

Private Attorney- Client Communications and the Effect of Videoconferencing in the Courtroom

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Abstract: Courts are experimenting with new technologies in response to increasingly crowded dockets. Videoconferencing is being increasingly employed to streamline legal proceedings and provide the accused greater access to justice. The use of videoconferencing has spread through the federal and state court systems. While no criminal trial has been conducted entirely by videoconferencing, it has been used in arraignments, bail, sentencing, and post-conviction hearings. The impact of videoconferencing technology on the legal process, however, has yet to be measured in any systematic way. Of prime concern is the impact of this technology on the attorney/client relationship and their private communications. Critics argue the use of videoconferencing calls into question the ability of attorneys and clients to communicate effectively, undermining effective representation by counsel. In this first of its kind study, this article examines the impact of videoconferencing on private communications and the wider implications of the impacts of technology on civil liberties. Through a marriage of social scientific and legal analysis, videoconference private communications are analysed with empirical data and conclude with a discussion of how the negative aspects of videoconferencing can be lessened, avoided, and/or remedied.

1. Introduction

In recent years, courts have increasingly turned to videoconferencing as they struggle to balance large caseloads and limited resources.¹ Although scant data is available on its actual use, it is clearly being used in courts across the country in a variety of criminal proceedings, particularly to connect out of court defendants with their attorney in the courtroom.² The impact of videoconferencing on private communications between attorneys and clients has yet to be systematically studied. The essential question is does videoconferencing dilute constitutional guarantees to legal counsel or by limiting communication between defines attorney and client?

A trusting and thorough communication, both direct and nuanced, between attorney and client must be established and maintained in order for justice to be served.³ It is important to examine the expansion

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¹ Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 61-62 (2006). (The author states videoconferencing violate a number of important rights that are fundamental to our concepts of justice: the right to be present in court, the right to confront witnesses and evidence against you, and *the right to effective representation by an attorney*.) Emphasis added.

² Zachary M. Hillman, *Pleading Guilty and Video Teleconference: Is a Defendant Constitutionally "Present" when Pleading Guilty by Video Teleconference*, 7 J. HIGH TECH. L. 41, 41 (2007). (As the author notes, courtrooms around the country are not perceived as fertile grounds for the use of new technology.)

³ See Alexandra 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.

of videoconferencing and ensure that its use is not at odds with the fundamental purpose of the access it ostensibly provides.⁴ For courts to enhance a defendants' sense that courtrooms are fair and just, they must focus on improving communications.⁵ Effective communication is crucial to ensuring that defendants perceive their experience as fair and effective.⁶

The effect videoconferencing has on attorney/client private communications in the courtroom is understudied.⁷ Research questions and methodologies have been proposed but not carried out.⁸ Possible avenues of research include the effects of videoconferencing on legal decision-making, perceptions of justice, and legal efficiency.⁹ The underlying concern is to determine whether videoconferencing in legal proceedings violates the due process rights of defendants or whether it violates a defendant's right of confrontation under the Sixth Amendment.¹⁰

This article investigates the claim that videoconferencing is detrimental to attorney-client private communications when the attorney is in the courtroom but the client is in a remote location, such as a jail or prison. I review the literature and research in this area to illustrate how this technology is currently being used and the constitutional issues involved. Data from the National Center for State Courts (NCSC) survey are utilized to explore how these issues currently manifest themselves.

Part 2 defines videoconferencing. This section focuses on attorney-client private communications and the theories of how videoconferencing impacts such communications when the attorney is in the courtroom and the client is located in a remote location. Part 3 discusses the theories of communication that relate to its functions. A review of Emergent Meaning Theory, Information Integration Theory, Communication Theory, and others offer different ways in which videoconferencing are handled. Part 4 examines the pros and cons of videoconferencing with examples of how the courts have addressed these issues and how social scientific theories view videoconferencing. In Part 5, I examine data from the NCSC that suggests videoconferencing is having a negative impact on attorney-client communications, where clients have no opportunity for private communications with their attorney when their lawyer is in the courtroom and they are located at a remote location.¹¹

Little is known about the practical issue associated with attorney-client private communications via videoconferencing, specifically in comparing the difference between videoconferenced and in person

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, (Center for St. Ct. Innovation, NY, NY) Sept. 2006 at 24. (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 has been diminished.).

⁶ *Id.* at 29. 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.

⁷ Molly Treadway Johnson and Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28:2, LAW & POL'Y, 212 (April 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 need to be reviewed and its effects on defendants' rights.).

⁸ *Id.* at 223. Some potential research approaches include the use of previously developed psychological theories on how video conferenced affect communications, especially private attorney-client communications.

⁹ *Id.* Questions about the actual effects of videoconferencing on the perceptions and behavior of participants in criminal proceedings can be answered through survey and the use of experimental design.

¹⁰ Gerald G. Ashdown and Michael A. Menzel, *The Convenience of the Guillotine?: Video Proceedings in Federal Prosecutions*, 80 DENV. U.L. REV. 63, 64-65 (2002). (If efficiency is the issue, then the authors offer the example of the efficiency of eliminating juries. "Without juries there would be no evidentiary objections, no need for conferences at sidebar, and, of course, no jury deliberations. Although defendants might obtain some benefit from the increased efficiency achieved by eliminating juries, it would be trivial compared to the benefits to the government and the cost to defendants of not being tried by their peers.").

¹¹ See Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1110-1112 (2004). (These problematic questions have not been fully studied; that critical aspects of the defendant's communicative efforts will not be conveyed and, conversely, the defendant will not receive the full import of their attorneys' communications.).

communications.¹² The data however, does show there is a difference between the quality, indeed even the possibility, of private communications between attorney and client via videoconferencing.

2. Real-Time Sound and Images

2.1 What is Videoconferencing?

Videoconferencing is comprised of interactive telecommunication technologies that allow two or more locations to interact (via two-way video and audio transmissions) simultaneously.¹³ Electronic communications aims to improve the interchange of information between users.¹⁴ This technology permits both real-time sound and images of conversation between people in different locations¹⁵ through the use of a system of monitors, microphones, cameras, computer equipment, and other devices.¹⁶

As the technology has developed and become more affordable, videoconferencing has gained popularity in a number of fields.¹⁷ The business world praises videoconferencing as an efficient and economical alternative to face-to-face meetings.¹⁸ The drive for saving time and money has spurred its use in the courtroom, with the hope that it would improve the efficiency of the administration of justice.

With video, transporting defendants is not required; the risk to those officers transporting and securing the defendant during a hearing is removed. Proponents maintain that by keeping the accused in the confines of jail, his or her human dignity can be better preserved; they avoid entering a courtroom in an orange jumpsuit and handcuffs.¹⁹ Critics do not agree. Some defence attorneys have reported varying degrees of comfort with the process.²⁰ They believe videoconferenced hearings lack the dignity, decorum, and respect of a personal appearance before the court.²¹ Legal scholars have also expressed concern over the impact of technology on the defendant's rights, including its effect on attorney/client private communication.²² Other criticisms center on situations where the defendant and counsel are physically separated and cannot freely communicate.²³ The courtroom is viewed as the wrong place for

¹² *Id.* at 1104-1111.

¹³ Haas, *supra* note 2, at 62.

¹⁴ Pauline Ratnasingham, *The Importance of Trust in Electronic Commerce*, 8: 4 INTERNET RESEARCH: ELEC. NETWORKING APPLICATION & POL'Y 313, 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.).

¹⁵ Ernst Bekkering and J. P. Shim, *i2i Trust in Videoconferencing*, 29:7 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.).

¹⁶ 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.).

¹⁷ *Id.* at .62.

¹⁸ Fredric Lederer, *The Legality and Practicality of Remote Witness Testimony*, PRACTICAL LITIGATOR, 22 (September 2009) (The author is a proponent of videoconferencing technology. Indeed, the author states that as the technology improves, there will come a time when physical presence will never be mandated.).

¹⁹ Robert H. Philiposian et al., *Video Arraignments and its Potential for use in the County Criminal Justice System*, LOS ANGELES COUNTY CITIZENS' ECONOMY & EFFICIENCY COMM'N, 6 (November 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 makes no accommodations for private communications between attorney and client.).

²⁰ *Id.*

²¹ David A. Davis, *Talking Heads – Virtual Reality and the Presence of Defendants in Court*, FLA. BAR J., 75:2, 27 (February 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.).

²² Hillman, *supra* note 3, at 44. (Often concerning the potential dehumanizing effect of defendants, attorneys, and judges.).

²³ Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 878-879 (2010). (Among the ways that defense attorneys, legal scholars, and judges have argued that videoconferencing impairs the fairness and integrity of criminal proceedings is that when a defendant and their defense are physically separated, they cannot pass notes nor have an impromptu whispered

such experiments.²⁴ Legal and social scientific determinations must be made concerning the impact of videoconferencing on the ability of attorneys and clients to freely communicate and form a relationship based on trust. The essential question is, does videoconferencing represent a dilution of the quality of justice?²⁵

2.2 Videoconferencing and the Justice Process

Calls are being made for more research into how videoconferencing is used for a variety of criminal proceedings.²⁶ A foundation for ensuring fairness is the ability of defendants to consult with their attorneys at key times. The U.S. Constitution, the Rules of Evidence, and the Rules of Criminal Procedure form the cornerstone of fairness and procedural justice. The Rules of Evidence were written to ensure that proper, useful evidence (i.e. evidence that has high probative value) is admitted while evidence that does not is minimized. The Rules of Criminal Procedure are used to tailor the rules of the Constitution and the Rules of Evidence to a legal process that considers the elevated standard of an individual who is accused by the State of a crime, where the individual may be punished by a loss of liberty or death. Interpretation and alteration of these rules jeopardize the chance for a correct outcome in the legal process. Any change in these basic rules must further ensure a correct outcome. Creating more correct outcomes is a benefit to all, ensuring fundamental fairness and establishing legitimacy to the legal process. Many rules impact fundamental fairness and procedural justice. A major rule in the American legal process concerns the ability of the accused to confront the witnesses, evidence, and the state apparatus (the court itself) that threaten his liberty. The use of videoconferencing represents a change to the basic rules, and it must be examined with respect to fairness and procedural justice.

