Report to the Arizona Judicial Council

From the Criminal Rules Video-Conference Advisory Committee

ADMINISTRATIVE ORDER 2008-92

Arizona Supreme Court

JUNE 17, 2009

CRIMINAL RULES VIDEO-CONFERENCE ADVISORY COMMITTEE MEMBERS

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I. Executive Summary

The Criminal Rules Video-conference Advisory Committee ("*CRVAC*") was established by Administrative Order 2008-92. The genesis of the Committee was a Supreme Court rule petition, R-06-0016, which sought to expand the use of video-conferences in criminal proceedings pursuant to Rule 1.6 of the Arizona Rules of Criminal Procedure.

CRVAC was directed to make recommendations for the appropriate use of video appearances, taking into account the legal concerns raised during the comment period for R-06-0016. The Committee was also directed to recommend the types of proceedings for which video-conferencing could be utilized, and what technical issues needed to be addressed to effectively implement video appearances.

CRVAC met six times from January through May, 2009. During the first meeting, the Committee received input from groups representing interpreters, court reporters, and crime victims. At subsequent meetings, a former presiding criminal judge of the Maricopa County Superior Court, the Pinal County Public Defender, and Maricopa and Pima County deputy public defenders formally addressed the Committee. The Mohave County Public Defender provided informal comments at Committee meetings. Technical presentations were made by the Information Technology Division of the Administrative Office of the Courts, as well as by video-conference system vendors.

The Committee considered the experiences of Arizona courts, as well as courts in other states, that use video-conferencing. A telephonic presentation to the Committee was made by a prosecutor and a judge in Montana regarding that state's experience with video-conferencing in criminal cases. Select Committee members visited the Pima County jail to observe video-conferences at initial appearances, and they reported their observations to the Committee.

As a result of study and discussion, the Committee reached an agreement on proposed amendments to Rule 1.6 of the Arizona Rules of Criminal Procedure. A majority of members believe the proposed amendments will expand the use of video-conferencing while also safeguarding the rights of the accused. A minority view opposes a recommended amendment to Rule 1.6 which would permit video-conferences for initial appearances. See Appendix 7.

Section II of this report describes the Committee's study of video-conferencing. Section III contains a detailed discussion of the proposed amendments to Criminal Rule 1.6. The operative paragraphs of proposed Rule 1.6 describe proceedings that are excluded from video-conferencing, proceedings that may be done by video in the sole discretion of the judge, and proceedings that may be conducted by video upon agreement of the parties. A mark-up version of proposed changes to Rule 1.6 is in Appendix 1.

The Committee considered three other issues, which are described in Section IV of this report. The first includes a recommendation to adopt a section of the Arizona Code of Judicial Administration for video-conferences. A proposed code section is in Appendix 6. The second issue is an anticipated resistance to video-conferences. The Committee recommends training of

judges, judicial staff, and attorneys as a method of encouraging the use of video-conferencing. The final issue discusses an extension of the comment period for R-06-0016 to assure that broad views on the recommended amendments to Rule 1.6 are fully considered.

II. The Committee's Study

1. Introduction. Administrative Order 2008-92[1] was entered on November 12, 2008. Specific references were made in that order to rule petition number R-06-0016[2], and the *"variety of legal, technical, and other issues"* that were raised by the comments that were received regarding that petition.

The administrative order stated that at the Court's September 8, 2008, rules agenda, consideration of R-06-0016 was continued pending a report from a study committee. The administrative order accordingly established the Criminal Rules Video-conference Advisory Committee to undertake that study and to make recommendations regarding the appropriate use of video-conferencing. The members of CRVAC – judges, court administrators, public attorneys, and sheriff commanders -- were throughout these Committee meetings cognizant of fiscal concerns which were referenced in A.O. 2008-92.[3]

2. Preliminary survey. Prior to the first meeting of the Committee, staff conducted a survey of superior court administrators in Arizona's fifteen counties to determine the extent to which video-conferencing was currently being used in criminal proceedings in Arizona. Thirteen counties responded to the survey. Only three of these counties reported that they did not use video-conferencing at any court level. Ten of those thirteen counties reported that they were using video-conferences, and for those counties whose courts use video-conferencing:

1. Most use video-conferencing in limited jurisdiction as well as general jurisdiction courts.

2. The video-conferencing system connects the court with the main jail. Some also connect with sheriff's sub-stations and/or police departments.

3. Some county systems connect court administration, victim-witness, the public defender, county attorney, adult and juvenile probation, and juvenile detention facilities.

4. Most utilize video-conferencing for initial appearances and for arraignments.

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[1] Administrative Order 2008-92 is reproduced in Appendix 2. The administrative order further noted *"the serious fiscal crisis that exists, and that potential cost savings and judicial efficiencies that potentially could be achieved by the use of video appearances"*.

[2] R-06-0016 is set out in Appendix 3.

[3] Administrative Order 2009-01, entered on January 8, 2009, also directed courts at all levels to *"examine all expenditures", "identify where cuts can be made",* and *"consider case processing or other changes that may increase efficiency."*

5. Some use video-conferencing for pre-trials, case management conferences, extradition proceedings, and sentencing.

The full survey results are in Appendix 4 of this report.

3. Arizona's video-conference networks and technical issues. Representatives of the Information Technology Division of the Administrative Office of the Courts (*"AOC"*) presented technical information to the Committee regarding the video-conferencing infrastructure currently in use by Arizona courts. Their presentations noted that Arizona uses both statewide and local networks for video-conferencing.

Every county's superior court is connected to the statewide Arizona Judicial Information Network (*"AJIN"*). Some municipal and justice of the peace courthouses, but not all of them, also connect to AJIN.[4] Because of the finite amount of AJIN bandwidth dedicated to video-conferencing, only one video-conference at a time, per court location, is permitted. For example, the use by a remote court reporter of an AJIN video-conference connection at one court location would preclude the concurrent use of video-conferencing across AJIN in another courtroom at that same location.

The majority of video-conferences from or to courthouses in Arizona are conducted via county or local connections.[5] Jails in particular are usually on a county or city network. A significantly higher number of video-conferences can be conducted simultaneously on a local network than can be conducted over AJIN. Some county video-conference networks are sophisticated and enjoy high quality video communications.

