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Appendices

How to use this handbook

This handbook is a revision of a project first published by the Quality Indicators Work Group of the Wisconsin State Public Defender in 2005. It is an extensive document that incorporates material from numerous sources that are relevant for the defense attorney facing the use of videoconferencing in the courtroom. The amount of material may seem overwhelming to the practitioner when confronted with a video court appearance for the first time. The following suggestions may help in using the handbook.

1. Identify the type of proceeding in question and review the applicable statutes.
2. Review Chapter 885 Subchapter III of the Wisconsin Statutes (see Appendix C).
3. Review all sections of the handbook that apply to your court proceeding and the issues that will arise in your case.
4. Take special note of the Quality Practice Standards.
5. Consult the reference list for additional research material.

The use of videoconferencing in criminal cases and other cases handled by the State Public Defender involves complex constitutional and statutory issues. Although the steps above are designed to help the reader begin the process of dealing with these issues, complete mastery of this subject requires a full review of this handbook. The handbook is merely a reference point and should not limit the research and litigation strategy of the lawyer.

Overview

Protecting Quality Representation in Video Court - A Practical Handbook for Wisconsin Defense Attorneys was prepared by the Wisconsin State Public Defender's Quality Indicators Work Group in September 2005. This is the 2010 edition which incorporates not only the Wisconsin Supreme Court's issuance of *Subchapter III, Chapter 885, Use of Videoconferencing in the Circuit Courts* but also a discussion of some of the issues concerning the use of videoconferencing which have arisen in the last five years. It is designed to guide defense attorneys representing clients in courtroom telephone and *videoconferencing*[1] systems. Included in this handbook are quality practice standards which were developed by the Quality Indicators Work Group. This handbook provides an overview of some of the issues surrounding the use of video in court proceedings and provides a framework for analyzing those issues. It also suggests[2] considerations for attorneys and clients appearing via video.

This handbook begins with the section **"…lest we begin to practice virtual justice,"** which describes some of the legal and practical problems caused by the use of video technology when it replaces in-person communication in the courtroom. The allure of using the latest technological advances in communication sometimes conflicts with the demands of the criminal justice system and the rights and needs of criminal defendants. Court efficiency and cost savings are only one side of the criminal justice balance sheet. On the other side are serious issues such as diminishment of public trust and confidence in the criminal justice system, alteration of the attorney-client relationship, and the dehumanization of the judicial process.

Section I, Maintaining the quality of justice addresses the impact of videoconferencing in court on the quality of legal representation. Quality representation must be the primary consideration for the defense lawyer confronted with a video court appearance. Communication and consultation with clients are at the heart of quality representation and may be severely tested by video court appearances. This section contains quality practice standards recommended as a starting point for attorneys involved in video court proceedings. In addition, the court's ability to maintain dignity and decorum may be compromised by video court. This section discusses concerns and issues that affect the court's ability to ensure a high-quality legal experience for all participants.

Section II, Raising challenges offers suggestions on making a record to protect the rights of defendants confronted with involuntary video court appearances.

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[1] "'Videoconferencing' means an interactive technology that sends video, voice, and data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video monitors." WIS. STAT. § 885.52(3).

[2] See also Appendix A which is a Video Court Checklist for Defense Attorneys.

Constitutional and statutory considerations are discussed as the framework for making effective objections and arguments.

Section III, Providing effective representation includes material intended to help attorneys to be as effective as possible in video court appearances. Not only must the attorney prepare the client, but attorneys must also address a host of other issues that arise when video is used in the courtroom. Video testimony is permitted by statute under prescribed circumstances, but should be carefully scrutinized by the defense attorney and should be objected to when appropriate. Confidentiality is hard to preserve during video court appearances, and caution is required by the defense. Using interpreters may make video appearances ineffective or impractical. Finally, this section contains suggestions regarding when and how to use videoconferencing as a resource for communication with clients who are confined in remote locations.

Section IV, Preparing for video court discusses concerns that should be considered before a video court appearance. There is a critical distinction between voluntary video appearances and involuntary appearances. Attorneys need to properly advise clients about the risks and benefits of appearing by video when clients have the option to participate. Often clients do not have that choice. Clients may be prevented from appearing in person as a result of court rules or orders requiring video appearances from remote locations. Attorneys must be prepared to vigorously advocate for a client's right to appear in person. Regardless, clients must be thoroughly advised about issues surrounding video appearances.

In conclusion, we hope that this handbook helps the reader be aware of (1) how to deal with appearances by telephone or videoconferencing, (2) how to be persuasive when appearing by telephone or videoconferencing, and (3) how to use the new technologies in the courtroom to the defendant's advantage.

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[3] The Quality Indicators Work Group thanks Michael Tobin, Director, Trial Division, for his assistance in developing the 2011 edition.

"…lest we begin to practice 'virtual justice'."[4]

> *"Technology clearly has changed the ways in which we work and communicate with others," Custodian of Records v. State (In re Doe), 2004 WI 65, ¶47, 272 Wis. 2d 208, 680 N.W.2d 792.*
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> *"The complexities of modern life and its problems make it increasingly difficult accurately to predict the value and effect of particular procedures, and increasingly necessary to move by a method of trial and error," In re Constitutionality of Section 251.18, 204 Wis. 501, 514, 236 N.W. 717 (1931).*

There is an ongoing focus on the use of video technology to increase the efficiency of the court, to lower transportation costs and to increase security. In this connection, the Wisconsin Court of Appeals has opined that in a civil proceeding "[a]s a result of the…advances in communication technology, we anticipate that a trial court will rarely determine that the incarcerated party must be brought to the proceedings," *Schmidt v. Schmidt*, 212 Wis. 2d 405, 413-14, 569 N.W.2d 74 (Ct. App. 1997). In fact, "[t]he trend among state and federal courts is to allow the properly safeguarded use of video proceedings, provided there is no violation of some specific constitutional right," *Commonwealth v. Ingram*, Ky., 46 S.W.3d 569, 572 (2001). This trend is not without problems.[5] The Illinois Court of Appeals held that "[i]n a televised appearance, crucial aspects of a defendant's physical presence may be lost or misinterpreted, such as the participants' demeanor, facial expressions and vocal inflections, the ability for immediate and unmediated contact with counsel, and the solemnity of a court proceeding," *People v. Guttendorf*, 309 Ill. App. 3d 1044, 1047, 723 N.E.2d 838, 840, 243 Ill. Dec. 535 (Ill. App. Ct. 3d Dist. 2000). However, the Kentucky Supreme Court held that "[t]he closed circuit video technology operates as the functional equivalent of an in-court arraignment, as both the defendant and the judge can see and hear each other," *Commonwealth v. Ingram*, 46 S.W.3d at 570.

One critic observed that "[a]s our society becomes increasingly depersonalized, it becomes ever more important to keep those methods of procedure that personalize and humanize the administration of justice," *Lewis v. Superior Court of San Bernadino County*, 19 Cal. 4th 1232, 1265-66, 970 P.2d 872; 82 Cal. Rptr. 2d 85 (1999), (Kennard, J., dissenting). "…[D]ue process…requires that throughout the criminal process the state must treat a defendant as a person possessing human dignity…" *Browne v. State*, 24 Wis. 2d 491, 511, 129 N.W.2d 175 (1964). There is a significant difference between the client who chooses to

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[4] "Put in more modern parlance, I, though an avid supporter of the 'Courtroom of the Future,' with a courtroom equipped with every manner and means of high tech accoutrements, believe that we should be cautious about the technology lest we begin to practice 'virtual justice.'" *United States v. Nippon Paper Indus. Co. LTD*, 17 F. Supp. 2d 38, 42 (D. Mass. 1998).

[5] Many of these problems are discussed in Anne Bowen Poulin's law review article, Criminal Justice and Videoconferencing Technology: The Remote Defendant, 78 Tul. L. Rev. 1089 (2004).

appear via video technology and the client who is not given the choice and is compelled to do so.

Our supreme court observed "[t]here is a fleeting attractiveness to the rendition of 'swift justice' wherein the alleged felon is brought into court shortly after his apprehension, enters his plea, and within minutes is whisked off to prison. The nub of judicial responsibility requires the trial court to stand between the accused and an impatient or inflamed community," *State ex rel. Burnett v. Burke*, 22 Wis. 2d 486, 492, 126 N.W.2d 91 (1964). Judicial responsibility requires the court to be sensitive and responsive to the rights, needs and perceptions of the parties appearing by video.

The quality of the technology is essential to the proper functioning of a video court system[6]. We agree that "[t]he rate at which technological developments is growing, coupled with the complexity of technology is beyond many laypersons' ken." *It's in the Cards v. Fuschetto*, 193 Wis. 2d 429, 437, 535 N.W.2d 11 (Ct. App. 1995). Hence, it is important for attorneys to be as conversant as possible with the technology associated with video court. The publication *Bridging the Distance 2005 - Implementing Videoconferencing in Wisconsin* is an excellent resource to use in understanding the technology that is required.

The expansion of video court is recognized in appellate decisions. "As Wisconsin has now officially recognized the utility of using technology in the trial process, we expect that trial courts will heavily rely on these advances to keep these cases progressing to resolution," *Schmidt v. Schmidt*, 212 Wis. 2d at 412. "Video and audio systems have…been increasingly used and relied upon to conduct a variety of court proceedings," *State v. Peters*, 2000 WI App. 154, ¶13 fn 12, 237 Wis. 2d 741, 615 N.W.2d 655 reversed on other grounds, *State v. Peters*, 2001 WI 74, 244 Wis. 2d 470, 628 N.W.2d 797. However, as the Court of Appeals noted in *Schmidt v. Schmidt*, 212 Wis. 2d at 411, "none of the cases reflect how an incarcerated person may now be able to effectively participate in a judicial proceeding without leaving the institution." This question has not been settled in Wisconsin.

More and more counties are installing equipment and implementing the use of telephone and videoconferencing in various court proceedings. These proceedings include initial appearances for defendants in the county jail and other remote facilities, probable cause hearings in civil commitment cases, and some juvenile proceedings including jury trials in TPR proceedings. Some video proceedings held to date were not conducted in conformity with the requirements of Wisconsin case law and statutes.[7]

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[6] WIS. STAT. § 885.54.

[7] "[W]hen a defendant must be physically present, sec. 967.08 does not authorize the use of a telephone in a postconviction evidentiary hearing pursuant to secs. 974.02 and 809.30(2)(h). Section 967.08 specifically enumerates proceedings intended to be included within the parameters of the statute", *State v. Vennemann*, 180 Wis. 2d 81, 96, 508 N.W.2d 404 (1993).

Some proponents of videoconferencing in court proceedings claim that it saves time, money[8], and manpower for courts, counties and corrections. However, many times these savings are at the expense of the defense. When the client is not transported to court, the attorney must travel to the detention facility to appear with the client. This travel is likely to take more time for the attorney. If the attorney has clients in the courtroom and a remote location, the attorney will have to juggle court appearances. No matter where the attorney is - with the client or in the courtroom - something is lost in the process. As stated in *Rusu v. U.S. INS* (4th Cir. 2002) 296 F3d 316, 323;

> "A … problem inherent in the video conferencing of asylum hearings is its effect on a petitioner's lawyer. Because video conferencing permits the petitioner to be in one location and an IJ [immigration judge] in another, its use results in a "Catch 22" situation for the petitioner's lawyer. While he can be present with his client – thereby able to confer privately and personally assist in the presentation of the client's testimony – he cannot, in such a circumstance, interact as effectively with the IJ or his opposing counsel. Alternately, if he decides to be with the IJ, he forfeits the ability to privately advise with and counsel his client. Therefore, under either scenario, the effectiveness of the lawyer is diminished; he simply must choose the least damaging option."

Requiring the defendant to choose between asserting (1) the right to have counsel present in the courtroom or (2) the right to have counsel present at the remote location and to confer with counsel confidentially impairs the policies underlying both of these rights. See *State v. Schultz,* 152 Wis. 2d 408, 423-25, 448 N.W.2d 424 (1989). See also Appendix B for a list of Frequently Reported Problems with Video Court.

Attorneys and judges may not be fully aware of the Wisconsin statutes and case law governing the use of the telephone or videoconferencing in the courtroom[9].

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[8] In *Smith v. Hooey*, 393 U.S. 374, 380, fn. 11, 21 L.Ed.2d 607, 89 S.Ct. 575 (1969), the United States Supreme Court observed that "…the short and perhaps the best answer to any objection based upon expense was given by the Supreme Court of Wisconsin… 'We will not put a price tag upon constitutional rights.' State ex rel Fredenberg v. Byrne, 20 Wis. 2d 504, 511,123 N.W.2d 305,…" (1963).

[9] While it is often said that the presumption is, that every one knows the law, that is, in some respects, a legal relic. It is, in its broad sense, obsolete. It is so said, in effect, in all modern text-books, based on judicial authority. Lawson on Law of Presumptive Evidence at page 6 illustrates by quoting the language of an eminent judge that:

> "There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so. . . . If everybody knew the law, there would be no need of courts of appeal, whose existence shows that judges may be ignorant of law."

Topolewski v. Plankinton Packing Co., 143 Wis. 52, 72, 126 N.W. 554 (1910).

See Appendix C and D for a Synopsis of Statutes, Court Orders, Administrative Rules and Case Law Concerning Using the Telephone and Videoconferencing in Wisconsin Court Proceedings. An effective advocate needs a working knowledge of statutes and case law[10] and must ensure that they are followed.

It is now established under WIS. STAT. § 885.60(2)(a), that instead of an appearance by videoconferencing a client is "entitled to be physically present in the courtroom at all critical stages of the proceedings, including evidentiary hearings, trials or fact-finding hearings, plea hearings at which a plea of guilty or no contest, or an admission, will be offered, and sentencing or dispositional hearings." Although the term "critical stage" is not further defined, the comments to the section make clear that "critical stage" incorporates existing law as well as new law that is adopted or decided.

If a client does not consent to making an appearance by telephone or videoconferencing in a non-critical stage, then an objection must be made[11]. A record must be made that "good cause to the contrary" exists under WIS. STAT. § 967.08(1), and other statutes. Neither the statute nor case law defines "good cause to the contrary". It should be argued that "good cause to the contrary" includes the constitutional and statutory rights of the client, the liberty interest which is at stake; the use of inadequate technology; the fact that the client and/or attorney cannot see and/or hear everything that is taking place in the courtroom; and the need for the client and attorney to be together and to confer confidentially during the course of the proceeding.

Whenever possible, the State Public Defender and the defense bar should be involved in the planning process for all new, remodeled or relocated court facilities[12] because it includes planning for the installation of the technology for telephone and/or videoconferencing court proceedings. At a minimum, the technology must enable the client and the attorney to hear and see everything in the courtroom, including that portion of the courtroom behind the bar. This field of vision may require multiple cameras and microphones. The client and the attorney must also be able to see clearly the facial expressions and the demeanor of the judge and all others who are speaking. The technology must allow private, confidential communications between the remote location and the courtroom.

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[10] Officially published opinions of the court of appeals have statewide precedential effect. Unpublished court of appeals decisions issued after July 1, 2009 can be cited for persuasive authority. Unpublished court of appeals decisions issued before July 1, 2009 cannot be cited.

[11] In *Boyd v. United States*, 116 U.S. 616, 635 (1886), the United States Supreme Court gave the following admonition: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure", *State v. Douglas*, 123 Wis. 2d 13, 21, 365 N.W.2d 580 (1985).

[12] Appendix D, Practical Tips for Participating on a Videoconferencing Committee: discusses things to be considered when participating on such a committee.

Furthermore, the facility being used as the remote courtroom site should be as much like a courtroom as possible, with adequate table space and seating. The attorney and/or client at the remote location must be able to control the microphones and cameras at both sites. It is not acceptable, and it diminishes the dignity and decorum of the court, to have defendants appearing via videoconferencing from a corridor in the jail or at the jail booking desk.

Section I Maintaining the quality of justice

Quality representation

As attorneys, we "are responsible in no small degree for the quality of justice administered by the courts," *State v. Cannon*, 196 Wis. 534, 539, 221 N.W. 603 (1928). "The right to counsel was designed to protect the fundamental due process rights of criminal defendants," *State v. Scott*, 230 Wis. 2d 643, 656, 602 N.W.2d 296 (Ct. App. 1999), and it "includes the right to effective assistance of counsel," *State v. Thiele*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305. Thus, "[t]he objective in providing counsel should be to assure that quality legal representation is afforded to all persons eligible for counsel, "Standard 5-1.1, ABA Standards for Criminal Justice: Providing Defense Services, 3rd Edition *(*1992).

Quality representation includes those critical activities that an attorney does which are client-centered[13] and optimizes the chances for the best possible result for the client. They include meeting and conferring with the client in-person, face-to-face, ensuring that the client's rights to be physically present in court, to hear the proceedings, and to see everything in court are preserved. The defense attorney must ensure effective and confidential communication with the client. SCR 20:1.4.

Therefore, the defense attorney must "guard against practices that make these proceedings unfair," *State v. Beals*, 52 Wis. 2d 599, 612, 191 N.W.2d 221 (1971). "Trial counsel is expected to know the law relevant to his or her case, particularly when it is so closely tied in with defense strategy," *State v. DeKeyser*, 221 Wis. 2d 435, 451, 585 N.W.2d 668 (Ct. App. 1998). Accordingly, every attorney must be knowledgeable about the issues surrounding video court and be prepared to raise and preserve all of the relevant issues because it "…has long been recognized that certain constitutional as well as statutory rights and privileges are waived unless they are asserted at the proper time and in proper manner," *Post v. State*, 197 Wis. 457, 459, 222 N.W. 224 (1928).

Communication and consultation

"Clarity in out-of-court communications between counsel and client is vital to effective representation," *Interpreter in State v. Le*, 184 Wis. 2d 860, 869-70, 517 N.W.2d 144 (1994). As Justice Abrahamson observed in *State ex rel. Flores v.*

[13] "The client-centered approach emphasizes the value and importance of clients taking the role of primary decision maker", David A. Binder, Paul Bergman and Susan C. Price, Lawyers as Counselors: A Client Centered Approach, 20, West Publishing Co. (1991).

State, 183 Wis. 2d 587; 625-26, 516 N.W.2d 362 (1994) (Abrahamson, J., concurring):

> Sending information about the appellate process to new clients by mail seems sensible to me. Despite the large caseloads of public defenders and the limited funds available for counsel for indigent defendants, I believe the better practice would be for the attorney to supplement the mailing by discussing the right to a no merit report with the client in person when the decision to file a no-merit report would be made. In such a face-to-face meeting counsel would have an opportunity to answer questions and correct any apparent misunderstandings.

This preference for face-to-face communication exists because "[c]ommunication is effective only if it clearly and accurately relates all pertinent information to the listener," *State v. Xiong*, 178 Wis. 2d 525, 537, 504 N.W.2d 428 (Ct. App. 1993). The new Supreme Court rule (Subchapter III, Chapter 885, Use Of Videoconferencing in the Circuit Courts) codifies the importance of attorney-client communication during video proceedings in WIS. STAT. § 885.54(1)(a).

Effective communication is essential because "[t]he attorney-client relationship is one of agent to principal, and as an agent, the attorney must act in conformity with his or her authority and instructions and is responsible to the principal if he or she violates this duty," *State v. Divanovic*, 200 Wis. 2d 210, 224, 546 N.W.2d 501 (Ct. App. 1996) citing *Olfe v. Gordon*, 93 Wis. 2d 173, 182, 286 N.W.2d 573, 577 (1980).[14] "The vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and [her or] his attorney," *State v. Brewer*, 195 Wis. 2d 295, 302, 536 N.W.2d 406 (Ct. App. 1995) quoting *Estelle v. Williams,* 425 U.S. 501, 512 (1976).

"The Wisconsin Rules of Professional Conduct for Attorneys emphasize the client's role in making decisions . . . SCR 20:1.2 (a)," *State v. Debra A. E.*, 188 Wis. 2d 111, 126 fn 9, 523 N.W.2d 727 (1994). The chief justice pointed out in *State v. Gordon*, 2003 WI 69, ¶52, 262 Wis. 2d 380, fn 12, 663 N.W.2d 765 (Abrahamson, C.J., dissenting) that:

> The Wisconsin Rules of Professional Conduct make it clear that even those strategic or tactical decisions that are within the province of an attorney are to be made after consultation with the client. See SCR 20:1.2 (a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are pursued); SCR 20:1.4(b) (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation).

[14] "If a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advice and reasons, and the conclusion reached. The record should be made in a manner which protects the confidentiality of the lawyer-client relationship." Standard 4-5.2(c), ABA Standards for Defense Function.

"Implicit in the Rules of Professional Conduct is a requirement to involve a client in any matter relating to his or her representation," *State v. Redmond*, 203 Wis. 2d 13, 20, 552 N.W.2d 115 (Ct. App. 1996).[15] "A lawyer may limit the objectives of representation if the client consents after consultation," SCR 20:1.2(c).[16]

Quality practice standards

The following quality practice standards were developed by the Quality Indicators Work Group:

I. A client needs to know and understand what his or her choices are and the risks and benefits of those choices.

II. In person, face-to-face, contact between an attorney and client is preferred over a conference by telephone or videoconferencing for substantive matters.

III. A client's personal, physical appearance in a courtroom is preferable to an appearance by telephone or videoconferencing.

IV. The attorney must advocate the client's position concerning whether or not the client appears by telephone or videoconferencing.

V. The attorney must consult with his or her client as to whether the attorney will appear from a location other than with the client.

The following standards were developed by the Quality Indicators Work Group and are now encompassed by WIS. STAT. §§ 885.54 and 885.60:

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[15] See also *Disciplinary Proceedings Against Ward*, 2005 WI 9, ¶ 20 fn 7, 691 N.W.2d 689, ["Attorney Ward was not charged with a violation of SCR 20:1.2(a) and (c) which require a lawyer to abide by a client's decisions concerning the objectives of representation unless the client consents after consultation to a change. Neither was he charged under SCR 20:1.4(a) and (b) which require the lawyer to keep the client reasonably informed about the status of a matter and to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. But it is apparent that if Attorney Ward had thoroughly discussed his alleged tactical designs with regard to venue and obtained her consent to delay the matter, the problems in this case might not have resulted."]

[16] See *State v. Pote*, 2003 WI App 31, ¶ 38, 260 Wis. 2d 426, 659 N.W.2d 82 "to the extent counsel was following his client's instructions at the resentencing hearing, those instructions were not shown to have been given only after Pote had received and considered counsel's advice regarding what actions might be in his best interest. See id. at 224 ("[L]imits on the objectives of representation must follow consultation between the lawyer and the client." (citing SCR 20:1.2 cmt))."

VI. The video technology that is used must enable persons appearing from the remote location to hear and see everything as if they were in the courtroom. (See WIS. STAT. § 885.54(1)(a), (b), (c), and (d)).

VII. Persons in a remote location should have the ability to control the microphones and the cameras in order to see and hear what they want and when they want in the courtroom. (See WIS. STAT. § 885.54(1)(d), which does not grant control to the parties, but they may request that cameras scan the courtroom.)

VIII. Contested court proceedings should be conducted in a courtroom, not by telephone or videoconferencing. (See WIS. STAT. § 885.60(2)(a)).

IX. Confidential communication must be maintained between a courtroom and a remote location. (See WIS. STAT. § 885.54(1)(e), (g)).

X. Instantaneous transmission of documents between a courtroom and a remote location must be available. (See WIS. STAT. § 885.54(1)(f)).

Dignity and decorum in courtrooms and other court facilities

While videoconferencing changes the traditional relationships between the court and courtroom participants, the duty to maintain dignity, decorum, and due process does not change.[17] There is a "basic order, authority and dignity essential to the conduct of judicial proceedings," *Shepard v. Outagamie County Circuit Court*, 189 Wis. 2d 279, 289, 525 N.W.2d 764 (Ct. App. 1994). The judicial standards set forth in SCR 60.01 require, in relevant part, that "[a] judge should conduct the work of his or her court with dignity and decorum and without interference which might detract from the proper courtroom atmosphere," SCR 60.01(9). See also *Judicial Disc. Proc. Against Breitenbach*, 167 Wis. 2d 102, 113-14, 482 N.W.2d 52 (1992).

This standard means that not only must "the work of [the] court [be done] with appropriate dignity and decorum…" *Disciplinary Proc. Against Gorenstein*, 147 Wis. 2d 861, 863, 434 N.W.2d 603 (1989,) but that every person appearing in court must be afforded "…fair and impartial treatment," *Disciplinary Proc. Against Gorenstein*, 147 Wis. 2d at 874. "A defendant is entitled to more than a due process which insures a reliable determination of his guilt or innocence. He is entitled to a due process which respects his human dignity." *McKinley v. State*, 37 Wis. 2d 26, 40, 154 N.W.2d 344 (1967). Accordingly, when a court appearance is being made by videoconferencing, "the attendant circumstances

[17] "If citizens are expected to deal fairly with the state and respect the laws, the state must deal fairly with its citizens and show respect for its citizens." *State v. Brown,* 107 Wis. 2d 44, 55, 318 N.W.2d 370 (1982).

[must provide] all the dignity and decorum of a court room…" *State v. Thomas*, 144 Wis. 2d 876, 895, 425 N.W.2d 641 (1988). WIS. STAT. §§ 885.50 and 885.56(1)(g), (i), also recognize the importance of courtroom dignity and decorum.

The potential effect of cameras on courtroom dignity and decorum is not a recent concern. For decades most courts barred still and television news cameras from the courtroom for these reasons. Conducting court by remote video raises similar concerns. Few courtrooms have been designed with videoconferencing capability in mind. Cameras, monitors, and their attendant clutter appear out of place in the formal surroundings of the traditional courtroom.

Litigants who appear by video cannot have the same sense of the court's dignity as those who appear in the courtroom. Peering at a small screen that may only show the head and shoulder shots of the main participants in the courtroom diminishes the real sense of the significance of appearing in court. This effect is not beneficial to litigants, especially juveniles or witnesses, whom society intends to impress with the gravity of the situation that brings them to the formal court setting.

