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# Special Topic: Telecommunications in the Courtroom

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## Special Topic: Telecommunications in the Courtroom

J. ALLISON DEFOOR, II\*

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\* Editor to Special Topic.

## Introduction to Special Topic: Telecommunications in the Courtroom

It was, in a certain sense, inevitable. The spread of technology through American society culminated in Time Magazine's "Man of the Year" being a personal computer. Even the smallest law offices have acquired the latest technical aids (or worry if they have not). Only the particular insulation of the judiciary can account for its late entry into the technological age.

Today most courts conduct business in the same manner that they did a half century ago. If we were to resurrect a trial lawyer from over a century ago, the courts would be totally familiar to him. But the courts now need to change rapidly, if for no other reason than the necessity of keeping pace with the massive increases in work product and efficiency that the bar has achieved.

Our principal concern in this symposium is the use of telephone technology in the courtroom. The humble telephone, one of the oldest electronic technologies, is already ubiquitous in court-houses and law offices. Indeed, it is surprising that its use has not crept into the court before now. Because of widespread availability and acceptance by the bench, bar, and laymen, it is the technology that can be most easily utilized to achieve immediate increases in productivity and efficiency in judicial work. Its utility and simplicity have led to the *sua sponte* adoption of telephone use in courtroom related activities over the past decade.

Across the country, judges with no enabling statutes or procedures, and with little in the way of practical or legal precedent, have accepted the telephone as a judicial tool on an unprecedented scale. Judge after judge in state after state has used telephone hearings in an attempt to increase the efficiency of their courts, saving both the lawyers and their clients untold hours of wasted time.

The practical aspect of telephone technology in the courtroom has dictated the direction of this symposium. The purpose of this symposium is not to engage in an esoteric explanation of legal minutia, but rather to bring to the legal community a practical compendium of information that hopefully will stimulate the use of telephone technology for the benefit of the bench, bar, and citizenry.

The following pages include a discussion of the development of telephone hearings in Florida as well as a background analysis of the national evolution of this practice. The emphasis upon Florida

is not only because this journal is published in that state, but also because of Florida's emergence as a bellweather state for judicial innovations. If it works in Florida, it will eventually find widespread acceptance in the rest of the nation.

The American Bar Association Action Commission on Court Costs and Delay offers a very practical analysis of the utility of telephone conferencing in criminal court cases. The Commission, in conjunction with the Institute for Court Management, has been engaged for several years in the disseminating information and encouraging the use of telephone hearings as a judicial tool. Indeed, they are largely responsible for drawing together into a national theme the widespread individual efforts of local judges to use telephone practice; the judiciary is deeply indebted to their work.

Dr. Geoffrey Alpert of the University of Miami's Center for the Study of Law and Society offers an analysis of the utility of telephonic search warrants, which have been used for sometime in the federal courts and in the many state court systems in the west with great success. It certainly sounds intriguing to one who, like this author when he was a prosecutor in the Florida Keys, has spent many hours attempting to find a judge close to the scene of a needed search warrant.

Because this symposium is intended to have practical results, concrete proposals are made. The proposals, and some of the discussion, focus on Florida, although they are adaptable to any state. The state legislature addressed the use of teleconferencing in the administrative branches of government and called for a proposed administrative rule to standardize the practice. Percy W. Mallison, Assistant Attorney General, responded to that legislative directive with the proposed model rule contained herein.

Finally, in an effort to provide some structure to the growing statewide phenomenon of the use of telephone hearings in civil and criminal courts, a proposed rule of judicial administration is offered for adoption. A copy has been forwarded, pursuant to the the Rules of Judicial Administration, to the Supreme Court for its consideration for adoption.

Dr. Jerome Corsi and his associates offered an article that analyzes the results of a year-long study conducted in New Mexico involving the use of telephone technology in administrative hearings. This article is the first published report of the conclusions of that experiment.

The symposium concludes with an analysis of where we are heading with all of this technology—toward using audiovisual com-

munications to make court appearances. The ongoing experiment in Dade County involving the use of audiovisual appearances of defendants for first appearances has proven a great success. The use of technology for conferencing between cities is growing as AT&T sets up teleconferencing centers around the country. There is no doubt that widespread availability of such technology in every courtroom and, ultimately, in every office, will revolutionize the ability of attorneys and witnesses to "appear" in court. Regardless of how interesting the experiments are in the area of telephone hearings, those experiments are a passing phase. With more technological advances, the telephone hearing will quickly lose its current status as a "new idea," become widely accepted, and eventually be outmoded by newer communication methods.

J. ALLISON DEFOOR, II  
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# Telephone Hearings in Florida\*

## I. INTRODUCTION

As the State of Florida moves toward becoming the fourth most populous state in the country,<sup>1</sup> swelling caseloads are straining Florida's legal and judicial system.<sup>2</sup> Increasing crime rates, civil litigiousness and the creation of new causes of action add to the already growing caseloads.<sup>3</sup> In order to meet these increased demands, courts have tried many different ways to increase judicial efficiency.

Although the spectacle of the harried bureaucrat is an age-old one, the image of a harried judge, or worse, the harried administration of justice, is chilling.<sup>4</sup> Consequently, despite the state's rapid growth, which affects all branches of government, the unique role of the legal system in protecting our liberties requires special attention to the methods that the courts are using to meet the challenge.

Past attempts to improve the administration of justice include the revision of Article V of the Florida Constitution, replacement of a hodge-podge of courts with a lean four-tiered system,<sup>5</sup> an ex-

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\* Portions of this article have been adopted from DeFoor & Sechen, *Telecommunications in the Courtroom*, 57 FLA. B.J. 500 (1983).

1. Bureau of the Census, U.S. Dep't of Com., *Illustrative Projections of State Populations by Age, Race, and Sex: 1975 to 2000*, CURRENT POPULATION REPS., (Mar. 1979). The latest projections reveal trends that may make Florida the third largest state in the United States, behind only California and Texas, and ahead of New York, by the year 2000. See Florida Times-Union, Sept. 8, 1983, § A, at 1, col. 3; Miami Herald, Sept. 11, 1983, § B, at 1, col. 1.

2. In remarks recently delivered by Florida Supreme Court Justice Ben Overton to a meeting of the American Judicature Society, the speaker discussed the strains affecting Florida's judicial system. *Expect Delays as Caseloads Swell, High Court Justice Tells Lawyers*, Miami Herald, June 17, 1983, § C, at 2, col. 1 (first ed.) [hereinafter cited as *Expected Delays*]. Among the causes cited were severe increases in population, litigiousness, and an inadequate response to the problem by the legislative branch. *Id.* Proposed solutions included further reform of the judicial system, and increasing the numbers of judges at a rate concomitant with caseload demands. *Id.*

3. See, e.g., Kaufman, *The Courts in Peril*, Miami Herald, Feb. 13, 1983, § E, at 1, col. 1.

4. As every member of the Bar doubtlessly now knows, a justice of the United States Supreme Court recently revealed that he did not read up to 80 percent of the pleadings filed before the Court. See Overton, *Relieving an overworked state supreme court: Florida asks its courts of appeal to assist in screening cases*, 66 JUDICATURE 371 (Mar. 1983).

5. See FLA. CONST. art. V, § 1 (adopted 1972); see generally D'Alemberte, *Judicial Reform—Now or Never*, 46 FLA. B.J. 68 (Feb. 1972).

pansion of the number and function of the district courts of appeal,<sup>6</sup> and a general increase in the number of judges in Florida.<sup>7</sup> Similar efforts on a national scale resulted in the split of the Fifth Circuit Court of Appeals<sup>8</sup> and a proposal for the creation of a new national intermediate appellate court.<sup>9</sup> In line with these major structural changes, a less publicized attempt at streamlining is occurring with the utilization of technology to the legal process<sup>10</sup>—including the courtroom itself.<sup>11</sup>

Specifically, counsel and witnesses are using telephone conference calling equipment and speakerphones as a means of "appearing" in court without ever leaving their offices. The potential for achieving savings and efficiency, in terms of otherwise wasted transportation time of judges, attorneys, and witnesses, is substantial. This article will explore the nature and incidence of appearance by telephone in Florida and in national legal proceedings. It

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6. See generally, Overton, *District Courts of Appeal: Courts of Final Jurisdiction with Two New Responsibilities—An Expanded Power to Certify Questions and Authority to Sit En Banc*, 35 U. FLA. L. REV. 80 (1983); Report of the Supreme Court Commission on the Florida Appellate Court Structure, 53 FLA. B.J. 274 (1979).

7. In his address, Justice Overton noted that the less than twenty-five percent increase in the number of judges in the past decade was in marked contrast to the 100 percent increase in the number of cases filed during the same period. *Expected Delays*, supra note 2.

8. See generally Heflin, *Fifth Circuit Court of Appeals Reorganization Act of 1980—Overdue Relief for an Overworked Court*, 11 CUM. L. REV. 597 (1980); Ainsworth, *Fifth Circuit Court of Appeals Reorganization Act of 1980*, 1981 B.Y.U. L. REV. 423.

9. See *Burger's Opening Argument for a New Appellate Court*, N.Y. Times, Feb. 13, 1983, § 4, at 5, col. 1. The debate has raged intensively on this proposal. See *Rx for an Overburdened Supreme Court: Is Relief in Sight?* 66 JUDICATURE 395 (April 1983); Hellman, *Caseload Conflicts and Decisional Capacity: Does the Supreme Court Need Help?*, 67 JUDICATURE 28 (June/July 1983).

10. Although this article is principally concerned with telephone hearings, other forms of technology are increasingly being applied in the legal sphere. The generalized computerization of the law office is well known. See, e.g., Karasik, *The Computerization of an 11-lawyer Firm*, 69 A.B.A. J. 1236 (Sept. 1983). Other representative applications include the advent of telephonic search warrants, FED. R. CRIM. PRO. 41(c)(2); multi-track recorded court reporting, see, e.g., Polansky & Bartholow, *Audio Recording in the Superior Court of the District of Columbia*, 11 STATE CT. J. 12 (Winter 1983); NAT'L CENTER FOR STATE COURTS; THE EFFECT OF SPACE AND DISTANCE ON THE ADMINISTRATION OF JUSTICE, PUB. NO. R0032 (1977); and most recently the advent of Pioneers "Electronic Mail," McComb, *Court of Appeals Pioneers "Electric Mail,"* 12 Ct. CRIER 20 (July 1983). Florida has followed these national trends see, e.g., FLA. R. JUD. ADMIN. 2.070(c) (providing for electronic recording for court reporting of judicial proceedings, including depositions); FLA. R. JUD. ADMIN. 2.090 (providing for use of electronic transmission of documents for filing).

11. Examples include the use of videotaped depositions. Murray, *Videotaped Depositions: the Ohio experience*, 61 JUDICATURE 258 (Dec./Jan. 1978). For the use of cameras in the courtroom and the audiovisual appearances of witnesses, see *infra* notes 95-96. Again, Florida has followed (or led) these trends. See, e.g., FLA. R. JUD. ADMIN. 2.070(c), (d) (providing for the use in court of videotaped depositions); FLA. BAR CODE JUD. CONDUCT Canon 3A(7) and commentary (cameras in the courtroom).

will also explore the potential advantages and disadvantages of this technique and its potential for expanded use in the future in the criminal and civil justice systems. The term "telephone hearing" will be used for the purposes of simplicity. It is defined as any legal proceeding at which one or more of the parties attends from another location by means of electronic telecommunications.<sup>12</sup> Normally, though not necessarily, the parties will use speakerphones to facilitate a telephone hearing.

### A. Reasons for Use

It is hardly surprising that attorneys and witnesses have begun to use the telephone as a means of appearing at hearings. The telephone is an ubiquitous and indispensable support device in the personal and professional lives of even the most conservative judge or lawyer. Telephone calls are used to schedule hearings, to arrange witnesses' appearances, and even to order research.<sup>13</sup> In trials, "telephone standby" has become the ultimate state of readiness for a trial lawyer.

The reason for the increasing use of the telephone in hearings is simple—economy.<sup>14</sup> What attorney has not spent more time in

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12. In its most basic form, telephone conferencing is a three-way conversation among the judge and the attorneys for each side in which each participant can be heard by the others:

The judge generally is situated in chambers and uses a speaker phone rather than a standard hand receiver. The lawyers, in turn, are located in their respective offices where they may have speaker phones or use a regular phone. Depending on the nature and significance of the subject matter, a record of the proceeding may be taken either by a court reporter present in chambers or by a tape recorder attached to the telephone. The judge gives instructions on how the hearing is to be conducted in roughly the same manner as at in-person hearings.

Hanson, Mahoney, Nejelski & Shuart, *Lady Justice—Only a Phone Call Away*, 20 JUDGES J. 40, 42 (Spring 1981); [hereinafter cited as *Lady Justice*]; see also Chapper, *The Implementation of Telephone Hearings*, 7 STATE CT. J. 88 (Winter 1983).

13. See Haerberle, *Court Congestion and Delay—Use of Speaker Telephone or Picturephones in Civil Cases When Witnesses Are Not Available—A Proposal*, 10 LINCOLN L. REV. 49, 49-50 (1977).

14. *Lady Justice*, *supra* note 12, at 42; Chapper, *supra* note 12, at 8. A recent Florida House of Representatives analyst found savings by one administrative agency of over \$2,000.00 per meeting, mostly in travel costs, by virtue of holding public meetings by teleconference. See *infra* note 52. A recent study sponsored by the American Bar Association and the Institute for Court Management found perceptions of the utility of telephone hearings to be reflected in the following propositions:

Telephone conferencing saves the court time because the hearings are easier to schedule, less time is spent waiting for attorneys, and there is less elapsed time from filing to disposition of motions.

Telephone conferencing has little or no effect (i.e., it neither improves nor impairs) on most aspects of the nature of the court hearings. These aspects in-



transit for a hearing than in the hearing itself? This is most disturbing when the matters are minor, or worse, uncontested. Waste also occurs when judges and hearing officers ride the circuit, sitting in more than one place. The costs of travel are substantial.<sup>15</sup> Furthermore, it has been estimated that the waste of an administrative law judge's time due to travel,<sup>16</sup> cancelled hearings, and mischeduling may be as high as thirty percent.<sup>17</sup> Even for a judge sitting at a central location, time is frequently lost due to the problem of assembling all of the "players."<sup>18</sup>

In suburban and rural areas, time is lost due to the distances between attorneys' offices and the place of the hearing. In urban areas, time is lost due to traffic congestion and parking difficulties.<sup>19</sup> Counsel may also face conflicting appearances in different courts or courthouses on the same day.<sup>20</sup> In areas other than Florida, weather conditions may cause delays when one of the parties is unable to get to the courthouse.<sup>21</sup> Extreme geographical remote-

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clude: counsel's preparation, judge's preparation, judge's control over the hearing, judge's ability to manage the hearing, and the judge's ability to ask questions. However, although most judges believe that the relevancy of counsel's arguments is not different during telephone hearings, some believe that there is greater relevancy.

Telephone hearings save attorneys' time by reducing both travel and waiting times.

Hanson, Olson, Shuart & Thornton, *Telephone Hearings in Civil Trial Courts: What Do Attorneys Think?*, 66 JUDICATURE 408, 410 (1983) [hereinafter cited as *Telephone Hearings*]. The Staff Director of the ABA Action Committee to Reduce Court Costs and Delay has estimated the potential savings at \$150.00 per hearing, *Judge Spreads Word on Testimony by Phone*, Miami Herald, July 8, 1984, § B (Keys Area News), at 1.

15. While the Sixteenth Judicial Circuit, the Florida Keys, is hardly typical in this regard, its experience is illustrative. In the six-month period of July to December, 1981, its three circuit judges made a total of 70 trips from Key West, the county seat, to the Marathon sub-courthouse (48 miles), and 52 trips to the Plantation Key sub-courthouse (87 miles). The cost in mileage alone was \$3,153.60, not counting per diem expenses and, most importantly, lost judicial time. As a result, an additional circuit judge was installed to serve the upper and middle keys.

16. For an extreme example of the hardships encountered by a judicial official riding a circuit, see Corsi & Hurley, *Attitudes Toward the Use of the Telephone in Administrative Fair Hearings: The California Experience*, 247, 31 Ad. L. Rev. 270 n.28 (1979) (recounting the difficulties encountered by administrative officers in Alaska) [hereinafter cited as *California Experience*].

17. See Memorandum from Edward W. Davidson, Southeast Regional Director, Food and Nutrition Service, U.S. Dep't of Agric. to the State Welfare Commissioners, Region IV, at 2 (June 29, 1981) [hereinafter cited as Dep't of Agric. Memo.].

18. See *Telephone Hearings*, *supra* note 14, at 408.

19. *Id.* at 416.

20. See *Lady Justice*, *supra* note 12, at 47.

21. *Id.*

ness may also decrease courthouse accessibility.<sup>22</sup> Telephone hearings offer a way to avoid such waste.

### B. *Origins*

Telephone hearings were first used in the west, where distances between cities and courthouses are great. Apparently, telephone hearings concerning minor judicial matters in California were occurring as early as the mid 1960's.<sup>23</sup> By the early 1970's, California was using the telephone for full evidentiary hearings in administrative matters,<sup>24</sup> which quickly received favorable judicial comment.<sup>25</sup> Extensive use of telephone hearings occurs in states with small populations distributed over vast distances.<sup>26</sup> New Mexico uses telephone conferencing in administrative hearings,<sup>27</sup> trial courts,<sup>28</sup> and even at the appellate level.<sup>29</sup> A study conducted by the American Bar Association and the Institute for Court Management found that at least seven federal district courts,<sup>30</sup> two state appellate courts,<sup>31</sup> and the trial courts of ten states<sup>32</sup> use telephone

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22. *Id.*; see also *California Experience*, *supra* note 16, at 28-29.

23. Haerberle, *supra* note 13, at 51 n.8.

24. See *California Experience*, *supra* note 16, at 247.

25. "The Board had devised a pragmatic solution, made possible by modern technology, which attempts to reconcile the problem of geographically separated adversaries with the core elements of a fair adversary hearing: The opportunity to cross-examine adverse witnesses and to rebut or explain unfavorable evidence." *Slattery v. California Unemp. Ins. Appeals Bd.*, 60 Cal. App. 3d 245, 251, 131 Cal. Rptr. 422, 425 (1976); accord *Greenburg v. Simons Merchant Police Service*, 410 So. 2d 566, 567-68 (Fla. 1st DCA 1982) (quoting the language of the court in *Slattery*).

26. *Lady Justice*, *supra* note 12, at 47.

27. The fifth largest state in the Union, New Mexico has a population of only 1.3 million concentrated on a northwest-southeast diagonal that centers at Albuquerque, in Bernalillo County, where 32 percent of the population resides. The remainder of the state is largely rural, and 65 percent of the locations covered regularly by the Department of Human Services have fewer than 2500 residents. All unemployment insurance appeals in the state, (approximately 5000/year) are handled by eight Employment Services Division Appeals Referees who cover the state in four circuits. This places a substantial and costly travel burden on the referees. For instance, in a typical trip in the southeast quadrant, Chief Appeals Referee Dean Harvel, conducted 32 hearings in nine cities, logged about 700 miles and spent more than 14 hours on the road in a 3-day period.

*California Experience*, *supra* note 16, at 270 n.29. See Corsi & Hurley, *Pilot Study Report on the Use of the Telephone in Administrative Fair Hearings*, 31 Ad. L. Rev. 485 (1979) [hereinafter cited as *Pilot Study*]. This procedure has apparently been met with great success; *id.* at 500-01; *California Experience*, *supra* note 16.

28. See *Lady Justice*, *supra* note 12, at 57.

29. *Id.*

30. *Id.* See also Luongo, *Telephone Conferencing in a Federal District Court*, 20 JUDGES J. 48 (Spring 1981).

31. See *Lady Justice*, *supra* note 12, at 57; see also Hendley, *Telephone Conferencing*

conferencing.

Faced with distances which are, by standards east of the Mississippi, quite vast, it is logical that Florida is experimenting with telephone hearings. The authors conducted an informal poll of the court administrators and administrative agencies throughout the state to ascertain the nature and extent of the use of telephone hearings.<sup>33</sup> Because Florida is the bellweather of the nation, its experimentation in this area can be significant.<sup>34</sup>

The results of the poll showed that no fewer than sixteen of the state's twenty judicial circuits have used telephone hearings in their judicial systems.<sup>35</sup> The practice seems to have developed as

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*in an Appellate Court*, 20 JUDGES J. 45 (Spring 1981).

32. See *Lady Justice*, *supra* note 12, at 57; see also Goebel, *Telephone Conferencing in a State Trial Court*, 20 JUDGES J. 46 (Spring 1981).