The AOC uses standard internet (TCP/IP) and communications (H.323) protocols, and therefore AJIN users can communicate with any others who employ the same standards, even in separate branches of government. Certain standards are set out in the Arizona Code of Judicial Administration, section 1-105 (*"Enterprise Architecture Standards"*). The Commission on Technology has also authorized its Technical Advisory Council subcommittee to recommend statewide technical standards for the judicial branch. The H.323 protocol is the specified standard for video-conferencing over AJIN, with a maximum transfer rate of 384 kbps. Under present standards, particular video-conferencing equipment and products are not specified for the county and city systems used by the courts.

Some Arizona court and county users have selected an ISDN[6] protocol and equipment. These users do not follow the H.323 protocol on their local networks. Accordingly, and also because of local network policies, it is not always possible to switch a video-conference from a local network to the statewide network.

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[4] Diagrams of these networks are in Appendix 5 to this report.

[5] Montana, for example, conducts its criminal court video-conferences on a statewide network.

[6] ISDN (integrated services digital network) is a communications standard for sending voice, video, and data over a telephone network.

In summary, the overwhelming majority of video-conferences in criminal proceedings in Arizona are done over local networks, rather than through the statewide AJIN network.

Presentations made to the Committee by private vendors emphasized that selection of a video-conferencing system for court use is site specific. For example, rooms have differences in size and shape, as well as ceiling heights and floor construction. Other differences include the presence or absence of pillars and windows, and the age of the buildings. Additionally, some systems are permanently installed, whereas others are portable. Consequently, there is not a universal video-conferencing solution for all court customers.[7]

One issue raised was who should be shown on the video monitor during a video-conference? One vendor's suggestion was a *"5+1"* screen, where up to five participants would be shown in small rectangles on a single screen, and, using voice activation, the person speaking would be shown in a larger dominant rectangle. Because of the number of cameras required for 5+1, this is a costlier alternative. Another option offered was to split the courtroom into sectors, with a remote keypad used to select the desired camera view for one of the sectors. A third alternative was to use a single wide angle camera that can also do a close-up of the speaker.[8]

Another issue repeatedly discussed by the members was a means of confidential communications between the defendant and counsel. There are two scenarios. In one scenario, the defendant and counsel are both present in the jail. A confidential communication could take place in that setting in much the same way as it does in court: by covering a microphone, by using a mute switch, or by turning heads and talking in whispers. However, the second scenario, where the defendant is in the jail and counsel is in the courtroom, is more problematic. The most commonly suggested solution was a phone connection, independent of the video connection. Cell phones or dedicated *"land lines"* could be utilized, although either of these methods raises security concerns for the sheriff.[9] The Committee members unanimously agreed that a means of confidential communications was "crucial" for video-conferencing in a criminal proceeding.[10]

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[7] It was noted that the optimum time to install a video-conferencing system is during building construction, since it is less expensive than retrofitting.

[8] One vendor advised that court personnel, and particularly judges, prefer to focus on the proceedings before them without having simultaneous responsibilities to adjust or to monitor video equipment settings.

[9] The sheriff's concerns include a handset being used as a weapon, or the defendant's use of a cell phone for an unauthorized call. Presenters from the State of Montana advised that when confidential communications are requested in that scenario, the judge clears the courtroom of everyone except defense counsel, who can then speak privately with the defendant over the video-conference link.

[10] Neither Maricopa County nor Pima County currently has an established means for a jail inmate to have confidential communications with defense counsel during the course of a video-conference criminal proceeding, if defense counsel is present in the courtroom rather than at the

One vendor recommended using large screen (e.g., 42 to 50 inch) monitors in the courtroom. By using a large, well-positioned monitor, only one monitor may be required to provide a view for everyone in the courtroom. High definition (*"HD"*) is becoming the industry standard for monitors in video-conferencing systems. Closed captioning is available. Equipment now is reported to have better quality, and include greater functionality, than a few years ago, and yet is said to be less costly.[11]

Court reporter and interpreter representatives emphasized the need for clear audio and video connections. They also noted a need to visually identify who is speaking; and expressed caution about video-conferencing proceedings where there were multiple speakers, or when there was a speaker using technical or heavily accented language. The court reporter and interpreter will presumably be in the courtroom during a video-conference, although that may not always be the case. An interpreter may occasionally be in the jail with the defendant, and may need to interpret speakers other than the judge who may be in the courtroom. This could increase the difficulty of the interpreter's work. A court reporter suggested if she was remote from the proceeding, that in addition to a monitor, she should have a microphone so she could ask a speaker to repeat something that was inaudible.

Victim representatives expressed interest in an ability to watch proceedings remotely, especially from their home or workplace. A vendor confirmed that this can be done, and that a victim could watch a court's video-conference proceeding on a computer terminal at a location remote from the courthouse via a live, streaming video, which could be accessed on-line, although it has not been confirmed that all or even any of the networks in Arizona have this capacity.[12] However, even with streaming video, if there is no camera or microphone at the remote site, the victim could only watch, and not participate. A sheriff's representative noted that some victims are at greater ease when watching a video proceeding in a room where they are physically separate from the defendant.[13]

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jail. The plans for Maricopa County's new criminal court tower provide a means for confidential communications during video-conferences.

[11] Lower equipment costs were reported by one of the vendors. The Montana presenters advised that high-definition monitors could now be acquired for a price comparable to what their state had paid for conventional monitors just a few years ago, and they recommended use of high definition monitors.

[12] Making video-conference proceedings available by streaming video involves technical knowledge and decisions which this Committee would defer to the Commission on Technology.

[13] Sheriffs' representatives have advised the Committee that jail inmates frequently and willingly agree to appear by video-conference. From the inmate's perspective, video-appearances avoid schedule disruptions and inconveniences required for an in-person court appearance, such as an early morning wake-up, missed meals, and being shackled for transport to court. However, see Part II, section 7, *infra*, and Appendix 7 for the defense perspective.

4. History of video-conferencing under the Arizona Rules of Criminal Procedure. With advances in technology, Rule 14 was amended in 1979 to permit arraignments by *"video-telephone"*. However, guilty pleas at video arraignments were not allowed.

In 1998, Maricopa and Coconino Counties sought rule changes for expanding the uses of video-conferencing, and these were followed by a rule proposal from the AOC. A committee was formed in 1999 to evaluate R-98-0027/0034. That committee's work led to the adoption by the Supreme Court of the current Rule 1.6 in 2000.

