

The Legality And Practicality Of Remote Witness Testimony



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Eventually, the question may be whether physical presence is really necessary at all.

Courts, government agencies, and law firms have used videoconferencing for multiple purposes for many years. Today, the confluence of greatly improved technology at decreasing cost and increasing travel costs and difficulty now make videoconferencing especially appealing. Among other uses, videoconferencing can be employed for:

- Law firm administration;
- Law firm hiring, as demonstrated by Law School Connect. A joint effort by the Center for Legal and Court Technology and Courtroom Connect, Law School Connect provides videoconferencing to over 50 law schools so that students may be interviewed by legal employers for summer and permanent positions. See www.lawschoolconnect.com;
- Alternative dispute resolution and settlement;
- Remote appearances at pretrial matters, trials, administrative hearings, and appeals; and
- Education and training.

Deciding whether to use remote appearance technology requires familiarity with the technology and its costs, the quality of use, and the legal, human, and practical matters that accompany videoconferencing. This article is designed to give you a basic introduction to the topic. The Center for Legal and Court Technology (CLCT) has been a pioneer in the legal uses of video conferencing for many years, and this article is based on that experience.

Although videoconferencing has been accepted for many applications, the critical legal issue that accompanies remote appearances is whether its use by the prosecution in criminal cases to present remote government witness testimony violates the Confrontation Clause. I address general background as well as the general issue of remote testimony of various kinds.

TECHNOLOGY • Much of the following is taken in various forms from Fredric I. Lederer, *The Potential Use of Courtroom Technology in Major Terrorism Cases*, 12 Wm. & Mary Bill Rts. J. 887 (2004) with updating as appropriate. Modern video conferencing uses either ISDN (Integrated Services Digital Network, which can be thought of as high bandwidth telephone lines), or IP (Internet Protocol) data connections. New high-end commercial level equipment customarily has both connection capabilities. In its most basic form, a single location-to-location connection (“point-to-point”) consists at each end of a camera, microphone, and visual display (e.g., TV screen), and the “codec” (the video-conferencing hardware). Each end’s equipment must be connected to either an Internet connection or the ISDN connections. “Multi-point” connections are possible, customarily with the use of a “master control unit” (MCU) or the use of commercial “bridging” services. CLCT is unique with the potential capability of hosting five or more independent concurrent video conferences in William & Mary’s McGlothlin Courtroom.

Understanding the technology is not as important as understanding its implications. Modern quality commercial videoconferencing presents a high-quality image, fully synchronized with the audio. In other words, a person’s voice is fully coordinated with lip movements. Subject to the availability of the communication lines, equipment can be highly portable. Commercial standard videoconferencing does not use satellite technology and thus does not need to originate in a television studio. We distinguish quality commercial technology from low-cost computer-based conferencing that often has video in a small window with the image sometimes at low resolution or an inadequate frame rate, resulting in jerky movements.

High-end videoconferencing equipment permits the concurrent transmission of computer images, whether of digital documents or of PowerPoint or similar electronic slides. In such a case, the video can be displayed on one screen and the computer data on another. In the CLCT context, a remote witness would appear on a large screen behind the witness stand while the data being discussed by the witness would be shown to the jury on their individual flat screen monitors.

Absent such features, document cameras or fax technology may be used for expeditious two-way document viewing. Television cameras that show a picture of any document or object placed below its television camera can be used to show documents.

The newest major development in videoconferencing is “HD,” high definition. High definition images are detailed enough to allow a judge to see sweat on the forehead of a witness. HD does require, however, HD-capable equipment on each end as well as adequate communication connections (“bandwidth”). Very high end “telepresence” solutions such as those available from CISCO are very close to science fiction in terms of technology permitting one to feel in the same room as the remote party.