Every criminal defendant has a constitutional due process right to be physically present at all critical stages of their criminal proceeding.²⁷ Where courts have found a defendant's presence a constitutional necessity, it generally has been because of the intuition that the defendant's presence affects perceptions and impacts the outcome.²⁸ Client interviews concerning privacy have been cited as a problem.²⁹ It is necessary to provide a defendant with a way to privately communicate with their attorney.³⁰ Often, there is no provision for privileged communications between attorney and client via videoconferencing.³¹

Videoconferencing invariably detracts from the attorney/client relationship and the private communication between them.³² It highlights the issues and detrimental impact that videoconferencing has on attorney/client communications.³³ The use of videoconferencing leads to decreased personal contact between users and the possible alienation of defendants in the criminal justice system.³⁴

conference. Further, there is a diminishment of the ability to assess credibility, competence, ability to understand the proceedings, wellbeing, and/or the gravity of the proceedings.). See also, note 59.

²⁴ See Johnson & Wiggins, *supra* note 10, at 223. The use of videoconferencing in courtrooms before its effects of the technology on the legal process and the rights of the defendant are fully understood is problematic.

²⁵ 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.

²⁶ See Michael A. Stodgill, *Permitting the Use of Videoconferencing in Civil Commitment Hearings*, 55 MD. L. REV. 1001, 1016 (1996).

²⁷ 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 "physical presence" means ever since.).

²⁸ Diamond et al., *supra* note 24, at 882. 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.

²⁹ Philibosian, *supra* note 20, at 20. The situation cited in the article highlight the concerns of a public defender and their client where the public defender's office in the jurisdiction mandates physical presence of the defense attorney.

³⁰ 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 business person in terms of education, familiarity with videoconferencing technology, and nature of such communications.

³¹ Poulin, *supra* note 12, at 1129. See note 200. No communication or limited communications (communications that limited non-verbal communications) is a problem of videoconferencing in many jurisdictions.

³² See *Id.* This article highlights the 2002 case of *Rusu v. INS* where the respondent participated in his hearing from a detention facility while his counsel, along with the immigration judge, were 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.

³³ Harvard Law Review Association, *supra* note 5, at 1189.

³⁴ See Stodgill, *supra* note 27, at 1017.

2.3 The Attorney-Client Relationship: Communication and Trust

An attorney cannot effectively represent a client without effective private communication.³⁵ During a hearing or trial when the defendant is in detention and their defence counsel is in the courtroom, videoconferencing creates major barrier to attorney/client communication.³⁶ Videoconferencing creates two problems regarding access to counsel: 1) not being able to communicate with counsel at all and 2) limited communication with counsel via video.³⁷ One study found, the vast majority of defence lawyers believe that private attorney/client communications is impossible via videoconferencing.³⁸ Via video, a defendant's confidence in his counsel may be reduced, and the crucial trust between attorney and client is minimized.³⁹ In a video appearance, crucial aspects of a defendant's physical presence may be lost or misinterpreted, such as a participants' demeanour, facial expression, and vocal inflections resulting in an inability for immediate and unmediated contact with counsel.⁴⁰

2.4 Counsel and Client

Because defence counsel faces so many difficulties in representing a client via videoconferencing, he or she may be less effectual.⁴¹ This may raise objections of ineffective assistance of counsel based on lack of Attorney-Client private communication or limits on such communications, as a deaf client's attorney might if there is a problem with an interpreter.⁴² Just as a defendant's attorney should ensure that a client is not prevented from communicating with them because of deafness, a videoconferenced client should not be prevented from communicating with their attorney because of videoconferencing.⁴³ Videoconferencing is especially problematic for evidentiary hearings.⁴⁴ If an attorney believes that a situation (videoconferencing) is ineffective, that attorney should promptly advise the court and formally object for the record, if necessary.⁴⁵ A defendant's ability to properly interact with counsel, answer or ask questions, pass notes or view documents is impossible via videoconferencing.⁴⁶ The criminal justice system needs to make resources available for effective client-attorney private communication.⁴⁷ Basic communication between attorney and client is complicated and diminished by videoconferencing separation.⁴⁸

³⁵ 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.).

³⁶ 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.

³⁷ *Id.* at 38.

³⁸ *Id.*

³⁹ Davis, *supra* note 22, 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.

⁴⁰ See *Id.*

⁴¹ See *Id.*

⁴² 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 because of the situation, the defense attorney may not know whether the defendant understands or is failing to communicate.

⁴³ See *Id.* at 899.

⁴⁴ William M. Binder, *Videoconferencing: A Juvenile Defense Attorney's Perspective*, WIS. LAWYER 1 (July 1997). (The author states that the defendant will not see the demonstrative evidence, diagrams or documents discussed in the courtroom, out of sight of the video camera.).

⁴⁵ See Compton, *supra* note 36, at 900. The "situation" can be ineffective interpreting for a deaf client or videoconferencing where an attorney cannot effectively communicate because of the medium.

⁴⁶ Binder, *supra* note 45, at 47. The author relates how Hollywood uses camera angles and other video techniques to evoke opinions and emotions and that videoconferencing in the courtroom may have similar, perhaps unintended, consequences.

⁴⁷ 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.

⁴⁸ Poulin, *supra* note 12, at 1129. Videoconferencing complicates an already difficult situation and will likely contribute to the problem of marginal or inadequate representation.

In a videoconferenced situation, a defendant who has little or no private communication with his/her attorney may believe that their lawyer is merely processing their case without any real connection to them. Such a perception can only weaken the client-attorney relationship.⁴⁹

Attorneys and clients typically “size each other up” evaluating each other’s character, demeanour, experience, the nature of the offense, the defendant’s prior record, and a multitude of other factors that lead (or not) to the necessary trust for a working relationship. Critics argue that videoconferencing may impede this trust building process.⁵⁰ Both counsel and defendant are a critical source of information in determining how to proceed with a defence. The courtroom is the ultimate forum for gathering critical information, the place where people come face-to-face and exchange information to settle what is controversial.⁵¹ If the face-to-face nature of the process is what makes a courtroom so effective, then the question becomes whether a virtual presence is as effective.

2.5 Attorney-Client Interactions

The human interactions that foster trust in the attorney-client relationship are muted by videoconferencing.⁵² Videoconferencing imposes a limit on attorney-client private communication within a system that imposes other limits on such communications.⁵³ Often, when video is used, the attorney is in court and the defendant is present on video from a detention center.⁵⁴ With videoconferencing, some defence counsels state that they might have a more difficult time presenting their case. The prosecution and defence present conflicting information. The prosecution may present evidence to influence the court. If the defendant is not in court, and cannot privately, effectively communicate with defence counsel in court, the defendant will likely be hampered in challenging and evaluating such evidence. Due to the physical separation between the defendant and counsel, a defence attorney might find it more difficult to advise, calm, or control a defendant.⁵⁵

Attorney-client interviews are significant interactions for both lawyers and clients.⁵⁶ Attorney-client conversations are essentially a cooperative activity.⁵⁷ In a typical attorney-client interaction, information is exchanged in an orderly way. That information concerns the clients’ goals and the manner in which the attorney will achieve those goals.⁵⁸ These conversations are different from “ordinary talk.”⁵⁹ A client’s background, interests, and context for what they would consider to be a successful outcome should precede an attorney’s solution.⁶⁰ Many defendants and counsellors are dissatisfied with videoconferencing because it fails to supply enough information about the people with whom they are speaking.⁶¹ Some scholars believe that the benefits of videoconferencing flow primarily to the

⁴⁹ Davis, *supra* note 22, 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.

⁵⁰ See Ashdown & Menzel, *supra* note 11, at 67.

⁵¹ *Id.* at 66-67.

⁵² 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.

⁵³ See Natapoff, *supra* note 4, at 1473. Privileged communications that the court assumes has 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.

⁵⁴ Poulin, *supra* note 12, at 1129.

⁵⁵ *Id.*

⁵⁶ See Linda F. Smith, Client-Lawyer Talk: Lessons from Other Disciplines, 13 CLINICAL L. REV. 507, 512 (2006) (Attorney-client interactions are essentially conversations and that conversations need to proceed in “orderly” ways. Any impediments to these interactions, such as videoconferencing, detract from effective representation.).

⁵⁷ *Id.*

⁵⁸ *Id.* at 510-512.

⁵⁹ *Id.* at 513.

⁶⁰ *Id.* at 523-524.

⁶¹ Cameron Teoh et al., *Investigating Factors Influencing Trust in Video-Mediated Communications*, (<http://portal.acm.org/dl.cfm>) 313 (2010). (Among the factors investigated were the use of videoconferencing technology and communication and collaborative activities. The study specifically explored the effect of 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.).

government.⁶² Some attorneys find the use of videoconferencing to be a “surreal experience” in which clients are turned into a “piece of electronic equipment.”⁶³

Just as with a client who is mentally incompetent to stand trial, a client who cannot privately communicate with their attorney because of an inadequate videoconferencing arrangement is compromised in his ability to make rational decisions, or to produce ideas and thoughts necessary for achieving fundamental fairness.⁶⁴ Attorney-client communication, like competency, is necessary for a fair trial.⁶⁵ As with issues of competency, most defence attorneys are untrained in the use of videoconferencing. Thus defence attorneys unfamiliar with videoconferencing’s inadequacies are concerned that raising competency issues may negatively impact their client’s defence.⁶⁶

Researchers found that the more complex the task, the greater the need for a richer and more subtle communication environment.⁶⁷ The richness of videoconferencing depends on the availability of instant feedback, the use of multiple cues (such as facial expressions, voice inflections, and gestures), the use of natural language for conveying a broad set of concepts and ideas, and the personal focus of the medium.⁶⁸ Videoconferencing systems are notorious for introducing spatial distortions.⁶⁹ Internet videoconferencing is subject to jerky or halting images, depending on the level of Internet traffic and the speed of connections.⁷⁰

Non-verbal gestures and cues form a large part of the way we communicate and express ourselves.⁷¹ Because communicating via videoconferencing often presents timing difficulties, people have to be careful not to interrupt and allow others to finish speaking or alter the way they speak.⁷² People often need to be coached to look into the camera, and not the viewing monitor, when speaking to give the impression of eye contact.⁷³ In some jurisdictions, the defendant stands before the screen, is viewed by the court and audience, but sees only the judge.⁷⁴ Biases and stereotypes of attorneys and defendants may influence perceptions of face-to-face versus videoed communications.⁷⁵

2.6 Communication versus Effective Communication

Some of the strongest predictors of believability in communication are the speaker’s confidence and consistency.⁷⁶ Many non-verbal cues, including gaze and deictic gestures, are dependent on the spatial faithfulness of the video system.⁷⁷ Any technical problem can render videoconferencing exchanges

⁶² 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.