Of greater concern, perhaps, is the court's ability to control what happens in the remote location, be it a jail, prison, or an office supply store. This remote location, in theory at least, is part of the courtroom. However, WIS. STAT. §§ 753.24 and 757.12, and case law set limits to judicial authority outside of the county. As a practical matter, the judge is limited in his or her ability to control a location that is distant and that may, in fact, be under the control of some other entity, for example, the sheriff or correctional staff. Other limitations exist because those in the "real" courtroom, including the judge, cannot see the surroundings outside of camera range at the remote location.

If remote locations are the functional equivalent of the courtroom, then we must argue that court facility standards apply to them. A "…'court facility' means the courtroom …and any other facilities used in the operation of a court," SCR 70.38(2). "Courtrooms should be designed to impress upon the public and the litigants the fairness and dignity of the judicial system," SCR 70.39(9) (d). But small rooms crowded with numerous witnesses and parties inhibit confidential, fair, and dignified proceedings. It can be difficult to question a witness sitting next to you when both persons are looking at a video monitor.

Each courtroom should have "[a]coustics that will eliminate noise from outside the courtroom and permit all participants to hear one another clearly with microphone systems in all jury courtrooms and in larger nonjury courtrooms," SCR 70.39(9) (e) 3, as well as "[a]dequate electronic capacity to permit the installation or use of telephone, X-ray view box, computers, videotape player, microphones and other equipment," SCR 70.39(9) (e) 4. SCR 70.38(7) requires that before "a new, remodeled or relocated court facility "may be used it must be

approved by the chief judge and is "subject to review by the supreme court," SCR 70.38(6).[18]

[18] SCR 70.38(4) requires that whenever there is a proposal to remodel, construct or relocate any court facility, "[t]he circuit judges and the chief judge shall participate in a planning process to ensure that the proposals …are consistent with current court facility standards, including those relating to functional design, audio-visual and acoustical adequacy and security of the courts and the public, and that they conform to the requirements of the Americans With Disabilities Act and other federal, state and local laws". In addition, pursuant to SCR 70.39(8)(a), the security and facilities committee in each county, "should …establish a design subcommittee for any contemplated reconstruction or significant remodeling of court facilities in the county."

Section II Raising challenges

Making the record

When analyzing the legality of a proposed use of videoconferencing, attorneys should determine whether the proposed use conforms to constitutional considerations, statutory authorization, and/or the relevant case law. It is important to remember "claimed errors at trial [or other court proceedings] that have not been preserved by appropriate motions and objections will not be considered... [by the trial court or on appeal]," *Chrysler Corp. v. Adamatic, Inc.*, 59 Wis. 2d 219, 236, 208 N.W.2d 97 (1973).

In order to preserve the record, "[l]itigants must inform themselves of applicable legal requirements and procedures," *Hilmes v. DILHR*, 147 Wis. 2d 48, 55, 433 N.W.2d 251 (Ct. App. 1988). Preparation includes, if necessary, becoming informed "of the relevant law prior to…determining a strategy or tactic…" *State v. Felton*, 110 Wis. 2d 458, 507, 329 N.W.2d 161 (1983).

It is essential for counsel to be familiar with Chapter 885 Subchapter III, Wis. Stats. A copy of this subsection is found in Appendix C. WIS. STAT. § 885.50(3) reads in part, "In declaring this intent, the Supreme Court further finds that improper use of videoconferencing technology, or use in situations in which the technical or operational standards set forth in this subchapter are not met, can result in abridgement of fundamental rights of litigants, crime victims and the public…"

The Synopsis of Additional Statutes, Court Orders, Administrative Rules and Case Law Concerning Using Telephone and Videoconferencing in Wisconsin Court Proceedings is found in Appendix D. It is a place to start research on the use of telephone or videoconferencing in a particular case or type of proceeding. Reading Appendices C and D in their entirety will also provide an understanding of the current law in Wisconsin on this topic. In addition, in the References section, there is a list of other useful articles.

The publication *Bridging the Distance 2005 - Implementing Videoconferencing in Wisconsin* identifies numerous considerations when implementing videoconferencing in Wisconsin courtrooms. In the appropriate circumstances, one or more of these considerations can form the basis for making an objection to the court. These considerations include technical requirements, communication issues, and the ability to obtain and review documents. See WIS. STAT. § 885.54. In addition, these issues need to be considered:

- Is the use of the telephone or videoconferencing in this proceeding permitted by the state and federal constitutions, state statutes, and case law?

- What are the constitutional, statutory, and case law requirements for using telephone or live videoconferencing means in this proceeding?

- Does the technical quality of the equipment being used meet the necessary requirements for conducting a court proceeding?

- Does the use of the telephone or videoconferencing either dehumanize[19] the client or the process itself?

- Can the client at the remote location see and hear everything that she/he would see and hear if physically present in the courtroom, including demeanor, facial expressions, and vocal inflections?

- Who has the ability to control the cameras on both ends?

- For discussions with anyone appearing via video, can the attorney view the camera and the monitor simultaneously?

- For discussions with anyone appearing via video, can the individual at the other location view the camera and the monitor there simultaneously?

- Does the attorney in the courtroom have access to a confidential telephone line to the remote location?

- When both the client and the attorney are at the remote location can the audio system be muted so no one in the courtroom can overhear the conversation between the client and the attorney?

- Is the remote location physically arranged so the client and attorney can speak confidentially?

[19] "It is the considered opinion of the juvenile court rules committee that the use of video technology would dehumanize the process. The child and parents or responsible adult need to be physically present before the trial court," *Amendment to Fla. Rule of Juvenile Procedure 8.100(a)*, 667 So. 2d 195**,** 198 n3 (Fla. 1996) (Anstead, J., dissenting), quoting the Comments and Recommendations of the Florida Bar Juvenile Court Rules Committee. "While we agree that the program depersonalizes the proceedings to a degree, we find that this result is no more "dehumanizing" than the fights, long waits, and shackles that plague the current system in some circuits, ..." *Amendment to Fla. Rule of Juvenile Procedure 8.100(a),* 753 So.2d 541**,** 543 (Fla. 1999).

- π Can the interpreter be involved in a confidential conversation between the attorney and client?

- π Are the sound and video feeds kept on in the remote location during the entire time there are court personnel in the courtroom?

- π If there is an overall mute control, can the attorney or client at the remote location indicate to the court that the attorney/client would like to be heard?

In addition to these considerations, there are additional issues discussed and identified throughout this handbook. They should also be considered as possible grounds for objecting to the use of telephone or videoconferencing in criminal cases.

Issues can be raised by motion[20] or by an objection[21] on the record. In this connection, it is important to remember, as pointed out in *Breunig v. American Family Insurance Company*, 45 Wis. 2d 536, 548, 173 N.W.2d 619 (1970), that:

> "The cold record on appeal fails to record the impressions received by those present in the courtroom. Facial expression, tonal quality, stares, smiles, sneers, raised eyebrows, which convey meaning and perhaps have more power than words to transmit a general attitude of mind are lost when testimony is put in writing. [They]…cannot appear in a record on appeal unless the trial lawyer makes them part of the record in some way. Like alleged errors, counsel should, when objectionable expressions and gestures occur, ask to make a record thereof and take exception to the tone, facial expression and gesture, give a proper description thereof, …"

The same procedure in making a record should be followed when attorneys and clients cannot see exactly what and who they would see if they were actually in the courtroom, cannot have a confidential conversation, or cannot obtain or review a document being used in the courtroom. See WIS. STAT. § 885.54(1)(b), (d), (g).

In this connection, it helps to keep a log of these occurrences and to collect the transcript, when appropriate, for use in supporting a future motion. Other anecdotal evidence may be helpful to collect as well.

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[20] "At a minimum, a motion, whether made pretrial or postconviction, must "[s]tate with particularity the [factual and legal] grounds for the motion," WIS. STAT. § 971.30(2)(c) (2001-02), and must provide a "good faith argument" that the relevant law entitles the movant to relief, WIS. STAT. § 802.05(1)(a) (2001-02)", *State v. Allen*, 2004 WI 106, ¶ 10, 274 Wis. 2d 568, 682 N.W.2d 433.

[21] "An objection must be made with sufficient specificity and prominence so that the trial court understands what it is expected to rule on." *State v. Kienitz*, 221 Wis. 2d 275, 314, 585 N.W.2d 609 (Ct. App. 1998). "In addition, the objection must be made on proper ground." *State v. Wind*, 60 Wis. 2d 267, 273, 208 N.W.2d 357 (1973). Furthermore, the "failure to make a timely objection constitutes a waiver of [the] objection." *State v. Carprue*, 2004 WI 111, ¶ 36, 274 Wis. 2d 656, 683 N.W.2d 31.

Under the right circumstances, the declaratory judgment procedure[22] under WIS. STAT. § 806.04 may provide appropriate relief because it "is particularly well-suited (in cases where such relief is otherwise appropriate) for resolving controversies as to the constitutionality or proper construction and application of statutory provisions." *Lister v. Board of Regents,* 72 Wis. 2d 282, 303, 240 N.W.2d 610 (1976). In addition, "[t]he scope and purpose of the writ of habeas corpus have been expanded to review violations of the constitutional rights of persons confined by the state in correctional institutions." *State ex rel. Terry v. Schubert*, 74 Wis. 2d 487, 491, 247 N.W.2d 109 (1976).

Constitutional considerations

The following constitutional considerations may apply in your case and override statutory provisions:

- Right to equal protection - U.S. Const. amend. XIV and Wis. Const. art. 1, § 1.
- Right to be present at a civil jury trial - Wis. Const. art. 1, § 5.
- Right to be present at criminal proceedings[23] - U.S. Const. amends. VI and XIV and Wis. Const. art. 1, § 7.
- Right to counsel - U.S. Const. amends. VI and XIV and Wis. Const. art. 1, § 7.
- Right to the effective assistance of counsel - U.S. Const. amends. VI and XIV and Wis. Const. art. 1, § 7.
- Right to communicate confidentially with counsel - U.S. Const. amends. VI and XIV and Wis. Const. art. 1, § 7.
- Right to have counsel present at criminal proceedings - U.S. Const. amends. VI and XIV and Wis. Const. art. 1, § 7.
- Right to confront witnesses face to face - U.S. Const. amends. VI and XIV and Wis. Const. art. 1, § 7.

[22] See *Loy v. Bunderson*, 107 Wis. 2d 400, 409-410, 320 N.W.2d 175 (1982), which sets out the requisites for a declaratory judgment. In addition, WIS. STAT. § 977.05(4)(L), authorizes the State Public Defender to "[c]ommence actions in the name of the state public defender or any client or group of clients to seek declaratory judgment on any matter of concern to persons being represented by the office." Staff attorneys of the State Public Defender are required to obtain prior approval to commence an action under this section.

[23] This right of presence includes the right to be in the physical presence of the judge.

- Right to a public hearing in an open courtroom in criminal proceedings - U.S. Const. amends. VI and XIV and Wis. Const. art. 1, § 7.

- Right to due process - U.S. Const. amends. V and XIV and Wis. Const. art. 1, § 8.

- Right to testify - U.S. Const. amends. VI and XIV and Wis. Const. art. 1, § 8.

- Right of access to court to obtain justice - Wis. Const. art. 1, § 9.

If one or more of these constitutional considerations apply, they should be researched so that the relevant case law can be incorporated into motions, objections, and arguments.

When is a hearing a critical stage?

Before objecting to the use of videoconferencing, the first issue an attorney should address is whether the hearing is a critical stage pursuant to sec. 885.60, WIS. STAT. If a hearing is a critical stage, then a defendant in a criminal matter or a respondent in a matter listed under § 885.60(2)(a), WIS. STAT. "has a right to be physically present in all stages of the proceedings, including evidentiary hearings, trials, fact-finding hearings, plea hearings at which a plea of guilty or no contest, or an admission, will be offered, and sentencing or dispositional hearings." WIS.STAT. §§ 885.60(2) and 971.04.

"A critical stage is any point in the criminal proceedings when a person may need counsel's assistance to assure a meaningful defense," *State v. Anderson*, 2006 WI 77, ¶68, 291 Wis. 2d 673, 717 N.W.2d 74. Hence, it is one where the defendant is constitutionally entitled to be present and represented by counsel,[24] *State v. Harris*, 229 Wis. 2d 832, 601 N.W.2d 682 (1999). "This amounts to a "guaranteed… right to be present at any stage of the criminal proceeding that is critical to its outcome if [the accused's] presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987)," *State v. Carter*, 2010 WI App. 37, ¶19, 324 Wis. 2d 208, 781 N.W.2d 527. The constitutional right to be present can be waived by the defendant and "…may be lost by consent or misconduct," *State v. Haynes*, 118 Wis. 2d 21, 25, 345 N.W.2d 892 (Ct. App. 1984) citing *Illinois v. Allen*, 397 U.S. 337, 342-43 *reh. denied*, 398 U.S. 915 (1970).

[24] "Before counsel may be excused from any portion of the proceedings, the court must make a record that the absence of counsel is knowingly and voluntarily approved by the defendant, for the option to excuse counsel is exclusively with the defendant", *Spencer v. State*, 85 Wis. 2d 565, 571-72, 271 N.W.2d 25 (1978).

"An accused has both a constitutional and statutory right to be present at the criminal trial," *State v. Anderson*, 2006 WI 77, ¶38. WIS. STAT. § 971.04(1) specifies at what proceedings a defendant shall be present[25]. When a defendant shall be present, with specific statutory exception, the defendant does not have the right to waive his/her appearance. See *State v. Koopmans*, 210 Wis. 2d 670, 677-79, 563 N.W.2d 528 (1997). Similarly, the respondent in a termination of parental rights proceeding has the right to be personally present during certain court proceedings, thus prohibiting the use of video conferencing. See *Grant County Dept. of Social Services v. Stacy K.S.*, 2010 Wis. App. Lexis 804 (unpublished).

WIS. STAT. § 967.08 sets forth when proceedings in criminal cases can be done by telephone or videoconferencing. When a defendant must be physically present in a criminal proceeding, WIS. STAT. § 967.08 does not authorize the use of telephone or videoconferencing. See *State v. Vennemann*, 180 Wis. 2d 81, 508 N.W. 2d 404 (1993).

Federal and state courts have addressed the issue of presence. "Several appellate courts have held that the term **"**present" means physical presence in the same location as the judge (that is, a defendant must be physically in the courtroom) and that, as a result, video-conferencing does not satisfy Rule 43's requirement of presence. *See, e.g., United States v. Torres-Palma,* 290 F.3d 1244, 1248 (10th Cir. 2002); *United States v. Lawrence,* 248 F.3d 300, 303-04 (4th Cir. 2001); *United States v. Navarro,* 169 F.3d 228, 235-39 (5th Cir. 1999)." *United States v. Wright*, 342 F. Supp. 2d 1068, 1069 (M.D. Ala. 2004).

The Wisconsin Court of Appeals in its unpublished decision in *State v. Cook*, 2002 WI App. 56, ¶19, 251 Wis. 2d 482, 640 N.W.2d 566, held that "[w]e will assume without deciding that Cook could not, as a matter of law, waive his right under § 971.04(1) (g) to be in the physical presence of the judge at sentencing." "The physical presence of the Judge throughout all proceedings relating to the trial is, of course, critical to insuring that the parties' right to a fair trial is safeguarded," *Fogel v. Lenox Hill Hospital*, 127 A.D.2d 548, 549, 512 N.Y.S. 2d 109 (N.Y. App. Div. 1st Dept. 1987).

[25] "Payette was not denied his right to "be present … [at] the imposition of sentence" provided by WIS. STAT. § 971.04(1)(g). It is undisputed that Payette remained in the courtroom throughout the sentencing, and that he was present when sentence was imposed.

"There is no claim that, because of the trial court's order not to look at the victim, Payette was unable to consult with trial counsel, or that he was restricted from full participation in any way except that he was not permitted to look at the victim during her sentencing statement…", *State v. Payette*, 2008 WI App 106, ¶¶ 52-53, 313 Wis. 2d 39, 756 N.W.2d 423.

Contesting proceedings where videoconferencing may be used

"In the most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact," *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. Ky. 1993). As pointed out in *Thornton v. Snyder*, 428 F.3d 690, 697, (7th Cir. Ill. 2005):

> Videoconference proceedings have their shortcomings. "The immediacy of a living person is lost" with video technology. *Stoner v. Sowders*, 997 F.2d 209, 213 (6th Cir. 1993). As the court in *Edwards v. Logan*, 38 F. Supp. 2d 463 (W.D. Va. 1999), observed, "Video conferencing … is not the same as actual presence, and it is to be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing. This may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion." 38 F. Supp. 2d at 467.

"Furthermore, although the State contends that "the audio-visual equipment in use by the magistrate courts offers extraordinary clarity in both sight and sound quality," we are not persuaded that such communication can offer the same level of meaningful human interaction as a face-to-face meeting," *State v. Miller*, 143 N.M. 777, 182 P.3d 158 (N.M. Ct. App. 2008).

Juvenile proceedings

Counsel for children in juvenile proceedings should be especially alert to efforts to conduct any proceeding via videoconferencing technology. WIS. STAT. § 885.60(2) creates a right to object to the use of videoconferencing technology and a right to be present in the courtroom at any juvenile proceeding considered a critical stage. The child's objection must be sustained pursuant to WIS. STAT. § 885.60(2)(c).

Counsel should consider objecting to the of use videoconferencing technology in juvenile court proceedings that are not considered "critical stages." There is a strong need for the presence of the juvenile in order for the court to make direct observations and decisions based on the court's evaluation of the juvenile, the juvenile's family, and their circumstances. Children are immature and frequently do not understand proceedings in court. Having counsel next to the child enhances explanation of the proceedings.

Separating the child from the courtroom by using videoconferencing technology diminishes the impact of the proceeding on the child. The separation distances the child and counsel from other participants like parents, relatives, and those working with the child who appear at the courtroom, creating a sense of

alienation for the child. Issues such as due process, fundamental fairness, confrontation, and effective assistance of counsel may be raised. "[V]irtual reality is rarely a substitute for actual presence and … even in an age of advancing technology, watching an event on a screen remains less than the complete equivalent of actually attending it." *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001).

Chapter 51 and Chapter 55 proceedings

WIS. STAT. § 885.60(2)(a) indicates a respondent in a Chapter 51 or Chapter 55 proceeding is entitled to be physically present in the courtroom if involved in a contested hearing.

It was observed in *United States v. Frierson*, 208 F.3d 282, 288, (1st Cir. 2000), that:

> An inmate's presence at a commitment hearing will assist the judge in reaching the correct decision, may serve as a deterrent to false testimony, and, more generally, reaffirms the dignity of the individual. In this case, Frierson's presence before the court might have had the additional advantage of convincing him to take his medication voluntarily, as had occurred following his prior § 4245 hearing.

If a hearing in a Chapter 51 proceeding is not contested, it is not clear that the respondent has a right to be present at that hearing. However, if it is a settlement hearing, one could argue that it is equivalent to a dispositional hearing and the respondent should be entitled to physically be present. Further, if "…a respondent will react adversely to the presence of a video camera, video conferencing would be inappropriate," *United States v. Baker*, 45 F.3d 837, 845 (4th Cir. 1995).

If there is an objection by a respondent to a witness testifying through videoconferencing, then the court must sustain that objection pursuant to WIS. STAT. § 885.60(2)(d). However, if a petitioner objects to a witness testifying by videoconferencing in this section, the court should utilize its discretion based on the criteria set forth in WIS. STAT. § 885.56.

Moreover, WIS. STAT. § 885.64(3) provides, "the use of non-video telephone communications otherwise permitted by specific statutes and rules shall not be affected by this subchapter, and shall remain available as provided in those specific statutes and rules." Section 807.13 WIS. STAT. defines when telephone testimony can be utilized for civil proceedings including those under chs. 48, 51, 54 and 55. Specifically, telephone testimony can be utilized when the applicable

statutes or rules permit, the parties so stipulate or the proponent shows good cause to the court. WIS. STAT. § 807.13(2)(a)(b)(c).

Therefore, even if videoconferencing would not be allowed by statute over objection, there is an argument that telephone testimony could be allowed under the same circumstances. When confronted with the decision of whether to object to video testimony, counsel should consider the relative benefits and disadvantages of telephone versus video testimony. When reaching a decision, a lawyer should consider any additional arguments against using telephone testimony, which are available in that particular case.

Intake hearings

An area where the law does not seem to be clear-cut on the use of video technology is in initial appearances. While an initial appearance in a criminal proceeding is not listed specifically as a critical stage, nonetheless, it may fit within the definition of a critical stage. Certainly, the setting of bond in a criminal proceeding is an important stage of the criminal case. It determines whether the client will have to fight his or her case while in or out of custody.

The initial appearance is the first time the defendant hears the criminal charges against him or her. In misdemeanor cases, the arraignment often occurs at the initial appearance. Pursuant to WIS. STAT. § 971.04(1), a defendant is to be present at arraignment. It would seem a defendant in a misdemeanor case at initial appearance in open court would have the right to be physically present in the courtroom to enter a plea, pursuant to WIS. STAT. § 971.05.

Yet, the same statute also indicates that "a defendant charged with a misdemeanor may authorize his or her attorney in writing to act on his/her behalf in any manner with leave of the court, and be excused from attendance at any and all proceedings," WIS. STAT. § 971.04(2).

WIS. STAT. § 970.01(1) indicates "the initial appearance may be conducted on the record by telephone or live audiovisual means under WIS. STAT. § 967.08. If the initial appearance is conducted by telephone or live audiovisual means, the person may waive physical appearance… If the person does not waive physical appearance, conducting the hearing by telephone or live audiovisual means under WIS. STAT. § 967.08 will not waive any grounds that the person has for challenging the court's jurisdiction."

There is nothing in the statutes preventing a defendant charged with a felony offense from being forced to do an initial appearance by telephone or audiovisual means. WIS. STAT. § 885.60 does not specifically define an initial appearance as a critical stage. In *Williams v. State*, 40 Wis. 2d 154, 160-61, 161 N.W.2d 218 (1968) the Wisconsin Supreme Court pointed out that:

> Generally, an accused has a constitutional right to be present at all stages of his trial, though many authorities state this rule in such a way as apparently to limit it to felony prosecutions. The trial, for this purpose, is generally conceived as running from the commencement of the selection of the jury through the rendering of the verdict and the final discharge of the jury, though some statements of the right to be present speak of it as running from the finding of the indictment, or from arraignment, to final judgment. During this period, defendant has a right to be personally present when anything is done affecting him, or, as it is sometimes put, whenever any substantive step is taken by the court in his case. 21 Am. Jur.2d, *Criminal Law*, p. 318, sec. 288.
>
> * * *
>
> Wisconsin has long held that ". . . every person tried for a felony has the right to be present at the whole trial . . ." *State v. Biller*, 262 Wis. 472, 479, 55 N.W.2d 414 (1952): *Hill v. State*, 17 Wis. 697(1864). We can find no Wisconsin case that defines what is meant by "the whole trial," but even assuming that the period covered is from the indictment to the rendering of the verdict there is no problem in this situation.

For a brief comment acknowledging the argument that an initial appearance in a felony case is a critical stage requiring counsel is unresolved, see *Wolke v. Rudd*, 32 Wis. 2d 516, 520, 145 N.W.2d 786 (1966).

WIS. STAT. § 885.54 speaks to the technical standards that must be present in order to go forward with a videoconferencing hearing. WIS. STAT. § 885.54(2) indicates, "the moving party including the court shall certify that the technical and operational standards at the court and the remote location are in compliance with the requirements of sub (1)." Moreover, the comments in this section state that "section 885.54 WIS. STAT. is intended to establish stringent technical and operational standards for the use of videoconferencing over objection." The comments even go so far as to indicate that "most cart based systems will not meet these standards in many or most situations, but may be used pursuant to a waiver or stipulation approved by the court."

Even though there is no clear-cut argument for initial appearances being a critical stage in felony cases, the technical standards to utilize videoconferencing must be met before it can be used at initial appearances.

The contested revocation hearing

As discussed below, there does not appear to be any controlling authority that prohibits, under all circumstances, the use of video technology in a revocation

hearing. However, there is potential merit to objections to its use, and the grounds for objection may include the right to due process and the statutory technical and operational standards for video equipment.

"Under our revocation scheme, the ultimate decision to revoke probation or parole rests with the executive branch of government, not the judiciary," *State v Terry*, 2000 WI App. 250, ¶14, 239 Wis. 2d 519, 620 N.W.2d 217 (citing *State v Horn*, 226 Wis. 2d 637, 650-53, 594 N.W.2d 772 (1999)). "… [R]evocation hearings are held before the Division of Hearings and Appeals in the Department of Administration," *State ex rel. Mentek v Schwarz*, 2001 WI 32, ¶6, 242 Wis. 2d 94, 624 N.W.2d 746. The DHA "… is not part of the DOC; … and …has sole responsibility for the decision to revoke parole "… in all contested cases…"*George v Schwarz*, 2001 WI App. 72, ¶21, 242 Wis. 2d 450, 626 N.W.2d 57. The administrative rules governing these hearings are found in Ch. HA 2, Wisconsin Administrative Code.

