Minority Report of the Criminal Rules Videoconferencing Committee and Proposed Amendments to Rule 1.6
(R-06-0016)
June 2, 2009

(1) Overview

In December 2008, the Arizona Supreme Court established the Criminal Rules Videoconference Advisory Committee (the Committee) to make recommendations on the appropriate disposition of R-06-0016, a rule petition by the Pima County Attorney to expand the utilization of videoconferencing of defendants' appearances in criminal proceedings. The Chief Justice of the Arizona Supreme Court directed the Committee to: "[m]ake recommendations for the appropriate use of video appearances ***taking into account the legal concerns raised during the comment period***" (emphasis added) and to "[r]ecommend the types of proceedings for which videoconferencing could be utilized." Arizona Supreme Court Administrative Order 2008-92.

The Committee met six times. Despite strong opposition from the Committee's two defense representatives, on May 1, 2009, the Majority of the Committee approved expansive proposed changes to Rule 1.6. The Majority then sought approval for their proposed changes from the Committee on Superior Courts (COSC) and the Limited Jurisdiction Committee (LJC). On May, 15, 2009, representatives from the Majority and Minority made formal presentations to the COSC. The spokesman for the Minority emphasized that the Majority's proposal failed to address a number of defense concerns. The COSC voted against approving the Majority's proposal by a vote of fourteen against, five in favor and one abstention. On May 20, 2009, representatives from the Majority and Minority made formal presentations to the LJC. Once again, the Minority emphasized defense concerns. The LJC also refused to approve the Majority's proposal; eight voted against and eight voted in favor.

On May 29, 2009, the Committee met again and modified the Majority's proposed rules changes. Chief among these changes is a narrowing of paragraph 1.6(d), "*Proceedings Allowed in Sole Discretion of the Court."* The Majority modified the previous proposed rule that provided for judicially mandated videoconferencing for a broad range of non-specified proceedings and limited this category to: (1) initial appearance; (2) arraignment; (3) informal conferences; (4) hearings on uncontested matters; (5) pretrial or status conference, and (6) change of plea in a misdemeanor case. The Majority's belief that this list is limited to perfunctory matters, however, is misplaced. The Minority has advanced legal and constitutional concerns about the use of mandatory videoconferencing at initial appearances since the first meeting of this Committee. During the comment period referenced in the Administrative Order, legal concerns about the proposal were raised by the defense bar, joined by the Arizona Court Reporters' Association. *See* Pima County Public Defender's Comment submitted on May 22, 2007; Arizona Public Defender Association's Comment submitted on August 15, 2007; and Arizona Court Reporters Association's, filed July 9, 2008 (stating that the Association shared the "potential concerns by the defense bar"). *See* R-06-0016.

Serious legal concerns were raised regarding the defendant's right to be present in the

courtroom at initial appearances under Art. 2, § 24 of the Arizona Constitution (defendant's right to "appear and defend in person" in criminal prosecutions) and the Confrontation and Due Process clauses of the federal constitution. This is a basic right which cannot be abridged through videoconferencing absent the defendant's consent.

The Arizona Supreme Court had been faced with these same concerns in the previous rule-making proceeding on videoconferencing of criminal proceedings, R-98-0027/0034. The petition in that proceeding, which was filed by the Director of the Administrative Office of the Courts, proposed to equate videoconferencing with personal appearance in all proceedings except trials and specified sentencings. It asserted that "high quality interactive audiovisual devices could comply with the [Art 2, § 24 constitutional] requirements, except for holding an actual trial." Petition in R-98-0027/0034, filed July 1, 1998. Rather than specify at which proceedings videoconferencing could be utilized, the AOC petition would have provided "a broad range of option to the courts and permit[ted] the courts to exercise good judgment in their selected applications." *Id*.

