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# Videoconferencing in the Courtroom: Benefits, Concerns, and How to Move Forward

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## **Videoconferencing in the Courtroom: Benefits, Concerns, and How to Move Forward**

### **Introduction**

A recent study by the Federal Judicial Center covering the use of videoconferencing in Appellate Courts quoted one judge who said “Videoconferencing is the wave of the future.”<sup>1</sup> This judge’s prediction may well be true, but when and how that future will come about is far from clear. The predictions become even murkier when one considers the use of videoconferencing in trial courts. Trial judges have other considerations to keep in mind regarding videoconferencing that Appellate judges have the luxury of avoiding. For example, trial judges must make snap judgments regarding evidence, must often deal with a jury, and must consider Constitutional protections for defendants.

Thinking that the results of the study on the use of videoconferencing in Appellate Courts was not the most useful analysis for a majority of judges and practicing attorneys, we set out to take a closer look at the use of the technology in the areas where it has the most promise (and the most problems). There are three main goals of this paper. First, to explain how judges in various courts use videoconferencing. Second, to address some of the concerns videoconferencing raises for the practice of judging and our legal system. Third, to suggest some solutions to remedy these concerns and offer a prediction as to how the use of videoconferencing will evolve.

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<sup>1</sup> Meghan Dunn & Rebecca Norwick, *Report of a Survey of Videoconferencing in the Court of Appeals*, Federal Judicial Center 17 (2006), available at [http://www.fjc.gov/public/home.nsf/autoframe?openform&url\\_l=/public/home.nsf/inavgeneral?openpage&url\\_r=/public/home.nsf/pages/1105](http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/1105).

To understand the use of the technology from a judge's perspective we spoke with or received email responses to questions from a number of federal appellate judges, federal district court judges, and magistrate judges who have used the technology. These interviews included discussions with Judge Michael Boudin of the First Circuit, Judge Ronald Gould of the Ninth Circuit, Judge Frederick Motz of the United States Court for the District of Maryland, Chief Judge Mark Wolf, Judge Patti Saris, Judge George O'Toole, Judge Nathaniel Gorton, Chief Magistrate Judge Judith Dein, Magistrate Judge Marianne Bowler, Magistrate Judge Timothy Hillman, Magistrate Judge Robert Collings, and Magistrate Judge Leo Sorokin. In addition to the judges we spoke with, we also interviewed a law professor and former clerk on the Ninth Circuit, several attorneys who have used videoconferencing in their practice, and Judge Dein's courtroom deputy, Thomas Quinn.

These interviews combined with relevant academic literature and caselaw raise more questions than they answer. One conclusion is clear: the technology has arrived. The debate about how and when to most effectively and judiciously to use the technology, however, is still ongoing.

Part I begins with a description of the technology and how courts use videoconferencing. Part II examines the experiences of judges who have used the technology. This Part also reviews some of the benefits and concerns that come with the use of videoconferencing. Part III discusses how some of these concerns may be overcome and how the use of videoconferencing may develop in the future.

## **Part I: How Judges Use Videoconferencing**

### **The Basics of Videoconferencing**

Videoconferencing is not a new technology; it has been used since the 1970s.<sup>2</sup> Videoconferencing works like a telephone call, except with the addition of a video image streamed between parties. In a court setting, videoconferencing may be requested by any party in a case.<sup>3</sup> In its simplest form, the remote party and the party in the courthouse sit in front of television screens topped with a camera and microphone. The video and audio is then broadcast over telephone lines or a broadband connection. Each viewer will see the opposite party on their respective screen. As the ability to compress and transmit video and audio data increases, the speed and quality of videoconferencing also increases. Early models had audio/video syncing issues and low-resolution images.

Initial videoconferencing technology also involved many cameras and limited visibility. In the *Baker* civil commitment hearing, the inmate could only see one image on the television screen at a time – either the judge or the witness. The inmate’s attorney had to quickly switch back and forth between the images in order to see the judge’s reaction to the witness’s testimony. This constant, abrupt shifting in images may have limited the inmate’s feeling that he was participating in the hearing.<sup>4</sup> Videoconferencing technology has rapidly progressed since the

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<sup>2</sup> Primitive models appeared as early as the 1940s with the advent of the television.

<sup>3</sup> *United States v. Baker*, 45 F.3d 837, 841 (4th Cir. 1995) (United States requested that mental competency hearing be conducted by videoconferencing as part of pilot program for the Judicial Conference of the United States); Interview with Judge Dein (plaintiff in prisoner civil rights case requested to appear by videoconferencing due to medical issues); *United States v. Guild*, 2008 WL 191184, at \*4 (E.D. Va. Jan. 17, 2008) (defendant requested witnesses appear by videoconference to save costs).

<sup>4</sup> *United States v. Baker*, 45 F.3d 837, 842 (4th Cir. 1995).

mid-1990s. Many newer computers now come with built-in cameras and microphones for easy videoconference communication.<sup>5</sup>

The simultaneous development of electronic case filing has accelerated adoption of videoconferencing technology. Parties on both sides of the conference can easily access documents without worrying about coordination mishaps. The logistical advantages of videoconferencing, coupled with the convenience of electronic case filing, seem to have increased access of relatively disadvantaged litigants to the courts.<sup>6</sup> For example, the Intercircuit Assignments Committee has an increased ability to assist struggling districts due to these technological advances.<sup>7</sup>

Compared to many other advanced countries, the US is not a leader in using videoconferencing in court settings.<sup>8</sup> Major industrial nations including Australia,<sup>9</sup> Canada,<sup>10</sup>

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<sup>5</sup> All Mac laptops include a built-in camera. See David Pogue, *Apple Laptop Has Looks and Brains*, N.Y. Times, Mar. 2, 2006 (“[T]he camera makes the MacBook a perfect companion to the iChat program, which lets you hold smooth, full-screen video conferences with up to three other people over the Internet.”).

<sup>6</sup> In Maryland, judges were initially concerned that electronic case filing would disadvantage smaller firms farther from the city. “We were worried that smaller firms in smaller areas would not like electronic case filing because they didn’t have the technology – but that was not the case at all. Lawyers in smaller firms love it; it makes court accessible to them, they don’t have to drive down to get paperwork. The most resistant people were some of the old guys in big firms that hadn’t kept up with the times.” Judge Motz, Interview on April 9, 2009.

<sup>7</sup> The Committee has reached out to the DC courts, which are overwhelmed with Guantanamo Bay cases, and the Florida courts, which have many unfilled vacancies coupled with litigation from the Hurricane in Galveston. Judge Young recently took over a docket for a judge that passed away, and judges have been more proactive about helping border states overwhelmed with immigration cases.

<sup>8</sup> For an overview of the varying foreign uses of the technology, see the April 2004 issue of the William & Mary Bill of Rights Journal.

<sup>9</sup> Ros Macdonald & Anne Wallace, *Review of the Extent of Courtroom Technology in Australia*, 12 WM. & MARY BILL OF RTS. J. 649, 652 (2004) (“Videoconferencing is used for a range of pretrial and administrative purposes, as well as in hearings. In large measure, its popularity is a product of both the enormous distances courts have to cover, particularly in the larger States, and the consequent costs associated with travel for witnesses, lawyers and the judiciary.”).

<sup>10</sup> Julian Borkowski, *Court Technology in Canada*, 12 WM. & MARY BILL OF RTS. J. 681, 681 (2004) (“The result of using such technology is that justice is better served.”).

United Kingdom,<sup>11</sup> and India<sup>12</sup> all use videoconferencing for various court proceedings. The most far-reaching use of videoconferencing, however, has been in Singapore. Singapore is in the midst of developing a “virtual” court system in which videoconferencing plays a major role.<sup>13</sup> There is much the US can study and learn from the successes and challenges of these early-adopting countries to more ably conduct the efficient and fair use of the technology. Although the US is not a leader in use of the technology, US courts employ videoconferencing for a variety of tasks.

## **Use in Trial Courts**

### *Criminal Cases: Trial Proceedings*

The most controversial use of videoconferencing is for the presentation of evidence in criminal trials. In regards to witnesses for the prosecution, videoconferencing may satisfy the Confrontation Clause in certain circumstances.<sup>14</sup> Although the Confrontation Clause includes the right to confront accusers face-to-face, that right is not absolute.<sup>15</sup> An exception to this right

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<sup>11</sup> Jeremy Barnett, *The United Kingdom*, 12 WM. & MARY BILL OF RTS. J. 687, 690 (2004) (“Videoconferencing of evidence is another area of growth in both criminal and civil courts.”).

<sup>12</sup> Shubha Singh, *Witness Deposition Through Videoconference Now Acceptable in India*, THAINDIAN NEWS, (Mar. 30, 2008) available at [http://www.thaindian.com/newsportal/uncategorized/witness-deposition-through-videoconference-now-acceptable-in-india\\_10032692.html](http://www.thaindian.com/newsportal/uncategorized/witness-deposition-through-videoconference-now-acceptable-in-india_10032692.html)

<sup>13</sup> Richard Magnus, *The Confluence of Law and Policy in Leveraging Technology: Singapore Judiciary’s Experience*, 12 WM. & MARY BILL OF RTS. J. 661, 675 (2004) (“Launched in 2002, JusticeOnline (JOL) is a strategic initiative that successfully conflates broadband Internet and videoconferencing technologies, positioning the Singapore courts as the first cybercourts in the world.”).

