

**ARIZONA SUPREME COURT**  
*Committee on the Impact of Wireless Mobile Technologies and Social Media*  
*on Court Proceedings*

Minutes  
 April 6, 2012

Members present:

Hon. Robert Brutinel, Chair  
 Hon. Janet Barton  
 Hon. James Conlogue  
 Hon. Dan Dodge  
 Hon. Margaret Downie  
 Hon. Michael Jeanes,  
     by Chris Kelly, proxy  
 Hon. Eric Jeffery  
 Hon. Scott Rash

Members present (cont'd):

Karen Arra  
 David Bodney  
 Joe Kanefield  
 Robert Lawless  
 Robin Phillips  
 Marla Randall  
 George Riemer

Members not present:

Kathy Pollard

Guests:

Jennifer Liewer  
 Cindy Trimble  
 Theresa Barrett  
 Alicia Moffatt

Staff:

Mark Meltzer  
 Ashley Dammen  
 Julie Graber

**1. Call to Order; welcome by the Chair; introductions.** The Chair called the first meeting of this Committee to order at 10:05 a.m. The Chair welcomed the members and thanked them for their participation. He noted that the Committee would review issues, including jurors' access to materials that are not in evidence and the presence of cameras in the courtroom, which are not unprecedented but that are again timely because of the development of widespread wireless internet access and ubiquitous video recording devices. The Chair then asked the members to review proposed rules for conducting Committee business.

**Motion:** A motion was made and seconded that the proposed rules for conducting Committee business be adopted, and the motion carried unanimously. **Wireless 12-001**

The Chair provided an outline of Administrative Order 2012-22. The Chair added that the Chief Justice appreciates the members' interest in addressing the innovative subjects before this Committee. The Chair noted that the Committee is required to submit a report of its recommendations to the Arizona Judicial Council by November 30, 2012. The Chair briefly summarized his judicial service for the members, and each of the members, staff, and others in attendance introduced themselves.

**2. Overview of wireless mobile technology and social media.** The Chair then invited Jennifer Liewer, the Supreme Court's public information officer, to address the Committee.

Ms. Liewer emphasized the goals of achieving justice in court and protecting the integrity of the judicial process during what has been called a "social media revolution." She proceeded to play a YouTube video with that title. The video stressed a fundamental shift over the past decade in the way people communicate because of the new social media. The shift occurred with the

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introduction of i-Pods (2001), Facebook (2004), YouTube (2005), Twitter (2006), i-Phones and Kindles (2007), and i-Pads (2010). This technology has allowed a number of bulky items (such as a telephone, a computer, and audio and video players) to be combined into a single, compact device. Many of these devices also have the capacity to take high quality photographs and digital videos.

The most popular social media sites are free of charge, open rather than private, and vast. Ms. Liewer noted that on Twitter, the quality of the content can be more significant than the initial number of followers, and a single tweet can result in quick and global distribution of a popular message or photograph.

Ms. Liewer outlined positive changes brought about by the new technology and social media. The new devices eliminate the need for litigants to take boxes of paper to the courthouse. Jurors can continue to stay in touch with home and work during jury service. Judges now use i-Pads to review briefs and court records. A recent attorney discipline hearing in Arizona was streamed live on-line to 14,000 viewers, and many followed live tweets of the proceeding from a reporter in the hearing room. A Pima County judge recently allowed a political action group, pursuant to Supreme Court Rule 122, to make a video of a court proceeding for posting on YouTube.

There are also negative implications arising from the use of new technology. Citizen journalists in the courtroom may not accurately report the proceeding. Although Ms. Liewer noted studies have indicated jurors will follow applicable rules when given proper instructions, access by jurors to outside sources of information or opinions may continue to interfere with case outcomes. In response to a question, Ms. Liewer stated that rather than being overwhelming, the variety of new media allows her to better manage time and to stay more engaged with others, and that her use of the new media has become second nature.

Ms. Liewer concluded by noting a risk of inaction. She said that social media is here to stay, and courts must consider and manage its impact on judicial proceedings.

**3. Roundtable discussion of member experiences with new technology.** Ms. Arra, the Public Information Officer for the Maricopa County Superior Court, stated that the new technology has allowed her to provide increased amounts of information about judicial rulings and court activity to large numbers of media and citizens who are not physically present in the courthouse. She provides breaking news in high profile cases on Twitter, and detailed information on programs such as specialty courts on Facebook. Ms. Arra said that the public now has an expectation that she will cover more rather than just a few courtrooms, and provide even more public relations information. Providing content will continue to take more of her time because individual judges do not post or tweet on the court's social media sites, but instead route public information through her office.

One trial judge said that reporters may tweet from her courtroom, and that she has experienced very few problems with the professional media. She noted that the press has an interest in following court rules because they will repeatedly return to the courthouse. Individuals, on the

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other hand, usually are in the courthouse concerning a single case and are less interested in abiding by the rules. Her court deputy has made her aware that some court visitors have taken photographs in court, and she has requested that a visitor delete a photo on at least one occasion. She is concerned about clandestine audio recording of court proceedings, which may be difficult to detect. She shared an experience about a juror who brought a dictionary into the courtroom so she could correctly spell technical terms in her notes of trial testimony. She requests court visitors to turn off their cell phones in the courtroom, but this is to avoid disruption rather than to prevent messaging.

Another judge mentioned that in a case involving gang violence, she ordered that a friend of the defendant stop taking photos of prospective jurors, and the defendant later claimed on appeal that this order caused jurors to be biased. Another member related that a family member took a photograph of a defendant in a jail uniform; a judge ordered deletion of this photo. It is challenging to determine if members of the public are taking photographs in courtrooms where there may be less security, or in any crowded courtroom.

On the subject of social media, a judge mentioned a post-trial motion that contended a juror was untruthful during voir dire based on information counsel later observed on Facebook. Another judge mentioned that he spends considerable time during voir dire on the subject of internet use by jurors; he has excused jurors who have stated that they would prefer on-line information over evidence presented in court, or who have acknowledged that they are so accustomed to internet use that they would not refrain from doing on-line research during trial. A judge raised a question about how frequently he must monitor social media and other websites to assure that his name is not used inappropriately on-line.

None of the members advocated that jurors or other court visitors surrender their electronic devices at the courthouse. Not only would it deprive jurors of the ability to contact work and family; it would also be logistically complex for court staff to maintain and to return hundreds of devices daily. Moreover, separating jurors from their devices in court would not affect the ability of jurors to do internet research on a case once they left the courthouse. The members preferred that judges give jurors instructions that are more meaningful. One judge noted that jurors may do internet research because they might not receive the assistance they request from the court. For example, if a jury asks the court to define a word, a judge's instruction that the jury should give the word its "ordinary and common meaning" may not be particularly helpful.

A number of courts have electronic recording systems, including "FTR" ["for the record"]. FTR recordings requested by members of the public have been subsequently posted on YouTube. The public can edit FTR videos of court proceedings and the on-line versions of these videos can therefore be misleading. In some courts, judges also utilize a court reporter in the event portions of the FTR are inaudible, and both the transcript and FTR are official records. Other courts use the recording only to assist the clerk, and it is not an official record. In municipal courts, parties have requested to record a witness' testimony or a court ruling on an i-Phone, and some but not all judges permit this. Judges universally enforce other rules, particularly the rule about not recording images of jurors.

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Parties often present evidence in protective order proceedings of harassment or threats posted on social media sites or received on a smart phone, and parties occasionally want to present video evidence of an accident scene recorded on an electronic device. Certain court websites provide instructions to parties to transfer electronic evidence to a disc or other medium so the court does not need to take the device into evidence.

Ms. Kelly advised that the Maricopa County Superior Court Clerk receives about a thousand electronic filings daily in civil cases. Some filers mistakenly believe that a document is processed at the same instant it is filed, but processing still takes time. A few judges prefer to have paper documents in complex cases. The Clerk will be implementing an “e-file foundation” in a few months that will make electronic filing quicker, cleaner, and easier to navigate.

Mr. Kanefield discussed how i-Pads have affected his practice. He uses his i-Pad for remote tracking of client matters, documents, and other information. He can highlight, bookmark, and annotate documents, and he sends messages and documents to his office for more extensive editing. One of the State Bar’s strategic initiatives this year is to familiarize attorneys with new technology and to increase its use by the legal profession.

Although he has personal preferences for handwriting and for paper, Mr. Bodney advised that the State Bar’s initiative is well taken. Mr. Bodney is integrating an i-Pad into his practice, and he is using the device to receive and to transmit information, and for note taking. He added that he was recently in a federal courthouse in the Midwest that prohibited members of the public from bringing their telephones past security.

**4. Issues arising from the use of new technology.** The Chair identified possible legal authorities that the Committee might consider, including Supreme Court Rule 122, the Arizona Code of Judicial Administration, recommended Arizona jury instructions, the Code of Judicial Conduct, and ethical rules for attorneys. Ms. Randall mentioned a “Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees” that was prepared by the federal Judicial Conference Committee on Codes of Conduct in April 2010. The packet is available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/conduct/SocialMediaLayout.pdf>. The Chair then asked the members to identify issues involving the use of new media that the Committee might consider at future meetings.

The discussion turned to juries. If schools stop teaching cursive writing, which some have already done, will the court provide electronic devices to jurors for note taking? Who would “own” the notes in that circumstance? Would jurors be less likely to engage in robust note taking if there was a possibility that the court might not destroy their notes after trial? Will attorneys utilize data mining services to determine if jurors used social media sites to post information concerning a trial while it was in progress, and how would that impact post-verdict motions? How frequently and when should the court admonish jurors about not doing internet research, and will jurors follow the admonition? How effective are admonitions in preventing jurors from doing on-line research over the lunch hour, or at home? Should admonitions advise of potential financial (the cost of mistrial) or other consequences (contempt) if a juror fails to

observe the admonition? What rights to due process would a juror have if the court contemplates a sanction for not following an admonition? Is it more productive for courts to provide jurors with Wi-Fi access than it is to prevent internet access, and if the court provides access, what responsibility does the court have for its misuse?

The members then discussed media. Should courts have different policies for journalists' use of social media and for social media use by other stakeholders? What is the differentiation between a blogger, a citizen blogger, and a journalist, and does Rule 122 apply to all of these, or only to some? Are there significant distinctions between professional "pool" cameras and images taken by individuals using i-Phones? Do judges have the inherent authority to prohibit the use of personal cameras in the courtroom, or should this be the subject of a rule? How should the court deal with special situations, such as taking images of someone who is in a witness protection program? Can an individual courtroom require additional screening for electronic devices in this situation or under other unique circumstances? Do journalists have fundamental rights to bring electronic devices into, and to transmit from, courtrooms? Do domestic relations or other case types require special rules regarding cameras, similar to Rule 122(a)'s provision concerning juvenile proceedings? Should there be prescribed consequences for disruptive use or misuse of electronic devices in court? If most court visitors have the ability to take digital video, how should the court prevent recording in the hallways or lobbies outside the courtrooms?

