

Task Force on the Arizona Rules of Criminal Procedure (“CRTF”)

State Courts Building, Phoenix

Meeting Minutes: September 16, 2016

Members attending: Hon. Joseph Welty (Chair), Paul Ahler, Timothy Eckstein, David Euchner by his proxy John Canby, Hon. Maria Felix, Hon. Richard Fields, Hon. Pamela Gates, Bill Hughes, Hon. Eric Jeffery, Kellie Johnson, Amy Kalman, Prof. Jason Kreag (by telephone), Hon. Mark Moran, Aaron Nash, Natman Schaye, Hon. Paul Tang, Kenneth Vick

Absent: Hon. Kent Cattani, Hon. Sally Duncan, Jerry Landau

Staff: John Rogers, Mark Meltzer, Julie Graber, Sabrina Nash, Theresa Barrett

Guests: John Belatti

1. Call to order, introductory comments, approval of the meeting minutes.

The Chair called the seventh Task Force meeting to order at 9:30 a.m. He informed the Task Force that he had addressed the Committee on Superior Court at its September 9 meeting concerning the work of the Task Force (Judge Jeffery and Judge Felix had made a similar address to the Committee on Limited Jurisdiction Courts on August 31), and those committees expressed appreciation for the work and progress of the Task Force. By the conclusion of today’s meeting, the Task Force will have been discussed 26 rules, and the Chair has assigned the remaining 15 rules to workgroups. The Chair then asked members to review the August 26, 2016 draft meeting minutes.

Motion: To approve the draft minutes. Seconded, and the motion passed unanimously. CRTF-007

2. Summary of pertinent petitions on the Court’s August rules agenda. The Chair invited Mr. Rogers to summarize the Court’s disposition of criminal rule petitions on its August rules agenda. Mr. Rogers first noted R-16-0007, which amends Rule 8.4. The amendments provide 30 days of excluded time after the conclusion of a Rule 11 restoration to allow parties to prepare for trial. R-16-0024 amends Rule 7.5 to conform to statutory changes. Pursuant to the amendments, a bond “must” (not “may”) be exonerated under specified circumstances. The Court declined to adopt R-16-0031, which proposed amendments to Rule 20 that would have disallowed a motion for a judgment of acquittal before submission of a case to the jury. R-16-0033 adopted a new Supreme Court Rule 28.1 that established a process for promulgating local rules; the implementation order abrogates, among other rules, Criminal Rule 36. Judge Tang observed that Rule 15 includes a reference to “local rules.” Mr. Rogers advised that by

virtue of R-16-0033, local rules would continue in existence; new Rule 28.1 only changes the process by which the Court approves local rules.

Mr. Rogers also noted a recently filed petition, R-16-0041, which proposes amendments to Criminal Rules 6, 7, and 41. The petition requests expedited consideration and the Court will consider the petition at its December 2016 rules agenda. Comments on this petition are due October 21, 2016.

The Chair noted that amendments to Rule 8.4 adopted by R-16-0007 were not restyled. He requested staff to restyle those amendments and submit them for review by Workgroup 3.

3. Workgroup 3: Rule 12 (“the grand jury”). Judge Jeffery presented this rule on behalf of the workgroup. He noted initially that the workgroup deferred presenting this rule until it had obtained input from a member of the Attorney General’s office, and for that purpose, Ms. Mary Harriss, an assistant attorney general who tends statewide grand juries, was present at the most recent Workgroup 3 meeting.

