



## **Self-Represented Litigation Network**

### **Remote Appearances of Parties, Attorneys and Witnesses**

#### **A Review of Current Court Rules and Practices**

Prepared for the Self-Represented Litigation Network  
SRLN.org

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## Introduction

In July of 2016, the Self-Represented Litigation Network published *Serving Self-Represented Litigants Remotely – A Resource Guide* describing how eight jurisdictions use remote service delivery technologies to provide assistance to self-represented litigants (SRLs) – allowing SRLs to access information, forms and other assistance without having to travel to a courthouse. The data collected for that publication showed that the provisions of services remotely was of benefit to both the court and the SRL. Significant interest was expressed concerning the related question of whether SRLs (and lawyers) could conduct court business without going to a courthouse. This effort is intended to collect available information on this topic.

The topic covers both remote appearances of parties and attorneys at court proceedings and the remote presentation of evidence for those proceedings. It covers both types of appearances by telephone and by videoconference.

This summary report presents the author's conclusions about the current state of remote appearances in the United States based on his review of existing state statutes and federal, state and local court rules on the topic and discussions with knowledgeable persons throughout the country. The report has two appendices – a compendium of all the statutes and rules identified by Lindsay Welton, a talented third year law student at the University of New Mexico College of Law, and compiled by the author, and a technology assessment *Use of Telephonic and Video Conferencing Technology in Remote Court Appearances*, prepared by Vince Morris and Stewart Whaley of Open Access Law Firm, PLLC of Little Rock, Arkansas.

The information in the statutes and rules compendium, while filing many pages of text, was compiled using basic legal research tools of court rules using three search terms – “appear,” “telephone” and “video.” If statutes were mentioned in the rules, we included them. We invite states and local courts to provide us with information that should be, but has not been, included in this compendium.

We include footnotes that reference materials in the statutes and rules compendium. The footnotes are not in “blue book” format. However, they contain the identifier used in the compendium; consequently, it is easy for persons to find the reference material supporting the statements made in this report in the compendium.

Readers must also be aware that the information contained in a report of this kind is time dated. Its accuracy and utility will begin to diminish the moment it is published as rules and practices change and evolve.

## **Remote appearances – endorsement by the Conference of Chief Justices**

In its *Call to Action: Achieving Civil Justice for All*, the Conference of Chief Justices' Civil Justice Improvement Committee set forth a convincing series of findings concerning the makeup of the civil calendar of trial courts in the United States and made a series of thirteen recommendations for dramatic change in the procedures used in handling civil cases. The last recommendation includes the following:

### **Recommendation 13.4 Judges should promote the use of remote audio and video services for case hearings and case management meetings.**

The commentary supporting this recommendation reads as follows:

Vast numbers of self-represented litigants navigate the civil justice system every year. However, travel costs and work absences associated with attending a court hearing can deter self-represented litigants from effectively pursuing or defending their legal rights. The use of remote hearings has the potential to increase access to justice for low-income individuals who have to miss work to be at the courthouse on every court date. Audio or videoconferencing can mitigate these obstacles, offering significant cost savings for litigants and generally resulting in increased access to justice through courts that “extend beyond courthouse walls.” The growing prevalence of smart phones enables participants to join audio or videoconferences from any location. To the extent possible and appropriate, courts should expand the use of telephone communication for civil case conferences, appearances, and other straightforward case events. If a hearing or case event presents a variety of complexities, remote communication capacities should expand to accommodate those circumstances. In such instances video conferencing may be more fitting than telephone conferencing. The visual component may facilitate reference to documents and items under discussion, foster more natural conversation among the participants, and enable the court to “read” unspoken messages. For example, the video may reveal that a litigant is confused or that a party would like an opportunity to talk but is having trouble getting into the conversation.

The full report was approved by the Conference of Chief Justices in 2016.

## **Remote appearances – pros and cons**

Remote court appearances provide many benefits to multiple entities.

By allowing persons to appear by telephone or videoconference, courts reduce the number of persons coming to court, finding parking, going through security screening, requiring directions

to offices and courtrooms, and filling small courtrooms. While there is no data on this matter, there is little reason to believe that the actual time required to complete a court proceeding is increased or decreased by remote appearance. The time of court staff may be increased marginally by the need to handle telephone and videoconferencing equipment. On the other hand, judges may appear telephonically or by video in rural courthouses, saving considerable time and expenses of their travel.

Parties can avoid the costs of lost time from work, transportation, parking, child care, and meals associated with a trip to the courthouse. There is existing evidence of those costs and their significance. They can also use the technology tools of their everyday life – smartphones, tablets, and laptop computers – to appear and testify in court. There is a further cost for persons with disabilities that is harder to quantify – the pain, discomfort, and frustration of having to travel to a court facility not designed to accommodate their needs. These costs are just as real for urban as for rural residents.

