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

7 PETITION TO AMEND SUPREME
8 COURT RULE 122

No. R-13-0012

9 **Comment of the State Bar of**
10 **Arizona on Petition to Amend**
11 **Supreme Court Rule 122**

12 The State Bar of Arizona submits its comment regarding the Petition to
13 Amend Supreme Court Rule 122. The Petition relates to the “Cameras in the
14 Courtroom” rule. It seeks to address the role of emerging technologies in the
15 courtroom and courthouse, define previously undefined terms, and provide a defined
16 procedure for seeking coverage of a court proceeding. The State Bar supports the
17 goals of the Petition and concurs that a substantive and stylistic overhaul of Rule 122
is appropriate in light of those goals.

18 In reviewing the Petition and the proposed amendments to Rule 122, the State
19 Bar has identified certain areas that may require additional consideration. The State
20 Bar has not, however, endeavored to draft language to the proposed amendments to
21 address the areas for which additional consideration may be appropriate because the
22 Petition asks for a modified comment period so that the Wireless Committee¹ can
23 reconvene after the initial comment period to address any comments submitted in
24

25 ¹ Unless otherwise indicated, capitalized terms have the same meaning as set
forth in the Petition.

1 connection with the Petition and prepare an Amended Petition if appropriate. See
2 Petition at 7, Part IV.

3 **I. Proposed Rule 122(b) - Definitions**

4 Throughout the Proposed Rule, the term “victim” is used. That term,
5 however, is not defined in section (b) of the proposed amendments. Because the
6 status of “victim” in Arizona carries with it certain constitutional and statutory
7 protections and rights, see Ariz. Const. art. 2, § 2.1; A.R.S. §§ 13-4401, *et seq.*, it
8 may be appropriate to specifically define the term “victim.”

9 The Proposed Rule also references the “judge who will conduct the
10 proceeding,” “presiding judge,” “judge,” “judge conducting the proceeding,”
11 “presiding judge or a designee,” and “assigned judge.” The use of the phrase
12 “presiding judge” throughout the Proposed Rule is, in most circumstances, confusing.
13 See Parts IV and VI, *infra*. The State Bar recommends deleting references to
14 “presiding judge” except in Proposed Rule 122(c) (distinguishing between “the judge
15 who will conduct the proceeding” and “an office of the court designated by the
16 presiding judge for receiving requests under this rule”).

17 The State Bar further recommends defining “judge” in Proposed Rule 122(b)
18 to include justices of the peace, municipal and police court judges, Superior Court
19 judges, Court of Appeals judges, and Supreme Court justices. Because Proposed
20 Rule 122(b)(2) defines “court proceeding” as “an event conducted in a courtroom,”
21 the State Bar believes the reach of the Proposed Rule should also extend to limited
22 jurisdiction courts. In addition, defining “judge” to include Court of Appeals judges
23 and Supreme Court justices, without reference to “Chief Justice” or “Chief Judge,”
24 acknowledges the reality that the “Chief Justice” or the “Chief Judge” may not
25 necessarily participate in all appellate court proceedings. The State Bar believes that
a broad definition of “judge” in this manner may also eliminate the need for Proposed

1 Rule 122(p) – Appellate courts.

2 **II. Proposed Rule 122(c) – Request to cover a court proceeding**

3 This section sets forth the general rule for the submission and timing of a
4 request to cover a court proceeding. The last sentence of this section provides: “A
5 court may provide coverage of its own proceedings, and it is exempt from the
6 requirement of section (c).” Outside of the context of an “electronic courtroom,”
7 where audio or audio/video of a court proceeding comprises the record it is not clear
8 from the text of the proposed amendment, or the Petition why this provision was
9 included. To the extent this provision was simply intended to address the electronic
10 courtroom scenario, the Rule should so state. If it is intended to bring within its
11 scope circumstances other than coverage in an electronic courtroom, not only would
12 the Proposed Rule exempt the court from having to submit a written request, *see*
13 Petition at 6, it would also appear to exempt the court from having to give notice to
14 the parties of its intent to provide its own coverage, the opportunity for the parties to
15 object, and the opportunity for a hearing on any objection. Further clarification of
16 the reasoning behind the inclusion of the last sentence of Proposed Rule 122(c), and
its scope, is appropriate.

