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*Testimony before the Senate Committee on Judiciary and Public Safety  
State Senator André Jacque  
May 6, 2021*

Chairman Wanggaard and Fellow Committee Members,

Thank you for holding this hearing and the opportunity to testify before you today in support of Senate Bill 219.

SB 219 updates current law relating to juvenile and adult criminal case proceedings to allow for the use of remote telephonic and live audiovisual interaction. While the need for these changes has certainly been on full display due to changes to court operations during the COVID-19 pandemic, it is important to note that several states had already adopted more expansive use of technological advances for court appearances on a permanent basis without requiring an emergency order, and we have received support from many stakeholders within Wisconsin's court system for incorporating available communications technology infrastructure to enhance court operations.

In addition to the effect of reducing transportation costs and other efficiencies, this legislation will also allow for defendants to enter pleas, accept plea deals, receive sentencing, deal with interstate detainer proceedings, and allow individuals to enter treatment more quickly. For example, juveniles who wish to make admissions and enter a treatment facility are currently precluded from doing so electronically, and have been personally appearing in empty courtrooms in some cases. They should also be allowed to do so by telephonic or audiovisual means.

This proposal is supported by the Wisconsin District Attorneys Association.

Thank you for your consideration of Senate Bill 219.



**TO:** Chair Wanggaard, Vice-Chair Wimberger, and Honorable Members of the Senate  
Committee on Judiciary and Public Safety

**FROM:** Amanda Merkwae, Legislative Advisor

**DATE:** May 6, 2021

**SUBJECT:** 2021 Senate Bill 219

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The Department of Children and Families (DCF) is the state agency responsible for oversight of the community-based youth justice system. The vision of Wisconsin's youth justice system includes a focus on prevention, diversion, and the provision of accountability and services to youth and families in the system. This vision is guided by **DCF's commitment to ensuring all youth have the tools to thrive in adulthood.**

When a child under age 17 is involved in the formal court process under the Juvenile Justice Code (Chapter 938), it is critical that the youth is able to understand what is happening during court hearings, able to build positive relationships with system actors and service providers, and able to have a voice in proceedings that impact their lives and liberty interests. DCF reviewed Senate Bill 219 with these considerations in mind and will be testifying for information.

As it relates to proceedings under Chapter 938, SB219 would permit any party to participate in a plea hearing by telephone or live audiovisual means in which a juvenile intends to admit to the facts of a delinquency petition. Further, SB219 would specify that proceedings under Chapter 938 may be conducted by telephone or live audiovisual means unless good cause to the contrary is shown, and that any action taken by the court or any party in such a proceeding has the same effect as if made in court.

As demonstrated by courts across the state that operationalized phone and Zoom hearings throughout the COVID-19 pandemic, virtual options in some circumstances can contribute to greater equity and efficiency in the court process. For example, the ability for youth and parents or caregivers to participate in some hearings by phone or live audiovisual means can mitigate challenges related to court scheduling, transportation costs, unnecessary school and employment absences, and child care issues.

In assessing the appropriateness of continuing this practice moving forward, it is important to **illustrate what the experience of navigating the court process is like for youth both in-person and virtually**. Often, even aspects of in-person hearings in delinquency cases can be difficult for youth to meaningfully participate in and understand. Decades of neuroscience research, recognized by the U.S. Supreme Court, highlight the profound difference between youth and adults regarding emotional regulation, impulsivity, foresight and planning, anticipation of outcomes, problem-solving, and reading and oral comprehension skills.

When youth appear in court, they may struggle to differentiate between the differing roles held by each of the adults in the courtroom, grasp the purpose of each stage of the proceedings, or appreciate the significance of their decision to waive a particular right. Effective assistance of counsel requires the ability for confidential and privileged attorney-client communication to occur and—for youth in particular—the ability for ongoing attorney-client communication to occur throughout the duration of a court hearing. At in-person hearings, Further, significant aspects of rapport building between a youth, judge, and other system actors take place before, during, and after an in-person hearing. This can have a significant impact on a youth's understanding and trust in the system and the goals of that system. A youth's in-person interactions with the court also help to preserve the fairness and solemnity of the court process.

Youth in delinquency proceedings are entitled to due process protections under the Fourteenth Amendment, including the constitutional right to be physically present at hearings in which their presence would contribute to the fairness of the proceeding. The provisions contained in Wis. Stat. s. 885.60 provide a framework to ensure that the rights of youth in matters under Chapter 938 are protected at critical stages of proceedings. Virtual hearings have several limitations that can present concerns related to due process and constitutionally effective assistance of counsel for youth. Even if a youth and their attorney are both in the same Zoom courtroom, there can be a constructive denial of counsel if the attorney cannot provide timely and confidential consultation to the youth. For example, in a trial or other evidentiary hearing held virtually, a youth is unable to confidentially and simultaneously communicate with their attorney while a witness is testifying on direct or cross examination.

DCF supports the proposed statutory change in Section 1 of the bill to allow a virtual hearing option in a circumstance where a youth intends to admit the facts of the delinquency petition. This change may allow youth to expediently proceed to the disposition phase in a case to allow for the transition to a particular dispositional placement or for treatment services to begin.

Ultimately, the Department appreciates the additional flexibility this proposal will provide to youth, families, and other parties engaged in the court process. In light of the unique challenges that virtual hearings can present for youth and the fundamental rights and liberty interests at stake in many proceedings under Chapter 938, the **Department would recommend language be added to Section 2 of the bill to clarify that if a youth objects to a hearing by audiovisual means—particularly a trial or other evidentiary hearing—that a court shall sustain that objection,** preserving a youth’s choice for an in-person hearing.

Thank you for the opportunity to testify about this legislation.



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Senate Committee on Judiciary & Public Safety  
Public Hearing - Senate Bill 219  
Thursday, May 6, 2021

Chairman Wanggaard & Committee Members,

Thank you for having this hearing on Senate Bill (SB) 219 related to the use of audiovisual conferencing in juvenile delinquency and adult criminal proceedings. From the SPD perspective, the value of videoconferencing is in allowing virtual court hearings for ministerial tasks such as scheduling and status conferences. And while it has been used beyond that for more critical proceedings in the course of the pandemic, this is not a practice which should continue in a post-pandemic world when the juvenile or defendant objects.

Interestingly, both the legislative and judicial branches of government have proposals in process on this same topic but take significantly different approaches to how they should be handled. While some of the affected statutes are areas of shared governance between the two branches, if both proposals were to move forward, statute and criminal procedure would be thrown into dischord with no obvious remedy to reconcile the provisions.

Although Supreme Court Rule Petition 20-09 and SB 219 take very different approaches to accomplishing the expanded use of videoconferencing, in the end very similar concerns arise if the expanded use of videoconferencing is not accompanied by strict limitations based on the defendant's federal and state constitutional rights. Any expansion on the use of videoconferencing technology in critical proceedings must be accompanied with a provision allowing a juvenile or defendant the unqualified right to demand that the proceeding be held in person. Below the SPD outlines some considerations.

1. Use of videoconferencing for a critical proceeding over the objection of the juvenile or defendant infringes on rights.

The modified text creates a misleading impression that video court is an adequate substitute for in-person hearings, over the objection of the defendant or juvenile. In fact, the amendments to WIS. STAT. §§ 938.325 and 967.01 shift the presumption to be that hearings will be conducted on a remote basis, rather than an in-person basis ("Unless good cause to the contrary is shown, proceedings under this chapter may be conducted by telephone or live audiovisual means. . ."). The following constitutional, statutory, and ethical considerations make clear that a defendant must be permitted to opt out of videoconferencing during critical proceedings, such as jury trials.

