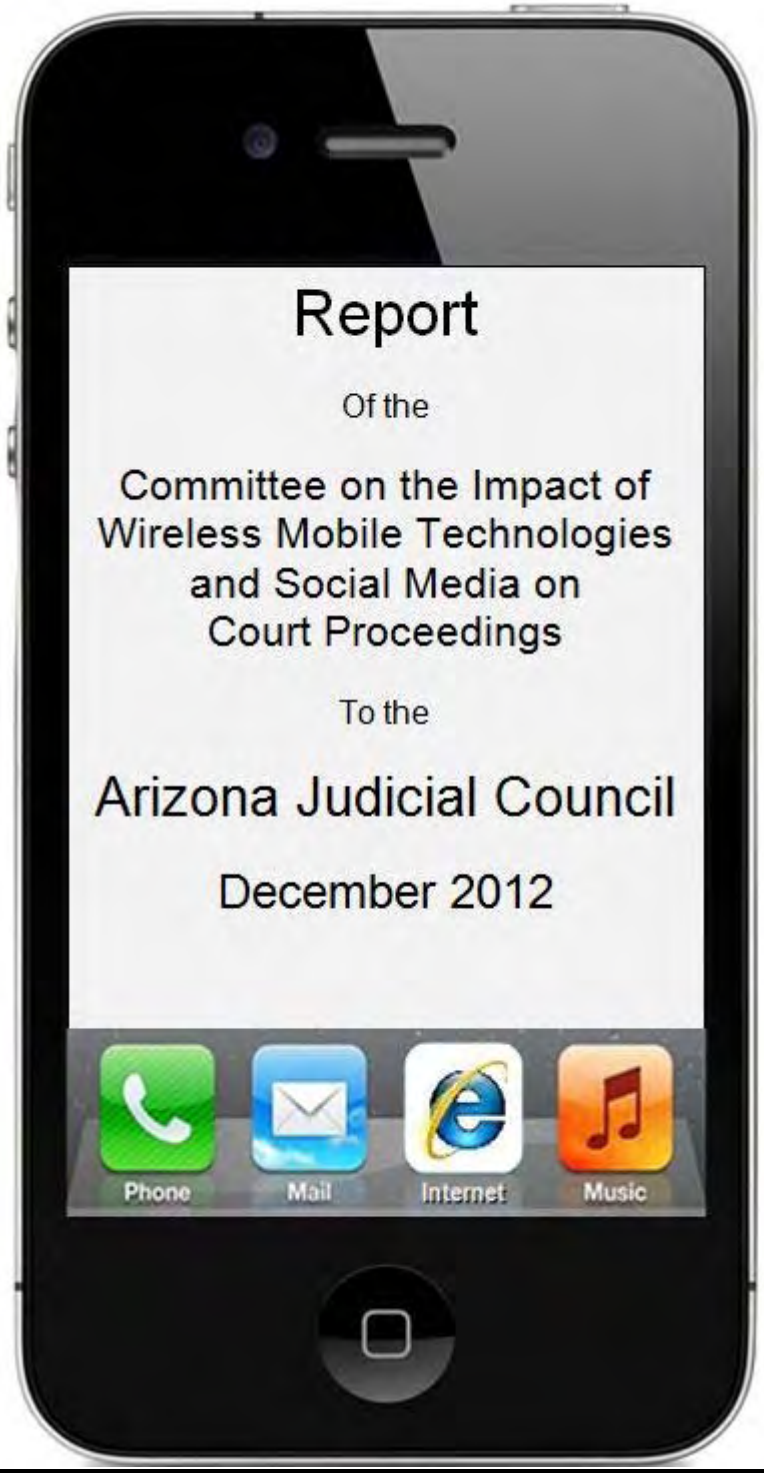


Report

Of the

Committee on the Impact of Wireless Mobile Technologies and Social Media on Court Proceedings

To the

Arizona Judicial Council

December 2012

Justice 2020

Members of the Wireless Committee

Chair:
Honorable Robert M. Brutinel
Arizona Supreme Court

Karen Arra
Public Information Officer
Superior Court, Maricopa County

Honorable Janet Barton
Superior Court
Maricopa County

David J. Bodney
Steptoe & Johnson LLP
Media Representative

Honorable James Conlogue
Presiding Judge
Superior Court, Cochise County

Honorable Dan Dodge
Highland Justice Court
Maricopa County

Honorable Margaret Downie
Court of Appeals, Division 1
Chair, Judicial Ethics Advisory Committee

Honorable Michael Jeanes
Clerk of the Court
Superior Court, Maricopa County

Honorable Eric Jeffery
Assistant Presiding Judge
Phoenix Municipal Court

Joseph A. Kanefield
Ballard Spahr LLP
State Bar Representative

Robert Lawless
Security Manager
Superior Court, Mohave County

Robin J. Phillips
Digital Director
ASU Reynolds Center for Business Journalism

Kathy Pollard
Jury Commissioner
Superior Court, Pima County

Marla Randall
Court Administrator
Navajo County

Honorable Scott Rash
Superior Court
Pima County

George A. Riemer
Executive Director
Commission on Judicial Conduct

Committee Staff:
Mark Meltzer, Ashley Dammen, Julie Graber
Administrative Office of the Courts

Table of Contents

Executive Summary……..4

Recommendations:

Recommendation 1: *Revise Supreme Court Rule 122 concerning the use of recording devices in the courtroom*……..……..…..**6**

Recommendation 2: *Adopt a new Supreme Court Rule 122.1 on the use of portable electronic devices*…….…….....**8**

Recommendation 3: *Revise the admonition to the jury, as set out in Recommended Arizona Jury Instruction ("RAJI") Preliminary Civil 9, RAJI Preliminary Criminal 13, and the Judicial College of Arizona (JCA) Bench Book. In conjunction with the admonition, the Wireless Committee recommends revisions to the jurors' oath, as prescribed in Ariz. R. Civ. P. Rule 47(a)(3) and Ariz. R. Crim. P., Rule 18.6(b). The Wireless Committee also recommends use of a "smart juror" card*……**10**

Recommendation 4: *Consider revisions to the rules and jury instructions regarding the exclusion of witnesses. The rules and instructions on this subject are contained in Arizona Rules of Evidence, Rule 615; Ariz. R. Crim. P., Rule 9.3; RAJI Preliminary Civil 12 and Criminal 8; and the JCA Bench Book*……..……..…...**13**

Recommendation 5: *Consider revisions to RAJI Standard 7, the instruction to an excused alternate juror*……..…….....**14**

Recommendation 6: *Refer judicial ethics questions to the Judicial Ethics Advisory Committee, and request a formal opinion from that committee*..…....**14**

Comments on the Wireless Committee's Recommendations…….…….....**15**

Consideration of Arizona Statutes…….…….…...…….**15**

Continuation of the Wireless Committee's Work……...…..**15**

Table of Recommended Actions…….....……...….**16**

Table of Appendices…….……....**18**

Executive Summary

Our society continues to devise electronic technology that is increasingly versatile, easy-to-use, and portable. This ubiquitous technology is now in the hands of the parties, attorneys, witnesses, jurors, and spectators who participate in the more than two million cases filed annually in Arizona. Courthouses have no protective moats insulating them from new technology; portable electronic devices, with their multiple functions and apps, are already well-past the courthouse door.

Chief Justice Berch entered Administrative Order 2012-22 on March 7, 2012 establishing the Committee on the Impact of Wireless Mobile Technologies and Social Media on Court Proceedings (the "Wireless Committee"). The Order directed the Wireless Committee, after appropriate study, to recommend a reasonable balance of new technology in the courts with the right of every person to due process, and the need for security in the courthouse. The Order specifically directed the Wireless Committee to:

> (a) Address the use of wireless mobile technology by lawyers, jurors, media, witnesses, and the public who attend and participate in court proceedings;
>
> (b) Provide direction to judges, court security officers, and personnel on the possession and use of photo- and video- enabled technology by courthouse visitors; and
>
> (c) Identify ethical questions for consideration by the Judicial Ethics Advisory Committee, the Commission on Judicial Conduct, or another appropriate Supreme Court committee.

The Wireless Committee met regularly between April and November. It established a workgroup to consider revisions to the jury admonition. As directed by the administrative order, the Wireless Committee submits this report.

Advances in technology allow stakeholders to bring the latest electronic devices into the courthouse, yet many of the issues raised by those new devices have judicial precedents. For example, some jurors previously violated the admonition by searching for information in books or newspapers, on television or radio, or by visiting a scene where events occurred. Today, by using the internet, a juror can view a scene "virtually," or access vast amounts of information with a few keystrokes. The internet simply provides new methods for jurors to violate these established admonitions. Judges traditionally instruct witnesses not to speak with each other about the case. The advent of such things as Facebook and text messaging requires that judges add advice to their traditional instructions to witnesses, but it does not make the old instructions irrelevant. Although cameras today are smaller and quieter, and courthouse visitors have become individual

media centers, the same concerns about cameras in courtrooms have existed for decades. With this perspective, the Wireless Committee's consensus is not to broadly prohibit use of advanced technology, but to accommodate a productive use of this technology within existing rules and ethical principles, and which comports with the needs of the judicial system for due process, decorum, and security.

The intersection of courts and technology is not free of conflicts. The members of the Wireless Committee have seen or learned of instances, and can conceive of a myriad of situations, where individuals abuse technology in the courtroom. For example, and notwithstanding any rule to the contrary, a few individuals may use portable devices to surreptitiously take photographs or make unauthorized recordings while court is in session. Some of those violations will be undetected. Exceptional circumstances and unfortunate events will occur, notwithstanding the most superbly drafted rules. The Wireless Committee hopes its proposals will keep these exceptions to a minimum. Only a total ban of portable electronic devices inside the courthouse, a wholly improbable scenario, would have any chance of eliminating all misuse.

Here are the Wireless Committee's recommendations. The subsequent pages of the report explain these recommendations.

1. Revise Supreme Court Rule 122 on the use of recording devices in a courtroom.

2. Adopt a new Supreme Court Rule 122.1 as a general policy concerning use of portable electronic devices in courtrooms and courthouses.

3. Revise the admonition to the jury, as set out in Recommended Arizona Jury Instruction ("RAJI") Preliminary Civil 9, RAJI Preliminary Criminal 13, and the Judicial College of Arizona ("JCA") Bench Book. In conjunction with the admonition, the Wireless Committee recommends revisions to the jurors' oath, as prescribed in Ariz. R. Civ. P., Rule 47(a)(3) and Ariz. R. Crim. P., Rule 18.6(b). The Wireless Committee also recommends use of a "smart juror" card.

4. Consider revisions to the rules and jury instructions regarding the exclusion of witnesses. The rules and instructions on this subject are contained in Arizona Rules of Evidence, Rule 615; Ariz. R. Crim. P., Rule 9.3; RAJI Preliminary Civil 12 and Criminal 8; and the JCA Bench Book.

5. Consider revisions to RAJI Standard 7, the instruction to an excused alternate juror.

6. Refer judicial ethics questions to the Judicial Ethics Advisory Committee, and request a formal opinion from that committee.

<u>Recommendation 1:</u> Revise Supreme Court Rule 122 concerning the use of recording devices in the courtroom.

Administrative Order 2012-22 specifically mentions only one rule: Supreme Court Rule 122. The Arizona Supreme Court adopted Rule 122 in 1993. Audio and video recording technology has changed considerably over the past twenty years. Mr. Mark Casey, a vice-president and news director of KPNX Channel 12, told the Wireless Committee that a camera now built into an iPhone has resolution far superior to that of a camera, circa 1993, which required two men to move into the courthouse. Rule 122 refers to tripods and wires, but tripods are no longer essential, and wires may be passé. Most cameras today are considerably quieter and less distracting than the ones used in 1993. Some cameras can be operated robotically.

In light of the widespread availability of high quality, compact cameras, should the presumption underlying Rule 122, which requires a judge to allow use of a camera in a courtroom unless he or she finds good cause not to, continue to be Arizona judicial policy? The comments submitted in rule petition number R-07-0016, in opposition to proposed amendments that established the presumption, may be as valid now as they were five years ago. Cameras can make a witness shy, or can embolden courtroom theatrics. The proposition that the presence of a camera has absolutely no effect on a judicial proceeding is a debatable one. Some members of the bench believe that the presumption in Rule 122 favoring camera coverage warrants reconsideration by the Supreme Court. Mr. Casey and others, on the other hand, believe that the public has been educated about the judicial system because of the presence of news cameras.[1]

While keeping the existing presumption intact, the members recognized ways that revisions could benefit Rule 122. The Wireless Committee's draft of Rule 122 is in Appendix 1. Some of the proposed changes are:

- Section (f) of the current rule begins, "Requests by the media for coverage…." Some construe this phrase as requiring only the media to submit a request for camera coverage. Section (c) of the revised rule eliminates this ambiguity and clarifies that any person, and not just a media organization, must submit a request for camera coverage of a court proceeding. A "citizen journalist" may therefore submit a request for coverage, and must do so, if he or she wishes to use a camera in the courtroom.