Judge Jeffery began by reviewing restyling changes in Rule 12.1 (“selecting and preparing grand jurors”). Current Rule 12.1(a) requires summoning and impaneling grand jurors “as provided by law.” The draft changed this to “as provided in A.R.S. tit. 21.” After discussion, the members agreed to revert to the current phrase, “as provided by law.” In Rule 12.2 (“grounds to disqualify a grand juror”), section (c), a member inquired whether “within the fourth degree” modified consanguinity and affinity, or only affinity. The members agreed that it should modify both terms, and at the direction of members, Ms. Graber changed the on-screen language to reflect this. Another member suggested adding the words “a victim” to this provision, and the members agreed to this addition. Other members questioned why draft Rule 12.2 was a single paragraph. After discussion, and at the members’ direction, Ms. Graber reorganized Rule 12.2 into subparts (a) through (d). A member asked why draft Rule 12.3 (“challenge to a grand jury or a grand juror”) omitted a phrase in current Rule 12.3(c): “in addition to any remedy granted under Rule 12.9....” One member thought the phrase added nothing of substance, and another believed that Rule 12.9 as currently phrased did not provide a remedy. The members agreed to revisit this issue during their discussion of Rule 12.9.

In Rule 12.4 (“grand jury foreperson”), the word “foreman” in the draft changed to the gender-neutral “foreperson,” but there were no substantive changes to this rule. The members agreed that in Rule 12.5 (“who may be present during grand jury sessions”), the persons who could be present should be in a list format and Ms. Graber made appropriate on-screen changes. Current Rule 12.6 (“appearance of persons under investigation”), which is currently a single paragraph, became sections (a) and (b) in the draft. The members agreed that although current Rule 12.6 states that the foreperson

“shall” expel a person who attempts to communicate with anyone other than their client, the members agreed that it would be more appropriate to use the word “may.” (One member gave an example of a defense attorney saying, “bless you,” to a grand juror after the juror sneezed; this should not require the attorney’s expulsion.) Draft Rule 12.7 (“indictment”), section (d), which derives from the second sentence in current Rule 12.7(a), would require the foreperson to report “no indictment” to the court “through the prosecutor.” In Rule 12.8 (“record of grand jury proceedings”), sections (b) and (c), in addition to making the transcript and the foreperson’s vote tally available to the State and the defendant, the court reporter may make these items available “to the court.” The members concurred with the changes to these rules.

When they considered Rule 12.9 (“challenge to grand jury proceedings”), the members resumed their discussion of Rule 12.3. One member asked whether an unqualified grand juror constitutes a denial of a substantial procedural right under Rule 12.9, or whether it is an issue cognizable under Rule 12.3. After further discussion, the members agreed that challenges under these two rules should be more proximately located than they are currently. Accordingly, the members agreed to renumber Rule 12.3 as Rule 12.8, and to move Rules 12.4 through 12.7 up one number. With regard to Rule 12.10 (“entering a not-guilty plea”), Mr. Hughes advised that Yavapai previously utilized the process described in that rule, and that it no longer does, although it may revert to the process in the future. Rather than deleting Rule 12.10 because no Arizona county currently uses the described process, the members decided that the substance of Rule 12.10 would be more appropriately located in Rule 14. They accordingly referred Rule 12.10 to Workgroup 4 for integration into Rule 14.

Judge Jeffery then turned to the provisions of Rule 12 on statewide grand juries. He noted that Ms. Harriss was particularly helpful with the workgroup’s understanding of Rule 12.22 (“selection and preparation of state grand jurors”) and the process of selecting statewide grand jurors. She explained that the process begins with a pool of about 1,000 potential jurors, composed proportionately and subsequently reduced to a smaller pool of about 100. The workgroup restyled Rule 12.22, but did not alter its substance, and judge members of the Task Force who had experience with statewide grand juries observed that the current Rule 12.22 process works well. The members revised Rule 12.23 (“size of state grand jury”), which currently directs that a statewide grand jury be composed of 16 persons, to “at least 12 but not more than 16 persons” so it is consistent with statutory requirements. Rule 12.24 (“location of state grand jury sessions”) had no substantive changes. The current title of Rule 12.25 (“preservation of state grand jury evidence”), section (b) is “restitution,” but after discussion, the members agreed to change this to “release or retention.” Members then considered whether Rule 12.26 (“return of indictment”) adequately described potential scenarios when the court must keep the indictment secret. They concluded it did not and made these changes:

“...until the defendant is in custody or ~~has given bail~~ served with a summons....” One member noted that most indicted defendants appear in court by summons rather than an arrest warrant. There were no substantive changes to Rule 12.27 (“disclosure of a lack of indictment”).

