

**C1-84-2137
STATE OF MINNESOTA
IN SUPREME COURT**

OFFICE OF
APPELLATE COURTS

FEB 2 2007

FILED

In Re:

**Supreme Court Advisory Committee
On Rules of Criminal Procedure**

**REPORT WITH PROPOSED AMENDMENTS
TO THE RULES OF CRIMINAL PROCEDURE
CONCERNING ITV COURT APPEARANCES**

February 2, 2007

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**REPORT TO THE MINNESOTA SUPREME COURT
FROM THE SUPREME COURT
ADVISORY COMMITTEE
ON RULES OF
CRIMINAL PROCEDURE
February 2, 2007**

In October 1999, the Minnesota Supreme Court approved the statewide use of ITV in limited criminal matters on a pilot basis under the protocol previously approved by the Court for the Ninth Judicial District's pilot project. In April 2006, the Judicial Council submitted to the Supreme Court its Proposed Protocol for the Use of ITV for Criminal Matters in District Court. By order of the Supreme Court dated May 16, 2006, the Advisory Committee on Rules of Criminal Procedure was directed to review the Judicial Council's protocol and to recommend and comment upon proposed rules implementing the protocol if adopted by the Court. The order gave interested persons the opportunity to submit to the committee written statements concerning this subject and directed that our report be submitted to the Court by October 20, 2006. By subsequent order of the Court dated October 24, 2006, the deadline for submitting the report was extended to February 2, 2007.

The advisory committee reviewed both protocols and the comments received from members of the bench and bar, including comments from many persons with experience in the pilot project. The committee has completed its review on this matter and recommends that the Supreme Court adopt a new Rule 1.05 to govern ITV proceedings. The Proposed Amendments to the Minnesota Rules of Criminal Procedure are submitted

herewith. A summary of those proposed rule amendments along with our comments concerning ITV follows.

COMMITTEE CONCERNS

The advisory committee recognizes that most states allow ITV appearances to some extent in criminal matters and that the use of ITV in appropriate circumstances can result in more-prompt hearings and possibly an earlier release for defendants who are in custody. Without ITV, defendants in certain areas of the state may be penalized by having their initial court appearances delayed due to the great distances involved, the lack of sufficient judicial and other resources, and other unpredictable events. This is of special concern in misdemeanor cases where a defendant may spend more time in custody awaiting the first appearance and a release determination than might be appropriate as punishment for the offense. More-prompt appearances by ITV could result in earlier release for defendants and the more prompt resolution of their cases.

Nevertheless, the advisory committee believes that in-person court appearances are preferable and is very concerned that ITV not be extended beyond what is absolutely necessary to benefit in-custody defendants by offering more-prompt hearings than would otherwise be possible. The committee is concerned about the impersonal nature of ITV court appearances and the possible adverse effects on the due process rights of defendants who appear by ITV. The committee is concerned that if ITV appearances are not strictly limited, the financial and other pressures to expand ITV use could result in ITV becoming the rule rather than the exception for certain court appearances. That could result in a

two-tier court system with those persons financially or otherwise unable to obtain release from custody appearing by ITV and those persons not in custody appearing personally before a judge. Proposed Rule 1.05, subd. 2, therefore expresses a presumption in favor of in-person court appearances. This presumption is in accord with the American Bar Association Standards for Criminal Justice, Special Functions of the Trial Judge, Standard 6-1.8(a) (3d ed. 2000). The committee believes that such a presumption is appropriate considering the defendant's right to confrontation and to a public trial under the Sixth Amendment to the United States Constitution and under Article I, Section 6 of the Minnesota Constitution. This presumption also protects the public's right to open criminal trials and judicial proceedings. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). In accordance with these concerns, proposed Rule 1.05 contains specific restrictions on the use of ITV that go beyond the restrictions included in the Judicial Council Protocol.

RECOMMENDATIONS

Proposed Rule 1.05, subd. 3, allows the use of ITV only if permitted by the court when there is no judge physically present in the venue county. This is more restrictive than the Judicial Council's protocol which would allow certain ITV appearances if no judge is "available" in the venue county and other ITV appearances regardless of judge availability. Further, pursuant to proposed Rule 1.05, subd. 1(1), ITV may be used only for specifically-designated court appearances and then only when the defendant is in custody. For felony and gross misdemeanor cases, those specifically-designated court

appearances under subdivision 3(1) of the rule are for hearings under Rule 5, Rule 6, and consolidated Rule 5 and Rule 8 hearings under Rule 5.03. Unlike the protocol, the proposed rule does not permit ITV hearings for separate Rule 8 appearances or for Rule 13 appearances. Those hearings are held later in the proceedings and there should be sufficient time for the court to schedule in-person court appearances.