---

[1] The Court has recognized that "[i]t is in the public interest that people understand as fully as possible the operation of the justice system, and the courts in particular." "In the Matter of: Special Electronic Access to Superior Court Proceedings," A.O. No. 2006-9.

- Section (e) of the revised rule incorporates the seven existing factors that a judge must consider in ruling on a coverage request, but it adds one factor. The new factor is "whether the person making the request is engaged in the dissemination of news to a broad community." This additional factor should favor camera use that fulfills the original intent of the rule: making court events available for viewing by the public-at-large.

- The current rule omits a procedure for submitting a request. Section (c) of the revised rule provides a procedural process. Note that this draft section requires a person to "submit" rather than "file" a request, because the filing of a request with the court clerk could delay its transmission to the appropriate judge. In Maricopa and Pima counties, a person may submit an on-line request to the court's Public Information Officer or its Community Relations Officer, who will route it to the proper judge. In practice, these officers or the judge's staff promptly notify the parties of the request for coverage.

- Because the court usually schedules a trial date well in advance, section (c) of the revised rule requires a person to submit a request to cover a trial at least seven days before the trial starts, rather than two days as provided in the existing rule. A person must submit a request to cover any other proceeding forty-eight hours before the proceeding (compared to two days under the current rule), unless the court scheduled a proceeding less than seventy-two hours in advance, in which case a person must submit the request "sufficiently in advance of the proceeding as not to delay or interfere with it."

- Although section (i) of the proposed revisions retains a "presumptive limit" of one microphone and one audio recording device, or one video and one still camera, the judge conducting the proceeding has discretion under this section to approve a request for additional recording devices. Multiple cameras may produce a superior journalistic product without disrupting a proceeding.

- Rule 122 currently does not have a provision concerning coverage of a victim. Sections (e), (f), and (l) of the proposed revisions to Rule 122 do. These revisions acknowledge the special status of a victim, who may be neither a party nor a witness in a criminal proceeding.

- The revisions to Rule 122 allow use of a "personal audio recorder," but only after the operator notifies the court of the intended use. A "personal audio recorder" is one that is on, held by, or immediately next to the operator. As under the current rule, the judge has no authority under this proposed rule to forbid the use of a

personal audio recorder, but the notice requirement will make the court aware of when one is being used in the courtroom.

- The revised version re-organizes the rule. The re-organization includes placing sections of the rule in a sequential order, combining provisions, and eliminating duplicate text. Note that other rules in Chapter XII of the Supreme Court rules (the "Miscellaneous Provisions"), such as Rule 123, have helpful topic headings for each section, but Rule 122 currently has no section headings. Section headings are included in the Wireless Committee's revised version.

Recommendation 2: ***Adopt a new Supreme Court Rule 122.1 on the use of portable electronic devices.***

The Wireless Committee made an early decision that it would not recommend a policy that required court visitors to surrender their portable devices upon entry into the courthouse, or upon entry into a courtroom, although a few courts have attempted this. Surrendering devices at the door is incompatible with the philosophy expressed in the executive summary. Moreover, keeping track of surrendered devices would create a logistical nightmare for courthouse security. The members then considered where in the courthouse, and by whom, when, and how, wireless devices could be used. The members incorporated their conclusions in a proposed Supreme Court rule, identified as Rule 122.1, and entitled "Use of portable electronic devices."

Proposed Supreme Court Rule 122.1, contained in Appendix 2, consists of six sections. Section (a) sets out the purpose of this rule, which is to describe permissible uses of portable electronic devices by visitors to the courthouse. Section (b) defines three terms: "portable electronic device," "courthouse," and "courtroom."

Section (c) prohibits use of a portable electronic device for photography and recording in a "courtroom," except when authorized by a judge or as otherwise allowed under Rule 122. An early draft of Rule 122.1 had expanded this prohibition to the entire "courthouse." However, some Arizona courthouses are historic and invite photography, and it could be counterproductive if the rule required a judge to approve every visitor's request to take a photograph of something of architectural or historical interest. In addition, a prohibition of camera use in all areas of a courthouse might be difficult to enforce. However, the proposed rule states that a local court, by an administrative order, may prohibit or limit use of recording devices in other areas of the courthouse, such as at a filing counter.

During the vetting process for this rule, the Wireless Committee heard concerns about an earlier version of section (c). The former version would have allowed parties or members of the public to take photos of judges, court personnel, prosecutors, and victims outside

the courtroom. The Wireless Committee added language to section (c) that prohibits anyone from "knowingly" photographing or recording another person anywhere in the courthouse without that person's consent, except as allowed under Rule 122. Section (c) also provides that a violation of this section "presumptively obstructs the administration of justice and lessens the dignity of the court" to clarify that a violation is punishable by the contempt provisions Rule 33.1 of the Arizona Rules of Criminal Procedure. The members also drafted a proposed addition to the Bench Book regarding enforcement of contempt citations against those who take photos or make recordings in violation of the rule. (The proposed Bench Book addition, which is in Appendix 6, notes that a person's voluntary deletion of the photo or recording is the preferred resolution of a violation, and "the court should issue a contempt citation only as a last resort.") Section (c) requires that the court use reasonable means to advise the public of the prohibitions of this section.

Proposed Rule 122.1, section (d), concerns the use of a portable electronic device in the courtroom by a juror or by a witness. The rule provides that a juror may not use a portable electronic device while in the courtroom, or while in a jury room during deliberations. Because a juror may not use a portable electronic device during deliberations, this section requires the court to provide jurors with a court telephone number at which an emergency message may be left for a juror. A witness may use a portable electronic device in a courtroom while testifying only with permission of a judge, for example, pursuant to Rule 612 of the Arizona Rules of Evidence.

Section (e) applies to the use of devices by attorneys, parties, and members of the public while in the courtroom. This was a challenging section of the proposed rule because on the one hand, attorneys, parties, and members of the public can use devices in a courtroom productively, and without distracting others. On the other hand, some judges, especially those in limited jurisdiction courts where there are fewer attorneys and larger volumes of individuals in their courtrooms, believe that allowing use of devices undermines their control of the courtroom and poses potential security risks. They believe the rule should allow them to require that everyone turn their devices off when they enter the courtroom. Some courts in Arizona already have policies that require everyone, or everyone other than attorneys, to turn off their portable devices when entering a courthouse or courtroom.

The compromise provision of proposed section (e) is that any person, other than a juror or a witness, may use a device in a courtroom to retrieve and store information, to access the internet, and to send or receive messages or information. However, because public use of electronic devices in a high volume courtroom may be a hindrance to a judge's effective management of a calendar, or a particular courtroom's acoustics may easily transmit the sound of keystrokes, section (e) also provides that any use is subject to limits imposed by the judge. Because audible sounds create distractions, section (e) also states that a person

may not use a device to make or to receive telephone calls, or for other audible functions, while court is in session, without the court's express permission.

Section (f) permits anyone to use a portable electronic device within a courthouse, and outside a courtroom, except as provided by sections (c), (d), and (e). The proposed rule provides that any use of a device within the courthouse is subject to the authority of judges, court administrators, or court security officers to limit or to terminate activity that may be disruptive to court operations, or that may compromise courthouse security.

Recommendation 3: ***Revise the admonition to the jury, as set out in Recommended Arizona Jury Instruction ("RAJI') Preliminary Civil 9, RAJI Preliminary Criminal 13, and the Judicial College of Arizona (JCA) Bench Book. In conjunction with the admonition, the Wireless Committee recommends revisions to the jurors' oath, as prescribed in Ariz. R. Civ. P., Rule 47(a)(3) and Ariz. R. Crim. P., Rule 18.6(b). The Wireless Committee also recommends use of a "smart juror" card.***

The three components of this recommendation are the court's admonition to the jury, the jurors' oath, and a "smart juror" card. A revised admonition, a revised juror oath, and the "smart juror" card are in Appendix 3.

The Wireless Committee spent considerable time discussing the jury admonition because improper use of the new technology by a juror can result in a mistrial, which can cost the court and litigants substantial amounts of time and money. Rosalind Greene, an attorney and jury consultant, presented a study that found a number of verdicts challenged nationwide because of juror misuse of technology. As more jurors acquire new technology, the number of these challenges grows. Division One of the Court of Appeals issued an opinion in such a case in 2010, and another case was concluded in Division One on October 23, 2012 with a memorandum decision.[2]

Ms. Greene described four types of jurors who use the new technology. "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. Ms. Greene suggested that the

---

[2] In *State v Aguilar,* Division One of the Court of Appeals remanded the defendant's convictions for attempted first degree murder after jurors conducted internet research to define legal terms. 224 Ariz. 299, 230 P.3d 358 (App. 2010). In *State v Thompson*, Division One affirmed a conviction although a juror had done internet research revealing felony convictions of a co-defendant and a defense witness. No. 1-CA CR 11-0424, 2012 WL 3208682 (Ariz. App. Oct. 24, 2012).

court identify and excuse "addicts" early in the jury selection process. 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.

Judges already have a trio of suggested admonitions, including: RAJI Preliminary Civil 9, RAJI Preliminary Criminal 13, and a third admonition found in the Bench Book. The civil RAJI makes only a brief reference to the internet, and even the recent criminal RAJI makes no mention of "friending."[3] These omissions coupled with Ms. Greene's comments led the Wireless Committee to discuss revising these existing admonitions. Based on its recent revisions, RAJI Criminal 13 became the template for the Wireless Committee's revised admonition.

The Wireless Committee saw no justification for using different admonitions in civil and criminal trials, and it recommends use of its revised admonition in both types of cases.[4] The Wireless Committee intends to submit its draft to the State Bar, which promulgates the RAJIs, for consideration by its civil and criminal jury instructions committees. The Wireless Committee also proposes submission of its draft to the Judicial College for inclusion in the next edition of the Bench Book.

The revisions go beyond updates that acknowledge new technology. The revisions also address the language of the admonitions.[5] The second sentence of RAJI Preliminary Civil 9 serves as a general illustration of this process. The instruction begins, "this admonition is designed to prevent jury tampering and the appearance of jury tampering." Leaving aside such issues as the RAJI's lack of a definition for jury tampering, the

---

[3] In *Sluss v. Commonwealth of Kentucky*, an appellate court remanded a murder conviction based on post-verdict evidence that two jurors were Facebook "friends" with the victim's mother. No. 2011-SC-000318-MR, 2012 WL4243650 (Sept. 20, 2012).

[4] Rule 21.1, Arizona Rules of Criminal Procedure, states: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

[5] An instructive article on this subject is "Say What You Mean: Drafting Comprehensible Jury Instructions" in the February 2011 issue of Arizona Attorney. The article, written by Ms. Greene and her colleague, Jan Mills Spaeth, Ph.D., notes that "because of the excessive use of legal terminology, complex sentence structure and other communication flaws, jurors often misunderstand even commonly used patterned jury instructions."

members recognized that this admonition should begin with a message that jurors might respond to positively. The revised admonition begins with a constructive message about jurors sharing in the responsibility for a fair trial, and the Wireless Committee believes, the proposed admonition continues with a more productive tone throughout. An effective admonition is one in which jurors understand not only the words of the admonition, but also its underlying rationale. A successful admonition will persuade jurors to assume ownership for a fair trial.

The two current RAJIs have a specific list of don'ts, but fail to clearly explain the reasons why jurors may not do certain things. The revised admonition provides that explanation. One paragraph of the revised admonition provides four cogent reasons why jurors should not look for information about the case outside the courtroom. The revised admonition also uses simpler language than the RAJIs. For example, the existing RAJIs use terms such as "treatise," "prohibition," or "appearance of improper conduct," words that every juror may not comprehend. Likewise, the criminal admonition presently instructs jurors not to "consult any source such as a newspaper," and directs that they "do not engage in any conduct…." Jurors would better understand the admonition if the judge simply told them not to "read a newspaper" or "don't do anything…." The revised admonition is about the same length as the RAJIs currently in use.

It is unrealistic to believe that an admonition will prevent all juror misconduct. The admonition applies when jurors are in the courthouse, but it also applies when they are away from court and the temptations of technology and society are pervasive. However, the language, tone, and explanations of the proposed admonition provide jurors with a better understanding of their responsibilities, making it more likely they will remember and comply with the admonition, in and outside of the courthouse.

