



Episode 12: Video Court and Language Impairments with Lisa Vavonese and Michele LaVigne

Release date: March 8, 2022

Intro: Welcome to the NCJA podcast. This podcast series explores promising practices, provides guidance on strategic planning and discusses how the Byrne Justice Assistance Grant Program, or Byrne JAG, contributes to improving justice systems across the country. We hope you enjoy it.

Chris Asplen: Hello. My name is Chris Asplen and I am the executive director of the National Criminal Justice Association. I am delighted to be joined today by two distinguished speakers to discuss the very timely topic of video court; the benefits, challenges, and the drawbacks and how the seemingly simple practice of switching from in-person proceedings to a virtual format actually demands that we think quite critically about how we communicate.

My guests are Lisa Vavonese, who is the director of research practice strategies with the Center for Court Innovation, and Michele LaVigne, Emeritus Distinguished Clinical Professor of Law and former director of the Public Defender Project at the University of Wisconsin Madison Law School. Welcome to you both.

Lisa, let's start with you. Video courts are not new but have become a necessity during the pandemic. And since then, there have been a lot of questions regarding their pros and cons. Can you provide a general overview of what we're talking about when we refer to video courts and what the national conversation is around video courts and what that looks like?

Lisa Vavonese: Thank you for having me, Chris. Yes, video court is describing when a court appearance is held without all of the individuals in the same room and they communicate using a video conferencing platform like Zoom or Teams. Prior to COVID-19, in criminal cases, most often it was only the defendant, likely incarcerated, and possibly his attorney in a different room. The judge and prosecutor were together.

During COVID, it was everyone separated. Since the very beginning of the pandemic, we've seen many people advocating to keep video permanent. Generally, while certainly not universal, we've seen judges, court administrators and staff, more interested in keeping video, and defense attorneys less inclined.



We don't know how defendants feel, because researching their perspectives has been logistically difficult during COVID. Researchers are sounding the alarm for caution.

Chris Asplen: Now, in August of 2021, the Center for Court Innovations with the Brennan Center for Justice and the National Legal Aid & Defender Association hosted a round table discussion about video courts with system leaders from across the country. Could you give us a summary of what the major themes gleaned from that meeting were?

Lisa Vavonese: Absolutely. There was a consensus that court appearances for status checks, calendaring and similar non-substantive matters is a win-win for both legal system actors and the parties most of the time. And video may be more well-suited for non-carceral proceedings where there won't be jail.

Video court is also an important tool during emergencies such as a public health crisis. However, video complicates things. It can alter the attorney-client relationship, particularly by making regular and confidential communication more difficult, it affects parties differently based on their circumstances, thinking about vulnerable populations here, and video adds complexity to the judge's role in terms of courtroom management, perception and engagement with the parties and their surroundings and decision making. The takeaway, there's a desire to understand the available research more fully and a consensus that more research, specific to the courtroom context, is needed.

The only empirical study on video court in criminal matters found a 51% increase on the average bail amount set for incarcerated individuals appearing over video compared to when they appeared in person for their first court appearance. That was in Cook County, Illinois in 2010. That should concern everyone.

Chris Asplen: So, this reminds me of pretrial risk assessments that were created to reduce bias in decision making but we now know may have the potential to produce a whole different set of biased results. There seems to be a parallel conundrum happening here with video courts seen as the shiny new tool, but one that comes with its own set of problems. Can you give us some of the benefits of video courts but also discuss some of the obstacles?

Lisa Vavonese: Certainly. Benefits cited include reduced travel and waiting times at courts, parties don't have to pay for parking, to miss work or to find alternate childcare, possibly more speedy calendaring of cases and the ability for people to access court that might not otherwise, if in-person, was the only option. Reduced failures to appear during COVID is an example often cited.

Concerns, and I mentioned these earlier, include perception, engagement, and altered decision making. System actors are often assessing the credibility of parties. How is that different over video? Other concerns include cognitive overload and video fatigue, lack of access to technology or familiarity with video platforms and their functions.

I heard it said well by the Brennan Center for Justice, the efficiencies or advantages of video can be easier to see, particularly for system actors than the potential harms.

Chris Asplen:

There are a lot of components to video courts then that we could spend all day discussing. But for today, I'd like to pivot to discuss video courts and their relationship to language impairments, and therefore quality of justice more widely. Michele, before we dive into the specifics, could you give us an overview of language impairments and why they're important when we talk about access to justice?