<sup>14</sup> *Maryland v. Craig*, 497 U.S. 836 (1990). In exceptional circumstances, courts may use videotaped depositions under Federal Rule of Criminal Procedure 15(a). Exceptional circumstances include the difficulty in securing live testimony from the President of the United States. *United States v. McDougal*, 934 F. Supp. 296 (E.D. Ark., 1996) (“[N]o sitting President has ever been directed to provide in-court testimony.”)

<sup>15</sup> *Maryland v. Craig*, 497 U.S. 836, 844 (1990). The Supreme Court’s prior interpretations of the Confrontation Clause show that this right is not absolute. “Given our hearsay cases, the word “confronted,” as used in the

must set forth an important public policy.<sup>16</sup> In *Maryland v. Craig*, the Supreme Court decided that the Confrontation Clause of the Sixth Amendment does not categorically prohibit the videoconferencing of witnesses against the defendant.<sup>17</sup> The Court set a standard for videoconferencing of prosecution witnesses,<sup>18</sup> which compares the truth-seeking and symbolic purposes of the Confrontation clause with the government’s interest in accurate factfinding.<sup>19</sup> The testimony must be reliable and the prosecution must show a specific necessity for the videoconferencing.<sup>20</sup>

In *Maryland v. Craig*, the prosecution wished to use one-way videoconferencing for the testimony of a 6-year-old child sex abuse victim.<sup>21</sup> This procedure allowed the witness, the prosecutor, and defense counsel to withdraw to a separate room for delivery of testimony.<sup>22</sup>

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Confrontation Clause, cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant -a declarant who is undoubtedly as much a “witness against” a defendant as one who actually testifies at trial.” *Id.* at 849. *See also Boujaily v. United States*, 483 U.S. 171 (1987) (refusing to adopt a literal interpretation of the Confrontation Clause in allowing hearsay statements of non-testifying co-conspirators).

<sup>16</sup> *Coy v. Iowa*, 487 U.S. 1021, 1021 (1988) (deciding that a screen could not be placed between a child witness and the defendant because there was only a “generalized presumption of trauma”).

<sup>17</sup> *Maryland v. Craig*, 497 U.S. 836, 853 (1990) (“We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.”).

<sup>18</sup> *Id.* at 855 (“[W]e hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.”).

<sup>19</sup> *Id.* at 851.

<sup>20</sup> *Id.* at 856.

<sup>21</sup> This procedure was in accordance with a Maryland statute that allowed the court to order videoconferencing of child witnesses in certain circumstances where in-court testimony would “result in the child suffering serious emotional distress such that the child cannot reasonably communicate.” *Id.* at 841 (citing Maryland Cts. & Jud.Proc.Code Ann. § 9-102).

<sup>22</sup> The procedure took place as follows:

Videoconferencing in child witness situations addresses specific concerns that a child will suffer severe emotional distress in presence of the defendant.<sup>23</sup> Although defendants cannot directly confront the witness if he or she is not physically in front of them, the defendant maintains her right to observe, cross-examine, and have the jury view the demeanor of the witness.<sup>24</sup> Accordingly, child witnesses may appear through videoconferencing when it is “necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate”

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In March 1987, before the case went to trial, the State sought to invoke a Maryland statutory procedure that permits a judge to receive, by one-way closed circuit television, the testimony of a child witness who is alleged to be a victim of child abuse. To invoke the procedure, the trial judge must first determine that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate. Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child witness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom. During this time the witness cannot see the defendant. The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.

*Id.* at 841-42 (citations omitted).

<sup>23</sup> Several states have adopted statutes for videoconferencing of child witnesses because of these concerns, including California, Florida, Massachusetts, and New Jersey. *See* Cal. Penal Code Ann. § 1347(d)(1) (West Supp.1988); Fla. Stat. § 92.54(4) (1987); Mass. Gen. Laws § 278:16D(b)(1) (1986); N.J. Stat. Ann. § 2A:84A-32.4(b) (Supp.1988). These statutes require a “case-specific finding of necessity” as opposed to the general presumption held unconstitutional in *Coy*. *See Coy v. Iowa*, 487 U.S. 1021, 1025 (1988) (O’Connor, J., dissenting).

<sup>24</sup> *Maryland v. Craig*, 497 U.S. 836, 843 (1990).

Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation-oath, cross-examination, and observation of the witness' demeanor-adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by ex parte affidavit or inquisition.

*Id.* at 851. *See also United States v. Gigante*, 166 F.3d 75, 80 (2d Cir. 1999) (finding videoconferencing preserved all of the characteristics of in-court testimony because the witness was sworn, subject to cross, testified in view of the jury and the court, and testified in front of the defendant himself).



and the technology “ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.”<sup>25</sup>

Courts have extended *Maryland v. Craig* to adult witnesses with health problems and witnesses living abroad.<sup>26</sup> Judge Gertner allowed videoconferencing of the witness in a criminal antitrust action, but not live in front of the jury.<sup>27</sup> She decided to have the testimony taped, edited, and replayed in front of the jury due to logistical concerns.<sup>28</sup> The witness was in Tokyo, Japan, which was thirteen hours ahead of Boston time, and the witness could not testify in the middle of the night because of illness.<sup>29</sup>

For situations where witness videoconferencing does not implicate the Confrontation Clause, courts have applied the Federal Rule of Civil Procedure 43(a).<sup>30</sup> Fed. R. Civ. Proc. 43(a) provides that videoconferencing is available in civil proceedings for “good cause in compelling circumstances with appropriate safeguards.”<sup>31</sup> This standard considers the relative cost of transporting the witnesses to court in comparison to the cost for videoconferencing, the ability of the Court to use subpoena power over the proposed witnesses, whether the alleged criminal

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<sup>25</sup> *Maryland v. Craig*, 497 U.S. 836, 857 (1990).

<sup>26</sup> See *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006) (applying the *Craig* test to deny videoconferencing of witnesses from Australia); *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999) (allowing a witness suffering from fatal cancer to testify through videoconferencing); *United States v. Nippon Paper Industries Co.*, 17 F. Supp. 2d 38 (D. Mass., 1998) (allowing videoconferencing of cooperating Japanese witness who refused to come to the United States to testify).

<sup>27</sup> See *United States v. Nippon Paper Industries Co.*, 17 F. Supp. 2d 38, 38 (D. Mass. 1998).

<sup>28</sup> See *Id.* at 43.

<sup>29</sup> *Id.*.

<sup>30</sup> *United States v. Guild*, 2008 WL 191184, at \*3 (E.D. Va. Jan. 17, 2008) (“Recognizing both the importance of live testimony in a criminal trial and the fact that the Confrontation Clause is not implicated by this testimony, the Court will use Federal Rule of Civil Procedure 43(a) as the threshold showing for the use of video conferencing in this instance.”).

<sup>31</sup> Fed. R. Civ. P. 43(a).

incident occurred overseas, and whether United States officials will be available to swear in witnesses at their location.<sup>32</sup> Courts will not consider the ultimate admissibility of witness testimony until trial.

### *Criminal Cases: Non-Trial Proceedings*

Videoconferencing is also used in non-trial proceedings.<sup>33</sup> Non-trial proceedings are not criminal prosecutions, therefore they do not demand the full package of constitutional protection provided during criminal trials.<sup>34</sup> It is unclear whether the Constitution requires physical presence at arraignments or sentencing.<sup>35</sup> The Federal Rules of Criminal Procedure provide more protections than the constitution requires.<sup>36</sup> In Federal courts, arraignments may not be conducted through videoconference for mere convenience; they require defendant's actual presence under the Federal Rules of Criminal Procedure.<sup>37</sup> Under Federal Rule of Criminal

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<sup>32</sup> A court found this standard met in a criminal case for child sex abuse, where the abuse took place in the Ukraine. *See United States v. Guild*, 2008 WL 191184, at \*4 (E.D. Va. Jan. 17, 2008). The witnesses were foreign nationals residing in the Ukraine so the court did not have subpoena power over them, their testimony was important given that the alleged criminal activity took place abroad, and United States Consular Officer were available to swear in the witnesses at the videoconferencing location. *See Id. See also United States v. Nippon Paper Industries Co.*, 17 F. Supp. 2d 38, 38 (D. Mass. 1998) (allowing videoconferencing of cooperating Japanese witness who refused to come to the United States to testify).

<sup>33</sup> Many judges we spoke with use teleconferencing for pre-trial conferences. *See* interviews with Chief Justice Wolf, Judge Collings. Judge Collings was open to replacing such conferences with videoconferencing, although because some of these conferences involve straightforward scheduling issues it may not be necessary to use this more complicated technology. Inmate

<sup>34</sup> *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (“[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.”).