Ms. Greene also suggested a written pledge to help jurors remember to follow the admonition. A member of a workgroup that the Wireless Committee established to revise the admonition improved on this suggestion by recommending inclusion of the words "comply with the admonition" in the jurors' oath, which was adopted by the full Committee. Juror oaths are prescribed by Ariz. R. Civ. P., Rule 47(a)(3) and Ariz. R. Crim. P., Rule 18.6(b), and this recommendation will require the Wireless Committee to file a rule petition to add these words to the oath. The Wireless Committee recommends using the same oath for civil and criminal cases, rather than different oaths as the respective rules currently provide.

The Wireless Committee also recommends the use of something they have dubbed the "smart juror" card. Ms. Greene advised that not every juror absorbs the admonition by listening to it, and she suggested using another medium to deliver the admonition. The Wireless Committee created the "smart juror" card to harmonize with and to reinforce the revised admonition. The card is thin and laminated like a playing card, and it is

roughly the size and the shape of a smart phone. Color, text, and symbols on both sides of the card are used to emphasize concepts of the admonition. The Wireless Committee is aware that jurors receive the admonition in writing in black-and-white on letter-sized paper, along with the other instructions. However, the court could give a "smart juror" card to each trial juror when he or she is sworn, and a juror could carry it in a pocket, or use it as a bookmark, as a tangible, friendly and ongoing reminder of the admonition. The cards in quantity are about thirteen cents each, or less than two dollars per jury. If this minimal cost is prohibitive, a court could place a poster-sized reproduction of the card on a wall in its jury room.

In addition, the Wireless Committee has drafted proposed voir dire for inclusion in the Bench Book. The voir dire concerns the jurors' use of portable electronic devices, and the ability of individual jurors to follow the court's instructions limiting their use of these devices during their jury service. The proposed voir dire is in Appendix 7.

Recommendation 4: ***Consider revisions to the rules and jury instructions regarding the exclusion of witnesses. The rules and instructions on this subject are contained in Arizona Rules of Evidence, Rule 615; Ariz. R. Crim. P., Rule 9.3; RAJI Preliminary Civil 12 and Criminal 8; and the JCA Bench Book.***

Rule 615 of the Rules of Evidence provides in part that upon request of a party, the court must order the exclusion of a witness from the courtroom so that the witness "cannot hear other witnesses' testimony." Proposed Rule 122.1, discussed *supra*, would allow individuals in the courtroom, other than jurors and witnesses, to use their portable devices to send text messages or to blog while court is in session. An excluded witness could fully comply with Rule 615 if the witness was unable to "hear" the testimony of the other witnesses, yet violate the intent of the rule by reading text messages, social media posts, or blogs while waiting in the hallway or a witness waiting room.

Accordingly, the Wireless Committee has informally advised the Supreme Court's Advisory Committee on the Rules of Evidence, established by A.O. 2012-43, of this circumstance. The Wireless Committee also recommends that this anomaly be addressed by:

- The State Bar, for consideration by appropriate Bar committees of changes to Ariz. R. Crim. P., Rule 9.3 (exclusion of witnesses and spectators); RAJI Preliminary Civil 12 (exclusion of witnesses); and RAJI Preliminary Criminal 8 (exclusion of witnesses)

- The Judicial College, for consideration of changes to language in the Bench Book regarding exclusion of witnesses

Suggested changes to these provisions are in Appendix 4.

<u>Recommendation 5:</u> Consider revisions to RAJI Standard 7, the instruction to an excused alternate juror.

A trial judge gives RAJI Standard 7 to an excused alternate juror. While the instruction directs the excused alternate not to discuss the case, it omits any direction to the alternate juror about not looking for information concerning the case on the internet or elsewhere prior to the juror's complete discharge from jury service. The Wireless Committee recommends referral of this instruction to an appropriate jury instruction committee of the State Bar for revision. Suggested revisions are in Appendix 5.

<u>Recommendation 6:</u> Refer judicial ethics questions to the Judicial Ethics Advisory Committeee, and request a formal opinion from that committee.

As directed by A.O. 2012-22, the Wireless Committee considered several ethics questions which it deems appropriate for possible review by another appropriate committee, commission or body for future action.

Patricia A. Sallen, the Ethics Director of the State Bar, and Lynda Shely, the former Ethics Director, made presentations to the Wireless Committee in August concerning ethics issues that attorneys may encounter concerning the new technology and social media. While Ms. Sallen and Ms. Shely posed a variety of novel scenarios, they believe that Arizona's existing attorney ethics rules cover the scenarios presented by the new technology. Ms. Sallen and Ms. Shely encouraged attorneys to obtain continuing education for guidance in applying the existing rules to these situations, but the Wireless Committee members believe that there is no need to refer ethics questions to the State Bar at this time.

Judge Margaret Downie, Division One of the Court of Appeals and Chair of the Judicial Ethics Advisory Committee, and George Riemer, Executive Director of the Commission on Judicial Conduct, both serve on the Wireless Committee. They made presentations to the members in September regarding ethics issues arising from the new technology and social media that may be of concern to judicial officers and court staff. Although the existing rules probably address these issues, the Wireless Committee members believe that the judiciary would benefit from an omnibus advisory opinion that answers frequently asked questions on the most common scenarios involving use of social media. The Wireless Committee's letter to the Judicial Ethics Advisory Committee posing these ethics questions is contained in Appendix 8.

Comments on the Wireless Committee's recommendations

Staff presented the Wireless Committee's drafts concerning SCR 122, SCR 122.1, and the admonition, to three standing committees of the AJC: the Committee on Limited Jurisdiction Courts (twice), the Committee on Superior Court (twice), and the Commission on Victims in the Courts. At their second meetings, the LJC and COSC approved drafts of these documents. Comments were requested from COVIC, but it was not asked to take formal action. Staff also presented these three draft documents at a conference of the Presiding Judges, and at meetings of the Arizona Association of Superior Court Administrators and Limited Jurisdiction Courts Administrators Associations. The recommended text of these rules and the admonition, as shown in the appendix, reflects many of the suggestions and comments that were received during these presentations. Several judges statewide also provided informal input during the drafting process.

Consideration of Arizona statutes

Although not a charge under A.O. 2012-22, at the November meeting the members nonetheless discussed whether Arizona statutes covered two recently reported situations. A person posted on a website and claimed to be a sitting juror in an ongoing, high-profile murder case in Kansas; however, the poster was anonymous. In a federal case, a self-avowed neo-Nazi posted a jury foreperson's photo and home address on a white supremacy website. The Wireless Committee took no formal action concerning the adequacy of Arizona statutes in these and similar situations. However, there are several existing statutes in Title 13 that might apply to these fact situations, including A.R.S. §§ 13-1202 (threatening or intimidating); 13-2401 (personal information on the World Wide Web); 13-2802 (influencing a witness); 13-2805 (influencing a juror); 13-2916 (use of an electronic communication to terrify, intimidate, threaten, or harass); and 13-2921 (harassment). The contempt provisions of Rule 33.1 of the Arizona Rules of Criminal Procedure might also be applicable to a particular set of facts.

Continuation of the Wireless Committee's work

A.O. 2012-22 provides: "The Committee shall continue as long as necessary to complete its work, including the filing of any rule petition not later than January 2013." If the Arizona Judicial Council approves the Wireless Committee's recommendations to file rule petitions, the Wireless Committee will continue to review and respond to comments throughout the rule petition process.

The members of this Committee appreciate their opportunity to serve the Chief Justice and this Council.

Table of Recommended Actions

Item (subject to AJC approval):	***Wireless Committee will submit to:***		
	AZ Supreme Court	*Judicial Coll. of AZ*	*State Bar of AZ*
SCR 122 [revisions]: use of recording devices during a court proceeding	File a rule petition by January 10	Refer contempt additions to the JCA	
SCR 122.1 [new]: use of portable electronic devices	File a rule petition by January 10	Refer contempt additions to the JCA	
Bench Book: voir dire script		Refer voir dire to the JCA	
Ariz. R. Civ. P., Rule 47(a)(3): jurors' oath **Ariz. R. Crim. P, Rule 18.6(b):** jurors' oath	File a rule petition by January 10 File a rule petition by January 10		
RAJI Preliminary Civil 9: admonition **RAJI Preliminary Criminal 13:** admonition **Bench Book:** admonition		Refer to the JCA	Refer to SBA Comm. on Civil Jury Instructions Refer to SBA Comm. on Criminal Jury Instructions
Smart juror card: adjunct to the admonition	Refer to Court Services Division		
ARE, Rule 615: excluding witnesses	Refer to the Advisory Comm. on Rules of Evid		
Ariz. R. Crim. P., Rule 9.3: exclusion of witnesses and spectators			Refer to SBA Comm. on Criminal Practice and Proc.

RAJI Preliminary Civil 12 exclusion of witnesses; and **RAJI Preliminary Criminal 8** exclusion of witnesses **Bench Book:** exclusion of witnesses		Refer to the JCA	Refer to respective SBA Comms. on Civil and Crim. Jury Instructions
RAJI Standard 7: excused and alternate jurors			Refer to SBA Comms. on Civ. and Crim. Jury Instruct.
Ethical questions: judges	Submit a letter to the Judicial Ethics Advisory Comm.		
Ethical questions: attorneys			Not applicable

<u>Table of actions by subject area:</u>

- **Electronic devices:**

SCR 122 [revisions]: use of recording devices
SCR 122.1 [new]: use of portable electronic devices
Bench book: information regarding contempt under SCR 122 and 122.1

- **Voir dire:**

Bench Book: voir dire script

- **Admonition:**

Ariz. R. Civ. P., Rule 47(a)(3): juror oath
Ariz. R. Crim. P., Rule 18.6(b): juror oath
RAJI Preliminary Civil 9: admonition
RAJI Preliminary Criminal 13: admonition
Bench Book: admonition
Smart juror card: adjunct to the admonition
RAJI Standard 7: excused and alternate jurors

- **Exclusion of witnesses:**

ARE, Rule 615: excluding witnesses
Ariz. R. Crim. P., Rule 9.3: exclusion of witnesses and spectators
RAJI Preliminary Civil 12: exclusion of witnesses
RAJI Preliminary Criminal 8: exclusion of witnesses
Bench Book: exclusion of witnesses

- **Ethical questions:**

Letter: to the JEAC requesting an omnibus advisory opinion regarding the use of social media by judges and courtroom staff

Table of Appendices

Appendix 1: Proposed revisions to Supreme Court Rule 122 19

Appendix 2: Proposed Supreme Court Rule 122.1 [new] 30

Appendix 3: Proposed revisions to the jury admonition, revisions to the jurors' oath, and the "*smart juror*" card 32

Appendix 4: Proposed revisions to Ariz. R. Crim. P., Rule 9.3; RAJI Preliminary Civil 12 and Criminal 8 36

Appendix 5: Proposed revisions to RAJI Standard 7 38

Appendix 6: Proposed additions to the Bench Book regarding contempt 39

Appendix 7: Proposed additions to the Bench Book regarding voir dire 42

Appendix 8: Letter to the Judicial Ethics Advisory Committee 45

Appendix 9: List of materials considered by the Wireless Committee 48

Appendix 10: Administrative Order 2012-22 53

The rule revisions included in the appendix show additional text with underline, and deleted text with ~~strikethrough~~.

Appendix 1: Proposed revisions to Supreme Court Rule 122

"Clean" version (A mark-up version of the current rule follows the clean version):

Rule 122. Use of Recording Devices during a Court Proceeding

a. Purpose. This rule allows the use of recording devices during a court proceeding, subject to specified requirements and limitations.

b. Definitions. The following definitions apply in this rule. A term defined in the singular includes the plural.

1. A *"camera"* is any electronic or mechanical device used to photograph, record, or broadcast still or moving images.

2. A *"court proceeding"* is an event conducted in a courtroom. A court proceeding does not include an event conducted in judicial chambers, in anterooms, in rooms where jurors assemble or deliberate, or in other areas of the courthouse.

3. *"Cover"* and *"coverage"* refer to a person's use of a recording device during a court proceeding.

4. A *"person"* includes an individual and any organization except a court.

5. A *"personal audio recorder"* is any audio recording device that is on, held by, or immediately next to, a person who is operating the device.

