴

⁸³ On July 7, 2020, the SJC issued “Supplemental Order Regarding Virtual Proceedings and Administration of Oaths and Affirmations,” available at: <https://www.mass.gov/doc/sjc-supplemental-order-regarding-virtual-proceedings-and-administration-of-oaths-and/download>.
<https://www.mass.gov/doc/sjc-supplemental-order-regarding-virtual-proceedings-and-administration-of-oaths-and/download>.

⁸⁴ Counsel may wish to consider asking the court to issue a supplemental oath to witnesses at Zoom hearings. Before testifying, witnesses should affirm that they are alone in the

- They must not have any ex parte communication with any attorney;
- If sequestered, they cannot speak to other witnesses throughout the trial or other hearing.
- They cannot use anything (such as a computer, a phone, notes, or other documents) to help them testify from memory unless the court so permits.

Beyond the warnings, counsel should ask the judge to conduct a video survey of each witness' physical space to ensure that no one else is present, the witness has no notes (other than what might be agreed upon by counsel in advance), the witness has (and can view) no other screens, and the witness has no other devices within reach.⁸⁵ At the close of each witness's testimony, the judge should ask the witness if they have complied with the earlier warnings throughout the course of their testimony. Further, if the judge is in the courtroom with the clerk, the judge should also pan their camera to show the video participants who else is in the courtroom.⁸⁶

- **Direct and Cross-Examination**

Counsel should clarify with the judge any specific procedures counsel should follow regarding the direct, cross, and impeachment of witnesses.⁸⁷

Impeaching witnesses with documents (including impeachment with prior inconsistent statements) can be particularly challenging, because counsel cannot "approach" the witness with the document. Counsel should use the RAC method (recommit, accredit, confront) as in in-person hearings. Recommitting and accrediting will be exactly the same; confrontation, however, is a bit trickier.

To confront, hold the physical document to the camera to show that counsel has a document, and state, "I'm going to show you a document." The witness won't be able to read the document;

room where they are giving testimony, and that they will receive no outside assistance during their testimony. If the court refuses to administer such a supplemental oath, counsel should consider asking questions during cross-examination regarding possible prohibited assistance.

⁸⁵ *State v. Montini*, 52 Conn. App. 682, 689 (1999) ("Prior to the victim's testimony, the video camera panned the room so that a viewer could see the courtroom setting."); *People v. Grady*, 133 Misc. 2d 211 (N.Y. 1986) ("The video camera, located in the courtroom, panned the entire courtroom, stopping momentarily on the face of each person therein, including the defendant.").

⁸⁶ *Bridging the Distance: Implementing Videoconferencing in Wisconsin*, at 15, available at <https://www.wicourts.gov/courts/committees/docs/ppacvidconf.pdf>.

⁸⁷ Katrina Grider, *Features: Staying Ahead of the Curse: Technology at Trial: Goodbye Flip Charts, Hello Plasma Screens*, 68 Tex. B. J. 567 (2005).

counsel must then ask the court for permission to share the screen.⁸⁸ Direct the witness to look at the document on the screen-share. At that point, confirm that the document was authored by the witness closer in time to the event, and ask the witness, “In this document, you said that _,” or “In this document, you never wrote that _.” (Of course, there are other ways to confront witnesses with their prior statements. To the extent possible, counsel should consider the best methods for impeachment with a prior written statement well ahead of time.)

Redact other portions of the document if counsel doesn’t want the witness (or judge) to be able to read it.⁸⁹ Alternatively, if counsel wants to call the witness’s attention to a specific section of a document, highlight the relevant portions.⁹⁰ Counsel should object to any process where the witness can review the document in advance.⁹¹ This would allow the witness to prepare their response and eliminates the element of surprise that can be invaluable during impeachment.

Counsel may wish to permit DCF workers to have ready access to their dictation notes or other documents during testimony. This can be helpful if counsel wishes to refresh recollection or impeach with DCF records. Allowing DCF workers to keep their records close at hand during testimony is a strategic decision for counsel. DCF witnesses are like all other witnesses; they have no “right” to have their records at hand during testimony. If counsel has no objection, the matter should be agreed upon with other counsel and communicated to the court.

Defensive advocacy (objections, motions to strike, etc.)