33. The authors received responses from the offices of the court administrators and chief judges in all twenty circuits. Also responding were three administrative agencies. Correspondence was received from: Ray C. Helms, Court Administrator, First Circuit (Mar. 8, 1983); Dozier Allen, Court Administrator, Second Circuit (Mar. 7, 1983); Nancy K. Summersill, Deputy Court Administrator, Third Circuit (May 16, 1983); W.M. Alexander, Court Administrator, Fifth Circuit (Mar. 14, 1983); Robert E. Beach, Chief Judge, Sixth Circuit (Mar. 4, 1983); Elizabeth Gardner, Deputy Court Administrator, Seventh Circuit (Mar. 15, 1983); Ben E. North, Court Executive Assistant, Eighth Circuit (Mar. 25, 1983); C.E. Limpus, Jr., Court Administrator, Ninth Circuit (Mar. 7, 1982); W.D. Wilcox, Court Administrator, Tenth Circuit (Mar. 9, 1983); Ruben O. Carrerou, Director of Operations, Eleventh Circuit (Aug. 16, 1983); Fay P. Rice, Assistant Court Administrator, Twelfth Circuit (Mar. 8, 1983); Frank Alfonso, Jr., Court Administrator, Thirteenth Circuit (Mar. 30, 1983); R. Robert Brown, Court Administrator, Fourteenth Circuit (Mar. 4, 1983); Peggy Compiani, Secretary to Court Administrator, Fifteenth Circuit (Apr. 20, 1983); Frederick H. Eley, Deputy Court Administrator, Seventeenth Circuit (Sept. 16, 1983); William G. Deitz, Executive Assistant to Chief Judge, Eighteenth Circuit (Mar. 4, 1983); David B. Douglas, Court Administrator, Nineteenth Circuit (undated); William D. Wilkenson, Jr., Court Administrator, Twentieth Circuit (Mar. 23, 1983); Michael M. Switzer, Assistant General Counsel, Public Employees Relations Commission (Apr. 18, 1983); Thurman D. Burnett, Chief, Bureau of Unemployment Compensation (Apr. 15, 1983); Thomas C. Oldham, Assistant Director, Division of Administrative Hearings (Jan. 26, 1983).

In footnotes 35-81, reference will be made to this correspondence, indicating the name, title, and the judicial circuit or administrative agency designation. Copies of the correspondence are on file with the authors and with the *University of Miami Law Review* office.

34. "Florida has emerged as an increasingly important state. It has, in fact, surpassed California as the premier bellweather state." Naisbitt & Kuypero-Denlinger, *Why the Future Belongs to Florida*, 25 FLA. TREND 50, 52 (Apr. 1983). In the legal realm, Florida has also broken ground in the area of interest on legal trust accounts. See Krawso, *IOLTA programs gaining momentum*, 67 JUDICATURE 49 (June/July 1983); Rivlin, *I.O.L.T.A. Gains Momentum Nationwide*, 69 A.B.A. J. 1036 (Aug. 1983); and in allowing cameras in the courtroom, *Chandler v. State*, 449 U.S. 560 (1981); Smith & Powell, *Fair Trial—Free Press: The Camera in the Courtroom Dilemma Continues*, 3 NOVA L.J. 11 (1979).

35. Those circuits that use telephone hearings more frequently are the 1st, 3rd, 5th, 6th, 11th, 13th, 16th, 17th, 18th, and 20th. Those that use it less frequently are the 2nd, 7th, 10th, 12th, 14th, and 15th. See *supra* note 33.

early as the mid-1970's.<sup>36</sup> Only a small minority of circuits reported no use of the practice in any fashion.<sup>37</sup> Of those indicating that the practice has been permitted, six reported that the practice was relatively infrequent.<sup>38</sup> The most extensive use of the practice is in the Eighteenth Circuit. This is probably due to the fact that it is a long circuit with four population centers, each served by a functional courthouse.<sup>39</sup> The circuit's adoption of elaborate rules for allowing telephone hearings has facilitated its use.<sup>40</sup> As a result, the practice appears to be common to all judges in the circuit.<sup>41</sup> Several jurisdictions reported that the use of telephone hearings is restricted to relatively simple, non-testimonial matters.<sup>42</sup> Others have tried limited taking of testimony with success.<sup>43</sup> Several jurisdictions, particularly those with outlying courthouses, report that they allow first appearances to be made by telephone.<sup>44</sup> Generally

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36. Judge John R. Beranak, then of the Fifteenth Judicial Circuit, now of the Fourth District Court of Appeal, issued a Notice of Instruction concerning telephone hearings in early 1976. A copy is on file with the authors and the *University of Miami Law Review* office.

37. Correspondence from W.M. Alexander, Court Administrator, Fourth Circuit; Ben North, Court Executive Assistant, Eighth Circuit; C.E. Limpus, Court Administrator, Ninth Circuit, David Douglas, Court Administrator, Nineteenth Circuit. *See supra* note 33.

38. *See supra* note 33.

39. *See* 56 FLA. B.J. at 261-63 (Directory Issue, Sept. 1982).

40. *See* memorandum from Philip F. Nohrr, President of the Brevard County Bar Association, to its members, June 25, 1980. A copy is on file with the authors and the *University of Miami Law Review* office.

41. FLORIDA JUDGES HANDBOOK § 4.7 (1981).

42. Correspondence from Nancy Summersill, Deputy Court Administrator, Third Circuit; Elizabeth Gardner, Deputy Court Administrator, Seventh Circuit. *See supra* note 33.

43. Correspondence from Ray Helms, Court Administrator, First Circuit; Robert Beach, Chief Judge, Sixth Circuit. *See supra* note 33 and *infra* note 77.

44. Correspondence from W.D. Wilcox, Court Administrator, Tenth Circuit; R. Robert Brown, Court Administrator, Fourteenth Circuit. In the authors' experience, the Sixteenth Circuit also uses this practice. An informal opinion of an Assistant Attorney General notes that the issue had never been litigated, but discourages the practice. *See Re: Opinion Request on Whether a Judicial Officer May Conduct a First Appearance Hearing by Phone Conference*, advisory opinion of John W. Tiedemann, Assistant Attorney General to Marc A. Cianca, County Judge (February 22, 1983). The Assistant Attorney General's concerns centered on the appearance of assembly-line justice and questioned whether this constitutes an appearance as required by FLA. R. CRIM. PRO. 3.130(b)(1). *Id.* at 1-4. The authors share this concern but feel that the opinion ignores the utility of teleconferencing for first appearances to both the court and the defendant. Certainly not every case (e.g., murder or drug trafficking) is appropriate for a telephone first appearance. However, a DUI defendant, in a circuit where the weekend duty judge is 50 miles away, would probably prefer a telephone first appearance to the wait for transportation to the judge.

One of the authors uses teleconferencing for first appearances extensively. Normally, the practice is restricted to misdemeanors and third degree felonies. Cases involving more serious offenses, complicated fact patterns, and multiple charges are not done in this manner. All normal first appearance procedures are complied with when utilizing the telephone.

speaking, circuits with several courthouses spread over large distances<sup>45</sup> were more likely to use the practice than those whose legal infrastructure is concentrated around a central courthouse.<sup>46</sup> The stimuli of one or more judges enthused over the practice makes quite a difference.<sup>47</sup> One jurisdiction reports that early and frequent use of the practice declined significantly when the propounding judge left the circuit.<sup>48</sup>

Facing ever greater distance problems, the Division of Administrative Hearings of the Florida Department of Administration uses telephone hearings extensively. Administrative hearings are generally held in Tallahassee, but involve counsel from around the State. The division allows telephone hearings for procedural matters, but indicates that there is "no apparent legal obstacle" to holding the hearings themselves in this fashion, though it is not now its practice.<sup>49</sup> Other administrative agencies have used telephone hearings even more extensively. The Bureau of Unemployment conducts several thousand appeals a year in this manner,<sup>50</sup> and the practice has been held in context not to be a denial of due process.<sup>51</sup> Still other administrative agencies reported extensive use of telephone hearings.<sup>52</sup>

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The presence of a public defender, and of a court reporter, help to preserve decorum. Finally, each defendant is presented the option of a live first appearance. The author has yet to find a defendant who felt that the telephone hearing was unacceptable; apparently defendants are less bothered by technology than judges and assistant attorney generals.

45. Correspondence from Ray Helms, Court Administrator, First Circuit, R. Robert Brown, Court Administrator, Fourteenth Circuit; David Hawkins, Court Administrator, Sixteenth Circuit; William Deitz, Executive Assistant to Chief Judge, Eighteenth Circuit. See *supra* note 33.

46. The Fourth Circuit does not utilize telephone hearings. Correspondence from W.M. Alexander, Court Administrator, Fourth Circuit. Not surprisingly, a significant percentage of its bar is located within a few miles of its principal courthouse. *Id.*

47. Generally, this enthusiasm was gained while in practice, before assuming the bench. See *Lady Justice*, *supra* note 12, at 57.

48. Correspondence from Peggy Compiani, Secretary to Court Administrator, Fifteenth Circuit. The author did note a "renewed interest" of late. *Id.*

49. Correspondence from Thomas Oldham, Assistant Director, Division of Administrative Hearings.

50. Correspondence from Thurman Burnett, Chief, Bureau of Unemployment Compensation. Approximately 25 percent of the Bureau's 30,000 annual hearings are conducted by telephone, with great success. *Id.*

51. See *infra* notes 54-55.

52. Correspondence from Michael Switzes' Assistant General Counsel, Public Employees Relations Commission, under the Department of Professional Responsibility, the regulatory boards have made the most extensive use of telephone conference calls to replace public meetings, increasing from five such conference calls in 1979-80 to forty-five in 1981-82. House of Representatives Committee on Governmental Operations, Staff Analysis of FLA. H.B. 1257, 1982 Reg. Sess. at 1. This has been estimated to result in substantial savings

What little case law exists on the subject seems to approve of the use of telephone hearings. Judge Beranek's dicta in *Glades General Hospital v. Louis*<sup>53</sup> proposed a telephonic deposition as a solution to an impasse in a civil case. In *Greenberg v. Simms Merchant Police Service*,<sup>54</sup> the First District Court of Appeal approved the use of telephone hearings in an unemployment appeal case, despite the absence of specific authorization in the statutes or rules of procedure. In the case of *Jamason v. State*,<sup>55</sup> the Fourth District Court of Appeal sanctioned the use of telephones for an issuance of a writ of habeas corpus.<sup>56</sup>

No circuit using the procedure, whether extensively or not, expressed any negative experiences or opinions. Many stressed the potential savings in time and money to out of town counsel and witnesses (or to the counties paying for the witness's appearance).<sup>57</sup> One administrator whose circuit makes extensive use of telephone hearings stated that, "if the State of Florida would use the telephone system more, it would save the counties a tremendous amount of money."<sup>58</sup> An assistant to a court administrator aptly noted that the biggest impediment to its widespread use would be resistance to change by attorneys and judges.<sup>59</sup>

It is interesting to note that similar efforts are underway to expand the use of teleconferencing in the legislative and executive branches of Florida government.<sup>60</sup>

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primarily due to lower travel expenditures: \$350 cost for a meeting conducted by telephone versus \$2,750.00 for a face-to-face meeting. *Id.* at 3.

53. 411 So. 2d 1318, 1320 (Fla. 4th DCA 1981) (Beranek, J., concurring specially).

54. 410 So. 2d 566 (Fla. 1st DCA 1982). The Court relied upon and cited extensively from *Slattery v. California Unemployment Ins. Appeals Bd.*, 60 Cal. App. 3d 245, 131 Cal. Rptr. 422 (Ct. App. 1976).

55. 447 So. 2d 892 (Fla. 4th DCA 1983).

56. The court noted that such practices "demand the exercise of judicial discretion to a high degree." *Id.* at 896. The following question was then certified to the Supreme Court of Florida pursuant to FLA. CONST. art. V, § 3(b)(4); "Whether the willful refusal to obey a telephonic order (in the nature of a writ of habeas corpus) issued by a court of general jurisdiction, and based upon an oral application therefore by an attorney for the individual said to illegally restrained, may constitute criminal contempt." *Id.* at 896.

57. Correspondence from Ray Helms, Court Administrator, First Circuit; Dozier Allen, Court Administrator, Second Circuit; Fay Rice, Assistant Court Administrator, Twelfth Circuit. See *supra* note 33.

58. Correspondence from Ray Helms, Court Administrator, First Circuit.

59. For an excellent discussion of all the various impediments encountered in the implementation of the use of telephone hearings, see Chapper, *supra* note 12.

60. *Senator Nudges State to Leap into Information Age*, Miami Herald, Jan. 23, 1983, § D, at 1, col. 1. This article noted the efforts of Senator Edgar Dunn (D.-Ormond Beach and member of the Florida Bar) to cut state travel budgets by widespread adoption of teleconferencing as a substitute for face-to-face meetings. See also *infra* note 69.

## II. PROCEDURES

Florida has no uniform, statewide regulations controlling telephone hearings. There are no directly controlling provisions in the Florida Statutes or the rules of civil or criminal procedure.<sup>61</sup> Only one circuit has uniform, circuit-wide rules regulating the practice.<sup>62</sup> Regulation is generally achieved on an *ad hoc* basis, or by rule adopted by each judge, stipulation of the parties, or by a combination of these. Accordingly, there is great variation. Some courts require stipulation of the parties,<sup>63</sup> others require only notice,<sup>64</sup> others have procedures for the practice even over the objection of one side or the other.<sup>65</sup> Some courts limit the use of telephone hearings to simple non-evidentiary matters,<sup>66</sup> while still others allow the taking of testimony in limited instances.<sup>67</sup>

Comments by those persons interviewed indicate that there is a reluctance to interfere with a method that works well. One administrator whose circuit uses the practice summed up the circuit judges' feelings by stating, "If it ain't broke, don't fix it."<sup>68</sup>

It probably serves the needs of all concerned to continue to allow local experimentation in this area so that various techniques may be tried. It is equally clear that the trend toward uniform statewide standards has begun. A state statute adopted in the 1982 session mandated the adoption of rules of procedure by all administrative agencies using teleconferencing for public meetings and hearings.<sup>69</sup> Any statewide procedures must balance the need for

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61. Nor is there a controlling provision in the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence. Annot., 80 A.L.R. 3d 1212, 1213 (1977). However, telephonic search warrants are authorized. FED. R. CRIM. P. 41(c)(2). A few states have adopted statewide regulations governing telephone hearings. WASH. R. APP. P. 17.5(e); MICH. GEN. CT. R. 1963, 917.

62. See Correspondence from William G. Deitz, Executive Assistant to the Chief Judge, Eighteenth Circuit, *supra* note 33.

63. Correspondence from Nancy K. Summersill, Deputy Court Administrator, Third Circuit, *supra* note 33; Fred F. Hooten, Court Administrator, Fifth Circuit, *supra* note 33.

64. Correspondence from William D. Wilkinson, Sr., Court Administrator, Twentieth Circuit, *supra* note 33.

65. Correspondence from Philip F. Nohrr, President of the Brevard County Bar Association (June 25, 1980) (available in *University of Miami Law Review* office).

66. Correspondence from Elizabeth Gardner, Deputy Administrator, Seventh Circuit; *see supra* note 33.

67. Correspondence from Ray C. Helms, Court Administrator, First Circuit; *see supra* note 33; Robert E. Beach, Chief Judge, Sixth Circuit; *see supra* note 33. *See supra* note 22 and accompanying text.

68. Correspondence from William D. Wilkinson, Sr., Court Administrator, Twentieth Circuit, *supra* note 33.

69. 1983 Fla. Laws ch. 82-273, §§ 2, 3 amended FLA. STAT. § 120.52 to add: "Communi-

positive regulation to implement the approach where it may not be well received with the need to guard against stifling local initiative.<sup>70</sup>

### III. ISSUES

Whether regulated on an *ad hoc* basis, by local rules, or ultimately, by state-wide rules, there are certain issues raised in the context of telephone hearings that we must address. Some of these issues are philosophical and some are practical. Foremost among them is the determination of the types of matters to be conducted by telephone. Because telephone conferencing by speakerphone theoretically is adaptable to any legal context, including trials,<sup>71</sup> or even on the appellate level,<sup>72</sup> certain threshold decisions must be made.

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cations media technology' means the electronic transmission of printed matter, audio, full motion video, freeze-frame video, compressed video, and digital video by any method available."

The bill further amended FLA. STAT. § 120.53 to add:

(6) Each state agency, as defined in s. 216.011, shall adopt rules providing a procedure for conducting meetings, hearings, and workshops, and for taking evidence, testimony, and argument at such meetings, hearings, and workshops, by means of communications media technology. The rules shall provide that all evidence, testimony, and argument presented shall be afforded equal consideration, regardless of the method of communication. If a meeting, hearing, or workshop is to be conducted by means of communications media technology, or if attendance may be provided by such means, the notice shall so state. The notice for meetings, hearings, and workshops utilizing communications media technology shall state how persons interested in attending may do so and shall name locations, if any, where communications media technology facilities will be available. Nothing in this subsection shall be construed to diminish the public's right to inspect public records under chapter 119. Limiting points of access to meetings, hearings, and workshops subject to the provisions of s. 286.011 to places not normally open to the public shall be presumed to violate the right of access of the public, and any official action taken under such circumstances is void and of no effect. Other laws relating to public meetings, hearings, and workshops, including penal and remedial provisions, shall apply to meetings, hearings, and workshops conducted by means of communications media technology, and shall be liberally construed in their application to such meetings, hearings, and workshops.

The Act took effect October 1, 1983. The office of the Florida Attorney General has drafted model rules to implement the statute. Correspondence from Percy W. Mallinson, Jr., Assistant Attorney General to J. Allison DeFoor, II (June 30, 1983) (available in the *University of Miami Law Review* office).

70. See Chapper, *supra* note 12.

71. See *Lady Justice*, *supra* note 12, at 46; see Goebel, *Telephone Conferencing in a State Trial Court*, 20 JUDGES J., 46 (Spring 1981).

72. See *Lady Justice*, *supra* note 12, at 46; see Hendley, *Telephone Conferencing in an Appellate Court*, 20 JUDGES J., 45 (Spring 1981).



Depositions are one logical area of application. If the court reporter and witnesses are together in a place equipped with speakerphones, it is conceivable that the attorneys could be anywhere else in the world.<sup>73</sup>

As to telephone use in hearings, the threshold decision is whether evidentiary matters will be heard or whether the use will be restricted to non-evidentiary matters. All jurisdictions allowing telephone hearings allow them for non-evidentiary hearings. Indeed, it is for the routine non-testimonial hearing that the telephone hearing is best suited.<sup>74</sup>

In California and New Mexico, full-blown evidentiary hearings in administrative matters are being conducted with great success.<sup>75</sup> The witnesses testify from one or more places while the hearing officer sits elsewhere.<sup>76</sup> One of the authors has experimented in using telephone hearings in small claims cases. Upon stipulation of the parties, an entire trial was conducted in this fashion, with the court in Plantation Key, the plaintiff in Key Largo, and the defendant in Sarasota.<sup>77</sup> It is doubtful that a serious criminal or civil matter would be conducted in this manner, though there are aspects of any trial that might be so conducted. Expert testimony seems particularly well-suited for this approach. Even if telephone

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73. See Haerberle, *supra* note 13, at 60-63. Cf. *Glades General Hosp. v. Louis*, 411 So. 2d 1318, 1320 (Fla. 4th DCA 1981) (Beranek, J., concurring specially). One of the authors used this technique while serving as narcotics prosecutor in the Florida Keys, a jurisdiction covering 120 miles and three courthouses. After two months of driving down a busy federal highway attending depositions of a small pool of law enforcement personnel, it became apparent that there had to be a better way. Speakerphones were installed at each courthouse allowing attendance by counsel at depositions attended on-site by the witnesses, court reporter, and defense counsel. On one occasion, the defense counsel and the prosecutor were present in their respective offices in Key West deposing a single witness for 15 minutes in Marathon, Florida, some 45 miles (and one hour's drive) away. The savings are apparent.

74. See *Lady Justice*, *supra* note 12, at 40, 42, 48-49.

75. See *California Experience*, *supra* note 16 at 247-48; *Pilot Study*, *supra* note 27.

76. See *California Experience*, *supra* note 16 at 252.

77. *Key Lane Supply, Inc. v. Leach*, No. 83-26-SP-16 (Monroe County Ct. June 1, 1983). In this case, both sides requested that the case be heard in their home counties (Monroe for the plaintiff, and Sarasota for the defendant), and the amount in issue (\$517.67) precluded a trial in the other's choice of forum. After stipulation by both parties to a telephone trial, the court's pre-trial order directed each side to be available by phone at a pre-arranged time, with a witness and a notary public present, for determining the identity and the swearing in of witnesses.

The testimony of the parties and of one supplement witness was taken. After a ruling on liability, an amicable settlement was achieved. After the case, the plaintiff communicated to the court that "[t]he idea of a telephone hearing such as you conducted is clearly recommended. The savings in time and expense means all the difference in the world on small cases such as this." Correspondence from Saul Lane, of Key Lane Supply, Inc., to Judge J. Allison DeFoor, II (June 9, 1983) (available in the *University of Miami Law Review* office).

hearings are restricted to non-testimonial matters, it does not significantly limit the application of telephone conferencing to most cases. Few cases today, whether civil or criminal, involve trials, but virtually all involve one or more non-testimonial court appearances.<sup>78</sup>

A closely related issue is the complexity of matters to be argued by telephone. Even if limited to non-evidentiary motion practice, are all motions arguable in this fashion? Although routine matters are ideally suited for telephone hearings, it is less clear whether the resolution of complex, detailed legal issues is suited for telephone practice.<sup>79</sup> Furthermore, the question arises whether the court will permit "split" hearings—in which one counsel appears by phone and the other appears in person.<sup>80</sup>

A final question is whether telephone hearings will be allowed only upon the stipulation of the parties. Counsel should be allowed the option of appearing in person. Should counsel be able to prevent opposing counsel from conducting his or her portion by telephone? On the one hand, the objections may be legitimate based upon the complexity of the issues raised; on the other hand, an ill-founded objection should not be allowed to needlessly inconvenience opposing counsel. The Eighteenth Circuit, which has the most sophisticated rules regarding telephone hearings, provides for the resolution of such disputes between opposing counsel by permitting courts to hold a telephone hearing over one attorney's objections.<sup>81</sup>

It should be remembered that telephone hearings remain only a tool to be applied for the convenience of the parties or the court. Even where this technique is used frequently, it has not replaced live courtroom practice.<sup>82</sup>

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78. See *Lady Justice*, *supra* note 12 at 40.

79. *Id.* at 48-49.