IP-based video conferencing is increasingly the type used. If the user has the necessary bandwidth available for normal law firm or court purposes, for example, the connection is effectively free. However, IP-based videoconferencing may provide variable quality depending upon whether other users use the same Internet bandwidth for their own purposes during the video conferencing use. ISDN-based videoconferencing requires specialized communications lines and can be thought of as costing about three times the cost of a normal phone call of the same duration (for a non-HD call) plus the monthly line subscription cost. ISDN tends to give a more dependable connection but is being increasingly abandoned in favor of the less expensive IP method of connection.

Although there are a number of videoconferencing manufacturers, perhaps the best known are Polycom, Tandberg, and LifeSize, all of which are CLCT Participating Companies (those that have equipment installed in CLCT's McGlothlin Courtroom and with which we are familiar). Most people are familiar with videoconferencing using either large flat panels or televisions; desktop models are now available and Polycom now offers an HD unit that can also serve as a computer monitor.

Personal computer-based videoconferencing has been in use for some years, but ordinarily we have not found it to give a good enough picture for important legal usages in which credibility and similar factors are critical. We have had good success in remote motion experiments with Polycom's PC-based PVX software solution, except that computer firewall issues may present difficult technical problems for some users. On September 13, 2008, our 2008 Center for Legal and Court Technology Laboratory Trial successfully incorporated quality remote testimony to the courtroom by an elderly witness who testified from her retirement community apartment using a laptop with the PVX software and a standard cable Internet connection. We believe that this may have been the first time in

history that remote testimony has been given from a retirement community.

IMPACT ON FACT-FINDERS • Video conferencing customarily works well from a technological perspective. However, its pragmatic and legal utility have long been controversial. Insofar as the CLCT has been able to ascertain, remote appearances appear to be treated by courtroom participants just as if those persons were physically in the courtroom. Some years ago we conducted two separate scientifically controlled experiments conducted over two academic years under the supervision of then William & Mary psychology professor Kelly Shaver. They demonstrated that in civil personal injury jury trials in which damage verdicts relied upon the testimony of medical experts, there was no statistically significant difference in verdict whether the experts were physically in the courtroom or elsewhere, at least so long as witness images are displayed life-size behind the witness stand, and the witness is subject to cross-examination under oath. Years of non-controlled experiments in criminal Laboratory Trials suggest that the same result applies to merits witnesses in criminal cases.

Even if the William & Mary results are confirmed in other experiments, however, there are questions for which we have no answer. Likely the most important of these concern the willingness of remote witnesses to lie when testifying remotely. We do not know whether the psychological separation from the courtroom that unavoidably accompanies remote testimony affects the willingness to lie. One of the reasons used to justify remote testimony by abused young children is the need to insulate them from the fear that can accompany being in the same courtroom with the defendant. Does the same removal affect other witnesses, and if so, how? Note that although physical absence from the courtroom might make it easier psychologically to lie, such an ease does not necessarily mean that a witness would lie.

If so, would “confronting” a remote witness with an immediately present high-resolution image of the defendant while the witness testifies counteract any effects of the physical absence? In short, the use of videoconferencing for remote court appearances, particularly for remote witness testimony, raises human and potential legal issues not yet resolved. Although these issues are likely critical for remote witness testimony, they do not necessarily affect other forms of remote participation. Our experiments were conducted with conditions such as the location of the witness being fixed. We do not know what the consequences would be if they were to be varied. As a result, our courtroom designs err on the side of safety by following the design protocol used in the experiments. At the same time, we prefer this methodology as a matter of policy. We believe that technology should be as invisible as possible and should not alter traditional trial practice if possible. Having a remote witness appear where the in-court witness sits appears intuitively desirable.

Happily, these are not significant issues for many video conferencing uses. They are important, however for remote witness testimony.

REMOTE PARTICIPANTS • Most civil and criminal trial courtroom use of videoconferencing to date has involved remote witnesses, or in appellate cases, remote judges or counsel. Administrative hearings such as Social Security disability hearings have used video conferencing for both remote judges and remote claimants and their representatives.