<sup>35</sup> Arraignment is not required by the Fifth Amendment, at the confrontation clause is not implicated because there are no witnesses. *Valenzuela-Gonzalez v. U.S. Dist. Court for Dist. of Arizona*, 915 F.2d 1276, 1279 (9th Cir. 1990).

<sup>36</sup> *United States v. Gordon*, 829 F.2d 119, 123-24 (D.C.Cir.1987).

<sup>37</sup> *Valenzuela-Gonzalez v. U.S. Dist. Court for Dist. of Arizona*, 915 F.2d 1276 (9th Cir. 1990) (discussing the reasons for the rules, including assurance that the defendant knows what he is accused of).

Procedure 43, presence of the defendant is required at arraignment.<sup>38</sup> “Presence” has been interpreted to require physical presence in both the arraignment and sentencing contexts.<sup>39</sup> However, a defendant can appear through videoconferencing if he or she consents.<sup>40</sup> Additionally, videoconferencing may satisfy “presence” for arraignments if it is necessary; necessity includes prevention of continued disruptive conduct by the defendant.<sup>41</sup>

Courts have allowed videoconferencing during parole revocation hearings.<sup>42</sup> Parole revocation hearings are not equivalent to criminal prosecutions.<sup>43</sup> These hearings merely require:

- (a) written notice of the claimed violations of parole;
- (b) disclosure to the parolee of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a ‘neutral and detached’ hearing body such as a traditional parole board, members of

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<sup>38</sup> “(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.” Fed. R. Crim. P. 43(a).

<sup>39</sup> *Valenzuela-Gonzalez v. U.S. Dist. Court for Dist. of Arizona*, 915 F.2d 1280 (9th Cir. 1990). However, a few courts have interpreted “presence” to include videoconferencing, *United States v. Edmondson*, 10 F. Supp. 2d 651 (E.D. Tex. 1998), although this interpretation seems doubtful now that the Fed. R. Crim. Proc. have a provision expressly stating that the defendant must waive his right to be physically present in order to allow videoconferencing. See Fed. R. Crim. P. 10(c).

<sup>40</sup> Fed. R. Crim. P. 10(c). Some defendants have been sentenced via videoconference. See David Singleton, *Sentencing in Steroid Case is First by Videoconference*, The Times-Tribune, (Jul. 25, 2008) available at [http://www.thetimes-tribune.com/articles/2008/07/25/news/sc\\_times\\_trib.20080725.a.pg3.tt25steroids\\_sl.1834421\\_top6.txt](http://www.thetimes-tribune.com/articles/2008/07/25/news/sc_times_trib.20080725.a.pg3.tt25steroids_sl.1834421_top6.txt).

<sup>41</sup> See *United States v. Lawrence*, 248 F.3d 300, 305 (4th Cir. 2001) (finding that videoconferencing use at sentencing was not allowed under Fed. R. Crim. Proc. 43 because defendant was not warned that continued disruptive conduct would result in removal from the courtroom); *United States v. Washington*, 705 F.2d 489, 497 n. 4 (D.C. Cir. 1983).

<sup>42</sup> See *Wilkins v. Timmerman-Cooper*, 512 F.3d 768, 770 (6th Cir. 2008) (upholding lower court’s decision that videoconferencing of witness against the defendant did not violate defendant’s Fifth or Sixth Amendment rights). ADD others

<sup>43</sup> *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (“We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense.”).

which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.<sup>44</sup>

Although the Supreme Court has not directly addressed the use of videoconferencing in parole revocation hearings, it has emphasized that *Morrissey* does not “prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence”<sup>45</sup> and that courts should develop “creative solutions”<sup>46</sup> to avoid Confrontation Clause concerns.

The Sixth Circuit found videoconferencing of witnesses in parole revocation hearings to satisfy these requirements in *Wilkins v. Timmerman-Cooper*.<sup>47</sup> Given the flexible structure<sup>48</sup> of parole revocation hearings and Supreme Court’s encouragement of “creative solutions” to Confrontation Clause concerns, the court held that videoconferencing in parole revocation hearings presents no Confrontation Clause concerns as long as it is “used in a manner that allows the defendant to confront and hear his accusers in real time.”<sup>49</sup> Under the Sixth Circuit’s reasoning, courts may also extend videoconferencing to probation revocation hearings because they are “constitutionally indistinguishable.”<sup>50</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.5 (1973).

<sup>46</sup> *Id.*

<sup>47</sup> 512 F.3d 768, 771 (6th Cir. 2008) (“It is not ‘objectively unreasonable’ to conclude [videoconferencing] is just the sort of ‘creative solution’ envisioned by the Supreme Court.”) (citing *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.5 (1973)). The defendant’s parole officer and the state’s witnesses testified through videoconferencing, while the defendant, his counsel, and the hearing officer were present at the correctional facility. *Id.*

<sup>48</sup> *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972) (“We have no thought to create an inflexible structure for parole revocation procedures.”).

<sup>49</sup> *Wilkins v. Timmerman-Cooper*, 512 F.3d 768, 776 (6th Cir. 2008) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.5 (1973)).

<sup>50</sup> *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

## Civil Cases

Videoconferencing is more likely in civil cases because of fewer constitutional concerns. Judge Fred Motz, head of the Intercircuit Assignments Committee, has supervised many judges using it when they assist overwhelmed judges in another district. The technology also has been a “tremendous cost savings device” in regards to witness testimony.<sup>51</sup> The amount of work assigned through this committee is significant and the growing use of videoconferencing technology will help ameliorate the pressure on backed-up district courts.<sup>52</sup> This technology has also increased communication between the District Courts; often after judges appear through videoconference, they are invited to sit in that district as a live visiting judge.

### *Videoconferencing of the Parties*

Prisoner civil rights cases are popular instances to employ videoconferencing. There are logistical and security concerns as with anytime prison officials transport inmates. These costs are so significant that Congress passed the Prison Litigation Reform Act of 1996 to encourage use of videoconferencing in prisoner litigation.<sup>53</sup> Given the risks involved, Judges are more apt

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<sup>51</sup> Interview with Judge Fred Motz, April 9, 2009.

<sup>52</sup> For example, in the Middle District of Florida Judge Motz has about twenty judges lined up to take motions with an average of five each. Because of this initiative, about 100 motions that were going stale are now going to be decided. Interview with Judge Fred Motz, April 9, 2009.

<sup>53</sup> The statute specifically addresses pretrial proceedings. The statute provides:

To the extent practicable, in any action brought with respect to prison conditions in Federal Court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner’s participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

42 U.S.C.A. § 1997(e)(f)(1) (Supp. 1998). Courts have interpreted this statute to encourage use of videoconferencing at all stages of prisoner litigation. *See Edwards v. Logan*, 38 F.Supp. 2d 463, 466-67 (W.D. Va. 1999) (allowing videoconferencing because the issue in dispute was “relatively simple and straightforward and [the

to allow videoconferencing for these cases. When the need for a party to be in court is not great, the public interest in keeping the inmate, prison officials, judicial officers, and the public safe can sometimes tip the scales toward allowing videoconferencing.<sup>54</sup>

Although these are civil matters, prisoners have a constitutional right of meaningful access to the courts.<sup>55</sup> This right ensures that even the lawfully detained have the opportunity vindicate violations of fundamental constitutional rights.<sup>56</sup> However, this access may not include a right to attend court for an inmate-initiated civil rights proceeding.<sup>57</sup> Scope of access is similarly limited if the inmate is a witness for his civil rights claim.<sup>58</sup> Courts acknowledge the great expense the state goes through to transport an inmate to court,<sup>59</sup> but maintain a strong

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judge] anticipate[d] no difficulty in the effective presentation of all the facts and contentions through videoconferencing”).

<sup>54</sup> Courts prefer plaintiffs to be present to ensure “not only the appearance but the reality of justice.” *Muhammad v. Warden*, 849 F.2d 107, 111 (4th Cir. 1988). “The law recognizes this of course, but it also recognizes that there are countervailing considerations of expense, security, logistics, and docket control that prevent according prisoners an absolute right to be present.” *Id.* at 111-12.

<sup>55</sup> *Bounds v. Smith*, 430 U.S. 817, 821 (1977). This right is grounded in the right to due process of law and equal protection. *See Murray v. Giarratano*, 492 U.S. 1, 11 n.6 (1989).

<sup>56</sup> *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

<sup>57</sup> *See Thornton v. Snyder*, 428 F.3d 690, 697 (7th Cir. 2005) (considering an inmate’s videoconferencing for his civil rights claim trial); *Jones v. Hamelman*, 869 F.2d 1023, 1029-30 (7th Cir. 1989); *Poole v. Lambert*, 819 F.2d 1025, 1028 (11th Cir. 1987) (affirming lower court’s denial of plaintiff’s writ of habeas corpus *ad testificandum*); *Stone v. Morris*, 546 F.2d 730, 735 (holding that there is no absolute right for an inmate to appear in court for his civil rights claim, but that the lower court did not sufficiently consider the inmate’s interests when making the appearance decision); *Matter of Warden of Wisconsin State Prison*, 541 F.2d 177, 180 (7th Cir. 1976) (weighing the inmate’s interest in being present against the state’s interest in avoiding expense and risk of flight). *Cf. Price v. Johnston*, 334 U.S. 266, 286 (1948) (defendant has a right to be present at each “significant stage” of a felony prosecution).

