

# Wisconsin Association of Criminal Defense Lawyers

Peter McKeever, Executive Director  
wacdl@wacdl.com

P.O. Box 6706 • Monona, WI 53716-6706 • (608) 223-1275 • FAX (608) 223-9329 • www.wacdl.com

March 1, 2021  
Clerk of Supreme Court  
Attn: Deputy Clerk – Rules  
P.O. Box 1688  
Madison, WI 53701-1688

RE: April 7, 2021  
Public Hearing on Rule Petition 20-09

Honorable Justices of the Wisconsin Supreme Court,

Use of videoconference technology has been expanded and used more than ever before in Wisconsin during the on-going Covid-19 pandemic. Thus far, it has been used to allow circuit courts to continue to conduct business, as much as possible, without unnecessarily exposing participants and the public to Covid-19. All participants in the system have had to adjust, in some cases learning and implementing new technology. The update to the rules and statutes addressing use of videoconferencing technology in court proceedings is the natural consequence of this new experience and expanded use of the technology.

In responding to the proposed rules and statutory changes, the Wisconsin Association of Criminal Defense Attorneys is focused on ensuring that the positive aspects of this practice continue while the constitutional rights of defendants are protected. These goals are not mutually exclusive. Videoconferencing innovations have resulted in benefits and efficiencies for all participants such that some practices should be continued even after the pandemic. But focusing only on the practical and efficient uses of videoconferencing technology is not sufficient to ensure that constitutional rights a defendant has in critical proceedings are protected. Because of this, we object to acceptance of the petition in its current form.

At contested evidentiary hearings and at jury trials the use of videoconferencing technology in lieu of personal appearance on the part of some or all of the participants could not satisfy the federal and state constitutional requirements that the defendant be able to confront witnesses, that due process be satisfied, and that the defendant have effective assistance of counsel.

The Sixth Amendment to the U.S. Constitution (*see* Appendix, p. v) requires that defendants be confronted with the witnesses against them and that they have assistance of counsel, among other rights. Further, Article 1, Section 7 of the Wisconsin Constitution states the defendant has the right to meet witnesses face to face. (*Id.*)

The Due Process Clause supplements the defendant's Sixth Amendment right to be present at all critical stages of the criminal proceeding by protecting the defendant's right to be present during some stages of the trial even where the defendant's ability to confront a witness against him is not in question. U.S.C.A. Const. Amends. 5, 6 (Appendix at p. v) ; **Moore v. Knight**, 368 F.3d 936 (7th Cir. 2004).

The proposed amendments to Wis. Stat. § 885.60 (Appendix at p. i) would permit use of videoconferencing technology at any proceeding and would require the court to use the factors in Wis. Stat. § 885.56 (Appendix at p. ii-iii) to determine whether to allow videoconferencing over the objection of any opposing participant. Wis. Stat. § 885.60(c) would be modified to allow a plaintiff or petitioner to object to videoconferencing in all proceedings and directs the court to the factors in Wis. Stat. § 885.56 to determine whether to proceed over objection of another participant. Wis. Stat. § 885.60(d)—which currently allows defendants and respondents to unilaterally block videoconference proceedings in any hearing in which they are entitled to be physically present in the courtroom, and further allows defendants and respondents the same opportunity as plaintiffs and petitioners to object in all other proceedings—would be entirely removed. *Id.*

The petition, if granted, would create a new and unbalanced statute specifically allowing plaintiffs and petitioners to object but not defendants and respondents. Further, the constitutional rights of the defendant would no longer be acknowledged in either the new Wis. Stat. § 885.60 or the touchstone factors the court is to review to determine whether to use videoconferencing technology over objection in Wis. Stat. § 885.56.

The comments to the changes made in 2008 to Wis. Stat. § 885.60 are:

It is the intent of s. 885.60 to scrupulously protect the rights of criminal defendants and respondents in matters which could result in loss of liberty or fundamental rights with respect to their children by preserving to such litigants the right to be physically present in court at all critical stages of their proceedings. This section also protects such litigants' rights to adequate representation by counsel by eliminating the potential problems that might arise where counsel and litigants are either physically separated, or counsel are with litigants at remote locations and not present in court.

"Critical stages of the proceedings" is not defined under this section, but incorporates existing law as well as new law as it is adopted or decided. This section is not intended to create new rights in litigants to be physically present which they do not otherwise

possess; it is intended merely to preserve such rights, and to avoid abrogating by virtue of the adoption of this subchapter any such rights.