Defensive advocacy – including objections, motions to strike, offers of proof, etc. – is even more important during video hearings than in in-person hearings. Judges make more mistakes because video is harder to control than a live courtroom. In addition, the video hearing process is flawed; portions of questions and answers are lost, attorney-client communications are difficult, exhibits are difficult to handle and argue about. No video hearing can be error-free. In addition, judges may take shortcuts, because dockets are crowded and the video hearing process takes much

⁸⁸ Zoom, *Side-by-side Mode for Screen Sharing*, available at: https://support.zoom.us/hc/en-us/articles/115004802843-Side-by-side-Mode-for-screen-sharing#h_7ebd355a-bdc4-489c-8193-63c4b063774e.

There are very detailed, but simple, instructions on how to make those adjustments in real time (after the screen is shared) and as changes to counsel’s profile settings; changes to the profile settings will enable Zoom to automatically enter side-by-side mode whenever a screen is shared with counsel: https://support.zoom.us/hc/en-us/articles/115004802843-Side-by-side-Mode-for-screen-sharing#h_7ebd355a-bdc4-489c-8193-63c4b063774e.

⁸⁹ National Association for Public Defense, *Get out of Bed, Put on Your Suit, and Dominate Video Hearings*, webinar (June 9, 2020).

⁹⁰ *Id.*

⁹¹ *Id.*

longer than in-person hearings. Further, there is very little law concerning the proper conduct of video hearings, so judges have far less guidance. Counsel cannot sit back and simply accept that shortcuts are necessary or that rights might be abridged in the interest of “just getting the matter heard.” Counsel must protect the client’s rights much more aggressively.

Prior to the start of the hearing, counsel should ask the judge to lay out the process for objections. That process might include oral objections, counsel raising their hand, or another method. Note that the “hand-raising” function on Zoom may be very difficult for the judge to see and, therefore, might not be a good method.

Counsel should remind their client and witnesses to stop speaking if they see an objection by counsel. In the event an adverse witness continues to speak after counsel’s objection, counsel must also move to strike the witness’s additional statements.

Problems with video/audio/connectivity during hearing

A number of problems may arise and prevent counsel, as well as clients and witnesses, from successfully participating. Audio and video loss or freezing is common. At the outset of the hearing, counsel should ask that the judge confirm the procedure participants should use to notify the judge if they experience audio or video loss. If counsel or the client suffers a loss of audio or video, counsel should object and ask the judge to instruct a witness (or other counsel) to repeat what was missed. If the audio or video connection problem is more serious, counsel should object and ask for a suspension of the hearing until the issue can be corrected.

If counsel is completely dropped from the hearing, counsel should follow the procedure outlined by the judge to provide notice of the issue. If counsel is able to rejoin the proceeding, counsel should ask the judge to strike the portion of the proceeding that counsel was unable to participate in. If counsel is unable to rejoin the proceeding by video, counsel should join by telephone, move to strike everything said on the record during counsel’s absence, and request a suspension of the hearing until a later date. If the judge refuses to strike the portions of the record that arose when counsel was “gone” or refuses to suspend the hearing, counsel must object. Counsel should also consider moving for a mistrial, a new video hearing, an in-person hearing, and/or pursuing an appeal.

Sidebars

Counsel should ask the judge how he or she wishes to conduct sidebars and lobby conferences. If they are in a breakout room, counsel should ask the court to record them.⁹² (Breakout rooms

⁹² See *Conducting Effective Remote Hearings in Child Welfare Cases*, Capacity Building Center for Courts, Children’s Bureau (April 16, 2020).

may not be recorded otherwise, because most are used for confidential attorney-client conversations.)

If the court is unable to record the sidebar in a breakout room, ask the court to hold the sidebar in the main “courtroom” and send those not participating in the sidebar into a breakout room. If the court is unable or refuses to do so, and counsel objects to what occurs in an unrecorded lobby or sidebar, counsel must put the problematic contents or statements on the record upon resumption of the hearing. If the judge exhibits bias during the lobby or sidebar, counsel must generally move for recusal upon returning to the hearing, stating the reasons on the record.

A few thoughts on child witnesses

Child testimony can be crucial in CAFL cases. While children sometimes testify in the “normal” manner – on the stand, subject to cross-examination – at in-person hearings, courts often take their testimony in camera, believing that children will be traumatized by testifying in open court. In an era of video hearings, all of this goes out the window.