The members believed that Rule 122 contemplated the use of a single, tripod-mounted camera that would function as a pool for mass transmission. Dozens of individuals attempting to record images on personal electronic devices is a wholly different situation that could be as distracting and disruptive as paparazzi in the courtroom. Although transparency is generally positive, even one camera in the courtroom can affect the way court staff and judges behave. Cameras can embolden some witnesses, and make others more inhibited. Because a trial is a search for the truth, what is the best course of action?

The members also asked whether there should be a court rule concerning tweeting. Should the court allow witnesses to tweet? Can counsel tweet a court ruling, and is Ethical Rule 3.6 instructive on this question? When does tweeting prejudice a judicial proceeding? Should courts facilitate the use of Twitter for attorneys who may need to be in multiple courts at the same time?

Ms. Liewer advised the members that she had taken a photograph of the Committee earlier in the day, which she posted on her Facebook page and displayed for the members. No one in the meeting room knew that she had taken the photograph. What could therefore prevent members of the public from taking photos of judges or other participants in the courtroom? What measures are available to detect clandestine audio or video recordings during court proceedings? Will attempts be made to impeach official records of proceedings by introducing surreptitious recordings?

The members also discussed ethical issues involving attorneys as well as judicial officers. If there is no specific ethical constraint against an attorney looking up potential jurors on Facebook or Google, is it nevertheless unprofessional conduct? While the members have not seen potential

jurors use these sites to find background information on trial attorneys, there have been instances of jurors using these sites to research criminal defendants, and that is problematic. Does E.R. 3.5 cover situations where an attorney's use of social media may be tantamount to an ex parte communication with a judge? Some judges in Arizona are elected; is the use of social media proper in election campaigns? While some judges adopt bright line policies that no one who is a friend on Facebook can appear in their court, some judges have active Facebook pages at the time they take office; following such a bright line policy, especially in a small community, might be challenging.

**5. Next steps.** The Chair requested staff to organize the issues raised today for further discussion at the next meeting. The members then agreed to schedule the next meetings of this Committee for June 7, August 30, and September 28, 2012.

**6. Call to the Public; Adjourn.** There was no response to a call to the public. The meeting adjourned at 2:20 p.m.

The next meeting date is **Thursday, June 7, 2012.**

**ARIZONA SUPREME COURT**  
*Committee on the Impact of Wireless Mobile Technologies and Social Media*  
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 Minutes  
 June 07, 2012

Members present:

Hon. Robert Brutinel, Chair  
 Hon. James Conlogue  
 Hon. Dan Dodge  
 Hon. Margaret Downie  
 Hon. Michael Jeanes  
 Hon. Eric Jeffery  
 Hon. Scott Rash

Members present (cont'd):

Karen Arra  
 David Bodney  
 Joe Kanefield  
 Robert Lawless  
 Robin Phillips  
 Kathy Pollard  
 Marla Randall (by telephone)  
 George Riemer

Guests:

Jennifer Liewer  
 Stewart Bruner  
 Theresa Barrett  
 Rose Meltzer  
 Sam Meltzer  
 Paul Julien  
 Michaela Waisman  
 Melinda Hardman  
 Jennifer Greene  
 Tyler Cornia  
 Lawton Jackson  
 Rosalind Greene  
 (by telephone)  
 Kymberly Lopez

Members not present:

Hon. Janet Barton

Staff:

Mark Meltzer  
 Ashley Dammen  
 Julie Graber

**1. Call to Order; introductions; approval of meeting minutes:** The Chair called the meeting to order at 10:05 a.m. The Chair introduced Mr. Jeanes and Ms. Pollard. Mr. Jeanes and Ms. Pollard commented on the rapid advance of technology in the courts, and the challenge of satisfying the expectations of attorneys and jurors for access to technology within their respective courthouses. The Chair then asked the members to review the draft minutes of the April 6 meeting, noting two corrections previously made to the draft.

**Motion:** A member made a motion to approve the April 6 minutes with those corrections. The motion received a second and the motion passed unanimously.

**Wireless 12-002**

**2. Rosalind Greene's presentation on juror issues:** The Chair invited Rosalind Greene to share her views on the impact of wireless mobile technology and social media on juror conduct. Ms. Greene is a jury consultant, a member of the State Bar of Arizona, and a former litigator. Ms. Greene was present by telephone as she was in New Orleans attending a convention of the American Society of Trial Consultants.

Ms. Greene began by describing use of new technology by four types of potential jurors. "Addicts" are compulsive users of the internet and social media; "rebels" will do the opposite of

what courts ask them to do; “*helpers*” believe that being a good juror is finding out as much as possible about the case from extraneous sources; and “*five-minutes-of-famers*” desire to be the center of attention and seek special recognition. She suggested identification of the “*addicts*” early in the jury selection process, and recommended that the court excuse those individuals. The other groups may respond favorably to instructions from the court about fairness, team effort, cooperation, and rationales for the rules of juror conduct.

Ms. Greene said that admonitions to the jurors are the most effective method of preventing a juror’s misuse of the internet and social media during a trial. She stressed three elements of effective admonitions: communication, repetition, and language.

Communication: Ms. Greene is an instructor on communications, and she noted that what is important is not only what the judge says, but also how the judge says it. She encouraged judges to refrain from merely relying on the robe as authority and reciting admonitions by rote. She suggested that a judge take on the role of an advocate by persuading jurors to follow the admonitions, to deliver admonitions as an attorney delivers a closing argument, and to engage the jurors directly and dynamically.

The court has several opportunities to give admonitions to a jury. Ms. Greene said that Florida recommends giving a full admonition before and after voir dire, and a third time prior to deliberations. She suggested including a brief admonition in the juror summons, and in a juror questionnaire if one is used. An admonition could also be included in a video played in the jury assembly room; the video could describe harmful consequences if jurors fail to follow rules, and even provide specific examples where that occurred.

It is critical that the court inquire into a juror’s use of technology during voir dire, and not rely on counsel to do this because attorneys may be reluctant to ask, or because attorneys may have limited time during voir dire. Ms. Greene recommended that a judge specifically ask jurors if their internet and social media use interferes with other activities, and then later connect this dialogue with the formal admonition. Ms. Greene expressed a growing concern: the number of individuals who use the internet and social media is now a large segment of society, and removing everyone who is an internet or social media “*addict*” from the panel could result in a jury that is not representative of the community as a whole.

Repetition: The court could give a short admonition before breaks, but Ms. Greene felt that simply saying, “*Remember the admonition,*” is too short. Ms. Greene was supportive of staff’s proposed “*smart juror*” card, and she suggested that the court could reinforce the message on the card if the court held up a large cutout of the card before a break. Ms. Greene also encouraged judges to give the admonition, information about the consequences of violating the admonition, and a juror’s duty to report other jurors’ violations of the admonition, during the final jury instructions, so the admonition is fresh when the jury begins deliberations.

Ms. Greene discussed other mechanisms of repeating the admonition. One mechanism is a written juror pledge, such as the one used in the Bout case in New York. The judge could ask

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during voir dire if any potential juror would object to signing a written pledge, and if so, the judge would excuse the juror. Alternatively, she suggested obtaining a verbal commitment from jurors to follow the admonition, although an oral commitment may not be as effective as one in writing. Posters in the jury room containing admonitions might also be effective. The American College of Trial Lawyers materials includes a model message for a juror to give to family and friends requesting that family and friends not ask the juror about the case until it concludes.

Language: Ms. Greene's third point was that the language of the admonition should be simple, specific, and concrete. Concrete language in an admonition mentions devices by name, so that the admonition becomes more meaningful and personal when a juror hears the name of his or her device in the admonition. The admonition should also mention specific internet sites or applications such as LinkedIn, Twitter, or chat rooms; and the admonition can incorporate new names as the technology evolves.

Ms. Greene's suggestions concerning staff's proposed draft admonition included: adding "tweets" and "blogs" to the draft; and including in the draft that a juror should not "friend" a party. She also said that telling a juror to "not discuss" implies a two-way conversation, but a one-way post or blog would also violate the admonition, so use a word other than "discuss"

Ms. Greene liked the draft's inclusion of rationales, and the emphasis in the draft of the concept of fairness. She referred to the phrasing used in the American College of Trial Lawyers materials that explains the concept of fairness. She suggested a metaphor of the courtroom as a playing field where both sides have agreed to conduct the case and have the jury decide the case by the court's rules, one rule being that the jury may consider only the evidence produced in court. An admonition might include generic mention of penalties for violations, or specific penalties such as fines, contempt, and perjury.

Ms. Greene recommended that a judge take a proactive role by questioning jurors throughout a trial, such as after breaks, about whether they used the internet or social media, rather than asking for information at a late stage of the case. She added that jurors are less inclined to seek information from sources outside the courtroom when rules allow jurors to ask questions during a trial, as Arizona's rules allow.

Studies and anecdotes: Ms. Greene informed the members of a study where almost 10% of judges reported that they observed jurors using smart phones in the courtroom, notwithstanding an admonition not to use their devices in court. A Reuters study found that 90 verdicts were challenged between 1999 and 2010 because of juror misuse of the internet, with most of the challenges occurring in 2009 and 2010 as more jurors acquired technology; and that in 21 of these cases, verdicts were overturned

Ms. Greene also reported that a Florida judge held a juror in contempt and imposed a three-day jail sentence for "friending" a defendant. In another case, a judge dismissed a juror who conducted an internet poll on whether a defendant was guilty. A Michigan judge fined and ordered a juror to write an essay for violating an admonition. A juror in an Arkansas capital case

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continued to tweet despite a warning, resulting in a mistrial, although the juror received no punishment.

Ms. Greene added that some courts might not punish jurors for violating an admonition because punishment could discourage the reporting of violations, and it is preferable that a court learn of a violation and take corrective action than to never know about it. Courts should encourage juries to self-report violations. Punishment is also problematic because of the nature of jury service, and because it might discourage prospective jurors from complete engagement in a case.

Ms. Greene concluded with an observation that courts might not be able to solve jurors' revolutionary use of the internet. A paradigm shift may then occur whereby courts would permit partial use of the internet by jurors. Scholars are studying how constitutional requirements for a fair trial can coexist with social media and the internet.

Questions and comments: Members then had the following questions and comments:

1. The court could add an admonition to the juror orientation video that is available on-line.
2. Many people use “apps,” so we should add this term to the draft admonition
3. Can the court phrase admonitions positively? Ms. Greene replied that jurors respond more favorably with positive phrasing.
4. Jurors frequently complain about repetitive admonitions as being insulting to their intelligence; what is the proper balance? Ms. Greene said that despite repetitive admonitions, some jurors still do not understand the concepts. She suggested delivering the admonition in different ways to break the monotony, such as pledges, a “*smart juror*” card, and mixing long and short admonitions. Individual jurors absorb the admonition differently. A member added that jurors usually do not mind repetition if it is done respectfully.
5. Does she feel the written pledge is effective? Ms. Greene stated that she is only aware of its use in the Bout case, but that jurors who sign a written pledge may be less inclined to violate the admonition. Judges could first try a verbal pledge and assess if that is effective.
6. Should jurors be required to disclose Twitter handles so the court can monitor activity? Ms. Greene noted that this occurred in the Casey Anthony trial, but it is probably inappropriate in ordinary cases.
7. What is the impact of the media on jurors, and do witnesses testify differently when the media is present? Ms. Greene will ask this question to other attendees at her conference.

