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(STATE BAR NUMBER 003813)

8 IN THE SUPREME COURT OF THE STATE OF ARIZONA

9
10 IN THE MATTER OF:
11 PETITION TO AMEND THE RULE 15 OF
12 THE RULES OF CRIMINAL PROCEDURE.

R- _____
MARICOPA COUNTY ATTORNEY'S PETITION TO
AMEND RULE 15 OF THE RULES OF CRIMINAL
PROCEDURE

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14 The Maricopa County Attorney hereby moves, pursuant to Rule 28, Arizona Rules of the Supreme
15 Court, to amend Rule 15 of the Rules of Criminal Procedure to create new Rule 15.10, dealing with ex
16 parte communications, proceedings or requests.

17 Respectfully submitted this 30th day of October, 2006.

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19 ANDREW P. THOMAS
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1 **I. SUMMARY OF PROPOSED CHANGES**

2 Rules 1.6, 3.5 and 81 of the Rules of the Supreme Court outline situations when it may be
3 acceptable for an attorney and judge to engage in an ex parte communication which do not involve the
4 merits of the case. Rule 15.9 of the Rules of Criminal Procedure allows for ex parte communications to
5 address the appointment of investigators and expert witnesses for indigent defendants. Consequently,
6 there are often situations in criminal cases where counsel feels it necessary to approach the court
7 without opposing counsel being notified. Given the nature of these communications, it is almost
8 always defense counsel who approaches the court to discuss either a concern regarding their
9 representation or the allocation of additional resources. Because the State is neither notified of nor
10 invited to these meetings, the State is unable to ensure that an adequate record is made for appellate
11 review, or that a record is even made at all.
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14 Particularly in the context of a capital case, a deficient record may lead to a reversal at some
15 point in the future. A recent case in Maricopa County illustrates this concern. In *State v. Bearup*, a
16 capital case, the State learned that several ex parte proceedings had been held before both the presiding
17 criminal judge and the trial judge with no notice to the State, and thus no notice to victim
18 representatives. It was subsequently learned that the proceedings dealt, at least in part, with the
19 defendant's request to represent himself at the aggravation and penalty phases of the capital sentencing
20 trial. Subsequent to these various ex parte proceedings, the trial judge granted the defendant's request
21 to represent himself. Because the State was not present at these proceedings, neither the State nor the
22 victims have any assurances that a complete record was made that would survive appellate review
23 should the defendant later challenge the appropriateness of his self representation, or any other issues
24 that may have been raised during these proceedings.
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27 Before an ex parte proceeding occurs, the State, and thus the victim, should be provided with
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1 notice of the request, the general nature of the communication, and an opportunity to respond. If the
2 communication involves only the relationship between the attorney and the defendant, the State need
3 not have further involvement. However, if the communication involves a substantive issue that could
4 have later repercussions on the integrity of the case, such as a defendant's request to represent himself,
5 then the State must have an opportunity to make a sufficient record and to notify the victims. In
6 addition, to avoid the possibility of one party being able to unduly influence the trial judge, there is a
7 further proposal that whenever the opposing party objects to the ex parte contact, the matter should be
8 assigned to the presiding criminal judge.
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10 The Maricopa County Attorney's Office is proposing that these provisions be included in new
11 Rule 15.10, Arizona Rules of Criminal Procedure. To avoid duplicative language, we further propose
12 that the language in Rule 15.9(b) be deleted and incorporated into new Rule 15.10 as set forth in Exhibit
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14 A.

15 Respectfully submitted this 30th of October, 2006.

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1 EXHIBIT A

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3 **Rule 15.9. Appointment of investigators and expert witnesses for indigent defendants**

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5 **a. Application for Appointment.** An indigent defendant may apply for the appointment of an
6 investigator and expert witness, and in a capital case an indigent defendant may also apply for the
7 appointment of a mitigation specialist, to be paid at county expense if the defendant can show that
8 such assistance is reasonably necessary to present a defense adequately at trial or sentencing.

9 ~~**b. Ex Parte Proceeding.** No ex parte proceeding, communication, or request may be considered
10 pursuant to this rule unless a proper showing is made concerning the need for confidentiality. Any
11 such proceeding, communication, or request shall be recorded verbatim and made a part of the
12 record available for appellate review.~~

13 **c. Mitigation Specialist.** As used in this rule, a "mitigation specialist" is a person qualified by
14 knowledge, skill, experience, or other training as a mental health or sociology professional to
15 investigate, evaluate, and present psycho-social and other mitigation evidence.

16 **d. Capital Case.** In a capital case, any motion for experts or mitigation specialists shall be made no
17 later than 60 days after the state makes its disclosure pursuant to Rule 15.1(i)(3).

18 **Rule 15.10 Ex Parte Proceedings, Communications or Requests.**

19 **a. Notice to Opposing Party.** No ex parte proceeding, communication, or request may be
20 considered pursuant to this rule unless a proper showing is made concerning the need for
21 confidentiality. Any such proceeding, communication, or request shall be recorded verbatim and
22 made a part of the record available for appellate review. The party seeking the proceeding,
23 communication or request shall immediately notify opposing counsel in order to provide an
24 opportunity for them to respond.

25 **b. Objection to Ex Parte Proceeding, Communication or Request.** If the opposing party objects
26 to the ex parte proceeding, communication or request, the matter will be assigned to the presiding
27 criminal judge or his designee for a determination of whether the ex parte contact is appropriate. If
28 the presiding criminal judge or his designee determines that the ex parte contact is appropriate, the
presiding criminal judge or his designee will hear the ex parte proceeding, communication or
request. The presiding judge may not designate the trial judge to hear the ex parte proceeding,
communication or request.