

BAYFIELD COUNTY CIRCUIT COURT

TENTH JUDICIAL DISTRICT OF WISCONSIN BAYFIELD COUNTY COURTHOUSE

Hon. John P. Anderson
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April 25, 2022

Wisconsin Supreme Court
PO Box 1688
Madison, WI 53701-1688

Re: Petition 20-09A Amending Videoconferencing Technology – Petitioner’s Response to Comments

Honorable Justices of the Wisconsin Supreme Court:

I am responding to the comments submitted on Petition 20-09A through April 12, 2022.

It is important to note at the outset, contrary to some of the concerns raised by the comments submitted in response to Petition 20-09A, the changes proposed in Petition 20-09A do not do any of the following:

- Restrict in-person proceedings or appearances.
- Preclude a judge from sequestering a victim who is appearing by videoconferencing technology.
- Allow jurors to appear from their homes using videoconferencing technology during a trial.
- Allow an available witness to appear remotely using videoconferencing technology over the objection of a defendant.
- Allow a proceeding to be held remotely when the defendant has the right to be physically present in the courtroom and does not waive that right.

The amendments proposed in Petition 20-09A promote responsible use of videoconferencing technology in appropriate circumstances and provides additional flexibility to allow courts to function in emergency situations.

One concern that was raised is the addition of “victim” to the definition of “participant” in Wis. Stat. § 885.52 (2).¹ The original petition proposed creating a new subsection specific to victims. After discussions, the Videoconferencing Subcommittee of the Planning and Policy Advisory Committee (PPAC) determined that it was appropriate to include victims in the list of

¹ This proposed amendment appears in Section 2 of Petition 20-09A: Section 885.52 (2) of the statutes is amended to read: “Participants” includes litigants, counsel, witnesses while on the stand, victims as defined in article I, sec. 9m (1) of the Wisconsin constitution or s. 950.02 (4), judges, and essential court staff, but excludes other interested persons and the public at large.

participants. Several commenters objected to this change, stating that it would appear to exempt victims from sequestration orders.

The addition of victims to the definition of participant simply ensures that technical standards set forth in Wis. Stat. § 885.54 are also guaranteed for victims appearing by videoconferencing technology. The proposed changes do not necessarily preclude a sequestration order and do not affect the judge's ability to manage their courtroom.² Those who objected to the proposed language in Section 2 stating that victims appearing remotely cannot be subject to a sequestration order are reading a limitation into the language that is not present.

Another concern raised in response to Petition 20-09A was the treatment of jury trials. Questions were raised in the comments to and during the public hearing for the original petition (20-09) as to whether the proposed changes would allow members of a jury to appear remotely from their homes or otherwise be unsupervised. It was never the intention of the Videoconferencing Subcommittee to allow jurors to appear remotely outside of the courthouse, which is why clarifying language was added in Sections 13 and 15 of Petition 20-09A. While it is expected that using videoconferencing technology for jury trials would be rare, nonetheless, the Subcommittee wanted to provide the ability for counties to continue to hold jury trials in unique situations where using this technology is the only way to safely proceed with the case. The inability to safely hold jury trials during the pandemic for a year or more in some counties caused a significant increase in the backlog of cases now needing to be resolved. By adding this language to Chapter 885, judges will have the authority to hold jury trials in a way that protect defendants' rights without having to rely upon emergency orders.

Several comments submitted object to the changes proposed to Wis. Stat. § 885.60. The main changes to this section proposes eliminating the requirement that the judge sustain an objection to the use of videoconferencing made by the defendant. The original petition also proposed eliminating this section. Petition 20-09A also recommends the creation of additional sections to add safeguards and detail factors a judge will consider when ruling on an objection to a witness appearing by videoconferencing technology. The court can consider a remote appearance by a witness despite a defendant's objection only if the witness is unavailable because of an emergency or other compelling reason. The proposed changes do not contemplate remote appearance by a witness over a defendant's objection when that witness is available.

One comment in opposition to the petition notes that there is no conflict with the current Wis. Stat. § 885.60 and 2021 Wisconsin Act 141 ("Act 141"). This comment appears to ignore the requirement that Wis. Stat. § 938.299 (5) (b) requires the court to sustain an objection by the juvenile or prosecutor and Wis. Stat. § 967.08 (4) requires the court to sustain an objection by any party, which would include the prosecutor. The petitioner's letter dated April 8, 2022 discusses the impact of Act 141 on the pending petition, as well as the current language in Wis. Stat. § 885.60.

² Victim sequestration may be impacted by the constitutional amendment to Wis. Const. Art. I, § 9m (2) (e) related to victim appearance, which removed previous language that allowed the court to sequester victims if the court found sequestration necessary to a fair trial for the defendant Wis. Stat. § 906.15 (2) (d) still provides that a victim in a criminal or juvenile case may be excluded if the court finds exclusion "is necessary to provide a fair trial for the defendant or a fair fact-finding hearing for the juvenile."

The new statutory sections created by Act 141 and several commenters use the phrase, “critical stage of the proceeding.” The Videoconferencing Subcommittee specifically avoided using this phrase in the proposed rule changes because there is no statutory definition of “critical stage” and, therefore, it is subject to varying interpretations by judges.³

Finally, comments in opposition to the Petition state that the court does not have the authority to enact the proposed amendments and state that the proposed changes modify the substantive rights of litigants. Neither of those statements is true. As stated in the petitioner’s April 8, 2022 letter, the court created the rules at issue related to the use of telephone and live-audio visual means during court proceedings. The rules in question are procedural. “Procedural law” is defined as, “[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.”⁴ The proposed amendments consist of rules that establish how the business of the court is conducted when using videoconferencing technology, and it is the judge’s responsibility to apply those rules.

The proposed amendments would provide additional flexibility and options to the circuit courts for the use videoconferencing technology now and moving into the future. Again, the proposed amendments do not require that videoconferencing technology be used in any court proceeding and, importantly, the right of a defendant to be physically present in courtroom is not changed or diminished by this petition.

Over the past two years, the court system and its justice partners have experienced significant benefits by using videoconferencing. This technology made it possible to keep courts open and accessible at the height of the pandemic. The use of videoconferencing has subsequently become interwoven into many courts’ day-to-day operations, as evidenced by the fact that many litigants and attorneys now request to appear using videoconferencing technology.

The pandemic has demonstrated that innovation and flexibility are essential to maintaining a functioning court system when facing the unexpected. Petition 20-09A provides the flexibility for the court system to operate under both ordinary, and extraordinary, circumstances while continuing to preserve defendants’ rights.

Respectfully submitted,

Hon. John P. Anderson
Bayfield County Circuit Court

³ The meaning of critical stage is discussed in case law, often in reference to the Sixth Amendment right to effective assistance of counsel. *See, e.g., Hamilton v. Alabama*, 368 U.S. 52 (1961) and *White v. Maryland*, 373 U.S. 59 (1963).

⁴ BLACK’S LAW DICTIONARY (11th ed. 2019).