Although the 1999 committee had considered allowing for evidentiary hearings and felony sentencing by video-conference, these proceedings were ultimately excluded from the scope of the rule. The rule adopted in 2000 required that parties be able to view and converse with one another simultaneously; that a full record of proceedings be kept; that before conducting a proceeding by video-conferencing, the court was required to determine that the defendant knowingly, intelligently, and voluntarily agreed to appear by video; that communications between the defendant and counsel remain confidential; and that victims' rights be enforced.

5. Arizona law. The Arizona Constitution, Article II, section 24, guarantees to a defendant the rights to *"appear and defend in person",* and *"to meet the witnesses against him face to face."*

In a case affirming a trial court's order which required that juvenile defendants watch the testimony of a six-year-old witness from an adjoining room on closed circuit television, Division Two noted: "*...the right of confrontation is not absolute." Matter of Appeal in Pinal County Juvenile Action Nos. J-1123 and J-1124,* 147 Ariz. 302, 305, 709 P.2d 1361, 1364 (1985).

In *State v. Schackart*, 190 Ariz. 238, 947 P.2d 315 (1997), a capital defendant argued that his absence from two hearings which took place prior to resentencing violated his constitutional right to attend all critical stages of the proceedings. The Court noted that:

> *"An accused's presence at trial is protected by the Sixth and Fourteenth Amendments to the United States Constitution, and by Article II, Section 24, of the Arizona Constitution. See State v. Levato, 186 Ariz. 441, 443, 924 P.2d 445, 447, (1996)[citing cases.] We have adopted the view that a defendant also has a right to attend those proceedings where 'his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.' State v. Christensen, 129 Ariz. 32, 38, 628 P.2d 580, 586 (1981) [citations omitted]; Levato, 186 Ariz. at 443, 924 P.2d at 447."*

The first of the proceedings in *Schackart* (the scheduling of a sentencing date) was deemed a "*mere housekeeping matter during which no argument was heard, no other issues were addressed, and defendant could have contributed nothing.*" 190 Ariz. at 256. At the other proceeding, defense counsel thoroughly argued defendant's motion for a mitigation hearing. The Court found that the defendant "*has not shown that his presence would have made any difference.*" 190 Ariz. 256.

The following year, the Arizona Supreme Court reversed a conviction where the defendant was denied a brief postponement of jury selection to permit him to change into civilian clothing. Defendant then chose to be absent from the proceeding rather than appear in jail dress. *State v Garcia-Contreras*, 191 Ariz. 144, 953 P.2d 536 (1998) held that under the circumstances presented, the defendant's decision not to attend was involuntary, and the trial court's ruling resulted in a denial of defendant's right to be present under the Sixth Amendment of the United States Constitution and Article II, Section 24, of the Arizona Constitution. The opinion stated that in order to assess the magnitude of "*presence error*" (that is, error through a denial of the defendant's right to defend in person), "*...the character of the proceeding from which the defendant was excluded must be evaluated to ascertain the impact of the constitutional violation on the overall structure of the criminal proceeding.*"

The *Schackart* test was formulated in terms of "*the fullness of the defendant's opportunity to defend against the charge.*" In *Garcia-Contreras*, the test was framed as "*the impact of the constitutional violation on the overall structure of the criminal proceedings*." In the context of both opinions, the standard used by the Committee was: **would the accused's physical absence from the courtroom and his appearance at a particular proceeding by video, impact his ability to defend against the charge?**

6. Case law from other jurisdictions. A number of cases from other jurisdictions concerning video appearances were cited by members of this Committee in support of the proposed amendments to Rule 1.6 which are set out in Appendix 1 of this report. Among those cases were the following:

People v Lindsey, 772 N.E. 2d 1268 (Ill., 2002):

> "Moreover, the record does not establish that defendant's underlying constitutional rights were violated by the fact that he was not physically present at his arraignment and jury waiver. Defendant's sixth amendment right to confront witnesses was not implicated because there were no witnesses to confront at the proceedings. We acknowledge that defendant's absence from the courtroom had some impact on defendant's access to counsel. Because defendant and his attorney appeared at separate locations during the arraignment and jury waiver, defendant's ability to communicate freely with counsel was impaired - communication through the closed circuit system could not be done privately and, to speak privately, counsel was required to leave the courtroom to contact defendant by telephone. See *People v. Guttendorf*, 309 Ill.App.3d 1044, 243 Ill.Dec. 535, 723 N.E.2d 838 (2000) (defendant's inability to consult freely with counsel contributed to the unconstitutionality of defendant's closed circuit television appearance when entering a guilty plea). Nevertheless, we cannot say that, in the context of the arraignment and jury waiver involved here, defendant's right to counsel was so impaired by his physical absence from the courtroom that he was denied the effective assistance of counsel. As noted above, at the arraignment, counsel merely entered defendant's not-guilty plea. The fact that defendant was not physically present in the courtroom, by counsel's side, had no prejudicial effect on defendant's plea. We note, too, that prior to waiving trial by jury, defendant had the opportunity to consult privately with counsel. We conclude that the

record does not support a finding that, as a result of his physical absence from the courtroom, defendant was denied adequate representation with regard to his arraignment and jury waiver.

"In sum, we hold that defendant's appearances via closed circuit television at arraignment and jury waiver did not render those proceedings unconstitutional. To show a constitutional violation of the right to be present, there must be evidence that defendant's due process rights were violated by his absence from the courtroom, *i.e.*, that defendant's physical absence from the proceedings caused the proceedings to be unfair or that his physical absence from the proceedings resulted in the denial of an underlying constitutional right. There has been no such showing on this record. Consequently, we find no constitutional violation." [772 N.E.2d at 1278]

State v Stroud, 804 NE2d 510 (Ill, 2004):

"We hold today that a defendant's physical presence at a guilty plea proceeding is constitutionally required unless he consents to having the plea taken by closed-circuit television. Like the advisory committee to the federal rules, we believe that it would normally satisfy constitutional considerations for the defendant to waive his physical appearance in court by stating so on the record while participating through closed-circuit television. We further add that an admonishment about the right to be physically present should be given by the trial judge at the beginning of the guilty plea proceeding as part of the admonitions required by Supreme Court Rule 402 (177 Ill.2d R. 402), unless the defendant has previously given his written consent to the closed circuit procedure. Because defendant's plea was taken without him specifically waiving his right to be present, we affirm the judgment of the appellate court, which vacated defendant's convictions and remanded the cause for further proceedings." [804 N.E.2d 519]

Commonwealth v Ingram, 46 SW 3d 569 (Ky., 2001):

"The closed circuit video technology operates as a functional equivalent of an in-court arraignment, as both the defendant and the judge can hear each other. Moreover, the requirement that the arraignment be held in open court is satisfied because a television monitor allows any member of the general public present in the courtroom to observe the proceedings." [46 S.W.3d at 570-571]

In re Rule 3.160(a), Florida Rules of Criminal Procedure, 528 So2d 1179 (Fla., 1988):

"When the technology is available, audiovisual arraignments, as well as appearances, can save time and expense, promote safety, minimize the need for additional court personnel, and still fully and accurately protect defendants' rights.