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

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

If the changes are made as proposed the new statute would not protect the rights of defendants and respondents in matters which could result in the loss of liberty or fundamental rights with respect to their children. Further, it specifically reserves the right of plaintiffs and petitioners to object without addressing the rights of defendants or respondents. At best, defendants and respondents would be on equal footing and objection would be determined in the same manner as civil cases and special proceedings without even acknowledging defendants and respondents constitutionally protected rights. This deletion of the statutory imperative that a court "shall sustain" the objective of a defendant diminishes the protections afforded a defendant.

The comments proposed now are:

For a list of criminal proceedings where the defendant has a right to be present, see s. 971.04 (1). When the defendant has the right to be physically present, videoconference appearance by the defendant may occur only when the defendant knowingly, intelligently, and voluntarily waives that right. The judge must engage in a colloquy with the defendant to ensure that this right is understood by the defendant and that the waiver is being made knowingly, intelligently, and voluntarily. *See State v. Soto*, 343 Wis. 2d 43 (2012), and *see State v. Anderson*, 374 Wis. 2d 372 (2017).

The apparent sense is that the elimination of Wis. Stat. § 885.60(2)(d) is justified by the addition of "unless affirmatively waived by the defendant or respondent" in (2)(a). However, this is not the case. The additional language in (2)(a) ensures that a defendant is entitled to be physically present in the courtroom unless the defendant's presence is affirmatively waived. Conversely, the current (2)(d) ensures that if a defendant objects to videoconferencing at all, that objection is to be sustained. These are not the same thing. Merely ensuring that a defendant can be physically present is not the same as ensuring that the proceeding is conducted with everyone's physical presence.

The problems that can potentially arise from these statutory provisions are perhaps best illustrated with examples, minor variations on which occur daily throughout circuit courts in Wisconsin.

For example: the new comment would indicate a defendant in a criminal proceeding must knowingly, intelligently, and voluntarily waive the right to be present in a courtroom. Presumably this will often happen, but where the defendant is proceeding to a jury trial or significant contested evidentiary hearing, the defendant might not waive his or her presence in court. If these statutory changes are enacted, it is possible that a defendant would find himself or herself sitting in a courtroom with a judge, but no other participant physically present. The defense attorney, prosecutor, and all witnesses could be allowed to participate by videoconference technology. It doesn't do a defendant any good to be in a courtroom when the witness isn't there. Due process is not satisfied by access to a room.

Specific issues may arise during jury trials and evidentiary hearings that cannot be adequately addressed with most participants appearing via videoconference technology. How a court could adequately conduct *voir dire* with a jury panel attempting to use such technology - allowing the defendant to participate as required and have meaningful input or conversation with his counsel is hard to envision. During *voir dire* in person counsel and the defendant would be able to form impressions of potential jurors, pass notes to one another, form additional questions to ask, and follow up as needed. A breakout room in a Zoom conference cannot take the place of such in-person viewing of the jurors and consultation during *voir dire*.

Suppose in a particular case a judge allows an alleged victim/complaining witness or any witness to appear via videoconference technology. Even if all other participants are present in the courtroom, and the new language in Wis. Stat. § 885.54(d) allows a request that the person appearing via videoconference technology to view the courtroom, there is no like requirement that the participants in the courtroom view the surroundings of the witness. It is unknown whether the witness is alone and in a private location, is in a semi-public place, or has others interested in the outcome of the case present in the same room. As others (including any witness) would be able view the proceedings via YouTube or other streaming service, what information might the witness receive in violation of a sequestration and exclusion order? Any such information would evade the notice of the court under the present proposal.

Suppose a defendant is charged with domestic battery, alleged to have taken place in front of her 9 year-old child. She is involved in a contested divorce proceeding with the father of the child which is also on-going. Due to the domestic criminal charges the child is placed with the father. At jury trial the child witness is allowed to testify via videoconference technology. Under the current proposal, how do we ensure that the father of the child isn't present in the room during testimony and holding a white board

on which he wrote information for the child to convey in response to questions asked by the parties?

Another scenario that will doubtlessly recur using videoconference technology at either an evidentiary hearing or jury trial is when a fairly new and inexperienced police officer is called to testify using videoconference technology. She has rarely testified previously. She testifies on direct and is then asked questions on cross-examination. It becomes clear that unknown to any other participant she has reports and notes in front of her that she has consulted during testimony. How can this be adequately addressed or remedied? Sharing of the reports and notes? It is unknown what her testimony would have been without access to such material. How likely is it even to be noticed?

Variations on these themes occur daily in circuit courts throughout our state, such that they're less "hypothetical" and more "common example."

At a minimum, to ensure protection of constitutional rights, a defendant must be able to unilaterally deny videoconference technology use during *voir dire*, evidentiary hearings, and all stages of jury trial. Wis. Stat. § 885.60(d) must be retained to meet the minimum constitutional requirements of confrontation, due process, and effective assistance of counsel.

