

COMMUNICATING WITH CLIENTS VIA VIDEOCONFERENCING: WHAT DEFENSE ATTORNEYS ARE SAYING

Eric T. Bellone, JD/PhD*

I. INTRODUCTION

Criminal courts have increasingly turned to videoconferencing as they struggle to balance large caseloads and limited resources.¹ Across the country, as court budgets are consistently cut year after year,² courts have embraced videoconferencing as a means to cut costs and process their mounting caseloads. Videoconferencing has introduced a new means of

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¹ C. McKAY, *Video Links from Prison: Court "Appearance" within Carceral Space*, 14 L., CULTURE, & HUMANITIES 242 (2018). The policy implications detailed by the author include that effective communication is crucial to ensuring defendants perceive their experiences as fair and that courts should continually work to improve communications.

² M. Vuono, *Will Sequestration Impair Timely Justice?*, 15 LAWYERS SJ 3 (2013). Aaron Haas, *Videoconferencing in Immigration Proceeding*, 5 PIERCE L. REV. 59 (2006).

communication in the courtroom. As such, a crucial unanswered question is whether videoconferencing reduces necessary communications between defense attorneys and clients. Critics fear that such a dangerous loss of communication would hinder justice.

The right to counsel includes open, trusting, and thorough communication, both direct and nuanced, between defense attorney and client.³ It is essential that the criminal justice system, and especially the court system, foster an environment where defendants sense that courtrooms are fair and just.⁴ To do this, courts focus on improving communications.⁵ While there is

³ See A. Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U.L. REV. 1449, 1452, 1469 (2005). (Anything that disrupts the free flow of private communications between attorney and client effectively silence the defendant. (“Speech is the constitutionally celebrated vehicle by which defendants have their ‘day in court’ enforce or waive their constitutional rights, tell their stories to the jury, persuade the judge of proper punishment, and communicate with their constitutionally guaranteed counsel.”) (Emphasis added) *Id.* Zachary Hillman, *Pleading Guilty and Video Teleconference: Is a Defendant Constitutionally Present When Pleading Guilty by Video Teleconference*, 7 J. HIGH TECH. L. 41 (2007).

⁴ Harvard Law Review Association: Developments in the Law, *Access to Courts: Access to Courts and Videoconferencing in Immigration Court Proceedings*, 122 HARV. L. REV. 1181, 1182, 1192 (2009). (Videoconferencing obstructs the fact-finding process and prevents courts from fulfilling the adjudicative function for which they were designed.).

⁵ See M. Somjen Frazer, *The Impact of the Community Court Model on Defendant Perceptions of Fairness*, CTR FOR ST. CT. INNOVATION 24

an increase in the use of technology throughout the criminal justice system (e.g., electronic bracelets and surveillance cameras), the courtroom is different. Fundamental fairness and due process requirements mandate that “the court must be alert to avoid practices that undermine fairness of the fact-finding process.”⁶ Further, more than the constitutional issues, the use of videoconferencing in the courtroom may unfortunately be viewed as “an affront to the very dignity of the courtroom and the decorum of judicial proceedings that the judge is seeking to uphold.”⁷

Effective communication is crucial to ensuring that defendants perceive their experience as impartial and successful.⁸ It begs the question of whether justice is served if communication is hampered by a medium

(2006). (This research focused on the perception of fairness in different court models. It was found that the clearer the communication between the defendant and all the other participants in the court, including his defense attorney, the more positive their perception of justice. This emphasis on clear communications is analogous to the use of videoconferencing. If videoconferencing perceptively diminishes communications between a defendant and their attorney, then their substantive right to adequate counsel and procedural rights have been diminished.)

⁶ United States Court of Appeals, Second Circuit, Ronald Davidson v. Dean Riley et. al., 44 F.3d 1118, 1122 (1995).

⁷ Davidson, at 1122.

⁸ McKAY, 14 L., *Culture, & Humanities* 242(2018).

where the defendant does not physically make an appearance in courtroom but appears remotely.

The effect of videoconferencing on attorney-client communications is not well studied.⁹ This Article addresses the claim that videoconferencing may be detrimental to attorney-client communications specifically when the attorney is in the courtroom, but the client is at a remote location such as a jail or prison. The data does indicate there is a difference between the quality of private communications between defense attorney and client via videoconferencing.

II. DEFINING THE MEDIUM

Videoconferencing is an interactive telecommunication technology that allows people in two or more locations to interact (via two-way video

⁹ Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 L. & POL'Y 212 (2006). (The authors confirm that there is little empirical information concerning the use of videoconferencing in criminal proceedings. The effects of videoconferencing on the behavior of the participants and its effects on defendants' rights needs to be reviewed.)

and audio transmissions) simultaneously.¹⁰ It aims to improve the exchange of information between users electronically when personal interaction is not possible or convenient.¹¹ It provides both synchronous audio and visual of conversation¹² through a system of monitors, microphones, cameras, computer equipment, and other devices.¹³

Advocates of videoconferencing maintain, it eliminates the physical risk to officers who transport

¹⁰ L.B. Varvonese, E. Ling, R. Joy, & S. Kobar, *How Video Changes the Conversation: Social Science Research on Communication over Video and Implications for the Criminal Courtroom*, Center for Court Innovation (2020), www.innovatingjustice.org/sites/default/files/media/document/2020/Monograph_RemoteJustice_12932020.pdf.

¹¹ Pauline Ratnasingham, *The Importance of Trust in Electronic Commerce*, 8 INTERNET RESEARCH: ELEC. NETWORKING APPLICATION & POL'Y 313 (1998). (This research focuses on issues of trust in electronic commerce. It concludes that confidence in a trustful relationship is necessary to reduce the threat of a breakdown of effective communications.)

¹² Ernst Bekkering & J.P. Shim, *i2i Trust in Videoconferencing*, 29 COMM'NS ACM 103 (2006). (This definition was established many years ago from the beginnings of the use of videoconferencing-like technology dating back to the 1964 New York World's Fair where the PicturePhone was introduced.) Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089 (2004).

¹³ ROSALIE T. TORRES, HALLIE PRESKILL, MARY E. PIONTEK, EVALUATION STRATEGIES FOR COMMUNICATING AND REPORTING 204 (2ND. ED. 2005). (Cautions that the use of technology impedes communications and highlights specific strategies and techniques to minimize such impediments.)

and secure defendants to and from a court hearing.¹⁴ While this may relieve a burden on the government, literature and case law illustrate how negatively a defendant can be viewed in the courtroom via videoconferencing.¹⁵ Some defense attorneys have reported varying degrees of discomfort with the process.¹⁶ They believe videoconferenced hearings lack the dignity and decorum of a personal appearance before the court.¹⁷ The main concern, by far, is that videoconferencing interferes with the communication between attorney and client necessary for a proper

¹⁴ Robert H. Philibosian, et al., *Video Arraignments and its Potential for use in the County Criminal Justice System*, LOS ANGELES COUNTY CITIZENS' ECONOMY & EFFICIENCY COMM'N 6 (2004). (This study states that some defense attorneys supported the use of videoconferencing because videoconferencing facilities at the court routinely enabled defense attorneys to interview in-custody clients without the need to the detention facility. Given the communication difficulties stated National Center for State Courts' (NCSC) survey (*See Data Section*), a large percentage make no accommodations for private communications between attorney and client.)

