

PRACTICAL CONSIDERATIONS FOR ATTORNEYS IN THE VIRTUAL COURTROOM

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The “New Normal”

- Due to the COVID-19 epidemic, courts in NYS are currently using and slowly expanding virtual courtrooms in place of in-person proceedings
 - Many courts are physically closed, and litigants, attorneys, and court staff are appearing by tele- or videoconference only
- We can anticipate that proceedings of this nature will be the standard for most if not all of Summer 2020, and possibly well into Fall 2020
- The courts may continue making use of virtual courtrooms in some capacity on a long term or even permanent basis

Training Purpose and Content

- This training will, from a Family Court practitioner perspective:
 - Provide attorneys with tips for appearing and conducting hearings in the virtual courtroom
 - Guide attorneys in preparing clients for the virtual courtroom, and in protecting the record
 - Discuss the challenges of offering testimony and admitting evidence in the best manner to preserve the integrity of the proceedings and protect the litigants' due process rights
- Remember: this is brand new territory for most judges, attorneys, court staff and litigants
 - Judges have a lot of discretion in how to conduct these proceedings
 - We have very little guidance so far

Part One: NYS Family Courts Covid-19 Operations

The Current Status of Family Courts

- Family Courts statewide are limited to “essential proceedings,” e.g.:
 - Family Offense Petitions
 - Child Protective removal petitions/hearings
 - Emergency Orders to Show Cause
 - JD proceedings where respondents are remanded
 - Some jurisdictions are allowing some child support petitions to preserve filing dates, but not moving the cases forward
- Courts statewide have even more limited resources than usual due to limited number of court staff who are able to work from home
- Presently NYC Family Courts collectively are operating only 5 virtual courtrooms. They are expanding, but it’s not clear how soon and by how many. Petitions must be sent to centralized emails addresses.

Family Offense Proceedings

- While FOPs are “essential proceedings” some courts are reviewing allegations, deeming them non-emergency, and adjourning indefinitely even without TOPs
- Return dates vary widely by court—some courts are issuing short return dates within days, others much longer or even indefinite
- Courts seem reluctant to proceed to trial; instead setting return dates further out
- Service of TOPs/OOPs by sheriffs is not being done consistently statewide
- Monitor your emails closely and alert clients using email to do so as well—court notices to appear may end up in your junk mail folder

Part Two: The Basics

Getting Started

- First and Foremost: Are you (or will you be in) a Virtual Courtroom?
 - Only the Virtual Courtroom is an on-the-record proceeding
 - Judges may schedule a tele- or videoconference, which is not the same!
 - Not on the record, not transcribed, similar to a conference in chambers
 - Make sure you (and your client) know in advance
- Who is appearing and how?
 - Attorneys, litigants, interpreters (courts must still provide), witnesses, ACS, NYPD, social worker, case worker
 - By phone, video, with what technology/platform
 - Not all participants may be appearing in the same manner (discussed further below)
 - Clarify in advance

Some Dos & Don'ts

- Do not record the proceeding without the court's permission (and make sure your client doesn't either)
 - There will be a transcript available just as in an in-person courtroom
- Do not have anyone else listening in or present without the court's knowledge (and instruct your client as well)
 - If you have any reason to believe anyone else has an undisclosed person listening in or participating, raise it on the record immediately
- If an interpreter is needed, arrange in advance how that will be set up
 - E.g.: if your client needs an ASL interpreter, will they both be on video or will the client be on video with the interpreter and the interpreter on the phone
 - Remember: the courts are still responsible for arranging interpreters as needed
- Always remember due process: the courts should be making every effort to mimic the in-person experience as much as reasonable possible

Privacy and Safety Concerns

- Can your client appear by video without disclosing a confidential location?
- A party calling in may be asked to put their phone number on the record, make sure your client knows how to respond
- Can your client appear without children, other persons, adverse parties listening or in the background?
- Consider options when your client is living with the adverse party or other unfriendly family/persons
 - Brainstorm with clients and their support network for solutions/alternatives
 - Safety plan in advance with clients who can't leave
 - Refer clients for supportive services if needed

Should Your Client Appear By Video?

- In some instances, you may want your client on video
 - Boost credibility
 - Counter allegations about fitness
- BUT consider other drawbacks
 - Are there privacy/safety concerns?
 - Is it potentially one-sided (is the other party able or unable to appear by video)?
 - If clients are in their home, it allows the court, opposing counsel, the adverse party a “peek” into their home
 - Can be exploited by the other side—look how nice their home is by comparison
- If need be (and possible), have your client arrange a quiet and neutral space to appear from, e.g. sit with their back to a blank wall

Preparing Your Clients

- Are your clients able to appear in the virtual courtroom, and how?
 - Technological limitations
 - Familiarity with technology
 - Consider practicing with clients in advance
 - Cognitive/other limitations with use of technology
 - Does your client have/need someone to assist, is that person willing to appear in court
 - Be prepared to brainstorm with clients, supportive friends/family, case managers, social workers, etc. and think creatively about workarounds
 - Remember, this is an ongoing conversation: what's not possible now may be possible a month from now

Preparing Your Clients, cont'd

- Prepare clients for the experience/feel of appearing virtually
 - Don't assume your client will be familiar or comfortable with this
 - Consider a practice run of calling/videoing in and noting how everyone looks, sounds, how their background appears, noise levels, etc.
- Have a plan with the client for what to do if they can't hear, get disconnected, or otherwise have a problem
 - E.g. "If you can't hear, you're going to hang up and try dialing back in. If you can't get back in, call my office number and leave a short message."
 - Make sure the court knows your plan so the court can provide an alternative if necessary
 - Consider "checking in" every few minutes on the record—"Your Honor, could we take a moment to make sure everyone can still hear?"

