

Hon. Robert Brutinel, Chair
Committee on the Impact of Wireless Mobile Technologies
and Social Media on Court Proceedings
1501 W. Washington St., Suite 410
Phoenix, AZ 85007

IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO ADOPT RULE 122.1,)
RULES OF THE SUPREME COURT) Supreme Court No. R-13-0013
)
) Petitioner’s Reply
)
)
_____)

As provided by the Court’s Order establishing a modified comment period, Petitioner respectfully replies to comments concerning the amended petition. The Appendix to this Reply contains the proposed new Supreme Court Rule 122.1 in two versions: (1) a “mark-up” showing revisions to the version submitted with the original rule petition, and (2) a “clean” version of Rule 122.1 as now proposed.

I. Background. Petitioner is the Chair of the Committee on the Impact of Wireless Mobile Technologies and Social Media on Court Proceedings (the “Wireless Committee”), which was established by Administrative Order 2012-22. The Wireless Committee presented its report and recommendations to the Arizona

Judicial Council (“AJC”) on December 13, 2012; the AJC approved the Wireless Committee’s request to file a petition proposing adoption of this new rule. The proposed number is Rule 122.1 because this rule is a companion to Supreme Court Rule 122, which is the subject of a concurrent rule petition filed by the Wireless Committee, R-13-0012.

Administrative Order 2012-22 recognized the “unprecedented growth” in the number of hand-held smart devices, laptops, and tablets. The Order described how these mobile and wireless devices “may be accessed nearly anywhere and anytime for email, phone and video calls, text messages, internet browsing, taking pictures and videos, research, blogging, and posting to social media sites.” The Order also noted how increasing accessibility to these devices poses new security challenges for the courts. The Order established the Wireless Committee to address issues arising from use of this advanced technology during court proceedings.

The Wireless Committee’s proposed amendments to companion Rule 122 address the use of “recording devices” in the courtroom. (The proposed amendments to Rule 122 include a definition of “recording devices.”) Rule 122 is not broad enough to cover use of wireless mobile technology in the courtroom for functions other than recording, such as text messaging or internet access. Moreover, Rule 122’s scope does not encompass “recording” in areas of the

courthouse other than courtrooms. The Wireless Committee drafted proposed Rule 122.1 to address these additional topics.

The Wireless Committee made an early decision that it would not recommend a rule that required court visitors to surrender their portable electronic devices upon entry into the courthouse, or upon entry into a courtroom. Requiring visitors to surrender to courthouse security officers each day hundreds, or even thousands, of i-Phones, i-Pads, Androids, laptops, tablets, and other mobile electronic devices would create a logistical nightmare. Over the past two decades courthouses became “wired,” and more recently they have become “wireless.” Technology is useful, and application of wired and wireless technology in court settings enhances productivity for judges and court staff. Court visitors should share this benefit. Prohibiting the use of devices in the courtroom for texting or internet browsing would hinder the efficiency of counsel and parties. The prohibition would also be difficult for the court to enforce. Instead, the Wireless Committee considered where in the courthouse, and by whom, when, and how, court visitors should be allowed to use the devices. The Wireless Committee incorporated its conclusions in proposed new Rule 122.1, entitled “Use of portable electronic devices.”

II. Summary of comments. The State Bar of Arizona filed the sole comment during the initial comment period. During the second comment period,

and in response to the Wireless Committee's amended rule petition, the Arizona Association of Superior Court Clerks filed a comment, as did Judge MaryAnne Majestic on behalf of about twenty limited jurisdiction court judges. The Wireless Committee held public meetings following the conclusion of both comment periods.

III. Specific sections of Rule 122.1. The State Bar's comments to the initial rule petition prompted the Wireless Committee to clarify and to streamline the entirety of proposed Rule 122.1, and to integrate this proposed rule governing the use of portable electronic devices in the courthouse with its companion, Supreme Court Rule 122, regarding the use of recording devices in the courtroom. Proposed Supreme Court Rule 122.1 consists of six sections, and the following paragraphs highlight some of the other significant revisions to the Wireless Committee's original version.

