

Videoconferencing in the Courts: An Exploratory Study of
Videoconferencing Impact on the Attorney-Client Relationship in
Massachusetts

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CHAPTER SEVEN – CONCLUSION

Many critics cite the main objection of videoconferencing is that it is currently used with little knowledge of its impact on fundamental fairness. There have been a minimal number of empirical studies on videoconferencing's effect on the due process rights of defendants in the legal system. Opponents of videoconferencing view it as adding yet another unfair process that processes people through the court system, rather than protect their rights. They see the overuse of plea-bargaining, the abuses of specialized courts, and now the use of videoconferencing as another example of fundamental unfairness. Opponents err on the side of caution with new processes, where the unknown impact must be adequately studied before it is used. Without such study, critics believe videoconferencing must be assumed as a negative until it is proven a positive.

It is unknown whether the medium would disparately impact the poor and minority classes. It seems that it could. Most videoconferencing is being used in criminal cases, where the vast majority of defendants are poor or minorities. This population is the most vulnerable and the least able to protect itself.

With only poor and minority populations at risk, it seems that the courts are experimenting with these defendants to gage the effectiveness of videoconferencing. Where it is implied that an outcome would be assessed and appropriate changes made, and regardless of whether videoconferencing harms the rights of defendants, courts continue to use it because it is useful in moving vast numbers of people through the legal system.

Critics view this as a perfect storm for unstudied experimentation: 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 possible diminution in a defendant's rights where the other articulated problems are alleviated. It is viewed a step too far. Until videoconferencing is properly studied, and those studies analyzed and replicated to the satisfaction of the social science and legal communities, its use should be limited.

Limiting videoconferencing's use was another reoccurring theme in this study. One way to limit its use is to remove it from criminal actions and confine it to civil actions. The higher burden of proof in a criminal case beyond a reasonable doubt requires much more than in a civil case by a preponderance of the evidence as well as more stringent rules of procedure. Nevertheless, the main reason for limiting videoconferencing to civil actions is the greater stake in the outcomes/punishments in criminal actions versus civil ones. This goes back to basic fairness and due process. The greater the risk of error, the more formal process is due a defendant. Because criminal matters carry greater penalties (jail time or even death), versus civil actions where generally only money or property can be lost, more formal process is due. More formal process to many means traditional face-to-face interactions.

Even critics understand that the use of videoconferencing in the courts will continue into the future. It is a cost-efficient way to facilitate the courtroom process. Critics claim that while its efficiency is clear, its effectiveness is in question, specifically the impact on attorney-client communication. The goal of this research was to better understand this impact. An important assumption is that attorney-client communication in the courtroom may be assisted by the physical presence of the attorney and the client in the same location (the courtroom), and that videoconferencing's separation of physical presence has a detrimental impact on the relationship. From this perspective, the framework of Information

Integration Theory, the Emergent Meaning Theory, and the open-ended interviews conducted with Massachusetts attorneys offer insight on the use of videoconferencing in the Commonwealth.

In many courtrooms there is clearly little or no private communication between defendant and counsel, which affects their relationship and representation. The results from this first, large-scale empirical study clearly show there is a problem. Videoconferencing creates a Hobson's choice for defense attorneys: either they can appear at the remote 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.³⁹⁹ The separation of attorney and client will continue to create problems of marginal or inadequate representation.⁴⁰⁰ Jurisdictions across the country use videoconferencing, and while most agree on the benefits of the technology, critics maintain that there is a negative effect on attorney-client communication where substandard or no provisions are made for private communication between the two. These conclusions are consistent with the legal literature/analysis, the quantitative and qualitative data. Understanding these issues will aid policy-makers in improving how videoconferencing is used and minimize its negative effects.

Decisions made concerning videoconferencing will have wider implications as other technologies are introduced into the courts. Videoconferencing is a gateway to other technologies gaining a foothold. Technology offers greater speed and efficiency in processing defendants through the courts and save costs. Saving money is a popular idea in

³⁹⁹ *Id.* at 56.

⁴⁰⁰ Poulin, *supra* note 12, at 1129.

times of shrinking court budgets, but the impact of new technologies in the courtroom on constitutional rights and civil liberties need to be accessed. While the court gains from cost savings and administrative productivity, the new technology may alienate and dehumanize 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.⁴⁰¹ Videoconferencing in the courtroom can be remedied to protect attorney-client communication by instituting proper procedures to ensure free flow of these private communications, safeguarding the ability of counsel to provide adequate assistance.

⁴⁰¹ 391 U.S. 123, 135 (1968).