

**ARIZONA SUPREME COURT  
CRIMINAL RULES VIDEO-CONFERENCE ADVISORY COMMITTEE  
MINUTES  
January 9, 2009**

Members Present:

Hon. Antonio Riojas, Chair  
Kent Batty  
Amelia Cramer  
Hon. Charles Donofrio (proxy for  
    Hon. Gary Donahoe)  
Hon. Samuel Goodman  
Robert Hirsh  
Capt. Charles Johnson  
Bob James  
Capt. Rodney Mayhew  
Jeremy Mussman  
Deborah Schaefer  
Hon. K.C. Stanford  
Terry Stewart  
Sally Wells (by telephone)

Guests and Presenters:

Diane Sonntag  
Denise Sanders-Couvaras  
Kathleen Penney  
Dan Levey  
Keli Luther  
Dana Hlavac  
Dan Carrion  
Theresa Barrett

Staff: Patience Huntwork, Mark Meltzer, Lorraine Nevarez

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**1. Call to order.** The meeting was called to order at 10:05 a.m. The Chair welcomed the members, and introductions were made. Commissioner Donofrio appeared as the proxy for Judge Donahoe.

The members were presented with a notebook of materials, which included, among other items, Administrative Order 2008-92, proposed amendments to Ariz. R. Crim. Proc. 1.6, and rules of conducting Committee business. The Chair introduced the scope and goals of the Committee. Notice was taken of the goal of achieving a rule which would accommodate the budget crisis, without sacrificing constitutional rights of defendants. A suggestion was made to consider video-conferencing in pre-arraignment, arraignment, and post-arraignment proceedings.

**2. History of the video-conferencing rule.** Patience Huntwork presented the history of the Arizona rule concerning video-conferencing. She noted Article II, section 24, of the Arizona Constitution, and the right of the accused to appear and defend in person. In 1979, with advances in technology, Rule 4.2 was amended to permit arraignments by “video-telephone”, but guilty pleas at video arraignments were not allowed. In 1998, Maricopa and Coconino counties sought rule changes for expanding the uses of video-conferencing. This was followed by a rule proposal from the Administrative Office of the Courts. In 1999, a committee was formed to evaluate R-98-0027/0034. That committee’s work led to the adoption of Ariz. R. Crim. P. 1.6 by the Supreme Court in 2000. Although that committee had considered allowing for evidentiary hearings and felony sentencing by video-conference, these proceedings were

ultimately excluded from the scope of the rule. Moreover, the rule as adopted did not make video-conferencing mandatory. The rule adopted in 2000 required that parties be able to view and converse with one another simultaneously; that a full record of proceedings be kept; that an agreement by the defendant to voluntarily appear by video, other than at an initial appearance or arraignment, be knowing and intelligent; that communications between the defendant and counsel remain confidential; and that victims' rights be enforced.

**3. County experience.** The Chair invited the counties represented at the Committee meeting to share with the members their uses of video-conferencing.

Pima County does a county-wide consolidation of initial appearances. Defendants at the main jail may appear for the initial appearance by a video-conference connection with the courthouse, which is half a mile away. Defense counsel is present at the jail, as well as in the courtroom. Prosecutors are present in court. ~~An interpreter is present at the jail, although for "exotic" languages, the interpreter may be in court.~~ If a defendant wishes to appear in person, after the video calendar court staff will travel to the jail, where a courtroom is available for in-person initial appearances. Pima County actually has two jail courtrooms: one in the main jail, and another at the minimum security (day release) facility on the same site. The A video connection is made between the two court and the jail courtrooms is made twice daily, at 9 a.m. and at 8 p.m. Generally, an interpreter is present at the main jail courtroom, although for "exotic" languages, the interpreter may be in the courthouse. A telephone is available for confidential communications, but because of noise and the presence of others it is not always conducive to effective conversation. Other video connections in the system allow for probation violation arraignments. No felony matters are done by video after arraignment. Misdemeanors may proceed by video after arraignment, but evidentiary proceedings are not done by video. It was estimated that it may cost as much as \$150 to transport an inmate for an in-court hearing.

Maricopa County typically does not use video for initial appearances because there is an initial appearance courtroom in the main jail. In custody not-guilty arraignments are done by video-conference. These are done three times a week, with about 60 to 150 inmates arraigned on each occasion. Guilty pleas by video are not permitted. No changes in bond are considered at the video arraignments. No oral motions are allowed. Rights are given along with new court dates. Deputies serve as clerks. Video-conferencing is also used for miscellaneous proceedings, including some bond reinstatements, misdemeanor pleas, and civil divorces. New technology exists which can do more (split screens, more audio controls, confidential communications, etc.) Any rule that is written should keep that in mind so that technology does not by-pass what is permitted by a rule. While the sheriff's representative noted that the public defender is using video for inmate interviews, the public defender indicated that the video quality is inconsistent.

An observation was made that justice courts can be more efficient with expanded video proceedings because the sheriff has limited resources to transport inmates to justice courts. An example was given that two deputies are required to transport an inmate to Gila Bend, even for a brief misdemeanor proceeding.

Yavapai County has superior court divisions in two locations which are 50 miles apart. The majority of courts are served by a small jail, while the main jail is located next to a smaller

number of courts in the Verde Valley. On weekends and holidays, a magistrate goes to one of the jails and does initial appearances in person for those inmates present at that jail, but uses video for initial appearances of inmates at the other jail and for all other courts in the county. The video system is used for attorney and probation officer interviews of inmates, as well as for protective orders. A new courthouse is being built in Camp Verde with a new audio-visual system. Consideration is being given to using the new system for case management conferences, pre-trials, guilty pleas, and sentencing on cases without victims.

Mohave County is building a new jail facility which will incorporate a video system. Videos are being used in the county now only for initial appearances.

**4. Defenders' objections to video.** The Chair invited the two public defender members of the Committee, Mr. Hirsh and Mr. Mussman, to state their objections to criminal proceedings by video-conference.

Mr. Hirsh explained that in Pima County, the public defender appears at initial appearances, and this leads to an increased volume of defendant releases at initial appearances and a cost savings for the county. It is important, he believes, that the magistrate see the defendant in person at the initial appearance rather than by video because that has a greater impact. He believes that the magistrate is able to make a more considered decision based on non-verbal communication arising from an in-person appearance. Video dehumanizes the process; it creates an "artificial barrier" and "changes the equation". Mr. Hirsh feels that an initial appearance is a significant hearing inasmuch as important issues of bail and release are decided.

Mr. Mussman concurred that there is a disadvantage when he is not personally present with his client in the courtroom. He stated that it is more difficult "to engage" with the court. He said that with a video proceeding, it is necessary to replicate the defendant's presence in the courtroom, which would require multiple cameras, a method of confidential communication, and increased expense. He stressed that there is a disadvantage when video-conferencing is mandatory, and he urged the Committee to make video-appearances permissive. He proposed adding language to the rule that video-conferencing only be allowed "absent an objection from the defendant." He also suggested the need for input from the private defense bar to this Committee.

Mr. Mussman pointed out that in Maricopa County, the public defender is not funded for the initial appearance, and defender services at those proceedings are not mandated. He also noted that the public defender could not represent every defendant at the initial appearance because of conflicts of interest, and therefore contract counsel should appear at these initial proceedings. He stated his belief that the initial appearance is an evidentiary hearing because the magistrate considers documents and gets input from ICE agents. Mr. Mussman concluded by pointing out the following comments on the Wisconsin study about video-conferencing: video takes additional time, not less time, due to logistics; the quality of the video and audio is not always optimal; there can be no communication with family during a video proceeding; confidential communications are limited; and the defendant and counsel from jail can't see and hear everything that occurs in the courtroom.

Mr. Hirsh added that when the defendant is treated in an “assembly line” manner during the video-conference calendars, it “hardens” defendant’s view of the system.

**5. Prosecutors’ response.** The Chair asked the prosecutors on the Committee, Ms. Cramer and Ms. Wells, to respond to the defenders’ objections.

Ms. Cramer explained that prior to filing rule petition R-06-0016, the stakeholders in Pima County, through the Justice Coordinating Committee, attempted to work out issues presented by video-conference appearances. When these efforts were unsuccessful, the rule petition was filed by the Pima County Attorney. The thrust of the petition was to make video-conference appearances available through the court’s discretion rather than by the defendant’s choice.

Ms. Cramer emphasized that with video-conferencing, cost savings can be obtained without sacrificing the defendant’s constitutional rights, and she was in no way advocating any reduction of rights. She did not envision video-conferencing being used for changes of plea, trials, or sentencing. She acknowledged that there was some vagueness about what constituted an “evidentiary hearing”, but that this could be left to the sound discretion of the judge, so that the court could determine that there was compliance with the confrontation clause and with due process.

Ms. Cramer noted that Pima County is 9,000 square miles, or about the size of the State of Connecticut. It is a six-hour round trip drive from Ajo to Tucson, and to make that drive for a court appearance that could be done by video would not only incur transportation expenses; it would also result in lost time from work and child care issues. Distance can also present a difficulty for both victims and the families of defendants. She added that there has not been any empirical study showing that the outcomes have been any different by video than with in-person court appearances.

Ms. Cramer acknowledged that Proposition 100 hearings are significant evidentiary hearings. It is therefore appropriate to have these hearings in person, ~~rather than~~ and not by video, similar to a preliminary hearing. Proposition 100 hearings in Pima County, she noted, are not conducted at the initial appearance, but require a few days of notice.

[Paragraph break added.] While a defendant may not be present in the same room as the judge during a video proceeding, Ms. Cramer submitted that the court can still observe a defendant’s facial expressions and demeanor, and believes that if there are technical issues that arise, the court could take steps to protect the defendant’s rights. If, however, the equipment is working properly, she feels that video-conferencing is appropriate for initial appearances, arraignments, continuances, and other similar hearings.

Ms. Cramer added that there have been occasional incidents of threats against the judge when the judge appears in person, that some female magistrates in particular have expressed concerns, and that safety is an ongoing issue. She concluded with the observations that counties that want to use video-conferencing now should be allowed to do so, even if every county will not use video-conferencing immediately.

Ms. Wells distinguished those proceedings where everyone appears by video, from those where only some parties appear by video, and noted that the former situations raise issues of whether the courtroom is “public”. ~~She believes that the court was in the best position to determine “victim issues”.~~ She stated that because initial appearances must be conducted within 24 hours of arrest, an in-person appearance is not always possible. Videos can also help assure that the defendant is initialed in the appropriate venue if there are jurisdictional considerations. Ms. Wells noted that infectious diseases, such as tuberculosis, posed a public health issue, and that video-conferencing is useful in those circumstances, as well as when there have been threats made. In Maricopa County, she added, Proposition 100 hearings are evidentiary proceedings held within days after the request for a hearing.

