The Commonwealth of Massachusetts

Committee for Public Counsel Services

44 Bromfield Street, Boston, MA 02108-4909

TEL: (617) 482-6212

FAX: (617) 988-8495

 ANTHONY BENEDETTI MICHAEL DSIDA

 CHIEF COUNSEL DEPUTY CHIEF COUNSEL

**CHILDREN AND FAMILY LAW DIVISION**

**Practice tips regarding videoconferencing and telephonic participation**

Telephonic hearings

 Most courts are conducting hearings via telephone conferences facilitated by the clerk’s office. These hearings raise significant concerns regarding client participation and perception. It often takes some effort to set up the conference with your client in a way that he/she can readily participate. In addition, hearings by telephone set a tone that may suggest to the client that their case is unimportant to the court. Tips throughout this document offer some suggestions for elevating the substantive formality of telephonic hearings to the extent possible.

 Juvenile Court Standing Order provides for hearings on civil matters in a limited number of cases and on limited issues. Currently, most courts are taking the position that they will hear only 72-hour hearings in care and protection matters.

 Most courts are hearing 72-hour hearings telephonically. The practice and procedure vary somewhat from court to court but generally involve the following:

* Cases assignments generally have not changed. Cases seem to be being heard within the statutory time period.
* Courts have been assigned a telephone conference line for hearings. Some counties (Barnstable County/Plymouth Town) have only one line for hearings so judges are coordinating their hearing schedules. The clerk’s office will contact attorneys with the phone number to call in for the conference.
* Attorneys are responsible for arranging for clients and witnesses to access the hearing. Clients and others (including DCF workers) may not be given the phone number for the hearing. Suggestions for arranging access for clients and witnesses include a Zoom conference with the client and witness while contacting the hearing line by cell phone. Zoom has a private chat for communication with the client. It is also possible to call the client directly and then conference in the hearing line. Private communication with the client during the hearing could then occur by text or email.

* Exhibits should be provided to counsel and the court before the hearing. DCF should be sending any 51As and 51Bs to the court and to counsel to allow for any necessary motions in limine.
* Be certain to have a discussion with your client before the hearing so that he/she knows what to expect. Explain who will be on the telephone and what the order of events will be.
* Should your client wish to appeal the outcome of the hearing, know that interlocutory appeals are proceeding as usual in the Appeals Court.
* Interpreter services are available, but as always let the court know in advance.

Some courts[[1]](#footnote-1) indicate they are proceeding with 72-hour hearings by videoconference which allows for more complete communication. But, even so, reducing the client to a video image (as opposed to an in-person hearing) can further dehumanize the client. If, as these circumstances may dictate, you are unable to be in the same location as your client, or if you are with your client but not at court during the video- or teleconferencing, you should:

* Ensure that the court provides a secure connection and a private room for a confidential attorney-client conversation, if possible.
* Ensure that there is privacy and confidentiality for you at the courthouse and for the client (including clients in detention).
* Have a private, confidential attorney-client privileged consultation before every video-conferenced hearing or telephone hearing.
* Ensure that the client (including those in detention) is in a private setting where his privileged conversation with you cannot be overheard by others. Before beginning the attorney-client conversation, you should ask the client if there is anyone within hearing distance of the conversation. If there is, ask to speak to the person and arrange for a confidential conversation. Clients are not being habed in. It is up to us to arrange them to participate by phone. Do so in advance by calling the jail or correctional facility.
* Determine that the client understands how to confidentially communicate with you during the video-conferenced hearing. You should inform the client that any communication with counsel is important and must be carried out in a confidential way. You should instruct the client how to communicate with the attorney during the video- or teleconferenced hearing. If you use Zoom to video conference with your client during a telephonic hearing, you can use Zoom Chat to have private, written conversations with your client.
* Ask for a second call if you have not had sufficient time to discuss and advise the client in regard to the video- or teleconferenced hearing or if something comes up in the hearing that you have not anticipated.
* Acknowledge the client’s presence via the video- or teleconference at the start of the hearing.
* Ask the client on the record if the client can see and/or hear what is happening in the courtroom.
* Ensure that the client is visible to the court (standing in view of the camera, etc.) and that the client can see and/or hear the judge, counsel, and all other participants during the video- or teleconferenced hearing.
* Be aware of your client’s presence even as you become focused on your arguments and advocacy. Make the court aware of the client’s “presence” during the hearing directly and through the use of your body language and physical gesture in video conferencing and referring to him in the telephone conferencing. For example, you can point to the client with an open hand and look at your on-screen client when referring to him. Or say, for example, “As you know, my client is on video conference with me and he would like me to add something here, Judge.”
* Alert the court whenever there is a malfunction that impedes the proper functioning of the video- or teleconferencing equipment, and request a suspension of the hearing until the malfunction is corrected.
* Request suspension of the proceedings whenever unexpected issues arise that cannot be resolved in the absence of the client.
* Ensure that an interpreter is available whenever one is needed, and try to use the same interpreter beforehand in preparing your client for the hearing if possible.