The defendant's right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and art. I, § 7 of the Wisconsin Constitution must permit the defendant to opt out of a videoconferencing appearance. The use of video rather than in-person appearances can negatively affect client representation; detract from the lawyer's ability to observe non-verbal cues of the defendant indicating that the defendant had a question or concern; impair

communication, in particular, discrete communication between counsel and the defendant; and hinder counsel's ability to adequately cross-examine witnesses.

The defendant's confrontation rights, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and art. I, § 7 of the Wisconsin Constitution ("shall enjoy the right . . . to meet the witnesses face to face") must permit the defendant to opt-out of a videoconferencing appearance, and, must permit the defendant to require that a witness appear personally at an evidentiary hearing. Although two-way video conferencing more closely approximates face-to-face confrontation, it is in no way the constitutional equivalent to the confrontation right envisioned by the constitution.

The defendant's due process rights, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and art. I, § 8 of the Wisconsin Constitution require in-person appearances at any stage in the criminal proceeding that is critical to the outcome if the defendant's presence would influence the fairness of the proceeding. *United States v. Gagnon*, 470 U.S. 522 (1985).

The ethical requirements of defense counsel, including communication SCR 20:1.4, confidentiality SCR 20:1.6, and competence SCR 20:1.1 may prohibit videoconferencing appearances for critical proceedings in some cases. Consider the following example. Assume a judge creates a breakout room for an attorney and her incarcerated client to discuss a confidential matter during a motion hearing. If the incarcerated client is appearing from jail or prison, there is no guarantee that the client's location will facilitate confidential communication. Rather, it is possible that another inmate in an adjoining booth or a correctional officer may be privy to the attorney-client communication by videoconferencing. Even if the attorney travels to the jail to meet with a client in a visiting booth, there is no guarantee to confidentiality. An in-person attorney-client conversation taking place in a visiting booth adjacent to the jail Zoom room could be (and has been) captured by video cameras and transmitted into a public courtroom.

Although efficiency is an admirable goal, videoconferencing should not infringe upon the rights of juveniles and defendants. The proposed changes fail to preserve any right for the defendant to object to either his or her remote appearance at trial from a jail or juvenile detention center. The proposed changes fail to preserve any right for the defendant to object to a crucial witness's remote appearance at a trial. SB 219 should be amended to better protect the rights of juveniles and defendants during critical proceedings.

2. The change to the definition of "present" conflicts with federal law.

WIS. STAT. §971.04 creates a statutory right for the defendant to be present at certain hearings. Wisconsin cases have interpreted the definition of present to mean "physically present." However, SB 219 equates physical presence and telephone presence as one and the same.

The proposed definitional shift contradicts important findings made clear in federal case law. "Present" within the Federal Rules of Criminal Procedure means "physically present." In *United States v. Navarro*, (5th Cir. 1999), 169 F.3d 228 the 5th Circuit found that sentencing a defendant by video does not comply with the Federal Rules of Criminal Procedure #43 because the defendant is not "present" within the meaning of the word. The court uses the common sense definition of "physical existence in the same place as whatever act is done there" citing Black's Law Dictionary. 169 F.3d at 236.

The Court also noted that Rule 43 protects the defendant's Constitutional Due Process and Confrontational rights, as well as the common law "right to be present." *Id.* at 236-37. ("Video

conferencing would seemingly violate a defendant's Confrontation Clause rights at those other stages of trial. The scope of the protection offered by Rule 43 is broader than that offered by the Constitution, and so the term "present" suggests a physical existence in the same location as the judge.") This approach has been widely adopted in other federal circuits and several states. *See e.g. State v. Moore*, 2006-Ohio-816 (8th Dist. Ct. App. Ohio); *United States v. Lawrence*, 248 F.3d 300 (4th Cir. 2001) (at 304 "The government maintains that district courts should have the discretion to permit video teleconferencing when circumstances warrant it. The rule reflects a firm judgment, however, that virtual reality is rarely a substitute for actual presence and that, even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it."); *United States v. Torres-Palma*, 290 F.3d 1244 (10th Cir. 2002); *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018) (Agreeing with *Navarro* and finding that defendant must be physically present for entering a plea); *United States v. Thompson*, 599 F.3d 595 (7th Cir. 2010) (at 601 "A judge's decision whether to send a defendant to prison requires a careful, qualitative, and individualized assessment of the offense and the offender; no matter how simple the case, this is never a mechanical or rote determination. At the end of the day, Rule 32.1(b)(2) reflects a conclusion that a judge cannot properly assess the defendant without the defendant's in-person appearance before the court. The rule's strictures are "mandatory in meaning as well as mandatory in form," *Escoe*, 295 U.S. at 494, and the form of the hearing required by the rule excludes videoconferencing."); *Valenzuela-Gonzalez v. United States Dist. Court*, 915 F.2d 1276 (9th Cir. 1990) (Arraignment by closed circuit television violates Rules 10 and 43.)

### 3. Juveniles need stronger safeguards.

Juveniles are not the same as adults. Brain development science tells us that juveniles may process information in a way that is unique when compared with a typical adult. Some courts have found juveniles to be more immature, impulsive or lack capacity for foresight, self discipline and judgment. These factors are extremely important when read with WIS. STAT. § 938.02, setting forth the legislative intent of the juvenile justice code:

It is the intent of the legislature to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively.

Replacing in-person appearances with videoconferencing appearances may frustrate the ultimate goals of juvenile court, given the unique circumstances of juveniles. For example, video court may make it more difficult for juveniles to fully grasp the severity of the offense and the solemnity of the proceedings.

Moreover, there is a strong presumption in Chapter 938 of confidentiality of both the records and proceedings. Videoconferencing compromises confidentiality, if for no other reason than the judge lacks the control over the physical space from which a juvenile appears. By broadly allowing the use of videoconferencing in juvenile proceedings, it will be difficult to abide by the intent of the statute with such strong aims at preserving confidentiality that the term is mentioned more than 40 times in the chapter.

4. Risks linked to remote appearances.

Finally, the use of videoconferencing for critical proceedings generates concerns related to witnesses, experts, court interpreters, and the public. Holding evidentiary hearings by videoconferencing may complicate enforcement of sequestration orders. For example, when witnesses appear remotely, there are no assurances regarding the environment from which the witness testifies. Other people, even other witnesses, may be present unbeknownst to the judge or the parties. Unlike in-person hearings, there is no way to monitor compliance with a sequestration order, especially in a time where court proceedings are broadcast by livestream with no meaningful way to monitor those who view them in real time. Across Wisconsin, some victims have elected to participate in hearings using videoconferencing without identifying themselves or turning on a video camera. To the extent that the changes would permit a victim to appear in this manner for a critical proceeding, the Public Defender's Office opposes this practice. Participants who hide their identities do not appear in a manner that closely approximates an in-person appearance, and violate both WIS. STAT. § 757.14 and WIS. STAT. § 885.54.

The Public Defender's office supports video appearances for court interpreters while practicable, recognizing that expanded access benefits lawyers and clients. However, an interpreter appearing remotely must be able to facilitate confidential communication between the defense attorney and the client. That will be more difficult to accomplish over videoconferencing, especially during trial. Also, an interpreter appearing over videoconferencing will have less information compared to an in-person hearing. For example, direct eye contact is not possible over videoconferencing. Body language may be either completely omitted or poorly transmitted. And, video software tends to prioritize mid-range frequencies, which makes it harder for an interpreter to pick up on expression. The Public Defender's office would oppose use of an interpreter by videoconferencing if the end result is decreased communication and understanding.

The public also has a stake in being able to observe the court process. WIS. STAT. § 757.14, regarding public sittings, makes clear that the public has a right to freely attend court hearings unless a limited exception applies. Utilization of videoconferencing could impede the public's right to freely observe the proceedings where a witness appearing by video obscures his or her appearance, intentionally or unintentionally.