Section (a): Purpose. Section (a) consists of three sentences; and the first sentence of the proposed rule introduces its purpose: "This rule specifies the permitted and prohibited uses of portable electronic devices in a courthouse." The second sentence requires the court to use reasonable means to advise courthouse visitors of the provisions of this rule. The third sentence says, "A violation of this rule may be punishable as contempt."

Section (b): Definitions. This section defines two terms: “portable electronic device” and “courthouse.” The Superior Court Clerks noted that court proceedings sometimes occur outside a courthouse. The current draft rule therefore added a second sentence to the definition of “courthouse,” which states, “A ‘courthouse’ also includes settings outside of a court building where a judge conducts an event concerning a court case.” (The term “event” was used in this definition rather than “proceeding” because Rule 122 defines “proceeding” as “an event concerning a court case that takes place in a courtroom.”) Rule 122.1(b) expressly incorporates other definitions found in Supreme Court Rule 122(b), thereby allowing terms defined in Rule 122 to apply by reference to Rule 122.1.

Section (c): Photography and audio or video recording. Section (c) begins with the phrase, “Photography, audio recording, and video recording in a courthouse are permitted, but the following restrictions apply....”

One restriction discussed extensively by the Wireless Committee concerned photos and recordings of individuals outside a courtroom. (Rule 122 governs photography and recording in a courtroom.) The Wireless Committee considered a restriction on recording or photographing certain classes of people, such as judges, prosecutors, victims, or jurors. However, the Wireless Committee concluded that no one should be photographed without their consent, and the proposed provision

accordingly provides, “In areas of a courthouse other than courtrooms, no one may photograph or record an individual without that individual’s express consent.”

Another restriction in section (c) allows adoption by local administrative orders of further limitations on recording in the courthouse, as long as those restrictions are “reasonable” and “not inconsistent with this rule or with Rule 122.” The Wireless Committee included these provisions to express its philosophy opposing adoption of local administrative orders that establish blanket prohibitions on the use of cameras and recording devices in a courthouse.

Section (d): Jurors and witnesses. The State Bar suggested that the provisions of section (d) should apply to prospective as well as to empanelled jurors. The Wireless Committee agreed, and it made an appropriate revision.

The Wireless Committee also discussed the State Bar’s concern that the provisions of this section, which require jurors to turn off their devices while in the courtroom and during deliberations, is an “overreach,” and that silencing the devices should be sufficient. The Wireless Committee disagreed. It believes that jurors should focus on trial proceedings and jury deliberations and give them their undivided attention without potential electronic interruptions. However, in response to the State Bar’s comment, the Wireless Committee added a sentence to section (d) that allows jurors to use devices during their free time. The sentence states, “Jurors may use their devices for allowable purposes during breaks.”

Section (e): Attorneys, parties, and members of the public. Judge Majestic and the limited jurisdiction judges noted that their courts frequently have long dockets and crowded courtrooms, and they believe that it would make those proceedings go more smoothly if the judges could order everyone to turn off their portable electronic devices. The Wireless Committee considered this issue on multiple occasions during its term.

At their June meeting, members of the Wireless Committee discussed three options for section (e). The first option was to retain the existing language of Rule 122.1(e), which would allow a judge to “terminate activity that may be disruptive.” The members acknowledged that this language is arguably ambiguous, because judges could interpret it in a way that would allow a prospective prohibition of devices based on judges’ prior experience with portable electronic devices in their courtrooms. A second option would remove the ambiguity by substituting the word “is” for the words “may be.” This would require actual disruption before a judge could terminate use of devices. The third option, which Judge Majestic suggested, would allow a judge “either to prohibit usage, or to terminate activity that is, or may become, disruptive....” This option would allow, for example, a judge to post a sign on the courtroom door requiring visitors to turn off any portable electronic devices before entering.