The Wisconsin Supreme Court in *State ex rel. Vanderbeke v Endicott*, 210 Wis. 2d 502, 513, 563 N.W.2d 883, pointed out that a revocation proceeding is not considered part of the underlying criminal case:

> The revocation of probation is not as a constitutional matter, a stage of a criminal prosecution. Gagnon v Scarpelli, 411 U.S. 778, 782 (1973). Revocation of probation is a civil proceeding in Wisconsin. A probationer is therefore not entitled to the full panoply of rights accorded persons subject to criminal process. It is well settled, however, that a probationer is entitled to due process of law before probationer may be revoked, because probation revocation may entail a substantial loss of liberty…

Hence, the "[r]evocation of probation is an administrative, not judicial, procedure…" *State v Prager*, 2005 WI App. 95, ¶20 n. 6, 281 Wis. 2d 811, 698 N.W.2d 837. Accordingly, the provisions of Subchapter III, Chapter 885, Use of Videoconferencing in Circuit Courts, would not apply directly to administrative hearings. However, the relevant standards set forth in WIS. STAT. § 885.54, arguably should apply under the due process requirement for administrative hearings if videoconferencing is used because these standards are designed to protect such fundamental rights as the right to counsel, the right to testify, and the right to respond to the evidence presented.

"Administrative rules are equal to statutes in their power to regulate behavior," *DeBeck v Department or Natural Resources*, 172 Wis. 2d 382, 387-88, 493 N.W.2d 234 (Ct. App. 1992). Accordingly, "… an agency is bound by its own procedural rules, and its failure to follow its own regulations is reviewable on certiorari," *State ex rel. Staples v Department of Health & Social Services*, 136 Wis. 2d 487, 493-94, 402 N.W.2d 369 (Ct. App. 1987), citing *State ex rel. Meeks v Gagnon*, 95 Wis. 2d 115, 199, 289 N.W.1d 357 (Ct. App. 1980) and "[t]hose

rules define the boundaries of … [the administrative agency's] … authority and when it abandon's or exceeds them, it acts beyond its authority," *State ex rel. Jones v Franklin*, 151 Wis. 2d 419, 423, 444 N.W.2d 738 (Ct. App. 1989) (citing *State ex rel. Meeks v Gagnon*, 95 Wis. 2d at 119).

Rights at a revocation hearing

The administrative rules governing revocation hearings are found in Ch. HA 2, Wis. Admin. Code.[26] According to HA 2.02(8), Wis. Admin. Code, "[r]evocation means the removal of a client from probation, parole, extended supervision or youth aftercare supervision."

Every parolee or probationer facing revocation has certain enumerated rights under HA 2.05:

> (3) OFFENDER'S RIGHTS. The client's rights at the hearing include:
>
> (a) The right to attend the hearing in person or by electronic means.
>
> * * *
>
> (c) The right to be heard and to present witnesses.
>
> * * *
>
> (e) The right to question witnesses.
>
> * * *

Among "[t]he minimal requirements of due process which … [are applicable to revocation proceedings include] … (3) the opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation), (5) a neutral and detached hearing body [or examiner] members of which need not be judicial officers or lawyers …" *State ex rel. Vanderbeke v Endicott*, 210 Wis. 2d at 514. See also *State ex rel. R. v Schmidt*, 63 Wis. 2d 82, 87-8, 216 N.W.2d 18 (1974).

The provisions of HA 2.05 (3)(a) were adopted effective June 1, 2010 at the request of the Division of Hearings and Appeals to allow Administrative Law Judges to conduct final hearings by video and telephone. In addition, HA 2.05 (6) now provides as follows:

> Procedure (a) … The administrative law judge may conduct the hearing by video conference. The hearing may also be conducted by telephone conference if all parties agree. If all parties do not agree to conduct a hearing by telephone conference, the administrative law judge may

[26] It must be noted at this point that HA 1.01(3), Wisconsin Administrative Code, provides that Ch. HA 1 "does not apply to corrections hearings conducted pursuant to Ch. HA 2…"

> conduct the hearing by telephone conference if there is no factual dispute regarding the violations alleged by the department or when the administrative law judge determines that good cause exists to conduct the hearing by telephone conference.

Depending on the distance involved, ALJs may appear by electronic means from Madison or Milwaukee while other participants appear from jail or prison. Being heard by electronic means is not the same as being heard in person.[27] The opportunity to be heard in person encompasses the right to be present. At the time of publication of this handbook these provisions remain untested and their legality is uncertain. Counsel should be prepared to make appropriate challenges in writing in advance of any hearing that is scheduled for video or telephonic appearances by the ALJ.

Presence

"While due process must be extended in an administrative contested case, this does not mean that all of the procedural niceties of a judicial trial must be observed." *Daly v Natural Resources Board*, 60 Wis. 2d 208, 218, 208 N.W.2d 839 (1973). "It is . . . undisputable that a minimal rudiment of due process is a fair and impartial decisionmaker." *Guthrie v. WERC,* 111 Wis. 2d 447, 454, 331 N.W.2d 331 (1983).

"Administrative boards in performing quasi-judicial functions are not required to follow all the rules of procedure and customary practices, of courts of law," *State v ex rel. Wasilewski v Board of School Directors*, 14 Wis. 2d 243, 268, 111 N.W.2d 198 (1961). However, "[w]hile a hearing examiner is not a judge, he or she performs many of the functions of a judge," *State ex rel. Gibson v Department of Health & Social Services*, 86 Wis. 2d 345, 355, 272 N.W.2d 395 (1978). In *Berrafato v Exner*, 194 Wis. 149, 159, 216 N.W. 165 (1927), the Wisconsin Supreme Court pointed out that "… the duty of a trial judge is to remain in the court room during the progress of a trial." The same duty would apply to a hearing examiner.

The Wisconsin Court of Appeals in its unpublished opinion in *State ex rel. Stokes v. Department of Health & Social Services*, 146 Wis. 2d 872, 433 N.W.2d 33 (Ct. App. 1988) found that not only did the DHSS violate "Stokes' due process rights under the federal constitution, the DHSS infringed upon Stokes' rights under its administrative code…" and was "…in violation of its own rules when the examiner denied Stokes his right to be present at his revocation hearing." Although the

[27] The Wisconsin Court of Appeals stated in *State v Peters*, 2000 WI App 154, ¶7, 237 Wis. 2d 741, 615 N.W.2d 655, that it agreed "… with the circuit court that the closed-circuit television procedure violated statutory criminal procedure" which required "…that a defendant shall be present at the arraignment and at the imposition of sentence." WIS. STAT. § 971.04(1).

Stokes case can not be cited it may still have relevance to the due process considerations in video proceedings but the use of video no longer violates the administrative rules.

The concept of the right to be present is the same whether the hearing is a court proceeding or an administrative hearing. Most of the case law on the issue of presence has been defined and interpreted in the context of criminal court proceedings. Hence, some of the pertinent authorities may not directly apply to revocation proceedings, but the policies underlying them may be relevant. The term "present" in Fed. R. Crim. P. 43 "… suggests a physical existence in the same location as the judge … [in other words] … the defendant must be at the same location as the judge to be "present," "*United States v Navarro*, 169 F 3d 228, 237 (5th Cir. 1999). The Wisconsin Court of Appeals in its unpublished decision in *State v. Cook*, 2002 WI App. 56, ¶19, 251 Wis. 2d 482, 640 N.W.2d 566, held that "[w]e will assume without deciding that Cook could not, as a matter of law, waive his right under WIS. STAT. § 971.04(1)(g) to be in the physical presence of the judge at sentencing." See *In re Estate of Hulett*, 6 Wis. 2d 20, 26, 94 N.W.2d 127 (1959), where it was held that "…the concept of *presence* includes…physical proximity."

In addition, it appears that the "opportunity to be heard in person" encompasses "the right to be present." See *Schmidt v. Schmidt*, 212 Wis. 2d 405, 413, 569 N.W.2d 74, (Ct. App. 1997), ("…the party seeking the presence of the incarcerated person must show why his or her presence is necessary, and equally, why the possible alternatives to having him or her appear in person are not appropriate.")

Presenting and confronting witnesses

It was noted in *State v. Love*, 2005 WI 116, ¶42, 284 Wis. 2d 111, 700 N.W.2d 62, that "[t]he general rule is that credibility determinations are resolved by live testimony." As explained in *State v. Pallone*, 2000 WI 77, ¶45, 236 Wis. 2d 162, 613 N.W.2d 568, "…it is the role of the fact finder listening to live testimony, not an appellate court relying on a written transcript, to gauge the credibility of witnesses" as well as "…the overall persuasiveness of his or her testimony," *State v. Hughes*, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621.

The right to present live testimony at a revocation hearing was discussed in *State ex rel. Harris v Schmidt*, 69 Wis. 2d 668, 679-80, 230 N.W.2d 890 (1975):

> The question here is, was the testimony that the defendant desired to elicit from witnesses under the facts in this case the type for which there is "simply no adequate alternative" to live testimony or was this the kind where a mere affidavit would suffice? Inevitably live testimony

> is to be preferred to a deposition or affidavit, but in a situation such as this one must bear in mind the nature of the testimony that the probationer wishes to present. If that testimony is merely cumulative or is merely testimony of a general background or character nature, the requirement for live testimony is not as strong. But if the testimony is to be directly and unequivocally exculpatory, rather than merely background testimony which militates in favor of the probationer in only a general way, then it weighs more heavily… The testimony for the state given by Mrs. Harris was definite and unequivocal that these events had occurred on November 2, 1972. But the testimony that the defendant wished to offer by live witnesses in Tennessee, if believed, would have shown that the defendant had no opportunity to commit the acts alleged. It is not enough in such a case to say one disbelieves an affidavit to that effect. This is a case where live testimony and the opportunity to examine and cross-examine should have been given. It is necessary to give the defendant a hearing that comports with the requirements of the due process clause of the United States Constitution; a reversal is required in this case.

The court upheld the need for live testimony because "[w]here, as here, witnesses have directly contradicted each other, the impression of the fact finder has of their demeanor is likely to be the decisive factor in determining who is telling the truth." *Braun v Industrial Comm.*, 36 Wis. 2d 48, 57, 153 N.W.2d 81 (1967). HA 2.05(6)(a), Wis. Admin. Code, requires the administrative law judge to weigh the credibility of witnesses.

In *State v. Thomas*, 144 Wis. 2d 876, 890, 425 N.W.2d 641 (1988), it was stated that "…a videotaped deposition under WIS. STAT. § 967.04(7)-(10), is the functional equivalent of live testimony and ensures the fundamental protections of the confrontation clause, namely the right of cross-examination, the observation of witness demeanor and the requirement of testimony under oath, …" However, in *State v. Thomas*, 150 Wis. 2d 374, 405, 442 N.W.2d 10 (1989), (Abrahamson, J. *concurring)* it was cautioned that there are:

> …unavoidable differences between live testimony and testimony on a screen. Videotape is indisputably superior, for purposes of observing demeanor, to a written transcript. But viewing a videotape is different from viewing a person live. The camera selects and comments on what it sees, thereby affecting the juror's impressions and ability to determine credibility. For discussion of this issue, see *Commonwealth v. Bergstrom*, 402 Mass. 534, 524 N.E.2d 366, 373 (1988); Armstrong, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 Or. L. Rev. 567, 574-75 (1976).

WIS. STAT. § 973.10(2m) provides that "In any administrative hearing under sub. (2), the hearing examiner may order that a deposition be taken by audiovisual

means and allow the use of a recorded deposition under s. 967.04 (7) to (10)." HA 2.05(5) (b), Wis. Admin. Code,, permits the taking of testimony "…outside the presence of the client when there is substantial likelihood that the witness will suffer significant psychological or emotional trauma if the witness testifies in the presence of the client or when there is substantial likelihood that the witness will not be able to give effective, truthful testimony in the presence of the client at hearing."

The Wisconsin Court of Appeals in *State ex rel. Simpson v Schwarz*, 2002 WI App. 7, ¶¶12, 20, 22, 250 Wis. 2d 214, 640 N.W.2d 527, held that:

> ¶12 … because parole revocation involves a loss of liberty and inflicts a "grievous loss" on the parolee, the Due Process Clause in the Fourteenth Amendment demands that parolees have an opportunity to be heard before the decision to revoke parole is made. *Morrissey*, 408 U.S. at 482, 487. … The Court emphasized that it had "no thought to create an inflexible structure for parole revocation procedures," and that the "process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversarial trial." *Id*. at 489-90.
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> * * *
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> ¶20. We agree with those courts concluding that a finding of good cause should generally be based upon a balancing of the need of the probationer in cross-examining the witness and the interest of the State in denying confrontation, including consideration of the reliability of the evidence and the difficulty, expense, or other barriers to obtaining live testimony. Because "[c]ross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested," *see Davis v. Alaska*, 415 U.S. 308, 316 (1974), the State should provide a reason for why it will not make a witness available for cross-examination.
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> * * *
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> ¶22. We need not determine, however, the contours of the good cause requirement; because we conclude that the test is always met when the evidence offered in lieu of an adverse witness's live testimony would be admissible under the Wisconsin Rules of Evidence …

It was explained in *State ex rel. Thompson v Riveland*, 109 Wis. 2d 580, 586, 326 N.W.2d 768 (1982) that "[i]t is incumbent upon the department, not the probationer, to ensure that the examiner has sufficient evidence before him to determine whether revocation is warranted."

In the right circumstances, it may be permissible to use videoconferencing to present testimony. The provisions of WIS. STAT. § 885.54 should be used to ensure that when videoconferencing is used, it meets the technical and

operational standards established by the Wisconsin Supreme Court for the use of videoconferencing in court.

Statutory, court rule and administrative rule considerations

"The administration of the courts in [a] county is governed by the statutes, supreme court rules, and local rules," *Dumer v. State*, 64 Wis. 2d 590, 597, 219 N.W.2d 592, 597 (1974), "that all litigants, lawyers and judges must follow," *State ex rel. Klieger v. Alby*, 125 Wis. 2d 468, 475, 373 N.W.2d 57 (Ct. App. 1985). A number of the sections in the Wisconsin Statutes dealing with video court are court rules, see e.g. *In the Matter of the Petition to Create a Rule governing the Use of Videoconferencing in the Courts,* 305 Wis. 2d xli-xlix (2008), *In re the Amendment of Rules of Civil, Criminal and Appellate Procedure: Proceedings by Telephone and Audio-Visual Means*, 141 Wis. 2d xiii - xxxiii (1987) and *In the Matter of the Amendment of Secs. 48.30, 804.05, 807.13, 967.08, 970.03, 971.14, 971.17, Stats.: Proceedings by Telephone and Audio-Visual Means*, 158 Wis. 2d xvii - xxiii (1990).

"Section 751.12 authorizes… [the Wisconsin Supreme Court]…, in pertinent part, to adopt rules "regulat[ing] pleading, practice, and procedure in judicial proceedings in all courts," but the rules "shall not abridge, enlarge, or modify the substantive rights of any litigant," *Marriage of Franke v. Franke,* 2004 WI 8, ¶ 45, 268 Wis. 2d 360, 674 N.W.2d 832. "A statute that prescribes the method for enforcing a right or remedy is procedural; if it creates, defines or regulates rights or obligations, it is substantive," *Modica v. Verhulst*, 195 Wis. 2d 633, 643, 536 N.W.2d 466 (Ct. App. 1995). However, there is a "need for exercising care and discrimination because some rules of substantive law are couched in terms of procedure," *Estate of Delmady*, 250 Wis. 389, 391, 27 N.W.2d 497 (1947).

WIS. STAT. § 753.35(1) provides that "[a] circuit court may, subject to the approval of the chief judge of the judicial administrative district, adopt and amend rules governing practice in that court that are consistent with rules adopted under § 751.12 and statutes relating to pleading, practice, and procedure." In addition, SCR 70.34 provides that "[e]ach chief judge may adopt additional local rules not in conflict with the uniform judicial administrative rules." However, these local court rules must be "consistent with law and … [the Wisconsin Supreme court's]…rules of judicial administration," *Drow v. Schwarz*, 225 Wis. 2d 362, 370, 592 N.W.2d 623 (1999). Some counties have local rules dealing with telephone and/or video appearances.[28]

"The goal of rule interpretation, like that of statutory interpretation is to give effect to the intent of the enacting body," *City of West Allis v. Sheedy,* 211 Wis. 2d 92,

[28] Check local court rules for the county where you practice.

96, 564 N.W.2d 708 (1997). It was explained in *Schwister v. Schoenecker*, 2002 WI 132, ¶8, 258 Wis. 2d 1, 654 N.W.2d 852 that:

> When this court interprets court rules, it turns to the rules of statutory interpretation for guidance… The first step in ascertaining the intent of the Supreme Court is to look to the language adopted. When the language of the court rule does not give sufficient guidance, we must look to rules of interpretation for assistance.

Further, there may be challenges based "on the grounds that the rules, as interpreted, violate this court's rule making authority under sec. 751.12, Stats." *Korkow v. General Gas. Co. of Wisconsin*, 117 Wis. 2d 187, 197, 344 N.W.2d 108 (1984).

In addition to statutes that directly pertain to the application and use of the telephone or videoconferencing in a specific type of courtroom proceeding, there are at least two other major statutes, WIS. STAT. § 807.13 [Telephone and audiovisual proceedings] and sec. 967.08, Stats. [Telephone proceedings]. Also, on the issue of the client's right to be present during a criminal proceeding, it is necessary to be familiar with the provisions of WIS. STAT. § 885.60. [Use in criminal and proceedings under chapters 48, 51, 55, 938 and 980] and WIS. STAT. § 971.04 [Defendant to be present]. Attorneys also need to know the cases interpreting the statutes relevant to their issue.

Three kinds of statutes authorize the use of telephone or videoconferencing in specific court proceedings. The first is a statute that authorizes just the taking of a witness' testimony, e.g. WIS. STAT. § 970.03(13). The second type authorizes only the making of an appearance by telephone or videoconferencing in a court proceeding, e.g. sec. 973.20(14) (d), Wis. Stats. The third type permits both the taking of testimony and making an appearance by telephone or videoconferencing in a specific type of court proceeding, e.g. WIS. STAT. § 938.299(5).

When the court is considering using telephone or videoconferencing contrary to the provisions of the relevant statutes, the defense can argue the rules of statutory construction. As explained in *State v. Piddington*, 2001 WI 24, ¶14, 241 Wis. 2d 754, 623 N.W.2d 528:

> In searching for legislative intent, we start with the language of the statute. Kelley Co. v. Marquardt, 172 Wis. 2d 234, 247, 493 N.W.2d 68 (1992). If the plain meaning of the statute is self-evident, we look no further. UFE, Inc. v. LIRC, 201 Wis. 2d 274, 281, 548 N.W.2d 57 (1996). Where a statute is ambiguous, that is, "reasonable minds could differ as to its meaning," the court examines further into the scope, history, context, subject matter and purpose of the statute in question. Harnischfeger Corp. v. LIRC, 196 Wis. 2d 650, 662, 539 N.W.2d 98 (1995); See also UFE, Inc., 201 Wis. 2d at 282.

"Nontechnical words utilized in the statute must be given their ordinary and accepted meaning when not specifically defined [in the statutes] and that meaning may be ascertained from a recognized dictionary," *State v. Williquette*, 129 Wis. 2d 239, 248, 385 N.W.2d 145 (1986) (citing *State v. Wittrock*, 119 Wis. 2d 664, 670, 350 N.W.2d 647 (1984)).

Furthermore, it was pointed out in *State v. McKee*, 2002 WI App. 148, ¶13, 256 Wis. 2d 547, 648 N.W.2d 34, that *"*[*a*]nother way to ascertain the legislative intent underlying an ambiguous statute is to examine related statutes to see if they shed light on the legislature's intended application of the statute under examination." See *Edelman v. State*, 62 Wis. 2d 613, 619, 215 N.W.2d 386 (1974) ("[I]n the determination of legislative intent when there are several statutes relating to the same subject matter they should be read together and harmonized, if possible."). In *State ex rel. Julie A.B. v. Circuit Court (In re Prestin T.B.)*, 2002 WI App. 220, ¶15, 257 Wis. 2d 285, 650 N.W.2d 920, it was explained that "[i]t is well established that if a statute contains a given provision, 'the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed.' *Kimberly-Clark Corp. v. PSC*, 110 Wis. 2d 455, 463, 329 N.W.2d 143 (1983) (citation omitted)."

"A court may declare an administrative rule invalid 'if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures.' WIS. STAT. § 227.40(4)(a)," *Wisconsin Citizen's v. Dept. of Natural Res.*, 2004 WI 40, ¶ 5, 270 Wis. 2d 318, 677 N.W.2d 612. It was pointed out in *Liberty Homes, Inc, v. DIHLR*, 136 Wis. 2d 368, 376-377, 401 N.W.2d 805 (1987) that:

> …trial courts should insist that parties challenging administrative rules clearly state which type of challenge under sec. 227.05, Stats., [now Wis. Stat. § 227.40] is being made, 1) constitutional, 2) exceeding statutory authority or 3) failure to comply with statutory regulatory procedures. The trial court should also require that the precise basis for each challenge is clearly enunciated, e.g., it is a constitutional due process challenge because the facts do not show that the rule is reasonably related to a legitimate governmental purpose. Finally, the parties should also be required to state the applicable standard of review the circuit court should apply in resolving the case.

"Hensley sought declaratory judgment on the validity of administrative rules; such actions are typically governed by WIS. STAT. § 806.04, which provides the general rules for declaratory relief, and WIS. STATS. § 227.40, which provides the

procedures for contesting the validity of administrative rules. "*State ex rel. Hensley V. Endicott*, 2001 WI 105, ¶ 20, 245 Wis. 2d 607, 629 N.W.2d 686[29].

[29] See *Public Defender v. Fond du Lac Cty. Cir. Ct.*, 198 Wis. 2d 1, 7-9, 542 N.W.2d 458 (Ct. App. 1995), for a discussion as to what constitutes a criminal prosecution under WIS. STAT. § 227.40(2)(b).

Section III Providing effective representation

Meeting the required technical and operational standards.

WIS. STAT. § 885.54 requires videoconferencing technology to meet certain technical and operational standards when used in circuit court proceedings. WIS. STAT. § 885.54 (1)(a)-(h) mandate the following:

a) Participants shall be able to see, hear, and communicate with each other.
b) Participants shall be able to see, hear, and otherwise observe any physical evidence or exhibits presented during the proceeding.
c) Video and sound quality shall be adequate to allow participants to observe the demeanor and non-verbal communications of other participants and to clearly hear what is taking place in the courtroom to the same extent as if they were present in the courtroom.
d) Parties and counsel at remote locations shall be able, upon request, to have the courtroom cameras scan the courtroom so that remote participants may observe other persons present and activities taking place in the courtroom during the proceedings.
e) In matters set out in sub. (g), counsel for a defendant or respondent shall have the option to be physically present with the client at the remote location, and the facilities at the remote location shall be able to accommodate counsel's participation in the proceeding from such location. Parties and counsel at remote locations shall be able to mute the microphone system at that location so that there can be private, confidential communication between them.
f) If applicable, there shall be a means by which documents can be transmitted between the courtroom and the remote location.
g) In criminal matters, and in proceedings under chs. 48, 51, 55, 938, and 980, if not in each other's physical presence, a separate private voice communication facility shall be available so that the defendant or respondent and his or her attorney are able to communicate privately during the entire proceeding.
h) The proceeding at the location from which the judge is presiding shall be visible and audible to the jury and the public, including crime victims, to the same extent as the proceeding would be if not conducted by videoconferencing.

Subsection (2) requires the court or the moving party to certify that the courtroom and the remote location are in compliance with the technical standards. Certification is intended to enforce the standards**.** "If the statute is to serve its purpose its provisions must be enforced by trial courts," *Adelmeyer v. Wisconsin Electric Power Co.*, 135 Wis. 2d 367, 400 N.W.2d 473 (Ct. App. 1986).

Courts and practitioners have struggled to reach consensus on the meaning of the term "certify." Some jurisdictions have adopted a blanket certification approach for the video system in the courtroom. This approach is a "once certified, always certified" approach. Other jurisdictions address certification at every hearing where videoconferencing is used. Blanket certifications should be carefully scrutinized. Even systems that have been certified for some proceedings (routine) may prove to be inadequate for other proceedings (complex). Counsel should be prepared to object accordingly.

The courtroom equipment may not change but there are many remote locations with wide variance in equipment and practices. Every remote location must be certified by the court under subsection (2).

Lawyers are advised to carefully review the technical and operational standards and use them in evaluating the system and equipment when video is used in court. Objections should be raised whenever compliance is in question and counsel should link the compliance issue with factual information about how representation is negatively impacted. Failure to describe the prejudice suffered by the client will affect the vitality of the objection.

Waivers and stipulations

WIS. STAT. § 885.62, provides that "[p]arties to circuit court proceedings may waive the technical and operational standards provided in this subchapter, or may stipulate[30] to any different or modified procedure, as may be approved by the court." According to its *Comment*, this statute is intended "…to permit litigants to take advantage of videoconferencing technology in any matter before the court regardless of whether the provisions of this subchapter would otherwise permit such use, as long as the parties are in agreement to do so and the circuit court approves."

Waiver

It was observed in *Douglas County Child Support Enforcement Unit for Niemi v. Fisher*, 185 Wis. 2d 662, 668, 517 N.W.2d 700 (Ct. App. 1994), that:

> "Waiver" is an intentional relinquishment of a known right. Intent to waive is an essential element of waiver. *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 681, 273 N.W.2d 279, 284 (1979). While waiver can be established by actions as well as by words, *Attoe v. State Farm Mut. Auto. Ins. Co.*, 36 Wis. 2d 539, 545, 153 N.W.2d 575, 579 (1967) we

[30] See also WIS. STAT. § 807.13(2)(b).

reject Niemi's silence alone as "action" demonstrating the intent to waive. *Attoe* approved the following language from a standard reference work:

> "The intent to waive may appear as a legal result of conduct. The actuating motive, or the intention to abandon a right, is generally a matter of inference to be deduced with more or less certainty from the external and visible acts of the party, and all the accompanying circumstances of the transaction, regardless of whether there was an actual or expressed intent to waive, or even if there was an actual but undisclosed intention to the contrary …."

Id. at 546, 153 N.W.2d at 579."