The Chair then thanked Ms. Greene for her presentation, and the members continued with a discussion of juror issues.

**4. Committee’s discussion of juror issues:** The Chair asked staff to elaborate on the “*smart juror*” card. Staff explained that the proposed card is a non-verbal method of delivering the admonition to the jurors. When the court empanels a jury, it could provide each juror with one of the cards, which would be about the size of a smart phone and would have the feel of a playing card. A juror could use the card as a bookmark, or could simply place the card in a

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pocket or handbag, as a continuous and tangible reminder of the admonition. Staff circulated a prototype card, and the members concurred in recommending use of a “*smart juror*” card.

Staff also provided a draft admonition for use in criminal and civil cases. Committee members made the following comments concerning the draft admonition:

1. Potential jurors may not read an admonition contained in a summons; but the summons could include a link to the juror orientation video so jurors could watch a video presentation concerning the admonition.
2. Prescreening questionnaires could include a brief admonition.
3. The distinction between the admonition in a civil and a criminal case is that a civil jury may discuss the case while it is in progress; otherwise, the admonition should be the same.
4. The admonition should require jurors to report violations. A jury that self-polices may help avoid a mistrial, because when a judge receives a note from a juror about a violation, the court is able to deal with the issue.
5. The admonition should refer to “*jury service*” rather than “*jury duty*.”
6. An admonition should use readily understood words. The admonition should advise of the consequences for violations by using non-threatening language.
7. A judge should explain prohibitions, and reasons why they exist, during voir dire.
8. The admonition should mention the burden of proof, that the rules require a party to meet its burden of proof, and that a juror should not do internet research to fill a gap if a party has not met its burden of proof.
9. A short admonition or commitment could be included in the juror’s oath.
10. Excessive attention to the admonition may detract from other important concepts during a trial.
11. The judge should tell jurors at the beginning of a trial when they will be able to talk with family and friends about the case.
12. It would be appropriate to include an admonition in the concluding instructions.
13. In addition to RAJI preliminary criminal 13 and civil 9, the committee should review the language in RAJIs about excusing jurors to deliberate, and alternate jurors.
14. The committee should draft an admonition for consideration by the State Bar.

**ACTION:** The Committee established a workgroup to revise the draft admonition. Members of the workgroup include Justice Brutinel, Judge Downie, Judge Conlogue, and Judge Jeffery.

**5. Policy decisions:** The members then considered staff’s matrix of who may use portable electronic devices in the courthouse or courtrooms, and the allowable uses of devices. For areas of the courthouse other than courtrooms, the members were mindful that some use of cameras could be benign and appropriate, but other uses could be disruptive, intrusive, or antagonistic, and on balance, the members concluded that the policy should preclude the public’s use of cameras within the courthouse. The members added the use of audio to this general prohibition.

The members also considered the use of portable electronic devices by witnesses who are waiting to testify in a case. While someone in the courtroom may communicate electronically

with an excluded witness, implications of this situation are similar to what existed before the advent of the new technology, that is, a person in the courtroom could simply walk outside and tell the witness what was occurring in court. Requiring a witness to surrender a device outside the courtroom would be problematic, and admonitions may remain the most viable way of dealing with this issue.

**ACTION:** The committee should review Rule 615 concerning exclusion of witnesses and determine whether to add that a witness may not follow tweets or blogs.

Members of the public can text or tweet from a courtroom, although some courts preclude this in specific situations, such as criminal competency hearings. Judges may not be aware from the bench when someone is texting, and if texting is precluded in a specific case, court personnel would need to be in the back of the courtroom as monitors. As that would be resource intensive, and just as the public can use pen and paper in the courtroom, the members agreed that individuals should generally be allowed to text or tweet from a courtroom whenever a proceeding is open to the public. The proposed matrix would allow a judge to preclude texting or tweeting if it was distracting or disruptive. The members determined that Rule 611 sets out principles for order and decorum in the courtroom.

Jurors occasionally, and inappropriately, text from the courtroom while the court is conducting a bench conference; but the members agreed that if the court is conducting a prolonged bench conference, the jury should be removed and allowed to use their devices outside the courtroom. The court should allow jurors during a recess to use a device as any member of the public. Jurors should turn off their devices when the jury retires for deliberations, and the concluding admonition should include this instruction. However, the court should provide jurors with a court telephone number that family or friends can call to contact a deliberating juror for a true emergency. In one county jurors are asked to surrender their devices to court staff during deliberations, but no events prompted this policy and that county may reexamine the practice as a result of this committee's discussions.

**6. Rule 122:** The Chair then asked staff to explain changes to a draft revision of Supreme Court Rule 122. Staff said the intent of the revisions was to restyle, reorganize, and update the rule, but not to alter the substance of the rule. Restyling included adding subsection headings; adding definitions and a definition of “*media*” in particular; and avoiding legal jargon. Reorganization of the rules provided a sequential process and combined existing paragraphs with related subjects. Staff suggested that the members consider updates to reflect changes in technology since adoption of the rule in 1993, and to integrate citizen journalists within the scope of the rule. Member comments on the revised draft and on Rule 122 generally included the following:

1. Who is a journalist, and how is a journalist distinguished from a member of the public?
2. Judges have flexibility under Rule 122 to determine who the “*media*” is. Generally, “*media*” are those who are able to disseminate information broadly and professionally. The judiciary is a transparent department of government, and the purpose of Rule 122 is for the media to provide the public with information about court proceedings.

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3. The rule would provide a more orderly process if media were required to give the court at least 7-10 days notice of an intent to cover a court proceeding. The two-day notice currently required by the rule is too short.

4. Who has the responsibility of notifying a non-party witness of media coverage? Do attorneys have this duty? If so, do attorneys frequently overlook giving a witness notice?

5. If a non-party witness objects to coverage, is the court required to hold a hearing outside the presence of the jury? Should this be resolved in advance of the witness' testimony so it does not delay the trial? If a witness does not want to be filmed, does the judge have inherent authority to prohibit coverage without holding an evidentiary hearing?

6. Although the draft rule attempts to define who is a "journalist" and what is "news," courts are reluctant to define the words because these terms are hard to define.

7. Staff acknowledged that he should have omitted from the draft a requirement that a journalist submit a request to make an audio recording.

8. Judges should have discretion to exceed the limit of one camera in the courtroom.

9. The rule allows one television camera and one still camera, but because most new still cameras can also record video, as a practical matter the rule allows two video cameras.

10. The rule requires a "pool" feed if multiple organizations want coverage, but a new entrepreneur may not have the technology needed to participate in the pool.

11. Is it the court's responsibility to determine whether a person is unable to receive a pool feed? Does the present rule favor institutional journalists? Has any Arizona court denied a request from an entrepreneurial journalist to cover a proceeding?

12. Unless allowed pursuant to a Rule 122 request, the court does not permit camera phones; the court could post signs in courtrooms to give the public notice of this policy.

13. Someone is going to have to address the impact of technology changes on Rule 122.

14. Restyling Rule 122 would be helpful because as currently written, a user often has to read the entire rule to find the answer to a specific question.

15. If the committee makes revisions to the rule, the provision that states, "*media equipment shall be connected to existing courtroom sound systems*" should be clarified to assure that the media equipment does not connect to the court's FTR ("*for the record*") system.

16. Rule 122 works well as currently written. The rule could be written more clearly, but would revising the rule be a productive use of the committee's time?

**ACTION:** Based on the discussion, the Chair directed staff to prepare another revision of Rule 122 with a focus on restyling of the current rule. The draft or an alternate version should include language that would allow a judge to decide whether the person submitting the request is entitled to provide coverage, in addition to deciding whether to allow coverage.

**6. Call to the Public; Adjourn:** There was no response to a call to the public. The meeting adjourned at 2:50 p.m.

The next meeting date is **Thursday, August 30, 2012.**

**ARIZONA SUPREME COURT**  
***Committee on the Impact of Wireless Mobile Technologies and Social Media***  
***on Court Proceedings***

Minutes

August 30, 2012

Members present:

Hon. Robert Brutinel, Chair  
 Hon. Janet Barton  
 Hon. James Conlogue  
 Hon. Dan Dodge  
 Hon. Michael Jeanes  
 Hon. Eric Jeffery  
 Hon. Scott Rash

Members present (cont'd):

Karen Arra  
 David Bodney  
 Joe Kanefield  
 Robert Lawless  
 Robin Phillips  
 Kathy Pollard  
 Marla Randall  
 George Riemer

Guests:

Patricia Sallen  
 Lynda Shely  
 Rusty Anderson  
 Cindy Trimble  
 Paul Julien  
 Theresa Barrett  
 Jennifer Liewer  
 Stephanie Harris  
 Mark Casey  
 Michael Kiefer

Members not present:

Hon. Margaret Downie

Staff:

Mark Meltzer  
 Ashley Dammen  
 Julie Graber

**1. Call to Order; approval of meeting minutes:** The Chair called the meeting to order at 10:10 a.m. The Chair asked the members to review the draft minutes of the June 7 meeting. The members had no additions or corrections to the minutes.

**Motion:** A member then made a motion to approve the June 7 minutes. The motion received a second and it passed unanimously. **Wireless 12-003**

**2. Presentation on attorney ethics questions:** The Chair noted that Administrative Order 2012-22 requires the committee to identify ethical questions that another appropriate body should address. To this end, he explained the committee would consider ethics questions that the State Bar might need to examine concerning the use of wireless mobile technology and social media by attorneys. The Chair then introduced Patricia Sallen, the State Bar's Ethics Director, and Lynda Shely, the former Ethics Director, who presented on this subject.

*Confidentiality:* The first issue raised by Ms. Sallen and Ms. Shely was confidentiality. They stressed that confidentiality is a broader concept than privileged communications. Although an attorney may have information concerning a client that is not privileged, counsel may not improperly use the information, for example, for attorney marketing, without the client's consent. A lawyer may not blog or tweet about a courtroom success without the consent of the client who was a party in that proceeding. Another example was use of a listserv; unless a client consents, counsel may not disclose information on a listserv that might identify that client.

The duty of confidentiality has other applications to an attorney's use of electronic devices. Ms. Sallen and Ms. Shely explained that just as an attorney should not have a phone conversation about a client that could be overheard in a public setting, a device screen that displays client or case information should not be visible to others in public places. Counsel should protect devices with passwords. It is not an ethical violation if counsel's electronic device is lost or stolen, but it could be a violation if counsel had not previously taken steps to safeguard information that was stored on the device. Counsel should have the ability to purge data remotely in the event of loss or theft. If a device, including a flash drive, is lost or stolen, the attorney must notify clients whose information is on the device so clients can attempt to mitigate the impact. They cautioned that a typical malpractice policy might not cover case information stored on "the cloud." They added that if a law firm requires one of its attorneys to use his or her personal electronic device, the attorney and firm should have an agreement concerning use of the device and ownership of information that is stored on the device should they terminate their relationship.

*Preservation of evidence:* Ms. Sallen and Ms. Shely discussed attorney duties to preserve electronic evidence. They recommended that attorneys and staff obtain training about their obligations to preserve electronic materials, and about counsels' duty to explain to clients their responsibilities to preserve electronic and social media evidence in anticipation of litigation.

