ARIZONA SUPREME COURT
Committee on the Impact of Wireless Mobile Technologies and Social Media on Court Proceedings
Minutes
August 30, 2012

Members present:	Members present (cont'd):	Guests:
Hon. Robert Brutinel, Chair	Karen Arra	Patricia Sallen
Hon. Janet Barton	David Bodney	Lynda Shely
Hon. James Conlogue	Joe Kanefield	Rusty Anderson
Hon. Dan Dodge	Robert Lawless	Cindy Trimble
Hon. Michael Jeanes	Robin Phillips	Paul Julien
Hon. Eric Jeffery	Kathy Pollard	Theresa Barrett
Hon. Scott Rash	Marla Randall	Jennifer Liewer
	George Riemer	Stephanie Harris
		Mark Casey
Members not present:	Staff:	Michael Kiefer
Hon. Margaret Downie	Mark Meltzer	
	Ashley Dammen	
	Julie Graber	

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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

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:

- 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.

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.**