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IMMIGRATION LAW

## Videoconferencing's promise of increased access to justice has a disconnect in immigration courts

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K.T. showed up early for his immigration court hearing, but it was adjourned without him anyway.

For this hearing, K.T. did not appear at New York City’s Varick Street Immigration Court, where his case was being heard. Instead, he went to the teleconferencing room at the Orange County, New York, jail, which was holding him under a contract with Immigration and Customs Enforcement.

According to a complaint in a lawsuit filed later, the guard told K.T. at 8:30 a.m. to wait for the court to call. So he waited. And waited. And waited.

At noon, the guard called the immigration court and learned that the judge in K.T.’s case had intentionally never called. The judge had already connected the court’s one videoconferencing line to another jail and, regardless of what other hearings were scheduled, didn’t want to disconnect for fear that he would never be able to reconnect. Then the judge adjourned the case, in part, because K.T. didn’t appear by video—even though he was waiting the whole time.

K.T.’s hearing was rescheduled for April, five months after his original hearing and nine months after he was first detained. He is now one of the plaintiffs in a federal lawsuit alleging that an ICE policy of exclusively using teleconferencing at Varick Street is intended “to expedite deportations at the expense of due process.”

In fact, advocates for immigrants have argued for years that the misuse of videoconferencing could violate their due process rights. That’s even though many state courts see it as a money-saver—and in some cases, a way to increase access to the courts when travel is difficult. The most experienced state courts are already following at least some of the best practices for the use of video in courtroom proceedings, as outlined by a 2014 report from the Center for Legal & Court Technology at William & Mary Law School. But by the same metrics, the immigration courts appear to be faltering—in a way that the plaintiffs in K.T.’s lawsuit allege can affect the outcomes of the cases.

“Generally, our understanding is that this is a far less efficient system than what is sometimes available in other courts,” says Brooke Menschel, civil rights counsel for Brooklyn Defender Services and an attorney on K.T.’s case, *P.L., et al., v. ICE*.

The seven lead plaintiffs in *P.L.*, a proposed class action lawsuit that seeks to include thousands of detainees with cases at Varick Street, say ICE is denying immigrants appearing at the court due process, the right to counsel and the right of access to the courts.

## **TECHNICAL DIFFICULTIES**

Videoconferencing for immigration hearings is not unique to the Varick Street Immigration Court. It’s used throughout the national immigration court system, occasionally in some courts, but exclusively by judges at two special VTC-only “Immigration Adjudication Centers” in Falls Church, Virginia, and Fort Worth, Texas. The technology is especially likely to be used for immigrants detained in rural areas far from an immigration court.

But for immigrants in New York—where most are held in suburban or upstate jails that contract with ICE—the distance to the court is not the problem. Rather, ICE’s New York field office decided last June that it would no longer bring any immigrants to Varick Street in person, requiring all of those people to appear via videoconferencing. The agency cited safety concerns stemming from a protest of the Trump administration’s family separation policy on June 25, 2018, which had shut down operations at the court that day. The policy was announced two days later.

The lead plaintiffs in *P.L.* allege that the real reason for the decision is to make it harder for immigrants to win their deportation cases.

“Since the government stopped producing people in person last June, technical failures across the board have prevented our clients from understanding what’s happening in court,” Menschel says. “Very, very regularly, the audio cuts out, and they can’t hear what’s happening.”

This is a long-standing issue in the immigration courts, according to immigration judge Ashley Tabaddor, president of the National Association of Immigration Judges. Tabaddor, who is a sitting judge in Los Angeles but emphasizes that she’s speaking in her role as a union leader, says that kind of technical problem, if not resolved quickly, can be enough to get a case postponed.

Menschel says that problem is compounded when the immigrants need a translator and poor audio quality hurts the work of the translator, especially if the translator is appearing by telephone and that signal must be piped through the videoconferencing software. Cognitive or mental health disabilities that impede communication can also be worsened by videoconferencing.

Tabaddor adds that old computers and other technical equipment can also slow cases, even if the videoconferencing works.

“For all the stars to be aligned correctly all the time is not routine,” Tabaddor says.

And immigrants also can’t necessarily see what’s happening, Menschel says, because the camera angle doesn’t change when the speaker does. If the speaker is offscreen, immigrants watching from a county jail miles away might not even realize that they’re missing something. Poor video quality can interfere with their ability to do things like show scars from mistreatment in their home country. And she says camera angles can further mislead the courtroom about the immigrants’ body language and credibility.

The distance is a problem for those represented by counsel because the lawyer is generally in the courtroom—a necessity because the same lawyer may represent multiple immigrants with hearings scheduled on the same day, even when the immigrants are held in different jails. There’s no opportunity to confer privately unless the immigration judge agrees to clear the courtroom, which the lawsuit says judges are

reluctant to do because of the large and growing immigration court backlog. According to Syracuse University's Transactional Records Access Clearinghouse, which tracks the backlog via Freedom of Information Act requests, the backlog stands at 892,517 cases as of the end of April.

It's unclear what defense the government has raised, since the case is sealed.

ICE's parent agency, the Department of Homeland Security, directed the *ABA Journal* to talk to its attorneys at the Department of Justice; the department didn't respond.

## **BEST PRACTICES**

The plaintiffs' situations likely violate the best practices for the use of video in federal administrative courts laid out in the Center for Legal & Court Technology report. That report was addressed to the Administrative Conference of the United States and looked at the use of video in numerous federal administrative bodies, including the immigration courts.

Among the best practices the report outlines: Cameras should face the person speaking at all times; judges should be able to redirect cameras to achieve that; and agencies should have as much bandwidth as they can afford to ensure good quality images and sound.

The lawsuit suggests that these practices aren't being followed in immigration courts, but similar practices are not uncommon in state courts that use videoconferencing. Bill Raftery of the National Center for State Courts has no record of how many of the nation's 15,000-plus state courts use videoconferencing, but he says it's often used for preliminary matters where the cost or risk of travel is high relative to the amount of time in court.

That's different from its use at Varick Street and other immigration courts, where full hearings are routinely conducted by video for thousands of detained immigrants across the country.

That's come under criticism from the ABA Commission on Immigration in an update to its report on Reforming the Immigration System

([https://www.americanbar.org/content/dam/aba/publications/commission\\_on\\_immigration/2019\\_reforming\\_the\\_immigration\\_system\\_volume\\_1.pdf](https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf)) released in March, which says that videoconferencing raises due process concerns because the frequently poor connections make it more difficult for immigrants to argue their cases and establish credibility—potentially affecting the outcome. The report suggests using videoconferencing only for “nonsubstantive” hearings involving adults who consented to use video.

Due process concerns are echoed by two other reports submitted to the federal government. A 2017 Booz Allen Hamilton report to the Department of Justice notes that 29% of court staff said videoconferencing equipment “caused a meaningful delay” in their

daily work. The report says faulty equipment “can disrupt cases to the point that due process issues may arise.” Similarly, a Government Accountability Office report from just two months later says “differences in the technical quality of VTC hearings could have an effect on the outcomes.”

That’s a point that Menschel and her co-counsel make expressly in *P.L.* That case was still seeking a preliminary injunction in June. But the alleged problems for detained immigrants in New York City—a class that plaintiffs estimated would include thousands if a class action is certified—likely continued.

“There are regular adjournments because of interference in the video line,” Menschel says. “We’ve seen cases adjourned multiple times because of no line or a bad connection.”

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