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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-15-0011
PETITION TO AMEND RULES 15.5 AND 39 OF THE ARIZONA RULES OF CRIMINAL PROCEDURE	**COMMENT OF THE STATE BAR OF ARIZONA**

I. Introduction

The defense and prosecution subcommittees of the State Bar of Arizona's Criminal Practice & Procedure Committee had divergent views on many aspects of this petition. The Criminal Prosecution Subcommittee proposed that the State Bar object to the petition; the Criminal Defense Subcommittee proposed that the State Bar support the petition. They had common ground: deletions of discovery/redactions should be by blackout.

The State Bar believes it would be beneficial for the Court to have both

perspectives on the rule-change petition. As a result, the State Bar presents in this comment the two differing views and, other than endorsing the common ground that deletions/redactions should be by blackout, does not favor one over the other.

II. Criminal Prosecution Subcommittee proposal

A. Background of Petition

On January 8, 2015, James J. Haas, Philip Beatty, and Valerie Walker, of the Maricopa County Public Defender's Office, filed a Petition to Amend Rules 15.5 and 39, Ariz. R. Crim. P. The Petitioners have identified three goals with respect to problems they see with discovery in criminal proceedings:

1) identifying what was redacted;

2) preventing information that should be disclosed from being redacted; and

3) preventing discovery from being so extensively redacted that it is rendered virtually meaningless.

To remedy these problems, Petitioners have proposed that Rule 15.5 be amended to add a new section (e) that would read as follows:

> e. Claims of Privilege or Protection
>
> (1) Information Withheld. When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

> (2) Information Produced. If a party contends that information subject to a claim of privilege or of protection as trial-preparation material has been inadvertently disclosed or produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has made and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

In addition to this new section, Petitioners also ask that Rule 39(b)(10) be amended to the following (proposed new language is shown with underscoring):

> 10. The right to require the prosecutor to withhold, during discovery and other proceedings, the victim's date of birth, social security number, official state- or government-issued driver license or identification number, home address, telephone number, e-mail address, the address and telephone number of the victim's place of employment, and the name of the victim's employer; provided, however, that for good cause shown by the defendant, the court may order that such information be disclosed to defense counsel and may impose such further restrictions as are appropriate, including a provision that the information shall not be disclosed by counsel to any person other than counsel's staff and designated investigator and shall not be conveyed to the defendant. When information is withheld from disclosure or discovery pursuant to this rule, the prosecutor shall follow the process set forth in Rule 15.5(e). Additionally, the prosecutor shall identify the victim's name (in the case of multiple victims or when it is unclear which victim's information is being withheld), and the legal basis for withholding the information.

B. Analysis

The State Bar of Arizona opposes these proposed changes. While the Petitioners' stated objective of being able to ensure that disclosure has not been overly redacted and being able to identify what has been redacted is laudable, the additional requirements in the proposal are overbroad and onerous. Specifically, the State Bar is not opposed to requiring law enforcement agencies and prosecutors to disclose in a method that makes clear what has been redacted by using blackout redaction instead of white tape or white liquid. As illustrated in Petitioners' example on page 4 of the Petition, using blackout instead of white redaction tape on a white background provides the needed clarity so that a Defendant knows what has been redacted. However, there are additional onerous conditions in the proposed rule changes to Rule 15.5 and Rule 39 that are burdensome and not needed.

In most jurisdictions throughout the State, redactions are performed not by attorneys but by legal secretaries, paralegals and police officers. Given the volume of cases, particularly in larger jurisdictions, hundreds of pages of disclosure can be required to be redacted each and every day. For example, in 2014, the Pima County Attorney's Office disposed of cases involving over 6,200 felony criminal defendants. Assuming approximately 260 working days in a year (365 x 5/7), that amounts to roughly 23 felony cases per day that need to be reviewed for redaction. Each case can have dozens, and even hundreds, of pages of disclosure. Notably, this

does not even include the 20,000 misdemeanor cases that are also in need of redaction in a given year in a larger jurisdiction.

