Remote Justice? Expanding the Use of Interactive Video Teleconference in Minnesota Criminal Proceedings

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REMOTE JUSTICE? EXPANDING THE USE OF INTERACTIVE VIDEO TELECONFERENCE IN MINNESOTA CRIMINAL PROCEEDINGS

By Emily Babcock† and Kate Johansen‡‡

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I. INTRODUCTION

On June 7, 2010, the United States Supreme Court highlighted an issue raised by an unusual jurisprudential pairing: the rights of criminal defendants and television. More specifically, the Court denied a writ of certiorari arising from a New York Court of Appeals case, People v. Wrotten. Wrotten, the Court noted, presented the question of whether introducing two-way video testimony by a witness violates a criminal defendant’s rights under the Sixth Amendment’s Confrontation Clause. Justice Sonia Sotomayor, in one of her first statements for the Court, observed that the Court had not previously addressed this specific issue. Still, the Court denied the petition due to the case’s unfavorable procedural posture. In her statement, however, Justice Sotomayor underscored that the Court’s action “does not represent an expression of any opinion concerning” the importance of the question presented. Indeed, she dubbed the question “an important one,” hinting that the Court may address it in the future.

While the United States Supreme Court hesitated to weigh in on the use of television technology in criminal defense proceedings, states have shown no such reluctance. “Interactive video teleconference,” referred to as “ITV,” is playing an increasingly prominent role in state judicial systems.

2. Id.; see also People v. Wrotten, 923 N.E.2d 1099 (N.Y. 2009).
3. Wrotten, 923 N.E.2d at 1100.
5. Id. The case came to the Supreme Court on interlocutory appeal after New York’s high court, the New York Court of Appeals, remanded the case to the intermediate state appellate court for further review. Id. The procedural posture was thus unfavorable because the court would have had to “resolve the threshold question [of] whether the Court of Appeals’ decision constitutes a ‘[f]inal judgment[t]’” and because, had the Court chosen to hear the case, the Court “would not have the benefit of the state courts’ full consideration.” Id.
7. Id.
8. ITV refers to “the simultaneous transmission of audio and visual images” between parties or the court via a “closed-circuit television, audio-video link, or other means involving the instantaneous transmission of images and voices.” Fern L. Kletter, Annotation, Constitutional and Statutory Validity of Judicial Videoconferencing, 115 A.L.R. 5th 509, 519 (2004). For the purposes of this article, “ITV” refers only to cases in which a defendant in a criminal proceeding is physically absent from the courtroom and participates via an ITV transmission as
Approximately eighty percent of states, as well as federal courts, have amended their rules to contemplate the use of ITV.\(^9\) Minnesota is no exception.\(^10\) Over the last thirteen years, Minnesota has implemented pilot programs, reviewed proposed procedural changes, and amended both its criminal and civil rules to incorporate ITV proceedings into Minnesota’s judicial system.\(^11\) Most recently, the Minnesota Supreme Court ordered amendments to the Rules of Criminal Procedure, effective July 1, 2010, that expanded the use of ITV in criminal proceedings across the state.\(^12\)

Part II of this article reviews Minnesota’s thirteen-year history of ITV and the 2010 amendments to the Rules of Criminal Procedure expanding ITV use to criminal cases. Part III examines the predicted effects of this expansion on three distinct groups in the criminal justice system: (1) the court; (2) public defenders; and (3) criminal defendants. Part III also combines legal policy with social science and psychology research to produce an analysis that goes beyond the initial question of whether the use of ITV in criminal cases is legal, to the more important questions of whether it is a good idea and what potential problems the system might produce going forward. Part IV concludes by offering practical advice for Minnesota criminal law practitioners adjusting to the recently changed ITV rules and procedures. The article does not discuss whether the state should alter its newly amended ITV rule; we recognize that the rule has already been made effective and that ITV provides substantial benefits to participants in terms of cost-savings and efficiency. Thus, the purpose of the article is to alert stakeholders to potential pitfalls of the new rule and to foster its best implementation by all involved.


\(^10\) See MINN. R. CRIM. P. 1.05.

\(^11\) See ITV Court Order, supra note 9; WILLET R. WILLIS, KAREN A. GOTTLIEB, EDWIN T. ZIMNY & JAMES D. THOMAS, NAT’L CTR. FOR STATE COURTS, ASSESSMENT OF THE INTERACTIVE TELEVISION PROGRAM IN THE NINTH JUDICIAL DISTRICT OF MINNESOTA: FINAL REPORT 6 (1999). For an example of changes to the civil rules that reflect the use of ITV, see MINN. GEN. R. PRAC. 131.01 (2009).

II. THE HISTORY OF ITV IN MINNESOTA

The history of ITV in Minnesota falls into three main phases: (1) the Ninth Judicial District’s pilot program (1997–1999); (2) the expansion of that pilot program for statewide implementation (1999–2008); and (3) the most recent revision of the statewide protocol, as created by the 2010 amendment (2008–2010).


The advent of ITV in Minnesota occurred in 1997, when the state legislature provided funding for an ITV pilot program in the Ninth Judicial District. The Ninth District spans the rural northwest corner of Minnesota, encompassing seventeen counties. The legislature authorized the pilot program to help neutralize problems—such as delays due to transporting defendants, the costs of additional transportation and detainment, and shortages of judicial resources—created by the district’s large size.

The Ninth Judicial District’s pilot program was established by the “Protocol for the Use of ITV for Criminal Matters in the District Court” (hereinafter Protocol). The Protocol limited the scope of ITV in criminal proceedings by restricting ITV use in two primary ways. First, the Protocol confined ITV use to only certain types of criminal hearings. Regarding felony and gross misdemeanor cases, the Protocol permitted ITV use under the following Rules of Criminal Procedure: Rule 5 (first appearances), Rule 6 (pretrial release), Rule 8 (initial appearances), and Rule 13 (arraignment)

13. WILLIS ET AL., supra note 11, at 1.
14. Id.
15. Id.
16. See ITV Court Order, supra note 9, at Attachment A (delineating the ITV Protocol).
17. Id. at XX.
18. MINN. R. CRIM. P. 5 (2006) (amended 2010) (including statement to the defendant, Rule 5.01; appointment of counsel, Rule 5.02; date of appearance information, Rule 5.03; plea and post-plea procedure in misdemeanor cases, Rule 5.04; bail or release conditions, Rule 5.05; and information about the required record, Rule 5.06); ITV Court Order, supra note 9, at XX.
19. MINN. R. CRIM. P. 6 (2006) (amended 2010) (including pretrial release on citation, Rule 6.01; release by the court, Rule 6.02; violation of conditions of release, Rule 6.03; forfeitures, Rule 6.04; supervision of detention, Rule 6.05; and trial dates in misdemeanor cases, Rule 6.06); ITV Court Order, supra note 9, at XX.
20. MINN. R. CRIM. P. 8 (2006) (amended 2010) (including place of appearance and arraignment, Rule 8.01; guilty pleas, Rule 8.02; demand or waiver
Similarly, the Protocol authorized the use of ITV in misdemeanor cases for arraignment, pleas, and sentencing, but not trials, contested pretrial hearings, or other contested hearings. For petty misdemeanors and criminal offenses deemed regulatory offenses, the Protocol allowed ITV use for all hearings, including trials.