⁶³ Haas, *supra* note 2, at 64.

⁶⁴ See Joanmarie Ilaria Davoli, *Physically Present, Yet Mentally Absent*, 48 LOUISVILLE L. REV. 313, 318 (2010) (Impediments to effective representation can take many forms. Unlike mental incompetence, videoconferencing is an impediment introduced into the justice system.).

⁶⁵ *Id.* at 317.

⁶⁶ *Id.* at 318.

⁶⁷ 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)).

⁶⁸ Bekkering & Shim, *supra* note 16, 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.

⁶⁹ Torres, Preskill & Piontek, *supra* note at 17. See *infra* note 124.

⁷⁰ *Id.*

⁷¹ Teoh et al., *supra* note 62, at 313.

⁷² Torres, Preskill & Piontek, *supra* note 17, at 208.

⁷³ *Id.* at 209.

⁷⁴ Binder, *supra* note 45, at. 47. The author stresses that the view of the participants in a videoconferenced proceeding is important.

⁷⁵ See Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children’s Eyewitness Testimony and Jurors’ Decisions*, 22:2 L. HUM. BEHAV. 165, 169 (1998).

⁷⁶ *Id.* at 170.

⁷⁷ David Nguyen and John Canny, *MultiView: Improving Trust in Group Video Conferencing Through Spatial Faithfulness*, CHI 2007 PROCEEDINGS-TRUST & ENGAGEMENT 1465 (2007). (Videoconferencing systems are often

worthless.⁷⁸ Although body language is considered to be extremely important to people who use videoconferencing in establishing trust, the ability to read these non-verbal gestures and cues is limited.⁷⁹ Non-verbal gestures and cues are vital, especially during initial meetings that establish a rapport and trust, enabling the exchange of information necessary to make informed decisions concerning his/her case.⁸⁰

Because of the quality of the connection or age of the video equipment, it can be necessary for all parties to speak slowly and clearly into the microphone.⁸¹ Fast movements are sometimes blurred, or “freeze” on the screen for two to four seconds before returning to live action.⁸² Videoconferencing is a powerful medium, but without a clear connection, it can be a bumpy pothole-riddled section of the information super-highway.⁸³ Many believe, in order to support the complex, multi-layered processes required to conduct effective videoconference hearings, it is necessary to have both the prosecutor and defence attorney at the same place eliminating the need for video.⁸⁴

Research has confirmed that body language and eye/gaze contact are important contributing factors for effective remote communication.⁸⁵ Further, men and women experience, perceive, and use videoconferencing in significantly different ways.⁸⁶ Communicating via videoconferencing effectively is a learned skill where speaking into the camera versus looking at the monitor to see the person with whom they are conversing makes a difference. When the speaker looks only at the screen (monitor) and not the camera, it appears to the listener that the speaker is not looking at them. In face-to-face communication, failure to maintain eye-contact is universally considered to be a sign of deception, leading to feelings of mistrust.⁸⁷ Humans are highly skilled at perceiving eye-contact, and the negative effects of failing to maintain eye-contact and interact smoothly significantly impact the promotion and maintenance of trust.⁸⁸

Teamwork is considered to be necessary to the working relationship between an attorney and their client.⁸⁹ Research shows trust is particularly critical in new relationships and, like partnerships, takes time to establish.⁹⁰ However, trust forms more slowly between people in videoconferences compared to

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

⁷⁸ David M. Fetterman, *Videoconferencing On-Line : Enhancing Communication over the Internet*, 25:4 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.).

⁷⁹ Cameron Teoh et al., *Body Language and Gender in Videoconferencing*, Info. Sci. Postgraduate Day, 9, 10 (October 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.).

⁸⁰ *Id.* at 10.

⁸¹ Binder, *supra* note 45, at 1. The author states that technical flaws and limitations in the equipment diminish the quality of the court proceeding and that they may rise to the level of procedural and substantive violations for a fair hearing.

⁸² *Id.* at 1.

⁸³ Fetterman, *supra* note 79, at 27. Without a clear connection videoconferencing has limited usefulness in the courtroom.

⁸⁴ Lawrence P. Webster, *Evaluation of Videoconferencing Technology Mesa Arizona Municipal Court*, NAT'L CENTER FOR SAT. CTS. (Nat'l Center for Sat. Cts. Williamsburg, Va.) 10 (May 2009). (The author states that the only way for videoconferencing to be used in a way that is both fair and efficient is to have the defendant, defense counsel, and the prosecutor in the same locations (at the jail facility) and have their images videoconferenced to the judge in the courtroom. In this way all the necessary parties can view and converse with each other simultaneously. Interactions between the defendant and counsel can take place in the traditional fashion including private communications. Any disadvantage (or advantage) to the defense would be shared by the prosecution. This scenario seems to satisfy most criticisms of the technology.).

⁸⁵ Teoh et al., *supra* note 80, at 9.

⁸⁶ *Id.* at 10.

⁸⁷ Bekkering & Shim, *supra* note 16, 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 that 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.

⁸⁸ *Id.* at 107.

⁸⁹ Corbitt et al., *supra* note 68, 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.

⁹⁰ Ratnasingham, *supra* note 15, at 341.

face-to-face conversations.⁹¹ Trust, like rapport and partnership, takes time to establish in the initial phase of relationship.⁹² The trust formed by videoconferenced encounters is fragile.⁹³ High trust teams are more effective than low trust teams.⁹⁴ Research found people involved in videoconferenced negotiations there was less trust amongst participants.⁹⁵

Videoconferencing has issues that interfere with the smooth flow of information between people. Small time lags in time when people do not know when the other has finished speaking along with the resulting trust issues.⁹⁶ Non-verbal gestures and cues contribute meaningfully to a conversation, and help one to determine the trustworthiness of others.⁹⁷ 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 between client and attorney.⁹⁸

Trust in electronic communications reinforces the prospect of continuity in a relationship and a commitment to extend relationships.⁹⁹ The more virtual a relationship, the more the people involved in the relationship need to meet in person. Virtuality (videoconferencing) requires trust to make it work. Research shows that technology alone is not enough.¹⁰⁰ Trust that breaks down in videoconferenced situations can be repaired by face-to-face contact, but then that extra effort has to be made.¹⁰¹

The richness of communication between people increases the learning capacity that comes from shared information, which can contribute to a faster and stronger development of trust.¹⁰² A poor quality video can create artificial cues associated with lying, detrimental to promote trust.¹⁰³ Videoconferencing systems reduce levels of trust as compared to face-to-face meetings.¹⁰⁴ This research has found that people exhibit more cooperative behaviours and have greater trust in their interactions when communicating face-to-face than in a mediated environment.¹⁰⁵ Videoconferencing also inhibits trust by distorting conversational turn-taking cues affecting the normal flow of conversation.¹⁰⁶

⁹¹ 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.)

⁹² Ratnasingham, *supra* note 15, 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.

⁹³ Bos, et al., *supra* note 96, at 292. The authors noted that videoconferenced and audio communications took some time to catch up with face-to-face group 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.'

⁹⁴ Corbitt et al., *supra* note 68, at 2.

⁹⁵ Teoh et al., *supra* note 62, 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 untrustworthy behavior and the body language endemic in videoconferencing reinforces judgments of untrustworthiness. Second, due the nature of the task, people are less trustworthy.

⁹⁶ Fetterman, *supra* note 79, 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.

⁹⁷ Cameron Teoh et al., *supra* note 80, at 9. Videoconferencing often does not show or obscures the non-verbal gestures and cues of attorneys or defendants.

⁹⁸ Ratnasingham, *supra* note 15, 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.

⁹⁹ *Id.* at 313.

¹⁰⁰ *Id.* at 316.

¹⁰¹ See Bos et al., *supra* note 96, at 292.

¹⁰² Bekkering & Shim, *supra* note 16, at 105.

¹⁰³ *Id.* A slow signal makes it appear that that the speaking is hesitating, and hesitation in answering is generally considered a sign of lying.

¹⁰⁴ Nguyen & Canny, *supra* note 78, 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.

¹⁰⁵ *Id.* The authors highlight issues of perspective invariance and the Mona Lisa Effect detailing the effect of Mona Lisa's eyes following you as you walk around.

¹⁰⁶ Bekkering & Shim, *supra* note 16, at 105. The authors note the subtleties of tone of voice or eye contact involved in conversational turn-taking.

Trust can be difficult to observe and measure. It can be difficult to build trust via videoconferencing without meeting face-to-face due to a lack of: 1) prior familiarity with each other, 2) prior shared experiences and, 3) expectations of a common future.¹⁰⁷ Low levels of trust can be attributed to the: 1) general uncertainty of the users in technology (videoconferencing), 2) lack of face-to-face initial introductions, 3) lack of enthusiasm and initiative among the parties (attorney/client relationship) and, 4) the unpredictability of communications between the users.¹⁰⁸

3. Theories of Communications via Videoconferencing

The possible negative effects of videoconferencing are examined by some theorists clarifying how people communicate, form working relationships, establish trust, and make informed decisions. These theories posit that how information is assessed depends on how it is gathered.

3.1 Emergent Meaning Theory

Emergent Meaning Theory assesses how people consider various elements of a speaker's story – the story itself, the level of trust between speaker(s) and listener(s), how effectively information is exchanged, and the degree that the speaker is to be believed – to create a *mélange* of understanding.¹⁰⁹ The medium of videoconferencing, often largely unnoticed, contributes to the quality of communication.¹¹⁰ The medium often over-or under-emphasizes certain content on an adjudicator without the adjudicator being aware. Video technology, according to this theory, can never truthfully capture all of the physical and psychological cues that humans understand innately or socialized to consider when forming an opinion about a certain person. Video is two-dimensional while reality is three-dimensional. Camera angles, lighting, and background can either emphasize or minimize certain characteristics that are taken into account when people communicate.¹¹¹ The theory maintains that videoconferencing interferes with the “emergent meaning” assessment that users apply to the quality of exchanged information and retards the building of trust necessary to an attorney-client relationship. Videoconferencing interferes with and distorts the process. With videoconferencing, people are less able to detect sincerity or deception, appreciate cultural differences, or understand non-verbal cues well as if the applicant was before the court in person.¹¹² If the medium has such a strong negative impact on people's perceptions and communications, then videoconferencing will likely interfere with attorney-client communications.¹¹³

¹⁰⁷ Ratnasingham, *supra* note 15, at 316-317.

¹⁰⁸ *Id.* at 317.