The Arizona Supreme Court modified this approach at the urging of both prosecutors and defense representatives by imposing a requirement that, with respect to all videoconferencing, "the court shall determine that the defendant knowingly, intelligently and voluntarily agrees to appear at the proceeding by an interactive audiovisual device," and a requirement of stipulation of all parties except for initial appearance and arraignment. *See* Ariz. R. Crim. Pro. 1.6. Among the comments received was one from Jerry Landau, Deputy Maricopa County Attorney, who recommended the following:

> Exemption of the defendant from appearing in court should not be taken lightly. Many times there is a need for the judge to address the defendant personally or for the victim of the offense to see the defendant in court. Therefore it is recommended that all parties must agree to the videoconferencing in order for it to occur. Comment of Maricopa County Attorney, submitted in R-98-0027/0034 on August 17, 1999.

The Supreme Court's December 2008 Administrative Order makes clear that expansion of videoconferencing must account for the legal concerns previously expressed, *i.e.*, the constitutional guarantees of "presence" arising under both the Arizona and federal constitutions. It was left to the Committee to recommend how best to harmonize expanded videoconferencing with those constitutional rights. The Majority's proposal, however, falls short of this mark.

The stipulation and waiver requirements which were added as safeguards in the current rule would be eliminated by the Pima County Attorney's proposal in R-06-0016 for initial appearances. Initial appearances, however, are not "housekeeping matters" that can be handled by videoconference without a defendant's consent. They are significant events at which critical decisions are made, such as determinations of release conditions and initial assessments of medical and mental health needs.

In addition, the majority's proposal to allow the court to wait until the time of a hearing to obtain consent from defendants to agree to videoconferencing will lead to a coercive atmosphere for many defendants and a lack of true consent in many instances. For example, if a hearing is set for videoconferencing without defendant's prior consent and at the commencement of the hearing the defendant and his attorney inform the court that they want the defendant to appear in person, the court can, in effect, coerce many defendants in this situation into agreeing to videoconferencing by informing them that lengthy delays will occur if the matter is rescheduled for personal appearance.

Furthermore, the projected cost savings analysis submitted by the majority is flawed and far too speculative to be of any use. It fails to factor in the capital expenditures needed to create videoconferencing that meets minimum standards, it neglects to address the shifting of costs to defense counsel needing to appear at the jails, and it is premised on a far broader rule than the one currently being proposed by the majority. Furthermore, it does not account for the fact that the Pima County Superior Court is already fully equipped to handle initial appearances in person in its existing jail court. The Majority never made any meaningful inquiries into what costs would be saved if initial appearances were required to be videoconferenced at the jail as opposed to using the facilities for in-person appearances that already exist. Indeed, such a study would have likely shown the savings to be nonexistent for the overwhelming majority of Arizona cases. Both Maricopa and Pima County presently conduct initial appearances in courtrooms that have been built in their jails. It is unknown how many other counties conduct initial appearances in this manner. In any event, there is no information available to this Committee as to what savings could possibly be achieved by moving a judge to the courthouse and requiring defendants to appear by video. The real losses attendant to such a change, however are abundantly apparent: the lack of a face-to-face meeting with a judicial officer at initial appearances will violate the law and undercut the accuracy and effectiveness of critical determinations concerning release, medical needs and mental health assessments.

Judicial precedent, state and federal, provided the Committee with guidance which the Majority ignored.

The Arizona Supreme Court and U.S. Supreme Court have announced certain constitutional rules and guidelines as safeguards for the defendant's right to be present in the courtroom. These constitutional principles must be taken into account when expanding the use of videoconferencing of defendants' appearances in criminal proceedings.

(a) Ariz. Const. Art. 2, § 24:

The Arizona Constitution confers on the accused the right to "appear and defend in person" in a criminal prosecution. In *State v. Garcia-Contreras,* the Arizona Supreme Court held that in order to assess the magnitude of "presence error" in violation of Art. 2, Sec. 24, "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." 191 Ariz. 144 (1998). Furthermore, the Arizona Supreme Court has construed Ariz. Const. Art. 2, Sec. 24 and the Sixth Amendment to the U.S. Constitution as requiring defendant's

presence at those proceedings where such presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *State v. Schackart,* 190 Ariz. 238, 255 (1997), citing *State v. Christensen,* 129 Ariz. 32, 38 (1991).