Further, the advisory committee does not believe it is appropriate to enter a felony or gross misdemeanor plea under Rule 13 by ITV. A not guilty plea entered under Rule 13 for a felony or gross misdemeanor is not to be entered until the omnibus hearing is held under Rule 11. Under the rules, an omnibus hearing must be held and the committee believes that should be an in-person appearance by the defendant. The Judicial Council's protocol provides for waiver of an omnibus hearing by ITV, but such a waiver is not appropriate under the existing rules. If there are no evidence suppression issues or if no hearing on such issues is demanded, that will not be part of the omnibus hearing. However, an omnibus hearing still must be held and there is no need for a waiver whether by ITV or in person.

For misdemeanor cases, including petty misdemeanors, the specifically-designated ITV court appearances permitted under subdivision 3(2) of the rule are for hearings under Rule 5 and Rule 6, and for arraignments, pleas, and sentencings. Where the defendant is not in custody and for other hearings scheduled later in the criminal proceedings, time pressures are not so great and it should be possible to schedule those hearings before a judge in person.

Additionally, ITV hearings are subject to the consent and objection requirements of subdivision 4. An ITV hearing otherwise permitted by Rule 1.05 may not be held unless the defendant consents to such a hearing, either in writing or orally on the record. To be sure that those defendants understand their rights regarding ITV appearances, proposed Rule 1.05, subd. 4(1), provides for an ITV advisory and proposed Form 51 provides a waiver of personal presence form that may be used by defendants appearing by ITV. Proposed Form 51 is similar to the waiver form appended to the Ninth Judicial District's protocol. Further, under Rule 1.05, subd. 4(3), either the defendant's attorney or the prosecuting attorney may prevent an ITV appearance by objecting either in writing or orally on the record to such an appearance.

The provision in proposed Rule 1.05, subd. 4(4), allowing the chief public defender to object to an ITV hearing is in addition to the right of either the prosecuting attorney or the public defender assigned to the case to make such an objection. There is no such provision in the Judicial Council's protocol, but there was a similar provision in the Ninth Judicial District's protocol. The chief public defender has no right to object to an ITV appearance by a defendant who is represented by private counsel. The right of objection by the chief public defender is included as a check against abuse of the rule and the possibly excessive use of ITV for mass calendars where in-person appearances could be arranged. It is possible that an objection by the chief public defender may conflict with a defendant's desire for an ITV appearance. However, such a conflict is unlikely to occur if the chief public defender considers any ethical obligations to the defendant and

the defendant's right of self-representation under Faretta v. California, 422 U.S. 806 (1975).

Where an ITV hearing is not held because the defendant does not consent or an objection is made by counsel or the chief public defender, subdivision 4 directs that an in-person court appearance for that hearing must be scheduled to be held within the time limits as otherwise provided by the rules.

Rule 1.05, subd. 5(1), requires the defendant's attorney to be present at the same terminal site as the defendant for ITV court appearances, except in "emergency" circumstances when both parties agree that the defendant's attorney may be at a different site. The rule does not permit either the defendant's attorney or the prosecuting attorney to be present at the same terminal as the judge unless both attorneys are at that site with the judge or unless the attorney who is not there agrees on the record that the other attorney may be at the site with the judge. This proposed rule is substantially the same as the Judicial Council's protocol, except that the protocol would also allow the defendant's attorney to be at a different terminal site in "unusual" circumstances. The advisory committee believes that "unusual" circumstances could be too broadly-defined and too easily sacrifice the substantial benefits of having defense counsel with the defendant at the time of the ITV appearance.

Under proposed subdivision 6, for any ITV appearance, a defendant may request a rehearing before a judge in person. The rehearing shall be *de novo* and shall be held within three business days after the defendant requests the rehearing. If the request for

the rehearing is made at the time of the initial ITV hearing, then the rehearing must be held within three business days after that ITV hearing. However, often a defendant will not have counsel at the time of the ITV hearing and the request might not be made until after the defendant has had the opportunity to obtain and talk to counsel. The time limit for the rehearing would then start when the request is submitted to the court.

