

# The Importance of In-Person Court Proceedings

Beth McMahon

Our court system is attempting to regain some sense of normalcy after the COVID-19 pandemic dramatically disrupted court operations over the last 18 months. One issue the pandemic has highlighted is the importance and necessity of resuming in-person court proceedings.

Although “[r]emote technology has been a vital tool for courts in the midst of a public health crisis...the use of remote technology—and its possible—expansion also raises critical questions about how litigants’ rights and their access to justice may be impacted....” Bannon, Alicia and Janna Adelstein. “The Impact of Video Proceedings on Fairness and Access to Justice in Court.” *BrennanCenter.org*, Brennan Center for Justice, 20 Sept. 2020. As several studies demonstrate, remote technology can negatively impact the fairness of judicial proceedings and impede attorney-client communications.

In one study of remote proceedings, bail decisions were examined in Cook County, Illinois for a period of 8 years before and 8 years after the use of video arraignments. The study concluded, “The results are dramatic. We find a sharp increase in the average amount of bail set in cases subject to the [closed circuit television procedure], but no change in cases that continued to have live hearings.” Diamond, Shari Seidman, et al. “Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions.” *Journal of Criminal Law and Criminology*, vol. 100, issue 3, 2010, p. 870.

In fact, those defendants with hearings conducted via video suffered substantial bond “increases that ranged from 54 to 90 percent, depending on the offense.” Bannon, Alicia, and Janna Adelstein. “The Impact of Video Proceedings on Fairness and Access to Justice in Court.” *BrennanCenter.org*, Brennan Center for Justice, 20 Sept. 2020.

As a result, “[i]f there is something about the presence of a live individual that cannot be replicated, even with modern technology, then videoconferenced bail hearings cannot avoid a sacrifice of information that may threaten the quality of bail decisions, and a dehumanization that encourages a harsher response than would occur if a judge were faced with a live individual. Nor can any hearing that entails judgments about a defendant or other witness.” *Id.*

Immigration proceedings also have disparate impact if conducted virtually rather than in person. For example, a study of asylum hearings over a two-year period demonstrated that the grant rate for in-person asylum applicants is “roughly double” that of applicants heard via videoconference. Walsh, Frank M. and Edward M. Walsh. “Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings.” *Georgetown Immigration Law Journal*, vol. 22, 2008, p. 259.

In addition, a nationwide study of over 150,000 immigration removal hearings confirmed that individuals seeking relief from deportation were less likely to be granted relief when their hearings were conducted by

video. Eagly, Ingrid V. “Remote Adjudication in Immigration.” *Northwestern University Law Review*, vol. 109, no. 4, 2015, p. 966.

What accounts for this wide variance between in-person and remote hearings? For one thing, credibility assessments are adversely impacted when conducted by video. “Numerous studies have shown the overwhelming weight the court places on body language. At least 50% of any message is carried by nonverbal communication: tension in the hands, a nervous tapping of fingers, tightened lips, raised eyebrows.” Connor, Cormac T. “Human Rights Violations in the Information Age.” *Georgetown Immigration Law Review*, vol. 16, 2001, p. 217.

“Eye contact is consistently ranked as the most important element of nonverbal communication.... Thus, one of the main criticisms of the use of videoconference techniques in the courtroom has been the impossibility of maintaining eye contact because a person cannot simultaneously look at the camera and at the display monitor.” *Id.* “Furthermore, studies on effective public speakers have found that 90% of persuasive effectiveness comes from the speaker’s physical attractiveness, warmth, sympathy, movements, gestures, clothing, and voice.” *Id.*

Because videoconference technology uses a middle bandwidth filter, the “low and high frequencies of the voice are cut off. Thus, the content of the voice message is heard and understood, but some information about the emotional state of the speaker, which is carried in the higher frequencies, may be partly excluded. It is precisely this information that may be critical to judgments of the defendant’s remorse and credibility.” Wiggins, Elizabeth C. “What We Know and What We Need to Know About the Effects of Courtroom Technology.” *William & Mary Bill of Rights Journal*, vol. 12, issue 3, 2004, p. 738.

In fact, a 2017 report by the Government Accountability Office detailing the shortcomings of videoconference hearings in immigration courts revealed that all six immigration courts involved in the study experienced difficulties “assessing the demeanor and credibility of respondents and witnesses” when conducting video hearings. “Immigration Courts: Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges.” *United States Government Accountability Office Report to Congressional Requesters*, GAO-17-438, June 2017, p. 55. Half of the immigration officials from the courts surveyed “changed their assessment of a respondent’s credibility that was initially made during a [video teleconference] hearing after holding a subsequent in-person hearing.” *Id.*

Lack of physical proximity can also unconsciously affect a judge’s decision and dehumanize the defendant. While physical proximity “promotes psychological closeness,” creating “a sense of mutuality, of connection, common ground, and shared understandings” and resulting in “higher levels of credibility, trust, and influence,” physical distance produces psychological distance. Burgoon, Judee K., et al. “Testing the Interactivity Principle: Effects of Mediation, Proximity, and Verbal

and Nonverbal Modalities in Interpersonal Interaction.” *Journal of Communication*, vol. 52, 2002, p. 662.