The Arizona Supreme Court has held that, where the harm resulting from presence error is unquantifiable, *i.e.,* where it is impossible to tell what opportunities have been lost to the defendant due to absence from the proceeding, the error is deemed "structural"(requiring reversal without a showing of prejudice). *Garcia-Contreras,* 191 Ariz. at 149.
The Court has also held that the defendant's 5th and 14th Amendment right to presence extends to proceedings "not implicating a defendant's right to confront witnesses or evidence against him." *State v. Levato,*186 Ariz. 441, 443 (1996).

The right to presence in the courtroom under Arizona law is therefore not merely coextensive with, but broader than, the right to confrontation.

No case to date has dealt with the degree to which videoconferencing may be equated with physical presence for the purposes of the defendant's right to presence. This is a question of first impression never presented to or resolved by either the Arizona Supreme Court or the U.S. Supreme Court.

Despite the lack of express authority on the issue, *Garcia-Contreras* suggests that, in Arizona, the presence required by Art. 2, Sec. 24 is physical presence in the courtroom, with all the attendant benefits derived from attendance in person. *Garcia-Contreras,* 191 Ariz. at 148-149. *Garcia-Contreras* emphasized the importance of the defendant's visualization of the jurors "face to face" and the defendant's resulting ability to partake of "sudden impressions and unaccountable prejudices" based upon the "bare looks and gestures of another" *Id., quoting Lewis v. United States,* 146 U.S. 370, 376 (1892). *Garcia-Contreras,* also emphasized the importance of the defendant's ability to "personally see and know what is being done in the case," and to "give advice or suggestion or even supersede his lawyers altogether and conduct the trial himself." *Id.,* quoting *Goodroe v. Georgia,* 480 S.E.2d 378, 381 (1997) and *Snyder v. Massachusetts,* 291 U.S. 97, 106 (1934), respectively.

The distinctive benefits of "presence" held to be critical under *Garcia-Contreras* are the very benefits denied the defendant by videoconferencing, namely, the opportunity to face the judge, victim, prosecutor and other participants directly, to obtain fleeting impressions, to see everything that is occurring in the courtroom, and the ability to communicate easily with counsel or any interpreter.

Moreover, the plain wording of Art. 2, Sec. 24 places limits upon videoconferencing. The constitutional wording at issue is the right of the defendant in a "criminal prosecution" to "appear and defend in person." Ariz. Const. Art. 2, Sec. 24 In Art. 2, Sec. 24, the right to "appear" is expressly modified by "in person," strongly indicating that physical presence is required. It would be difficult to devise a plainer requirement of physical presence than found in Ariz. Const. Art 2, Sec. 24 in light of the fact that in contemporary parlance "in-person" appearance is *distinguished from,* rather than equated with, video or audio appearance.

To interpret a statutory phrase to mean the exact opposite of what it is generally understood to mean in common usage is highly suspect and violates all norms of statutory interpretation. Yet this analysis provides the foundation for much of the Majority proposal.

The Sixth Circuit earlier this year interpreted statutory language conferring a right to "appear" as requiring an in-person hearing rather than a videoconferenced hearing. Terrell, v. U.S., 564 F.3d 442 (6th Cir., 2009) (holding the statutory term "appear" must be interpreted in accordance with the meaning at the statute's enactment, as signifying physical presence in the courtroom).

Until such time as video appearance by a defendant is adjudicated to be constitutionally equivalent to in-person appearance – a determination not yet made by the Arizona Supreme Court – a videoconferencing rule designed to comply with Art. 2, Sec. 24 must safeguard the defendant's presence right through a requirement of stipulation or waiver at any proceeding where, due to the nature or function of the proceeding, the defendant's presence could impact the overall structure of the criminal proceeding. *Garcia-Contreras*, 191 Ariz. 144.

Absent a waiver, a court rule should provide for compulsory videoconferencing *only* at those proceedings not impacted by the personal presence of the defendant in the courtroom.

