

1 Lisa M. Panahi, Bar No. 023421
2 General Counsel
3 State Bar of Arizona
4 4201 N. 24th Street, Suite 100
5 Phoenix, AZ 85016-6288
6 (602) 340-7236

7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-20-0015

10 **PETITION TO AMEND RULE 22.5**
11 **OF THE ARIZONA RULES OF**
12 **CRIMINAL PROCEDURE**

COMMENT OF
THE STATE BAR OF ARIZONA

13 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar
14 of Arizona (the “State Bar”) hereby submits the following as its comment to the
15 above-captioned Petition. The analysis and details for this Comment are
16 substantially the product of the State Bar’s Criminal Practice and Procedure
17 Committee, composed of a balance of prosecution and defense practitioners, and
18 judicial members.
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21 Petitioner seeks to amend Rule 22.5 of the Arizona Rules of Criminal Procedure
22 to regulate post-trial juror contact. A substantially similar petition was filed by the
23 same Petitioner, opposed by the State Bar of Arizona, and denied by the Arizona
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1 Supreme Court in 2019. (R-19-0008).

2 The stated aim of the Petition is to protect jurors from unwanted post-trial
3 contact after the 10-day jurisdictional period within which a defendant must file a
4 Motion for New Trial pursuant to Rule 24.1, Ariz. R. Crim. P. The proposed
5 amendment would not preclude post-trial juror contact after the 10-day period but
6 would limit it by requiring a lawyer to first establish “good cause” before a judge.
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8 The justification in the Petition is framed as being in furtherance of juror
9 privacy; however, privacy rights of citizens remain the same whether a person is a juror
10 or not. Mere “contact” with a citizen does not constitute a violation of that citizen’s
11 right to privacy. The privacy rights guaranteed by the state and federal constitutions
12 protect citizens from *governmental* intrusions—not intrusions of this nature.
13 “However broad the federal constitutional right to privacy may be, it applies only to
14 intrusions by the *government* or where there is ‘state action.’” *Hart v. Seven Resorts,*
15 *Inc.*, 190 Ariz. 272, 276-77 (App.1997) (*emphasis* in original). “An individual
16 successfully can assert his or her constitutional right to privacy only against
17 governmental acts and not against acts of a private defendant unless ‘state action’
18 exists. * * * [N]othing [in Arizona law] suggests the Arizona right applies against
19 private individuals.” *Id.* At the end of each criminal trial, the trial judge advises jurors
20 that they may communicate with the trial attorneys about the case, or may decline to
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1 do so, and that the attorneys are required to respect those wishes.

2 The proposed rule change is legally unsound and practically unworkable. It's
3 legally unsound because Petitioner repeatedly relies on federal authorities prohibiting
4 post-trial juror contact. The federal rule, however, is different from Arizona's rule.
5 Federal Rule of Evidence 606(b) adopted the Senate's version broadly prohibiting
6 inquiry into what transpired during juror deliberations. *Tanner v. United States*, 483
7 U.S. 107, 121 (1987). The House version of the rule, ultimately adopted by Arizona,
8 permits "the impeachment of verdicts by inquiry into, not the mental processes of the
9 jurors, but what happened in terms of conduct in the jury room." *Id.* at 123-124; *see*
10 *also A.R.E. 606(b); Rule 24.1(d), Ariz. R. Crim. P.*

11 The Petition does not address this important distinction, and thus misses the fact
12 that juror testimony involving internal misconduct may be received by a trial court
13 when necessary to ensure fundamental fairness. As such, the Petition fails to recognize
14 that claims of juror misconduct don't involve the deliberative process—a process
15 protected from inquiry or intrusion. Rather, such claims involve *conduct* occurring
16 during deliberations, such as: premature deliberations occurring before the close of the
17 case; intoxicated or sleeping jurors; non-participating jurors; juror refusal to follow
18 instructions; receipt of information from external sources; juror threats or intimidation
19 of other jurors; coerced verdicts; or statements indicative of reliance on racial or other
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1 stereotypes or animus to convict a defendant – to name but a few. *See, e.g., Rule*
2 *24.1(c)(3), Ariz. R. Crim P.* All of these implicate a criminal defendant’s Sixth
3 Amendment right to a fair trial.
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5 The proposed rule change is unworkable in practice for at least two reasons.
6 First, in capital trials, after the guilt-phase verdict(s) are rendered, the case proceeds to
7 the aggravation phase followed by the penalty phase. These latter two phases can last
8 weeks or months. Thus, although a Motion for New Trial – which includes the ground
9 of juror misconduct – must be filed within 10 days of the guilt-phase verdict(s), lawyers
10 and jurors will still be participating in the remaining two phases of the capital trial.
11 Lawyer/juror communication is impossible because it is prohibited during all phases
12 of a capital trial.
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15 Second, in Arizona, “juror misconduct warrants a new trial if the defense shows
16 actual prejudice or if prejudice may fairly be presumed from the facts.” *State v. Miller,*
17 *178 Ariz. 555, 558 (1994)* (emphasis removed). A showing of “good cause” to permit
18 juror contact past the 10-day time frame within which a Motion for New Trial may be
19 filed is an impossibility absent counsel’s possession of *some facts* gleaned from one or
20 more jurors in the first instance. Lawyer speculation will not suffice as “good cause.”
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1 **CONCLUSION**

2 For the reasons stated above, the State Bar of Arizona respectfully requests
3 that this Petition be denied.
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5 RESPECTFULLY SUBMITTED this 1st day of May, 2020.

6 /s/ Lisa M. Panahi
7 Lisa M. Panahi
8 General Counsel

9 Electronic copy filed with the
10 Clerk of the Supreme Court of Arizona
11 this 1st day of May, 2020.

12 by: Patricia Seguin
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