¹⁰⁹ Federman, *supra* note 81, at 435. Some of the elements that contribute to impacts on videoconferencing might include: 1) the relative cultural conditioning of television itself, 2) participants' conditioning relative to video camera use in surveillance, 3) the effects of distortion in experiencing non-verbal communications, or those induced by shifted eye-contact (through non-alignment of viewing screen and camera angle), 4) the effects of a video-mediated environment may have on encouraging or detecting deception and, 5) the effects of the participants' relative imbalance in experience with videoconferencing, among other secondary and tertiary ground influences.

¹¹⁰ Marshall McLuhan, *Understanding Media: The Extensions of Man*, New York: McGraw-Hill (1964); See S. R. Ellis, Videoconferencing in Refugee Hearings: Report to the Immigration and Refugee Board Audit and Evaluation Committee, (Unpublished report) Ottawa: Government of Canada (2004).

¹¹¹ Federman, *supra* note 81, at 436. The awareness of these effects is the first step in mitigating the unperceived influences of videoconferencing. But awareness alone is not sufficient to eliminate them. Steps must be taken to alleviate or eliminate them.

¹¹² *Id.* The author states that in some instances these negative issues may not be eliminated from human cognition.

¹¹³ *Id.* at 435-436. Videoconferencing, as well as technology in general, modifies perceptions and manipulates the processes of cognition, and changes the behaviors and interactions with others. The documented negative issues with videoconferencing and its impact on private attorney-client communications is reason enough to slow or stop the process until it can be further studied to alleviate the negative impacts.

3.2 Information Integration Theory

Information Integration Theory argues that videoconferencing technology may have little impact on attorney/client communications in the courtroom.¹¹⁴ This research, backed by previous studies indicates that other factors may be more important than videoconferencing in communicating and formulating opinions.¹¹⁵ This theory assumes that people use a process to combine or integrate information to form impressions and communicate ideas.¹¹⁶ Most of the research relevant to this theory suggests that communication and social judgments, whether towards individuals or groups, are the result of a weighted average of the different sources of available information.¹¹⁷ According to this theory, all pieces of information are not treated equally; some are considered more important and given greater “weight” in forming relationships and opinions. Ebbesen and Konecni used variables to represent the subjective value of each type of information a judge uses to communicate in the courtroom and make decisions. The authors chose five key variables based on observing judges and the types of information most important to their decisions.¹¹⁸ They are: (1) the severity of the crime; (2) a defendant’s prior record; (3) the defendant’s local ties to the community; (4) the recommendation of the district attorney and (5) the defence attorney’s recommendation.¹¹⁹ It was often noted that both prosecutors and defence attorneys often used these factors in support of their recommendations. The main assumption that the authors make and attempt to test is that “... judges would use some type of averaging process to put together the various types of information that they have available when setting bail...”¹²⁰ The research concluded that the five variables were the most important factors judges consider in determining levels of trust. If these factors have a strong impact on communication and conclusions, then videoconferencing would likely have little or no impact on their perceptions of trust (i.e. bail setting).

3.3 Communication Theories

In broad terms, communication theories attempt to explain how information is conveyed and interpreted. A pillar of these theories is Claude Shannon’s Information Theory of communication.¹²¹ This theory assumes that “noise” is the enemy of information. “Noise” is defined as anything that comes between the speaker and the listener.¹²² This is shown, for example, by having someone read a text in a quiet room, in a noisy room, and at a music concert and then quizzing the listeners on their understanding of the text. Information Theory shows that as the amount of environmental noise increases, the amount of information transmitted is reduced. Noise is also categorized as either physical or semantic. Examples of physical noise include background talking, loud music, or bad weather. Semantic noise refers to

¹¹⁴ Orcutt et al., et al., *Detecting Deception in Children’s Testimony: Factfinders’ Abilities to Reach the Truth in Open Court and Closed-Circuit Trials*, 25:4 L. HUMAN BEHAVIOR 339, 366-367 (2001). (The video in this study was not interactive but it does highlight the negative perceptions that the viewers had of subject on video. Because of these negative issues it was the conclusion of the research that such technology may not be in the best interest of the witness on video.)

¹¹⁵ *Id.*

¹¹⁶ See Ebbe B. Ebbesen and Vladimir J. Konecni, *Decision Making and Information Integration in the Courts: The Setting of Bail*, 322: 5 J. PERSONALITY AND SOC. PSYCHOLOGY 806 (1975). (“This theory is primarily concerned with the process that allows people to combine or integrate social information to form impressions and make decisions.”)

¹¹⁷ *Id.* at 807. Information integration theory employs an averaging model to help guide the analysis and interpretation of the results.

¹¹⁸ *Id.* at 808. The primary purpose of the research was to determine how people, in this case a judge, integrates information to arrive at decisions.

¹¹⁹ *Id.* at 812. “There were two purposes of this study. The first was to determine whether the same factors that were important in the judges’ simulated decisions would prove important in their actual bail decisions. The second was to determine whether or not the same integration model used to explain the results from the full factorial design could be generalized to actual bail hearings.”

¹²⁰ *Id.*

¹²¹ See C. E. Shannon, *A Mathematical Theory of Communication*, BELL SYSTEMS TECH. J. (1948); reprinted in MOBILE COMPUTING AND COMM. REV. Vol. 5, No. 1. 3. (Shannon views a major problem with communication, especially through an artificial medium such as videoconferencing, is that of reproducing a message sent from one point to another. The danger of confusion of the message from the person sending the message (the Source) to Receiver is high the more problematic the medium. The negative issues associated with videoconferencing impedes communication and interferes with the attorney-client relationship.)

¹²² Davis Foulger, *Models of the Communication Process*, <http://davis.foulger.info/research/unifiedModelOfCommunication.htm>, 2-3 (2004).

distortions or misunderstanding in the meanings of words between the sender and receiver, usually based on false assumptions, resulting in a breakdown of communication.¹²³ Summarized mathematically, this theory states:

$$\text{Capacity} = \text{Information} + \text{Noise}^{124}$$

The insidious nature of this type of communication breakdown is that the people involved often do not realize that there has been a breakdown or realize it very late in the interaction. In the videoconferencing context, the more environmental noise there is from poor technology, poor training of court personnel, or ignorance of the use of videoconferencing, the less capacity there is for the users to understand the information transmitted.

Shannon's communication process is broken-down into eight components:

1. the Source – the person sending the message;
2. the Message – sent by the Transmitter and received by the Destination;
3. the Transmitter – the Transmitter has two layers: the sound (voice) and (body) gestures of the speaker, and the method used to convey the sound and gestures, either by face-to-face contact or via camera and microphone.
4. the Signal – the Message from the Source that flows from the two layers of the Transmitter.
5. the Channel – how the Signal is carried. In the example of videoconferencing the Signal is carried via the Internet or the hardwires that carry the video.
6. the Noise – ancillary signals that obscure or confuse the Signal.
7. the Receiver – that which receives the Message from the Source. In the example of videoconferencing it is the video monitor from the Transmitter.
8. the Destination – the person who hears/receives the Message.¹²⁵

Videoconferencing is a classic example of Shannon's Information Theory. The Message, the private communications, between the defendant (the source) and their attorney (the receiver), is confused by the video camera and microphone (the Transmitter) or the poor quality of videoconferencing or training of the operators (Noise) negatively impacts defendants' quality of justice. Problems with the Transmitter or Noise as defined by Shannon's theory creates impedes communications between attorney and client.

Other communication studies have focused on issues, including videoconferencing, that impact attorney-client communications. Some studies conclude that attorney-client communications via video have a great deal of ambiguity.¹²⁶ Another study examined the influence of closed-circuit television (CCTV) in open court and the ability to effectively communicate, and also came to an ambiguous conclusion.¹²⁷ This study explored a fact-finders' ability to determine (1) deception or non-deception of a child's testimony via CCTV versus traditional trial settings, and (2) the influence of viewing deceptive and non-deceptive testimony on a person's rating of a witness' credibility and defendant's guilt.¹²⁸ It was found that there was no support for the idea that fact-finders reach the truth better when children testify in open court versus CCTV. Unlike videoconferencing, CCTV is not interactive – it is a visual medium where a person's ability to determine deception is tested.

Low credibility is also associated with videoconferencing.¹²⁹ As previously mentioned, establishing trust via video is difficult because non-verbal cues are unavailable to read.¹³⁰ For videoconferencing to

¹²³ *Id.*

¹²⁴ Graham Williamson, *Communication Theory*, <http://www.speech-therapy-information-and-resources.com/communication-theory.html> 2 (visited 2012).

¹²⁵ Fougler, *supra* note 123, at 2-3.

¹²⁶ Orcutt et al., *supra* note 115, at 365-367. This study highlights the problematic issues associated with this technology. Issues of accuracy, believability, consistency, confidence, attractiveness, and intelligence are all detailed in this research. These issues in the context of private communications between an attorney and their client via videoconferencing, underscore the dangers of how such communication can be diminished to the point of failure.

¹²⁷ *Id.* at 807.

¹²⁸ *Id.* at 368.

¹²⁹ Torres, Preskill & Piontek, *supra* note 17, at 178.

¹³⁰ Teoh et al., *supra* note 62, 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.

work in the courtroom when an attorney is present but their client is being held in prison, some basic safeguards must be implemented. The introduction of videoconferencing should be gradual, allowing law enforcement, judges, attorneys, and court administrators to implement fair and effective procedures.¹³¹ Videoconferencing can have a place in the legal process, but such systems must be employed in a way that does not diminish trust between parties.¹³² Research has shown that video, whether interactive or not can lead to a negative bias.¹³³ Data clearly shows that there are issues with defendants being able to clearly and privately communicate with their attorneys. Clear, private communication channels must be established between attorney and client.