Attorneys can avoid the costs of travel, parking, and waiting in court for a hearing to take place. While many attorneys are able to bill clients for that time, their lives would be improved by being able to make more productive use of the time.

Witnesses can realize the same savings of time and expense experienced by parties and attorneys. Expert witnesses can benefit especially from remote appearances; by virtue of their unique qualifications, experts are unlikely to live near a courthouse at which they will be required to testify.

Law enforcement, correctional institutions, hospitals and mental health facilities benefit enormously from the ability to have court appearances take place on their premises rather than at a remote courthouse. The costs of transportation and security for prison and jail inmates that can be avoided by the use of videoconferencing has led to the widespread use of videoconferencing for first appearances, arraignments, and other criminal hearings.

Appellate courts in California<sup>1</sup> and Missouri<sup>2</sup> allow judges, parties and attorneys to appear remotely for oral argument. In both instances the locations at which any participant can be present are limited to specified courthouses – presumably because they are equipped with particular videoconferencing equipment.

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<sup>1</sup> Cal. 1st App. Dist. L.R. 13

<sup>2</sup> Mo. App. S.D. Spec. R. 1

But there are potential costs as well – most of which are considered potential because they have not been measured empirically. Remote appearances of witnesses may lessen the accuracy of judge and jury fact finding. Judges may without knowing they are doing it, favor or disfavor persons who appear remotely or those who do not. Not having all parties present in the courthouse may reduce the opportunities for early settlement of both civil and criminal matters – increasing the average time required to dispose of cases. Not having persons experience the courtroom environment, with impressive physical facilities and the robed judge seated above the parties, may reduce litigant respect for the judicial process and lessen the impact of court orders.

There is some evidence of negative effects. The most famous study was done in 2008 by Professor Shari Diamond. She and her colleagues gathered extensive data on bail outcomes both before and after the introduction of videoconference arraignments in Chicago. They documented an average increase in the amount of bail of \$21,000 – a 51% increase. Persons who appeared personally in court after the introduction of videoconferencing did not experience such an increase. The URL for her study is <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7365&context=jcl>

In 2005, two public interest entities in Chicago studied removal hearings conducted by the US Immigration Court using videoconferencing and reported a number of negative consequences. The URL for that study is [http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport\\_080205.pdf](http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf)

Neither of these studies appears to have dampened enthusiasm for the use of video proceedings in criminal cases outside Chicago itself. The US Justice Department's National Institute of Justice is currently conducting a three-phase study to produce empirical evidence from multiple sites on the fairness of video proceedings in criminal cases. The first phase report summarizes the literature on perceived problems and best practices to avoid them or their effects. The URL for the report is <https://www.ncjrs.gov/pdffiles1/nij/grants/248903.pdf>

## **Contrasting basic approaches**

The traditional approach to both types of appearances begins with the premise that personal appearance in the courtroom is preferred and therefore that remote appearances are exceptional, requiring a showing of circumstances warranting the granting of such an exception. The burden of proof is on the party wishing to appear remotely. Deciding whether to allow

remote appearance is done through a traditional motion, service, answer, oral argument process. All costs of the remote appearance are the responsibility of the requesting (or first requesting) party.

Several states have now reversed this presumption, creating a neutral environment for deciding whether to allow a remote appearance – leaving judges with full discretion for deciding each situation on its relative merits. In these states, it is still presumed that the opposing party has a right to notice of the request to appear remotely and that the court needs to know in advance whether a party will be using the telephone appearance option.

Three states have reversed the presumption for non-evidentiary hearings. Florida<sup>3</sup>, Hawai'i<sup>4</sup> and Oregon<sup>5</sup> have statewide rules requiring their courts to allow remote appearances for administrative and non-evidentiary hearings absent some compelling reason to the contrary – giving the party or attorney the discretion to decide whether to appear in court or by phone. In these states, the burden remains on the requesting party to obtain the consent of the other side or to prove to the court that the hardship on the witness warrants the allowance of testimony by telephone or video conference.