80. Attorneys are often concerned about split hearings, presumably because of the possibility that the attorney physically present might gain some advantage over the attorney appearing by telephone. This might occur because the party physically present is able to observe the judge's reaction to argument. See *Telephone Hearings*, *supra* note 14, at 411. The mirror image of this concern would be the ability of the party present to communicate silently, with body language (rolled eyes, shrugged shoulders, or even finger clasp his nose). The authors whimsically have dubbed this the "Chevy Chase" factor, after the actor who formerly appeared on NBC's "Saturday Night Live." One of his acts consisted of such conduct, carried on behind the back of his foil, Roseann Roseannadana.

81. Correspondence from Philip F. Nohrr, President of the Brevard County Bar Association, *supra* note 40, 1.

82. "Even heavy users of telephone conferencing estimate that only 40 percent of the court's motion hearing [sic] was conducted by phone." See *Lady Justice*, *supra* note 12, at

## IV. PRACTICAL MATTERS

Beyond these broad philosophical considerations, there are more mundane, though vital, practical considerations to the successful use of telephone conferencing as a legal tool. Provision must be made for adequate notice, so that stipulations or objections are known and dealt with, in case the court is willing to proceed over the objection.

Another fundamental practical consideration is who initiates and pays for the call. Common sense would dictate that the moving party initiate and pay for the call. The problem arises in integrating a 10:00 A.M. telephone hearing, for example, with a judge's actual schedule, which may or may not run on time. Do the parties wait on hold, or is the judge's current hearing to be interrupted? Some judges have dealt with the problem by scheduling telephone hearings only at certain times.<sup>83</sup> At least one judge prefers to have the parties stand by at designated numbers with the court initiating collect calls.<sup>84</sup>

Once the hearing begins, maintaining order becomes even more vital than usual. Because the nature of conference equipment allows only one voice to be transmitted at a time, procedures must allow only one person to speak at a time. The lack of visual identification dictates that the parties identify themselves prior to speaking in order to protect the record. A scheduled order of argument or questioning could achieve the same end. The potential for confusion is always present and may place practical limits on the number of participants in such a hearing. A similar issue is how to ensure that all documents referred to are before all parties prior to the hearing. Better practice requires opposing counsel to forward copies of all documents and cases to the court prior to the hearing.

If the testimony is taken, the problem of translation may arise. Hearings involving translations are difficult enough even when face-to-face. Experience shows that the problem is not insurmountable,<sup>85</sup> but this context does not seem ideally suited for telephone hearings. Finally, one contemplating the use of telephone hearings must consider the practicalities of the quality of the transmission, the potential for accidental cut-off (and who has the

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83. FLORIDA JUDGES HANDBOOK, § 4.7 exhibits a,b,c (1981).

84. See Correspondence from Peggy Compiani to J. Allison DeFoor, II and enclosure, *Notice—Telephone Conferences Regarding Hearings* (March 8, 1983)(available in the *University of Miami Law Review* office).85. See *Pilot Study*, *supra* note 27, at 501-02.

duty of restoring the connection), and even the availability of lines into a busy courthouse switchboard. Nevertheless, experience in actual practice reflects that such technical problems are rare.<sup>86</sup>

## V. DRAWBACKS

All of the foregoing discussion has ignored the major objections to telephone hearings. The law has historically depended upon face-to-face encounters for a variety of reasons.<sup>87</sup> The United States<sup>88</sup> and Florida<sup>89</sup> constitutions each contain a right to confrontation, and the Florida Statutes<sup>90</sup> and Florida Rules of Criminal Procedure<sup>91</sup> contain similar provisions. Whether these provisions would prohibit an evidentiary hearing over the objections of a party is an open question, turning ultimately on the meaning of words like "appearance" and "confrontation" in an electronic age.

Many express a qualitative concern over the inability of the listener, whether judge or counsel, to observe the speaker. This would be particularly true of witnesses. What judge or counsel would deny that he picks up insight from the body language of opposing counsel in argument? The concern of some counsel has been the inability to see the judge's reaction to the arguments presented.<sup>92</sup> The ability to evaluate a witness's demeanor is important in factual problems. These problems suggest a limit to the widespread use of telephone hearings involving evidentiary matters.

An interesting counterpoint, however, to traditional assumptions in this area is recent research indicating that listeners are better able to detect lying audibly only, as opposed to visually and

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86. See *Lady Justice*, *supra* note 12, at 49.

87. "The classic model of litigation in American courts involves the resolution of cases through proceedings in which the judge, counsel for the parties, and sometimes the parties themselves and potential witnesses all are present in the courtroom." *Lady Justice*, *supra* note 12, at 40. See also *Telephone Hearings*, *supra* note 14, at 408.

88. U.S. CONST. amend. VI.

89. FLA. CONST. art. I, § 16. The same section contains a correlative right to be heard in person, by counsel or both. *Id.* While no such wording appears in the federal Constitution, the Supreme Court has held it to be implicit. See *Faretta v. California*, 422 U.S. 806 (1975).

90. *Cf.* FLA. STAT. § 90.801 (1983) (defines hearsay that is inadmissible except as provided by statute). FLA. STAT. § 90.802 (1983). Hearsay is generally inadmissible because it denies the party against whom it is admitted the opportunity to confront and cross-examine the person who made the original statement. J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1362 (1983).

91. *Cf.* FLA. R. CRIM. P. 3.180 (calling for the defendant to be "present," therefore assuring the ability to confront witnesses).

92. See *supra* note 80.

audibly.<sup>93</sup> Visual stimuli may, in fact, inhibit the ability to detect lying. Of course, with the advent of technology that permits audio and visual appearances, these objections may become moot.

Finally, there is an unspoken fear that anything but a dramatic courthouse occasion has a demeaning effect and otherwise lessens the impact of any legal proceeding. But what damages the system more, a state attorney attending depositions by telephone while working in his office, or one who, as is so common today, does not attend at all? Would telephone hearings of routine matters that eliminate charges for time wasted in transit, harm a system in which a vast majority of our citizens cannot afford the services of lawyers? Can we ignore so obvious an application of technology and economy to our profession?

## VI. FUTURE

The application of existing telephone technology to legal practice, particularly hearings and depositions, offers great potential savings in judicial and legal time. But it is just the beginning. The technology that allows audio/visual telephoning is already here<sup>94</sup> and in use in selected cities. In Dade County, prisoners are "brought before" a committing magistrate for a first appearance via television, the prisoner sitting in one building and the judge in another. Already, one state supreme court has found that the confrontation requirements of the United States Constitution does not prohibit this type of "appearance" of a witness in a criminal case.<sup>95</sup>

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93. See *California Experience*, *supra* note 16; Haeberle, *supra* note 13, at nn. 68-69.

94. See Haeberle, *supra* note 13.

95. In *Kansas City v. McCoy*, 525 S.W.2d 336 (Mo. 1975), the defendant was charged with violation of a municipal ordinance proscribing the possession of marijuana. In what clearly was intended as a test case, the chemist was allowed to testify from his office, appearing in court by means of an audio-visual hook-up. This was all done over the objections of the defense. The *McCoy* Court found that this did not violate the confrontation clause of the United States Constitution. *Id.* at 339. The court reasoned that the primary purpose of the clause was the prevention of the evil of testimony by means of *ex parte* affidavits, and that this evil was avoided by the audio-visual appearance of the witness, which allowed the trier of fact to perceive his demeanor and the opposing counsel to examine him. *Id.* at 338-39. The court relied on some interesting language in *Douglas v. Alabama*, 380 U.S. 415 (1965): "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *Id.* at 418. The *McCoy* court went on to state:

We have the view that to require the *physical* presence of an expert witness against one accused of violating a municipal police regulation would be to require more than the confrontation clause rights of an accused demand in many instances of prosecutions for felonies. Today we have means of communication

The application of such technology to the legal profession promises a virtual revolution in the way trials and hearings are conducted.<sup>96</sup>

## VII. CONCLUSION

As the legal profession, and virtually all of American society, weighs the cost effectiveness of telephone conferencing in the coming years, there is no doubt that innovation will occur. The introduction of technology is already restructuring American law offices. This trend is manifesting itself in the judiciary by the increasing use of telecommunication as a means of appearance in hearings and depositions. The telephone hearing is most applicable to routine, non-evidentiary matters but has some use in more serious matters. In the future, video capability in telephone communication may revolutionize the meaning of a court "appearance."

J. ALLISON DEFOOR, II\*  
ROBERT N. SECHEN\*\*

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not available only a few years ago. We can now by electronic means project the image and voice of man clearly and distinctly at the speed of light and control that means and ensure its integrity by closed circuit and monitors. While Dr. Young was not physically present in the courtroom, his image and his voice were there; they were there for the purpose of examination and cross-examination of the witness as much so as if he were there in person; they were there for defendant to see and hear and, by the same means, simultaneously for him to be seen and heard by the witness; they were there for the trier of fact to see and here and observe the demeanor of the witness as he sat miles, but much less than a second, away responding to questions propounded by counsel.

*McCoy*, 525 S.W.2d at 339. *Cf. Hutchins v. State*, 286 So. 2d 244 (Fla. 3d DCA 1973) (prior to the rule allowing videotaped depositions, a court-ordered videotaping of an unavailable chemist testifying in a criminal prosecution did not deny that defendant the right to confront and cross-examine the witnesses against him, where the defendant was present at the deposition and was given the right to cross-examine) (emphasis in original). *Compare State v. Brashire*, 353 So. 2d 820 (Fla. 1977) (use of deposition of victim unavailable due to death from natural causes violated the criminal defendant's right of confrontation); *with State v. James*, 402 So. 2d 1169 (Fla. 1981) (deposition of victim, unavailable for trial because of death, not admissible at trial).

96. See generally Eliot, *The Video Telephone in Criminal Justice: The Phoenix Project*, 55 U. DET. J. URB. L. 721 (1978); Gilmore, *Arraignment by Television: A New Way to Bring Defendants to the Courtroom*, 63 JUDICATURE 396 (1980).

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# Telephone Conferencing in Criminal Court Cases\*

## I. INTRODUCTION AND BACKGROUND

As a response to the call for judicial efficiency, selected criminal trial courts of general jurisdiction were the sites for a research project that explored telephone conferencing.<sup>1</sup> The research component of the project, undertaken in conjunction with state and local officials and the American Bar Association Action Commission to Reduce Court Costs and Delay and the Institute for Court Management (ICM),<sup>2</sup> was designed to identify the conditions under which telephone conferencing is feasible, and to gauge the advantages and disadvantages of the procedure for the court, the attorneys, and the defendants.

The idea for the pilot program grew out of related applications of telephone conferencing in administrative fair hearings.<sup>3</sup> Telephone conferencing was proved an efficient alternative to in-person proceedings that require hearing participants to travel considerable distances. Moreover, the telephone conferencing proceedings were as satisfactory as in-person proceedings for the various participants.

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1. A telephone-conference court hearing is a three-way conversation between a judge located in chambers and two attorneys located in their respective offices. The judge listens to the attorneys through a speakerphone, which also facilitates the record being made by a court reporter. Clients may be present with their attorneys, although in many instances they do not participate in the hearing.

2. The ABA Action Commission is a sixteen member body established in 1979 for the purpose of designing, implementing, evaluating, and disseminating new court procedures that reduce the cost of litigation. Telephone conferencing is one of the Commission's project areas with more complex programs aimed at reducing overall trial court delay, expediting appellate cases, deterring discovery abuse, and activating state and local bar groups to initiate their own cost and delay reduction programs. ICM is a private, nonprofit organization located in Denver, Colorado. Established in 1970, ICM's main goal is to train judges, court administrators, and lawyers in the tools of court management through a combined program of training, research and technical assistance.

3. Corsi, *The Use of Telephone Conferencing in Administrative Fair Hearings: Major Findings of the New Mexico Experiment with Welfare Appeals*, (1981) (available in University of Denver Law School library); Corsi, *The Use of Telephone Conferencing in Administrative Fair Hearings: Major Findings of the New Mexico Experiment with Unemployment Insurance Appeals*, (1981) (available in University of Denver Law School Library).



The success of the administrative fair hearings project led to an exploratory study of the current use of telephone conferencing in America's court systems, with a special focus on civil litigation. Research uncovered a sporadic utilization pattern with individual judges in selected jurisdictions conducting a variety of civil court matters by telephone conferencing.<sup>4</sup> Because there was virtually no documentation of the effects of telephone conferencing in these jurisdictions, the Action Commission and the ICM designed a policy research project to explore the range of suitable applications and to answer many of the basic questions concerning the consequences of telephone conferencing on the time, cost and quality of court proceedings.

The Action Commission and the ICM approached court officials and bar groups in Colorado and New Jersey with a plan to try the new procedure in a variety of court settings. The proposal initially focused on the use of telephone conferencing in civil cases with a primary emphasis on motion hearings. After preliminary results identified time savings for attorneys, cost savings to the litigants, and no undue burdens for judges and court staff,<sup>5</sup> the same courts were asked to consider a parallel project in criminal cases.<sup>6</sup>

While the civil telephone conferencing project indicated the acceptability of the procedures to judges and attorneys, uncertainty existed regarding its use in the criminal arena. First, unlike civil applications where the litigants frequently do not attend pre-trial hearings, the criminal defendant has a right to be present at all critical stages of the proceedings. Although this right may be waived, the defendant's presence is making a factor that made criminal telephone hearings more complicated than the three-way conversations among judges and the two attorneys for civil litigants.<sup>7</sup>

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4. Hanson, Olson, Shuart, Thornton, Chapper & Mahoney, *Telephone Conferencing in Civil and Criminal Court Cases* (Mar. 1984) (available at the National Institute of Justice, Washington, D.C.).

5. Hanson, Olson, Shuart & Thornton, *Telephone Hearings in Civil Trial Courts: What Do Attorneys Think?*, 66 JUDICATURE 408 (1983).

6. The criminal courts include Cumberland and Atlantic Counties in New Jersey, and the Second, Twelfth, and Twentieth Judicial Districts in Colorado. The New Jersey sites were, at the time of study, part of the Atlantic Vicinage which then consisted of the four southernmost counties of that state. The Atlantic Vicinage has since been reorganized and now includes only two of the counties. Denver is Colorado's Second Judicial District. The Twelfth District, a six-county jurisdiction located in the southern part of the state, has two principal courthouses in Alamosa and Del Norte. Boulder, a suburb of Denver, is the Twentieth District.

7. Although there are numerous grounds on which the legality of telephone hearings in

A second reason for questioning the efficiency of telephone conferencing in criminal matters was that district attorneys and public defenders generally had many hearings to handle each day. As a result, their continuous presence at the courthouse raised the issue whether they would save travel or waiting time by the use of telephone conferencing.

Finally, attorneys and judges in criminal cases are sensitive to both the seriousness of the charges brought against the defendant and the possible sanctions that may be imposed. This sensitivity makes judges and attorneys more cautious in designing operational procedures and in selecting appropriate matters for telephone conferencing in criminal cases than in civil cases.

Despite these meritorious concerns, evidence from the pilot sites indicated that the new procedure worked well for a wide range of matters and was advantageous to all of the participants. The criminal court experiences corresponded to the previous civil court results and led to the conclusion that telephone conferencing was an idea whose time had come. Other courts which introduce telephone conferencing systems will probably achieve the same kind of positive results found in the pilot tests.

The purpose of this article is to highlight the essential findings from the Colorado and New Jersey criminal court experiences.<sup>8</sup> Section II describes the kinds of matters handled by telephone, the conditions under which telephone hearings were held, and the guidelines followed by the courts in conducting telephone conferences. Section III reviews the reactions of the attorneys and judges to the innovation. In Section IV, suggestions are made as to how and why certain procedures commonly used in criminal trial courts may have to be modified in order to achieve maximum benefits from telephone conferencing.

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courts and other public bodies may be challenged, litigation attacking the procedure in general, or its application in specific cases, has been limited. A recent Virginia case challenged the legality of the Roanoke School Board holding meetings by telephone conference. *Roanoke City School Bd. v. Times-World Corp.*, 226 Va. 185, 307 S.E.2d 256 (1983). Plaintiffs argued that such a practice violated the state's Freedom of Information Act. The Virginia Supreme Court, however, ruled that the Act does not ban telephone conferences, and, that if the state legislature intended the Act to apply to telephone conferencing, it would be necessary to amend the statute. Sherwood, *Information Act Does Not Bar Teleconferences*, *Va. Court Says*, *Wash. Post*, Sept. 10, 1983, at 1, col. 3.

8. A more complete description of the background of both the civil and criminal court projects is available elsewhere. See Hanson, *Evaluation of Telephone Conferencing in Civil and Criminal Cases* (1983) (available at the Institute for Court Management, Denver, Colo.).

## II. NATURE OF TELEPHONE HEARINGS AND PROCEDURES

Prior to the pilot project, selected courts used telephone conferencing in criminal cases.<sup>9</sup> Telephone conferencing occurred on a regular basis in pretrial conferences (Lakewood Colorado Municipal Court), motion hearings (United States District Court for the Eastern District of New York and New Mexico Court of Appeal), and obtaining testimony from witnesses unable to come to court (Los Angeles Municipal Court). In each of these jurisdictions, judges, through meetings with the prosecutor and the public defender, usually made a determination as to those matters that were potentially appropriate for telephone hearings. The court then drew up preliminary guidelines for scheduling, arranging, and conducting telephone hearings. The court distributed notices of the pilot project, a tentative list of matters, and procedural guidelines to the attorneys through bar association newsletters, and documents made available in the individual courtrooms.

In criminal telephone hearings, as in in-person criminal hearings, defendants did not always participate either because their presence was not required for a particular hearing or because they waived their right to be present. In other cases, defendants on bond participated with their attorneys by telephone from their attorneys' offices, and incarcerated or hospitalized defendants also appeared by telephone. Rarely did an attorney participate in a telephone hearing without his client's consent.

Because of the willingness of the judges and the attorneys to propose telephone hearings, the range of matters that proved suitable for telephone hearings was extensive. The criminal court business that was handled included substantive, procedural, and discovery-related matters. The matters heard by telephone conferencing at various stages of the criminal process, included (in order of their frequency): municipal court appeals; entry of pleas; sentencing; motions (e.g., discovery-related motions, motion to expunge prior criminal record, motion to sequester a jury, motion to continue a jury trial); show cause hearings on bond forfeiture; questions from a jury; bail review hearings; witness testimony; and miscellaneous (e.g., issuance of a court order, filing of government papers, discussion of amended statute, disposition hearing, habeas corpus return).

Although telephone conferencing was regularly used in these areas, it often was not used exclusively in handling a particular

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9. See *supra* note 4.

type of criminal matter. An exception was municipal court appeals in New Jersey, where it was the presumed mode. In most instances, these hearings involved a private defense counsel and a defendant on bond. Telephone conferencing created time savings because defense counsel were generally located at a distance from the courthouse, and the defendant avoided both travel and waiting time. Although these factors may have made the telephone hearings in these instances desirable, there were additional factors that contributed to their regular use. For example, municipal court appeals are based on the lower court record and involve neither new evidence nor testimony from the defendant. Thus, telephone conferencing seemed reasonable to the defendants.

Telephone hearings were prearranged or handled spontaneously as situations arose. Telephone conferencing was used in criminal cases in the following specific instances:

1. One judge, unable to appear in court because of illness, conducted her entire day's schedule of miscellaneous matters by telephone from her home. The prosecutor, defense attorneys, and defendants, who were scheduled to appear in court that day, participated in the hearings from the judge's chambers by speakerphone.
2. A telephone hearing was conducted in which a defendant appeared by telephone from his bed at the state hospital.
3. A statement was given over the telephone by a defendant who was incarcerated in an out-of-state federal detention center. This eliminated the necessity and potential risks involved in transporting the defendant under guard.
4. Testimony was taken by telephone from a nurse in a hearing on defendant's motion for a new trial. The defendant, public defender, and district attorney were present in the judge's chambers. The nurse underwent examination and cross-examination during the forty-minute hearing. This proved to be a substantial saving of the witness's time.

More generally, telephone conferencing of criminal matters has proven a suitable alternative to in-person hearings in various circumstances. Hearings involving out-of-town lawyers, who would have to travel a considerable distance to appear in court, took place by phone. Routine or uncomplicated matters where there was no compelling reason for the lawyers to come to the courthouse were particularly appropriate for telephone conferencing. Although travel may not be an essential consideration here, the judge or lawyers may simply prefer to dispose of the matter by telephone. Emergency situations, where a matter must be resolved quickly,

and where it would be difficult for the attorneys to get to the courthouse on short notice, were handled rapidly and efficiently.

Moreover, given the proximity of the district attorney to the courthouse, telephone hearings are useful in "split-hearings," where one attorney is at the courthouse and appears in person, while the other appears by telephone. Although the split-hearing is not a telephone conference call involving parties at three (or more) locations, this application of the telephone serves to reduce travel and waiting time for defense counsel.

Telephone conferencing was successful largely because of the use of procedures to ensure the same degree of judicial control, order, and decorum as existed in in-person hearings. Despite the simplicity of the telephone conference calls, judges and court staff are required to perform certain new administrative functions. These include selecting a location for the telephone hearing and setting up the conference call.

Although some telephone hearings were conducted in the courtroom, the majority took place in the judge's chambers. Coordination for a particular telephone hearing between the judge and the staff (e.g., court reporter, division or court clerk) was similar to the coordination required for an in-court hearing. If the hearing was to be a matter of record, a court reporter was present, or, if accessible, audio-recording equipment was used to record the proceeding.