6. A *"recording device"* is any electronic or mechanical apparatus and related equipment that is used to capture and store sound or images, or both, and from which a person can retrieve or broadcast sound or images. A camera, a smart phone, and an audio recorder are examples of recording devices.

c. Request to cover a court proceeding. A person who wishes to use a recording device during a court proceeding, other than a personal audio recorder as provided in section (j), must submit a written request to approve coverage. The person must submit the request to the judge who will conduct the proceeding, or to an office of the court designated by the presiding judge for receiving requests under this rule. The request must identify at a minimum the person who is submitting it, the case, the proceeding, and the date(s) of the proposed coverage. The submission of a request to cover a court proceeding provides a person with standing on the request, but it does not confer upon a person the status of a party to the case. If the specified proceeding is a trial, a person must submit a request at least seven calendar days before the trial date. If the proceeding is not a trial, a person must submit a request as soon as possible, and no less than forty-eight hours before the specified proceeding, to allow the judge to consider the request in a timely manner. However, if the court schedules a proceeding on less than seventy-two hours notice, a person must file the request sufficiently in advance of the proceeding as not to delay or interfere with it. The court will notify the parties of its receipt of a request for coverage. The

judge will promptly hold a hearing if the judge intends to deny the request or a portion of the request, or if a party objects to a request. A court may provide coverage of its own proceedings, and it is exempt from the requirements of section (c).

d. Time for a party to object to a request. A party waives an objection to coverage unless the party objects to the request in writing or on the record no later than the commencement of the specified proceeding, or the conclusion of a hearing held under section (c), whichever occurs first.

e. Factors a judge must consider; findings when a judge limits or denies a request for coverage. In deciding whether to approve a person's request to cover a court proceeding or a party's objection to coverage, the judge conducting the proceeding must consider the following factors:

(1) The impact of coverage upon the right of any party to a fair hearing or trial;

(2) The impact of coverage upon the right of privacy of any party, victim, or witness;

(3) The impact of coverage upon the safety and well-being of any party, victim, witness or juror;

(4) The likelihood that coverage would distract participants, or that coverage would detract from the dignity of or would disrupt a proceeding;

(5) The adequacy of the physical facilities of the court;

(6) The timeliness of the request pursuant to section (c) of this rule;

(7) Whether the person making the request is engaged in the dissemination of news to a broad community; and

(8) Any other factor affecting the fair administration of justice.

The judge conducting the proceeding may limit or deny coverage only after making specific, on-the-record findings that there is a likelihood of harm arising from one or more of the above factors, and that the harm outweighs the benefit of coverage to the public. A judge's decision to limit or to deny a request for coverage under this rule is reviewable only by special action.

f. Objection to coverage by a non-party victim or witness. An attorney who represents a non-party victim, or who calls a witness to testify, must notify that victim or witness of coverage of the court proceeding. A non-party victim or witness may object to coverage of his or her appearance or testimony at any time. A judge may grant the objection and prohibit coverage of the appearance or testimony of a particular non-party victim or witness after consideration of the factors in section (e) and upon a determination that coverage would have a greater adverse

impact upon that victim or witness or his or her testimony than other traditional methods of news reporting.

g. Manner of coverage. The judge conducting the proceeding will preserve the dignity of the proceeding by designating the placement of equipment and personnel for photographing, recording, or broadcasting the proceeding, and all equipment and personnel will be restricted to the designated area. Operators of recording devices may not move about the courtroom while court is in session. All persons and affiliated individuals engaged in the coverage must avoid conduct or dress that may detract from the dignity of the proceeding. The judge conducting the proceeding may order a restriction or cessation of coverage during a proceeding in furtherance of the interests of justice.

h. Equipment. A person must not install, move, or take recording equipment from the courtroom during a court proceeding. A person must hide wiring as much as possible, and wiring must not cause an inconvenience or a hazard. A person may connect equipment used to provide coverage to an existing courtroom electronic system, if possible, but a person must not connect equipment to a court's digital recording system without the express approval of the judge conducting the proceeding. A person must not bring flash devices, strobe lights or other artificial lights of any kind into the courtroom. If a person wishes to use additional standard light fixtures or higher wattage light bulbs, additional microphones, or other modifications or improvements concerning lighting or sound, the person must submit this information in the request under section (c). The judge may direct whatever modifications or improvements deemed necessary. The judge may not require that public funds be used to make or to maintain any such modifications or improvements. Microphones, cameras, and other equipment used for coverage must meet current industry standards, so that the recording devices are as unobtrusive and as equivalent in technical quality and sensitivity as recording devices in general use by major broadcast stations in the community where the courtroom is located. Recording devices that produce distracting sounds are not permitted. Any questions concerning whether particular equipment complies with this rule will be resolved by the presiding judge or a designee.

i. Number of recording devices; pooling. A request submitted under section (c) may ask the judge to approve audio coverage, or coverage by video camera or by still camera. The presumptive limits are one microphone and recording device for audio coverage, or one video camera and one still camera, but the judge conducting the proceeding has discretion to approve a person's request to use additional recording devices. If a judge approves requests by more than one person to cover a court proceeding, those persons must pool their resources to limit recording devices in the courtroom to the number approved by the judge. Those persons have the responsibility to settle their own disputes, to facilitate pooling as necessary, and to implement procedures that meet the approval of the assigned judge prior to any coverage and without disruption to the court.

j. Personal audio recorders; required notice to the court. Any person including a journalist may use a personal audio recorder during a court proceeding without the prior approval of the judge conducting the proceeding, but only after the person has given notice of that intended use to the judge or to the judge's staff prior to using the device. The use of a personal audio recorder

pursuant to this section may not be obtrusive, distracting, or otherwise prohibited, and use is subject to the prohibitions of section (m)(2) of this rule. Anyone who wishes to audio record a court proceeding with a device that is not on the person, as specified in section (b)(5), must submit a request pursuant to section (c) of this rule.

k. Recording not admissible as evidence. No video, photograph, or audio reproduction of a judicial proceeding that is obtained pursuant to this rule or Rule 122.1 may be used to modify or supplement the official court record of that proceeding, nor is it admissible at that or any subsequent proceeding unless it is offered for another purpose allowed under the Arizona Rules of Evidence.

l. Informal approval of camera use. Notwithstanding other provisions of this rule, a person may verbally request, and a judge conducting the proceeding may verbally approve, use of a camera in a courtroom to photograph or to record a celebratory or ceremonial court proceeding. A person must obtain the express permission of the presiding judge or a designee to use a camera in any courtroom when that court is not in session.

m. Prohibitions. Recording or broadcasting is not permitted in the following circumstances.

> **1. Jurors.** Cameras must be placed to avoid showing jurors in any manner. Audio or video recordings or broadcasts of juror interviews, statements, or conversations are also prohibited, except that a juror may expressly consent to an interview after the jury has been discharged.
>
> **2. Attorney conferences.** Audio recordings or broadcasts of bench conferences between a judge and counsel, or off-the-record conferences between attorneys and their clients, or between attorneys, anywhere in the courthouse are prohibited.
>
> **3. Other areas of the courthouse.** A person whose request under this rule has been granted may not photograph, record in, or broadcast from, locations in a courthouse where a court proceeding is not being conducted, without the judge's express approval.
>
> **4. Juvenile proceedings.** Photographing, recording, or broadcasting of juvenile court proceedings is only as allowed by Arizona law, or as provided in section (l).
>
> **5. Criminal proceedings.** In a criminal proceeding, a judge on his or her own motion may order that no one may photograph, record, or broadcast the victim in the courtroom. The judge may alternatively order that video coverage must effectively obscure the victim's face and identity, or that there may only be audio coverage of the victim's testimony.

n. Use of a recording device prohibited without approval. Use of a recording device during court proceedings is prohibited except as allowed by this rule. A court must use reasonable means to inform the public of these prohibitions.

o. Other governing law. The law generally applicable to inclusion or exclusion of the press or the public at court proceedings or during the testimony of a particular witness applies to persons who submit a request or notice under this rule. Nothing in this rule alters the obligation of any attorney to comply with the provisions of the Arizona Rules of Professional Conduct governing trial publicity.

p. Appellate courts. For coverage of proceedings in the Arizona Supreme Court and Courts of Appeal, any reference in this rule to the "*judge conducting the proceeding*" or to the "*presiding judge*" means the Chief Justice of the Arizona Supreme Court or the Chief Judge of the Court of Appeals, as applicable.

Mark-up version of the current rule:

Rule 122: ~~Electronic and Photographic Coverage of Public Judicial~~ Use of Recording Devices during a Court Proceedings

~~Electronic and still photographic coverage of public judicial proceedings conducted by a judicial officer during sessions of court may be permitted in accordance with the following guidelines:~~

~~**(a)** No electronic or still photographic coverage of juvenile court proceedings shall be permitted, except that such coverage may be permitted in adoption proceedings for the purpose of memorializing the event, with the agreement of the parties to the proceeding and the court.~~

a. Purpose. This rule allows the use of recording devices during a court proceeding, subject to specified requirements and limitations.

b. Definitions. The following definitions apply in this rule. A term defined in the singular includes the plural.

1. A *"camera"* is any electronic or mechanical device used to photograph, record, or broadcast still or moving images.

2. A *"court proceeding"* is an event conducted in a courtroom. A court proceeding does not include an event conducted in judicial chambers, in anterooms, in rooms where jurors assemble or deliberate, or in other areas of the courthouse.

3. *"Cover"* and *"coverage"* refer to a person's use of a recording device during a court proceeding.

4. A *"person"* includes an individual and any organization except a court.

5. A *"personal audio recorder"* is any audio recording device that is on, held by, or immediately next to, a person who is operating the device.

6. A *"recording device"* is any electronic or mechanical apparatus and related equipment that is used to capture and store sound or images, or both, and from which a person can retrieve or broadcast sound or images. A camera, a smart phone, and an audio recorder are examples of recording devices.

c. Request to cover a court proceeding. A person who wishes to use a recording device during a court proceeding, other than a personal audio recorder as provided in section (j), must submit a written request to approve camera coverage. The person must submit the request to the judge who will conduct the proceeding, or to an office of the court designated by the presiding judge for receiving requests under this rule. The request must identify at a minimum the person who is submitting it, the case, the proceeding, and the date(s) of the proposed coverage. The submission of a request to cover a court proceeding provides a person with standing on the

request, but it does not confer upon the person the status of a party to the case. If the specified proceeding is a trial, the person must submit a request at least seven calendar days before the trial date. If the proceeding is not a trial, the person must submit a request as soon as possible, and no less than forty-eight hours before the specified proceeding, to allow the judge to consider the request in a timely manner. However, if the court schedules a proceeding on less than seventy-two hours notice, the person must file the request sufficiently in advance of the proceeding as not to delay or interfere with it. The court will notify the parties of its receipt of a request for coverage. The judge will promptly hold a hearing if the judge intends to deny the request or a portion of the request, or if a party objects to a request. A court may provide coverage of its own proceedings, and it is exempt from the requirements of section (c).

d. Time for a party to object to a request. A party waives an objection to coverage unless the party objects to the request in writing or on the record no later than the commencement of the specified proceeding, or the conclusion of a hearing held under section (c), whichever occurs first.

~~**(b)** Electronic and still photographic coverage of public judicial proceedings other than the proceedings specified in paragraph (a) above may be permitted in the discretion of the judge giving due~~ **e. Factors a judge must consider; findings when a judge limits or denies a request for coverage.** In deciding whether to approve a request to cover a court proceeding, the judge conducting the proceeding must consider~~ation to~~ the following factors:

~~(i)~~ (1) The impact of coverage upon the right of any party to a fair hearing or trial;

~~(ii)~~ (2) The impact of coverage upon the right of privacy of any party, victim, or witness;

~~(iii)~~ (3) The impact of coverage upon the safety and well-being of any party, victim, witness or juror;

~~(iv)~~ (4) The likelihood that coverage would distract participants, or that coverage would detract from the dignity of or would disrupt ~~the~~ a proceeding~~s~~;

~~(v)~~ (5) The adequacy of the physical facilities of the court ~~for coverage~~;

~~(vi)~~ (6)The timeliness of the request pursuant to ~~sub~~section ~~(f)~~ (c) of this ~~R~~rule; ~~and~~

(7) Whether the person making the request is engaged in the dissemination of news to a broad community; and

~~(vii)~~ (8) Any other factor affecting the fair administration of justice.

The judge conducting the proceeding may limit or prohibit coverage only after making specific, on-the-record findings that there is a likelihood of harm arising from one or more of the above factors, and that the harm outweighs the benefit of coverage to the public. A judge's decision to limit or to deny a request for coverage under this rule is reviewable only by special action.