¹⁵ Frazer at 24. *See also* *Illinois v. Allen*, 397 U.S. 337 (1970).

¹⁶ E. Nir & J. Musial, *Zooming In*, 31 SOCIAL & LEG. STUDIES 725 (2022).

¹⁷ David A. Davis, *Talking Heads – Virtual Reality and the Presence of Defendants in Court*, 75 FLA. BAR J. 27 (2001). (The author states that the courtroom is more than a mere location with seats for a judge, jury, witnesses, defendant, prosecutor, defense, counsel, and public observers; the setting that the courtroom provides is an important element in the constitutional conception of a trial contributing to the dignity essential to the trial process.)

defense.¹⁸ More critics cite the physical separation of defendant and counsel as a major detriment. The consensus among these legal scholars is that the courtroom is the wrong place for such experiments.¹⁹ The impact of videoconferencing on the ability of attorneys and defendants to communicate and trust each other must be determined on legal and social scientific grounds. The key research question is, does videoconferencing dilute the quality of justice?²⁰

Critics question how videoconferencing is used in the criminal justice system.²¹ The Constitution, the Rules of Evidence, and the Rules of Criminal Procedure are the cornerstones of fairness and

¹⁸ Z. Given-Wilson & A. Memon, *Seeing is Believing? A Systemic Review of Credibility Perceptions of Live and Remote Video-Mediated Communication in Legal Proceedings*, 36 APPLIED COGNITIVE PSYCHOLOGY 1168 (2022). (often concerning the potential dehumanizing effect of defendants, attorneys, and judges)

¹⁹ See Johnson & Wiggins, *supra* note 9, at 223. The use of videoconferencing in courtrooms before the effects of the technology on the legal process and the rights of the defendant are fully understood is problematic.

²⁰ Poulin, *supra* note 12, at 1104. The author states that if videoconferencing technology reduces client-attorney contact by separating the defendant from the defense attorney, then courts should instead devote those resources to supporting representation of incarcerated defendants and improving the quality of justice.

²¹ See Michael A. Stodgill, *Permitting the Use of Videoconferencing in Civil Commitment Hearings*, 55 MD. L. REV. 1001, 1016 (1996).

procedural justice.²² Included in this foundation is the ability of defendants to consult with their attorneys at key times. The Rules of Evidence were written to ensure that evidence with high probative value is admitted, while evidence that does not is minimized. The Rules of Evidence consider the elevated standard of proof for an individual accused of a crime, punishable by loss of liberty or death. Any change that is made as to how attorneys and clients communicate must be done to ensure a correct outcome. Creating outcomes that are more just is a benefit to all, ensuring fundamental fairness and conferring legitimacy to the legal process. Videoconferencing may change this dynamic. The use of videoconferencing must be examined with respect to fairness and procedural justice, because it represents a change to the basic rules.

Every criminal defendant has a constitutional due process right to be physically present at all critical stages of their criminal proceeding.²³ Courts have

²² Poulin at 1105.

²³ See Hillman, *supra* note 3, at 41. See *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (Courts have been attempting to determine what

generally found a defendant's presence to be a constitutional necessity because the defendant's attendance affects perceptions and outcomes.²⁴ An essential part of this process is providing a defendant a way to speak privately with their attorney.²⁵

This lack of easy communication during videoconferencing obviously detracts from the attorney-client relationship and the private communications between them.²⁶ For critics, it highlights the issues and detrimental impact that

"physical presence" means ever since.). *See also* Crawford v. Washington, 541 U.S. 36 (2004).

²⁴ Shari Seidman Diamond, Locke E. Bowman, Manyee Wong, & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 3 J. Crim. L. & Criminology 869, 882 (2010). Given the example of sentencing where the Fifth Circuit determined that sentencing a defendant by videoconferencing risks the loss of the human element. The technology creates a "disconnect" between a living person and a picture of a person on a screen.

²⁵ *See* Diamond et al., *supra* note 24, at 899. Studies that find that business meetings differ little from face-to-face meetings are not analogous to attorney-client interactions at criminal hearings and/or trials. The dynamics of these situations are different as the average criminal defendant is markedly different from that average businessperson in terms of education, familiarity with videoconferencing technology, and nature of such communications.

²⁶ *See Id.* This article highlights the 2002 case of *Rusu v. INS*, 296 F.3d 316 where the respondent participated in his hearing from a detention facility while his counsel, along with the immigration judge, where convened in a courtroom many miles away. During this hearing, the reviewing court recognized that the participants' mutual inability to understand each other at times.

videoconferencing has on attorney-client communications.²⁷ They maintain the use of videoconferencing leads to decreased personal contact between users and the possible alienation of defendants in the criminal justice system.²⁸ Via videoconferencing, there is often no easy way for privileged conversations between attorney and client.²⁹

III. HOW PEOPLE COMMUNICATE IN THE JUSTICE SYSTEM

How information is assessed depends on how it is gathered. Some theories can guide the research design of this thesis by the types of variables used from the analyzed data set as related to the impact of videoconferencing on attorney-client private communications in the courtroom. In addition, these

²⁷ Harvard Law Review Association, *supra* note 4, at 1189.

²⁸ D. Ariturk, W.E. Crozier, & B.L. Garrett, *Virtual Criminal Courts*, UNIVERSITY OF CHICAGO LAW REVIEW ONLINE 57 (2020).

²⁹ E.T. Bellone, *Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom*, 8 J. COMMERCIAL L. & TECHNOLOGY 24 (2013). No communication or limited communications (communications that limited non-verbal communications) is a problem of videoconferencing in many jurisdictions.

theories guided the types of questions asked of the attorneys interviewed to shed light on such impact.

The American criminal court system strives for a set of rules to deliver fundamental fairness and procedural justice. This process-driven system struggles to reach the desired outcome: that defendants are found guilty only if they are found to have committed a crime, through strict faithfulness to the legal process.³⁰ Strict adherence to the process, as well as an expectation of reliability on the part of the society administering that process, is necessary to ensure consistency in those proceedings.³¹ At its best expression, it is through that consistency that the court system arrives at correct outcomes and legitimacy.³²

³⁰ *Id.* The legal process (and the strict adherence to procedure) gives legitimacy to the criminal justice system. Without adherence to fair, just rules, the process breaks down distrust of authority breeds through society. Fair and consistent rules are needed to legitimize the system. The danger of videoconferencing is that it has not been researched for its fairness to the defendant.

³¹ *Id.* The dignity of the defendant must be maintained as well as being fair and consistent. Human dignity must be an element of the criminal justice system as well as due process and equal protection. When this is lost, it erodes the legitimacy of the system. Videoconferencing has a danger of dehumanizing defendants to an extent that it may further compromise a system that is already viewed with a jaundiced eye.

³² *Id.*

A defendant's speech has personal, dignitary, and democratic import beyond being instrumental to a criminal case.³³ That speech is perhaps the quintessential example of an individual defending their life and liberty against the state.³⁴ Only the government can bring a criminal case, imprison, or execute an individual. This extraordinary power calls for strict adherence to legitimate rules.