(b) Sixth Amendment Right to "Presence" (Due Process):

The U.S. Supreme Court has recognized that the right to be present in the courtroom is protected not only by the Confrontation Clause, but by the Due Process Clause. The Court has held that a defendant has a right to be present "in some situations where the defendant is not actually confronting witnesses or evidence against him. *United States v. Gagnon*, 470 U.S. 522, 526 (1985). That right exists "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge…[and] to the extent that a fair and just hearing would be thwarted by his absence." *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934)

The U.S. Supreme Court has not had occasion to decide if videoconferencing is constitutionally equivalent to physical presence as a safeguard of the presence right. However, in a rule-making proceeding disapproving videoconferencing, Justice Scalia stated that a decision made in a room that "contains a television set beaming electrons that portray the defendant's image" is not the same as a decision made in the physical presence of a person. *Order of the Supreme Court on Court Rules*, 207 F.R.D. 89, 94 (2002) (Statement of Scalia, J). Justice Scalia observed, "Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones." *Id.*

In the absence of more definitive rulings, the current federal constitutional guidelines on the presence right – those from *Gagnon* and *Snyder* – require the defendant's presence (or a valid waiver thereof) whenever such presence has a reasonably substantial relation to the defendant's ability to defend against the charge, or where a fair and just hearing would be thwarted by the

defendant's absence. *Gagnon*, 470 U.S. 522; *Snyder*, 291 U.S. 97.

(3) Despite the strong desire of the Majority to avoid in-person presentment of the defendant, Initial Appearances are not appropriate for videoconferencing absent the defendant's waiver. The Minority proposal complies with constitutional and statutory provisions which give the defendant a right to physical presence at Initial Appearances.

At present, Maricopa County routinely provides in-court Initial Appearances for its defendants. In contrast, Pima County, at least at its Tucson facility, provides in-court Initial Appearances solely for felony defendants, while misdemeanor defendants are routinely excluded from the courtroom for Initial Appearances. Pima County practice is to require these defendants to appear via video camera from inside the jail holding area while the judge, prosecutor, victim if any, interpreter and family members are present in a courtroom *in the same building complex.*

Pima County's practice appears to be in open disregard of the requirement of Rule 1.6 to obtain a knowing and voluntary waiver of the right to presence from misdemeanor defendants.

The Majority proposal would authorize courts and administrators to adopt the Pima County misdemeanor videoconferencing practice, *i.e.* compulsory videoconferencing, as the practice in all Arizona felony and misdemeanor cases, including capital cases.

Initial Appearances are not among those proceedings appropriate for mandatory videoconferencing. The right to presentment, afforded at the Initial Appearance, is of historic importance dating back to common law, *Corley v. U.S.*, 129 S.Ct.1558 (2009), *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975), and is constitutionally mandated under the Fourth Amendment, *Id*., *County of Riverside v. McLaughlin*, 500 U.S. 44, 47 (1991). The presentment requirement of bringing an accused before a magistrate "tended to prevent secret detention," *Corley v. U.S.*, 129 S.Ct. 1558 (2009), citing, *County of Riverside v. McLaughlin*, 500 U.S. at 60-61, and *McNabb v. U.S.* 328 U.S. 332, 342 (1943). The U.S. Supreme Court stated this year in *Corley:*

> In a world without *McNabb-Mallory* [the presentment requirement], federal agents would be free to question suspects for extended periods before bringing them out in the open, and we have always known what custodial secrecy leads to. See, *McNabb*, 318 U.S. 332. No one with any smattering of the history of 20th-Centry dictatorships needs a lecture on the subject, and we understand the need even within our own system to take care against going too far. '[C]ustodial police interrogation, by its very nature, isolates and pressures the individual.' *Dickerson*, 530 U.S, at 435, and there is mounting empirical evidence that these pressures can induce a frighteningly high percentage of people to confess to crimes they never committed, *see, e.g.* Drizin & Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C.L. rev. 891, 906-907(2004).
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> Justice Frankfurter's point in *McNabb* is as fresh as ever: 'The history of liberty has

> largely been the history of observance of procedural safeguards. 318 U.S. at 347. *McNabb-Mallory* is one of them, and neither the text nor the history of §3501 makes out a case that Congress meant to do away with it.

Corley v. U.S., 129 S.Ct. at 1570.