Past CLCT experiments have made substantial use of the technology for trial participants generally. Perhaps the most straightforward use of the technology is to permit judges or counsel to appear remotely for motion or other arguments. In 1999, the CLCT demonstrated how a remote judge could preside remotely from the United States District Court for the District of Oregon over a jury trial in Williamsburg, Virginia. In two United States

federal military appeals cases, *United States v. Salazar*, 44 M.J. 464 (C.A.A.F. 1996), and *United States v. Rockwood*, 52 M.J. 98 (C.A.A.F. 1999), judges of the United States Court of Appeals for the Armed Forces have appeared remotely as part of the Court’s hearing of actual cases in the McGlothlin Courtroom, a practice that has also been used in one form or another in at least the Second, Tenth, and D.C. Circuits, as well as in courts in other nations, such as the High Court of Australia. *Videoconferencing Links Federal Courts and Public*, The Third Branch (June 8th 1998) <http://www.uscourts.gov/ttb/jun98ttb/video.html> (10th and D.C. Circuits); Robin Topping, *Hearings Linked By Videoconferencing*, *Newsday*, Apr. 23, 1997, at A29 (2d Circuit); Mark Pazniokas, *Video Justice Is Catching On In Legal Circles*, *Hartford Courant*, May 7, 1997, at A3 (2d Circuit).

One of the most interesting CLCT experimental uses of videoconferencing was to permit the remote appearance of a prosecutor at trial. The 2001 experimental terrorism CLCT Laboratory Trial, *United States v. Linsor*, involved a bombing of a United States military aircraft in England. We assumed a substantial amount of cooperation from United Kingdom officials, so much so that it made sense for a British barrister acting for the prosecution to conduct the direct examination of a key government witness who himself appeared live from Canberra, Australia. Having filed an appropriate motion with the Court to permit his appearance, British Barrister Jeremy Barnett appeared remotely from Leeds on a 40-inch diagonal flat screen plasma display placed on the prosecution table and conducted an outstanding direct and redirect of the defendant’s primary accomplice. His examination was both professional and successful; the videoconferencing nature of the examination seemed to have no adverse consequence. Although we consider Mr. Barnett’s examination as a successful proof of concept, in the ordinary case it seems self-evident that counsel will wish to be in the courtroom, even if they

examine a remote witness. This may be subject to change as society increasingly accommodates itself to burgeoning technology, or as sufficient need arises. Indeed, in the 2005 experimental Laboratory Trial, *In re Blossom & Blossom*, an international parental child custody trial, our CLCT court and a Monterrey, Mexico, court agreed to jointly take evidence from each other in an effort to reach a common custody result. Counsel, witnesses, and judges used videoconferencing to connect to each other's courtroom.

In the 2003 Courtroom 21 Laboratory Trial, *United States v. Stanhope*, the prosecution was faced with a case-determinative proof problem. The defendant had been indicted for trying to finance an al Qaeda strike in the United States. She had sent a valuable oil painting to Dubai where it had been sold to an Australian art collector for a substantial sum of gold. The gold was effectively converted to U.S. dollars and transmitted through the Hawala money transfer system to Cairo, thence to Beirut, and from Beirut to London and then Berlin. In Berlin the money was conveyed to the United States to buy a minority interest in a United States firm so as to support al Qaeda operatives. The prosecution was able to trace the funds back to Dubai and the painting from the United States to Dubai. However, in the absence of the art collector, who had disappeared, the prosecution could not connect the painting and the money. The art collector, however, had sought legal advice from his Australian solicitor while they were both in London and had fully communicated all of the necessary evidentiary details to the lawyer. If the prosecution could obtain the testimony of the lawyer, the art collector's statement would be admissible as a declaration against interest under Federal Rule of Evidence 804(b)(3). The lawyer claimed the attorney-client privilege under Australian, British, and United States law.

