

**Newly Announced Supreme Court Rule 45 & Revised Rule 241–  
The Path Toward Greater Access To Justice And Transparency**

**By Judy Cates<sup>1</sup>**

Responding to the need for continued access to the Illinois justice system during these trying times, the Illinois Supreme Court recently adopted new rules for the use of remote video conferencing. On May 22, 2020, the Supreme Court adopted Illinois Supreme Court Rule 45, entitled, “Participation in Civil or Criminal Proceedings by Telephone or Video Conference,” and made significant amendments to Supreme Court Rule 241, “Use of Video Conference Technology in Civil Trials and Evidentiary Hearings.”<sup>2</sup> Typically, the review and implementation of new or amended rules is accomplished through a committee structure, which allows for public comment and a hearing process.<sup>3</sup> These new rules, however, did not follow the traditional path, although the Illinois Supreme Court Commission on Access to Justice (ATJ Commission) had been investigating methods for using remote court appearances prior to the COVID-19 pandemic.<sup>4</sup> Recognizing the urgent need to implement a process that would keep our courts open, protect the rights of litigants, and ensure access to justice, the Illinois Supreme Court acted quickly to adopt rules that now allow witnesses in civil cases, criminal cases, and delinquency matters, to testify remotely using video conferencing.<sup>5</sup> As a result of the Supreme Court’s wisdom in fast-tracking Rule 45 and Rule 241, all participants involved with the Illinois justice system will have greater access to court services. Practitioners, however, should familiarize themselves with these rules, as they

contain some potential barriers. Nevertheless, if used effectively, new Rule 45 and amended Rule 241 will decrease the costs of litigation, expedite hearings, reduce delays, and add a layer of transparency that has never before been witnessed by the Illinois court system.

New Rule 45 provides as follows:

**Rule 45. Participation in Civil or Criminal Proceedings by Telephone or Video**

The court may, upon request or on its own order, allow a case participant to participate in a civil or criminal matter remotely, including by telephone or video conference. Use of telephone or video conferences in criminal or juvenile delinquency matters shall be undertaken consistent with constitutional guarantees applicable to such proceedings.

The court may further direct which party shall pay the cost, if any associated with the telephone or video conference and shall take whatever action is necessary to ensure that the cost of remote participation is not a barrier to accessing the courts.<sup>6</sup>

Prior to the adoption of Rule 45, telephone and video conferences were limited by Rule 185, which has been repealed. In addition to civil cases, Rule 45 specifically applies to criminal cases and delinquency matters. The committee comments illustrate the intended, broad reach of this new rule.<sup>7</sup> The comments provide that Rule 45 “covers all *non-testimonial* court appearances.”<sup>8</sup> Notably, the committee comments emphasize that “New Rule 45 intentionally provides wider latitude for a court to conduct proceedings remotely by allowing any case participant to request a remote appearance for any reason and by allowing a court to make that decision on its own even if no request has been

made by a case participant.”<sup>9</sup> The fact that parties and non-parties alike can now appear remotely, for any reason, will save costs and make our courts much more efficient. Courts can schedule remote case management conferences that allow participation by the parties and their attorneys, without the need for a long wait while other cases are heard. Clients should also benefit from a reduction in litigation costs. For example, attorneys may no longer need to travel to distant courthouses to attend brief court conferences involving simple discovery disputes or motions in non-complex litigation, as hearings on those matters can now be held remotely. And attorneys arguing in Illinois courts of review can do so from their offices, rather than travel long distances for a 40 minute argument.

In criminal proceedings, search warrants and charging instruments can be obtained instantaneously through the use of video conferencing, as these are non-testimonial “matters.” Defendants who are out on bond in minor criminal matters can also attend a waiver of court appearances by checking in remotely with the trial court.