A defendant's physical appearance in the courtroom creates the functional dividing line between the initiation of the court process and the end of the investigative process. For that reason, it is important that the defendant be brought physically in front of the initial appearance magistrate rather than remain inside the jail for a virtual appearance by videoconferencing.

In light of the U.S. Supreme Court's recognition of a causal nexus between custodial isolation and erroneous convictions, the possibility seems remote that a technology such as videoconferencing, which increases rather than prevents custodial isolation, would provide equivalent protection for the defendant for the purposes of the *McNabb-Mallory* rule. In-person Initial Appearances are also mandated by the plain language of the Arizona statute. Arizona's version of the *McNabb-Mallory* rule, A.R.S. §13-3898, provides that the accused "shall without unnecessary delay be **taken before the nearest or most accessible magistrate** in the county in which the arrest occurs. . . " (Emphasis added).

The reference in the statute to the "nearest magistrate" implies if not expressly requires an in-person Initial Appearance, as physical proximity of the magistrate would have no relevance to a proceeding by videoconference. Moreover, the words "taken before the nearest magistrate" exactly mirror the federal and common law requirement of physical presentment of the defendant in the open as a safeguard against custodial overreaching – a danger which would be exacerbated rather than prevented by videoconferencing. Indeed, "presentment" of the defendant otherwise than in person appears incompatible with the common law and historic function of presentment.

The Majority proposal also runs afoul of the federal right to due process. In addressing that issue, the Majority simply asserts without analysis or elaboration that the proposed rule permits a defendant to be present "to the extent necessary to defend against his or her charges."

The correct test for the presence right under the due process clause is whether "a fair and just hearing would be thwarted by his absence . . ." *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934). The Majority does not purport to discuss the myriad ways in which isolation of the defendant in a jail without the ability to view proceedings, communicate freely with his attorney or interpreter, or converse with the judicial officer face to face, does thwart the defendant's opportunity for a fair and just hearing during his initial appearance.

Moreover, the initial appearance includes the bail and release determinations, which expressly focus upon the character, credibility and mental condition of the defendant. Under A.R.S. §13-3967, the magistrate is required to consider "the accused's family ties, employment, financial resources, ***character and mental condition***" as well as "whether the accused is using any substance if its possession or use is illegal . . ." A.R.S. §13-3967. As to the factors of character, credibility, mental condition and state of intoxication, the physical presence of the

defendant undeniably impacts the outcome of the proceeding within the meaning of the constitutional precedents discussed above. Accordingly a defendant has a clear right of physical presence at the Initial Appearance. The current rule's requirement of a waiver by the defendant of his or her right to presence at the Initial Appearance must be retained if the new rule is to pass constitutional muster.

The Majority's most recent change to Rule 1.6(d) providing for mandatory videoconferencing for initial appearances appears to be premised on an erroneous belief that initial appearances are somehow perfunctory and do not constitute a critical stage. However, Rule 4.2 is not a "housekeeping matter." Every proceeding under Rule 4.2 involves a bail setting under Rule 7.2 directly impacting every criminal defendant's liberty interest. *The Majority provides no answer as to why, under their proposed rule, defendants would have a right to be personally present at hearings on motions to release filed under Rule 7.2, but would have* ***no right to be personally present*** *when initial determinations on release conditions are made at initial appearances under Rule 4.2.*

(4) The Majority's proposal, if adopted by the Arizona Supreme Court, would require the Court to issue an advisory opinion on sharply-disputed constitutional claims.

In order to adopt the Majority's proposal, the Arizona Supreme Court would be required to endorse the unprecedented view that, in those instances ordered by the court, i.e. initial appearances, the State may discharge its constitutional obligations under Ariz. Const. Art. 2, Sec. 24 by placing the defendant before a videocamera from a jail location remote from the judge, supportive family members, public, media, and in many cases, his interpreter and counsel, while the victim and prosecution enjoy unrestricted access to the judge and the formality of the public courtroom.