The defenders and prosecutors exchanged further comments. ~~regarding Proposition 100 hearings.~~ The defenders took the position that the form 4 and testimony by law enforcement officers at the initial appearance constituted the taking of evidence. ~~The prosecutors~~ Ms. Cramer maintained that these are merely statements, not testimony, and there is no cross-examination. ~~They~~ Ms. Wells also submitted that other “no bond” determinations, which are not based on Proposition 100, are considered at the initial appearance. The defenders replied that factual findings are nonetheless made at the initial appearance, and that a “liberty interest” is at stake during those proceedings. Moreover, Proposition 100 does not exist in Wisconsin, so it was not considered in its study of video-conferencing.

**6. Judicial observations.** Commissioner Donofrio noted that from the view of an initial appearance magistrate, the presence of friends or family at the proceeding can be significant. He suggested that the court make a determination about proceeding with video-conference after considering defendant’s objections. Mr. Hirsh replied that he believed that the court can always find exigent circumstances which it could use to justify a video-conference proceeding. Commissioner Donofrio submitted that different video-conferencing issues are presented in rural versus urban settings. He indicated that some guilty pleas by video-conference might be appropriate, but he had reservations about doing sentencing by video. He expressed concern about whether the denial of defendants’ rights to be present would generate an increasing volume of petitions for post-conviction relief.

Judge Goodman said that sentencing by video could be appropriate for misdemeanors, especially when the sentence is to time served. It could avoid the defendant’s return to court for further proceedings. It would be an added safeguard if the public defender was present at the time of sentencing.

Judge Riojas submitted that bond decisions actually improve with video-conferencing. He believed that the biggest problem with release determinations results from having a lot of different magistrates making them, leading to inconsistent decisions. He observed that one of the problems with in-person appearances is that defendants occasionally talk themselves into staying in jail by volunteering information in court, which they might not do during a video appearance. He added that while he is not worried about his safety in a jail courtroom, that there is nonetheless a concern with communicable diseases. He asked the Committee members to use the rule proposed by R-06-0016 as a starting point for discussions.

**7. Lunch recess.** The meeting was adjourned at 12:10 p.m. for lunch, and resumed at 12:40 p.m.

**8. Presentations by stakeholders.** Kathleen Penney, a Maricopa County superior court interpreter and a former president of the Arizona Court Interpreters' Association, addressed the Committee.

Ms. Penney emphasized that the court interpreter must be able to see and hear every speaker. Video-conference arraignments have not been problematic, she said, because they are a brief and specific proceeding (e.g., what is your name, what is your date of birth, and questions which can be answered with a yes or no), and therefore these involve limited interaction between the court and the defendant. If the attorney begins to converse, however, the proceeding can become garbled, and with multiple voices or objections, the quality of the equipment becomes of increasing importance. The location of the interpreter is also significant: is the interpreter remote (e.g., in the courtroom) or standing next to the defendant? Her preference is to be with a defendant at the jail site, but this requires more of her time; and if she is at a remote site, it requires good equipment.

Ms. Penney asked how an attorney will communicate through an interpreter with the defendant during a video proceeding? Will the interpreter be required to speak simultaneously with another person? People often speak on top of each other, without taking turns, and this makes the interpreters' job more difficult. People have a tendency to mumble and speak softly, which requires that she interrupt the speaker to have the speaker repeat what was said, and this is sometimes followed by an explanation, which adds to the complexity of what is being interpreted. It becomes increasingly difficult when the interpreter cannot see everyone, and Ms. Penney requested that everyone who speaks have a camera on them. Video quality is also important for sign language interpreting, and also for non-verbal clues for any language interpreter, and quality equipment is critical for doing a proper interpretation.

Ms. Penney concluded by saying that while interpreting is not problematic during passive proceedings, such as not-guilty arraignments, she has reservations about doing interpreting with video-conferencing in any proceeding with a lot interchange or complexity. There are major technological hurdles from her vantage point.

Diane Sonntag, president of the Arizona Court Reporters' Association, and Denise Sanders-Couvaras, the chief court reporter in Maricopa County, addressed the Committee.

Ms. Sonntag stressed the importance of having a good record. Dropped words and garbled words are problematic, and even more so with remote court reporting. It is harder when doing remote reporting to get the correct gist, especially if there are slight delays in transmission. If a remote court reporter needs to have something repeated, it requires that the court reporter have a microphone; otherwise, it is difficult for the reporter to stop the proceeding. The court reporter needs to hear every word that is spoken, and when words are spoken too far from a microphone, or too close to it, it is difficult to hear them clearly. A sound system for the court reporter should be considered in new courtroom designs. Motions in limine should not be reported remotely.

Ms. Sanders-Couvaras presented the members with a 28 page transcript of a criminal calendar proceeding in the Coconino County superior court taken by a remote certified court reporter. Every page of the transcript had at least one “inaudible”, most pages had at least two “inaudibles”, and some pages had as many as eight “inaudibles”. Because of the available equipment, and because the court reporter did not appear on camera, the remote court reporter was not able to interrupt the proceeding. The speakers spoke too fast. There was poor audio and video feed. Proper names were especially difficult for the remote court reporter to discern. He felt that the size of the video-screen was too small.

Dan Levey, from the Governor’s Office for Crime Victims, and Keli Luther, from Arizona Voice for Victims, addressed the Committee on behalf of victims.

Mr. Levey noted that the victim has a constitutional right to be present at criminal proceedings, and he inquired whether that right could be exercised from a remote internet link, for example, from the victim’s home, without capturing a camera image of the victim. This would save the victim from taking time from work, or having to arrange child care, or to travel to court, and would be a tremendous accommodation to the victim.

Ms. Luther supported video-conferencing as a means of bringing the courts to the people, but she cautioned against small screens in video proceedings. She noted that a web link would be helpful to victims in rural areas, many of whom have to take a day from work to attend court proceedings. She joined in Mr. Levey’s inquiry about a web link for the victim to view the defendant, and added that victims, especially victims of violent crimes, are comforted by seeing the defendant in a jail setting. She expressed concern about images of victims being captured on a video-recording, and the possibility of a victim’s image appearing thereafter on a publicly accessible site such as You-tube.

**9. Round table discussion.** At this point, the Chair invited the Committee members to make further observations about video-conferencing.

Mr. Hirsch questioned whether video-conferencing would result in cost savings.

Captain Johnson responded by noting that recently, the Maricopa County Sheriff set a record by transporting 1,073 inmates to court on a single day. It costs the sheriff \$400,000 to purchase a new bus, and the bus is operated 23 hours a day. The sheriff’s resources are stretched. He wants to know why more hearings can’t be done by video-conferencing. He observed that if an inmate can’t make an in-person appearance because the sheriff has no resources to transport, that the inmate’s jail stay could be extended, and that’s an added cost to the sheriff. He added that inmates are angry when they have to go to court for a perfunctory motion to continue their case.

Mr. Hirsh suggested that all of the members should set out their positions prior to the next Committee meeting. He stated that while the technology will probably improve after the Committee adopts a rule, the rule that the Committee should consider is what is compatible with existing technology. He submitted that if the Committee proposed a rule for unknown, future technology, that there may not be funds to provide that technology, and that the administrative order which established this Committee was focused on what is presently available. He added

that with regard to waivers of in-person appearances, the right belonged to the defendant, and not to the court, especially because the defendant could be asked to choose something that was not the functional equivalent of being in the courtroom.

**10. Plan for the next Committee meeting.** The Chair directed the following future action:

- What can the stakeholders agree to with regard to video-conferencing? Can the members agree on what hearings may be conducted by video? Everyone should put their position in writing, and submit their positions to staff for distribution, prior to the February 4 Committee meeting.
- How does Arizona currently compare with the use of video-conference proceedings in criminal cases in other states? Staff provided the following ALR citation: 115 ALR 5<sup>th</sup> 509. Staff will do further research on use in other states.
- What technology is currently available? Capt. Johnson will try to arrange a demonstration by his vendor for the members at the next meeting.
- What are the cost savings? The Maricopa and Pima County Sheriffs and County Attorneys will attempt to get financial information.

**11. Call to the Public.** The Chair made a call to the public. Mr. Dana Hlavac, the Mohave County Public Defender, made comments. Mr. Hlavac suggested that the approach to video-conferencing should not be one size fits all, but should be on a case-by-case determination. He submitted that if video-conferencing was discretionary, there would be a standard for review (whether there was an abuse of discretion); but if video-conferencing was mandatory, there might be no standard for review. Mr. Hlavac asked what the baseline measurements were for determining the cost savings achieved by video-conferencing. He asked that cost savings be distinguished from cost shifting. He inquired what considerations the Committee would give to media access. He asked what the technology standards are for a video-conferencing system, and whether there would be minimum standards so that any single county does not attempt video-conferencing with simply a laptop and a web camera.

**12. Adjourn.** The meeting was adjourned at 1:55 p.m. The next meeting is scheduled for February 4, 2009, from 10:00 a.m. to 2:30 p.m., at the State Courts Building in Phoenix.

**ARIZONA SUPREME COURT  
CRIMINAL RULES VIDEO-CONFERENCE ADVISORY COMMITTEE  
MEETING MINUTES  
February 4, 2009**

Members Present:

Hon. Antonio Riojas, Chair  
Kent Batty  
Hon. Gary Donahoe  
Hon. Samuel Goodman  
Robert Hirsh  
Capt. Charles Johnson  
Bob James  
Capt. Rodney Mayhew  
Jeremy Mussman  
Deborah Schaefer  
Sally Wells

Guests and Presenters:

Rod Franklin  
Stewart Bruner  
Dan Carrion  
Theresa Barrett  
Dave Condolora  
Dana Hlavac

Members not Present:

Hon. K.C. Stanford  
Terry Stewart

Member present by telephone:

Amelia Cramer

Staff: Patience Huntwork, Mark Meltzer, Tama Reily

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**1. Call to order.** The meeting was called to order at 10:10 a.m. The draft minutes of the January 9, 2009, meeting were unanimously adopted as proposed.

**2. A technical overview of the statewide video-conferencing network.** Rod Franklin and Stewart Bruner, both of whom are from the Information Technology Division (“ITD”) of the Administrative Office of the Courts (“AOC”), provided a technical overview of the AOC’s statewide video-conferencing network, as well as an overview of local networks used by courts and connected facilities, such as jails.