New Rule 45 does not require any participant who wants to appear remotely to show “good cause” or any “hardship.” The intent of this rule is “that remote appearances should be easy to request and liberally allowed. The Illinois Supreme Court Policy on Remote Appearances in Civil Cases<sup>10</sup> provides additional guidance on the use of this Rule.”<sup>11</sup>

In addition to new Rule 45, which applies to non-testimonial matters, the Supreme Court also amended Rule 241, which further expands the use of video conferencing in civil litigation. Specifically, Rule 241 now allows a “case participant to testify or

otherwise participate in a civil trial or evidentiary hearing by video conferencing from a remote location.<sup>12</sup> Unlike Rule 45, in order for a case participant to use video conferencing during an evidentiary hearing, or a trial, Rule 241 requires that the request be “for good cause shown and upon [use of] appropriate safeguards.”<sup>13</sup> The committee comments provide some guidance regarding what constitutes “good cause,” referring to “unexpected reasons, such as accident, illness, or limited court operations, but also for foreseeable circumstances such as residing out of state.”<sup>14</sup> Considering the expansive scope of Rule 45, the amendments to Rule 241, while perhaps altruistic, are more restrictive, and may require some revisions in the future. Under amended Rule 241, trial courts are given “broad discretion” to determine whether to allow the request for remote participation. If video conferencing is not available to a participant, Rule 241 allows the court to consider participation by telephone, “but only upon a showing of good cause, including the showing of exigent, safety, or security circumstances and with appropriate safeguards.”<sup>15</sup>

For example, in a civil case involving a minor traffic accident, the plaintiff may typically not be able to bring an expert witness to trial, as the expense of asking the collision repair expert to attend a court proceeding would be prohibitive. Using video conferencing, the plaintiff could simply “dial-in” the expert, and with proper safeguards, the judge could take the testimony of this witness. Many *pro se* litigants have judgments entered against them because the “other side” had a lawyer. Too often, we hear such a litigant say, “if I could have had Joe here to testify....” Rather than truly expanding

access to justice, the amendments to Rule 241 may, however, impose an invisible barrier, requiring case participants to establish “good cause” or “exigent circumstances” in order to present witness testimony remotely. Despite the committee comments that refer to the noble purposes of Rule 45, newly amended Rule 241, with its “built-in” burden of showing “good cause,” may represent a missed opportunity for wider access to the courts via remote video conferencing.

Consider the Illinois Supreme Court Policy on Remote Appearances in Civil Cases (“Remote Access Policy”), which recognizes “that meaningful access to the courts is essential to ensuring the integrity and fairness of the judicial process.”<sup>16</sup> This policy references only civil litigation, although the Supreme Court has made it abundantly clear that the intent and purpose of Rule 45 is to reach across all layers of the civil justice system, including small claims cases and family cases, in order to reduce costs, allow for easier access to court services, and reduce the delay attendant in cases where scheduling may be problematic.<sup>17</sup> Under Rule 45, no longer would a self-represented defendant in a small claim proceeding have to find a babysitter, commute to a courthouse some distance away, find a parking space, and then wait for hours in the courtroom for her case to be called for a first appearance or status conference, as these are non-testimonial hearings. With the efficient management of a court docket, cases can be staggered, and litigants can be given appointed times to call in, using devices such as a cell phone.

Consider, however, the plight of this same *pro se* defendant during the trial of her small claim’s case. Under newly revised Rule 241, the *pro se* defendant could not appear

via video conferencing, except for “good cause” shown. Inconvenience is not included as a factor for the court to consider in the committee comments. The *pro se* litigant here would have to find and pay a babysitter, perhaps miss additional hours of work, commute to the courthouse, and wait for her case to be called. This results in wasted hours for the participant, and sometimes it is just “not worth the effort,” resulting in a default judgment against the defendant. Therefore, as these new rules on video conferencing and remote access are implemented, our courts must remain vigilant to ensure that *pro se* litigants are not denied equal access to justice, and equal justice.

The revision to Rule 241 will, logically, result in a variety of interpretations of what constitutes “good cause” across 102 county courthouses and multitudes of individual judges. There is also a potential that a litigant’s request may be denied simply because an individual judge is unfamiliar or uncomfortable with the new video technology. Accordingly, it will be important to make “hands on training” as well as on-line practice resources available to the bench and bar in order to bridge the technology gap. Funding for a video conferencing coordinator in larger courthouses would be helpful to those judges with large dockets, so that time is not taken away from the judiciary in setting up and scheduling the remote video conferencing.