The Protocol also included several provisions to articulate fully ITV’s operation in practice. First, the Protocol required that each defendant receive an “ITV rights advisory/waiver form” upon arrest and detention or first appearance before a judge, whichever occurred first. When an ITV hearing is scheduled and the defendant is to appear by summons, the Protocol further required that the form be mailed (or otherwise delivered) to the defendant along with the notice of hearing. Second, the Protocol included strong consent mandates. In first appearances or pretrial release hearings, the Protocol provided that the defendant, defense attorney, prosecuting attorney, and presiding judge must all consent to holding the hearing by ITV; if the defense attorney is a public defender, the district’s chief public defender must also consent. Even after an ITV hearing, the Protocol permitted a defendant to request an in-person rehearing to occur before a

of hearings, Rule 8.03; the plea and time and place of omnibus hearings, Rule 8.04; the record, Rule 8.05; and conditions of release, Rule. 8.06); ITV Court Order, supra note 9, at XX.

21. MINN. R. CRIM. P. 13 (2006) (repealed 2010) (requiring that arraignments be conducted in open court, Rule 13.01; the defendant be advised of his right to counsel, Rule 13.02; the defendant be provided with and read a copy of the complaint or indictment, Rule 13.03; the defendant be called on or given time to plead, Rule 13.04; a verbatim record be made, Rule 13.05); ITV Court Order, supra note 9, at XX.

22. ITV Court Order, supra note 9, at XXI.

23. Id.

24. Id.

25. Id.

26. Id. The form states:

PLEASE TAKE NOTICE THAT the undersigned Defendant, acknowledges his or her right to be personally present before the presiding Judge at all stages of these proceedings. I hereby waive that right for the present hearing, and agree to appear before the presiding Judge via interactive television. I further understand that I am entitled to an in-person hearing within three business days if conditions of release were addressed at the interactive television hearing.

Id. at XXIII.

27. Id. at XXI.
judge. The hearing would be de novo and held within three days of the ITV hearing. Third, the Protocol set standard procedures for ITV operations, which obligate the court to: give prior notice of the time and manner of proceeding, allow witness appearances via ITV at all hearings, give identical effect to legal actions taken in ITV hearings, conduct hearings in courtrooms or other venues reasonably accessible to the public, generate a written record, maintain hearing minutes, abide by established procedural and substantive rules, and maintain the same decorum as would exist in a typical courtroom setting. The Protocol further mandates that the defendant’s attorney be present at the same place at which the defendant appears, that the judge, prosecutor, and witnesses may appear at any site, and that the court clerk should be at the same site as the presiding judge.

The above parameters and guidelines governed the practical operation of the Ninth Judicial District’s ITV pilot program in its earliest stage from 1997–1999. In 1999, the National Center for State Courts published a study evaluating the effectiveness of the pilot program. Notably, the study was required because the legislature required an outside assessment of the ITV system for funding purposes in order to determine whether ITV should be expanded statewide. The study laid out a clear, three-part methodology for evaluating the ITV pilot project, including a participant survey, a cost-effectiveness analysis, and interviews with key project players. The ITV system received positive reviews. Generally, respondents had a “very favorable opinion” of ITV, with many praising the time and cost saved by the system and two-thirds stating that ITV made the judicial system more accessible to citizens. The survey further revealed that the ITV system easily paid for itself, with savings on transportation alone covering ITV’s

28. Id.
29. Id.
30. Id. at XXII.
31. Id.
32. WILLIS ET AL., supra note 11, at 1.
33. Id.
34. Id. at i. The Center administered 183 opinion surveys to judges, attorneys, court employees, government employees, law-enforcement officials, and private individuals who participated in ITV proceedings. Id. Of those, 140 returned completed surveys. Id. The Center also reviewed 450 “user surveys” that logged the impact of ITV on transportation time and cost. Id. at ii.
35. Id. at i.
implementation and operation costs. No interviewee reported that ITV had a negative impact on court proceedings, although some felt that ITV should be the “exception, not the rule." Overall, the National Center for State Courts concluded of the pilot program that “[t]he Ninth Judicial District and the State of Minnesota are to be commended for their foresight in the use of technology to improve court and government services for the residents of the Ninth Judicial District.”

B. Developing the Statewide Program: 1999–2008

In the wake of a successful pilot project and an independent study lauding the Ninth Judicial District’s experiment, the Minnesota Supreme Court in October 1999 approved the statewide use of ITV in limited criminal matters on a pilot basis. The court implemented ITV statewide by adopting the same Protocol approved in 1997 for the Ninth Judicial District pilot program. In April 2006, the Minnesota Judicial Council, the administrative policy-making branch of the state’s judiciary, recommended a revised protocol (“the Council’s revised protocol”) for statewide use. The Council’s revised protocol differed from the Ninth Judicial District’s original Protocol in that it permitted ITV use in cases from other districts, the entry of guilty pleas, and restitution and other mutually agreed upon hearings. In short, the Council’s revised protocol would permit ITV use in contested hearings.

Upon receiving the Council’s revised protocol, the court observed that it could potentially conflict with the Minnesota Rules of Criminal Procedure; this observation triggered a substantial administrative review process. The court referred the

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36. Id. at ii.
37. Id. at i.
38. Id. at iii.
39. ITV Court Order, supra note 9.
40. Memorandum from Kelly Mitchell, Court Services Div. 1 (on file with author) [hereinafter Summary of Recent ITV Activity] (summarizing recent ITV activity).
42. Summary of Recent ITV Activity, supra note 40, at 1.
43. Id.
44. Id.
recommended protocol to the Advisory Committee on Rules of Criminal Procedure ("the committee"). 45 The order referring the matter provided that the committee “shall recommend and comment upon draft rules implementing the protocol, if it is adopted by the Court, and shall report the recommended rule changes to the Court, along with any comments the committee may wish to make in regard to the protocol . . . .” 46 The order further provided for written comments to the committee. 47 After discussing the issue and gathering comments, the committee scheduled an informational meeting in October 2006 that included appearances by ITV and was attended by judges, court administrators, and attorneys. 48

In February 2007, the committee submitted a report comparing the Protocol and the Council’s revised protocol. 49 In its report, the committee acknowledged that ITV’s use was widely accepted in other states and, “in appropriate circumstances,” results in prompter hearings and earlier release dates for defendants. 50 The committee also conceded that ITV enabled more efficient utilization of judicial resources. 51 But, the committee underscored its concern about the impact of ITV on the overall quality and constitutionality of criminal proceedings. It stated:

[T]he advisory committee believes that in-person court appearances are preferable and is very concerned that ITV not be extended beyond what is absolutely necessary to benefit in-custody defendants by offering more-prompt hearings than would otherwise be possible. The committee is concerned about the impersonal nature of ITV court appearances and the possible adverse effects on the due process rights of defendants who appear by ITV. The committee is concerned that if ITV appearances are

45. Id.
47. Id.
48. Id.
50. Id. at 2.
51. Id.
not strictly limited, the financial and other pressures to expand ITV use could result in ITV becoming the rule rather than the exception for certain court appearances. That could result in a two-tier court system with those persons financially or otherwise unable to obtain release from custody appearing by ITV and those persons not in custody appearing personally before a judge.52

The committee further cited an American Bar Association (ABA) Standard expressing a presumption in favor of in-person court appearances, to emphasize its concerns about ITV.53 Such a presumption, the committee underscored, better comports with a criminal defendant’s right to confrontation and public trial under both the United States and Minnesota Constitutions.54