*Contact with other persons:* This subject included attorney contact with an unrepresented person through a social networking site, and visiting a social networking site to view information about a represented party. Does the contact require interaction with the other person or party? If it does not, then it is analogous to watching the other person or party walk down a public street, which is ethically permissible. However, when there is interaction with an unrepresented person, counsel must disclose material information to the other person, such as the identity of counsel and their client. This is required even if counsel is using a surrogate such as a family member or an investigator to make the inquiry. Ms. Sallen and Ms. Shely added that lawyers can ethically Google and review accessible social media pages of opposing parties if there is no interaction, and suggested that lawyers may actually have an affirmative duty to their clients to undertake such research.

*Advertising issues:* Is an attorney posting on a social media site considered advertising? Ms. Sallen and Ms. Shely advised that ethical rules on advertising cover all public communications about attorney services, including social media posts. They noted in this regard that a firm should be aware of information its attorneys are posting on their personal pages about the firm. Is it ethical to buy another firm's name in Google Adwords? The presenters consider this deceptive, but they conceded that there is a split of opinion on this issue nationwide. Can a lawyer, or a lawyer's friends, or staff, or a marketing service, submit online reviews about a competitor that are false? This would not be ethically responsible. Moreover, an attorney responding to a false review that the attorney knows a specific client wrote must be mindful not to disparage the client in the response.

*Summary:* Ms. Sallen and Ms. Shely advised that although the American Bar Association has proposed minor revisions to its model rules in response to new technology, they believe that

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Arizona's existing ethics rules cover the issues they raised during today's presentation. Attorneys' use of these devices may be new, but the ethical principles remain the same. They suggested that counsel obtain continuing education on applying the existing rules to these devices and the new media. The Chair then inquired whether any member had any other attorney ethics questions arising from the new technology. The members offered none. Accordingly, the consensus was to refer no ethics questions to the State Bar at this time. The Chair thanked Ms. Sallen and Ms. Shely for their presentation.

**3. Jury admonition:** The jury admonition workgroup established at the June 7 meeting convened on August 16. The Chair requested staff to summarize the workgroup's discussions concerning the draft admonition. Staff noted that the workgroup (Judges Downie, Conlogue, and Jeffery) continued to focus on the reasons for the admonition, simplification of language, re-organization, and additional text concerning jurors' use of new technology. The workgroup intended that judges would use the same admonition in both civil and criminal cases. The workgroup successfully met an objective of keeping the revised admonition at about the same length, less than two pages, as the current admonitions (RAJI preliminary civil 9 and criminal 13). Judge Conlogue suggested, and the workgroup agreed, that the words "*comply with the admonition*" be included in the jurors' oath; this would require a rule petition requesting amendments to Ariz. R. Civ. P., Rule 47(a)(3) and Ariz. R. Crim. P., Rule 18.6(b). Judge Conlogue recommended placing the oath at the beginning of the admonition. The same oath would be given to civil and criminal juries. Staff also revised the "*smart juror*" card, including changing the heading of the card to "*Remember the Admonition.*" The workgroup approved these changes.

Because the revised admonition would require changes to the RAJIs, the Chair invited Ms. Sallen to review State Bar procedures for revising jury instructions. Ms. Sallen said that the proposed revisions would first go to a subject matter group, probably a civil or a criminal jury instruction committee. The proposals would proceed to the Board of Governors Rules Committee, which would make a recommendation to the Board of Governors. A member noted that the process might take several months, although another member suggested that judges could use the revised admonition prior to its official adoption.

**Action:** Mr. Kanefield, immediate past president of the State Bar, offered his assistance in guiding the proposed revisions through the Bar.

In response to an inquiry from the Chair, Paul Julien, the Judicial Education Officer of the Administrative Office of the Courts, informed the members about the process for making changes to the admonition in the Judicial College Bench Book. Mr. Julien advised that a publications committee of the Committee on Judicial Education and Training ("*COJET*") assembles the Bench Book, and toward the end of each calendar year, it sends sections of the book to one of its ninety subject matter editors for autonomous review and updates. He uses the revised edition the following year for new judge orientation.

After the Chair opened the revised admonition for discussion, members made these comments:

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- The admonition should clarify when the case is “over”
- Telling the jurors to “please” not take photos may be unnecessarily courteous
- Colleagues should be asked to review the admonition and provide comments
- To mitigate the expense of giving pocket-sized “*smart juror*” cards to individual jurors, an alternative is displaying a poster-sized card on a wall in the jury room

The members discussed whether judges should ask jurors to recite the entire oath, or only verbalize their affirmation. A member thought it was best for each judge to have discretion on this question. Another member pointed out that jurors receive an oath before as well as after voir dire, and that repeating the entire oath might be overly formal and time consuming. A consistent manner of giving the oath would also facilitate training of court clerks. One member suggested placing the oath on the front of a notebook given to jurors, or at the beginning of the instructions, as recommended by Judge Conlogue, as more effective ways of reminding jurors of the oath. The members then made a series of motions, all of which received a second:

**Motion:** That prior to the next meeting, the workgroup meet again to review the admonition, that members ask the court community to provide further comments; and that the committee refer the final version of the proposed admonition to the State Bar and to the Judicial College; passed unanimously: **Wireless 12-004**

**Motion:** That the words “*comply with the admonition*” be added to the oath; passed unanimously: **Wireless 12-005**

**Motion:** That the committee recommend that judges place the oath in front of the preliminary jury instructions, or on the front of a juror notebook; passed unanimously: **Wireless 12-006**

**Motion:** That the committee refer the “*smart juror*” card to the Court Services Division for possible distribution to the trial courts, provided it has a source of funding; passed unanimously: **Wireless 12-007**

**Action:** The Chair directed staff to forward the final version of the admonition to Mr. Julien so he could provide it to the editors later this year. The Chair also directed staff to speak with State Bar representatives to initiate the committee’s submission of its proposed RAJI revisions.

**4. Rule 122:** The members next considered revisions to Supreme Court Rule 122. The Chair invited Mr. Mark Casey, vice-president and news director at KPNX Channel 12 in Phoenix, to address the committee. Mr. Casey thanked the Chair for allowing him to comment. Mr. Casey said that having a broadcast camera in a courtroom permits members of the public who cannot come to the courthouse an opportunity to see a proceeding and to learn how the judicial system works. He also said that he was involved in television news prior to the advent of broadcasting from courtrooms in Arizona, and that current technology allows for more compact and functional cameras than those in use two decades ago. He added that multiple cameras, some controlled robotically, could provide coverage now without any disruption in a courtroom.

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Mr. Casey participated in the 2007-2008 amendments to Rule 122. He stated that the rule needed amendments then because trial judges were denying requests for camera coverage, including coverage of high profile cases, without giving a reason. The amendments attempted to balance the respective interests of the media and the judiciary. If a judge denies coverage now, the judge must provide an explanation, and the media can seek review by special action. Mr. Casey noted that the amendments are working well; since 2009, there has been only a single media challenge to a judge's denial of coverage.

Mr. Casey offered these comments concerning the current draft of the Rule 122 revisions. He supports the addition of a proposed new factor in section (e)(7) [“*whether the person making the request is engaged in the dissemination of news to a broad community*”], and he supports section (i), which governs pooling and would allow a judge to approve coverage by more than one video camera. He expressed concerns, however, about the time requirements specified in section (c), which would require filing of a coverage request at least seven calendar days in advance of a proceeding. He described this as “*a solution in search of a problem,*” and stated that the media sometimes is not aware of a proceeding until just hours before it starts. He added that the media and court administrators work together to satisfactorily resolve notice issues, and that requiring a seven-day notice for all proceedings would open the door to routine denial of requests for coverage. He also opposed a proposed duty that the media provide notice of a coverage request to the parties, because the media may not always know the identity of all the parties, and because the media is not well adapted to providing notice of court proceedings.

Mr. Casey said that the media has sensitivity to victims, and his and other major broadcast stations have policies not to show juveniles or victims of sexual abuse, or that might compromise the identity of a witness, such as an undercover officer. Occasionally photojournalists protect a witness' identity by turning a camera away from the witness and recording only a voice. He stated that the policy requires a photojournalist to turn a camera off upon request of a witness. He said that the media attempts to balance the needs of the judicial system and the requisite decorum for a fair trial, with the interests of the media in access to the courtroom and providing coverage for the public. He gave as an example the “*sweat lodge*” trial in Yavapai County, where a broadcast of testimony of survivors and next-of-kin provided the public a better understanding of what happened in that highly publicized case. He urged the committee to avoid recommending a rule that would lead to routine denial of camera requests. He said that even though problematic circumstances still occur, those are the exceptions, and the public now understands the judicial process better because cameras are in the courtroom.

The Chair opened questions to Mr. Casey by asking how he differentiates between professional media and citizen journalists. Mr. Casey gave as his first criteria whether the person or entity has the operational capability to distribute a broadcast to a wide audience, or to other news organizations, or to make copies as a “*pool*” camera. Second, he asked if the recording is of high enough quality to be used for a television broadcast; and third, whether the journalist has the ability to cover a trial “*gavel-to-gavel.*” He suggested that the “*pool*” camera should be the organization that can provide the broadest distribution of a proceeding. Pool disputes can be

complex, and different file sizes and other technical requirements can slow the process of sharing, but he is confident these issues are resolvable.

A member then asked Mr. Casey how the court could hold a hearing on a request if the media submits it only hours before a trial. Mr. Casey responded that the judge has discretion about when to hold a hearing on the request, and that jury selection, which the media does not cover, would be ongoing pending a hearing, so the court would have no downtime. Another member asked about cases that are not high profile but that someone wants to cover as a citizen. Mr. Casey thought that if a citizen has the technical ability, for example, if a judge believed that a citizen's iPhone met the state-of-the-art, a judge should allow the citizen's request.

What is the benefit to the public, a member asked, of showing a few seconds of court video on the evening news, and without providing more details about a case? Mr. Casey responded that the public has increased opportunity to be educated about what happens in court because news cameras are there. Mr. Casey admitted that whether a few seconds of courtroom coverage constitutes good journalism is an open question; but even a few seconds of court news on a regular basis creates a perception that the public has a right to know about events that occur in our courtrooms, and that court is open and accessible. The "sweat lodge" case provided "gavel-to-gavel" coverage, which is ideal. Some networks cover "gavel-to-gavel" but later edit the coverage for shorter stories. The members discussed a recent Maricopa County case where defendant swallowed cyanide after the verdict, and there was some misunderstanding about why a camera continued to roll after the judge ordered that recording cease. Ultimately, and because of a court order, the media released no video of defendant after the ingestion. A member described a recording of the moments preceding ingestion as powerful and accurate, and added that the public had greater awareness of the event because a camera was in fact present in the courtroom.

A member described a live-feed of a proceeding in her rural court to Norway, where it was widely viewed. Mr. Casey commented that the quality of iPhones and other camera technology is rapidly improving, with less weight and size yet higher resolution. An iPhone now, he said, has quality superior to what was produced by a camera twenty years ago that required two men to carry. The need for wires is disappearing. The issues now concern how to advance distribution technology so it can keep up with developments in camera technology.

