

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

State Courts Building, Phoenix

Meeting Minutes: October 7, 2016

Members attending: Hon. Kent Cattani (Acting Chair), Paul Ahler, Hon. Sally Duncan, Timothy Eckstein, David Euchner, Hon. Maria Felix, Hon. Pamela Gates, Bill Hughes, Hon. Eric Jeffery, Kellie Johnson, Amy Kalman, Prof. Jason Kreag, Hon. Mark Moran, Aaron Nash by his proxy Nancy Rodriquez, Natman Schaye by his proxy John Canby, Hon. Paul Tang, Kenneth Vick by his proxy John Belatti

Absent: Hon. Richard Fields, Jerry Landau, Hon. Joseph Welty

Staff: John Rogers, Mark Meltzer, Julie Graber, Karla Williams, Theresa Barrett

Guests: None

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

Judge Cattani, acting as Chair at Judge Welty’s request, called the eighth Task Force meeting to order at 9:34 a.m. Judge Cattani introduced and welcomed the proxies. He advised that workgroups met five times after the September 16 Task Force meeting, and there have been 48 workgroup meetings to date. The Chair then asked members to review the September 16, 2016 draft meeting minutes. A member noted in the first paragraph of the draft an unnecessary use of the word “been”.

Motion: With the correction noted above, a member moved to approve the draft minutes. Seconded, and the motion passed unanimously. **CRTF-008**

2. Workgroup 4. Workgroup 4 presented three rules to the Task Force, two new rules (Rules 19 and 21), and a further review of Rule 14.

Rule 14 (“arraignment”): While discussing Rule 12 during the September 16 meeting, the members concluded that the substance of Rule 12.10 would be more appropriately located in Rule 14. The members accordingly assigned this task to Workgroup 4. Workgroup 4 thereafter prepared a new rule, draft Rule 14.5 (“proceedings in counties where no arraignment is held”), and Judge Tang presented this new rule to the Task Force.

The members discussed whether the defendant could waive an appearance under Rule 14.5. Draft Rule 14.3(b) generally permits the defendant to waive an appearance at a Rule 14 proceeding. Mr. Hughes commented that when Yavapai County utilized Rule 12.10, it required the defendants’ appearance, although he believed this was a matter of local policy rather than a rule requirement. The members resolved the issue by adding a provision in draft Rule 14.5 that allows the defendant to waive personal presence under

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Rule 14.3(b). The members then made changes to draft Rule 14.3(b) that improved the rule's grammar and clarified the process of filing a waiver. They also made an edit that deleted the words "in superior court," which allows the rule to be applied in limited jurisdiction courts. After discussion, they left intact the text in draft Rule 14.3(b) concerning "losing the right to a direct appeal." The members had no additional changes to Rule 14.

Rule 19 ("trial"): Mr. Hughes presented this rule on behalf of the workgroup. He noted that the workgroup restyled the rule but it made minimal substantive changes. However, there is a new Rule 19.7 ("sequestration") derived from current Rule 19.4. The workgroup also changed the current title of Rule 19.4 ("sequestration and detention of jurors") to "admonition" in the draft. The "order of proceedings" for a trial in current Rule 19.1(a) is now in Rule 19.1(b) because there is a new Rule 19.1(a) titled "generally," which deals with the application of the rule and agreements to modify the order of proceedings. The workgroup recommended deletion of most of the comments to Rule 19.

Rule 19.3 currently and in the draft has the title, "evidence." Judge Gates advised that the workgroup referred this rule to the Court's Advisory Committee on Rules of Evidence, and requested the Advisory Committee to determine whether the content of Rule 19.3 should move to the Rules of Evidence. If it is moved, the Task Force could delete Rule 19.3. She noted that practitioners usually cite Evidence Rule 403 in criminal cases rather than Rule 19.3, but the latter rule includes a concept of "materiality" that the evidence rule does not. The Advisory Committee will meet in December.

After the presentation by the workgroup, the members agreed to modify the language of Rule 19.1(a) to provide that the rule "generally applies to all trials, but portions of the rule may not apply to non-jury trials." The members discussed a comment to Rule 19.1 and they agreed to retain it. Mr. Rogers noted that draft Rule 21 contains a reference to Civil Rule 51, and the civil rule allows instructions prior to final argument; he inquired whether the order of proceedings in Rule 19.1(b) should reverse numbers 7 (argument) and 8 (instructions). The members agreed it was unnecessary because the RAJIs cover this matter.

The members also discussed Rule 19.1(c), and in particular subpart (2) concerning proceedings after the jury returns with a guilt phase verdict. The members discussed several issues arising under this rule, including the following. Should a separate provision in this rule govern the defendant's admission of a non-capital sentence allegation? Do juries "decide," "determine," or "find" non-capital sentencing allegations? What is the jury's role when the existence of the allegation is inherent in the guilt phase verdict (referencing *State v Patterson*, 230 Ariz. 270 (2012)? How should the rule distinguish post-guilt phase findings that the court must make from those made by

a jury? The members directed Ms. Graber in making on-screen edits to Rule 19.1(c)(2), but after a considerable time discussing these issues, the members lacked consensus and agreed to return the rule to the workgroup for further consideration.