It follows that these new and amended rules will be effective only if the participants are aware of the opportunities for remote hearings and video conferencing, and the procedures to obtain them. Attorneys are expected to know the rules. *Pro se* litigants, and non-party participants, however, may be at a disadvantage because they are

not expected to be familiar with the Illinois Supreme Court Rules, or to keep up with amendments, such as the new opportunities to request remote video conferencing. The Remote Access Policy suggests that “signs” should be written in plain language that includes information about remote court appearances and the process for requesting them.<sup>18</sup> Additionally, the policy directs individual courts to “issue and publish” a court order, detailing the process for requesting and participating in a remote court appearance.<sup>19</sup> These suggested actions seem to impose yet another barrier to the effectiveness and implementation of Rule 45 and Rule 241.

To anticipate that a litigant is going to see a “sign,” or even understand what it means, seems unrealistic. Many people involved in the justice system would not be looking for these kinds of courthouse signs, nor would they be searching for this kind of information on a website. After all, video conferencing is new to the Illinois court system, and even the attorneys are going to have to adjust to new procedures, as they are adopted by individual courthouses throughout the state. The vision of the Illinois Supreme Court in its swift adoption of Rule 45 and amendment of Rule 241 clearly benefits those who are represented by attorneys, or who are knowledgeable about the justice system, such as law enforcement officers, guardians *ad litem*, social workers, probation officers, etc. In contrast, our *pro se* defendant and other “case participants” confront yet another invisible barrier, as their knowledge of the rules would be dependent upon either the availability of information displayed in various courthouses, or their individual capabilities to discover the rules and proper procedures regarding remote video conferencing. Again, while

altruistic, it is unrealistic to assume that these signs are going to convey the intended knowledge to case participants, some of whom may not even have to appear in a courthouse prior to their trial date.

One possible solution to this invisible knowledge barrier may be some simple revisions to the current Access to Justice forms.<sup>20</sup> Such revisions might include the addition of a check box that asks the individual completing the form whether he/she would like to participate in the judicial proceeding remotely – either by cell phone or video conferencing under Rule 45. All *pro se* litigants could also be given a copy of the circuit court’s standing order, and a copy of Rule 45, as the rule is written in plain language and is concise. In situations where civil litigation is anticipated, perhaps the summons could contain the information contained in Rule 45 and Rule 241. Although these are just a few suggestions, the ATJ Commission, or another committee, will likely have other creative and practical solutions to deal with this potential barrier.

In addition to greater opportunities to participate more efficiently, the new rules on video conferencing and remote access enable a new layer of transparency in our courts. Never had the Illinois court system contemplated that its proceedings would be streamed over the internet. But public access to non-confidential court matters is a right of constitutional dimension, and the use of remote technology means that the public will no longer have to walk into a courthouse to observe legal proceedings. On May 12-14, 2020, our Supreme Court conducted oral arguments via Zoom video conferencing. To comply with its constitutional obligations, the arguments were livestreamed via YouTube. This

real-time view allowed the public to see the Supreme Court justices and the attorneys who were appearing before the court. Instead of fictional television, the events displayed were real, and issues of utmost significance were in plain view for those members of the public who wished to “tune-in.” History was made in Illinois with this initiative, and if continued, the people of Illinois will have a greater understanding of the justice system.

Simultaneously with the enactment of Rule 45 and the amendments to Rule 241, the Supreme Court also issued recommendations to the courts in a document entitled, “Remote Court Proceedings – Guidance Document.”<sup>21</sup> In its Guidance Document, the Supreme Court advised that “courts should make all reasonable efforts to ensure and accommodate public access to non-confidential court proceedings.”<sup>22</sup> In furtherance of this admonition, the Guidance Document indicates:

- Any court hearing conducted over Zoom, WebEx, Teams or other video conferencing platform should be capable of **livestreaming** in a static format, such as YouTube or other similar service. YouTube is preferable, as the user can enable a “Do Not Record” watermark to be placed over the live video. Livestreaming by the courtroom host is permissible under Supreme Court Rules and policies, but video or audio recording by any party, attorney, or any member of the public is strictly prohibited. The court should make this prohibition clear and inform that failure to comply may result in the imposition of sanctions or a finding of contempt.