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"As the population grows, with the attendant multiple places of confinement and courthouses, the use of audiovisual transmissions can enhance the efficiency of the

courts. Care must be taken to fully protect all the constitutional rights of an accused. This rule change, however, does not adversely affect any such right." [528 So.2d at 1179-1180]

L*aRose v Superintendent*, 702 A2d 326 (NH, 1997):

"…we conclude that the petitioners have not established that the teleconferencing procedures employed here violated due process. As the trial court noted, the petitioners offered no evidence that the results of their arraignments and bail hearings would have been any more favorable if they had been conducted at the district court rather than by teleconference." [702 A.2d at 329-330]

Commonwealth v Terebieniec, 408 A.2d 1120 (Pa., 1979):

"…reliance upon mechanical and electronic devices in pretrial proceedings can be salutary and are permissible so long as they do not impair the rights of the accused." [408 A2d 1124]

Scott v State, 618 So.2d 1386 (Fla App, 1993):

"We have no reason to assume that the audio-video hookup prevented the defendant and his counsel from fully and adequately participating in that public hearing. The record indicates that the judge could and did communicate with the defendant and his attorney. No one suggests that the defendant lacked a satisfactory ability to communicate with the judge and other participants in the courtroom. For constitutional purposes, the audio-video hookup may well be the legal equivalent of physical presence." [618 So.2d at 1388]

7. Objections by defense counsel to video-conferencing. The greatest opposition to video-conferencing came from public defenders and other defense counsel who addressed the Committee. Specific defense objections and comments included the following:

1. Defense counsel is faced with the dilemma of being in the jail with the client, or being in the courtroom with the judge, prosecutor, clerks, victims, and witnesses.[14] The jail location places counsel with his client, where counsel's support and communication can best be offered. Alternatively, the court location permits defense counsel to be in the same place as other participants, where counsel can more effectively communicate with them during the proceeding, and before and after as well. The choice of either location puts defense counsel at a disadvantage; counsel cannot choose to be at both locations. The need for defense counsel to be present at the jail will lead to cost shifting rather than cost savings.

2. Video dehumanizes the criminal process. It takes away the ability of a judge to *"look the defendant in the eye."* It *"hardens"* the defendant's perception of the system, and

[14] News media may also be in the courtroom.

fails to promote the requisite degree of respect for a judicial proceeding. Video-conferencing may engender a defendant's distrust of the criminal process.

3. Video-conferencing systems have inconsistent quality of audio and video.

4. The defendant is frequently able to see and hear only the judge, and is not able to view or listen to other participants.

5. Credibility assessments cannot be done by video as well as they can be done in-person. The same holds for assessments of mental illness, intoxication, or physical illness or infirmity.

6. A judge cannot adequately assess by video whether a defendant's choices, such as waiving a right, are made *"knowingly, voluntarily, and intelligently."* Any agreement to appear by a video-conference that is made on the record during a video proceeding rather than in writing prior to the proceeding might be coercive and lack meaningful consent.

7. All criminal proceedings are required by court policy to be *"meaningful"*. If every proceeding is meaningful, a criminal defendant should be personally present at every proceeding.

8. A defendant has a right to be present when any evidence, and not just sworn testimony, is presented to the judge.

9. A defendant has a right to be present when dispositive or significant legal motions are heard.

10. In addition to being present during the proceeding, the defendant should have a right to be present immediately before and immediately after the proceeding, for example, to hear colloquy of counsel concerning the defendant's case.

As to each of these objections, the Committee considered **whether the accused's physical absence from the courtroom and his appearance at a particular proceeding by video, would impact his ability to defend against the charge.** The recommended amendments to Rule 1.6, *infra*, *Section III*, reflect the Committee's consensus for addressing these objections.

8. Initial appearances in Arizona. Initial appearances under Ariz. R. Crim. P. 4.2 were the subject of considerable discussion by this Committee.[15] On the one hand, video-conferencing is currently being used to conduct initial appearances in a manner that contributes to judicial economy and that promotes jail and court security. On the other hand, because initial

[15] The Committee member from the Pima County Attorney's Office advised the other members that the filing of R-06-0016 was in large part motivated by an impasse between that office and the Pima County Public Defender on developing a procedural rule for using video-conferences at initial appearances.

appearances are constitutionally mandated, defense counsel have characterized the initial appearance as a *"critical stage"* of the criminal process. Since a release determination is made at the initial appearance, an important liberty interest is at stake, and defense counsel maintain that the proceeding should be conducted *"live"* rather than by video. Ultimately, this issue became the basis for a lack of unanimity on the recommendations of this Committee.

The setting within any county's venue must also be taken into account on the matter of initial appearances. These settings include the following considerations:

1. **Location.** In Maricopa County, a courtroom located within the physical confines of the jail is used for initial appearances. There is little need for video-conferencing during initial appearances in Maricopa County, because they are routinely done *"live."*

2. **Defense counsel.** Only two of Arizona's fifteen counties have a public defender present at initial appearances. Those two counties are Pima and Pinal, and only Pima County uses video-conferencing for initial appearances. The Pima County defenders oppose video-conferencing at the initial appearance because they feel at a disadvantage in being remote from the courtroom during what they perceive is a critical stage of the criminal process.

3. **Distance.** In several rural counties, including Yavapai and Cochise, there are considerable distances between the jail and the nearest available courthouse. Because the initial appearance must be conducted within 24 hours of arrest, timely transporting the inmate to a courtroom can be problematic in these counties.