The members agreed to delete repetitive use of the word “then” in Rules 19.1(d) and (e), and changed “must proceed as follows” to “proceeds as follows.” In Rule 19.5, the members agreed to move both sentences that are now in a comment to the body of this draft rule. However, the members did not conclude what the standard should be when the substitute judge orders a new trial or other proceeding. Some members believed that unless the substitute judge found a “manifest necessity” for a new trial, jeopardy might have attached in the original proceeding and a new trial might be inapposite. Other members suggested removing the last sentence of the draft rule, which otherwise would permit the substitute judge to order a new trial. The Task Force requested the workgroup to review this issue further. In Rule 19.6, the members agreed to add a new last sentence that states, “Any substantive communications must be on the record.”

Rule 21 (“Instructions”): Judge Tang presented this rule. He noted that Rule 21.1 of the current rule includes a reference to “the law relating to instructions to the jury in civil actions.” Draft Rule 21.1 changed this reference to Civil Rule 51. In Rule 21.2, members changed the phrase “counsel for each party” to “parties.” The current rule requires a party to furnish proposed instructions to “the other parties.” The draft rule adds the words “including co-defendants.”

The members changed the concept of “proposed action” in current and draft Rule 21.3(a) to text that requires the court to inform the parties of “its proposed jury instructions and verdict forms.” The revised phrasing requires the court to discuss all of the proposed instructions with the parties, and not just requested instructions. Because of this change and parallel changes to other portions of this rule, the members changed the title of Rule 21 from “instructions” to “jury instructions and verdict forms.” The members relocated draft Rule 21.3(b) (“source of the instructions”) as draft Rule 21.3(c) so it appears sequentially. They also made a variety of edits to Rule 21.3(b) (“record of objections”), which Ms. Graber noted on-screen. The edits included the last sentence of this rule concerning fundamental error, which complements the concept of a failure to object precluding a subsequent claim of error. The draft now provides, “If a party does not make a proper objection, appellate review is limited to a review for fundamental error only.”

Current Rule 21.3(d) permits limited jurisdiction courts to provide juries with prerecorded audio instructions rather than paper copies of the instructions. One of the proxies has experience in multiple urban limited jurisdiction courts and he has never seen those courts use prerecorded instructions. Of the two limited jurisdiction judge members

on the Task Force, one also had not used prerecorded instructions, and the other had heard of this being done, but disfavored the practice because judges who use it are not inclined to deviate from the prerecording in order to customize the instructions for specific cases. The members agreed to strike this portion of Rule 21.3(d), but to note in the rule petition that they have done so.

A member observed that Rule 23.3 includes provisions for submitting forms of verdict to the jury on necessarily included offenses. The member suggested relocating this provision to Rule 21. The members agreed, and Rule 23.3 is now a new Rule 21.4 (“verdict forms for necessarily included offenses or attempts”). The members also agreed to add a new prefatory phrase to Rule 21.4(a) that requires the court to submit these forms of verdict “on request by any party and if supported by the evidence....”

3. Workgroup 3: Rule 18 (“trial by jury”). Judge Jeffery and Mr. Eckstein drafted an additional three-sentence paragraph for inclusion in the comment to draft Rule 18.1(a) concerning the right to a jury trial for misdemeanor offenses. The members approved this addition.

4. Workgroup 1: Workgroup 1 presented one rule for further review and one new rule.

Rule 15 (“disclosure”): After the previous presentation of this rule to the Task Force, Mr. Euchner proposed additional provisions concerning “cold” experts. (A “cold” expert witness offers testimony on general principles, rather than opinions derived from the facts of the case.) The previous draft rule had no provisions for a cold expert, and Mr. Euchner suggested additional language in Rules 15.1 and 15.2 concerning this subject. The civil rules served as his model for these new provisions. Mr. Euchner anticipated that under these proposed rule additions, counsel would prepare a summary of the facts and opinions on which the cold expert would base his or her testimony, and a summary of the expert’s qualifications. He stated that opposing counsel would not use the summary to impeach the expert at trial, but rather the summary would assist opposing counsel during a pretrial interview of the cold expert. Ms. Kalman suggested that the proposed rule should also require counsel to disclose the cold expert’s scholarly articles, which would also assist opposing counsel in preparing for a pretrial interview.

Some members were concerned that these provisions would be a substantial change from existing practices. Some suggested limiting disclosure to the cold expert’s subject matter. Another noted that the proposed rule would require more disclosure about an expert who did not prepare a report than one who did. However, not all members shared these concerns. Some members emphasized the importance of learning the expert’s opinions through written disclosure. They noted that civil cases, where money is at issue, require more details in expert witness disclosure than criminal cases,

in which an individual's liberty is at stake. They requested expert disclosure provisions in the criminal rules that are comparable to disclosure provisions in the civil rules. One judge stated that prosecutors in his jurisdiction already were providing this enhanced level of disclosure. Others members expressed that an interview was the appropriate method to learn of the expert's opinions. A judge member had concerns with the logistics of the proposed rule, especially in a large limited jurisdiction court that might have thousands of DUI cases, each with an expert witness. One judge stated that in these circumstances, the disclosure would probably include general information concerning the expert and possibly a single paragraph that was specific to the case at issue. Another judge believes that cold experts only provide background information that falls short of opinion testimony. Several members expressed a flaw in the proposed provisions because if counsel prepared the summaries, parties could not use them for impeachment.