TECHNICAL PROTOCOL REQUIREMENTS

Proposed Rule 1.05 does not contain the various requirements for conducting ITV hearings that are included as “Standard Procedures” and “Equipment and Room Standards” in number 5 and number 7 of the Judicial Council’s protocol. Although these requirements are important to a successful ITV hearing, they are very detailed and technical and should apply to both criminal and civil proceedings. The advisory committee therefore believes it is appropriate to set forth these requirements somewhere other than in the Rules of Criminal Procedure; possibly in the General Rules of Practice for the District Courts. The committee therefore suggests that the Court refer this matter to the appropriate committee for further consideration.

FUTURE REVIEW

Because of the concerns of the advisory committee expressed in this report, proposed Rule 1.05 strictly limits the use of ITV in criminal proceedings. If ITV is approved by the Court, the committee believes it is very important to carefully review both the beneficial and adverse effects of ITV appearances on defendants. This is important not just for minority and indigent defendants, but for all defendants who make

such appearances. The committee therefore recommends that data be gathered on future ITV appearances concerning how well the rule is working, who is impacted by ITV appearances, and how they are impacted. It will then be possible to evaluate whether further revision of the ITV rules is necessary.

Dated: FEBRUARY 1, 2007

Respectfully Submitted,



Judge Robert Carolan, Chair
Supreme Court Advisory Committee
on Rules of Criminal Procedure

**PROPOSED AMENDMENTS TO THE
RULES OF CRIMINAL PROCEDURE
February 2, 2007**

The Supreme Court Advisory Committee on Rules of Criminal Procedure recommends that the following amendments relating to the use of interactive video teleconference (“ITV”) in criminal proceedings be made in the Minnesota Rules of Criminal Procedure.

1. Rule 1. Scope, Application, General Purpose, and Construction.

Amend this rule by adding a new Rule 1.05 as follows:

Rule 1.05. Use of Interactive Video Teleconference in Criminal Proceedings

Subd. 1. Definitions.

(1) **ITV.** “ITV” refers to interactive video teleconference and is permitted only for court appearances authorized by subdivision 3 of this rule for defendants who are in custody.

(2) **Terminal Site.** A terminal site is any location where ITV is used for any part of a court proceeding.

(3) **Venue County.** The “venue county” is the county where pleadings are filed and hearings are held under current court procedures.

Subd. 2. Presumption. All appearances under the Minnesota Rules of Criminal Procedure shall be made in person unless authorized to be conducted by ITV under this rule.

Subd. 3. Permissible Use of ITV.

(1) **Felony and Gross Misdemeanor Cases.** Subject to the limitations in subdivision 4 of this rule, the court may permit hearings under Rule 5 and Rule 6 and

consolidated Rule 5 and Rule 8 hearings under Rule 5.03 to be conducted by ITV before any available judge of the district if there is no judge physically present in the venue county, provided that no plea may be taken by ITV.

(2) **Misdemeanor Cases.** Subject to the limitations in subdivision 4 of this rule, the court may permit Rule 5 and Rule 6 hearings, arraignments, pleas and sentencings to be conducted by ITV before any available judge of the district if there is no judge physically present in the venue county.

Subd. 4. Consent Requirements.

(1) **ITV Advisory.** When a hearing by ITV is scheduled, a waiver of personal presence form as appended to these rules shall be provided to the defendant together with the notice of hearing. At the time of the appearance by ITV, the judge, judicial officer, or other duly authorized personnel shall advise the defendant of the right to be personally present before the presiding judge at all proceedings and that an in-person appearance will be scheduled if the defendant does not consent to appearing by ITV. The judge, judicial officer, or other duly authorized personnel shall also advise the defendant that if the defendant does consent to the ITV hearing, the defendant has the right to an in-person rehearing to be held within three business days after the defendant requests such a hearing.

(2) **Consent of Defendant.** Court hearings pursuant to subdivision 3 of this rule may not be conducted by ITV unless the defendant consents thereto either in writing or orally on the record at the ITV appearance. If the defendant does not consent to the hearing being conducted by ITV, an in-person court appearance for that hearing shall be

scheduled to be held within the time limits as otherwise provided by these rules.