The members discussed the procedure for submitting a request, which is missing in the current version of Rule 122. Mr. Bodney advised that the process is informal, and that a person submits a request by e-mail, fax, or hand-delivery. He believes the proposal that would require the person to notify the parties is impractical because the person may not know who the parties are. A judge added that the judicial assistant in her court sends the request to the parties electronically promptly upon receipt by the court. In Pima County, a person may submit an on-line request to the court's community relations coordinator, who properly routes the request. Mr. Bodney added that most requests do not require hearings, and hearings, when held, usually take less than an hour. The members and Mr. Casey discussed the forty-eight hour notice requirement in the current rule, which Mr. Casey would like to retain, but some members felt that certain

proceedings are scheduled far in advance, and it may be difficult for the court to set a Rule 122 hearing in the forty-eight hour window before a trial. Other proceedings, however, such as orders to show cause and hearings in election cases, are set on short notice. The members' compromise was to require submission of requests for coverage seven days before a trial date, but forty-eight hours before other proceedings. The members also agreed that the rule should permit a person to verbally request, and a judge to verbally authorize, camera coverage for a celebratory proceeding such as an adoption.

The members also discussed camera coverage of victims. The members considered two circumstances: when the victim testified, and when the victim was present as a spectator. When the victims are spectators, the media may not know who they are, and media may inadvertently record them. Judge Barton suggested that the judge ask the victims to raise their hands while the media is present to assure they are identifiable by the media. As for victims who testify, who should inform the victims about a right not to be shown on camera? Should the judge ask the victim if he or she objects to camera coverage, should the victim initiate a request, or should the rule preclude camera coverage of every victim? The consensus was that the victim must tell the court, i.e., "*the victim may request....*" Staff will present this issue on September 21 to the Commission on Victims in the Court ("*COVIC*").

The members also agreed Rule 122 should clarify that anyone who wants to cover a proceeding, and not just media, should be required to submit a request. On a final point, the members thought the phrase "*state-of-the-art*" in existing Rule 122 was vague; the concept is that media equipment should "*not be obtrusive.*"

**5. Rule 122.1:** Staff drafted this new, proposed Supreme Court rule to memorialize the policy decisions the committee made on June 7. Staff described proposed section (e), which would allow use of portable devices in a courtroom by attorneys, parties, and members of the public. Staff discussed a presentation he had made concerning this rule on August 31 to the Committee on Limited Jurisdiction Courts ("*LJC*"); LJC members observed that some LJ courts require everyone to turn off their devices when entering the courtroom, and that judges allow no use whatsoever of devices in court. Those courtrooms are crowded, there may be frequent recesses, and some judges believe that the devices are distracting and present security concerns.

A committee member was empathetic about LJ judges wanting discretion to require turning off devices in court, especially given local variations in the physical attributes of courthouses. However, the consensus of the members was that the devices are distracting only when they make audible sounds, such as when a phone rings; and the rule should permit a judge to require that devices be silenced, but not that they be off. Members also commented:

- A rule requiring everyone to turn devices off could be difficult to enforce
- Attorneys use the calendars on their devices when the court is setting future court dates, which assists the court in scheduling matters
- Tweeting or texting is not disruptive to the court

- If there is a genuine security concern about someone's use of a device in court, it will probably be brought to the attention of the judge, who can take appropriate action
- It is reassuring to have devices on in court in the event there is an actual emergency

**6. Other RAJI and Bench Book issues:** Several cover sheets were included in the meeting materials that described other actions recommended by staff:

*Cover sheet #4, voir dire script:* The recommended action was to submit a list of voir dire questions concerning jurors' use of technology and social media for inclusion in the Bench Book. While members believed it might be appropriate to suggest that the Bench Book cover these subjects, the members declined to submit a list of specific questions to the Judicial College.

*Cover sheet #5, exclusion of witnesses and Rule 615, Arizona Rules of Evidence:* Rule 615 provides that a witness who is excluded from the courtroom "cannot hear" other witnesses' testimony, but it does not preclude a witness from reading tweets or blogs about other witness' testimony that could be sent by a courtroom spectator. The recommended action was referral of this issue to the Advisory Committee on the Rules of Evidence.

*Cover sheet #6, exclusion of witnesses and spectators, and Rule 9.3, Ariz. R. Crim. P.:* The recommended action was referral of proposed amendments to section (a) of this rule to the State Bar Committee on Criminal Practice and Procedure, The proposed amendments would preclude an excluded witness from reading tweets or blogs concerning the trial.

*Cover sheet #7, exclusion of witnesses, RAJI Civil Preliminary 12, RAJI Criminal Preliminary 8, and 2012 Bench Book:* The recommended action was referral to appropriate State Bar committees and to the Judicial College of various provisions that would prohibit an excluded witness from reading tweets or blogs about the trial.

*Cover sheet #8, Excused Alternate Jurors, RAJI Standard 7:* The recommended action was to refer this RAJI to appropriate committees of the State Bar for consideration of additional text that would instruct an excused alternate juror to refrain from using the internet or having electronic communications about the case prior to the juror's discharge from service. Staff recommended no action concerning RAJI Standard 8, the closing instruction.

**Motion:** A member moved to approve the recommended actions in cover sheets #5, #6, #7, and #8. The motion received a second, and it passed unanimously. **Wireless 12-008**

**7. Roadmap:** At the next committee meeting, the members will consider judicial ethics issues arising from the new technology. The members agreed that they would also consider ethics issues affecting judicial staff. The members will also review a draft report to the AJC. The members set a fifth meeting for November 7, 2012, if one is necessary to finalize the report.

**8. Call to the Public; Adjourn:** There was no response to a call to the public. The meeting adjourned at 2:55 p.m. The next meeting date is **Friday, September 28, 2012.**

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**ARIZONA SUPREME COURT**  
*Committee on the Impact of Wireless Mobile Technologies and Social Media*  
*on Court Proceedings*

Minutes

September 28, 2012

Members present:

Hon. Robert Brutinel, Chair  
 Hon. Margaret Downie  
 Hon. James Conlogue  
 Hon. Dan Dodge  
 Hon. Michael Jeanes,  
   by his proxy, Chris Kelly  
 Hon. Eric Jeffery  
 Hon. Scott Rash

Members present (cont'd):

Karen Arra  
 David Bodney  
 Joe Kanefield  
 Robert Lawless  
 Robin Phillips  
 Kathy Pollard  
 Marla Randall  
 George Riemer

Guests:

David Withey  
 Theresa Barrett  
 Melinda Hardman  
 Alden Anderson  
 Jennifer Greene

Staff:

Mark Meltzer  
 Ashley Dammen  
 Julie Graber

Members not present:

Hon. Janet Barton

**1. Call to Order; approval of meeting minutes:** The Chair called the meeting to order at 10:00 a.m. The Chair commented on the progress the committee has made, and he thanked the members for their hard work. He then asked the members to review the draft minutes of the August 30 meeting. A member suggested two edits (changing “on” the cloud to “in” the cloud at page 2; and adding “the” before “defendant” at page 6.)

**Motion:** A member then made a motion to approve the August 30 minutes with these changes. The motion received a second and it passed unanimously. **Wireless 12-009**

**2. Presentation on judicial ethics questions:** The Chair asked Judge Downie and Mr. Riemer to identify judicial ethical questions raised by the new technology. Judge Downie is chair of the Judicial Ethics Advisory Committee (“JEAC”), and Mr. Riemer is Executive Director of the Commission on Judicial Conduct. Judge Downie said that almost half the judges have Facebook pages, and noted that today’s meeting materials describe a variety of ethical issues arising from judges’ use of blogs, Facebook, and other social media sites. She added that many judges use this new technology innovatively; as an illustration, she displayed a short YouTube video produced by two local judges regarding Maricopa County’s new criminal court tower.

Judge Downie believes that neither Arizona nor other states have seen a need to amend their codes of judicial conduct because the existing rules sufficiently cover the new technology issues. Nevertheless, she believes it might be useful for the JEAC to issue an omnibus, formal advisory opinion concerning ethical issues presented by this technology and social media. She noted that different states have taken different approaches to these ethical issues. She characterized some of these approaches as “restrictive,” and others as “more liberal.” Judge Downie believes that the Code of Conduct for Judicial Employees probably does not require revision either, but it

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would be helpful to develop fact scenarios to educate employees, for example, about what employees may post on social media sites regarding political issues. She noted that § 1-503 of the Arizona Code of Judicial Administration, the codified electronic communications policy of the judicial branch, might not fully address the nuances of social media use by court employees.

Mr. Riemer reviewed a variety of rules in the Code of Judicial Conduct that warrant consideration when a judge uses social media, including

- Rule 1.2: Promoting Confidence in the Judiciary
- Rule 1.3: Avoiding Abuse of the Prestige of Judicial Office
- Rule 2.3(a): Bias or Prejudice
- Rule 2.4: External Influences on Judicial Conduct
- Rule 2.8: Decorum and Demeanor
- Rule 2.9: Ex Parte Communication
- Rule 2.10(a): Judicial Statements on Pending and Impending Cases
- Rule 2.11: Disqualification
- Rule 3.1: Extrajudicial Activities in General
- Rule 3.5: Use of Nonpublic Information
- Rule 4.1: Political and Campaign Activities of Judges and Judicial Candidates in General

Mr. Riemer provided several examples of activities where a judge's conduct might raise an appearance of impropriety, such as:

- Friending someone (a lawyer, a party, a witness, a politician, or an appellate court judge) on Facebook
- Connecting with someone on LinkedIn
- Using a smart phone from the bench
- Blogging on law-related issues
- Participating in law-related listservs
- Tweeting on law-related issues

Mr. Riemer noted that social media use by court staff also implicates correlatively numbered provisions of the Code of Judicial Conduct for Judicial Employees. He agreed with Judge Downie's opinion that the principles of the existing rules adequately cover social media use by judges and employees. He cautioned that a rule in either of these codes might prohibit conduct that another rule might permit. He also agreed that judges and judicial staff could benefit from fact-specific guidance. Although few Arizona judges have requested advisory opinions on social media issues, an omnibus advisory opinion could be helpful in describing whether a violation occurs under a given set of facts. Mr. Riemer added that a judge could rely on a formal ethics opinion as a "safe harbor" to defend against an ethics complaint.

A common scenario that an omnibus opinion could address is whether a judge may "friend" an attorney or a litigant who appears before the judge. Although a social media "friend" may not be a friend in the ordinary meaning of the word, some litigants may nonetheless have an impression

that anyone who is the judge's social media friend has a preferential status with a judge. One member observed that while an attorney might create physical distance in a relationship with a judge while a case is pending, Facebook relationships are ongoing. Mr. Reimer said that a variety of these ethics issues predate social media. For example, in a complex case with multiple attorneys in an urban court, judges may have long-established friendships with one or more of the lawyers. In a small community, judges frequently know all of the attorneys; however, this does not mean that judges must disqualify themselves in every case, but rather, judges must determine on a case-by-case basis whether a relationship creates a conflict of interest.