Waiver is further defined in *Davies v. J. D. Wilson Co*., 1 Wis. 2d 443, 466, 85 N.W.2d 459 (1957), as being the "…voluntary…relinquishment of a known right." According to *Allen v. Allen*, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977), citing *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 594, 218 N.W.2d 129 (1974), the "…failure to make a timely objection constitutes a waiver of the objection."[31] However, **"**[f]undamental rights must be knowingly and intelligently relinquished," *State v. Nonahal*, 2001 WI App. 39, ¶8 n. 3, 241 Wis. 2d 397, 626 N.W.2d 1, and "…may only be waived personally and expressly," *State v. Huebner*, 2000 WI 59, ¶14, 235 Wis. 2d 486, 611 N.W.2d 727. Nonetheless, "[a]s a general rule, the failure to follow a procedural rule results in a waiver of the right to raise the question in issue," *Thiesen v. State*, 86 Wis. 2d 562, 564, 273 N.W.2d 314 (1979), and has been held to "…constitute[…] a waiver of a constitutional right,…" *State v. Wilkens*, 159 Wis. 2d 618, 623, 465 N.W.2d 206 (Ct. App. 1990).[32]

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[31] "The reason why we view the waiver rule with favor is because failure to bring a matter to the trial court's attention denies the trial court an opportunity to rule on the matter after consideration. Notice allows the trial court to prevent error from occurring. When no motion or objection is interposed, it is difficult for the appellate court to say that a trial court "erred" when it was never given the opportunity to rule on the matter in the first place." *State v. McMahon*, 186 Wis. 2d 68, 93, 519 N.W.2d 621 (Ct. App. 1994) citing *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 218 N.W.2d 129 (1974).

[32] "As both WIS. STAT. § (Rule) 805.01(3) and WIS. STAT. § 814.61 make clear, a party's "waiver" of the Article I, Section 5 right of trial by jury need not be a "waiver" in the strictest sense of that word, that is, an "intentional relinquishment of a known right." Instead, a party may "waive" the Article I, Section 5 right of trial by jury by failing to assert the right timely (as when a party fails to demand a jury trial timely in accordance with § (Rule) 805.01) or by violating a law setting conditions on the party's exercise of the jury trial right (as when a party fails to pay the jury fee timely in accordance with WIS. STAT. § 814.61)", *Rao v. WMA Sec., Inc*., 2008 WI 73, ¶ 22, 310 Wis. 2d 623, 752 N.W.2d 220

Stipulation

"Wisconsin recognizes two types of stipulations: First, those which are procedural in nature, and, second, those which are contractual," *State v. Aldazabal*, 146 Wis. 2d 267, 269, 430 N.W.2d 614 (Ct. App. 1988) citing *Paine v. Chicago & N.W.R. Co.,* 217 Wis. 601, 604, 258 N.W. 846 (1935). **"**A stipulation is a contract made in the course of judicial proceedings," *Johnson v. Owen,* 191 Wis. 2d 344, 349, 528 N.W.2d 511 (Ct. App. 1995). The stipulation must be mutually agreed to and must be conclusive on the issue. However, "[p]arties may not by stipulation control the action of the court…" *In re Exercise of Original Jurisdiction of Supreme Court,* 201 Wis. 123, 129, 229 N.W. 643 (1930).

"The term "stipulation" is generously used in courtrooms today, but it has a precise legal definition found in § 807.05, Stats." *Fritz v. Fritz*, 231 Wis. 2d 33, 605 N.W.2d 270 (Ct. App. 1999). Nonetheless, "[t]he requirements of sec. 807.05 …have nothing to do with in-court procedural stipulations…," *State v. Aldazabal*, 146 Wis. 2d at 269. This is because "…procedural stipulations 'have vitality only within the context of the litigation for which they were entered into.'" *Tesky v. Tesky*, 110 Wis. 2d 205, 211-12, 327 N.W.2d 706 (1983)[33] quoting *State v. Craft*, 99 Wis. 2d 128, 134, 298 N.W.2d 530 (1980). [34]

Who makes the decision?

It was pointed out *In Interest of T.R.B.*, 109 Wis. 2d 179, 197-98, 325 N.W.2d 329 (1982), that:

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[33] "…a stipulation waiving a jury trial is a procedural stipulation, rather than a contractual one", *Tesky v. Tesky,* 110 Wis. 2d 205, 211, 327 N.W.2d 706 (1983).

[34] The Wisconsin Court of Appeals in *Gustafson v. Physicians Ins. Co.*, 223 Wis. 2d 164, 175-76, 588 N.W.2d 363 (Ct. App. 1998) pointed out that:

> In *Illinois Steel Co. v. Warras*, 141 Wis. 119, 123 N.W. 656 (1909), a defendant sought to be relieved from the effects of a stipulation on the grounds that it was beyond the scope of the attorney's powers to enter into the stipulation in the first place. *See id. at 121-22, 123 N.W. at 657.* The trial court's decision to set aside the stipulation was reversed. *See id. at 126, 123 N.W. at 659*. The supreme court explained the attorney's duty in the case as follows:
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> > The powers of attorneys at law in charge of litigation are very broad, and while it may be that the general retainer is not sufficient to authorize an absolute surrender of substantive property rights which the attorney is employed to establish and enforce, still it is and must be sufficient to enable the attorney in his honest judgment to control all matter of procedure in the action brought for such enforcement.
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> *Id. at 122, 123 N.W. at 657* (citations omitted).

The stipulation in *Illinois Steel Co. v. Warras* was a procedural stipulation.

> This court and other courts have characterized certain rights[35] as fundamental and have held that the law takes particular pains to ensure that the decision to waive those rights is that of the defendant. *State v. Albright,* 96 Wis. 2d 122, 129-30, 291 N.W.2d 487 (1980). When a defendant attempts to waive fundamental rights, the trial court has a "serious and weighty responsibility" to determine "whether there is an intelligent and competent waiver by the accused" and "it would be fitting and appropriate for that determination to appear on the record." *Johnson v. Zerbst*, 304 U.S. 458, 465 (1937).

However, as explained in *State v. Brunette*, 220 Wis. 2d 431, 443-44, 583 N.W.2d 174 (Ct. App. 1998),

> With these few exceptions, when a defendant accepts counsel, the defendant delegates to counsel the decision[36] whether to assert or waive constitutional rights, *Albright*, 96 Wis. 2d at 132, 291 N.W.2d at 492, as well as the myriad tactical decisions an attorney must make during a trial. *See Wainwright v. Sykes*, 433 U.S. 72, 93, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977) (Burger, J. concurring). The rationale for considering

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[35] "We recognize that certain constitutional rights of a criminal defendant are so fundamental that they are deemed to be personal rights which must be waived personally by the defendant. In this category of personal rights is found the decision whether to plead guilty, *Boykin v. Alabama,* 395 U.S. 238 (1969); the decision whether to request a trial by jury, *Adams v. U. S. ex rel. McCann,* 317 U.S. 269 (1942); the decision to appeal, *Fay v. Noia,* 377 U.S. 391 (1963) the decision whether to forego the assistance of counsel, *Faretta v. California,* 422 U.S. 806 (1975); and the decision to obtain the assistance of counsel and to refrain from self-incrimination, *Miranda v. Arizona,* 384 U.S. 436 (1966)" *State v. Albright,* 96 Wis. 2d 122, 130, 291 N.W.2d 487 (1980).

"In light of the U.S. Supreme Court's decision in Rock, as well as the court of appeals' decisions in Simpson and Wilson, we affirm that a criminal defendant's constitutional right to testify on his or her behalf is a fundamental right", *State v. Weed*, 2003 WI 85, ¶ 39, 263 Wis. 2d 434, 666 N.W.2d 485

Also included in these fundamental rights are the defendant's right to be present, See *State v. Haynes*, 118 Wis. 2d 21, 25-26, 345 N.W.2d 892 (Ct. App. 1984), and the right to have counsel present "…at every stage where he needs aid in dealing with legal problems", *State v. Burton*, 112 Wis. 2d 560, 565, 334 N.W.2d 263 (1983).

[36] See *State v. Washington*, 142 Wis. 2d 630, 633-34, 419 N.W.2d 275 (Ct. App. 1987) for a discussion of whether "…it was error for the trial court to ask… [the defendant]…, and not his attorney, if he wished to request (and thereby receive) a mistrial… [because]…this is a tactical decision in which all authority for a decision is vested with the defense attorney, and does not rise to the level of a fundamental right which the defendant must personally decide. *See State v. Neave*, 117 Wis. 2d 359, 369, 344 N.W.2d 181, 186 (1984)."

"However, the issue of whose decision it should be was never raised in the trial court. …[An]… examination of the record reveals that the trial court, without objection from defense counsel, allowed Washington to decline the court's offer of a mistrial. Washington simply elected not to follow his attorney's advice and, without any indication to the contrary in the record, it appears that defense counsel was satisfied to follow his client's choice in this regard." *State v. Washington*, 142 Wis. 2d at 634.

> most decisions to be delegated to counsel is that they require the skill, training and experience of the advocate and therefore the advocate must ultimately have the power to make the decisions. Many tactical and strategic decisions must be made during proceedings under circumstances that allow for limited or no consultation with the client. *See State v. Harper*, 57 Wis. 2d 543, 549, 205 N.W.2d 1, 5 (1973); see also commentary to the ABA Standards for Criminal Justice, § 4-5.2 (1980). When the decision whether to assert or waive a right is delegated to counsel, it may be waived by counsel; the defendant need not personally make a statement waiving the right. *See State v. Jackson*, 188 Wis. 2d 537, 542-43, 525 N.W.2d 165, 167-68 (Ct. App. 1994) (decision whether to poll jury is delegated to counsel and defense counsel's failure to request poll is waiver; no need for court to inquire personally of defendant).

This delegation to counsel is recognized because "…defendant has no constitutional right to be actively represented in the courtroom both by counsel and by himself." *Moore v. State,* 83 Wis. 2d 285, 300, 265 N.W.2d 540 (1978). However, this delegation "…does not, of course, mean that a defendant may have no input in the decision," *State v. Brunette*, 220 Wis. 2d at 444, as decisions should be made after consultation[37] and in the absence of the defendant's express disapproval.

How to be effective when appearing by video

The creation of Chapter 885 on July 1, 2008 significantly impacted the situations that might require counsel or a client to appear by video. Video appearances may occur by consent of the client or in cases that are determined to be non-critical stages under WIS. STAT. § 885.60(2) (a). Regardless of the circumstances, it is important to prepare in advance of the video appearance. Prepare the client in a face-to-face meeting, if at all possible, before the video court appearance. (For further information, see "What to Consider When Preparing for the Video Hearing," above.)

It is important to remember that when appearing by video, the concept and perception of "presence" - yours and that of those watching you - is altered. For example, if you are appearing from a remote location on camera, you may not feel that you are in front of a room full of people and may find yourself distracted by people and activities in your immediate vicinity. However, those watching from the courtroom may interpret your distraction as disinterest or disrespect because of the different, more formal setting surrounding them.

[37] See also SCR 20:1.2 and SCR 20:1.4

You will be most effective if you pay full attention to the proceedings, look directly into the camera, and speak in a strong, clear voice at all times.

Learn the individual characteristics of the video system you will be using by observing it in use from the courtroom and the remote location, if possible. Know the strengths and weaknesses of the particular system, such as the camera angles and size of the viewable images in each location.

It is advisable to view a monitor showing your image to ensure that microphones or objects in the room are not blocking your appearance or that your appearance is not otherwise being distorted.

Some video equipment cannot display busy patterned clothing (particularly plaids and geometrics) or bright colors without annoying, distracting distortion, so they should be avoided.

Gesture slowly and smoothly. Compressed video cannot transmit rapid movement without some loss of picture quality. Avoid swaying, rocking, pacing, and moving your hands rapidly.

Make sure that you can see and hear everything that you need to see and hear. Bring technical problems to the attention of the court and request that the hearing be held in person if the problems cannot be corrected. Make a record concerning your inability to see or hear any part of the proceedings.

Do not be intimidated by the fact that others are personally present in the courtroom and you are not. Point out the unfairness of the process if the parties present in the courtroom are able to engage in communication that you are not fully a part of. It may be nothing more than non-case-related banter, but it is impossible to know that for sure. Object if the situation leads to what appears to be ex parte communication between the Court and other parties. When the video appearance is over, it is crucial to ensure that the client understood what transpired.

Dealing with video testimony

Video testimony is controlled by WIS. STAT. § 885.60(2)(b-d). An objection to video testimony of a witness by a defendant or respondent in any case described in WIS. STAT. § 885.60(1), must be sustained. If video testimony is offered by a defendant or respondent the procedures of WIS. STAT. § 885.60(2)(b) apply. Notice of the intent to use video technology is required within 20 days prior to the start of the proceeding. Objections are due within 10 days of filing of the notice. Objections by the state or petitioner are resolved by reference to the criteria in WIS. STAT. § 885.56.

The Wisconsin Court of Appeals in *In re Halko*, 2005 WI App. 99, ¶16, 281 Wis. 2d 825, 698 N.W.2d 832, noted that:

> Commentators have pointed out the benefits of video technology in circumstances when travel is inconvenient[38] or unduly expensive[39] for an important witness. *See* Stuart G. Mondschein, *Lights, Camera, Action: Videoconference Trial Testimony*, Wisconsin Lawyer, July 1997, at 14, 16; Gregory T. Jones, *Lex, Lies & Videotape*, 18 U. Ark. Little Rock L.J. 613, 616 (1996).

There are cases where a party may seek the testimony of an incarcerated person. In civil actions, "the party seeking the presence of the incarcerated person must show why his or her presence is necessary, and equally, why the possible alternatives to having him or her appear in person are not appropriate." *Schmidt v. Schmidt*, 212 Wis. 2d at 413. "The trial court should weigh the interest of the prisoner in presenting his testimony in person against the interest of the state in maintaining his confinement,"[40] *State ex rel. Rilla v. Dodge County Cir. Ct.*, 76 Wis. 2d 429, 434, 251 N.W.2d 476 (1977).

The video provisions of Chapter 885 do not replace or negate the application of statutes that authorize the use of telephone testimony.[41] There a number of statutes that permit not only telephone testimony but telephone appearances in certain cases.[42] However a telephone appearance may not allow for meaningful participation.[43] Consequently, an objection to telephone testimony by a defendant does not have to be sustained pursuant to WIS. STAT. § 885.60(1).

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[38] "Convenience must… be viewed in light of modern transportation," *Kelly v. MD Buyline, Inc*., 2 F. Supp. 2d 420, 441 fn 9 (S.D.N.Y. 1998).

[39] "From the record, it is difficult to determine the fiscal and administrative burdens that in-court testimony, the alternative to telephone testimony, would entail. The court can take judicial notice, however, that the costs of securing experts, especially from another area, are considerable." *In Matter of W.J.C.*, 124 Wis. 2d 238, 241, 369 N.W.2d 162 (Ct.App. 1985).

[40] "In doing so, the court should take into account:

1. The costs and inconvenience of transporting the prisoner from his place of incarceration to the courtroom,
2. Any potential danger or security risks which the presence of the prisoner would pose to the court,
3. Whether the matter at issue is substantial,
4. The need for an early determination,
5. The possibility of delaying trial until the prisoner is released,
6. The probability of success on the merits,
7. The integrity of the correctional system,
8. The interests of the inmate in presenting his testimony in person, rather than by deposition", *State ex rel. Rilla v. Dodge County Cir. Ct*., 76 Wis. 2d 429, 434, 251 N.W.2d 476 (1977).

[41] In deciding whether to object to the use of testimony by video the defense attorney should consider whether such testimony would be allowed by telephone under 885.64(3), Stats.

[42] See Appendix C.

[43] Our discussion so far would be academic if the telephone solution allowed Lavelle W. to meaningfully participate in the termination-of-parental-rights proceedings. …In our view, any alternative to a parent's personal presence at a proceeding to terminate his or her parental rights

WIS. STAT. § 807.13(2), provides that "[I]n civil actions and proceedings, including those under chs. 48, 51, 55 and 880, the court may admit oral testimony communicated to the court on the record by telephone or live audiovisual means, subject to cross-examination[44], when the:

(a) applicable rules permit;
(b) parties so stipulate; or
(c) proponent shows good cause[45] to the court"

WIS. STAT. § 807.13 (4)(b) requires that "[I]n any proceeding conducted by telephone under this section: ... [p]arties entitled to be heard shall be given prior notice of the manner and time of the proceeding." In addition, there are other statutes that permit oral testimony being communicated to the court by telephone or live audiovisual means in specified criminal and juvenile justice court proceedings.

When you receive notice of such a hearing, you should consider making an objection to the proceeding pursuant to WIS. STAT. § 885.60(2)(d) if appropriate, as well as making "diligent use of discovery procedures" to obtain all relevant

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must, unless either the parent knowingly waives this right or the ministerial nature of the proceedings make personal-presence unnecessary, be functionally equivalent to personal presence: the parent must be able to assess the witnesses, confer with his or her lawyer, and, of course, hear everything that is going on. The Record here reveals that at times Lavelle W.'s ability to hear the proceedings faded in and out, and, at least at one point, was temporarily interrupted by static. *State v. LaVelle W.* (*In re Idella W.*), 2005 WI App 266, ¶ 8 (Wis. Ct. App. 2005).

[44] "A judge does not have the discretion to allow the admission of testimony when the right of cross-examination is limited by the circumstances.

* * *

"While, in the instant case, the judge did not deny the right of cross-examination by limiting the defense counsel's right to ask questions, he did, by permitting telephonic testimony, allow Chemist Neuser to use documents which were not, and had not been, made available for defense counsel's inspection." *Town of Geneva v. Tills*, 129 Wis. 2d 167, 179-80, 384 N.W.2d 701 (1986).

[45] Section 807.13(2)(c), Stats., sets forth the following appropriate considerations when determining good cause:

1. Whether any undue surprise or prejudice would result;
2. Whether the proponent has been unable, after due diligence, to procure the physical presence of the witness;
3. The convenience of the parties and the proposed witness, and the cost of producing the witness in relation to the importance of the offered testimony;
4. Whether the procedure would allow full effective cross-examination, especially where availability to counsel of documents and exhibits available to the witness would affect such cross-examination;
5. The importance of presenting the testimony of witnesses in open court, where the finder of fact may observe the demeanor of the witness, and where the solemnity of the surroundings will impress upon the witness the duty to testify truthfully;
6. Whether the quality of the communication is sufficient to understand the offered testimony;
7. Whether a physical liberty interest is at stake in the proceeding; and
8. Such other factors as the court may, in each individual case, determine to be relevant.

documents and other evidence. See *Town of Geneva v. Tills,* 129 Wis. 2d 167, 181, 384 N.W.2d 701 (1986).[46] "The trial lawyer's ability to prepare to cross-examine his adversary's expert witness is, of course, dependent to a large degree upon his diligence in pursuing the pretrial discovery procedures that are available in Wisconsin." *Rabata v. Dohner*, 45 Wis. 2d 111, 134 n. 1, 172 N.W.2d 409 (1969).

It is very important that the quality of the video equipment being used is such that the viewer can clearly see and hear the witness who is testifying. It was pointed out in *State v. Thomas*, 150 Wis. 2d 374, 405, 442 N.W.2d 10 (1989), (Abrahamson, J., concurring), that:

> viewing a videotape is different from viewing a person live. The camera selects and comments on what it sees, thereby affecting the juror's impressions and ability to determine credibility. For discussion of this issue, see *Commonwealth v. Bergstrom*, 402 Mass. 534, 524 N.E.2d 366, 373 (1988); Armstrong, The Criminal Videotape Trial: Serious Constitutional Questions, 55 Or. L. Rev. 567, 574-75 (1976).

In *Commonwealth v. Bergstrom*, 402 Mass. at 549-50, it was explained that:

> Many of the technical aspects of these videotapes are troublesome. The color and sound were not true. The court reporter, who watched the jury's monitor, at times, had difficulty hearing the proceedings, as did we. At one point, the screen went blank. Sounds that ordinarily would be minor background noises -- such as a truck passing outside, or one of the attorneys ripping a piece of paper from a pad -- when carried over the audio portion of the transmission were highly magnified and distracting. Often the child would play with the microphone wire, creating very loud crackling noises that interfered with both sound and concentration. Due to the camera angle, throughout much of the first child's appearance her right hand fully or partially obscured her face; at times, when she leaned back in the chair, her face was nearly out of camera range. The electronic techniques that were used showed neither the face of the judge presiding nor the image of the attorneys. The disembodied voices of the participants in the interrogations were transmitted. Also, unidentified persons were seen on the screen without explanation.
>
> A video machine does not simply transport evidence from the scene to the monitor. "In reality... the camera unintentionally becomes the juror's eyes, necessarily selecting and commenting upon what is seen... 'Composition, camera angle, light direction, colour renderings, will all *affect the viewer's impressions and attitudes* to what he sees in the

[46] You may also want to request that you and your client be physically present with the witness at the remote location during the examination of the witness.

> picture.'… [T]he picture conveyed may influence a juror's feelings about guilt or believability. For example, the lens or camera angle chosen can make a witness look small and weak or large and strong. Lighting can alter demeanor in a number of ways, misshaping features or, if directed from below, giving witnesses an evil or sinister cast. In fact, for most witnesses to appear natural, as they would in a live trial, the use of makeup may be required." (Emphasis added and footnotes omitted.) Comment, The Criminal Videotape Trial: Serious Constitutional Questions, 55 Or. L. Rev. 567, 574-75 (1976). Subtle indications of a witness's credibility, such as a blush or a nervous twitch, often may not be transmitted. *Id.* at 576. These problems are compounded when the recording is not made in a professional studio. *Id.* at 575. See generally *Hochheiser* v. *Superior Court*, 161 Cal. App. 3d 777, 786 (1984).
>
> Absent compelling circumstances, a jury ought to be able to view the interaction between a witness and others who are present. The subtle nuances of eye contact, expressions, and gestures between a witness and others in the room are for the jury to evaluate. Hearing the disembodied, off-screen voices of the judge and the attorneys is not ordinarily an adequate substitute for witnessing personal interactions…

Although the above discussion concerns the problems associated with video tapes, the same concerns apply to the use of all forms of video technology in court.

"The primary purpose of face-to-face confrontation is to insure that the trier of fact has a satisfactory basis for evaluating the truthfulness of evidence." *In Matter of W.J.C.*, 124 Wis. 2d 238, 243, 369 N.W.2d 162 (Ct. App. 1985) [citing *State v. Bauer*, 109 Wis. 2d 204, 208, 325 N.W.2d 857, 859-60 (1982)]. It was explained in *State v. Turner*, 186 Wis. 2d 277, 285, 521 N.W.2d 148 (Ct. App. 1994), that:

> The credibility of a witness is determined by more than a witness's words. Tonal quality, volume and speech patterns all give clues to whether a witness is telling the truth. See Breunig v. American Family Ins. Co., 45 Wis. 2d 536, 547-48, 173 N.W.2d 619, 626-27 (1970) (written record incapable of conveying total meaning of trial judge). Thus, it was critical for each juror to hear the testimony from each witness and relate that testimony to the witness's demeanor.

Observation of demeanor is important because "[f]acial expression, tonal quality, stares, smiles, sneers, raised eyebrows, …convey meaning and perhaps have more power than words to transmit a general attitude of mind." *Rivera v. Eisenberg*, 95 Wis. 2d 384, 391, 290 N.W.2d 539 (Ct. App. 1980).[47]

[47] See also *Linsk v. Linsk*, 70 Cal. 2d 272, 279, 449 P.2d 760, 74 Cal. Rptr. 544 (1969), **"**It seems incontrovertible that the right of a party to have the trier of fact observe his demeanor, and that of

When testimony is being given by a witness at a remote location, it is important to ensure that the witness' testimony is not being influenced by someone else at the remote location, see *Disciplinary Proceedings Against Elliott*, 133 Wis. 2d 110, 111, 394 N.W.2d 313 (1986). Coaching a witness during the witness' testimony, *State v. Shanks*, 2002 WI App. 93, ¶11, 253 Wis. 2d 600, 644 N.W.2d 275, or communicating "affirmative or negative signals while the [witness is] being cross-examined." *Disciplinary Proceedings Against Elliott*, 133 Wis. 2d at 111, is improper. Therefore, it is important that you are able to see clearly the entire room at the remote location as well as everyone in that room.

In addition, it is necessary to see the area in front of the witness in order to determine whether the witness is reading from a document. "The rule against hearsay recognizes that ascertainment of the truth is best served by having as in-court witnesses those persons who can relate contested events from their own personal knowledge. Cf. Rule 906.02, Stats." *State v. Jenkins*, 168 Wis. 2d 175, 192, 483 N.W.2d 262 (Ct. App. 1992). "It is hardly necessary to state that it is *only when the memory needs assistance* that resort may be had to… [reading a document], and that, if the witness has an independent recollection of the facts inquired about, there is no necessity or propriety in his inspecting any writing or memorandum." *Coxe Bros. & Co. v. Milbrath*, 110 Wis. 499, 504, 86 N.W. 174 (1901) (quoting Jones, Ev. § 883).[48]

Furthermore, it is essential that there is a way for documents to be transmitted between the courtroom and the remote location because either the examining attorney or the witness may need to review a relevant document that is at the other location.

Similarly, "[t]he purpose of a sequestration order is to assure a fair [hearing], and more specifically, to prevent the shaping of testimony by one witness to match that given by other witnesses." *Nyberg v. State*, 75 Wis. 2d 400, 409, 249 N.W.2d 524 (1977). Thus, if there will be more than one witness testifying from the remote location, it will be necessary to request the court pursuant to sec. 906.15(1), Stats., to "order witnesses excluded so that they cannot hear the

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his adversary and other witnesses, during examination and cross-examination is so crucial to a party's cause of action that an attorney cannot be permitted to waive by stipulation such right as to all the testimony in a trial when the stipulation is contrary to the express wishes of his client."