Some legal scholars believe that videoconferencing may cause defendants to underestimate the importance of the proceedings. Judge Joseph Goodwin, of the southern district of West Virginia, believes that no video monitor can exert the same psychological impact as a person present in the courtroom. A judge in robes presiding on the raised bench over the proceedings, the witnesses, the attorneys, the families and spectators, the flags, the seals, and the armed bailiffs are all elements of a courtroom that invest solemnity, dignity, and seriousness. They are more than mere trappings. These

³³ See Natapoff, *supra* note 3, at 1450.

³⁴ See *id.* at 1451.

elements are designed to impel people to reflect on the legal process and their responsibilities to the law and greater society. Both the form and the process are pillars that support the structure of the criminal justice system just as ceremony and ritual reinforce religion practices.³⁵

Judge Goodwin further stated that videoconferencing may taint the public's perception of a criminal court's integrity. He said the court's moral authority rests on the perception that its proceedings are humane, fair, and just.³⁶ The criminal court process depends on this perception and should not take this confidence for granted. Practices that threaten to demean the dignity of defendants will likely reduce respect for the court and imperil the criminal justice system. Given the possible impact on effective, private communication between attorney and defendant and

³⁵ Gerald G. Ashdown & Michael A. Menzel, *The Convenience of the Guillotine: Video Proceeding in Federal Prosecution*, 80 Den. U. L. Rev. 63 (2002), at 68 (quoting a letter from Judge Joseph Goodwin, District Court Judge for the Southern District of West Virginia, to Judge Robin J. Cauthron, Chair, Defender Services Committee (Sep. 6, 2001)).

³⁶ *Id.* Communication problems compromise the legitimacy of the courtroom. Any impairment can cause mistakes. Videoconferencing is supposed to enhance communication, when it does not it causes problems it is detrimental to the system.

possible results in the lack of adequate legal representation, videoconferencing's impact on communication cannot be denied.

IV. COMMUNICATION IS NOT ALWAYS COMMUNICATIVE

The word “communicative” describes the ability to exchange thoughts, feelings, and ideas.³⁷ Body language is important in establishing trust between people, but videoconferencing limits the ability to read non-verbal gestures and cues.³⁸ In assessing communication, some of the strongest predictors of believability concern the speaker's confidence and consistency.³⁹ In videoconferencing, many non-verbal cues, including gaze and deictic gestures, are dependent on the spatial faithfulness of the system.⁴⁰

³⁷ Communicative, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/communicative>.

³⁸ Cameron Teoh et al., *Body Language and Gender in Videoconferencing*, Info. Sci. Postgraduate Day, 9, 10 (Oct. 2010) (This study identified the importance of body language and eye- and gaze contact as well as the consideration of gender as important contributing factors for effective remote communications.).

³⁹ *Id.* at 170.

⁴⁰ David Nguyen & John Canny, *MultiView: Improving Trust in Group Video Conferencing Through Spatial Faithfulness*, CHI 2007 PROCEEDINGS-TRUST & ENGAGEMENT 1465 (2007).

Any technical problem can render the exchange worthless.⁴¹ During initial meetings that establish rapport and trust, non-verbal gestures and cues between client and attorney as vital for making informed decisions concerning the case.⁴² Research confirms that body language and eye contact are important contributing factors for effective communication.⁴³

People experience, perceive, and use videoconferencing in significantly different ways.⁴⁴ Communicating via videoconferencing is a learned skill; speaking into the camera and not the monitor (screen) to address the other person makes a difference. When the speaker looks only at the monitor and not the camera, it appears to the listener that the speaker is not

(Videoconferencing systems are often used in group-to-group meetings where spatial distortions are exacerbated and this research concludes that such systems negatively affect trust patterns.)

⁴¹ David M. Fetterman, *Videoconferencing On-Line: Enhancing Communication over the Internet*, 25 EDUCATIONAL RESEARCHER 23, 26 (1996). (Although the research is dated, the conclusions reached are valid. Situations that have a negative impact on the quality of the videoconferenced communications will likely degrade the attorney-client relationship.)

⁴² *Id.* at 10.

⁴³ Teoh et al., *supra* note 38, at 9.

⁴⁴ *Id.* at 10.

looking at them. Lack of eye contact, in western culture, is considered a sign of deception, leading to feelings of mistrust.⁴⁵ Humans are highly skilled at perceiving eye contact, and the negative effects of failing to maintain eye contact while speaking impacts the promotion and maintenance of trust.⁴⁶

V. TRUST

Teamwork and trust is necessary to the relationship between attorney and client, and “teams” with high degrees of trust function more effectively.⁴⁷ Trust is

⁴⁵ Bekkering & Shim, *supra* note 12, at 105-106. Researchers state that measuring trust can be accomplished in several ways. First, trust may be measured through certain behaviors such as delegating a task (as a client does with their attorney). Another way is through social dilemma games where participants are rewarded for higher levels of trust. (This happens in the attorney-client context where clear communications between attorney and client result in information being exchanged that yield positive outcomes for the client.) And finally, trust can be measured by having the participants report their levels of trust on a questionnaire. D.M. BINDER, THE RELATIONSHIP BETWEEN NEED FOR COGNITION, ARGUMENT STRENGTH, AND THE PERSUASIVENESS OF COURTROOM TECHNOLOGY (2006).

⁴⁶ *Id.* at 107.

⁴⁷ Corbitt et al., *infra* note 85, at 1 and 7. Complex relationships need high levels of trust in order to be efficient and effective. This research concluded that for trust to be established and maintained, participants must meet work expectations early in the relationship where the issues with videoconferencing inhibit work expectations and trust negatively impacting the attorney-client relationship.

particularly critical in new relationships that, like partnerships, take time to establish.⁴⁸ Trust forms more slowly between people speaking via videoconferencing compared with traditional face-to-face conversations.⁴⁹ Trust, like rapport and partnership, takes time to establish in the initial phase of any relationship.⁵⁰ The trust formed by videoconference encounters is fragile.⁵¹ High trust teams are more effective than low trust teams.⁵² People involved in videoconference negotiations experienced the feeling of less trust amongst them.⁵³

⁴⁸ Ratnasingham, *supra* note 11, at 341.

⁴⁹ Nathan Bos, et al., *Being There Versus Seeing There: Trust Via Video*, SHORT TALKS 292 (2001). (The study examined the emergence of trust in four different communication situations: face-to-face, videoconferenced, audio, and text chat scenarios. They noted how trust emerges in mediated communications.)

⁵⁰ Ratnasingham, *supra* note 11, at 341. Often a limited time is available for clients and lawyers to establish such a relationship in a criminal case, especially where the attorney is court appointed or a public defender. Because of this limited time, trust needs to be established as quickly as possible. Any medium that inhibits or reduces the establishment of trust must be reviewed.

⁵¹ Bos, et al., *supra* note 49, at 292. The authors noted that videoconferenced and audio communications took some time to catch up with face-to-face groups in developing trust. Often the decisions needed and the relationship between an attorney and a criminal defendant do not have the time needed to ‘catch up.’

⁵² Corbitt et al., *infra* note 85, at 2.