~~**(c)**~~ **f. Objection to coverage by a non-party victim or witness.** ~~The judge may limit or prohibit electronic or still photographic coverage only after making specific, on-the-record findings that there is a likelihood of harm arising from one or more of the above factors that outweighs the benefit to the public of camera coverage. **(d)** Electronic and still photographic~~ An attorney who represents a non-party victim, or who calls a witness to testify, must notify that victim or witness of coverage of the court proceeding. A non-party witness or victim may object to coverage of his or her appearance or testimony at any time. A judge may grant the objection and prohibit coverage of the appearance or testimony of a particular non-party victim or witness ~~may be prohibited if the judge determines~~ after consideration of the factors in section (e) and upon a determination that ~~such coverage~~ coverage would have a greater adverse impact upon ~~the~~ that victim or witness or his or her testimony than ~~non-electronic and non-photographic coverage would have~~ other traditional methods of news reporting. ~~**(e)** The law generally applicable to inclusion or exclusion of the press or public at court proceedings or during the testimony of particular witness shall apply to the coverage hereunder. The exercise of the judge's discretion in limiting or precluding electronic or still photographic coverage shall be reviewable only by special action.~~

~~**(f)** Requests by the media for coverage shall be made to the judge of the particular proceeding sufficiently in advance of the proceeding or portion thereof as not to delay or interfere with it. Unless the judicial proceeding is scheduled on less than three days notice, the request to tape or photograph a proceeding must be made no less than two days in advance of the hearing. The judge shall notify all parties and witnesses of the request. If there is any objection to a request for camera coverage or an order allowing electronic or still photographic coverage, the court shall hold a hearing promptly.~~

~~**(g)** Objections of a party to coverage must be made on the record prior to commencement of the proceeding or portion thereof for which coverage is requested. Objections of a non-party witness to coverage of his or her appearance or testimony may be made to the judge at any time. Any objection not so made will be deemed waived.~~

~~**(h)** Nothing herein shall alter the obligation of any attorney to comply with the provisions of the Arizona Rules of Professional Conduct governing trial publicity.~~

~~**(i)** Individual journalists may use their personal audio recorders in the courtroom, but such usage shall not be obtrusive or distracting and no changes of tape or reels shall be made during court sessions. In all other respects, news reporters or other media representatives not using cameras or electronic equipment shall not be subject to these guidelines.~~

~~**(j)** No media film, videotape, still photograph or audio reproduction of a judicial proceeding shall be admissible as evidence in such proceeding or in any retrial or appeal thereof.~~

~~**(k)** Coverage of jurors in a manner that will permit recognition of individual jurors by the public is strictly forbidden. Where possible, cameras should be placed so as to avoid photographing jurors in any manner.~~

~~**(l)** Absent express permission of the court, there shall be no audio recording or broadcasting of conferences in the court building between attorneys and their clients, between attorneys, of jury interviews or in any part of the court building where a judicial proceeding is not being conducted.~~

~~**(m)** It shall be the responsibility of the media to settle disputes among media representatives, facilitate pooling where necessary, and implement procedures which meet the approval of the judge of the particular proceeding prior to any coverage and without disruption to the court. If necessary the media representatives shall elect a spokesperson to confer with the court.~~

~~**(n)** No more than one television camera and one still camera mounted on a tripod, each with a single camera operator, shall be permitted in the courtroom for coverage at any time while court is in session. The broadcast media shall select a representative to arrange the pooling of media participants. The court shall not participate in the pooling agreement.~~

~~**(o)**~~ **g. Manner of coverage.** The judge conducting the proceeding ~~of a particular proceeding shall, in a manner which~~ will preserve~~s~~ the dignity of ~~the~~ the proceeding~~,~~ by designating~~e~~ the placement of equipment and personnel for ~~electronic and still photographic~~ ~~coverage of~~ photographing, recording, or broadcasting ~~that~~ the proceeding, and all equipment and personnel ~~shall~~ will be restricted to the designated area ~~so designated. Whenever possible, media equipment and personnel shall be placed outside the courtroom. Videotape recording equipment not a component part of a television camera shall be placed outside the courtroom. To the extent possible, wiring shall be hidden, and in any event shall not be obtrusive or cause inconvenience or hazard. While court is in session, equipment shall not be installed, moved or taken from the courtroom nor shall photographers or camera o~~ Operators of recording devices may not move about the courtroom while court is in session. ~~**(p)**~~ All persons and affiliated individuals engaged in the coverage ~~permitted hereunder shall~~ must avoid conduct or dress ~~which~~ that may detract from the dignity of the proceedings~~s~~. The judge conducting the proceeding may order a restriction or cessation of camera coverage during a proceeding in furtherance of the interests of justice.

~~**(q)**~~ **h. Equipment.** A person must not install, move, or take equipment from the courtroom during a court proceeding. A person must hide wiring as much as possible, and wiring must not cause an inconvenience or a hazard. A person may connect ~~If possible, media~~ equipment used to provide coverage ~~shall be connected~~ to an existing courtroom ~~sound~~ electronic system~~s~~, if possible, but a person must not connect equipment to a court's digital recording system without the express approval of the judge conducting the proceeding. ~~No~~ A person must not bring flash ~~bulbs~~ devices, strobe lights or other artificial lights of any kind ~~shall be brought~~ into the courtroom. ~~by the media for use in coverage of a proceeding~~. ~~Where the addition of~~ If a person wishes to use additional standard light fixtures or higher wattage light bulbs, ~~additional standard light fixtures,~~ additional microphones, or other modifications or improvements ~~are sought by the media, the media, through their spokesperson, shall make their recommendations~~ concerning lighting or sound, the person must submit this information in the request under section (c). ~~to t~~The ~~presiding~~ judge ~~of the Superior Court~~, ~~who~~ may direct whatever modifications or improvements deemed necessary~~.~~, ~~and~~ The judge may not require that public funds be used to

make or to maintain ~~A~~any such modifications or improvements ~~shall be made and maintained without public expense~~. ~~**(r)** Television or still cameras which produce distracting sound shall not be permitted. In this regard, the presiding judge may consider a non-digital still camera acceptable if accompanied by a device that effectively muffles camera sounds. **(s)**~~ Cameras and microphones used ~~in the~~ for coverage ~~permitted hereunder shall~~ must meet ~~the "state of the art." A camera or microphone shall be deemed to meets the "state of the art" when equal in unobtrusiveness,~~ current industry standards, so that they are as unobtrusive and as equivalent in technical quality and sensitivity ~~to~~ as equipment in general ~~usage~~ use by ~~the~~ major broadcast stations in the community ~~in which~~ where the courtroom is located. Cameras that produce distracting sounds are not permitted. ~~**(t)**~~ Any questions concerning whether particular equipment complies with ~~these guidelines shall~~ this rule will be resolved by the presiding judge ~~of the Superior Court~~ or a designee.

i. Number of cameras; pool cameras. A request submitted under section (c) may ask the judge to approve audio coverage, or coverage by video camera or by still camera. The presumptive limits are one microphone and recording device for audio coverage, or one video camera and one still camera, but the judge conducting the proceeding has discretion to approve a person's request to use additional recording devices. If a judge approves requests by more than one person to cover a court proceeding, those persons must pool their resources to limit cameras in the courtroom to the number approved by the judge. Those persons have the responsibility to settle their own disputes, to facilitate pooling as necessary, and to implement procedures that meet the approval of the assigned judge prior to any coverage and without disruption to the court.

j. Personal audio recorders; required notice to the court. Any person including a journalist may use a personall audio recorder during a court proceeding, without the prior approval of the judge conducting the proceeding, but only after the person has given notice of that intended use to the judge or to the judge's staff prior to using the device. The use of a personal audio recorder pursuant to this section may not be obtrusive, distracting, or otherwise prohibited, andf use is subject to the prohibitions of section (m)(2) of this rule. Anyone who wishes to audio record a proceeding with a device that is not on the person, as specified in section (b)(5), must submit a request pursuant to section (c) this rule.

k. Recording not admissible as evidence. No video, photograph, or audio reproduction of a judicial proceeding that is obtained pursuant to this rule or Rule 122.1 may be used to modify or supplement the official court record of that proceeding, nor is it admissible at that or any subsequent proceeding unless it is offered for another purpose allowed under the Arizona Rules of Evidence.

l. Informal approval of camera use. Notwithstanding other provisions of this rule, a person may verbally request, and a judge conducting the proceeding may verbally approve, use of a camera in a courtroom to photograph or to record celebratory or ceremonial court proceeding. A person must obtain the express permission of the presiding judge or a designee to use a camera in any courtroom when that court is not in session.

m. Prohibitions: Recording or broadcasting is not permitted in the following circumstances.

1. Jurors: Cameras must be placed to avoid showing jurors in any manner. Audio or video recordings or broadcasts of juror interviews, statements, or conversations are also prohibited, except that a juror may expressly consent to an interview after the jury has been discharged.

2. Attorney conferences: Audio recordings or broadcasts of bench conferences between a judge and counsel, or off-the-record conferences between attorneys and their clients, or between attorneys, anywhere in the courthouse are prohibited.

3. Other areas of the courthouse: A person whose request under this rule has been granted may not photograph, record in, or broadcast from, locations in a courthouse where a court proceeding is not being conducted, without the judge's express approval.

4. Juvenile proceedings: Photographing, recording or broadcasting of juvenile court proceedings is only as allowed by Arizona law, or as provided in section (l).

5. Criminal proceedings: In a criminal proceeding, a judge on his or her own motion, or may order that no one may photograph, record, or broadcast the victim in the courtroom. The judge may alternatively order that video coverage must effectively obscure the victim's face and identity, or that there may only be audio coverage of the victim's testimony.

n. Use of a recording device prohibited without prior approval. Use of a recording device during court proceedings is prohibited except as allowed by this rule. A court must use reasonable means to inform the public of these prohibitions.

o. Other governing law: The law generally applicable to inclusion or exclusion of the press or the public at court proceedings or during the testimony of a particular witness applies to persons who submit a request or notice under this rule. Nothing in this rule alters the obligation of any attorney to comply with the provisions of the Arizona Rules of Professional Conduct governing trial publicity.

~~**(u)** To facilitate implementation of this rule, the presiding judge of the Superior Court may appoint an advisory committee to make recommendations regarding improvements affecting media coverage of judicial proceedings.~~

~~**(v)**~~ **p. Appellate courts:** ~~In the case of~~ For coverage of proceedings in the Arizona Supreme Court and Courts of Appeal, any references ~~herein~~ in this rule to the *"judge conducing the proceeding"* or to ~~"judge of the particular proceeding" or~~ the *"presiding judge ~~of the Superior Court~~"* ~~shall~~ means the Chief Justice of the Arizona Supreme Court or the Chief Judge of the Court of Appeals, as ~~the case may be~~ applicable.

Appendix 2: Proposed Supreme Court Rule 122.1 [new]

Rule 122.1: Use of portable electronic devices [New]

a. Purpose. This rule describes permissible uses of portable electronic devices in a courthouse and in a courtroom by attorneys, parties, witnesses, jurors, and members of the public.

b. Definitions. Words have the following meaning in this rule:

1. A *"portable electronic device"* is a mobile device capable of electronically storing, accessing, or transmitting information. The term encompasses among other things, a transportable computer of any size, including a tablet, a notebook, and a laptop; a smart phone, a cell phone, or other wireless phone; a camera and other audio or video recording devices; a personal digital assistant (PDA); other devices that provide internet access; and any similar items.

2. A *"courthouse"* includes all areas within the exterior walls of a court building, or if the court does not occupy the entire building, that portion of the building used for the administration and operation of the court.

3. A *"courtroom"* is an area of a courthouse or other building where a judge or other judicial officer conducts judicial proceedings.

c. Photography and audio or video recording. No one may use a portable electronic device for photographs or for audio or video recording in a courtroom, unless that use was approved by the judge conducting a proceeding in that courtroom, or is otherwise allowed under Rule 122. By local administrative order, a court may prohibit or limit photography or recording in other areas of a courthouse. A party or a member of the public may not knowingly photograph or record another person 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. A court must use reasonable means to advise the public and court participants of prohibitions under this section.

d. Jurors and witnesses. A juror may not use a portable electronic device while present in a courtroom during a trial, or in a jury room during the jury's deliberations and discussions concerning a case, and jurors must turn off their portable electronic devices while in those locations at those times. When a jury is deliberating, the court must provide jurors with a court telephone number at which an emergency message may be left for a juror. While in a courtroom, a witness must silence any portable electronic device, and may use a device while testifying only with permission of a judge.

e. Attorneys, parties, and members of the public. Any person, other than a juror or a witness, may use a portable electronic device in a courtroom to retrieve or to store information, to access the internet, and to send and receive text messages or information. A portable electronic device may not be used, without permission of the court, to make or to receive telephone calls or for

other audible functions while court is in session, and attorneys, parties, and members of the public must silence portable electronic devices while in the courtroom. Any allowed use of a portable electronic device is subject to the authority of a judge to prohibit activity that may be disruptive or distracting to a court proceeding, or that may otherwise be contrary to the administration of justice.

f. Use of a portable electronic device outside a courtroom. Except as provided in sections (c), (d) and (e), any person may use a portable electronic device within a courthouse and outside of a courtroom, subject to the authority of judges, court administrators, or court security officers to limit or terminate activity that may be disruptive to court operations or that may compromise courthouse security.