[48] "If a witness uses a writing to refresh the witness's memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness….", WIS. STAT. § 906.12. "Under the doctrine of present recollection refreshed, a witness may look at a writing to refresh his memory and then testify in his own words as to the contents of the writing. Before this is allowed, however, the witness must be able to state, after looking at the writing, that he now recalls the facts therein on the basis of his own independent (although refreshed) recollection. If a witness can state that he has such an independent recollection, then he may testify to the facts in the writing and his testimony - not the writing itself - is admitted to evidence." *Harper, Drake & Asso. v. Jewett & Sherman Co.*, 49 Wis. 2d 330, 342, 182 N.W.2d 551(1971).

testimony of other witnesses." It will also be necessary to be able to monitor the sequestration order.

Who pays for videoconferencing?

Generally, "…the county is liable for the necessary expenses and services incident to the administration of the criminal laws of the state," *Chafin v. County of Waukesha*, 62 Wis. 463, 465, 22 N.W. 732 (1885). However, "[l]iability cannot be imposed upon counties or other governmental subdivisions of the state except in accordance with statute law, and no statute is referred to conferring any such authority upon counsel for one accused of crime," *Philler v. Waukesha County*, 139 Wis. 211, 217, 120 N.W. 829 (1909).

WIS. STAT. § 753.19 "…provides that '[t]he cost of operation of the circuit court for each county … except as otherwise provided, shall be paid by the county'…," *State v. Campbell*, 2006 WI 99, ¶99, 294 Wis. 2d 100, 718 N.W.2d 649. The "…traditional costs of operation have been concerned with suitable courtrooms, offices, security personnel, clerks, furniture and supplies." 74 Op. Att. Gen. 164, 16 (1985). "…[T]he general policy of the statute is that all costs of operation of circuit courts throughout the state shall be paid for by the county in which they are situate," *Romasko v. Milwaukee*, 108 Wis. 2d 32, 43, 321 N.W.2d 129 (1982). In other words, "[u]nless some other portion of the statutes explicitly imposes that duty upon other persons or other governmental units, the obligation under sec. 753.19, Stats., to make that payment is upon the county in which the proceedings are brought," *Romasko v. Milwaukee*, 108 Wis. 2d at 45.

When the defendant/respondent appears from a remote location it is usually for the convenience and economy of the court or the agency that would otherwise transport the defendant/respondent. The video appearance of a defendant/respondent should be considered an operating cost of the circuit court, charged to the county under sec. 753.19, WIS. STATS.

Defense witnesses

"Few rights are more fundamental than that of the defendant to present witnesses in his or her own defense," *State v. Harris*, 92 Wis. 2d 836, 844, 285 N.W.2d 917 (Ct. App. 1979) citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). "A party…has a right to have the remedies provided by law, to secure the attendance of material and necessary witnesses, …, enforced in his behalf, when he has been vigilant and done all which is incumbent on him to do to obtain such attendance,…" , *Oatman v. Bond*, 15 Wis. 20, 24 (1862) quoting *Lefarge v. The Lefarge Ins. Co.*, 14 How. Pr. R. 26.

However, "[w]hile a state may not by statute, rule, or otherwise deny a defendant the right to compulsory process, it may, as in the case of other constitutional rights, provide reasonable regulations for the exercise and administration of the right." *Elam v. State*, 50 Wis. 2d 383, 389, 184 N.W.2d 176, 180 (1971). For the constitutional right to compulsory process to be invoked, a defendant must, if the subpoena is challenged, show there is a reasonable probability that the subpoenaed witnesses' testimony will be competent, relevant, material and favorable to his defense," *State ex rel. Green Bay Newspaper Co. v. Circuit Court, Branch 1*, 113 Wis. 2d 411, 420-21, 335 N.W.2d 367 (1983). "It is readily apparent that a defendant suffers no constitutional deprivation when he is limited to subpoenaing witnesses who can offer relevant and material evidence[49] on his behalf," *State v. Groppi*, 41 Wis. 2d 312, 323, 164 N.W.2d 266 (1969). In fact, "[a] witness subpoenaed on behalf of… [a party]… is one who is expected to provide relevant testimony or evidence for … [that party]." *State v. Kielisch*, 123 Wis. 2d 125, 128, 365 N.W.2d 904 (Ct. App. 1985).

Requesting the use of videoconferencing

It was pointed out in *Elam v.State,* 50 Wis. 2d at 389, that "… the primary responsibility for having witnesses present in court rests with the parties and not the court…". Both WIS. STAT. § 885.58[50] (use in civil cases and special proceedings) and WIS. STAT. § 885.60[51] (use in criminal cases and proceedings

[49] "Evidence is relevant when it "tends 'to make the existence of [a material fact] more probable or less probable than it would be without the evidence.'" *In Interest of Michael R.B.*, 175 Wis. 2d 713, 724, 499 N.W.2d 641 (1993) (quoting *State v. Denny*, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984)); WIS. STAT. § 904.01. Material facts are those that are of consequence to the merits of the litigation. *In Interest of Michael R.B*., 175 Wis. 2d at 724.

[50] WIS. STAT. §885.58 provides:

(1) Subject to the standards and criteria set forth in §§ 885.54 and 885.56 and to the limitations of sub. (2), a circuit court may, on its own motion or at the request of any party, in any civil case or special proceeding permit the use of videoconferencing technology in any pre-trial, trial, or post-trial hearing.

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

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

[51] WIS. STAT. § 885.60 provides in relevant part "

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

(2) (b) A proponent of a witness via videoconferencing technology at any evidentiary hearing, trial, or fact−finding hearing shall file a notice of intention to present testimony by videoconference

under chapters 48, 51, 55, 938, and 980) permit the use of videoconferencing to present witness testimony. WIS. STAT. §§ 885.58(2)(a), and 885.60(2)(b) set forth the procedure and time frame to be followed when making such a request as well as objecting to such a request while WIS. STAT. § 885.56[52] (Criteria for exercise of court's discretion) lists the criteria the court should consider when ruling on the request. Requests/notice of intention should be in writing and address the relevant criteria. According to WIS. STAT. § 885.56(2) "[t]he denial of the use of videoconferencing technology is not appealable."

When a party seeks to use videoconferencing for the testimony of a person from a remote location, there may be a cost associated with the video testimony. The witness who appears from a remote location has to be linked in via a remote video terminal. The facility that is at the remote location may be a commercial or a public enterprise that offers video facilities for a fee that must be agreed upon in advance. Any proponent of video testimony must be prepared to negotiate the logistics in advance with the private facility and with the court.

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technology 20 days prior to the scheduled start of the proceeding. Any other party may file an objection to the testimony of a witness by videoconference technology within 10 days of the filing of the notice of intention. If the time limits of the proceeding do not permit the time periods provided for in this paragraph, the court may in its discretion shorten the time to file notice of intention and objection.

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

[52]Section 885.56 provides

(1) In determining in a particular case whether to permit the use of videoconferencing technology and the manner of proceeding with videoconferencing, the circuit court may consider one or more of the following criteria:
   (a) Whether any undue surprise or prejudice would result.
   (b) Whether the proponent of the use of videoconferencing technology has been unable, after a diligent effort, to procure the physical presence of a witness.
   (c) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony.
   (d) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits.
   (e) The importance of the witness being personally present in the courtroom where the dignity, solemnity, and decorum of the surroundings will impress upon the witness the duty to testify truthfully.
   (f) Whether a physical liberty or other fundamental interest is at stake in the proceeding.
   (g) Whether the court is satisfied that it can sufficiently know and control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.
   (h) Whether the participation of an individual from a remote location presents the person at the remote location in a diminished or distorted sense such that it negatively reflects upon the individual at the remote location to persons present in the courtroom.
   (i) Whether the use of videoconferencing diminishes or detracts from the dignity, solemnity, and formality of the proceeding so as to undermine the integrity, fairness, and effectiveness of the proceeding.
   (j) Whether the person proposed to appear by videoconferencing presents a significant security risk to transport and present personally in the courtroom.
   (k) Waivers and stipulations of the parties offered pursuant to s. 885.62.
   (l) Any other factors that the court may in each individual case determine to be relevant.

"While a defendant has a constitutional right to compulsory process of witnesses on his behalf, he may be required to give a reasonable notice of his desire." *State ex rel Simos v. Burke,* 41 Wis. 2d 129, 135, 163 N.W.2d 177 (1968). Accordingly it was pointed out in *State ex rel. Dressler v. Circuit Court for Racine County*, 163 Wis. 2d 622, 640, 472 N.W.2d 532 (Ct. App. 1991), that:

> We conclude that the federal and state constitutions and the statute do not create a clear legal duty that mandates the trial court to provide witness funds for indigent defendants upon a general request. Rather, what is contemplated is a discretionary decision by the court. The court will only be able to make that decision after the defendant has made a plausible showing that the proposed witnesses are both material and favorable to his or her defense, *i.e.*, necessary.

"Information is necessary to the defense if it tends to support the theory of defense which the defendant intends to assert at trial," *State ex rel. Green Bay Newspaper Co. v. Circuit Court, Branch 1*, 113 Wis. 2d at 423.

Motions should be filed in advance of the testimony requesting any necessary court order. Counsel should be prepared to argue that the costs associated with video testimony on behalf of an indigent defendant/respondent should also be treated as an operating cost under WIS. STAT. § 753.19. In order "[f]or the circuit court to have power to order a public agency … [to do an act] … there must exist either, (1) a statute granting this power to the court; or (2) a statute which imposes upon the public agency the duty to …" do that act, *State v. Ramsay*, 16 Wis. 2d 154, 166, 114 N.W.2d 118, (1962). The "…court may not do indirectly a thing the court has no power under the statute to do directly," *Volland v. McGee*, 236 Wis. 358, 365, 294 N.W. 497 (1941). If the court orders the cost of video testimony to be paid by the State Public Defender, the attorney should immediately notify the State Public Defender. There is no statutory authority to order this cost be borne by the State Public Defender.

Any motion may require a particularized showing of why video testimony is necessary[53]. The alternative for the court is to assume the costs of producing a witness for a defendant under WIS. STAT. § 885.10 which provides that in any case handled by the State Public Defender under WIS. STAT. § 977.08 witnesses may be subpoenaed and paid in the manner that state witnesses are paid. WIS. STAT. § 885.09 provides that the court may order that indigent or out-of-state witnesses be paid for their expenses and attendance.

[53] Fed. R. Civ. P 43(a) provides in relevant part that "[f]or good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Hence, it may be prudent to include in a motion requesting that the testimony of a witness be taken by videoconferencing not only why the testimony is necessary but also what constitutes the good cause and compelling circumstances as well as what safeguards will be in place.

In this connection, it should be noted that according to WIS. STAT. § 757.01(1), "[t]he several courts of record of this state shall have power: [t]o issue process of subpoena, requiring the attendance of any witness, residing or being in any part of this state, to testify in any matter or cause pending or triable in such courts." WIS. STAT. § 885.03 sets forth the ways in which a subpoena may be served and "… must be strictly followed," *Tomah-Mauston Board Co. v. Eklund,* 143 Wis. 2d 648,657, 422 N.W.2d 169 (Ct. App. 1988). "Attempting to , …, persuade a reluctant witness, either directly or through relatives to come to court is not sufficient when a subpoena could have and should have been served," *State v King,* 2005 WI App. 224, P. 16, 287 Wis. 2d 756, 706 N.W.2d 181. Further, while a witness may respond to a mailed subpoena, this method of service is not recognized under the statutes, and the court will not enforce a subpoena served that way.[54] Hence, in order to obtain the presence of an out-of-state witness in a criminal matter, the provisions of WIS. STAT. § 976.02(3)[55] must be followed. In civil matters the attorney should assume that it will be necessary to seek the assistance of a court in another state to serve an enforceable subpoena on an out of state witness. WIS. STATS. § 887.25 sets forth the procedure used in Wisconsin to compel residents to appear by subpoena in another state. Civil litigants should make a motion to a circuit court in Wisconsin for a certificate requesting the issuance of an out of state subpoena following the criteria in WIS. STAT. § 887.25.

The court that allows video testimony may also seek to recoup fees for the use of the court's video equipment and video connection. Counsel would be well advised to inquire in advance about the existence of any such court practices. In times of budget limitations, it is likely that some courts would try to pass these

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[54] "Service of a subpoena by publication or mailing is not an authorized mode of service under either WIS STAT § 805.07 or § 885.03". 3A Jay e. Grenig, Wisconsin Practice Series: Civil Procedure 48 (3d ed. 2003) (citing Graczk, The New Wisconsin Rules of Civil Procedure: Chapters 805-807, 50 Marq. L. Rev. 671, 687, 1976).

[55] WIS. STAT. § 976.02(3) provides:

(a) If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure the witnesses attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(b) If the witness is summoned to attend and testify in this state the witness shall be tendered the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and 5 for each day that the witness is required to travel and attend as a witness. A witness who has appeared in accordance with the summons shall not be required to remain within this state a longer period of time than otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, the witness shall be punished as provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

costs onto litigants.[56] Notice to the State Public Defender and an opportunity to be heard is essential before a court can order a public agency to expend funds.[57]

Courts might order the costs of video testimony be passed on to a defendant that is convicted of a crime as a cost. WIS. STAT. § 973.06 allows the imposition of costs, fees, and surcharges at sentencing including… (b) Fees and travel allowance of witnesses for the state at the preliminary hearing and the trial; (c) Fees and disbursements allowed by the court to expert witnesses; and (d) Fees and travel allowances of witnesses for the defense incurred by the county at the request of the defendant, at the preliminary hearing and the trial. In non-criminal proceedings handled by the State Public Defender (juvenile, mental health and ch. 980 cases), it is possible the costs could be assessed under WIS. STAT. § 814.04(2).

Client and witness conferences

The State Public Defender should expect to pay for the cost of videoconferencing with clients and for the preparation of witnesses by video. This cost is similar to the costs borne by the State Public Defender[58] for expert services needed to

[56] "Power of the court can be inherent or can be derived from the common law or from a statute." *State v. Braunsdorf*, 92 Wis. 2d 849, 851, 286 N.W.2d 14 (Ct. App. 1979). The "…court may not do indirectly a thing the court has no power under the statute to do directly", *Volland v. McGee*, 236 Wis. 358, 365, 294 N.W. 497 (1941). In order "[f]or the circuit court to have power to order a public agency … [to do an act] … there must exist either, (1) a statute granting this power to the court; or (2) a statute which imposes upon the public agency the duty to …" do that act, *State v. Ramsay*, 16 Wis. 2d 154, 166, 114 N.W.2d 118, (1962). It must be noted at this point that "Section 977.05, Stats., does impose a limited duty to perform as "[i]nherent in the obligation to provide legal services: is the obligation to provide expert assistance when it is essential to the legal defense," *Payment of Witness Fees in State v. Huisman*, 167 Wis. 2d 168, 174, 482 N.W.2d 665 (Ct. App. 1992).

[57] "It is one of the elementary essentials of judicial proceedings that notice of hearing be given… [and]... [i]t is not within the province or power of a court to enter orders or decrees without notice" *State ex rel. Hall v. Cowie*, 259 Wis. 12, 128, 47 N.W.2d 309 (1951) citing *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). It is [also] elementary law that in order to bind a party by an order or judgment, there must have been [not only] a notice… [but also]…a hearing at which the party to be bound may appear and be heard", *Estate of Friedman*, 251 Wis. 180, 186, 28 N.W.2d 261 (1947). Accordingly, before a court can order a public agency such as the Office of State Public Defender to expend funds, the court must give the SPD notice and an opportunity to be heard. See *In Interest of Eileen K.C.*, 172 Wis. 2d 512, 516, 493 N.W.2d 264 (Ct. App. 1992).

[58] "The procedures for criminal cases are determined by statute," *State v. May*, 100 Wis. 2d 9, 11, 301 N.W.2d 458 (Ct. App. 1980). Hence, "…the question of which state agency or which level of government is best situated to cover such expenses and oversee such programs is a legislative and administrative question", Appointment of Interpreter in *State v. Le*, 184 Wis. 2d 860, 872, 517 N.W.2d 144 (1994), and "…there are administrative and managerial reasons for placing the responsibility for the out-of-court expenses upon the agency or level of government which will be using the services most directly", Appointment of Interpreter in *State v. Le*, 184 Wis. 2d at 871-72.

prepare for trial, cf. *Payment of Witness Fees in State v. Huisman*, 167 Wis. 2d 168, 482 N.W.2d 665 (Ct. App. 1992) and Appointment of Interpreter in *State v. Le*, 184 Wis. 2d 860, 871-72, 517 N.W.2d 144 (1944). In a State Public Defender case it is necessary to notify the administrative office of the State Public Defender and obtain approval before incurring the cost of video interviews for preparation.

Any practitioner using videoconferencing for testimony should consider the issue of who pays for the cost of the equipment and the connection. This question is particularly important for State Public Defenders and those representing indigent people in criminal proceedings and other State Public Defender cases. This issue is twofold. First, does the court have an obligation to provide access and resources for video testimony; and second, can the court recover the expense of videoconferencing as a cost under WIS. STAT. § 973.06.

Confidentiality issues

The most serious potential confidentiality issues arise when the attorney is in the courtroom and the client is at a remote location appearing by video.[59] The best systems have a private phone line that turns off the microphones when the receiver is lifted, but these have serious drawbacks, as well. Typically a jailer or other inmates are present in close proximity to the client. It is also possible that others in the courtroom will be able to hear the attorney's end of the conversation.

The attorney must ensure that the phone line is a dedicated line that cannot be overheard or intercepted.

In that situation, the attorney should speak very quietly and advise the client to do the same. They should not discuss anything that would be damaging if it were overheard, and the attorney should warn the client at the start not to say anything of that nature for fear it might be overheard. If it becomes impossible to

[59] The opinions of two Florida cases are relevant on the issue of private, confidential communication between the client and his or her attorney. Both of these opinions concern the situation where the defendant was in jail and appeared by closed circuit television while his attorney was in the courtroom. It was pointed in Jacobs v. State, 567 So. 2d 16, 17 (Fla. 4th DCA 1990), that during a court appearance, it "… is essential to permit the defendant to confer with his counsel privately and to have the benefit of his advice." The court observed in Seymour v. State, 582 So. 2d 127, 128-129 (Fla. 4th DCA 1991), that "[w]e can imagine no more fettered and ineffective consultation and communication between the accused and his lawyer than to do so by television in front of a crowed courtroom with the prosecutor and judge able to hear the exchange." The opinion went on to hold that it is important for the defendant to have "… the opportunity to look directly into the eyes of his counsel, to see facial movements, to perceive subtle changes in tone and inflection, in short, to use all of the intangible methods by which human beings discern meaning and intent in oral communication." Seymour v. State, 582 So. 2d at 129.

represent the client effectively and maintain confidentiality, the attorney should request that the client be brought to court for an in-person hearing, citing confidentiality concerns. Alternatively, the attorney may ask the court to adjourn the proceeding so that he or she can go to the jail and talk with the client in person.

If not in the same location as the client, the attorney should warn the client not to say anything that may be damaging.

If the attorney and client are appearing from the same location, there may be confidentiality issues that arise from the need to have additional participants appear on the same screen. The limited angle of viewing may require parties to sit in close proximity to each other at the same table. This may require special caution to protect confidential documents and materials in the client file. It may also create uncomfortable intrusions into the personal space of the participants. This type of discomfort can be misinterpreted when assessing demeanor or determining credibility.

Client conferences by video

Systems are being designed and proposed that would allow client conferences by video. This method of communication presents a new set of issues.

It was noted in Utah State Bar ETHICS ADVISORY OPINION No. 97-09 that:

> The quantum and form of communication necessary for a particular representation will depend upon many factors and must be assessed by Attorney on a case-by-case basis. This communication with the client may, under some circumstances, require face-to-face communications. Telephonic communications will be sufficient under other circumstances. It is unlikely that non-interactive written communications alone will be sufficient under normal circumstances.

Hence, it is necessary to identify the purpose of the conference with the client. A client conference by video technology should be viewed as an enhanced telephone call and not a substitute for in-person contact. Use of videoconferencing for client conferences requires that there already exists a solid, trusting attorney-client relationship.

The attorney should check to see if there is a cost to using the system, and, if so, how the cost is determined and who is expected to pay. Depending on the availability and ease of reserving the system, it may be easier to schedule and arrange a conference by phone rather than a videoconference.

The client may need to view documents during the videoconference. It will be impossible to contemporaneously view and share documents when conversing by video. The volume and nature of such documents might make it necessary to have the meeting in person. If documents are provided to the client ahead of the videoconference, documents mailed or faxed may be viewed by others.

As noted in Colorado Ethics Opinion 90 11/14/92, preservation of client confidences in view of modem communications technology, "regardless of technological developments, the attorney must exercise reasonable care to guard against the risk that the medium of the communication may somehow compromise the confidential nature of the information being communicated." Accordingly, the attorney needs to consider who else will be, or might be, in the room with the client or in close enough proximity to overhear what is said.

"Full and frank communication [between an attorney and client] is … promoted by endowing the communication with confidentiality." *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust*, 2004 WI 57, ¶ 42, 271 Wis. 2d 610, 679 N.W.2d 794. It was pointed out in *State v. Steffes*, 2003 WI App. 55, ¶ 15, 260 Wis. 2d 841, 659 N.W.2d 445 that:

> The Sixth Amendment protects the attorney-client relationship from intrusion in a criminal matter. *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974). The need for an inmate to be able to communicate privately with his or her counsel is vital to the effective assistance of counsel. See *Bach v. Illinois*, 504 F.2d 1100, 1102 (7th Cir. 1974).

Video technology is inappropriate to discuss confidential matters if they will be overheard by others[60]. The attorney should insist that the conversation be completely private. This includes ensuring that video communications with clients are not recorded, monitored, or stored on any server.

Local governments may offer to provide videoconferencing equipment to local State Public Defender offices for video access to clients. A memorandum of understanding is essential to record the terms of use for any equipment provided by an outside governmental agency. The memorandum should cover issues relating to cost, warranty of equipment, confidentiality, security, and monitoring. Offices should assess whether there are any implied expectations for cooperation with courts seeking to expand the use of video court appearances.

[60] "It is clear "that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him," *Mastrian v. McManus*, 554 F. 2d 813, 321 (8th Cir. 1977) citing *Coplon v. United States*, 191 F. 2d 749, 757 (D.C. Cir. 1951). "In order to be a confidential communication it must necessarily be a secret one, *Sears, Roebuck & Co. v. America Plumbing & Supply Co.,* 19 F.R.D. 329, 331 (E.D. Wis. 1956) citing 70 C.J. 413, 414.

Interpreters and video court

In cases requiring an interpreter for a non-English speaking or a hearing-impaired client, the use of video equipment becomes even more complicated and problematic.

Some hearing-impaired people may have the ability to read lips, but this ability may be completely or partially lost due to the size and/or quality of the image on the video screen. Compressed video images may not be smooth enough or contain enough detail to convey the speaker's meaning to a person whose ability to communicate relies in whole or in part on the ability to read lips.

Adding an interpreter to video court proceedings has other logistical challenges. The interpreter needs to be able to see and hear everyone involved in the proceedings clearly, and everyone needs to be able to see and hear the interpreter clearly. Simultaneous interpretation of the type often seen in court is a very difficult skill to master when all the speakers are in close physical proximity. It is probably impossible to do effectively over a video connection. As a result, these proceedings are likely to take much longer than they would if held in person.

Finally, it may be necessary to have the interpreter physically present with the defendant and defense attorney so that the attorney can communicate confidentially with the client. If all are not present in the same space, it may be impossible to have a conversation with the client without having the attorney's or client's statements, or the translation of them, overheard by someone.

Section IV Preparing for video court

Preparing for the video hearing

Video links between courts and other facilities are praised as good for all, but the attorney-client relationship and effective representation suffer in these new arrangements.[61] Attorneys must counsel their clients how to best present themselves to the court in this new era. Attorneys must vigorously support their clients' efforts to appear personally before the judge[62] and to have a fair hearing, because their clients have much at stake, namely:

1. The benefit of being physically present in the courtroom.
2. The benefit of having their counsel present with them during the proceeding.
3. The benefit of being provided with all documents the court examines.
4. The benefit of knowing and understanding the ruling of the court and their responsibilities under the court's order.
5. The benefit of confidential attorney/client communications.
6. The benefit of hearing and seeing everything that occurs in the courtroom.

This is especially true for clients who are required to make an involuntary video court appearance.

Who decides where the client and attorney will be located?

Who should make the decision about where the client and attorney are located during video hearings? Is it the client whose future is on the line, the attorney whose professional judgment is relied upon by the client, or the judge whose courtroom has the video connection?

WIS. STAT. § 885.60 (2)(a) states that a defendant or respondent in criminal cases and proceedings under chapters 48, 51, 55, 938, and 980 "is entitled to be physically present in the courtroom at all critical stages of the proceedings, including evidentiary hearings, trials or fact finding hearings, plea hearings at

[61] In an ideal world, attorneys could be stationed in both the courtroom and at the client's remote location simultaneously to ease this problem.

[62] "One could argue that Polak has waived appellate review of this issue. Although postconviction counsel requested the court's permission to offer Polak's testimony during the hearing, counsel did not file a motion asking that Polak be produced, did not argue that Polak needed to be present in person to do so and did not object when Polak appeared via telephone", *State v. Polak*, 2002 WI App 120, ¶ 21 fn 2, 254 Wis. 2d 585, 646 N.W.2d 845.

which a plea of guilty or no contest, or an admission, will be offered, and sentencing or dispositional hearings". The term "critical stage" is not further defined in this section, and the comment to the section states that the term "critical stage" was meant to incorporate the meaning of that term under existing law and the law as it may develop and was not meant to create new rights or destroy existing rights as they relate to the subject of physical presence in court.

There is no question that an attorney must consult with the client about where the client and attorney should be located, and provide the client with his or her best professional and strategic judgments on the subject.

Attorneys may feel that they should determine the issue of physical location for the client because of their expertise in presenting cases. But the attorney's role does not permit unilateral decision making for the client because the attorney-client relationship is one of agent to principal. Clients need to make informed decisions based upon consultation with counsel and an assessment of the risks and benefits of appearing by video.

