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ARIZONA SUPREME COURT

In the Matter of: Petition to Amend Rule of Protective Order Procedure 36; Rule of Procedure for Juvenile Courts 315; Rule of Evidence 901	Supreme Court No. R-25-0030 Joint Comment by the Directors of the Maricopa County Indigent Defense Agencies

The Maricopa County indigent representation offices (IR) collectively handle most cases filed in Maricopa County in which there has been a finding of indigency. The Office of Public Defense Services (OPDS) provides administrative and financial oversight to the staffed offices and the Office of Contract Counsel (OCC). The staffed offices are comprised of the Office of the Public Defender (OPD), the Office of the Legal Advocate

(OLA), the Office of the Legal Defender (OLD), and the Office of the Public Advocate (OPA). We jointly submit this comment in opposition to R-25-0030, specifically the proposal to amend the comment to Ariz. R. Evid. 901. We do not take a position on the other two proposals pursuant to R-25-0030—the amendments to Rule 36 of the Arizona Rules of Protective Order and Rule 315 of the Arizona Rules for Juvenile Court.

I. The proposal to amend the comment to Rule 901 aims to solve a problem not yet appropriately identified.

The proposal to amend the comment to Rule 901 stems from the obvious and undoubted impact Artificial Intelligence ("AI") already has and will continue to have in our courts. However, the proposal is premature.

Administrative Order No. 2024-33 was created only one year ago, in January 2024. Its stated purpose is to advise the Arizona Judicial Council on matters relating to the implementation, evaluation, and ethical use of AI technologies within the state's judicial system. This AO gave rise to the comment proposal at issue here. However, the committee that was born from this AO has not yet identified tangible problems that AI use in our courts have created. Indeed, the proposed comment change opens by specifically stating: "This comment addresses the proliferation of *possibilities* for artificial intelligence-generated evidence to be proffered in court and the proceedings that may be necessary when it is." (emphasis added). The comment highlights these potential issues it aims to address as "possibilities" and nowhere in the proposal is there evidence that any problem actually does exist.

Moreover, the committee behind the AO at issue has only been together for one

year. Surely if evidence or research comes forward showing these possibilities to be truths, and that our courts do become proliferated with AI-generated "evidence" that is fake, we must take action. But that concern is merely speculative right now, and changing counsel's obligations based on mere speculation is unwarranted.

II. **The proposal aims to combat the proliferation of AI generated evidence but no other types of manufactured evidence.**

While we understand the concern of AI generated evidence being proffered in court, the proposal treats this type of manufactured evidence differently from other types of manufactured evidence. This is especially noteworthy because the comment identifies that courts already have procedures in place to combat the proliferation of other manufactured evidence. As the comment points out, "[e]xisting rules and the trial court's inherent powers to control the presentation of evidence to 'make those procedures effective for determining the truth' address the vast majority of scenarios that could arise.'" Indeed, existing rules of evidence and Arizona caselaw—cited to in the proposed change—highlights the ways in which the court can investigate, and exclude, any evidence it believes is manufactured. Courts are permitted to appoint an expert to investigate such concerns. *See* Ariz. R. Evid. 706; *see also Logerquist v. McVey*, 196 Ariz. 470, 490 (2000).

It is unclear why the *possibility* of AI proliferated evidence should be treated differently than other "fake" evidence at this time, when there has been no reliable study into, or discussion about, how prevalent the proliferation of AI generated evidence is in our courts. Moreover, it is also unclear why existing procedures the court already has available to it is insufficient to quell the potential concerns AI generated evidence brings.

Accordingly, it is unclear what this proposed comment change will practically fix.

III. <u>It is unclear when metadata will be "reasonably necessary" and it is unclear what type of onus this will place on counsel with varying resources.</u>

The final paragraph of the proposed comment change to Rule 901 highlights generalized, non-specific requirements for counsel considering the use of evidence that may be AI-generated. Of course the problem is that counsel will not know if this evidence is AI generated or legitimate. While it is clear the comment change aims to allow opposing counsel and the court ample time to consider whether the proffered evidence is false, it is unclear what the meaning of "reasonably necessary" is. Thus, there may be situations where one counsel believes it is reasonably necessary but another counsel does not.

There also do not appear to be universal and easily accessible methods to access metadata. Thus, this paragraph presents two problems: first, when it is reasonably necessary to provide the metadata; and second, how easily it is to obtain metadata. One law firm may have resources to easily obtain metadata and assess authenticity. Other firms, or solo practitioners, may not. Without a universal and easily accessible method to obtain this information and determine the legitimacy of the potentially proffered evidence, differing requirements is premature and places uneven burdens on counsel.

IV. <u>Conclusion.</u>

The comment change to Rule 901 does nothing to add to the existing measures and mechanisms in the courts to identify and deal with forged evidence. Treating AI evidence differently, at this juncture without knowing more, is premature. The committee should

continue investigating the use of AI-generated evidence in our courts and reliable measures to combat it before proposing changes that impact counsel's ethical obligations.

Respectfully submitted this day of April 30, 2025.

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