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TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

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

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 (including telephonic 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 current rule allows modification for purposes of witnesses or witnesses' testimony. See Rule 4(3)(b), 4(3)(c) and 4(4).

Justice Gibbons' proposed rule changes seek to address the "witness" issue and, in doing so, separates the telephonic rules from the simultaneous audiovisual rules. The "telephonic rules", Part IX (A), seem limited to case management, status conferences, and to certain types of events other than case management that will not exceed 15 minutes in duration, unless stipulated to by the parties and approved by the judge. Rule 4(1)(a-h). Witnesses at these types of hearings would be "case management-necessary" witnesses and not necessarily "merit-witnesses." Trial motions in limine are specifically excluded from these telephonic rules. Rule 4(1)(c). And, under Rule 4(3)(b) and Rule 4(4), a court can require the personal appearance by a party or witness for good cause shown or where the court determines that a personal appearance is necessary. Part IX (A) does not depart significantly from the current rules and, in my view, works.

However, Justice Gibbons' proposed rule change for audiovisual appearances, Part IX (B), is more problematic – at least under sections 4(1)(a)(1), (2) and (6). For example, Rule 4(1)(a)(2)'s requirement that a party must appear at a *preliminary hearing* is in conflict with this Court's opinion in *State v. Sargent*, 122 Nev. 210, 217,128 P.3d 1052 (2006) (justice of the peace does not have authority to order the defendant's personal appearance at a preliminary hearing where the defendant has filed a waiver of personal appearance and has counsel appearing on his behalf).

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Similarly, while a criminal defendant has a Sixth Amendment right to be present during certain crucial stages of his prosecution – pre-trial motion hearings, for example – a defendant represented by counsel may waive his appearance and allow the hearing to proceed without him. Yet this rule absolutely requires "a personal appearance or an appearance by use of simultaneous audiovisual transmission equipment" by a party for "hearings at which witnesses are expected to testify", Rule 4(1)(a)(1), and "[h]earings on motions in limine, Rule 4(1)(a)(6), and makes no provision for appearance waiver. Compare Rule 4(3) (requiring personal appearance if, at any time during a hearing "conducted by simultaneous audiovisual transmission equipment" the court determines that a personal appearance is necessary).

As to Rule 4(1)(a)(2) – dealing with criminal trials -- in my letter to this Court dated July 1, 2011 – which addressed an earlier set of proposed changes to Part IX by Justice Gibbons – I wrote:

> 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.

I believe these concerns are still present under the new proposed changes.

Finally, the "notice by party" provisions of Rule 4(4) address only how a party is to provide notice of the party's intent to appear by simultaneous audiovisual transmission, or withdraw from such notice if the party has changed his mind and now wishes to appear by personal appearance. A "party" under the rule means "plaintiff or defendant" and "such party's attorney of record." Rule 1(3). The notice provision does not speak to witnesses defined in Rule 1(5). But even if one assumed that a witness's participation could be "noticed" under this rule, there are no provisions for the party on the other side to object and demand the personal appearance of the witness for the purpose of testifying in a court proceeding. In contrast under Rule 4(5), the court can require the personal appearance of a party even after that party has requested to appear by simultaneous audiovisual transmission equipment, simply by giving reasonable notice to all parties before the hearing.

It seems to me that the "notice" provisions contained in Rule 4(4) cannot survive a modern confrontation analysis since they do not contain a notice and demand procedure as robust as the one for affidavits / declarations in lieu of live testimony. See e.g. *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, 129 S.Ct. 2527, 2541 (2009) (discussing notice and demand statutes), and *Id* at 2557 (Kennedy, J., dissenting) (noting that more onerous burden-shifting statutes may violate the Confrontation Clause). In this regard, this part of the rule must be re-written to provide a robust notice and demand provision.

Sincerely,

JOHN REESE PETTY
Chief Deputy, Washoe County Public Defender