Alaska<sup>6</sup> and a number of individual courts<sup>7</sup> have implemented this presumption administratively or by rule – providing the option for remote appearance to all parties in eligible types of

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<sup>3</sup> Fla. R. Jud. Admin. 2.530 (c) (for civil hearings scheduled for fifteen minutes or less)

<sup>4</sup> Haw. R. Civ. P. Rule 16.1

<sup>5</sup> Ore. UTCR 5.050 2(b)

<sup>6</sup> Communication by the author with the Director of the Alaska Family Law Self Help Center

<sup>7</sup> CA Super Ct. Santa Clara County Local Rules Rule 12C; Ca. Super. Ct. Santa Cruz County, Local Rules, rule 3.1.02 (b); Ca. Super. Ct. Shasta County, Local Rules, rule 15.16 (A); Ca. Super. Ct. Shasta County, Local Rules, rule 5.13; Ca. Super. Ct. Sierra County, Local Rules, rule 1.1 (A)(d); Ca. Super Ct. Tulare County Local Rules Rule 108 b; 9th Jud. Cir. AO 2004-03-01 3.1 (videoconferencing by agreement of the parties; court approval not required); Montana statutes Section 25-31-710 (Justice's court); Texas Fort Bend Cty Dist. Ct. Local Rules Rules of Practice in the 400th District Court, Civil 5. Fort Bend Cty Dist. Ct. Fam. LR 3 section 3.3.

hearings by providing information for appearing remotely on the notice of hearing. In these jurisdictions, the court simply assumes that some parties will be appearing by phone – checking in persons on the phone at the same time as they check in the persons who are appearing in person.

All jurisdictions require prior notice of and judicial approval of the remote appearance of a party or witness for a hearing in which testimony will be taken.

California’s rule<sup>8</sup> strongly encourages remote appearances – “To improve access and reduce litigation costs, courts should permit parties, to the extent feasible, to appear by telephone at appropriate conferences, hearings and proceedings in civil cases.” However, it has created a strong monetary disincentive for the parties. Every remote appearance requires the payment of a fee of \$86, absent the granting of a fee waiver in the case on a showing of indigency.<sup>9</sup> The fee is reduced to \$66 for cases involving Title IV-D child support matters.<sup>10</sup> Twenty dollars of the fee is placed in the Trial Court Trust Fund – the source from which trial courts are funded. The remainder of the fee goes to a commercial vendor (CourtCall has a statewide contract in California) or to the court if it provides its own phone service or the party provides the conference call in a different manner. Interestingly, any judge may decide not to impose any remote appearance fee in her or his courtroom<sup>11</sup>. It is clear from some of the California trial court local rules that this is the practice in some courts – with some departments using the private vendor and others not.<sup>12</sup>

The disincentive is magnified by a provision that remote appearance fees cannot be claimed or taxed as costs against the losing party.<sup>13</sup> The Superior Court in Sacramento County has created a countervailing financial incentive; it warns attorneys that it will not allow the costs of attorney travel in computing attorney’s fees (when they are allowable) if an attorney has failed to take advantage of the remote appearance option.<sup>14</sup>

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<sup>8</sup> CA ST CIVIL RULES Rule 3.670

<sup>9</sup> CA ST CIVIL RULES Rule 3.670 (k)

<sup>10</sup> CA ST CIVIL RULES Rule 3.670 (m)(2)

<sup>11</sup> CA ST CIVIL RULES Rule 3.670 (j)(2); Cal Govt Code Section 72010(c)(3)

<sup>12</sup> Ca. Super. Ct. San Luis Obispo County, Local Rules, rule 7.13 B1(a)

<sup>13</sup> Ca. Super. Ct. Siskiyou County, Local Rules, rule 4.03 C

<sup>14</sup> Ca. Super. Ct. Sacramento County, Local Rules, rule 2.04(C)

Several California courts by local rule provide a free alternative – either by allowing a party to propose a different form of conference call or by providing that, if a prior request has been made, courtroom staff will call the party at the time of the hearing.<sup>15</sup>

## **Case types and proceeding types in which remote appearances are allowed**

Two states have enacted a single rule covering both telephonic and videoconference appearances. North Dakota<sup>16</sup> uses the term “contemporaneous transmission by reliable electronic means.” The single rule covers criminal, civil and mental health cases and sets out four basic requirements:

- (B) A party wishing to use reliable electronic means must obtain prior approval from the court after providing notice to other parties.
- (C) Parties must coordinate approved reliable electronic means proceedings with the court to facilitate scheduling and ensure equipment compatibility.
- (D) Each site where reliable electronic means are used in a court proceeding must provide equipment or facilities for confidential attorney-client communication.
- (E) A method for electronic transmission of documents must be available at each site where reliable electronic means are used in a court proceeding for use in conjunction with the proceeding.

Oregon’s statute<sup>17</sup> uses the term “simultaneous electronic transmission” which it defines to mean “television, telephone or any other form of electronic communication transmission if the form of transmission allows” four capabilities:

- (A) The court and the person making the appearance to communicate with each other during the proceeding;
- (B) A defendant who is represented by counsel to consult privately with defense counsel during the proceeding;
- (C) The victim to participate in the proceeding to the same extent that the victim is entitled to participate when the person making the appearance is physically present in the court; and
- (D) The public to hear and, if the transmission includes a visual image, to see the appearance if the public has a right to hear and see the appearance when the person making the appearance is physically present in the court.