(3) **Objection by Counsel.** The defendant's attorney or the prosecuting attorney may object either in writing or orally in court on the record to conducting an ITV hearing otherwise permitted to be held under subdivision 3 of this rule. If such an objection is made, an in-person court appearance for that hearing shall be scheduled to be held within the time limits as otherwise provided by these rules.

(4) **Objection by Chief Public Defender.** In those cases where a defendant is not represented by private counsel, the chief public defender for the district also may object either in writing or orally in court on the record to conducting an ITV hearing otherwise permitted to be held under subdivision 3 of this rule. If such an objection is made, an in-person court appearance for that hearing shall be scheduled to be held within the time limits as otherwise provided by these rules.

Subd. 5. Location of Participants.

(1) **Defendant's Attorney.** The defendant's attorney shall be at the same terminal site from which the defendant appears except in emergency circumstances when agreed to by both parties on the record. In such emergency circumstances, the defendant's attorney may be at any terminal site, provided that defendant's attorney may not be at the same terminal site as the judge unless the prosecuting attorney agrees to that on the record or both counsel are present at the same terminal site as the judge.

(2) **Prosecuting Attorney.** The prosecuting attorney may be present at any terminal site except the terminal site from which the judge appears, unless the defendant's

attorney agrees to that on the record or both counsel are present at the same terminal site as the judge.

(3) **Judge.** The judge may be at any terminal site.

(4) **Public.** Members of the public may be at any terminal site.

Subd. 6. Request for Rehearing. If a hearing is conducted by ITV under subdivision 3 of this rule, the defendant may request an in-person rehearing before a judge. The rehearing shall be held *de novo* within three business days of the defendant's request for that hearing and shall be deemed a continuance of the ITV hearing.

Subd. 7. Multi-county Violations. When a defendant has pending charges in more than one county within a district, any or all ITV appearances authorized by this rule may be heard by ITV by any judge of that district.

Subd. 8. Protocol. All other requirements for conducting ITV hearings shall be governed by the Protocol for the Use of ITV for Criminal Matters in the District Court.

2. **Comments on Rule 1.**

Amend the comments on Rule 1 by adding the following new paragraphs at the end of the existing comments as follows:

Rule 1.05 authorizes the use of interactive video teleconference ("ITV") for certain court appearances and establishes the procedure for such appearances. In 1999, the Minnesota Supreme Court approved the statewide use of ITV in limited criminal matters on a pilot basis under the protocol previously approved by the Court for the Ninth Judicial District's pilot project. In 2006, the Judicial Council recommended to the Court a revised

protocol for ITV court appearances. The Court then directed the Supreme Court Advisory Committee on Rules of Criminal Procedure to review that protocol and to recommend and comment upon proposed rules implementing the Judicial Council's protocol if adopted by the Court. Rule 1.05 is the result of that review.

The advisory committee recognizes most states allow ITV appearances to some extent in criminal matters and the use of ITV in appropriate circumstances can result in more-prompt hearings and possibly an earlier release for defendants who are in custody. Without ITV, defendants in certain areas of the state may be penalized by having their initial court appearances delayed due to the great distances involved, the lack of sufficient judicial and other resources, and other unpredictable events. This is of special concern in misdemeanor cases where a defendant may spend more time in custody awaiting the first appearance and a release determination than might be appropriate as punishment for the offense. Permitting ITV use for more-prompt appearances could result in earlier release for defendants and the more prompt resolution of their cases.

Nevertheless, the advisory committee believes that in-person court appearances are preferable and is very concerned ITV not be extended beyond what is absolutely necessary to benefit in-custody defendants by offering more-prompt hearings than would otherwise be possible. The committee is concerned about the impersonal nature of ITV court appearances and the possible adverse effects on the due process rights of defendants who appear by ITV. The committee is concerned that if ITV appearances are not strictly limited, the financial and other pressures to expand ITV use could result in ITV becoming

the rule rather than the exception for certain court appearances. That could result in a two-tier court system with those persons financially or otherwise unable to obtain release from custody appearing by ITV and those persons not in custody appearing personally before a judge. Rule 1.05, subd. 2, therefore expresses a presumption in favor of in-person court appearances. This presumption is in accord with the American Bar Association Standards for Criminal Justice, Special Functions of the Trial Judge, Standard 6-1.8(a) (3d ed. 2000). The committee believes that such a presumption is appropriate considering the defendant's right to confrontation and to a public trial under the Sixth Amendment to the United States Constitution and under Article I, Section 6 of the Minnesota Constitution. This presumption also protects the public's right to open criminal trials and judicial proceedings. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). In accordance with these concerns, Rule 1.05 contains specific restrictions on the use of ITV.