As an initial matter, video testimony may be less stressful than live testimony in a courtroom.⁹³ After all, the child can testify by video in familiar, comfortable surroundings, and talk into a tablet or monitor they may already be sitting in front of for hours each day. If the child is nevertheless traumatized⁹⁴ by testifying, the child can be accommodated very easily on video. For example, if a child is traumatized by facing a parent on camera, the judge can instruct the parent to mute the audio and video, which still allows the parent to hear and watch the child’s testimony. If the child is stressed by seeing the faces of other hearing participants, the judge can order them, too, to mute the audio and video.

Accordingly, video hearings, and the easy accommodations they permit, should open up more opportunities for children to testify. They should also create opportunities for child clients to observe hearings, even when they are not testifying, if they so desire. Counsel should explore with child clients whether they wish to testify or observe the hearings. If they do, counsel should

⁹³ See Dawn H. Thoman, *Testifying Minors: Pre-Trial Strategies to Reduce Anxiety in Child Witnesses*, 14 Nev. L. J. 236, 240-44 (Jan. 2014), and studies cited at nn. 40, 44; see also Robert H. Pantell, *The Child Witness in the Courtroom*, 139(3) Pediatrics (2017), available at: <https://pediatrics.aappublications.org/content/pediatrics/139/3/e20164008.full.pdf>.

⁹⁴ Everyone is “stressed” or “nervous” about testifying, which is why “nervousness” and “stress” are not the standards for accommodating child witnesses. In *Adoption of Roni*, 56 Mass. App. Ct. 52, 55-56 (2002), the Appeals Court held that children must be “traumatized” by testifying in the traditional manner before the court should accommodate them. The court must make specific findings about the trauma, and the accommodation must be narrowly tailored to avoid the trauma. *Id.* at 56-57 (holding that “only where absolutely necessary should parents be excluded entirely from the courtroom” during a child’s testimony).

inform the court (and the custodian and foster parents) of the child's wishes and arrange for the child's testimony and/or attendance. Counsel for parents should also consider subpoenaing child witnesses (or asking the court to order the child's attendance), explaining that the child will not be traumatized or can easily be accommodated.

Zoom's ability to make parents, social workers, lawyers, and clerks "disappear" for the child renders in camera interviews unnecessary. In camera interviews are intended to protect the child from trauma – not to keep parents from hearing the child's testimony – and children can be protected using basic muting/camera functions. Judges may still wish to question children themselves, and counsel may still need to submit questions in advance for judges to ask, but counsel (and parents) should be allowed to observe the examination while muted and invisible. Barring counsel and parents from the judge's questioning of a child witness serves no purpose and violates parents' due process rights.⁹⁵

As for child sexual abuse hearsay under G.L. c. 233, § 82, the statute requires that the court find the child to be "unavailable" to give live testimony. A child who might have been unavailable based on trauma from testifying in person may not be unavailable if they can testify, with the accommodations discussed above, by video.⁹⁶

Post-trial/post-hearing motions

After the hearing, counsel should consider filing appropriate motions, such as a motion to reopen the evidence (if, for example, video or audio was lost during testimony, or new evidence comes to light, or if the facts presented to the court were inaccurate), to amend the judgment, for new trial, or for relief from judgment. Post-hearing or post-trial motion practice should look much as it did in the pre-COVID world of in-person hearings.

But what if the video hearing was problematic based on counsel's or the client's lack of access to a device or reliable Internet access? What if the judge, despite counsel's many objections, insisted on pressing forward with the hearing despite counsel's inability to communicate confidentially with the client? What if the hearing depended on many – or subtle – credibility determinations by the judge, but the video or audio for key witnesses was unclear, making credibility determinations a fruitless exercise? Indeed, what if the hearing was – to put it bluntly – a disaster based on the limitations of the video hearing platform itself (as opposed to the client's or counsel's performance or the bad facts of a given case)? Counsel should consider moving for a new hearing to be held in person. Explain to the judge why the video hearing was

⁹⁵ See *Roni*, 56 Mass. App. Ct. at 57.

⁹⁶ See *Adoption of Olivette*, 79 Mass. App. Ct. 141, 153 (2011) (noting that judges "ordinarily should consider whether any accommodations could minimize or eliminate possible harm to the child before finding the child unavailable for purposes of [the § 82] exception based on such concerns.").

unfair, violated the client’s rights, or failed to provide the tribunal with the information needed to adjudicate the issues. The judge might agree and schedule a new hearing to be held in person. Or the judge might deny the motion, in which case counsel should consider filing an interlocutory appeal or, if the matter went to final judgment, a notice of appeal. Our appellate courts have yet to decide whether video hearings suffice for certain types of matters.