To restate our position, the use of videoconferencing can be positive in several types of court proceedings, but for critical stages it must be strictly limited to protect the constitutional rights of defendants and juveniles. Thank you again for the opportunity to testify on Senate Bill 219. If you have any additional questions, please do not hesitate to contact us.



# **The Impact of Video Proceedings on Fairness and Access to Justice in Court**

Increasing use of remote video technology poses challenges for fair judicial proceedings. Judges should adopt the technology with caution.

By **Alicia Bannon and Janna Adelstein** PUBLISHED SEPTEMBER 10, 2020

# Introduction

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The Covid-19 pandemic has disrupted court operations across the country, prompting judges to postpone nonessential proceedings and conduct others through video or phone.<sup>1</sup> Even as courts have begun to reopen, many are also continuing or testing new ways to expand the use of remote technology.<sup>2</sup> At the same time, public health concerns are leading some legal services providers and other advocates to oppose the return to in-person proceedings.<sup>3</sup> Beyond the current moment, several court leaders have also suggested that expanded use of remote technology should become a permanent feature of our justice system.<sup>4</sup>

Remote technology has been a vital tool for courts in the midst of a public health crisis. But the use of remote technology — and its possible expansion — also raises critical questions about how litigants' rights and their access to justice may be impacted, either positively or negatively, and what courts and other stakeholders can do to mitigate any harms.

This paper collects and summarizes existing scholarship on the effects of video technology in court proceedings. Federal courts, immigration courts, and state courts have long used video technology for certain kinds of proceedings.<sup>5</sup> While the available scholarship on the use of video proceedings is limited, existing research suggests reason for caution in expanding the use of these practices, as well as the need for further research on their potential effects.

## For Example:

- One study of criminal bail hearings found that defendants whose hearings were conducted over video had substantially higher bond amounts set than their in-person counterparts, with increases ranging from 54 to 90 percent, depending on the offense.<sup>6</sup>
- A study of immigration courts found that detained individuals were more likely to be deported when their hearings occurred over video conference rather than in person.<sup>7</sup>
- Several studies of remote witness testimony by children found that the children were perceived as less accurate, believable, consistent, and confident when appearing over video.<sup>8</sup>
- In three out of six surveyed immigration courts, judges identified instances where they had changed credibility assessments made during a video hearing after holding an in-person hearing.<sup>9</sup>

Research also suggests that the use of remote video proceedings can make attorney-client communications more difficult. For example, a 2010 survey by the National Center for State Courts found that 37 percent of courts using videoconferencing had no provisions to enable private communications between attorneys and their clients when they were in separate locations.<sup>10</sup> Remote proceedings can likewise make it harder for self-represented litigants to obtain representation and other forms of support by separating them from the physical courthouse. A study of immigration hearings found that detained immigrants who appeared in person were 35 percent more likely to obtain counsel than those who appeared remotely.<sup>11</sup>

At the same time, other research suggests that remote video proceedings may also enhance access to justice under some circumstances. For example, a Montana study found that the use of video hearings allowed legal aid organizations to reach previously underserved parts of the state.<sup>12</sup> Organizations such as the Conference of Chief Justices have called for the expanded use of video or telephone proceedings in civil cases, particularly for

self-represented and low-income litigants, as a way of reducing costs for those who, for example, may need to take time off work to travel to court.<sup>13</sup>

One challenge in interpreting this research is that court systems hear a wide range of cases, both civil and criminal, and the use of videoconferencing may pose widely disparate challenges and benefits for litigants in different types of cases. Courts are involved in adjudicating everything from evictions to traffic violations, from multimillion-dollar commercial disputes to felony cases. In some instances, litigants are detained in jails or detention centers. In others, they may be self-represented. Courts hold preliminary hearings, arraignments, settlement negotiations, scheduling conferences, arguments on legal motions, jury trials, and much more.

At its core, this review of existing scholarship underscores the need for broad stakeholder engagement in developing court policies involving remote proceedings, as well as the need for more research and evaluation as courts experiment with different systems.

# Impact of Video Proceedings on Case Outcomes

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A handful of studies have directly assessed whether replacing certain in-person proceedings with videoconferences impacted substantive outcomes in criminal, civil, or immigration proceedings. Several other studies have sought to evaluate the impact of using video on factors that are likely to affect substantive outcomes, such as credibility assessments by juries or other factfinders, and communication between attorneys and their clients.

## Video Proceedings and Substantive Outcomes

One study by law and psychology professor Shari Seidman Diamond and coauthors, published in the *Journal of Criminal Law and Criminology*, looked at the impact of using closed-circuit television during bail hearings in Cook County, Illinois. The study found that judges imposed substantially higher bond amounts when proceedings occurred over video.<sup>14</sup>

In 1999, Cook County began using closed-circuit television for most felony cases, requiring defendants to remain at a remote location during bail hearings. A 2008 analysis of over 645,000 felony bond proceedings held between January 1, 1991 and December 31, 2007 found that after the closed-circuit television procedure was introduced, the average bond amount for impacted cases rose by 51 percent — and increased by as much as 90 percent for some offenses. By contrast, there were no statistically significant changes in bond amounts for those cases that continued to have live bail hearings.<sup>15</sup> These disparities persisted over time. The release of this study, which was prepared in connection with a class action lawsuit challenging Cook County’s practices, caused the county to voluntarily return to live bail hearings.<sup>16</sup>

The authors theorized several explanations for the difference in bond amounts in Cook County. Among other things, they pointed to the picture quality and the video setup, which gave the appearance that the defendant was not making eye contact. In addition, they suggested that the defendant’s remote location made it difficult for their attorney to gather information in advance of the hearing or consult with their client during the hearing. The authors also pointed out that the video was in black and white, and that litigants with darker skin were difficult to see on camera. Finally, they raised the question of whether some aspect of appearing in person affects a person’s believability.<sup>17</sup>

Another study by law professor Ingrid Eagly looked at the use of video technology to adjudicate immigration proceedings remotely, finding that detained respondents were more likely to be deported when their proceedings occurred over videoconference.<sup>18</sup> Video hearings are now a common feature in immigration court, and have been used regularly since the 1990s.<sup>19</sup> The use of videoconferencing, even without the petitioner’s consent, is specifically authorized by statute.<sup>20</sup> According to the Transactional Records Access Clearinghouse Immigration Center at Syracuse University, from October through December 2019, one out of every six final hearings deciding an immigrant’s case was held by video.<sup>21</sup> Eagly examined outcomes for detained immigrants in immigration court, comparing those who participated via video to those who participated in person.<sup>22</sup> Eagly used a nationwide sample of nearly 154,000 cases, in which immigration judges reached a decision on the merits during fiscal years 2011 and 2012.<sup>23</sup>

Eagly found what she described as a “paradox”: detained immigrants whose proceedings occurred over video were more likely to be deported, but *not* because judges denied their claims at higher rates. Rather, these respondents were less likely to take advantage of procedures that might help them. Detained individuals who

appeared in person were 90 percent more likely to apply for relief, 35 percent more likely to obtain counsel, and 6 percent more likely to apply only for voluntary departure, as compared to similarly situated individuals who appeared by video. These results were statistically significant, even when controlling for other factors that could influence case outcomes.<sup>24</sup>

At the same time, among those individuals who actually applied for various forms of relief, there was no statistically significant difference in outcome after controlling for other factors. However, because video participants were *less likely* to seek relief or retain counsel, video cases were still significantly more likely to end in removal.<sup>25</sup> Eagly argued that “[t]elevideo must therefore be understood as having an indirect relationship to overall substantive case outcomes—one linked to the disengagement of respondents who are separated from the traditional courtroom setting.”<sup>26</sup>