“By confining an [individual] to a video screen, the human element disappears, nonverbal communication is largely negated, and any ability the [defendant] might have had to convince the judge of the veracity of her story or to prove that she is worthy of the judge’s sympathy is severely limited.” Connor, Cormac T. “Human Rights Violations in the Information Age.” *Georgetown Immigration Law Journal*, vol. 16, 2001, p. 209.

Further, remote proceedings adversely impact the attorney-client relationship and impede defense counsel’s ability to render effective assistance. Courts conducting video hearings create a dilemma: Should defense counsel remain present in the courtroom while the client appears by video, or should defense counsel appear by video alongside the client? Both choices have negative implications.

If defense counsel remains in the courtroom while the client remains in the jail, the ability to confer confidentially is compromised. When communicating remotely, all exchanges become “audible to the judge, the prosecution, the members of the public in the courtroom, and other inmates and jail personnel located in the room from where the defendant’s images are being projected. Communications that would be privileged if the defendant were present become very public.

All the defendant’s statements will be recorded, and could be used against him.” Cimino, Edie Fortuna, et. al. “Charm City Televised & Dehumanized: How CCTV Bail Reviews Violate Due Process.” *University of Baltimore Law Forum*, vol. 45, no. 1, 2014, pp. 84–85. See also Poulin, Anne Bowen. “Criminal Justice and Videoconferencing Technology: The Remote Defendant.” *Tulane Law Review*, vol. 78, 2004, pp. 1126–27 (“In the courtroom, the defense attorney can nudge the defendant if the defendant is not acting appropriately. The defense attorney can subtly remind the defendant to look up or not to slouch, fidget, or mutter. That type of interaction is difficult to accomplish in a nonintrusive manner when the defendant and the attorney are in separate places, connected at best by telephone.”)

Additionally, having defense counsel appear separately from the clients “often leaves defendants feeling deserted and alienated,” believing they are alone in the process. Ashdown, Gerald G. and Michael A. Menzel. “The Convenience of the Guillotine: Video Proceedings in Federal Prosecutions.” *Denver University Law Review*, vol. 80, 2002, pp. 94–95.

On the other hand, having defense counsel appear by video alongside her client also carries adverse consequences. It interferes with defense counsel’s ability to speak with witnesses prior to the hearing and to “gauge the emotional interactions and mood of the courtroom as effectively to determine when and how to intervene on the client’s behalf.” Poulin, Anne Bowen. “Criminal Justice and Videoconferencing Technology: The Remote Defendant.” *Tulane Law Review*, vol. 78,

2004, pp. 1111–12.

This arrangement also discourages efficient resolution of cases, as there is no longer an opportunity to easily confer with the prosecutor during the hearing. Having the prosecutor in the courtroom and defense counsel appearing remotely places defense counsel at a distinct disadvantage.

Studies suggest that when some individuals are in one physical location and others are separated by videoconference, “alliances form among those who are in the same physical location. The court’s perception of the attorney is likely to be influenced by the distance, diminishing the professional stature of the attorney in the court’s eyes.” *Id.*

“Perhaps more importantly, if a defense attorney attends the proceeding from the side of her incarcerated client, while the prosecutor is physically present in the courtroom only a few yards from the judge, this may support the defendant’s belief that his attorney is isolated from the system, that prosecutors are insiders, and that the judge is not a fair and impartial adjudicator of his case.” Ashdown, Gerald G. and Michael A. Menzel. “The Convenience of the Guillotine: Video Proceedings in Federal Prosecutions.” *Denver University Law Review*, vol. 80, 2002, pp. 94–95.

The negative side of virtual technology was certainly revealed as school systems, students and parents struggled with remote learning. In addition to technical issues, there were also problems with engagement and fostering relationships between students and teachers.

In the Jefferson County Public School System, “[n]on-traditional instruction participation rates dropped to 88% in February just before in-person learning resumed. That’s 12,000 students who weren’t participating in any form of virtual learning.” Grace, Caray. “JCPS Superintendent Talks about ‘Lost Learning Time’ from Past School YEAR, Lessons Learned.” WLKY, 24 June 2021.

Further, an “unintended consequence of remote learning, according to many researchers, is a widening education gap, with students who lack access to technology and support at home scrambling more than ever to keep up.” Vasan, Paula. “Families, Teachers Say Digital Divide among Students Is More Pronounced amid Covid-19.” WHAS11, 2 Sept. 2020. Similarly, defendants in the criminal justice system often suffer from this “digital divide,” lacking the means to access technology.