If such a drastic expansion of videoconferencing at the expense of the rights of the accused is to occur, it must be in the context of a juridical case or controversy, with all attendant formality and opportunity for briefing and further appeal to federal courts including the U.S. Supreme Court. The Arizona Supreme Court should avoid issuing an improper constitutional advisory opinion as would occur if it adopted the Majority's proposed rule.

(5) The Majority's proposal ignores compelling information from Montana, a state which is expanding videoconferencing within constitutional limitations.

The State of Montana has recently implemented a statewide video system for use in criminal and other cases. At the April 7, 2009 meeting of the Committee, the Chair and staff arranged to have representatives from Montana present information telephonically regarding their State's expanded use of videoconferencing. (Montana's constitution has a provision identical to Arizona's Art. 2, Sec. 24.)

The prosecutor representative, Mr. Kent Sipe, had previously been an employee of the Administrative Office of the Courts, where he helped to establish the video system. Mr. Sipe took the position that "if a defendant makes a request to be personally present, that request

should be granted." The judicial representative, Judge Randy Spaulding, stated that he approves the use of video for "ministerial" types of proceedings and does not recommend it for any significant proceeding. He reiterated that a defendant should have a right to be personally present if he chooses.

The fact that Montana has made significant progress in the utilization of videoconferencing while continuing to respect defendants' constitutional right to presence in the courtroom is compelling evidence favoring the Minority proposal.

(6) The Majority's proposal would undermine the defense function, the public's right of access to the courts, and the defendant's right to public court proceedings.

(a) Undermining the defense function by conducting initial appearance from the jail.

The Majority's proposal presents the lawyer with an insoluble question about where he should be located during videoconferencing in order to best serve his client, provide his best advocacy to the judge, and develop the best and most trusting relationship with his client. If counsel decides to remain with the judge in the courtroom, he or she sacrifices the ability to develop a trust relationship necessary for him to advocate for his client. If he or she chooses to be with the client in jail, the lawyer gives up the opportunity to better persuade the judge by advocating in the judge's presence.

If the attorney and client are physically remote, it is extremely difficult for counsel to gauge the defendant's mental and emotional state. The defendant must proceed without the psychological benefit of having his or her attorney next to him or her, ready to respond to both verbal and non-verbal cues. Physical distancing of defendant and counsel provides a huge impediment to the defendant's ability to meaningfully interact with counsel and be fully represented.

The attorney's other choice is to be present with the defendant at jail. The ability of the attorney to advocate will be impaired if he or she is in the jail rather than the courtroom with the judge and prosecutor. The attorney will not be aware of everything that is happening in the courtroom because of the selective view of the camera and will not always be able to respond adequately or appropriately. Furthermore, few attorneys would believe themselves equally effective advocates on screen.

Just as the attorney will have difficulty gauging the mental state and understanding of a client seen only on video, so the attorney will have difficulty gauging the judge's response to his or her argument and to his or her client. In any adversarial justice system, both sides must have an equal ability to advocate for their position. That equality is destroyed when the defense attorney must advocate by video and the prosecutor remains "live" in the courtroom.

Under the Majority proposal, one or both of the relevant parties to criminal litigation will be outside the courtroom and appearing from the jail. Defendants and possibly counsel will continuously be deprived of firsthand, present sense impressions of the court, courtroom, and

surrounding atmosphere; information always critical to experienced counsel in making strategic, emotional, and legal decisions.

(a) Undermining the public's right of access to the court and the defendant's right to public proceedings.

It is undisputed that a defendant in a criminal case has a constitutional right to a public trial. U.S. Const. Amend. VI; Ariz. Const. Art. 2, § 24. It is also undisputed that the public has a constitutional and common law right of access to observe court proceedings. U.S. Const.Amend. I; Ariz. Const. Art. 2, § 11 and Art. 6, § 17; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-69 (1980); *Ridenour v. Schwartz*, 179 Ariz. 1 at 3 (1994) ("Because the value of the public trial guarantee to the judicial system is incalculable, we carefully scrutinize any trial court order that denies, restricts or limits a defendant's right to a public trial").

The proposed rule will isolate the defendant from the courtroom by requiring him or her to appear from jail, via video screens. Under the best of videoconferencing systems, the defendant will not have full visual access to the entirety of the courtroom. Members of the public, friends and family in addition to victims will be present in the courtroom but may not be visible by the defendant.