<sup>58</sup> *Jones v. Hamelman*, 869 F.2d 1023, 1029-30 (7th Cir. 1989).

<sup>59</sup> Judge Dein discussed the difficulty in transporting inmates from federal prison to the courthouse. For security reasons, inmates cannot be transported on a regular schedule. It could take a week for an inmate to be transported from a neighboring state. This transport is so taxing that one civil rights plaintiff requested to appear by videoconference in Dein’s court; he had health problems and was concerned that they would be exacerbated by the ordeal of traveling to the courthouse.

preference to have the inmates present.<sup>60</sup> Even though a prisoner litigant's right to be present is qualified, this right cannot be arbitrarily denied.<sup>61</sup> To determine whether to allow videoconferencing of an inmate plaintiff, the trial court must "weigh the interest of the plaintiff in presenting his testimony in person against the interest of the state in maintaining the confinement of the plaintiff-prisoner."<sup>62</sup> This balancing may include whether the inmate is a high escape risk, the distance of the prison from the courthouse, the number of potential witnesses who were also incarcerated, the quality of the videoconferencing technology, whether the inmate is acting *pro se*, and the complicated nature of the inmate's claim.<sup>63</sup> The balance may not consider the probability that the prisoner's claim will succeed on its merits.<sup>64</sup>

One judge mentioned that a prisoner actually suggested videoconferencing.<sup>65</sup> The prisoner had a health issue and preferred not to be in a holding van for transportation between the prison and the courthouse. A courtroom deputy, however, mentioned that some prisoners file a plethora of civil rights cases as a means of being able to leave the facility on a regular basis to come to court.<sup>66</sup>

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<sup>60</sup> Judge Bowler finds it important to the integrity of the judicial system to show civil rights plaintiffs that they are getting their day in court.

<sup>61</sup> *Muhammad v. Warden*, 849 F.2d 107, 112 (4th Cir. 1988) (requiring a "reasoned consideration of the alternatives").

<sup>62</sup> *Thornton v. Snyder*, 428 F.3d 690, 697 (7th Cir. 2005); *Jones v. Hamelman*, 869 F.2d 1023, 1029-30 (7th Cir. 1989) (applying a similar balancing test). Some other factors courts have considered include whether the proceeding is a bench or jury trial, whether the prisoner is the only witness for his claim, and whether the defendants plan to testify in court. *Stone v. Morris*, 546 F.2d 730, 736 (7th Cir. 1976).

<sup>63</sup> *Thornton v. Snyder*, 428 F.3d 690, 698 (7th Cir. 2005) (applying these factors to an inmate's claim that denial of yard exercise privileges was cruel and unusual punishment).

<sup>64</sup> *Muhammad v. Warden*, 849 F.2d 107, 112 (4th Cir. 1988).

<sup>65</sup> Judge Dein.

<sup>66</sup> Deputy to Judge Dein.

Civil commitment hearings also may utilize videoconferencing. Although the protections given to defendants in criminal trials do not extend to civil commitment proceedings, procedural due process does guarantee some constitutional protections to commitment respondents.<sup>67</sup> These required procedures include some right to confront and cross-examine witnesses and a right to an “independent advisor – not necessarily an attorney.”<sup>68</sup> In *United States v. Baker*, the Fourth Circuit held that appearance of a commitment respondent by videoconferencing in civil commitment hearings does not violate constitutional due process.<sup>69</sup> Appearance by videoconferencing constitutes sufficient “presence” because according to the *Mathews v. Eldridge* balancing test, the respondent’s interest in involuntary commitment is overshadowed by the slight risk of error in these proceedings and the substantial government interest in safety and cost reduction.<sup>70</sup>

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<sup>67</sup> “[T]he transfer of a prisoner from a prison to a mental hospital must be accompanied by appropriate procedural protections. Involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual.” *Vitek v. Jones*, 445 U.S. 480, 481 (1980). To determine whether sufficient procedural safeguards have been provided, courts must consider the three factors set out in *Mathews v. Eldridge*: 1) the private interest that will be affected by the state action; 2) the risk of erroneous deprivation according to the procedures used, and the cost relative to the benefit of additional procedures; and 3) the government’s interest, including the costs and administrative burden of additional procedures. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>68</sup> *Vitek v. Jones*, 445 U.S. 480, 494-96 (1980).

<sup>69</sup> *United States v. Baker*, 45 F.3d 837, 840 (4th Cir. 1995) (inmate had been diagnosed with paranoid schizophrenia and mental health staff decided he was in need of involuntary treatment). The United States District Court for the Eastern District of North Carolina participated in a pilot program set up by the Judicial Conference of the United States. For the test case, the defendant had a hearing while he remained at his prison facility, and communicated with his attorney and the district judge through videoconferencing. *Id.*

<sup>70</sup> *Id.* at 847. “[T]he safety concerns inherent in transporting a potential mentally unstable person to a courthouse, with respect to the respondent and other parties, are substantially alleviated by the use of the video conferencing procedure.” *Id.* However, the dissenting judge believed that administrative concerns might not justify such harsh treatment. *See Id.* at 850 (Widener, Circuit Judge, dissenting) (detailing concerns about setting out approval of videoconferencing procedure through a commitment case that was essentially uncontested).



## *Videoconferencing of Witnesses*

Videoconferencing of witnesses is more common in civil proceedings because criminal procedure protections do not apply. The Federal Rule of Civil Procedure 43 allows testimony through videoconference.

In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.<sup>71</sup>

Appropriate safeguards involve some type of official atmosphere to swear in the witnesses and maintain the seriousness of the proceeding.<sup>72</sup> Compelling circumstances are similar to those in the prosecution witness situations, although the threshold for compelling is lower.<sup>73</sup> Compelling circumstances imply more than minor inconvenience.<sup>74</sup>

## **Use in Appellate Courts**

Technology use varies throughout the Circuit courts. The First Circuit, for example, rarely uses videoconferencing. This is surprising given the comments of Judge Boudin, who found the lack of widespread adoption of videoconferencing by courts puzzling given the long-

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<sup>71</sup> F.R.C.P. 43. However, the Advisory Committee Notes to the 1996 amendment to F.R.C.P. 43 cautions courts about the drawbacks of out-of-court testimony.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

<sup>72</sup> *United States v. Guild*, 2008 WL 191184, at \*3 (E.D. Va. Jan. 17, 2008) (applying 43(a) in a criminal case where the witness did not invoke Confrontation Clause concerns).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

term and broad use of the technology in industry. Boudin remarked that he had seen videoconferencing used heavily within industry for more than twenty years. The First Circuit's lack of videoconferencing use may be due to the concentrated area of the Circuit, which results in shorter traveling distances.<sup>75</sup>

Videoconferencing use is very common on the Ninth Circuit, where Circuit judges sit farther distances from each other. The parties do not have a say in whether videoconferencing will be used by one of the judges of their panel. The parties do not know who will be on their panel until about a week before, so these decisions are made amongst the judges. On the Ninth Circuit, Judge Gould often sits through videoconferencing. The technology is set up both in the judges' conference room (where he sits) and the courtroom (where the litigants and other judges will sit). On Judge Gould's monitor appears the litigant, the other judges on the bench, and a picture of how he appears to them. The litigants have a monitor to see Judge Gould, and the other judges can also see him. Judge Gould has found traveling these long distances especially taxing due to health issues and uses videoconferencing regularly. He always uses videoconferencing for screening and motions review involving staff presentations, and is using it more often for appearing on panels outside of Seattle (where he primarily sits) to hear oral arguments. He currently hears about six oral arguments a year through videoconferencing. Judges on the Ninth Circuit appear more comfortable with the technology in general, often using it for clerkship interviews or communications with other chambers.<sup>76</sup>

Other Circuit courts that have used videoconferencing for arguments with a judge remotely participating include the Third, Fifth, Tenth, and the Bankruptcy Panel of the Eighth

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<sup>75</sup> The inclusion of Puerto Rico in the Circuit would imply otherwise, however.

<sup>76</sup> Interview with former Ninth Circuit Clerk, April 9, 2009.

Circuit.<sup>77</sup> The Second Circuit uses videoconferencing for approximately 10% of the oral arguments conducted each week, but only with remote appearances from attorneys, not judges.<sup>78</sup>

### **Other Types of Use**

An important and highly controversial use of videoconferencing is for immigration removal proceedings. The number of these proceedings has increased in recent years as immigration increases and the government's efforts to stem the tide of illegal immigration have also increased. When asked about the availability of videoconferencing for removal proceedings, most judges replied that the option should always be available.

Procedural due process protections apply to immigration and asylum proceedings.<sup>79</sup> An alien must establish prejudice from the due process violation in order to invalidate deportation proceedings.<sup>80</sup> Credibility of the petitioner is often central to a deportation proceeding; therefore the disadvantages of videoconferencing may implicate due process concerns.<sup>81</sup> Furthermore, the determination of the Immigration Judge receives further deference at the Board of Immigration Appeals if he has observed the alien testify in person.<sup>82</sup> The alien's lawyer has to decide between being in the courtroom to effectively interact with the Immigration Judge and opposing

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<sup>77</sup> *Dunn & Norwick*, *supra* note 1 at 7 ("The Fifth Circuit no longer uses videoconferencing for oral arguments, but when it did, it was to accommodate the needs of a judge with a medical condition who could not travel.").

