

## COVID-19 AND CHALLENGES TO ACCESS TO COUNSEL

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The public health and logistical challenges precipitated by the coronavirus pandemic endanger not only a criminal defendant's Sixth Amendment right to counsel but also the right to effective, ethical representation. The trust, candor and confidence essential to the attorney-client relationship are compromised when physical isolation and communication barriers hinder meaningful access to counsel.

**Impact on the Choice of Counsel.** Subject to certain limitations, the right to the assistance of counsel includes a defendant's right to counsel of the defendant's choice.<sup>1</sup> Lawyers, especially those who by age or underlying conditions are vulnerable to infection, may be reluctant to represent defendants in settings exposing them to risk of contracting COVID-19.<sup>2</sup> Defendants represented by counsel in high-risk categories also face the probability that their counsel may be compelled to withdraw in order to avoid exposure to illness.<sup>3</sup>

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<sup>1</sup> *United States v. Gonzalez-Lopez*, 584 U.S. 140, 146 (2006) (the Sixth Amendment right to counsel "commands, not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes best.")

<sup>2</sup> Duggan, "Maryland public defender complains of 'superspreader' court hearings," *Washington Post*, November 24, 2020.

<sup>3</sup> In May 2020 a group of national organizations, including the National Association of Criminal Defense Lawyers, the Association of Prosecuting Attorneys, and the Center for HIV Law & Policy called for vaccine distribution to prioritize judges, prosecutors, defense counsel, defendants and other stakeholders in the criminal justice system to ensure their vaccination prior to resumption of normal operations. *Proposed Public Health and Public Safety Pathways for Criminal Justice Responses to COVID-19* (May 2020) (available at [www.nacdl.org](http://www.nacdl.org)).

### **Impact on Meaningful Interaction between Lawyer and Client.**

Similarly daunting to creation of a meaningful professional relationship is the lack of face-to-face interaction between lawyer and client often imposed by COVID-mandated physical or technical barriers or other health concerns. Social and psychological research shows that “people evaluate those with whom they work face-to-face more positive than those with whom they work over a video connection. When decision makers interact with the defendant through the barrier of technology, they are likely to be less sensitive to the impact of negative decisions on the defendant.”<sup>4</sup> In-person meetings are critical to the lawyer’s duty to establish trust and confidence with their clients and to assure the lawyer’s ability to evaluate the client’s capacity to understand the proceedings.<sup>5</sup>

**Impact on Communications between Lawyer and Client.** The barriers to creation of an effective lawyer-client relationship also impede a defendant’s ability to communicate with counsel in a confidential manner. Incarcerated defendants unable to meet with counsel other than by phone or videoconferencing may not be assured that their conversations are unmonitored. Correctional officer shortages and limited phone access make it difficult to schedule calls.<sup>6</sup>

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<sup>4</sup> Poulin, “Criminal Justice and Videoconferencing Technology: The Remote Defendant,” 78 *Tulane Law Review* 1089, 1118 (2004).

<sup>5</sup> See *Criminal Justice Standards and Best Practices During the COVID-19 Pandemic*, Federal Defenders, CJA Panel Representatives for the SDNY and EDNY, and New York Council of Defense Lawyers (May 2020); Poulin, *supra* note 3 at 1129

<sup>6</sup>“D.C. Jail Inmates with Coronavirus Barred from Access to Lawyers, Family, Showers and Changes of Clothing, Inspectors Say,” *Washington Post*, April 15, 2020. The U.S. District Court for the District of Maryland has ordered

Access to counsel is similarly difficult for defendants not detained for whom there exists a substantial “digital divide.”

According to the Pew Research Center, there are substantial disparities in access to internet broadband and computers according to income and race. Americans who live in rural communities are also less likely to have access to broadband internet. The same is true for people with disabilities, who may also require special technology in order to engage in online activities such as remote court proceedings.<sup>7</sup>

The closing of businesses and libraries – ordinarily areas where clients could access the internet – likewise poses a hurdle for contacting counsel.

Unemployment may hinder a defendant’s ability to pay phone and internet bills.

Pretrial release provisions (especially in internet crime prosecutions), seizure of a defendant’s computers and cell phones, and restrictive discovery policies also impede a client’s ability to review sometimes voluminous discovery materials and exhibits, locate potential witness, assist with pretrial investigation, prepare for testifying and cross-examination, or evaluate proposed plea agreements.<sup>8</sup>

**In-Court Challenges.** A defendant’s right to privately consult with counsel in court also faces major barriers. Many courts using video proceedings have no

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that custodians of Maryland detainees ensure reasonable access to counsel and that counsel have reasonable access to their clients, by telephone “at least.” *In Re: COVID-19 Pandemic Procedures*, Misc. No.20-146 (April 23, 2020).

<sup>7</sup> Bannon and Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, Brennan Center for Justice, New York University School of Law, September 10, 2020. “Roughly three-in-ten adults with household incomes below \$30,000 a year (29%) don’t own a smartphone. More than four-in-ten don’t have home broadband services (44%) or a traditional computer.” Anderson and Kumar, “Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption,” *Pew Research Center: Fact Tank* (May 7, 2019).

<sup>8</sup> For example, pretrial discovery policies in the districts of Iowa bar counsel from copying and disseminating discovery materials.

provisions to enable private communications between lawyers and clients in separate locations, and even secure phone lines make non-verbal communications difficult and hard for clients to provide counsel with relevant information.<sup>9</sup> Of major concern are studies showing that virtual court technology could have a negative impact on the attorney-client relationship.<sup>10</sup> A defendant's confidence in his counsel may be reduced, and a lawyer's ability to advise, reassure or control a client made more difficult.<sup>11</sup> In similar legal settings, a vast majority of defense lawyers believed that private attorney-client communication via videoconferencing was simply impossible.<sup>12</sup>

In an effort to protect a defendant's right to consult with his attorney while using the protective measures necessitated by COVID-19, the COVID-19 Judicial Task Force for the United States Courts has recommended that courts "develop reasonable accommodations to allow for socially distanced attorney-client conferences during trial. Possibilities include secure text-messaging capability to allow counsel and client to communicate mid-trial" as well as separate secure

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<sup>9</sup> Bellone, "Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom," 8 *Journal of International Commercial Law and Technology* 44-45 (2013); Poulin at 1130.

<sup>10</sup> Gourdet, Witwer, Langton et al., "Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practical Needs to Preserve Fairness While Leveraging New Technology," *Rand Corporation, 2020*, p. 5; Bellone, *Videoconferencing in the Courts: An Exploratory Study of Videoconferencing Impact on the Attorney-Client Relationship in Massachusetts*, dissertation, Northeastern University, Boston, Mass, (March 2015). As of November 30, 2020: <https://repository.library.northeastern.edu/files/neu:349724/fulltext.pdf>.

<sup>11</sup> Davis, "Talking Heads – Virtual Reality and the Presence of Defendants in Court," 75 *Fla. Bar. J.* 2, 28 (Feb. 2001); Poulin, *supra* note 5 at 1129.

<sup>12</sup> Grant et al., *Videoconferencing in Removal Proceedings: A Case Study of the Chicago Immigration Court*, The Legal Assistance Fdn. of Metropolitan Chicago & Chicago Appleseed Fund for Justice 38-39 (Aug.2005) (observing problems related to access to counsel, presentation of evidence, and interpretation).

space for conferences outside the courtroom, and use of white-noise to mask privileged communications.<sup>13</sup>

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<sup>13</sup> COVID-19 Judicial Task Force, Report of the Jury Subgroup, *Conducting Jury Trials and Convening Grand Juries During the Pandemic*, June 4, 2020, pp. 12-13.