Additionally, the responsibility for initiating and setting up the telephone hearing usually rested with a staff member or a judge. Court initiation, rather than attorney initiation of the conference, allowed more judicial control over the timing of the hearing and eliminated the necessity of routing the call through a telephone company conference operator where the attorney's offices were not equipped with telephone conferencing equipment. Making the court the call-initiator, however, clearly placed more demands on the court staff members.

Another consideration in determining where the conference call was to originate was whether the court had access to a WATS line. This arrangement enabled the courts in New Jersey to absorb more easily the operating costs associated with long-distance telephone calls. Even where courts do not have access to WATS lines, long-distance toll charges should not be an impediment because the call can be court-initiated and the charges reversed to one or both parties.

### III. JUDICIAL AND ATTORNEY REACTION

#### A. *Judges' Reactions*

The willingness of the bench to use telephone conferencing should not be automatically assumed. The most direct beneficiaries of the procedure are the attorneys who save travel and waiting time. The effect of telephone conferencing on the quality of the hearing is an important consideration to the bench and the bar, especially in criminal matters where individual liberty is at stake. Few judges are likely to sacrifice the quality of a hearing simply to save attorneys travel time.

Personal interviews were conducted with participating judges in order to study their views on the use of telephone conferencing for criminal matters. The extent to which the judges used telephone conferencing correlated with their views on the utility of the new procedure. Those who used it most frequently tended to have more positive views, while those who used it less found that it offered fewer advantages to the court, attorneys, and defendants, and that it was a potential source of problems in resolving cases. Greater use may contribute to more positive views, but frequency of use depends on a commitment by judges and courtroom staff to examine pending dockets and carefully isolate likely candidates for telephone hearings. In the courtrooms where telephone conferencing was used most extensively, the innovation gradually became part of the court's case management tools.

Among the advantages that the judges noted was the greater operational efficiency of the court, especially in scheduling flexibility and in time savings. The scheduling flexibility meant convenience in rescheduling hearings. Matters handled by telephone were generally scheduled on the same days that they would have been scheduled for in-court hearings. The judges found that they were able to reschedule these hearings if they or counsel were not available at the prearranged time. Instead of having to reset the matter for the next regularly-scheduled date, the matter could be heard by telephone within a day or two.

The judges also described the time savings that arose from an increased capacity to resolve matters without having to wait for all of the attorneys to arrive at the courthouse. Telephone conferencing enabled the judges to make decisions at the time that a request for a hearing was made, and thus to avoid clogging the calendar with additional matters for future hearing dates.

Another notable benefit to the court is that telephone hearings

do not seem to last as long as in-person hearings. There are several factors that may explain this. One factor, according to the judges, is that interruptions among the attorneys for both sides are less common during telephone hearings than during in-person hearings. In addition, judges believe that attorneys appearing by telephone tend to deliver shorter and more concise presentations of the legal issues than when appearing in court. Finally, because in-court proceedings may serve as a "social" gathering for lawyers and judges, they often extend beyond the actual content of the hearing itself. Dialogue during a telephone hearing tends to be limited to the matter at hand. The judges who used telephone conferences most extensively did not see any disadvantage to the court, counsel, or defendants. They felt comfortable with the new procedure and did not view the use of the telephone as making any difference in the quality of the hearing.

Another group of criminal court judges used the telephone conferencing procedure on a more limited basis. These judges would suggest a telephone hearing in certain instances, for example, if the hearing involved considerable travel for one or more of the participants. The reason for this may be twofold. First, these judges early in the project expressed some reluctance in conducting criminal telephone hearings because they believed that the procedure might actually lengthen the disposition of cases. The judges believed that because the district attorney and defense counsel would not have the same opportunity to discuss issues on the telephone as they would during a recess at court, the chances for early disposal of the case would decrease. Second, these judges handled relatively few criminal cases, and efficiency in the court was simply not a primary motivation for handling matters by telephone. In-court hearings give both the judge and the attorneys an opportunity to discuss informally the status of other cases.

With reference to the quality of the hearings, all of the judges were asked to compare telephone hearings to the traditional in-person hearings on the basis of: the judge's understanding of the issues, the judge's ability to control a telephone hearing, the judge's ability to ask questions, counsel's ability to present an effective argument, and counsel's ability to answer questions. Most agreed that telephone conferencing did not change the proceedings for better or for worse. The judges unanimously agreed that telephone hearings did not alter their understanding of the issues pertinent to the hearing. Furthermore, they overwhelmingly agreed that their ability to ask questions during a telephone hearing was

the same as for in-person hearings. Although there appears to be somewhat less of a consensus, a plurality of the judges believed that their control over a telephone hearing, counsel's ability to answer questions, and counsel's preparation efforts are the same when compared to an in-court hearing.

Finally, in looking at the impact on the defendants, the judges indicated that telephone hearings did not sacrifice the rights or interests of criminal defendants. Again, the judges who used telephone conferencing saw several positive effects and few, if any, negative consequences. The benefits cited include the potential financial savings in the form of lower fees to clients and the possibility of defendants losing less time from work because of the more certain time schedule for telephone hearings.

### B. *Attorneys' Reactions*

At the beginning of the project, several attorneys expressed reservations about the desirability of telephone hearings. Some attorneys offered arguments against all possible applications of telephone conferencing. As an illustration, members of one public defender's office stated that there would be no gain to them by conducting telephone hearings when the defendants are in custody, and there would even be a loss in time or a weakening in relationships with their clients. If a public defender traveled to the jail in order to be with his client during a telephone hearing, this would require more time than is normally required to walk to the courthouse. On the other hand, if the attorney was not with his client, and the defendant "appeared" by telephone from the jail and the attorney "appeared" by telephone from his office, this might diminish the importance of the hearing for the client, lessen the attorney's control over his client, or make the hearing too impersonal for the defendant.

These same attorneys had arguments against telephone hearings for their clients on bond. Although they admitted that a telephone hearing might mean that their clients would lose less time from work by traveling to the law office instead of the courthouse, and that it also might be more convenient than an in-court hearing because of less waiting time, the attorneys nevertheless objected to telephone hearings for clients who were free on bond. They said that if the defendant were at the attorney's office, the defendant would want to discuss the case after the hearing was concluded. This additional time spent with the client was viewed as a burden



and a valid reason for not using the new procedure.<sup>10</sup>

Interestingly, after the procedure was implemented some of the attorneys who were initially skeptical joined the vast majority who were satisfied with the new procedure. Structured interviews were conducted with attorneys on a variety of topics, including their degree of satisfaction, the factors associated with satisfaction, the effects on criminal defendants, and the time and cost savings. The results of the interviews are summarized below.

### 1. SATISFACTION

Most of the attorneys were satisfied with the way that telephone hearings were conducted and saw little difference between in-person and telephone hearings. Of the prosecutors, public defenders, and private attorneys interviewed, ninety percent (83/92) were either "very satisfied" or "somewhat satisfied" with the procedure.<sup>11</sup>

Based on civil court research,<sup>12</sup> we expected that three attitudinal variables would predict satisfaction. They include the attorneys' views on (1) the ability to make an effective oral argument; (2) the ability to answer the judge's questions; and (3) the judge's understanding of the issues. If telephone hearings allowed attorneys to present arguments adequately on these three dimensions, they were likely to be satisfied with the procedure.

Attorneys in both Colorado and New Jersey were likely to view telephone conferencing positively if they believed that the procedure allowed them to present an effective oral argument. Attorneys in New Jersey, moreover, were likely to be satisfied with the hearing if they felt that the judge was just as able to understand the issues in a telephone hearing as in an in-person hearing. Finally, the ability to answer the judge's questions in a telephone

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10. Although the illustrations describing situations in which attorneys were skeptical of telephone conferencing refer to institutional attorneys, we encountered several situations in which district attorneys and public defenders were the leading proponents of telephone hearings. In Colorado's Twelfth Judicial District, covering six large counties, the district attorney and the public defender saw advantages both to their offices and to their clients. By avoiding two hours of travel time, they were able to work on other matters and allow investigators to use the offices' automobiles. Similarly, the use of telephone conferencing for motion hearings in the New Mexico Court of Appeal arose at the request of district attorneys who represent the state in criminal appeals. Because New Mexico is the fifth largest state, the travel savings are considerable.

11. The interview included both open-ended and close-ended questions. The closed-ended questions were generally Likert-scale items with possible answers ranging from "very satisfied" or "strongly agree" to "very dissatisfied" or "strongly disagree."

12. See *supra* note 4.

hearing was found to be a predictor of satisfaction in Colorado.

Factors That Predict Attorney Satisfaction  
with Telephone Hearings<sup>13</sup>

	<u>Colorado</u>	<u>New Jersey</u>
Ability to Present an Effective Oral Argument	.47	.70
Ability to Answer the Judge's Questions	.42	-.01
Judge's Understanding of the Issues	-.14	.76

## 2. TIME SAVINGS

When hearings were conducted by telephone, attorneys saved both travel and waiting time. The round trip travel time was approximately one hour in both states. However, the time saved varied from court to court and state to state. For example, the average travel time saved in Colorado's Twelfth District was four hours,<sup>14</sup> while the average time saved in the Second District (Denver) was one hour. Additionally, the travel time is augmented by avoided waiting time at the courthouse; waiting time was reduced an average of one-half hour in Colorado and nearly an hour in New Jersey. This savings is important because the attorneys indicated that most of the in-court waiting time is spent unproductively. The amount of travel and waiting time saved by institutional attorneys takes on an added dimension when these particular savings are viewed in terms of increased efficiency and the corresponding potential for saving tax dollars.

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13. The numbers in this table are correlation coefficients. A rule of thumb in interpreting these numbers is that 1.0 to .6 indicates a strong relationship, .59 to .3 indicates a moderate relationship, and .29 to .0 indicates a weak relationship.

14. The Twelfth District is a large rural district characterized by mountainous terrain. Therefore, an average four-hour savings time is not unusual for out-of-district attorneys. Even many local attorneys could save 100 miles of travel by automobile.

### 3. EFFECTS OF TELEPHONE CONFERENCING ON DEFENDANTS

Although criminal attorneys may appreciate the opportunity to save time and believe that telephone hearings are properly conducted, they may nevertheless have reservations about telephone conferencing because of its effects on their clients. Our discussions with private counsel and public defenders prior to implementation of the pilot programs revealed several potential problems, including the impersonal nature of a telephone hearing, the lack of opportunity to discuss matters with a client in custody, and the weakening of an already fragile relationship between counsel and client. After introduction of telephone conferencing, however, attorneys handling criminal matters by telephone saw a greater number of advantages than disadvantages to their clients. The representative role of the attorney seemed to make a difference in the types of advantages and disadvantages that the attorney saw. For example, the public defenders saw fewer tangible savings (such as less time and travel) for their clients than did private lawyers. Overall, public defenders saw fewer benefits than did district attorneys and private attorneys. In citing disadvantages, public defenders expressed concern with telephone hearings' effects on their rapport with clients and on the defendants' constitutional rights.

### 4. COST SAVINGS

The cost savings to criminal defendants was not an automatic translation of private counsel's time savings to a proportionate reduction in fees charged.<sup>15</sup> Numerous factors prevent a perfect translation. The highest hurdle was the lawyer's fee structure. Fixed fees were less likely to be adjusted than hourly fees because of reduced time. Nevertheless, when court proceedings were handled by telephone, thirty-eight percent of the Colorado private attorneys and seventy-five percent of the New Jersey private attorneys responded that they did pass on cost savings to their clients. In those instances where the attorneys charged lower fees, the average savings was nearly \$400 in Colorado and \$130 in New Jersey.<sup>16</sup>

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15. The issue of cost savings to criminal defendants is relevant only in cases involving private counsel. The time savings that district attorneys and public defenders realize, however, contributes to greater efficiency, which is beneficial to taxpayers.

16. The larger savings in Colorado are attributed to the extraordinary savings accruing to defendants in the Twelfth District who were represented by counsel from Denver. If the Twelfth District cases are excluded, the average savings in Colorado are much closer to that for New Jersey.

#### IV. ATTAINING REGULAR USE OF TELEPHONE CONFERENCING

Telephone conferencing may be limited to a case-by-case basis at the request of attorneys or at the suggestion of a judge. On the other hand, regular usage maximizes the benefits that accrue to judges, attorneys, and defendants. Unlike civil proceedings, criminal court proceedings often involve a core group of "actors"—prosecutors, public defenders, retained counsel—who are scheduled to be at the courthouse throughout the week, making telephone hearings appear to offer little benefit. Prosecutors' offices are generally located very near to, or within, the courthouse. In addition, where a large proportion of defense work is handled by a public defender's office, the workload often requires public defenders to be in court on a daily basis. The need to be in court so frequently is also the result of a court's scheduling practices. Criminal hearings are scheduled throughout the week, often with no particular day set aside for certain types of matters.

If telephone conferencing is to be used on a regular basis, advance planning is essential. For example, scheduling only matters suitable for telephone conferencing on a specific day may permit a public defender or prosecutor to avoid travel to the courthouse for other in-court matters. This type of scheduling was adopted in Cumberland County, New Jersey. The crucial factor there was the court's familiarity with the institutional office's practices and with those of the private bar. The ability and willingness of the judge and the calendaring clerk to rearrange their own sequences and methods of handling matters enabled telephone hearings to become a viable alternative to in-court hearings.

There was minimal change in the scheduling habits of the Colorado courts after telephone hearings were implemented there; judges and staff members did not alter their regular docketing procedures. A rearrangement of the court's docketing systems, however, may have produced time slots convenient for both prosecutors and public defenders to remain in their offices and conduct pending business by telephone. For example, if matters necessitating in-court appearance could be set on particular days, this would create a greater opportunity for the judge and staff to conduct matters by telephone on other days when it might be convenient for the attorneys to remain in their offices. It should be recognized that this may be difficult to arrange, especially in a smaller-sized court and bar. Regardless of size, however, the administrative effort requires constant communication between the judge and other staff members and the prosecutors, public defenders, and private

counsel.

## V. CONCLUSION

Research studies over the past several years have questioned commonly accepted practices in law enforcement, adjudication, and corrections. Additionally, evaluation reports consistently conclude that reforms fail to be effective and efficient substitutes for existing programs. Consequently, a common lament among policy-makers is that systematic analyses tend to point out the programs that do not work instead of the ones that do. The telephone hearing projects in Colorado and New Jersey offer a counter-example to this trend.

The project's primary focus on pretrial criminal matters raises the issue of its extension to other areas. For example, telephone conferencing has been considered for handling post-trial motions by inmates of state penal institutions. Telephone conferencing eliminates the security problems involved in transporting prisoners to court.

Thus, telephone conferencing is an incremental but important change that courts can introduce to benefit attorneys and defendants without imposing significant costs on the court or compromising the quality of justice. Although careful planning is necessary to integrate the innovation into existing procedures and practices, telephone conferencing in criminal cases is a viable option in the overall scheme to increase judicial efficiency.

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# Telephonic Search Warrants

## I. INTRODUCTION

The history of the interpretation of the fourth amendment<sup>1</sup> is long and complex. Numerous books, scholarly articles, and judicial expositions have attempted to trace and to clarify its various constructions, uses, and abuses.<sup>2</sup> This article will examine the interrelationship between the law of search and seizure and modern electronic communications.<sup>3</sup>

Every state has a statutory provision governing the issuance of search warrants.<sup>4</sup> Generally, these statutes, together with the case

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1. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

2. See, e.g., *Illinois v. Gates*, 103 S. Ct. 2317 (1983); J. HIRSCHL, *FOURTH AMENDMENT RIGHTS* (1979); Israel, *Legislative Regulation of Search and Seizures: The Michigan Proposals*, 73 MICH. L. REV. 221, 258-62 (1974); Nakell, *Proposed Revisions of North Carolina's Search and Seizure Law*, 52 N.C. L. REV. 277, 306-11 (1973); Comment, *Oral Search Warrants: A New Standard of Warrant Availability*, 21 U.C.L.A. L. REV. 691 (1973); Note, *Telephonic Search Warrants: A Proposal*, 2 CRIM. JUST. Q. 151 (1974).

3. For an examination of the encroachment of modern communications upon individuals' privacy, see generally J. WICKLEIN, *ELECTRONIC NIGHTMARE: THE NEW COMMUNICATIONS AND FREEDOM* (1981), and M. COHEN, N. RONEY & J. STEPAN, *LAW & SCIENCE: A SELECTED BIBLIOGRAPHY* (1980).

4. ALA. CODE § 15-15-4 (1982); ALASKA STAT. § 12.35.010 (1983); ARIZ. REV. STAT. ANN. § 13-3914 (1978); ARK. STAT. ANN. § 43-205 (1977); CAL. PENAL CODE § 1526 (Deering 1982); COLO. REV. STAT. § 16-3-303 (1979); CONN. GEN. STAT. § 54-33a(c); DEL. CODE ANN. tit. 11 § 2306 (1979); D.C. CODE ANN. § 23-522 (1981); FLA. STAT. ANN. § 933.03 (West 1973); GA. CODE ANN. § 27-303 [17-5-21] (1983); HAWAII REV. STAT. § 803-33 (1976); IDAHO CODE § 19-4403 (1979); ILL. ANN. STAT. ch. 38 S. 108-3 (Smith-Hurd 1970); IND. CODE ANN. § 35-33-5-2 (Burns 1979); IOWA CODE ANN. § 808.3 (West 1979); KAN. STAT. ANN. § 22-2502 (1981); KY. R. CRIM. P. 13.10; LA. CODE CRIM. PROC. ANN. art. 162 (West Supp. 1984); ME. REV. STAT. ANN. tit. 15, § 55 (1964); MD. ANN. CODE art. 27, § 551 (Supp. 1983); MASS. GEN. LAWS ANN. ch. 276, § 1 (West Supp. 1983-1984); MICH. STAT. ANN. § 1259 (1) (Callaghan 1978); MINN. STAT. ANN. § 626.08 (West 1983); MO. ANN. STAT. § 542.27(6)(2)(1) (Vernon Supp. 1984); MONT. CODE ANN. § 46-5-202 (1983); NEV. REV. STAT. § 29-814.03 (Supp. 1982); NEV. REV. STAT. § 179.045 (1979); N.H. REV. STAT. ANN. § 595-A:4 (1974); N.J. CONST. art. I, § 7; N.Y. CRIM. PROC. LAW §§ 690.36(1)-(2) (McKinney Supp. 1983-1984); N.C. GEN. STAT. § 15A-244 (1983); OHIO REV. CODE ANN. § 2933.23 (Page 1982); OKLA. STAT. ANN. tit. 22 § 1223 (West 1958); OKLA. STAT. ANN. tit. 22 § 1223.1 (West Supp. 1983-1984); OR. REV. STAT. § 133.545(4) (1983); PA. R. CRIM. P. 2003(a); R.I. GEN. LAWS § 12-5-3 (1981); S.C. CODE ANN. § 17-13-1-40 (Law Co-op. 1976); S.D. CODIFIED LAWS ANN. § 23A-35-5 (1979); TENN. CODE ANN. § 40-6-103 (1982); TEX. STAT. ANN. art. 18.01(b) (Vernon 1977 Supp. 1984); UTAH CODE ANN. § 77-23-4(2) (1982); VT. R. CRIM. P. 41(c); VA. CODE § 19.2-54 (1983); WASH. SUPER. CT. CRIM. R. 2.3(c); WASH. J. CT. CRIM. R. 2.10(c); W. VA. CODE § 62-1A-3 (1977); WIS. STAT. ANN. § 968.12(1) (West 1971 & Supp. 1983-1984); WYO. R. CRIM. P. 40(c).

law, require an independent magistrate to rule on probable cause based on the totality of the circumstances.<sup>5</sup> For a magistrate to issue a search warrant, affidavits and other information must convince him that probable cause exists in order to authorize the search. “[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.”<sup>6</sup> The totality of circumstances test allows the magistrate to balance all relevant information presented to him.

Occasionally, searches are permitted without the benefit of a judge’s or magistrate’s determination of probable cause.<sup>7</sup> One example is when there is not enough time to obtain a warrant. It is fair to say, as the Supreme Court did in *Chimel v. California*,<sup>8</sup> that law-enforcement officers who believe that they have probable cause may wait briefly at a location until another officer returns with a signed warrant. It is, however, unfair to bring the wheels of justice to a grinding halt for several hours while an officer attempts to locate a judge or magistrate.<sup>9</sup>

Our challenge is to bring criminal justice procedures up-to-date with current technology. Reducing the delay between requesting a search warrant and receiving an authorization was the chief reason that California in 1970<sup>10</sup> and Arizona in 1971<sup>11</sup> enacted legislation that permits telephonic search warrants. Although several other states issue warrants over the phone,<sup>12</sup> this article will focus

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5. This test is set forth in *Illinois v. Gates*, 103 S. Ct. 2317 (1984).

6. *Id.* at 2328.

7. Generally, the Supreme Court follows a *per se* exclusionary rule, holding that warrantless searches are automatically unreasonable in the absence of those limited circumstances that justify governmental intrusion. This rule was most clearly articulated in *Katz v. United States*, 389 U.S. 347 (1967), where the court declared that “[s]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable—subject only to a few specifically established and well-delineated exceptions.” *Id.* at 357. The following cases illustrate some of the circumstances that permit warrantless searches: *South Dakota v. Opperman*, 428 U.S. 364 (1976) (routine automobile inventory searches); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (consent); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (border searches); *United States v. Biswell*, 406 U.S. 311 (1972) (certain administrative searches); *United States v. White*, 401 U.S. 745 (1971) (misplaced trust); *Chimel v. California*, 395 U.S. 752 (1969) (incidental to a lawful arrest); *Terry v. Ohio*, 392 U.S. 1 (1968) (“stop and frisk”); *Warden v. Hayden*, 387 U.S. 294 (1967) (hot pursuit); *Schmerber v. California*, 384 U.S. 757 (1966) (an emergency); *Abel v. United States*, 362 U.S. 217 (1960) (abandoned property).