VIII. Client debriefing after hearing

After the video hearing – as with any in-person hearing – counsel should debrief with the client. Counsel must remember that video hearings – like in-person hearings – can be traumatizing for the client. Further, because counsel is not “present” with the client after the hearing, it is harder to read the client’s emotions. Clients may feel “shut down,” despondent, hopeful, or furious. Counsel, during the debriefing, should not assume they understand the client’s feelings about the hearing and the legal proceedings generally. But counsel can check in frequently, and, if possible, have a longer follow-up discussion with the client the next day.

During the debriefing – whether immediately after the hearing or the next day – counsel should ensure that the client understood what happened during the hearing and knows what to expect if a ruling wasn’t made at the close of the hearing. If the client lost meaningful portions of the audio or video during the hearing (but did not tell counsel until after the hearing had concluded), counsel should consider filing a motion to reopen or other post-hearing motion. If the judge issued a decision at the close of the hearing, counsel should discuss appellate options with the client and file all appropriate papers to effectuate the appeal.

IX. Future of video hearings

Clients and other stakeholders might benefit if certain hearings continue to be held by video. Counsel may wish to request a video hearing for status conferences, uncontested motions, *ex parte* motions for funds, and other motions and hearings that are not expected to be adversarial and do not involve witness testimony. Video hearings may also be beneficial for clients who:

- are incarcerated out of state,
- live out of state and cannot afford to travel to an in-person hearing
- cannot take an entire day off of work for a few minutes of testimony
- have no child-care for that hearing date,
- need a rare-language interpreter who lives in another state or country, who can participate by video; or
- live outside of the country and cannot, for financial or immigration reasons, enter or re-enter the country.

But, in all cases, video hearings (or video appearances of select witnesses) post-COVID should only be held at the client's request or with the client's assent; they should never be imposed on an unwilling client.

Video hearings, for the most part, should end once the current pandemic is under control.⁹⁷ They are generally a poor substitute for in-person hearings. Video negatively impacts the judge's ability to evaluate witness credibility and see clients as "whole persons." They are also difficult, if not impossible, for many clients to access technologically. Most video hearings have technological problems; frozen video and dropped audio are commonplace. Finally, video hearings diminish clients' perception that our legal system is treating them with fairness and justice – a perception that is every bit as important as actual fairness and justice.⁹⁸ Good lawyering at video hearings is essential for CAFL clients to have a meaningful opportunity to be heard.

X. Other Resources

A Guide to Virtual Hearings for Family Law Practitioners, Boston Bar Ass'n (June 2020), available at: https://bostonbar.org/docs/default-document-library/family-practioners-guides.pdf?sfvrsn=17ee9ea0_2.

Albert Fox Cahn & Melissa Giddings, *Virtual Justice: Online Courts during COVID-19*, Surveillance Technology Oversight Project, Urban Justice Center (July 17, 2020), available at: <https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5f11ee5cc2f36c756ea9620d/1595010663758/Online+courts+white+paper>.

Protecting Quality Representation in Video Court - A Practical Handbook for Wisconsin Defense Attorneys, Wisconsin State Pub. Def., Quality Indicators Work Group (Sept. 2005, 2010 ed.), available at: <https://www.wispd.org/images/AppellateFolder/templatesforms/QI.pdf>.

⁹⁷ Note that SORB hearings have been conducted by videoconference for individuals in DOC custody well before the pandemic; this will likely continue, and may even be expanded post-pandemic.

⁹⁸ *Adoption of Tia*, 73 Mass. App. Ct. 115, 122 (2008); see also *NAPD Statement on the Issues with the Use of Virtual Court Technology*, National Ass'n for Public Defense (May 29, 2020) (citing Tracey Mears & Tom Tyler, *Justice Sotomayor and the Jurisprudence Justice*, 123 Yale L. J. F. 525, 527 (2013-2014) ("Research clearly shows that procedural justice matters more than whether or not people agree with a decision or regard it as substantively fair"))).

Remote Hearings Guide, Massachusetts Bar Association, available at: <https://massbar.mediasite.com/mediasite/Play/65cde77780d543c8969f1113fad26dde1d> (last accessed 7/23/2020).