Eagly relied on interviews and court observations to explore why video proceedings led to less engagement by respondents. She suggested that respondents may have been less likely to participate fully in video proceedings due to logistical hurdles requiring advanced preparation, such as the need to mail an application for relief in advance of the hearing, rather than bringing one to court and physically handing over a copy. She also highlighted the difficulties that video proceedings pose in allowing individuals to communicate effectively and confidentially with their attorney. Finally, she found that respondents often found it difficult to understand what was happening during video proceedings, and that many perceived a video appearance as unfair and not a real “day in court,” an assertion which has also been made by the American Bar Association Commission on Immigration.<sup>27</sup>

A few studies have also examined the impact of video testimony on jury trials, with mixed results. One study by psychology professor Holly Orcutt and coauthors examined the impact of remote testimony by children in sexual abuse cases. The authors created a simulation involving a fake crime with children and an adult actor. The children then testified on their experiences within the experiment during a mock trial,<sup>28</sup> using actors and mock jurors. The child witnesses testified either in person or via one-way closed-circuit television.<sup>29</sup>

Orcutt found that when children testified via closed-circuit television, the mock jurors rated them as less honest, intelligent, and attractive, and concluded that their testimony was less accurate. Mock jurors were also less likely to vote to convict the defendant (accused by the child witness), when the child testified by closed-circuit television.<sup>30</sup> Thus, closed-circuit testimony “appeared to result in a more negative view of child witnesses as well as a small but significant decrease in the likelihood of conviction [of the defendant].”<sup>31</sup> However, after jurors deliberated, there was no statistically significant impact of video versus live testimony on the verdict.<sup>32</sup> It is possible that study participants had a specific skepticism about remote testimony by children in abuse cases due to assumptions about why a child might not testify in person. However, this study also raises the possibility that remote witness testimony is generally less likely to be seen as credible, disadvantaging litigants and raising fairness concerns in cases where testimony is likely to be critical to a party’s case.

On the other hand, a series of studies from the 1970s and 1980s based on reenacted trials generally found that videotaped trials had no impact on outcomes. For example, in a reenacted trial involving an automobile personal injury case, staffed by actors, there was no statistically significant difference in the mean amount awarded by the jury, or in the jury’s retention of information, between the in-person and videotaped trials.<sup>33</sup> However, several caveats apply. First, these studies did not address the use of remote jurors, or jurors who interacted with each other over video.<sup>34</sup> Also relevant is that the technologies available to conduct remote proceedings today are vastly different than those used in studies in the 1970s and 80s. Finally, another limitation of these studies is that they do not address how less than ideal technological conditions may impact

court dynamics. For example, a study of immigration courts by Booz Allen Hamilton for the Department of Justice determined that technological glitches had disrupted cases to such an extent that due process concerns may arise.<sup>35</sup>

Lastly, the Administrative Conference of the United States has studied the use of video conferencing by federal executive agencies in administrative hearings. According to an analysis by the Bureau of Veteran Affairs, there was no evidence that video proceedings for veterans benefits adjudications had an impact on outcomes: “the difference in grants [for veterans’ benefits claims] between video hearings and in-person hearings has been within one percent” over the five-year period preceding the 2011 report.<sup>36</sup> The study also found that these hearings had increased productivity for Veterans Law Judges and supporting counsel by eliminating the need for travel to and from hearings.

## Other Effects on Litigants

### Video and Perceptions of Credibility

In addition to studies that directly assess the relationship between video proceedings and outcomes, such as conviction or deportation rates, other research has looked at whether video testimony by a witness has an impact on how they are perceived by factfinders. Because credibility determinations are often central to case outcomes, the effect of video appearance on credibility has important implications for the overall fairness of remote proceedings.

In addition to the Orcutt study discussed previously, several other studies have looked at the impact of video testimony by children on their perceived credibility in the context of sexual abuse cases, finding that video testimony had an impact on jurors’ perceptions of the child’s believability. For example, an analysis involving mock trials with actors where a child testified either in-person or via closed-circuit television found that testimony over video lowered jurors’ perception of a child’s accuracy and believability.<sup>37</sup> Similarly, in a Swedish simulation where different jurors watched the child testimony either live or via video, jurors perceived the live testimony in more positive terms and rated the children’s statements as more convincing than the video testimony. Live observers also had a better memory of the children’s statements.<sup>38</sup>

Other research suggests that technological limitations may affect immigration judges’ ability to assess credibility in video proceedings. For example, in a 2017 U.S. Government Accountability Office report on immigration courts, judges in three of the six surveyed courts identified instances where they had changed credibility assessments made during a video hearing after holding a subsequent in-person hearing:

For example, one immigration judge described making the initial assessment to deny the respondent’s asylum application during a [video teleconference] hearing in which it was difficult to understand the respondent due to the poor audio quality of the [video teleconference]. However, after holding an in-person hearing with the respondent in which the audio and resulting interpretation challenges were resolved, the judge clarified the facts of the case, and as a result, decided to grant the respondent asylum. Another immigration judge reported being unable to identify a respondent’s cognitive disability over [video teleconference], but that the disability was clearly evident when the respondent appeared in person at a subsequent hearing, which affected the judge’s interpretation of the respondent’s credibility.<sup>39</sup>

Psychology research also provides theoretical support for the concern that individuals who appear by video may face disadvantages. For example, psychology professor Sara Landstrom, who studied video testimony by children, has described the “vividness effect,” whereby testimony that is more emotionally interesting and proximate in a sensory, temporal, or spatial way is generally perceived by observers as more credible and is better remembered. Landstrom notes, “it can be argued that live testimonies, due to face-to-face immediacy, are perceived [by jurors] as more vivid than, for example, video-based testimonies, and in-turn are perceived more favourably, considered more credible and are more memorable.”<sup>40</sup>

Similarly, drawing from communications and social psychology research, law professor Anne Bowen Poulin argued, “[s]tudies reveal that people evaluate those with whom they work face-to-face more positively than those with whom they work over a video connection. When decisionmakers interact with the defendant through the barrier of technology, they are likely to be less sensitive to the impact of negative decisions on the defendant.”<sup>41</sup>

Technology choices may also have unintended consequences. For example, research by G. Daniel Lassiter and coauthors have documented a camera perspective bias in the context of videotaped confessions, finding that observers were more likely to believe a confession was voluntary when the camera was focused only on the defendant during a videotaped interrogation.<sup>42</sup> Poulin has also noted that space constraints may necessitate the use of close-up shots during some video hearings, which can exaggerate features, obfuscate the perception of a person’s size and age, and obscure body language.<sup>43</sup>

### **Effects on Attorney-Client Communications and Relationship**

Another question raised by the use of video proceedings is whether they impact communication and other aspects of the relationship between attorneys and their clients, who are frequently separated during remote proceedings. For example, in a 2010 survey by the National Center for State Courts, 37 percent of courts that used video proceedings reported that they had no provisions to enable private communications between an attorney and client when they were in separate locations.<sup>44</sup> Poulin also noted that even when a secure phone line for private attorney-client communication is provided, nonverbal communication is likely to be difficult, and it may be hard for a client to catch their attorney’s attention with a question or to provide relevant information.<sup>45</sup>

Similarly, Diamond’s Cook County study on the impact of video proceedings on bail observed that separating attorneys and clients made it harder for them to quickly confer during a bail hearing. She noted that such a communication challenge could be consequential in a bail hearing: a defendant may be able to provide “mitigating details regarding past convictions that will greatly assist counsel... Obviously, such communications must occur immediately if counsel is to be able to make use of his client’s information during a fast-paced bail hearing.”<sup>46</sup>

