

Washoe County Public Defender

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July 1, 2011

Tracie K. Lindeman
Clerk of the Supreme Court
The Nevada Supreme Court
201 South Carson Street
Carson City, Nevada 89701-4702

JUL 01 2011
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

Re: ADKT No. 424 (proposed amendments to Part IX of the Supreme Court Rules governing telephonic and audiovisual participation in Nevada courts)

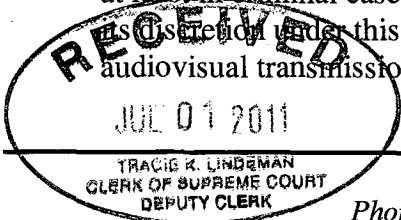
Dear Ms. Lindeman:

In response to the Supreme Court's invitation to submit written comments on certain amendments proposed to Part IX of the Supreme Court Rules, I offer the following:

Presently, Part IX of the Supreme Court Rules allow parties and attorneys to appear before a court by way of audiovisual transmission equipment for very limited purposes related generally to case management and scheduling. Substantive court processes are excluded. See Rule 4. And, although this rule allows court discretion to modify application of the rule as the circumstances warrant, that modification must, under the terms of the rule, relate solely to appearances by the party or counsel. Nothing in the rule allows modification for purposes of witnesses or witnesses' testimony. See Rule 4(3)(b), 4(3)(c) and 4(4). The proposed amendments change this scheme by adding the word "witness" at selected places within each of these provisions.

If amended, Rule 4(3)(b), can be read together with Rule 4(1), to provide that, upon a showing of good cause either by motion of a party or upon its own motion, a court *may require a party or witness* to appear in person at – case management conferences, trial setting conferences, hearings on law and motion, discovery conferences, status conferences, and hearings to review the dismissal of an action -- if the court determines on a hearing-by-hearing basis that a personal appearance would materially assist in the determination of the proceedings or in the effective management or resolution of the particular case. Otherwise, such party or witness is allowed to appear by audiovisual transmission equipment (except for motions in limine or where the discovery commissioner has determined that it is necessary for parties to meet personally regarding discovery disputes or scheduling matters). Because case management and similar types of scheduling issues can benefit from the personal appearance of the parties (and perhaps a witness), this amendment seems to advance the general purpose of Part IX.

Amending Rule 4(3)(c) as proposed however, could create constitutional and other issues, at least in criminal cases, and this rule applies to criminal cases. See Rule 4(3)(a) ("i]n exercising its discretion under this provision, the court should consider the general policy favoring audiovisual transmission equipment appearances in civil and criminal cases").



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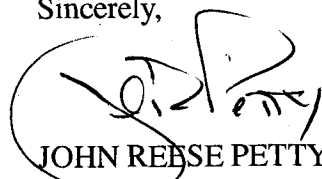
The Sixth Amendment's Confrontation Clause confers on a defendant "[i]n all criminal prosecutions, ... the right ... to be confronted with witnesses against him." If amended, Rule 4(3)(c), can be read together with Rule 4(2), to provide that a court *may permit a party or witness to appear by audiovisual transmission equipment at -- trials and hearings at which witnesses are expected to testify*, hearings on temporary restraining orders, settlement conferences, trial management conferences, hearings on motions in limine, etc. – *if* the court determines that an audiovisual transmission equipment appearance is appropriate. The rule states that a court "may permit a party or witness to appear by audiovisual transmission equipment." This suggests that a party must move for an order allowing a witness to appear by audiovisual transmission equipment. (Notably this rule, unlike 4(3)(b), does not require that a good cause showing be made.)

In the context of a criminal trial, allowing a state's witness to appear by audiovisual transmission equipment instead of being personally present, implicates the Sixth Amendment right to confrontation. Viewing a person live is different from viewing that person via audiovisual transmission equipment. The jury or the judge sitting without a jury (and the defendant) ought to be able to view the actual interaction between a witness and others who are present, and not through the filter of an audiovisual transmission. Importantly, triers of fact must be allowed to hear testimony from live witnesses – not only for content, but also for other speech factors that give clues as to the witness's veracity – and relate that testimony to the witness's demeanor. Additionally, in some types of criminal cases – domestic battery or child sexual assault, for example -- the state may attempt to use this rule to "shield" its victim-witness from actual courtroom confrontation.

This letter is not intended to exhaust the set of issues that could arise if state witness testimony is permitted in a criminal trial by way of audiovisual transmission equipment, but it is intended to raise concerns. In that regard, I would like to participate in the hearing scheduled for July 7, 2011, at 3:00, in Carson City.

Because the general tenor of the present rule is one of case management and not testimony, the proposed amendments constitute a significant shift in the rule's focus. I believe that such a shift – at least as it pertains to Rule 4(3)(c) – should be studied and analyzed for its effect on criminal trial practice in both the district and limited jurisdiction courts. Accordingly, I respectfully recommend that rather than rush through the present proposed amendments, this Court should create a committee duly authorized to explore the Sixth Amendment issues and other related concerns involved in the use at criminal trials of remote testimonial evidence. That committee would report back to the Court with recommendations.

Sincerely,

A handwritten signature in black ink, appearing to read "John Reese Petty", is written over a circular stamp. The stamp contains the name "JOHN REESE PETTY" in capital letters.

JOHN REESE PETTY
Chief Deputy, Washoe County Public Defender