Michele LaVigne:

Sure. Let me start by saying that my initial interest in language impairments started because I am a criminal defense attorney, both as a practitioner and as a teacher. But it didn't take me long to figure out that this has as much to do with so many civil proceedings and for the prosecution side as well.

I'm just going to give you some basics because there's 100 years of research about language impairments, and this is going to be the sound bite version. When I talk about a language impairment or a language disorder, I mean, I'm referring to oral language competency. And generally, someone with a language impairment will have underdeveloped competency in one or more aspects of language use.

Language is a developmental function, it is a processing function, it's neurocognitive, it's psychological, and it also relates to the environment. So, it's a pretty complicated beast, even though it's something that we as lawyers take very much for granted. What language impairments can do is affect any and all cognitive and communicative aspects of being a human being.

So, what do I mean by that? Well, your expressive ability. That's what I'm doing. I'm expressing with language. Receptive. Anybody who's listening to this, that's their receptive ability. Auditory processing, auditory memory. Do you remember what you are told? It has to do with semantics, which has to do with understanding meaning and inference, vocabulary, narrative ability, which is not the ability to just supply basic facts, but to really tell a listener what happened in a way that the listener can grasp, ah, yes, the context. Ah, yes, the cause and effect.



And then there's, actually my favorite aspect of language impairments or language disorders, which refers to pragmatic deficits. And pragmatic deficits refer to social communication. It's using language between people, it's understanding what's the right thing to say at the right time and how to say it to get my point across.

Then we go into, and like I said, this is 100 years of research, so I'm really trying hard to compress this down. Who gets these? Where do we find these? And there's any numbers of causation issues, there's comorbidities, there's risk factors.

And we find them among some of these following; people with ADHD, people with learning disabilities, people with even a mild hearing loss that is onset early as a child, people with auditory processing deficits, people on autism spectrum, any kind of cognitive or intellectual deficit, people with, especially kids with behavior disorders, kids who have been abused or neglected, kids who've undergone trauma and kids that are subjected to longstanding, deeply ingrained extreme poverty.

And so, if you listen just to that list, anybody who does criminal or juvenile justice is well aware that these are the people we see every day. As a public defender, these were my clients.

And so, I realize, "Wow, this actually has a whole lot to do with what we do and with law." There has been research on what happens to these people when they come into court, where do they take a hit? What kind of issues do they end up with? Obviously there's a lot. And I'll talk about that in a few minutes.

There's something that really concerns me and is a never ending issue. When we talk about developmental issues, we're talking about kids. And most of the research has been with kids because this is considered a childhood disorder. But people do not grow out of this. The effects continue into adulthood. Though they will definitely look different in an adult than in a child.

Chris Asplen:

I know that you're fond of saying that language impairments are the most common disorder you've never heard of. Could you talk a little bit about that?

Michele LaVigne:

Sure. I stole that saying from the speech language pathology profession, they love to say language impairment is the most common disorder you've never heard of. They all accept it, they all understand it. And so, let me give you some numbers that I think will help explain that.

We are all familiar with autism and autism spectrum disorders. Those occur in the general population at 1.8%. Language impairments occur at 7%, so we're already seeing a massive difference. Then when we look into the criminal justice system, the numbers skyrocket. We know that people with language impairments are more likely to be arrested, convicted, revoked, sentenced. So, they come into the system with a disadvantage.

The research on this, again, it is more robust with kids. With kids in correctional institutions or in residential facilities, the rate of language impairments ranges anywhere from 50% to 80%. Within adults, again, smaller test population, but greater than 35% within adult correctional facilities and in several studies, even people on supervision. Listen to those numbers. Those are high.

We all, I think, have to say, "How is it that we haven't heard of this?" How is it that this is the most common disorder that we've never heard of? And there's a number of reasons. People are very good at passing. As people go into adulthood, even adolescents, they do not want to look stupid so they learn to cover.

Within schools, there are a tendency to view behavior issues as the issue that has to be addressed as opposed to understanding that very often these behavior issues are directly related to language. And so, people cover. They certainly won't tell you if they don't understand. I mean, for heaven's sake, we were in law school. We didn't tell the teacher when we didn't understand the rule against perpetuities, we all do this.