Fritz Riesmeyer & Curry Sexton, *Tips for Remote Video Hearings and Trials: Technology, Witnesses, Evidence, and Etiquette: Tips for technology, witnesses, evidence, and etiquette during the COVID-19 pandemic* (June 5, 2020), available at: <https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2020/tips-for-remote-video-hearings-and-trials/>.

Tips for Attending Remote Court Hearings, Indiana Office of Jud. Admin. (May 6, 2020), available at: <https://citybase-cms-prod.s3.amazonaws.com/38f05ce9c5b04858b1ec5111515c0ce9.pdf>

XI. Addenda – useful tips for CAFL lawyers and clients

Addendum I

Tips for Preparing Youth for Virtual Hearings (NACC/Children’s Law Office)

- 1. Make sure the youth has access to technology and the internet.**
 - a. Do they have access to a computer or phone with video feature and internet / WiFi? Do they have enough data to participate in the hearing and meet their other communications needs? Will they need help paying for data to ensure access and other communications?
 - b. Do they know how to use the equipment?
 - c. Is there a back-up plan, like phone access, if there are technical difficulties?
 - d. Is there a need for an interpreter?
 - e. Do a trial run with the youth to make sure everything works and he or she feels comfortable.
 - f. If you have not been able to assure access to what is needed to participate in the hearing, have you contacted the child welfare agency and court to inform them that you have not been able to ensure access and ask for assistance or direction?
- 2. Explain the platform and basics of how it works.**
 - a. Does the youth know how to mute and unmute?
 - b. Does the youth understand what can be seen when on camera?
 - c. Does the youth understand who will be part of the hearing and can hear what he or she says?

- d. Does the youth understand that any chatting you do through the platform may not be private? Have you advised the youth not to communicate with you in that manner during the hearing?
- 3. Make sure the youth has a place where he or she can privately participate in the hearing.**
- a. What arrangements have been made to ensure that the youth can participate without the presence of a caregiver or staff so they can speak freely?
 - b. What arrangements have been made to ensure that the youth has a quiet space that is private?
 - c. If you have not been able to assure privacy, have you contacted the child welfare agency and court to inform them that you have not been able to ensure privacy and ask for assistance or direction?
- 4. Communication with the attorney during the hearing.**
- a. What is the plan for how you and the youth will communicate confidentially during the hearing? Text, email, google hangouts?
 - b. Have you let the youth know that you will not be communicating with them on the platform (chatting or in separate “rooms”) because those communications are not confidential?
 - c. Does the youth understand that he or she can ask to pause the hearing so that they can talk privately with their lawyer?
- 5. Clarify expectations for the hearing.**
- a. Does the youth understand if there are expectations about dress for the hearing?
 - b. Does the youth know when the hearing will start, if there is a chance for delays, and how long it will last? (Should they have a snack beforehand? Will they need to cancel or postpone other plans?)
 - c. Does the youth understand the best place to do the hearing from? Have you let them know that a quiet, private space is ideal and that a having a neutral background (or at least a background that does not have things the youth would not want to be seen) is best?
 - d. Does the youth understand that it is important to stay in a quiet space and not do other activities at the same time? If the youth feels they do not have control over this due to scheduling or placement conditions, additional planning may be needed? (Making arrangements with the resource parent or placement, letting the judge know at the beginning of the hearing)
 - e. Have you explained to the youth who will be at the hearing and how he or she can see that on the screen?
 - f. Have you let the youth know that they can ask you questions during the hearing or ask for time to talk to you?
- 6. Prepare with the youth to identify key issues to raise at the hearing.**
- a. Are there any COVID-19 specific issues to raise? Health? School? Visitation, etc.?

- b. What are the ongoing issues that need to be flagged? Permanency? Transition planning? Placement issues, such as getting to a more family based setting?
- 7. Prepare with the youth to determine if they want to speak at the hearing.**
 - a. Prepare with the youth for participation in the hearing, including what they want to say. Does the youth want to present anything during the hearing? Something they have worked on with you like a statement? Answering questions you have prepared with them?
- 8. Make a plan to debrief with the youth and ensure that the youth has emotional support.**
 - a. Make a plan to talk with the youth about the hearing as soon as possible following the hearing?
 - b. Prior to the hearing help the youth identify someone in the home or placement or someone he or she can reach out to if they need support after the hearing if you are not available?