8. 395 U.S. 752.

9. *Id.*

10. CAL. PENAL CODE §§ 1523-1542 (West 1982).

11. ARIZ. REV. STAT. ANN. § 13-3914 (1978).

12. Several other states have also authorized telephonic warrants. See, e.g., MONT.

first upon the Federal Rules of Criminal Procedure in relation to telephonic search warrants, and then upon the several controversial issues involved with their use.

## II. TELEPHONIC SEARCH WARRANTS: A CONCESSION TO MODERN TECHNOLOGY BY THE FEDERAL JUDICIAL SYSTEM

In 1977, Rule 41 of the Federal Rules of Criminal Procedure was amended to allow for the issuance of a warrant under certain circumstances "based upon sworn and oral testimony communicated by telephone or other appropriate means."<sup>13</sup> The basic requirements that must be met under this provision are outlined below.

The warrant must be requested by a "federal law enforcement officer or an attorney for the government."<sup>14</sup> In this respect, there is no difference between telephonic search warrants and federal search warrants. Although a strict interpretation of this rule might seem to preclude a state officer from obtaining a federal warrant, as a practical matter a federal warrant may be obtained by a state officer so long as he coordinates the request with either a federal agent or government attorney. Thus, in *United States v. Johnson*,<sup>15</sup> a telephonic warrant was upheld where a city police officer supplied an oral affidavit, but where an Assistant United States Attorney initiated contact with the magistrate, who then telephoned the police officer.

Application for a search warrant must be made to a federal magistrate.<sup>16</sup> This differs from the provisions applicable to warrants supported by a written affidavit, which authorize either a federal magistrate or a judge of a state court of record within the district where the property is located to issue federal warrants.<sup>17</sup> The rationale for this difference is that federal magistrates should be easily accessible over the telephone. Yet, in the interest of promoting the issuance of search warrants, and hence reducing warrantless searches, it may become necessary to authorize state

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CODE ANN. ] 46-5-202 (1983); NEB. REV. STAT. § 29-814.03 (Supp. 1982); N.Y. CRIM. PROC. LAW § 690.36 (McKinney Supp. 1983-1984); OR. REV. STAT. § 133.545(4) (1983); S.D. CODIFIED LAWS ANN. § 23A-35-5 (1979); UTAH CODE ANN. § 77-23-4(2) (1982); WASH. SUPER. CT. CRIM. R. 2.3(c) (1973); WIS. STAT. ANN. § 968.12(1) (West 1971 & Supp. 1983-1984).

13. FED. R. CRIM. P. 41(a)(c)(2)(A).

14. FED. R. CRIM. P. 41 (a).

15. 641 F.2d 652 (9th Cir. 1981).

16. FED. R. CRIM. P. 41(c)(2)(A).

17. FED. R. CRIM. P. 41(a).



judges to issue telephonic warrants.

The warrant itself, as opposed to the affidavit, must be in written form.<sup>18</sup> The applicant must prepare a document called a "duplicate original" warrant and read it verbatim to the magistrate, who enters the information verbatim on a document to be known as the "original warrant." The magistrate may direct the applicant to sign the magistrate's name on the duplicate original while he, in turn, signs the original warrant and enters on the face of the original the exact time of its issuance.<sup>19</sup>

The Rule contemplates the preparation of the duplicate original warrant in advance of the call to the magistrate. As long as the duplicate warrant executed by the agent conforms in all material respects to the original warrant in the possession of the magistrate, it appears that any procedural error in the timing of the preparation of the duplicate original will be deemed harmless by the courts.<sup>20</sup>

In addition to finding probable cause to support the issuance of a telephonic warrant, the magistrate must be satisfied that the circumstances make it reasonable to dispense with the preferred written affidavit.<sup>21</sup> The magistrate's finding in this regard is not reviewable absent a showing of bad faith on the part of the applicant.<sup>22</sup>

The oral testimony in support of the warrant must be sworn and recorded.<sup>23</sup> The oath should be administered by the magistrate in advance of the recitation of the testimony. The Court of Appeals for the Sixth Circuit has held that the failure to administer the oath prior to the taking of the testimony invalidates any resulting warrant, notwithstanding the subsequent giving of the oath in the telephonic proceeding in a manner that relates back to the earlier testimony.<sup>24</sup> But this decision is illogical and hypertechnical. Written affidavits are invariably prepared by the affiant and read by the magistrate before an oath is administered. Moreover,

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18. FED. R. CRIM. P. 41(c)(1)(B).

19. FED. R. CRIM. P. 41(c)(1)(C).

20. *United States v. Shorter*, 600 F.2d 585, 587 (6th Cir. 1979) (search valid even where agent failed to fill out "duplicate original warrant" before calling the magistrate where there was no bad faith shown; but search invalid where oath was not administered in advance of the agent's testimony).

21. FED. R. CRIM. P. 41(c)(2)(C).

22. See *Johnson*, 641 F.2d 652, 658; *Shorter*, 600 F.2d 585, 587.

23. FED. R. CRIM. P. 41(c)(2)(D) (recording must be by writing or by mechanical device).

24. *Shorter*, 600 F.2d at 588.

the court's rationale suggests that the congressional purpose of impressing upon the telephone caller "the solemnity of the proceeding in spite of the lack of formal appearance before a court"<sup>25</sup> can only be fulfilled by administering the oath in advance of the testimony. The court overemphasizes the significance of the timing and mandates exceeding ritualistic results. There is no reason to believe that a contemporaneous oath incorporating that which has been previously stated makes any less of an impression on an affiant than an oath verifying that which has yet to be said. Where an error in timing is made regarding the administering of the oath, there is no substantial distinction between asking an affiant if he swears to the truth of his previous statement and asking him to repeat verbatim those previous statements. When the magistrate fails to administer the oath immediately, and the error is discovered, a truly literal interpretation of the statute would mandate that the call be terminated and placed again. The Ninth Circuit, by a better analysis, reached the opposite conclusion and held that an oath administered at the conclusion of the affiant's testimony "constitutes non-fundamental noncompliance with Rule 41 and does not require suppression."<sup>26</sup> The court reasoned that no prejudice resulted from the timing of the oath in that the testimony would have been substantially identical had the oath been administered in advance.

In addition to administering the oath properly, the magistrate must record all of the call after being informed that the purpose of the call is to request a warrant. A tape recording is the preferred method, but in its absence a stenographic or longhand verbatim record will suffice. If a tape recording or stenographic record is made, the magistrate must have it transcribed and certified as accurate. The transcription and a copy of the original record must then be filed with the court.<sup>27</sup>

### III. TELEPHONIC SEARCH WARRANTS: PROSPECTS AND PROBLEMS

The telephonic search warrant represents a technological advancement that can bring law enforcement up to date with other uses of telecommunications. When used properly, a telephonic search warrant enables law enforcement officers to receive prompt and prior judicial approval of searches. This should minimize the

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25. *Id.*

26. *Johnson*, 641 F.2d at 657-58.

27. FED. R. CRIM. P. 41(c)(2)(D).

threat of exclusion of evidence as a result of pre-trial motions, as well as ensure the maximum protection of fourth amendment rights. A great deal of the potential benefit of telephonic search warrants remains unrealized because states have chosen to prohibit their use. This section will delineate several issues that may be raised concerning the acquisition and use of telephonic search warrants. Little in this area of the law is clear-cut. But because the prospects for the use of telephonic search warrants outweigh the problems, the National Advisory Commission on Criminal Justice Standards and Goals<sup>28</sup> has suggested that state legislatures should follow the lead of California, Arizona, and the United States Congress in passing legislation permitting the use of telephonic search warrants.

#### A. *Recording the Conversation*

The issuance of a telephonic warrant in some jurisdictions is contingent upon the availability of a recording device at the magistrate's home or office.<sup>29</sup> Other jurisdictions allow for a longhand verbatim or stenographic record to be made by the magistrate.<sup>30</sup> Few magistrates know shorthand, however, and no judicial officer is going to react very graciously to a request at 3:00 a.m. to take pen and paper in hand and take dictation for the next hour or so. Thus, a tape recorder or telephone answering machine, coupled with a willing magistrate, is probably necessary if such warrants are to be issued. An applicant for a telephone search warrant should himself, if possible, record the call in its entirety. Although Rule 41(c)(2)(D) specifies that the magistrate is to make the recording, mechanical devices have been known to fail, and it is unfortunately all too easy for tapes to be accidentally erased. Where the magistrate accidentally records over the affidavit upon which the prosecution's entire case rests, a secondary recording would probably be admissible to save the warrant.<sup>31</sup>

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28. Report on Police 95 (1973).

29. *E.g.*, ARIZ. REV. STAT. ANN. § 13-3914 (1978); MONT. CODE ANN. § 46-5-202 (1983); NEB. REV. STAT. § 29-814.03 (Supp. 1982); N.Y. CRIM. PROC. LAW. §§ 690.36(1)-(2) (McKinney Supp. 1983-1984); UTAH CODE ANN. § 77-23-4(2) (1982); WASH. SUPER. CT. CRIM. R. 2.3(c) (West 1980).

30. CAL. PENAL CODE § 1526 (Deering 1982); OR. REV. STAT. § 133.545(4) (1983).

31. This result would be in accord with *Johnson*, 641 F.2d 652. The court there held that "non-fundamental non-compliance" with Rule 41 required suppression only where prejudice could be demonstrated or where the non-compliance was deliberate. *See also* *United States v. Lloyd*, 721 F.2d 331 (11th Cir. 1983). Furthermore, because many jurisdictions make use of form warrants, it may be possible for officers and judges to use forms that,

### B. Warrants Based on an Informant

The four corners of an application for a warrant, whether written or oral must convince a neutral magistrate that probable cause exists. Generally, a magistrate should issue warrants according to a single standard. Several questions arise, however, when the issuance of a warrant requested over the phone is based on an informant's testimony. Questions may surface relating to the veracity or reliability of the informant's report. For example, it may be necessary for the police, who know the informant, to satisfy the magistrate that there is a substantial basis for believing the informant.<sup>32</sup> Will this differ from person-to-person conversation? Similarly, when a judge is confronted by only the voice of an officer,<sup>33</sup> what will be necessary to convince the judge of the value to place on the informant's tip?<sup>34</sup>

In the presence of a judge, an officer may be able to use forms of non-verbal communication and persuasion unavailable on the telephone.<sup>35</sup> For example, if an officer must explain the informant's basis of knowledge, or the particular means by which he came by certain information, visual signals and cues may be important in convincing a judge of probable cause.

Unlike a written application for a warrant, which is judged solely on its merits as stated, an oral application can be changed to serve the desires of the magistrates. As Heisse notes, "[i]n the event the magistrate does not find sufficient probable cause in the officer's statement, he may question the officer until satisfied that probable cause does, indeed, exist."<sup>36</sup> It would be difficult to appeal the legality of such a warrant, even if it took several attempts for the magistrate to issue it.<sup>37</sup>

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when approved, could serve as duplicate originals.

32. See, e.g., *United States v. Harris*, 403 U.S. 573 (1971).

33. Comment, *Oral Search Warrants*, 21 U.C.L.A. L. REV. 691 (1972).

34. See *Adams v. Williams*, 407 U.S. 143 (1972); Comment, *Anonymous Tips, Corroboration and Probable Cause*, 20 AM. CR. L.R. 99 (1982).

35. See generally M. KNAPP, *NON-VERBAL COMMUNICATION IN HUMAN INTERACTION* (1978).

36. Heisse, *Warrantless Automobile Searches and Telephonic Search Warrants*, 7 HASTINGS CONST. L.Q. 1031, 1036 (1980).

37. It would be difficult to appeal the legality of such a warrant, even if it took several attempts for the magistrate to issue it. In some circumstances, it may be necessary for the officer to break the connection and call the judge again. This would constitute a new application rather than an amended attempt.

### C. Warrantless Searches

A significant legal issue that promises to emerge from telephonic warrant procedure is the extent to which warrantless searches will continue to be justified in light of exigent circumstances, if a telephonic warrant is reasonably available. The amount of time necessary to obtain a warrant by traditional means has always been considered in determining whether circumstances are exigent.<sup>38</sup> Specifically, in the area where search warrants are not generally required, the search of motor vehicles,<sup>39</sup> the availability of a telephonic warrant may limit the exigent circumstances exception and require the issuance of a warrant in most circumstances.<sup>40</sup> As Nakell observed:

[The] rapid availability of a warrant could mean that some search situations now considered sufficiently exigent to justify dispensing with a warrant—such as searches of motor vehicles—might no longer carry their emergency character. As a result, the reason for excusing the failure to obtain a search warrant in those situations would no longer exist.<sup>41</sup>

A request for a telephonic search warrant in this instance has benefits to both law enforcement and the public. In most automobile stops, immediate action by the officer is not required. A suspect can easily be detained just as a motor vehicle can be immobilized while an officer seeks advance judicial approval for a search. Although this places a burden on law enforcement, it increases the likelihood that a search will be valid, and serves to protect the sus-

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38. See, e.g., *United States v. McEachin*, 670 F.2d 1139 (D.C. Cir. 1981) (officer learned that defendant was going to dispose of shotgun that was evidence of armed robbery); *United States v. Allison*, 639 F.2d 792 (D.C. Cir. 1980) (drugs threatened with destruction); *United States v. Hendrix*, 595 F.2d 883 (D.C. Cir. 1979) (weapon threatened with imminent destruction coupled with threat to human life). The court in *McEachin* noted:

Consistent with Congress' intent, we believe that the courts must consider the availability of a telephonic warrant in determining whether exigent circumstances existed, unless it is clear that the exigency of a particular case was so great that it precluded recourse to any warrant procedure, however brief. Because the Government bears the burden of proving the existence of exigent circumstances, it must ordinarily introduce evidence on the availability of a telephonic warrant and on the time required to obtain one.

670 F.2d at 1147.

39. See generally Alpert and Haas, *The Limits of the Fourth Amendment*, 35 ALA. L. REV. 23 (1984).

40. See Heisse, *supra* note 36.

41. Nakell, *Proposed Revisions of North Carolina's Search and Seizure Law*, 52 N.C.L. REV. 277, 311 (1973).

pect's constitutional rights.<sup>42</sup>

#### D. *Other Related Concerns*

The issues of privacy and consent must both be considered as jurisdictions adopt a policy that permits telephonic search warrants. In situations involving motor vehicles, it is quite possible that an innocent suspect could be delayed at the scene of a lawful stop while a warrant is being secured. This may infringe on three of the suspect's interests: (1) his interest in continuing; (2) his expectation of privacy; and (3) his willingness to consent to a search. If a suspect is detained while a telephonic search warrant is being sought, then his freedom of movement is restricted. Alternatively, if a warrantless search is conducted, the suspect's privacy is invaded. A solution to this dilemma was submitted by Justice Harlan in *Chambers v. Maroney*.<sup>43</sup> Justice Harlan suggested that a suspect select which interest shall be compromised by: (1) consenting to a warrantless search, which will minimize delay; or (2) insisting upon judicial intervention, which protects his privacy.

The privacy issue revolves around one's expectation of privacy in his motor vehicle.<sup>44</sup> In states that do not have the benefit of telephonic search warrants, the delay and inconvenience to police officers in acquiring search warrants have been balanced against the privacy interests of the suspect. The result has been to allow warrantless searches in some areas, but not in others.<sup>45</sup>

Finally, the widespread use of telephonic warrants may have a profound impact on a suspect's willingness to consent to a search. If an individual knows that a warrant is just a phone call away, he may be more willing to consent to a search than he would be if the convenience of a telephonic search warrant were not available.<sup>46</sup> This in turn raises the question of whether a police officer has a duty to advise the suspect of his right to refuse consent.<sup>47</sup>

There may exist numerous other problems and issues that arise from the use of telephonic search warrants. If states analyze

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42. See Heisse, *supra* note 36.

43. 399 U.S. 42, 63-65 (1970) (Harlan, J., concurring in part and dissenting in part).

44. See, e.g., *United States v. Ortiz*, 442 U.S. 891 (1975) (border patrol stopped petitioner's car at routine checkpoint and searched the trunk without a warrant); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (petitioner was arrested, and his car impounded from a public parking lot; the exterior of the car was inspected without a warrant).

45. See Heisse, *supra* note 36.

46. Consent must be voluntary, and not "the product of duress or coercion, express or implied . . . ." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

47. *Id.* at 231-33.

the cases and specific problems experienced by those jurisdictions with telephonic search warrants, then they can avoid making many of the same mistakes. But what constitutes harmful error or harmless error is more problematic.<sup>48</sup>

#### IV. CONCLUSION

The reasonable acquisition of a search warrant probably has a different meaning in the states that have telephonic search warrants available than in those that are limited to the traditional methods of acquiring a warrant. The exigency of the circumstances and the lapse of time required to obtain a warrant are the usual situations that successfully fit within the category of lawful warrantless searches.<sup>49</sup> It makes sense, therefore, that states like California and Arizona have passed such legislation. These states, with wide open spaces and great distances between cities and judges, were logically the first to enact laws that permit telephonic search warrants. Florida is an excellent example of a state in which this type of legislation is needed. For example, Monroe County is more than 150 miles long, and so narrow that it is held together by one predominantly two-lane road. In a recent search warrant case in Monroe County, Third District Court of Appeal Judge Hendry noted in dissent exactly why telephonic search warrants should be made available: "[T]he incident took place on a Sunday and . . . the nearest judge in the Keys was at least fifty miles away, and if he [were] unavailable all other judges were over 100 miles away."<sup>50</sup>

An intriguing possible policy involves the use of a sliding scale to determine how a warrant is to be obtained. In most non-emergency situations, or in those situations that do not inconvenience law enforcement personnel, a traditional warrant should be required. Under circumstances that are more problematic or inconvenient, telephone approval for a warrant would be reasonable. In a bona fide emergency, a warrantless search could be conducted.<sup>51</sup>

Law enforcement officers will be guided in the most efficient and effective manner to obtain a search warrant by administrative policies and, if necessary, by judicial rulemaking.<sup>52</sup> Many jurisdic-

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48. For example, South Carolina permits search warrants to be validly amended by telephone prior to their execution, but no *per se* telephonic warrants are permitted. S.C. CODE ANN. § 17-13-140 (Law Co-op. 1976).

49. See cases cited *supra* note 7.

50. *Morejon v. State*, 431 So. 2d 315 (Fla. 3d DCA 1983) (Hendry, J., dissenting).

51. See cases cited *supra* note 7.

52. See Alpert and Haas, *supra* note 39.

tions still operate with only two methods of conducting lawful searches: a traditional search warrant or a warrantless search. A better option in many situations, the telephonic search warrant, may soon be available to all law enforcement officers.<sup>53</sup> Obtaining a telephonic search warrant is a two-way communication: a double-edged sword that helps to expedite law enforcement and that protects fourth amendment rights.

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53. See authorities cited *supra* note 2.

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## Implementing the 1983 Telecommunications in Evidence Act: Model Rules for Conducting the Public's Business

On June 24, 1983, the Governor approved the Telecommunications in Evidence Act (the "Act"). The Act<sup>1</sup> requires state agencies to adopt rules of procedure for conducting meetings, hearings and workshops, and for taking evidence, testimony, and argument by means of communications media technology. The term "communications media technology" is defined as "the electronic transmission of printed matter, audio, full motion video, freeze frame video, compressed video, and digital video, by any means available."<sup>2</sup> With the enactment of this piece of legislation, the State stands poised to enter the electronic age of government.

Notwithstanding the eventual passage of the Act, it appeared early in the 1983 session that a different policy might emerge. In reaction to the perception that some agencies were circumventing the Government-in-the-Sunshine Law<sup>3</sup> through the use of tele-

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1. FLA. STAT. s. 120.53 (1983) reads as follows:

Adoption of rules of procedure and public inspection.—

(6) Each state agency, as defined in s. 216.011, shall adopt rules providing a procedure for conducting meetings, hearings, and workshops, and for taking evidence, testimony, and argument at such meetings, hearings, and workshops, by means of communications media technology. The rules shall provide that all evidence, testimony, and argument presented shall be afforded equal consideration, regardless of the method of communication. If a meeting, hearing, or workshop is to be conducted by means of communications media technology, or if attendance may be provided by such means, the notice shall so state. The notice for meetings, hearings, and workshops utilizing communications media technology shall state how persons interested in attending may do so and shall name locations, if any, where communications media technology facilities will be available. Nothing in this subsection shall be construed to diminish the right to inspect public records under chapter 119. Limiting points of access to meetings, hearings, and workshops subject to the provisions of s. 286.011 to places not normally open to the public shall be presumed to violate the right of access of the public, and any official action taken under such circumstances is void and of no effect. Other laws relating to public meetings, hearings, and workshops, including penal and remedial provisions, shall apply to meetings, hearings, and workshops conducted by means of communications media technology and shall be liberally construed in their application to such meetings, hearings, and workshops.