- Account names displayed on YouTube should identify the Judicial Officer holding the hearing via videoconferencing technology and be formatted in the following way: Judge \_\_\_\_\_, \_\_\_\_\_ Judicial Circuit, \_\_\_\_\_ County.”

The Illinois courts have now been given tools to expand the transparency of our justice system. Livestreaming proceedings over the internet will offer the citizens of Illinois the opportunity to witness all non-confidential proceedings in real time. Given proper implementation and public education about the new and amended rules, our courts can offer participants of the justice system the opportunities to use remote video conferencing, and broader, more inclusive access to our system of justice. Undoubtedly there will be some obstacles to address along the way. There will be a learning curve for judges and litigators who are unfamiliar with the video conferencing technologies, and there may be some fear or reluctance relative to this new way of conducting proceedings. Additionally, as with all efforts involving change, there may be a need for further amendments to other supreme court rules.<sup>23</sup> These issues are not insurmountable and should not obstruct the purpose and vision of Rule 45. It is time we shine a light on our courts, and Rule 45 is the beginning of the renaissance era.

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<sup>2</sup> With the adoption of Rule 45, Illinois Supreme Court Rule 185 was repealed, and amendments were made to Supreme Court Rule 46 and Rule 241 (amended May 22, 2020, eff. immediately).

<sup>3</sup> See Illinois Supreme Court Rule 3 (eff. July 1, 2017).

<sup>4</sup> In addition to the initial work by the ATJ Commission, the Illinois Judicial Conference had included the concept of remote appearances as a potential strategy in implementation of the 2019-2022 Illinois Judicial Branch Strategic Agenda. ([www.illinoiscourts.gov/Media/enews/2020/052620-ATJ-remote.asp](http://www.illinoiscourts.gov/Media/enews/2020/052620-ATJ-remote.asp)).

<sup>5</sup> Under Supreme Court Rule 3(a)(2) (eff. July 1, 2017), the Illinois Supreme Court reserved the prerogative to depart from the procedures of the rule.

<sup>6</sup> Ill. S. Ct. R. 45, (adopted May 22, 2020 eff. immediately).

<sup>7</sup> Ill. S. Ct. R. 45, Committee Comments (adopted May 22, 2020).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> [https://courts.illinois.gov/supremecourt/Policies/Pdf/ATJ Commission on Policy on Remote Court Appearances in Civil Proceedings.pdf](https://courts.illinois.gov/supremecourt/Policies/Pdf/ATJ%20Commission%20on%20Policy%20on%20Remote%20Court%20Appearances%20in%20Civil%20Proceedings.pdf) (“*hereinafter referred to as* “Remote Access Policy”)

<sup>11</sup> Ill. S. Ct. R. 45, Committee Comments (adopted May 22, 2020).

<sup>12</sup> Ill. S. Ct. R. 241 (amended May 22, 2020, eff. immediately).

<sup>13</sup> *Id.*

<sup>14</sup> Ill. S.Ct. R. 241, Committee Comments (May 22, 2020).

<sup>15</sup> Ill. S. Ct. R. 241 (amended May 22, 2020, eff. immediately).

<sup>16</sup> [https://courts.illinois.gov/supremecourt/Policies/Pdf/ATJ Commission Policy on Remote Court Appearances in Civil Proceedings.pdf](https://courts.illinois.gov/supremecourt/Policies/Pdf/ATJ%20Commission%20Policy%20on%20Remote%20Court%20Appearances%20in%20Civil%20Proceedings.pdf)

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.* at 7.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> <http://www.illinoiscourts.gov/Forms/approved/default.asp> (last visited May 26, 2020).

<sup>21</sup> [https://courts.illinois.gov/Administrative/covid/052220-SC\\_RHG.pdf](https://courts.illinois.gov/Administrative/covid/052220-SC_RHG.pdf).

<sup>22</sup> *Id.*

<sup>23</sup> For example, does the word “appearance” in Illinois Supreme Court Rule 218, or Rule 203 now mean the that a video conference appearance is sufficient? Ill. S. Ct. R. 218 (eff. May 29, 2014), Ill. S. Ct. R. 203 (eff. June 1, 1995).