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SUPREME COURT OF WISCONSIN

NOTICE
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No. 07-12

In the matter of the petition to create a rule governing the use of videoconferencing in the courts

FILED

MAY 1, 2008

David R. Schanker
Clerk of Supreme Court
Madison, WI

On September 4, 2007, A. John Voelker, Director of State Courts, petitioned the court to create a rule governing the use of videoconferencing in the courts, pursuant to the court's rulemaking authority under Wis. Stat. § 751.12. A public hearing on the petition was conducted on January 8, 2008.

At the ensuing administrative conference, the court voted to adopt the petition, as modified. The court ruled that the effective date of this rule shall be July 1, 2008.

Therefore,

IT IS ORDERED that effective July 1, 2008:

Section 1. Subchapter III of chapter 885 of the statutes is created to read:

SUBCHAPTER III
CHAPTER 885
USE OF VIDEOCONFERENCING IN THE CIRCUIT COURTS

885.50 Statement of intent. (1) It is the intent of the Supreme Court that videoconferencing technology be available for use in the circuit courts of Wisconsin to the greatest extent possible consistent with the limitations of the technology, the rights of litigants and other participants in matters before the courts, and the need to preserve the fairness, dignity, solemnity, and decorum of court proceedings. Further, it is the intent of the Supreme Court that circuit court judges be vested with the discretion to determine the manner and extent of the use of videoconferencing technology, except as specifically set forth in this subchapter.

(2) In declaring this intent, the Supreme Court finds that careful use of this evolving technology can make proceedings in the circuit courts more efficient and less expensive to the public and the participants without compromising the fairness, dignity, solemnity, and decorum of these proceedings. The Supreme Court further finds that an open-ended approach to the incorporation of this technology into the court system under the supervision and control of judges, subject to the limitations and guidance set forth in this subchapter, will most rapidly realize the benefits of videoconferencing for all concerned.

(3) In declaring this intent, the Supreme Court further finds that improper use of videoconferencing technology, or use in situations in which the technical and operational standards set forth in this subchapter are not met, can result in abridgement of fundamental rights of litigants, crime victims, and the public, unfair shifting of costs, and loss of the

fairness, dignity, solemnity, and decorum of court proceedings that is essential to the proper administration of justice.

885.52 Definitions. In this subchapter:

(1) "Circuit court" includes proceedings before circuit court judges and commissioners, and all references to circuit court judges include circuit court commissioners.

(2) "Participants" includes litigants, counsel, witnesses while on the stand, judges, and essential court staff, but excludes other interested persons and the public at large.

(3) "Videoconferencing" means an interactive technology that sends video, voice, and data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video monitors.

885.54 Technical and operational standards. **(1)** Videoconferencing technology used in circuit court proceedings shall meet the following technical and operational standards:

(a) Participants shall be able to see, hear, and communicate with each other.

(b) Participants shall be able to see, hear, and otherwise observe any physical evidence or exhibits presented during the proceeding.

(c) Video and sound quality shall be adequate to allow participants to observe the demeanor and non-verbal communications of other participants and to clearly hear what is taking place in the courtroom to the same extent as if they were present in the courtroom.

(d) Parties and counsel at remote locations shall be able, upon request, to have the courtroom cameras scan the courtroom so that remote participants may observe other persons present and activities taking place in the courtroom during the proceedings.

(e) In matters set out in sub. (g), counsel for a defendant or respondent shall have the option to be physically present with the client at the remote location, and the facilities at the remote location shall be able to accommodate counsel's participation in the proceeding from such location. Parties and counsel at remote locations shall be able to mute the microphone system at that location so that there can be private, confidential communication between them.

(f) If applicable, there shall be a means by which documents can be transmitted between the courtroom and the remote location.

(g) In criminal matters, and in proceedings under chs. 48, 51, 55, 938, and 980, if not in each other's physical presence, a separate private voice communication facility shall be available so that the defendant or respondent and his or her attorney are able to communicate privately during the entire proceeding.

(h) The proceeding at the location from which the judge is presiding shall be visible and audible to the jury and the public, including crime victims, to the same extent as the proceeding would be if not conducted by videoconferencing.

(2) The moving party, including the circuit court, shall certify that the technical and operational standards at the court and the remote location are in compliance with the requirements of sub. (1).

885.56 Criteria for exercise of court's discretion. (1) In determining in a particular case whether to permit the use of videoconferencing technology and the manner of proceeding with videoconferencing, the circuit court may consider one or more of the following criteria:

(a) Whether any undue surprise or prejudice would result.