With the lawyer in a United States district court courtroom, the Federal Rules of Evidence would have applied, likely without any application of for-

eign law, as the law of the forum ordinarily governs privileges. However, we assumed that we were unable to extradite the lawyer, either as a legal or practical matter. Without the ability to compel testimony in the United States, we were left with the need to comply with foreign law. The Australian lawyer would testify if the Australian and British courts determined that he could do so without violating his duty as a lawyer. Accordingly, we held the first known three-court concurrent hearing. Using the CLCT Tandberg videoconferencing systems, the courtroom was connected to Queensland, Australia, and Leeds, England. The prosecution argued Australian law to Australia, English law to England, and the Federal Rules of Evidence to the presiding judge in Williamsburg, the Honorable James Spencer, United States District Judge for the Eastern District of Virginia. After all three courts ruled seriatim that the respective national privilege did not apply (using what amounted to a crime/fraud exception), in Queensland the lawyer was directed to testify and did so remotely to Williamsburg. Although the probability of such a hearing in the near future seems unlikely, it is indeed possible, and videoconferencing appears to be the most useful way of accommodating the varied practical, legal, and political issues involved. In *Stanhope*, no judge sat outside his or her own court, let alone nation. Although the time zones were extremely bothersome, especially for our Australian colleagues, the hearing was far more efficient than any other mechanism that we could envision. As we increasingly are forced to deal with courts abroad, particularly the courts of allied nations, hearings similar to the one we held in *Stanhope* may be highly desirable.

THE LEGAL SITUATION FOR REMOTE WITNESS TESTIMONY •

The most widespread and accepted use of videoconferencing in the courtroom is remote witness testimony. Authorized in federal civil cases by Federal Rule of

Civil Procedure 43(a), remote testimony has been used in state and federal courts in the United States and courts abroad, especially in Australia. *See, e.g.*, Chief Justice M.E.J. Black, *A Court-Based National Videoconferencing Network for Taking Evidence and Aiding in Administration*, presentation during The First Worldwide Common Law Judiciary Conference (May 29, 1995). It has also seen successful use in the International Criminal Tribunal for the Former Yugoslavia. Information Technology in An International Criminal Court, a videotape presented at the 2002 Australian Institute of Judicial Administration 3rd AIJA Technology for Justice Conference by the Honorable David Hunt, of the International Criminal Tribunal for the Former Yugoslavia (on file with the Courtroom 21 Project). *See also* Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 *Stan. J. Int'l L.* 255, 286 (2001) (“The ICTY in the Tadic case, for example, ... provided eleven witnesses with the opportunity to testify via videoconferencing from a location in the former Yugoslavia”). Its use in American criminal cases, however, has been controversial.

Defense Testimony

Because the Bill of Rights protects defendants against government action, there is no Constitutional prohibition on remote defense testimony. In any jurisdiction, however, there may be a court rule or statutory constraint. Both the utility and difficulty of such testimony can be seen from the trial in *Commonwealth v. Malvo*.

Malvo was the capital trial of the younger of the two “Washington snipers.” Charged with murder “in the commission of an act of terrorism,” Malvo’s prospects for a favorable verdict were dim. The evidence against him was overwhelming. In addition to attempting to counter the prosecution’s case in chief on the merits, the defense needed to present especially probative evidence on capital sentencing if it was to avoid a death sentence. The

defense sought to call a very large number of witnesses. Early in the case the trial judge suggested that many of the witnesses might best testify via videoconferencing. The defense adopted the judge’s suggestion and formally proposed the taking of testimony from 25 or more witnesses. The witnesses were to be located primarily in Antigua, Jamaica, Washington State, and Louisiana. Most, but not all, would be mitigation sentencing witnesses, and a number would replace the defense-proposed use of videotaped deposition/statement evidence previously opposed by the prosecution. The Fairfax Circuit Court is a Courtroom 21 Court Affiliate. (CLCT was originally named the Courtroom 21 Project, a name still used for courtroom purposes, including the Courtroom 21 Court Affiliates.) The Clerk’s Office appointed CLCT to serve as Executive Agent to determine the feasibility of remote testimony and, should the court so order it, to implement it.