While requiring redactions to be conducted in black may be a relatively simple change, Petitioners' suggested "log of redactions" is not simple; it is onerous and unnecessary. Requiring an accompanying log entry for every redaction, possibly dozens on a page, would likely double, triple, or even quadruple the amount of time it would take to redact a single document. This would further stretch the already very thin financial resources allocated to law enforcement agencies for very little value, to either the State or the Defendant.

While the petition cites to Rule 26.1(f), Rules of Civil Procedure, as a model for requiring a log of redactions, the civil rule pertains only to matters that have been withheld from civil disclosure or discovery due to a claimed "privilege" or as "trial-preparation materials." Such claims are not grounds for redaction in criminal discovery. Further, withholding information on claims of "privilege" or "trial-preparation material" requires far more discretion by a party to a civil dispute and is far different from redacting in criminal discovery certain victim identifying information, birth dates, social security numbers, driver's license numbers, bank account numbers and the like. The civil rule is simply not an appropriate example for modeling a criminal redaction rule.

The vast majority of redactions make self-evident what has been redacted and

are not in need of an additional description. Going back to Petitioners' example on page 4 of the petition, there can be no doubt what has been redacted given that the blackout is directly adjacent to the titles "OLN:" and "SSN:". It is clear from Petitioners' example that the OLN and SSN have been redacted. In this example, requiring that an accompanying log be kept that specifies what items have been redacted and the legal basis for such redaction would simply not be a good use of time or resources and would greatly increase the workload for prosecution offices across the state. In addition, because attorneys are assigned on cases, any ambiguity as to what was redacted can be addressed between the attorneys, with no necessity for court intervention or a new onerous rule.

III. Criminal Defense Subcommittee proposal

Petitioner Maricopa County Public Defender's Office ("MCPD") has proposed amendments to Criminal Rules 15.5 and 39 to address the gaps in the Arizona Rules of Criminal Procedure, which do not specify any procedues that a party must follow when (1) withholding privileged information from discovery; or (2) a party has inadvertently disclosed privileged information that it wishes to claw-back. Both of these issues are addressed in Rule 26.1(f) of the Arizona Rules of Civil Procedure and its federal counterpart. The Petition proposes to amend Criminal Rule 15.5 by adopting the provisions of Civil Rule 26.1(f) and making corresponding changes to Rule 39 for purposes of consistency in implementation.

In addition to the reasons stated in the Petition, the State Bar supports the proposed rule changes for other reasons, as well.

Withholding information on the basis that it is privileged, trial-preparation material (work product), or is otherwise protected from disclosure by law (collectively, "privileged") typically occurs in two ways: (1) redaction of information contained in a record that otherwise must be produced; and (2) withholding a record in its entirety that, but for its privileged nature, would need to be produced. When information is withheld in either of these ways in civil cases, the rules require that the withholding party put the other parties on notice. Specifically, the withholding party must (1) make the claim "expressly"; and (2) describe the nature of the documents, communications or tangible things not produced in a manner that will enable the other parties to assess the claim and whether it should be challenged. *See* Rule 26.1(f)(1), Ariz. R. Civ. P.[1]

There is no equivalent procedure under our current criminal rules. Yet, in criminal cases, improperly withholding information from disclosure can result in discovery violations of constitutional magnitude. While defendants in criminal cases currently have the right to challenge the basis on which information has been withheld as privileged, that right is often rendered meaningless because there is

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[1] Arizona adopted Rule 26.1(f) from Fed. R. Civ. P. 26(b)(5). The official commentary to the federal rule, which as promulgated in 1993, explained, among other things, that "...The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc. may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories. A party can seek relief through a protective order... if compliance with the requirement for providing this information would be an unreasonable burden...." Fed. R. Civ. P. 26(b)(5)(A).

simply no way to know that the information exists, let alone that it has been withheld. And, even when redactions are visible or the existence of a withheld document is somehow vaguely known, it is often impossible to discern whether it has been withheld as privileged or whether there is a basis to challenge the basis for such a claim. Without a rule that requires privilege claims to be made "expressly," the door is open for "invisible" redactions and non-disclosure of entire records to deprive parties of (1) fair notice that the information exists and (2) a fair opportunity to assess the basis of the privilege claim and, if necessary, have the court decide whether the information must be disclosed. Adoption of the proposed rule would solve this problem.