<u>Appendix 3: Proposed revisions to the jury admonition, with revisions to the jurors' oath and the "*smart juror*" card</u>

1. Proposed language for the admonition (for use in civil and criminal cases):

All participants in a trial have a responsibility to follow rules that ensure a fair trial. I will now explain certain rules you must follow while serving as a juror, which I will call "*the admonition.*"

First, please wear your juror badge at all times in and around the courthouse so everyone will know you are a juror. Wearing a juror badge is important because it identifies you as a juror to others. A juror badge signifies that you cannot discuss this case with anyone, or let anyone discuss this case with you, or let anyone discuss the case with other people if you are present. You must not speak or communicate about this case with anyone until after it is completely over and I have discharged you from service on this jury. "*Anyone*" includes your family, friends, coworkers, acquaintances, and even strangers. I have given the lawyers and parties the same instruction about not speaking with you jurors while this case is going on, so do not think they are being unfriendly to you if they do not speak with you outside the courtroom.

You must not communicate with anyone about your experiences as a juror, or about the evidence, the lawyers, the parties, the witnesses, me, or the other jurors. You may not tell other people what you think about this case, and you may not ask other people what they think about it. All you can tell someone is that you are on a jury, the estimated schedule for the trial, and that you cannot talk about this case until it is completely over. I will discharge you from your duties as a juror when this case is completely over, and at that time, you may speak freely with anyone about this case. Until then, it is your duty not to speak with any person, or allow any person to speak with you, or to be present while other people are speaking, on any subject related to this trial.

In a criminal case such as this, you, as a juror, may not discuss the evidence with other jurors until you retire to deliberate on your verdict. Therefore, during breaks and recesses, whether you are in the jury room or not, you must not discuss any aspect of the case with each other until I submit the case to you for your deliberations at the end of this trial.

[Alternative: In a civil case such as this, you may discuss the evidence with other jurors during recesses. However, you may do this only if you agree to do so, only when all of you are present in the jury room with the door closed, and only if you reserve judgment about the outcome of this case until you start your deliberations after receiving my final instructions on the law.]

Electronic devices are things that store and retrieve information, give you access to the internet, or allow you to send or receive messages. Examples of electronic devices include smart phones, cell phones, cameras, notebooks, tablets, or laptops, and other computers and communication tools. You may use electronic devices in the courthouse, but there are limitations. Electronic devices may be used during breaks as long as the use is completely unrelated to the trial and your duties as a juror. You cannot use your electronic devices for any reason while you are in the

courtroom or while you are deliberating in the jury room. Please make sure that you have turned off your electronic devices while you are in the courtroom and during deliberations. You cannot take notes with your electronic devices; you may only take notes on the paper notepad the court has provided to you.

When I say that you must not speak with anyone about this case, this also applies to electronic communications. You must not communicate about the case electronically, on the internet, or by any other form of application or "*app.*" You must not communicate about this case on Facebook, Twitter, or on any other social media site, through blogs, or by e-mail, text, or instant messaging. While this case is going on, you must not attempt to friend, find, or look up on a social media site anyone who is connected with this case in any way, including me, my court staff, the attorneys, parties, witnesses, or other jurors.

You must not look outside the courtroom for knowledge about this case at any time. If you have a question or need additional information, submit your request to me in writing. I will answer your question or provide the requested information if I can. However, you cannot use Google or any other internet website, or newspapers, magazines, dictionaries, books, maps, television, or radio to find out more. There may be names, words, or subjects that come up during this trial that you want to look up. You cannot do that. You must not search for information about the parties, witnesses, locations, events, facts, or legal issues involved with this case. You must decide this case only on the evidence that you see and hear in this courtroom. This rule may seem strange, because you use these tools on a daily basis, and you may think that looking for information is helpful, but doing this could jeopardize the trial, and it will violate your oath as a juror. Here are the reasons for this rule.

First, I am responsible for deciding what evidence you have, and my court staff carefully records the testimony of witnesses, marks exhibits, and maintains minutes to keep track of evidence. Every juror must decide this case on the body of evidence produced in court. I am not suggesting that there is other information for you to find outside the courtroom; but you will have all of the information that the law allows you to have for deciding the case. Deciding the case based on information that one of you finds elsewhere could jeopardize the parties' right to a fair trial. Second, the rules of evidence exist so that what you see and hear meets legal requirements. Information available outside the courtroom may be unreliable, and because I would not know what you might find from an outside source, I would have no way to determine whether that information is accurate. Third, the parties have a right to examine witnesses, which is one of the fundamental principles of our legal system. If you obtain information outside this courtroom, you will be ignoring the right of the parties to examine the source or accuracy of that information. Finally, if a party has not met their burden of proof, you may not do research and try to fill that gap.

In a few minutes, when you take your oath (or affirmation) as a trial juror, you will agree to comply with this admonition. If any juror violates the admonition, I may have to declare a mistrial and start the trial over again, beginning with calling a new jury. A mistrial is unfair to the parties, the attorneys, and the witnesses, all of whom must come back to court a second time. A mistrial is also financially costly to the taxpayers. If anyone has tried to contact you

concerning the case, or if you believe that another juror has violated the admonition, please send a note to me immediately. All of us have the responsibility to conduct this trial fairly.

Form your opinions only after you have had an opportunity to discuss this case with each other in the jury room. Do not form final opinions about any fact or about the outcome of this case until you have heard and considered all of the evidence presented in court, the closing arguments, and the rest of the instructions. Keep an open mind during the trial.

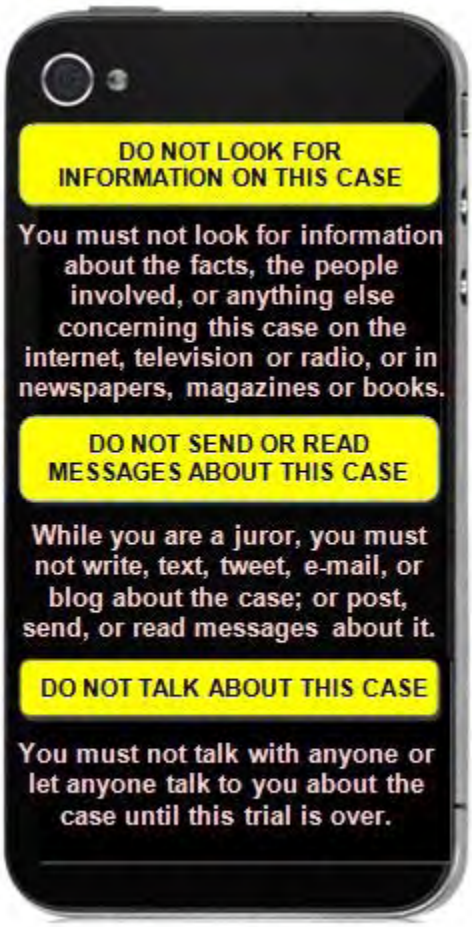
Before a recess, I may say, "*Remember the admonition*" without repeating the entire admonition that I have just given to you. I do this as a reminder to keep this admonition in mind at all times. Even if I do not recite the words "*Remember the admonition*" before a recess, you must remember and obey the admonition until this trial is completely over.

2. The oath: Proposed language for the oath (for use in civil and criminal cases):

> *"(I swear) (*or *I affirm) that I will give careful attention to the proceedings, abide by the court's instructions, comply with the admonition, and render a verdict in accordance with the law and evidence presented to me (so help me God)." [Omit the last four words if the juror takes an affirmation rather than an oath.]*

3. *Smart juror* card (or jury room poster): [Optional: Present each juror with a "smart juror" card and say: "*Here is something for you to keep that will help you to remember the admonition.*"]

Remember the Admonition
Every juror has a responsibility to ensure a fair trial.
Because your verdict must be based on evidence presented in court …
PLEASE FOLLOW THESE RULES:


DO NOT LOOK FOR INFORMATION ON THIS CASE
You must not look for information about the facts, the people involved, or anything else concerning this case on the internet, television or radio, or in newspapers, magazines or books.
DO NOT SEND OR READ MESSAGES ABOUT THIS CASE
While you are a juror, you must not write, text, tweet, e-mail, or blog about the case; or post, send, or read messages about it.
DO NOT TALK ABOUT THIS CASE
You must not talk with anyone or let anyone talk to you about the case until this trial is over.

Appendix 4: Proposed revisions to Ariz. R. Crim. P., Rule 9.3; RAJI Preliminary Civil 12 and Criminal 8

Rule 9.3: Exclusion of witnesses and spectators

a. Witnesses. The court may, and at the request of either party shall, exclude prospective witnesses from the courtroom during opening statements and the testimony of other witnesses. The court shall direct the witnesses to refrain from reading anything about the case, such as tweets, blogs, or e-mail messages, which someone might send from inside the courtroom while the trial is continuing. The court shall also direct ~~them~~ the witnesses not to communicate with each other until all have testified. If the court finds that a party's claim that a person is a prospective witness is not made in good faith, the person shall not be excluded from the courtroom. Once a witness has testified on direct examination and has been made available to all parties for cross-examination, the witness shall be allowed to remain in the courtroom unless the court finds, upon application of a party or witness, that the presence of the witness would be prejudicial to a fair trial. Notwithstanding the foregoing, the victim, as defined in Rule 39a, Rules of Criminal Procedure, shall have the right to be present at all proceedings at which the defendant has such right.

b. Spectators. All proceedings shall be open to the public, including representatives of the news media, unless the court finds, upon application of the defendant, that an open proceeding presents a clear and present danger to the defendant's right to a fair trial by an impartial jury. A complete record of any closed proceedings shall be kept and made available to the public following the completion of trial or disposition of the case without trial.

c. Protection of witness. The court may, in its discretion, exclude all spectators except representatives of the press during the testimony of a witness whenever reasonably necessary to prevent embarrassment or emotional disturbance of the witness.

d. Investigator. If an exclusion order is entered, both the defendant and the prosecutor shall nevertheless be entitled to the presence of one investigator at counsel table.

RAJI Civil Preliminary 12: Exclusion of Witnesses

The rule of exclusion of witnesses is in effect and will be observed by all witnesses until the trial is over and a result announced. This means that all witnesses will remain outside the courtroom during the entire trial except when one is called to the witness stand. They will wait in the areas directed by the bailiff unless other arrangements have been made with the attorney who has called them. The rule forbids witnesses from reading anything about the case, such as tweets, blogs, or e-mail messages that someone might send from inside the courtroom, before all of the parties have rested. The rule also forbids witnesses from telling anyone but the lawyers what they will testify about or what they have testified to. If witnesses do talk to the lawyers about their testimony, other witnesses and jurors should avoid being present or overhearing.

The lawyers are directed to inform all their witnesses of these rules and to remind them of their obligations from time to time as may be necessary. The parties and their lawyers should keep a careful lookout to prevent any potential witness from remaining in the courtroom if they inadvertently enter.

RAJI Preliminary Criminal 8, Exclusion of Witnesses

The text is identical to RAJI Civil Preliminary 12.

Appendix 5: Proposed revisions to RAJI Standard 7

RAJI Standard 7: Excused Alternate Jurors

[*Name of alternate juror*], your name has been drawn by lot as an alternate juror. While you are physically excused from your service as a juror at this time, there remains a possibility you may be called back to court to deliberate should one of the other jurors be unable to do so. The bailiff will retain your notes [and notebook] for your use if you are called back. The admonition continues to apply to you. Please do not ~~discuss~~ communicate about this case with anyone, or let anyone talk to you about it, until you have been notified a verdict has been reached or the jury has been discharged. And please do not look for any information about the case on the internet or anywhere else until you've been advised that the case is concluded.

Appendix 6: Proposed additions to the Bench Book regarding contempt

Supreme Court Rule 122 allows photography and recording during a court proceeding, but only after submission of a request to, and approval by, the judge conducting the proceeding. An exception is a "personal audio recorder," as defined in the rule, which may be used without the judge's approval, but only after the operator notifies the court that he or she will be using the device. Even when the judge approves the request or after a person provides appropriate notice, photography and recording is subject to certain conditions (for example, a person may not take photos or video of jurors, or victims, nor may bench conferences be audio recorded). The rule also requires that a court use reasonable means to inform the public of these prohibitions.

Supreme Court Rule 122.1 governs the use of portable electronic devices in the courthouse. This rule reiterates that no one may use a portable electronic device for photographs or for audio or video recording in a courtroom, unless the judge approved this use under Rule 122, or Rule 122 otherwise allows the use. Rule 122.1 also provides that a court may prohibit or limit photography or recording in other areas of a courthouse (for example, at a filing counter) by local administrative order. The rule further provides that a party or a member of the public may not photograph or record another person anywhere in the courthouse without the person's consent. The rule recites that a violation of this section presumptively obstructs the administration of justice, and lessens the dignity and authority of the court. This language mirrors Rule 33.1 of the Rules of Criminal Procedure. The rule requires a court to use reasonable means to advise the public and court participants of the rule's prohibitions.