Attorneys have the responsibility to present the most effective and persuasive case possible to the court. The attorney is also responsible for making many strategic and tactical decisions during the course of a case. However, the attorney is required by SCR 20:1.2 to consult with the client before making those decisions and to further the objectives of the client when making those decisions. An attorney needs to act in a defendant's interest and not for personal reasons such as scheduling of other cases or personal preference.[63] (See Quality Representation, above.)

In some courts, either the judge or sheriff[64] will tell the attorney where he or she will be located during the hearing. However, WIS. STAT. § 885.54(1)(e) provides that in criminal matters and in proceedings under chs. 48, 51, 55, 938 and 980, counsel for the defendant or respondent has the option of being with the client at the remote location. In addition, there are other compelling arguments against imposing a blanket rule.[65] The client's right to due process, effective

[63] "It was his professional duty as a lawyer to refrain from acting on behalf of his client … in circumstances in which his independent professional judgment was impermissibly influenced by considerations personal to himself", *Disciplinary Proceedings Against Johnson*, 165 Wis. 2d 14, 19, 477 N.W.2d 54 (1991), or "when the exercise of his independent professional judgment on behalf of one client would or would be likely to adversely affect his representation of another client …." *Disciplinary Proceedings Against Eisenberg*, 117 Wis. 2d 332, 333, 344 N.W.2d 169 (1984). See also SCR 20:1.7(b).

[64] "While the accused is in the courtroom, the balancing of the rights of the accused and of the public is a matter for the trial court [and not the sheriff] to determine," *State v. Cassel*, 48 Wis. 2d 619, 624, 180 N.W.2d 607 (1970). It is an abuse of discretion for a court to rely "…primarily upon sheriff's department procedures, rather than…" making its own independent determination. *State v. Grinder*, 190 Wis. 2d 541, 551, 527 N.W.2d 325 (1995).

[65] "A blanket ruling, while expedient and consistent, fails to show a consideration of the proper factors…and thus, is an erroneous exercise of discretion. See *McCleary v. State*, 49 Wis. 2d

representation of counsel, and ongoing confidential communication with his or her attorney should impact the court's courtroom control.

"Trial counsel must be present at all critical stages of any proceedings unless the presence of trial counsel is knowingly waived by the client and such waiver is approved by the court," *Spencer v. State*, 85 Wis. 2d 565, 574, 271 N.W.2d 25 (1978). This requirement demonstrates the "…concern that counsel be present or expressly waived whenever alternatives of action are available to the accused, including opportunity for objection or for the presentation of arguments to the court ….," *State v. Ritchie*, 46 Wis. 2d 47, 53, 174 N.W.2d 504 (1970). "The mere physical presence of an attorney does not fulfill the sixth amendment entitlement to the assistance of counsel, particularly when the client cannot consult with his or her attorney or receive informed guidance from him or her during the course of the trial." *Javor v. United States*, 724 F.2d 831, 834 (9thCir. 1984), (citation omitted). "Before counsel may be excused from any portion of the proceedings, the court must make a record that the absence of counsel is knowingly and voluntarily approved by the defendant, for the option to excuse counsel is exclusively with the defendant," *Spencer v. State*, 85 Wis. 2d at 571-72. See also *State v. Behnke*, 155 Wis. 2d 796, 801, 456 N.W.2d 610 (1990).

Counsel participating in a video hearing would be well advised to consider the United States Supreme Court holding of *Wright v. VanPatten,* 128 S. Ct. 743 (2008) and the procedural history involved before making decisions about participating in a video proceeding with a criminal defendant. The U.S. Supreme Court in VanPatten considered a review of habeas relief granted to a Wisconsin prisoner who entered a no contest plea to a charge of First Degree Reckless Homicide in open court when his lawyer appeared by telephone from a remote location. Although the U.S. Supreme Court reversed the Seventh Circuit's order granting habeas relief, the holding of the Seventh Circuit should give counsel reason to pause before attempting a video hearing in a critical stage of a criminal proceeding when the lawyer and client are not in the same location.

The Wisconsin Court of Appeals in *State v. VanPatten*, 211 Wis. 2d 891 (Ct. App. 1997) rejected VanPatten's appeal of the trial court decision denying his motion to withdraw his no contest plea based on ineffective assistance of counsel. The Wisconsin Supreme Court denied the petition for review. *State v. VanPatten,* 215 Wis. 2d (1997). However, the U.S. Court of Appeals for the Seventh Circuit granted VanPatten's petition for habeas corpus in *VanPatten v. Deppisch*, 434 F. 3d 1038 (2006), holding that the constructive absence of counsel from the courtroom was a structural defect[66] under *United States v. Cronic*, 466 U.S 648,

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263, 277-78, 182 N.W.2d 512, 520 (1971)." *State v. Smith*, 203 Wis. 2d 288, 299, 553 N.W.2d 824 (Ct. App. 1996).

[66] It was held in *Garris v. Governing Bd. of the State Reinsurance Facility*, 333 S.C. 432; 447-48, 511 S.E.2d 48 (1998), that the concept of a structural defect applies to the framework under which an administrative hearing proceeds.

104 S. Ct. 2039, 80 L.Ed. 2d 657 (1984) in the proceeding against him and that the case was not properly resolved by a *Strickland* ineffective assistance of counsel analysis. What is instructive for the practitioner is the comment and analysis of the Seventh Circuit concerning the difficulties of having the lawyer and client physically separated even though they may be connected by technology. The Seventh Circuit cited the following concerns with long distance representation:

1. The client could not turn to his lawyer for private legal advice, to clear up a misunderstanding, to seek reassurance or to discuss any last-minute misgivings.
2. Counsel could not detect and respond to cues from the client's demeanor that might have indicated he did not understand certain aspects of the proceedings.
3. If the client wanted to talk with his lawyer, anyone in the courtroom could eavesdrop.
4. No advance arrangements had been made for a private line in a private place and would have required a special request.
5. Physical presence is necessary for the attorney to keep an eye on the client and the prosecutor.
6. Physical presence is necessary for the court to keep an eye on counsel. The court may never know if the lawyer was being attentive, surfing the web or falling asleep.
7. A phone line makes it too easy for a lawyer to miss something because he or she was not paying attention. Lawyers might be tempted to let objections pass or neglect to inform the client about a crucial piece of information.

The grant of habeas relief was overturned by the U.S. Supreme Court, on the grounds that the state court did not unreasonably apply clearly established federal law because the issue regarding telephonic appearance of counsel was not clear. *Wright v. VanPatten,* 128 S. Ct. 743 (2008). The court stated that the "merits of telephone practice, however, is for another day, and this case turns on the recognition that no clearly established law contrary to the state court's conclusion justifies collateral relief." Id. at 747.

The lesson of *Van Patten* should be read to extend beyond the risks of lawyering by telephone.[67] Most of the arguments raised by the Seventh Circuit apply equally to video appearances when the client and lawyer are physically separated. *Van Patten* should be a warning that not only is it preferable for counsel and client to be in the same physical location during a critical stage of a

[67] But see *In re the Termination of Parental Rights to Adrianna A.E. v. Teodoro,* 2008 WI App 16, 307 Wis. 2d 372 where the court held that in a TPR trial a respondent who appeared by webcam from a remote location was afforded "meaningful participation" in the proceedings. The respondent was located in Mexico and all other parties appeared in the courtroom including his lawyer. "Meaningful participation" and "presence" are distinct legal concepts.

criminal proceeding, but that separation may actually diminish the Sixth Amendment right to counsel by constitutional proportions.

Advising the client about appearing by video

Physical presence in court is beneficial to the persuasive power of the client's defense and is preferable to a video appearance. If the client asks to appear by video, discuss your concerns with the client about the effect of his or her remote appearance on the judge. Among the points to discuss are:

- Going to court is more than wearing handcuffs and a jumpsuit, which clients may find embarrassing to wear in a public courtroom.

- The physical presence of the client in court helps to humanize the client. The judge may find the client less credible or less sympathetic because of the video hookup.

- The client will be better able to both hear and see what transpires as well as to be seen by the judge and other parties in court.

- The client will be able to consult with the attorney with greater ease and to examine documents in person.

- The client will also be able to spot family or friends who are attending and who might be helpful to his or her cause.

- Clients who request to physically appear in court may find that their case is placed at the end of the calendar or that it is rescheduled by the court on the grounds that personnel must be moved to accommodate the request.

The issue of the attorney's location, whether to be in court or with the client in a remote location, is a complicated one. When advising your client, discuss:

- The importance of personal contact between attorney and client. Personal contact enhances communication and performance in the representation of clients.

- Clients often have useful information or questions they want to ask during a hearing.

- The presence of the attorney in the room where the decisions are being made can be critical for forcefully asserting the client's position.

- It may be important to have access to family members attending the hearing, prosecuting attorneys, witnesses, and records.

- Other important issues may exist, such as the need for multiple hearings on a case, the use of interpreters, and representing the hearing-impaired client.

All of these factors must be considered when advising the client. After the discussions, the attorney must take the client's wishes into account in deciding whether to appear in the courtroom or at the remote location.

The attorney's responsibilities when the court denies the client's request

When the client will not be brought to court, it is the duty of the attorney, under *Divanovic, supra,* to seek court permission for the client's personal appearance in the courtroom unless the client wishes to appear by video. Ultimately, the client's decision whether to appear in the courtroom must be argued in court by counsel if the court refuses to permit the client's personal appearance. The attorney should object and cite authority in support of the request[68]. Broadly speaking, counsel will assert that Wisconsin Statutes, due process, effective assistance of counsel, and the protection of the attorney-client confidential relationship require that the client be allowed to appear personally in court with counsel.

Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal, *State v. Caban*, 210 Wis. 2d 597, 563 N.W.2d 501 (1997). Counsel should remember that an attorney's failure to achieve the client's wishes is not a subject of discipline if the attorney consulted with the client, the attorney tried to achieve the desired result, and the court denied the effort.

Attorney's appearance from a separate location

A related issue is whether the attorney should appear from a third location, separate from the court and separate from their client. An example would be appearing from the office by telephone or video. This approach is rife with trouble and substantially weakens the attorney-client relationship and the effectiveness of the attorney. No confidential relationship is possible when

[68] WIS. STAT. § 885.60 provides that "a defendant in a criminal case and a respondent in matter listed in sub. (1) is entitled to be physically present in the courtroom at all critical stages of the proceedings, …"

attorney and client are linked to the court by two separate connections. This arrangement is to be avoided. (See previous discussion of *VanPatten* case*).*

Advising the client before the hearing

Preparation of the client for a video appearance should orient the client to the hearing procedure, assist the client in making a positive impression, and help the client avoid potentially damaging behavior during the hearing. The client will be nervous and will need reassurance that the attorney is doing a good job for him or her. Face-to-face preparation will build the client's trust and avoid the pitfalls of video court.

Before meeting the client, the attorney should obtain a copy of any handout that the jail facility or court provided to the client, so the attorney can discuss it with the client during the preparation. Also, if possible, the attorney should view any video the courts or jail have shown to the client.

The following pre-hearing advice is recommended <u>if the attorney is in the courtroom</u>:

1. I will be sitting in the courtroom. We should talk privately if you have questions, so tell me that you have a question for me during the hearing, and I will speak to you on a private phone line. What you say in court can and will be used against you, so private conversations between us are extremely important.

2. Speak up right away if you can't hear or see everything that is going on in court. Let me know if you are unable to detect facial expressions, who is talking, etc.

3. If you do not understand what the court has decided or ordered in your case, ask to speak to me on the private phone line.

4. Your appearance is as important as if you were appearing in the courtroom. Be as neat as possible. Remember that large screens can exaggerate details, such as any hair out of place.

5. Speak strongly and clearly if I say you should answer questions.

6. Maintain eye contact with the camera.

7. Gesture slowly and smoothly with your hands. Otherwise the images may look jerky.

The following pre-hearing advice is recommended <u>if the attorney is at the remote location with the client:</u>

1. I will be sitting with you. It is important that I am able to hear everything that is going on in the courtroom, so please write your questions and comments down and hand them to me.

2. Your appearance is as important as if you were appearing in the courtroom. Be as neat as possible. Remember that large screens can exaggerate details, such as hair out of place.

3. Speak strongly and clearly if you are addressed by the court and I indicate you should answer. Anything you say can be used against you in court, so be certain that I agree that you should speak.

4. Maintain eye contact with the camera.

5. Gesture slowly and smoothly with your hands. Otherwise the images may look jerky.

In any video court hearing, counsel needs to remember special aspects of the camera and sound system such as movement of the camera, the use of sound controls, etc. Also, remember that depending on the system, the camera might be able to transmit images of written notes in front of participants and that the sound system may broadcast comments or even whispers.

Final thoughts

The unfettered use of videoconferencing technology in the courtroom requires a careful review of the law and the practical demands of presenting a legal defense. The promise of efficiency must be tempered by careful and thoughtful advocacy to ensure that involuntary video court appearances do not become a dehumanizing process.

To further this end, counsel must protect a client's rights to due process of law, the effective assistance of counsel, and full access to the courtroom. Counsel must continue to provide meaningful communication with clients and consult with them about the advantages and disadvantages of appearing in court by telephone or videoconferencing. Attorneys must carefully balance competing interests when providing advice to clients and making decisions about the most effective strategies in video court proceedings.

It is hoped that this handbook will make this process more understandable and ultimately more effective.

Appendix A

Video Court Checklist for Defense Attorneys

- Determine the proposed scope and use of videoconferencing technology in the courtroom as it relates to each individual case.

- Does the videoconferencing system meet the operational and technical standards set forth in WIS. STAT. § 885.54 (1)?
  - Participants shall be able to see, hear, and communicate with each other.
  - Participants shall be able to see, hear, and otherwise observe any physical evidence or exhibits presented during the proceeding.
  - Video and sound quality shall be adequate to allow participants to observe the demeanor and non-verbal communications of other participants and to clearly hear what is taking place in the courtroom to the same extent as if they were present in the courtroom.
  - Parties and counsel at remote locations shall be able, upon request, to have the courtroom cameras scan the courtroom so that remote participants may observe other persons present and activities taking place in the courtroom during the proceedings.
  - In matters set out in sub. (g), counsel for a defendant or respondent shall have the option to be physically present with the client at the remote location, and the facilities at the remote location shall be able to accommodate counsel's participation in the proceeding from such location. Parties and counsel at remote locations shall be able to mute the microphone system at that location so that there can be private, confidential communication between them.
  - If applicable, there shall be a means by which documents can be transmitted between the courtroom and the remote location.
  - In criminal matters, and in proceedings under chs. 48, 51, 55, 938, and 980, if not in each other's physical presence, a separate private voice communication facility shall be available so that the defendant or respondent and his or her attorney are able to communicate privately during the entire proceeding.
  - The proceeding at the location from which the judge is presiding shall be visible and audible to the jury and the public, including crime victims, to the same extent as the proceeding would be if not conducted by videoconferencing.

- Has the videoconferencing system been certified for this hearing pursuant to WIS. STAT. § 885.54 (2)?

- Is the proposed use of videoconferencing permitted by state and federal constitutions, state statutes, and case law?

- Is the proposed court proceeding a critical proceeding under WIS. STAT. § 885.60 (2)?

- Does the client consent to the use of videoconferencing in lieu of a personal appearance?
  - If yes, do you have an express waiver of personal appearance from the client?
  - If no, can you obtain the client's personal appearance without unreasonable delay by motion, objection, or stipulation?

- Determine the feasibility and desirability of the attorney and client appearing from the same location after advising the client and obtaining the client's input.

- After consultation with the client, determine where the attorney should be located during the video court proceeding.
  - Identify the time and expense involved which is needed for the attorney to make a remote video appearance.
  - Determine the benefit, if any, to the client for the attorney appearing in court and the client remotely.

- Make a complete record of objections during a video court proceeding that are factually detailed to account for any interference with the client's or counsel's ability to hear and see all portions of the proceeding.

- Is the use of an interpreter necessary and possible for the proposed video appearance?

- Is there an issue as to who pays for the videoconferencing?

- Communicate effectively with client after the video proceeding to make sure that the client understands what transpired and what the client needs to do.

Appendix B

Frequently Reported Problems with Video Court

In the past few years, lawyers in Wisconsin have reported the following problems associated with video court appearances:

- **Video court appearances frequently take more time.** Attorneys report that video appearances are not necessarily faster than normal in-custody appearances. Courts are not able to control the logistics at a remote location. There can be delays when a court needs to make video connection to more than one remote location. Delays in proceedings also occur when participants or family members are at two locations and there is a need for a private conversation. There needs to be a pause in the court proceeding when this occurs.

- **Lawyers have to make multiple trips to the remote location where clients are detained.** When a court is not prepared to proceed and reschedules a video court appearance for later in the same day, lawyers may have to make multiple trips for court appearances. Appearing with the client at a remote location is frequently necessary or advisable for quality representation. However, the travel to a remote location reduces the efficiency of the lawyer by reducing the ability to be available for other hearings.

- **The quality of the video feed from the courtroom is frequently of poor quality.** The equipment in a remote location is frequently not as good as the equipment in the courtroom. It is common that lawyers and parties cannot see and hear everything from the remote location.

- **The quality of the sound at the remote location is frequently poor.** Attorneys complain that they are distracted by external noises picked up on the sound system that connects the courtroom and remote location. Some systems are too sensitive and pick up sounds from movements in the courtroom that interfere with the ability of the attorney to hear and concentrate.

- **The size of the video screen is too small to view all participants.** Lawyers report that the size of the video screen is not large enough to clearly view individuals appearing in court as well as individuals in the gallery of the courtroom.

- **Lawyers cannot talk to family members or other parties interested in the defendant.** The technology is inadequate to permit lawyers appearing in a remote location to communicate privately with the public,

district attorney or court officials. Lawyers frequently need to be with the client, thus cutting off access to other interested parties who are in the courtroom.

- **When lawyers speak to their clients about a court proceeding such as an initial appearance, there is no way to speak to the client confidentially before the hearing without other inmates or jail staff hearing the conversation.**

- **When the lawyer is on the record at the remote location with the client, he/she cannot have a confidential conversation with the client without other clients and jail staff overhearing the conversation "even when pushing the remote's mute button" because other clients and jail staff are in the room.**

- **Court personnel are impatient with the delay caused by the need to speak with the client confidentially when the lawyer and client are separated.** When lawyers appear in the courtroom while the client is in a remote location, it is frequently necessary to speak to a client confidentially. Even when the technology exists for a private phone call with a client, court personnel express impatience with lawyers who use this option.

- **Some systems are not able to exchange court documents with a remote location.** Technology may be inadequate to review documents and exhibits instantaneously. Some systems do not have fax machines readily available.

- **Technology may be inadequate to permit confidential communications between attorney and client.** Not all courtrooms have access to private phone lines that allow lawyers to talk to clients confidentially during court proceedings.

- **Separation of the client from the courtroom compromises attorney-client representation.** Attorneys must choose between an appearance in court without the client and appearing in remote location with the client. The choice will either compromise client confidentiality and communication or courtroom access and the ability to persuasively communicate with the court.

- **Clients are unable to see and hear everything that takes place in the courtroom from a remote location.** Technology may limit the ability to see and hear everything that you could see and hear if you were in the courtroom. Video systems vary in quality and do not deliver uniform results. Often there are not sufficient cameras and not sufficient microphones.

- **Videoconferencing reduces access to clients.** Greater separation between defendants and attorneys reduces the opportunity for face-to-face communication. This is a barrier to the speedy and efficient appointment of counsel by the State Public Defender. Legal preparation is harder for the defense and negatively impacts the quality of representation.

- **Some legal proceedings are not appropriate for video court.** Evidentiary and testimonial hearings are usually inappropriate for video court. Witnesses need to be examined and confronted in person. Documents must be shared and presented in full view of all participants. The defendant has constitutional and statutory rights to be present at all critical stages of a criminal case. Another level of complexity is added when interpreters are needed.

- **The defense is frequently unable to adjust the picture, sound, or camera position during a video court appearance.** Court rules and equipment may constrain the ability of the lawyer and client to make adjustments during the proceeding to meet the demands of legal representation. Some jurisdictions have reported the existence of "blind spots" in the courtroom that do not appear on the video monitor in a remote location. Prosecutors have exploited these shortcomings by hiding victims and witnesses from view.

- **Courts ignore complaints by the defense that they cannot see and hear everything in the court and remote location during video court hearings.** Lawyers report that courts are not receptive to complaints about the quality of video proceedings. Objections are frequently dismissed, and adjustments to the video image or sound are routinely denied.

- **Clients appearing by video do not understand the result of the court appearance and the orders of the court.** A client's perception of the court is altered by a video appearance. Limitations of a clients' ability to hear and see everything clearly impairs the clients' ability to understand the court proceeding. Clients frequently have more questions about the outcome of the court appearance when they appear by video, which in turn places a greater burden on the lawyer to review the results of the court appearance at a later time.

- **Videoconferencing in court proceedings tends to shift costs to the defense.** Separation of the client from the court makes it more difficult to meet with clients and communicate effectively. This separation frequently requires the State Public Defender or private counsel to travel to remote

locations at greater expense to the defense and reduces the ability of defenders to handle high volume caseloads.

- **Barriers exist that discourage attorneys from appearing with the client at a remote location, even though the defendant has the right to have counsel at his/her side.** Distance, court schedules, time demands and uncooperative judges all contribute to pressure to have the lawyer in the courtroom instead of with the client in the remote location.

- **Video court appearances create a detachment that a defendant has with the presiding court.** Defendants who appear by video are not in the actual presence of the court. Lawyers report that clients are less inhibited when appearing by video and are less bound by the rules of court decorum.

- **Physical facilities at remote locations are sometimes inadequate for legal representation.** Not all remote locations are equipped with proper tables, chairs and microphones. Remote locations may not have adequate space, privacy, lighting, or soundproofing.

- **Clients and attorneys are excluded from some portions of court proceedings conducted by video.** The court controls when sound and picture are turned on and off. Remote participants are frequently excluded from critical discussions that occur in court before, during, and after the actual video appearance. The ability of an attorney or defendant to go back on the record is limited by the court when the video appearance is terminated by the court. Attorneys report that discussions with court staff and court clerks cannot be heard from the remote location.

- **Individuals charged with misdemeanors who are unable to post bail prior to their initial appearance are forced to make appearances by video while those who post bail can appear in the courtroom.**

- **Technical problems with video frequently cause delays or adjournments and require proceedings to be moved to other facilities.** Parties, court staff, and witnesses suffer the inconvenience of technical problems.

Appendix C

Chapter 885 Wis. Stats. relating to Videoconferencing in the Circuit Courts

SUBCHAPTER III USE OF VIDEOCONFERENCING IN THE CIRCUIT COURTS

885.50 Statement of intent.

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

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

(3) In declaring this intent, the Supreme Court further finds that improper use of videoconferencing technology, or use in situations in which the technical and operational standards set forth in this subchapter are not met, can result in abridgement of fundamental rights of litigants, crime victims, and the public, unfair shifting of costs, and loss of the fairness, dignity, solemnity, and decorum of court proceedings that is essential to the proper administration of justice.

History: Sup. Ct. Order No. 07-12, 2008 WI 37, 305 Wis.2d xli.

Comment, 2008: Section 885.50 is intended to recognize and summarize the larger debate concerning the use of videoconferencing technology in the courts, and to provide a clear statement of the Supreme Court's intent concerning such use, which should be helpful guidance to litigants, counsel and circuit and appellate courts in interpreting and applying these rules.

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

Bridging the Distance: Videoconferencing in Wisconsin Circuit Courts. Leineweber. Wis. Law. July 2008.

885.52 Definitions.

In this subchapter:

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

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

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

History: Sup. Ct. Order No. 07-12, 2008 WI 37, 305 Wis.2d xli.

885.54 Technical and operational standards.

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

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

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

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

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

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

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

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

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

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

History: Sup. Ct. Order No. 07-12, 2008 WI 37, 305 Wis.2d xli; Sup. Ct. Order No. 08-21, 2008 WI 111, filed 7-30-08.

Comment, 2008: Section 885.54 is intended to establish stringent technical and operational standards for the use of videoconferencing technology over objection, and in considering approval by the circuit court of waivers or stipulations under § 885.62. Mobile cart-based systems will not meet these standards in many or even most situations, but may still be used pursuant to a waiver or stipulation approved by the court. The effect will be to encourage the installation of multiple camera systems, while still allowing the use of cart-based systems when participants are in agreement to do so, which is likely to be much of the time.

885.56 Criteria for exercise of court's discretion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

History: Sup. Ct. Order No. 07-12, 2008 WI 37, 305 Wis.2d xli.

Comment, 2008: Section 885.56 is intended to give the circuit court broad discretion to permit the use of videoconferencing technology when the technical and operation standards of § 885.54 are met, while providing clear guidance in the exercise of that discretion. Under this section, the circuit court may permit the use of videoconferencing technology in almost any situation, even over objection, except as provided under § 885.60. On the other hand, the court may deny the use of videoconferencing technology in any circumstance, regardless of the guidelines. This is consistent with the intent of this legislation to vest circuit courts with broad discretion to advance the use of videoconferencing technology in court proceedings under the standards and guidelines set out, but to reserve to courts the prerogative to deny its use without explanation. A circuit court's denial of the use of videoconferencing is not appealable as an interlocutory order, but to the extent the denial involves issues related to a party's ability to present its case and broader issues related to the presentation of evidence, the denial can be appealed as part of the appeal of the final judgment.

885.58 Use in civil cases and special proceedings.

(1) Subject to the standards and criteria set forth in §§ 885.54 and 885.56 and to the limitations of sub. (2), a circuit court may, on its own motion or at the request of any party, in any civil case or special proceeding permit the use of videoconferencing technology in any pre-trial, trial, or post-trial hearing.

