

1 **Elizabeth Burton Ortiz**
State Bar No. 012838
2 ARIZONA PROSECUTING ATTORNEYS'
ADVISORY COUNCIL
3 3838 N. Central Avenue, Suite 850
Phoenix, Arizona 85012
4 Tel. (602) 542-7222
Fax. (602) 274-4215

5
6 **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

7 In the Matter of

In Re: R-26-0024

8 PETITION TO AMEND RULES OF
CRIMINAL PROCEDURE 1.9, 15.1,
9 32.6, AND 33.6

**ARIZONA PROSECUTING
ATTORNEYS' ADVISORY
COUNCIL COMMENT IN
OPPOSITION**

10
11
12 The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") respectfully
13 submits the following comment opposing Petition R-26-0024, which proposes to amend
14 Rules 1.9, 15.1, 32.6, and 33.6, of the Arizona Rules of Criminal Procedure, to expand the
15 use of ex parte hearings by criminal defendants for discovery purposes.

16 The use of ex parte hearings in criminal matters should be restricted, not expanded.
17 "Ex parte hearings are not required by due process or equal protection, and they are
18 inherently harmful. Not only can they give the appearance of judicial bias and favoritism,
19 but they also create a risk of erroneous rulings based on one-sided information." *State v.*
20 *Smith*, --- Ariz. ---, 1 CA-SA 25-0281, 2025 WL 3899501, *2, ¶ 10 (Ariz. Ct. App., Dec.
31, 2025). This Court has also expressed concerns with ex parte hearings. In *San Carlos*

1 *Apache Tribe v. Bolton*, 194 Ariz. 68, 72, ¶ 8 (1999), this Court stated that “Ex parte
2 communications with a judge are prohibited for several reasons. They cast doubt upon the
3 adversary system and give the appearance of favoritism.” This Court expanded upon those
4 concerns in more detail:

5 Ex parte communications also deprive the absent party of the right to respond
6 and be heard. They suggest bias or partiality on the part of the judge. Ex
7 parte conversations or correspondence can be misleading. At the very least,
8 participation in ex parte communications will expose the judge to one-sided
9 argumentation, which carries the attendant risk of an erroneous ruling on the
10 law or facts. At worst, ex parte communications is an invitation to improper
11 influence if not outright corruption.

12 *Id.* (cleaned up).

13 These concerns are not small or insignificant. They go to the core purpose of why
14 we use an adversarial system of justice. It functions on the premise that outcomes will be
15 more accurate when both parties are present, both parties are aware of what information
16 and evidence the judge is basing their decisions on, and both parties can make their best
17 arguments. The risk of bias or misleading information being presented to the judge is
18 present in every ex parte hearing. It does not even have to be intentional on the part of the
19 party engaging in ex parte communications with the judge. We often see a case from a
20 specific point of view and provide facts and information from that perspective. Our
opponents often see the case differently. As the saying goes, “there are always two sides
to every story.” What is irrelevant information to one party is relevant to the other. What
is prejudicial to one party is viewed differently by the other party. Whose rights and
interests are being affected often depends on the point of view being expressed. The

1 adversarial system was designed to provide a more well-rounded version of the facts and
2 legal arguments relevant to every issue litigated.

3 The petitioner's concept of fairness is at odds with the purpose of an adversarial
4 system and the purpose of a criminal trial. A trial is supposed to result in a fair verdict.
5 One that reflects a search for the truth. The goal is to provide the trier of fact with as much
6 accurate and reliable information as possible in which to base their decision. It is not a
7 game to be won or lost. The United States Supreme Court stated this principle clearly in
8 *Wardius v. Oregon*, 412 U.S. 470, 474 (1973) when it said:

9 The adversary system of trial is hardly an end in itself; it is not yet a poker
10 game in which players enjoy an absolute right always to conceal their cards
11 until played. We find ample room in that system, at least as far as due process
is concerned, for (a rule) which is designed to enhance the search for the truth
in the criminal trial by insuring both the defendant and the State ample
opportunity to investigate certain facts crucial to the determination of guilt
or innocence.

12 Arizona judges have echoed the same sentiments. *See State v. Huerta*, 175 Ariz. 262, 271-
13 72 (1993) (Martone, J. dissenting) ("A trial is not a game to be won or lost, the fairness of
14 which is measured by weighing collateral characteristics. A trial is an effort to find the
15 truth.").

16 Neither side should be entitled to ex parte hearings with the courts, as a matter of
17 course. This Court has considered this issue in the past and concluded that the small
18 benefits from allowing such hearings are outweighed by the harm caused. *See State v.*
19 *Apelt*, 176 Ariz. 349, 365 (1993) (stating that "[w]hen we balance the potential benefit in
20 some few cases against the harm inherent in ex parte proceedings, we cannot conclude such
a proceeding is constitutionally required."). *See also Snyder v. Massachusetts*, 291 U.S.

1 97, 122 (1934) (“But justice, though due to the accused, is due to the accuser also. The
2 concept of fairness must not be strained till it is narrowed to a filament. We are to keep
3 the balance true.”).

4 The risk of inaccurate and one-sided information being provided to the court which
5 may lead to erroneous rulings is too substantial to justify the creation of the rule sought by
6 the petitioner. This risk is only exacerbated by the appearance of impropriety that such
7 hearings will bring to the legal process. The parties and the public will have the highest
8 level of confidence in the criminal justice system only when they are convinced that the
9 basic tenants of due process are being followed—the right to be present, the right to be
10 heard, and to have their arguments considered by a neutral judicial officer. Ex parte
11 hearings are antithetical to all of this.

12 Accordingly, for these reasons stated herein, APAAC respectfully opposes the
13 proposed amendment to Rules 1.9, 15.1, 32.6, and 33.6, of the Arizona Rules of Criminal
14 Procedure.

15 Respectfully submitted this 30th day of April, 2026.

16 /s/ Elizabeth Burton Ortiz
17 Elizabeth Burton Ortiz
18
19
20