The right of public access to the court ensures the integrity of the judicial system by protecting against abuses. The proposed rule on videoconferencing will prevent the public from having full access to videoconferenced proceedings as is necessary not only to ensure justice is done but to enhance public confidence in the judiciary. Videoconferencing does not provide this same protection or assurance. Although the public can watch the videoconference, this is not the same as being physically present with the defendant; the public is in a different location and has only a partial or skewed view of what is occurring.

Furthermore, if the defendant is in detention, those in the jail or prison have the potential for controlling or coercing him. The court cannot protect the defendant from coercive actions in such a situation. Indeed, it cannot even assess coercion. The protection of an open court is lost.

Having the defendant appear by videoconferencing deprives him of any interaction with friends and family who come to court. A defendant's separation from court isolates the defendant from friends, family, and other supporters who have come to court to be present on the defendant's behalf and whose right to view the proceeding is impaired by viewing the defendant on a screen.

(7) The Majority's proposal undermines the goals of courts by depersonalizing and dehumanizing the administration of justice.

The proper function of any new rule of criminal procedure is to improve the criminal justice system without impairing the rights of any criminal defendant. Not only does the proposed rule impede the defendant's ability to litigate his or her case, but it will serve to dehumanize these defendants in the eyes of people important to their case, *i.e.*, the judge, the

prosecutor, the victim, and ultimately the public. Videoconferencing also compromises the fair standards inherent in our criminal justice system, and will tend to undermine public respect for the way justice is administered.

Every victim, judge and prosecutor must make a nuanced judgment about the criminal defendant as he appears in court. These judgments influence many issues ultimately decided in the case, certainly those including matters of bail and release. Defendants are observed for signs of remorse, acceptance of responsibility, or submission to authority. These fine judgments can frequently be affected by depersonalizing defendants through the use of videoconferencing.

Courtrooms themselves also play an important part of our justice system. The layout of the courtroom symbolizes the distribution of power and the parties' adversarial positions. The judge sits at the front of the room and is raised in a position that signals the court's authority. The defense and prosecutor have separate but otherwise equal counsel tables, which gives both sides the appearance of equality in making their respective claims. The psychological impact of that layout is lost when the defendant's courtroom becomes a bare room in a jail and his image is transmitted to the actual courtroom by video.

(8) The Minority's rule proposal should be adopted by the Court

On April 27, 2009, the minority members of the Committee provided the following proposed amendments to Rule 1.6. As stated in the draft comments to this proposed rule: "The 2009 amendments attempt to balance the right of a defendant to be present in person against the potential of video technology to increase the efficiency of the court, lower transportation costs and enhance security." We respectfully request that this proposal be adopted, as it provides a more cogent and legally sound approach than that submitted by the Majority.

Proposed Amendments to Rule 1.6, Rules of Criminal Procedure

April 27, 2009

Rule 1.6. Interactive audiovisual devices

a. General Provisions. At those proceedings specified in paragraphs (c)(1) and (2) below, the appearance of a defendant or counsel may be made in any court by the use of an interactive audiovisual device, including videoconferencing equipment. 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. Any interactive audiovisual device shall meet or exceed minimum technical specifications adopted by the Administrative Office of the Courts and no videoconference shall occur under circumstances that do not meet these standards.

b. Requirements. In utilizing an interactive audiovisual device all of the following are required: (1) A full record of the proceedings shall be made as provided in applicable statutes and rules.(2**)**

Provisions shall be made to allow for confidential communications between the defendant and counsel before, during and after the proceeding.

(3) In cases requiring interpreters for non-English speaking or hearing-impaired defendants, absent compelling circumstances, the interpreter shall be present with the defendant, and provisions shall be made to enable simultaneous appearance of both the defendant and interpreter.

(4) Provisions shall be made to allow a victim a means to view and participate in the proceedings, including participation through videoconferencing when available.
(5) Provisions shall be made to ensure compliance with all victims' rights laws.