A study by the advocacy organization Transform Justice surveyed lawyers, magistrates, probation officers, intermediaries, and other officials about the use of remote proceedings in the United Kingdom. Fifty-eight percent of respondents thought that video hearings had a negative impact on defendants’ ability to participate in hearings, and 72 percent thought that video hearings had a negative impact on defendants’ ability to communicate with practitioners and judges.<sup>47</sup> Survey respondents indicated that they believed the following groups were the most negatively impacted by video hearings: defendants with limited English proficiency, unrepresented defendants, and children under 18.<sup>48</sup>

These findings were echoed in Florida's experience with remote video proceedings for juvenile detention hearings. In 2001, the Florida Supreme Court repealed an interim rule that had been in effect from 1999 through 2001 that authorized remote juvenile hearings.<sup>49</sup> In repealing the rule, the Court detailed public defenders' concerns that "there was no proper opportunity for meaningful, private communications between the child and the parents or guardians, between the parents or guardians and the public defender at the detention center, and between a public defender at the detention center and a public defender in the courtroom."<sup>50</sup> The court observed that "[a]t the conclusion of far too many hearings, the child had no comprehension as to what had occurred and was forced to ask the public defender whether he or she was being released or detained."<sup>51</sup>



## Additional Access to Justice Considerations

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Another question raised by remote video proceedings is how their use impacts the public's access to justice in civil cases, where there is generally no right to counsel and where other safeguards for litigants are weaker than in criminal cases.

### Access to Counsel and Other Resources in Civil Cases

One critical issue is the extent to which videoconferencing increases or diminishes burdens for self-represented litigants in arenas like housing or family court. Understanding the relationship between video proceedings and access to justice can inform courts' use of video both now and in the future, and help identify areas where courts should invest in additional resources or support for litigants.

The Conference of Chief Justices has encouraged judges to “promote the use of remote audio and video services for case hearings and case management meetings” in civil cases as part of a broader set of reforms to promote access to justice.<sup>52</sup> The Conference cites, among other things, that video proceedings can help mitigate the costs borne by litigants who might have to travel far distances or take time off from work to attend in-person court proceedings.<sup>53</sup> Notably, the Conference of Chief Justices' proposal calls for combining video proceedings with enhanced services for self-represented litigants, including internet portals and stand-alone kiosks to facilitate access to court services, simplified court forms, and real-time court assistance services over the internet and phone.

A report by the Self-Represented Litigation Network similarly observed that videoconferencing technology can reduce the time and expenses associated with traveling, transportation, childcare, and other day-to-day costs that individuals incur when they go to court. The report also noted the potential costs of such technology, including the possibility that remote appearances may lessen the accuracy of factfinding and reduce early opportunities to settle cases.<sup>54</sup>

There is only limited research on the benefits and harms of video proceedings with respect to access to the courts. Eagly's study of immigration court hearings found that detained immigrants who appeared in person were 35 percent more likely to obtain counsel than those who appeared remotely, highlighting the role that courthouses often play in connecting self-represented individuals with resources, including representation.<sup>55</sup>

On the other hand, a 2007 study on the use of videoconference technology in Montana, which included interviews and court observations, found that the use of video court appearances in both civil and criminal hearings enabled legal aid organizations to serve previously underserved parts of the state.<sup>56</sup> Montana, one of the largest and least populated states, had only 84 lawyers in the entire eastern portion of the state in 2004.<sup>57</sup> The study concluded that introducing video hearings means that “legal aid has a presence in counties from which they would be absent if video were not there as an option.”<sup>58</sup> Video proceedings also opened up greater opportunities for pro bono representation. The report endorsed the use of the video technology in Montana, while urging caution in ensuring that the technology was “used with sensitivity to overall access to justice goals,” including recognizing that there are cases that may not be appropriate for video appearances, such as those involving lengthy proceedings.<sup>59</sup> The study also acknowledged that there are still unanswered questions about how to properly cross-examine a witness over video and that the potential issues with such examinations could be more significant when dealing with an individual's credibility or integrity.<sup>60</sup>

Beyond the use of videoconferencing, another study looked at an online case resolution system for minor civil infractions and misdemeanors. This online system did not use video; rather, individuals had the option to use an online portal to communicate with judges, prosecutors, and law enforcement at any time of day. The study found that the system saved time, significantly reduced case duration, and reduced default rates (where individuals lose cases by not contesting their claims).<sup>64</sup> The author highlighted the costs associated with going to court for relatively low-stakes proceedings: “Physically going to court costs money, takes time, creates fear and confusion, and presents both real and perceived risks.”<sup>62</sup> To the extent that video proceedings may similarly reduce some of the costs of going to the courthouse, this study suggests that in lower-stakes proceedings, the use of video can save time compared to attending in-person proceedings, and can enable more individuals to engage with the system rather than defaulting their claims. However, it also highlights that videoconferencing is not the only way to conduct proceedings remotely, and that in some contexts online systems and other technologies have functioned well.<sup>63</sup>

## **Additional Consideration for Marginalized Communities**

Other research raises potential equity concerns about the broad use of video proceedings, particularly for marginalized communities and in cases where individuals are required to participate by video. These concerns underscore the need for additional research and evaluation as courts experiment with remote systems, as well as the need for courts to consult with a wide array of stakeholders when developing policies for video proceedings.

For instance, there is a substantial digital divide associated with access to the internet and communication technology. One critical unanswered question is whether and how video proceedings may exacerbate existing inequalities. According to studies by the Pew Research Center, there are substantial disparities in access to internet broadband and computers according to income and race.<sup>64</sup> Americans who live in rural communities are also less likely to have access to broadband internet.<sup>65</sup> The same is true for people with disabilities, who may also require special technology in order to engage in online activities such as remote court proceedings.<sup>66</sup>

Technology disparities potentially pose significant hurdles to the widespread use of video court proceedings for marginalized communities, particularly when Covid-19 has led to the closure of many offices and libraries. The pandemic has also caused a massive spike in unemployment, which may hinder litigants’ abilities to pay their phone and internet bills.<sup>67</sup> Because there is currently a dearth of research on how the digital divide impacts access to video proceedings, courts and other stakeholders should conduct their own studies before committing to the use of video hearings in the long term.

Other research has identified challenges that self-represented litigants face in navigating the legal system, including the need for training and support offered in multiple languages.<sup>68</sup> In some states, as many as 80 to 90 percent of litigants are unrepresented.<sup>69</sup> Another critical research question is the extent to which courts are able to provide adequate support remotely, particularly in jurisdictions where courthouses have been the principal place where individuals going to court connect with resources.

A final question is how remote technology affects access to justice for individuals who do not speak English or have limited English proficiency. This is a particular concern in the judicial context because research suggests that dense court language can be difficult to communicate via translation to non-English speakers.<sup>70</sup>

Research related to the use of remote translation in areas such as telemedicine has been mixed as to whether remote translation impacts quality and satisfaction.<sup>71</sup> And while there is limited research on remote translation in courts, a study by the Legal Assistance Foundation of Metropolitan Chicago and the Chicago Appleseed Fund for Justice found that approximately 30 percent of litigants in immigration court who used an interpreter appeared to misunderstand what was happening, either due to misinterpretation or inadequate interpretation.<sup>72</sup> The study lacked a control group, making it difficult to assess the role that remote video immigration proceedings played in translation difficulties, but the report's authors suggested that, based on their observation of these proceedings, videoconferences exacerbated translation difficulties.<sup>73</sup>

## Conclusion

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Though video conferencing technology has been a valuable tool during the Covid-19 pandemic, existing scholarship suggests reasons to be cautious about the expansion or long-term adoption of remote court proceedings. More research is necessary, both about the potential impact of remote technology on outcomes in a diverse range of cases, as well as the advantages and disadvantages with respect to access to justice. In the meantime, as courts develop policies for remote proceedings, they should consult with a broad set of stakeholders, including public defenders and prosecutors, legal services providers, victim and disability advocates, community leaders, and legal scholars.

