



## Alerts

### Defendant's Due Process Rights Violated When Counsel's Remote Technology Prevented Meaningful Participation in Trial

January 24, 2022

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*Kinder Morgan Prod. Co., LLC v. Scurry Cnty. Appraisal Dist.*, 2021 TX App (11th), No. 11-20-00258-CV

#### Brief Summary

In a case of first impression, the Texas Court of Appeals held that a party's due process rights were violated where, shortly before trial, (1) its lead counsel was ordered by his physician not to appear in person for trial due to underlying health concerns and the risks posed by the COVID-19 pandemic, (2) the trial court refused to continue the trial, and (3) after lead counsel made a good faith effort to participate in the trial remotely, the use of remote technology (*i.e.*, Zoom) prevented him from fully and effectively representing his client.

#### Complete Summary

The case arose from an *ad valorem* tax suit filed by plaintiff, Kinder Morgan Production Company, LLC (KMPC), in which it appealed the order of the defendant, Scurry County Appraisal Review Board (ARB), and challenged the appraised value of certain mineral interests for the 2019 tax year.

In April 2020, in the midst of the initial COVID-19 outbreak, KMPC filed a motion to continue the tracking order because its lead counsel had been advised by his physician that due to his age and underlying medical conditions, he should isolate for six weeks, not travel, and not be within six feet of other individuals. The trial court denied the motion.

A month later, KMPC filed a motion for reconsideration based on an intervening order of the Texas Supreme Court stating that no jury trial could proceed prior to August 1, 2020, unless all parties consented, and KMPC did not consent. The trial court granted the motion and set trial to begin on August 20, 2020. Prior to *voir dire*, KMPC moved to continue the trial on the grounds that it had a due process right to be represented by counsel of its choice, and lead counsel's inability to appear in person deprived it of that right. The trial court denied the motion for continuance but allowed KMPC's lead counsel to participate at trial by remote means.

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Based on the court's denial, KMPC's lead trial counsel was required to participate remotely through Zoom, with his physical appearance depicted on a video screen in the courtroom. By contrast, the lead counsel's co-counsel and the ARB's lead counsel were able to appear in person.

KMPC hired individuals with technical expertise to assist with the logistics of remote participation. However, during *voir dire*, there were numerous technical difficulties with both Zoom and the audio system, including: (1) three occasions that feedback issues were noted, (2) 28 instances when a participant had difficulty hearing another participant, (3) four times that KMPC's lead counsel could not see at least some portion of the venire panel, and (4) 13 times that KMPC's lead counsel requested that his co-counsel take over. KMPC again renewed its motion for continuance and orally requested a mistrial, which was denied.

During the direct examination of KMPC's first witness, there were two complaints about feedback; 19 complaints that a participant could either not hear or not understand what was being said; three complaints that KMPC's lead counsel could not see either the exhibits that were offered, the witness, or the judge; and three requests by KMPC's lead counsel that his co-counsel needed to take over. The record also showed that at one point, KMPC's lead counsel lost internet for 30-40 minutes, but the trial went on without him. After KMPC rested its case, the trial court granted the ARB's motion for directed verdict.

On appeal, the Texas Court of Appeals concluded that based on the unique circumstances, the trial court's refusal to grant a continuance violated KMPC's due process right to be represented at trial by counsel of its choice. The court rejected ARB's argument that KMPC knew and accepted the risks of not finding substitute counsel and proceeding remotely. The court reasoned that in light of the uncertainties created by the pandemic, KMPC's decision not to "jettison" its lead counsel during the compressed timeframe before trial did not amount to negligence or fault. However, the court made clear that its holding did not mean: (1) that a party is entitled to a continuance simply because its counsel of choice is unable to appear in person at trial or (2) that a party is always harmed when its lead counsel is required to appear and participate in a trial remotely. Nevertheless, the court concluded that the overarching purpose of a remote proceedings is to accommodate, rather than hinder, a party's ability to participate, and where technology fails, a court should either adjourn or postpone the proceeding. On that basis, the court reversed and remanded the case for further proceedings.

## Significance of Decision

This decision illustrates that a party's due process right to be represented by counsel of its choice can be violated where its lead counsel cannot appear at trial in person due to health concerns stemming from a pandemic, the court refuses to continue the trial and counsel attempts to participate remotely at trial, but is prevented from doing so to due technical difficulties. The court made it clear, however, that there is no *per se* rule in favor of continuances simply due to counsel's preference to appear in person, nor should it be read as condemning the use of remote technology as a general matter. Rather, in order to interfere with a party's due process rights, the party must be able to show that the remote technology prevented the party's lawyer from meaningful participation in the trial due to technical difficulties.