Research also suggests that videoconferencing may be more useful when participants are already acquainted and have a pre-existing relationship.¹³⁴ This is seldom the case, especially with defendants represented by public defenders. Important decisions need to be discussed between an attorney and their client prior to going to court. Case strategies, fact gathering, and basic decisions (such as pleas and the ramifications of such decisions) are better hashed out in person. Studies clearly show that negotiation and intellectual tasks are better performed using face-to-face communication.¹³⁵ Researchers question some of the basic procedures that happen at many videoconferenced hearings. In some jurisdictions, it is mandated that defence attorneys be physically present with their client during videoconferenced hearings.¹³⁶ Other studies state that videoconferencing cannot eliminate the need to transport defendants to the courthouse.¹³⁷

Video conferencing is a poor substitute for in-person hearings.¹³⁸ 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.¹³⁹ In *A Theory of Justice*, John Rawls maintains that fundamental fairness and procedural justice rely on rules that are reasonably expected to be to everyone's advantage.¹⁴⁰ If a rule does not benefit everyone, it is likely that the rule is unfair. This does not imply that everyone must benefit equally for a rule for it to be considered fair, only that everyone, to some degree, benefits. A set of rules, properly followed, make up a process. Nowhere are rules and processes more important than in a legal setting. The American criminal court system is a near-perfect example of a people's attempt to put into action a set of rules that depends upon fundamental fairness and procedural justice. This process-driven activity strives for a desired outcome that a defendant is found guilty only if that defendant committed that crime through strict adherence to the legal process. Strict adherence to the legal process is necessary to ensure consistency in all proceedings, as well as an expectation of reliability on the part of the society instituting the legal process. It is through consistency and reliability that the legal process attains correct outcomes and legitimacy. A defendant's speech has personal, dignitary, and democratic import beyond its instrumental within a criminal case.¹⁴¹ Criminal defendant speech is perhaps the quintessential example of the individual defending his or her life and

¹³¹ Philiposian et al., *supra* note 20, 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.

¹³² Nguyen & Canny, *supra* note 78, 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.

¹³³ Goodman et al., *supra* note 76, at 170. The use of closed-circuit television (CCTV) was associated with a negative bias.

¹³⁴ Toeh et al., *supra* note 64, at 313-314. A videoconferenced hearing is often the first meeting between a client and their attorney, especially a public defender or court appointed attorney.

¹³⁵ *Id.* at 314. A client-lawyer communication, especially during initial meetings and pre-trial hearings involve negotiation and intellectual interactions between client and lawyer.

¹³⁶ Philiposian et al., *supra* note 20, at 20. Indeed, the jurisdiction in question in the article is one where physical presence of a defense attorney is a mandatory condition of the Public Defender's participation in videoconferencing.

¹³⁷ Webster, *supra* note 85, at 6. This evaluation assumed that the defense attorney and the client were together at the jail facility.

¹³⁸ Grant, *supra* note 39, at 5.

¹³⁹ Davis, *supra* note 22, 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.

¹⁴⁰ John Rawls, *A Theory of Justice* 110-112 (1971).

¹⁴¹ See Natapoff, *supra* note 4, at 1450.

liberty against the state.¹⁴² Poor defendants, in addition to their socioeconomic and educational disadvantages, are often represented by public defenders or low-paid attorneys who lack the resources and/or time to fully interview and listen to their clients – adding to an often poor client-attorney communication.¹⁴³ Proceedings conducted by videoconferencing raise a number of concerns that have not been fully explored, particularly in light of the growing body of scientific evidence that shows video-mediated personal interactions are perceived as significantly different by the participants and observers than in-person interactions.¹⁴⁴

Many legal scholars believe that the use of 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 does a physical presence in the courtroom. The judge in robes, the raised bench, the witnesses, the attorneys, the families and spectators, the flags, the seals, and the armed bailiffs are all elements that invest the solemnity and seriousness that the courtroom warrants. They are designed to impel people to reflect on the legal process and their responsibilities to the law and greater society. They are more than mere trappings. The form and the process are pillars that support the structure of the criminal justice system just as ceremony and ritual reinforce religion practices.¹⁴⁵ Judge Goodwin further states that videoconferencing may taint the general public's perception of integrity of the criminal court process. He maintains that the court's moral authority rests on the perception that its proceedings are humane, fair, and just.¹⁴⁶ The criminal court process depends on this perception, and the court should not take this confidence for granted. Any practice that threatens to demean the dignity of defendants will likely reduce the respect for the court and imperil the criminal justice system.

Given the mixed conclusions that research has reached, more research is necessary to determine if videoconferencing has an impact on effective, private communication and whether that impact, if any, results in a lack of adequate legal representation for defendants.

4. Pros and Cons of Videoconferencing

4.1 Cons of Videoconferencing

Researchers detail the drawbacks of synchronous electronic communications (communications that include videoconferencing). First is a lack of access or experience with videoconferencing technology.¹⁴⁷ Often, court personnel do not have experience with videoconferencing equipment, which creates communication problems. These problems in turn change the behaviour of videoconference users in the courtroom. It becomes difficult for defendants to see, hear, and understand what is taking place, and at a remote location therefore they do not behave as those in a courtroom.¹⁴⁸ Some defendants are impressed that they are “on TV,” which might also alter the way they behave.¹⁴⁹ Not all people are comfortable with communicating via videoconferencing.¹⁵⁰ One judge noted that the some defendants are so unaccustomed and uncomfortable with videoconferencing or speaking on camera that they appear to act “like zombies.”¹⁵¹

A second drawback is failures or problems associated with videoconferencing technology.¹⁵² Issues with the videoconferencing equipment are detrimental to effective communications. Videoconferencing

¹⁴² *See Id.* at 1451.

¹⁴³ *See Id.* at 1453-1454 .

¹⁴⁴ Haas, *supra* note 2, at 61.

¹⁴⁵ Ashdown & Menzel, *supra* note 11, 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 (Sept. 6, 2001)).

¹⁴⁶ *Id.*

¹⁴⁷ Torres, Preskill & Piontek, *supra* note 17, at 198-199.

¹⁴⁸ Davis, *supra* note 22, at 27. The author states that many observed that there was often no proper meaningful, private communications between clients, located at a detention center, and their attorneys, located in the courtroom.

¹⁴⁹ Binder, *supra* note 45, at 1.

¹⁵⁰ Torres, Preskill & Piontek, *supra* note 17, at 209.

¹⁵¹ Davis, *supra* note 22, at 27. Conversations via videoconferencing are difficult and problematic especially in situations that are emotionally charged and filled with anxiety.

¹⁵² Torres, Preskill & Piontek, *supra* note 17, at 198-199.

systems are notorious for the spatial distortions they introduce.¹⁵³ Many videoconferencing systems are low quality, limited and offer or no interaction between client and lawyer, leading to reduced trust between the two sides with obvious negative outcomes.¹⁵⁴ Inferior, problematic videoconferencing yields inferior, problematic communications.

Third is an inability (through scheduling or as a result of the technology) for attorneys and clients to set an agenda ahead of time.¹⁵⁵ Defence attorneys and clients must be able to meet ahead of time to discuss and strategize the issues of their case. The give and take of information exchanged before a hearing or trial has an impact on what happens at that hearing or trial. The defendant may, for example, be able to point out errors in the record or provide some illuminating piece of evidence that will assist his counsel in the case. Often, such private communications must occur immediately as in a fast-paced hearing (such as a bail hearing). In this context, separating the defendant from counsel via videoconferencing can infringe on the Sixth Amendment right to counsel.¹⁵⁶ In a 2010 study of the effect of videoconferencing on bail hearing outcomes, researchers found that there were “extremely limited” opportunities for private attorney-client communications.¹⁵⁷ The results of the research showed that the average bond amounts rose substantially following the introduction of videoconferencing at bail hearings and that there was a steady rise in bond levels over time.¹⁵⁸

Another detriment is a reduced opportunity for full participation among videoconference users.¹⁵⁹ Communications in the courtroom, whether they are private communications between attorney and client or in open court, are complex. Studies show that the more complex the communications, the less effective videoconferencing is in the courtroom. To be sure, any medium that inhibits confident and consistent testimony in attorney-client communications must be viewed with caution.¹⁶⁰ It is clear that the larger the audience, the more issues emerge with videoconferencing.¹⁶¹ Studies show that videoconferencing overloads the cognitive processing of users involved in a complex task and biases their perceptions of one another.¹⁶²

Videoconferencing also does not present the same opportunity for mutual understanding and trust building that is unique to face-to-face meetings.¹⁶³ Via videoconferencing, an attorney may not gauge the emotional state of their client.¹⁶⁴ An attorney cannot personally comfort or defend their client by placing a hand on an arm or shoulder or standing beside the client before the court.¹⁶⁵ In some jurisdictions, videoconferencing means that there is no proper opportunity for meaningful, private communication between attorney and client.¹⁶⁶ Electronic communications often lack security and reliability arising from issues of trust among users.¹⁶⁷ In some jurisdictions, courts provide a separate telephone line for

¹⁵³ Nguyen & Canny, *supra* note 78, at 1465. The authors state that the only way to alleviate the negative effects of videoconferencing is to have multiple cameras and multiple viewing monitors available for all participants.

¹⁵⁴ See Corbitt et al., *supra* note 68, at 6-7.

¹⁵⁵ Torres, Preskill & Piontek, *supra* note 17, at 198-199.

¹⁵⁶ Diamond et al., *supra* note 24, at 881-882. The author highlight that during bail hearings judges are required to make a determination on a defendant’s trustworthiness and character concerning the likelihood of a defendant’s returning for trial if released and that the opportunity to physically observe a defendant would add useful information to a judge in making a determination.

¹⁵⁷ *Id.* at 884-885.

¹⁵⁸ *Id.* at 897-898.

¹⁵⁹ Torres, Preskill & Piontek, *supra* note 17, at 198-199.

¹⁶⁰ Goodman et al., *supra* note 76, at 169.

¹⁶¹ Fetterman, *supra* note 79, at 25. The more people involved in the videoconferencing process, the more issues that can arise. Multiple people require multiple points of view or a wider angle will result in a diminution of detail in each participant.

¹⁶² James H. Watt et al., *Asynchronous Videoconferencing: A Hybrid Communication Prototype*, Proceedings of the 35th Hawaii International Conference on System Sciences, 3 (2002) (This paper reviews the literature on the costs and benefits of synchronous and asynchronous interactions.).

¹⁶³ Torres, Preskill & Piontek, *supra* note 17, at 198-199.

¹⁶⁴ Poulin, *supra* note 12, at 1130.

¹⁶⁵ *Id.*

¹⁶⁶ Davis, *supra* note 22, at 27. The author highlights four problems of videoconferencing: 1) the authority for defendants to appear via videoconferencing, 2) the Six Amendment right of confrontation, 3) the Sixth Amendment right to effective assistance of counsel and, 4) due process rights under state and federal constitutions.