The members agreed that the committee should submit a letter to the JEAC requesting an omnibus advisory opinion. The letter should provide links or references to existing opinions from other states, including Utah and Florida, on social media use by judges. The letter should also request guidance on ethical issues pertaining to judicial staff.

**Action:** The Chair requested that committee staff survey judges and judicial staff regarding their ethical concerns about using social media and new technology. Those concerns will be included in the committee's letter to the JEAC.

The members also discussed a recommendation to the Judicial Staff Education Committee concerning production of an instructional video for widespread distribution to court staff. A video could educate court staff on using social media appropriately.

**3. Jury admonition:** The Chair requested staff to describe changes to the draft jury admonition. Staff explained that the current version included his stylistic revisions as well as several revisions suggested by Judge Barton.

**Motion:** A member then moved to adopt the current version of the admonition, with the amendments proposed by Judge Barton. The motion received a second and it passed unanimously. **Wireless 12-010**

The members voiced appreciation for the voir dire submitted by Judge Mackey. Upon further consideration, the members agreed that it would be useful for the Bench Book to include questions to prospective jurors about their use of new technology and social media.

**Action:** Judge Conlogue will request from judges statewide their suggestions for additional voir dire on this subject.

**4. Revisions to Rule 122.1:** This led to a discussion on the enforcement of prohibitions under proposed new Rule 122.1. If a court posts a warning on the courtroom door advising that visitors may not take photographs and someone takes a photo or video anyway, is that enough to hold someone in contempt? While that conduct may be disruptive, is it contemptuous? Would it more likely be contemptuous if jurors were the subject of the photo or video? The members and David Withey, chief counsel for the Administrative Office of the Courts ("AOC"), offered factors for consideration. Did the person who took the photo read the sign on the door? Did the

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person post or transmit the photo, and can the court require the person to remove it if it is already on the internet? Was the conduct intentional or innocuous? Is taking a picture under these circumstances any different than a phone ringing in court notwithstanding a sign directing visitors to silence their phones? One member noted that a contempt citation involves a variety of consequential and complex issues, among them transfer to a different judge, a “cooling off” period, the right to a jury trial, and a right to court-appointed counsel.

The AOC’s assistant counsel, Jennifer Greene, offered the results of her research on contempt. She reviewed with the members Rule 33 of the Rules of Criminal Procedure concerning contempt, and other Arizona authorities. She concluded that a judge can inherently do what is necessary to maintain order in a courtroom, and a judge can do what is necessary and appropriate in response to someone taking an unauthorized photo or a video in court. She believes that draft Rule 122.1 is sufficient authority to find this conduct contumacious, even in the absence of a sign on the door; and if the conduct is sufficiently disruptive, it is contumacious even in the absence of this proposed rule. She stated that a judge has considerable authority in dealing with unauthorized use of a camera, including seizing the device and ordering deletion of a photo or video. She said that a judge could hold a person in contempt for failing to delete a photo after the judge ordered the person to do so; the contempt would be civil because the person could avoid the sanction by deleting the photo.

The members agreed that judges must know their options when unauthorized camera use occurs. Judge Downie suggested that judges obtain education about controlling their courtrooms. Most court visitors will abide by a judge’s requests without the need for a contempt citation. Judges are reticent to hold people in contempt, and too much emphasis on the contempt power might encourage its overuse. If a judge issues an order to remove a photo, the order should be broad enough to require deletion from sites where a person may have been transmitted it.

**Action:** The Chair requested Ms. Greene’s assistance in preparing guidance for judges for possible inclusion in the Bench Book, and as an attachment to the committee’s report. The Chair noted that the recommended text should mention that contempt is a last resort, and judges should use this authority sparingly.

The members reconsidered a blanket prohibition on use of devices in the courtroom, and concluded once again that the better course is to allow devices but to limit use if they are disruptive, or if use is contrary to the administration of justice. To clarify the committee’s intent, the members agreed to remove the words “or limit use of” following the word “silence” in the first sentence of section (e) of the draft. The members also agreed to delete the word “public” in the definition of “courtroom” that was provided in section (b).

**5. Revisions to the draft report:** The Chair then asked for comments concerning staff’s initial draft of the committee’s report to the Arizona Judicial Council (“AJC”). In the second sentence of the executive summary, a member suggested that the word “hands” should replace “palms;” but another member thought the second sentence lacked impact, and that staff should delete it

and should convey instead that electronic devices are small and easily portable. Judge Conlogue noted that the report should mention the recommended *voir dire*.

**Action:** The Chair requested the members to send specific revisions to staff.

The Chair invited further general comments. Judge Rash inquired whether a sentence in the draft's discussion of Rule 122, that "the majority of committee members share this latter point of view," was accurate. The "latter point of view" was a statement "that the public has been educated about the judicial system because of the presence of news cameras, and that even a few seconds of court news create a perception that court is open and accessible." Judge Rash believes that snippets of coverage do little to educate the public, and that coverage sometimes reports only dramatic events while omitting a balanced and broader perspective of a court proceeding. Ms. Phillips agreed that stories are sometimes superficial, but the stories may prompt viewers to learn more from other sources. The members agreed to retain the first portion of the sentence, but to delete the second half. The Chair observed that the Court years ago settled the fundamental, preliminary question of whether cameras should be in the courtroom by its adoption of Rule 122 permitting cameras.

**6. Rule 122:** The members proceeded to discuss the current draft of Rule 122, starting with proposed section (m) and the use of personal audio recorders by journalists. Staff related a comment from the Committee on Superior Court, which noted that anyone could bring a portable device into the courtroom; but allowing only credentialed journalists to use the devices to audio record treats them and members of the public unequally. One member noted that the reason journalists can do this is to take notes so they can accurately write a story, whereas members of the public are not writing news articles. The Chair inquired whether the purpose of recording is to take notes, or to broadcast the audio; the current rule is not specific. If the audio is for broadcast, is court approval required? Another member asked why there should be a distinction between a credentialed journalist and a professional or other blogger. The Chair noted that proposed Rule 122.1 generally allows audio recording. [Rule 122.1 allows use of devices by the public in courtrooms "to retrieve or to store information."] Moreover, if a rule disallowed recording, could the court enforce it? The members decided to delete the word "credentialed" in the current draft of section (m), but otherwise, proposed section (m) and related provisions in draft Rule 122.1 will remain as written in the drafts.

The members also discussed proposed section (l)(5) regarding a prohibition of camera coverage of victims in a criminal proceeding. Staff advised that the Commission on Victims in the Courts had requested changes to the text of this prohibition to allow the victim to "opt in" to coverage, rather than requiring the victim to "opt out." The consensus of the committee after discussing this request was to retain the current language in the draft, which provides that a victim in a criminal proceeding "may request" that they not be covered. Mr. Bodney noted that a victim's request not to be shown on camera is not solely determinative, but it is one of multiple factors a judge must consider under section (e). The members agreed that the text of section (l)(5) should be revised to reflect this. Judge Downie added, and the members agreed, that a judge should have the authority under this provision to make a *sua sponte* determination that there be no

coverage of a victim, for example, when there is a child victim and no one else has made the request on behalf of the child. The members discussed revisions to section (f) to assure its compatibility with section (l)(5), but concluded that revisions to section (f) were unnecessary. They declined to include amendments to Criminal Rule 39 within a petition to amend Rule 122.

The members next discussed section (c), and the notice requirement. Mr. Bodney requested that the draft be modified to specify that a 48-hour notice is not required if a proceeding is scheduled on less than 48-hours notice, such as a hearing in an election case or for a temporary restraining order. The members agreed and noted that the existing rule may provide useful guidance in drafting the required revisions. The members agreed that staff should make these revisions. If a reporter did not submit a non-exigent request within 48-hours because of the reporter's oversight, the request is untimely; but a judge should still consider it, although not necessarily before the start of a proceeding. The members further discussed that section (c) of the draft uses a standard of "days" as well as one of "hours," but the members agreed that a reference to two time standards was reasonable in the context of this section. A member also suggested addition of the words "on this request" to the sentence in section (c) regarding standing.

In section (d) regarding objections, the members agreed to remove in the second sentence the portion after the words "at any time." The members also agreed to remove the first sentence of section (h) in the current draft, which states that equipment must remain outside the courtroom, because this sentence is unnecessary. The sentence in section (h) beginning with the words "the judge may direct" should be broken into two sentences; and staff should revise the provision regarding public funds so that it states, "the judge may not require that public funds be used." The members agreed that section (i) should refer to "additional" cameras in lieu of "more than one" camera. Finally, Mr. Bodney noted that there has been a change in the law about juvenile proceedings being open to the public, and the members agreed that section (l)(4) should provide that coverage of juvenile proceedings is only as allowed by Arizona law.

**7. Roadmap:** At the Chair's request, staff noted the calendar for future events. The events include staff's progress report to the Presiding Judges, on October 24; and further progress reports to the Committee on Limited Jurisdiction Courts, on October 31; and to the Committee on Superior Court, on November 2. The committee's report to the Arizona Judicial Council is due by November 30, for presentation at the AJC's December meeting. If the AJC approves the committee's recommendations concerning rule changes, the committee must file rule petitions by January 10, 2013. The rule petitions would then be open for public comments during the following months, and the committee would thereafter have an opportunity to file a formal reply to those comments. The Court would consider the petitions at its August rules agenda. Because A.O. 2012-22 directs that the committee "shall continue as long as necessary to complete its work," the committee's duties will probably extend into the second half of 2013. The Chair noted that this committee would need to reconvene on November 7 to finalize its report to the AJC, but that members would be able to attend remotely via WebEx.

**8. Call to the Public; Adjourn:** There was no response to a call to the public. The meeting adjourned at 2:05 p.m. The next meeting date is **Wednesday, November 7, 2012.**

*Committee on the Impact of Wireless Mobile Technologies & Social Media  
Minutes: Sept. 28, 2012*

**ARIZONA SUPREME COURT**  
*Committee on the Impact of Wireless Mobile Technologies and Social Media  
on Court Proceedings*

Minutes

November 7, 2012

Members present:

Hon. Robert Brutinel, Chair  
Hon. Janet Barton  
Hon. Dan Dodge  
Hon. Margaret Downie  
Hon. Michael Jeanes  
Hon. Eric Jeffery  
Hon. Scott Rash

Members present (cont'd):

Karen Arra  
David Bodney  
Joe Kanefield  
Robert Lawless  
Robin Phillips  
George Riemer

Guests:

Jennifer Liewer  
Theresa Barrett

Staff:

Mark Meltzer  
Ashley Dammen  
Julie Graber

Members not present:

Hon. James Conlogue  
Kathy Pollard  
Marla Randall

**1. Call to Order; approval of meeting minutes:** The Chair called the meeting to order at 10:10 a.m. The Chair asked the members to review the draft minutes of the September 28 meeting.

**Motion:** A member made a motion to approve the September 28 minutes. The motion received a second and it passed unanimously. **Wireless 12-011**

**2. Draft letter to the Judicial Ethics Advisory Committee:** The members proceeded to discuss a draft letter to the Judicial Ethics Advisory Committee (“JEAC”) requesting an omnibus advisory opinion on the use of social media by judges and courtroom staff. The members discussed ethics opinions from other jurisdictions, including a recent one from Ohio, which have varying conclusions. The members offered the following comments during this discussion:

- Is it possible, necessary, or appropriate for Arizona to have a social media policy for its judges and court staff?
- What are the implications when the public associates a social media post with a judge, even if the judge’s capacity is not expressly identified?
- Should the same social media policy govern both elected judges as well as judges appointed by merit selection?