Contempt scenarios may arise under these two rules in the following ways:

- A person may take an unauthorized photograph, or make an unauthorized recording, inside the courtroom, in the presence of a judge. The court may punish this conduct as direct contempt.

- A party or a member of the public may take a photograph, or make a recording, inside the courthouse but outside the courtroom, of another person without the person's consent.

As to the second situation, a finding of direct contempt may also be appropriate under the authority of *Hirschfeld v Superior Court*, 184 Ariz. 208, 908 P.2d 22 (1995):

> *"…the court has the right and the duty to protect litigants, witnesses, attorneys and jurors from misbehavior and harassment while they are in or near the courtroom, whether they are arriving, waiting, or departing. Conduct like Hirschfeld's, because it impinges on that right and duty, lessens the dignity and authority of the court. There are a number of cases which support this conclusion."*

Generally, the primary objective that the court wishes to accomplish is the voluntary deletion of the photograph or recording by the person who took the photo or who made the recording. Most court visitors will abide by a judge's request that they delete a photo or an audio or video

recording, and in most circumstances, the person's cooperation should obviate any need for the court to cite the person. This is by far the preferred resolution; the court should issue a contempt citation only as a last resort.

In cases where the person voluntarily, cooperatively, and promptly deletes the photo or video:

> 1) The court should assure that the person has deleted the photo or recording from the device that took it. The court may verify deletion of the photo or recording if the person deletes it in the presence of the judge, a member of the judge's staff, or a law enforcement officer.
>
> 2) The court should assure that the person has deleted the photo or recording from any backup server or *"cloud"* that may store a secondary copy of the image. The person should also do this in the presence of an officer of the court or a law enforcement officer.
>
> 3) The judge should inquire whether the person has transmitted the photo or recording to another individual by e-mail, or whether the person has posted the photo or recording on a social media or other site. If the person confirms that he or she has done so, the court should order the person to delete the photo or recording from these other locations. This may involve the person recalling an e-mail, taking a photo or recording down from a blog or social media page, or other appropriate action.
>
> 4) The court should also advise the person that he or she will be held in contempt of court if the court later determines that the photo or recording still exists, i.e., if the person made false representations to the court about his or her complete deletion of the electronic file.

The court has a more difficult situation when the person refuses to delete the photo or video. Criminal contempt is an option if the objective is punishment. Civil contempt is also an option if the objective is remedial, i.e., if the objective is to compel the person to delete the photo or recording. The court may order the person to surrender the device to assure deletion.

Other factors that the judge might consider in deciding whether to issue a contempt citation and whether to impose criminal or civil contempt in situations involving unauthorized photography or recording include:

- whether the person was aware of a sign advising of the prohibition, or whether the photo or recording was taken in ignorance of the prohibition
- whether a photo or video recording was taken of an inanimate object or of an individual
    - If taken of an inanimate object, whether it shows anything that might compromise courthouse security

- If taken of an individual, the effect upon the individual (e.g., embarrassment, intimidation, harassment), and the motivation and intent of the person who took it.

Appendix 7: Proposed additions to the Bench Book regarding voir dire

Note:

- Here is an initial instruction to the venire, and proposed voir dire. You should give the initial instruction to the panel near the beginning of the voir dire, before the panel takes its first recess.

- Trial judges frequently develop their own verbiage and individual style during voir dire, so what follows are suggestions rather than requirements. Individual variation and follow-up questions are encouraged, as you deem appropriate.

Initial instruction: I will give you a few rules or instructions that you must follow even at this early stage. I am giving you these rules because every one of us – including my staff, the lawyers, you and me, and everyone else involved in this case -- has a responsibility to ensure a fair trial.

Now that this trial has started, you must not communicate with anyone about your experiences in this courtroom. You must not talk about this case, about what type of case this is, or about anything you may learn about the case. You must not talk about the case in person or on the phone, and you must not communicate about the case in writing or electronically. You also must not use your computers or electronic devices to find out any information about this case, or about the people or the issues involved in the case. I will explain this further, but right now…

- … Is there anyone who would be unable to follow this instruction?

Voir dire: If you become a juror on this case, you must not talk about or discuss this case with anyone, other than to tell someone that you are on a jury, and to give them the estimated schedule of the trial. That includes not talking to each other about the case during your breaks [in a civil case, you should modify this language as provided in Civil Rule 39(f)], and it includes not talking to your friends, family members, and others about the case. "Not talking about the case" requires that you may not even mention the names of the lawyers, the parties, witnesses, or anyone else involved in the case. In order to avoid even the appearance of improper conduct, the law forbids any of the participants in this trial – the lawyers, the parties, any spectator or visitor, any witnesses, and also including me –from talking to you jurors, except through my staff, or as I permit while we are all in this courtroom.

- Do you all agree not to discuss this case with anyone until the trial is over?

When I say you must not talk about or discuss the case, I am referring to talking in person or on the phone, as I mentioned before; but I also mean discussing the case in writing or

electronically. When I say electronically, I am including e-mail messaging, texting, blogging, tweeting, "facebooking," and any other form of electronic communication.

- How many of you utilize electronic communications for personal use, or at work?

You must not tweet, blog, e-mail, text, post, talk, or communicate in any other way about this case, or the issues or the people involved in this case, while you are serving as a juror. During this trial, you must not use or attempt to use Facebook or another social media website to friend or to post about me, or to friend or to post about my court staff, the attorneys, the parties, witnesses, other participants, or any other jurors or potential jurors.

- Do you all agree not talk to or communicate with anyone about this case, or about any of the people or circumstances involved in the case, until the trial is over?

While you are in the courtroom, you must turn your cell phones, smart phones, laptops, Blackberries, or any other electronic device off - not on vibrate, not on silent, but off -- or you must leave your device in the jury room. You may use those devices during breaks or recesses, but for personal reasons only, and not for anything having to do with the facts, people, or issues involved in this case.

- Is there anyone who would be unable to follow this instruction?

- How many of you have cell phones or another electronic device with you?

- How many of you are able to access the internet right now?

- Have you all turned off your cell phone or any other electronic device?

You may not do your own investigation or independent research to find information about this case. You may not look up or research anyone or anything having to do with this case in the newspaper, in a book, using Google or another internet site, or by using any other available resource. If any of you attempt to use information that you find outside the courtroom, it will cause the trial to come to a screeching halt, the case will most likely have to be tried all over again by a different jury, and you may face significant penalties for your behavior.

The reason for this requirement is that the trial process only works if each side knows exactly what evidence you have, and what law you are applying to the facts you find. Evidence is information, including testimony from witnesses and exhibits that I allow in

court. I provide the law to you in my instructions. You cannot consider any information from any outside source.

- Is there anyone who would be unable to follow this instruction?

If you are selected to sit as a juror on this case, would any of you be unable or unwilling to return a verdict based only on the evidence presented at trial?

- As jurors, although you must not conduct your own investigation or independent research on the internet or anywhere else, you will be able to ask questions in this courtroom.

- Could you follow that instruction?

If you are selected to serve as a trial juror in this case, is there anyone who would be unable to follow any of the rules I have just given to you?

Appendix 8: Letter to the Judicial Ethics Advisory Committee

Draft letter to the Judicial Ethics Advisory Committee

December __, 2012

Hon. Margaret Downie
Chair, Judicial Ethics Advisory Committee
1501 West Washington Street
Phoenix, Arizona 85007

Re: Wireless Committee's request for an Advisory Opinion

Dear Judge Downie:

Chief Justice Berch established the Committee on the Impact of Wireless Mobile Technologies and Social Media on Court Proceedings (the *"Wireless Committee"*) in March 2012 by the entry of Administrative Order 2012-22. This Order directed the Wireless Committee, among other things, to identify to the Judicial Ethics Advisory Committee (the *"Advisory Committee"*) any ethical issues arising from this new technology. As a member of the Wireless Committee, you have first-hand knowledge of these issues, but here is a summary.

Judges in Arizona are adapting to, and in many instances embracing, new technology, including social media. Some estimates suggest that half of Arizona judges are already using social media, commonly Facebook, but also Twitter, LinkedIn, Google, and other sites. Facebook users can *"like"* or *"friend"* other users, while those on Twitter can *"follow"* other users.

During their study of judges' use of social media, members of the Wireless Committee learned that other jurisdictions have reached different answers to the same ethics questions. For example, a Florida Court of Appeal in *Domville v. State*, case number 4D12-556, Sept. 5, 2012, agreed with its Judicial Ethics Advisory Committee, that

> *"…when a judge lists a lawyer who appears before him as a 'friend" on his social networking page this 'reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge."*

The appellate court held that Domville's allegations of *"friending"* were sufficient to *"create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial."* The Court of Appeal therefore disqualified the trial judge.

Less than a week before the *Domville* opinion, a Utah Informal Advisory Opinion had reached a different conclusion. On a virtually identical scenario, the Utah opinion, number 12-01, August 31, 2012, concluded that a judge might allowably be *"friends"* with lawyers who appear before the judge:

> *"Being friends with someone is not a violation of the Code of Judicial Conduct. Furthermore, the designation of someone as a 'friend' on a website such as Facebook does not indicate that the person is a friend under the usual understanding of the term. Many Facebook users have hundreds and even thousands of 'friends.' Whether someone is truly a friend depends on the frequency and the substance of the contact, and not on an appellation created by a website for users to identify those who are known to the user."*

Does Arizona adopt the Florida or the Utah view, or does it draw the line elsewhere? Specifically:

> (1) May a judge be *"friends"* or accept *"friend"* requests from lawyers who appear before the judge?
>
> (2) If a judge is a *"friend"* with a lawyer on Facebook, does that require the judge to recuse himself or herself from the lawyer's cases?
>
> (3) Do the ethical rules allow a judge to identify himself or herself on Facebook, by words or by photographs, as a judge?
>
> (4) Do the ethical rules allow a judge to be a *"friend"* to an elected official, or to a candidate for political office?

The first two pages of Utah Advisory opinion 12-01 included the four questions above, as well as almost twenty related questions. The Wireless Committee incorporates those other questions by reference. The Wireless Committee believes that the Advisory Committee may combine its answers to these other questions rather than state them separately because the questions raise intertwined issues. The Advisory Committee may also wish to consider ethics opinions from other states. The Ohio Supreme Court's Board of Commissioners on Grievances and Discipline issued Advisory Opinion 2010-7 (2010); and Tennessee's Judicial Ethics Committee recently released Advisory Opinion No. 12-01 (October 23, 2012.)

The Wireless Committee poses these same questions to the Advisory Committee with regard to judicial employees. Would the Advisory Committee's responses be different for a judicial employee versus a judge? An Arizona court employee recently posted a story concerning a citizen who wanted to pay a court fine in pennies. Other Arizona court employees have posted stories on Facebook pages about promotions, or terminations of court staff, before Human Resources was able to notify the involved employees. What are the ethical considerations in these scenarios? A question was recently raised about how a well-known court administrator could post anything on Facebook, if everyone in the community was aware of the administrator's position with the court and even if it was not explicitly mentioned, the individual's relationship with the court was inherent in every post. What determines when someone identifies himself or herself as a judicial employee? Is it possible, appropriate, or necessary for a court to have a social media policy for court employees?

The Wireless Committee believes that the issuance of an omnibus advisory opinion will greatly assist Arizona judges in applying the Code of Judicial Conduct to their use of new technology, particularly social media. Your advisory opinion could be a valuable adjunct in educating judges and judicial employees on these frequently asked questions.

Thank you for your assistance.