The civil rule and the proposed criminal rule do not impose technical requirements for how redactions must be made or records withheld in their entirety are to be catalogued. Instead, the existing rule and proposed criminal counterpart allow a flexible approach to meet the needs and complexities of each case.[1] In civil cases, parties routinely comply with the requirements of Rule 26.1(f)(1) and its federal counterpart through the use of privilege logs, which list redactions as well as documents that have been withheld in their entirety. Privilege logs provide a convenient way to clearly explain the legal basis for withholding each item.[2] For

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[2] The sample privilege log shows how compliance with the proposed rule can easily eliminate needless confusion and void the necessity of getting the court involved just to get basic information about the basis of a privilege claim. For example:

Bates 002: If John Smith is a percipient witness and not a victim, there is no basis under Arizona law to withhold disclosure of his date of birth, address or phone number. Nor is there any basis to withhold such information about any other person mentioned in Smith's statement, except a victim. Without a requirement to expressly identify what is being redacted and which redactions relate to which individuals, a defendant might not know that the redactions have been made. And, even if she

example:

Bates No.	Description	Privilege Basis	Withheld in entirety ("W") or Redacted ("R")
002	1/1/2015 statement of John Smith to police	A.R.S. §13-4434(D)(1); Rule 39(b)(10)	R1 (Jones' date of birth); R2 (Smith's phone number); R3 (Black's address)
003	1/2/2015 letter from James Black to attorney Jane White regarding alleged crime	Attorney-client privilege	W

As a matter of routine, privilege claims are also "expressly" identified by making the redactions visible on the face of the records in which they appear and explaining the basis for the claim on the privilege log. This gives the receiving party the context necessary to assess the validity of the privilege claim. The most efficient and appropriate method of redaction will vary on a case-by-case basis. For example, redactions may appear as blackouts on the record. This approach works well when there are few redactions or there is no chance of confusion from multiple redactions in the same record. Alternatively, if multiple redactions on a page are made for

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does, she would not be able to determine if there is a basis to challenge some or all of the redactions.

Bates 003: Regarding privilege log item 003, if witness James Black has written a letter to his attorney, Jane White, about the alleged crime and then provided a copy of the letter to the police or the prosecutor, the defendant could challenge the withholding on the basis that the privilege has been waived. The defendant would also have grounds to challenge the privilege claim regarding item 003 if White were not Black's lawyer. Under the current rule, the defendant might never know that this record exists or has been withheld.

different reasons, relate to different persons, or concern different categories of protected information, the redactions may appear as Redaction 1, Redaction 2, Redaction 3, etc., and those labels are easily referenced on a privilege log that sets forth the basis for the privilege claim for each item. This approach is particularly helpful in multiple victim cases where extensive redaction often makes it difficult or impossible to follow a chronology of events, understand what kind of information is being redacted, who it relates to, or where a series of events occurred.

Proposed Rule 15.5(e)(1) would solve many of the practical problems that currently diminish the fairness and efficiency discovery and disclosure in criminal cases. It also substantially reduces the risk that non-disclosure of information on a faulty privilege claim will result in a constitutional violation. For these reasons, and for all of the reasons stated in the Petition, proposed Rule 15.5(e)(1) should be adopted. The Proposed amendment to Criminal Rule 39 provides for consistency in implementation of proposed Rule 15.5(e)(1) in withholding victim information and, therefore, also should be adopted.

IV. Conclusion

The State Bar endorses the common ground that deletions/redactions should be by blackout. Other than that, the State Bar does not favor one position over the other but presents both defense and prosecution perspectives for the Court's benefit.

RESPECTFULLY SUBMITTED this 5th day of May, 2015.

John Furlong
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Electronic copy filed with the
Clerk of the Arizona Supreme Court
this 18th day of May, 2015.

by: _____