17 **III. Proposed Rule 122(f) – Objection to coverage by a non-party
18 victim or witness**

19 This section governs objections to coverage by victims and witnesses. The
20 use of the phrase “non-party victim” is confusing, begging the question: “Under
21 what circumstances would a victim in a criminal case also be a party to the criminal
22 case?” Conceptually, one of two co-defendants could be both a victim and a
23 defendant—*e.g.*, one defendant assaults the other while the two are together
24 committing a robbery. But even under that scenario, trying the defendants together
25 when one is both a victim and a defendant would seem to offend, among other things,

1 A.R.S. § 13-4431 (minimizing victim’s contacts.). Defining “victim,” as suggested
2 above, would eliminate the need to use the predicate “non-party.”²

3 This section also appears to assume that attorneys will always be involved in
4 every court proceeding, whether in the capacity as counsel for a victim or counsel for
5 a party calling a witness, at least for notice purposes. The State Bar believes that
6 many victims are not represented by their own counsel and many parties represent
7 themselves in both civil and criminal cases. For purposes of providing notice of
8 coverage of a court proceeding, consideration should be given to imposing
9 notification obligations on prosecutors (in the case of victims) or parties appearing *in*
10 *propria persona* (in the case of non-party witnesses called by the party) that a court
11 proceeding will have coverage.

12 Finally, the last sentence of this section vests with the judge the discretion to
13 prohibit (but not necessarily limit) coverage of an objecting victim or witness to his
14 or her “appearance or testimony,” after taking into consideration the other factors for
15 allowing coverage, and determining “that coverage would have a greater adverse
16 impact upon that victim or witness, or his or her testimony, than other traditional
17 methods of news reporting.” As contemplated in Proposed Rule 122(m)(5)
18 (imposing restrictions on coverage of victims), however, the judge should also have
19 the ability to limit and impose appropriate restrictions on coverage of victims and
20 witnesses, rather than be limited solely to the wholesale prohibition of any coverage.
21 In addition, the State Bar is not convinced that the undefined phrase, “other
22 traditional methods of news reporting,” is the proper yardstick for measuring the
23 adverse impact of coverage on a victim or witness. Insofar as the current Rule and
24 the Proposed Rule relate to all manner of coverage of court proceedings, not simply
25 the mainstream news media, but “citizen journalists” alike, *see* Petition at 2, the

² It is possible that this is simply a scrivener’s error in that the phrase “non-party” was intended to refer to witnesses.

1 standard should be revised to reflect definitions already proposed; *i.e.*, "...upon a
2 determination that coverage would have a substantial adverse impact upon that
3 victim or witness or his or her testimony than it would without the use of a recording
4 device."

5 **IV. Proposed Rule 122(h) - Equipment**

6 Proposed Rule 122(h) addresses the technical requirements for the equipment
7 used for coverage of a court proceeding. It would appear that the language requiring
8 "[m]icrophones, cameras, and *other equipment*" to meet "current industry standards"
9 as "recording devices in general use by major broadcast stations" could
10 unintentionally sweep too broadly. *See* Proposed Rule 122(h) (emphasis added). In
11 other words, the "current industry standards" requirement could be construed to
12 include a "personal audio recorder." A "personal audio recorder" as defined in
13 Proposed Rule 122(b)(5) also fits within the definition of "recording device" under
14 Proposed Rule 122(b)(6). Unlike other recording devices, the use of a personal audio
15 recorder is permitted by anyone without the need for prior authorization. Only prior
16 notice need be provided. *See* Proposed Rule 122(j). It is doubtful that the technical
17 requirements of Proposed Rule 122(f) were intended to encompass the personal audio
18 recorder.

19 Also, the last sentence of Proposed Rule 122(h) vests with "the presiding
20 judge or a designee" the determination of whether any particular equipment is in
21 compliance with the Proposed Rule. It is possible, but not readily apparent, that the
22 use of the phrase "presiding judge" in Proposed Rule 122(h) was meant to refer to the
23 judge presiding over the particular courtroom, or that judge's courtroom staff, rather
24 than the presiding judge of the Superior Court. *But see* Proposed Rule 122(p)
25 (equating "presiding judge" with the "Chief Justice of the Arizona Supreme Court or
supra, clarification of the use of this phrase may be warranted.

1 **V. Proposed Rule 122(j) – Personal audio recorders; required notice**
2 **to the court**

3 As noted by the Petition, current Rule 122 restricts the use of personal audio
4 recorders to journalists, but the “proposed rule contains no such limitation.” Petition
5 at 6. The Proposed Rule, however, continues to refer to journalists. See proposed
6 Rule 122(j) (“Any person, including a journalist, may use a personal audio recorder .
7 . .”). If the purpose of the Proposed Rule is to retreat from the limitation in favor of
8 journalists, it is not clear to the State Bar why the Proposed Rule retains any
9 reference to journalists.

