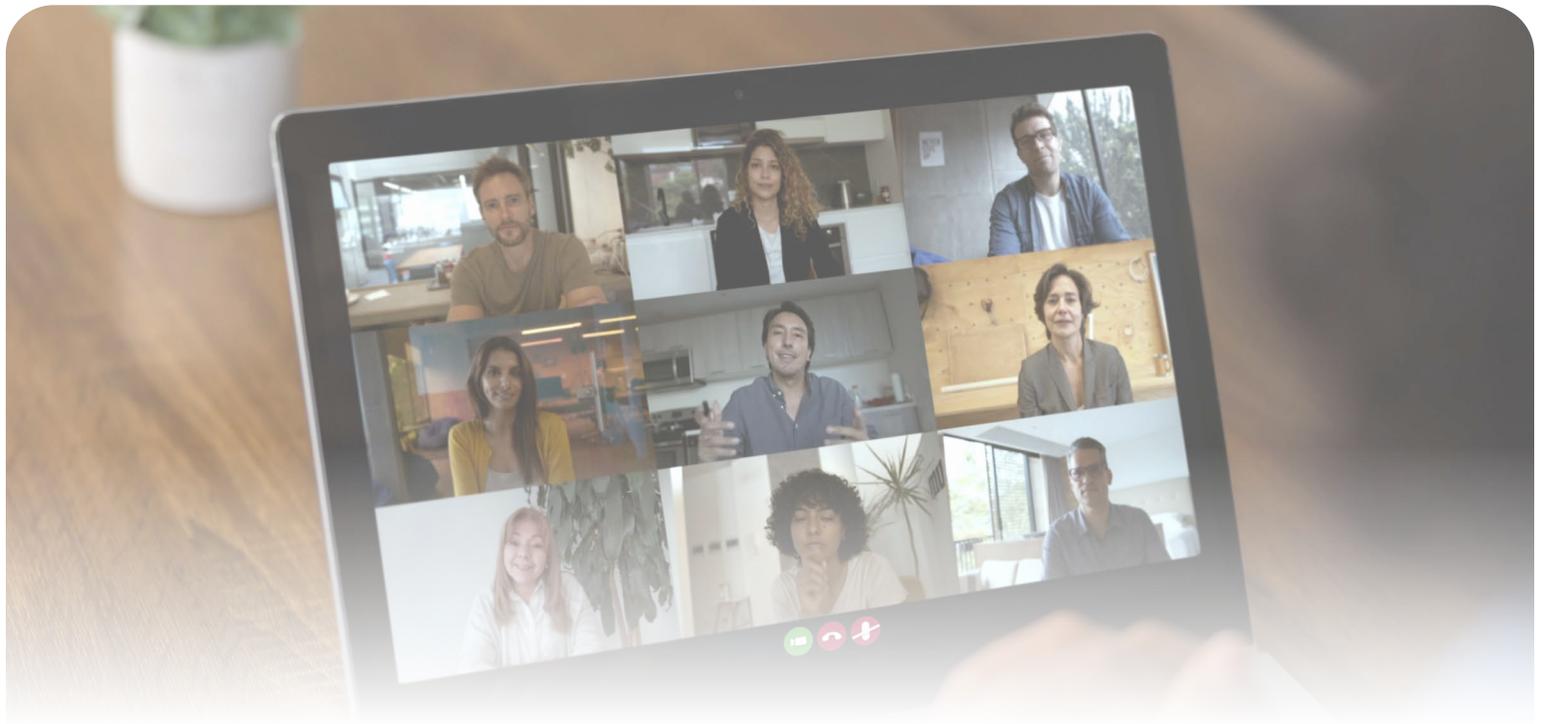


Navigating Virtual Proceedings in Juvenile Court

A Guide for Judges





People do not live on two-dimensional flat screens.

When we see families and young persons solely on a screen, we risk losing sight of essential aspects of their humanity, of their personhood. When we hear cases virtually, we lose a thousand and one nonverbal cues that help us understand who a person is and give us a glimpse of their circumstances. This is one of the reasons I strive to bring young people and the caretakers in their lives into the courthouse for substantive or dispositive hearings. If I am to make a decision that has the potential to alter the trajectory of a persons' life, I should do so looking that person in the eye while confronted by their full humanity.

Kenneth J. King

Associate Justice
Middlesex County, Massachusetts Juvenile Court

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Since the onset of the COVID-19 pandemic, juvenile courts across the country have adopted video and teleconferencing to conduct virtual hearings. Although initially embraced as an emergency measure, virtual proceedings continue to be utilized even as jurisdictions increasingly lift restrictions on in-person hearings. This new “hybrid” model is being heralded as a groundbreaking way to make court more accessible and, more importantly, more convenient. However, as gatekeepers to court proceedings, judges must ensure that the constitutional rights of youth in their courtrooms are prioritized over efficiency or cost-saving concerns. Before proceeding with virtual hearings, judges should be mindful of access to technology, constitutional implications, and the limitations of remote proceedings specific to youth.

Access to Technology

Access to appropriate technology remains an impediment to virtual proceedings. When setting hearings, judges should not presume that youth have access to all of the technology necessary to engage in a virtual hearing. The digital divide¹ remains stark. A recent report from the Pew Research Center found that 41 percent of adults with household incomes below \$30,000 do not own a desktop or laptop computer, 43 percent do not have broadband services at home, and 24 percent do not own a smartphone.² Additionally, Black and Latino/a adults, those with disabilities, and those from rural communities are also less likely to have access to multiple forms of digital technology.³ Of course, some of these adults are the parents and guardians of young people who, by virtue of being minors, also do not have access to technology. Tackling this digital divide is necessary to protect the fairness of virtual court proceedings.



When setting virtual hearings, courts must also be aware that while some youth may have access to technology, they do not necessarily have the skills and familiarity to use specific platforms. Not all youth are able to navigate the intricacies of virtual platforms they do not utilize daily. Moreover, these platforms also create specific challenges for limited and non-English speaking youth and caregivers.⁴ Individuals with disabilities face additional obstacles accessing the necessary technology for hearings.⁵

Courts must ensure that all parties, especially those from marginalized groups, have an opportunity to **meaningfully** engage in proceedings.⁶ This meaningful engagement does not only exist in what courts call “evidentiary hearings,” but also in “non-evidentiary,” bond and detention, and status hearings. Can youth really meaningfully engage, follow along, communicate, and be protected the way the Constitution and law require in virtual spaces?

1 The “digital divide” references the gap between those who do and those who do not have access to broadband internet and/or the technology to use it.
2 Emily A. Vogels, *Digital Divide Persist Even as Lower-Income Americans Make Gains in Tech Adoption*, PEW RESEARCH CENTER, June 22, 2021.
3 Sara Atske & Andrew Perrin, *Home Broadband Adoption, Computer Ownership Vary by Race, Ethnicity in the U.S.*, PEW RESEARCH CENTER, July 16, 2021; Andrew Perrin and Sara Atske, *Americans with Disabilities Less Likely to Own Computer, Smartphone*, PEW RESEARCH CENTER, September 10, 2021; Emily A. Vogels, *Some Digital Divides Between Rural, Urban, Suburban America Persist*, PEW RESEARCH CENTER, August 19, 2021.
4 BRENNAN CENTER FOR JUSTICE, *The Impact of Video Proceedings on Fairness and Access to Justice in Court* (2020) (noting that “dense court language can be difficult to communicate via translation to non-English speakers”).
5 CTR. FOR COURT INNOVATION & NAT’L LEGAL AID & DEF. ASSOC., *Remote Justice: Communication in the Virtual Courtroom* (2020).
6 BRENNAN CENTER FOR JUSTICE, *Principles for Continued Use of Remote Court Proceedings* (2020).

Constitutional Protections

While conducting proceedings remotely may eliminate some barriers to participation,⁷ the practice raises significant constitutional concerns. Embedded in the right to counsel for youth is the right to effective assistance of counsel.⁸ Youth are entitled to “the guiding hand of counsel at every step in the proceedings against him.”⁹ Due process requires that youth have a meaningful opportunity to communicate with their attorneys.¹⁰ Widespread reports indicate that attorneys do not have reliable means of communicating confidentially with their clients during virtual proceedings, which erodes the attorney-client relationship and deprives youth of access to counsel.¹¹ Youth have a right to participate and assist in their defense, and they must be able to communicate confidentially with their attorneys before, during, and after hearings.

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Virtual proceedings also present significant confrontation issues¹² when witnesses testify remotely. Video testimony can skew perceptions through camera placement, the absence of nonverbal cues, and lack of eye contact.¹³ In-person confrontation is necessary to protect the integrity of the factfinding process and is designed to enhance assessments of credibility.¹⁴ Unless courts can ensure that virtual testimony is reliable, necessary, and does not run afoul of the Confrontation Clause, virtual proceedings should not be used for hearings involving witness testimony.

Youth also have a right to be present at all critical stages of a proceeding.¹⁵ The Supreme Court has held that “due process clearly requires that a defendant be allowed to be present ‘to the extent that a fair and just hearing would be thwarted by his absence.’”¹⁶ Therefore, any substantive hearing, including but not limited to probable cause hearings, bail hearings,¹⁷ evidentiary hearings, and trials, carries a right to presence. Ultimately, the constitutional concerns created by virtual proceedings require courts to safeguard due process and fundamental fairness. Any abridgement of constitutional protections requires in-person hearings.



7 LEGAL AID INTERAGENCY ROUNDTABLE, *Access to Justice in the Age of Covid-19* (2021) (For example, the shift to remote hearings often eliminated barriers like lack of transportation, lack of childcare, and the inability to take time off of work, which reduced default or non-appearance rates.).

8 *In re Gault*, 387 U.S. 1, 34 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

9 *Id.*

10 NAT’L JUV. DEF. CTR., *Due Process in the Time of Covid: Defenders as First Responders in a Juvenile Court System Struggling with the COVID-19 Pandemic* (2020) [hereafter *Due Process in the Time of Covid*].

11 *Due Process in the Time of Covid*, *supra* note 10; STANFORD PRISON EXPERIMENT: A FILM BY KYLE PATRICK ALVAREZ (VOD 2015).

12 U.S. CONST. amend. VI.

13 Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1108 (2004).

14 *Coy v. Iowa*, 487 U.S. 1012 (1988); *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

15 *Illinois v. Allen*, 397 U.S. 337 (1970) (“One of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.”).

16 *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (internal citations omitted).

17 Edie Fortuna Cimino et. al., *Charm City Televised & Dehumanized: How CCTV Bail Reviews Violate Due Process*, 45 U. BALT. L.F. 56 (2014). (Constitutional issues with video bail conferences).

Limitations of Virtual Proceedings

While issues with access to technology and constitutional concerns permeate both adult and juvenile courts, there are additional limitations to virtual proceedings involving youth. Youth are not simply “miniature adults,”¹⁸ and they face additional hurdles in engaging with virtual court proceedings. Defense attorneys across the country have noted the negative effects virtual proceedings have had on their clients’ ability to understand the legal process.¹⁹ This compounds the already existing challenge many youth face because of developmental differences in their capacity for understanding and behavior-control compared to adults.²⁰ Youth with learning disabilities or speech and language impairments are at even greater risk of not understanding what happens in the courtroom.²¹ As a result, courts should consider adolescent development and each young person’s unique ability to comprehend the substance of proceedings during virtual hearings.

Previous studies of virtual hearings have shown that remote proceedings can lead to disengagement with the judicial process and, at times, result in harsher outcomes in cases.²² Given the overrepresentation of Black, Latino/a, Native/Indigenous, and other youth of color in juvenile courts,²³ virtual proceedings can also exacerbate racial disparities. One assessment found that children were perceived as less accurate and believable when appearing over video.²⁴ In addition, communication over video can cause the unintentional dehumanization of participants.²⁵ Absent in-person interactions in a court room, the gravity of proceedings can be diminished.²⁶

Judicial officers may assume that because young people are generally active on social media or routinely use video game consoles for recreational purposes that they are also adept at navigating video conferencing platforms and are comfortable with the medium. This is a faulty deduction. Virtual court hearings are not interactive in the same way as social media and video game consoles. With the latter, young people are constantly engaged and continuously stimulated by activity and can move quickly from one item to the next. In video hearings, young people are asked to sit quietly and pay attention without the benefit of actual human contact, sometimes for long periods. The two activities – recreational technological use and attending a court hearing – are not comparable.

Given these limitations, courts should prioritize in-person hearings as a matter of practice. However, should courts decide that a virtual hearing may be warranted and that a young person would like to proceed virtually, the following checklist is offered to assist courts in conducting virtual proceedings.