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<sup>15</sup> Ca. Super. Ct. Placer County, Local Rules, rule 30.17 D; Ca. Super. Ct. Riverside County, Local Rules, rule 5160 (for family law matters)

<sup>16</sup> ND Administrative Rule 52

<sup>17</sup> ORS § 131.045



A number of courts and jurisdictions have different rules governing remote appearances in different case types. All jurisdictions provide separate rules governing criminal proceedings. But there are often different rules in different civil case types. For instance, California has separate rules for remote appearances in Title IV-D child support cases.<sup>18</sup> The Superior Court in Mendocino, California identifies virtually the same procedures for five different categories of civil cases in the same rule.<sup>19</sup>

In criminal cases, courts typically authorize remote issuance of search or arrest warrants, and videoconferencing for initial appearance, arraignment, not guilty plea, non-evidentiary bail hearing, and case status conferences in misdemeanor and felony cases in which a party is in custody. Many allow the use of video conferencing for guilty plea and sentencing hearings with the defendant's consent. Alaska allows remote appearances for traffic and misdemeanor sentencing.<sup>20</sup> Alaska also authorizes video testimony at a preliminary hearing if the witness lives 50 miles from the courthouse or has to travel by air to reach the courthouse.<sup>21</sup> Alaska allow grand jury witnesses to appear telephonically so long as they ensure that no one is listening on the call on an extension within the witness's place of business.<sup>22</sup> Orange County, California allows an attorney to appear telephonically or by fax machine for a misdemeanor arraignment.<sup>23</sup>

Jurisdictions frequently provide rules addressing specific civil case types:

- Family cases. Several states have enacted the Uniform Interstate Family Support Act;<sup>24</sup> section 316 of that act requires courts in the state to allow out of state parties to appear and testify in such cases by telephone, audiovisual or "other electronic means." There are two other uniform laws with sections bearing on electronic appearances in family matters – the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act<sup>25</sup> and the Uniform Deployed Parents Custody and Visitation Act.<sup>26</sup> Many states and courts have their own unique remote appearance rules for family cases.<sup>27</sup>

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<sup>18</sup> Cal. R. Ct. 5.324

<sup>19</sup> Ca. Super. Ct. Mendocino County, Local Rules, rule 11.1

<sup>20</sup> AK R RCRP Rule 38.2(b)

<sup>21</sup> AK R RCRP Rule 5.1 (e)(1)(A)

<sup>22</sup> AK R RCRP Rule 6 (3)(B)

<sup>23</sup> Ca. Super. Ct. Orange County, Local Rules, rule 856 F

<sup>24</sup> ARS 25-1256. Special rules of evidence and procedure

<sup>25</sup> NC statutes Section 35B-7

<sup>26</sup> NC statutes Section 50A-363

<sup>27</sup> Minn. Gen. R. Prac. 359.01

- Foreclosure cases. A number of jurisdictions have created special procedures for settlement of these cases. Florida is such a state. These rules often prohibit a party from appearing remotely at such a conference.<sup>28</sup> In the 20<sup>th</sup> Judicial District, however, the plaintiff's representative is granted the right to appear remotely because of the impact on judicial administration of requiring personal presence with so many pending cases.<sup>29</sup>
- Probate. Many rules allow the remote appearance of conservators and personal representatives in required but uncontested matters<sup>30</sup>
- Juvenile delinquency, dependency, and CHINS/PINS cases. A number of jurisdictions authorize remote appearances in these cases, sometimes disallowing it for a particular class of party.<sup>31</sup>
- Domestic violence protective orders. Following the example of individual courts in other states, New York has recently implemented a procedure allowing persons seeking protective orders to appear by Skype the ex parte issuance of a temporary order of protection.<sup>32</sup> Contested hearings require the personal appearance of the person seeking protection.
- Traffic cases. Florida's 15<sup>th</sup> Judicial District is conducting an experimental Saturday and video conference traffic hearing calendar.<sup>33</sup> The Superior Court for Fresno County, California has a pilot program for remote appearance for traffic hearings in two communities.<sup>34</sup>
- Driver's license revocation or restoration<sup>35</sup>
- Court-sponsored mediation and other ADR processes. Most rules state a preference for in person presence for ADR processes, but provide the judge with the discretion to allow parties to participate remotely when good cause is shown.<sup>36</sup> The San Mateo County, California Superior Court requires parties to redial into the commercial vendor service on a different line with a different PIN when a mediation has been ordered during a family law hearing so that the remotely participating party(ies) can schedule the