9. *Terrell v United States.* During the tenure of this Committee, the Sixth Circuit Court of Appeals issued an opinion in *Terrell v United States of America* (case number 07-2546, March 26, 2009). The decision involved an interpretation of a federal statute which had been enacted in 1976, 18 U.S.C. §4208(e), and a requirement in that statute that *"[a] prisoner shall be allowed to appear and testify on his own behalf at the parole determination hearing."* The United States Parole Commission interpreted the word *"appear"* in a manner that permitted the prisoner to attend the parole determination hearing by video-conference. The Sixth Circuit disagreed, stating in part:

> *"At the time 'appear' pursuant to 18 U.S.C. §4208(e) was enacted into law, videoconferencing did not exist and, unambiguously, 'appear' required an in-person hearing. No subsequent technological development can change that fact."* **(**Slip opinion, pages 10-11.)
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> *"…[t]he government does not argue that videoconferencing is equivalent to an in-person hearing because it simply is not. Rather, Congress's understanding of how parole hearings could be conducted in 1976 informs our understanding of what 'appear' requires of a proceeding, and influenced its creation of the statutory scheme of parole that allowed a prisoner to 'appear at' a proceeding held at a 'place,' both of which increase the degree of specificity with which we understand 'appear.' Put differently, when we hold that the statute requires an in-person hearing, we mean that the statute*

unambiguously requires particular characteristics in a hearing which videoconferencing does not have." (Slip opinion, pages 15-16.)

Arizona first adopted a rule permitting appearances by *"video-telephone"* in 1979. (See page 12, *supra*.) In 1978, one year prior to the adoption of this rule, Arizona enacted a variety of criminal statutes, among them statutes regarding the initial appearance of an accused, which required that after arrest, the accused *"shall"* be *"taken before a magistrate"*.[16] The members of this Committee considered these statutes in light of Terrell v United States.

The majority view of the Committee was that Terrell was not an impediment to doing initial appearances in Arizona by video-conference. First, the members believed that the opinion of the Sixth Circuit is not binding precedent for Arizona courts. See, for example, State v Montano 206 Ariz. 296, 77 P.3d 1246 (2003), at footnote 1: *"We are not bound by the Ninth Circuit's interpretation of what the Constitution requires."* But more substantively, had the hearing in Terrell been conducted under the Committee's proposed version of Rule 1.6, it would have required a stipulation from the defendant to proceed by video, because witness testimony would have been taken and conducting the proceeding by video would not have been permitted in the sole discretion of the judge. *See* section III, *infra*.

The majority of the Committee concluded that when conducting video-conferences for initial appearances under the proposed rule, the constitutional requirements of confrontation and due process are satisfied. Furthermore, the majority contends that there is no compelling argument that a defendant's constitutional rights might be infringed, or that any injustice would result, from conducting certain proceedings by video.

10. Cost Savings. Cost efficiencies achieved by using video-conferencing in criminal cases arise predominantly from a reduction in transportation costs.

The greatest cost component associated with transporting an inmate to court is labor; the lesser component is vehicle cost.[17] For example, if an inmate required transportation from a downtown Phoenix jail to Gila Bend, two deputies would be mandated for security reasons. The labor cost calculation would include not only the round trip to and from Gila Bend, but also the associated time in retrieving the inmate from the jail, and waiting time in Gila Bend.

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[16] See A.R.S. sections 13-3854 (arrest without a warrant), 13-3897 (duty of officer after arresting with a warrant), 13-3898 (arrest without warrant, magistrate, complaint), and 13-3963 (admission to bail when arrest occurs in another county). See also sections 13-3967 (release on bailable offenses before trial, which begins, *"[A]t his appearance before a judicial officer…"*); 13-3968 (violations of conditions of release, requiring a defendant to be *"taken forthwith before a superior court for hearing"*); and 13-4129 (production of prisoner, mandating that a person served with a writ *"shall bring the body of the party in his custody or under his restraint before the court…"*)

[17] There are variations on this model. The Pinal County jail, for example, is across the street from the courthouse. The sheriff does not use a vehicle for court transportation; instead, sheriff's deputies accompany inmates on a short walk to the courthouse.

The Pima County Sheriff utilizes vans, which can hold a maximum of twelve inmates, for transportation to court. Two deputies are required in the van for security. The Pima County Sheriff provided the following estimate for the cost of transporting a single inmate to the courthouse, which is three miles from the jail:

Personnel cost:	$27.19 x 2 (officers) = $54.38 x 3 hours = $163.14
Vehicle cost:	$0.608 per mile x 6 round trip miles = $3.65
Total cost	$163.14 + $3.65 = $166.79

The transportation cost would be the same for 1 to 12 inmates, because 12 is the capacity of the sheriff's vans in Pima County, but more vans for each incremental group of 1 to 12 inmates would involve added labor and vehicle costs. Once at the court building, the costs would increase due to the inmates being dispersed to various courtrooms, which would require additional Pima County Sheriff's staff to escort the inmates to each courtroom and to provide courtroom security.

For calendar year 2008, the Pima County Sheriff reported that he transported 23,075 inmates.[18] The Sheriff estimated that as many as 75% of inmate appearances could be done by video-conference, including status conferences, motions, and hearings. Pima County began using video for pre-trial conferences in late-2008, and the Sheriff has seen roughly a 40% reduction in afternoon transports for these proceedings.[19]

Computations of video-conference cost savings can be affected by a variety of factors. These include the geography of a jurisdiction, and the distances between its jails and its courts; the nature and types of proceedings for which video-conferencing is permitted; the volume of inmate appearances by video-conference; and whether the cost calculation includes the time of the public defender, witnesses, or others whose time is saved or shifted by video-conferencing. [20]

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[18] For a single day in 2008, the Maricopa County Sheriff transported a record 1,078 inmates from the county jails to county courts.

[19] A rough calculation of the Pima County Sheriff's cost savings by using video-conferencing for court appearances would be as follows: 23,075 inmates per year ÷ 260 court days/year = approximately 88 inmates per court day. Assume 40% of the inmates appear by videoconferencing, 88 inmates x .4 = 35 inmates per each court day appear by video. That would save the cost of three vans: $166.79/van x 3 = $500/day x 260 court days/year = $130,000/year.