The members were informed that every county courthouse in Arizona is connected to the Arizona Judicial Information Network (“AJIN”). Some municipal and justice of the peace courthouses, but not all of them, are also connected to AJIN. Jails are typically on a county or city network. The AJIN and local networks each have protective firewalls, but courts on the AJIN network can communicate through these firewalls, for example, to a local jail, provided AOC and the county have coordinated their firewall settings. All fifteen Arizona counties are connected to AJIN, and the AOC controls 13 of those connections.

The AOC guarantees sufficient bandwidth on AJIN to assure the level of quality necessary for a video-conference. However, because of the finite amount of AJIN bandwidth dedicated to videoconferencing, only one video-conference at a time, per court location, is permitted. For example, the use by a remote court reporter of an AJIN video-conference connection at one court location would preclude the concurrent use of video-conferencing across AJIN by another court at that same location or to another participant in a another court location.

Members were advised that although the AOC would like to expand its network over time so that a larger number of video-conferences could occur simultaneously over AJIN, the current budget requires any expansion to be deferred to the future.

Because the AOC uses a standard internet protocol (TCP/IP) and communications protocol (H.323), AJIN users can communicate with any others who employ the same standards, even in separate branches of government. After a county or municipality makes a purchase of video equipment, the AOC must be involved in making the connection to AJIN.

Mr. Franklin and Mr. Bruner also addressed questions regarding applicable technical standards. Certain standards are set out in A.C.J.A. section 1-105 (“Enterprise Architecture Standards”). The Commission on Technology (“COT”) has given the Technical Advisory Council the ability to adopt technical standards. In certain circumstances, particular products are specified in the standards, but this is not the case with video-conferencing equipment; only the H.323 protocol is specified for video-conferencing over AJIN with a maximum transfer rate of 384 kbps. Mr. Bruner recommended emulating the structure of A.C.J.A. section 1-602, which deals with “Digital Recording of Court Proceedings”, when drafting any contemplated code section or other standards for video-conferencing.

During the course of this presentation, the members discussed ways to assure confidential communications between defense counsel and a client during a video-conference. Among the recommendations were conversations by cell phone; privacy rooms; and permitting counsel to turn off microphones on the video-conferencing system.

The presentation concluded with a discussion of non-supported networks. Some Arizona court and county users do not follow the H.323 protocol on their local networks, having selected the ISDN protocol and equipment. This is an issue that these users should discuss with their vendors. It would be preferable for all local users to utilize the H.323 standard, and if possible, to get a non-compliant system upgraded by the vendors. It was noted that the majority of video-conferencing traffic from or to a county courthouse is via a local connection, typically a jail; and that there are usually a higher number of video-conferences that can be conducted simultaneously on a local network than can currently be conducted over AJIN.

The Chair thanked Mr. Franklin and Mr. Bruner for their informative presentation.

**3. An informal discussion with a territory sales manager of BT Conferencing regarding video-conferencing in the courts.** Dave Condolora from BT Conferencing addressed the Committee.

Mr. Condolora contended that video-conferencing enhances safety during the judicial process. He cited an event in Clark County, Nevada, where a corrections officer was murdered by an inmate during transport to a courthouse, which might have been avoided had the court proceeding been done by video-conference.

Mr. Condolora emphasized that video-conferencing systems are site specific. There is not a universal solution for all customers. For example, rooms have differences in size and shape, as well as ceiling heights and floor construction. Other differences include the presence or absence of pillars and windows, and the age of the buildings. Each video-conferencing system, he said, is customized. The optimum time to install a system is during building construction; it's less expensive than retrofitting.

With an ideal video-conference system, the participants will be oblivious to the technology and will have a normal meeting. Courtrooms pose particular challenges for system designs. If the customer wants a camera on everyone, who will be responsible for switching the camera view that is shown on the monitor? Mr. Condolora stated that he has a preference for wide angle cameras, because people in the courtroom like to do their jobs without dealing with the operation of a video-system during the court proceeding. An alternative is to use a wide angle camera that can also do a close-up of the speaker. Another alternative is to split the courtroom into three sectors, with a remote keypad which is used to select the desired camera view for one of the three sectors.

Mr. Condolora recommended using large screen (e.g., 42 to 50 inch) monitors. With a large, well-positioned monitor, only one monitor may be required to provide a view for everyone in the courtroom. He advised that high definition ("HD") is becoming the industry standard for monitors in video-conferencing systems. Close captioning is available. He noted that equipment now is of better quality, and has greater function, than a few years ago, and yet is less costly.

A question was posed as to whether a victim can watch a court's video-conference proceeding on a computer terminal at a remote location. Mr. Condolora answered affirmatively. A live, streaming video of a video-conference can be accessed on-line. However, if there is no camera or microphone at the remote site, the victim can only watch, and not participate.

In response to another question, Mr. Condolora stated that for various reasons, he has not tracked cost savings of his Arizona customers who use video-conferencing. However, his company believes that customers routinely have returns on their investment ("ROI") in a video-conference system within six months; and that only rarely does it take longer than one year to recoup the investment. He also noted that for those users who have a large carbon footprint, e.g., due to vehicle use, the recoupment can be even quicker. A large segment of cost savings using video-conferencing is attributable to lowering the costs of transportation.

Mr. Condolora was asked about the cost of a video-conference system for a courtroom. He prefaced his response by noting that each system is site specific. For example, a large courtroom might require more speakers and microphones than a smaller one. That said, he gave a range of \$50-75,000. A less expensive solution would involve placement of all the video-conference equipment on a cart. The cart, although portable, typically is moved little if at all. With installation and maintenance, as well as a high definition monitor, the cost for a cart system would be in the neighborhood of \$15,000.

Addressing standards, Mr. Condolora noted that there are industry standards, including the H.323 protocol as well as encryption standards. While Polycom and Tandberg, among others, adhere to industry standards, new software and other proprietary features are being continually developed.

A question was posed about screen size. Once again, this is not standard. The size of the room, and the seating arrangement in the room, are variables.

The members engaged in a discussion with Mr. Condolora on providing a method of confidential communications between defense counsel and defendant. He assured the members that technology exists to provide a means of confidential communication. Among the possible solutions was a two-way handset as a component of the video-conference system. Although comments were made about the competing interests of liberty and judicial efficiency, Mr. Condolora believes that technology exists to address whatever legal requirements may exist, and however complex those requirements may be.

The Chair thanked Mr. Condolora for his presentation, and the meeting was adjourned for a lunch break.

**4. Members' position statements.** After the recess, the members discussed various position statements concerning a proposed rule for video-conferencing in Arizona criminal proceedings.

The public defenders took the position that any judicial proceeding where a liberty interest is considered (e.g., a release or bail hearing, or sentencing), or which involves the consideration of evidence, is a "critical" proceeding, whether involving a felony or a misdemeanor, and that "critical" proceedings should not be done by video-conference. Since many initial appearances involve release determinations, it was the position of the defenders that these were "critical" and should be excluded from the scope of video-conferencing. A suggestion was made that what would be a "critical" proceeding should be considered in the light of existing law.

The R-06-0016 petitioner believes that initial appearances are an appropriate proceeding for video-conferencing. Moreover, the "right to appear and defend in person" under Article II, section 24, of the *Arizona Constitution* does not preclude this; and that the issue as to whether initial appearances might be done by video-conference was a significant impetus for this rule petition. It was noted that this "right to appear and defend in person" provision in section 24 was distinct from another provision in section 24 concerning the right of the accused "to meet the witnesses against him face to face." It was also contended that what is allowed by the *United States Constitution* in this area is coterminous with what is permitted under Arizona's constitution; see *State v Vincent* 159 Ariz. 418, 768 P2d 150 (1989).

A sheriff's representative noted that last year, the Maricopa County sheriff's office processed over 130,000 bookings, which equates to a high volume of initial appearances.

It was questioned whether this Committee exists because the applicable law is not clear, or whether the Committee exists to permit the stakeholders to reach their own consensus on video-conferencing in criminal cases. Most members favored the latter view.

The following case citations, most of which support video-conferencing in the courtroom, were offered by a member:

*People v. Lindsey*, 772 NE2d 1268 (Ill., 2002)  
*State v. Stroud*, 804 NE2d 510 (Ill., 2004)  
*Commonwealth v. Ingram*, 46 SW3d 569 (Ky, 2001)  
*In re Rule 3.160(a), Florida Rules of Criminal Procedure*, 528 So2d 1179 (Fla., 1988)  
*Larose v. Superintendent, Hillsborough County Corrections*, 702 A2d 326 (NH, 1997)  
*Commonwealth v. Terebieniec*, 408 A2d 1120 (Pa. Super.Ct., 1979)  
*Scott v State*, 618 So2d 1386 (Fla. App, 1993)

The Committee's Supreme Court staff attorney also cited two Arizona cases for the Committee's guidance:

*State v Schackart*, 190 Ariz. 238, 947 P2d 315 (1997)  
*State v Garcia-Contreras*, 191 Ariz. 144, 953 P2d 536 (1998)

Based in part on these cases, she concluded that consideration must be given to constitutional guarantees which require the accused's physical presence in the courtroom, but that those guarantees are not absolute; and that the various types of proceedings must be individually examined to determine whether the defendant's physical presence at those proceedings, as distinct from that of defendant's counsel, would impact the defendant's ability to defend against the charge. It is her opinion that where there is no showing of a loss of influence or advantage by being personally present in court, judicial efficiency may outweigh the importance of personal presence.

A majority of the members concurred with this opinion. During the discussion which ensued, the following comments were made:

- A member noted that existing technology allows clear images and good audio communication via video-conference.
- In some cases, video-conferencing may be more advantageous to the defendant than a personal appearance.
- Victims often have greater comfort by watching a proceeding on a remote monitor than they do in watching the proceeding while physically present in the courtroom.
- Video-conferencing was not an impediment to the defendant's participation, but rather, that it should be looked upon as the use of technology to facilitate participation.

Some members felt that the judicial officer should have discretion about which cases and what specific proceedings might be done by video-conference. This discretion would extend to initial appearances and arraignments. Also, since the accused may waive constitutional rights, even proceedings such as trials or evidentiary hearings might, with appropriate waivers and under certain circumstances, proceed by video-conference.

At this point, the following cross-motions were made and considered:

**MOTION:** A motion was made for the Committee to utilize the proposed rule 1.6 set forth by the public defender members as the basis for the further work of the Committee.