Based on these considerations, the committee proposed a rule (“the committee’s proposed rule”) that reflected an extremely conservative procedure as compared to the Council’s revised protocol.55 The committee’s proposed rule allowed ITV use “only if permitted by the court when there is no judge physically present in the venue county.”56 The committee’s proposed rule permitted ITV use only for specifically designated court appearances for in-custody defendants.57 The committee’s proposed rule did not permit ITV hearings for separate Rule 8 or Rule 13 appearances in felony and gross misdemeanor cases.58 More generally, the committee diminished the importance of ITV in alleviating time pressures on criminal proceedings, emphasizing the importance of in-person appearances and declaring that “time pressures are not so great” that it should be impossible to schedule hearings not permitted via ITV before a judge in person.59 Furthermore, the committee stressed that ITV hearings should remain subject to consent and objection requirements.60 To be certain that

52. Id. at 2–3. The concerns outlined by the committee are more fully addressed in Part III.C.
53. Id. at 3 (citing AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE, Standard 6-1.8(a) (3d ed. 2000)).
54. Id. at 4.
55. Id.
56. Id. This is more restrictive than the Judicial Council’s protocol, which would have allowed certain ITV appearances if no judge was available and certain other appearances regardless of a judge’s availability. Id.
57. Id. at 3–4.
58. Id. at 4–5.
59. Id. at 5.
60. Id.
defendants understood their rights with respect to ITV appearances, the committee included in its proposed rule an ITV advisory and a proposed form regarding a defendant’s waiver of the right to appear in-person. The waiver was required to be documented, either in writing or orally, in the court’s record. The committee also retained the chief public defender’s right to object to an ITV appearance and a defendant’s right to request an in-person rehearing, two features included in the Ninth Judicial District’s Protocol. The committee also noted that the technical standards required to operate ITV should be documented outside the Rules of Criminal Procedure. Finally, the committee emphasized that, due to ITV’s impact on “minority and indigent defendants,” any future changes to rules governing ITV’s role in criminal proceedings should be thoroughly studied.

Following the committee’s proposal, the court was presented with two distinct possibilities for a revised ITV rule: a progressive expansion of ITV via the Council’s revised protocol or a cautious restriction of ITV via the committee’s proposed rule. On May 15, 2007, the court held a hearing to consider both proposals. “The Court heard from 14 presenters, and reviewed numerous written comments.” Defense attorneys strongly favored the Advisory Committee’s proposed rule and voiced concern that an “implicit bias” would be injected into procedural considerations because, “more and more counties were building regional jails with built-in ITV terminals.” Conversely, county attorneys, the Association of Minnesota Counties, and the Minnesota Inter-County Association supported the Judicial Council’s proposed rule because they felt it utilized resources more efficiently and better enhanced public safety. Together with the court, these stakeholders cultivated a comprehensive discussion on the virtues and vices of ITV, both of which are discussed further in Part III.

61. Id.
62. Id.
63. Id. at 6–8.
64. Id. at 8.
65. Id.
66. Summary of Recent ITV Activity, supra note 40, at 1.
67. Id.
68. Id.
69. Id.
70. See infra Part III.
The court “painstakingly compared” the Ninth Judicial District’s original Protocol with the Council’s revised protocol and the committee’s proposed rule. Ultimately, the court drafted a new proposed rule that incorporated elements from each previous or proposed version. After receiving five written comments on the newly published rule—three from the public defense point of view, one from the Minnesota County Attorney’s Association, and one from the Minnesota Sheriffs Association—the court incorporated some minor edits and published the final version of the rule, effective January 1, 2008 (the “2008 rule”).

C. The Latest Amendment: 2008–2010

Even after a decade of development, significant deliberation was necessary to determine the appropriate role of ITV in Minnesota’s criminal proceedings. When a legislative budget crisis precipitated the need to cut corners in every area of the state’s spending, ITV regained attention as a possible way to tighten the judicial branch’s belt.

In 2008, the Chief Justice of the Minnesota Supreme Court convened the Criminal Justice Forum. The group was composed of agency policy makers, policy deputies, representatives from the Governor’s Office, representatives from local and county law enforcement, the State Public Defender and his chief administrator, representatives from the Minnesota County Attorney’s Association, trial and appellate judges, and other interested stakeholders. Its purpose was to “form a collaborative effort . . . to consider and develop new ways to make the criminal justice system work better by working together.” As part of its work, the Forum requested that the court establish an ITV Task Force to consider expanding the use of ITV in criminal cases.

The court established the ITV Task Force on June 10, 2009, with the charge “to review and recommend proposed changes to the Rules of Criminal Procedure concerning the use of ITV in

71. Summary of Recent ITV Activity, supra note 40, at 1.
72. Id.
73. For more information regarding the budget, see infra Part III.A.
74. ITV TASK FORCE, REPORT AND PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF CRIMINAL PROCEDURE, ADM-09-8005 (Jan. 15, 2010) (on file with author).
75. Id. at 1.
76. Id.
criminal cases and related issues." The Task Force members drew from “boots on the ground" level practitioners, including judges, defense attorneys, prosecutors, law enforcement, and county commissioners. The Task Force found that ITV could be a “force multiplier,” that achieved “greater respect for the judicial process and a new model of doing business in an era of increasing case volume and case complexity coupled with shrinking time and resources.” ITV, the Task Force concluded, enhanced judicial operations, security, cost management, and efficiency. In short, it produced a favorable review of ITV and proposed amendments to the Minnesota Rules of Criminal Procedure to “allow and encourage an expanded use of ITV in criminal cases.”

The Task Force, drawing from three previous versions of ITV rules and over eleven years of experience of limited ITV use, formulated a new recommended rule (the “Task Force’s proposed rule”). To understand the key points of the Task Force’s rule proposal, it is helpful to compare it with the 2008 rule.

First, the Task Force suggested expanding the conditions that can trigger ITV proceedings. Under the 2008 rule, ITV was permitted only when no judge was available. The Task Force’s proposed rule would have amended the 2008 rule to permit ITV when: (1) no judge is available; (2) a defendant is being held in custody in a county other than the venue county; or (3) the interests of justice permit using ITV. The 2008 rule, the Task Force argued, limited ITV to rare situations and failed to recognize that ITV may be used effectively to address resource shortages that do not involve judicial personnel.

Second, the Task Force recommended expanding ITV in various types of proceedings. The 2008 rule permitted ITV use in only “very limited circumstances, primarily for initial appearances” in felony and gross misdemeanor cases but in nearly all stages of proceedings for misdemeanor and petty misdemeanor cases.

77. Id.
78. Id. (internal quotation marks omitted).
79. Id. (internal quotation marks omitted).
80. See id.
81. Id. at 2.
82. Id. at 4.
83. Id. at 5.
84. Id.
85. Id.
86. Id.
According to the Task Force, such a distinction reflected an antiquated classification system in which “gross misdemeanors were more like felonies” (based on considerations such as “dollar amount, level of injury, or lack of other conditions of significance”). The distinction “makes less sense now,” the Task Force argued, because gross misdemeanors are more like misdemeanors under current law. Accordingly, the Task Force recommended that ITV use in misdemeanor hearings should be expanded to integrate “all criminal case types.”

Third, the Task Force suggested strengthening the consent provisions of the ITV rule. Under the 2008 rule, a defendant must have consented to all ITV appearances, except in Rule 5 and 6 hearings. The Task Force determined that all parties, including the defendant, defense attorney, prosecutor, and judge, must consent to an ITV appearance for any proceeding, except in Rule 5 or 6 hearings.

Fourth, the Task Force recommended stricter rules regarding the location of participants. The 2008 rule required that a defendant and defense attorney must be located at the same terminal site if the defendant is entering a guilty plea via ITV. The Task Force proposed that the same must be true when the defendant is being sentenced.