⁵³ Teoh et al., *infra* note 79, at 319. The research explains two possible reasons for a lack or drop in trust. The first is that due to the competitive, mixed-motive nature of the environment, people expect

There are three stages of trust: 1) deterrence-based trust; 2) knowledge-based trust; and 3) identification-based trust. The first leads to the next, with identification-based trust being the highest form. Further, the development of trust is the same for all types of relationships be they romantic, manager-employee, or client-attorney.⁵⁴

Trust can be difficult to observe and measure as operationalizing the variables can be problematic.⁵⁵ It can be difficult to build trust via videoconferencing due to a lack of prior familiarity with each other, prior shared experiences, or without expectations of a common future.⁵⁶ Low levels of trust can be attributed to: 1) the general uncertainty of the users of the technology (videoconferencing); 2) the lack of face-to-

untrustworthy behavior and the body language endemic in videoconferencing reinforces judgments of untrustworthiness. Second, due the nature of the task, people are less trustworthy.

⁵⁴ Ratnasingham, *supra* note 11, at 315. Deterrence-based trust is grounded in the fear of punishment and emphasizes utilitarian considerations to maintain a relationship. Knowledge-based trust is where knowledge of the other person (attorney to a client) and the information that is passed between the two builds trust. And Identification-based trust is based on empathy and common values between two people (attorney and client) where this trust revolves around a common task such as a court hearing or trial.

⁵⁵ *Id.*

⁵⁶ Ratnasingham, *supra* note 11, at 316-317.

face introductions; 3) the lack of enthusiasm and initiative among the parties; and 4) the unpredictability of communications between the users.⁵⁷

Videoconferencing may reduce levels of trust as compared to face-to-face meetings.⁵⁸ This research has found that people exhibit more cooperative behaviors and have greater trust in their interactions when communicating face-to-face than in a mediated environment.⁵⁹ The quality of communication between people increases the learning capacity that comes from shared information, which can contribute to a faster and stronger development of trust.⁶⁰ A poor quality video can create artificial cues associated with lying, and are thus detrimental to promoting trust.⁶¹ Videoconferencing also inhibits trust by distorting

⁵⁷ *Id.* at 317.

⁵⁸ Nguyen & Canny, *supra* note 40, at 1466. In face-to-face meetings, each participant in the meeting has their own unique perspective defined by his position. Videoconferencing usually only has one camera and that single view is shared by all participants. No matter what angle the participants take, they all take on a shared and perhaps incorrect perspective, defined by the position of the camera.

⁵⁹ *Id.* The authors highlight issues of perspective invariance and the Mona Lisa Effect detailing the effect of Mona Lisa's eyes following one as he walks around.

⁶⁰ Bekkering & Shim, *supra* note 12, at 105.

⁶¹ *Id.* A slow signal makes it appear that the speaking is hesitating, and hesitation in answering is generally considered a sign of lying.

conversational turn-taking cues affecting the normal flow of conversation.⁶²

Trust in electronic communications reinforces the prospect of continuity in a relationship and a commitment to extend relationships.⁶³ The more virtual a relationship, the more the people involved in the relationship need to meet in person. Videoconferencing requires trust to make it work. Research shows that technology alone is not enough.⁶⁴ Should videoconferencing lead to trust being broken between attorney and client, extra attention will then need to be paid to repair the situation, ideally in person.⁶⁵

VI. TRUST AND ATTORNEY-CLIENT COMMUNICATIONS

Defense counsel represents a defendant accused of a crime, a counterweight to the prosecutor. Navigating

⁶² Bekkering & Shim, *supra* note 12, at 105. The authors note the subtleties of tone of voice or eye contact involved in conversational turn-taking.

⁶³ *Id.* at 313.

⁶⁴ *Id.* at 316.

⁶⁵ See Bos et al., *supra* note 49, at 292.

the client through the complexities of criminal law and procedure is the job of defense counsel. A defense counsel has a duty to zealously defend their client while requiring the prosecution to prove every element of the charges beyond a reasonable doubt. Defense counsel advises and guides the defendant through the multiple stages of the criminal justice process: arrest, arraignment, the initial appearance/preliminary hearing, bail hearing, other pre-trial hearings, trial, and, if necessary, appeal. Defense counsel explains what is happening at every stage in the justice process and helps the defendant understand their rights. They deal with the prosecution and safeguard against governmental overreach. Legislation and the courts have enacted Constitutional protections, the rules of evidence, and the rules of criminal procedure for the protection of citizens accused of a crime.⁶⁶ Their duties include investigating the crime, interviewing the accused, contacting the prosecutor (including plea bargain negotiations), interviewing witnesses and police, preparing for trial, representing the accused at

⁶⁶ Poulin at 1105.

pretrial hearings, representing the accused at trial, and, if necessary, representing at sentencing and preparing an appeal.⁶⁷

Trust is believing that someone is good and honest, will not harm you, and that they are safe and reliable.⁶⁸ Attorneys and clients typically “size each other up” during their relationship: they evaluate each other’s character, demeanor, experience, the nature of the offense, the defendant’s prior record, and a multitude of other factors that cement (or not) the necessary trust for a working relationship. Critics argue that videoconferencing may impede this trust building process.⁶⁹ Counsel and defendant are the critical sources in determining how to proceed with a defense. The courtroom is the forum for gathering critical information, where people exchange information and settle what is controversial.⁷⁰ Often for lesser charges in busy urban courts, meetings take place in the hallways just before preliminary hearings. If the face-

⁶⁷ *Id.*

⁶⁸ Trust, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/trust>.

⁶⁹ See Ashdown & Menzel, *supra* note 35, at 67.

⁷⁰ *Id.* at 66-67.

to-face nature of the process is what makes a courtroom so effective, then the question becomes whether a virtual presence is just as effective for missing these elements.

Videoconferencing dampers the human interaction that promotes trust in the attorney-client relationship.⁷¹ It imposes yet another limit on attorney-client private communication within a system that already imposes other limits.⁷² Often the attorney is in court while the defendant is “present” from a detention center, rather than physically in the courtroom.⁷³ Some defense counsels state that they would have a more difficult time communicating and representing with their client virtually. If the defendant is not present in court, and cannot privately and effectively communicate with their attorney, the defense will likely be hampered in

⁷¹ Poulin, *supra* note 12, at 1129. The technology changes the basics of communication between attorney and defendant by delivering less communicative information than by face-to-face contact. And, as such, lowers the relationship of trust necessary in the attorney-client relationship.

⁷² See Natapoff, *supra* note 3, at 1473. Privileged communications that the court assumes have taken place between defense counsel and their client include an understanding of basic constitutional rights, the right to a jury, to testify, appeal, and challenge evidence.

⁷³ Poulin, *supra* note 12, at 1129.

challenging and evaluating the evidence being presented. The physical separation makes it difficult for a defense counsel to advise, calm, or control a defendant.⁷⁴

It begins with the initial attorney-client interview and the exchange of information.⁷⁵ In a typical attorney-client interaction, information is exchanged in an orderly way. That information concerns more than the tactical topics of the clients' goals and the manner in which the attorney will achieve those goals.⁷⁶ Not merely "ordinary talk,"⁷⁷ these exchanges deal with the client's background, interests, and context for what they would consider to be a successful outcome and should precede an attorney's solution.⁷⁸ Many defendants and counselors are frustrated with videoconferencing because it fails to supply enough information about the defendant with whom they are

⁷⁴ *Id.*

⁷⁵ *Id.* Linda F. Smith, *Client-Lawyer Talk: Lessons from Other Disciplines*, 13 CLINICAL L. REV. 507 (2006).

