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8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**

10 PETITION TO AMEND RULE 17.4,
11 ARIZONA RULES OF CRIMINAL
12 PROCEDURE

Supreme Court No. R-13-0014

**Comment of the State Bar of Arizona
on Petition to Amend Rule 17.4,
Arizona Rules of Criminal Procedure**

13 In two 2012 cases, the United States Supreme Court raised the profile of the
14 issue of ineffective assistance of counsel during the plea-bargaining process. One of
15 those cases, *Missouri v. Frye*, 132 S.Ct. 1399 (2012), suggests that trial courts “adopt
16 some measures to help ensure against late, frivolous, or fabricated claims after a later,
17 less advantageous plea offer has been accepted or after a trial leading to conviction with
18 resulting harsh consequences.” 132 S.Ct. at 1408-09.

19 In the rule-change proposal, the Superior Court claims to have received more
20 than 50 petitions for post-conviction relief with citations to *Frye*. In many of these
21 petitions, the defendants apparently claim that they were offered and rejected a more
22 favorable plea, but the prosecutors have no documentation of the rejected plea. The
23 proposal aims to create a record by requiring that rejected plea offers be reduced to
24 writing, and requiring that prosecutors file them with the court under seal.

25 For several reasons, the State Bar opposes the addition of new Rule 17.4(b) as
proposed.

First, disclosing *any* rejected plea offer to the trial judge is problematic.

1 Second, filing a rejected plea offer as a confidential document “available to the
2 parties, the parties’ attorneys, court personnel and any other person or agency
3 authorized by court order” glaringly omits the victim. This raises serious implications of
4 plea offers on victims’ rights and about the mechanism under which victims and
5 witnesses could access the information.

6 A third and a related concern is the impact of sealing an entire class of records
7 on the media and public’s First Amendment right of access to criminal proceedings.
8 The proposal quotes Rule 11, Fed. R. Crim. P., as requiring disclosure “in open
9 court...unless the court for good cause allows the parties to disclose the plea agreement
10 in camera.” Under Arizona Public Records law, there is no compelling reason for these
11 documents to be confidential in every case. If the court were inclined to adopt this
12 proposed rule, a far better approach would be to make the filed rejected plea offers
13 open, with sealing left to the court’s discretion when specific circumstances dictate a
14 need for confidentiality.

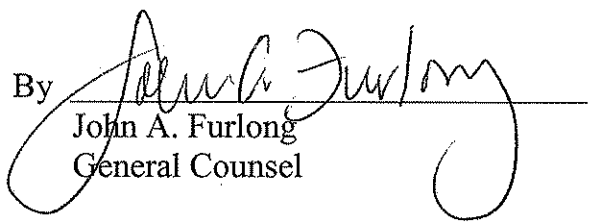
15 Fourth, if the Court were inclined to adopt the rule as proposed, it should be
16 limited to plea offers in felony proceedings. The proposal presumes that it would not be
17 administratively difficult to file all plea offers made in any criminal court. The
18 proposed rule, however, would apply not only in felony cases at the Superior Court
19 level, but to any criminal case at any level. Municipal and justice courts handle dozens
20 or hundreds of misdemeanor cases a day, and a single prosecutor may make dozens of
21 offers to resolve a single day’s docket of cases. The prosecutor’s time and effort spent
22 handling and filing such documentation would be daunting. The court likewise would
23 have to spend scarce resources collecting, sealing and storing these rejected plea offers.
24 The proposal would be much more realistic if it was limited to just felony matters or
25 matters where incarceration was required by law.

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Instead of adopting the proposed new Rule 17.4(b), the State Bar suggests a more comprehensive approach. As the petition recounts, *Frye* may indeed be resulting in a problem, at least in Maricopa County. A statewide rule, however, needs statewide input and a statewide solution. A comprehensive solution with statewide stakeholders could address the weaknesses identified above.

RESPECTFULLY SUBMITTED this 29th day of April

2013.

By 
John A. Furlong
General Counsel

Electronic copy filed with the Clerk of the Supreme Court of Arizona this 29th day of April, 2013.

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