Fifth, the Task Force recommended altering how ITV is used in consolidated proceedings. The 2008 rule permitted consolidating cases using ITV proceedings from a different district only with the approval of the Chief Judge in the other district. The Task Force specified that “for the ITV rule to be fully effective, it must allow for the possibility that proceedings from any location within the state may be consolidated via ITV.” The Task Force’s proposed rule permits consolidation, with a preference for the judge in the county of the most serious offense unless the parties agree to a different judge. Also new, the Task Force’s proposed

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87. Id.
88. Id.
89. Id.
90. Id. at 6.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
96. Id.
rule fully outlines the participation expected of each attorney.97

Sixth, the Task Force contemplated the role of ITV in witness testimony. The Bureau of Criminal Apprehension advocated utilizing ITV for witness testimony because the Bureau’s scientists are frequent witnesses.98 But the Task Force members were “concerned that opening the door too widely to allow testimony by ITV would compromise the right and quality of confrontation.”99 Several stakeholders weighed in: defense attorneys argued that ITV should never be permitted for witness testimony while prosecutors advocated for witness testimony by ITV per a judge’s discretion.100 Ultimately, the two sides compromised, and the Task Force proposed a provision that permits witnesses to testify by ITV if the court and all parties agree.101

Seventh, the Task Force adamantly declared that ITV proceedings should maintain the same formality, decorum, and solemnity of proceedings conducted in a typical courtroom setting.102 Still, the Task Force recommended technical edits to permit ITV stations to be located within law enforcement centers as well as courtrooms.103

Finally, the Task Force maintained some aspects of the 2008 rule. The Task Force’s proposed rule still prohibited the use of ITV for trial, contested pretrial hearings, contested omnibus hearings, or any other evidentiary matters. Incorporating the content of the Task Force’s proposed rule, the court adopted the proposed changes and amended the Minnesota Rules of Criminal Procedure accordingly effective July 1, 2010 (the “2010 rule”).104

D. The Final Rule: The 2010 Amendments

Practitioners should, of course, familiarize themselves with the new rule, reading it in the context of surrounding rules as well as the background provided by this article.105 Still, we provide some
Subd. 1. Definitions.
(1) *ITV*. “ITV” refers to interactive video teleconference.
(2) *Terminal Site*. A “terminal site” is any location where ITV is used for any part of a court proceeding.
(3) *Venue County*. The “venue county” is the county where pleadings are filed and hearings are held under current court procedures.
(4) *District*. The “district” is the judicial district in which the venue county is located.

Subd. 2. Appearance; How Made. Appearances in proceedings governed by the Minnesota Rules of Criminal Procedure shall be made in person except as authorized to be made by ITV in this rule, by written petition in Rules 14.02, subd. 2 and 15.03, subd. 2, and by phone in Rule 26.03, subd. 1(3)4.

Subd. 3. Permissible Use of ITV.
(1) *Felony and Gross Misdemeanor Proceedings*. ITV may be used to conduct the following criminal hearings:
   (a) *Rule 5 or Rule 6 Hearings*. A defendant in custody may appear before any available judge of the district by ITV for a Rule 5 or Rule 6 hearing if no judge is available in the venue county.
   (b) *Rule 8 and Rule 13 Hearings*. A defendant may appear before any available judge of the district by ITV for a Rule 8 or Rule 13 hearing if no judge is available in the venue county. No plea of guilty may be taken by ITV unless the court and all parties agree, and the defendant and defendant’s attorney are located at the same terminal site.
   (c) *Rule 11 Hearings*. A defendant may appear before any available judge of the district by ITV for the purpose of waiving an omnibus hearing.
   (d) *Other Hearings*. A defendant or the defendant’s counsel on behalf of the defendant may appear before any available judge of the district by ITV for any hearing for which the defendant’s personal presence is not required pursuant to Rule 26.03, subd. 1(3) if the court and all parties agree to the ITV appearance.

   ITV may not be used to conduct a trial, sentencing, contested omnibus hearing, or any other contested matter except as provided herein.

(2) *Misdemeanor Proceedings*. A defendant may appear before any available judge of the district by ITV for any of the following:
   (a) Arraignment;
   (b) Plea;
   (c) Sentencing.

   A defendant or the defendant’s counsel on behalf of the defendant may also appear before any available judge of the district by ITV for any hearing for which the defendant’s personal presence is not required pursuant to Rules 14.02, subd. 2 and 26.03, subd. 1(3) if the court and parties agree to the ITV appearance.

   ITV may not be used to conduct a trial, contested pretrial hearing, or any other contested matter except as provided herein.

(3) *Petty Misdemeanor and Regulatory or Administrative Criminal Offenses*. A defendant may appear before any available judge of the district by ITV for all hearings, including trials, related to petty misdemeanors and regulatory or administrative criminal offenses not punishable by imprisonment.
Subd. 4. Request for In-Person Hearing; Consent Requirements.
(1) Rule 5 or Rule 6 Hearings. When a defendant appears before the court by ITV for a Rule 5 or Rule 6 hearing, the defendant may request to appear in person before a judge. If the request is made, the hearing will be held within three business days of the ITV hearing and shall be deemed a continuance of the ITV hearing.
(2) Other Hearings; Consent. In all proceedings other than a Rule 5 or Rule 6 hearing, the defendant must consent to appearing by ITV. If the defendant does not consent to appear by ITV, an in-person court appearance for that hearing shall be scheduled to be held within the time limits as otherwise provided by these rules or other law.

Subd. 5. Location of Participants.
(1) Defendant's Attorney. The defendant's attorney shall be present at the same terminal site from which the defendant appears except in unusual or emergency circumstances, and then only if all parties agree on the record. This exception for unusual or emergency circumstances does not apply to felony or gross misdemeanor proceedings at which a guilty plea is taken.
(2) Prosecuting Attorney. Subject to paragraph (4), the prosecuting attorney may appear from any terminal site.
(3) Judge. Subject to paragraph (4), the judge may appear from any terminal site.
(4) Defendant's Attorney or Prosecuting Attorney at Same Terminal Site as Judge. When the right to counsel applies, ITV may not be used in a situation in which only the defense attorney or prosecuting attorney is physically present before the judge unless all parties agree on the record.
(5) Witnesses, Victims, Other Persons. Witnesses, victims, and other persons may be located at any terminal site.

Subd. 6. Multi-county Violations. When a defendant has pending charges in more than one county within a district, any or all ITV appearances authorized by this rule may be heard by any judge of that district. Cases from other districts may be heard upon authorization by the Chief Justice of the Supreme Court.

Subd. 7. Proceedings; Record; Decorum.
(1) Where Conducted. All ITV hearings will be conducted in a courtroom or other room at the courthouse reasonably accessible to the public.
(2) Effect of ITV Hearing. Regardless of the physical location of any party to the ITV hearing, any waiver, stipulation, motion, objection, order, or any other action taken by the court or a party at an ITV hearing shall have the same effect as if done in person.
(3) Defendant Right to Counsel. The court shall ensure that the defendant has adequate opportunity to speak privately with counsel, including, where appropriate, suspension of the audio transmission and recording or allowing counsel to leave the conference table to communicate with the defendant in private.
(4) Record. The court administrator of the venue county shall keep court minutes and maintain court records as if the proceeding were heard in person. If the hearing requires a written record, a court reporter shall be in simultaneous voice communication with all ITV terminal sites, and shall make the appropriate verbatim record of the proceeding as if heard in person. No recording shall be made of any ITV proceeding except the recording made as the official court record.
basics of the current rule here, as follows. ITV’s use is limited to three situations: (1) when no judge is available in the venue; (2) when the defendant is in custody in a location outside the venue; and (3) when it is in the interests of justice. It is also limited to the following types of hearings: (1) Rule 5 or Rule 6 hearings; (2) Rule 8 hearings; (3) Rule 11 hearings (omnibus hearings in gross misdemeanor and felony cases) for the purpose of waiving an omnibus hearing; (4) pleas; (5) sentencing; and (6) probation revocation hearings. Rule 5 and Rule 6 hearings do not require consent, but note that a defendant can request an in-person hearing. The other hearings require consent by the defendant, defense attorney, prosecutor, and judge. Except in emergency situations, defense counsel is required to use the same terminal site as his or her client.