The Wireless Committee members agreed that judges should be able to terminate use of electronic devices, but not prospectively. They believe that if this provision allowed for a prospective prohibition of devices, in some courthouses prohibition could become the rule rather than the exception. Accordingly, in their final draft, the members replaced the words “may be” in section (e) with the word “is,” so that an actual rather than a presumptive or possible disruption or distraction is required to justify terminating use of a portable electronic device.

Section (f): Use of a portable electronic device outside the courtroom; limitations. The Superior Court Clerks requested that, in addition to “judges, court administrators, or court security officers,” that they too have authority to limit use of a portable electronic device outside a courtroom. In Rule 122.1(f), the words “Clerks of the Court” were therefore added to that series of officials. The members discussed whether to use “Clerks of the Court” or a more generic “clerks.” The consensus was to add the elected “Clerks of the Court” rather than line clerks, because the former rather than the latter establish court policy. The members also discussed and agreed to remove the words “court security officers.” Like line clerks, security officers do not create court policy, but instead act to implement policies and directives established by judges, Clerks, and administrators. The members also agreed to change the word “may” to “is” to make this section consistent with the revisions in section (e).

IV. Conclusion. The Wireless Committee appreciates each of the formal comments and informal suggestions for improving the proposed new rule. The Wireless Committee now submits its revisions to Rule 122.1, and a clean version of the proposed new rule, in the Appendix to this reply.

RESPECTFULLY SUBMITTED this 3rd day of July 2013

By _____
Hon. Robert Brutinel, Chair
Committee on the Impact of Wireless Mobile
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Mark-up of the version filed with the original rule petition: deleted text has ~~strikethrough~~; new text has underline

Rule 122.1: Use of a portable electronic devices in a courthouse [New]

a. Purpose. This rule ~~describes permissible~~ specifies the permitted and prohibited uses of portable electronic devices in a courthouse ~~and in a courtroom by attorneys, parties, witnesses, jurors, and members of the public.~~ A court must use reasonable means to advise courthouse visitors of the provisions of this rule. A violation of this rule may be punishable as contempt.

b. Definitions. The following definitions apply in this rule:

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

(2.) A “*courthouse*” includes all areas within the exterior walls of a court building, or if the court does not occupy the entire building, that portion of the building used for the administration and operation of the court. A “courthouse” also includes areas outside a court building where a judge conducts an event concerning a court case.

(3.) ~~A “*courtroom*” is an area of a courthouse or other building where a judge or other judicial officer conducts judicial proceedings.~~ Other definitions: This rule incorporates other definitions found in Supreme Court Rule 122(b).

c. Photography and audio or video recording. Photography, audio recording, and video recording in a courthouse are permitted, but the following restrictions apply:

(1) In a courtroom: In a courtroom, no one may use a portable electronic device ~~for to take~~ to take photographs or for audio or video recording ~~in a courtroom, unless that use was approved by the judge conducting a proceeding in that courtroom, or is otherwise~~ is allowed under Rule 122.

(2) Outside a courtroom: In areas of a courthouse other than courtrooms, no one may photograph or record an individual without that individual's express consent.

(3) Local orders: By local administrative order, a court may prohibit or limit adopt further limits on photography and audio or video recording in other areas of a courthouse. A party or a member of the public may not knowingly photograph or record another person anywhere in the courthouse without the person's consent. A violation of this section presumptively obstructs the administration of justice, and lessens the dignity and authority of the court. A court must use reasonable means to advise the public and court participants of prohibitions under a courthouse that are not inconsistent with this section rule or with Rule 122.

d. Jurors and witnesses. A juror may not The following restrictions apply to use of portable electronic devices by jurors, including prospective jurors, and by witnesses.

(1) Jurors: Jurors must turn off their portable electronic devices while present in a courtroom during a trial, or, and while present in a jury room during the jury's deliberations and discussions concerning a case. , and jurors must turn off their portable electronic devices while in those locations at those times. When a jury is deliberating, the court must provide jurors with a court telephone number at which an emergency message may be left for a juror. While in a courtroom, a witness, a Jurors may use their devices for allowable purposes during breaks.