For this though, it's hyper. They don't want people to know that they don't understand. They understand that it's a point of ridicule. And so, this becomes a big problem. It's hidden. And it really does not have a sound. But there's a second part, and that has to do with us. And that's that we don't know what we don't know. And not only do we not know what we don't know, we think we do. We actually believe that we are very good at assessing communication, and assessing messages, and meaning, and intent and motivation. And in fact, nothing could be further from the truth.

Chris Asplen: So, talk a little bit more about the impact on actual justice that comes from our failure at assessing communication well.

Michele LaVigne: Well, boy, where to begin? That is such a great question. And it's a hard question because, Lisa made this point earlier, judges make determinations about people's credibility, their remorse, their character, their worthiness based upon what? Well, upon how the person communicates. It's the communicative aspects of their behavior on what they say, how they say it.



And we do this all the time. I mean, I could take something as simple as this, about three weeks ago, there was a little blurb on one of the feeds I get about a judge who doubled a defendant's bail because she said yeah instead of yes. Because in the judge's mind, that indicated lack of respect.

We've all done sentencings and how important remorse is. Well, what is remorse? Remorse is a verbal act. You can't get in there, you can't measure it. So, how do we determine it? Well, by what the person sounds like and how they sound. And of course, we apply our standards. Our standards are what get applied. And so, if you apply the standards of lawyers, who by definition are good at language, people with language impairments are going to fare very poorly.

Now, layered down on top of this, the fact that language impairments are not widely known in the legal system. It is not widely recognized that people with communication disorders are regular visitors to the criminal justice system. And then add on top of that our own overestimation of our ability to judge. How many times has a lawyer said, "Oh, I could tell he understands." No you can't. It's actually very hard to tell. And it's even harder to tell when somebody has a language impairment.

And this is going to hit these people everywhere from dealing with the police, in front of the judge, if they're testifying, most importantly when they're dealing with their own lawyers. Because the attorney-client relationship sits and rides on verbal ability back and forth.

And if there's gaps, that relationship will start to fall apart. So, I struggle with this as you can probably tell by the sound of my voice. I'm pretty passionate about this because as I started to understand it, I thought, "Wow, large percentages of people are misunderstood and are getting punished because people do not understand what's going on with them."

And I'm going to come back to this and again say, my area was criminal law, but everything I'm talking about in terms of language access applies equally in civil cases, in family law, landlord-tenant, in debtor cases, and then obviously to any victims or witnesses for either side.

Chris Asplen: Let's circle back around to the video court aspect of all of this. How does video court impact these very difficult dynamics of communication assessment deficits, if you will?

Michele LaVigne: When I was talking about the difficulty people are having in court, that's under the best of circumstances. From the beginning, it's a disadvantage to anybody

who's not fully versed in communication. There is no research on this. There's no direct research on what happens in video court with people with language disorders. And that's as of right now, which is early 2022.

But I actually got ahold of Pamela Snow, who's a researcher in Australia who's the goddess of all this. And asked what can we expect to be the disadvantages for people with language impairments coming into video or remote courts? And she had a lot to say. Number one, as Lisa said, video is a foreign platform and it is a platform.

I mean, right now we're on Zoom, but what if we were on Teams? Well, that's actually a different platform and it's got to be different. The rules are different. Well, we use it a lot. And I'm retired, so I actually don't use it as much as some of you, but it still feels very foreign to me.

Bear in mind that when you've got a communication deficit, any kind of communication makes you nervous. This is even harder. I'm not talking to a person I'm talking to a computer, or I'm talking to a phone, or I'm talking to nothing. It does require adaptive skills. Well, we all have them because we don't have language impairments. But those kind of adaptive skills are just not possible if your language is already coming up short.

Many people with language impairments will have maladaptive behaviors when they're confused or they're lost. Courts are going to interpret this as a bad attitude, not interested, not concerned, rude, all the things that really come home to haunt certainly any number of my clients. The real time cues are missing. We are all dependent on nonverbal cues for, is it my turn? Is it your turn? Do you mean what you're saying? Are you being literal? That's all missing.

Speaking of turn taking, it is contrived. We all know what it's like to be on a Zoom call and whose turn is it? When we're in person, we know how to figure that out. Very, very difficult on Zoom, even for people who don't have communication deficits. The non-literal language, which we use a lot of, becomes very hard to tell, the contextual cues are all removed.