The motion was defeated: 2-10-0. **CRVAC-09-001.**

**MOTION:** A motion was made for the Committee to utilize the proposed rule 1.6 set forth in R-06-0016 as the basis for the further work of the Committee.

The motion was carried: 10-2-0. **CRVAC-09-002.**

**5. Plan for the next Committee meeting.** The Chair directed the following future action:

- Should the Committee consider other circumstances (for example, a medical reason precluding the defendant from appearing in court) which might warrant video-conferencing under Rule 1.6?
- Should the Committee consider other modifications or amendments to Rule 1.6 in the form currently attached to R-06-0016 (as provided at Tab 4 of the notebooks)?
- How should the rule deal with the crucial issue of confidential communications between attorney and client?
- What are the minimum technical requirements for video-conferencing?

**MOTION:** As to the last item, a Committee member made a “friendly motion” to include in the R-06-0016 draft rule 1.6 the following language, which was taken from the draft rule 1.6 proposed by the public defender members:

“Any interactive audiovisual device must meet or exceed minimum technical specifications adopted by the Administrative Office of the Courts.”

There was unanimous agreement in favor of this motion, and the foregoing language will be included as the last sentence of paragraph (a) of Rule 1.6, as appended to R-06-0016. **CRVAC-09-003.**

**ACTION.** The Chair also asked the members to clarify at the next meeting what specific proceedings should be included and excluded from the ambit of Rule 1.6. The Chair requested that the members submit their lists of included and excluded proceedings to Committee staff at their earliest opportunity, so that these lists can be distributed by staff to the members prior to the date of the next Committee meeting.

**11. Call to the Public.** There was no response to the Chair’s call to the public.

**12. Adjourn.** The meeting was adjourned at 2:05 p.m. The next meeting is scheduled for March 4, 2009, from 10:00 a.m. to 2:00 p.m., at the State Courts Building in Phoenix.

DRAFT

**ARIZONA SUPREME COURT  
CRIMINAL RULES VIDEO-CONFERENCE ADVISORY COMMITTEE  
MEETING MINUTES  
March 4, 2009**

Members Present:

Hon. Antonio Riojas, Chair  
Kent Batty  
Amelia Cramer  
Hon. Gary Donahoe  
Hon. Samuel Goodman  
Robert Hirsh  
Capt. Charles Johnson  
Bob James  
Capt. Rodney Mayhew  
Jeremy Mussman  
Deborah Schaefer

Guests and Presenters:

Hon. David Derickson  
Mary Wisdom  
Judy Lutgring  
Dan Carrion  
Stewart Bruner  
Tom Hesse  
Dana Hlavac

Members not Present:

Terry Stewart  
Sally Wells

Member present by telephone:

Hon. K.C. Stanford

Staff: Patience Huntwork, Mark Meltzer, Tama Reily

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**1. Call to order.** The meeting was called to order at 10:10 a.m. The draft minutes of the February 4, 2009, meeting were approved without objection.

**2. Presentation of further comments from members of the defense bar.** David Derickson, Mary Wisdom, and Judy Lutgring were invited to present their comments on video-conferencing to the Committee. Judge Derickson is an attorney with a private criminal defense practice; he is a former presiding criminal judge of the Maricopa County Superior Court. Ms. Wisdom is currently the Pinal County Public Defender; she was formerly a prosecutor and public defender in Maricopa County. Ms. Lutgring is a deputy in the office of the Pima County Public Defender; she spends considerable time in initial appearance courts.

Comments from Ms. Lutgring. Ms. Lutgring explained that the two primary functions of the initial appearance are to make a preliminary determination of probable cause, and to determine conditions of release. The initial appearance must be held within 24 hours of an arrest.

Ms. Lutgring said that there are many nuances which confront attorneys appearing in the court for an initial appearance, and these nuances support doing the proceeding “live” rather than by video-conference. Ms. Lutgring noted the following:

- To be effective prior to and during the initial appearance, defense counsel must have contact with multiple individuals within a short period of time. These individuals include not just the client and the judge, but also the county attorney, the court clerk, and pretrial

services. Especially in light of the volume of the initial appearance calendars, it is difficult to make contact with so many individuals on such a high volume of cases without all of these individuals being in the same place.

- Defense counsel frequently needs to confer with the client's family, or with other parties, regarding a release under the supervision of a third party; and these individuals also need to appear before and speak to the judge.
- Defense counsel cannot simultaneously be in the courtroom with the judge, and in the jail with the client, and given this choice, defense counsel choose to be at the jail. It was Ms. Lutgring's opinion that being at a site remote from the judge and other courtroom participants is disadvantageous to defense counsel.
- At the initial client interview in the jail, defense counsel must routinely deal with the defendant's lack of education, the defendant's eligibility for social security benefits, physical or sexual abuse, potential job loss due to incarceration, economic hardships for the family of the client should he or she continue in custody, and mental health problems and related medication. For example, if a seriously mentally ill client is on medication, failure to secure a prompt release of the individual at the initial appearance could interfere with the availability of medication, potentially resulting in a relapse while in custody. In Ms. Lutgring's opinion, these and similar issues are more effectively explained to the judge during a live appearance.
- There have been times when the physical condition of the accused has been a factor in determining release. She gave as examples the presence or absence of needle track marks, a physical deformity, and an illness or injury. She believes that these conditions are inadequately shown during a video appearance.

Ms. Lutgring contended that while the judge may offer the arrested individual the choice of appearing live or by video, the implications of a choice to proceed by video-conference may not be fully appreciated until after the choice has been made. She added that she has had experiences when the video equipment failed to function properly, and this has impaired her effectiveness during the proceeding.

Ms. Lutgring also submitted that the initial appearance is the proceeding at which the accused's contact with the justice system begins, and that it's important to engender respect for the proceeding. An initial appearance is a brief proceeding, lasting no more than a few minutes, and frequently less time than that; and that doing the proceeding by video dilutes the defendant's understanding of the proceeding and his or her respect for what has occurred. Although it may be an abbreviated proceeding, she maintained that it's crucial that the magistrate look the accused in the eye during a live proceeding rather than one done by video-conference.

Comments from Ms. Wisdom. Ms. Wisdom explained that Pinal County and Pima County are the only two counties in Arizona that have the public defender present at the initial appearance. (Unlike Pima County, the county attorney is not present at the initial appearance in Pinal County.)

Ms. Wisdom expressed her opinion that a live initial appearance permits the judge to make better release decisions than could be made using a video proceeding. She stressed the importance of the judge being face-to-face with the accused when making a bond determination. She said that it was important that the judge be able to observe the accused in the context of the entire courtroom, rather than separate and apart from the courtroom on a video screen. Ms. Wisdom observed that video proceedings require that defense counsel be at the jail site with the client, while at the same time counsel needs to be in the courtroom to monitor the activity taking place there. The public defender can accommodate this by using two attorneys, one in court and the other at the jail; but a sole practitioner has to choose one site and forego the other. She also noted technical difficulties that have arisen during the course of video-conference proceedings.

Ms. Wisdom told the Committee that Pinal County formerly did arraignments by video, but she said arraignments are “housekeeping” matters, and they don’t present the issues which are raised at an initial appearance. In Pinal County, the jail and courthouse are only a hundred yards apart, and inmates can be taken to the courtroom without using a vehicle and with minimal logistical burdens.

Ms. Wisdom maintained that it’s inappropriate to do a change of plea by video. A judicial officer must be able to make findings that the defendant knowingly, voluntarily, and intelligently entered a plea. She believed that this required the court to consider the defendant’s demeanor and manner when entering the plea, and this evaluation should not be attempted during a video-conference. She was aware that certain city courts in her county do misdemeanor pleas and sentencing by video. Ms. Wisdom suggested that if a proceeding is done by video-conference, it should be recorded.

Comments from Judge Derickson. Judge Derickson provided the members with historical background of the Arizona Constitution. He explained that discussions regarding this state’s Constitution began in 1910, at a time when populist sentiment was strong (“love your country, and distrust your government”.) He noted that by 1910, the federal Constitution, as well as the constitutions of most states, had been in existence for decades, and the Arizona framers were able to evaluate the shortcomings of these other documents. The states of Washington and Montana were used as models, and Arizona’s Constitution is almost a “carbon copy” of the constitutions of those states.

Article II, section 24, of the Arizona Constitution therefore provides that the defendant has “...the right to appear and defend in person...” Judge Derickson believes that this provision requires that justice be administered openly, and that the defendant, as well as victims, the press, and members of the public, all must have the opportunity to personally attend.

Judge Derickson believes that Rule 1.6, Ariz. R. Crim. P. unfairly discriminates among classes of people by varying the right to attend. For example, under this rule, defendants who are not incarcerated can exercise their right to appear in court, whereas defendants who are incarcerated may be required to appear by video. Another example is that under Rule 1.6, victims can personally attend a court proceeding, whereas the defendant may not be allowed to personally attend.

If video-conferencing is going to comport with these fundamental rights, Judge Derickson's contended that the defendant must knowingly, voluntarily, and intelligently waive the right to be present.

Judge Derickson posed a number of questions to the members. While the public defenders had suggested that video-conferencing should not be used for "critical" proceedings, Judge Derickson asked, "when is a proceeding in a criminal case not critical?" He believes that under the current policy of the Maricopa County Superior Court, every court event should be meaningful. He believes that to be meaningful, events in a criminal case, including hearings on legal motions, require the defendant's presence on the same personal basis as the other participants.

Judge Derickson suggested that the court process is going to be less effective if the defendant is not personally present in the courtroom. At a pretrial conference, for example, a *Donald* hearing has more impact done face-to-face than by video-conference. For a client who may already be distrustful of the process, a video appearance at a pretrial conference may add to the distrust. Video-conferencing may impair the ability of a self-represented individual to act as his or her own advocate at an initial appearance.

Judge Derickson also cautioned against permitting video-conferences for non-evidentiary hearings. He said that the concept of evidence in the criminal process is more elastic than in civil cases, where evidence is strictly by sworn testimony or affidavit. It's his belief that evidence in a criminal case could include material from any outside source, including unsworn statements; and that the defendant should be allowed in the courtroom when "evidence" of this sort may be introduced.

One of the Committee members observed that a typical, initial pretrial conference is merely a confirmation that both sides have provided discovery, and then dates for a settlement conference and trial are set. When the defendants are sitting in the courtroom, with as many as twenty defendants on the chain, there is very little dialogue, if any, between the judicial officer and the defendant. Judge Derickson believed that it's still important for defendants to be in the courtroom to allow them to appreciate the gravity of the proceeding.