[20] A Montana study reported: *"In calendar year 2005 the JVN [Judicial Video Network] conducted over 2,000 separate events that totaled over 1,500 hours of usage. Over 80% of this was specific to district court events that kept either judges, attorneys, law enforcement personnel, citizens, witnesses, prisoners, patients, or others in their home locations, thereby avoiding costs of travel and time. It is estimated that the entities using the JVN in 2005 avoided incurring costs of more than $600,000 by using this resource. This was a significant increase from the 2004 estimate of $221,000 in statewide cost avoidance due to JVN usage that year."* Montana Judicial Video Network: Phase II Report (June 12, 2006).

11. Video-conferencing in other states. This Committee discussed an extensive report from Wisconsin on video-conferencing in criminal cases.[21] The Committee reviewed an article on a variety of states that use either video-conferencing or closed circuit television for criminal proceedings.[22] The members also heard telephonic presentations from representatives from the State of Montana.[23] The reports indicate that most states have had successful experiences, financially and in other ways, after implementing video-conferencing, despite encountering a variety of objections and initial reluctance by some stakeholders.

III. Recommendations for Amendments to Rule 1.6.

After considering the objections to video-conferencing as well as the other matters discussed in Section II of this report, the Committee presents its recommendations for amendments to Rule 1.6.

Summary of proposed amendments. The proposed amendments identify three categories of proceedings to determine whether they may be done by an interactive audiovisual system. Specifically:

- Paragraph (c) excludes certain felony and misdemeanor proceedings (specifically, trials and probation violation hearings), as well as felony sentencing and felony probation violation dispositions, from the scope of the rule, unless there is a judicial finding of "extraordinary circumstances", and then only with the consent of the parties.

- Paragraph (d) allows routine, "*housekeeping*" proceedings to be done by interactive audiovisual systems, in the court's discretion, and without a stipulation. These proceedings specifically include initial appearances and arraignments.

- Paragraph (e) permits any proceeding not identified in paragraphs (c) or (d) to be done by an interactive audiovisual system, but only upon a court-approved stipulation of the parties.

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21 *"Bridging the Distance: Implementing Videoconferencing in Wisconsin"* (The Planning & Policy Advisory Committee Videoconferencing Subcommittee of the Planning & Policy Advisory Committee**,** Chief Justice Shirley S. Abrahamson, Chair, 2005), available at: http://www.courts.state.wi.us/about/committees/ppacvidconf.htm

22 *"Constitutional and Statutory Validity of Judicial Videoconferencing"* 115 ALR 5th 509 (2004). The article includes case law from California, Colorado, Florida, Idaho, Illinois, Kentucky, Massachusetts, Minnesota, Missouri, New Hampshire, North Carolina, Ohio, Pennsylvania, Texas, West Virginia, Wisconsin, and the Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia federal Circuit Courts.

23 http://www.courts.mt.gov/cao/technology/it_video_confer.asp

In addition, there are proposed amendments to Rule 1.6 to update terminology, to further safeguard rights of the accused, and to re-organize and to clarify the provisions of the rule. The Committee also recommends adopting a new section of the Arizona Code of Judicial Administration to establish operational standards, technical standards, and recommended practices for interactive audiovisual proceedings.

The following is a detailed discussion of the majority's fourteen recommended amendments to Rule 1.6.

1. ***Rule title*:** The Committee recommends that the title of *"Interactive audio and audiovisual devices"* be changed to *"Interactive audiovisual systems"*, because the rule is not intended to apply to interactive audio proceedings, i.e., teleconferences. Furthermore, the word *"device"* is no longer appropriate. The interactive audiovisual equipment used by the courts is typically a *"system"* rather than a single *"device"*, and the word *"system"* should be substituted for *"device"* throughout the rule.

*a. Paragraph (a): **General Provisions**.*

2. **Preserve, but move**, the following, current sentence to paragraph (b) [the "requirements" paragraph of Rule 1.6]: "An interactive audiovisual device shall at a minimum operate so as to enable the court and all parties to view and converse with each other simultaneously."

*b. Paragraph (b): **Requirements**.*

3. **Add** the words "all of" and **delete** repetitious use of the word "and".

The existing Rule 1.6 has five requirements in paragraph (b). Each requirement except the last one is followed by the word "and". The proposed Rule 1.6 has seven requirements in paragraph (b). Rather than following each requirement with the word "and", the Committee recommends that the rule simply state that "all of" the following are required.

4. **Add** the following sentence: "Any interactive audiovisual system must meet or exceed minimum requirements adopted by the Administrative Office of the Courts."

The members expressed concerns that an individual court may attempt to video-conference a criminal proceeding with little more than a laptop computer and a "web-cam". The Committee members unanimously believe that a set of standards should be promulgated for interactive audiovisual proceedings in the form of a new section of the Arizona Code of Judicial Administration. A proposed section of the Arizona Code of Judicial Administration is provided in Appendix 6 of this report and is further discussed in Part IV of this report, *infra*.

5. **Add** the following sentence: "An interactive audiovisual system shall at a minimum operate so as to enable the court and all parties to view and converse with each other simultaneously."

This sentence has merely been moved from paragraph (a) to paragraph (b). The word *"system"* replaces the word *"device"* in this sentence.

6. **Delete** the following sentence: ~~" (2) The court shall determine that the defendant knowingly, intelligently and voluntarily agrees to appear at the proceeding by an interactive audiovisual device."~~

The Committee majority believes that in many circumstances, the court rather than the defendant should make the determination whether to proceed by video.[24] As set out in paragraph (d) of the proposed version of Rule 1.6, the judge is vested with discretion to conduct non-dispositive, "housekeeping" proceedings by an interactive audiovisual system. The view of the Committee is that the judge will be in the best position to assess the nature and gravity of a proceeding, and any factors which may exist in an individual case and that bear on its suitability for being conducted under this rule.

For more substantive proceedings under paragraph (e), the requirement that for a defendant to appear by video, the defendant's waiver must be "knowing, intelligent, and voluntary" remains an integral part of the rule.

7. With regard to confidential communications, **add** the word "defendant's" before the word "counsel"; **change** the words "prior to" to the word "before", and **add** the words "and immediately after" to the existing requirement that provision be made for confidential communications.

Adding the word *"defendant's"* before the word *"counsel"* would clarify that a defendant may have a confidential communication with his or her own counsel, but not with other counsel.

The Committee prefers the use of the simpler word *"before"* instead of *"prior to"*, which is the language of the current rule.