(b) Whether the proponent of the use of videoconferencing technology has been unable, after a diligent effort, to procure the physical presence of a witness.

(c) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony.

(d) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits.

(e) The importance of the witness being personally present in the courtroom where the dignity, solemnity, and decorum of the surroundings will impress upon the witness the duty to testify truthfully.

(f) Whether a physical liberty or other fundamental interest is at stake in the proceeding.

(g) Whether the court is satisfied that it can sufficiently know and control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.

(h) Whether the participation of an individual from a remote location presents the person at the remote location in a diminished or distorted sense such that it negatively reflects upon the individual at the remote location to persons present in the courtroom.

(i) Whether the use of videoconferencing diminishes or detracts from the dignity, solemnity, and formality of the proceeding so as to undermine the integrity, fairness, and effectiveness of the proceeding.

(j) Whether the person proposed to appear by videoconferencing presents a significant security risk to transport and present personally in the courtroom.

(k) Waivers and stipulations of the parties offered pursuant to s. 885.62.

(L) Any other factors that the court may in each individual case determine to be relevant.

(2) The denial of the use of videoconferencing technology is not appealable.

885.58 Use in civil cases and special proceedings. (1) Subject to the standards and criteria set forth in ss. 885.54 and 885.56 and to the limitations of sub. (2), a circuit court may, on its own motion or at the request of any party, in any civil case or special proceeding permit the use of

videoconferencing technology in any pre-trial, trial, or post-trial hearing.

(2) (a) A proponent of a witness via videoconferencing technology at any evidentiary hearing or trial shall file a notice of intention to present testimony by videoconference technology 30 days prior to the scheduled start of the proceeding. Any other party may file an objection to the testimony of a witness by videoconferencing technology within 10 days of the filing of the notice of intention. If the time limits of the proceeding do not permit the time periods provided for in this paragraph, the court may in its discretion shorten the time to file notice of intention and objection.

(b) The court shall determine the objection in the exercise of its discretion under the criteria set forth in s. 885.56.

885.60 Use in criminal cases and proceedings under chapters 48, 51, 55, 938, and 980. **(1)** Subject to the standards and criteria set forth in ss. 885.54 and 885.56 and to the limitations of sub. (2), a circuit court may, on its own motion or at the request of any party, in any criminal case or matter under chs. 48, 51, 55, 938, or 980, permit the use of videoconferencing technology in any pre-trial, trial or fact-finding, or post-trial proceeding.

(2) (a) Except as may otherwise be provided by law, a defendant in a criminal case and a respondent in a matter listed in sub. (1) is entitled to be physically present in the courtroom at all critical stages of the proceedings, including evidentiary hearings, trials or fact-finding hearings, plea

hearings at which a plea of guilty or no contest, or an admission, will be offered, and sentencing or dispositional hearings.

(b) A proponent of a witness via videoconferencing technology at any evidentiary hearing, trial, or fact-finding hearing shall file a notice of intention to present testimony by videoconference technology 20 days prior to the scheduled start of the proceeding. Any other party may file an objection to the testimony of a witness by videoconference technology within 10 days of the filing of the notice of intention. If the time limits of the proceeding do not permit the time periods provided for in this paragraph, the court may in its discretion shorten the time to file notice of intention and objection.

(c) If an objection is made by the plaintiff or petitioner in a matter listed in sub. (1), the court shall determine the objection in the exercise of its discretion under the criteria set forth in s. 885.56.

(d) If an objection is made by the defendant or respondent in a matter listed in sub. (1), the court shall sustain the objection.

885.62 Waivers and stipulations. Parties to circuit court proceedings may waive the technical and operational standards provided in this subchapter, or may stipulate to any different or modified procedure, as may be approved by the court.

885.64 Applicability. (1) The provisions of this subchapter shall govern the procedure, practice, and use of videoconferencing in the circuit courts of this state.

(2) All circuit court proceedings, with the exception of proceedings pursuant to s. 972.11 (2m), that are conducted by videoconference, interactive video and audio transmission, audiovisual means, live audiovisual means, closed-circuit audiovisual, or other interactive electronic communication with a video component, shall be conducted in accordance with the provisions of this subchapter.

(3) The use of non-video telephone communications otherwise permitted by specific statutes and rules shall not be affected by this subchapter, and shall remain available as provided in those specific statutes and rules.

Section 2. The following Comment to subchapter III of chapter 885 of the statutes is not adopted but will be published and may be consulted for guidance in interpreting and applying the statute.