<sup>78</sup> *Id.* at 5.

<sup>79</sup> *Mathews v. Diaz*, 426 U.S. 67, 77 (1976). The due process principle of being afforded "an opportunity to be heard in a meaningful time and in a meaningful manner" applies to deportation proceedings. See *Rusu v. U.S. I.N.S.* 296 F.3d 316, 321 (4th Cir. 2002) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

<sup>80</sup> *United States v. Cerda-Pena*, 799 F.2d 1374, 1377 (9th Cir.1986).

<sup>81</sup> See *Rusu v. U.S. I.N.S.* 296 F.3d 316, 322 (4th Cir. 2002).

<sup>82</sup> See *Matter of Burbano*, 20 Immigration & Naturalization, Interim Decision 3229 (September 13, 1994).

counsel, or being with his client to assist in presentation of testimony.<sup>83</sup> Despite these concerns, courts have found videoconferencing constitutional for both appearance of the alien and for witnesses.<sup>84</sup> Additionally, Congress explicitly authorizes the use of videoconferencing in removal proceedings.<sup>85</sup>

A recent joint-study by The Chicago Appleseed Fund for Justice and the Legal Assistance Foundation of Metropolitan Chicago is highly critical of the use of videoconferencing in removal proceedings.<sup>86</sup> This study found numerous problems with the use of the technology in these proceedings.<sup>87</sup> The authors claim that:

Videoconferencing creates a Hobson's choice for immigrants' attorneys: they can either appear at the remote site, where they will be able to confer more freely with their clients but have reduced access to the court; or they can appear in court, where they will have greater access to the judge, trial attorney, and the file, but less access to their client.<sup>88</sup>

The report argues that a moratorium should be put on videoconference use in immigration removal proceedings until further study can identify solutions to the various problems.<sup>89</sup> The report authors blamed the Executive Office for Immigration Review for failing to investigate the

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<sup>83</sup> "Therefore, under either scenario, the effectiveness of the lawyer is diminished; he simply must choose the least damaging option." *Rusu v. U.S. I.N.S.* 296 F.3d 316, 323 (4th Cir. 2002). Note that a petitioner does not have a right to counsel in an asylum hearing, but courts have considered the full exercise of privilege of counsel as relevant to the due process determination. See *Farrokhi v. INS*, 900 F.2d 697, 701 (4th Cir. 1990).

<sup>84</sup> See *Aslam v. Mukasey*, 537 F.3d 110, 114 (2d Cir. 2008). See also *Garz-Moreno v. Gonzalez*, 489 F.3d 239 (6th Cir. 2007); *United States v. Guild*, 2008 WL 191184 (E.D. Va. Jan. 17, 2008) (allowing the defendant to use videoconferencing for overseas witnesses).

<sup>85</sup> See 8 U.S.C.A. 1229(b)(2)(A)(iii) ("The proceeding may take place through video conference.")

<sup>86</sup> The Chicago Appleseed Fund for Justice & Legal Assistance Foundation of Metropolitan Chicago, *Videoconferencing in Removal Hearings: A Case Study of the Chicago Immigration Court*, 56 (Aug. 2, 2005) available at [http://www.chicagoappleseed.org/projects/immigration/VideoConfReport\\_080205.pdf](http://www.chicagoappleseed.org/projects/immigration/VideoConfReport_080205.pdf)

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 60.

<sup>89</sup> *Id.* at 10..

efficacy and fairness of videoconferencing use in these proceedings.<sup>90</sup> Among the problems found were technical difficulties, interpretation problems, inadequate discussion between attorney and client, and clients were unable to speak or ask questions.<sup>91</sup> They found that 45% of the 110 hearings reviewed had at least one of these problems.<sup>92</sup>

Not all immigration attorneys agree with the report of The Chicago Appleseed Fund for Justice and Legal Assistance and the Legal Assistance Foundation of Metropolitan Chicago. One immigration attorney interviewed said that the availability of videoconferencing and teleconferencing is very important for immigrants, especially those representing themselves pro se. This attorney mentioned that many immigrants are moved to different immigration detention centers far away from where they were picked up by the Department of Homeland Security. Because of these distances, “When our clients move to distant jurisdictions, they do not have the finances to retain us to travel and represent them in those proceedings in person.” Videoconferencing allows these immigrants to have legal counsel during the proceeding, even if that legal counsel is not as perfect as in the face-to-face proceeding with the lawyer and client together directly in front of a judge.

This attorney’s argument is in line with one of the major findings of the joint-study. For immigrants not represented by counsel during the videoconferenced hearing, 44% were ordered removed compared to only 17.7% with access to counsel.<sup>93</sup> Whether these differences can be blamed on videoconferencing technology is unclear, but the access to competent counsel for immigrants is clearly an important concern. In Part III we offer some ideas for how to resolve

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<sup>90</sup> *Id.* at 6.

<sup>91</sup> *Id.* at 7.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

some of the problems cited in the joint-study while also increasing immigrant access to legal counsel.

There are other non-trial uses for videoconferencing. Judge Bowler uses videoconferencing primarily for mediation. Bowler said that using videoconferencing for mediation is incredibly useful because of the cost and time savings for the participants, which can be great if the courthouse is far away from the lawyers' offices. She cautions using videoconferencing during the first mediation meeting, however, because mediation requires a high level of rapport between the parties and the judge. Judge Bowler often uses videoconferencing for a second mediation session once that rapport has been established.

## **Part II: Judges' Experiences With Videoconferencing – The Benefits and Concerns**

### **The Benefits of Videoconferencing**

These ideas are more fully developed elsewhere in the paper, but these represent some of the most common arguments in support of the use of videoconferencing in courts.

#### *Cost Savings*

Every judge mentioned the ability of videoconferencing to reduce litigation costs. Even those lawyers and advocates who are highly critical of the expanding use of the technology in the courtroom acknowledge the ability of videoconferencing to reduce costs.<sup>94</sup> Travel expenses are usually billed to the client, which increases the client's litigation costs.<sup>95</sup> This cost savings also

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<sup>94</sup> These critics argue that the desire to get a cheap and "efficient" result is often done at the expense of getting the right result. See Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 82 (2006).

<sup>95</sup> Dunn & Norwick, *supra* note 1 at 8.

applies to government attorneys and judges.<sup>96</sup> One judge remarked that “you don’t have to deal with the dead time of spending all that time in a hotel.”<sup>97</sup> Judge Gorton remarked “It is always preferable from my point of view to see witnesses and/or litigants in person but sometimes appearance in person is either impossible or prohibitively expensive.”

### *Distance problems*

Coupled with the cost savings benefit is the ability of videoconferencing to shrink the world. In small districts, such as Massachusetts, the problem of having witnesses, parties, lawyers, and the courthouse all more than a few hundred miles away from the courthouse is usually not a major problem. Other districts, however, with large geographical areas often pose significant hurdles for individuals traveling to the courthouse. Controversies are also becoming more international in nature.<sup>98</sup> The US has no power to compel individuals living overseas to testify in a US court, so videoconferencing or a videotaped deposition may be the only way to get the testimony of a foreign witness into court.<sup>99</sup> Judges can also use the technology to offer court proceedings to suspected terrorists – either in detention centers like Guantanamo, Supermax correctional facilities, or even in tribunals set up overseas.<sup>100</sup> This benefit extends to

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 9.

<sup>98</sup> Pamela Maclean, *Courts Urged to Accept Videoconferencing*, Law.com (Apr. 22, 2005) (“The growing internationalization of prosecutions -- particularly international fraud -- raises problems for the government, which can't force foreign witnesses to come to the United States.”).

<sup>99</sup> *Id.*

<sup>100</sup> Fredric Lederer, *The Potential Use of Courtroom Technology in Major Terrorism Cases*, 12 WM. & MARY BILL OF RTS. J. 887, 906 (2004) (“Because major terrorism cases are likely to rely heavily on foreign participants in varied capacities, it may be that videoconferencing is or will be the defining technology for terrorism trials.”).

judges, not just parties and attorneys. Some judges, including Judge Gould on the Ninth Circuit, take advantage of the technology because a disability keeps them from regularly attending court.

### *Security*

Sometimes it is safer to have certain individuals in a different location than the judge and other parties in a case. Transporting prisoners to and from courts creates risks for the public, detention officers, and court personnel. This risk increases exponentially in multi-defendant criminal proceedings involving a group of prisoners. Security is also an obvious concern in cases involving international terrorism.