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<sup>28</sup> Florida 16th Jud. Cir. AO 2.072 Rules for Foreclosure Mediation a

<sup>29</sup> Florida 20th Jud. Cir. AO 1.12 13

<sup>30</sup> Ca. Super. Ct. Ventura County, Local Rules, rule 10.00; Ohio Warren Cty. Probate Div. LR 5

<sup>31</sup> Ohio Warren Cty. Juv. Div. LR 4; AK R CINA Rule 3

<sup>32</sup> From New York Unified Court Press Release

<sup>33</sup> Florida 15th Jud. Cir. AO 10.406

<sup>34</sup> Ca. Super. Ct. Fresno County, Local Rules, rule 3.6.3

<sup>35</sup> A.C.A. § 5-65-402 (B)(8)(A); C.R.S.A. § 42-1-218.5 (driver's license revocation hearings)

<sup>36</sup> Ca. Super. Ct. Contra Costa County, Local Rules, rule 5.7

mediation at the time of the initial court hearing (duplicating the requirement for in-court participants to proceed directly to a specific court office for this purpose).<sup>37</sup>

- Attorney discipline and client protection fund proceedings. Many courts allow persons to appear remotely in these proceedings (these rules were not included in the compendium).
- At least two states – Arkansas and North Carolina – authorize the county sheriff to serve subpoenas requiring a person to appear in court to testify by telephone.<sup>38</sup>

## **Recognition of the needs of persons in special categories**

A number of states give a right of remote appearance to a person in the military in deployed status.<sup>39</sup> There are a number of court rules that allow remote appearance automatically for persons living in a different state or a certain distance from the courthouse – e.g., 50 miles, 60 miles, 100 miles, 150 miles.<sup>40</sup>

Virginia has special rules relating to the isolation of persons with communicable diseases.<sup>41</sup> These rules are for the protection of the courts and court personnel as well as for the convenience of the confined persons.

## **Processes for obtaining permission to appear remotely**

The typical process calls for a party wishing to appear remotely or to have a witness appear remotely to file a request a certain number of days prior to the hearing. The number of days' advance notice varies from 1 to 30 days.<sup>42</sup> Some rules allow a party to make such a request by

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<sup>37</sup> Ca. Super. Ct. San Mateo County, Local Rules, rule 4.2 D(4)

<sup>38</sup> AR R RCP Rule 45 (c); NC Civil Rule 45(b)(1)

<sup>39</sup> Rules of Civil Procedure, Rule 99 (a)

<sup>40</sup> AK R RCRP Rule 6 u(1)(A) (50 miles for appearance before grand jury); Ca. Super. Ct. Sonoma County, Local Rules, rule 9.14 (60 miles for child custody); Ca. Super. Ct. Humboldt County, Local Rules, rule 8.26 (100 miles for Child Custody Recommending Counseling (CCRC) session); Ca. Super. Ct. Mendocino County, Local Rules, rule 6.4 (150 miles for mandatory settlement conference)

<sup>41</sup> Va. Sup. Ct. R. 7A:16; Va. Sup. Ct. R. 3:24; Va. Sup. Ct. R. 5:41

<sup>42</sup> Ca. Super. Ct. Sonoma County, Local Rules, rule 9.14 2 ( one day's notice for appearance in child custody hearing); Arizona 17B A.R.S. Rules Probate Proc., Rule 11 (30 day's notice for appearance in probate matter)

including a phrase such as “Telephonic Appearance Requested” in the caption of a motion.<sup>43</sup> Many rules require this request to be served on all other parties in the case; in some instances the rules allow notice to be given by phone. The rules usually provide an opportunity for the filing of an objection.

The Washington Circuit Court for Asotin, Columbia, and Garfield Counties has the common sense rule that a contested motion about remote telephonic appearance will be heard telephonically.<sup>44</sup>

The courts that give the discretion to the party do not require notice to the court or to the other side of one party’s decision to appear remotely, unless there are unusual technical requirements associated with the appearance.

Courts take different approaches to what the requesting party should presume if s/he has not received notice of the court’s ruling on a remote appearance request. In the San Francisco Superior Court the parties are instructed to presume that an application to appear remotely in a family law matter has been denied.<sup>45</sup> In Sonoma County, just north of San Francisco, the opposite is the case – a party should presume in the absence of notice that a remote appearance application has been granted in the same type of matter.<sup>46</sup>

Florida’s 15<sup>th</sup> Judicial District has an experimental Saturday and video traffic hearing process; attorneys are assumed to be available to make regular court appearances, so they are not allowed to participate in the experimental process.<sup>47</sup>

## **Processes for obtaining permission to have a witness appear remotely**

Jurisdictions set forth criteria for permitting remote testimony in very different ways. We set forth only three examples taken from the rules compendium.