(6) Provisions shall be made for the public to view the proceedings, as provided by law.

c. Proceedings.

(1) **Videoconferencing Permitted in the Sole Discretion of the Court:** In the sole discretion of the court, videoconferencing may be allowed at the following proceedings: not guilty arraignments held pursuant to Rule 5.8, Rules of Criminal Procedures; omnibus hearings held pursuant to Rules 16.3(a)(3), 16.3(a)(4), and 16.3(d), Rules of Criminal Procedure; informal conferences held pursuant to Rule 32.7, Rules of Criminal Procedure; and pretrial conferences, and motions to continue, which are limited to setting trial dates that do not entail any waiver of time pursuant to Rule 8, Rules of Criminal Procedure.

(2) **Videoconferencing Permitted upon Stipulation of the Parties**: Upon stipulation of the parties and a knowing and intelligent waiver of personal appearance by the defendant, videoconferencing may be permitted at any other proceeding, except as set forth in paragraph (3) below. Except in the case of initial appearances, stipulation by the parties to videoconferencing shall be provided in written form prior to the commencement of the proceeding.

(3) . **Videoconferencing Not Permitted:** Absent compelling circumstances and a knowing and intelligent waiver of personal appearance by the defendant, videoconferencing shall not be permitted at any trial, contested probation violation hearing, probation disposition hearing or felony sentencing.

(4) **Expansion of Scope of Proceeding**: Notwithstanding the foregoing, the court shall reschedule a videoconference to require the defendant's personal appearance if the scope of the hearing expands beyond that specified in paragraphs (1) and (2) above.

Committee Comment to 2009 Amendments

A criminal defendant has the right to appear in person and by counsel in criminal proceedings. Ariz. Const. Art. 2 § 24. The scope of the right to be present is further defined in *State v. Schackart*, 190 Ariz. 238, 255 ¶ 16, 947 P.2d 315, 332 (1997), wherein the

Arizona Supreme Court stated: "We have adopted the view that a defendant also has the right to attend those proceedings where '"his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."'" *Quoting State v. Christensen*, 129 Ariz. 32, 38, 628 P.2d 580, 586 (1981). The 2009 amendments attempt to balance the right of a defendant to be present in person against the potential of video technology to increase the efficiency of the court, lower transportation costs and enhance security. Strict adherence to the technical standards referenced in paragraph (a) is critical not only to the constitutional rights of the defendant, state and victims, but to the dignity and decorum of the judicial proceedings.

Paragraph (b)(2) addresses the need for ongoing confidential communications between the defendant and defense counsel in light of the difficulty of such communications when a defendant is at a remote location.

Paragraph (b)(3) addresses the use of interpreters. Simultaneous interpretation is a difficult skill to master even when all parties are present in the courtroom. Having an interpreter attempt to translate at a location remote from the defendant exacerbates what is already a difficult task and should, therefore, be avoided.

The purpose of paragraphs (b)(4) and (b)(5) is to enable victims to participate by videoconferencing, if possible, and to ensure that the use of videoconferencing does not impede victims' rights. Paragraph (b)(6) focuses on the problem of ensuring that public access to proceedings, to the extent possible, is not compromised by the use of videoconferencing.

Paragraph (c) establishes a three-tiered procedural framework for defining proceedings at which videoconferencing is permitted. Paragraph (c)(1) lists those proceeding that can occur irrespective of defendant's consent. It is designed to reflect the constitutional standard set forth in *Schackart, supra*. Paragraph (c)(2) provides for a greatly expanded scope of videoconferencing, as it encompasses matters at which the defendant voluntarily agrees to appear by videoconference. Paragraph (c)(3) recognizes, however, that absent compelling circumstances a defendant must be personally present at trials, felony sentencings, contested probation violation hearings and probation dispositions, even if the parties and the court might desire to stipulate to use of videoconferencing. Examples of compelling circumstances would be a defendant having a communicable disease constituting a threat to public health or a defendant being held in custody at an out-of-state facility. Paragraph (c)(4) addresses the situation where the scope of a hearing at which a defendant appears by videoconference expands beyond that which was originally anticipated by the parties.