The members reorganized Rule 12.28 (“challenge to state grand jury, grand juror, or grand jury proceedings”) in a manner than corresponded to changes for rules regarding the county grand jury. Current Rule 12.28 implies that a defendant may challenge a statewide grand jury under Rule 12.9, but members added a new Rule 12.28(a)(3) that expressly states this. Members expressed concern with Rule 12.28(c), and how the court would know that it “must dismiss the case without prejudice” if the prosecutor did not take specified action following the grant of a Rule 12.9 motion. The members therefore agreed to add to Rule 12.28(c), and to Rule 12.9(c), the phrase “on motion or on its own.” Members declined to extend the provisions of Rule 12.29 (“expenses of prospective and selected state grand jurors”) to county grand juries because doing so would exceed the scope of the Task Force’s charge.

The members also discussed whether a grand jury transcript sealed after a “no bill” should be available to defense counsel in a subsequent proceeding. Some members contended the transcript might include prior testimony of a witness or other *Brady* materials, yet if the transcript was sealed and not disclosed, and especially if the prosecutor did not identify the individual who testified as a trial witness in the subsequent proceeding, the defendant could be unaware of this information. The Chair concluded that this issue might not fall within Rule 12, but he invited members expressing these concerns to propose language for Rule 15 when the Task Force revisits that rule.

4. Workgroup 3: Rule 41 (“forms”). Judge Jeffery noted that the workgroup’s review of this rule did not include review of the forms. With regard to the rule’s text, the workgroup changed the word “mandatory” to “required.” There were no other changes and the members approved Rule 41.

5. Workgroup 4: Rule 18 (“trial by jury; waiver; selection and preparation of jurors”). Judge Tang presented Rule 18. Draft Rule 18.1 (“trial by jury”), section (a), substituted a statutory reference for the phrase “as provided by law.” However, and similar to Rule 12.1(a) that was discussed above, the members reverted to the original phrase in Rule 18.1(a). However, this was contingent on including the content of the current comment to Rule 18.1 as modified during the discussion and as shown on-screen. Judge Jeffery also agreed to provide additional language for the comment concerning the right to a jury trial in misdemeanor cases.

In Rule 18.2 (“additional jurors”), the members concurred with changing the phrase “regular jurors” in the current rule to “trial jurors.” They also agreed to delete the comment to Rule 18.2. The workgroup restyled Rule 18.3 (“jurors’ information”) and reorganized the current single paragraph into sections (a) and (b). It also changed the phrase “felony conviction status” to “prior felony conviction.” A member inquired whether the age of the prior felony is relevant. The members agreed that it was, however, the summons or the jury commissioner’s preliminary questionnaire might include this inquiry so it did not involve questioning by the trial judge during voir dire. The workgroup changed the word “jury commissioner” to “court” so it encompasses similar functions performed by other designated staff in courts that do not have a dedicated jury commissioner. The workgroup deleted the comments to current Rule 18.3. The members agreed with these changes.

A comment to current Rule 18.4 (“challenges”), section (a), instructs that a challenge to the panel must include a showing of prejudice. The workgroup included this requirement in the body of draft Rule 18.4(a). After discussion, the members agreed that a challenge to the panel must be in writing, as provided in current and draft Rule 18.4(a). However, to clarify that a party may challenge multiple jurors for cause under Rule 18.4(b), rather than only a single juror, the members added the words “or jurors.” The workgroup rephrased portions of Rule 18.4(c) in the active voice. Although the current comment to Rule 18.4 is lengthy, members believe it provides useful guidance, and they agreed to retain it.