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

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

History: Sup. Ct. Order No. 07-12, 2008 WI 37, 305 Wis.2d xli.

Comment, 2008: Regarding section 885.58, civil cases and special proceedings in general pose few problems of constitutional dimension concerning the use of videoconferencing technology and offer litigants the potential of significant savings in trial expenses. For these reasons, this technology will likely gain rapid acceptance resulting in expanding use. Where objections are raised, the rule provides that the circuit court will resolve the issue pursuant to the standards and decisional guidance set out in §§ 885.54 and 885.56.

885.60 Use in criminal cases and proceedings under chapters 48, 51, 55, 938, and 980.

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

(2)(a) Except as may otherwise be provided by law, a defendant in a criminal case and a respondent in a matter listed in sub. (1) is entitled to be physically present in the courtroom at all critical stages of the proceedings, including evidentiary hearings, trials or fact-finding hearings, plea hearings at which a plea of guilty or no contest, or an admission, will be offered, and sentencing or dispositional hearings.

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

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

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

History: Sup. Ct. Order No. 07-12, 2008 WI 37, 305 Wis.2d xli.

Comment, 2008: It is the intent of §. 885.60 to scrupulously protect the rights of criminal defendants and respondents in matters which could result in loss of liberty or fundamental rights with respect to their children by preserving to such

litigants the right to be physically present in court at all critical stages of their proceedings. This section also protects such litigants' rights to adequate representation by counsel by eliminating the potential problems that might arise where counsel and litigants are either physically separated, or counsel are with litigants at remote locations and not present in court.

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

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

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

885.62 Waivers and stipulations.

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

History: Sup. Ct. Order No. 07-12, 2008 WI 37, 305 Wis.2d xli.

Comment, 2008: The intent of § 885.62 is to permit litigants to take advantage of videoconferencing technology in any matter before the court regardless of whether the provisions of this subchapter would otherwise permit such use, as long as the parties are in agreement to do so and the circuit court approves. This should help to encourage innovation and experimentation in the use of videoconferencing technology, and thereby promote the most rapid realization of its benefits, while preserving to the litigants and ultimately to the courts the ability to prevent abuses and loss of the fairness, dignity, solemnity and decorum of court proceedings.

885.64 Applicability.

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

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

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

History: Sup. Ct. Order No. 07-12, 2008 WI 37, 305 Wis.2d xli.

Comment, 2008: The intent of § 885.64 is to make it clear that all electronic communications with a video component are to be conducted under the provisions of this subchapter, regardless of the various names and terms by which such means of communication are referenced in other statutes and rules, and also to make clear that the provisions of this subchapter are to take precedence over other statutes and rules which address the use of such means of communication. Finally, sub. (3) is intended to make clear that existing authority for the use of non-video telephone communications in court proceedings remains unaffected by the new provisions of this subchapter concerning videoconferencing.

Appendix D

Synopsis of Additional Statutes, Court Orders, Administrative Rules and Case Law Concerning Using Telephone and Videoconferencing in Wisconsin Court Proceedings

The following synopsis provides a starting point for attorneys in understanding the law in Wisconsin underlying video court as well providing a starting point for conducting legal research on the issues arising from the use of video in court proceedings. The summaries are designed to give a brief overview and are not intended to replace the attorney's reading of the relevant cases, statutes and/or rules in their entirety.

WIS. STAT. § 809.23(3). Now provides that "an (authored) unpublished opinion may be cited for persuasive value" (as well as preclusive and law-of-the-case effect). Per curiams, and summary and memorandum orders, not being authorized, aren't citable. Unpublished cases decided before 7/1/09 may not be cited as precedent or authority. Violation of this rule risks sanctions by the court.

Criminal Proceedings

Statutes

Statutes which make provisions for the use of telephone or videoconferencing in criminal proceedings include:

(1) WIS. STAT. § 950.04(1v) (b) incarcerated victim's participation in court hearings.

(2) WIS. STAT. § 967.04(2) testimony at a deposition.

(3) WIS. STAT. § 967.08 when telephone or videoconferencing may be used in criminal proceedings.

(4) WIS. STAT. § 967.09 provides that "[o]n request of any party, the court may permit an interpreter to act in any criminal proceeding, other than trial, by telephone or live audio-visual means".

(5) WIS. STAT. § 970.01(1) initial appearance.

(6) WIS. STAT. § 970.03(13) testimony at preliminary hearings.

(7) WIS. STAT. § 971.14(1)(c) testimony at a competency hearing.

(8) WIS. STAT. § 971.14(4)(b) testimony at a competency hearing.

(9) WIS. STAT. § 971.17(7)(a) and (d) testimony at a commitment and recommitment hearing.

(10) WIS. STAT. § 972.02(1) waiver of a jury trial.

(11) WIS. STAT. § 972.11(2m) testimony of any child witness by means of closed circuit audiovisual equipment.

(12) WIS. STAT. § 973.20 (14)(d) incarcerated defendant's participation at a restitution hearing.

(13) WIS. STAT. § 975.06(7) testimony at a hearing on the defendant's competency to refuse medication.

Published decisions

State v. Vogelsberg, 2006 WI App. 228; 297 Wis. 2d 519. Child alleged sexual assault victim could testify from behind screen without violating confrontation clause where defendant had allegedly threatened victim with harm if he ever told about sexual assault.

State v. Lewis, 2004 WI App. 211; 277 Wis. 2d 446. Waiver of statutory right (interstate detainer act) must be intentional and voluntary relinquishment of known right and it must be accompanied by clear and specific renunciation of that right.

State v. Stenseth, 2003 WI App. 198, 266 Wis. 2d 959, 669 N.W.2d 776. The court held the modification of the sentence amounted to a resentencing and defendant had the right to be present, but in this case it amounted to harmless error.

State v. Brockett, 2002 WI App. 115, 254 Wis. 2d 817, 647 N.W.2d 357. The court held that under *Vennemann*, the defendant's physical presence was not required at the evidentiary hearing on the state's motion for reconsideration. The defendant appeared by telephone.

State v. Polak, 2002 WI App. 120, 254 Wis. 2d 585, 646 N.W.2d 845. The Court of Appeals comments on preserving the issue as to whether the defendant should be physically present in court.

State v. Peters, 2001 WI 74, 244 Wis. 2d 470, 628 N.W.2d 797. The court did not address defendant's challenge to the constitutionality of closed-circuit television guilty or no contest pleas.

State v. Peters[69], 2000 WI App. 154, 237 Wis. 2d 741, 615 N.W.2d 655, reversed on other grounds 2001 WI 74, 244 Wis. 2d 470, 628 N.W.2d 797. The Court of Appeals quoting *Scott v. Florida*, 618 So.2d 1386, 1388 (Fla. Dist. Ct. App. 1993), indicated that "[w]e agree with a Florida district court of appeals that noted that "an audio-video hookup may well be the legal equivalent of physical presence," it acknowledged that: "Section 971.04(1) provides that a defendant shall be present at the arraignment and at the imposition of sentence. Our supreme court has previously interpreted this statute as identifying the stages of the criminal process where a defendant must be physically present. See *State v. Vennemann*, 180 Wis. 2d 81, 93, 508 N.W.2d 404 (1993). Peters did not explicitly waive his right to be physically present, and we agree with the circuit court that the closed-circuit television procedure violated statutory criminal procedure." The Court of Appeals then determined that "…a statutory violation of 971.04(1) Stats. does not automatically translate into a constitutional violation…[because in order]…[t]o meet his initial burden, Peters must show that the closed-circuit television procedure denied him a fair and just hearing". The opinion went on to state that "[a]bsent any substantiated allegations of unfairness, we are not persuaded that simply appearing live via closed-circuit television, as opposed to being physically present in the courtroom, would inherently damage the fairness or justness of the plea hearing".

State v. Vennemann, 180 Wis. 2d 81, 508 N.W.2d 404 (1993). Post-conviction hearing. Defendant should have been physically present at the postconviction relief hearing. WIS. STAT. § 971.04(1) applied only to the pretrial, trial, sentencing, and judgment phases of criminal procedure and was inapplicable to postconviction evidentiary hearings brought pursuant to WIS. STAT. § 974.02 and WIS. STAT. § 809.30(2)(h). However, the evidence offered at the postconviction evidentiary hearing raised substantial issues of fact supporting defendant's claim that he was not present when the crimes were committed, and he should have been physically present to hear the testimony and to consult his counsel.

State v. Guck, 176 Wis. 2d 845, 500 N.W.2d 910 (1993). Evidentiary hearings involving the competency of the accused. Unless good cause to the contrary is shown, proceedings referred to in this section may be conducted by the telephone or videoconferencing, if available.

State ex rel Rodencal v. Fitzgerald, 164 Wis. 2d 411, 474 N.W.2d 795 (Ct. App. 1991). Habeas corpus hearing in extradition proceeding. The fact that the witnesses would be testifying from out of state by telephone did not relieve the trial court from the obligation to hold a hearing. Witnesses were to testify that the defendant was not in the state at the time of the alleged crime.

[69] "Because of its rather scant analysis and because it involved a plea on a misdemeanor charge, we do not find *Peters* to be persuasive", People v. Stroud*, 208 Ill. 2d 398, 408, 804 N.E.2d 510, 516, 281 Ill. Dec. 545 (2004)*

Unpublished decisions

State v Barnes, 2008 WI App. 36; 2008 Wisc. App. LEXIS 1. Defendant only present by video during jury's questions, not able to confer with counsel. Court doesn't address whether defendant had a right to be present or confer with counsel because state showed defendant not prejudiced by either circumstance.

State v. Aguilar, 2008 WI App. 17; 2007 Wisc. App. LEXIS 1066. Defendant not entitled to appear at post-conviction hearing on sentence modification request because "no substantial issues of fact to resolve." *State v. Vennemann*, 180 Wis. 2d 81(1993).

State Ex Rel. Brown v. Hearings and Appeals, 2008 WI App. 17; 2007 Wisc. App. LEXIS 1057. Defendant's claim that counsel was ineffective for failing to object to a witness at revocation hearing testifying by telephone rejected because argument was "conclusory and undeveloped."

State v. Diehl, 2007 WI App. 230; 2007 Wisc. App. LEXIS 850. Defendant waived right to raise issue of police officer testifying by telephone by not objecting at trial.

State v Marlyn, 2007 WI App. 130; 301 Wis. 2d 747; 2007 Wisc. App. LEXIS 178. OK to have allowed alleged child sex assault victim to testify by closed circuit TV.

State v. Turonie, 2006 WI App. 175; 295 Wis. 2d 842; 2006 Wisc. App. LEXIS 601. Defense attorney appeared by phone for sentencing after revocation because attorney either "ill or overslept". Defendant argued ineffective assistance of counsel. State conceded defendant entitled to new sentencing. Court orders it without "adopting or rejecting" reasoning in *VanPatton*.

State v. Hendricks, 2005 WI App. 176; 285 Wis. 2d 804; 2005 Wisc. App. LEXIS 537. Defendant sought to reopen OWI 1st conviction. Wanted to appear by phone because had warrants out. Not allowed to. Fear of arrest not deemed valid reason for not appearing. OK that motions were dismissed as a result of the non-appearance.

State v. Mays, 2005 WI App. 214; 287 Wis. 2d 508; 2005 Wisc. App. LEXIS 753. Having defendant watch by video considered by trial court as alternative to mistrial where defendant was acting out in court.

State v. Jones, 2004 WI App. 88, 272 Wis. 2d 855, 679 N.W.2d 927, 2004 Wisc. App. LEXIS 188. The appellate court held the appellate counsel's representation was not deficient, as defendant failed to show his counsel's failure to raise the issue of the trial counsel not appearing in person at a Machner hearing and testifying by telephone prejudiced him. The trial court properly exercised its discretion in not requiring the trial attorney to appear in person. Defendant's

confrontation rights were not violated, as such rights did not apply in post-conviction hearings.

State v. Harvey, 2004 WI App. 37, 269 Wis. 2d 891, 675 N.W.2d 811, 2004 Wisc. App. LEXIS 62. Harvey had no right to be physically present at the postconviction hearing. Videoconference was sufficient.

State v. Gunderson, 2002 WI App. 193, 256 Wis. 2d 1049, 650 N.W.2d 322, 2002 Wisc. App. LEXIS 698. Error was harmless because unlike a felony charge where a defendant's presence was absolutely required, a defendant charged with a misdemeanor could waive his or her presence at sentencing. Defendant was not absent from the proceedings; he was present on the telephone and, indeed, participated in the hearing.

State v. Cook, 2002 WI App. 56, 251 Wis. 2d 482, 640 N.W.2d 566, 2002 Wisc. App. LEXIS 127. The plea-and-sentencing hearing was done by speakerphone. The court of appeals also held that, even if the circuit court erred in utilizing the speakerphone during the plea and sentencing hearing with defendant's consent, that error was harmless, as the sentencing proceeding was fair and just.

State v. Graewin, 2000 WI App. 71, 234 Wis. 2d 151, 610 N.W.2d 512, 2000 Wisc. App. LEXIS 113, (Ct. App. 2000). Graewin appeared at the plea hearing in person, while counsel appeared by telephone. However, Graewin offered no objection to the manner of counsel's appearance to the trial court, and his brief does not develop an argument as to why such a procedural failing should entitle to him to withdraw his pleas. The court therefore deemed the issue waived.

State v. DeWall, 229 Wis. 2d 254, 599 N.W.2d 667, 1999 Wisc. App. LEXIS 733, (Ct. App. 1999). Sentencing hearing. Defendant requested telephone testimony of witness. On appeal, the court found that there was good reason to deny telephone testimony because the judge wanted to observe the probation officer. The court held that when deciding whether to grant a continuance to obtain the attendance of a witness, a trial court should consider: (1) whether the testimony of the absent witness was material, (2) whether the moving party had been guilty of neglect procuring the attendance of the witness, and (3) whether there was a reasonable expectation that the witness could be located. The court found the continuance was properly denied because the judge took the statements of defendant's attorney at face value for what the probation officer would have said and having the officer there would not have made a difference.

State v. Tracy, 224 Wis. 2d 643, 590 N.W.2d 282, 1999 Wisc. App. LEXIS 65, (Ct. App. 1999). Trial court committed harmless error in admitting telephone testimony at the trial.

State v. Buettner, 218 Wis. 2d 831, 581 N.W.2d 594, 1998 Wisc. App. LEXIS 471, (Ct. App. 1998). A Post-conviction hearing took place with the judge sitting

in Dodge County, the prosecutor in Green Lake County appearing by telephone, and Buettner and defense counsel in Waushara County appearing by telephone. WIS. STAT. § 807.13 provides in part: (1) The court may permit any oral argument by telephone. (2) In civil actions and proceedings, including those under WIS. STAT. ch. 48, 51, 55, 880, the court may admit oral testimony communicated to the court on the record by telephone or live audio-visual means, subject to cross-examination. (3) Whenever the applicable statutes or rules so permit, or the court otherwise determines that it is practical to do so, conferences in civil actions and proceedings may be conducted by telephone. WIS. STAT. § 807.13. "A trial court may not conduct a felony arraignment wherein the defendant enters a plea of guilty or no contest, and may not sentence following a felony plea of guilty or no contest by means of a telephone proceeding pursuant to WIS. STAT. §967.08. (Jones, J., concurring).

State v. Oswalt, 212 Wis. 2d 241, 568 N.W.2d 784, 1997 Wisc. App. LEXIS 632, (Ct. App. 1997). Sentence Modification Hearing. The defendant argued that he had not sexually assaulted anyone for several years when the present charges were filed. The State introduced telephone evidence regarding Oswalt's behavior with three children in Mississippi after he had "reformed." It is not error to permit victims to make sentencing recommendations.

State v. Van Patten, 211 Wis. 2d 891, 568 N.W.2d 653, 1997 Wisc. App. LEXIS 579, (Ct. App. 1997). The appearance of defense counsel by telephone at the plea hearing did not constitute a "manifest injustice" sufficient to justify the withdrawal of defendant's plea.

State v. Kukes, 203 Wis. 2d 270, 551 N.W.2d 869, 1996 Wisc. App. LEXIS 766, (Ct. App. 1996). By asking permission to present the testimony by telephone if his motion for continuance was denied, defendant waived his right to argue on appeal that the testimony was error because there was no statutory authority to allow telephone.

State v. Keso, 193 Wis. 2d 638, 537 N.W.2d 433, 1995 Wisc. App. LEXIS 513, (Ct. App. 1995). Trial court properly denied defendant's request to present telephone testimony under WIS. STAT. § 967.08(2).

State v. Kavanagh, 181 Wis. 2d 367, 1993 Wisc. App. LEXIS 1541, (Ct. App. 1993). Post-conviction hearing done by phone. The trial court was not required to allow defendant to attend the postconviction hearing at which trial counsel's performance was evaluated. Defendant was allowed to examine his trial counsel by telephone, a practice expressly authorized by WIS. STAT. § 974.06(5) and WIS. STAT. § 807.13. Defendant also failed to establish any prejudice that resulted from his failure to attend the evidentiary hearings. Therefore, assuming he had a right to be present at the hearing, his absence was harmless.

State v. Santori, 178 Wis. 2d 317, 504 N.W.2d 875, 1993 Wisc. App. LEXIS 647, (Ct. App. 1993). Defendant's telephonic presence at his postconviction hearing met the requirements of due process.

State v Boone, 160 Wis. 2d 468 N.W.2d 31, 1990 Wisc. App. LEXIS 1187, (Ct. App. 1990). The court held that defendant waived any objection to the telephone testimony by failing to object to such testimony or to preserve the testimony for review under an ineffective assistance of counsel analysis.

State v. B.L.B., 155 Wis. 2d 469, 455 N.W.2d 915, 1990 Wisc. App. LEXIS 262 (Ct. App. 1990). Trial court erred in admitting the telephone testimony under WIS. STAT. § 971.17(2) because the patient openly objected to receiving it in the record.

Juvenile Proceedings

Statutes

The following statutes permit the use of telephone or videoconferencing in juvenile proceedings:

(1) WIS. STAT. § 48.243(3. Basic rights and duties of intake worker regarding notice of rights can be given by telephone.

(2) WIS. STAT. § 48.27(3). Notice of hearing may be provided by telephone.

(3) WIS. STAT. § 48.295(4). Motions and objections regarding physical, psychological, mental or developmental exams.

(4) WIS. STAT. § 48.297(7). Oral argument on motions before trial.

(5) WIS. STAT. § 48. 299(5). Hearings under Sec. 48.209(1)(e) (review of child held in jail) and sec. 48.21(1) (detention hearing).

(6) WIS. STAT. § 48.30(10). Plea Hearing – a party may participate by telephone or video.

(7) WIS. STAT. § 48.315(2) (continuance). The court may permit any party to participate in plea hearings by telephone or live audiovisual means, except for a juvenile who intends to admit the facts of a delinquency petition.

(8) WIS. STAT. § 48.335(4). Continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conference.

(9) WIS. STAT. § 48.335(4). Dispositional hearing and hearings under sec. 48.357 (change of placement), sec. 48.363 (revisions) and sec. 48.365 (extensions).

(10) WIS. STAT. § 807.13(2). Sets forth conditions when oral testimony admitted in ch. 48 proceedings.

(11) WIS. STAT. § 822.06(4). Proceedings under the Uniform Child Custody Jurisdiction Act.

(12) WIS. STAT. § 938.295(4). Motions and objections regarding psychological, physical, etc, exams.

(13) WIS. STAT. § 938.297(7). Oral arguments on motions before trial.

(14) WIS. STAT. § 938.295(5). Hearing under sec. 938.209(1)(e) (secure detention reviews) and sec. 938.21(1) (secure detention hearings).

(15) WIS. STAT. § 938.30(10). Plea hearing regarding party participating by telephone or video, except a juvenile admitting a petition.

(16) WIS. STAT. § 938.315(2). Continuance shall be granted by the court only upon a showing of good cause in open court or during a telephone conference.

(17) WIS. STAT. § 938.335(4) Dispositional hearings and hearings under sec. 938.357 (change in placement), sec. 938.363 (revisions) and sec. 938.365 (extensions).

Published decisions

In Re The Termination of Parental Rights to Adrianna A.E. and Antonio M.E., v Teodoro, 2008 WI App. 16; 307 Wis. 2d 372; 745 N.W.2d 701. TPR by webcam ok. Respondent/father could consult privately with his attorney who was in the courtroom.

State v. Lavelle W., 2005 WI App. 266; 288 Wis. 2d 504. Telephone TPR not ok—alternative to appearance in person must be the functional equivalent.

In Re Tammie J.C. v. Robert T.R., 2003 WI 61, 262 Wis. 2d 217, 663 N.W.2d 734, 2003 Wisc. LEXIS 431 [TPR]. Robert, a father held in an Arizona prison, was afforded an opportunity to be heard under § 822.05, and he participated by telephone in the trial and another hearing.

In Interest of Christopher D., 191 Wis. 2d 680, 530 N.W.2d 34, 1995 Wisc. App. LEXIS 426 (Ct. App. 1995) [TPR]. The trial court determined that the mother lacked the assets to pay for the father's transportation to attend the custody hearing. The court held that the father's participation via telephone did not violate his procedural due process rights because he was able to hear and participate in all aspects of the trial.

In re A.A.L., 152 Wis. 2d 159, 448 N.W.2d 239, 1989 Wisc. App. LEXIS 877 (Ct. App. 1989), [TPR]. The right to physical presence at trial of the respondent father who was held in an Arizona prison, was taken as a given, and the parties did not explore any lesser forms of participation for him.

Unpublished decisions

Grant County Dept. of Social Services v. Stacy K.S., 2010 Wisc. App. LEXIS 804. Telephonic appearance of respondent who admitted grounds for termination held to be permissible by statute. In reaching this decision the court distinguishes the statutory language concerning admission of grounds from language requiring personal appearance for voluntary termination.

In Re The Termination of Parental Rights to Patrick L. B., v Lawrence J.B., 2008 Wisc. App. LEXIS 486. TPR finding reversed and remanded for further proceedings because father's ability to participate by phone substantially reduced as indicated by numerous references in the record to poor quality sound or inability to hear at all.

In Re The Termination of Parental Rights to James C. P., 2006 WI App. 156; 295 Wis. 2d 491; 2006 Wisc. App. LEXIS 564. Tangentially related to telephone appearance. Dad (respondent) in private TPR did not attend court apparently just because he lived out of state. Was represented by counsel. Later complained he was prejudiced by not being able to appear in person or by phone. Claimed ineffective assistance of counsel for not asking to have him appear by phone. Both claims rejected by Court of Appeals.

In the Interest of Ty L., 218 Wis. 2d 834, 581 N.W.2d 595, 1998 Wisc. App. LEXIS 503, (Ct. App. 1998). Extension Hearing. The juvenile asserted he was denied due process when the juvenile court held that his appearance at his § 48.13, Stats., extension hearing could be accomplished by telephone rather than by his physical presence. The ruling is upheld because the juvenile's right to meaningfully participate in the hearing did not require his physical presence in the juvenile court.

Rhonda R.D., 191 Wis. 2d 680, 530 N.W.2d 34, 1995 Wisc. App. LEXIS 426 the appellate court approved a prisoner's participation by phone in a contested termination of parental rights case.

State v. Bonnie L.K., 205 Wis. 2d 115, 1996 Wisc. App. LEXIS 1157. With regard to the granting of continuances of hearings on petitions to terminate parental rights, the phrase "on the record" modifies the statutory reference to a telephone conference under § 807.13. Section 48.315(2) requires either a showing "in open court" or a showing during a telephone conference "on the record." A formal decision notifying the parties of a decision and an entry of the decision in the court records satisfies an "on the record" requirement.

In re the Interest of B.L., 157 Wis. 2d 815, 461 N.W.2d 449, 1990 Wisc. App. LEXIS 729 (Ct. App. 1990) extension hearing. Section 48.299(5), Stats., permits telephone hearings unless good cause to the contrary is shown. The section applies to CHIPS custody extension hearings. Telephone hearings are recognized in the law and are an alternative means of participating in court proceedings. As such, the requirement of sec. 48.356(1), Stats., that the parent be “in court” was satisfied.

Mental Health Proceedings

Statutes

WIS. STAT. § 51.20(5). The court may determine to hold a hearing at the institution unless the individual or attorney objects.

WIS. STAT. § 55.19 (3). Telephone or video for summary hearings.

WIS. STAT. § 807.13(2). Sets forth the conditions when oral testimony admitted in ch. 51, 55 and 880 proceedings.

WIS. STAT. § 980.038. Proceedings may be conducted under this section by telephone or live audiovisual means.

Published decisions

State v. Wood, 2010 WI 17, 323, Wis. 2d 321, 780 N.W.2d 63. Defendant’s counsel in a hearing to involuntarily medicate was found not to be ineffective despite the claim on appeal that counsel should have arranged a means for private communication between the client, who was appearing by video, and the lawyer was attended the hearing in person. The client claimed he would have opted to testify had he been able to communicate privately with the lawyer. The court noted that the client did not request to speak with the lawyer privately at the time of the hearing, remained silent when given the opportunity to testify at the hearing, and, in the court’s judgment, failed to show prejudice from the fact that he did not testify at the hearing. However, in a footnote, the court stated that the

ineffective assistance argument failed due to lack of prejudice, and "we do not reach the important issue of what requirements the Sixth Amendment imposes on telephonic appearances to protect a defendant's ability to privately consult with counsel and how the requirements apply to the first prong of the *Strickland* analysis."

County of Dunn v. Goldie H., 2001 WI 102, 245 Wis. 2d 538, 629 N.W.2d 189, 2001 Wisc. LEXIS 453. Summary hearing on the issue of whether to continue the protective placement of an incompetent person may be in court or may be held by other means, such as a telephone or videoconference.