Preparing Your Clients, cont'd

- If possible, have a “side channel” for your client to contact you or an assistant privately while in the virtual courtroom, such as via text/email
 - For many clients, including older adults, this won't be an option
- If not possible, have a plan for when you need to speak to your client privately
 - Ask the court to have everyone mute and turn off video so you can have a private moment with your client if needed OR
 - Ask to sign off briefly with your client and then sign back in when done
 - Some judges may not allow this, consider pushing back if critical
 - At the very least note your objection on the record

Preparing Yourself

- Consider your own limitations!
 - Your available technology and comfort level
 - If you work in a larger office/org, speak to your IT Dept about what they can provide
 - If you are a solo practitioner, speak to colleagues about what's available/costs
 - What do you need to learn? Where can you learn it?
 - Are you able to multitask while in front of a computer screen
 - What distractions can you minimize or eliminate
 - Practice with colleagues/friends
- Whenever possible, have an assistant/colleague/intern appear with you to take notes, check in with your client, etc.
 - If the court tries to prevent you, push back: this is about quality of representation

Self-Care

- There is evidence that video calls can be especially taxing on the brain
 - The Reason Zoom Calls Drain Your Energy
<https://www.bbc.com/worklife/article/20200421-why-zoom-video-chats-are-so-exhausting>
 - How To Combat Zoom Fatigue
<https://hbr.org/2020/04/how-to-combat-zoom-fatigue>
 - Upcoming Webinar, June 10, 2pm: Tech Tools for Self-Care
- Consider scheduling/pacing and length of appearances
 - What are you and your client doing before and after
 - How will that affect your ability to prepare and debrief

Part Three:
Presenting Testimony & Evidence

Key Points to Remember

- Just as with in-person proceedings, you may need to present evidence or testimony even if you're not scheduled for a formal trial/hearing
- Courts will **expect** cooperation by counsel, both with the court and each other
 - Communicate early and frequently
 - Think about balancing flexibility with protecting your client
 - Document all efforts to reach difficult/nonresponsive adversaries
- The courts will expect **even more** from you when the opposing party is appearing pro se
- Keep the court and all counsel apprised of everyone's respective tech capabilities and any changes

With Evidence, Planning is Key

- Insist on setting the ground rules in advance
 - Request a conference (even if off the record) to clarify, then memorialize
 - Don't allow "we'll figure it out as we go along"
 - Remember, you're setting rules for the evidence you want as well as don't want in!
- For example:
 - How far in advance to exchange and/or stipulate?
 - Must all docs be in pdf format? In color?
 - May you highlight portions or otherwise make distinctions for presentation?
 - Do you need a second version prepared in order to do this?
 - Uploaded/sent as one large file or individually?
 - Will screen sharing be permitted/required?
 - When screen sharing, make sure you ID the document clearly for the transcript as well

Planning is Key, cont'd

- Examples, cont'd
 - How to mark them for ID/evidence?
 - Remember: you will not be passing around a tangible object, so think about how it can be easily identified and referred to on a screen or over the phone
 - How will you direct the court's or witness' attention to certain portions
 - Bate stamp all docs, so even if you take documents out of sequence you have an easily identifiable reference
 - Paste photos into a document so you can bate stamp them as well
 - Consider how to make them easily distinguishable from your adverse party's documents
 - E.g. bate stamp with "P__" (for Petitioner) or "R__" (for Respondent)

Planning is Key, cont'd

- Examples, cont'd
 - How to handle real evidence
 - Who has it in their physical custody
 - How will it be presented: is on video sufficient
 - Does it need to be physically examined by the other party or court
 - How to handle recordings
 - Make and share digital copies in advance
 - Address privacy concerns
 - How will you have the witness authenticate it
 - Who will actually play it into evidence (you, the witness, or the court)
 - Take extra care to describe evidence for the record

Testimony

- When testimony is needed, consider whether it can/should be by video
 - Video allows for more non-verbal cues, better credibility determination
 - (That could work for or against your case!)
 - You want to avoid nonparity—if one party or some witnesses can't testify by video, should anyone else?
- Remember earlier concerns we discussed about clients appearing by video
 - May be even more of a concern when testifying
 - But also, where prior non-video appearances were allowed, for testimony the court may require it

Testimony, cont'd

- Interpreter issues

- Discuss setup with the court in advance, know the plan
 - Will everyone be heard on the record, will only the interpreter be heard for the person who needs it, will one interpreter be used for more than one person
- Discuss with your client/witness what to do if there is a problem with the interpreter, ask the court for instruction if needed
 - This is where a “side channel” with the client can be most useful in a non-testimonial appearance
 - However, remember a “side channel” with a witness or with your client while testifying would not be appropriate

Preparing Your Client/Witness for Testimony

- Practice!
 - Not just content but technology
 - Take extra care to practice how evidence will be handled
 - Another reason to plan in advance with court—so you can prepare the witness
- All the more important to stress: listen carefully, indicate if you can't hear or don't understand, avoid cross talk
- Ask the court to clarify before testimony starts what the witness should do if they can't hear or are disconnected; confirm the witness understands
- Additional considerations for older adults and people with disabilities:
 - Are they hard of hearing or have poor eyesight, difficulty with technology
 - Do they need/have a family member or caregiver to assist
 - Additional preparation time and practice likely needed

Part Four:
Questions? Share Experiences?