*Committee on the Impact of Wireless Mobile Technologies & Social Media  
Minutes: November 7, 2012*

- What restrictions should apply to a judge or a clerk during an election campaign or during an elected official's term in office? How should those restrictions apply if the judge or clerk's election opponent is using social media?
- Should a policy distinguish between courtroom staff and staff who are not present in the courtroom?

The members agreed that there are numerous scenarios and distinctions, and that an advisory opinion could not cover every factual permutation. Mr. Riemer offered to compile the opinions from other jurisdictions and provide them to the JEAC. He is already gathering information, and the JEAC will look for the Wireless Committee's letter requesting an advisory sometime in January.

**3. Jury admonition:** The members proceeded to the subject of the jury admonition. Staff played a video recording by Paula Hannaford-Agor, the director of the National Center for State Courts Center for Jury Studies, on Juror and Jury Use of New Media. Ms. Hannaford-Agor posed questions about why jurors use social media, and the impact their use of social media might have on a jury's decision-making. She hypothesized that in some cases, the risk of compromising the jury's impartiality might be high, and in other cases, a jury's use of social media might have no impact. If a juror uses social media, will they find any information about the case? If they do, will they share it with other jurors, and if so, will it affect the fairness of the proceeding and the integrity of the verdict?

The committee members then discussed the video, and whether in the future, a court might permit jurors, perhaps experimentally, to use social media during a trial. One member commented that the desire to communicate with others drives the use of social media, and courts should recognize this need, possibly by allowing partial but not complete use.

The Chair requested staff to describe changes to the draft jury admonition. The jury admonition, as well as the drafts of Supreme Court Rules 122 and 122.1, had been considered during the preceding weeks at meetings of the Arizona Association of Superior Court Administrators, the Committee on Limited Jurisdiction Courts, the Committee on Superior Court, and the Limited Jurisdiction Courts Administrators Association, as well as at a meeting of presiding judges of the superior court.

The members reviewed a mark-up version of the jury admonition showing changes made during the September 28 meeting, as well as further modifications made by staff as a result of comments received during the foregoing meetings. Some of these changes were stylistic or improved the organization of the admonition. The warning about not taking photos or videos was removed. There was a revision to the language regarding "friending." The revised admonition included a sentence that advised jurors that if they had a question or needed additional information, they should submit the question or request in writing. The admonition added a sentence explaining that the court instruction to jurors not to look for information outside the courtroom was not a suggestion that there was other information that a juror could find.

**4. Rule 122:** Next, the members considered revisions to the draft of Supreme Court Rule 122.

The members discussed which judge would approve the use of a camera in the courtroom while the court is not in session. The members agreed that if the proposed camera use does not arise from a proceeding in the courtroom, the person making the request should present it to the presiding judge or a designee.

The members then discussed whether the requirements of the draft rule should apply to devices that are used solely for audio recording. On the one hand, there is a desire for transparency in court proceedings. On the other, judges should be aware of any recording that occurs inside a courtroom. For example, judges should have control of audio recordings if there are bench conferences, or off-the-record or privileged conversations; otherwise, members of the public could post or broadcast these conferences or conversations without limitation. Members noted that audio recording technology is sophisticated enough to make good quality recordings from the gallery, and the judge should therefore be notified before this occurs.

After further discussion, the members agreed that a formal request process was not necessary for a person wishing to audio record a proceeding. However, any person, including a journalist, would be required to notify the court that they were using a personal audio recorder in the courtroom. This would allow the court to advise those persons that they are subject to the provisions of Rule 122, section (l). This abbreviated process would also alert the parties that someone was making an audio recording. The proposed rule would not authorize the judge to prohibit use of a personal audio recorder, but rather would serve only to provide notice of use. The members discussed whether a sign would be necessary to inform members of the public of the requirement to notify the court. The members decided that a sign or information on the court's website would be optional ways of notifying the public, although the rule itself is probably sufficient notice, but that each court could develop its own preferred method of providing notice.

Judge Dodge commented that the younger generations may not equate a camera with a video recording device, and he suggested that the revised rule's title refer to a "recording device" rather than to a "camera." The members had no objection to this change. The members also considered adding a definition for a "personal recording device." An audio recording device that is not on the person of an individual in the gallery, but that requires a microphone in the well of the courtroom, would be subject to the request requirement under section (c). Staff will revise the draft rule accordingly.

The members proceeded to discuss the rights of victims under Rule 122. In addition to the word "victim" appearing in section (l)(5) of the draft, the most recent version also added "victim" to two of the factors in section (e). [These draft provisions now say, "The impact of coverage upon the right of privacy of any party, victim, or witness;" and "the impact of coverage upon the safety and well-being of any party, victim, witness, or juror..."] One member commented that the court always grants a victim's request that he or she not be photographed; why then should the judge have discretion under section (e) to deny such a request? The members agreed that the

judge should not be required to provide specific findings under section (e) to deny a request to photograph a victim, but that the court should be required to consider the factors. In a criminal proceeding, minute entries routinely include express prohibitions regarding photographs or video of victims, and proposed section (l)(5) would allow a judge on his or her own motion to deny a request to photograph victims.

Staff also noted a revision to section (b)(4). The revision has the effect of excluding the court from the requirements of section (c), that is, a court can record and broadcast its own proceedings. Staff advised that this addition resulted from information that at least one municipality is contemplating a broadcast of some of its city court proceedings. The members discussed whether that court should be required in this circumstance to advise participants and the public of the broadcast. The members declined to require this; if municipalities have concerns, they may wish to get advice from their city attorney. The second sentence of revised section (b)(4), which provided that “a court may provide coverage of its own proceedings, and it is exempt from the requirements of section (c),” was moved to section (c).

**5. Rule 122.1:** The members also considered a revised version of Supreme Court Rule 122.1 concerning use of portable electronic devices in the courtroom and courthouse. Staff described changes to the present version of this new rule made during the September 28 meeting as well as subsequently. Staff noted language in section (c) that was added in response to comments by judges during the vetting process. The additional language stated, “A party or a member of the public may not photograph or video record a judge, a judicial employee, an attorney, a party or an opposing party, a victim, a witness, a juror, or a peace officer anywhere in the courthouse without the person’s consent. A violation of this section presumptively obstructs the administration of justice, and lessens the dignity and authority of the court.” The members suggested substituting the words “another person” in lieu of this list of specific individuals.

**Motion:** A member moved to add the word “knowingly” to this provision. Rule 122.1 would therefore prohibit anyone from “knowingly” taking photographs or making recordings of another person anywhere in the courthouse without that person’s consent, except as allowed under Rule 122. The motion received a second and it passed with two nays. **Wireless 12-012**

The members also discussed section (e) of this proposed rule, and specifically a recommendation by the Committee on Limited Jurisdiction Courts (“LJC”) that a judge have authority to “prohibit” activity rather than “terminate” activity that may be disruptive or distracting to a court proceeding. Judge Jeffery, who also serves on the LJC, explained the reasons for this recommendation. The consensus of the members was not to fashion a blanket prohibition of using devices in court, but to allow prohibition following a pattern of disruptive activity.

**Motion:** A member moved to keep the language as currently written. The current language gives a judge authority to terminate activity, rather than prohibit activity, which may be disruptive or distracting to a court proceeding. The motion received a second and it passed with one nay. **Wireless 12-013**

Regarding the prohibition in section (e) about making or receiving phone calls while court is in session, the members agreed to add the words “without permission of the court.” **6. Consideration of statutes:** Two recent articles concerning use of social media were included in the meeting materials. One of these articles involved a juror anonymously blogging about a trial, and whether a judge could compel a newspaper to disclose the author of the blog; the other article concerned a threat made to a juror on Facebook. The members briefly discussed whether Arizona statutes addressed these electronic communication scenarios. One member noted that a few unsatisfied litigants have created Facebook pages concerning family court judges. While there are free speech considerations, actions such as threatening a judge or a juror could be criminally prohibited. The members took no action today on this topic.

**7. Roadmap:** Staff noted that November 26 is the deadline for submission of a final version of the Wireless Committee’s report to the Arizona Judicial Council, for consideration at its meeting on December 13, 2012. The Chair requested authority to finalize the report and appendices.

**Motion:** A member moved to provide the Chair with the authority to finalize the report. The motion received a second and it passed unanimously. **Wireless 12-014**

**8. Call to the Public; Adjourn:** There was no response to a call to the public. The meeting adjourned at 2:15 p.m. Staff will schedule a meeting following the conclusion of the initial comment period, and will notify the members of that date.

**ARIZONA SUPREME COURT**  
*Committee on the Impact of Wireless Mobile Technologies and Social Media*  
*on Court Proceedings*

Minutes  
 April 8, 2013

Members present:

Hon. Robert Brutinel, Chair  
 Hon. Dan Dodge  
 Hon. Margaret Downie  
 Hon. Michael Jeanes,  
   by his proxy Chris Kelly  
 Hon. Eric Jeffery  
 Karen Arra  
 David Bodney  
 Robert Lawless  
 Marla Randall  
 George Riemer

Members present by WebEx:

Hon. James Conlogue  
 Joe Kanefield  
 Robin Phillips  
 Kathy Pollard

Staff:

Mark Meltzer  
 Ashley Dammen  
 Julie Graber

Members not present:

Hon. Janet Barton  
 Hon. Scott Rash

Guests:

Paul Julien

**1. Call to Order; approval of meeting minutes:** The Chair called the meeting to order at 10:05 a.m. The Chair noted that today's meeting follows the conclusion of the first of two public comment periods for R-13-0012 and R-13-0013, the Wireless Committee's rule petitions concerning Supreme Court Rules 122 and 122.1. The Chair reported that the State Bar filed one formal comment during the initial comment period in each of these rule petitions; these were the only formal comments. Staff has prepared revised rules after a review and analysis of these comments, and in addition, staff has suggested other changes to the draft rules.

Before proceeding to discuss the comments, the Chair asked the members to review the draft minutes of the November 7, 2012 meeting.

**Motion:** A member made a motion to approve the November 7, 2012 minutes. The motion received a second and it passed unanimously. **Wireless 13-001**

**2. Discussion of the comments and rule revisions:** The Chair requested staff to summarize the comments and newly proposed rule revisions. Staff first discussed revisions that were common to both Rule 122 and Rule 122.1. These revisions included modifications of the rule titles and section titles; the addition of subsection titles; and modifications to the introductory provisions in sections (a) of both rules. Staff characterized these two rules as complementary, and they now include similar titles, parallel organization and formatting, and cross-references in each rule to the other, especially with regard to definitions.