The Utah criteria are very simple:<sup>48</sup>

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<sup>43</sup> CA St Civil Rules Rule 3.670 (h)(1)(A)

<sup>44</sup> Washington Asotin, Columbia, Garfield Super. Ct. LCR 7

<sup>45</sup> Ca. Super. Ct. San Francisco County, Local Rules, rule 11 D 4 a (iv)

<sup>46</sup> Ca. Super. Ct. Sonoma County, Local Rules, rule 9.6 E

<sup>47</sup> Florida 15th Jud. Cir. AO 10.406

## **Utah**

Intent:

To authorize the use of conferencing from a different location in lieu of personal appearances in appropriate cases.

To establish the minimum requirements for remote appearance from a different location.

Applicability:

This rule shall apply to all courts of record and not of record.

Statement of the Rule:

- (1)** If the requirements of paragraph (3) are satisfied, the judge may conduct the hearing remotely.
- (2)** If the requirements of paragraph (3) are met, the court may, for good cause, permit a witness, a party, or counsel to participate in a hearing remotely.
- (3)** The remote appearance must enable:
  - (A)** a party and the party's counsel to communicate confidentially;
  - (B)** documents, photos and other things that are delivered in the courtroom to be delivered previously or simultaneously to the remote participants;
  - (C)** interpretation for a person of limited English proficiency; and
  - (D)** a verbatim record of the hearing.

The rules in Maryland<sup>49</sup> and Michigan<sup>50</sup> are much more detailed.

## **Maryland**

**(d)** Contents of motion. The motion shall state the witness's name and, unless excused by the court:

- (1)** the address and telephone number of the witness;
  - (2)** the subject matter of the witness's expected testimony;
  - (3)** the reasons why testimony taken by telephone should be allowed, including any circumstances listed in section (e) of this Rule;
  - (4)** the location from which the witness will testify;
  - (5)** whether there will be any other individual present in the room with the witness while the witness is testifying and, if so, the reason for the individual's presence and the individual's name, if known; and
  - (6)** whether transmission of the witness's testimony will be from a wired handset, a wireless handset connected to the landline, or a speaker phone.
- (e)** Good cause. A court may find that there is good cause to allow the testimony of a witness to be taken by telephone if:

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<sup>48</sup> Utah R. Judicial Admin Rule 4-106

<sup>49</sup> Md. Rule 2-513

<sup>50</sup> Michigan MCR 2.407

- (1) the witness is otherwise unavailable to appear because of age, infirmity, or illness;
- (2) personal appearance of the witness cannot be secured by subpoena or other reasonable means;
- (3) a personal appearance would be an undue hardship to the witness; or
- (4) there are any other circumstances that constitute good cause for allowing the testimony of the witness to be taken by telephone.

**Committee note.** -- This section applies to the witness's unavailability to appear personally in court, not to the witness's unavailability to testify.

(f) When testimony taken by telephone is prohibited. If a party objects, a court shall not allow the testimony of a witness to be taken by telephone unless the court finds that:

- (1) the witness is not a party and will not be testifying as an expert;
- (2) the testimony is not to be offered in a jury trial;
- (3) the demeanor and credibility of the witness are not likely to be critical to the outcome of the proceeding;
- (4) the issue or issues about which the witness is to testify are not likely to be so determinative of the outcome of the proceeding that the opportunity for face-to-face cross-examination is needed;
- (5) a deposition taken under these Rules is not a fairer way to present the testimony;
- (6) the exhibits or documents about which the witness is to testify are not so voluminous that testimony by telephone is impractical;
- (7) adequate facilities for taking the testimony by telephone are available;
- (8) failure of the witness to appear in person is not likely to cause substantial prejudice to a party; and
- (9) no other circumstance requires the personal appearance of the witness.

## **Michigan**

(C) Criteria for Videoconferencing. In determining in a particular case whether to permit the use of videoconferencing technology and the manner of proceeding with videoconferencing, the court shall consider the following factors:

- (1) The capabilities of the court's videoconferencing equipment.
- (2) Whether any undue prejudice would result.
- (3) The convenience of the parties and the proposed witness, and the cost of producing the witness in person in relation to the importance of the offered testimony.
- (4) Whether the procedure would allow for full and effective cross-examination, especially when the cross-examination would involve documents or other exhibits.
- (5) Whether the dignity, solemnity, and decorum of the courtroom would tend to impress upon the witness the duty to testify truthfully.
- (6) Whether a physical liberty or other fundamental interest is at stake in the proceeding.
- (7) Whether the court is satisfied that it can sufficiently control the proceedings at the remote location so as to effectively extend the courtroom to the remote location.