# Endnotes

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<sup>1</sup> Brennan Center for Justice, *Courts' Responses to the Covid-19 Crisis*, last updated September 10, 2020, <https://www.brennancenter.org/our-work/research-reports/courts-responses-covid-19-crisis>.

<sup>2</sup> Daniel Siegel, "Miami, Orlando Headline Fla. Courts' Remote Trial Experiment," *Law360*, June 4, 2020, <https://www.law360.com/articles/1279653/miami-orlando-headline-fla-courts-remote-trial-experiment>; and

Jake Bleiberg, "Texas Court Holds First US Jury Trial via Videoconferencing," *Associated Press*, May 22, 2020, <https://abcnews.go.com/Health/wireStory/texas-court-holds-us-jury-trial-videoconferencing-70825080>.

<sup>3</sup> Rocco Parascandola and Molly Crane-Newman, "Lawyers Fear Sudden Return to NYC Courthouses Next Week will Spread Coronavirus," *Daily News*, July 8, 2020, <https://www.nydailynews.com/new-york/nyc-crime/nyc-courts-reopening-early-outrage-lawyers-advocates-20200708-42rpmqyhyjc2iphrgohwdsyvy6q-story.html>.

<sup>4</sup> Lyle Moran, "How Hosting a National Pandemic Summit Aided the Nebraska Courts System with its Covid-10 Response," *Legal Rebels Podcast*, May 13, 2020, [https://www.abajournal.com/legalrebels/article/rebels\\_podcast\\_episode\\_052](https://www.abajournal.com/legalrebels/article/rebels_podcast_episode_052); and Katelyn Kivel, "How the Coronavirus Revolutionized Michigan's Courts," *The Gander Newsroom*, July 14, 2020, <https://gandemewsroom.com/2020/07/14/coronavirus-revolutionized-courts/>.

<sup>5</sup> Shari Seidman Diamond et al., "Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions," *Journal of Criminal Law and Criminology* 100 (2010): 877-878, 900; Ingrid V. Eagly, "Remote Adjudication in Immigration," *Northwestern University Law Review* 109 (2015): 934; and Mike L. Bridenback, *Study of State Trial Courts Use of Remote Technology*, National Association for Presiding Judges and Court Executive Officers, 2016, 12, <http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf>.

<sup>6</sup> Diamond et al., "Efficiency and Cost," 893.

<sup>7</sup> Eagly, "Remote Adjudication," 966; and Frank M. Walsh and Edward M. Walsh, "Effective Processing or Assembly-Line Justice - The Use of Videoconferencing in Asylum Removal Hearings," *Georgetown Immigration Law Journal* 22 (2008): 271-72.

<sup>8</sup> Holly K. Orcutt et al., "Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials," *Law and Human Behavior* 25 (2001): 357-8, 366. However, it is important to note that these studies are simulated experiments and not observations of actual court proceedings, so outcomes might have differed if video proceedings were used and examined in an actual court hearing. Also worth noting is that the judge, bailiff, and attorneys questioning the children were in the room with the children testifying; the children only appeared by CCTV to the mock jurors.

<sup>9</sup> Government Accountability Office, *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, 2017, 55, <https://www.gao.gov/assets/690/685022.pdf>.

<sup>10</sup> Eric Bellone, "Private Attorney- Client Communications and the Effect of Videoconferencing in the Courtroom," *Journal of International Commercial Law and Technology* 8 (2013): 44-45.

<sup>11</sup> Eagly, "Remote Adjudication," 938.

<sup>12</sup> Richard Zorza, *Video Conferencing for Access to Justice: An Evaluation of the Montana Experiment*, Legal Services Corporation, 2007, 1, 3, <https://docplayer.net/3126017-Video-conferencing-for-access-to-justice-an-evaluation-of-the-montana-experiment-final-report.html>.

<sup>13</sup> National Center for State Courts, *Call to Action: Achieving Civil Justice for All*, 2016, 37-38 <https://iaals.du.edu/publications/call-action-achieving-civil-justice-all>.

<sup>14</sup> Diamond et al., "Efficiency and Cost," 897.

<sup>15</sup> Diamond et al., "Efficiency and Cost," 896.

<sup>16</sup> Diamond et al., "Efficiency and Cost," 870.

<sup>17</sup> Diamond et al., "Efficiency and Cost," 884-85, 898-900.

<sup>18</sup> An earlier analysis by Frank and Edward Walsh in the *Georgetown Immigration Law Journal* likewise found disparities in outcomes in asylum cases. The study, which looked at fiscal years 2005 and 2006, found that "the grant rate for asylum applicants whose cases were held in person is roughly double the grant rate for the applicants whose cases were heard via [video]." Walsh and Walsh, "Effective

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Processing,” 271. These differences were statistically significant, and the authors found similar and statistically significant differences when controlling for whether the applicant was represented by counsel. However, according to Eagly, most immigration hearings were not coded for whether they were conducted in person or by video prior to 2007, undercutting the reliability of the findings. Eagly, 946. Nor did the study identify the basis by which some asylum applicants were designated for video conference, suggesting the possibility of confounding variables. Nevertheless, the striking difference in asylum rates highlights the need for further research.

<sup>19</sup> “Video Hearings in Immigration Court FOIA,” American Immigration Council, last modified August 11, 2016, accessed May 14, 2020, <https://www.americanimmigrationcouncil.org/content/video-hearings-immigration-court-foia>.

<sup>20</sup> See 8 U.S.C. § 1229a(b)(2)(A)(iii); see also 8 C.F.R. § 1003.25(c) (“An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person.”).

<sup>21</sup> TRAC Immigration, “Use of Video in Place of In-Person Immigration Court Hearings,” January 28, 2020, <https://trac.syr.edu/immigration/reports/593/>.

<sup>22</sup> Eagly, “Remote Adjudication,” 933.

<sup>23</sup> Eagly, “Remote Adjudication,” 960.

<sup>24</sup> Among other things, Eagly controlled for the type of proceeding and charge, the respondent’s nationality, whether they are represented by counsel, their judge, and the year the proceedings took place. Eagly, “Remote Adjudication,” 938.

<sup>25</sup> Eagly looked at two samples, a national sample and a subset of locations that she called the Active Base Sample. She found that “in the National Sample, 80 percent of in-person respondents were ordered removed, compared to 83 percent of televideo respondents. In the Active Base City Sample, 83 percent of in-person respondents were ordered removed, compared to 88 percent of televideo respondents.” The disparities in outcomes were statistically significant. Eagly, “Remote Adjudication,” 966.

<sup>26</sup> Eagly, “Remote Adjudication,” 938.

<sup>27</sup> Eagly, “Remote Adjudication,” 978, 984, 989. A 2019 report from the American Bar Association, which issued recommendations for reforming the immigration system, argued that based on its 2010 findings, the use of video conferencing technology can undermine the fairness of proceedings by making it more difficult to establish credibility and thus argue one’s case. The report goes on to suggest limiting the use of video to nonsubstantive hearings. See American Bar Association Commission on Immigration, *2019 Update Report: Reforming the Immigration System*, 2019, 18, [https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/2019\\_reforming\\_the\\_immigration\\_system\\_volume\\_1.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf).

<sup>28</sup> Some children experienced the fake crime and some did not. In addition, some children were asked to modify their testimony to falsely indicate that a crime had taken place. Orcutt et al., “Detecting Deception in Children’s Testimony,” 343.

<sup>29</sup> Orcutt et al., “Detecting Deception in Children’s Testimony,” 339-372.

<sup>30</sup> Orcutt et al., “Detecting Deception in Children’s Testimony,” 357, 363.

<sup>31</sup> Orcutt et al., “Detecting Deception in Children’s Testimony,” 366.