Any statute that removes the language "If an objection is made by the defendant or respondent in a matter listed in sub. (1), regarding any proceeding where he or she is entitled to be physically present in the courtroom, the court shall sustain the objection" under Wis. Stat. § 885.60(d) is unconstitutional and unworkable.

The pandemic remains a challenge that courts and participants have met with creativity and innovation, such that some of the innovations adopted may increase fairness and efficiency even after the pandemic has ended. In creatively addressing our current circumstances, the utmost consideration must be placed not merely on efficiency or convenience, but on fairness and especially a defendant's constitutional rights.



Sarah M. Schmeiser  
Vice President of WACDL

Chair of the WACDL Legislative Affairs Committee

*The Wisconsin Association of Criminal Defense Lawyers (WACDL) is a statewide organization of criminal defense lawyers committed to promoting the proper administration of criminal justice; fostering and maintaining the integrity, independence, and expertise of the defense lawyer in criminal cases; and encouraging an unyielding concern for the protection of individual rights and due process. The Association has more than 400 members across the state who protect the federal and state constitutional and statutory rights of those accused of crimes.*

## APPENDIX

### Current statutes with proposed changes:

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

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

(2) (a) Except as may otherwise be provided by law, a defendant in a criminal case and a respondent in a matter listed in sub. (1) is entitled to be physically present in the courtroom at all trials and sentencing or dispositional hearings, unless affirmatively waived by the defendant or respondent.

(b) A proponent of a witness via videoconferencing technology at any evidentiary hearing, trial, or fact-finding hearing in a matter listed in sub. (1) shall file a notice of intention to present testimony by videoconference technology 20 days prior to the scheduled start of the proceeding. Any other party may file an objection to the testimony of a witness by videoconference technology within 10 days of the filing of the notice of intention. If the time limits of the proceeding do not permit the time periods provided for in this paragraph, the court may in its discretion shorten the time to file notice of intention and objection, and shall determine the objection in the exercise of its discretion using the criteria set forth in s. 885.56.

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

~~(d) If an objection is made by the defendant or respondent in a matter listed in sub. (1), regarding any proceeding where he or she is entitled to be physically present in the courtroom, the court shall sustain the objection. For all other proceedings in a matter listed in sub. (1), the court shall determine the objection in the exercise of its discretion under the criteria set forth in s. 885.56.~~

**History:** Sup. Ct. Order No. 07-12, 2008 WI 37, 305 Wis. 2d xli; 2011 a. 32.

**Comment, 2008:** It is the intent of s. 885.60 to scrupulously protect the rights of criminal defendants and respondents in matters which could result in loss of liberty or fundamental rights with respect to their children by preserving to such litigants the right to be physically present in court at all critical stages of their proceedings. This section also protects such litigants' rights to adequate representation by counsel by eliminating the potential problems that might arise where counsel and litigants are either physically separated, or counsel are with litigants at remote locations and not present in court.

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

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

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

Comment, 2020: For a list of criminal proceedings where the defendant has a right to be present, see s. 971.04 (1). When the defendant has the right to be physically present, videoconference appearance by the defendant may occur only when the defendant knowingly, intelligently, and voluntarily waives that right. The judge must engage in a colloquy with the defendant to ensure that this right is understood by the defendant and that the waiver is being made knowingly, intelligently, and voluntarily. *See State v. Soto*, 343 Wis. 2d 43 (2012), and *see State v. Anderson*, 374 Wis. 2d 372 (2017).

### **885.56 Criteria for exercise of court's discretion.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **885.54 Technical and operational standards.**

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

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

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

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



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

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

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

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

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

(i) Crime victims and witnesses shall be able to hear, see, and participate as necessary during the proceeding.

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

(3) The court shall provide written instructions to parties and counsel on how to appear by videoconference. Any instructions shall be maintained in a confidential manner, unless disclosure is permitted by the court.

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

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

Comment, 2020: A requirement to keep videoconferencing participation information confidential is intended to preserve the integrity of hearings and prevent disruptions from members of the public. Counties may decide how best to accomplish this.

## **Constitutional References**

### **United States Constitution, Amendment V**

No person shall be . . . deprived of life, liberty, or property, without due process of law. . .

### **United States Constitution, Amendment VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### **Wisconsin Constitution Article 1, § 7. Rights of accused**

Section 7. In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

### **Wisconsin Constitution Article 1, § 8. Prosecutions; Double Jeopardy; Self-incrimination; bail; Habeas Corpus**

Section 8. (1) No person may be held to answer for a criminal offense without due process of law, and no person for the same offense may be put twice in jeopardy of punishment, nor may be compelled in any criminal case to be a witness against himself or herself.