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Bradford R. Jerbic
City Attorney
Benard G. Little
Assistant City Attorney

**OFFICE OF THE CITY ATTORNEY
CRIMINAL DIVISION**

2008 MAY 29 AM 8:38
Regional Justice Center
P. O. Box 3930
Las Vegas, Nevada 89127
(702) 229-6201
Fax: (702) 464-2530
E-mail: blittle@lasvegasnv.gov



May 29, 2008

Honorable Justices of the Nevada Supreme Court
C/O Tracie K. Lindeman, Clerk of the Supreme Court
201 South Carson Street
Carson City Nevada 89701

FILED

Re: ADKT No. 424

MAY 30 2008
TRACIE K. LINDEMAN
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BY *[Signature]*
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Dear Honorable Justices:

Last week, I was off with my son who was home from law school for the week. Upon returning to work, I received notice of ADKT No. 424 and the need for any written comments to be provided no later than yesterday. Unfortunately, a week off from work, left me with too much work to be able to comply with the deadline given.

While admiring the goal, I would like to share some concerns with the proposal. First, it should be made clear that this rule does not create any right for any party, their counsel or their witness to participate telephonically or audiovisually. Rather, it should be viewed as vesting the court with discretion in the interest of judicial efficiency. If the rule is viewed as creating a "right," there would be a corresponding obligation upon the judicial system.

Nor should the rule be allowed to be interpreted to conflict with the N.R.S., for example:

- a) N.R.S. 174.175-174.231 - limited statutory rights to do depositions in criminal cases;
- b) N.R.S. 50.165 - witnesses duly served with a subpoena must "attend" ... is to "remain 'till the testimony is closed;"
- c) N.R.S. 51.385 - providing that a young child's presence "at the proceeding"(or unavailability) is a predicate to getting in to evidence a child sexual assault or physical abuse victim's hearsay statements;
- d) N.R.S. 171.1975 - governs use of audiovisual to present live testimony at a preliminary hearing;
- e) N.R.S. 178.388 - generally requires the defendant's presence at arraignment, trial and sentencing with limited exceptions in certain circumstances in non-death penalty felonies and, in the case of gross-misdemeanors and misdemeanors sets conditions for a

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defendant's ability to waive his right to appear at arraignment, plea, trial or sentencing). This statute appears to be patterned after Federal Rule of Criminal Procedure 43.

These are the few related N.R.S. provisions I found on short notice. I have no idea how many others there are. I would suggest the rule start out by saying something like: "Unless otherwise provided by law or subject to any additional legal requirements or limitations." However, the exceptions would appear to swallow the rule - or at least so minimize its utility as to outweigh its benefit. Additionally, I wonder if the courts are going to be mindful of such specific statutory constraints.

I fear constitutional challenges to or arising from a court's allowance of a person's "participation by telephonic or audiovisual means." Ineffective assistance of counsel, due process, denial of confrontation rights (*Crawford*), separation of powers (should the rule be intended to modify the N.R.S.), equal application/protection (some courts may not have money for necessary equipment; inconsistency in decisions...), discrimination (presumably all foreign language speakers must appear in court with certified court interpreters) and attorney-client confidentiality (where the defendant and his counsel are separated and need to communicate in private) come to mind.

What about the risks of coaching a witness (where the attorney and his witness are alone "appearing" via the same telephonic or audiovisual set-up) or subversion of an order sequestering witnesses (where multiple witnesses "appear" via the same telephonic or audiovisual set-up)? How does a prosecutor get a witness to identify the defendant if he or she is appearing by "telephone." How is a prosecutor to show an exhibit to the defense counsel/witness before getting it admitted if they are appearing by telephone? We have several cases of identity theft/malicious prosecution which may only come to light after person impersonated has been arrested on a warrant - because of the identity thief's failure to appear post plea and sentencing. Allowing the imposter to plea by telephone without adequate safeguards only compounds the problem. The rule neither sets such safeguards or requires the court to fashion its own prior to allowance of a defendant's appearance by telephonic or audiovisual means.

Furthermore, do the benefits of the rule to the lower courts really outweigh the substantial burden that is sure to be visited upon the appellate courts? Add the prospect of "technical difficulties" - potentially undetected until an appellate record is created - and is it worth the perceived benefits?

Because the court is to designate the "party responsible for arranging the call and the party or parties responsible for payment of the call" *before the trial or hearing*, one presumes a pretrial request is mandated. Can the request be made minutes or the day before the trial or hearing - becoming a tool used for delay or avoidance of a bench warrant? There should be a deadline for making the request to participate telephonically or by audiovisual means. N.R.S. 174.125 generally requires a written motion 10-15 days before trial, if a trial continuance would be necessitated. Does this statute apply? If so, should the rule reference it? Is there a waiver of constitutional rights by virtue of a failure

to make a timely objection similar to that found in *Walsh* (when looking at N.R.S. 50.315)? What is the period for a timely objection?

Must the City or State bear the cost when an indigent or his appointed counsel make the request? As you know, this Court is still dealing with the issue of how indigent counsel is to be provided. In a prior hearing on that issue, there was some discussion in a paper presented to the Court suggesting that the State should bear the cost of indigent counsel since it is through the Fourteenth Amendment that *the State* is obligated to provide such counsel. We find such an argument compelling. Rather than adopting a rule which presumes that local governments should pay for costs arising from the granting of the request of an indigent or his or her counsel, we would like this issue addressed directly by the Court (via a process worthy of the magnitude of the issue).

On a related note, is the mandate to pay for costs an unfunded mandate? If not (or if so, but an acceptable one), should the responsible entity be given time to budget for such an expense? [We just completed a budget for the upcoming fiscal year that required a 4% reduction and have been instructed to anticipate a 3% reduction next year]. Should such entity be allowed to recoup part of the cost if the defendant is no longer indigent or is able to pay part of the cost? If not available to indigents, is there an equal protection/application argument?

If the rule is to be adopted, in light of the precedent in *Walsh*, would it be beneficial to require the court to also find that the requestor has demonstrated that the interests of justice do not require the person's appearance in court as opposed to a telephonic or audiovisual appearance? Should the person requesting participation by telephonic or audiovisual means be required to make the request via affidavit specifying the "good cause" for the request, the reason that the interests of justice do not require his or her personal appearance, the basis for believing an absence of substantial prejudice to the opposing party and the bona fide nature of the request - similar to that required in *Hill*?

The rule states "a verbatim record of the proceeding must be made." Upon convening the proceeding, shouldn't the judge test the recording system to assure audibility to a transcriber/recorder and not just audibility "to all participants." What if the court is not a court-of-record? Must a verbatim record still be made?

Is sentencing a "hearing" within the definition of the rule? Is a status check date a "hearing?" These are a few issues we have identified in the time given our particular circumstance. I hope they prove of assistance.

We have had little time to research the provisions or cases federally and in other states, but our brief review gives the impression that use is largely limited to a stipulation of the parties, to civil depositions or hearings or waiver by failure to object. I doubt that these other jurisdictions have the statutory limitations that appear to exist in Nevada.

Cordially,

Benard Little,
Assistant City Attorney, City of Las Vegas