So essentially, these people are, they're dropped into a foreign land and they're told, "Here, go ahead and deal." But then of course it's made worse by the fact that the legal professionals continue to interpret a person's character and behavior, even though they're now looking at it on screen. And so much of this is held against people. And I can tell you, there's plenty of anecdotal evidence to support that even in my own supposedly liberal county.



Chris Asplen: So, with so many folks coming into contact with the criminal or the juvenile legal system with language impairments, what are the ways that systems can mitigate those difficulties, both virtual we'll take some time and say even in person?

Michele LaVigne: Okay. This is a hard word to say when you're dealing with lawyers, but I think the first thing we have to do is embrace humility. As I've said, I don't know how many times here today, we don't know what we don't know. We don't understand communication in general. We actually don't. I know people that are graded at diagramming sentences, but actually the very complicated human aspects of communication are not well known. And one of the first things we have to do is admit it.

And honestly, if I were queen, I would say there should be mandatory training about language impairments for anybody who's going to be dealing in the juvenile or criminal justice systems, or frankly, in the civil systems, especially small claims family, that kind of thing. And it does sound heavy handed, but honestly, this is a behemoth of a problem.

Something that I learned from was having a speech language pathologist watch my communication with clients. I would urge, certainly, judges to do that. Have a speech language pathologist sit in the courtroom and say, "How are you communicating? How's that working for you? Are you reaching this person or are you just saying a bunch of magic words?"

The UK has a system where they actually employ communication specialists where they have any suspicion that a witness or a party has any kind of language problem. And they assist both that person and the courts to ensure the communication is done right. Any of this applies whether we're talking about in-person or video, because the truth is, we need to get our communication chaps way up before we can start to do a decent job of communicating, again, in person or by remote.

For virtual proceedings, I really do understand the attraction. I do. I've seen people who've had to give up a whole day and who knows how much in parking so the court could have the 8:30 pretrial status conference at 3:30 in the afternoon. And I think those certain kinds of status conference, of non substantive things can be well done and can serve a purpose for the kind of clients that I'm talking about.

But if there's any substantive issue, any evidence is being taken these cannot happen if communication is to matter. If they're just window dressing, then nothing I say matters anyway. But if they matter, if we really do care about



someone's ability to understand and participate, then we should not be doing these kind of serious cases over a computer, over Zoom or whatever platform the courts happen to use.

Because the risk of miscommunication is astronomical. Not only for the client, by the way, but for the courts and the decision makers. Because they will be making decisions on faulty information.

Chris Asplen: State administering agencies who may be interested in using Byrne JAG dollars to support video courts moving forward. What are some of the major takeaways they should consider prior to funding these programs?

Michele LaVigne: Well, I suppose the ultimate takeaway should be that video courts cannot be the be all and end all. They can't. They can't, especially for the kind of people that I'm talking about, which if we look back is a very large percentage of people coming through the criminal and juvenile justice systems.

I think indiscriminate use is, frankly, a recipe for due process disaster. Sometimes you'll hear about the consent of the attorney and the client. If you've got a client with language impairment, I cannot see how that consent could ever be valid given the plethora of issues that you've got to be dealing with. So, given that, I think any funding agency should say what limits are being put on these? If there's a limited purpose, what steps have the courts taken to increase awareness of communication issues?

Has the protocol and technology been assessed by speech language professionals, not the usual committee of judges, lawyers and clerks, but speech language professionals who actually do this for a living? What steps have the courts taken to ensure that when you are using remote court, the communication is optimal? And I'm not suggesting perfect, because frankly, nothing in the criminal justice system is. But is it solid?

And again, who's on these committees? Let's start to make up committees of people who actually understand the depth of these issues. It's got to be more than judges and lawyers. We've got to bring in professionals who get communication and the impediments that so many litigants and witnesses take. And yes, that takes humility.

Chris Asplen: That's probably a perfect message to end on, humility. Thank you to both of you for taking the time to speak with me today. It's been informative, it's been enlightening and I greatly appreciate your insights into this matter. Thank you.

Michele LaVigne: Thank you.



Outro:

Thanks again to Lisa Vavonese and Michele LaVigne for taking the time to speak with us. To learn more about Lisa's work on video courts and other rights-based court issues, visit the Center for Court Innovations, Sixth Amendment Project. And for more in Michele's work, check out her profile on the University of Wisconsin, Madison Law School website. You can find links in the episode description. Thank you.