### *Versatility and Administrative Ease*

Much like the widespread use of teleconferencing for a variety of judicial business, videoconferencing allows judges to use the technology in a variety of different ways and settings. Judge Sorokin believes that videoconferencing could be promising for scheduling concerns, which would help reduce the administrative burden on the courts. Other judges, most notably Judge Bowler, commend the technology for its ability to facilitate Alternative Dispute Resolution.<sup>101</sup>

### *Access to Courts*

An argument for the use of videoconferencing that is related to many of these other benefits but often goes unnoticed by those supporting the use of videoconferencing for certain proceedings is that videoconferencing can increase the level of access to courts for some

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<sup>101</sup> See generally Amy Moeves & Scott Moeves, *Two Roads Diverged: A Tale of Technology and Alternative Dispute Resolution*, 12 WM. & MARY BILL OF RTS. J. 843 (2004).



marginalized individuals. Coming to the appropriate courthouse would be onerous for some severely disabled individuals.<sup>102</sup> Some lawyers would like to appear in court for their clients, but sometimes the financial and time costs are too severe to justify.<sup>103</sup>

## **Judges' Concerns About the Use of Videoconferencing**

### **Practical Issues**

Judges with some familiarity with the technology say that there have been surprisingly few technical problems with using videoconferencing. A few judges mentioned minor sound delays as a problem, but most said that there were no technical difficulties. These responses from trial judges differ from those of judges in Courts of Appeal.<sup>104</sup> Technical problems were the most cited concern and problem faced by appeals court judges.<sup>105</sup> None of the judges interviewed mentioned any serious technical problems.

Judge O'Toole remarked that the judge and judicial officers have no problems using the technology and that the only problems that might arise are from the party not in the courtroom or one of the lawyers attempting to use the technology. O'Toole mentioned that lawyers are a conservative group and can often be slow to adopt changes in practice. He also said that judges are somewhat more receptive to changes, but new technology can create some problems. Judge Gorton, who has not used the technology for a court proceeding is an example of this willingness

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<sup>102</sup> Dunn & Norwick, *supra* note 1 at 9.

<sup>103</sup> *Id.* (quoting a judge who said "Not every lawyer wants to show in court, and it's not a lack of commitment to the case but more an economic decision. Videoconferencing solves that.").

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

to use the technology.<sup>106</sup> He says “If both parties agree, I would have no problem with using video conferencing in jury trials.” The technology, like many new things, is not completely intuitive and user-friendly. Gaining facility with the technology may not take long, but the first few tries could be problematic.

The other major concern of most judges is the quality of the videoconferenced proceedings. Although most judges said that videoconferencing would not be appropriate in certain situations, the most significant practical concern was the quality of the presentation.<sup>107</sup> Along with this idea is the belief that videoconferencing may result in a lower quality of decisions.<sup>108</sup> There is some research showing an increased likelihood of error and viewer bias when using videoconferencing,<sup>109</sup> but many of these studies are from the 1990s, when the quality of the transmission and the experience level of participants were significantly lower. Other, more recent studies, show little difference in the quality of the decisions.<sup>110</sup>

Only Judge Patti Saris lamented the few experiences using videoconferencing. Saris had major technical problems on two occasions. One time the system simply did not work, and another time the picture feed transmitting witness testimony from the Middle East was hazy. More important than the technical problems, Judge Saris found the dialogue between parties

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<sup>106</sup> Judge Gorton mentioned that he has used videoconferencing to interview potential law clerks and interns and has been pleased with the convenience of the process.

<sup>107</sup> Almost all judges noted the significant concerns of using videoconferencing for testimony in criminal trials.

<sup>108</sup> Lederer, *supra* note 93 at 908 (“Two separate scientifically controlled experiments conducted over two academic years under the supervision of William & Mary psychology professor Kelly Shaver demonstrated that in civil personal-injury jury trials in which damage verdicts relied upon the testimony of medical experts, there were no statistically significant differences in the verdicts, whether the experts were physically in the courtroom or elsewhere, at least so long as witness images were displayed life-size behind the witness stand and the witness was subject to cross-examination under oath. Years of noncontrolled experiments in criminal Lab Trials suggest that the same result applies to merits witnesses in criminal cases.”).

<sup>109</sup> *See generally* Haas, *supra* note 87.

<sup>110</sup> *See* Lederer *supra* note 93.

stilted. Saris said that the “the technology made spontaneous and fluid argumentation difficult.” These technical problems could raise constitutional concerns.<sup>111</sup> Technical difficulties may impair the ability of the defendant to confront witnesses against him or stifle a factfinder’s assessment of a witness’s trustworthiness. This assessment may make videoconferencing particularly unsuitable for situations where a witness has trouble speaking clearly or learned English as a second language.<sup>112</sup>

The technology also has produced some awkwardness when both sides of the conference are not well-coordinated. For example, one judge was running late for a Ninth Circuit panel hearing. The judge who appeared remotely had to wait awkwardly off the screen, although the technology was set up, because the gavel had not yet dropped and he therefore could not appear before the parties.

Security is another practical concern for some judges. One area of security concern is the videotaping of asylum proceedings.<sup>113</sup> If a courts recorded a copy of the video feed the asylum-seeker, or a witness in an asylum proceeding could be at risk for retaliation.<sup>114</sup> The risk may be small, but the ability of computer hackers to access protected computer documents is nearly boundless.

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<sup>111</sup> Defendant stated sufficient facts to survive a motion to dismiss his constitutional claim when he alleged that “video camera was positioned in such a way as to prevent him and his counsel from making eye contact with the witnesses, and that the video picture froze on several occasions, thereby preventing Wilkins and the hearing officer from observing the demeanor of the witnesses.” *Wilkins v. Timmerman-Cooper*, 512 F.3d 768, 772 (6th Cir. 2008) (citing *Wilkins v. Wilkinson*, 2002 WL 47051 (Ohio Appeals Ct. Jan. 15, 2002)).

<sup>112</sup> The Fourth Circuit observed this situation in a deportation case, which was found to satisfy the limited due process protections afforded at such hearings. *See Rusu v. U.S. I.N.S.* 296 F.3d 316, 323 (4th Cir. 2002). The alien had few teeth due to torture in him home country, and refused to use an interpreter despite difficulty speaking English. *Id.* On multiple occasions during his testimony, the Immigration Judge asked the petitioner to move closer with the hope that it would make it easier to understand him. *Id.*

<sup>113</sup> An attorney we spoke with at DLA Piper at Washington, DC, who is involved with asylum pro bono work, mentioned this concern.

<sup>114</sup> *Id.*

## Responses to Legal and Constitutional Concerns

A criminal defendant has a constitutional right to be present at all critical stages of the proceeding against him.<sup>115</sup> The right of presence “pervades the entire law of criminal procedure.”<sup>116</sup> Primary concerns regarding videoconferencing stem from the Confrontation Clause. The Supreme Court set forth a test for the videoconferencing of prosecution witnesses in *Maryland v. Craig*: “a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”<sup>117</sup>

A number of judges mentioned the strong stance of the current Supreme Court, and especially Justice Scalia, as a reason why a significant change in Confrontation Clause jurisprudence is unlikely in the near future.<sup>118</sup> Justice Scalia believes that face-to-face confrontation is an essential protection of the Confrontation Clause and dissented from the *Maryland v. Craig* opinion.<sup>119</sup> The judges we spoke with have seriously considered his concerns

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<sup>115</sup> *Kentucky v. Stincer*, 482 U.S. 730, 744-45 (1987). This right stems from the Confrontation Clause of the Sixth Amendment, the due process clause of the Fourteenth Amendment, and the common law right of presence. See *United States v. Washington*, 705 F.2d 489, 496 (D.C. Cir. 1983) (citing *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (Sixth Amendment), *Bustamante v. Eyman*, 456 F.2d 269, 272-74 (9th Cir.1972) (due process clause), and *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934) (common law right to presence)).

<sup>116</sup> *Lewis v. United States*, 146 U.S. 370 (1892) (“A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner.”)

<sup>117</sup> *Maryland v. Craig*, 497 U.S. 836, 850 (1990). See discussion in Part I, *supra*.

<sup>118</sup> Judge Wolf and Judge O’Toole both made specific reference to this fact.

<sup>119</sup> Justice Scalia does not believe the *Maryland v. Craig* test is in accordance with the text of the Confrontation Clause.

This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was “face-to-face” confrontation. Whatever

– notably, that videoconferencing procedures are only “virtually constitutional.”<sup>120</sup> However, most agreed that *Maryland v. Craig* balancing is appropriate in criminal cases, and perhaps necessary in a large legal system overwhelmed with increasing amounts of litigation.

Judge O’Toole focused on the idea of the courthouse as a “special” social institution and a respected place for conducting court business. If videoconferencing was much more pervasive, the courthouse would lose its value as an important civic location in society. O’Toole thinks that videoconferencing is fine in certain situations, such as when the client and or lawyers reside hundreds of miles from the nearest courthouse, but most situations call for face-to-face interaction. The community value of human interaction is an important goal of civic life, and as the practice of that goal degrades, parts of our civic life will erode. O’Toole also remarked that “we live in a world of tradeoffs,” and nothing is an all-or-nothing proposition. Balancing is always appropriate. Judge Gould also believes that the benefits of the technology outweigh its drawbacks. He feels comfortable making videoconferencing a regular part of his practice, although he acknowledges the concerns that out-of-court appearances raise.

