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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of)
) Arizona Supreme Court No. R-23-0003
)
ARIZONA RULE OF)
EVIDENCE 615)
) REPLY TO COMMENTS
)
)
)
_____)

The Advisory Committee on Rules of Evidence, by and through its Co-Chairs, the Honorable Sara Agne and the Honorable Maria Elena Cruz (“Petitioner”) replies to the comments on its Petition to Amend Arizona Rule of Evidence 615 filed by the Directors of the Maricopa County Indigent Defense Agencies, the Pinal County

Public Defender’s Office and the Arizona Attorneys for Criminal Justice (“AACJ”). Petitioner urges the Court to adopt the amendments and comment as proposed in the Petition. Petitioner appreciates the supportive comment filed May 1, 2023, by the State Bar of Arizona, and addresses this Reply to the comments filed that recommend different courses of action from that sought by the Petition.

I. INTRODUCTION AND BACKGROUND

On January 3, 2023, the Advisory Committee on the Rules of Evidence, through its co-chairs, submitted a Petition to Amend Arizona Rule of Evidence 615. The proposed amendments are consistent with the recent amendments suggested to the federal rule. The amendments also provide needed clarification on the scope of an exclusion order—and the Court’s authority to enter additional orders preventing disclosure of trial testimony—because the current text of the rule operates only to physically exclude witnesses from the courtroom. The Committee’s proposed amendments give judges express authority to enter orders when, in the court’s discretion, additional orders are appropriate to prevent witnesses from learning what happens inside the courtroom while excluded.

II. SUMMARY OF COMMENTS; STATEMENTS IN REPLY

The Directors of the Maricopa County Indigent Defense Agencies filed a joint comment opposing the Advisory Committee’s petition. The comment argues that the proposed amendments subvert the protections of exclusion of witnesses and argues

the Court should “stay the course” with the mandatory requirements of 615. The comment argues that the criminal jury instruction regarding the exclusion of witnesses adequately addresses concerns. The Pinal County Public Defender also filed a comment raising similar concerns.

The Committee’s amendments do not affect the mandatory exclusion of witnesses from the courtroom when requested by a party. And the arguments suggesting the amendments turn “sequestration” into a discretionary decision fail to recognize that Rule 615, in its current form, is silent on a trial court’s authority to restrict witnesses’ conduct and access to trial testimony while already excluded. There is nothing “mandatory” in Rule 615 at present that safeguards against witnesses sharing their testimony with other witnesses after being excused from the courtroom. While Arizona Rule of Criminal Procedure 9.3(a)(3) states witnesses may not communicate “about the case,” the corresponding evidence rule does not include the same prohibition. Rather than subverting protections and defeating the purpose of Rule 615, the proposed amendments add additional protections to the integrity of the proceedings by giving judges express authority, and necessary discretion, to prohibit witnesses from sharing information in a way that subverts exclusion orders.

AAJC also filed a comment opposing the proposed amendments. In its comment, AAJC criticizes the amendments as incomplete and expresses concern

that because the amendments only address two improper methods of accessing trial testimony, other improper methods will be interpreted as being permitted. This concern is addressed by the broad language in the rule permitting the trial judge to “*prohibit excluded witnesses from accessing trial testimony*” (emphasis added). This broad language gives trial judges the authority to enter orders prohibiting excluded witnesses from listening to livestream proceedings, from speaking to other witnesses about testimony, or reading a transcript of testimony, among other methods. It is precisely the proposed amendment’s broad language that gives trial judges discretion to enter other appropriate orders that safeguard the trial process. Mandating the same order in every case, without allowing discretion to trial judges to make orders appropriate to the case at issue, creates far more danger of abuse not specifically addressed in the rule and overly cumbersome restrictions.

Next, AACJ expresses concerns that the amendments do not adequately address the issue of expert witnesses and suggests that a specific reference to experts be made in the exclusions. The Committee believes the rule allowing for an exception to exclusion for witnesses “whose presence a party shows to be essential to presenting a claim for defense” is adequate to cover not only experts, but any witness essential to a party’s courtroom presentation. Additionally, the amendments provide judges with authority to enter a specific order exempting experts from the rule of exclusion if deemed appropriate.

Finally, AAJC suggests that Rule 615 should not include specific references to crime victims but should instead simply refer to Criminal Rule 9.3 to include all the exceptions set forth in that criminal rule. The Advisory Committee notes that it tends to avoid cross-references to other rules within a rule to avoid confusion and the possibility of the need for cascading amendments when one rule set is amended and another would not be.

III. CONCLUSION

The Committee respectfully requests that the Court approve the amendments and comment as proposed by the Petition, with an effective date of January 1, 2024.

DATED this 31st day of May, 2023.

/s/ Sara J. Agne _____

Sara J. Agne

Co-Chair, Advisory Committee on Rules of Evidence

/s/ Maria Elena Cruz w/ permission _____

Maria Elena Cruz

Co-Chair, Advisory Committee on Rules of Evidence