¹⁶⁷ Ratnasingham, *supra* note 15, at 313. The author defines trust as “the willingness of a party to be vulnerable to the actions of another party based on the expectation that the other will perform a particular action important to the trustor...” This can be a working definition of the attorney-client relationship where a defendant is vulnerable to the actions of their attorney with an expectation that their defense attorney will effectively represent and inform them throughout the representation.

privileged communications between attorney and client, but even then nonverbal communication is limited.¹⁶⁸ Many attorneys' experience with videoconferencing involves speaking with the client by telephone the day before, with no convenient means for attorney-client private communication during the videoconferenced hearing the day of the hearing.¹⁶⁹ Even with a private telephone line, extemporaneous communications between attorney and client via videoconferencing is difficult.¹⁷⁰ If the attorney needed to discuss any point with his client (in a remote location) before or during the hearing, everyone in the courtroom would have to leave.¹⁷¹ The need for attorney-client confidentiality renders videoconferencing cumbersome and impractical if the courtroom needs to be cleared for every question.¹⁷² The court also deemed "private" any attorney-client communication and the communications could not be used in anyway by any party or agency since the security of the transmission was in question.¹⁷³

And lastly, videoconferencing may not be suitable for users unfamiliar with communicating electronically.¹⁷⁴ Attorneys and clients not familiar with videoconferencing communicate less effectively, and can do themselves harm by projecting themselves in a negative light. As noted previously, child witnesses who testified via Close Circuit Television CCTV were viewed as less believable than those who testified face-to-face despite the fact they testified more accurately.¹⁷⁵ Surprisingly, witnesses on video were also viewed as less attractive, less intelligent, less accurate, and more likely to make up a story.¹⁷⁶ Due to the negative biases toward witnesses using CCTV, attorneys may want to limit its use.¹⁷⁷ The lessons learned from CCTV must be applied to videoconferencing.

4.2 Pros of Videoconferencing

Proponents of videoconferencing claim that the medium has no adverse consequences.¹⁷⁸ However, these studies do not consider the special relationship between attorney and client. One study found no difference in the quality of cancer genetic counselling delivered to the patient via video versus face-to-face by a doctor. This was due to the fact the information was delivered to the patient quickly (lowering the anxiety of waiting for such news), and not from the differences in the medium. This differs from the attorney-client scenario, which requires information to be exchanged for a defence strategy, rather than a one-sided delivering of news.¹⁷⁹ Another study claims that that contact between people via videoconferencing builds trust in the absence of any other contact at all.¹⁸⁰ Of course, some contact is better than little or no contact. Further, another study states that jurors predicted deception by a child witness via video as often as face-to-face. This study differs from the present analysis of

¹⁶⁸ Poulin, *supra* note 12, at 1129.

¹⁶⁹ Binder, *supra* note 45, at 1. The author details the only way he could privately speak with his client during the hearing was to request that the judge clear the entire courtroom.

¹⁷⁰ Poulin, *supra* note 12, at 1129-1130. The defendant cannot use nonverbal communication to interact with their defense counsel. Similarly, defense counsel will have difficulty giving advice. The loss of non-verbal communication on the attorney/client relationship can be significant.

¹⁷¹ Binder, *supra* note 45, at 1. Such procedures may lead to a chilling effect on attorney-client communications by making them so cumbersome that attorneys are reluctant to use them for fear of slowing the process down to a point where the other participants (judges, clerks, opposing counsel) become exasperated.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Torres, Preskill & Piontek, *supra* note 17, at 198-199.

¹⁷⁵ Goodman et al., *supra* note 76, at 199. Any warping of perceptions in communications would detrimentally affect attorney-client communications.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Lederer, *supra* note 19, at 22.

¹⁷⁹ See Jordanna Joaquina Coelho et al., *An Assessment of the Efficacy of Cancer Genetic Counseling using Real-Time Videoconferencing Technology (Telemedicine) Compared to Face-to-Face Consultations*, 41 EUR. J. CANCER 2257, 2259-2260 (2005). (This study concludes that videoconferencing is effective for providing information in a doctor-patient relationship. This type of communication differs from attorney-client communication in the courtroom in obvious ways. The fast pace of the courtroom and the adversarial nature of the proceedings are the more prominent differences.)

¹⁸⁰ See Dominic Thomas and Robert Bostrom, *Building Trust and Cooperation through Technology Adaption in Virtual Teams: Empirical Field Evidence*, INFO. SYSS. MGMT. 25:45 45, 51-54 (2008). (When traditional face-to-face meetings are not possible due to cost and time required for travel, business people using videoconferencing can regain some of the lost connections and trust through technology adaption and specific management techniques. The technology adaptations included better training and equipment to facilitate the task and the management techniques included a more cooperative model to establish trust and integrity among the participants.)

videoconferencing involving the interaction between client and attorney in that the study did not involve interactive video (merely a one-sided taping of testimony), involved children rather than adults, and involved witnesses and not clients represented by counsel.¹⁸¹

4.3 Examples of Videoconferencing in the Courts

Videoconferencing is most frequently used for a jailed defendant, following arrest. At this stage in a criminal proceeding, the court, counsel, and the defendant have important functions to perform. Communications with defence counsel define the parameters of a defence strategy and begin the relationship of trust necessary for proper representation of counsel. These initial attorney-client interactions require a delicate feel for the defendant and the case. A defendant with information that changes the dynamics of the case must be able to privately communicate this to his attorney as early as possible.

In many courts, videoconferencing is being employed to avoid bringing defendants to the courtroom for certain proceedings. Case law on this subject extends back fewer than twenty years, but sheds light on the use of video both in the trial and non-trial stages of the criminal court process. The following cases detail federal court decisions during the first appearance/arraignment, testimony, and sentencing. Each stage is unique and has different consequence concerning the impact of interactive video. During the pre-trial phase, the impacts can be especially important. Because most cases do not go to trial, the determination of whether to reach a plea agreement and what the terms of the plea agreement might be are especially impacted by pre-trial procedures.

4.3.1 Arraignment

In *Valenzuela-Gonzalez v. United States District Court for the District of Arizona* (915 F.2d 1276 1990), the court held that arraignments of an accused must take place in open court with the accused physically present in the courtroom.¹⁸² In this case the court. The court cites the Federal Rules of Criminal Procedure, Rules 10 and 43, as its basis for ruling. Rule 10 states:

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called to plead.¹⁸³

Rule 43 states:

- (a) *Presence Required.* The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impanelling of the jury and the return of the verdict and at the imposition of sentence, except as otherwise provided in this rule.¹⁸⁴

The court did leave room to allow the Federal Rules of Criminal Procedure to be construed more broadly in future decisions, by including the allowance that “substantial compliance” with Rule 10 might include interactive video. At this time there have been no federal challenges to altering the courts stand on video arraignments.

¹⁸¹ Holly Orcutt *supra* note 115, at 365-367. This research found participants that observed videoed witnesses were able to discern the truth. But the study also found that videoed witnesses (children in this study) were viewed as less accurate, believable, consistent, confident, attractive, and intelligent.

¹⁸² See *Valenzuela-Gonzalez v. United States District Court for the District of Arizona* 915 F.2d 1276, 1280-1281 1990. (Videoconferencing was proper absent a showing that the procedure was necessary as opposed to convenient. “Arraignment by closed circuit television constitutes a violation of Federal Rules of Criminal Procedure 10 and 43.” “Absent a determination by Congress that closed circuit television may satisfy the presence requirement of the rules, we are not free to ignore the clear instructions of Rules 10 and 43.”).

¹⁸³ FED. R. CRIM. P. 10.

¹⁸⁴ FED. R. CRIM. P. 43.

4.3.2 Testimony

In *Maryland v. Craig* (497 U.S. 836 1990), the court reviewed the question of whether the confrontation clause categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial by one-way closed circuit television (outside the defendant's physical presence).¹⁸⁵ The court found that such testimony did not violate the confrontation clause but the prosecution must show a finding of "necessity" on a case specific basis. In this case, the court state that a defendant's right to confrontation is not absolute and that Sixth Amendment rights must be interpreted in the context of the necessities of trial and the adversarial process. The court articulated a two-part test that must be met to deny confrontation: (1) to further an important public policy and (2) where the reliability of the testimony offered is otherwise assured.¹⁸⁶ In the *Craig* case, the court identified the protection of children as an important state interest. To satisfy the second requirement of the test, the court stated the testimony was reliable in that the child witness was: (1) deemed competent to testify, (2) under oath, (3) the defendant, the judge, and the jury were able to view the demeanour of the child witness through a video monitor during testimony and, (4) the defendant retained the opportunity for contemporaneous cross-examination.¹⁸⁷

The *Craig* case, a five to four decision, sparked a strong dissenting opinion. In the dissent, the four quoted the Constitution's Sixth Amendment directly: "In *all* criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."¹⁸⁸ To these Justices, "to confront" plainly means to encounter physically, face-to-face. The Justices also held that if this is a defect in the Constitution, then it should be amended by proper procedures, not by judicial pronouncement.¹⁸⁹

The issue was further explored in *Harrell v. Florida* (709 So.2d 1364 1998).¹⁹⁰ In *Harrell*, the court held that the admission of a victim's testimony via interactive video did not violate the defendant's right to confrontation.¹⁹¹ In this case, the victims were tourists visiting the United States from Argentina who was assaulted and robbed while on their way to the airport to return home, the court refined the two part test articulated in the *Craig* case. Part one of the test states the use of interactive video must: (1) be justified, on a case specific finding, based on important state interests, public policies, or necessities of the case and (2) must satisfy the three elements of confrontation, that is, the oath, cross-examination, and the observation of the witness's demeanour.¹⁹² The first part of the test was satisfied in that the victims were home in Argentina, beyond the subpoena power of the court, in poor health, and that their testimony was absolutely essential to the case. The second part was fulfilled by the interactive video transmission by swearing of an oath, the opportunity for interactive cross examination, and video monitor's image that allowed observation the witness's demeanour. The *Harrell* case gave further precedent to the use of interactive video as well as further refining the situations of when it will be allowed.

United States v. Gigante (166 F.3d 75 1999) concerned a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), RICO conspiracy, conspiracy to murder, extortion conspiracy, and a labour payoff conspiracy.¹⁹³ The court ruled a witness's testimony via two-way, closed circuit television

¹⁸⁵ See *Maryland v. Craig* 497 U.S. 836, 848, 852 1990. (The Confrontation Clause reflects a "preference" for face-to-face confrontation at trial and that preference must give way to necessities of the case and public policy considerations. The physical and psychological well-being of child abuse victims at trial can qualify as such a public policy.)

¹⁸⁶ *Id.* at 850. "That the face-to-face requirement is not absolute does not, of course, mean that it may be easily dispensed with." The majority, in applying their reasoning, believed that it could be dispensed with.