2. FLA. STAT. § 120.52 (1983).

3. Section 286.011 of the Florida Statutes declares that "[a]ll meetings of any board or commission of any state agency or authority . . . , except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times. . . ." This provision has been consistently interpreted by both the

phone conference meetings, Senate Bill 26 was prefiled in December 1982 to prohibit the conduct of public meetings by means of telephone conference calls.<sup>4</sup> The Senate Committee on Governmental Operations heard lengthy testimony from numerous state agencies supporting the continued use of telephone conference meetings.<sup>5</sup> Two points that became obvious during the hearings were that: (1) telephone conferencing is considerably cheaper than the convening of members from the four corners of the state, and that (2) telephone conferencing can be conducted in a manner that does not interfere with the public's right to attend meetings held by its elected and appointed officials.<sup>6</sup>

While Senate Bill 26 was winding its way toward eventual rejection, three other bills were filed, each of which specifically authorized telephone conference meetings as well as other forms of audio and video conferencing.<sup>7</sup> House Bill 1257 was the first to reach the floor, passing in the House by a vote of 105-4 on May 24, 1983.<sup>8</sup> It was immediately sent to the Senate where it was referred to the Committee on Governmental Operations, which had already passed out Committee Substitute Senate Bill (CS/SB) 803, a bill identical to House Bill 1257. On June 1, the bill was withdrawn from Committee, substituted for CS/SB 803 and passed by a vote

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courts and the Attorney General to require that every step in the decision making process of a collegial public body be open and accessible to the public. *See, e.g.*, Board of Public Instruction of Broward County v. Doran, 224 So. 2d 693 (Fla. 1960); Times Publishing Co. v. Williams, 222 So. 2d 470 (Fla. 2d DCA 1969); 1981 FLA. ATT'Y GEN. ANN. REP. 151 (No. 081-51), 1980 FLA. ATT'Y GEN. ANN. REP. 250 (No. 080-99), 1976 FLA. ATT'Y GEN. REP. 186 (No. 076-102), 1975 FLA. ATT'Y GEN. REP. 61 (No. 075-37), 1974 FLA. ATT'Y GEN. REP. 604 (No. 074-364).

4. Senate Bill 26 by the Committee on Governmental Operations was identical to Senate Bill 151, which had been filed during the 1982 session by Senator Paul Steinberg. Senate Bill 151 died on the Senate Calendar after being recommended by the Senate Committee on Governmental Operations. FLA. S. JOUR., 1982 Reg. Sess. at 19, 47 and 654. The Staff Analysis of Senate Bill 26 reports that, while the number of telephone conference meetings held by regulatory boards within the Department of Professional Regulation in fiscal year 1979-80 totaled only five, that number had jumped to forty-five during fiscal year 1981-82 STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, Senate Bill 26 (December 21, 1982). The Committee was clearly concerned that telephone conference meetings could be used as a mechanism for excluding the public from attending public meetings.

5. Tapes of the committee hearings are on file in the committee's offices.

6. The staff analysis prepared for Senate Bill 26 notes that a typical meeting of one of the regulatory boards within the Department of Professional Regulation costs \$2750.00 while the cost of convening the board with a telephone conference hookup is only \$350.00. Senate STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT, Senate Bill 26 (December 21, 1982).

7. *See* Senate Bill 803, Senate Bill 1062 and House Bill 1257, 1983 Legislative Session.

8. Journal of the House of Representatives, State of Florida, 1983 Regular Session, at 547 (May 24, 1983).

of 31-1.<sup>9</sup>

While the Act itself calls for each state agency to adopt procedural rules for the use of communications media technology, the Attorney General felt that it would be appropriate for the Administration Commission to adopt a set of model rules to serve as guidelines for all state agencies.<sup>10</sup> Consequently, the Attorney General wrote to the Secretary of the Administration Commission to ask that this be done.<sup>11</sup> He noted that in the past, the Department of Legal Affairs<sup>12</sup> had been responsible for drafting the model rules for the Administration Commission, and suggested that it would be appropriate to request the Governor and Cabinet, as the head of the Commission, to officially delegate that responsibility to the Department. On July 19, 1983 that delegation was approved.

The Department developed a working draft of the proposed model rules.<sup>13</sup> At the time of this writing, those rules have not been adopted by the Administration Commission.<sup>14</sup> They are offered here, however, under the presumption that they do represent a realistic and fundamentally sound approach to fulfilling the compliance requirements of the Act and the authority delegated to the Department.

PERCY W. MALLISON, JR.\*

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9. Journal of the Senate, State of Florida, 1983 Regular Session, at 647 (June 1, 1983).

10. Section 120.54(10) of the Florida Statutes authorizes the Governor and Cabinet, sitting as the Administration Commission, to promulgate model rules of procedure to govern the procedural operations of each state agency subject to the Administrative Procedure Act so long as and to the extent that an individual agency does not adopt a specific rule covering the same subject matter. FLA. STAT. § 120.54(10) (1981).

11. Letter from Jim Smith to Tom Herndon (July 8, 1983) (available in the *University of Miami Law Review* office).

12. The Attorney General is the head of the Department of Legal Affairs. FLA. STAT. § 20.11 (1969).

13. A rough draft of the model rules was the subject of a rules workshop held in Tallahassee on December 2, 1983. As a result of comments received at that time, several changes were made to the proposed rules, and a second draft was prepared. It is that draft which is incorporated as part of this article.

14. See FLA. STAT. § 120.54 (1981), which sets out the procedures for rule adoption.

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# Proposed Model Rules of Procedure

## Section 1. GENERAL.

The purpose of this chapter is to implement the provisions of §120.53(6), F.S., by providing general procedures to be followed by an agency which desires to conduct a meeting or workshop by means of communications media technology or in conjunction with communications media technology.

## Section 2. APPLICATION AND CONSTRUCTION.

In accordance with the provisions of §120.53(6), F.S., an agency may conduct a meeting or workshop by using communications media technology or, alternatively, may provide communications media technology access to a meeting or workshop for purposes of taking evidence, testimony or argument. Unless an agency adopts its own rules of procedure, these rules shall prescribe the manner in which an agency shall conduct meetings or workshops by means of or in conjunction with communications media technology.

These rules shall not apply to any meeting or workshop not being held by means of or in conjunction with communications media technology merely because the proceedings are being broadcast over a communications network. Neither shall these rules be construed to require an agency to conduct any meeting or workshop by means of or in conjunction with communications media technology. Furthermore, these rules shall not be construed to limit the authority of the chairperson or hearing officer to conduct any meeting or workshop in such a fashion as to maintain decorum and order.

These rules do not apply to any court, or agency thereof, for which the Supreme Court has exclusive jurisdiction under Section 2 of Article V, State Constitution, to adopt rules of procedure.

## Section 3. DEFINITIONS.

*Access Point* means a designated place where a person interested in attending a CMT meeting or workshop may go for purposes of attending such meeting or workshop.

*Agency* means any official, officer, commission, board, authority, council, committee, or department of the executive branch of

state government.

*Attend* means having access to the communications media technology network being used to conduct a meeting or workshop, or being used to take evidence, testimony or argument relative to any issue being considered at a meeting or workshop.

*Chairperson* means the person appointed or selected to preside at a meeting or workshop.

*CMT* means communications media technology.

*CMT Meeting or Workshop* means a meeting or workshop that is conducted by means of or in conjunction with communications media technology.

*Communications Media Technology* shall have the same meaning as is provided in §120.52(15), F.S.

*In Conjunction with Communications Media Technology* means that CMT access is being provided to a meeting or workshop otherwise being held with the collective, physical presence of the members of the agency in one place.

*By Means of Communications Media Technology* means that a meeting or workshop is being conducted entirely by means of communications media technology and the members of the agency conducting such meeting or workshop are not collectively, physically together in one place.

#### Section 4. GOVERNMENT IN THE SUNSHINE.

In accordance with the provisions of §286.011, F.S., all meetings of any board or commission of any state agency or authority, unless exempted by law, at which official acts are to be taken, are public meetings which shall be open to the public at all times. Nothing in this chapter shall be construed to permit an agency to conduct any meeting or workshop otherwise subject to the provisions of §286.011 by means of communications media technology without making provision for the attendance at that meeting or workshop of any member of the public who desires to attend.

An agency may not limit the points of access provided to the public to places not normally open to the public. An agency must provide at least one access point in a location which is ordinarily open to the public and, depending upon the nature of and the public interest in the CMT meeting or workshop, should provide more than one access point. Any official action taken at a CMT meeting or workshop subject to the provisions of §286.011 to which at least one access point is not provided shall be void and of no effect as being violative of the public's right of access.

No meeting or workshop otherwise subject to §286.011, F.S., shall be conducted entirely by means of communications media technology if the available technology is insufficient to permit all interested persons to attend. If, during the course of a CMT meeting or workshop, technical problems develop with the communications network that prevent interested persons from attending, the agency shall terminate the meeting or workshop until such problems have been corrected.

#### Section 5. NOTICE.

An agency choosing to conduct a CMT meeting or workshop shall provide notice in the same manner as required for a regular meeting or workshop, except that the notice shall be given at least fourteen days in advance (except in the case of an emergency meeting which shall be noticed as provided in Rule 28-2.07) and shall plainly state that such meeting or workshop is to be conducted by means of or in conjunction with communications media technology. The notice shall also prescribe how interested persons may attend and contain the address or addresses of all access points, specifically designating those which are in locations normally open to the public. If, for example, a CMT meeting is to be conducted by utilizing a telephone conference hookup, the notice shall so state and shall provide the address of each access point where an interested person may go for purposes of attending the meeting. The notice may also contain an address and telephone number where an interested person may write or call for additional information and shall provide an address to which a person may submit written or other physical evidence which he intends to offer into evidence.

#### Section 6. EVIDENCE.

Any person who will be attending a meeting or workshop by means of communications media technology and who desires to submit written or other physical evidence shall submit the original (or a certified copy) of the evidence to an address designated in the notice at least seven (7) days in advance of the scheduled meeting or workshop.

An agency receiving evidence in advance of a meeting or workshop shall, provided that the form of the evidence permits it, provide copies to be inspected by all members of the agency who will be participating in the meeting or workshop as well as a reasonable



number of copies to be inspected at each of the access points designated in the notice.

Any evidence otherwise admissible which is introduced by means of communication media technology shall be afforded equal consideration as if it were introduced by its proponent in person.

The chairperson may waive the advance submission requirement to the extent necessary upon application of any person or party subject to the right of any affected person or party to object to its admission into evidence. Where the advance submission requirement is waived, the person offering the evidence may be permitted to proffer such evidence subject to its subsequent admission into evidence. The chairperson shall direct the person at the time of the proffer to read or otherwise describe the proffered evidence and to briefly state its relevance and the purpose for which it is being offered. He shall also provide each affected party a time certain in which to object to the admission of the proffered evidence.

#### Section 7. TESTIMONY AND ARGUMENT.

Any person or party who would otherwise be authorized to testify or argue on any issue being considered at a CMT meeting or workshop shall be entitled to so testify or argue through the communications media technology network being utilized in conjunction with or to conduct said meeting or workshop unless for good cause stated in the record the chairperson determines that personal testimony or argument is necessary. When otherwise required, the chairperson shall require said person or party to be sworn before offering testimony or argument.

Any testimony or argument received by such method shall be afforded equal consideration as if it were made in person, but shall be subject to the same objections as if it were made in person.

## **Proposed Rule of Judicial Administration 2.071: Use of Communication Equipment**

(a) *Definition*

Communication equipment means a conference telephone or other electronic device that permits all those appearing or participating to hear and speak to each other, provided that all conversation of all parties is audible to all persons present in court, or in chambers.

(b) *Use*

A county, circuit or district court judge may, upon the Court's own motion or on the written request of a party, direct that communication equipment be used for a motion hearing, pre-trial conference, or a status conference. A judge must give notice to the parties before directing on the Court's own motion that communication equipment be used. A party's written request must be made at least seven (7) days before the day on which communication equipment is sought to be used.

(c) *Testimony*

A judge may, with the consent of all the parties, direct that the testimony of a witness be taken through communication equipment.

(d) *Burden of Expense*

The cost for the use of the communication equipment is the responsibility of the moving party unless otherwise directed by the Court.

### **COMMENTARY:**

This proposed rule is adopted largely from a rule first proposed for use in Michigan in 1982, and finally adopted as Use of Communication Equipment, Michigan General Court Rule 918, West's Michigan Court Rules (Adopted March 1, 1983, effective March 8, 1983). It has been modified using language from Rule 3.2 of the Local Rules for Practice for the Superior Court of Maricopa County (adopted January 1, by Robert C. Broomfield, Presiding Judge of the Superior Court, Maricopa County, and approved by the Chief Justice of the Supreme Court of Arizona on January 6, 1981. Effective January 12, 1981). The additional language requires, at the Court's end of things, that the proceedings be audible to all persons present in court or chambers. This would effectively preclude the Court from being on the telephone and would

mandate the use of speaker phones.

The issue of the recording of the proceedings is not addressed, as it is felt that recording would be governed in telephone hearings, as any other hearing, by Rule 2.070(a) of the Florida Rules of Judicial Administration. This is a modification of the Michigan rule, which requires verbatim transcription of all telephone hearings. Of course, this requirement could be added, should the committee desire.

An additional alternative form of the proposed rule might follow Washington Rule of Appellate Procedure 17.5(e), and the final form of the Michigan rule when approved, which provides for costs to be shared equally by the parties unless otherwise directed by the Court. It was felt by the proposer that this allocation procedure might prove cumbersome to both determine and collect.

Pursuant to Rule 2.130(b) of the Florida Rules of Judicial Administration, a copy of this rule has been forwarded in writing to the Clerk of the Supreme Court for referral to the appropriate committee of the Florida Bar for consideration as a rule of judicial administration in Florida.

J. ALLISON DEFOOR, II\*

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## Major Findings of the New Mexico Experiment of Teleconferenced Administrative Fair Hearings

Over a four-year period ending in 1981, the Fair Hearing Project<sup>1</sup> undertook an extensive investigation of the use of telephone conferencing in conducting unemployment insurance and welfare administrative appeals in New Mexico. With the support of the New Mexico Department of Employment Security (ESD) and the New Mexico Department of Human Services (DHS), the endorsement of federal funding agencies, and the cooperation of the Albuquerque Legal Aid Society, a successful pilot study was undertaken in 1978. In the fall of 1979, a full-scale, randomized field test was begun.

In the unemployment insurance test, over 1,000 cases were assigned into the experiment. From the smaller population of welfare cases that was available, over 100 appeals in the Aid to Families with Dependent Children (AFDC) and Food Stamp (FS) programs were included in the test. Somewhat more than half of all cases were conducted by telephone.

This discussion represents the highlighting of major findings

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1. This research was funded by the National Science Foundation, Grant No. APR-7715516, July 15, 1977; and Grant No. DAR-7715516, February 16, 1979. Charles Brownstein and Arthur F. Konopka of the National Science Foundation were instrumental at every step of this research. Additional funding for the experiment with unemployment insurance appeals was obtained from the Employment and Training Administration of the U.S. Department of Labor. Supplemental funding for the experiment with welfare hearings was obtained from the U.S. Department of Health and Human Services, Grant No. 18-0-00114-8-01, and from the Food and Nutrition Service of the U.S. Department of Agriculture, Grant No. 53-3198-0-23. Any findings, opinions, and conclusions or recommendations expressed in this report are those of the authors and do not necessarily reflect the views of the funding agencies.

The research project came to be known as "The Fair Hearing Project." Research was conducted with the cooperation of both the University of New Mexico and the University of Denver, between March 1977 and May 1981. Authors would like to acknowledge the following professional research staff who contributed to the development of this project: Thomas L. Hurley, Joseph Goldberg, Harry P. Stumpf, and Gary D. Libecap. Also acknowledged are the following research assistants: Susan Williams, Marilyn Jackson, Jane Herron, and Michael Condon.

Previously published results of this study can be found in the legal literature. See Corsi & Hurley, *Attitudes Toward the Use of the Telephone in Administrative Fair Hearings: The California Experience*, 31 Ad. L. Rev. 247 (1979), and Corsi & Hurley, *Pilot Study Report on the Use of the Telephone in Administrative Fair Hearings*, 31 Ad. L. Rev. 485 (1979).

initially presented in May 1981, along with a comprehensive two-volume final research report. All data discussed here involve the primary analysis of the major dataset, consisting of 399 "active" unemployment insurance appeals and 52 "active" welfare cases. An "active" case was defined as one conducted as assigned (i.e., in person or by telephone), in which researchers were able to complete all required interviews and collect all specified documentary data.

The summary nature of this discussion virtually necessitates eliminating all technical presentation of research methodology and statistical data analysis. Rather, our purpose here is to direct attention to the major findings, emphasizing the conclusions made possible through demanding scientific analysis.

### I. RESEARCH PROBLEM

The purpose of the research was to examine the effects of telephone conferencing utilized as a substitute for in-person hearings. Research focused on the appeals hearings conducted by the eight ESD appeals referees and the two DHS hearings officers. Essentially, three research questions were asked:

1. Are hearings conducted over the telephone perceived to meet due process standards as specified by the courts for administrative hearings?
2. Is the quality of the hearing changed by the introduction of telephone conferencing?
3. Are telephone hearings cost-effective?

In the unemployment insurance experiment, two separate hearing modes were selected for analysis: (1) the "split telephone hearing," in which all participants were permitted to remain at locations of their choosing and the appeals referee initiated a multi-party conference call from the main ESD office at the Tiwa Building in Albuquerque; and, (2) the "office telephone hearing," in which participants were instructed to come to an outlying ESD area office and the appeals referee initiated a two-party conference call linking the hearing room in the Tiwa Building with the local area office where the participants gathered. These two hearing forms were chosen to determine whether or not the official hearing room setting in the office telephone hearing context led to important differences in outcome when compared to the split telephone hearing. The split telephone configuration was designed to maximize the potential of teleconferencing so as to provide for participant convenience.

The telephone hearing in the welfare experiment involved having all parties to the hearing gather at a local DHS office in the presence of the caseworker, with the hearing officer linked by telephone from the main DHS office in Santa Fe. Researchers initially considered implementing an additional experimental condition comparable to the split conference telephone mode that was tested in the unemployment insurance experiment. DHS officials, however, as well as officials from the U.S. Department of Human Services and the Food and Nutrition Service of the Department of Agriculture, felt strongly that clients should still be required to appear in person at a county DHS office for a telephone hearing.

Welfare officials argued that clients normally file for benefits at an agency county office, where they receive services and consultation from a caseworker. Caseworkers at the county office regularly attend hearings, often accompanied by a casework supervisor. With clients and caseworkers present in the same room, officials felt that the testimony, cross-examination, and the use of documentary evidence would be facilitated. All testimony, questioning (other than questions involving the hearing officer), and submissions of documents into the record by caseworkers, clients, or representatives of either, thus took place among the participants gathered together in person. Only the hearing officer appeared via teleconferencing.

## II. HEARING OUTCOME

One of the most important concerns of the study involved the question of whether hearing outcomes would be affected by teleconferencing. In the unemployment insurance experiment, the comparison between in-person and split telephone hearings was nearly identical, with approximately 51% of all appeals upheld in both modes. While the difference was not statistically significant, a greater tendency was exhibited in office telephone hearings for appeals to be denied. Specifically, in office telephone hearings, only 44.6% of all appeals were upheld. Given that over 80% of all unemployment insurance appellants were employees, researchers concluded that a higher denial percentage in office telephone hearings suggested a moderate (though not statistically significant) effect of this mode upon employee hearing performance.

The office telephone hearing was a somewhat artificial hearing setting, in that the employee and the previous employer in question were the only parties asked to appear in person at the distant hearing office. Here they faced the teleconferencing equipment

over which the appeals referee conducted the hearing. After a job separation, employees and their former employers generally have little reason to gather together. At an in-person hearing, their meeting is mediated by a presiding appeals referee. Tension that led to or followed the job separation is frequently evident in unemployment insurance hearings. As reflected in the outcome figures, this particular meeting might well generate a situation that is detrimental to certain employees who might feel slightly less able to express themselves or somewhat more intimidated in this setting. Once again, however, we must stress that this difference did not reach the level of statistical significance.

Welfare cases involved a relatively complex decision sequence. For both in-person and telephone hearings, a hearing officer prepared a recommendation shortly after the conclusion of the study, following the receipt of the transcript and submitted documents from the local county office where the hearing was held. The hearing officer recommendation was then reviewed by the Fair Hearing Review Committee, generally a three-person review panel including the relevant program specialist (i.e., the Program Specialist for AFDC or the Program Specialist for FS) and the agency legal counsel. After considering the recommendations of the hearing officer and the Review Committee, the DHS Director rendered the final decision.

In neither hearing officer recommendations nor in agency decisions were there any large (or statistically significant) differences in results. Regarding hearing officer recommendations, there was a slightly greater tendency in telephone hearings to favor the client; however, regarding agency decision outcomes, the percentages in both modes were virtually identical (in favor of the agency: in-person hearings 51.7%, telephone hearings 52.2%).

The largest outcome differences in welfare hearings did not concern hearing mode at all. Rather, the largest shifts occurred in the degree to which the DHS Director found in favor of the client: hearing officers recommended in favor of clients about 25-30% of the time; the Agency Director was likely to find in this direction virtually half the time. Importantly, for the purposes of this study, none of the outcome results (or the relationships between hearing officer recommendation or final decision) appear altered at all by the use of teleconferencing to conduct the hearing.

### III. PARTICIPANT RESPONSES

Interviews conducted with hearing participants (including ap-

peals referees, employers, and employees, in the unemployment insurance test; hearing officers, case workers, and clients, in the welfare experiment) asked a detailed set of questions concerning a variety of reactions to the hearing experience. Only the most central summary questions will be discussed here.

In the unemployment insurance experiment, employees reported the highest overall satisfaction for the split telephone hearing (73.3% satisfied); employer satisfaction with both telephone hearing mode (84.6% satisfied in each of the two conditions) exceeded their satisfaction with in-person hearings (79.8%). None of the differences were statistically significant. Appeals referee satisfaction in all hearing modes was nearly identical, with between 85-86% reporting that they were satisfied.