Other comments by members included the following:

- The court should use its discretion in deciding whether a proceeding was "evidentiary".
- An evidentiary proceeding is one where witnesses are sworn and there is a right to cross-examination.
- If discretion for doing a proceeding by video-conference rests with the judge, the great majority of requests to forego video-conferencing in favor of a live appearance would probably be denied.

- Live attendance at a proceeding includes what happens before and after the official court proceeding, and if a defendant is only allowed to see what happens during the proceeding, the defendant might miss significant pre-proceeding and post-proceeding activities.
- If the defendant has a constitutional right to be present at a particular proceeding, video-conferencing should not be done unless the defendant has provided a waiver. In other circumstances, the court should exercise its discretion.

All members in attendance concurred that if the parties agree to a video-conference proceeding, there is no issue about doing it that way.

The staff attorney cautioned that the Supreme Court would be reluctant to adopt a rule for video-conferencing if it might subsequently determine during an appeal that the rule violates a defendant's constitutional rights.

At this point, the meeting recessed for lunch, and the discussion will continue in the afternoon session.

### **3. Remote video-arraignments using the "5+1" screen, and other technical issues.**

Following the lunch recess, Tom Hesse, the chief executive officer of Multimedia Telesys, addressed the Committee.

Mr. Hesse explained that his company utilizes a "5+1" screen in video-conference systems. With this screen, each participant, up to five, would appear in a separate rectangle on the screen. Using voice activation, the person who is speaking would appear in a larger, or dominant, rectangle on the screen. While this would assist the defendant in seeing all participants during a proceeding, it would also require the installation of multiple cameras. The 5+1 system might also require the use of manual controls by the judge or court staff.

Mr. Hesse also stated that a portable video system could be utilized for inmates with physical limitations or communicable diseases. In these situations, the system could be taken to the inmate's housing unit.

Questions were raised about confidential communications. Mr. Hesse responded that confidential communications might need to take place via telephones. Dedicated phone lines at the jail, or perhaps cell phones, might be required for these conversations. The Maricopa County jail does not currently have a phone line for confidential communications between an attorney outside the jail and a jail inmate during a video-conference proceeding. A suggestion was made that a toggle switch or mute button might be used to facilitate confidential communications. An area or a room that is separated from the video-conference room by a sound barrier might also be a solution for facilitating confidential communications.

A further question was posed about whether the network used in the Maricopa County jail would allow an inmate to appear by video-conference in a courtroom in another county. Mr. Hesse acknowledged that the county's network does not yet have that switching capability. The

sheriff's representative on the Committee added that the county's policy is to stay within the county's local network, and not expand a video-conference connection beyond that network. It was also noted that bandwidth issues may preclude the county going from the local network on to the statewide network.

The Chair thanked Mr. Hesse for his presentation.

**4. Continuation of the morning discussion regarding Rule 1.6.** The Chair inquired if the only issues before this Committee concerned paragraph (c) of the proposed amendment to Rule 1.6, and if paragraphs (a) and (b) of the current draft of Rule 1.6 were acceptable. There was general consensus among the members that this was the case.

The Chair then suggested as a place to resume this morning's discussion that the proposed rule provide that "appearances by interactive audiovisual device, including video-conference, shall be permitted with the discretion of the court in the following proceedings: initial appearances [which the Chair acknowledged was still at issue], not guilty arraignments, uncontested proceedings, and any other hearing with consent of all parties."

A member inquired if the video-conference proceedings at the jail would be in a central location, or whether they would take place at different pods throughout the jail. The member's concern, citing the Wisconsin study, was that if the proceedings took place in diverse jail settings, including inmates' housing units, that the dignity and formality of the proceeding might be compromised.

Judge Donahoe stated his concern about being too specific in identifying particular proceedings that may or may not be done by video-conference. He explained that pretrial conferences in the Maricopa County Superior Court are referred to as "IPTCs" (initial pretrial conferences), case management conferences, trial management conferences, or final trial management conferences. Other counties may use different names for pretrial conferences. Rule 1.6 may be unduly restrictive or cumbersome if it attempts to identify every includable or excludable event by its specific name.

Judge Donahoe also reasoned that an initial appearance is not an evidentiary hearing. Rather, he believes that it is an "informational" hearing, since there is no sworn testimony and no cross-examination. He suggested that rather than refer to "evidentiary" hearings in Rule 1.6, that the rule should have language that video-conferencing should not be done during proceedings in which a witness is sworn to testify and is subject to cross-examination. He further believes that changes of plea should not be done by video-conference.

During the ensuing discussion, members commented that:

- An initial appearance could not be a critical stage of the proceedings, because thirteen of Arizona's counties have no public defender at the initial appearance, and if it was a critical proceeding, the public defender would be present.

- Certain rural counties have multiple jails distant from a central courthouse, and consideration must be given to permitting initial appearances by video-conference for inmates in these remote locations, especially since the initial appearance must take place within 24 hours of the arrest.
- A judge's review of a Form 4 to make a probable cause determination at the initial appearance does not rise to the level of an evidentiary proceeding.
- A judge's reading of a Form 4 would not be affected by whether the proceeding was occurring live or by video-conference.
- An assessment of whether an arrestee has a serious mental illness ("SMI") cannot accurately be done by simply looking at them, and an evaluation of SMI during the initial appearance would not be different whether the proceeding was done by video or done live, especially because the hearing occurs in such a brief span of time.
- The speed of the initial appearance increases the mediocrity of the decisions made at the proceeding, and appearances by video-conference increases the mediocrity even more.
- The quality of decision making at the initial appearance is important not only to the arrested individuals, but it's also essential in protecting the public by not releasing individuals who may be dangerous to the community.

The volume of initial appearances was reflected in Judge Donahoe's data, which showed that between 36,000 and 40,000 felony cases were filed annually in Maricopa County during the most recent fiscal years.

Ms. Lutgring presented Pima County data, which indicated that since the public defender began appearing at the initial appearances, 1.4% of the cases were dismissed (following which inmates were released); an additional 3.5% of the inmates were released compared to when the public defender had not appeared; and that the resulting savings in reduced costs of incarceration were about \$2.6 million. The Chair responded that this data may have coincided with the use of a smaller group of judges at initial appearances in Pima County, who became more consistent in release decisions than the former, larger group, who only did these proceedings infrequently.

Mr. Mussman proposed that the members not decide what proceedings should or should not be done by video-conference without first determining minimum, non-technical standards necessary to assure a fair and dignified proceeding. The members agreed to defer this issue to the next Committee meeting, and Mr. Mussman will provide a list of proposed standards prior to that time.

**MOTION:** Ms. Cramer made a motion at this point to delete the words "evidentiary hearing" in the draft of proposed Rule 1.6 (c)(1), and to substitute the words "hearing at which a witness is placed under oath and providing an opportunity for cross-examination."

The motion was carried: 10-2-0. **CRVAC-09-003.**

**ACTION:** The Chair directed that the members consider at the next meeting:

- Whether changes of plea should be permitted by video-conference under Rule 1.6; and
- Whether members have any further proposed changes to the language of Rule 1.6.

**5. Call to the Public.** Dana Hlavac responded to the Chair's call to the public. Mr. Hlavac, who is the Mohave County Public Defender, reminded the members of a comment he had made during the initial meeting of this Committee: that there is a difference between cost savings and cost shifting. For example, if video appearances take place from the inmate's separate pods, this may reduce expenses for the sheriff, but it might also increase expenses for the public defender, who could be required to cover proceedings at multiple locations within the jail. Mr. Hlavac also cautioned against using video-conferencing under circumstances which might give rise to either subsequent petitions for post-conviction relief, or to claims of ineffective assistance of counsel. He suggested that prior to adopting video-conferencing on a statewide basis, the Committee recommend a pilot program for video-conferencing. He proposed that a pilot program include a reliable analysis of what the cost savings are county wide, rather than by agency.

The Chair thanked Mr. Hlavac for his comment, and expressed a possibility of including a rural county and an urban county in any proposal for a pilot program.

**6. Adjourn.** The meeting was adjourned at 2:15 p.m. The next meeting is scheduled for April 7, 2009, from 10:00 a.m. to 2:00 p.m., at the State Courts Building in Phoenix.

**ARIZONA SUPREME COURT  
CRIMINAL RULES VIDEO-CONFERENCE ADVISORY COMMITTEE  
MEETING MINUTES  
April 7, 2009**

Members Present:

Hon. Antonio Riojas, Chair  
Hon. Gary Donahoe  
Hon. K.C. Stanford  
Hon. Samuel Goodman  
Shelly Bacon, proxy for Deborah Schaefer  
Sally Wells  
Robert Hirsh  
Capt. Charles Johnson  
Bob James  
Jeremy Mussman

Guests and Presenters:

Robert McWhirter  
Theresa Barrett  
Dana Hlavac  
Dan Carrion  
Stewart Bruner

Guests and Presenters present by telephone:

Kent Sipe  
Hon. Randy Spaulding  
Jacob Lines

Member present by telephone:

Amelia Cramer

Members not Present:

Kent Batty  
Capt. Rodney Mayhew  
Terry Stewart

Staff: Patience Huntwork, Mark Meltzer, Lorraine Nevarez

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**1. Call to order.** The meeting was called to order at 10:00 a.m. The Chair introduced Ms. Bacon, proxy for Ms. Schaefer. The draft minutes of the March 4, 2009, meeting were approved without revisions.

Ms. Huntwork brought to the attention of the members a decision of the United States Supreme Court, *Corley v United States*, which was decided on April 6, 2009.

**2. Meeting summary.** Throughout the April 7, 2009, meeting, the members discussed written variations of proposed amendments to Rule 1.6. One version was submitted by Judge Donahoe, a second was proposed by Mr. Hirsh and Mr. Mussman, and a third was prepared by Committee staff. An additional version included in R-06-0016 was also considered. The members also heard a live presentation from Mr. Robert McWhirter, as well as telephonic presentations from Montana Judge Randy Spaulding and Mr. Kent Sipe.

**3. Presentation by Mr. McWhirter.** Mr. McWhirter is an attorney with the Maricopa County Legal Defender. He is the current president of the Arizona Attorneys for Criminal Justice. Mr. McWhirter is also an author and scholar, and he is presently writing a book on the history of the Bill of Rights.

Mr. McWhirter noted that he was counsel for the defendant in the case of *United States v Valenzuela-Gonzales*, 915 F2d 1276 (9<sup>th</sup> Circ, 1990). In this case, arising out of the District of Arizona, use of a video-conference in the trial court for arraignment was struck down as a violation of Rule 43 of the Federal Rules of Criminal Procedure.