III. PREDICTING ITV’S EFFECT ON THE CRIMINAL JUSTICE SYSTEM

To analyze the effects of ITV expansion in Minnesota under the 2010 rule, the following section examines how ITV will affect the interests of three distinct groups: (1) the courts; (2) public defenders; and (3) criminal defendants.

(5) Decorum. Courtroom decorum during ITV hearings must conform to the extent possible to that required during traditional court proceedings. This may include the presence of one or more bailiffs at any ITV site. Subd. 8. Administrative Procedures. Administrative procedures for conducting ITV hearings are governed by the General Rules of Practice. 106. MINN. R. CRIM. P. 1.05, subdiv. 3 (emphasis added). The “interests of justice” is an ambiguous phrase. Minnesota courts have interpreted it differently within the context of different rules. Thus, subsequent litigation regarding ITV will likely define the parameters of “the interests of justice” under Rule 1.05, and practitioners should be attuned to the development of this phrase within the ITV context.

107. Id. at subdiv. 4.
108. Id. at subdiv. 6(1).
109. Id. at subdiv. 6(2).
110. Id. at subdiv. 7.
111. We recognize that other stakeholder groups, such as prosecutors and counties, will also be affected by the changes to Rule 1.05 and were deeply involved in crafting the newly amended rule. All of them have an interest in protecting the integrity of judicial proceedings. See generally Patrick Thornton, Defense Bar Wary of ITV Expansion, MINN. LAWYER, June 21, 2010, at 1. While we acknowledge that the new rule will, of course, impact these groups, we have chosen to focus this article primarily on the rule’s impact on the defense process.
A. The Courts’ Interests

The first group, the courts, is known more formally as the Minnesota Judicial Branch. Led by the Chief Justice of the Minnesota Supreme Court, it is composed of trial and appellate courts, the Judicial Council, and the state court administration. It has a state-funded operating budget of $300 million per year and employs 2800 judges, clerks, administrators, and other staff.

The Judicial Branch’s exclusive interest is in administering justice. It is constrained by the law and its limited resources. Like other state-funded institutions, it is sometimes underfunded. In the 2009 session, the Minnesota Legislature cut the courts’ budget by one percent despite the fact that the courts were already short-staffed by nine percent. The cut was modest considering a ten-percent cut had been expected.

Cutting the Judicial Branch’s budget does nothing to minimize its duty to administer justice. Former Chief Justice Eric Magnuson aptly remarked, “[u]nlike a business that just cuts back on production, we have a constitutional obligation to provide justice for all who come through our courthouse doors.” The result is the seemingly impossible obligation of administering justice without adequate resources. Without the power to


113. Id.


115. See Magnuson, supra note 112, at 20. This cut could have been much greater if it were not for the Herculean efforts of former Chief Justice Eric Magnuson, who in 2009 led a statewide campaign to raise awareness of the courts’ budget crisis. See id.

116. Id.

117. Id. at 19.

118. Id.

119. Id. at 20.
increase its budget, the Judicial Branch must find creative ways to achieve its objective.\textsuperscript{120} It must innovate. The expansion of ITV in criminal cases is one way the Judicial Branch chose to innovate.\textsuperscript{121}

1. \textit{ITV's (Positive) Effect on the Court}

Undoubtedly, the Judicial Branch and its participants benefit from the use of ITV.\textsuperscript{122} The Ninth Judicial District study documented ITV's advantages.\textsuperscript{123} First, ITV improves efficiency; nearly sixty percent of survey respondents indicated that “time saved” was the “most important benefit of ITV.”\textsuperscript{124} Second, ITV cuts the costs of criminal cases by reducing the costs of transporting defendants to court.\textsuperscript{125} Moreover, ITV pays for itself. For example, in the Ninth Judicial District, the costs saved by ITV on transporting defendants alone more than paid for the entire ITV system.\textsuperscript{126} Finally, ITV is well reviewed by those who have worked with it.\textsuperscript{127} The Ninth Judicial District survey found that “users are favorable to ITV and . . . want to keep ITV available.”\textsuperscript{128} Because the positive attributes of ITV are largely undisputed,\textsuperscript{129} the remainder of this section instead focuses on the negative aspects of ITV and its potential impact on the courts’ interest in administering justice.

2. \textit{ITV's (Negative) Effect on Administering Justice}

We now address the ways in which ITV affects the courts’ administration of justice. We begin with the presumption that ITV will not affect the outcomes of individual criminal cases. This is because criminal defendants have a constitutional right to be

\begin{thebibliography}{99}
\item[120.] See \textit{id}.
\item[121.] \textit{Id.} at 21.
\item[122.] See \textit{WILLIS ET AL., supra note 11}, at 36.
\item[123.] \textit{Id.} at 5–6, 8–21, 34–36.
\item[124.] \textit{Id.} at 11.
\item[125.] \textit{Id.} at ii, 11. In a speech to the Minnesota State Bar Association, Chief Justice Magnuson stated:
\begin{quote}
Technology will play a central role as we build a court system that can function effectively in the 21st century. . . . [One such technology is to] expand the use of ITV in criminal cases to reduce law-enforcement transport costs and cut the time for many of the participants.
\end{quote}
\textit{Magnuson, supra note 112}, at 21.
\item[126.] \textit{WILLIS ET AL., supra note 11}, at ii.
\item[127.] \textit{Id}.
\item[128.] \textit{Id.} at 36.
\item[129.] \textit{Id}.
\end{thebibliography}
physically present during proceedings which affect the outcomes of their cases. Therefore, ITV is constitutional only if used in proceedings which do not affect the outcome of the case. So, rather than discuss outcomes of cases, we instead focus this section on whether ITV affects the public’s perception of the courts.

Research shows that “perceptions of procedural fairness have a substantial impact on both satisfaction [with the courts] and compliance for the public.” Indeed, the perception of procedural fairness in the courts actually “reduces recidivism because fair procedures cultivate the impression that authorities are both legitimate and moral.” Abraham Lincoln summarized the same idea, remarking, “[P]ublic sentiment is everything. With public sentiment nothing can fail; without it, nothing can succeed.” Stated otherwise, well-regarded courts work better. And their regard depends on whether the public trusts the courts to function fairly.

Unfortunately, ITV has potential to appear procedurally unfair. First, the use of ITV can be linked to the socioeconomic status of the defendant. Defendants with money can post bail and appear personally. One widespread reason for public dissatisfaction with the courts is a concern for broader societal issues, like wealth disparities. ITV’s expansion may create the

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130. For more about the constitutionality of ITV, see infra Part III.C.1.a.
131. See infra Part III.C.1.a.
133. Id. at 7.
135. See Burke & Leben, supra note 132, at 7.
136. See id.
137. See id. at 18–19.
138. See, e.g., J. Thomas Greene, Some Current Causes for Popular Dissatisfaction with the Administration of Justice, 14 UTAH B.J. 35, 37 (2001). Judge Greene summarizes the public’s dissatisfaction:

Some of the unfavorable public perception of judges and courts may reflect broader social and cultural dissatisfaction with the very structure of our society, such as the disparity in wealth. The perception of how wealth may affect justice is typified in the well-known New Yorker cartoon in which the rich lawyer asks a client who is seeking to have her rights vindicated, ‘How much justice can you afford?’ That cartoon illustrates the widespread feeling that justice can be bought and that it is unequally dispensed based on ability (or inability) to pay.