- (8) Whether the use of videoconferencing technology presents the person at a remote location in a diminished or distorted sense that negatively reflects upon the individual at the remote location to persons present in the courtroom.
- (9) Whether the use of videoconferencing technology diminishes or detracts from the dignity, solemnity, and formality of the proceeding and undermines the integrity, fairness, or effectiveness of the proceeding.
- (10) Whether the person appearing by videoconferencing technology presents a significant security risk to transport and be present physically in the courtroom.
- (11) Whether the parties or witness(es) have waived personal appearance or stipulated to videoconferencing.
- (12) The proximity of the videoconferencing request date to the proposed appearance date.
- (13) Any other factors that the court may determine to be relevant.

## **Standards for telephonic and video appearance**

Several states provide that their Administrative Office of the Courts will promulgate standards for the use of videoconferencing.<sup>51</sup>

There are two quite recent excellent technical reports on best practices for the use of videoconferencing for the appearance of parties and witnesses and the presentation of testimony. The first was developed by InfoComm – a trade group for technology vendors – with the help of an international group of experts. *AV/IT Infrastructure Guidelines for Courts* The URL is <http://www.infocomm.org/cps/rde/xchg/infocomm/hs.xsl/38165.htm>

The second is a report for the Administrative Conference of the United States focused on best practices in administrative hearings. *Best Practices for Using Video Teleconferencing for Hearings and Related Proceedings* The URL is [https://www.acus.gov/sites/default/files/documents/Final\\_Best%2520Practices%2520Video%2520Hearings\\_11-03-14.pdf](https://www.acus.gov/sites/default/files/documents/Final_Best%2520Practices%2520Video%2520Hearings_11-03-14.pdf)

A recent article on testimony by videoconferencing in Canada can be found at this URL. <http://www.slaw.ca/2015/09/08/when-are-witnesses-allowed-to-testify-via-videoconference/>

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<sup>51</sup> Fla. R Jud Adm 2.530; Michigan MCR 2.407 F; Wash. GR 19;

A number of courts post on their websites the technical requirements for videoconferencing. An example from Florida's 9<sup>th</sup> Judicial District appears in the compendium.<sup>52</sup>

Technical requirements for telephonic appearances are set forth in many of the court rules and guidelines. They generally prohibit the use of cell phones<sup>53</sup> (although at least one court allows their use but warns users that they are responsible to ensuring a strong cell signal).<sup>54</sup> They prohibit the use of speaker phones, pay phones, and "voice over IP" computer-based telephone services.<sup>55</sup> Some require that parties "mute" themselves unless they are talking to prevent disruptive background noise.<sup>56</sup> They prohibit the use of the "hold" function.

Many courts explicitly pay attention to the right of the public to access court proceedings – requiring that videoconferencing be displayed in a manner that allows public viewing. Most vendor-provided and other forms of telephonic appearance include the broadcast of the voices of the telephonic participants so that they are heard in open court.<sup>57</sup> The California Court of Appeals requires that videoconferencing be available to the public at any of the courthouses where counsel or an appellate judge is participating.<sup>58</sup>

## **Courtroom procedures**

The procedure for long calendars is the same whether a court uses a commercial vendor or not. All parties who are appearing by telephone "sign in" with the operator before the hearing begins (following the same process used in the courtroom itself for persons coming to court). All of the telephone participants remain connected and hear what is transpiring in the courtroom and the voices of other parties appearing by phone. When their case is called, they confirm their presence and then repeat their name each time they speak. In hearings that are conducted in chambers – such as a case management conference in a major civil case – the telephonic conference takes the same form as the in-person conference; only the parties to that case are on the phone.

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<sup>52</sup> INFO FROM WEBLINK 9<sup>th</sup> Cir Video Conference Hearings Probate & Complex Civil Litigation Courts

<sup>53</sup> Ill. 10<sup>th</sup> Judicial Cir Admin Order 14-07 C 3; 17C ARS Super. Ct. Local Prac. Rules, Yuma County, Rule 2(C); but see Baker Cir. SLR 3.051

<sup>54</sup> CA Super Ct Calaveras County Local Rules Rule 3.8 (D) (2); Ill. 18<sup>th</sup> Judicial Cir Memorandum Appearance Procedure 4

<sup>55</sup> E.D. Mo. L.B.R. 9070

<sup>56</sup> Ca. Super. Ct. Lassen County, Local Rules, rule 6 (c) (3)

<sup>57</sup> AK R Civ P 99 (c); ORS § 131.045 D; Washington Island Dist. Ct. LCrRLJ 10

<sup>58</sup> Cal. R Ct. 8.885 (b)(2)(C)



Judges in some courts do an initial sorting and prioritizing of cases on a long calendar – informing parties and attorneys in cases that are expected to take more time that they will be heard at the end of the calendar. This allows them to leave the courtroom and attend to other business until later in the morning or afternoon. Some courts use this same process for telephonic participants – informing them that their case will be heard at a later time in the morning or afternoon and giving them a specific time to call back on the conference call line. Courts that do not use such a process often include in their local rules that a remotely appearing parties must remain on the conference call line for the entire calendar – or until their case has been called and heard.

