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

10 In the Matter of:

Supreme Court No. R-19-0008

11 **PETITION TO MODIFY RULES**  
12 **18.5, 22.5, and 32.1, OF THE**  
13 **ARIZONA RULES OF CRIMINAL**  
14 **PROCEDURE**

**COMMENT OF THE**  
**STATE BAR OF ARIZONA**

15 Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, the State Bar  
16 of Arizona (the “State Bar”) hereby submits the following as its Comment to the  
17 above-captioned Petition.

18 The Petition proposes amendments in furtherance of juror privacy. Because  
19 the methodology of the proposed revision presents procedural problems likely not  
20 contemplated by Petitioner, the State Bar conditionally supports the Petition with the  
21 following proposed modifications.  
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24 The analysis and details for this Comment are substantially the product of the  
25 State Bar’s Criminal Practice and Procedure Committee, composed of a balance of

1 prosecution and defense practitioners, and judicial members.

2           **1) Rule 18.5, Arizona Rules of Criminal Procedure.** The Petition proposes  
3 the addition of subsection (j), stating:  
4

5           **Contact with Jurors.** A party or a party’s representative  
6 must not have any contact with prospective jurors,  
7 alternate jurors, or jurors who have not been discharged.

8           The issue this Comment addresses is the State Bar’s concerns with respect to  
9 the proposed Rule’s application to jurors serving in an ongoing case.

10           Motions for a new trial are required to be filed “no later than 10 days after  
11 return of the verdict being challenged.” “This deadline is jurisdictional and the court  
12 may not extend it.” *Id.* Rule 24.1(b), Arizona Rules of Criminal Procedure.

13           In capital cases, when a verdict of guilty is rendered, the court proceeds to the  
14 aggravation/eligibility phase, followed by the penalty phase. This means that a  
15 capital defendant desirous of moving for a new trial based on the guilt-phase verdict  
16 must file the motion while the post-verdict proceedings are taking place. A claim of  
17 juror misconduct is one of several claims authorized by Rule 24.1(c). As to this  
18 claim, courts are required to set an evidentiary hearing where the misconduct alleged  
19 is not apparent in the record. Thus, trial courts frequently authorize the parties to  
20 conduct pre-hearing interviews of all jurors, including alternates, after the capital  
21 proceedings have concluded but *prior to* the court’s formal discharge of those jurors.  
22  
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24  
25 As written, the creation of Rule 18.5(j) would prohibit the court and the parties from

1 doing so.

2 To cure this problem, Appendix A modifies the proposed rule provision to  
3 permit contact of alternate jurors or jurors who have not been discharged where the  
4 court so orders.  
5

6 **2) Rule 22.5, Arizona Rules of Criminal Procedure.** The Petition  
7 Proposes subsection (c), which is captioned “Consent to Inquiries from Counsel.”  
8 subsection (1), “Notice of Rights,” provides that jurors are adequately and  
9 completely informed of their right to communicate or not communicate with parties  
10 following trial. A minor alteration in language substituting phrases using the word  
11 “communicate” instead of “speak” is proposed in Exhibit A for purposes of clarity  
12 and completeness.  
13  
14

15 The Petition next proposes a Subsection (2), captioned “Decision on the  
16 Record.” This proposed subsection would require jurors to have their decision as to  
17 whether to communicate or refuse to communicate with the parties become part of  
18 the record itself. The proffered method of “polling each juror on the record”  
19 following the trial will require appellate and post-conviction counsel from both sides  
20 to obtain transcripts of proceedings in order to learn of each jurors’ decision  
21 regarding subsequent communication. This method is overly burdensome to  
22 successor counsel. The alternative method proposed in the petition —“using a  
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24  
25

1 written form which will then be filed with the clerk”—is more workable. It is  
2 therefore recommended that the option of polling each juror be removed from the  
3 proposed revision.  
4

5 Proposed Subsection (3) to the rule should be modified as set forth in Exhibit  
6 A using the words “communicate about” to achieve the same result as that discussed  
7 above for subsection (c)(1).  
8

9 **3) Rule 32.1, Arizona Rules of Criminal Procedure.** The Petition seeks to  
10 add a final provision providing a procedure by which a party must proceed prior to  
11 contacting any juror who had previously indicated that no post-trial contact was  
12 desired by that juror.  
13

