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**IN THE SUPREME COURT  
STATE OF MARICOPA**

In the Matter of: ) Arizona Supreme Court No. R-24-0013  
PETITION TO AMEND RULE 38(f)(1), )  
(2) and (3) OF THE ARIZONA RULES ) REPLY  
OF PROTECTIVE ORDER )  
PROCEDURE )

Legal Services for Crime Victims in Arizona, Petitioner in this matter, hereby replies pursuant to Rule 28(e)(5), Rules of the Supreme Court.

**I. Procedural History**

On January 9, 2024, Petitioner filed a petition to amend Rules 83(f)(1), (2) and (3) of the Arizona Rules of Protective Order Procedure relating to the defendant’s personal appearance at a contested hearing. This Court will consider whether to adopt these amendments at its annual Rules Conference in August or September 2024. This petition was open for public comment until May 1, 2024, with any reply due June 3, 2024.

**II. Discussion of Comments**

This petition received two comments. The first comment was from Honorable Wendy Million in which she indicated an opposition on behalf of The Committee on the Impact of Domestic Violence and the Courts (“CIDVC”), arguing against the necessity and fairness of an amendment.

1 The second comment received was submitted by the Honorable Samuel A.  
2 Thumma, Chair of the Arizona Commission on Access to Justice (hereinafter referred  
3 to as “Commission”) and an Arizona Court of Appeals, Div. One, Judge. The  
4 Commission is remaining neutral on the amendment, however provided input  
5 regarding the term “personal appearance” should be clarified to include “virtual  
6 appearance”.

7 **A. Arizona Rule of Protective Order Procedure Rule 38(f)(1)**

8 The petition proposed one amendment to Rule 38(f)(1) to require the defendant  
9 to personally appear for a contested hearing, even when represented by counsel. The  
10 proposed amendment amends the subtitle to read: (1) *Defendant Fails to Personally*  
11 *Appear* (New language underlined). Petitioner proposed this amendment as the rule  
12 is silent on a procedure where the defendant’s appearance is waived by an attorney.

13 ***1. CIDVC COMMENT***

14 CIDVC recommends that this Court not adopt Petitioner’s proposed  
15 amendment. They argue that a defendant has a right to legal counsel and restricting  
16 the ability to waive will undermine that right and place an unnecessary burden on the  
17 defendant. They argue it is unfair to compel a Defendant to appear when their  
18 attorney is fully capable of representing their interests. CIDVC further points out  
19 that it is the plaintiff’s burden at a contest hearing to present evidence to support the  
20 petition. CIDVC notes that the proposed Rule change raises concern regarding  
21 victims’ rights, however claims the petition overlooks the safeguards in the legal  
22 system. CIDVC does not specifically what safeguard would prevent a Defendant  
23 facing a criminal case from using the civil case as a means of forcing a defense  
24 interview on a victim, which is expressly forbidden under Arizona’s Constitution (art.  
25 II, §2.1(A) (5)), A.R.S. §13-4433(A) and Ariz. R. Crim. P. 39.

26 Additionally, CIDVC’s comment ignores the value of the proposed rule  
27 change in prohibiting Defendant from doing an end-run around victims’ rights where  
28 the Plaintiff exercised his/her *constitutional right* and refused an interview in the

1 accompanying criminal case. They also ignored the value in not causing additional  
2 trauma to a crime victim who would be forced to relive victimization through  
3 testimony, especially when no evidence will be offered to contradict the Plaintiff's  
4 Petition. CIDVC has recognized this type of trauma in other rule change proposals<sup>1</sup>.

