# Open Courts

Online Court Issues

* The Colorado Children’s Code states that the general public may not be excluded from a hearing unless the court makes a finding that it is in the best interests of the child.[1](#_bookmark0)
* Does livestreaming a court proceeding via Facebook or YouTube require the best interests finding, since they are not accessible by the general public?
* If livestreaming is impracticable or intermittent, is it a statutory violation?
* What kind of notice to the public is required?
* Is an online trial “public”?[2](#_bookmark1)

# Digital Divide, Equal Protection, and Due Process

* There is a clear urban and rural divide in which Coloradans have access to broadband.[3](#_bookmark2)
* Few have highspeed internet and videoconferencing ability.
* Does requiring access to highspeed internet constitute:
	+ A tax or entry fee to enter the courthouse?
	+ A violation of Equal Protection?
	+ A violation of Compulsory Process?
	+ A violation of Due Process?
* If a parent is required to access highspeed internet at a library or other public facility for video visits during the covid-19 pandemic, does that lack of access constitute a lack of reasonable efforts to facilitate visitation?
* Are courts required to provide access to highspeed internet access to:
	+ Parties?
	+ Attorneys?
	+ Witnesses?
	+ The public?

# Recordings

* Must courts record proceedings?
* Must courts retain recordings of the proceedings? If not, should they?

1 §19-1-106(2), Colo. Rev. Stat (2019)

2 *See, e.g.*, *Cameron v. State*, 490 S.W.3d 57 (Tex. Crim. App. 2014); *Lilly v. State*, 365 S.W.3d 321 (Tex. Crim. App. 2012).

3 <https://ilsr.org/mapping-colorados-internet-service-options/>

* What is the result where the transcript and audio recording conflict?
* Are parties or members of the public allowed to record proceedings?
* What is the consequence if a party or a member of the public records a proceeding against court orders using a home computer?
* What is the penalty if a party or member of the public manipulates an audio recording?
* How can attorneys ensure that they have adequately “made their record” for appellate issues?
* If the Zoom host (*i.e.*, judge or other court personnel) can mute any party— intentionally or unintentionally—what effect does that have on the official record?

# Waivers

* Parents have a due process and statutory right to be present, in person or through counsel, at critical stages of dependency and neglect proceedings.[6](#_bookmark5)
* What is required for a parent to waive that right at the outset of the case?
* Must that waiver be knowing and voluntary? It must happen after parents are advised of their right to counsel by the court. If the parent waived their right to be advised, have they waived the right at subsequent critical stages of the proceedings?
* What script, or any, should be developed to meet this guarantee?

# Jails

* Many of the issues presented above assume a parent is not incarcerated. Similar issues arise when clients are incarcerated through the duration of the case:
	+ Adequate audio, video, and lighting;
	+ Interpretive services;
	+ Assistance for illiterate clients;
	+ Docusign, notaries, or other technology for signing court documents;
	+ Adequate confidential space for attorney-client meetings and communications during proceedings;

6 *See, e.g., People in Interest of V.M.R.,* 768 P.2d 1268 (Colo. App. 1989)

* + Measures to protect parents’ constitutional or statutory rights should equipment malfunction and any of the above (audio, interpretation, confidential communications) be lost;
	+ Cleaning measures after each case to prevent spread of covid-19;
* What additional burdens may video proceedings place on defendants with intellectual disabilities and mental illness and their attorneys? Does there need to be a request for reasonable accommodations pursuant to the ADA?

# Reasonably Effective Assistance of Counsel

* Professional standards are not suspended during a disaster.
* Attorneys must:[7](#_bookmark6)
	+ Investigate the facts;
	+ Research the law;
	+ File pertinent motions;
	+ Subpoena relevant documents;
	+ Visit their clients;
	+ Appear in court.
* These should be completed prior to any decision regarding whether to enter an agreement for a deferred adjudication, enter an admission to a petition, or proceed to trial.
* Some of these are easy to accomplish virtually.
* Others (particularly investigation) are nearly impossible to conduct from one’s home and cannot be competently completed during the pandemic. This could be a good circumstance to consider in-depth discovery tools, like hiring an ORPC investigator or conducting a deposition.
* Contested proceedings—bench trials, evidentiary hearings, visitation or allocation of parental rights hearings—would present further complications, such as serving and preparing witnesses.

7 *See* CJD 16-02

# Attorney-Client Communications

* Attorneys often must communicate confidentially with their clients during court proceedings.
* How can courts assure confidential attorney-client communications via Webex?
* If video breakout sessions are used for attorney-client communication, can the Webex host (*i.e.*, the judge or other court personnel) listen to those communications?
* If video breakout sessions are used for attorney-client communication, can the host (*i.e.*, the judge or other court personnel) end the breakout session at will?
* If judges and prosecutors are left in the main Webex room while attorneys and clients speak confidentially, do *ex parte* communication issues arise?
* Should a separate platform be used for attorney-client communication?
* Will attorneys, clients, and court personnel be adequately instructed on Webex or other technology to ensure confidential client communication?
* How do these issues intersect for clients with disabilities?

# Controlled Environment

* Courtrooms are controlled environments.
* How can that be replicated online?
* Can the court ensure that video witnesses are not subject to coaching, intimidation, or undue influence (*i.e.*, what is happening offscreen)?
* Can the court ensure that video witnesses are not testifying using notes, prompts, or simultaneous use of internet searches?
* Can the court ensure that video witnesses do not collaborate or otherwise violate witness sequestration?

# Voluntariness

* Does the lack of access to in-person proceedings, coupled with the threat of lack of in person visitation with their children for an indefinite period because of covid-19, affect the voluntariness of a parent’s admission or deferral agreement?

# Signatures and Fingerprints

* How can signatures and fingerprints be obtained, where:
	+ Scores of facilities lack technology for virtual signatures or fingerprints;
	+ It is unclear whether attaching booking sheets to plea paperwork will suffice.

# Evidence

* How can evidence be introduced and submitted in online courts?

# Psychological Impact of Online Proceedings

* Psychologists have documented differences between in-person and online human behavior.[11](#_bookmark10)
* Will online proceedings lead to higher rates of removal? Or higher rates of terminations?
* Will online proceedings lead to less empathy to the lack of in person visitation between parents and children?

11 *See, e.g.*, [https://liberalarts.oregonstate.edu/sites/liberalarts.oregonstate.edu/files/psychology/research/okdie\_g](https://liberalarts.oregonstate.edu/sites/liberalarts.oregonstate.edu/files/psychology/research/okdie_guadagno_bernieri_geers_mclarney-vesotski_2011.pdf) [uadagno\_bernieri\_geers\_mclarney-vesotski\_2011.pdf](https://liberalarts.oregonstate.edu/sites/liberalarts.oregonstate.edu/files/psychology/research/okdie_guadagno_bernieri_geers_mclarney-vesotski_2011.pdf)