Yours truly,

By: _____
On behalf of the Wireless Committee

Appendix 9: List of materials considered by the Wireless Committee

- **Opinions**

Star Publishing v Bernini, 2 CA-SA 2011-0095, Arizona, January 27, 2012

Stoddard v Donahoe, 224 Ariz. 152, 228 P.3d 144, Div One, 2010

USA v Lawson, #10-4831, 4th Circ, 2012

Commonwealth of Massachusetts v Werner, No. 11-P-368, May 2, 2012

Domville v Florida, Fourth District Court of Appeal, No. 4D12-556, September 5, 2012

Juror Number One v Superior Court (Royster), Third Appellate District, C067309, California, May 31, 2012

- **Miscellaneous Arizona Sources**

Pima County Superior Court: Request for Camera in the Courtroom under Rule 122 (webpage)

Email from AZAudit re: Rule 122 request (Pima County)

Pima County memo to jurors and prospective jurors regarding use of electronic devices

Exemplar Maricopa County minute entries regarding cameras in the courtroom

Materials on Wendell, including the Bench Book and RAJIs

- **Miscellaneous State Sources**

Supreme Court of Arkansas Administrative Order No. 6(c), July 2011

"Security: Prohibition on Cellular Telephones and other Personal Communication Devices in the New Castle County [Delaware] Courthouse," November 2005

Courthouse Decorum Order: *Illinois v Balfour*, April 2012

Decorum Order: *Pennsylvania v Sandusky*, May 2012

Rules proposed by the Pennsylvania Criminal Procedural Rules Committee, January 2012
Massachusetts Supreme Judicial Court Rule 1:19, 2012

Maryland Judicial Ethics Committee, Advisory Opinion 2012-7

San Diego County Bar Association, Legal Ethics Opinion 2011-2, May 24, 2011

New York City Bar, Formal Opinion 2012-2: Jury Research and Social Media

Utah Ethics Advisory Committee, Informal Opinion 12-01, August 31, 2012

Supreme Court of Florida Order Number SC 10-51, In Re: Standard Jury Instructions in Criminal Cases, Report Number 2010-01; and Standard Jury Instructions in Civil Cases, Report No. 2010-01, October 21, 2010

- **Law Reviews**

"Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age," University of Colorado Law Review, Winter 2012 (Author: Thaddeus Hoffmeister)

"The Courts Are All a 'Twitter': The Implications of Social Media Use in the Courts," Valparaiso University Law Review, Fall 2011 (Author: Emily M. Janoski-Haehlen)

"Ensuring an Impartial Jury in the Age of Social Media" Duke Law and Technology Review, Vol. 11, 2012 (Authors: Hon. Amy J. St. Eve and Michael A. Zuckerman)

"Juror Misconduct in the Age of Social Networking," FDCC Quarterly, Winter 2012 (Authors: Michael K. Kiernan and Samuel E. Cooley)

"Social Networking and Judicial Ethics" St. Mary's Journal on Legal Malpractice and Ethics (Author: Craig Estlinbaum)

"Somebody Poisoned The Jury Pool: Social Media's Effect on Jury Impartiality," Texas Wesleyan Law Review [publication is pending] (Author: Kristin Brown)

Various articles, Reynolds Courts & Media Law Journal, 2011 and 2012, including

> "Worlds Collide: The Digital Native Enters the Jury Box" (Author: Judge Dennis Sweeney)
>
> "That's what 'Friend' is For? Judges, Social Networks, and Standards for Recusal (Author: Genelle Belmas)
>
> "Untangling the Web: How Courts Should Respond to Juries Using the Internet for Research" (Author: Gareth Lacy)
>
> "Say Cheese: Cameras and Bloggers in Wisconsin's Courtrooms" (Author: Stacy Blasiola)

"Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media" (Author: Eric Robinson)

- **Policies and Reports**

"Resource Packet for Developing Guidelines on Use of Social Media by Judicial Employees," prepared by the Committee on Codes of Conduct, Judicial Conference of the United States, April 2010

"Model Policy on Access and Use of Electronic Portable Devices in Courthouses and Courtrooms," Media Law Research Center, 2010

"Principles and Practices for Electronic Devices," prepared by the Special Subcommittee for Electronic Devices and Approved by the Judicial Council of the Ninth Circuit (February 25, 2010)

"Jurors' Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management," Federal Judicial Center, November 2011

"Final Report: Judicial Council Study Committee on Technology Brought into the Courtroom," Utah State Courts, April 10, 2012

"Proposed Model Jury Instructions: the Use of Electronic Technology to Conduct Research on or Communicate about a Case," prepared by the Judicial Conference Committee on Court Administration and Case Management, June 2012

"Jury Instructions Cautioning Against Use of the Internet and Social Networking" American College of Trial Lawyers, September 2010

"2012 New Media Survey" Conference of Court Public Information Officers

"Juror and Jury Use of New Media: A Baseline Exploration," National Center for State Courts Perspectives on State Court Leadership Series, 2012 (Authors: Paula Hannaford-Agor, David B. Rottman, Nicole L. Waters)

- **Magazine and News Articles**

"Are Tweeters or Googlers in Your Jury Box?" Arizona Attorney, February 2010 (Authors: Rosalind Greene and Jan Mills Spaeth, Ph.D.)

"Most Federal Judges Warn Jurors about Social Media," The Third Branch, March 2012

Article, "Model Jury Instructions for the Digital Age," February 28, 2011 (Author: Prof. Thaddeus Hoffmeister)

"Ruling: Justice court judge's jailing of woman 'egregious'." Salt Lake City Tribune, August 2, 2012)

"Invasions of Privacy" National Law Journal, July 23, 2012

"Can You Hear Me Now? Issues and Policy Considerations for Cell Phones and Other Electronic Devices in the Courts" The Court Manager, Vol. 25 (Author: Nora Sydow)
"Ethics Classes Ordered for Lawyers Seen Reading Text Message on Judge's Phone," August 14, 2012

ABA Journal articles:

"Law Student Who Wrote to Federal Judge Sues Over Subsequent 'Unreasonable' Search of Her Cell Phone," July 24, 2012 (Author: Martha Neil)

"Where the Buck Stops: Lawyers Need to Verify All the Nice Things Being Said About Them Online," August 1, 2012 (Author: G.M. Filisko)

"Seduced: For Lawyers, the Appeal of Social Media Is Obvious. It's Also Dangerous," February 1, 2011 (Author: Steven Seidenberg)

"Report: More Smartphone Owners than Cell Phone Owners Report Privacy Breaches," September 6, 2012 (Author: Terry Carter)

"Judge Orders Newspaper to ID Claimed Juror Who Commented Online during Trial over Attorney's Murder," November 1, 2012 (Author: Martha Neil)
"Conviction Is Reinstated for Neo-Nazi Who Posted Juror's Photo and Address," October 31, 2012 (Author: Debra Weiss)

"Expect Jail Time, Judge Tells Prospective Juror Who Googled Murder Defendant, Flouting Written Order," October 11, 2012 (Author: Martha Neil)

"Facebook Friends and Judicial Ethics," Ifrah Law, February 15, 2011

"The Ethics of Trial by Facebook," Pittsburgh Legal Back Talk, May 8, 2012 (Author: Cliff Tuttle)

"12 Social Media Ethics Issues for Lawyers" Solo Practice University, March 11, 2010 (Author: Susan Cartier Liebel)

"Judges, Attorneys Debate Cameras in the Courtroom," The Blog of Legal Times, March 28, 2012

"Social Media and the Ethical Court Employee," National Association of Court Managers, Volume 26, Issue 1 (Author: Norman H. Meyer, Jr.)

"Blogging by Judicial Office Holders [England and Wales]," August 2012

"Woman Arrested for Posting Undercover Cop's Picture on Facebook," Security Today, October 29, 2012 (Author: L. Page)

George Zimmerman and Social Media (webpage)

"Trial by Social Media in Australia Prompts Clash over Accused Murderer," Media Shift, October 11, 2012 (Author: Julie Posetti)

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	
	)	
ESTABLISHMENT OF THE	)	Administrative Order
COMMITTEE ON THE IMPACT OF	)	No. 2012 – 22
WIRELESS MOBILE TECHNOLOGIES	)	
AND SOCIAL MEDIA ON COURT	)	
PROCEEDINGS	)	
	)	

New and affordable wireless mobile technologies have caused an unprecedented growth in the number of hand-held "smart" devices, laptops, and tablets used in this country. These technologies are shaping how we communicate, shop, bank, work, and inform and educate ourselves.

These devices also provide immediate access to information. Using social media sites such as Facebook, Twitter, and LinkedIn, information may be shared with business colleagues, clients, friends, and families. Mobile and wireless devices may be accessed nearly anywhere and anytime for email, phone and video calls, text messages, internet browsing, taking pictures and videos, research, blogging, and posting to social media sites.

The Judiciary uses technology to make courts more efficient, productive, and accessible. However, judges face unique challenges as they balance due process rights of parties and defendants with legitimate and sometimes necessary personal and professional uses of electronic devices in the courtroom and the courthouse. Guidance on balancing these sometimes competing interests through rules, policies, code sections, and jury instructions is needed.

New technologies present new security challenges as well. Arizona courts have rules governing cameras in the courtroom. Most rules allow media cameras in the courtroom with the judge's permission. Today, many devices such as laptops, cell phones, and tablets can take photos and videos. In Arizona, Supreme Court Rule 122 forbids photographic or video coverage of jurors in a manner that permits recognition of individual jurors by the public. Additionally, Rule 122 permits a judge to "limit or prohibit electronic or still photographic coverage… [if] there is a likelihood of harm arising…." The safety of those who participate in the judicial process is essential to serving the citizens and doing justice in all cases. Rule 122 may need revision to provide additional guidance to judges and other court personnel on how to respond appropriately to legitimate concerns about the use of cameras or other recording devices in the courtroom or the courthouse. Social media also raises ethical questions for judges and court personnel. By its design, social media provides a forum for dialogue between and among those who are invited or, of their own volition, choose to participate in an electronic conversation.

Facebook "friends" or Twitter "followers" can be as few as several to as many as hundreds or tens of thousands depending on the person, the cause, or business. There are times when the personal and professional lives of judges and court personnel intersect, online, with the lives of litigants, witnesses, jurors, and lawyers in the community they serve. Rules and codes of ethical conduct address ordinary circumstances related to friendships, acquaintances, and such. But existing rules and code sections do not specifically address whether ethical constraints or obligations to disclose relationships apply to social media sites.

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED that the Committee on the Impact of Wireless, Mobile Technologies and Social Media on Court Proceedings ("Committee") is established as follows:

1. **Purpose**: The Committee shall review current Supreme Court rules, the Arizona Code of Conduct for Judicial Employees, the Arizona Code of Judicial Administration, jury instructions, and any other authority it deems appropriate and prepare recommendations that

(a) Propose Supreme Court rules, code sections, policy provisions, or jury instructions it believes necessary or appropriate to provide direction to court employees on the use of wireless mobile technology by lawyers, jurors, media, witnesses, and the public attending or participating in court proceedings;

(b) Propose rules, code sections, or policy provisions that will provide direction to judges, court security officers, and personnel on possession and use of technology with the capability to take photos and electronically record videos by court participants and those attending court proceedings; and

(c) Identify ethical questions that should be addressed by the Judicial Ethics Committee, the Judicial Conduct Commission, or any other appropriate committee of the Supreme Court.

The Committee also shall suggest judicial officer and court staff training to implement its recommendations.

2. **Membership**: The individuals listed in Appendix A are appointed as members of the Committee. The Committee shall continue as long as necessary to complete its work, including the filing of any rule petition not later than January 2013. The Chief Justice may appoint additional members and extend the expiration date of the Committee, if necessary.

3. **Meetings**: Committee meetings shall be scheduled at the discretion of the Chair. All meetings shall comply with the Arizona Code of Judicial Administration § 1-202: Public Meetings.

4. **Reports:** The Committee shall submit its report and recommendations to the Arizona Judicial Council not later than November 30, 2012.

5. **Staff**: The Administrative Office of the Courts shall provide staff for the Committee and shall assist the Committee in developing recommendations and in preparing any necessary reports and proposed Supreme Court rule or code changes.

Dated this 7th day of March, 2012.

_____
REBECCA WHITE BERCH
Chief Justice

ATTACHMENT: Appendix A

APPENDIX A

MEMBERSHIP LIST
COMMITTEE ON THE IMPACT OF WIRELESS, MOBILE TECHNOLOGIES AND SOCIAL MEDIA ON COURT PROCEEDINGS

Chair
Hon. Robert M. Brutinel
Arizona Supreme Court

Members

General Jurisdiction Judges
Representative from Maricopa
Hon. Janet Barton

Representative from Pima
Hon. Scott Rash

Representative from Non-Metro County
Hon. James Conlogue
Cochise County

Limited Jurisdiction Courts
Justice Court Judge
Hon. Dan Dodge
Highland Justice Court, Maricopa County

Municipal Court Judge
Hon. Eric Jeffery
Assistant Presiding Judge
Phoenix Municipal Court

Court Administrator
Marla Randall
Superior Court/Limited Jurisdiction Court Administrator, Navajo County

Media Representative/Public Members
David Bodney
Steptoe & Johnson LLP

Robin J. Phillips
Web Managing Editor
Arizona State University
Reynolds Center for Business Journalism

Clerk of the Superior Court and Arizona Judicial Council Representative
Hon. Michael Jeanes
Clerk of Superior Court in Maricopa County

State Bar Representative
Joe Kanefield

Jury Commissioner
Kathy Pollard
Jury Commissioner
Pima County

Commission on Judicial Conduct
George A. Riemer
Executive Director

Judicial Ethics Advisory Committee
Hon. Margaret Downie
Court of Appeals, Division 1, Chair
Maricopa County

Court Security Representative
Robert Lawless
Court Security Manager
Superior Court in Mohave County

Court Public Information Officer
Karen Arra
Court Public Information Officer
Superior Court in Maricopa County