Id.
appearance that poor defendants face a justice system in which they
do not get to be physically present in court and rich defendants
do.\textsuperscript{139} Such an appearance exacerbates existing distrust of courts
with respect to the impression that defendants receive different
treatment based on their socioeconomic status.\textsuperscript{140} That impression
undermines public trust in courts to administer justice fairly.

Second, and connected to this notion of unequal justice, is the
idea that it is inherently unjust for a judge to determine the fate of
a defendant without having to face him, eye-to-eye. The idea that a
defendant should be face-to-face with his judge or jury is rooted in
the same sentiment that drives the defendant’s right to confront
the witnesses against him.

Third, because of the nature of ITV, some nonverbal
expression might be lost, hindering the defendants’ ability to be
heard in court.\textsuperscript{141} A hindered ability to express oneself may appear
to be procedurally unfair. Prevailing research shows that litigants
“have a powerful need to express themselves vocally during the
court’s proceedings.”\textsuperscript{142} Indeed, “being listened to is symbolically
important, as it reveals that group authorities value the individuals’
standing in their social group.”\textsuperscript{143} “Litigants make a strong
correlation between the ability to speak and a judge’s respectful
treatment of them as individuals; it demonstrates civic
competence.”\textsuperscript{144} To further underscore this need to be heard,
studies show that the need exists even when participants are told
unequivocally at the outset that their comments will not affect the
outcome.\textsuperscript{145} In other words, even if being heard has no effect on the
outcome, it is still an important part of achieving justice.

The research clearly shows that public perception of the courts
is an important factor in courts’ ability to effectively administer
justice.\textsuperscript{146} Thus, even though ITV helps the courts operate more

\textsuperscript{139} See id.
\textsuperscript{140} See id.
\textsuperscript{141} In very meaningful ways, ITV prevents the defendant from being heard. In addition to preventing eye contact, it prevents the use of other nonverbal cues which, in the real world, are used to communicate. See BURKE & LEBEN, supra note 132, at 13.
\textsuperscript{142} Id. at 11.
\textsuperscript{143} Id. (quoting Larry Heuer, \textit{What’s Just about the Criminal Justice System? A Psychological Perspective}, 13 J. L. & POL’Y 209, 211 (2005)).
\textsuperscript{144} Id.
\textsuperscript{146} BURKE & LEBEN, supra note 132, at 11–12.
cheaply and efficiently, it is equally important to preserve the public’s trust in the courts as they implement ITV systems. When utilizing ITV, practitioners should be mindful of ITV’s potential to undermine the judicial system’s image with regard to fair proceedings.

B. The Public Defenders’ Interests

The second interest group this paper considers is public defenders. Public defenders represent indigent clients in criminal cases. While all criminal defendants may experience the benefits of the expansion of the rule (for example, by providing criminal defendants with the opportunity to get to court in situations in which they would otherwise remain in custody over the weekend), indigent defendants are more likely than other defendants to be negatively impacted by ITV. Because their clients might be negatively impacted, the practice of public defenders is implicated and, therefore, is the focus of this section.

ITV will likely affect public defenders in two predictable ways: (1) increasing caseloads; and (2) presenting conflicts of interest with clients.

1. Caseload Increase

Budget considerations are a driving force behind ITV expansion. It is an alternative to increasing the judicial branch budget and hiring more public defenders and judges. If ITV works, presumably public defender cases will move through the system more efficiently. This predicted efficiency, in lieu of prompting the hiring of more public defenders, will increase public defender caseloads (the number of clients at a time).

If efficiency in technology leads to increased caseloads, there could be unintended consequences. Public defenders already experience excessive caseloads. For example, public defenders in the Fourth District report having over one hundred open cases.

147. During an advisory committee hearing on the rule, the Minnesota State Public Defender pointed out: “[T]he use of ITV in criminal proceedings only affects people who are too poor to make bail. Otherwise the individual would pay bail, get out, and be able to make it to the courtroom.” Meeting Summary, Advisory Comm. on Minn. Rules of Criminal Procedure 3 (Oct. 13, 2006) (on file with author).

148. See supra Part III.A.

149. David L. Wilson, Constitutional Law: Making a Case for Preserving the Integrity
An excessive caseload is defined as “a caseload or workload that may reasonably be expected to materially interfere with counsel’s ability to provide assistance to existing clients.” Some consider the excessive caseloads of public defenders to be an “obstruction of justice.” Excessive caseloads inhibit the ability of public defenders to do their jobs. It prevents them from being “good” lawyers.

Excessive caseloads raise two issues for public defenders: malpractice liability and the inability to comply with lawyers’ ethical obligations. The former issue was addressed by the Minnesota Supreme Court in Dziubak v. Mott, which held that public defenders are “immune from suit for legal malpractice” in Minnesota. It is worth noting that this immunity, while perhaps reducing public defenders’ stress, might actually be a bad thing for public defenders. It arguably gives license to the legislature to allocate the state’s limited resources elsewhere.

Issues of professional responsibility, on the other hand, are not addressed by Dziubak. Unlike malpractice, there is no indication that public defenders are “off the hook” for their professional responsibility obligations. In 2006, the ABA issued a formal ethics opinion entitled “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation.” The opinion stated that the obligations of professional responsibility (for example, competence, diligence, and communication) are required of all attorneys. The ABA does not provide an exception for public defenders. It orders them to turn down new

151. Id. at 104.
155. Id. at 9.
156. Id.
cases if their caseloads are excessive.\footnote{Id.}

Although turning down new cases is an obvious solution to the problem, it will not work in Minnesota. The Supreme Court of Minnesota, the sole arbiter of legal ethics in Minnesota, has stated that “a public defender may not reject a client” and that public defenders are “obligated to represent whomever is assigned to her or him, regardless of her or his current caseload or the degree of difficulty the case presents.”\footnote{Dziubak, 503 N.W.2d at 775 (emphasis added).} In other words, the option to reject new cases is unavailable to public defenders in Minnesota. Accordingly, if the efficiencies created by ITV lead to an increased public defender caseload, public defenders will be forced to cope with their excessive workload obligations at the expense of their ethical obligations. Overworked attorneys will become more overworked.

2. **Conflicts of Interest with Client**

Public defenders may have a conflict in deciding whether or not to advise their client to consent to ITV. This is especially true if ITV becomes “the rule” rather than the exception.\footnote{REPORT ON PROPOSED AMENDMENTS, supra note 49, at 2–3.} The general pressure on clients to use ITV was a concern mentioned during an advisory committee meeting on the 2010 rule. Kris Kolar, Chief Public Defender of the Ninth District, commented that “it is extremely important to obtain the consent of the defendant and Chief Public Defender of the district to protect the defendant and prevent the defendant from falling victim to pressure to agree to a hearing by ITV.”\footnote{Meeting Summary, Advisory Comm. on Minn. Rules of Criminal Procedure, supra note 147.} What the committee did not address, however, was the related issue of the public defenders themselves exerting pressure on their own clients to use ITV.

The notion that an attorney would advocate in favor of his or her own interests in managing an excessive caseload and against his or her clients’ interest as a result of ITV is admittedly speculative. Still, it is a foreseeable risk in a system that depends on conflict-free legal advice. Clients will rely on their attorney’s advice regarding waiver notwithstanding this potential conflict of interest; lawyers should be aware of this fact.