5 CIDVC goes on to argue that the plaintiff can subpoena a defendant if they  
6 wanted to call the defendant as a witness. The process for a plaintiff to obtain a  
7 subpoena in a Municipal Court is not only unclear, but would be extremely difficult  
8 for a lay person to navigate, assuming they knew utilizing a subpoena was even an  
9 option. This would be exacerbated for a domestic violence victim fleeing an abuser  
10 and the myriad collateral issues involved. There is also concern whether the  
11 mechanism and process for obtaining a subpoena are consistent in courts across  
12 Arizona. Putting aside the mechanism and process issue, this argument ignores the  
13 fact that many domestic violence victims lack the financial means to obtain a process  
14 server. Just as criminal defendants are often disproportionately poor, crime victims  
15 predominantly are of limited means.<sup>2</sup> Additionally, the short 5 to 10-day time frame  
16 once the victim is notified of a contested hearing would make it extremely difficult to  
17 have a defendant subpoenaed, which would be exacerbated if a defendant attempts to  
18 evade service, a common occurrence in these types of cases. What's more, if the  
19 victim is granted exclusive use of the residence, they may not know where the  
20 defendant is residing to have him/her served and if the defendant has a pending  
21 criminal case, he/she may be in custody making it almost impossible to compel their  
22 appearance. Forcing a Domestic Violence Victim to search out and locate a  
23 defendant in order to serve a subpoena against a person they believe presents a threat  
24 to their safety, does not comport with public policy, and is likely to create a chilling  
25 effect.

26 CIDVC final argument is similar to the Commissions comment below on the  
27 value of allowing virtual appearances. The Petitioner agrees with adopting the

28 <sup>1</sup> See CIDVC's *Comment to Petition to Repeal Rule 38(d)* filed April 23, 2024

<sup>2</sup> *Victims Criminal Procedure*, 3rd Ed. 2010, Beloof, D., et al.

1 recommendation proposed by the Commission discussed below.

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3 **2. ARIZONA COMMISSION OF ACCESS TO JUSTICE COMMENT**

4 The Commission, which is remaining neutral regarding the petitioners  
5 proposed amendments, only suggests that if the Supreme Court is inclined to adopt  
6 the rule petition, that personal appearance includes virtual appearance. Petitioner does  
7 not object to adopting the Commissions language to include virtual appearance.

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9 **B. Arizona Rule of Protective Order Procedure Rule 38(f)(1)(2) and 3.**

10 In reviewing the comments, the Petitioner noticed an error in the original  
11 Appendix pertaining to Rule 38 (f)(2). To correct the initial error and incorporate the  
12 comment pertaining to the value of allowing virtual appearances, Petitioner, hereby,  
13 proposes Rules 38(f)(1)(2) be amended as follows, and as set forth in Appendix (with  
14 additions underlined):

15 (1) *Defendant Fails to Personally Appear.* If the plaintiff personally appears  
16 for the contested hearing and the defendant fails to personally appear, and the  
17 defendant received actual notice of the hearing, the protective order will  
18 remain in effect. Personal appearance may include virtual appearance if  
19 approved by the court.

20 (2) *Plaintiff Fails to Personally Appear.* If the defendant personally appears  
21 for the contested hearing and the plaintiff fails to personally appear, and the  
22 plaintiff received actual notice of the hearing, the protective order will be  
23 dismissed. Personal appearance may include virtual appearance if approved  
24 by the court.

25 (3) *Neither Party Personally Appears.* If neither party personally appears for  
26 the contested hearing, and each party received actual notice, the hearing will  
27 be vacated, and the protective order will remain in effect. Personal appearance  
28 may include virtual appearance if approved by the court.

29 **III. REQUEST**

30 Petitioner appreciates the comments submitted during the comment period.  
31 Petitioner respectfully requests that this Court adopt the amendments to Arizona Rule  
32 of Protective Order Procedure Rule 38(f)(1),(2) and (3) as set forth in the Appendix.

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RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of May, 2024.

  
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Gina Godbehere

  
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Jamie Balson

ORIGINAL filed electronically  
this **17<sup>th</sup>** day of **May, 2024** with:

COPY of the foregoing served via email  
this **17<sup>th</sup>** day of **May, 2024** to: