
**In re amendment of
Wis. Stat. §§ 885.50, 885.52,
885.54, 885.56, 885.58, and 885.60
relating to the use of
videoconferencing technology.**

**SUPPORTING MEMORANDUM
20-09A**

The Videoconferencing Subcommittee of the Planning and Policy Advisory Committee (PPAC) respectfully submits this amended petition asking the court to amend Wis. Stat. §§ 885.50, 885.52, 885.54, 885.56, 885.58, and 885.60 to update and clarify the rules related to the use of videoconferencing technology within the court system.

I. Procedural History

The proposed amendments included in this petition were previously part of Rule Petition 20-09 (“Videoconferencing”). This court conducted a public hearing on the Videoconferencing petition on April 7, 2021 and ultimately returned the petition to the petitioner. Specifically, the rules the petitioner seeks to amend in this petition correlate with Sections 9-26 of Rule Petition 20-09.¹

After Rule Petition 20-09 was returned to the petitioner, the matter was referred to the PPAC Videoconferencing Subcommittee,² which was reconvened to review the changes proposed

¹ Based on the feedback received after Rule Petition 20-09 was returned to the petitioner, the Videoconferencing Subcommittee decided to focus only on the language in Chapter 885 for the amended petition.

² The members of the Videoconferencing Subcommittee were: Hon. John Anderson, Bayfield County Circuit Court (chair); Hon. Jerilyn Dietz, Manitowoc County Circuit Court; Hon. Jon Fredrickson, Racine County Circuit Court; Hon. Sandra Giernoth, Washington County Circuit Court; Hon. Karl Hanson, Rock County Circuit Court; Hon. William Pocan, Milwaukee County Circuit Court; Commissioner David Herring, Waukesha County; Commissioner Alice Rudebusch, Racine County; Kay Cederberg, Clerk of Circuit Court, Bayfield County; Mary Lou Mueller, Clerk of Circuit Court, Ozaukee County; Michael Neimon, District 3 Court Administrator; Diane Fremgen, Deputy Director, Office of Court Operations; Beth Barroilhet, Circuit Court Legal Advisor, Office of Court Operations; Ann Olson, Policy Analyst, Office of Court Operations; Amber Peterson, Circuit Court Legal Advisor, Office of Court Operations.

in Rule Petition 20-09 and make additional recommendations. The subcommittee discussed changes to Chapter 885 during a series of meetings held from September through early November, 2021. The draft petition and memo were presented to PPAC at its December 7, 2021 meeting. The chair of PPAC recommended that the vote be postponed to provide an opportunity for additional feedback on the final petition language. PPAC voted electronically to approve the revised petition for submission to the Supreme Court.

The Videoconferencing Subcommittee recognized that technology is evolving and recommended amendments with the goal of giving courts the tools and flexibility to use technology to effectively and efficiently process cases and address unforeseen challenges that may occur in the future.

II. Supreme Court Superintending Authority

The subject matter of the proposed rule changes falls within the power of the Wisconsin Supreme Court to regulate pleading, practice, and procedure in judicial proceedings in all courts.³ The statutes that are the subject of this petition may be amended by court rule or by legislation. The rule that authorizes the court to amend these statutes makes no distinction between statutes that were created by court rule or enacted by the legislature, “All statutes relating to pleading, practice, and procedure may be modified or suspended by rules promulgated under this section.”⁴ This is a shared authority with the legislature, and the legislature retains authority as well to enact, modify, or repeal statutes or rules relating to court procedures and practice.⁵ Therefore, this court

³ Wis. Stat. § 751.12(1).

⁴ Wis. Stat. § 751.12(2).

⁵ Wis. Stat. § 751.12(4).

has the power to modify acts of the legislature if those acts relate to “pleading, practice, and procedure.”

The proposed rule changes in this petition relate directly to the courts’ procedures and practice and are fundamental to the operation of the court system. The recommended procedural changes, relating to the means by which court is held and how the courtroom is managed, are administrative in nature and seek to align the rule with existing practice. The proposed changes promote the responsible use of videoconferencing technology changes and do not abridge, enlarge, or modify the substantive rights of any litigant. Due to significant improvements in this technology, the rights and protections afforded by an in-person appearance in the courtroom are similarly afforded when appearing from a remote location using videoconferencing technology. The rules impacted by this petition play a crucial role in allowing the court system to meet its current and future business needs.

III. Proposed Statutory Changes

The use of videoconferencing in court has many benefits, including increased efficiency and cost savings for government agencies, attorneys, litigants, and the public. Since the videoconferencing rules were implemented by this court in chapter 885 of the statutes in 2008,⁶ there have been many changes to technology and the way it is used. The COVID-19 pandemic has highlighted the need for providing clear guidance and flexibility in the use of technology.

The proposed statutory changes are intended to promote the expanded use of videoconferencing technology in a responsible way, while continuing to preserve the fairness, dignity, solemnity, and decorum of court proceedings. Additionally, the proposed rule changes will continue to protect the rights of litigants, victims, media, and the public. Videoconferencing

⁶ Wis. Stat. §§ 885.50-64 were created by the court with Sup. Ct. Order No. 07-12, 2008 WI 37.

technology provides court users with many benefits and provides effective access to the courts. Users may be able to more easily view and participate in court proceedings from remote locations. Parties, attorneys, the media, and the public encounter fewer challenges that can make coming to court difficult, such as transportation, work schedules, and child care. Appearing remotely may also alleviate some safety concerns of victims.

This petition proposes changes to multiple sections of Chapter 885 in order to provide clear authority and guidance when using videoconferencing technology for court proceedings. The proposed changes also reflect changes in technology and ensure that rights of participants and the public are protected.

This Memorandum sets forth each proposal in the Petition, with an explanation of the proposed changes.

A. Proposed Revisions to Chapter 885 Videoconferencing Rules

Chapter 885 videoconferencing rules, Wis. Stat. §§ 885.50-64, are court created rules. This petition recommends updates to the technical requirements of videoconferencing technology and updates to rules for using videoconferencing technology in criminal and civil proceedings.

1. Wis. Stat § 885.52(2) should be amended to include victims in the definition of “participants.”

The current definition of “participants” under s. 885.52(2) does not include victims. The proposed amendment would give victims the same status as the other persons included in that definition. It is proposed that the term “victim” be clarified by incorporating the definition under article I, sec. 9m (1) of the Wisconsin Constitution and s. 950.02(4).

885.52 Definitions. In this subchapter:

[(1)]

(2) 885.52 (2) “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.

[(3)]

This proposed change in terminology would also affect ss. 885.50 (3) and 885.54 (1) (h), by removing the word “crime” where it modifies “victim” to be consistent with the terminology used in other statutes and the Constitution.

2. Wis. Stat. 885.54 should be amended to set clear standards for technological requirements when using of videoconferencing technology.

The proposed amended subsection (1) (a) would remove the requirement that participants see, hear, and communicate “with each other.” The requirement would instead simply require that participants see, hear, and communicate. The nature of the proceeding and the judge will determine with whom a participant can communicate.

In subsection (1) (c), it is proposed that the phrase “to the same extent as if they were present in the courtroom” be amended to “in a manner as similar as practicable to being present in the courtroom”. Requiring the same experience for a participant is not realistic because of limitations with different technology that may be used by participants.⁷ The committee recognized that the in-person experience cannot be replicated exactly. However, the video and sound quality must still allow for effective communication and effective visibility, though this may be accomplished in different ways. The proposed amendments also suggest this new phrase be used in subsection (1) (h).

⁷ For example, a participant appearing at a Zoom meeting from a smartphone can see only one other participant at a time and would need to swipe their screen right or left to view other participants also on video or in the courtroom.

The proposed amendment to subsection (1) (d) would change the word “scan” to “display”. Use of the term “scan” may cause confusion and be disruptive to the proceedings if a participant were to request a “scan.”

It is proposed that subsections (1) (e) be amended to clearly state the requirement that an option for private communication between parties and their attorneys be made available. The proposed amendment to subsection (1) (e) would make subsection (1) (g) no longer necessary, and it is proposed that (1) (g) be deleted. Currently, these sections require counsel to be physically present in a correctional facility with their client or have a private phone line to communicate. Counsel sometimes are not permitted to be in correctional facilities or jails with their clients and having a separate phone line is not always possible. The proposed language allows for more flexibility based on the available technology. For example, the breakout room feature used by Zoom facilitates private communication. Additionally, the proposed change applies the private communication requirement to all parties and attorneys, not just those appearing in criminal matters.

Subsection (1) (f) addresses how exhibits and documents are viewed during a remote hearing. Exhibits and documents may be shared during a remote hearing using a screen-sharing function. It is not necessarily required that such exhibits or documents be transmitted at that time. To avoid confusion, the statute should reference sharing rather than transmitting.⁸

Subsection (2) should be revised to clarify that the court is responsible for ensuring that all technical requirements are met and not place this responsibility on a moving party.

⁸ Original exhibits are filed with the court prior to the proceeding. During the proceeding, the court official can access the exhibit and display it to the parties when referenced. This ensures that the exhibit viewed is the exhibit in the record.

Subsection (3) should be created to ensure that parties are properly notified by the court as to how they will access the remote hearing. The proposed version of subsection (3) that appeared in the original rule petition included language that the instructions for accessing a remote proceeding must be maintained in a confidential manner, unless disclosure is permitted by the court. As use of videoconferencing has increased and practices have evolved, it was determined that each court is in the best position to manage its notices for remote proceedings as they deem appropriate.⁹

Wis. Stat. 885.54 Technical and operational standards.

(1)

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

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

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

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

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

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

(g) ~~In criminal matters, and in proceedings under chs. 48, 51, 55, 938, and 980, if not in each other's physical presence, a separate private voice~~

⁹ As an example, some judges prefer to provide the unique Zoom meeting ID to members of the public and see and control everyone attending the meeting, in the same way that the judge can see everyone sitting in the galley. If the proceeding is livestreamed, the judge does not know who is watching the livestream. Additionally, with Zoom, participants can be managed by using the waiting room, breakout rooms, or the mute feature.

~~communication facility shall be available so that the defendant or respondent and his or her attorney are able to communicate privately during the entire proceeding.~~

(h) The proceeding at the location from which the judge is presiding shall be visible and audible to the jury and the public, including ~~crime~~ victims, ~~to the same extent as the proceeding would be if not conducted by videoconferencing in a manner as similar as practicable to being present in the courtroom.~~

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

(3) The court shall provide written instructions to parties and counsel on how to appear by videoconference.

3. Wis. Stat. § 885.56 (1) (b) should be amended.

This proposed revision would amend subsection (1) (b) of s. 885.56, which currently allows a witness to appear using videoconferencing technology only when the physical presence of witness cannot be procured after diligent effort.

The current language suggests that the default witness appearance is to be in-person. Use of videoconferencing technology may be a viable option in certain circumstances, and eliminating the party that the proponent of the use of videoconferencing technology make a diligent effort allows for greater flexibility and is less burdensome. The court should be permitted to exercise its discretion and not be limited by a proponent's diligent effort in securing a witness.

Wis. Stat. 885.56 Criteria for exercise of court's discretion.

(1)

[(a)]

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

[(c)-(l)]

4. Wis. Stat. § 885.58 should be amended to update considerations for use of videoconferencing technology in civil proceedings.

It is proposed that language referencing “in any pre-trial, trial, or post-trial hearing” in 885.58 (1) is removed to simplify the language and instead reference any “proceeding.” The language should be general so as not to impose limitations on the court’s ability to use videoconferencing technology. Additionally, counties may refer to proceedings by different names.

It is also proposed that a sentence about juries be added to subsection (1). The proposed amendment requires that jurors sworn to hear a trial must remain in the physical presence of the bailiff in the same location where court is being held. While the subcommittee discussed that it would be unlikely that jurors would hear a trial using videoconferencing technology, the subcommittee felt there should not be a limitation placed on the use of videoconferencing, and that judges will have to carefully consider such a situation and discuss with the parties. Requiring that jurors remain in the presence of the bailiff for the entire proceeding forecloses the possibility that jurors could serve on the jury from home or otherwise not be focused on the trial, but this requirement still permits the possibility for jury trials to continue in situations when there are safety concerns or construction issues, where, for example, jurors may need to view the trial from a different room in the courthouse.

It is proposed that 885.58 (2) (a) be revised to allow the judge discretion to adjust time limits for the notice of intention and objections. The recommended language is intended to encompass emergency situations, as well as encourage the court to address these timeframes at scheduling, when possible.

885.58 Use in civil cases and special proceedings.

(1) Subject to the standards and criteria set forth in ss. 885.54 and 885.56 and to the limitations of sub. (2), a circuit court may, on its own motion or at the request of any party, in any civil case or special proceeding permit the use of videoconferencing technology in any ~~pre-trial, trial, or post-trial hearing~~ proceeding. If jury members sworn to hear a trial appear by videoconferencing, they must remain in the physical presence of a bailiff throughout the entire proceeding at the location where court is being held.

(2) (a) ~~A~~ Unless otherwise provided by court order, a proponent of a witness via videoconferencing technology at any evidentiary hearing or trial shall file a notice of intention to present testimony by videoconference technology 30 days prior to the scheduled start of the proceeding. Any other party may file an objection to the testimony of a witness by videoconferencing technology within 10 days of the filing of the notice of intention. If the time limits of the proceeding do not permit the time periods provided for in this paragraph, the court may in its discretion shorten the time to file notice of intention and objection.

[(b)]

5. Wis. Stat. § 885.60 should be amended to update considerations for use of videoconferencing technology in criminal proceedings.

The subcommittee recognized that special attention must be given to the use of videoconferencing in criminal proceedings, and that it is necessary to ensure the constitutional guarantees applicable to such proceedings are consistently provided. It is anticipated that use of videoconferencing technology in an evidentiary hearing or trial would be rare but may be permissible under certain circumstances. The suggested changes to each subsection of 885.60 are outlined below.

It is proposed that language referencing “in any pre-trial, trial, or post-trial hearing” in subsection (1) is removed to simplify the language and instead reference any “proceeding.” The language should be general so as not to impose limitations on the court’s ability to use videoconferencing technology. Additionally, counties may refer to proceedings by different names.

It is also proposed that a sentence about juries be added to subsection (1). The proposed amendment requires that jurors sworn to hear a trial must remain in the physical presence of the

bailiff. While the subcommittee discussed that it would be unlikely that jurors would hear a trial using videoconferencing technology, the subcommittee felt there should not be a limitation placed on the use of videoconferencing, and that judges will have to carefully consider such a situation and discuss with the parties. Requiring that jurors remain in the presence of the bailiff for the entire proceeding forecloses the possibility that jurors could serve on the jury from home or otherwise not be focused on the trial, but this requirement still permits the possibility for jury trials to continue in situations when there are safety concerns or construction issues, where, for example, jurors may need to view the trial from a different room in the courthouse.

The recommended revision to subsection (2) (a) reflects current case law, requiring a defendant to affirmatively waive the right to be physically present, when applicable. An affirmative waiver of physical presence is required by the defendant or respondent in certain proceedings, as provided for in the proposed subsection (a), rather than simply the absence of an objection.

It is proposed that subsection (2) (b) be revised to allow the judge discretion to adjust time limits for the notice of intention and objections. The recommended language is intended to encompass emergency situations, as well as encourage the court to address these timeframes at scheduling, when possible.

The proposed amendment would repeal subsections (2) (c) and (2) (d) and create a new subsection (3) to address objections to the use of videoconferencing in criminal cases and proceedings under chapters 48, 51, 55, 938, and 980. The current language of (2) (d) is restrictive; a judge should be permitted to weigh a range of factors when ruling on an objection. Judges are entrusted with the responsibility to uphold the constitution and regularly address constitutional issues without specific instruction regarding how to rule on a particular issue.

The new proposed subsection (3) (c) does outline factors to be taken into consideration by the judge when ruling on the objection, in proceedings where a witness is unavailable, which is the most likely scenario that will arise.

