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

7
8 PETITION TO ADOPT RULE 122.1,
9 RULES OF THE SUPREME COURT

Supreme Court No. R-13-0013

10 **Comment of the State Bar of**
Arizona on the Petition to Adopt
Rule 122.1, Rules of the Supreme
11 **Court**

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13 The State Bar of Arizona submits its comment regarding the Petition to Adopt
14 Rule 122.1, Rules of the Supreme Court. The Petition and Proposed Rule address the
15 use of advanced technology within a courthouse and the use of wireless mobile
16 technology in courtrooms. The State Bar has identified certain areas in the Petition
17 and the Proposed Rule that may require additional consideration. The State Bar has
18 not, however, endeavored to draft language to the proposed amendments to address
19 the areas for which additional consideration may be appropriate, because the Petition
20 asks for a modified comment period so that the Wireless Committee¹ can reconvene
21 after the initial comment period to address any comments submitted in connection
22 with the Petition and prepare an Amended Petition if appropriate. *See* Petition at 7,
23 Part IV.

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

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I. Proposed Rule 122.1(c) – Photography and audio or video recording

Proposed Rule 122.1(c) relates to the use of portable electronic devices for audio or video recording in areas of a courthouse, other than a courtroom. The Proposed Rule provides that “[a] party or a member of the public may not knowingly photograph or record another person anywhere in the courthouse without the person’s consent,” and that doing so “presumptively obstructs the administration of justice, and lessens the dignity and authority of the Court.” The Petition explains that these provisions are intended to curtail photographs and recordings of “judges, court personnel, prosecutors, and victims outside the courtroom” and “clarify that a violation is punishable by the contempt provisions of Arizona Rule of Criminal Procedure 33.1.” Petition at 4-5. The State Bar is concerned that the first provision is both under- and over-inclusive and that the second does not effectively clarify that a violation could expose the violator to criminal contempt.

Regarding the first provision, the State Bar believes it is appropriate to prohibit photographs and recordings of crime victims² without consent and that such limitation should also extend to trial jurors, which are omitted in this section of the Proposed Rule. Protecting these two categories of individuals outside the courtroom would be consistent with the general protections proposed in the companion Petition to Amend Supreme Court Rule 122. See Rule 122 Petition, Appendix, Proposed Rule 122(f) and 122(m)(1), (5). Thus, the proposed section may be under-inclusive.

The State Bar is also concerned that this section of the Proposed Rule is over-inclusive. Aside from victims and jurors, the phrase “another person” may sweep too broadly. For example, members of the public in general may not enjoy the same

² “Victim” has special meaning under Arizona law. Ariz. Const. art. 2, § 2.1; A.R.S. §§ 13-4401, *et seq.* The definitions set forth in Proposed Rule 122.1(b) should include a definition of “victim”.

1 expectation of privacy or anonymity that victims and jurors may expect.³ In addition,
2 the Petition acknowledges that many courthouses “are historic and invite
3 photography” and that it would be counterproductive to require “a judge to approve
4 every visitor’s request to take a photograph of something of architectural or historical
5 interest.” Petition at 4. If a court visitor were to knowingly take a photograph in a
6 courthouse and “another person” happened to be captured in the photograph without
7 that person’s consent, the visitor could become a contemnor. The State Bar believes
8 that, to the extent courthouse photography and recording is a problem requiring a
9 solution, any prohibition on the taking of photographs or recordings in a courthouse
10 should be specifically defined.

11 Regarding the second provision, it states that a violation of Proposed Rule
12 122.1(c) could result in criminal contempt under Arizona Rule of Criminal Procedure
13 Rule 33.1. Rule 33.1 provides:

14 Any person who willfully disobeys a lawful writ,
15 process, order, or judgment of a court by doing or not
16 doing an act, or thing forbidden or required, or who
17 engages in any other willfully contumacious conduct
18 which obstructs the administration of justice, or which
19 lessens the dignity and authority of the court, may be held
20 in contempt of court.

21 From the State Bar’s perspective, simply parroting some of the language of
22 Rule 33.1 may not necessarily inform a person that a violation of this section could
23 expose the person to criminal contempt. If photographing or recording a person in a
24 courthouse could result in a finding of criminal contempt, then the rule should
25 specifically refer to the applicable rules relating to criminal contempt.