10 **VI. Proposed Rule 122(l) – Informal approval for use of a recording**
11 **device**

12 The last sentence of Proposed Rule 122(l) requires a person to “obtain express
13 permission of the presiding judge or a designee to use a recording device in any
14 courtroom when that court is not in session.” (Emphasis added). It is not apparent to
15 the State Bar why the person desiring to use a recording device must seek permission
16 from the presiding judge. It would seem more expedient to seek any such required
17 permission from the courtroom judge. As with Proposed Rule 122(h), however, it is
18 again possible that the phrase “presiding judge” was intended to mean the judge
19 presiding over the particular courtroom in which a person desires to use a recording
20 device.

21 **VII. Proposed Rule 122(m)(3) – Prohibitions; Other areas of the**
22 **courthouse**

23 Proposed Rule 122(m)(3) provides that a “person whose request under this
24 rule has been granted may not photograph, record in, or broadcast from, locations in
25 a courthouse where a court proceeding is not being conducted, without the judge’s
 express approval.” In the Petition to Adopt Rule 122.1, Rules of the Supreme Court,
 No. R-13-0013 (the “Rule 122.1 Petition”), which is the companion to the Petition to
 which this Comment is addressed, the petitioner acknowledges that the Rule 122

1 Petition relates to “the use of recording devices in the courtroom,” that “Rule 122 is
2 restricted to the courtroom,” and that “[i]t does not encompass recording in other
3 areas of the courthouse.” Rule 122.1 Petition at 2-3. One of the purposes of the Rule
4 122.1 Petition was “to address these other areas of concern.” Accordingly, this
5 provision of the Proposed Rule seems out of place.

6 This provision of the Proposed Rule may have been included to make it clear
7 that judicial permission to use recording devices in a courtroom is not a license to do
8 so anywhere else in the courthouse. The State Bar believes that, if that was the intent
9 behind the inclusion of this provision, the same message could be conveyed by
10 stating: “The use of recording devices in other areas of the courthouse is subject to
11 Rule 122.1 of these rules.”

12 **VIII. Proposed Rule 122(m)(5)**

13 Proposed Rule 122(m)(5) provides that in a criminal proceeding, “a judge . . .
14 may order that no one may photograph, record, or broadcast the victim in the
15 courtroom. . . .” It also provides as an alternative that the court may order that video
16 coverage must effectively obscure the victim’s face” The State Bar notes that
17 defendants were excluded from this proposed Rule 122 subsection (m)(5), and
18 wonders whether the word “defendant” should be included, especially since it is
19 discretionary with the judge.

20 **IX. Proposed Rule 122(p) – Appellate courts**

21 In the event that, a suitable definition of “judge” could be fashioned and made
22 applicable at all levels of our judiciary, the State Bar believes this provision could be
23 deleted in its entirety.

24 **X. Miscellaneous**

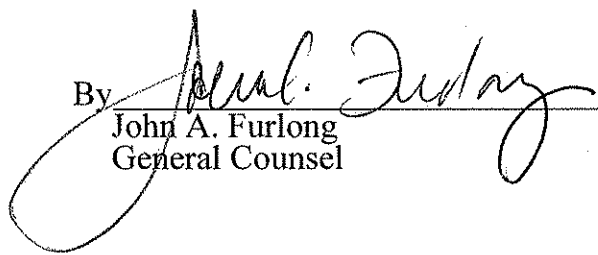
25 The Proposed Rule specifically defines “court proceeding.” Proposed Rule
122(b)(2). The Proposed Rule, however, uses the singular word “proceeding”
throughout the Proposed Rule more than it uses the phrase “court proceeding.” The

1 State Bar recommends modifying the Proposed Rule to be internally consistent—that
2 is, refer to either “court proceedings” or “proceedings” throughout the Proposed
3 Rule, but not both. To the extent the term “proceedings” is used, the definition
4 contained in Proposed Rule 122(b)(2) would need to be modified.

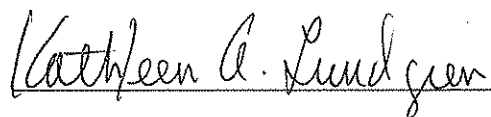
5 **CONCLUSION**

6 Although the State Bar supports the goals of the Petition, it also recognizes
7 that the Proposed Rule is a work in progress. To that end, the State Bar submits the
8 foregoing comments to the Petition.

9 RESPECTFULLY SUBMITTED this 1st day of April 2013.

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11
12 By 
13 John A. Furlong
14 General Counsel

15 Electronic copy filed with the
16 Clerk of the Supreme Court of Arizona
17 this 1st day of April, 2013.

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