In Matter of W.J.C., 124 Wis. 2d 238, 369 N.W.2d 162, 1985 Wisc. App. LEXIS 3239 (Ct. App. 1985). Use of telephone testimony in State's mental commitment procedure posed only slight risk that patient would be erroneously deprived of his liberty where, although fact that jury was visually unable to observe doctors' demeanors when they testified by telephone might arguably have caused jury to err in finding facts, doctors were neutral and their testimony was essentially medical in character.

Unpublished decisions

In the Matter of the Guardianship of H.F., 162 Wis. 2d 630, 471 N.W.2d 317, 1991 Wisc. App. LEXIS 635 (Ct. App. 1991). Appointment of Guardian. The trial court ruled that telephone testimony was insufficient because the court would not be able to assess the doctor's demeanor and the doctor's written report was not provided by counsel. Counsel was then required to produce the doctor in person if he wished to introduce this testimony.

In the Matter of the Mental Condition of A.V.A., 158 Wis. 2d 355, 462 N.W.2d 552, 1990 Wisc. App. LEXIS 827 (Ct. App. 1990). Mental Commitment. Use of telephone testimony at commitment hearing without advance notice not permitted because it does not allow full effective cross-examination.

Traffic

Statutes

WIS. STAT. § 343.305(3). Telephone testimony permitted in administrative hearing.

WIS. STAT. § 345.42 Preliminary proceedings. Provides that "[i]n civil actions under this chapter, oral arguments permitted on motions under sec. 345.41 or 345.421 may be heard by telephone under sec. 807.13(1) [as well as] [a]ny

pretrial or scheduling conference may be conducted by telephone under sec. 807.13(3)..."

Published decisions

Town of Geneva v. Tills, 129 Wis. 2d 167, 384 N.W.2d 701, 1986 Wisc. LEXIS 1806. Trial court may permit testimony by telephone in civil jury cases if in the circumstances, in exercise of sound discretion, right to fair trial is preserved. Defendant was denied meaningful cross-examination of witness testifying by telephone where defense counsel was unable to cross-examine on basis of documents that witness elected to use and which were, by nature of the telephonic examination, withheld from counsel. It was not per se erroneous to allow telephone testimony, but the court erred in allowing it as a last-minute determination, when there was no inkling that such procedure would be used and when it became apparent that counsel was handicapped on cross-examination.

Unpublished decisions

County of Sauk v. Volker, 160 Wis. 2d 50, 468 N.W.2d 33, 1990 Wisc. App. LEXIS 1164. 807.13(2)(c), Stats., provides that in civil actions and when the proponent shows good cause, the court may admit oral testimony telephonically communicated to the court on the record, subject to cross-examination. Trial courts are not required to consider each factor listed in WIS. STAT. § 807.13(2)(c) because permitting a telephone hearing is discretionary. The trial court held that there was no showing of undue surprise or prejudice, that an effort was made to produce the physical presence of the witness, and that defendant's right of cross-examination was preserved.

State v. Moore, 114 Wis. 2d 592, 337 N.W.2d 856, 1983 Wisc. App. LEXIS 3695 (Ct. App. 1983). Unambiguously, the statutes mandate that a court must inform a defendant of his right to a jury trial when the defendant appears in response to a citation. Moore did not personally appear in response to the citation because he was informed by the clerk that he could plead by telephone, thus avoiding the expense of an extra trip to the courthouse. This court sees no compelling reason why persons who personally appear at arraignment must receive notification of the right to jury trial, while those who plead by mail (or telephone) do not have a right to the same information.

Municipal Court Proceedings

Statutes

WIS. STAT. § 800.01(1)(b), Commencement of Action. Includes video appearances.

WIS. STAT. § 800.04(2)(b) and (5). Initial appearance; stipulation of guilt; deposit. Appearances in this section may be conducted by telephone or video. Bail hearings may be by video but a defendant can appear personally before a judge for a determination of release.

Civil Proceedings

Statutes

WIS. STAT. § 767.281 (1m). Regarding resolving jurisdictional questions.

WIS. STAT. § 769.316(6). Depositions and testimony under the Uniform Interstate Family Support Act.

WIS. STAT. § 799.04(1). Small claims proceedings may be conducted under 807.13, Stats.

WIS. STAT. § 799.208. Small claims pretrial may be conducted by telephone.

WIS. STAT. § 801.53. Oral argument on change of venue motion.

WIS. STAT. § 802.06(9). Oral argument on motions under 802.06, Stats.

WIS. STAT. § 802.08(7). Oral argument on motions for summary judgment.

WIS. STAT. § 802.09(5). Oral argument on motions concerning amendments.

WIS. STAT. § 803.05(3). Oral argument on motions concerning third party practice.

WIS. STAT. § 803.06(1). Oral argument on motions concerning misjoinder and nonjoinder.

WIS. STAT. § 804.01. Protective orders.

WIS. STAT. § 804.05(8). Depositions by telephone.

WIS. STAT. § 805.12(5). Failure to make discovery; sanctions.

WIS. STAT. § 805.07(6). Motion for a protective order re subpoena.

WIS. STAT. § 805.14(5)(f). Motions after verdict.

WIS. STAT. § 805.15 (1). Motions for new trial.

WIS. STAT. § 807.04(2). Testimony by prisoner in proceedings commenced by prisoner.

WIS. STAT. § 807.05. Stipulations.

WIS. STAT. § 807.13. Telephone and audiovisual proceedings. Outlines when telephone or videoconferencing may be used in civil proceedings.

WIS. STAT. § 807.14. Interpreters acting by telephone or video.

WIS. STAT. § 813.02(1)(b). Temporary injunction.

WIS. STAT. § 822.11(2). Taking testimony in another state by telephone or video.

WIS. STAT. § 990.01(24). Provides in relevant part that "[i]n actions and proceedings in courts, a person may take an oath or affirmation in communication with the administering officer by telephone or audio-visual means".

Administrative rules

ATCP 1.20 Hearing notice. Prehearing conference may be conducted by telephone.

ATCP 1.25 Hearing. At the discretion of the Administrative Law Judge under sub. (1)(b), a witness may testify by telephone rather than in person.

DWD 75.16, Wis. Adm. Code. Parties and witnesses shall attend a scheduled hearing unless a motion has been filed at least five days prior to the hearing stating reasonable cause for an individual to participate in the hearing by a live, real time electronic means as an alternative.

DWD 140.11, Wis. Adm. Code. Telephone hearings.

Ins 5.39 (1) 3.(b), Wis. Adm. Code. A hearing or any portion of a hearing, may be held by telephone or videoconference if the ALJ determines that this method is justified for the convenience of any party or witness, and that no party is unfairly prejudiced by this method.

PC 5.03 (6)(c), Wis. Adm. Code. At the discretion of the hearing examiner of the commission, witnesses' testimony may be taken via telephone rather than in person.

Trans 113.04 (7), Wis. Adm. Code. The examiner may permit testimony by telephone if the site of the administrative review is equipped with telephone facilities to allow multiple party conversations.

HA 1.06, Wis. Adm. Code, within the discretion of the ALJ, prehearing and other conferences may be conducted by telephone.

HA 1.07(3)(c), Wis. Adm. Code, failure to appear grounds for default in a telephone or video administrative hearing.

HA 1.12(8), Wis. Adm. Code, oral argument and oral testimony in a telephone or video administrative hearing.

CVRB 1.07, Wis. Adm. Code, a party may appear in person or by telephone at the hearing.

Published decisions

Guardianship of Jane E. P., 2005 WI 106; 283 Wis. 2d 258. Video mentioned as way to evaluate subjects of guardianships located out of state.

In re Halko, 2005 WI App. 99, ___Wis. 2d ___, 698 N.W.2d 832. WIS. STAT. § 885.42(1) permits taking video depositions. See e.g. WIS. STAT. §§ 885.40 to 885.47. Commentators have pointed out the benefits of video technology in circumstances when travel is inconvenient or unduly expensive for an important witness. *See* Stuart G. Mondschein, *Lights, Camera, Action: Videoconference Trial Testimony*, Wisconsin Lawyer, July 1997, at 14, 16; *Gregory T. Jones, Lex, Lies & Videotape*, 18 U. Ark. Little Rock L.J. 613, 616 (1996). The circuit court may consider this option.

Manitowoc W. Co. v. Montonen, 2002 WI 21, ¶28, 250 Wis. 2d 452, 639 N.W.2d 726. *The use of* internet videoconferencing would provide the benefits of face-to-face settlement negotiations without an in-person meeting and the risk of service.

State ex rel Christie v. Husz, 217 Wis. 2d 593, 579 N.W.2d 243, 1998 Wisc. App. LEXIS 220 (Ct. App. 1998). Court that orders prisoner to appear at hearing in habeas proceeding for modification of her sentence by telephone means has affirmative duty to order correctional institution to arrange for prisoner to have access to telephone at time of hearing. A hearing court's failure to arrange petitioner's access to telephone for scheduled telephone hearing on motion to quash required reversal. If the prisoner is represented by counsel, the prisoner's attendance, either in person or by telephone means, may not be necessary. If the represented prisoner's appearance is necessary, and it is determined that appearance by telephonic means will be satisfactory, it is the counsel's obligation to make the arrangements for the appearance. If counsel has problems arranging the telephone appearance, he or she should seek aid from the court.

Schmidt v. Schmidt, 212 Wis. 2d 405, 569 N.W.2d 74, 1997 Wisc. App. LEXIS 820 (Ct. App. 1997). Divorce case where one party is incarcerated. The incarcerated party may also be afforded access to evidentiary hearings and arguments through a telephone link or possibly through an audiovisual link. *See* § 807.13, Stats.

Unpublished decisions

Godlewski v. Butler, 2010 WI App. 71; 2010 Wis. App. LEXIS 329. Availability of video conferencing does not remove the need for witnesses to travel from out of state to testify.

Welytok v. Ziolkowski, 2008 WI App. 67; 2008 Wisc. App. LEXIS 331. OK to let witness testify to support harassment injunction due to short time limits to hold hearing and other considerations.

In Re The Marriage of: Charmane Barber n/k/a Vanier v Kelly Barber, 2006 WI App. 223; 296 Wis. 2d 935; 2006 Wisc. App. LEXIS 896. OK to allow doctor to testify by phone - proper exercise of discretion, even though doctor couldn't see videotape evidence of ex-wife that might have suggested she was not disabled and able to work full-time.

State ex rel. Garrett v. Berge, 2005 WI App. 21, 278 Wis. 2d 811, 691 N.W.2d 926, 2004 Wisc. App. LEXIS 1057. This action was brought pro se as a writ of certiorari, which limits review to the issues made on the record. Hence, the issue as to whether Garrett was denied due process because he was unable to examine copies of documents which were displayed on an 8-inch monitor from 8 feet away was not reached. The court did comment that due process requires that the screen must allow for "the inspection of documents at a level of detail that is appropriate for defending against the specific allegations."

Balbayis Asset Consultants v. Clark, 2003 WI App. 201, 267 Wis. 2d 280, 670 N.W.2d 558, 2003 Wisc. App. LEXIS 731. Telephone pretrial upheld or adjournment request was available option for defendant unable to appear in person.

Hoyme v. Brakken, 2003 WI App. 188, 266 Wis. 2d 1060, 668 N.W.2d 562, 2003 Wisc. App. LEXIS 670. Attorney appeared by telephone in case involving injunction.

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Gehr v. Lammers, 2003 WI App. 1, 259 Wis. 2d 483, 655 N.W.2d 547, 2002 Wisc. App. LEXIS 1206 (Ct. 2002). It was held that when one party is

incarcerated, the trial court has to exercise its discretion and determine whether the incarcerated party should make an appearance or whether alternative means of providing the prisoner access would suffice and the trial court erred in ruling the party could not appear by telephone and then dismissing his small claims action for his failure to appear.

In re the Paternity of Quentin J.Z. and David A.Z., 2002 WI App. 241, 257 Wis. 2d 938, 652 N.W.2d 133, 2002 Wisc. App. LEXIS 946. Denial of telephone testimony in child placement case.

In re Marriage of Sparish v. Sparish, 234 Wis. 2d 526, 611 N.W.2d 471, 2000 Wisc. App. LEXIS 269 (Ct. App. 2000). In child custody modification action, court properly determined child should be protected from testifying in open court; no prejudice to father by allowing telephone testimony.

Stebenow v. Jacobsen, 234 Wis. 2d 151, 610 N.W.2d 512, 2000 Wisc. App. LEXIS 348 (Ct. App. 2000). Whether to admit trial testimony by telephone in civil jury cases is left to the sound discretion of the trial court.

Vang v. Emmerich & Associates, Inc., 223 Wis. 2d 801, 589 N.W.2d 456, 1998 Wisc. App. LEXIS 1475 (Ct. App. 1998). It is unclear whether the trial court granted summary judgment dismissing the complaint or determined after a telephone trial that the evidence was insufficient to demonstrate Emmerich's negligence. Because no transcript was filed, this court of appeals construed all evidentiary matters as consistent with the trial court's decision. Accordingly, the order dismissing Vang's complaint is affirmed.

Ponchik v. Eversman, 216 Wis. 2d 113, 573 N.W.2d 900, 1997 Wisc. App. LEXIS 1408 (Ct. App. 1997). The trial court dismissed Ponchik's claim and found his failure to appear for a scheduling conference was egregious and without a clear and justifiable excuse. Because of his incarceration, Ponchik was not afforded the opportunity to provide a "justified excuse" for failing to appear. The appellate court found that Ponchik must be afforded that opportunity either in person or by telephone means.

Luedtke v. Luedtke, 208 Wis. 2d 374, 1997 Wisc. App. LEXIS 84. Inmate failed to object to testimony by telephone in small claims action.

Kaftan, Van Egeren and Gilson, S.C. v. Deering, 185 Wis. 2d 916, 520 N.W.2d 290, 1994 Wisc. App. LEXIS 692 (Ct. App. 1994). Court refused to allow litigant use of telephone to call wife to produce documents to refute the allegations of opposing counsel when the party did not produce the documents during discovery as ordered.

Veum v. Temple, 172 Wis. 2d 571, 495 N.W.2d 525, 1992 Wisc. App. LEXIS 883 (Ct. App. 1992). A judgment may not be reversed or set aside or a new trial

granted on grounds of improper admission of evidence (telephonic testimony) unless it appears from examination of the entire proceeding that the error has affected the substantial rights of the party seeking relief.

Public Health

Statutes

WIS. STAT. § 252.07(9)(d) Hearing requesting confinement – tuberculosis.

Administrative rules

HFS 145.10(8), Wis. Adm. Code, hearing requesting confinement - tuberculosis by telephone or live audiovisual means.

Appeals

Statutes

WIS. STAT. §752.31(1). Oral argument in an appeal before a single court of appeals judge.

WIS. STAT. §§ 809.105(8m) and (11)(cm). Oral argument in the court of appeals and in the supreme court in a parental consent case.

WIS. STAT. § 809.17(2). Presubmission conference in the court of appeals by telephone.

WIS. STAT. § 809.22(4). Oral argument in the court of appeals.

Other

Chapter 885: Witnesses and Oral Testimony (see Appendix C)

Supreme Court rules and orders

SCR 70.39(9)(e)4. Courtrooms should include all of the following: Adequate electronic capacity to permit installation or use of telephone, X-ray viewbox, computers, videotape player, microphones and other equipment.

In re the Amendment of Rules of Civil, Criminal and Appellate Procedure: Proceedings by Telephone and Audio-Visual Means, 141 Wis. 2d xiii - xxxiii (1987).

In the Matter of the Amendment of Secs. 48.30, 804.05, 807.13, 967.08, 970.03, 971.14, 971.17, Stats.: Proceedings by Telephone and Audio-Visual Means, 158 Wis. 2d xvii - xxiii (1990).

Appendix E

Practical Tips for Participating on a Videoconferencing Committee

The first step in addressing a proposed video court plan is to meet with your staff on a local level. Consult with staff attorneys, clerical and support staff to assess the impact of video court. Don't forget to talk with private bar attorneys that take local State Pubic Defender cases. It is also important to check with the State Pubic Defender First Assistant to assess the regional impact and implications. The First Assistant can consult with the Trial Division Director if needed.

It is essential to figure out where you are going as a State Pubic Defender office before you begin to work with others in the local criminal justice system. Develop a local plan and vision for how video court should work in your legal community. Blanket opposition to video court will rarely be effective. However, using knowledge of video court practices and the law concerning video court can help to shape pieces of any local video court plan.

Identifying What You Need to Know and Obtaining Information

1. Statutes and Case Law

   It is essential that during any planning process the partners consider statutes and case law to determine whether proposed video court proceedings comply with applicable state, federal and constitutional law. Particular attention should be paid to Subchapter III of Chapter 885, Wis. Stats., entitled "Use of Videoconferencing in the Circuit Courts." It is essential that the type of proceedings proposed for video court are clearly identified and that a careful examination of relevant law is considered by any planning committee.

2. What Interests Need to be Protected?

   The local State Pubic Defender's Office needs to do a careful review of the interests that need to be protected during the video court planning process. A primary concern is the rights of clients and how they will be affected or impaired by videoconferencing in the courtroom. Representatives of the State Pubic Defender's Office are in a superior position to identify and determine the interest that need to be protected. The client's rights include:

   a. The right to be physically present in the courtroom.

   b. The right to have their counsel present with them during the proceeding.

c. The right to be provided with all documents the court examines.

d. The right to know and understand the ruling of the court and their responsibilities under the court's order.

e. The right to confidential attorney/client communications.

f. The right to hear and see everything of importance that occurs in the courtroom.

Also at stake is the public's right to observe criminal court proceedings. These issues and interests must be balanced against the suggested cost savings of video court and the need for courtroom security.

3. Identify Common Complaints and Concerns

It is important to consult other jurisdictions to determine some of the frequent complaints or concerns with the use of videoconferencing. Reviewing the experience of courtroom participants in video court proceedings is very helpful during the planning process. A frequent concern is the change in client access when video court is used. Client access refers to the frequency and opportunity for attorneys to visit with their clients before and during court proceedings. Frequently, when courts start to use video court appearances for defendants, there is a drastic change in the ability of the attorney to consult confidentially with the client before and during court. Other common complaints and concerns involve the technical ability of the videoconferencing system to deliver quality sound and picture.

It is common to hear anecdotal reports from other counties about State Public Defender experiences with video. It is important not take these at face value but to investigate them thoroughly. Talk to the entire staff in other offices when you hear reports of State Public Defender video court experiences. Take the time to travel to other counties to observe video court first hand.

4. Technical Requirements

An important consideration in the planning process is whether or not the proposed equipment is sufficient to protect the rights of defendants and meet the needs of the court and the public. It is essential that local counties do it right if they are going to do it at all. It is important for counties to follow the recommendations made in "*Bridging the Distance 2005*." The planning process should carefully review the recommendations made in BTD and should not resort to systems that are unable to deliver the necessary sound, image, and accessibility that are required to do videoconferencing the correct way. An invaluable source of information can be obtained by viewing other

video court systems in counties that use equipment and procedures similar to those being considered.

Remote video sites need to be evaluated with the same scrutiny as the courtroom itself. Because remote sites such as jails, prisons or hospitals are an extension of the courtroom, they must be able to meet the legal and technical demands of the court.

Identifying the Key Players, their Interests and their Priorities

The use of video court changes the relationship between attorney and client because someone will not be in the courtroom; either the attorney, client, or both. The appearance of defendants from remote locations will place new burdens on defense counsel that need to be assessed in the planning process. It is important to evaluate the impact of video court on attorney travel for the purpose of client consultation.

When participating in a planning process, it is essential to identify the key players and their roles in any video court proposal. The key players will vary widely from county to county. It is essential to listen carefully to the positions and motives of planning committee members. It is important to determine which participants are in closest alignment with the positions of the State Public Defender's Office and State Public Defender clients.

During the planning stage, many of the individuals on the following list will be included. Of course, this list is not exhaustive.

1. Circuit Court Judges/Court Commissioners

   The judge will ultimately be most affected by the use of videoconferencing during court proceedings. Frequently, judges will be the most active participants in the video committee but not always. Judges are motivated by the desire to save money on prisoner transport, improve courtroom efficiency, improve courtroom security, eliminate the need for producing defendants in person, or obtain state-of-the-art equipment for their individual courtrooms. It is important to assess the motives of each individual judge/court commissioner. Participants need to be reminded that if the video appearance is an extension of the courtroom, then the judge will control the video court process.

2. Sheriffs

   Sheriffs will frequently be motivated by the desire to save money in their local operating budgets by eliminating the need to transport prisoners for what are described as "routine" court appearances. Additional concerns frequently

include security in the courtroom and transportation costs when the local jail is not attached to the courtroom.

3. District Attorneys

   Traditionally, DAs have not played a large role in video court planning. The district attorney may be motivated by the amount of time that staff saves or loses in conducting video court proceedings. Additional concerns are the increased likelihood of appeal and the ease or difficulty of conducting video court appearances.

4. Probation and Parole

   Frequently probation officers will not be direct participants in video court proceedings; however, if the access to clients changes as the result of a video court proceeding, they may have a direct stake in the outcome. If jail policies make it harder to get into the jail to see clients face-to-face, PP may be directly involved.

5. County Board Members

   County board members will have a direct stake in the outcome of video court proceedings if it involves spending county dollars to fund videoconferencing equipment or changing local infra-structures. County board members will frequently be motivated by the lure of cost savings by using videoconferencing in court, but will respond to concerns about large outlays for equipment and infrastructure.

6. Media

   The media will be affected by the use of video court to the extent that their ability to film, record, or report public court proceedings will be affected by the use of videoconferencing. Frequently, the sight lines in video court are inadequate or the ability for the public to see and hear is impaired by ineffective videoconferencing equipment. Planners should consider that the media may demand and claim a right to a direct video feed from court, and the costs that accompany such a right.

7. Members of the Public including Victim- Witness Issues

   Almost all criminal proceedings are public in nature and there are constitutional issues concerning the right to a public and fair trial. The use of videoconferencing must not impair or impede the public's right to observe criminal cases. This also affects victim-witness rights as well as the rights of family members to observe their relatives in court.

The Need to Obtain Agreements

Assuming that the local Public Defender's Office has been consulted during the planning process for video court, there may be opportunities to obtain needed agreements in advance of implementation. The planning process is the opportunity to seek and obtain agreements about access to clients, the need to confer confidentially with clients and the technical needs in the courtroom. It is essential to educate the other participants in the planning committee in two key areas. First, planning participants need to be able to understand the technical needs of a video court system from the point of view of the State Public Defender's Office. It is essential that planning participants understand the need for dedicated phone lines to protect confidentiality. Sufficient cameras are important so that video court participants can see all angles of the courtroom and all participants so that the "virtual courtroom" is a reality. Sound systems need to be adequate so that participants will be able to hear each other.

The second area is educating planning participants on the demands of the criminal justice systems from the point of view of preparing a legal defense. Planning participants, especially those who are not attorneys and are not familiar with the demands placed on the system by the prosecution and defense of criminal cases are frequently unfamiliar with the stages of the criminal process and the needs of individual participants. Planning participants need to be well informed about the stages in the criminal justice process and rights and responsibilities of each participant during a criminal court hearing.

State Pubic Defender staff should not assume that judges, DAs or sheriffs understand the demands of representing criminal defendants.

Caution: Be careful what you ask for. Some counties may be quick to grant concessions on relatively unimportant matters in order to forge ahead with a video court system. It is important to prioritize State Pubic Defender needs and issues and to decide which ones cannot be compromised. Certain values and principals must be identified that should be protected at all costs. These issues need to be identified and vigorously protected.

Requesting Data and Measurements

The planning process must include a built-in method for identifying expected outcomes and measuring whether or not those outcomes are achieved. To that end, it is essential that appropriate data be requested and monitored during any video court planning and pilot projects. It is important to develop clear objectives and measurements in advance of implementing the video court system. Examples of data include the cost of video equipment and hearings, the time it

takes to conduct video court, the delay that occurs in courts and the frequency of video court hearings.

The evaluation process should also attempt to measure or account for qualitative factors. Some effort should be made to measure or evaluate the change in the attorney-client relationship with video court. Planning groups should also consider changes in the quality of justice and the impact on public trust and confidence in the courts. It may be necessary to conduct client and participant surveys to measure satisfaction with and attitudes about video court.[70]

Claims of cost savings should be carefully scrutinized. Efficiency in the courtroom and delay should also be measured. The planning committee should make every effort to measure not only shifts in cost concerning prisoner transportation but should also attempt to measure increased costs for the local Public Defender's Office, privately retained defense attorneys, and court-appointed defense attorneys who have to travel to meet with clients outside of the courtroom. Courtroom time should be treated as a commodity that can be measured and should be considered just as important as the cost of prisoner transportation. Delays relating to the difficulty of examining documents, the need for attorneys to interrupt a court proceeding to talk to their clients confidentially, and the need of the attorneys to talk to each other off-the-record should all be considered and measured if possible.

Creative strategies are necessary in the evaluation process. It may be effective to develop scenarios for criminal justice participants to practice their roles in mock video proceedings to test equipment as well as procedures that are being considered.

[70] See Appendix E for a sample Client's Video Hearing Survey form.

Appendix F

Client's Video Hearing Survey

Client:
County:
Date of Video Appearance:
Before Judge:

1. When you appeared before the Judge by video, could you:

   a. Hear what was said? Yes No
   b. Hear clearly? Yes No
   c. See facial expressions clearly? Yes No
   d. See who was sitting as judge? Yes No
   e. See your attorney? Yes No
   f. See the prosecuting attorney? Yes No
   g. See who was sitting in the gallery of the courtroom? Yes No

2. Based on what you heard and saw during the hearing:
   a. Did you understand the charge or charges against you?
   Yes No

   b. Did you know when your next court date was scheduled for?
   Yes No

   c. Did you understand what the conditions of your release were?
   Yes No

   d. Did you understand what your options for representation were?
   Yes No

3. If you were to appear in court again, would you prefer to appear by video or in person?
   By video In person

4. How did you feel about your video court experience?
   _____
   _____
   _____

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