The use of video poses philosophical issues for some judges, and there certainly are those who would prefer to have all judges in the courtroom. However, if we watch the evening and weekend news, we increasingly see persons commenting on panels by video rather than in person, the technology has improved to the point where it is virtually the same as being in the courtroom, and I believe that there will be a trend to increasing use, not merely for accommodating health concerns but also to help control expenses associated with travel.<sup>121</sup>

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else it may mean in addition, the defendant's constitutional right to be confronted with the witnesses against him means, always and everywhere, at least what it explicitly says: the right to meet face to face all those who appear and give evidence at trial.

*Maryland v. Craig*, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) (citations omitted).

<sup>120</sup> *Id.* at 870 (citations omitted).

<sup>121</sup> Judge Gould, April 9, 2009.

In order to mitigate the drawbacks, Judge Gould always has a judge that is appearing live in court participate the most in responding to the parties. Judge Hillman described the process of being the remote party as “unremarkable” because it went so smoothly.

Judge O’Toole also worried about videoconferencing for someone detained in a prison. He expressed concern about the perception this image may put in the minds of jurors. O’Toole referred to the video image as a kind of “second-classness.” Even if there is no constitutional violation, there may be some level of tangible harm done to the plaintiff. If those in court, including jurors, do not consider the person important enough to be there in court, then this may impact their opinion of the person and the case. O’Toole also expressed a slight fear of video technology run rampant. If courts conducted everything through videoconferencing (as they could given current technology), there would be a certain Orwellian aspect to our justice system.

A few judges said that there would have to be a “very persuasive argument” to allow videoconferencing during the presentation of evidence. A major hurdle for the presentation of evidence is who can see what. If the defendant in a case is not in court (which is highly unlikely), he or she may only be able to see a single view of the courtroom. Everyone in the courtroom can see the individual defendant on the video screen, but the defendant cannot really focus his or her viewing angle onto a particular thing or person in the court.

Additionally, the Ninth Circuit shows how use of videoconferencing may mitigate Americans with Disabilities Act concerns. Although litigants may prefer to have all panel judges appear live in court, this particular circumstance illustrates the complications of administering a judicial system in such a large country. Videoconferencing may allow more access to judging as a career to individuals with disabilities.

### **Part III: The Future of Videoconferencing**

Judge Fred Motz, the head of the Intercircuit Assignment Committee, foresees increased use of videoconferencing technology as judges become more comfortable with it and litigation costs continue to grow. The technology has potential to be especially helpful in multi-district litigation. Videoconferencing could replace teleconferencing in these cases, which is already common for monthly meetings, but also may allow courts to reduce traveling for motion hearings. Many other judges echo this sentiment and say that they are open to, and expect to use videoconferencing more in the future. Other developments may make this increased use possible and even desirable.

#### **Changes in Technology**

Because most judges think that the major problem with videoconferencing is the inability for juries, the judge, and other courtroom participants to accurately assess the demeanor and physical expressions of a videoconferenced party or witness, upgrades to videoconferencing systems are needed to reduce these concerns. One minor change to the normal videoconferencing procedure is to use full body views of the videoconferencing party instead of just the upper-torso and head. A few judges mentioned that this change is important to capture a person's entire demeanor rather than just facial expressions. Nonverbal communication is just as important, and sometimes more important than verbal communication, especially when the parties dispute the reliability of a witness.<sup>122</sup>

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<sup>122</sup> Nancy Gertner, *Videoconferencing: Learning Through Screens*, 12 WM. & MARY BILL OF RTS. J. 769, 784 (2004) (“Sometimes a witness communicates something different from what he or she intended because of cultural differences - whether the witness looks directly at the questioner, when the witness pauses, how comfortable witnesses from different countries are with public displays of emotion.”).

Studies reveal that facial expressions are the most controllable of one's nonverbal communication.<sup>123</sup> Psychologists studying non-verbal communication refer to nonverbal communication cues as being "leaky" if a person is less able to control these cues.<sup>124</sup> For example, if a person can control his or her facial expressions to deceive someone, his or her body movements (shifting feet, for example) may "leak" and belie that person's true intent.<sup>125</sup> In order to catch these leakier forms of nonverbal communication, full-body camera angles, large screens, and quality audio and video are necessary to reduce some of the problems inherent in current videoconferencing uses.<sup>126</sup>

A problem with changing the camera angle is that it sacrifices the close-up view of the face for the entire body. This need not be a huge concern if courts employ widely available high definition technology for the videoconference feed. High definition video increases the quality of the presentation and would allow viewers to notice certain nonverbal cues that may be missing from standard videoconferencing technology.<sup>127</sup> High definition videoconferencing has been available for a few years, but only industry has had the desire, money, and need to invest in the technology to date.<sup>128</sup>

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<sup>123</sup> *Id.* at 786 (citing Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1189 (1993)).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (citing Michael D. Roth, Comment, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185, 190-91 (2000)).

<sup>127</sup> A handful of companies provide HD videoconferencing equipment and support. Among these are LifeSize (<http://www.lifesize.com/>) and Tandberg ([http://www.tandberg.com/products/high\\_definition.jsp](http://www.tandberg.com/products/high_definition.jsp)).

<sup>128</sup> George Ou, *High Definition Video Conferencing Is Here*, ZDNET, May 10, 2005 <http://blogs.zdnet.com/Ou/?p=59>. ("Going over to the next booth however, a new startup called Lifesize did nothing but HD conferencing demonstrations and I was blown away when I saw their live demo displaying a video image on a large LCD monitor at 1280 by 720 pixels at 30 progressive frames per second.").



Just five years ago, high definition televisions and cameras were only available to high-end electronic consumers willing to pay a significant premium over standard models.<sup>129</sup> Today, it is hard to find an electronics showroom that is not almost entirely full of high definition (“HD”) products. HD is now the standard. Most courtrooms using videoconferencing have HD-capable screens. The problem is that most of the cameras used in videoconferencing do not capture HD video. HD cameras are more costly than normal video cameras, but the prices have been falling.<sup>130</sup>

Another technology that will likely be readily available in the near future is something straight out of Star Trek: holographic video. Researchers at the Massachusetts Institute of Technology paved the way for this technology with the development of the Mark-I and Mark-II holovideo display systems in the late 1980s and early 1990s.<sup>131</sup> These early systems allowed for limited viewing angles, only a handful of colors, and updated at a per-second frame rate that was too slow to seem realistic.<sup>132</sup> In early 2007, MIT announced the creation of the Mark-III display system.<sup>133</sup> This goal of the system was to create a small, low-cost holographic imaging display useful for computer users.<sup>134</sup>

Other groups have tackled the technology to capture holographic images of real-life people. Cisco systems unveiled a new technology called the Cisco TelePresence OnStage

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<sup>130</sup> Handheld HD camcorders are now available for a few hundred dollars.

<sup>131</sup> The Spatial Imaging Group Holographic Video, <http://www.media.mit.edu/spi/holoVideoAll.htm> (last visited May 2, 2009).

<sup>132</sup> *Id.*

<sup>133</sup> Kate Greene, *Practical Holographic Video*, TECHNOLOGY REVIEW, Apr. 24, 2007, <http://www.technologyreview.com/Infotech/18572/>.

<sup>134</sup> *Id.*

Experience in late 2007.<sup>135</sup> The technology is not quite a full 3D-holographic video, but rather a high definition projection that looks as though the person is in the same room. The significant drawback to this product is that it requires a specialized screen draped over the area where the image will appear.<sup>136</sup> In mid-2008, Telstra, an Australian telephone company, used a high-definition hologram for a videoconference meeting.<sup>137</sup> The purpose of this presentation was less about the ability to project holographic video, but rather to demonstrate that modern networks can handle the massive data transmission necessary to make long-distance holographic and high-definition video possible.<sup>138</sup> During the 2008 Election night coverage, CNN used a holographic system to broadcast correspondents on location at the McCain and Obama headquarters into the main CNN newsroom.<sup>139</sup> The system required about forty high definition cameras shooting all angles of the person to be holographically rendered and an additional twenty computers crunching data to make sure the rendering is accurate and in real-time.

Currently, sophisticated holographic video displays are prohibitively expensive for most uses, but these, like most high technology advances, should increase in quality and decrease in price in the near future. In 2008, researchers at the University of Arizona announced a major

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<sup>135</sup> Human Productivity Lab, *Cisco Experimenting with an On-Stage Telepresence Experience*, [http://www.humanproductivitylab.com/archive\\_blogs/2007/11/15/cisco\\_experimenting\\_with\\_an\\_on\\_1.php](http://www.humanproductivitylab.com/archive_blogs/2007/11/15/cisco_experimenting_with_an_on_1.php) (last visited May 2, 2009); Cisco TelePresence - On-Stage Holographic Video Conferencing, [http://www.musion.co.uk/Cisco\\_TelePresence.html](http://www.musion.co.uk/Cisco_TelePresence.html) (last visited May 2, 2009).