¹⁸⁷ *Id.* at 844-846.

¹⁸⁸ *Id.* at 861-862. The dissent states that majority indulges in mental gymnastics that make the "impossible plausible" by re-characterizing the Confrontation Clause as an abstraction of observation rather than physical presence.

¹⁸⁹ *Id.* at 861-862. The dissent opined that the text of the Sixth Amendment is clear and meant to protect against, rather than conform to current beliefs that can qualify as a public policy.

¹⁹⁰ See *Harrell v. Florida* 709 So.2d 1364 1998.

¹⁹¹ *Id.* at 1372. The Court recognized that there are costs associated with technological change and that it is incumbent on the judge to monitor problems that threaten the reliability defendant rights and court proceedings. Further, the Court is confident that, when properly administered, this technology will advance both access to and the efficiency of the justice system.

¹⁹² *Id.* at 1369. The Court stated that there is a strong presumption in favor of face-to-face testimony. Further, the burden would be on the moving party to provide substantial justification for the use of the technology.

¹⁹³ See *United States v. Gigante* 166 F.3d 75, 81 1999. (The Court states that this technology should not be considered commonplace substitute for in-court testimony by a witness. Further, that there are intangible elements of the ordeal of testifying in a courtroom that are reduced or eliminated by remote testimony.)

did not violate the defendant's Sixth Amendment right of confrontation.¹⁹⁴ In this case, the witness was terminally ill and part of the witness protection program. The court reasoned that the testimony retained the salutary effect of in court testimony and the remote testimony afforded greater protection of the defendant's rights than would be provided by pre-trial deposition, which would have been permissible under the circumstances. The court reiterated that the right to face-to-face confrontation is not absolute but qualified the statement, stating that face-to-face confrontation will only be denied under "exceptional circumstances."¹⁹⁵ The exceptional circumstances requirement was met by the witness. Further, the court states that the testimony does not have to fulfil the test articulated in *Craig* because the situation in the instant case employed a two-way video system whereas the video system in *Craig* was a one-way video system. This case further defined the use of interactive video in the courts.

In *Minnesota v. Sewell* (595 N.W.2d 207 1999) the court ruled that the testimony of a prosecution witness on interactive television (ITV) did not violate the defendant's confrontation rights.¹⁹⁶ Here the court found that the use of ITV was akin to the use of videotaped deposition testimony, and thus was authorized. Further, because the witness had recently undergone surgery and his physician informed the court that the witness would not be able to travel for a minimum of three months, the court ruled that the video testimony was acceptable. This case further clarified some technology issues inherent in video testimony. The court held that any distortion in the prosecution witnesses testimony via ITV by occasional transitory and insignificant static-type interference with the video image and slight time delay between questions and answers did not preclude an effective cross-examination or interfere with the jury's assessment of the witness's demeanor. Further, the court stated that once the unavailability of a witness and the necessity of testimony have been demonstrated, the focus of the confrontation clause analysis shifts to the reliability of the testimony. The reliability of the testimony of an unavailable witness is ascertained, for the purposes of confrontation clause analysis, by examining four features: (1) whether the testimony was given under oath, (2) whether there existed an opportunity for cross-examination, (3) whether the fact-finder has the ability to observe demeanor evidence, and (4) whether there exists and increased risk that the witness will wrongfully implicate an innocent defendant when testifying out of his presence.¹⁹⁷ Please note the court used the test introduced in the *Craig* case and altered the fourth criteria of the test concerning the reliability of testimony from "the defendant retained the opportunity for contemporaneous cross-examination" to the risk of wrongfully implicate an innocent defendant.

4.3.3 Sentencing

In *United States v. Navarro* (169 F.3d 228 1999), the court held that sentencing by interactive video violated the rule requiring presence at sentencing.¹⁹⁸ The court stated that "presence" at sentencing means physical presence. The court in *Navarro* went to great lengths to establish a legal basis for physical presence being required at sentencing.¹⁹⁹ The Court ran through a thorough analysis of Rule 43 of the Federal Rules of Criminal Procedure forming the basis of the physical presence requirement. Further, the court expanded its examination of the definition of "presence" by invoking its definition in *Blacks Law Dictionary*, *Webster's Third International Dictionary*, and through the plain, ordinary meaning of the English language.²⁰⁰ The analysis of the definition focused on the words "in sight" and whether this key

¹⁹⁴ *Id.* Because this technology may provide at least as great protection of confrontation rights and the Court declined to articulate a clear standard. (See *United States v. Johnpoll*, 739 F.2d 702, 708 (2d Cir. 1984)).

¹⁹⁵ See *Id.* at 81-82. Here the Court embraces a standard the Federal Rules of Evidence 15 for "unavailable" witnesses where the decision to allow such testimony rests with at the discretion of the trial court and will not be disturbed without a clear abuse of discretion. (See *United States v. Johnpoll*, 739 F.2d 702, 708 (2d Cir. 1984)).

¹⁹⁶ See *Minnesota v. Sewell* 595 N.W.2d 207, 213 1999. (The defense counsel had an unfettered opportunity to cross-examine the witness and did so extensively and effectively. Further, counsel was able to explore the witnesses inconsistent statements, confront him with his criminal background, and the jury saw and heard the cross-examination and the witnesses' responses. The Appellant countered that he could not use common "body language" confrontational techniques, that the jury was deprived of "demeanor clues" (such as face-flushing, perspiration, breathing, and subtle eye movements), and could not see the whole witness because of the camera angle.).

¹⁹⁷ *Id.* at 212-213. (See *United States v. Gigante*, 166 F.3d 75, 80 (2nd Cir. 1999).

¹⁹⁸ See *United States v. Navarro* 169 F.3d 228, 235 1999. (The district court overruled the defendant's objection to being sentenced by videoconferencing and sentenced him to life in prison.).

¹⁹⁹ *Id.* at 235-237. The analysis is based on Federal Rules of Criminal Procedure 43, the plain language in Black's and Webster's Dictionaries, and case law.

²⁰⁰ Blacks Law Dictionary, Webster's Third International Dictionary.

part of the definition is satisfied through videoconferencing. The court definitively concluded that videoconferencing does not satisfy the requirement of presence. The court also touched upon the dignity and ritual of physical presence in court as necessary for the public's perception of justice:

The very ceremony of trial and presence of the fact finder may exert a powerful force for truth telling. The opportunity to judge the demeanour of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend trial. Sentencing a defendant by video conferencing creates the risk of a disconnect that can occur because '[t]he immediacy of a living person is lost.' *Stoner v. Sowders* 997 F.2d 209, 213 1993. "[I]n most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact."²⁰¹

The court opined that video conferencing cannot satisfy the presence requirement outside of extraordinary circumstances as well as a concern the legitimacy of the legal process.

In *United States v. Lawrence* (248 F.3d 300 2001), the court reinforced the *Navarro* decision by stating that "presence" at sentencing means physical presence.²⁰² The court unequivocally reiterated that Rule 43 of the Federal Rules of Criminal Procedure requires a defendant to be physically present at the imposition of sentence.²⁰³ The facts of this case shed light on why the court sentenced the defendant by interactive video. At the sentencing hearing, the defendant was unruly and abusive. The defendant cursed during the hearing, was sarcastic to the court, and repeatedly boasted of his intention to continue breaking the law. The defendant, who was six feet eight inches tall and weighed about three hundred pounds, had to be restrained during some of his court appearances by a 50,000 volt stun belt. The defendant was incarcerated in a federal super-maximum security facility and was deemed by the Bureau of Prisons to be "a danger to transport" and a "very dangerous individual due to his past behaviour." Rule 43 states that a defendant can be removed only "after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom."²⁰⁴ The court further stated that the warning was an integral part of the rule, as well as the constitutional underpinnings of the rule itself. In *Lawrence*, the court found that the defendant was not given proper notice that his behaviour was disruptive and that such behaviour would lead to his being removed from the courtroom for sentencing. Absent of such a warning, found the court, the defendant must be sentenced in the physical presence of the court. The court further stated:

The government maintains that district courts should have the discretion to permit video teleconferencing when circumstances warrant it. The rule reflects a firm judgment, however, that virtual reality is rarely a substitute for actual presence and that, even in the age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it. The Sixth Amendment right of a defendant to be present at trial best ensures the right to consult with counsel and confront adverse witnesses. Presence at sentencing serves additional purposes as well – it gives a defendant one last chance to physically plead his case. If we were to hold that video conferencing satisfies the presence requirement of Rule 43, it would permit the government to substitute such conferences for physical presence for any defendant at anytime for any reason.²⁰⁵

²⁰¹ 997 F.2d 209, 213 1993. ("To allow trial by deposition here (whether by video or written) to substitute for regular trial testimony would over time invite trial by deposition in many, perhaps most, criminal cases. Many witnesses would prefer not to testify in a criminal trial and can often find a doctor who will provide a cursory "doctor's excuse," a statement that the witness's physical or mental health "could" be adversely affected by having to appear.")

²⁰² See *United States v. Lawrence* 248 F.3d 300, 302 2001. (At the sentencing hearing, the defendant was physically located at a federal prison in Colorado while his counsel (with the judge, prosecutor, and other court personnel) was located in the courtroom in South Carolina.)

²⁰³ *Id.* at 304–305. Under FRCP 43 it is necessary that the defendant be sentenced in person unless 1) the defendant knowingly and intelligently waives the right or 2) the defendant is removed from the courtroom for persistent, disruptive conduct after the defendant has been warned that can be removed from the courtroom. Emphasis added.

²⁰⁴ Fed.R.Crim.P.43.

²⁰⁵ 248 F.3d 300, 304 2001. See Fed.R.Crim.P.43; see also Fed.R.Crim.P.43 advisory comm.1974 n. (making clear that closed circuit television is not the same as actually being in the courtroom). See *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

This provocative opinion will likely have far reaching ramifications for future use of interactive video technology.

5. Data

5.1 Introduction

In 2010, the National Center for State Courts (NCSC), through a grant from the State Justice Institute, surveyed the use of videoconferencing in state courts throughout the country.²⁰⁶ This research looks beyond the survey to address the question of how private communication between defence counsel and defendant is impacted and examines the relationship between the age of the videoconferencing program and attorney-client private communications.