In the welfare experiment, approximately 65% of the clients in both in-person and telephone hearings reported being satisfied with the hearing. The pattern of response to this question by clients in in-person hearings compared to clients in telephone hearings was so close as to be virtually identical. A slightly higher percentage of caseworkers indicated they were more satisfied with telephone hearings (73.7%) than with in-person hearings (61.9%). In both hearing modes, hearing officers were by far the participant group most satisfied with the hearing, responding between 15-30 percentage points higher on this question than had clients or caseworkers. Again, little difference was noticeable between hearing modes. Over 90% of the time, hearing officers in both in-person and telephone hearings reported being satisfied.

In both experiments, one of the strongest relationships observed in the entire study emerged from the delayed interviews conducted after participants knew the hearing outcomes. Not surprisingly, winners generally tended to remain satisfied with the hearing and losers became dissatisfied. Still, losing did not altogether affect the willingness of those in telephone hearings to have another hearing held by teleconferencing. Participants were more able to sort out their fate in the hearing and their attitude toward teleconferencing than they were able to distinguish winning and losing from their overall attitude toward the hearing itself.

#### IV. PEER REVIEW EVALUATION

While participant attitudinal response was an important indicator of satisfaction with the hearing, researchers sought to obtain a more objective assessment of hearing quality. Beginning in March, 1980, researchers began preparing cases for submission to



experts in the fields of unemployment insurance and welfare appeals.

Several steps were involved in this peer review process. First, a sample of 120 unemployment insurance cases were randomly selected from the population of active experimental cases; 44 cases in the welfare test (approximately 85% of all active cases) were selected. This set of cases constituted the population of peer review cases. All case file and transcript material for each case was edited: (a) to remove any individual or other identifying information, and (b) to remove any references (including comments during a hearing) which might suggest whether the hearing was conducted in-person or by telephone. When accomplishing these editing purposes, researchers sought to retain all substantive hearing information and participant interactions so as to avoid altering the case content of the hearing. Each edited transcript was checked by three separate researchers. One of these readings included examining the edited hearing transcript against the primary data of the hearing audio-tape recording.

Each of the two review panels included 25 nationally recognized experts drawn from state and federal agencies, advocacy agencies, legal aid groups, and academic institutions.

Reviewers, provided with the written record of each case, were asked their opinion regarding how the hearing was actually conducted, in-person or by telephone. In the unemployment insurance experiment, approximately half the time reviewers judged that in-person cases were held by telephone, and vice versa. Researchers concluded that reviewers correctly classified the hearing mode at a rate only slightly higher than would be expected by random guessing. Results in the welfare experiment were nearly identical, with only a slight indication that in-person hearings could be reliably determined as such by reviewers detecting cues from the written record.

Overall, the reviewers appeared equally satisfied that hearings in all three modes met the established due process standards. In the unemployment insurance experiment, nearly three-fourths of all peer review evaluations in each hearing mode reflected reviewer satisfaction that the hearing met legal due process standards. In the welfare experiment, nearly 80% of the time in both modes, reviewers reported being satisfied on this question.

## V. COST-EFFICIENCY

New Mexico is distinguished by its large geographical size and

relatively small population. As the fifth largest state in terms of territory, New Mexico, during the years of the test had a largely rural population of under 1.5 million. Approximately 65% of all New Mexico population centers have less than 2,500 residents.

To meet hearing demand throughout the state, New Mexico's eight unemployment insurance appeals referees in 1977 made 70 trips, covering approximately 36,836 miles; in 1978, the figures were 95 trips and 55,252 miles. In 1977, the average trip lasted 3.5 days, covered about 526 miles, and included stops for hearings at five different locations with an average of seven hearings scheduled at each location. In 1978, the comparable averages were as follows: trip duration, 3.4 days; 582 total miles covered on a trip; five hearing locations per trip; with six hearings scheduled at each location. To meet hearings on time, appeals referees frequently began their driving days as early as 6:00 A.M., continuing (after holding hearings all day) to their next location so they could spend the night at or near the next day's first hearing site. Based on an eight-hour day and average highway speeds, researchers concluded that New Mexico appeals referees in 1977 spent 103 working days driving, with a 1978 total of 147.5 working days consumed on the road.

Given the lower volume of welfare appeals, most trips involved one hearing, scheduled to avoid time delays that would compromise legal requirements for hearing promptness. In 1976, the two welfare hearing officers made 195 trips, driving 47,752 miles; in 1977, a total of 173 trips covered 44,321 miles; and in 1978, 151 trips involved 42,183 miles. Thus, the welfare hearing officers spent almost as much time on the road as their unemployment insurance counterparts, despite their considerably smaller caseload. Researchers concluded that each of the two hearing officers spent one of every four working days doing nothing but driving.

In both hearing settings, researchers examined a variety of in-person and telephone configurations that could be established to hold hearings most economically. Consistently, the conclusion was reached that time lapses could be reduced and expenses saved by holding remote hearings by phone and scheduling in-person hearings only in the cities where hearing officers were stationed or in cities with a sufficient population density to generate a reasonable hearing volume to justify travel. Cost-savings were identified even if the state were to establish a relatively sophisticated and expensive teleconferencing network devoted exclusively (or primarily) for hearing purposes.

The economic decision whether to travel to a given location or

to conduct telephone hearings was seen to key on several factors: the average cost per call of the particular teleconferencing hearing capability the agency chose to establish; the distance of a hearing site from the hearing officer's home station; and the volume of hearings at a given location. The larger the value placed on reducing time lapse, the greater was the efficiency of teleconferencing in providing timely appeal response at New Mexico's many remote and sparsely populated locations. Finally, by reducing the amount of time hearing officers must spend on the road, considerable gains could be achieved in their productivity.

## VI. CONCLUSION

When appeals referees and hearing officers in New Mexico first heard of the teleconferencing experiment, their initial reaction tended to be apprehension, if not hostility. Many expressed concern that the inability to see participants would adversely affect their ability to obtain the needed facts and make correct determinations.

The experience of the full-scale randomized field-test reinforced the positive results of the earlier pilot test. After a few initial tries, appeals referees and hearing officers surprised themselves in their ability during telephone hearings to focus on the record and to obtain the information needed to reach a decision. Those involved in the test began to consider that sight, while a preferred sense, may not be an indispensable requirement for a due process fair hearing. All the hard data collected in this extensive investigation supports that conclusion.

If anything, researchers were disappointed that so few statistically significant differences appeared in the literally hundreds of separate measures of hearing activity taken on in-person and telephone comparisons. The physical hearing records, decision outcomes, and participant reactions with both in-person hearings and telephone hearings were nearly identical. Surprisingly, with increased experience, some hearing officers actually came to prefer the teleconferenced hearing; and, throughout the study, researchers uncovered evidence that the teleconferenced approach could actually increase the comfort level of those hearing participants who might otherwise be inclined to be intimidated by the somewhat more confrontational nature of the in-person encounter.

Given these results, researchers could find no empirical basis of experimental evidence which would lead to a conclusion that the agencies should resist taking advantage of the savings teleconfer-

encing offered in the areas of cost-savings, time lapse reductions, and productivity improvements. After four years of the most painstaking social-scientific examination researchers could design, teleconferencing survived the test, defying initial intuitions that sight (or at least the in-person interaction) was an essential ingredient of a "fair hearing" if it were to remain fair in terms of the record generated, the nature of the outcome, the judgement of peer reviewers, or in the experience of the participants.

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# The Use of Closed Circuit Television for Conducting Misdemeanor Arraignments in Dade County, Florida

## I. INTRODUCTION

On July 15, 1982, The Honorable Gerald T. Wetherington, Chief Judge of the Eleventh Judicial Circuit of Florida (Dade County), signed an Administrative Order directing the use of television equipment to conduct misdemeanor first appearances for a trial period of ninety days.<sup>1</sup> On February 9, 1983, the Eleventh Judicial Circuit approved the use of television equipment on a regular basis to conduct misdemeanor arraignments.<sup>2</sup> In Dade County, the huge number of cases in every division of the county court (civil, misdemeanors, and traffic) had increased without a matching increase in the number of judges or judicial support personnel. Therefore, it became necessary to adopt new ways to handle this load, while preserving the rights of citizens to individual treatment.<sup>3</sup>

Misdemeanor defendants are arraigned through two-way closed-circuit television by a judge located in the courthouse. The defendants remain at the jail during the arraignment proceedings, which are videotaped simultaneously. The video tape is the official record of the proceedings. Misdemeanor arraignments held on the weekend are conducted without the use of video.

A court manager considering the use of audio/video equipment will first be confronted with state statutes, court procedural rules and constitutional questions. Although there is a distinction between the legal questions involved in using audio/video equipment and videotape, the central issues are the same—the defendant's rights to due process, the confrontation of witnesses, the effective assistance of counsel, and a public trial. Evaluators of the Office of

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1. On October 12, 1982, The Honorable Marshall T. Ader, Administrative Judge of the County Court, Traffic Division, requested the Office of the Dade-Miami Criminal Justice Council to undertake an objective study of the video system for the courts. The study evaluated the efficiency of the system in terms of cost, time, security, and effectuation of the defendants' legal rights, and forms the basis of this article. OFFICE OF THE DADE-MIAMI CRIMINAL JUSTICE COUNCIL, EVALUATION OF THE USE OF MISDEMEANOR FIRST APPEARANCES [hereinafter cited as EVALUATION].

2. Admin. Order No. 83-6, 11th Judicial Circuit, Dade County, Fla., Feb. 9, 1983.

3. Ader, *County Judges Trying Innovations*, MIAMI REVIEW, April 29, 1983, at 6, col. 1.

the Miami-Dade Criminal Justice Council conducted personal interviews with legal and support personnel of the criminal justice system, analyzed written questionnaires completed by the prisoners, judges, and staff of the state attorney's office and public defender's office, and researched the legal questions arising from videotaped first appearances. Costs were compared before and after the use of video. Where specific costs are unavailable, estimates are given.

## II. THE OPERATIONAL SYSTEM: THE USE OF VIDEO IN MISDEMEANOR FIRST APPEARANCES

### A. *Description of the System*

In the courtroom, the judge, the court clerks, and the assistant state attorney view the defendant through a forty-five inch retractable TV screen placed at the front of the jury box. Members of the public sitting in the courtroom view the defendant through a twenty-five inch color television. A color video camera focuses on the judge, but may be controlled to pick up the attorney or a member of the defendant's family speaking before the court.

The defendant, who is in the jail across the street from the courthouse, stands at a podium and views the judge through another forty-five inch retractable screen. A second color video camera at the jail is placed behind the TV screen. There are four pressure sensitive microphones. Each one can capture the voice of a person who is speaking from a distance of five feet. In the courtroom, one microphone is solely for the judge's use. One is located at the clerk's table for use by the assistant state attorney, the court clerk, or a member of the public speaking into the record. At the jail, one microphone is located on the podium for the defendant and the public defender. The final microphone is placed at a table next to the podium of the control unit for the camera. A microphone mixer controls the audio input from the various microphones in the system. The mixer has the capacity for handling eight microphones in addition to the four presently being used.

The main control system is located in the jury room and is operated by a communication technician who controls all technical aspects of the system. Two correctional officers sit at the table in the jail where the remote control unit is located. The control room operator maintains communications with one of these officers at the jail and with the court clerk in the courtroom through the use of a three-way headset intercom system. The correctional officer

records the case disposition for the jail's records. The clerk in the courtroom, if he has any questions, can communicate with the officer, who wears a headset, without disrupting the session.

A set of headsets is available for the defendant to communicate with members of his family who may be in the courtroom, without being heard by other parties in the court, or without having the communication picked up by the video tape. This enables the public defender who requests a side bar conference with the assistant state attorney and the judge to conduct the discussion in private, and out of the range of the other parties in the proceeding.

A special effects generator enables images from the camera in the courtroom and the camera in the jail to be combined into a split-screen single image, so that the video equipment tapes both the judge and the defendant simultaneously. The single image is recorded on two one-half inch video cassette recorders. One videotape is kept for three days, and if no party requests to review the proceeding within that time, the tape is erased and reused. The other tape is kept for five years, filed by month and by judge, and stored in a locked cabinet in the jury room.

### B. *The Advantages of the System*

In Dade County, the video tape project is considered a great success.<sup>4</sup> The courts expeditiously handle the enormous caseloads and receive financial benefits by using video arraignment. Personnel savings include the elimination of a court reporter and a liaison officer, the savings of time for correctional officers and for the staff of the clerk's office, and the reduction in the number of judges used to hear first appearances. Leaving inmates at the jail allows the court additional space to admit any family member or friend who desires to view the session. The video focuses solely on the judge and the defendant. All external noise is minimized and the ability to deal exclusively and exhaustively with one case is enhanced.

Security is maximized because the defendants do not leave the jail. Video eliminates the prisoners' potential for causing disruption and inflicting harm. It must be noted, however, that the defendant still has his or her right, upon request, to be brought to the courtroom to see the judge in person.

An additional benefit of the video tape system is that the videotape becomes the official record of proceedings. The tape en-

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4. Ader, *supra* note 3, at 6.



ables any party questioning the proceedings to examine the record immediately after the session. It provides audiovisual record of the proceedings and captures a more accurate recording of the proceeding. For example, video eliminates the problem faced by the court reporter when more than one person speaks at a time. The technician replaces the court reporter and has greater control over the accuracy of what is recorded. If persons not participating in the hearing create unnecessary noise, the technician can direct the correctional officer or the clerk to quiet them without interrupting the tape of the proceedings.

### C. *The Disadvantages of the System*

The judge is prevented from having person-to-person contact with the defendant. How this affects his ability to judge the defendant's demeanor is unknown. Some technical problems that exist are the inability to clearly see all of the defendants at one time, the periodic inability to see and hear the assistant public defender and the assistant state attorney, and the defendant's inability to simultaneously see the judge and the family member or friend requesting a custody release. There is also a potential for technical malfunction.

The change to video arraignments caused a slowdown in the flow of paperwork from one department/office to another. Paperwork could no longer be handed across the table. The assistant public defender had to get a copy of the charging documents before going to the jail. This was unnecessary when the public defender had access to the clerk's file in court. Additionally, the paperwork requiring signatures has to be hand carried from the courtroom to the jail and vice versa.

### D. *Changes in Administrative Procedure*

The use of video created several changes in the administrative procedure for conducting misdemeanor arraignments. Prior to the use of video, misdemeanants were brought over to the court and kept in either the holding cells located on the enclosed bridge connecting the jail to the courthouse, or in a cell located next to each courtroom, until the session began. Two courtrooms with different holding cells were used to eliminate the security problems created by crowding defendants charged with misdemeanors into the same holding cells as defendants charged with felonies. Often, more than one trip was made from the holding cells on the bridge to the

courtroom to transport a number of misdemeanants who could not fit in the holding cell next to the court on the first trip. One court is now used to conduct arraignments and bond hearings, while the second is used for other judicial business.

The change in the procedure of holding misdemeanor arraignments and bond hearings increased the efficiency of the judges. Prior to the change to video, there were three misdemeanor arraignments daily. Two county judges, acting as circuit court judges, conducted the hearings at each session. One judge heard the misdemeanor arraignments and the other judge conducted the felony bond hearings. Problems arose when arraignments lasted longer than expected, and the judge had to delay hearing his own calendar. Also, if a judge assigned to a particular session were in trial, he would be unable to attend the arraignments, and scheduling changes would have to be made at the last minute.

One judge does all misdemeanor and felony bond hearings for the entire day by using video. There are twenty-two county court judges who sit for these hearings on a rotating basis, Monday through Friday, approximately once a month. Arraignments are held two times daily instead of three.<sup>5</sup>

Prior to the use of video, the public was prevented from watching the proceedings when the defendants filled the courtroom to capacity. Now there is ample space for members of the defendant's family. They can see the defendant via the twenty-five inch color television located at the front of the audience seating area.

Defendants entitled to immediate release after the arraignment are now released faster. They are taken to the front holding cell on the first floor of the jail for release and receive their money and belongings at that location.

Finally, because signatures are required on a special form by parties not in the same place, the form had to be hand carried from the courtroom to the jail, or vice versa. Now the judge signs the form in the courtroom and the clerk stamps "sworn to in open

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5. Statistical analysis shows that even though there is one less session in the afternoon, an equivalent amount of cases are being processed. A statistical test (one-way analysis of variance) was done to test whether the number of morning arraignments before and after video differed, and whether the number of afternoon arraignments before and after video differed. The month of July 15 to August 15, 1982 was compared to the month of September 15 to October 15, 1982 (Monday to Friday only). The test yielded the following results:

- 1) The introduction of video into the justice system has increased the processing of arraignments scheduled for the morning session.
- 2) The implementation of the video system *has not* resulted in a significant difference in the number of arraignments that have been processed during the afternoon sessions of court.

court" on the form. The stamp is used in place of the defendant's signature.

### III. LEGAL DISCUSSION

#### A. *Historical Perspective*

The prohibition against telecommunication devices in the courtroom setting is a result of a series of unhappy events.<sup>6</sup> The courts have enacted a prophylactic prohibition against all media technology as suggested by the canons of the American Bar Association.<sup>7</sup>

There is a trend toward continued experimentation with video tape technology.<sup>8</sup> It appears that the evaluation of the technology itself may be the most important factor to its future use in court proceedings. As the equipment becomes less and less obtrusive and as legal professionals become more comfortable with its use, the general level of resistance should diminish.

#### B. *Use of Closed Circuit Television in Dade County Court*

This section discusses the legal issues relevant to the use of closed circuit television for conducting first appearances of defendants charged with misdemeanor crimes.<sup>9</sup> Because Dade County is

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6. Sparked by the spectacular publicity attendant to the trial of Bruno Hauptmann for the Lindberg kidnapping, the American Bar Association House of Delegates adopted a resolution creating a Special Committee on Cooperation Between Press, Radio and Bar. The resolution suggested a complete ban of radio broadcasting and still photography during judicial proceedings to prevent a breach of judicial decorum. Additionally, Canon 35 was adopted by the American Bar Association House of Delegates in 1937, proscribing photographic and broadcast coverage of courtroom proceedings. A second Special Committee of the American Bar Association in 1952 produced a report that caused the House of Delegates to amend Canon 35 to proscribe televising court proceedings as well. A majority of states adopted the substance of Canon 35. Its current form (as of April 12, 1979) is found in Florida as Canon 3A(7). *In re* Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 770 (Fla. 1979).

7. ABA CANONS OF JUDICIAL ETHICS Canon 35 (amended 1963) (improper publicizing of court proceedings).

8. "An expanding cadre of jurists and other legal professionals has endorsed the use of videotape in trial proceedings." Miller, Fontes, & Dalinke, *Using Videotape in the Courtroom: A Four-Year Test Pattern*, 55 U. DET. J. URB. L. 655, 656 (1978); see Bermant, Chappell, Crockett, Jacobovitch, & McGuire, *Juror Responses to Prerecorded Videotape Trial Presentations in California and Ohio*, 26 HASTINGS L.J. 975 (1975); Brennan, *Videotape—The Michigan Experience*, 24 HASTINGS L.J. 1 (1972); McCrystal, *Videotape Trials: Relief for Our Congested Courts*, 49 DEN. L.J. 463 (1973); Shutkin, *Videotape Trials: Legal and Practical Implications*, 9 COLUM. J.L. & SOC. PROBS. 363 (1973).

9. "Except when he has been previously released in a lawful manner, every arrested person shall be taken before a judicial officer within 24 hours of his arrest." FLA. R. CRIM. P.

the first jurisdiction in Florida to use closed-circuit television for conducting first appearances of misdemeanor defendants, the legal issues concerning the use of this technology are of first impression to the Florida Supreme Court. There is little case law directly on point, and the issues are reasoned by analogy to existing law.

The points of reference for discussion were established by the Florida Supreme Court in adopting the amended version of Canon 3A(7) of the Florida Code of Judicial Conduct<sup>10</sup> and was adopted by the Supreme Court of the United States when it affirmed the constitutionality of the new rule.<sup>11</sup> The new Canon 3A(7) authorizes the use of electronic media and still photography for use in trial and appellate courts.<sup>12</sup> In Idaho, the supreme court authorized rules permitting the use of closed circuit television to conduct misdemeanor first appearances and arraignments.<sup>13</sup>

In Dade County, the use of closed circuit television allows the judge to remain in the courtroom while the misdemeanant defendant is arraigned in the jail.<sup>14</sup> It is constitutionally permissible under both federal and Florida law.<sup>15</sup> First, the defendant still is present at the proceeding. He is able to see and converse with the judge who, as well, can see and speak with him. The proceeding is "live" because the transmission of the parties' images and voices

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3.130(a).

10. *In re* Petition of the Post-Newsweek Stations, Florida, Inc. 370 So. 2d 764, 781, (Fla. 1979).

11. *Chandler v. State*, 449 U.S. 560 (1980).

12. Canon 3A(7) states:

Subject at all times to the authority of the presiding judge to (i) control the conduct of the proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida."

FLA. BAR CODE JUD. CONDUCT Canon 3A(7) (amended April 12, 1979, effective May 1, 1979).

13. Idaho Criminal Rule 43.1 governs the use of electronic audiovisual devices in the courtroom. Whenever a defendant in a misdemeanor or felony case is required to be taken before a magistrate for a first appearance or arraignment, this requirement can be satisfied by the defendant's appearance before a magistrate, either in person by electronic audiovisual devices in the discretion of the magistrate.

14. If a sworn complaint charges the commission of a misdemeanor, then the defendant may plead guilty to such charge at his first appearance. FLA. R. CRIM. P. 3.170(a), 3.130(a). The judicial proceeding discussed here and the one for which closed-circuit television is used is the first appearance for defendants charged with misdemeanor offenses. *Id.* The Florida Rules governing the Practice and Procedure of Traffic Court are not discussed and apply as they are relevant to this proceeding.