⁷⁶ *Id.* at 510-512.

⁷⁷ *Id.* at 513.

⁷⁸ *Id.* at 523-524.

speaking.⁷⁹ Some attorneys find the use of videoconferencing to be a “surreal experience” in which clients become a “piece of electronic equipment.”⁸⁰ It does not aid communication but primarily benefits the government by lowering costs and speeding the legal process to the defendant’s detriment.⁸¹

Just as with a client who is mentally incompetent to stand trial, a client who cannot privately communicate with their attorney because of the liabilities of videoconferencing has a compromised ability to make good decisions, or to produce ideas and thoughts necessary for achieving fundamental fairness.⁸² Attorney-client communication, like

⁷⁹ Cameron Teoh et al., *Investigating Factors Influencing Trust in Video-Mediated Communications*, 313 <http://portal.acm.org/dl.cfm> (2010). (Among the factors investigated were the use of videoconferencing technology and communication and collaborative activities. The study specifically explored the effect varying the amount of visual information videoconferencing partners receive about each other on several factors: trust, performance, social presence, and satisfaction with performance and task process.)

⁸⁰ Haas, *supra* note 2, at 64.

⁸¹ Hillman, *supra* note 3, at 47. The author notes savings in efficiency and security which (especially at this time) are concerns of the government. The defendant’s concerns are much more likely to center on constitutional and procedural rights.

⁸² See Joanmarie Ilaria Davoli, *Physically Present, Yet Mentally Absent*, 48 LOUISVILLE L. REV. 313, 318 (2010). (Impediments to effective

competency, is necessary for a fair trial.⁸³ Defense attorneys are untrained in the use of videoconferencing. Defense attorneys unfamiliar with the dynamics of videoconferencing may be ignorant about raising issues that may negatively affect their client's defense.⁸⁴

The more complex the task, the greater the need for a richer and more subtle communication environment.⁸⁵ The richness of videoconferencing depends on the availability of instant feedback, the use of physical cues (such as facial expressions, voice inflections, and gestures), the use of natural language for conveying a broad set of concepts and ideas, and

representation can take many forms. Unlike mental incompetence, videoconferencing is an impediment introduced into the justice system.)

⁸³ *Id.* at 317.

⁸⁴ *Id.* at 318.

⁸⁵ Gail Corbitt et al., *A Comparison of Team Development Stages, Trust and Performance for Virtual versus Face-to-Face Teams*, Proceedings of the 37th Hawaii International Conference on System Sciences 3-4 (2004). (The four task classifications of increasing information requirements and complexity are: 1) generating ideas and plans (brainstorming), 2 making choices in situations with and without right answers, 3) negotiating or resolving conflicts of opinion and/or interest, and 4) executing plans (which includes negotiating differences in power). This study found that virtual teams had higher trust coefficients. But this was due to the positive actions the team took, regardless of the medium (either via video or face-to-face)).

the personal focus of the medium.⁸⁶ Videoconferencing, depending on the level of internet traffic, bandwidth, and the speed of connections is notorious for introducing spatial distortions⁸⁷ and “jerky” or halting images.⁸⁸

Non-verbal gestures and cues form a large part of the way people communicate and express themselves.⁸⁹ Videoconferencing often presents timing difficulties and people have to be careful not to interrupt others or alter the way they speak.⁹⁰ People often need to be coached to look into the camera and not the monitor to give the impression of eye contact when speaking.⁹¹ In some jurisdictions, the defendant standing before the screen is visible to the courtroom audience, while the defendant can see only the judge.⁹²

⁸⁶ Bekkering & Shim, *supra* note 12, at 104. Media Richness Theory (MRT) states that communication channels differ in the amount and variety of information they carry. As criminal defense is a complex, multidimensional task; a richer communication media is preferred and the richest form of communication is face-to-face.

⁸⁷ Torres, Preskill & Piontek, *supra* note at 13. *See infra* note 119.

⁸⁸ *Id.*

⁸⁹ Teoh et al., *supra* note 79, at 313.

⁹⁰ Torres, Preskill & Piontek, *supra* note 13, at 208.

⁹¹ *Id.* at 209.

⁹² Binder, *supra* note 45, at 47. The author stresses that the view of the participants in a videoconferenced proceeding is important.

Biases and stereotypes of attorneys and defendants may influence perceptions of face-to-face versus videoed communications.⁹³

VII. HEARING FROM DEFENSE COUNSEL

In recent years, many Massachusetts Superior courts and Massachusetts District courts have increasingly shifted to videoconferencing as they struggle to balance large caseloads and increasingly limited resources. Researchers at Suffolk University and the Committee for Public Counsel Services (CPCS), CPCS is the Massachusetts Public Defenders, have investigated the impact of videoconferencing in Massachusetts courts, especially on the private communications between attorneys and clients. Defenders of videoconferencing argue but cannot prove that it saves money. It is clear from this research that CPCS attorneys have significant issues with videoconferencing.

⁹³ See Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 L. HUM. BEHAV. 165, 169 (1998). See *Crawford v. Washington*, 541 U.S. 36 (2004).

Many CPCS attorneys view the use of videoconferencing as a “perfect storm” of harm to defendants: a vulnerable population, an overburdened legal system, and a tight fiscal environment all culminate in a circumstance where people are more willing to overlook a diminution in defendants’ rights. They see it as a step too far.

In November/December 2017, a survey was sent to approximately 3,000 CPCS attorneys; 223 responded. Their experience on the job ranges from 1 to 25+ years, with over 72% stating that they are comfortable or very comfortable with the use of technology in general. These questions assess their experiences and viewpoints concerning the use of videoconferencing in Massachusetts district and superior courts. Responses were received from all Massachusetts counties on the following topics: arraignments, bail, bail reviews, compliance and election dates, default warrant removals, evidentiary motion hearings, non-evidentiary motion hearings, pretrial conference hearings, probable cause hearings, and trials.

The survey highlighted several concerns among CPCS attorneys. Among these are issues relating to attorney-client confidentiality/private communications, technology/equipment, and concerns involving dehumanization and lack of dignity.

Attorney-Client Confidentiality/Private
Communications Issues

Over 55% CPCS attorneys answered there is an issue with confidential conversations during videoconferenced proceedings.

Over 79% answered there is an inability to have real time confidential conversations with their clients during videoconferencing.

Over 63% answered that any accommodations made by the court for confidential communications are inadequate; of those accommodations, over 69% answered they are cumbersome and disrupt the flow of court proceedings.

Maintaining attorney-client confidential communications during videoconferencing is a major concern. Videoconferencing invariably detracts from the attorney-client relationship and the private

communication between them. The use of videoconferencing leads to decreased personal contact between users and the possible alienation of defendants in the criminal justice system.