A new comment is proposed that directs the reader to the relevant statute and case law that addresses the defendant's right to be physically present at certain proceedings. An additional comment is proposed to capture the subcommittee's intention that videoconferencing technology will be used only when deemed necessary under rare circumstances in evidentiary hearings and criminal trials.

The subcommittee debated potential issues with expanding the statutes as discussed here, particularly with regard to the rights of criminal defendants. However, while these rights must be preserved, they must be balanced against the rights of victims and the court system's goal to avoid unnecessary delays and keep cases moving forward. Further, it is important that judges are permitted to exercise their discretion and take advantage of the available technology to continue to provide access to the courts and improve efficiency, even in the event of disruptions or emergencies.

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

(1) Subject to the standards and criteria set forth in ss. 885.54 and 885.56 and to the limitations of sub. (2), a circuit court may, on its own motion or at the request of any party, in any criminal case or matter under chs. 48, 51, 55, 938, or 980, permit the use of videoconferencing technology in any ~~pre-trial, trial or fact-finding, or post-trial~~ proceeding. If jury members sworn to hear a trial appear by videoconferencing, they must remain in the physical presence of a bailiff throughout the entire proceeding at the location where court is being held.

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

(b) A Unless otherwise provided by court order, a proponent of a witness via videoconferencing technology at any evidentiary hearing, trial, or fact-finding hearing shall file a notice of intention to present testimony by videoconference

technology 20 days prior to the scheduled start of the proceeding. Any other party may file an objection to the testimony of a witness by videoconference technology within 10 days of the filing of the notice of intention. ~~If the time limits of the proceeding do not permit the time periods provided for in this paragraph, the court may in its discretion shorten the time to file notice of intention and objection.~~

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

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

(3) (a) Use of videoconferencing technology in any criminal case or matter under chs. 48, 51, 55, 938, or 980 shall comply with applicable constitutional requirements and be consistent with the legal rights of the participants.

(b) Subject to sub. (3) (c), the court must determine an objection to the use of videoconferencing by considering the criteria set forth in s. 885.56, the constitutional rights of defendants, respondents, and victims, and any other applicable state and federal legal requirements.

(c) If an objection to any witness appearing by videoconferencing technology is made by the defendant or respondent in any proceeding where the defendant or respondent is entitled to be physically present in the courtroom under sub. (1), the court may allow the witness to appear by videoconferencing technology if the court finds all of the following are true:

1. The witness is unavailable to be physically present in the courtroom for the proceeding.
2. The witness's unavailability is due to an emergency or another compelling reason.
3. The use of videoconferencing technology for the witnesses' appearance will allow for full and effective examination and cross-examination of the witness by all parties and the court.
4. The witness is alone in a private area while testifying.
5. The criteria in s. 885.56 (1) favors permitting the witness to appear by videoconferencing technology.

[Comment, 2008]

Comment, 2021: For a list of criminal proceedings where the defendant has a right to be present, see s. 971.04 (1). When the defendant has the right to be physically present, videoconference appearance by the defendant may occur only when the defendant knowingly, intelligently, and voluntarily waives that right. The judge must engage in a colloquy with the defendant to ensure that this right is understood by the defendant and that the waiver is being made knowingly, intelligently, and voluntarily. See *State v. Soto*, 2012 WI 93, 343 Wis. 2d 43, 817 N.W.2d 848, and see *State v. Anderson*, 2017 WI App 17, 374 Wis. 2d 372, 896 N.W.2d 364.

Use of videoconferencing technology in criminal proceedings and proceedings under chapters 48, 51, 55, 938, and 980 requires careful consideration. It is anticipated that use of videoconferencing technology in an evidentiary hearing or trial would be rare but may be permissible under certain circumstances.

IV. Conclusion

The court system needs to continue to meet the needs of the courts, participants, and the public in the face of changing circumstances and advancing technologies. The proposed rule changes help expand the options for appropriate use of videoconferencing technology. For the reasons set forth in this Memorandum, the Videoconferencing Subcommittee of PPAC requests that the Supreme Court grant this petition, effective July 1, 2022.

Respectfully submitted this ____ day of January 2022.

Hon. John P. Anderson
Bayfield County Circuit Court