\footnotesize{157. Id.} \footnotesize{158. Dziubak, 503 N.W.2d at 775 (emphasis added).} \footnotesize{159. REPORT ON PROPOSED AMENDMENTS, supra note 49, at 2–3.} \footnotesize{160. Meeting Summary, Advisory Comm. on Minn. Rules of Criminal Procedure, supra note 147.}
Because the use of ITV in criminal cases will greatly affect the jobs of public defenders, it is important they keep in mind potential unintended consequences of the expansion. First, while ITV is a tool for efficiency and cost-saving for the courts, it might lead to increased caseloads for public defenders. The increase in cases might lead to issues of professional responsibility, and public defenders should take steps to mitigate any problems that might arise. Second, ITV will require public defenders to reconcile the conceivable conflict between their interests and their clients’ interests when advising clients whether to consent to ITV. Public defenders should discuss this issue to craft strategies and design protocol to handle potential conflicts in an ethical, balanced manner.

C. The Criminal Defendants’ Interests

Criminal defendants may benefit in some ways from the expansion of ITV. The concern and focus of this section, however, is the ways in which criminal defendants could be negatively impacted. The defendant has two primary interests that may be negatively impacted by the expansion of ITV: (1) an interest in his or her legal right to fair criminal proceedings; and (2) an interest in optimal courtroom strategy.

1. The Defendant’s Legal Rights to Fair Criminal Proceedings

Two legal rights of defendants are most affected by ITV in Minnesota:\(^{161}\) (1) the defendant’s fundamental right to be “present” at all critical stages; and (2) the defendant’s right to effective assistance of counsel. Both of these rights derive from the Sixth Amendment and apply to the states through operation of the Due Process Clause of the Fourteenth Amendment.\(^{162}\)

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161. A third legal right affected by ITV in some states is the defendant’s right to confront witnesses under the Sixth Amendment. See, e.g., Wrotten v. New York, 130 S. Ct. 2520 (2010). The specific confrontation issue is not discussed in this section because the new rule requires the consent of the defendant and defendant’s counsel before witnesses can appear via ITV. MINN. R. CRIM. P. 1.05, subdiv. 9.

162. See infra notes 163–65, 179 and accompanying text.
a. Right of defendant to be “present” at critical stages.

The right to be present is derived from the United States Constitution’s Sixth Amendment (Confrontation Clause),\textsuperscript{163} the Fifth Amendment (Due Process Clause),\textsuperscript{164} the Fourteenth Amendment (Due Process Clause),\textsuperscript{165} and the Minnesota Constitution, Article I, section six. The defendant’s constitutional right to be present is limited to occasions where “his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.”\textsuperscript{166} Put another way, the right to be present is not a stand-alone right; it is\textit{ not violated} unless the defendant can show that his absence “caused the proceedings to be unfair or . . . resulted in the denial of an underlying constitutional right.”\textsuperscript{167}

Courts that have analyzed whether ITV renders the proceedings “unfair,” so as to deprive the defendant of his right to be present, have held that there is\textit{ no violation} when used during arraignments and bail hearings;\textsuperscript{168} waiver of a jury trial;\textsuperscript{169} taking of a jury verdict;\textsuperscript{170} plea hearings;\textsuperscript{171} sentencing;\textsuperscript{172} post-conviction

\begin{footnotes}
\item[163] Ford v. State, 690 N.W.2d 706, 712 (Minn. 2005). But note, the Confrontation Clause is only implicated at stages of the trial where there will be witnesses. \textit{Id.}
\item[165] Ford, 690 N.W.2d at 712 (citing United States v. Gagnon, 470 U.S. 522, 526 (1985)).
\item[166] Snyder, 291 U.S. at 105–06.
\item[167] People v. Lindsey, 772 N.E.2d 1268, 1278 (Ill. 2002).
\item[168] See \textit{id.}; Commonwealth v. Ingram, 46 S.W.3d 569 (Ky. 2001) (finding conditions in holding area were over-crowded and hot, there were frequent disruptions of the ability to hear or see, the judge could not see defendant’s full body, and the printer malfunctioned frequently—still no due process violation); Larose v. Hillsborough Cnty. Corr. Admin., 702 A.2d 326, 329 (N.H. 1997) (employing two-part analysis: did challenged procedure concern a legally protected interest, and did the procedure afford the requisite safeguards; held that video procedure did not pose any greater risk of erroneous deprivation of liberty than would a live hearing); State v. Phillips, 656 N.E.2d 643, 665–65 (Ohio 1995) (holding that defendant’s actual presence at arraignment is not required under due process if defendant can see and hear proceedings and judge can see defendant); see also Commonwealth v. Terebieniec, 408 A.2d 1120, 1124 (Pa. Super. Ct. 1979) (“[R]eliance upon mechanical and electronic devices in pretrial proceedings can be salutary and are permissible so long as they do not impair the rights of the accused.”).
\item[169] See Lindsey, 772 N.E.2d at 1282 (no violation of right to be present without proof of prejudice); People v. Speed, 743 N.E.2d 1084, 1086–87 (Ill. App. Ct. 2001) (holding that use of closed-circuit video for waiver of jury trial was not plain error).
\item[170] See People v. Mendez, 745 N.E.2d 93, 99 (Ill. App. Ct. 2001) (stating that
\end{footnotes}
hearings; and parole hearings. For these types of hearings, courts have said that, because it would not make a difference whether or not the defendant is physically present, there is no harm.

In contrast, courts have held that there is a violation if ITV is used during parole violation hearings. Presumably this would apply to probation revocation hearings as well. In these cases, the courts have focused on the defendant’s right to confront witnesses. Because the constitutional right to be present only applies to situations in which the defendant can prove his presence would have affected the outcome, ITV’s limited use in Minnesota is likely constitutional under federal law. It is unlikely that a defendant would be able to prove that the limited types of hearings where ITV is permitted (for example, arraignment, pleas, and waivers) had an effect on the outcome of his or her case.

The right to be present under Minnesota law was historically more expansive than federal law. Under Minnesota law, the right to be present was expanded by Minnesota Rule of Criminal Procedure 26.03, subdivision 1(1), which required the defendant’s presence “at every stage of the trial.” Importantly, however, the rule included the caveat: “except as otherwise provided by these rules.” Accordingly, the 2010 amendments to the Minnesota Rule of Criminal Procedure 1.05, which expanded the use of ITV, likely narrowed Minnesota’s right to be present to mirror federal law.

right to be present is not substantial in itself, but a means of securing other substantial due process rights).

171. See State v. Peters, 615 N.W.2d 655, 659–60 (Wis. Ct. App. 2000) (holding that the presence of a defendant at a plea hearing is only a requirement of due process to the extent that a fair hearing would be thwarted by his absence). The court did say that the right to have counsel at a plea hearing still applies. Id.

172. Id. at 660 n.30 (defendant only has due process right to be present at sentencing to the extent the proceedings are fairly conducted—here they were fairly conducted).

173. See Guinan v. State, 769 S.W.2d 427, 430–31 (Mo. 1989) (defendant still had a fair trial even with closed-circuit proceeding).


177. MINN. R. CRIM. P. 26.03, subdiv. 1(1) (emphasis added); see also Ford v. State, 690 N.W.2d 706, 712 (Minn. 2005) (citing State v. Thompson, 430 N.W.2d 151, 152–53 (Minn. 1988)) (describing the state right as more broad).