Defense attorneys cannot effectively represent a client without effective communication. Videoconferencing creates a major barrier to communication between attorney and client, when the defendant is located in a detention center and defense counsel is located in the courtroom during a court proceeding. The Suffolk University/CPCS survey found that the majority of defense lawyers believe that private attorney-client communications via videoconferencing is simply impossible. A defendant's confidence in his counsel is reduced via video, thus minimizing the crucial trust between attorney and client. On video, crucial aspects of a defendant's physical presence is lost or misinterpreted, including demeanor, facial expressions, and vocal inflections. This prevents immediate and unmediated contact with counsel.

Videoconferencing mutes the human interaction that fosters trust in the attorney-client relationship. If the defendant is not in court, and cannot privately, effectively communicate with their defense counsel, the defendant will likely be hampered in challenging and evaluating the evidence being presented. The physical separation between the defendant and counsel makes it more difficult for a defense attorney to advise, calm, or control a defendant.

Attorney-client interviews are significant interactions for both lawyers and clients, and their conversations are essentially cooperative. Many defendants and counselors are dissatisfied with videoconferencing because it fails to supply enough information about the defendant with whom they are speaking. Many attorneys find the use of videoconferencing to be “disorienting” and reduces their clients to a “picture.” A reoccurring theme is that videoconferencing primarily benefits the government by lowering costs and speeding the legal process, but at the defendant’s expense.

Just as with a client who is mentally incompetent to stand trial, a defendant who cannot privately communicate with their attorney because of an inadequate videoconferencing system is compromised in his ability to make rational decisions, or to produce ideas and thoughts necessary for achieving fundamental fairness. Attorney-client communication, like competency, is necessary for a fair trial.

CPCS Attorneys were quoted in the survey as saying:

“There is ZERO confidentiality in these hearings. There is no ability to aid counsel in the defense of the case at the time of the hearing. This essentially renders the client incompetent.”

“It is terrifying that the state can deny liberty and then deny the defendant’s right to be present in the courtroom at the proceedings.”

“Private communications with clients is the main concern. There are guards outside the defendant’s door who can hear at least some of the conversation with the attorney. The judge often cannot see the screen in Msex Superior, so s/he is not looking at the defendant during the proceedings. It’s dehumanizing and unfair, all to save a buck.”

“And certainly from an attorney-client relationship perspective, it is completely unworkable to have

meaningful, private conversations with a client via videoconferencing.”

“Videoconferencing denies my client what my other clients get.”

“No confidentiality. Sometimes client blurts out questions or answers that are now on the record.”

“Having practiced criminal law for over 30 years I find videoconferencing to be a very real degradation of the rights of defendants in judicial proceedings.”

“There should never be videoconferencing. A defendant has a constitutional right to be present whenever his/her case is heard. Watching a TV is not being present. It is disorienting to the attorney and the defendant. It impedes attorney-client communication.”

“An affront to the dignity of the client and to constitutional justice.”

“McJustice. It may benefit the trial court in the long run, but it erodes the attorney client relationship.”

“The defendant becomes the least important person in the courtroom. Judicial proceedings have become an academic exercise.”

“Cases are fluid, and counsel cannot have meaningful interaction with their client.”

“Deteriorates the attorney client relationship, creates mistrust in the justice system, makes the system feel rigged against the defendant, dehumanizes the defendant, interferes with private communication between defendant and attorney, results in defendants being in jail longer than necessary...”

Dehumanization/Dignity Issues

Dignity of defendants and a concern of videoconferencing's impact on the accuracy/completeness court proceedings is also an issue.

Over 86% answered that videoconferencing diminishes the dignity of court proceeding.

Over 87% answered that videoconferencing dehumanizes the defendant.

Over 86% answered that defendants do not understand court proceedings as well in videoconferenced proceeding versus traditional face-to-face proceedings.

Over 77% answered that videoconferencing impinges on the accuracy/completeness of the proceedings.

Over 71% answered defendants seem disoriented during videoconferenced court proceedings.

Over 77% answered defendants prefer traditional face-to-face court proceedings to videoconferencing.

Videoconferencing taints the public's perception of a criminal court's integrity. The criminal court process depends on the perception that its proceedings are humane, fair, and just, and should not take this confidence for granted. Any practice that threatens to demean the dignity of defendants will likely reduce respect for the court and imperil the criminal justice system.

The dignity of the defendant must be maintained, and treatment must be fair and consistent. Human dignity must be an element of the criminal justice system as well as due process and equal protection. When this is lost, it erodes the legitimacy of the system. Videoconferencing has a danger of dehumanizing defendants to an extent that it may further compromise a system that is already viewed with a jaundiced eye.

Quotes from CPCS Attorneys relating to the dignity and dehumanizing of the defendant included:

“They [videoconferences] are dehumanizing. They discourage real human interaction. They stand in the

way of the defendant having a meaningful participation in their defense.”

“They have only been cumbersome in my experience, and further remove the defendant’s humanity from the courtroom.”

“Dehumanizing to the defendant and impinges on attorney client communication and trust.”

“I believe that video-conferencing reduces clients’ faith in the idea that the criminal justice system cares about them as an individual and their faith in the idea that things are happening in their cases that they would want to see happen.”

“Videoconferencing morphs my client into a picture, and not into a real life Human Being.”

“Dehumanization, unfair, and incomplete presentation of court experience based upon non-scientific placement of cameras, personnel, defendant, counsel, etc. should not be used.”

“The entire process is below the dignity of the Court and the process and it cheapens the entire system.”

“Confidentiality is nonexistent, it is impersonal, it is dehumanizing, it is not cost effective as its leading to higher attorney travel expenses.”

“Drawbacks of videoconferencing are: 1. Dehumanizes the client; 2. Interferes with the

attorney-client relationship; 3. Impairs communication between the client and his/her attorney; 4. Diminishes the dignity of the court proceedings.”

“It undermines the defendants’ belief in the fairness of the court system, since they are unable to observe any proceedings outside of their own. It undermines their faith in their attorney, since we are unable to update them in real time during court appearances.”

“Deficient hearings, with much less opportunity for interaction between attorney and defendant.”

“... it is dehumanizing, drive-thru court proceedings, and frequently impaired by technical difficulties.”

VIII. COST

The issues of cost and the alleged monetary savings by the Commonwealth were not the focus of this survey. Saving money has often been a rationale of proponents of videoconferencing. Many CPCS attorneys dispute that the Commonwealth saves money. Many lawyers see those costs shift from the Sheriffs’ Department to CPCS as the inadequacies and confusion caused by videoconferencing must be remedied by defense attorneys.

CPCS attorneys commented on this issue:

“The state doesn’t save money as defense attorneys now have to visit their clients before and after video conference.”

“Jail visits beforehand are the only way to prepare the client for the conference and public defenders are needing to take inordinate amounts of their time to make so many trips to the jail--it certainly cannot be cost savings over just bringing a couple of vans of clients to the courthouse.”

“Clients clearly do not understand the proceedings as well, and as a result, you end up having to make a trip to see them in custody in person simply to explain what happened. If they are brought in, that doesn’t happen.”

“I also question how much money, if any, we are actually saving. In district court, plans change quickly, and you will often find yourself pleading out your client on a date you don’t expect too. Right judge. Right DA. Client change of heart. Video conferencing takes away that opportunity. So it probably drives up cost by increasing incarceration.”