Rule 18.5 (“procedure for jury selection”) utilizes the term “shall.” The members agreed to change this to “must.” Members changed a reference in Rule 18.5(b) from “court or clerk” to simply “court,” which allows the jury commissioner to perform the function of calling jurors. Draft Rule 18.5(c) provides that the court may allow the parties to present brief opening statements to the jury panel, “or the court may require the parties to do so.” The latter phrase derives from the current rule. However, the members agreed that the court cannot compel the defendant to make an opening statement or a “mini-opening statement,” and the members deleted this phrase. The workgroup divided Rules 18.5(h) and 18.5(i) into subparts. In subpart Rule 18.6(h)(2), which deals with the selection of alternates, members added the words “or court official” after the word “clerk,” and the words “or stipulation” after the words “by lot.” These revisions allow more flexibility in determining who the alternate jurors will be. The members also agreed to add in Rule 18.5(i)(1) a new sentence: “this rule governs their continued participation in the case.” This is implicit in the current rule, and it is now explicit.

Members discussed the numerous comments to current Rule 18.5. The workgroup recommended retaining a comment to current Rule 18.5(b), which distinguishes the “strike and replace” and “struck” methods of jury selection, with

modifications. The members agreed. The members agreed to combine two comments concerning Rule 18.5(d), with modifications as shown on-screen. The substance of the comment to current Rule 18.5(f) is now in the rule, and members deleted this comment.

Current Rule 18.6 (“jurors’ conduct”), section (a), contains an obscure reference to a juror’s handbook approved by the Supreme Court. After discussion and after consideration of the 1937 decision in *Knight v State*, which is cited in the current comment, members agreed to change this provision to provide, “the court may provide prospective jurors with orientation information about jury service.” Members then turned to the jurors’ oath, which is contained in Rule 18.6(b). This robust discussion included whether to include or exclude the words “so help you G-d,” that are in the current rule. One member suggested that the rule might be unconstitutional, and another suggested changing the trial jurors’ oath to mirror the one given to grand jurors. The words “or affirm” in the current trial jurors’ oath are in parentheses, and ultimately, the members agreed to place corresponding parentheses around the phrase “so help me G-d.” The members agreed that with this addition, the oath passes constitutional muster, and that judges must determine the manner of administration, i.e., whether to administer it as an oath or as an affirmation. In Rule 18.6(c), the members agreed to delete the current rule’s initial phrase, “immediately after the jury is sworn,” as well as the phrase “by individuals unfamiliar with the legal system.” The members agreed to retain in the draft rule the concept in the current rule that the court will destroy jurors’ note after the court discharges the jury. Rules 18.6(e) and 18.6(f) have no substantive variation from the current rules. One member suggested that Rule 18.6(e) limit a juror’s opportunity to ask a question of the witness to the time the witness is testifying. Other members noted that this is already included in a jury instruction as well as the comment to Rule 18.6(e), which the workgroup recommends retaining; and there are exceptional situations where the judge might recall a witness to answer a juror’s subsequent question. The members agreed to retain the comment and they made no further changes to Rule 18.6(e). They also agreed to retain a portion of the comment to Rule 18.6(d).

6. Workgroup 4: Rule 25 (*currently: “procedure after verdict or finding of not guilty by reason of insanity”*). Ms. Kalman noted the workgroup’s changes to this short rule. To conform to statutory changes, the workgroup changed the title of the rule from what is shown in italics above to “procedure after a verdict or finding of guilty except insane.” The workgroup also changed “shall commit” to “must commit,” and deleted the comment to the 1993 amendment. The members had no further edits or questions concerning the workgroup’s changes.

7. Roadmap; call to the public; adjourn. The Chair advised that he will be unable to attend the meeting set for Friday, October 7, but he confirmed that the meeting would proceed with another member acting as chair in his absence. The remaining

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meeting schedule is Friday, October 21; Friday, November 18; and Friday, December 9. These meetings are set from 9:30 a.m. until 4:30 p.m.

There was no response to a call to the public. The meeting adjourned at 1:58 p.m.