According to Rule 1.05, subd. 3, ITV may be used only if permitted by the court when there is no judge physically present in the venue county. Further, pursuant to Rule 1.05, subd. 1(1), ITV may be used only for specifically-designated court appearances and then only when the defendant is in custody. For felony and gross misdemeanor cases, those specifically-designated court appearances under subdivision 3(1) of the rule are for hearings under Rule 5, Rule 6, and consolidated Rule 5 and Rule 8 hearings under Rule 5.03. For misdemeanor cases, including petty misdemeanors, those specifically-designated court appearances under subdivision 3(2) of the rule are for hearings under

Rule 5 and Rule 6, and for arraignments, pleas, and sentencings. Where the defendant is not in custody and for other hearings scheduled later in the criminal proceedings, time pressures are not so great and it should be possible to schedule those hearings before a judge in person.

Additionally, ITV hearings are subject to the consent and objection requirements of subdivision 4. An ITV hearing otherwise permitted by Rule 1.05 may not be held unless the defendant consents to such a hearing, either in writing or orally on the record. To be sure that those defendants understand their rights regarding ITV appearances, Rule 1.05, subd. 4(1), provides for an ITV advisory and a waiver of personal presence form, which is contained in the Criminal Forms appended to these rules as Form 51. Further, under Rule 1.05, subd. 4(3), either the defendant's attorney or the prosecuting attorney may prevent an ITV appearance by objecting either in writing or orally on the record to such an appearance.

The provision in Rule 1.05, subd. 4(4), allowing the chief public defender to object to an ITV hearing is in addition to the right of either the prosecuting attorney or the public defender assigned to the case to make such an objection. The chief public defender has no right to object to an ITV appearance by a defendant who is represented by private counsel. The right of objection by the chief public defender is included as a check against abuse of the rule and the possibly excessive use of ITV for mass calendars where in-person appearances could be arranged.

Where an ITV hearing is not held because the defendant does not consent or an

objection is made by counsel or the chief public defender, an in-person court appearance for that hearing must be scheduled to be held within the time limits as otherwise provided by these rules. See Rule 4.02, subd. 5, as to the time limit for a court appearance by an in-custody defendant arrested without a warrant. The refusal by a defendant to appear by ITV does not automatically extend the time limit for the in-person court appearance. Rather, any extension of that time limit would have to be justified by cause shown under Rule 34.02.

Rule 1.05, subd. 5(1), requires the defendant's attorney to be present at the same terminal site as the defendant for ITV court appearances, except in emergency circumstances when both parties agree that the defendant's attorney may be at a different site. The rule does not permit either the defendant's attorney or the prosecuting attorney to be present at the same terminal as the judge unless both attorneys are at that site with the judge or unless the attorney who is not there agrees on the record that the other attorney may be at the site with the judge.

The defendant may request a rehearing before a judge in person. The rehearing shall be *de novo* and shall be held within three business days after the defendant makes the request for the rehearing. If the request for the rehearing is made at the time of the initial ITV hearing, then the rehearing must be held within three business days after that ITV hearing. However, often a defendant will not have counsel at the time of the ITV hearing and the request might not be made until after the defendant has had the opportunity to obtain and talk to counsel. The time limit for the rehearing would then

start when the request is submitted to the court.

3. Form 51. ITV Waiver of Personal Presence.

Amend the Criminal Forms following the rules by adding a new Form 51 as follows:

FORM 51. ITV WAIVER OF PERSONAL PRESENCE

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF _____

_____ JUDICIAL DISTRICT

_____,)

Plaintiff,)

vs.)

_____,)

Defendant.)

ITV WAIVER OF

PERSONAL PRESENCE

PLEASE TAKE NOTICE that the undersigned Defendant acknowledges his or her right to be personally present before the presiding Judge at all stages of these proceedings. I hereby waive that right for the hearing scheduled for (date) , and agree to appear before the presiding Judge by interactive video teleconference (ITV) for that hearing. I further understand that I have the right to request a rehearing of this matter before a judge in person and it will be held within three business days after I make that request.

I understand that this waiver of personal presence before the presiding Judge of

this hearing may not be extended to a future hearing without my later consent.

Dated:

Signature of Defendant