Mr. McWhirter advised that the criminal rules of procedure are intended to provide a defendant with a means of adequately defending himself, including apprising him of the nature of the charge against him. It was Mr. McWhirter's opinion that the protections afforded by the court's criminal rules of procedure are even broader than those provided under the federal constitution. He submitted that insight into the protections of the criminal rules can be derived from examining the criminal practices of colonial America and late 18<sup>th</sup> century England.

Mr. McWhirter also noted that under old English common law, the prosecution's burden of proof was "beyond any doubt". Following trials arising from the Boston Massacre, the burden of proof was reduced to proof "beyond a reasonable doubt". To offset the prosecution's lesser burden of proof, the defendant was provided with additional rights, including the right to counsel (which was characterized as the most pervasive right under our adversarial system), the right to be informed of the charge, and, as set out in the Virginia Declaration of Rights, the right to confront witnesses. Mr. McWhirter pointed out that state constitutions, notably the Virginia Declaration of Rights and the Massachusetts constitution, preceded the federal constitution. Particular rights afforded by the states were incorporated within the fifth and sixth amendments of the federal Bill of Rights. These rights are inter-connected.

Mr. McWhirter briefly explained that the concept of a confrontation right goes back to Roman and canon law. Mr. McWhirter maintained that Arizona's constitution, and Article II, section 24 in particular, provides even broader confrontation protections than the federal constitution (i.e., the sixth amendment right of a defendant "to be confronted with the witnesses against him", versus the right of the defendant under Arizona's constitution to "meet the witnesses against him face to face...." Mr. McWhirter cited Arizona decisions, including *State v Levato*, as supporting his interpretation. He added that a challenge arising under a confrontation clause might be stronger on the basis of the Arizona constitution and common law, than it could be under the federal constitution.

The Chair and the members thanked Mr. McWhirter for his presentation.

**4. Montana's video system.** The State of Montana has recently implemented a statewide video system for use in criminal and other cases. Article II, section 24, of Montana's constitution is identical to the Arizona constitutional provision of the same number. Presentations were made to the Committee by Kent Sipe and Judge Randy Spaulding. Mr. Sipe is a county attorney, and was formerly with the Montana Administrative Office of the Courts, where he was instrumental in establishing the state's video network. Judge Spaulding is a judge of a general jurisdiction court in Montana. Mr. Doug Day, a public defender, had been on the agenda, but had a last-minute conflict that precluded him from addressing the Committee.

Mr. Sipe advised that Montana statutes establish the permitted uses of video. Mr. Sipe stated that his office processes about 50-60 felony cases annually. It utilizes the video system several times a week. The system has been used to conduct initial appearances, bail hearings, changes of pleas, and sentencing. Some witness testimony has also been taken by video. He mentioned one case where a witness left the state to avoid testimony. The witness was located out-of-state, and his testimony was taken by video. The case is presently on appeal on this issue.

Mr. Sipe believes that a Montana defendant has no right to be personally present during procedural matters, but that a defendant has a right to be present during substantive proceedings. He nevertheless takes the position that if a defendant makes a request to be personally present, that request should be granted. He did, however, give an example of one case where he objected to the defendant being present. The defendant in that case was going to have an initial appearance for a probation revocation, and the defendant had health issues; and although the defendant wanted to personally appear, to do so would have required a trip of several hundred miles in an ambulance. Mr. Sipe added that the defense attorney must be present with his client during a video proceeding, but the client can waive this requirement.

On other issues, Mr. Sipe stated that the public and media have access to a video proceeding through a large monitor that is placed in the courtroom. The defendant typically is able to see the judge and defense counsel, but if other people are speaking in the courtroom, they must move to be within view of the camera. In those situations where defense counsel is in court, and the client is in jail, confidential communications are usually done by the judge clearing the courtroom of everyone except defendant's attorney. Montana has considered having a direct phone line for confidential communications, but this has not yet been adopted. There are no standards for the appearance of the room where the defendant is present during a video, but videos are not done from jail pods. There is no streaming video in Montana by which victims can watch proceedings remotely.

When asked what he would have done differently, Mr. Sipe mentioned two items. (1) Use high definition monitors. He believes that while there is superior imaging with high definition, the current cost is close to what Montana paid for conventional monitors. (2) Co-ordinate implementation of the system. Montana has 56 counties, and a great deal of co-ordination was necessary. Mr. Sipe added that although Montana has done surveys on cost avoidance using video, the responses were subjective and some responses may have included items where costs were merely shifted.

Judge Spaulding presented after Mr. Sipe. He shared Mr. Sipe's belief that especially in felony cases, if a defendant objects to a video-conference, his personal presence should be allowed. He uses video for "ministerial" types of hearings. He is reluctant to use video for any proceeding that is significant.

There are few interpreters required in Montana proceedings, but those that are needed appear in the courtroom. Judge Spaulding uses the method of calling a recess and clearing the courtroom if a confidential conference between client and counsel is requested. Microphones are positioned around the courtroom, and the camera focuses on the speaker. Judge Spaulding occasionally operates the video equipment himself. There are few technical problems, and most of the

technical issues were encountered during initial use of the system. Judge Spaulding stated that judicial training on using the system was lacking.

Judge Spaulding stated that video conferences have saved him considerable travel time. Montana judges would like to have more video units and an opportunity to do more proceedings by video. He reiterated that a defendant should have a right to be personally present if he chooses.

The Chair thanked Mr. Sipe and Judge Spaulding for sharing their information and experience with the Committee.

**4. Discussion of draft versions of Rule 1.6.** The members discussed sections of the draft versions of Rule 1.6. The Chair guided the discussion, beginning with the title of the rule.

The rule is currently titled “Interactive audio and audiovisual devices”. A suggestion was made that the words “and audio” were superfluous.

**MOTION:** The words “and audio” should be deleted in the title of Rule 1.6.

The motion was carried. CRVAC 09-004

**MOTION:** A motion was then made to adopt paragraph (a) of Judge Donahoe’s proposed version of Rule 1.6. This version includes the current language of Rule 1.6, and adds the following sentence: “Any interactive audiovisual device must meet or exceed minimum technical specifications adopted by the Arizona Supreme Court.”

The motion was carried. CRVAC 09-005

After discussion, the members rejected that portion of paragraph (a) of staff’s version of Rule 1.6 which stated: “A proceeding that is conducted by the use of video-conferencing pursuant to this rule is considered to be done in open court.” It was the consensus of the members that this language was unnecessary.

Discussion turned to paragraph (b) of Rule 1.6

**MOTION:** A motion was made to adopt staff’s version whereby the words “all of” were added to the opening sentence of paragraph (b), [so that it reads: “In utilizing an interactive audiovisual device all of the following are required...;”] and that the word “and”, which repeatedly follows each of the multiple requirements of paragraph (b), be deleted.

The motion was carried. CRVAC 09-006

The members then focused on proposed versions of sub-paragraph (b)(2), and specifically whether the word “and following” should be included [so that the sub-paragraph would read: “Provisions shall be made to allow for confidential communications between the defendant and counsel prior to, during, and following the proceeding.”]

**MOTION:** A motion was made to amend sub-paragraph (b)(2) to include the concept of “following”, but with simpler language throughout, so that it would state: “Provisions shall be made to allow for confidential communications between the defendant and counsel before, during, and after the proceeding.”

In discussing this motion, the members inquired about the method that would be used for confidential communications. Currently, there is no means in Maricopa or Pima counties for confidential communications between a defendant who is in jail and counsel who may be in the courtroom. (Maricopa County will provide a method for confidential communications when a project which is under construction has been completed.) The consensus of the members was that this should be addressed by the technical specifications which will be adopted by the A.O.C. Technology may change over time, and these standards should be reviewed periodically. Caution was also expressed that confidential communications which exist under the video-conferencing rule need not be broader or more burdensome than what exists in person, i.e., that technology should not provide more confidentiality than ordinary attorney-client conversations.

Note that the members requested that a comment should be submitted with this proposed change to sub-paragraph (b)(2), advising that communications between defendant and counsel after the proceeding should not unnecessarily delay the proceeding. The members would also like the comment to express that confidential communications are a critical part of the video-conferencing process, and whatever technical standards are eventually adopted by the Supreme Court should consider input from the various stakeholders.

The motion was carried. CRVAC 09-007

The Committee looked next at proposed sub-paragraph (b)(3).

**MOTION:** A motion was made to add the words “to participate in”, so that sub-paragraph (b)(3) would state: “Provisions shall be made to allow a victim a means to view and to participate in the proceedings.”

One member expressed the view that the words “to participate in” were already included within the purview of proposed sub-paragraph (b)(4), and that adding these words in sub-paragraph (b)(3) would be redundant.

The motion was carried: 10-1-0. CRVAC 09-008

**MOTION:** A motion was then made to re-affirm the language of existing sub-paragraph (b)(5), which would be re-numbered as sub-paragraph (b)(4). [The sub-paragraph states: “Provisions shall be made to ensure compliance with all victims’ rights laws.”]

The motion was carried. CRVAC 09-009

**MOTION:** This was followed by a motion to add a new sub-paragraph (b)(5), which would state: “Provisions should be made for the public to have a means to view the proceedings, as provided by law.”

The motion was carried. CRVAC 09-010

In the afternoon, the members proceeded to discuss paragraph (c) of Rule 1.6. During the course of this discussion, there was no agreement by motion as to any provision in the various drafts of paragraph (c). The following comments were noted:

- What happens when the parties stipulate to proceed by video-conference, but a victim objects?
- The rule should combine staff’s proposed sub-paragraph (c)(4) with existing sub-paragraph (b)(2) so that the rule would provide: “Notwithstanding any other provision of this Rule 1.6, the parties may agree by written stipulation or upon the record in open court to conduct a proceeding with the defendant appearing by video-conference. The court shall determine that the defendant knowingly, intelligently, and voluntarily agrees to appear at the proceeding by an interactive audiovisual device.”
- Upon stipulation of the parties, a misdemeanor change of plea, a misdemeanor trial, or a misdemeanor sentencing may proceed by video-conference. (Query: How is a fingerprint obtained on a judgment of conviction if sentencing is done by video-conference?)
- A felony trial or probation violation hearing should not be done by video, even if the parties stipulate to proceed by video.
- Rule 1.6 should provide that felony sentencing and felony trials are excluded from the scope of the rule at all times. The rule should also state what proceedings can be done by video-conference.
- The rule should state which proceedings may be done by video in the court’s discretion, what proceedings can be done by video upon stipulation, and what proceedings should be excluded from video-conferences.
- Where would release hearings fall in the above classifications? Does *Corley v United States* impact the opportunity to do initial appearances, and release determinations in particular, by video?
- The rule should have these classifications: video-conferences allowed in the discretion of the court, and without defendant’s consent; videos allowed by stipulation, and with the court’s consent and upon a finding of an intelligent waiver by the defendant; and proceedings which are excluded from video-conferencing at all times (such as felony sentencing and trials), absent extraordinary circumstances.