178. MINN. R. CRIM. P. 26.03, subdiv. 1(1).
b. Right to effective assistance of counsel

The second right affected by ITV is criminal defendants’ right to effective assistance of counsel during the critical stages of the trial. This right is derived from the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, section six of the Minnesota Constitution. This right is implicated because the use of ITV could potentially limit the defendant’s ability to confer privately with counsel.

It is unlikely that the 2010 amendments expanding ITV use will violate this right for two reasons. First, as with the right to be present, the defendant would need to show that ITV had a prejudicial effect on his case in order to prove ineffective assistance of counsel. Because the use of ITV is limited to hearings that presumably do not affect the outcome of the case, this would be an impossible burden. Second, the rule in Minnesota specifically protects the defendant’s right to counsel. Minnesota Rule of Criminal Procedure 1.05, subdivision 10(3) states: “The court must ensure that the defendant has adequate opportunity to confidentially communicate with counsel . . . .” Moreover, the rule requires the defendant’s attorney to be present at the same terminal site as the defendant, except in unusual or extreme circumstances. Taken together, these requirements minimize the risk of ineffective assistance of counsel and it is unlikely that the rule violates the Sixth Amendment on its face.

2. The Ability of the Defendant to Waive Trial Rights or Consent to ITV

Even if the defendant’s rights are implicated by the use of ITV, the defendant can always waive those rights. In fact, other than Rule 5 and Rule 6 hearings, the defendant is required to waive his right to be present under the new rule in order for ITV to be

179. For more about the right to counsel in Minnesota, see Wilson, supra note 149.
180. See Schiffer v. State, 617 So. 2d 357, 358 (Fla. Dist. Ct. App. 1993) (holding that the defendant’s participation by videoconferencing deprived him of the ability to confer with counsel).
181. See People v. Lindsey, 772 N.E.2d 1268, 1278 (Ill. 2002).
182. MINN. R. CRIM. P. 1.05, subdiv. 7(1).
183. See State v. Martin, 723 N.W.2d 613, 619 (Minn. 2006) (“[L]ike any constitutional right, the right to be present at trial may be waived by the accused.” (quoting State v. Cassidy, 567 N.W.2d 707, 709 (Minn. 1997))).
used.\footnote{184} Of particular concern, however, is the fact that the defendant can \textit{impliedly} waive his right to be present during the proceedings.\footnote{185} This means that by not raising the issue, or simply appearing via ITV, the defendant can be deemed to have waived his right. It is important for judges, prosecutors, and defense counsel to be cognizant of this risk and safeguard against unintended waiver.

3. \textit{Defendants’ Strategy Issues}

Indigent defendants, like any other litigants, have an interest in employing the best legal strategy available. Appearing via video, while permissible under law, may not be the best trial strategy. This is because ITV technology does not mimic face-to-face interaction.\footnote{186} Scholars have identified at least four key differences between communication via ITV and face-to-face communication. First, it is recognized that “[t]estimony in a courtroom, in the gravitas of that setting, has an impact on all participants.”\footnote{187} Accordingly, it is suggested that the seriousness of the courtroom setting might render the impact of what the defendant says stronger if said in person than if said through a television screen.\footnote{188} Presumably, this would apply to what the defendant’s attorney says as well.

Second, there is a recognizable difficulty for a fact-finder (whether a judge or a jury) to gauge demeanor (for example, truthfulness and sincerity) when they are required to view the defendant (or his or her attorney) through a television screen.\footnote{189} “While videoscreens show all aspects—the face, the body, the voice—they do so with varying degrees of success. . . . Plainly, the image can be orchestrated—by decisions about lighting, the size of

\footnotesize{184. Minn. R. Crim. P. 1.05, subdiv. 6(2). For Rule 5 and Rule 6 hearings, the defendant does not need to consent to ITV, but may request an in-person hearing. \textit{Id.} at subdiv. 6(1).}
\footnotesize{185. \textit{See} Martin, 723 N.W.2d at 620 (“[A] detailed on-the-record colloquy between the defendant and the trial court is not necessary to show that a defendant has waived his right to be present for a portion of the trial.” (internal quotation omitted)).}
\footnotesize{187. \textit{Id.} at 784.}
\footnotesize{188. \textit{See id.}}
\footnotesize{189. \textit{Id.} at 786.
the image, the perspective."\textsuperscript{190} Appearing via ITV may be disadvantageous if the defendant (or his or her attorney) appears unnatural or insincere on screen.

The third, and perhaps most obvious, difference between ITV and face-to-face appearance is the fact that there can be no eye contact between the person on the video screen and the person in the courtroom. A criminal defendant may be inclined to look the judge in the eye when the judge is determining his or her sentence.

The final difference is that a defendant appearing on a video screen would have more difficulty consulting with his or her attorney than if he or she appeared in person if the attorney is in the courtroom. This difference is less relevant in Minnesota because the new rule requires the attorney to be at the same terminal site as the defendant during the proceedings.\textsuperscript{191} The downside to the Minnesota rule, however, is that the same difficulty with communication might occur between the attorney (who is appearing via ITV) and the judge or prosecutor. It might be more difficult to have “off the record” discussions.

All of the differences between ITV and face-to-face appearances influence the defendant’s optimal trial strategy. Based on these differences, it seems that in most cases, the optimal trial strategy would be to appear in person. To the extent that ITV becomes routine, defendants may be unknowingly forfeiting their optimal trial strategy.

IV. CONCLUSION

The expansion of ITV in criminal proceedings can be seen as a progressive step to a more efficient twenty-first century courtroom. It can be viewed as a solution to an underfunded court. The system offers at least some benefits to all participants in criminal cases. For these and other reasons, there is cause to be optimistic about the expansion of ITV.

As discussed, however, ITV expansion also causes concerns with respect to its potentially negative impact on the courts, public defenders, and criminal defendants. While these concerns may ultimately be outweighed by the cost-saving and efficiency benefits of ITV, they are important to keep in mind as we continue to craft an ITV system that comports with the state’s ultimate goal of

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{See Minn. R. Crim. P. 1.05, subdiv. 7(1).}
administering justice fairly to all.

This section promised to provide practical advice for practitioners adjusting to the recently changed ITV rules and procedures. The following issues are worth highlighting:

• Public faith in the courts

It is important for practitioners to be aware that public sentiment regarding the fairness of the courts is crucial to the courts’ function. Accordingly, an effort should be made by all parties to preserve the appearance of fairness. ITV should not be used only with poor clients, it should not be forced upon clients, and all parties in the system should be careful not to hinder the criminal defendant’s ability to be heard.

• Public defender caseload and corresponding conflict of interest

While ITV promises efficiency, practitioners should be wary of adding cases to already excessive caseloads. All parties in the system should be vigilant and watch for excessive caseload problems exacerbated by ITV use. Moreover, attorneys should be sensitive to potential conflicts of interest when advising their clients to waive the right to be present, remembering that the client’s best interests should control.

• Implied waiver

All parties in the system should be mindful of the potential problems of implied waiver. Practitioners should take steps to ensure that criminal defendants do not inadvertently waive their right to be present.

• Trial strategy

While it is likely that ITV trial strategy will evolve, practitioners should be attentive to the differences discussed that are inherent in video technology when making trial strategy decisions.

If defense attorneys, prosecutors, and judges take steps to mitigate the unintended consequences of ITV, it is possible that the expansion of ITV in criminal cases will fulfill its cost-saving promise while avoiding some of the potential pitfalls noted above. Until the United States Supreme Court officially weighs in on this issue, it is up to the practitioners in Minnesota to carry out the 2010 rule effectively to ensure the achievement of remote justice.