Initial CLCT actions proceeded on concurrent tracks: determining whether such testimony was technologically, logistically, and financially possible, and whether foreign testimony could be lawfully obtained. The first concern, although highly time-consuming, was straightforward and eventually yielded a determination of practicality and financial savings. Remote locations were located in federal court facilities in the United States and potentially adequate commercial facilities were located in Antigua and Jamaica. CLCT Deputy Director for Courtroom Design and Technology Martin Gruen and I surveyed the Chesapeake Courthouse and determined what would need to be done to implement videoconferencing in the courtroom. We determined a probable minimum cost savings of \$12,539.26 over the cost of transporting to Virginia those witnesses able to travel, a financial savings that did not address the fact that a number of potential witnesses, including Malvo’s mother, were not necessarily able to travel to testify. Letter from Chancellor Professor of Law & Director, Court-

room 21 Fredric I. Lederer to The Honorable Jane Marum Roush, Fairfax Circuit Court (October 15, 2003)(originally available at http://www.co.fairfax.va.us/courts/cases/pdf/r_101603other.pdf).

The second proved to be quite interesting. Because the Antigua and Jamaica witnesses were not in the United States, obtaining permission for them to testify was a diplomatic matter. As the Office of International Affairs of the Department of Justice's Criminal Division assists only prosecutors in obtaining evidence abroad in support of our Mutual Legal Assistance Treaties, we were left to other devices to obtain that testimony even though we were seeking the evidence on behalf of the court in the interest of expediting trial and lowering its cost to the taxpayer. We contacted and obtained support from the State Department, which was prepared to obtain permission from the foreign governments involved and, if necessary, to ensure the presence of a consular officer when the testimony was taken. The issue of where the oath was to be administered was raised by State Department representatives, an issue for which we had no adequate answer. We could potentially have had the oath administered remotely from Virginia, a consular official could have administered it in the originating location, or both. Because the evidence was to be presented by the defense, we assumed that the oath issues, however important, would in actuality be moot as the defense would be unable to assert error should the case go to appeal. Whether the testimony would be lawful under Virginia law was not a matter within our concern, although it may well have proven the determinative issue.

Ultimately, the prosecution opposed the defense request. The judge then ruled against the defense request for remote testimony stating, among other matters, that she would not grant the motion over government objection.

Upon reflection, I believe that the *Malvo* case illustrates some of the critical issues raised by remote testimony in criminal cases generally. The threshold

issue is its very legality. Ordinarily, debate about the legality of remote testimony centers on its constitutionality under the Sixth Amendment. That issue is moot if the court is estopped by statute from permitting the testimony, although such a statute may raise compulsory process issues. A review of Virginia's statutory law suggests that there is no affirmative statutory authority for such testimony. Such law as has been enacted could reasonably be read to prohibit it. Va. Code Ann. §19.2-3.1, Personal appearance by two-way electronic video and audio communication; standards ("Where an appearance is required or permitted before a magistrate, intake officer, or, prior to trial, before a judge, the appearance may be by ... use of two-way electronic video and audio communication"); Va. Code Ann. §17.1-513.2, Use of telephonic communication systems or electronic video and audio communication systems to conduct hearing (... in any *civil proceeding* ... the court may, in its discretion, conduct any hearing using ... an electronic audio and video communication system to provide for the appearance of any parties and witnesses)(emphasis added). The judge's decision not to permit the remote testimony in large part because of the government's opposition raises an interesting question. As the court failed to specify her reasons in greater detail it is unclear whether the decision was on policy or equitable grounds or whether she had considered any potential legal error as moot when the request was a defense one and unopposed by the prosecution.