<sup>32</sup> Orcutt et al., “Detecting Deception in Children’s Testimony,” 358.

<sup>33</sup> Gerald Miller, “Televised Trials: How Do Juries React,” *Judicature* 58 (December 1974): 242-246. The jurors in Miller’s study thought they were rendering a verdict in an actual trial. A similar study likewise found no statistically significant difference in juror attributions of negligence or the amount awarded by jurors in simulated video and in-person trials. The mode of presenting expert witnesses did affect pre-deliberation award, information retention, and source credibility, but not in a straightforward manner. The plaintiff’s witness was more effective in obtaining favorable awards when he appeared live, while the defendant’s witness was more effective in reducing the award (advantaging the defendant) when he appeared on videotape. The study suggested that “The most plausible explanation for this difference could be the variations in the communication skills of the two witnesses across presentational modes.” Gerald R. Miller, Norman E. Fontes, and Gordon L. Dahnke, “Using Videotape in the Courtroom: A Four-Year Test Pattern,” *University of Detroit Journal of Urban Law* 55 (Spring 1978): 668. See also Gerald R. Miller, Norman E. Fontes, and Arthur Konopka, *The Effects of Videotaped Court Materials on Juror Response* (East Lansing: Michigan State University Press, 1978).

<sup>34</sup> For additional research on simulated trials, see David F. Ross et al., “The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse,” *Law and Human Behavior*, 18, (1994): 553-566; and Tania E. Eaton et al., “Child-Witness and Defendant Credibility: Child Evidence Presentation Mode and Judicial Instructions,” *Journal of Applied Social Psychology*, 31 (2001): 1845-1858. However, in these studies, mock jurors watched videotapes of trials involving either live or videotaped testimony, so their findings are of limited utility for comparing videotaped and live trials.

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<sup>35</sup> Booz Allen Hamilton, *Legal Case Study: Summary Report*, 2017, 23, <https://www.aila.org/casestudy>.

<sup>36</sup> Funmi E. Olorunnipa, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, Administrative Conference of the United States, 2011, 24, <https://perma.cc/B3VS-FQAY>.

<sup>37</sup> Gail S. Goodman et al., "Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions," *Law and Human Behavior* 22 (1998): 195-96.

<sup>38</sup> Sara Landstrom, "Children's Live and Videotaped Testimonies: How Presentation Mode Affects Observers' Perception, Assessment and Memory," *Legal and Criminological Psychology* 12 (2007): 344-45.

<sup>39</sup> Government Accountability Office, *Actions Needed to Reduce Case Backlog*, 55.

<sup>40</sup> Landstrom, "Children's Live and Videotaped Testimonies," 335. See also Richard E. Nisbett and Lee Ross, L. Human Inference: Strategies and Shortcomings of Social Judgment. (Englewood Cliffs, NJ: Prentice-Hall, 1980).

<sup>41</sup> Anne Bowen Poulin, "Criminal Justice and Videoconferencing Technology: The Remote Defendant," *Tulane Law Review* 78 (2004): 1118.

<sup>42</sup> G. Daniel Lassiter et al., "Videotaped Confessions: Panacea or Pandora's Box?" *Law and Policy* 28 (2006): 195-201.

<sup>43</sup> Poulin, "Criminal Justice and Videoconferencing," 1121-1122.

<sup>44</sup> Bellone, "Client Communications and the Effect of Videoconferencing," 44-45.

<sup>45</sup> Poulin, "Criminal Justice and Videoconferencing," 1130.

<sup>46</sup> Diamond et al., "Efficiency and Cost," 881-882.

<sup>47</sup> Penelope Gibbs, *Defendants on video — conveyor belt justice or a revolution in access?*, Transform Justice, 2017, 16, [http://www.transformjustice.org.uk/wp-content/uploads/2017/10/TJ\\_Disconnected.pdf](http://www.transformjustice.org.uk/wp-content/uploads/2017/10/TJ_Disconnected.pdf).

<sup>48</sup> Gibbs, *Defendants on video*, 10, 26.

<sup>49</sup> Due to the Covid-19 pandemic, the Florida Supreme Court temporarily authorized video proceedings for juvenile delinquency proceedings (including juvenile detention hearings). See Florida Supreme Court, "Chief Justice Issues Emergency Order Expanding Remote Hearings and Suspending Jury Trials into Early July Statewide," May 4, 2020, <https://www.floridasupremecourt.org/News-Media/Court-News/Chief-Justice-issues-emergency-order-expanding-remote-hearings-and-suspending-jury-trials-into-early-july-statewide>.

<sup>50</sup> *Amendment to Fla. Rule of Juvenile Procedure 8.100(A)*, 796 So. 2d 470, 473 (Fla. 2001).

<sup>51</sup> *Amendment to Fla. Rule of Juvenile Procedure 8.100(A)*, 796 So. 2d 470, 473 (Fla. 2001).

<sup>52</sup> National Center for State Courts, *Call to Action*, 37.

<sup>53</sup> National Center for State Courts, *Call to Action*, 37-38.

<sup>54</sup> John Greacen, *Remote Appearances of Parties, Attorneys, and Witnesses*, Self-Represented Litigation Network, 2017, 3-4; and see also Camille Gourdet et al., *Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology*, RAND Corporation, 2020, 4-5, [https://www.rand.org/pubs/research\\_reports/RR3222.html](https://www.rand.org/pubs/research_reports/RR3222.html) (discussing advantages and disadvantages of remote proceedings in criminal cases).

<sup>55</sup> Eagly, "Remote Adjudication," 960.

<sup>56</sup> Zorza, *Video Conferencing for Access to Justice*.

<sup>57</sup> Zorza, *Video Conferencing for Access to Justice*. For context, the overall population in this 47,500 square mile region was between 10 to 14 percent of the state's total in 2004. See Larry Swanson, "Montana is One State with Three Changing Regions," *Belgrade News*, February 28, 2019, [http://www.belgrade-news.com/news/feature/montana-is-one-state-with-three-changing-regions/article\\_cc6ccb66-3b82-11e9-881c-8f20afd84778.html#:~:text=The%20Central%20Front%20region%20has,of%20the%20total%20in%201990](http://www.belgrade-news.com/news/feature/montana-is-one-state-with-three-changing-regions/article_cc6ccb66-3b82-11e9-881c-8f20afd84778.html#:~:text=The%20Central%20Front%20region%20has,of%20the%20total%20in%201990).

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<sup>58</sup> Zorza, *Video Conferencing for Access to Justice*, 12.

<sup>59</sup> Zorza, *Video Conferencing for Access to Justice*, 13.

<sup>60</sup> Zorza, *Video Conferencing for Access to Justice*, 18.

<sup>61</sup> J.J. Prescott, "Improving Access to Justice in State Courts with Platform Technology," *Vanderbilt Law Review* 70 (2017): 2028-2034.

<sup>62</sup> Prescott, "Improving Access to Justice," 1996.

<sup>63</sup> See also Maximilian A. Bulinski and J.J. Prescott, "Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency," *Michigan Journal of Race and Law* 21 (2016). OCR systems involve transitioning some everyday court proceedings, such as civil infraction citations, outstanding failure-to-pay or failure-to-appear warrants, and some misdemeanors to be settled online, sometimes via videoconference.

<sup>64</sup> 29 percent of adults with household incomes below \$30,000 did not own a smartphone, 44 percent did not have home broadband services, and 46 percent did not own a traditional computer. Households with incomes of \$100,000 almost universally had access to these technologies. Monica Anderson and Madhumitha Kumar, "Digital Divide Persist Even as Lower-Income Americans Make Gains in Tech Adoption," *Pew Research Center*, May 7, 2019, <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/>. Only 66 percent and 61 percent of Black and Latino Americans respectively have access to a home broadband compared to 79 percent of white Americans. Andrew Perrin and Erica Turner, "Smartphones Help Blacks, Hispanics Bridge Some — But Not All — Digital Gaps with Whites," *Pew Research Center*, August 20, 2019, <https://www.pewresearch.org/fact-tank/2019/08/20/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/>.