15. This discussion covers the rights guaranteed by U.S. CONST. amend. VI and FLA. CONST. art. I, §§ 9, 14, & 16.

over camera and monitors is instantaneous. Both parties at either end of the circuit are able to hear and be heard, to see and be seen simultaneously as the proceeding is conducted.

Second, the hearing remains procedurally the same as it was when the defendants were brought to court from jail and is thus in accordance with the requirements of the federal and Florida constitutions. The defendants are advised of their rights under the federal and Florida constitutions at the beginning of the hearing.<sup>16</sup> The presiding judge hears the individual case of each defendant, informs him of the charges, and then determines the appropriate type or amount of bail.<sup>17</sup>

Third, first appearances are conducted in open court, and therefore the public is able to view the defendant via a twenty-five inch television monitor at the side of the courtroom. The defendant is able to present witnesses because members of the defendant's family may be present and may approach the bench for the purpose of requesting the responsibility for his custody.<sup>18</sup>

Fourth, the defendant is assured of the right to assistance of counsel since an assistant public defender is present in the jail with the defendant.

Fifth, closed circuit television preserves the attorney-client privilege. The defendant is able to conduct private conversations with his attorney, out of the range of the microphone or spoken in whispers. In this manner, no other party may hear the attorney-client discussions, nor is the conversation recorded on the video tape.

Sixth, there is no evidence that conducting misdemeanor first appearances has affected the impartiality of the judge in any way that denies the defendant due process of law. On the contrary, the closed-circuit enables the judge to better focus on the defendant without being disturbed by extraneous noise or distractions.

Seventh, the use of electronic reporting is authorized by the Florida Rules of Appellate Procedure and has been adopted for re-

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16. Pursuant to U.S. CONST. amends. V, VI, FLA. CONST. art. 1, and FLA. R. CRIM. PRO. § 16, 3.130(b), the magistrate, upon the defendant's first appearance, must immediately inform him of the charge, provide him with a copy of the complaint, and advise him of his rights as enumerated in the rule.

17. The purpose of bail is to ensure the defendant's appearance in court for further proceedings, and is defined as any of the six forms of release enumerated in FLA. R. CRIM. P. 131(b)(1)(i)(vi).

18. A microphone is placed at the table in front of the judge for use by members of the public addressing the court.

ording testimony in "any judicial proceedings."<sup>19</sup>

Finally, the use of closed-circuit television to conduct first appearances does not violate any principles of legal ethics.<sup>20</sup>

### C. Discussion

Florida Rule of Criminal Procedure Rule 3.180 provides that the defendant is entitled to be present at his first appearance and when a plea is made, unless a written plea of not guilty is made pursuant to Rule 3.170(a). The presence of a defendant as a condition of due process, however, extends only to the point where his absence would prevent him from receiving a fair and just hearing.<sup>21</sup>

While the defendant in a first appearance hearing conducted by closed-circuit television is not physically situated in the courtroom, he does attend the hearing. He is present in the jail and can participate in a live proceeding where both the judge and he can see each other, hear each other, and converse with each other simultaneously. Because the defendant is not "absent" from the proceeding, he is not deprived of a "fair and just" hearing merely because he is not present physically in the courtroom.

In *Kansas City v. McCoy*,<sup>22</sup> the court upheld the examination of an expert witness via closed-circuit television in a prosecution for violation of a municipal ordinance. In ruling that the confrontation clause of the sixth amendment to the United States Constitution does not require that the expert testifying against the defendant be physically present, the court held:

Today we have means of communication not available a few years ago. We can by electronic means project the image and voice of a man clearly and distinctly at the speed of light and control that means and insure its integrity by closed circuit television and monitors. *While [the expert] was not physically present in the courtroom, his image and his voice were there; they were there for the purpose of examination . . . of the witness as much so as if he were there in person. . . .*<sup>23</sup>

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19. FLA. R. APP. P. 2.070(c).

20. FLA. BAR CODE JUD. COND. Canon 3A(7).

21. *Snyder v. Massachusetts*, 291 U.S. 97 (1934) (applied in the context of a felony prosecution; the defendant's presence as a prerequisite of due process in a misdemeanor case would *a fortiori* appear to be less compelling).

22. 525 S.W.2d 336 (Mo. 1975).

23. *Id.* at 339 (emphasis added). Arguably, placing the defendant outside the court has an impact on his performance; see Annot., 80 A.L.R. 3d 1212, 1214 (1977). But observation of the use of closed-circuit television in Dade County revealed that the defendants took the session seriously; see EVALUATION, *supra* note 1, at 24, Appendix 6.

The defendant's right to a public pretrial hearing is not mandated by the United States Constitution, but is provided for under Florida law. The Florida Rules of Criminal Procedure require that arraignment be conducted in "open court."<sup>24</sup>

The use of closed-circuit television to conduct these hearings enhances this right by providing more courtroom space for the public to attend. The public can both see the judge and view the defendant on a twenty-five inch black and white monitor in the courtroom. The image of the defendant on the monitor is the same as that which the judge sees and that which is recorded simultaneously on video tape.

Furthermore, members of the defendant's family may approach the bench and converse with the judge and the defendant through a microphone located there for the purposes of discussing the defendant's release. Therefore, the use of video ensures the defendant of his right to have witnesses speak on his behalf.

While members of the defendant's family are present in the court and may speak on his behalf at first appearance, the proceeding is not adversarial in nature.<sup>25</sup> The judge has broad discretion to determine the conditions of release<sup>26</sup> and the state rarely, if at all, presents witnesses against the misdemeanor defendant. Thus, the issue whether the defendant is deprived of his right to confront his accusers is not applicable.

*McCoy* held that the defendant's physical presence before a witness testifying against him is not necessary to protect the defendant's right to confront the witness. The court relied on *Douglas v. Alabama*,<sup>27</sup> which held that while the confrontation clause secures the right of cross-examination, an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation. That opportunity existed in *McCoy*, where examination of an expert witness by closed-circuit television placed the defendant's voice and image at the hearing in order to confront witnesses. Additionally, the opportunity for cross-examination is safeguarded by closed-circuit television because the proceeding is live, and because there is no opportunity to filter or edit the testimony as it occurs.<sup>28</sup>

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24. FLA. R. CRIM. P. 3.160(a).

25. FLA. R. CRIM. P. 3.131(b)(2)(3) provides that the judge shall determine bail on the basis "of all relevant" factors, including the weight of the evidence against the defendant.

26. Committee Note, FLA. R. CRIM. P. 3.131.

27. 380 U.S. 415 (1965).

28. See Annot., 80 A.L.R. 3d 1212, 1215 (1977).

The right of the defendant to assistance of counsel is satisfied where an assistant public defender is present in the prison throughout the hearing. In Florida, the arraignment of a defendant is a "critical stage" in a criminal prosecution,<sup>29</sup> during which the accused has the constitutional right to benefit of counsel unless he competently and intelligently waives his right.<sup>30</sup> The Florida Rules of Criminal Procedure provide for the appointment of counsel at first appearance and arraignment.

The assistant public defender has been present in the jail for misdemeanor first appearances since the first use of closed-circuit television. He arrives prior to the start of a hearing and remains there until the last case is heard in order to be available to render legal assistance and to facilitate his appointment to indigent defendants. No indigent criminal defendant can be sentenced to a term of imprisonment unless the state has afforded him the right to the assistance of appointed counsel for his defense.<sup>31</sup> To insure this right, the assistant public defender is present in the jail to intercede on behalf of the defendant who pleads guilty and is sentenced to additional jail time.

The standard for determining whether the defendant was afforded effective assistance of counsel is not that the "counsel [was] a 'sham and mockery' but whether counsel was reasonably likely to render and did render reasonably effective counsel based on the totality of the circumstances."<sup>32</sup>

In the "totality of the circumstances," the assistant public defender is capable of rendering reasonably effective counsel. The assistant public defender has access to the same information regarding the defendant's case as he did prior to the video system, although the new system requires additional effort by the court clerk and the attorney to ensure that the attorney has the information prior to the hearing.<sup>33</sup> The assistant public defender has with him a copy of a "booking sheet," the master list of all defendants heard in that session, and the charging document for each defendant. He may communicate with the clerk during the hearing concerning additional information. Additionally, communication with the judge, assistant state attorney, or member of the defendant's

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29. *Sardinia v. State*, 168 So. 2d 674 (Fla. 1964).

30. *Brewer v. Williams*, 430 U.S. 387 (1977).

31. *Argensinger v. Hamlin*, 407 U.S. 25 (1972), *construed in Scott v. Illinois*, 440 U.S. 367 (1979).

32. *Meeks v. State*, 382 So. 2d 673, 675 (Fla. 1980).

33. *Id.*



family is available through the monitor and microphone that the defendant uses. The assistant public defender may carry on a conversation with the judge or assistant state attorney that will not be heard by others present at the proceeding, and that will not be recorded on video tape, because of use of a headphone specifically designed for this purpose. In special circumstances, the assistant public defender may also request that the defendant be brought into the court.

The defendant is not deprived of effective assistance merely because the judge and the defendant do not have personal physical contact with each other. The assistant public defender's absence from the courtroom makes it more difficult for him to communicate as quickly with the assistant state attorney. While the television screen may not capture nuances in the defendant's demeanor, the assistant public defender could advise the judge and the prosecutor of this information.

Florida Evidence Code section 90.502 (1981) preserves the attorney-client privilege in this state. The use of closed-circuit television to conduct misdemeanor first appearances does not deprive the defendant of this privilege. It is technically, possible for the attorney to conduct discussions with his client in private. Observation of the system in use confirms that private discussions take place.

In *Kansas City v. McCoy*,<sup>34</sup> the court found that "[t]he judge who heard the case in the de novo trial was presented the same evidence and found that . . . 'calm, judicial decorum was maintained throughout the proceedings. . . .'" The use of closed-circuit television to conduct examination of a witness not present in the courtroom did not taint the integrity of the proceeding.

Closed-circuit television for first appearances allows the judge to observe the defendant on a forty-five inch color screen. The judge can see the defendant's physical features and his clothing; he can question the defendant as to his employment, financial resources, length of residence in the community, and family relationships. The correctional officer advises the judge of the defendant's "record of conviction," and any previous bench warrants. While use of closed-circuit television may prevent the judge from observing subtle nuances in the defendant's behavior, there is no evidence that the system prevents the judge from assessing his "char-

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34. 525 S.W.2d 336, 339 (Mo. 1975).

acter and mental condition."<sup>35</sup> In particularly sensitive situations, "the defendant will be brought to the courtroom."<sup>36</sup>

Rule 2.070(c) of the Florida Rules of Judicial Administration permits the Chief Judge to authorize the use of electronic reporting for any proceeding. Video tape recording is one such method.

Authorization for the use of video to record the proceeding can be found by analogy to rules governing other judicial proceedings. Rule 3.170(j) authorizes the acceptance of a plea of guilty or nolo contendere, and reporting by mechanical means in open court. Florida Rule of Criminal Procedure 1.310 provides that upon motion, the court shall order that the testimony at a deposition be recorded on video tape. The Florida Evidence Code provides that term "photographs" includes video tape and motion pictures.

Prior to the passage of Florida Rule of Criminal Procedure 1.310, a court approved the admissibility of videotaped deposition in trial.<sup>37</sup> One court admitted the videotape of a witness's testimony at a preliminary hearing as evidence at trial.<sup>38</sup> In *Paramore v. State*,<sup>39</sup> the court upheld the admissibility of a defendant's video-taped confession.

In light of the ability of video tape to capture a more accurate record of the proceeding, and to record both the audio and visual aspects of the proceedings, and in light of the state rules authorizing its use for this purpose, video tape is a permissible means of obtaining permanent record of first appearance.

The revised Canon 3A(7) of the Florida Bar Code of Judicial Conduct sanctions the use of audiovisual equipment to televise misdemeanor arraignments for the purpose of judicial administration.<sup>40</sup> The commentary states that the revised rule constitutes "a general authorization for the use of electronic media and still photography for all purposes, including the purpose expressed as exceptions in the former Canon." Therefore, electronic media can be

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35. FLA. R. CRIM. P. 3.130(b)(4)(iii). In determining what form of release will reasonably assure appearance, the judge must, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the defendant, the defendant's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearances at court proceedings, or of flight to avoid prosecution, or of failure to appear at court proceedings.

36. Memorandum of Judge Marshall T. Ader Supplementing Admin. Order No. 82-12, at app. 8.

37. *Hutchins v. State*, 286 So. 2d 244 (Fla. 3d DCA 1974).

38. *People v. Moran*, 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (Ct. App. 1974).

39. 229 So. 2d 855 (Fla. 1969).

40. See *supra* note 12.

used for purposes of judicial administration.

Florida Rule of Judicial Administration 2.050(b)(3) authorizes the Chief Judge of the judicial circuit to enter administrative orders for the "efficient and proper administration of courts within his circuit." Florida Rule of Judicial Administration 2.020(c) defines "administrative order" as "a directive necessary to administer properly the courts' affairs but not inconsistent with the constitution."

The federal and Florida constitutional rights of the accused remain intact with the use of closed-circuit television. The system has advantages that increase administrative efficiency and promote judicial economy as well. The system reduces the number of courtrooms and sessions used for jail arraignments without reducing the number of persons who can be arraigned daily. It also reduces the number of clerical persons and correctional officers used to assist in the proceedings and the number of hours used by administrative personnel to prepare the cases. The system eliminates prior scheduling problems and allows the judge to maximize work efficiency.

#### IV. EMPIRICAL ANALYSIS

##### A. *Flint, Michigan*

Michigan State University conducted a major empirical study of the effects of videotaped presentations upon court personnel on jurors from the General County Circuit Court (Flint, Michigan) over a period of four years.<sup>41</sup> The academics who conducted this series of studies (eleven in all) faced considerable general speculation, but had little prior experience with attempting to understand the phenomenon.<sup>42</sup> The research team was extensive in its approach,<sup>43</sup> and the general findings were favorable to the proposi-

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41. Miller, Fontes, & Dalinke, *Using Videotape in the Courtroom: A Four-Year Test Pattern*, 55 U. DET. J. URB. L. 655 (1978).

42. An example of such speculation concerned the effects of the type of medium employed:

Though no specific theoretical expectations were advanced, several lines of thought suggest that jurors may respond differently to diverse modes of trial presentation. McLuhan, for example, asserts that since the medium itself is the primary message in communicative transaction, differences in the medium of presentation employed will have a pervasive impact on the way perceptions are formed, information is processed, and judgments are rendered by the communicators. To date, however, there has been little empirical research investigating these effects, particularly in terms of live as opposed to mediated experiences.

*Id.* at 659.

43. The research was comprehensive:

tion that the courts can approach symbiotic positioning using video technology. The team observed that "no evidence indicates that videotaped presentations exert a deleterious effect on the courtroom communication between trial participants and jurors, nor does videotape appear to exercise a negative impact on juror decision-making process."<sup>44</sup>

Specifically, the researchers found that the juror's experience was not terribly altered because of the use of this technology,<sup>45</sup> nor did the type of technology used,<sup>46</sup> or the manner of use,<sup>47</sup> affect the outcome of the proceedings. Further examination of the relationship between video and the courts is necessary.<sup>48</sup>

### B. Dade County, Florida

As part of its evaluation mandate, the Office of the Miami-Dade Criminal Justice Council prepared a questionnaire that was to assess the perceptions of the video system by the participants in the misdemeanor arraignment setting.<sup>49</sup> The criteria on which the

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The eleven studies included in this report are organized according to five major research foci: (1) studies comparing juror responses to various modes, or combinations, of trial presentation; (2) studies examining the effects of deleting inadmissible testimony, and the influence of diverse techniques for editing such testimony; (3) studies investigating juror retention of trial-related information as a function of the presentational mode; (4) studies examining the impact of paralinguistic and nonverbal cues on juror evaluation of witness credibility under diverse modes of presentation; and (5) studies investigating the potential influence of alternative video production techniques or juror response.

*Id.* at 658 (footnotes omitted).

44. *Id.* at 696.

45. "[J]urors viewing a videotaped trial, when compared to their live trial counterparts, arrived at similar verdicts, had similar perceptions of trial participants, retained at least as much trial-related information, and also expressed similar levels of interest and motivation." *Id.*

46. "[S]plit-screen and full-screen videotape presentations are equally effective for presenting evidence in court." *Id.*

47. "Finally, . . . preliminary findings suggest that video production techniques do not exert a dramatic effect on a juror's perception of trial participants, or the ultimate outcome of civil litigation." *Id.* at 697.

48. As was noted:

It should be stressed, however, that research has just been commenced in this area. Moreover, the problems are complex, and the most prudent initial strategy probably lies in legislating for uniformity in the use of videotape which will stipulate a fixed camera system. Perhaps by having a presentation formula constant for all trial participants, questions about the influence of "editorial" judgments and the possible inequities resulting from wealthier participants retaining professional taping advice may be circumvented.

*Id.* at 697-98.

49. Questionnaires were given to county court judges, a sample of defendants, and all the assistant state attorneys and assistant public defenders assigned to the county court.

questions were based included the physical aspects—audio and visual clarity, courtroom demeanor, comfort/ease with the use of the system, length of arraignments, security, and inmates' understanding of the process.<sup>50</sup>

The attorneys representing the public defender's office and state attorney's office generally agree on the advantages and disadvantages to this new system. The main complaint voiced by these two offices is that video depersonalizes the contact between the parties in the courtroom and those in the jail. Part of the problem occurs because the assistant state attorneys and assistant public defenders cannot hear or see each other clearly.<sup>51</sup> This can easily be corrected if the parties involved request the necessary technical adjustments, such as turning up the volume or moving the camera.

The respondents' feeling that personal contact is lost may be due to technical limitations in the system. The parties commented that they did not have an overall view of the proceeding. The judge cannot see all of the defendants. The assistant public defender cannot see the assistant state attorney, thus hampering communication. To correct this problem, the court could purchase a wide angle lens and give remote control of the camera and microphone in the jail to the console technician.

The need for all parties involved to be sensitive to the new system is apparent. Complaints that the judge goes too fast and does not involve the assistant public defender in his talks with the assistant state attorney or pretrial staff may be remedied with time and increased judicial experience.

All respondents to the questionnaire agreed that video decreases the number of courtroom disruptions and increases the ability of the judge to focus on one defendant and conduct his case exhaustively. Because the defendants are not being jammed into holding cells behind each courtroom, there is a perceived humanness in this system.

## V. CONCLUSION

Videotaping misdemeanor arraignments should be continued. The increase in efficiency of judicial time, the cost savings, and the

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50. Responses were obtained from thirty-six inmates, twelve judges, eight assistant state attorneys, and nine assistant public defenders. The responses are numerically described *infra* in Tables A-E.

51. See *infra* Table A. It is interesting to compare the responses of the defendants concerning the adequacy of the audio-video components of the system with those responses of the attorneys (public defenders) representing those same defendants.

additional advantages, more than outweigh the disadvantages. The evaluators agree that the defendant is not deprived of the legal rights afforded him at regular misdemeanor first appearances.

The system has dealt only with misdemeanor processing to date. Future planning should analyze the use of electronic devices for felony bond hearings, and hearings involving juveniles or women, who are lodged far from the courthouse. This would cut down on the cost of transportation and avoid security problems resulting from the transport of prisoners.<sup>52</sup>

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52. A memorandum dated June 20, 1983 from County Court Judge Harvey Baxter to Chief Judge Gerald T. Wetherington outlined recommendations for a new jail video system. The proposed system incorporates the use of microwaves to transmit signals from remote facilities to the courthouse.

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CROSS-TABULATION OF RESPONDENT GROUP  
RESPONSES TO PHYSICAL ASPECT QUESTIONS  
(IN PERCENTAGES)

## TABLE

## A

AUDIO ADEQUACY OF VIDEO SYSTEM  
RESPONDENT GROUP (# OF RESPONDENTS)

<u>Opinion</u>	<u>Judges (10)</u>	State	Public	<u>Defendants (36)</u>
		<u>Attorney (8)</u>	<u>Defender (9)</u>	
Agree	90	50	0	75
Neutral	0	12.5	11.1	8.3
Disagree	10	37.5	88.9	16.7
No Reponse	0	0	0	0

## B

VISUAL ADEQUACY OF VIDEO SYSTEM  
RESPONDENT GROUP (# OF RESPONDENTS)

<u>Opinion</u>	<u>Judges (10)</u>	State	Public	<u>Defendants (36)</u>
		<u>Attorney (8)</u>	<u>Defender (9)</u>	
Agree	90	62.5	22.2	86.1
Neutral	0	0	0	5.6
Disagree	10	37.5	77.8	8.3
No Reponse	0	0	0	0

## C

COURT DISRUPTED DUE TO NOISE IN JAIL  
RESPONDENT GROUP (# OF RESPONDENTS)

<u>Opinion</u>	<u>Judges (10)</u>	State	<u>Defendants (36)</u>
		<u>Attorney (8)</u>	
Agree	20	23.5	19.4
Neutral	10	29.4	11.1
Disagree	70	47.1	66.7
No Response	0	0	2.8

D

ABILITY TO BE HEARD BY JUDGE

<u>Opinion</u>	• Assistant <u>State Attorney (8)</u>	Assistant <u>Public Defender (9)</u>
Agree	62.5	22.2
Neutral	12.5	22.2
Disagree	25	55.6
No Response	0	0

E

EFFECTIVE COMMUNICATION WITH OPPOSITION  
(OTHER SIDE)

<u>Opinion</u>	<u>Judge (10)</u>	State <u>Attorney's Office (8)</u>	<u>Public Defender (9)</u>
Agree	70	25	0
Neutral	20	25	0
Disagree	10	50	100
No Response	0	0	0