Accordingly, remote testimony for any criminal case, terrorism or not, is dependent at the very least upon the absence of a prohibitive statute or rule. Without such legal authority, the issue is at least left to the court's discretion. Far better would be affirmative authority similar either to Fed. R. Civ. P. 43(a) or the more comprehensive authority found in other jurisdictions such as Victoria, Australia. Victoria Evidence (Audio Visual and Audio Linking) Act 1997 section 3 (Act No. 4/1997, Victoria, Australia) inserting into the Evidence Act 1958,

new section 42G. The legality of the witness oath is a matter of consequence. In the absence of treaty, there is no clear way to know whether an oath is legally valid in the sense that a prosecution for perjury may result. Is a crime committed when one perjures oneself in one country while testifying in a trial in another? Whose law has been violated? And do we care about the probability that a foreign nation would actually prosecute? In the seminal case in this area, *State v. Harrell*, 709 So.2d 1364 (Fla.), *cert. denied*, 525 U.S. 903 (1998), the Florida Supreme Court held that the treaty between the United States and Argentina permitted the potential extradition to the United States for trial of Argentine witnesses testifying by two-way satellite against a Florida defendant. *Id.* at 1371. The Florida Supreme Court opined that perjury was punishable under both Florida and Argentine law. It is not entirely clear that the respective statutes punishing false statements in each jurisdiction necessarily extended to a false statement in Argentina made incident to a criminal trial in another nation.

Note that these questions arise even when it is the defense that is attempting to use remote testimony. Given the usual posture of such evidence attempts, it seemed ironic to have the prosecution oppose remote testimony for fear that it could not adequately cross-examine the remote witness, present adequate witness demeanor to the jury, or be aware of potential witness tampering abroad — claims one ordinarily hears from the defense. This raises one of the key questions about such testimony: Should it ever be used? At the same time, I would note that of the real concerns (witness tampering does not seem to be one; it can take place anywhere), technology can cope with almost all of them. The one critical concern that appears to be beyond our ability to adequately ascertain is, as previously discussed, whether remote testimony is more likely to yield intentionally false testimony. As we seem to be unable to be able to tell even with in-court witnesses who are telling the truth as they

know it and who are not, we do not even have a baseline for this determination.

Interestingly, the District of Columbia Circuit has summarily rejected an attack on remote testimony in a civil case because of the oath issue. *El-Hadad v. United Arab Emirates*, 496 F.3d 658, 668-69 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1872 (2008).

Before returning to the more usual prosecution use of such evidence, it is worthwhile to briefly examine the one area in which an attempt by the defense to use remote testimony is constitutionally unique, the Constitution's compulsory process clause.

Sixth Amendment Compulsory Process Clause

The Compulsory Process Clause provides simply that, "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor...." In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Supreme Court held the clause to be sufficient to override a state prohibition on declarations against interest when on the facts of the case the evidence was probative and necessary. Although it may as yet be premature to argue that *Chambers* gives rise to a generalized right to present probative evidence for a criminal defendant, such a claim is not unreasonable. If remote testimony is sufficiently probative and trustworthy, the defense ought to have a constitutional right to it, even if barred by rule or statute. Indeed, in *Malvo*, the defense argued compulsory process as a ground for the proposed remote testimony. When the judge asked counsel whether he was arguing that she might have a duty to provide remote testimony from anywhere in the world when otherwise justified, he ducked the question in favor of a response based on the court's likely financial savings. His better answer would have been "Yes." If the defense has a legitimate need for evidence and that evidence is available, in a system that pays

for witness travel, there seems to be no reason to reject remote testimony, especially if the result is to either entirely foreclose obtaining the evidence or to present it through the more expensive and less useful means of a deposition.

Proposed defense use of remote testimony is believed to be relatively rare. Given the option, the prosecution likely would be a more frequent user, but the prosecution must face the Sixth Amendment's Confrontation Clause.