**Rule 122(b) and Rule 122(i):** Staff reviewed changes to the definitions in these rules, and noted a revised definition of the word “judge” in Rule 122(b) that allowed the deletion of any reference to “presiding judge” as well as the deletion of former section (p) concerning appellate courts. The members discussed the application of the new definition of “judge” to Rule 122(i), and the process by which a person would request permission to use a camera in a courtroom that was not in session. In a written comment, Judge Barton had urged that a person should submit these requests to the presiding judge, not to the judge who presides in a specific courtroom. She believes that a new judge might not appreciate the implications of granting the request, and might inadvertently allow inappropriate use of a camera in a courtroom that was not in session, for example, as a set for filming a television commercial. One member also noted that the request to film in a courtroom might not always be the same courtroom where a proceeding is taking place. Administration of these requests should therefore occur in a centralized location. Ms. Arra observed that people usually submit requests in Maricopa County to the court’s public information office rather than to the judge in whose courtroom a proceeding takes place. Accordingly, the members revised the last sentence of Rule 122(i) concerning use of a recording device while court is not in session as follows:

If a person wishes to use a recording device in any courtroom when that judge’s courtroom is not in session, prior to using the device, the person must obtain the express permission of the presiding judge of that jurisdiction or an ~~authorized~~ office of the court authorized by the presiding judge to approve requests under this section prior to use.

The members discussed but did not include references in section (i) to the Chief Judge of the Court of Appeals or to the Chief Justice of the Supreme Court.

The members also discussed the new definitions of “courtroom” and “victim” in Rule 122(b), as well as the other definitions in section (b), without making changes to those definitions.

**Rule 122(c):** A member requested clarification of the waiver provision in subsection (4) to address cases in which there are multiple requests for coverage. The members concurred that this provision would be just as effective with less language. The members then agreed to the following changes to the draft:

*(4) Time for a party to object to a request:* A party’s objection to a request for coverage of a proceeding is waived if the party does not object to the request in writing or on the record no later than the start of the proceeding, ~~or the conclusion of a hearing held under section (c)(3), whichever occurs first.~~

The discussion turned to subsection (c)(5). Members felt that requiring someone to give notification of coverage to a victim or witness “prior to the proceeding” was ambiguous. They also believed that the notification required by this provision should include the right to object. The members therefore agreed to these changes:

*(5) Time for a victim or witness to object to a request:* A victim or a witness may object to coverage at any time. An attorney who represents a victim, and anyone who calls a witness to testify, has a responsibility to notify that victim or witness of coverage, and his or her right to object, prior to the victim's appearance or the witness' testimony at the proceeding.

There was consensus among the members that the provisions of subsection (5) did not establish substantive rights, for example, that a witness could not refrain from testifying if he or she had not received the notification. However, the members felt that stating this in the rule was unnecessary.

**Rule 122(d):** The members engaged in an extensive discussion of section (d). The first sentence of the draft stated that a request for coverage that was properly submitted “will presumptively be approved....” One member felt that this was an appropriate provision, because courts operate on this presumption as a practical matter and the provision merely codifies existing practice. Other members noted that a presumption has legal meaning, and inclusion of a presumption would require additional text to explain how someone could overcome the presumption. Moreover, the members agreed that the first sentence of this section could have the same meaning with the following change, which the members adopted:

A properly submitted request for coverage ~~that is properly submitted under section (e) will presumptively~~ should generally be approved, but a judge may deny or may limit the request as provided in this section.

The members also concurred that subsection (d)(1) should explicitly state that a judge may deny a request for coverage sua sponte. To avoid the use of Latin terms, the members agreed to the following language:

*(1) Denial of coverage:* A judge on his or her own motion may deny a request for coverage, or may sustain a party's objection to coverage, only after making specific, on-the-record findings...[etc.]

In subsection (d)(2)(C), the members again felt that in addition to granting a request by a witness to limit coverage, a judge should have sua sponte authority to limit coverage of a witness' testimony. The members agreed, and made the following change:

(C) A judge on his or her own motion or upon request of a witness, ~~or may grant an objection of a particular witness to coverage of that witness' testimony,~~ and may prohibit coverage of the testimony of that witness upon a determination that coverage would have a substantial adverse impact upon that witness or his or her testimony.

The members further discussed whether the “substantial adverse impact” provision in paragraph (d)(2)(C) created an additional factor that a judge should consider under subsection (d)(1). The members felt that the “substantial adverse impact” language was specifically and only applicable

to paragraph (d)(2)(C). To make that clear, the members agreed to add a new clause to the introductory sentence of subsection (d)(2), as follows:

*(2) Limitation of coverage:* A judge may allow coverage as requested, or may impose the following limitations on coverage after making specific, on-the-record findings based on the factors in subsection (d)(1), or based on paragraph (C) below:...

Finally, the members thought that a reference to “a criminal or a civil proceeding” in paragraph (d)(2)(B) was superfluous, and the reference was deleted.

**Rule 122(e) and Rule 122(f):** While discussing equipment, members made comments about how jurors are distracted by sound and by movement in the courtroom. Still cameras in particular may produce clicking sounds when the shutter opens and closes. The members agreed that these sections should emphasize that the manner of coverage, as set forth in section (e), and equipment, which is described under section (f), should not “disrupt” the proceedings. The members expressed that emphasis with these two revisions:

- In Rule 122(e): All persons and affiliated individuals engaged in the coverage must avoid conduct or dress that may disrupt or detract from the dignity of the proceeding.
- In Rule 122(f): Microphones, cameras, and other equipment used for coverage must be as unobtrusive as recording devices in general use in the community where the courtroom is located, and must not produce distracting sounds or otherwise disrupt the proceeding.

The members made no other changes to sections (e) or (f), or to sections (g) or (j).

**Rule 122(h):** Staff deleted the word “journalist” from this section on personal audio recorders because the provision allows for the use of a personal audio recorder by “a person,” which axiomatically includes “a journalist.” None of the members objected to this deletion.

**Rule 122(k):** The members discussed two new prohibitions in Rule 122(k). Staff included these proposed provisions following review of a “media information packet” prepared by Judge John Leonardo in a Pima County capital case.

One of the new provisions, subsection (k)(1), provides that “a person may use a recording device in the courtroom only when the judge is on the bench, and use of a recording device must terminate when the judge leaves the bench.” The members had no objection to adding this new provision.

The other provision, subsection (k)(4) stated that a person could not use a camera to take readable images of documents on counsel tables. The members raised a number of issues concerning this proposed language. Does the provision include all documents on counsel table, or only confidential ones? Would the provision apply to electronic information on counsel’s computer? Would it apply to counsel’s documents on a podium? Should the provision also

apply to jurors' notes? Because some courts now allow a second camera in the front of the courtroom, should this prohibition also apply to what is on the judge's bench and monitor? Should it apply to what is on the desks used by court staff? One member noted that a person would not need a telephoto lens to take a readable picture of a document, but that a lens of reasonable quality could capture an image that a person could enhance to make the document legible. Cameras and lenses will improve over time and capturing a readable image will become even more feasible. One member proposed that the provision should only prohibit a person from taking an image of a confidential document, one that has protected information, or one that is under seal. One member wanted the provision to allow a person to take pictures of any document that has been marked for identification; another member thought that the provision should allow taking images only of documents that were admitted into evidence. The members discussed various versions of the provision, but were unable to reach any consensus. The Chair advised that he and staff would work on revised language, and Mr. Bodney also volunteered to do so, and staff will circulate further revisions to the members.

This concluded the discussion of revisions to Rule 122, and the members then proceeded to Rule 122.1.

**Rule 122.1:** Staff described changes to sections (a) and (b) of Rule 122.1. Staff noted an inconsistency between the previous Rule 122(k)(3) ["a person whose request under this rule has been granted may not photograph...locations in a courthouse where a court proceeding is not being conducted..."] and Rule 122.1 (c), which would allow anyone to record in areas outside the courtroom. This inconsistency was resolved by deleting former Rule 122(k)(3) from the draft. The members accepted those changes.

**Rule 122.1(c):** Rule 122.1(c) in the prior version began by advising the reader of restrictions on recording in the courthouse, but it omitted to state that the rule allowed photography and recording outside the courtroom. The members therefore agreed to change the first sentence of section (c) as follows:

~~The following restrictions apply to p~~Photography, audio recording, and video recording in a courthouse are permitted, but the following restrictions apply:...

The members also agreed that naming specific categories of individuals in section (c)(2) was unnecessary. They believed that no individual should be the subject of a recording or a photograph taken without the individual's express consent. Therefore, the members changed the first sentence in this subsection to state:

(2) *Outside a courtroom:* In areas of a courthouse other than courtrooms, no one may photograph or record an individual, ~~including a judge, a juror, a witness, a victim, a law enforcement officer, an officer of the court, or court staff~~ without that person's individual's express consent. A violation of this section may be punished as contempt.

In subsection (c)(3), the members agreed to insert the word “reasonable” into the provision to convey its philosophy concerning blanket prohibitions of camera use, as follows:

By local administrative order, a court may adopt further reasonable limits....

**Rule 122.1(d):** The members reaffirmed a sentence in the previous version of Rule 122.1(c) that required jurors to turn off their portable electronic devices while in the courtroom or while in the jury room during deliberations, and not merely silence the devices. In reaching this conclusion, the members agreed that jurors should focus on court proceedings and jury deliberations by giving them their undivided attention. The members further concurred with a deletion of a provision in the previous version that would have required the court to provide a phone number for emergency messages to jurors. The members also agreed to add the following sentence in subsection (d)(1):

Jurors may use their devices for allowable purposes during breaks.

**Rule 122.1(e):** Staff noted that the version of Rule 122.1(e) included with R-13-0013 inadvertently allowed a judge to “prohibit” activity under this section. The members had agreed at the November 7 meeting that the rule should allow a judge to “terminate” activity. This remained the view of the members, and staff changed the word to “terminate,” as the members had previously agreed.

This concluded the members’ discussions concerning changes to Rule 122.1.

**3. R-13-0022:** Staff reviewed a proposed change, consistent with comments from the State Bar, which revised the following provision in the respective civil and criminal rules concerning the jurors’ oath:

...follow the court’s instructions, including the admonition....

The members agreed with this change. The members specifically agreed with substituting the word “follow” for the previously used word “comply” to further simplify the language of the juror oath.

**4. Next steps:** The Chair noted these dates:

May 8 is the deadline for filing amended rule petitions in R-13-0012 and R-13-0013

June 5 is the date that comments to the amended petitions are due

July 3 is Petitioner’s deadline for filing replies to comments on its amended petitions

Although staff will circulate drafts of today’s rule revisions to the members prior to the May 8 deadline, the Committee will not meet before then. The Chair therefore requested authority to draft the amended petitions and finalize the revised rules.

*Committee on the Impact of Wireless Mobile Technologies & Social Media  
Minutes: April 8, 2013*

**Motion:** A member moved to give the Chair authority to draft amended petitions in R-13-0012 and R-13-0013, and to finalize the proposed rules that are included with those petitions. The motion received a second and it passed unanimously. **Wireless 13-002**

The Chair advised the members that he would set another meeting during the week of June 10 or June 17, following the close of the second comment period, and he requested members to notify staff concerning dates that they would be unavailable for a meeting during those weeks.

**5. Call to the Public; Adjourn:** There was no response to a call to the public. The meeting adjourned at 1:45 p.m.