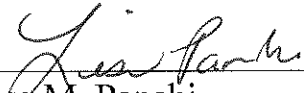
14 **Modified Proposal:** Exhibit A proposes modification the verbiage of the  
15 proposed rule for reasons of clarification as well as to logically connect proposed  
16 Rule 22.5 with the proposed addition to Rule 32.1. Additionally, in the subsection  
17 dealing with the “right to respond,” the word “The” has been substituted for the word  
18 “All” so that there is no misunderstanding that this rule change elevates a victim  
19 to the status of a party. *See, Lynn v. Reinstein*, 205 Ariz. 186, 191, 68 P.3d 412, 417,  
20 ¶15 (2003).  
21

## 22 CONCLUSION

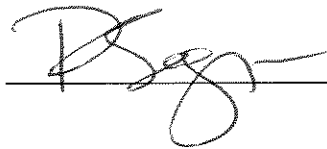
23  
24 The State Bar of Arizona respectfully requests that Petition R-19-0008 to  
25 amend Rules 18.5, 22.5, and 32.1, Arizona Rules of Criminal Procedure, be rejected

1 as written but accepted if modified in a manner consistent with Exhibit A.

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3 RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of May, 2019.

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6 \_\_\_\_\_  
7 Lisa M. Panahi  
8 General Counsel

9  
10 Electronic copy filed with the  
11 Clerk of the Supreme Court of Arizona  
12 this 1<sup>st</sup> day of May, 2019.

13 by:   
14 \_\_\_\_\_

## Exhibit A

### Rule 18.5, Arizona Rules of Criminal Procedure.

(a)-(i) [No Change.]

(j) **Contact with Jurors.** A party or a party's representative must not have any contact with prospective jurors [.] Absent a court order, a party or a party's representative must not have any contact with alternate jurors, or jurors who have not been discharged by the court.

### Rule 22.5, Arizona Rules of Criminal Procedure.

(a) (no change)

(b) **Disclosures and Release from Confidentiality.** When discharging a jury at the conclusion of the case, the court must advise the jurors that they are released from service. If appropriate, the court must release them from their duty of confidentiality and explain their rights regarding inquiries from ~~counsel~~ the parties, the media, or any person.

(c) **Consent to Inquiries after Discharge from Service.**

(1) *Notice of Rights.* Upon discharge, the court must inform jurors that they may agree or refuse to ~~spea~~ communicate with the parties about the case. The court must also inform the jurors that, if they agree to communicate with the parties, the parties may contact them now or in the future, ~~and~~ The court must inform the jurors that if they refuse to communicate about the case, the parties must not ~~talk to them~~ communicate with them about the case without a court order. ~~Even if a juror agrees to speak they can decide to end any conversation at any time.~~ The court must inform the jurors that they may revoke their consent to communicate about the case at any time.

(2) *Decision on the Record.* Each juror's option must be recorded by using a written form which will then be filed with the clerk.

(3) *Refusal.* A party or any person acting on behalf of a party may not contact a juror who has refused to ~~spea~~ ~~to discuss~~ communicate about any aspect of jury service without a court order, as provided in Rule 32.1.

### RULE 32.1, Arizona Rules of Criminal Procedure.

#### JURORS WHO REFUSED POST-VERDICT CONTACT.

(a) *Generally.* If a juror refused contact under Rule 22.5(c), no party, party's attorney or anyone other person acting on behalf of any party may ~~have any~~

contact with that **the** juror to discuss any aspect of jury service, unless the court issues an order authorizing the contact.

(b) **Motion. A party may ask to contact a juror who has refused contact under Rule 22.5(c) by filing a motion stating the specific reasons for the request.**

(b)(c) **Right to Respond.** All **The** parties have the right to respond to any motion seeking a court order for contact under this rule.

(e)(d) **Nature of the Order.** The court may issue an order permitting the juror contact only upon a showing of good cause. **The court must state specific reasons for** Any order permitting contact ~~must specify the good cause found~~ and define the scope of permissible contact **permissible in accordance with that authorized in Rule 24.1(d).**