Remote Prosecution Testimony

The usual intended use of remote testimony in a criminal case is to supply prosecution evidence. One can reasonably assume that this would be the norm for many cases, especially terrorism cases involving foreign witnesses. The complicated nature of major cases also suggests that there may be need for distant witnesses who are called to testify only very briefly to lay pro forma evidentiary foundations. In the *McVeigh* case, for example, 27 witnesses who testified during the morning session were phone company employees flown in from around the country to authenticate hundreds of pages of phone records, each testifying for only a few minutes. One witness was on the stand for just 50 seconds. Michael Fleeman, *McVeigh Phone Trial Retraced Prosecutors Call 27 to Recount Calls for Explosives, Rental Truck*, Pittsburgh Post Gazette, May 8, 1997, at A8. This might better be done by remote testimony that could result in large cost savings while minimizing the inconvenience caused to the witnesses.

The fundamental question in this area is whether prosecution-proffered remote witness testimony can or should be received in evidence. Remote testimony has been attacked as an inadequate substitute for in-court physical testimony. Concerns range from the already noted issue of the effect of physical absence from the courtroom influencing truth-telling to the inability to determine demeanor to the expressed critical need for the witness to face the defendant in open court. These are impor-

tant concerns and in light of them no one, to the best of my knowledge, has seriously suggested the routine use of remote testimony in criminal cases — although the Supreme Court's 2009 decision that prosecution use of forensic laboratory reports violates the Confrontation Clause, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), would justify remote analyst testimony if that proved constitutional. What has been suggested is a criminal analog to Federal Rule of Civil Procedure 43(a). When the Advisory Committee on the Federal Rules of Criminal Procedure issued its major rules amendment recommendations in 2002, it recommended that Federal Rule of Criminal Procedure 26 be amended to add proposed Rule 26(b):

“In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:

- (1) the requesting party establishes exceptional circumstances for such transmission;
- (2) appropriate safeguards for the transmission are used; and
- (3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)-(5).”

<http://www.supremecourtus.gov/orders/courtorders/fcr02p.pdf>.

In its notes, the committee favorably compared the use of remote testimony to traditional deposition evidence. *Id.* A criminal deposition ordinarily permits the accused to be present in the same room with the witness. In an unusual although not unprecedented act, the Supreme Court, with Justices Breyer and O'Connor dissenting, refused to transmit the proposed rule to Congress. Instead, Justice Scalia opined:

“As we made clear in [*Maryland v. Craig* ...], a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations in the defendant’s presence — which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant’s image. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.”

<http://www.supremecourtus.gov/orders/courtorders/frcr02p.pdf>.

The Court’s failure to forward the Rule simply deprived the federal courts of affirmative authorization for remote testimony, leaving United States district judges to make case-by-case individual decisions when remote testimony is proposed. The Court’s action, however, clearly signals the severe doubts held by many of its members as to at least the desirability of remote testimony.

In *State v. Harrell*, supra, the Supreme Court of Florida held that neither the state nor federal Constitution prohibited remote testimony by the eyewitness victims of the crime when they testified against the defendant by two-way satellite television from Argentina. The Court found sufficient necessity, reliability, and precautions to have been present and provided guidance for future cases:

“We are mindful of the possible difficulty in determining when the satellite procedure should be employed. We are also aware of the possibility that such a procedure can be abused. Therefore, we are establishing the following guidelines to aid in making this decision. The determination is not simply a mathematical calculation, based on the number of alleged public policy interests or state interests. Rather, the proper approach for determining when the satellite procedure is appropriate involves a finding similar to that of rule 3.190(j) of the Florida Rules of Criminal Procedure. Rule 3.190(j) pro-

vides the circumstances under which and the procedure by which a party can take a deposition to perpetuate testimony for those witnesses that are found to be unavailable. ...

“Thus, in all future criminal cases where one of the parties makes a motion to present testimony via satellite transmission, it is incumbent upon the party bringing the motion to (1) verify or support by the affidavits of credible persons that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing and (2) establish that the witness’s testimony is material and necessary to prevent a failure of justice. Upon such a showing, the trial judge shall allow for the satellite procedure.