Addendum II

Handout for Clients to Prepare for Zoom Hearings

Video hearings by Zoom can be stressful, but you can still make a good impression on the judge and win your case if you prepare for it with your lawyer.

Preparing for the Zoom Hearing:

- **Do a test with your lawyer on Zoom to make sure it works and that you can hear, see, be heard, and be seen.**
- **If you use your phone you may need to download the Zoom App.**
- **Remember that the judge is going to see, hear, and judge you.**
- **Set up in the most private place you have. Other people are not allowed to be there or to listen in without the judge's permission.**
- **If you do not have a place where you can be alone, tell your lawyer. Your lawyer can try to help you find one.**

- Set up in a quiet place. You must be able to hear and be heard. Use headphones if you have them, especially if there are children present.
- Test your Internet connection, your video, and your sound.
- Put your phone, tablet, or laptop on something stable so that it doesn't wobble.
- Set the camera at the same height as your eyes.
- Check the light in the room. It is better to have more light in front of you so there are no shadows. Make sure the light doesn't shine directly in your face.
- If you use a phone, prop up the phone so that you don't have to hold it.
- Make sure you have enough minutes or data. If you don't, tell your lawyer so you can figure out what to do.
- Check out what people can see behind you. Move anything you do not want them to see or hang a clean sheet behind you. Check this in your test with your lawyer.
- Practice muting and unmuting your microphone.
- Go over what to expect at the hearing with your lawyer.
- Make a plan for how you can ask for a break if you need one.
- Make a plan for how to ask to speak to your lawyer alone.
- Practice looking at the camera while talking.
- Practice speaking clearly so that everyone can hear you – not too loudly, and not too quietly.
- Get as comfortable with the Zoom “platform” as you can, so that you can be as calm and natural as possible at the hearing.

On the day of the hearing, before the hearing starts:

- Make sure your device is charged. Just in case, have a charger handy and plug your device in.
- Re-check your background and only show what you want to be seen.
- Re-check your lighting and make sure your device is sitting at the same height as your eyes.
- Dress for court. Wear the nicest shirt/blouse you have (preferably one with sleeves). Wear nice pants/skirt/dress. If you move away from the camera, the judge and other people on the call *will* see what you are wearing below.

- Turn off ringers to any other devices you have. If using a phone, use the “do not disturb” button so that you do not get calls.
- If you are on Wi-Fi, make sure that no one else on Wi-Fi is watching videos, playing games, or streaming music. (This may hurt your connection to the hearing.)
- Make sure that no one is listening to loud music or watching television near you.
- Try to get rid of distractions (barking dogs, loud children) during the hearing. If you can’t, tell your lawyer (who will explain this to the judge).
- Make sure you and your lawyer can reach each other during the hearing to talk about what is happening.

During the hearing:

- Unless you are testifying, “mute” yourself when you are not speaking.
- All the same rules apply that apply in a regular courtroom.
- Remember: the judge is going to see, hear, and judge you.
- Listen carefully, especially to questions the lawyers ask you and to anything the judge says.
- Speak only if someone asks you a question. Listen and answer the question they asked. Stop as soon as you have answered the question; don’t “ramble.” If you are a “nervous talker,” tell your lawyer ahead of time.
- If you do not understand a question or instruction, say, “I do not understand.” If you do not know the answer, say, “I do not know the answer.” Do not guess.
- Always wait for a speaker to finish before speaking. Do not interrupt or talk over the speaker.
- When speaking, look directly at the camera (or phone) as much as you can. This will make it seem like you are looking at them and not staring off to the side.
- Speak clearly so everyone can hear you, just as you practiced – not too loudly, not too quietly.
- While you are answering questions, you cannot use notes.
- The judge will see your expressions and gestures. Try not to look angry, annoyed, or frustrated. Try to look calm but interested.
- Sit down for the entire hearing unless your lawyer arranged something else.
- When you are not testifying, you may take notes if you want to.

- **Do not record the hearing or post any part of it anywhere.**
- **If you need a break, ask for one.**
- **If you need to speak to your lawyer alone, ask for time to speak with them.**
- **If there is an interpreter, pause to give them time to translate what you said.**
- **Do not smoke or eat during the hearing. (If you need to eat during the hearing for health reasons, tell your attorney before the hearing or in a private discussion.)**
- **When the hearing is over, call your lawyer and discuss it. Make sure you understand exactly what happened and when the next hearing will take place.**