<sup>136</sup> *Id.*

<sup>137</sup> Marguerite Reardon, *Beam Me Up, Telstra*, CNET NEWS, May 30, 2008, [http://news.cnet.com/8301-10784\\_3-9955821-7.html](http://news.cnet.com/8301-10784_3-9955821-7.html)

<sup>138</sup> *Id.*

<sup>139</sup> Jason Chen, *How the CNN Holographic Interview System Works*, GIZMODO, Nov. 4, 2008, <http://gizmodo.com/5076663/how-the-cnn-holographic-interview-system-works>. A video of this technology can be found at <http://www.youtube.com/watch?v=thOxW19vsTg>.

breakthrough in holographic video display production.<sup>140</sup> One roadblock for holographic video was the need to update images in real-time, which was impossible with older systems.<sup>141</sup> Now, “There are no more great barriers to overcome.”<sup>142</sup> Some skeptics, however, claim that the technology will not be available for the consumer market within the next ten years.<sup>143</sup> The Japanese Government is more hopeful.<sup>144</sup> They have increased government investing in the technology and are pushing for it to be available to consumers by 2020.<sup>145</sup> The exact timing of the widespread use of the technology may be unknown and in dispute, but it is clear that it is not too far off.

High-definition video and holographic displays may be some years off because of their current significant costs, but there are other important changes to videoconferencing in courts that are available now and may help make the process more life-like. The current technology deployed in courts allows participants just one or two viewing angles of the court room. Some judges mentioned that this inability for a remote party, especially a criminal defendant, being unable to see the entire courtroom is a significant problem for the use of videoconferencing. A simple and technologically possible solution is to allow the videoconferenced party to remotely control the camera angle on the courtroom cameras.

As early as 2000, researchers developed a way for videoconference participants to remotely control the angle and zoom of a camera, to switch between cameras, and to allow for

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<sup>140</sup> Mike Steere, *Scientist: Holographic Television to Become Reality*, CNN, Oct. 8, 2008, <http://www.cnn.com/2008/TECH/science/10/06/holographic.television/index.html>.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

picture-in-picture over the internet using a joystick control.<sup>146</sup> These programs have been used in other settings. For example, surgeons have used the technology to remotely proctor their students' cadaver examinations.<sup>147</sup> Allowing remote video control would give tremendous power to the videoconferenced participant and make them feel as if he or she is more a part of the proceedings. These developments in video technology will help make videoconferencing seem more lifelike, and therefore, more effective, but there are some other problems with videoconferencing that have little to do with the quality of the video presentation.

If the attorney is not in the same location as his or her client, which is common in immigration removal proceedings, and may become increasingly common in other proceedings, the ability for attorney-client realtime communication is stifled. The client cannot simply speak through the videoconference feed to speak privately with his or her attorney. A handful of judges mentioned that the usual response is for everyone except the attorney to leave the court and shut off the audio recording devices so that the attorney can meet with his client across the videoconference feed in relative privacy.

There are a couple of alternatives to this approach that may help reduce some disruption while allowing attorney and client to communicate about small issues on the fly. One potential change would be to allow the attorney a laptop at the desk with a secure instant messaging system set up between client and attorney. The client or attorney could send a private and

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<sup>146</sup> Marcia Perry & Deborah Agarwall, *Remote Control for Videoconferencing*, Proceedings of the 11th International Conference of the Information Resources Management Association 1-2 (2000), available at <http://acs.lbl.gov/OldMisc/mbone/remote/RemoteCntl.pdf> ("Remote control of videoconferencing devices can provide a non-disruptive means of moving cameras and improving audio quality locally."); K. Nishimura, K. Maeda, & R. Aibara, *Real-time camera control for videoconferencing over the Internet*, Proceedings. Fifth International Conference on Real-Time Computing Systems and Applications (1998), abstract available at [http://ieeexplore.ieee.org/xpl/freeabs\\_all.jsp?arnumber=726360](http://ieeexplore.ieee.org/xpl/freeabs_all.jsp?arnumber=726360).

<sup>147</sup> Daniel Smith & John Skandalakis, *Remote Presence Proctoring by Using a Wireless Remote-Control Videoconferencing System*, SURGICAL INNOVATIONS (2005) abstract available at <http://sri.sagepub.com/cgi/content/abstract/12/2/139>.

comparatively non-disruptive communication to his or her client. One problem with this is the sometimes limited English skills, language literacy, or computer literacy necessary for the client to effectively communicate with his or her attorney through a typing medium.

Another possible solution would be to have a secure phone line available to client and the attorney. This is more likely to be disruptive to court proceedings than the instant messaging system, but also provide more efficient communication for a wide variety of clients with their varying language and computer literacy. The phone could have an additional piece over the mouthpiece to shield the mouth of the person in court to minimize disruption and ensure private communication. These solutions may seem drastic and may cause more problems than they are worth, but allowing a client and attorney to communicate when needed is important for effective advocacy.

A less drastic change would be a satellite room set up near the courtroom or possibly in the judge's chambers in which the attorney and client could communicate privately. Instead of all other participants leaving the courtroom, the attorney could ask to leave, go to the adjacent room to communicate with his or her client via telephone.<sup>148</sup>

### **Recommendations for Judges and Lawyers**

Impeding technological progress is impossible. As one Appellate judge remarked, videoconferencing is the “wave of the future.”<sup>149</sup> The main issue with that statement is that the future is already here. Videoconferencing has a long history in a variety of fields and more and more people are becoming familiar with the process in other aspects of their work and life.

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<sup>148</sup> The courtroom deputy or IT professional could mute videoconference audio and blank out the video in the courtroom.

<sup>149</sup> See generally Dunn & Norwick, *supra* note 1.

## *Training*

A commonly voiced concern from judges about the use of videoconferencing is that lawyers have the most difficulty using the technology.<sup>150</sup> Few lawyers understand how the systems work, and fewer still can use the process to fully exploit all the advantages of videoconferencing. Like any other technology, familiarity and acquired comfort level enhances the ability to use videoconferencing effectively. Lawyers and judges need to be better trained in using this sort of courtroom technology.

Bar Associations and related continuing legal education centers can be invaluable in this regard.<sup>151</sup> To date, few organizations have offered comprehensive training on the use of technology in the courtroom.<sup>152</sup> Additionally, law schools courses, such as trial advocacy, which are almost always taught by judges and practicing attorneys, can incorporate information technology components to prepare new lawyers for practicing in a more technologically sophisticated profession.<sup>153</sup>

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<sup>150</sup> Judge O'Toole mentioned this idea and Judge Dein remarked that there is rarely an issue with court personnel using the equipment.

<sup>151</sup> Interestingly, many continuing legal education centers offer training through videoconference and videocast, but not on the use of those technologies.

<sup>152</sup> It appears that lawyers with the strictest cost constraints have been more open to adopting videoconferencing into their daily practice. For example, videoconferencing trainings are common at the Dallas Criminal Defense Lawyers Association. See <http://www.dcdla.org/>.

<sup>153</sup> See generally Kenneth J. Hirsh & Wayne Miller, *Law School Education in the 21<sup>st</sup> Century: Adding Information Technology Instruction to the Curriculum*, 12 WM. & MARY BILL OF RTS. J. 873 (2004).

### *Encourage and Support More Research*

More psychological and practical research on the use of the technology is necessary. Most research is now outdated and past findings may no longer be valid. To assist this effort to increase the study of the practice, judges should allow more access to researchers.<sup>154</sup> Part of this research should include study into the use of videoconferencing in other countries, with the possibility of educational exchanges between courts. More experienced users from other countries can share their experiences with adopting the technology with the goal of avoiding some of the pitfalls.

### *Understand the Changes in Demographics and the Conception of Communication*

Communication constantly evolves. What was once fantastical and cutting edge (televisions or the internet, for example) is now ubiquitous. Along with changes in technology come significant changes in what people consider to be effective and meaningful communication. Judge Gertner refers to the increasing prevalence of lawyers and jurors from “Generation X,”<sup>155</sup> but they are soon to be eclipsed by “Generation Y.”<sup>156</sup> Videoconferencing and other forms of high-tech communication are no longer unique, in fact, they may be more prevalent than actual face-to-face communication. New forms of communication are not merely modes that people have come to accept, some may even be things people have come to expect.

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<sup>154</sup> Thankfully, the judges participating in this project were all very forthcoming and open about their practices. The problems are not about access to individual judges, they are about the court as an institution, especially in terms of data availability.

<sup>155</sup> Gertner, *supra* note 120 at 769.

<sup>156</sup> Generation Y is also known as the Millennial Generation and used to describe those born in the early 1980s through the late 1990s. Some refer to the small generation between Generation X and Y as the “MTV Generation” in reference to this generation having come of age during the explosive growth of cable television.

## **Conclusion**

Like all new technologies, there are growing pains. Videoconferencing is not unique in this regard. If judges and lawyers approach the use of the technology with serious thought and a willingness to progress, the legal world will be richer for it. If they use the technology just because “everyone else is,” without adapting their approach appropriately, justice may be seriously hampered. Just as bad is outright rejecting new technology and all the promise it holds. Where its usefulness has been conclusively demonstrated, use should be expanded, and where questions still remain, more study should be undertaken.