“...However, some important caveats exist in regards to the oath, cross-examination, and observation of the witness’s demeanor. First, an oath is only effective if the witness can be subjected to prosecution for perjury upon making a knowingly false statement. ... To ensure that the possibility of perjury is not an empty threat for those witnesses that testify via satellite from outside the United States, it must be established that there exists an extradition treaty between the witness’s country and the United States, and that such a treaty permits extradition for the crime of perjury. ...

“We also acknowledge that possible audio and visual problems can develop with satellite transmission. It is incumbent upon the trial judge to monitor such problems and to halt the procedure if these problems threaten the reliability of the cross-examination or the observation of the witness’s demeanor.”

Id. at 709 So.2d 1370-72.

Ironically, the Eleventh Circuit, having sustained Harrell’s conviction in *Harrell v. Butterworth*, 251 F.3d 926 (11th Cir. 2001), held unconstitutional on direct appeal the conviction of a federal defendant

at whose trial two prosecution witnesses testified by video conferencing from Australia. In an en banc opinion, a majority of the court in *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006)(en banc) soundly condemned remote prosecution testimony as violating the confrontation clause. The federal courts are divided on whether remote testimony can satisfy the confrontation clause. Compare, e.g., *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999), cert. denied, 528 U.S. 1114 (2000) (sustaining use) with *United States v. Yates*, supra and *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005).

More recently, the Fourth Circuit sustained the legality of a live two-way videoconferenced deposition conducted from Saudi Arabia to Virginia in a terrorism case. *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), cert. denied, 129 S. Ct. 1312 (2009):

“A live, two-way video link was used to transmit the proceedings to a courtroom in Alexandria. This permitted Abu Ali and one of his attorneys to see and hear the testimony contemporaneously; it also allowed the Mabath officers to see and hear Abu Ali as he testified. A court reporter in Alexandria transcribed the testimony in real time, and both the witnesses and Abu Ali were videotaped during the depositions, so that the jury could see their reactions. The trial court presided over the deposition testimony of the Mabath officials from the courtroom in Alexandria, ruling on objections as they arose. Furthermore, Abu Ali was able to communicate via cell phone with his defense counsel in Saudi Arabia during the frequent breaks in the proceedings. In addition, the court was willing to stop the depositions if Abu Ali’s counsel in Saudi Arabia wanted to consult with their client.”

Id. at 528 F.3d 239

At footnote 12 of the opinion, the court distinguished *Yates* on the grounds both that the 11th Circuit’s decision was the result of the district court’s

lack of a finding of necessity for the remote testimony and that its case, unlike *Yates*, involved national security. A prosecutor arguing for use of remote government testimony can argue two differing positions: that modern remote testimony satisfies the Sixth Amendment confrontation clause per se or that on the specific facts of the case there is sufficient justification for the procedure, citing *Maryland v. Craig*, 497 U.S. 836, 850 (1990) and its requirement that “denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.” *Abu-Ali*, supra, at 528 F.3d 242.

It is worth noting that absent videoconferencing, the testimony of unavailable witnesses in a criminal case may be had only by deposition or hearsay. Although the Supreme Court’s decision in *Crawford v. Washington*, 541 U.S. 36 (2004), prohibits prosecutorial use of “testimonial hearsay,” it does not ban other forms of hearsay. Presumably, live cross-examination of a remote witness under oath, complete with demeanor evidence, would be superior to hearsay.

CONCLUSION • Videoconferencing is improving constantly. State-of-the-art “telepresence” installations can almost duplicate being in a room with a distant participant. At some point, it will be difficult even to realize that a law firm colleague, opposing counsel at a settlement meeting, or remote hearing participant, isn’t within a few physical feet. We are in a transition stage in which our legal system has not yet fully adapted to even the present realities of videoconferencing, let alone what is to come. At some point we will have to decide when, if ever, physical presence is truly mandated and, as technology improves, why.

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