Members concluded this discussion by provisionally limiting the disclosure requirement to the "subject matter" of the cold expert, as shown in on-screen changes. (This revision will require conforming changes to related provisions concerning disclosure in capital cases.) Some also believe that the rule petition should flag this issue, and perhaps suggest that the Court establish another project for considering disclosure obligations in criminal cases. The Chair also invited any member of the Task Force to submit a revised proposal for further discussion.

Mr. Euchner continued the discussion of Rule 15 by noting a pending rule petition, R-16-0035, that requests an amendment to Rule 15.1(j). This petition incorporates in Rule 15.1(j) certain language from House Bill 2001 (a so-called "revenge porn" bill), which affects A.R.S. § 13-1425 and became effective in March 2016. The rule petitioner filed R-16-0035 in April with a request for expedited adoption, and the Court amended the rule on an emergency basis with an immediate effective date. The Court may consider adopting the amendment on a permanent basis at its December 2106 rules agenda. Mr. Euchner proposed two alternatives. One is to add the language from R-16-0035 to the draft now; the other is to wait until the December rules agenda and take action based on the outcome then. The members agreed to add the language now. They declined to add a reference to the voyeurism statute, A.R.S. § 13-1424.

Mr. Euchner then noted that when the workgroup previously presented Rule 15, the Task Force requested the workgroup to prepare modifications to the sanctions provisions of Rule 15.7(a) and (b) to conform to the discussion during that meeting. The workgroup thereafter made the conforming changes, these changes were included in the meeting materials, and Task Force members approved those changes.

Elsewhere in Rule 15,

- The members deleted in draft Rule 15.3(e) a requirement that the defendant's waiver of the right to be present at a deposition be in writing.
- The members deleted a requirement in Rule 15.1(c) that in a limited jurisdiction court, the State provide disclosure "20 days after arraignment." This is not in the current rule. As revised, the provision requires the State's disclosure at the first pretrial conference, which is consistent with the current rule.
- The members considered changing the word "must" in the disclosure provision of Rule 15.2(b)(3) (the signature on defendant's disclosure by a self-represented defendant) to "may," but after discussion they retained the word "must."
- The members discussed Rule 15.1(f)(2), and an omission in the draft provision of the words "under the prosecutor's direction or control" that are in the current rule. The members made no changes to the draft provision but they agreed to revisit it at a future meeting.

Rule 20 ("judgment of acquittal or unproven aggravator"): Mr. Euchner presented this new rule. He noted that the workgroup's draft of Rule 20(a) ("before verdict") included separate subparts (1) and (2) for the guilt and aggravation phases of trial. A new subpart (3) concerned the timing of the motion, and required the court to rule on the motion "with all possible speed." A new sentence provided that "until the motion is decided, the defendant is not required to proceed." Mr. Euchner explained that until the court decides the motion, the rule should not require the defendant to present evidence that might supply missing proof and warrant the court's denial of the motion. A judge member disfavored that approach, and observed that frequently, witnesses are waiting to testify or the trial judge needs to review legal authorities, and the use of trial time is more efficient if judges have discretion about how to proceed after the defendant makes a motion under Rule 20(a). The judge suggested changing the "must" in the timing provision to "should," or alternatively, eliminating the provision and reinserting the current comment. However, the members deferred both suggestions to a future meeting. The members declined to rephrase Rule 20(a) by combining the "if there is no substantial evidence" language in subparts (1) and (2) into a single phrase.

Mr. Euchner also suggested a modification to Rule 20(b). Unlike the current rule, the modification would not require a pre-verdict motion as a prerequisite for a post-verdict motion. Some members opposed this change. They noted current Rule 20(b), which allows a motion to be "renewed" and implies a requirement that the defendant made the motion previously under Rule 20(a). They believe the rationale of a requirement for a pre-verdict motion is if the State's evidence is deficient, e.g., it did not prove jurisdiction, the trial judge can allow the State to reopen and cure the deficiency. The current language provides an opportunity for the court to deal with these insufficiencies at the earliest possible time. Mr. Euchner responded that if case law allows

raising the insufficiency of the evidence as a matter of fundamental error on appeal, the rule should also allow the trial court to consider the error after the verdict, even in the absence of a pre-verdict motion. Another member noted that without the proposed modification, and if the defendant had not made a previous Rule 20(a) motion, the trial judge might not be able to determine the insufficiency of the evidence on a sua sponte Rule 20(b) motion. However, a judge member advised that in this circumstance, Arizona cases permit the trial judge to sit as a “thirteenth juror.”

The Chair requested that the workgroup consider these Rule 20 issues and relevant case law, and he deferred further discussion until the next Task Force meeting.

5. Roadmap; call to the public; adjourn. The Chair advised that the next meeting is set for Friday, October 21, 2016. There was no response to a call to the public. The meeting adjourned at 3:38 p.m.