It is axiomatic that defense counsel and client must have a means for confidential communication *"during"* a proceeding. It's also reasonable that they have a means of confidential communication *"before"* a proceeding, because that time is important in preparing for the proceeding. The Committee believes that it's equally reasonable that this means of confidential communication be made available *"after"* the proceeding.

The termination of a video proceeding should not mean that the ability of a defendant to speak with counsel about what just occurred should abruptly and artificially end. There are frequently questions or comments that a defendant wishes to pose to counsel at that point, and it's natural that the lines of communication between them remain open. Since the means of communication is already in place for the *"before"* and *"during"* phases of the proceeding, there is little or no additional burden to make this means of communication available for the *"after"* phase of the proceeding. A defendant can continue to communicate with counsel during the

[24] Rule 1.6 as proposed by rule petition R-06-0016 also deleted this sentence.

"after" phase in the courtroom, and the same opportunity should be afforded during this phase of a video-conference. Note that the word *"immediately"* was added in this proposed rule to qualify the word *"after"*. The Committee's caveat was included to assure that conversations after a video proceeding in an individual case should not cause any unnecessary delay in processing the court's remaining video docket of cases.

8. **Add** the words "and participate in" so that victims may not only view a video proceeding, but may also "participate in" the proceeding.

The members believe that this is required by the law concerning victims' rights as that law applies to video-conference proceedings in criminal cases.

9. Add a sub-paragraph that states: "(6) Provisions shall be made to allow the public a means to view the proceedings as provided by law."

The members added this provision to assure that video-conference proceedings were open and public. Family members, friends, the media, and members of the public in general should all have the opportunity to view a video-conference, which is an extension of an open courtroom.

10. **Add** a sub-paragraph that states: "(7) Provisions shall be made for use of interpreter services when necessary."

This provision does not need detail specific requirements, such as where the interpreter should physically be present. (A minority view was that the interpreter should always be present in the same location as the defendant in a video proceeding. Members noted, however, that foreign language interpreters occasionally appear via telephone; and sign language interpreters are often located outside the county and are geographically distant.) The intent of this addition is to require the court to consider and to address issues that might arise when an interpreter is utilized in a video-conference proceeding.

*c. Paragraph (c): ~~**Proceedings**~~.*

11. **Delete** the paragraph heading and the entirety of existing paragraph (c), which states:

~~"Appearance by interactive audiovisual device, including video conferencing, shall be permitted in the discretion of the court at any proceeding except that:~~

~~(1) Written stipulation of the parties is required in all proceedings prior to the commencement of the proceeding, except in initial appearances and not guilty arraignment; and~~

~~(2) This Rule 1.6 shall not apply to any trial, evidentiary hearing or probation violation hearing; and~~

~~(3) This Rule 1.6 shall not apply to any felony sentencing.~~

12. **Add** a new paragraph (c)***: "Proceedings Excluded Absent Extraordinary Circumstances and Parties' Consent."*** This paragraph would state:

> "This rule shall not apply to any trial, contested probation violation hearing, felony sentencing, or felony probation disposition hearing, except upon the court's finding extraordinary circumstances and with consent of the parties by written stipulation or upon the record."

This paragraph incorporates the existing provision of Rule 1.6 that prohibits video-conferencing for a trial. It also continues the prohibition of video for a probation violation hearing, but only if the probation violation hearing is contested. These prohibitions apply in both felony and misdemeanor cases. In addition, this proposed paragraph excludes from the scope of video-conferencing a felony sentencing or a felony probation violation disposition, both of which can have serious consequences. The Committee's view is that it would be appropriate and advantageous for sentencing and probation violation dispositions in misdemeanor cases to be done by video upon stipulation of the parties, especially for those misdemeanors which are low level and which may result in a sentence of "*time served*". *See* the Committee's proposed paragraph (e), *"Proceedings Allowed upon Stipulation", infra*.

The proposed paragraph (c) would also permit proceedings such as a felony trial or sentencing to be conducted with a defendant appearing by an interactive audiovisual system, but only upon a finding by the court of *"extraordinary circumstances"*. The majority's envisioned application of this paragraph would include situations such as when a defendant has a communicable disease.[25] In addition to a finding of *"extraordinary circumstances"* by the trial court, a video proceeding under paragraph (c) would also require consent of the parties.

. 13. Add a new paragraph (d): **"*Proceedings Allowed in Sole Discretion of the Court.*"**

This paragraph would provide:

> "Appearance by an interactive audiovisual system may be required in the sole discretion of the court and without the consent of the parties at (1) an initial appearance, (2) an arraignment, (3) a hearing on an uncontested motion, (4) a pretrial or status conference, (5) a change of plea in a misdemeanor case, or (6) an informal conference held pursuant to Rule 32.7."

The Committee believes that the court rather than the parties should decide whether to proceed by video-conference in perfunctory matters such as status conferences, uncontested motion hearings, and other *"housekeeping"* issues. The Committee's consensus was that the judge conducting the proceeding will exercise his or her discretion based on all existing circumstances, including but not limited to any objections to conducting a video-conference that are made by any party. The court specifically has discretion to conduct initial appearances by video-conference under this proposed amendment to Rule 1.6, although it has been noted in this

[25] A disruptive defendant would not be an "extraordinary circumstance." The situation of a disruptive defendant would continue to be governed by Rule 9.2(a).

report that there is not unanimous agreement on whether an initial appearance is a "critical" event which requires the personal rather than the video appearance of a defendant.

These six proceedings in paragraph (d) do not require witness testimony. Therefore, a defendant's right to confrontation of witnesses is not implicated.

14. **Add** a new paragraph (e): ***"Proceedings Allowed Upon Stipulation".***

The proposed paragraph would state:

> "Except for those proceedings described in subsection (d), the parties, with the court's approval, may agree by written stipulation or upon the record to allow the defendant's appearance at a proceeding by an interactive audiovisual system. Before accepting the stipulation or agreement, the court shall find that the defendant knowingly, intelligently and voluntarily agrees to appear at the proceeding by an interactive audiovisual system."

There are a variety of proceedings where, although the defendant has a right to be personally present, he or she may wish to appear by video-conference. The defendant's motivation to appear by video might be for convenience: to avoid an early morning wake-up and shackling required for court transport, or to not miss a meal, or because he or she is not feeling well. The Committee believes that the primary motivation many defendants will have to appear by video is that their case will be heard more quickly and that it will be processed more efficiently.