(2) Witnesses: A witness must silence any portable electronic device while in a courtroom, and may use a device while testifying only with permission of a judge.

e. Attorneys, parties, and members of the public. Any person, other than a juror or a witness, The following provisions apply to use of portable electronic devices in a courtroom by attorneys, parties, and members of the public. Any allowed use of a portable electronic device under this section is subject to the authority of a judge to terminate activity that may be is disruptive or distracting to a court proceeding, or that may is otherwise be contrary to the administration of justice.

(1) Allowed uses: Attorneys, parties, and members of the public may use a portable electronic device in a courtroom to retrieve or to store information, to access the internet, and to send and receive text messages or information.

(2) Prohibited uses: A portable electronic device may not be used, without permission of the court, to make or to receive telephone calls or for other audible functions while court is in session, and attorneys, parties, and members of the public must silence portable electronic devices while in the courtroom. ~~Any allowed use of a portable electronic device is subject to the authority of a judge to prohibit activity that may be disruptive or distracting to a court proceeding, or that may otherwise be contrary to the administration of justice.~~

(3) Use of a personal audio recorder: Attorneys, parties, and members of the public may use a personal audio recorder in a courtroom only as provided by Rule 122.

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

Rule 122.1: Use of portable electronic devices in a courthouse [New]

a. Purpose. This rule specifies the permitted and prohibited uses of portable electronic devices in a courthouse. A court must use reasonable means to advise courthouse visitors of the provisions of this rule. A violation of this rule may be punishable as contempt.

b. Definitions. The following definitions apply in this rule:

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

(2) A “*courthouse*” includes all areas within the exterior walls of a court building, or if the court does not occupy the entire building, that portion of the building used for the administration and operation of the court. A “*courthouse*” also includes areas outside a court building where a judge conducts an event concerning a court case.

(3) *Other definitions:* This rule incorporates other definitions found in Supreme Court Rule 122(b).

c. Photography and audio or video recording. Photography, audio recording, and video recording in a courthouse are permitted, but the following restrictions apply:

(1) *In a courtroom:* In a courtroom, no one may use a portable electronic device to take photographs or for audio or video recording unless that use is allowed under Rule 122.

(2) *Outside a courtroom:* In areas of a courthouse other than courtrooms, no one may photograph or record an individual without that individual’s express consent.

(3) *Local orders:* By local administrative order, a court may adopt further reasonable limits on photography and audio or video recording in a courthouse that are not inconsistent with this rule or with Rule 122.

d. Jurors and witnesses. The following restrictions apply to use of portable electronic devices by jurors, including prospective jurors, and by witnesses.

(1) *Jurors:* Jurors must turn off their portable electronic devices while present in a courtroom and while present in a jury room during the jury's deliberations and discussions concerning a case. Jurors may use their devices for allowable purposes during breaks.

(2) *Witnesses:* A witness must silence any portable electronic device while in a courtroom, and may use a device while testifying only with permission of a judge.

e. Attorneys, parties, and members of the public. The following provisions apply to use of portable electronic devices in a courtroom by attorneys, parties, and members of the public. Any allowed use of a portable electronic device under this section is subject to the authority of a judge to terminate activity that is disruptive or distracting to a court proceeding, or that is otherwise contrary to the administration of justice.

(1) *Allowed uses:* Attorneys, parties, and members of the public may use a portable electronic device in a courtroom to retrieve or to store information, to access the internet, and to send and receive text messages or information.

(2) *Prohibited uses.* A portable electronic device may not be used, without permission of the court, to make or to receive telephone calls or for other audible functions while court is in session, and attorneys, parties, and members of the public must silence portable electronic devices while in the courtroom.

(3) *Use of a personal audio recorder:* Attorneys, parties, and members of the public may use a personal audio recorder in a courtroom only as provided by Rule 122.

f. Use of a portable electronic device outside a courtroom; limitations. Except as provided in sections (c), (d) and (e) of this rule, a person may use a portable electronic device in a courthouse, subject to the authority of judges, Clerks of the

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Appendix to Reply, Clean Version

Court, or court administrators to limit or terminate activity that is disruptive to court operations or that compromises courthouse security.