³ Although a courthouse is not likely a traditional public forum for the exercise of First Amendment rights, a courthouse is generally open to the public. *United States v. Grace*, 461 U.S. 171, 178-79 (1983) (observing that the United States Supreme Court building and its grounds, though publicly owned, “has not been traditionally held open for the use of the public for expressive activity”).

1 **II. Proposed Rule 122.1(d) – Jurors and witnesses**

2 Proposed Rule 122.1(d) describes the circumstances under which jurors,
3 among others, may use portable electronic devices. With respect to jurors, the

4 Proposed Rule:

- 5 • Prohibits a juror from using a portable electronic device “while present in
6 the courtroom during a trial or in a jury room during the jury’s
7 deliberations and discussions concerning a case”; and
- 8 • Requires jurors to “turn off their portable electronic devices” in the
9 courtroom, jury room, and anywhere the jury is discussing a case.

10 The State Bar believes that the Proposed Rule should also apply to prospective
11 jurors and would suggest that it be modified to apply to prospective jurors. This
12 would include insertion of the word “prospective” in both the heading and the text of
13 Proposed Rule 122.1(d).

14 The State Bar also believes that Proposed Rule 122.1(d) should apply at all
15 times when a juror or prospective juror is present in the courtroom. Thus, it would
16 suggest that the following words be stricken from the first sentence in 122.1(d):
17 “during a trial, or in a jury room during the jury’s deliberations and discussions
18 concerning a case.”

19 Because the Proposed Rule requires jurors to turn off their portable electronic
20 devices at certain times, it also requires the court to provide jurors “with a court
21 telephone number at which an emergency message may be left for a juror” while the
22 jury is deliberating. The State Bar believes that these restrictions on jurors’ use of
23 portable electronic devices may overreach, do little to address the primary concern of
24 preventing jurors from seeking information beyond the scope of the evidence
25 presented at trial, and denigrate the service that juries provide.

 Juries are *presumed* to follow the instructions of the court. *State v. Newell*,
212 Ariz. 389, 403, 132 P.3d 833, 847 (2006) (“We presume that the jurors followed
the court’s instructions.”). With that presumption in mind, it should be sufficient to

1 instruct the jury that they should not use their portable electronic devices to access
2 information outside the evidence presented at trial to inform their decision. In the
3 State Bar's view, assuming from the outset that jurors will ignore the court's
4 instructions and use their portable electronic devices during deliberations for an
5 improper purpose, thus requiring all jurors to not have access to their devices, does
6 not make good policy. An emergent telephone call to a juror could come from any
7 number of sources during deliberations. In the age of instant communication, forcing
8 jurors to rely upon the court to relay an emergent message in order to combat a
9 perception that juries will not follow the court's instructions and use their portable
10 electronic devices for impermissible purposes fails to recognize the legal
11 presumption that jurors will follow the court's instructions. Further, requiring jurors
12 to turn their portable electronic devices off during deliberations will not prevent a
13 rogue juror from using an electronic device at a break, during lunch, or during the
14 evening recess. The State Bar appreciates the concerns, but it is not convinced that
15 the ends justify the means.

16 **III. Proposed Rule 122.1(e) – Attorneys, parties, and members of the public**

17 This section of Proposed Rule 122.1 describes the circumstances under which
18 persons other than jurors or witnesses may use portable electronic devices in a
19 courtroom. This section does not appear to take into consideration circumstances
20 under which electronic recording devices may be used in a courtroom under
21 Proposed Rule 122—*e.g.*, Proposed Rule 122(j) (use of personal audio recorders
22 without prior authorization, only prior notice). Many personal electronic devices can
23 be used as a personal audio recorder. Thus, it may be prudent to add the phrase,
24 “Except as otherwise permitted in Rule 122” to the beginning of the sentence, “Any
25 allowed use of a portable electronic device is subject to the authority of a judge to

1 prohibit activity that may be disruptive or distracting to a court proceeding, or that
2 may otherwise be contrary to the administration of justice.”

3 **CONCLUSION**

4 The State Bar recognizes that this Petition and the Proposed Rule is a work in
5 progress. The State Bar’s intent is to contribute to the work already undertaken and,
6 therefore, submits the foregoing comments to the Petition.

7 RESPECTFULLY SUBMITTED this 1st day of April 2013.

8
9 By John A. Furlong
10 John A. Furlong
General Counsel

11 Electronic copy filed with the Clerk
12 of the Supreme Court of Arizona this
13 1st day of April, 2013.

14 By: Kathleen A. Lundgren
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