Comment, 2008

Section 885.50 of the subchapter is intended to recognize and summarize the larger debate concerning the use of videoconferencing technology in the courts, and to provide a clear statement of the Supreme Court's intent concerning such use, which should be helpful guidance to litigants, counsel and circuit and appellate courts in interpreting and applying these rules.

This subchapter is not intended to give circuit court judges the authority to compel county boards to acquire, maintain or replace videoconferencing equipment. Rather, it is intended to provide courts with authority and guidance in the use of whatever videoconferencing equipment might be made available to them.

Section 885.54 is intended to establish stringent technical and operational standards for the use of

videoconferencing technology over objection, and in considering approval by the circuit court of waivers or stipulations under s. 885.62. Mobile cart-based systems will not meet these standards in many or even most situations, but may still be used pursuant to a waiver or stipulation approved by the court. The effect will be to encourage the installation of multiple camera systems, while still allowing the use of cart-based systems when participants are in agreement to do so, which is likely to be much of the time.

Section 885.56 is intended to give the circuit court broad discretion to permit the use of videoconferencing technology when the technical and operation standards of s. 885.54 are met, while providing clear guidance in the exercise of that discretion. Under this section, the circuit court may permit the use of videoconferencing technology in almost any situation, even over objection, except as provided under s. 885.60. On the other hand, the court may deny the use of videoconferencing technology in any circumstance, regardless of the guidelines. This is consistent with the intent of this legislation to vest circuit courts with broad discretion to advance the use of videoconferencing technology in court proceedings under the standards and guidelines set out, but to reserve to courts the prerogative to deny its use without explanation. A circuit court's denial of the use of videoconferencing is not appealable as an interlocutory order, but to the extent the denial involves issues related to a party's ability to present its case and broader issues related to the presentation of evidence, the denial can be appealed as part of the appeal of the final judgment.

Regarding section 885.58, civil cases and special proceedings in general pose few problems of constitutional dimension concerning the use of videoconferencing technology and offer litigants the potential of significant savings in trial expenses. For these reasons, this technology will likely gain rapid acceptance resulting in expanding use. Where objections are raised, the rule provides that the circuit court will resolve the issue pursuant to the standards and decisional guidance set out in ss. 885.54 and 885.56.

It is the intent of s. 885.60 to scrupulously protect the rights of criminal defendants and respondents in matters which could result in loss of liberty or fundamental rights with respect to their children by preserving to such litigants the right to be physically present in court at all critical stages of their proceedings. This section also protects such litigants' rights to adequate representation by counsel by eliminating the potential problems that might arise where counsel and litigants are either physically separated, or counsel are with litigants at remote locations and not present in court.

"Critical stages of the proceedings" is not defined under this section, but incorporates existing law as well as new law as it is adopted or decided. This section is not intended to create new rights in litigants to be physically present which they do not otherwise possess; it is intended merely to preserve such rights, and to avoid abrogating by virtue of the adoption of this subchapter any such rights.

This section is also intended to preserve constitutional and other rights to confront and effectively cross-examine witnesses. It provides the right to prevent the use of videoconferencing technology to present such adverse witnesses, but rather require that such witnesses be physically produced in the courtroom. In requiring a defendant's objection to the use of videoconferencing to be sustained, this section also preserves the defendant's speedy trial rights intact.

Objections by the State or petitioner to the use of videoconferencing technology to present defense witnesses are resolved by the court in the same manner as provided in civil cases and special proceedings under ss. 885.54 and 885.56.

The intent of s. 885.62 is to permit litigants to take advantage of videoconferencing technology in any matter before the court regardless of whether the provisions of this subchapter would otherwise permit such use, as long as the parties are in agreement to do so and the circuit court approves. This should help to encourage innovation and experimentation in the use of videoconferencing technology, and thereby promote the most rapid realization of its benefits, while preserving to the litigants and ultimately to the

courts the ability to prevent abuses and loss of the fairness, dignity, solemnity and decorum of court proceedings.

The intent of s. 885.64 is to make it clear that all electronic communications with a video component are to be conducted under the provisions of this subchapter, regardless of the various names and terms by which such means of communication are referenced in other statutes and rules, and also to make clear that the provisions of this subchapter are to take precedence over other statutes and rules which address the use of such means of communication. Finally, sub. (3) is intended to make clear that existing authority for the use of non-video telephone communications in court proceedings remains unaffected by the new provisions of this subchapter concerning videoconferencing.

IT IS ORDERED that notice of the creation of subchapter III of chapter 885 of the statutes be given by a single publication of a copy of this order in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 1st day of May, 2008.

BY THE COURT:

David R. Schanker
Clerk of Supreme Court