Except for the ten proceedings identified in paragraphs (c) and (d), any proceeding may be done by video under this paragraph as long as there is consent of the parties. Conducting any proceeding by video under this paragraph requires the agreement of the parties by written stipulation or upon the record. Any agreement of the parties is still subject to approval by the court.

15. Comments by standing committees of the Arizona Judicial Council. The Committee would like to emphasize that the recommended amendments to Rule 1.6 reflect comments and input from members of the Committee on Superior Court and the Committee on Limited Jurisdiction Courts at their respective meetings in May, 2009. Both of these standing committees reviewed an earlier version of amendments to Rule 1.6 which had been proposed by this Committee. Those proposed amendments failed to gain the support of either standing committee. The proposed version of Rule 1.6 set out in Appendix 1 of this report has been revised and refined to address the expressed concerns of COSC and LJC members. Those criticisms of the earlier version focused on two areas: scope and standards.

The scope of the former version was both too broad and too indefinite. For example, it prohibited the use of video for a felony trial, but a defendant's video appearance for a misdemeanor trial was allowed. LJC members in particular objected to this disparate treatment between misdemeanors and felonies. The present rule requires the defendant's presence at any trial (absent extraordinary circumstances.) As another example, the default paragraph for any

proceeding not specified in the former version was one which allowed video in the court's discretion. The default paragraph under the present version is one that allows video upon stipulation of the parties. Under the rule presently proposed, unless the proceeding is one of the six "housekeeping" matters, as specified in paragraph (d), or unless it is one of the four proceedings mentioned in paragraph (c), then without a stipulation from the defendant to appear by video, the defendant's personal appearance in court will still be required.

At the time the earlier version was presented to the standing committees, a workgroup of this Committee was in the process of drafting standards for interactive audiovisual appearances. Because work on those standards was in progress, and because the work in progress had not been approved by this full Committee, there were no standards to present to the standing committees. The standing committees did, however, want to have standards.

The standards which have now been approved by this Committee are discussed in Part IV of this report, *infra*.

IV. Other Recommendations of the Committee.

1. A section of the Arizona Code of Judicial Administration should be adopted regarding the use of video-conferencing in criminal cases. The Committee members recognized midway through its study that standards for video-conferences in criminal cases should be adopted. It also knew that standards must accommodate the broad differences in the physical characteristics of Arizona's local courthouses and jails, as well as the degrees of modernization in these various structures. The standards envisioned by the Committee included technical ones. Yet the standards the members had in mind transcended technology, and dealt as well with jail practices and courtroom protocols.

The consensus of the Committee was a recommendation for adoption of a section of the Arizona Code of Judicial Administration. This proposed code section would include technical requirements, operational requirements, and recommended practices.[26] The proposed section would provide for the adoption of minimum technical standards by the Commission on Technology. These standards would have statewide application. This proposed code section would also require the adoption of local court policies by any jurisdiction utilizing interactive audiovisual appearances in criminal cases. These local court policies would be developed with input from local stakeholders, and would be subject to approval by the presiding judge of the county. These local standards would be designed to address infrastructure, resource, and operational issues that are specific to an individual jurisdiction. Operational requirements specified in the proposed code section are mandates directed at both the courtroom and the jail ends of the video proceeding.

The Committee's proposed code section may be found in Appendix 6 of this report.

[26] The proposed code section follows the structure of A.C.J.A. section 1-602, "Digital Recording of Court Proceedings".

2. Use of video-conferences in criminal cases should be encouraged by training. Video-conferencing, like any novel product such as facsimile machines, computers, or the internet, typically has some avid supporters, a few detractors, and a large number of people who have interest but who may be reluctant to use the new technology. Use of new equipment generates familiarity with it, and repeated use generally overcomes fear and doubt of the technology.

Use of video-conferencing in Arizona should be encouraged by education, and in the proposed A.C.J.A. section at Appendix 6 of this report, the Committee has submitted a "recommended practice" for training. There are nuances peculiar to video-conference proceedings, including where to sit or stand in order to be seen and heard, the use of eye contact and hand gestures, providing and submitting written documents, and the methods of confidential communications, which differentiate these proceedings from those taking place in the courtroom. There are also proceedings for which the appearance of a defendant by video-conferencing may be permissible, but which present circumstances where the court should exercise its discretion under paragraph (d), or reject a stipulation tendered under paragraph (e), and require the personal appearance of the defendant in the courtroom. Training for judicial officers as well as attorneys to distinguish events in a particular case that may not be suitable for a video appearance from those that may be suitable would also be appropriate.

Training programs need not be extensive, but they do need to be done. Training for the judiciary, and for prosecutors and defenders, should be supported by the courts at all levels.

Video-conferencing may also play a role in the court's pandemic planning. Routine use of video-conferencing before an emergency arises may facilitate a transition to widespread use of video-conferencing should an emergency occur.

3. The comment period for R-06-0016 should be extended. The views and recommendations expressed in this report are not unanimously shared. Views contrary to the ones contained in this report were expressed by public defender members of the Committee and by outside presenters during the course of the meetings, as well as by members of the Committee on Superior Court and by members of the Committee on Limited Jurisdiction Courts when the former version of a proposed rule was presented at their respective meetings in May.

The amendments to Rule 1.6 proposed in this report are substantially different from the amendments proposed in R-06-0016. It is therefore reasonable to expect that the Committee's proposed amendments would generate further comments.

The Maricopa County Public Defender filed a motion in R-06-0016 on May 13, 2009, to re-open R-06-0016 for further public comment on the proposed amendments to Rule 1.6. Consistent with the policy of the Supreme Court to encourage comments on rule changes, as expressed in the Preamble to Rule 28 of the Rules of the Supreme Court, this Committee as a whole would agree that the comment period be extended. This would assure that the broad range of views on these proposed amendments be considered when R-06-0016 comes on the Supreme Court's September, 2009, rules agenda.

V. Conclusion.

Although Arizona has a video-conference system in many of its counties, the Committee concluded that it is time to amend Rule 1.6 to clarify the appropriate and expanded use of these systems. There are economic and non-economic reasons to do so. Video-conference proceedings can be conducted in a manner that is consistent with, and upholds the rights of, criminal defendants, victims, and the public. Arizona could and should be in the forefront of jurisdictions balancing the benefits of video-conference technology with the constitutional rights inherent in court proceedings.