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- The foregoing proposal should substitute “compelling circumstances” for “extraordinary circumstances.”
- Any proceedings in limited jurisdiction courts should be done by video upon stipulation of the parties and with court approval.
- Release hearings at initial appearances could be done in person if the defendant objects to proceeding by video-conference.
- Video-conferences at initial appearances should be tried on a pilot basis.
- Should defense counsel be in the courtroom or in the jail during a video-conference?

A proposal was made that when a recommended rule is submitted to the Arizona Judicial Council, that it have a majority version followed by a minority version in brackets, so that the Council could select either version. A member noted in response that the rules of this Committee provide for making decisions by a majority vote, and that the majority version alone should be presented by the Committee to the A.J.C.

**ACTION:** The Chair directed that the members consider at the next meeting these various proposals and suggestions regarding Rule 1.6 paragraph (c). Staff was directed to furnish versions which could be projected on a screen for discussion at the May 1, 2009, meeting.

**5. Call to the Public.** There was no response to the call to the public.

**6. Adjourn.** The meeting was adjourned at 1:50 p.m. The next meeting is scheduled for May 1, 2009, from 10:00 a.m. to 2:00 p.m., at the State Courts Building in Phoenix.

**ARIZONA SUPREME COURT  
CRIMINAL RULES VIDEO-CONFERENCE ADVISORY COMMITTEE  
MEETING MINUTES  
May 1, 2009**

Members Present:

Hon. Antonio Riojas, Chair  
Hon. Gary Donahoe  
Hon. K.C. Stanford  
Hon. Samuel Goodman  
Amelia Cramer  
Sally Wells  
Robert Hirsh  
Capt. Charles Johnson  
Bob James  
Jeremy Mussman  
Kent Batty  
Deborah Schaefer  
Capt. Rodney Mayhew

Guests:

Stewart Bruner  
Theresa Barrett

Members not Present:

Terry Stewart

Staff: Patience Huntwork, Mark Meltzer, Lorraine Nevarez

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**1. Call to order.** The meeting was called to order at 10:00 a.m. The draft minutes of the April 7, 2009, meeting were unanimously approved.

**2. Meeting summary.** This meeting focused on adopting amendments to Rule 1.6 that the Committee will recommend to the Arizona Judicial Council. Mr. Mussman and Judge Donahoe submitted separate proposals for amending Rule 1.6, and staff provided a set of “best practices”, which were considered by the members at this meeting.

**3. Mr. Mussman’s proposed version of Rule 1.6.** Mr. Mussman introduced the features of his draft proposal:

- Interpreters would be required to be at the defendant’s location.
- The proposal enumerated specific proceedings where the court had discretion to utilize video-conferences. Mr. Mussman believed that his proposed version of Rule 1.6 followed the directive of A.O. 2008-92 to make recommendations concerning “the types

of proceedings for which video-conferencing could be utilized”. His proposed version would permit the court to exercise discretion in using video-conferences for arraignments and similar “housekeeping” matters such as omnibus hearings, informal conferences under Rule 32.7, and pretrial conferences and motions to continue where time is not waived.

- Other proceedings could be done under this version by stipulation. Mr. Mussman’s view was that if the video-conference was done appropriately, that the defendant would probably agree to it, but that the defendant should have a choice on the matter. He believed that if the defendant was required to appear by video-conference, it might adversely impact the attorney-client relationship.
- Video-conferences could also be done on a finding of “compelling circumstances”, for instance, where a defendant is out-of-state or has a communicable disease.
- If the scope of a video-conference “expanded”, the court could require the defendant’s personal appearance.
- Mr. Mussman characterized the “best practices” as “aspirational”, and cautioned that if these were not required, they would not be done. He proposed changing these to standards, and making them mandatory.
- Mr. Mussman believed that the Sixth Circuit opinion of *Terrell v USA* was significant because it relied on decisions of the U.S. Supreme Court for principals of statutory interpretation.

Members made the following responsive comments:

- The language in Judge Donahoe’s version (“except as provided by law”), addresses the *Terrell* issue by deferring to the legislature any requirements the legislature may impose regarding personal appearances in criminal proceedings.
- The U.S. Supreme Court has not yet established whether an initial appearance can be done by video-conference under the federal constitution, and this determination would transcend any Arizona legislation on the issue.
- The language in A.O. 2008-92 about the “types of proceedings” would allow for generic rather than specific identification of types of proceedings.
- The attorney-client relationship is fostered by out-of-court contacts.
- Remote interpreters work well. One Florida circuit court has a program which uses them routinely.
- The law does not require an in-person appearance to waive time.

**4. Judge Donahoe's proposed version of Rule 1.6.** Judge Donahoe discussed features of his proposed version and distinguished those from Mr. Mussman's:

- Best practices or standards would be deferred to the AOC.
- Felony trials and felony sentencing are excluded from the scope of his proposal. A felony change of plea would require a stipulation if it is going to be done by video.
- Initial appearances and arraignments may be done by video-conferencing.
- A "laundry list" of proceedings that may be done by video-conferencing would be problematic, because these are commonly known by different names in various courts. It is preferable to give courts broad discretion in deciding which proceedings should be done by video. The rule is not mandatory; it gives local courts discretion to not utilize video.
- The hearing in Terrell, if it had been conducted under this proposed version of the rule, would have required a stipulation, because witness testimony would have been taken. In any event, Terrell is not binding on Arizona courts, and it's inconsistent with decisions in other states which this committee has considered.

Member comments included the following:

- Under Judge Donahoe's version, the confrontation and due process requirements appear to be satisfied for initial appearances. There is no compelling argument that a defendant's constitutional rights would be infringed, nor that any injustice would result.
- The phrase "taken before a magistrate" in Arizona statutes, unlike the language in Terrell, may have ambiguity.
- There is no Arizona case law on the constitutionality of video-conferencing, but no one can say that a defendant's rights would not be impacted under Judge Donahoe's proposed rule. Lawyers making arguments from a jail will be at a disadvantage with lawyers appearing in the courtroom.
- Arizona's rule goes beyond rules adopted by other states. Many more proceedings are going to be done by video solely for expediency and cost savings.
- Wisconsin's use of video is broader than what is being proposed by Judge Donahoe.

Judge Donahoe reminded the members that under his proposed rule, every judicial officer will have discretion to determine if video is appropriate, or if prejudice might result. The proceedings which defense counsel are objecting to (such as a voluntariness hearing, a motion to suppress, or a probation violation hearing, are witness-based, and therefore could only be conducted by video with a stipulation from the defendant. Rule 11 hearings typically involve stipulations to submit the mental health issue on written reports, but if there is a hearing at which

a witness will testify, the defendant will have the options of stipulating to video or appearing in person.

A suggestion was made that if Judge Donahoe's version was adopted, there will be numerous legal challenges. The broader consensus was that either Mr. Mussman's version or Judge Donahoe's version would probably be challenged, but no one can say which would be challenged more than the other.

**MOTION:** A motion was made to adopt Judge Donahoe's version, without prejudice to further amend that version.

The motion was seconded and carried: 11-2-0. CRVAC 09-011

The Committee stood in recess for ten minutes.

A series of motions to amend Judge Donahoe's version were made. The members discussed each motion that was made, and then voted on the motion.

**MOTION:** The words "any misdemeanor trial" should be inserted in paragraph D prior to the words "any felony change of plea". This would allow many low level misdemeanors to be done by video upon stipulation of the parties.

The motion was seconded and carried. 11-2-0: CRVAC 09-012

**MOTION:** A new provision, sub-paragraph (6), should be added to paragraph B. This new provision would state: "Provision shall be made for the use of interpreter services when necessary." This provision would not need to detail specific provisions, such as where the interpreter should physically be present. Rather, the intent is to require the court to consider and to address issues that might arise when an interpreter is utilized in a video-conference proceeding. Ms. Schaefer noted that foreign language interpreters in Yavapai County occasionally appear via telephone, and that sign language interpreters are usually outside the county and their needs require consideration for video appearances.

The motion was seconded and carried: 11-2-0. CRVAC 09-013

**MOTION:** Felony probation revocation hearings and felony disposition proceedings should be excluded proceedings under paragraph C, because these are equivalent to felony trials and sentencing.

The motion was seconded and carried: 9-4-0 CRVAC 09-014

Note: After the lunch recess, a request was made to substitute the word "violation" for "revocation" on the foregoing motion. The members unanimously consented to this request.

**MOTION:** The language in paragraph (b) (1) of the proposed version, which requires that a full record of the proceedings should be made "as provided in applicable statutes and rules" (this is

also the wording of the current version of Rule 1.6), should be changed to “when required by law”. The motion was not seconded.

**MOTION:** The wording in paragraph (b)(2), regarding “confidential communications between the defendant and counsel”, should be changed to “confidential communications between the defendant and defendant’s counsel”. This would clarify that a defendant may have a confidential communication with his or her own counsel, but not other counsel.

The motion was carried unanimously. CRVAC 09-015

**MOTION:** The words “including video conferencing equipment” at the end of the first sentence of paragraph (a) of Judge Donahoe’s version should be deleted. These words are also in the current version of Rule 1.6. The words are considered unnecessary and, in anticipation of future changes in technology, restrictive.

The motion was carried unanimously. CRVAC 09-016

**MOTION:** In the last sentence of paragraph (d) regarding stipulated proceedings, within the phrase “before accepting the stipulation, the court shall determine...”, the word “determine” should be changed to “find”. This would be consistent with other verbiage in the proposed rule.

The motion was carried unanimously. CRVAC 09-017

A suggestion was made that comments submitted with versions of the Rule 1.6 be edited at this time. After discussion, the Committee agreed that drafting comments to the rules should be deferred until after presentations to Committee on Superior Court (on May 15), and to the Committee on Limited Jurisdiction Courts (on May 20).