“If a client wants to plea, they cannot do so over a videoconference, and so they will be held for longer before they can plea (get out).”

“I see NO benefit for the client or the attorney. The only people who benefit are the Judges (as they do not even have to interact with our criminal clients further adding to the stigma that they are inhuman), the Court Officers (as they, few if any, custody clients to deal with making their job easier), and the sheriff’s department (who spends less money on transportation costs) on the backs of the defense attorneys who have to make more frequent jail visits in order to establish and maintain any type of attorney-client relationship and of course the recording system (FTR), who benefit by the monopoly it now has in all court proceedings.”

“They say it’s a safety issue but it’s a money saving issue for the jails. They save money when they do not have to transfer prisoners. The state doesn’t save money as defense attorneys now have to visit their clients before and after the video conference.”

“... if there are matters to be discussed with the client that are private after the proceedings this cannot be done at the court and requires an extra jail visit to ensure privacy.”

IX. TAKEAWAYS FROM DEFENSE
ATTORNEYS

An criminal attorney cannot effectively represent a defendant without effective communication.⁹⁴ Does videoconferencing create a major barrier to this attorney-client communication, when the defendant is in detention but defense counsel is in the courtroom during a hearing or trial?⁹⁵ Does videoconferencing block access to counsel by: 1) preventing communication with counsel at all and/or 2) limiting communication with counsel via video?⁹⁶ The majority of defense lawyers believe that private attorney-client communications via videoconferencing is problematic.⁹⁷ A defendant's confidence in their

⁹⁴ See Matthew S. Compton, *Fulfilling Your Professional Responsibilities: Representing a Deaf Client in Texas*, 39 ST. MARY'S L. J. 819, 900-901 (2008) (The ability to communicate is vital to the justice process. Anytime the free flow of information, especially private communications between attorney and their client, justice suffers.).

⁹⁵ See AMANDA J. GRANT, ET AL., VIDEOCONFERENCING IN REMOVAL PROCEEDINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT, THE LEGAL ASSISTANCE FOUND. METROPOLITAN CHI. & CHI. APPLESEED FUND FOR JUST. 38 (AUG. 2, 2005) ("We found that videoconferencing is a poor substitute for in-person hearings. Among the problems, we observed deficiencies related to *access to counsel*, presentation of evidence, and interpretation."). Emphasis added.

⁹⁶ *Id.* at 38.

⁹⁷ *Id.*

counsel may be reduced via video, thus minimizing the crucial trust between attorney and client.⁹⁸ Via video, crucial aspects of a defendant's physical presence may be lost or misinterpreted, including demeanor, facial expressions, and vocal inflections. This prevents immediate and unmediated contact with counsel.⁹⁹

Videoconferencing is a medium that favors the prosecution at the expense of the defendant. The documented issues and problems of videoconferencing undermine the legitimacy and accuracy of our criminal courts. Videoconferencing needs to focus on using it in a way that preserves defendant rights.

The criminal justice system needs to make more resources available for effective client-attorney private communication.¹⁰⁰ Defense counsel faces many difficulties in representing a client via

⁹⁸ Davis, *supra* note 17, at 28. Via videoconferencing, crucial aspects of a defendant's or lawyers' appearance may be lost or misinterpreted. Things like a participant's demeanor, facial expressions, vocal inflections, and the ability for immediate and unmediated contact with counsel are necessary.

⁹⁹ *See Id.*

¹⁰⁰ *See Compton, supra* note 36, at 901. This relates to defense attorneys with deaf clients where translation equipment may not be adequate or utilized properly as in the criminal justice system where defense attorneys do not control the videoconferencing equipment.

videoconferencing and likely renders their representation inadequate to achieve fundamental fairness.¹⁰¹ Effective communication is noted in other circumstances. Ineffective assistance of counsel based on the lack of attorney-client private communication or limits on such communications of a deaf client's attorney would be particularly severe if there is a problem with an interpreter.¹⁰² Just as a defendant's attorney should ensure that deafness should not prevent a client from communicating with them, videoconferencing should not prevent a client from communicating with their attorney.¹⁰³

Videoconferencing physically separates an attorney and client, complicating and diminishing basic communication.¹⁰⁴ A defendant who has little or no private communication with his/her attorney may

¹⁰¹ *See Id.*

¹⁰² *See Compton, supra* note 36, at 855-886. The author highlights the issues that can arise when there is poor communication between the parties in the courtroom. Issues like the situation because of the defense attorney may not know whether the defendant understands or is failing to communicate.

¹⁰³ *See Id.* at 899.

¹⁰⁴ Poulin, *supra* note 12, at 1129. Videoconferencing complicates an already difficult situation and will likely contribute to the problem of marginal or inadequate representation.

believe that their lawyer is merely processing their case without any real personal connection, which can only weaken their relationship.¹⁰⁵ Low credibility is also associated with videoconferencing,¹⁰⁶ because non-verbal cues are unavailable or harder to read.¹⁰⁷ For videoconferencing to work between an attorney who is physically in court and a defendant in prison, some basic safeguards must be implemented.

Further, videoconferencing can interfere with the smooth flow of information between people. When one person cannot ascertain that another person has finished speaking, trust can be strained.¹⁰⁸ Non-verbal gestures and cues contribute meaningfully to a

¹⁰⁵ Davis, *supra* note 17, at 28. Consequently, because of videoconferencing, a client's confidence in his defense counsel may be reduced, and the critical trust between a client and defendant minimized.

¹⁰⁶ Torres, Preskill, & Piontek, *supra* note 13, at 178.

¹⁰⁷ Teoh et al., *supra* note 79, at 313. Participants stated that they were dissatisfied with videoconferencing because it did not provide enough visual information about the people they were conferencing with. They felt that being able to clearly see each other's body language was an essential aspect of face-to-face meetings that were absent in videoconferencing.

¹⁰⁸ Fetterman, *supra* note 41, at 25. Technological problems can come from many sources. Software glitches, incompatible hardware, improper training of personnel operating the equipment, and outside problems from service providers all can contribute to ineffective videoconferenced communications.

conversation and help one to determine the trustworthiness of others.¹⁰⁹

The introduction of videoconferencing should be gradual--allowing time for law enforcement, judges, attorneys, and court administrators to adjust to the technology and to implement fair and effective procedures.¹¹⁰ Videoconferencing can have a place in the legal process, but must be employed so as not to diminish trust between parties.¹¹¹ Research has shown that video, interactive or not, can lead to a negative bias.¹¹² It clearly shows that there are issues with defendants being able to clearly and privately

¹⁰⁹ Cameron Teoh et al., *supra* note 38, at 9. Videoconferencing often does not show or obscures the non-verbal gestures and cues of attorneys or defendants.

¹¹⁰ Philibosian et al., *supra* note 14, at 22. This research admits that there are problems with the technology and its implementation. It recommends that more thinking needs to be done to capitalize on the capabilities of videoconferencing and that all participants must work together to identify the problems and mutually work out solutions.