These studies and experiences underscore what criminal law practitioners already know: there is no substitute for having the client in person, in the courtroom, with his attorney for substantive court proceedings, including at arraignment. While remote technology may have been a necessary stopgap measure due to the pandemic, the fact remains it is not a viable long-term solution and it undermines rights guaranteed under the federal and state constitutions.

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**Gary R. Hillerich** and **Patrick S. McElhorne** are pleased to announce the relocation of their law offices to: One Riverfront Plaza, 401 W. Main St., Ste. 950, Louisville, KY 40202. (502) 736-8100.

Applegate Fifer Pulliam is pleased to announce that **Sara Rocke** has joined the firm as an associate attorney. A native of Floyds Knobs, Rocke obtained her J.D. from the University of South Carolina School of Law in 2016. She is admitted to practice law in Indiana and Kentucky. She will concentrate her practice in the areas of residential and commercial real estate transactions.

Gwin Steinmetz & Baird is pleased to announce that **Alex J. Kuebbing** has been promoted to Member. Kuebbing began his law career as a summer law clerk in 2009 with Gwin Steinmetz & Baird. After earning his J.D. from the University of Kentucky College of Law in 2011 he joined the firm as an Associate. Through the years he has earned the trust and respect

of his partners and clients becoming an integral part of the firm's insurance practice. Kuebbing's practice areas are litigation, insurance coverage and bad faith, motor vehicle liability, product liability and appellate.

**DBL Law** has been recognized as a Gold COVID Stops Here workplace for achieving a 90% vaccination rate. The COVID Stops Here campaign recognizes Kentucky workplaces that have achieved widespread vaccination against COVID-19. Organizations that have achieved at least a 70% vaccination rate are eligible to receive a designation. The Kentucky Chamber of Commerce developed the COVID Stops Here campaign to celebrate workplaces that are leading the fight to stop COVID-19—and to encourage more organizations to join their ranks.

Managing Intellectual Property (Managing IP) magazine recently selected Stites & Harbison attorney **Mandy Wilson Decker** to the 2021 edition of Managing IP's "Top 250 Women

in IP." This is the seventh time Decker has been honored on this list, and she is the only attorney honored from Kentucky. The "Top 250 Women in IP" list recognizes the leading women IP lawyers at the international level. Decker is a Member (Partner) of Stites & Harbison based in Louisville and Lexington. Her practice focuses on intellectual property protection strategy, including counseling clients on infringement, validity and patentability, transfer of intellectual property, patent drafting and patent prosecution.

Governor Andy Beshear has appointed Stites & Harbison attorney **Michael Kleinert** to the Kentucky Board of Physical Therapy (KBPT). KBPT consists of seven members appointed by the Governor of the Commonwealth, six working in the physical therapy profession and one public member. The mission of the board is to ensure that licensure qualifications and standards are met, and that appropriate disciplinary action is taken when violations of

the Practice Act happen. Kleinert is a Member (Partner) of Stites & Harbison based in the Louisville office.

World Intellectual Property Review (WIPR) has named Stites & Harbison attorney **Mari-Elise Paul** as one of 20 Trailblazers profiled from around the world in WIPR's Diversity Trailblazers 2021 list, which celebrates the achievements of those making positive changes towards driving diversity and inclusion in the IP field. WIPR's 2021 Trailblazers include women with a decade or less of experience in the IP industry who have already made a significant mark on the IP industry and have made efforts to promote diversity and inclusion within the sector. Paul is a full-time attorney and mother of a daughter—a heart transplant recipient—who faced an extremely challenging first year of life. Paul's goal is to serve as a role model for other women in the legal profession with medically fragile children who also want to thrive in the profession. ■

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Fortunately, Jefferson County Courts have recently resumed more in-person proceedings. As of July 1, inmates in Jefferson County have once again been permitted to appear in person in all courtrooms, except district arraignment court. For the defendants' sake as well as the integrity of the judicial system, remote practices must be discontinued in substantive criminal proceedings, including at arraignment. "A court's moral authority rests on the perception that its proceedings are fair and just. Public confidence in the judicial system depends on this perception. The remarkable resiliency of this confidence is something we ought not take for granted, and we should eschew any practice that threatens to demean the dignity of or reduce respect for the courts." Ashdown, Gerald G. and Michael A. Menzel. "The Convenience of

the Guillotine: Video Proceedings in Federal Prosecutions." *Denver University Law Review*, vol. 80, 2002, pp. 94-95, quoting Letter from Judge Joseph R. Goodwin, District Court Judge for the Southern District of West Virginia, to Judge Robin J. Cauthron, Chair, Defender Services Committee (Sept. 6, 2001).

\*Special thanks to Brenna Twohy, Staff Attorney at the Louisville Metro Public Defender's Office, for her contributions to this article.

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