6

* Remember out of adversity often comes opportunity. In some ways this crisis could pave the way, when normalcy returns, for clients who cannot otherwise afford the time to go to court, or who don’t have the means to get there, to participate nevertheless. Other unforeseen benefits may also arise.
* While video conferencing has not taken place yet, two counties have referenced an App. See below.

**Polycom RealPresence** Mobile for Apple iOS and Android devices

The videoconferencing system that we the courts use is Polycom and parties will be able to participate in videoconferences by downloading the app to their mobile devices. This should allow parties to either be with their clients for hearings or have their clients participate by using the app as well. Below are the instructions for downloading the application.

To install the Polycom RealPresence Mobile application:

1. Go to the Apple App Store or Google Play Store, search for Polycom RealPresence Mobile application
2. Tap the INSTALL APP

Getting started with Polycom RealPresence Mobile:

From the device application list, tap the Polycom RealPresence icon

1. Enter your email address and then tap “Next”
2. Click Skip sign in

**Here are some further tips from the NITA tutorial**

NITA Remote Advocacy: Representing Your Client During the COVID-19 Pandemic    3/27/2020

You can view the recorded webinar here: <https://www.nita.org/webcasts/s71LEC116>.

* Camera angles have different (unintended) results
	+ One study showed that :
		- Cameras that are positioned from above result in a perception of innocence
		- Cameras positioned from below gave people the perception of the person being menacing
	+ Cameras that capture just suspect (and not surroundings) resulted in double # convictions in comparison to view that included interviewer
	+ Don’t put your computer on the table, boost it way up with books
	+ Put camera at a level equal or higher to your eye; it should look over your shoulder at your background in a room, rather than at the ceiling
	+ Back away too, so it's not just your face (bust statue/newscaster look)
	+ Set the scene behind you, you don’t want people to be able to read things behind you and you don’t want vases that make you look like you have horns
	+ Remember, that is how the judge will look at you; look at the camera and only the camera (like you would in person)
	+ Elevate notes to the same level so you don’t have to lose eye contact and look down
* More light in front of you than behind you (otherwise darkens your face)
* Small spaces give you better audio; if it is too small, add a towel below your computer to get better acoustics
* Try not to interrupt because there will be a delay and will muddle your audio (more on objections later); also purposeful pauses to let people think, take it in, catch up the audio; use only a few sentences at a time--no paragraphs; give people more breaks from the audio in between your presentations
* Be concise, use simple words that can’t be misheard or misunderstood. One fact per sentence. Be conversational, not formal.
* Test, test, test beforehand
* Considerations in determining whether to do video hearings rather than taking continuance for in person hearing later:
	+ There will be a backlog when courts open up (some courts are estimating double the regular load); it will take longer to get an in person hearing
	+ Study showed statistically significant shorter sentences or probation when done in person rather than by video (it was a 2010 study, however, so people have become more accustomed to it)
	+ Over video may be better for some clients because of their demeanor or there may be a consequence to staying in detention longer
* What to do with video implicit bias of giving harsher sentences? Name the implicit bias!
	+ For example:  “Your Honor, I know this court doesn’t usually do sentencing by video, but I am concerned that Your Honor may not see my clients humanity when seen through a screen.”
	+ Studies show that just bringing it up, even when Judge discounts it verbally, will diminish the bias
* Consider stipulations with the other side to length of argument, exhibits, witnesses, issues in contest--with busier courts, this will help you get in faster and make the best use of your time
* Clarify with the judge at the beginning what the procedure will be for objections; keep in mind that most hearsay is heard by a judge first in person anyway before they rule on it and strike itso doing objections at the end (like a deposition)--if court agrees not waived--may leave a better record than mumbled audio
* Do written pleadings in advance; consider submitted proposed order as part of pleadings in advance, findings of facts afterwards too
* If someone interrupts you, let them finish, and then state that you would like to finish the remainder of your presentation without interruption
* Make things visual if you can- graphics, timelines, calendar; give the cast of characters--who will the witnesses be and what are their roles; maps, photos, charts, and diagrams
* Make a verbal road map (headlines): “I will address three issues: first.., second.., third... Now, turning to the first point…”; do the same thing for witnesses, “Now, I am going to put you back on the corner of X and Y on Z date, what were you doing there?”
* Clarify in advance how to confer with your client if everyone is by video
* Hearings with interpreter tips:
	+ Tough. Need an extra set up for that communication loop
	+ Consider a second computer/laptop to help
* If doing impeachment with a witness via video:
	+ Show them the document by holding it up to the camera (tell the judge, “I am going to hold it up to the camera until the Court or witness tell me they can read it”)
	+ Do a slide that can be switch-screened with the video (depending on tech); always be prepared for the tech to fail, so have a print out available too
	+ Send all exhibits to the court in advance so that they can see it in advance
1. Clerk-Magistrates in Plymouth and Franklin/Hampshire Counties indicate that videoconferencing in those courts will begin March 30, 2020. [↑](#footnote-ref-1)