<sup>65</sup> Andrew Perrin, "Digital Gap Between Rural and Nonrural America Persists," *Pew Research Center*, May 31, 2019, <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/>.

<sup>66</sup> Disabled Americans are about 20 percentage points less likely than those without a disability to say that they have access to home broadband internet or own a computer, smartphone, or tablet. Monica Anderson and Andrew Perrin, "Disabled Americans are Less Likely to Use Technology," *Pew Research Center*, April 7, 2017, <https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/>.

<sup>67</sup> Rachel Dissell and Jordyn Grzelewski, "Phone, Internet Providers Extend Service Yet Some Still Disconnected from Lifelines During Coronavirus Pandemic," *Cleveland.com*, April 8, 2020, <https://www.cleveland.com/coronavirus/2020/04/phone-internet-providers-extend-service-yet-some-still-disconnected-from-lifelines-during-coronavirus-pandemic.html>. See also NORC at the University of Chicago, "Most Working Americans Would Face Economic Hardship If They Missed More than One Paycheck," press release, May 16, 2019, <https://www.norc.org/NewsEvents/Publications/PressReleases/Pages/most-working-americans-would-face-economic-hardship-if-they-missed-more-than-one-paycheck.aspx>.

<sup>68</sup> Phil Malone et al., *Best Practices in the Use of Technology to Facilitate Access to Justice Initiatives: Preliminary Report*, Berkman Center for Internet and Society at Harvard University, 2010, 6-7, 14-19, Appendix A, [https://cyber.harvard.edu/sites/cyber.harvard.edu/files/A2J\\_Report\\_Final\\_073010.pdf](https://cyber.harvard.edu/sites/cyber.harvard.edu/files/A2J_Report_Final_073010.pdf).

<sup>69</sup> Jessica Steinberg, "Demand Side Reform in the Poor People's Court," *Connecticut Law Review*, 47 (2015): 741.

<sup>70</sup> Charles M. Grabau and Llewellyn Joseph Gibbons, "Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation," *New England Law Review* 30 (1996): 237-244, 255—60. See also Ashton Sappington, "Implied Consent and Non-English Speakers," *John Marshall Law Journal* 5 (2012): 638.

<sup>71</sup> Ann Chen Wu et al., "The Interpreter as Cultural Educator of Residents: Improving Communication for Latino Parents," *Archives of Pediatrics and Adolescent Medicine* 160 (2006): 1145-50; C. Jack, "Language, Cultural Brokerage and Informed consent — Will Technological Terms Impede Telemedicine Use?" *South African Journal of Bioethics and Law* 7 (2014): 14, 16-17; and Imo S. Momoh, *Cultural Competence Plan*, Contra Costa County Mental Health Services, 2010, 78, 101-108, 114, [https://ccchealth.org/mentalhealth/pdf/2010\\_cultural\\_competence\\_plan.pdf](https://ccchealth.org/mentalhealth/pdf/2010_cultural_competence_plan.pdf).

<sup>72</sup> The Legal Assistance Foundation of Metropolitan Chicago and the Chicago Appleseed Fund for Justice, *Videoconferencing in Removal Hearings: A Case Study of the Chicago Immigration Court*, 2005, 8, [http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport\\_080205.pdf](http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf).

<sup>73</sup> The Legal Assist. Found. of Metropolitan Chicago and the Chicago Appleseed Fund for Justice, *Videoconferencing in Removal Hearings*, 13.



# Wisconsin Justice Initiative

The logo for the Wisconsin Justice Initiative, featuring a stylized blue wave or swoosh graphic below the text.

Testimony on SB219

Senate Judiciary and Public Safety Committee

May 5, 2021

Chair Wanggaard and committee members:

My name is Craig Johnson. I am an attorney and have been practicing law in Wisconsin since 1994. I spent over 13 years as a staff public defender, and I am now in private practice. I practice in municipal, state, and federal courts.

In general, the availability of video conferencing has been a valuable asset for the courts during the past year in light of the COVID-19 public health crisis. It has protected the health of attorneys, judges, court staff and parties to litigation. My hope is that in appropriate circumstances going forward the courts will continue to avail themselves of the advantages this technology offers, while also balancing important rights that litigants have, particularly in the context of criminal prosecutions.

However, I strongly believe that any expansion in the use of videoconferencing must preserve the right of a defendant in a criminal case to “opt out” of video conferencing as a substitute for critical in-person hearings. I believe it is crucial to preserve current law that allows a criminal defendant to object to the court’s use of videoconferencing at any critical stage in a prosecution. Without preserving this “opt-out” right for defendants, video hearings likely will become more and more common, thus creating a culture in which defendants as well as witnesses and counsel will be expected to appear, as they have for much of the last year, via “Zoom” and other remote technology for important fact-finding hearings.

The specific concern I want to address today is the problem of technology and the technical limitations that many criminal defendants face. In my 25+ years practicing criminal defense, both as a staff public defender and in private practice, I have had many different types of clients – young and old, cognitively challenged, homeless, disabled, aged, infirm, people with severe mental health challenges, people with learning disabilities, and people who live in very insecure and/or challenging housing situations, such as transient rooming houses, residential treatment centers, hotels, etc. The concern I have about any changes to court procedure that would potentially expand the use of video technology is that it can negatively impact those who fall into any of those categories. An elderly person or someone with cognitive limitations may not understand how to use a smart phone or computer. Someone who is poor or lives in an area without good internet or wireless service may have trouble with this technology. If a person prefers to appear in person, in a courtroom, with their lawyer, before a judge, and see and hear the proceedings, including witnesses, LIVE, they should have the opportunity and right to do so.

Examining a map of Wisconsin broadband coverage shows significant difference in wireline download speeds across the state. In the rural areas of the state, especially in the central and western areas, speeds are significantly lower. In low-income households across the state wi-fi is less available and may not function as well. We have seen this reflected in concerns about equal access to online education during the last year of this pandemic. Increasing reliance on video conferencing in court proceedings can exacerbate this digital divide.

The fact is that justice should not be dependent on a person's technical capacity or the physical capability of his or her geographic location or living situation. Courts should serve the public – the entire public.

The Wisconsin Supreme Court's opinion in *State v. Soto*, 2012 WI 93, expressed well the problems that can attach to a future in which video hearings become the norm. Various concerns reflected in the opinion apply to hearings in which witnesses or parties to the action are participating remotely. The opinion notes that the physical presence in a courtroom provides a setting that emphasizes the solemnity and gravity of the proceeding. The physical courtroom setting also effectively displays the power and importance of the state, as personified by the circuit court judge. This is true for defendants, as discussed in *Soto*, but is equally true for witnesses, for counsel and for the public. Testifying in a courtroom conveys to witnesses the importance of truthfulness, the minimization of bias and prejudice, and the overall seriousness of the proceedings. Presentation of live witness testimony allows parties, counsel, and the court to properly evaluate witness demeanor and a witness's ability to accurately recall that to which they are testifying. Wisconsin criminal jury instruction 300 discusses how to determine the credibility of a witness. It specifically indicates that weight should be given to the witness's conduct, appearance, and *demeanor on the stand*. There is a concern with videoconferencing when defendants and their counsel, due to technical or other issues, cannot adequately hear, see, and critically review testimony and exhibits when they are presented remotely.

I would invite you to keep these concerns in mind in evaluating Senate Bill 219 and any statutory changes to expand video conferencing in criminal and juvenile proceedings.

Thank you.

Craig Johnson,  
President  
Wisconsin Justice Initiative