There is a disagreement among the courts concerning the preference to be given to cases on a long calendar when there are remote appearances. Some courts provide that cases will be taken in the order they appear on the calendar without reference to remote or in person appearance. In Missouri, the US District Court gives preference to cases in which a party has appeared in person.<sup>59</sup> In many California courts, the preference is given to cases with a telephonically appearing party.<sup>60</sup> In one California court, a trial judge must agree to that procedure in order to be able to use CourtCall in her or his courtroom.<sup>61</sup> It is possible that the interests of the commercial telephone services vendor are recognized in giving preference to remotely appearing parties.

Several courts require the presence of a notary public at the remote site where a witness is located – to identify the witness and to administer the oath in person.<sup>62</sup>

The role of court reporters remains unchanged in remote appearance hearings. S/he takes down the testimony as if the remotely appearing persons were present in the courtroom. A number of court rules expressly prohibit the recording of a telephonic hearing, presumably to protect the court reporter’s exclusive property rights in a transcript.<sup>63</sup>

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<sup>59</sup> E.D. Mo. L.B.R. 9070

<sup>60</sup> Ca. Super. Ct. Napa County, Local Rules, rule 2.8 A 1

<sup>61</sup> Ca. Super. Ct. San Luis Obispo County, Local Rules, rule 7.13 B 1 (a)

<sup>62</sup> Fla. R. Jud. Admin. 2.530 (d)(3); Texas Blanco Cty Dist. Ct. Procedures 33rd Judicial District Rule Re: Courtcall Telephonic Appearances

<sup>63</sup> Ill. 18<sup>th</sup> Judicial Cir Memorandum Appearance Procedure 5

## Technology options

The appendix prepared by Open Access Law Firm analyzes the telephone options available to courts. Mr. Morris and Mr. Whaley were asked to determine the availability of a model for telephonic appearances in a courtroom with a long calendar that would have the parties waiting in queue for their case to be called, but not having access to other proceedings in the court. From a review of the operation of current commercial vendor products, that model is not one that is currently in use, or sought. To the contrary, having all telephonic participants present in the courtroom for the full calendar – just as the persons physically present in the courtroom are – is seen as an advantage.

Free conference telephoning vendors – FreeConference.com and FreeConferenceCall.com – now provide any user the option of having a dedicated telephone number with its own PIN for use 24/7. No prior arrangement needs to be made with the vendor to reserve space for a specific number of participants (up to a very large maximum capacity). This service is free to the user. It does offer the option of digital recording for a fee. Similar service is available through some commercial business telephone applications. This free service appears to duplicate completely the telephone technology provided by commercial court telephone services vendors. It does not duplicate the service performed by these vendors of registering in advance the names of the parties and cases in which they plan to appear. But for courts willing to give the party the unfettered discretion to decide whether to appear telephonically or in person, such services are not necessary. The court can simply provide the call in number and PIN on all notices of hearing for which telephonic appearance is appropriate and dial in to the same number, using the same PIN, from a speakerphone in the courtroom to facilitate remote access at no cost to the court or the user.

The appendix describes an open source application developed by Open Access Law Firm using Twilio that it is willing to discuss with and adapt to the needs of courts seeking a customized, low cost teleconferencing solution.

The experience of one California court with videoconferencing technology is documented in the Resource Guide identified in the introduction. The courts in three northern California counties abandoned the use of Polycom equipment which requires a dedicated T1 phone line, and moved to an Internet-based videoconference solution. They initially used Skype but found that Zoom.us provided a higher quality resolution at a reasonable cost of \$10 per month.<sup>64</sup> A court

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<sup>64</sup> [http://www.srln.org/system/files/attachments/Remote%20Guide%20Final%208-16-16\\_0.pdf](http://www.srln.org/system/files/attachments/Remote%20Guide%20Final%208-16-16_0.pdf), at page 32

in Texas authorizes the use of Skype, FaceTime or similar technology.<sup>65</sup> West Virginia rules require that any videoconferencing application “provide a live signal transmission that is secure from unauthorized acquisition.”<sup>66</sup>

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<sup>65</sup> Texas Montgomery Cty Local Rule 14 Experts

<sup>66</sup> W. Va. Trial Court Rules R. 14.01 (d)(2)