**MOTION:** In paragraph (c), after the words “Except upon the court finding extraordinary circumstances...,” the words “and a knowing and intelligent waiver” should be added. The members discussed application of this paragraph to include circumstances such as a defendant’s illness, or a defendant’s refusal to go to a court proceeding. Some members expressed that a finding of extraordinary circumstances made a waiver unnecessary.

The motion failed: 2-11-0. CRVAC 09-018

The discussion then turned to the document entitled “best practices”. The members considered changing the requirement in paragraph (a) regarding “minimum technical standards” to “best practices”. It was also questioned if “best practices” were adopted, what the process would be for changing them. At 12:05 p.m., the members took a forty minute recess for lunch. After lunch, additional amendments to Judge Donahoe’s draft version were proposed.

**MOTION:** The second sentence of paragraph (a) [requiring that the parties be able to “view and converse with each other simultaneously”] should be cut from paragraph (a) and inserted as the first requirement of paragraph (b).

The motion was seconded and passed unanimously. CRVAC 09-019

**MOTION:** The last sentence of paragraph (a) [regarding minimum technical specifications adopted by the AOC] should be stricken. This was a continuation of the discussion that had begun just before the lunch recess.

Mr. Bruner, from the Information Technology Division of the AOC, advised the members that while his best estimate of the time requiring for adopting technical standards was about one year, that there was a possibility that standards could be crafted within the next eight months, that is, by January 1, 2010. Ms. Huntwork informed the members that the status of Rule 1.6, and the work of this Committee, would probably be on the Supreme Court's rules agenda in September, 2009. The members discussed whether technical specifications should be adopted, and if so, then who should prepare them, inasmuch as the members stated that they were not qualified to draft technical specifications. The members agreed that what they had intended would be more accurately characterized as "operational guidelines" than as technical standards. Any guidelines would be applicable to all courthouses and jails, regardless of their physical characteristics and their degree of modernization. The guidelines should take into consideration the budgetary limitations of many jurisdictions, and therefore these guidelines should not be financially burdensome.

Note: The previous motion would be deemed amended. In lieu of striking the last sentence of paragraph (a), it would remain in place, but it would state as follows: "Any interactive audiovisual device must meet or exceed the minimum operational guidelines adopted by the Administrative Office of the Courts."

The motion as amended was seconded and passed unanimously. CRVAC 09-020

**MOTION:** The word "device" used throughout the proposed rule should be changed to the word "system". The interactive audiovisual equipment used by the courts is typically a "system" rather than a single "device".

The motion was seconded and passed unanimously. CRVAC 09-021

Consideration was briefly given to a proposal in staff's draft of Rule 1.6 concerning the testimony of a witness via video-conference. The members believed that this was beyond the scope of this Committee's charge, as set out in A.O. 2008-92, and the proposal was not considered further.

**ACTION:** At this point, the members agreed that a workgroup would be formed to draft proposed "operational guidelines", using staff's "best practices" document as a starting point. Ms. Cramer, Capt. Johnson, Mr. James, Mr. Mussman, and Ms. Schaefer offered to serve on the workgroup. Committee staff will coordinate members' schedules to determine a meeting date.

The Chair will present the proposed Rule 1.6 in the form agreed to by the Committee to COSC on May 15, and to the LJC on May 20, to seek their comments and recommendations.

**5. Call to the Public.** There was no response to the call to the public.

**6. Adjourn.** The meeting was adjourned at 1:35 p.m. The next meeting is scheduled for Friday, May 29, 2009, from 1:00 p.m. to 4:30 p.m., at the State Courts Building in Phoenix. This meeting is intended to address any comments and recommendations which may be received concerning the draft of Rule 1.6. The meeting will also allow for discussion and revision of a draft report on the work of this Committee.

**ARIZONA SUPREME COURT  
CRIMINAL RULES VIDEO-CONFERENCE ADVISORY COMMITTEE (CRVAC)  
MEETING MINUTES  
May 29, 2009**

Members Present:

Hon. Antonio Riojas, Chair  
Paula Collins, as proxy for Hon. Gary Donahoe  
Hon. Samuel Goodman  
Amelia Cramer  
Sally Wells  
Robert Hirsh  
Capt. Charles Johnson  
Bob James  
Jeremy Mussman  
Deborah Schaefer

Members Present by Telephone:

Hon. K.C. Stanford  
Kent Batty

Members not Present:

Capt. Rodney Mayhew  
Terry Stewart

Guests:

Theresa Barrett

Staff: Patience Huntwork, Mark Meltzer, Tama Reily

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**1. Call to order.** The meeting was called to order at 1:05 p.m. The Chair introduced Paula Collins as the proxy for Judge Donahoe.

Draft minutes of the May 1, 2009, meeting were presented for approval. Mr. Mussman proposed two changes to the draft minutes, which were agreed to by the members, and with these revisions, the draft minutes were unanimously approved.

**2. Discussion of the presentations to the standing committees.** This meeting then proceeded to a discussion regarding the presentations made of the CRVAC majority and minority proposals for amending Rule 1.6 to the Committee on Superior Court, on May 15, 2009, and to the Committee on Limited Jurisdiction Courts, on May 20, 2009. Votes taken at these two meetings resulted in a lack of support by these Arizona Judicial Council (AJC) standing committees for the CRVAC majority proposal to amend Rule 1.6.

The Chair and Mr. Mussman made the presentations to the Committee on Superior Court (COSC). The Chair noted that COSC was concerned about the lack of operational guidelines for the proposed majority version. Mr. Mussman added that COSC objected to the scope of video proceedings that were permitted under the proposed “majority” rule; to a lack of definitions; and to the court conducting a video proceeding notwithstanding a defendant’s lack of consent.

The Chair, Mr. Mussman, and Judge Goodman, who along with Judge Donahoe made presentations to the Committee on Limited Jurisdiction Courts (LJC), then reported on their presentations to the LJC. The LJC was concerned about the differences between the majority version of Rule 1.6 and the rule proposal in R-06-0016, and the lack of public comment on the new proposal. The LJC also had concerns about the differences in treatment between felonies

and misdemeanors under the proposed rule. The LJC considered these differences to be a “glaring problem”.

The Chair advised the members that following the comments from these standing committees, he directed staff to prepare a new proposal for amendments to Rule 1.6. The new proposal was then circulated among the members and discussed. Staff noted that in order for any CRVAC recommendations to be considered by the AJC at its June 17, 2009, meeting, staff would have to receive CRVAC’s written recommendations by June 3, 2009.

**3. Discussion on the new proposed version of Rule 1.6.** The following comments were made by the members regarding the new proposed version of amendments to Rule 1.6:

- The public defender members had no objection to initial appearances under Rule 4.2 being done by video-conference, except for the bail portion of the proceeding. It was the defenders’ belief that a proceeding which determines conditions of release should be conducted with the accused personally present in the courtroom, and that it should not be done by video-conference.
- Paragraph titles in the new proposed version should be modified.

At this point, the new proposed version in Word format was projected on to a screen. While the proposed rule was in full view of the members, revisions were made to the title of paragraphs (c), (d), and (e), and to the body of these paragraphs. The titles of these three paragraphs were changed to: “(c) Proceedings Excluded Absent Extraordinary Circumstances and Parties’ Consent”, “(d) Proceedings Allowed in Sole Discretion of the Court”, and “(e) Proceedings Allowed upon Stipulation”. During the course of the meeting, updated drafts of the rule and code section under discussion were continually emailed to the members who were present by telephone.

**MOTION:** A motion was made to adopt the newly proposed version of Rule 1.6, as revised by the members.

The motion was seconded and carried: 9-2-0. CRVAC 09-022. [The Chair did not vote.]

The public defender members of the Committee requested that the proposed rule delete initial appearances from the proceedings identified in paragraph (d).

**MOTION:** That initial appearances be deleted from the enumerated proceedings allowed in the sole discretion of the court under paragraph (d).

The motion was seconded but failed to carry: 2-9-0. CRVAC 09-023. [The Chair did not vote.]

Following the motion, Ms. Wells left the meeting, and Ms. Cramer arrived at the meeting.

**4. Discussion on the proposed section of the Arizona Code of Judicial Administration.**

Next, the members reviewed the proposed section of the ACJA concerning interactive audiovisual proceedings. The proposed section contained technical requirements, operational requirements, and recommended practices for video-conferencing.

A discussion ensued on whether this Committee, or members of the criminal defense bar, will have an opportunity to review the standards which the Commission on Technology (COT) is required to promulgate under the provisions of the proposed code section. It was noted that the Technical Advisory Committee (TAC) will probably be delegated responsibility by COT for creating the video standards; and that under existing ACJA section 1-109, advisory committees may be created to assist TAC. It was further noted that the Vice Chief Justice of the Supreme Court chairs COT; and that under section 1-109, COT meetings are noticed and open to the public.

A recommendation was made that the minimum standards which are adopted by COT should appear in the code section before rather than after the local court policies which are required for individual jurisdictions.

**MOTION:** That the paragraphs in the sub-section of the proposed ACJA section dealing with technical requirements be re-ordered so that COT's minimum standards are first, followed by the local court policies.

The motion was seconded and carried unanimously. CRVAC 09-024.

**5. Discussion on the draft Committee report to the AJC.** The members proceeded to discuss the draft Committee report to the AJC. A member requested that case law from other jurisdictions which supported the use of video-conferencing in criminal cases be included in the body of the report. Staff then presented an alternative version of the draft Committee report which contained a new Part II, section 6, entitled "Case Law from Other Jurisdictions". This section recited portions of opinions from Illinois, Kentucky, New Hampshire, Pennsylvania, and Florida which had been discussed at previous meetings of the Committee. With approval of the members present, this new section 6 was added to the draft report.

An issue was also raised about whether it was appropriate to include the Arizona decision of State v Schackart in the report, inasmuch as this did not deal directly with video-conferencing. Staff explained that Arizona lacked case law on video-conferencing, but that Schackart was predicate case law on the issue of the right of a defendant to be present in the courtroom, and accordingly, the reference to Schackart remained in the report.

**ACTION:** The members requested that staff email them copies of the versions of the proposed rule and code section agreed to by the members this afternoon. Staff confirmed that this would be done following the conclusion of today's meeting. Staff also advised that he would circulate a revised version of the draft Committee report over the upcoming weekend so that it could be reviewed in its final form prior to submission to AJC staff on June 3, 2009.

**6. Call to the Public; Adjourn.** There was no response to the call to the public. The meeting was adjourned at 3:55 p.m. No further meetings are scheduled at this time. However, a future meeting may be scheduled if appropriate and according to the agendas and actions of the Arizona Judicial Council and the Arizona Supreme Court.

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