¹¹¹ Nguyen & Canny, *supra* note 40, at 1467 and 1474. As stated earlier (*supra see* note 132) where research states that the only way to alleviate the negative effects of videoconferencing is to have multiple cameras and multiple viewing monitors, such systems also need: 1) distances of videoconferencing equipment must mimic that of face-to-face meetings, 2) image quality must be good enough for the perception of precise eye contact and, 3) projectors must be placed so they are comfortable for prolonged meetings.

¹¹² Goodman et al., *supra* note 76, at 170. The use of closed-circuit television (CCTV) was associated with a negative bias.

communicate with their attorneys, which must be established.¹¹³

Video conferencing is a poor substitute for in-person hearings.¹¹⁴ A courtroom is more than a mere location. The setting is an important element in the constitutional conception of American justice, contributing to a dignity essential to the judicial process.¹¹⁵ John Rawls, in *A Theory of Justice*, maintains that fundamental fairness and procedural justice rely on rules that are reasonably expected to be to everyone's advantage.¹¹⁶ Excluding illegally seized evidence in court, for example, is a rule that protects society's rights and benefits everyone by declaring that the government must follow its own rules. If a rule does not benefit everyone, then it is likely that the rule is unfair.¹¹⁷ This does not imply that everyone must benefit equally for a rule to be considered fair, but only

¹¹³ *Id.*

¹¹⁴ Grant, *supra* note 95, at 40.

¹¹⁵ Davis, *supra* note 17, at 28. The author states that clients, via videoconferencing, do not behave the same as those participating in person in a courtroom due to the nature of the technology. The author attributes this to a lack of dignity, decorum, and respect of videoconferencing versus a traditional courtroom.

¹¹⁶ JOHN RAWLS, *A THEORY OF JUSTICE* 110-112 (1971).

¹¹⁷ Rawls at 110-112.

that everyone benefits in some degree. A set of rules, properly followed, make up a process.¹¹⁸ Nowhere are rules and processes more important than in a legal setting.

X. WHAT CAN BE DONE: BEST PRACTICES

If videoconferencing is forced upon CPCS attorneys, the challenge is how to use it responsibly. It is reiterated that the position of CPCS is that videoconferencing is fundamentally flawed as a process and should not be used under any circumstances in Massachusetts courts. Barring that, here are some “best practices” that must be adopted by Massachusetts courts in order to maintain the integrity and fundamental fairness of the judicial process.

1. The defendant should be given the choice to be subjected to videoconferencing. An informed consent procedure could help videoconferencing in terms of protecting procedural rights as well as perceptions of justice. Informing the defendant of the pros and cons of videoconferencing would also serve as a reminder for all participants (administrators, judges, and

¹¹⁸ *Id.*

attorneys) that videoconferencing is fundamentally different from traditional face-to-face contact and has different procedures.

2. Limit the use of videoconferencing to civil rather than criminal matters. Criminal matters are fundamentally different from civil matters in the penalties that may be imposed. In civil matters, generally a person's money or assets are impacted, while in criminal matters a person's liberty or life is at issue. Because of the severity of criminal penalties, criminal actions have a higher standard of proof, more stringent rules of evidence and procedure, and other protections that benefit the defendant. Because of these higher standards and rules, many attorneys believe that videoconferencing should not be used in criminal proceedings without the express consent of the defendant.

3. Limit videoconferencing to pre-trial matters, especially administrative/non-evidentiary matters. This will minimize its negative aspects while preserving useful aspects, notably its efficiency. Administrative/non-evidentiary matters are almost exclusively procedural with little input from the defendant. The case file provides most of the information needed for an administrative/non-evidentiary hearing, with the attorneys adding any needed facts

4. It is clear that videoconferencing has its issues in court, especially as it relates to attorney-client privileged communication. There should be

reasonable rules concerning the availability of private communication between attorney and client in the courtroom. A separate camera with a hidden monitor screen that only the attorney and client can see must be available. This would ensure that courtroom interactions take place in the courtroom in real time; attorney and client can communicate privately to help ensure effective representation. Less optimal would be a private phone line between the attorney in the courtroom and the client at a remote location. This would help safeguard private communication but would eliminate the visual picture between attorney and client. As a last resort, judges could clear the courtroom of all personnel (including himself/herself and the defense attorney) for the attorney to privately converse with the remote defendant via videoconferencing and, when finished, call everyone back into the courtroom. For this to be done every time private communication is needed between defense attorney and defendant could be cumbersome, burdensome, and slow. This would have a chilling effect on its use.

5. There should be standardized rules across the Commonwealth governing the use of videoconferencing. Further, standardized rules should govern videoconferencing through the Rules of Evidence and Rules of Criminal and Civil Procedure. Standardized rules will likely enshrine procedures that will minimize the technology's detrimental effects, especially if the rules are formulated with input from psychology and the media experts. Standardized rules will afford the defense the ability

to anticipate what will come and formulate strategies to overcome any communication difficulties. They would give the defense the ability to object to any irregularities in the proceedings that deviate from the established rules.

6. Another recommendation to alleviate the negative effects of videoconferencing is to educate attorneys, judges, clerks, and law students on the effects of the medium. Attorneys need to be aware of its negative aspects and the strategies that minimize such effects. Judges must be made aware of the differences in the dynamic of communication between videoconferencing and traditional face-to-face interactions. Clerks, who likely administer or oversee videoconferencing procedures and equipment, need to be educated in its use in the most fair and effective way. Moreover, as it is likely videoconferencing will continue to be part of the legal process, law students need to be taught how to use videoconferencing effectively in advocacy and procedure classes. A majority of CPCS attorneys answered that there should be formalized training for law clerks, IT, and court personnel in the use of videoconferencing to ensure its proper use. Training should be conducted by professionals with a background in videoconferencing and its effects on communication. Making clerks aware of the technology's shortcomings will help administrators safeguard attorney-client communication.

7. Provide standardized and reliable videoconferencing equipment. Communication via video is difficult and requires different strategies to be

effective. If the underlying equipment is inadequate, antiquated, or improperly handled, it only exacerbates such difficulties. Reliable, updated technology will lessen or eliminate technical difficulties such as asymmetrical video and audio, time lags in audio communications, poor audio or visuals, and intermittent or “dropped” connections.

The results from this survey clearly show there is a problem. Videoconferencing creates a Hobson’s choice for defense attorneys: either they can travel to the remote detention site to freely confer with their client but have reduced access to the court; or they can appear in court, where they will have greater access to the judge, clerk, and file but less access to their client. The separation of attorney and client will continue to create problems of marginal or inadequate representation. There is a negative effect on attorney-client communication where substandard or no provisions are made for private communication between the two. While the court might gain from cost savings and administrative productivity, the new technology alienates and dehumanizes defendants. Paraphrasing Justice Brennan in *Bruton v. U.S.*, if we secure greater speed, economy, and convenience in the

administration of the law at the price of fundamental principles of constitutional liberty, the price is too high.¹¹⁹ Videoconferencing in the courtroom must be remedied to protect attorney-client communication by instituting proper procedures to ensure free flow of these private communications and safeguard the ability of counsel to provide adequate assistance. In doing so, it will further protect the dignity of the court and the defendants who stand before it.

¹¹⁹ *Bruton v. United States*, 391 U.S. 123 (1968), <https://www.loc.gov/item/usrep391123/>.