In the NCSC survey, there were 164 responses. The courts that have no plans to implement a videoconferencing program were excluded, leaving 111 responses used in this analysis.²⁰⁷ The numbers are based on videoconferencing programs where the attorney is in the courtroom and the defendant is located at a remote facility (jail).²⁰⁸

5.2 Examining the Data

The data was collected by the National Center for State Courts (NCSC) supported by the State Justice Institute in 2010. There were 164 responses from every state in the nation. In a first of its kind study, this research focused on the breakdown of surveyed courts using videoconferencing when the attorney is in the courtroom and the client is at a remote location such as a jail or prison. It employs social scientific techniques to explore the assumptions of proponents and critics of the use of videoconferencing. Using a non-partisan analysis of the data, 111 responses were used from across the nation shedding light on the realities of videoconferencing. The data and results aid courts and policy-makers in the use of videoconferencing and how to move forward with this technology in the future. From the responses, 53 responses (of the 164) of the courts surveyed indicating that they did not use videoconferencing were removed. See Figure 1.

Figure 1.

surveyed courts using videoconferencing when attorney is in the courtroom			
Total Responses 164 n = 111	Responses indicating no videoconferencing 35	Did not Indicate 18	Total Used 111

Of the 111 courts used in this research, 41 courts, or 36.9%, indicated there is no provision for private communications between attorney and client when attorney is in the courtroom and the client is at a remote location. The 41 breakdown into 25 courts that indicated there is no provision for private communications with any explanation and 16 that indicated there no privacy with an explanation. These explanations stated answers such as “cannot ensure” or “don’t know” when it came to issues of privacy.

Figure 2

BREAKDOWN OF SURVEYED COURTS USING VIDEOCONFERENCING WHEN ATTORNEY IS IN THE COURTROOM			
NO PRIVACY IN VIDEOCONFERENCING DESCRIBED 25 n = 111	NO PRIVACY DESCRIBED 16	PRIVACY IN VIDEOCONFERENCING 70	TOTAL RESPONSES 111

²⁰⁶ See <http://www.ncsc.org/services-and-experts/areas-of-expertise/technology/ncsc-videoconferencing>.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

Analysis of the data shows some alarming trends. Of the 111 videoconferencing programs observed, 41 (36.94%) have no provisions for private communications between attorney and client. Without the ability of a client to communicate with their attorney during a hearing or trial, the quality of legal representation will likely be diminished. Because such a large percentage of programs enable no private communications between attorney and client, analysing the quality of communications in such circumstances is moot.

5.3 The Results

Specifically in criminal cases the data indicates that courts that use videoconferencing across the nation experience attorney-client communication privacy issues between attorneys located in the courtroom and clients located at a remote facility such as a jail or prison.

The data shows that a significant percentage of cases (79.3%) are criminal cases. Of those criminal cases, 28.8% have privacy issues between an attorney and their client when they communicate via videoconferencing. The importance of private communications between attorney and client in criminal cases cannot be minimized.²⁰⁹ The diminution of such communications can only result in less favourable outcomes (i.e. higher bail amounts, negative results for pre-trial hearings, guilty verdicts) for defendants. See Figure 3.

Figure 3

Criminal Cases and Private Communications Via Videoconferencing between Attorney and Client when Attorney is in the Courtroom			
	privacy	no privacy	total
criminal cases	56	32	88
non-criminal cases	12	11	23
total	68	43	111
N = 111			

The survey results show that a significant number of court videoconferencing systems (36.9%) experience equipment failures with physical components. These failures concern issues with wiring, electricity, and basic structural features. Other failures include various combinations of wiring, electrical, and structural problems with emphasis on bandwidth, aging equipment, and power issues. These equipment failures highlight some of the issues with videoconferencing. These failures can only result in delays in hearings, less or no communications between attorneys and defendants, and increased costs. See Figure 4.

Figure 4

courts using videoconferencing that have experienced equipment failures with physical components				
WIRING FAILURES	ELECTRICAL FAILURES	STRUCTURAL FAILURES	OTHER FAILURES	TOTAL FAILURES
18	6	4	13	41
n = 111				

²⁰⁹ The research shows that the data for the use of videoconferencing for criminal cases is no better than for other cases. In a realm of the law where the ramifications of error are greater and the standards of proof higher, videoconferencing in criminal cases has the same problems and issues as in other cases. Videoconferencing in criminal cases must have higher standards and rules than in civil cases to ensure the rights of defendants are not negatively impacted.

The findings of other studies reflect these conclusions. “Many observers regularly witnessed attorneys and clients becoming frustrated because they had no privacy,” said one.²¹⁰ “The use of videoconferencing is marked by persistent problems with equipment, presentation of evidence, access to counsel, interpretation, and assessment of credibility,” reported another.²¹¹ Problems related to access to counsel took place in one in six hearings (approx. 17%).²¹² Problems experienced during videoconferenced hearing (access to counsel, evidentiary/testimonial, interpretation, equipment/technological) is 44.5%.²¹³

In a separate section, the data shows other commons problems. These problems number 25 accounting for 22.5% of the issues. These problems highlight operator issues including “buy in” (by judges, clerks, and attorneys), training of equipment operators, operator error, and scheduling. See Figure 5.

Figure 5

Courts using Videoconferencing that have Experienced OTHER COMMON PROBLEMS	
COMMON PROBLEMS 25 n = 111	TOTAL RESPONSES 111

The proper training of court personnel to use videoconferencing most effectively would go a long way in remedying many issues. The lack of experience many courts have with the technology is well documented and cited in this article. Videoconferencing equipment vendors and social scientists with experience and training on the proper use of the equipment offer the best way to minimize many of the negative issues of videoconferencing. Court personnel training involve the equipment itself and the manner in which it is used. Some studies have shown that a number of videoconferencing users expressed frustration with ineffective technology because of an inability to set an agenda ahead of time. Further, it has been cited that videoconferencing may not be suited for users unfamiliar with electronic communications.²¹⁴ Trained court personnel can inform attorneys and clients that simple things (looking into the camera rather than the monitor, the placement of the monitor and camera, making allowances for possible lag times in communications, etc.) would benefit more effective videoconferencing communication. Court personnel who control and maintain the videoconference equipment and trained to be aware of these issues, could ensure a more effective use of videoconferencing.

Subpar technology is the most easily remedied. Video technology that offers clear, synchronous communication is currently available. Private communication between defendants and attorneys on a secure line can be offered with little technical difficulty. The problem associated with installing or upgrading suitable technology is more of a fiscal issue rather than a technological one. Tight budgets are more of an impediment to remedying this issue than any other.

Proponents often claim that any problems concerning videoconferencing will be minimized or eliminated by better technology.²¹⁵ The assertion is that as newer video technologies allow pictures to become crisper, clearer, and truer to life, where a client and an attorney can establish a trusting, and working relationship. The data does not bear this out. The study shows there is little difference between the newer and older programs with the percentage of videoconferencing programs that offer no secure privacy for communications between attorneys and their clients with programs 0 to 10 years old offering 39.1% private communications and programs 10 to 20 plus years old offering 32.4%. Not only is there no trend in the newer programs offering a greater percentage of private communications, to the contrary,

²¹⁰ Grant *supra* note 39, at 40.

²¹¹ *Id.* at 51.

²¹² *Id.* at 6.

²¹³ *Id.* at 36.

²¹⁴ Torres, Preskill & Piontek, *supra* note 17, at 198-199.

²¹⁵ There is an assumption among proponents that as time goes on that the issues and problems with videoconferencing will be worked out. Unfortunately, the data does not support this assumption. Procedures used by court personnel become entrenched and are not changed. Further, due to budgetary restrictions and limitations, the videoconferencing technology is not updated as often as necessary. As such, videoconferencing issues and problems become imbedded and are not alleviated over time. Worse still, the newer programs are often patterned on older programs adopting their older procedures and technologies perpetuating the negative aspects videoconferencing.

there are fewer newer programs offering such communications. For critics, this is a disheartening trend to say the least. See Figure 6.

Figure 6.

AGE OF VIDEOCONFERENCING SYSTEM AND PRIVATE COMMUNICATIONS VIA VIDEOCONFERENCING BETWEEN ATTORNEY AND CLIENT WHEN ATTORNEY IS IN THE COURTROOM			
	AGE OF SYSTEM		
	0 TO 10 YEARS	10 TO 20+ YEARS	TOTAL
PRIVACY	43	23	66
NO PRIVACY	27	11	38
TOTAL	70	34	104
N = 104			

It is clear that there are issues with videoconferencing in the courts, especially as it relates to attorney-client privileged communications. It is also clear that many of these issues can be lessened or remedied. The solution lies in installing or upgrading to suitable technology, training court personnel, and educating all users concerning the strategies for building trust and understanding. These steps are necessary to enable the fairest and most effective use of videoconferencing when the defendant is at a remote location and their attorney is in the courtroom.

Allowing videoconference users to set an agenda ahead of time would also alleviate another problem noted by many users - the lack of time available for attorneys and clients to build trust via videoconferencing. The attorney-client relationship done via video requires more time to develop a trusting working relationship than does a traditional face-to-face relationship.²¹⁶ Allowing more private videoconference time between attorney and client would improve video communications and lessen the negative impact of the technology. Further, allowing more time for attorneys and clients to become accustomed and comfortable with videoconferencing before forcing participants to use it under courtroom conditions would help lessen the findings that state that many users believe they have a reduced opportunity to speak and fully participate in the videoconferenced proceedings.

6. Conclusion

It is clear that in many courtrooms today there is little or no private communication between defendants and their 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 defence attorneys: they can either appear at the remote site where they will be able to freely confer with their clients 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.²¹⁷ The separation of attorney and client will continue to create problems of marginal or inadequate representation.²¹⁸ 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 communications where no or substandard provisions are made for private communications between the two.

Decisions made concerning videoconferencing will have wider implications as other technologies are introduced into the courts. The introduction of videoconferencing is a gateway to other technologies gaining a foothold in the courts. Technology offers greater speed and efficiency in processing defendants through the courts resulting in cost savings. In these times of shrinking court budgets, saving money is

²¹⁶ *Id*

²¹⁷ *Id.* at 56.

²¹⁸ Poulin, *supra* note 12, at 1129.

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popular but the impact of new technologies introduced in the courtroom on constitutional rights and civil liberties need to be accessed. While the court gains from cost savings and administrative productivity, the negative effects 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, then the price is too high.²¹⁹ Videoconferencing in the courtroom can be remedied to protect attorney/client communications by instituting proper procedures to ensure free flow of these private communications, safeguarding the ability of counsel to provide adequate assistance.

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²¹⁹ 391 U.S. 123, 135 (1968).