18 *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011).

19 *Due Process in the Time of Covid*, *supra* note 10.

20 See generally, Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop,”* 64 AM. PSYCHOLOGIST 583 (2009); Thomas Grisso et al., *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003), (discussing youth competency and decision-making); see also Jodi L. Viljoen et al., *Adjudicative Competence and Comprehension of Miranda Rights in Adolescent Defendants: A Comparison of Legal Standards*, 25 BEHAV. SCIS. & L. 1 (2007).

21 See, Pamela C. Snow & Martine B. Powell, *Oral Language Competence, Social Skills and High-Risk Boys: What are Juvenile Offenders Trying to Tell Us?*, 22 CHILDREN & SOCIETY 16 (2008).

22 *The Impact of Video Proceedings on Fairness and Access to Justice in Court* *supra* note 4; Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions* 100 J. OF CRIM. L. & CRIMINOLOGY, 869, 900 (2010).

23 See generally, Barbara Robles-Ramamurthy & Clarence Watson, *Examining Racial Disparities in Juvenile Justice*, 47 J AM. ACAD. PSYCHIATRY L. 1 (2019).

24 *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, *supra* note 4.

25 Min Kyung Lee, et al., *Making Decisions From a Distance: The Impact of Technological Mediation on Riskiness and Dehumanization* (2015); *Due Process In The Time Of Covid*, *supra* note 10; STANFORD PRISON EXPERIMENT: A FILM BY KYLE PATRICK ALVAREZ, *supra* note 11.

26 Shari Seidman Diamond et al., *supra* note 22, at 879.

Checklist for Conducting Virtual Hearings

Evaluate Legality & Necessity of Virtual Proceeding

- Assess constitutional implications of specific proceedings with respect to right to presence, confrontation, and effective assistance of counsel.
- Consider case-specific factors, including but not limited to:
 - Stage of Proceedings: arraignment, probable cause hearing, detention hearing, status hearing, evidentiary hearing, trial, or disposition.
 - Placement: whether a youth is detained, in an out-of-home placement, or with parents/caregivers in the community.
 - Youth's Ability to Engage: assess a youth's age; intellectual, emotional, or learning disabilities; and any other information known to the court that indicates a youth would struggle to comprehend or meaningfully engage with a virtual hearing.
 - Willingness of Parties: ascertain each party's willingness to proceed virtually prior to setting any hearing. Ensure attorneys have sufficient time to confer with clients before stating a position.

Create a Clear Record

- Ensure the consent of each party to proceed virtually is stated on the record.
- Ascertain whether a youth's consent is knowing and voluntary. Specifically ask whether a youth has had the opportunity to consult with their attorney about the decision to proceed virtually.
- Have all parties identify themselves by name and role in the proceeding (e.g., prosecution, probation officer, youth defense counsel, service provider).
- Articulate the legal basis for proceeding virtually, citing to an executive order, local rule, or applicable authority.
- State if a proceeding will be recorded through audio or video and/or transcribed by a court reporter.

Safeguard Confidentiality

- Confirm that proceedings are not streamed or available to the public. Depending on the platform, courts may be able to create meetings that require a specific ID and password to join.
- Remind all participants that proceedings may not be recorded in any form.
- Create a waiting room for participants to prevent others from joining a hearing in-progress. This allows the host to approve each participant.
- Disable platform chat function or confirm all participants are aware that anything written on the chat function will become part of the record.
- Ensure attorneys have a confidential means of communication with clients that is not recorded. If a platform allows for "breakout rooms," these can be an effective way to provide for confidential conversations.
- Permit breaks throughout the hearing to allow for confidential communications.
- Confirm youth have a safe, private space to participate in the hearing.

Facilitate Use of Technology

- Provide all participants with a guide on how to join proceedings and ensure this guide is available in languages other than English.
- Ensure youth have access to appropriate technology for hearing.
- Confirm appropriate accommodations are in place for persons with disabilities, as well as non-English speakers and those with limited English proficiency.
- Inform participants of how the court will proceed if technical difficulties emerge and how participants should proceed if their connection drops during a hearing.
- Allow youth defenders to co-host the virtual meeting platform during the hearing. This capability allows defenders to adjust the sound and/or stop the video if the youth is having a difficult time or needs a break.
- Do not penalize any party for technological difficulties.