

Task Force on the Arizona Rules of Criminal Procedure

Meeting Agenda

Friday, October 21, 2016

9:30 AM to 4:30 PM

State Courts Building * 1501 West Washington * Conference Room 230 * Phoenix, AZ

Conference call-in number: (602) 452-3288 Access code: 1742

Item no. 1	Call to Order Introductory comments	<i>Hon. Joseph Welty, Chair</i>
Item no. 2 Page 3	Approval of the October 7, 2016 meeting minutes	<i>Judge Welty</i>
Item no. 3 Pages 17, 19, 69, 73 Pages 31, 71 Pages 11, 27	Discussion of workgroup drafts - Workgroup 1: Rule 20 (further review), Rules 26, 37, and 39 - Workgroup 2: Rules 31 and 38 - Workgroup 3: Rules 17 and 29	<i>Judge Duncan, Mr. Euchner, Mr. Vick</i> <i>Judge Cattani</i> <i>Judge Moran, Mr. Eckstein, Ms. Johnson</i>
Item no. 4	Roadmap - Future Task Force meeting dates: November 4 November 18 December 9	<i>Judge Welty</i>
Item no. 5	Call to the Public Adjourn	<i>Judge Welty</i>

The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Sabrina Nash at (602) 452-3849. Please make requests as early as possible to allow time to arrange accommodations.

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

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.

Rule 17. Pleas of Guilty and No Contest

Rule 17.1. The Defendant's Plea

(a) Jurisdiction; Personal Appearance.

- (1) **Jurisdiction.** Only a court having jurisdiction to try the offense may accept a plea of guilty or no contest.
- (2) **Personal Appearance.** Except as provided in these rules, a court may accept a plea only if the defendant makes it personally in open court. If the defendant is a corporation, defense counsel or a corporate officer may enter a plea for the corporation. For purposes of this rule, a defendant who makes an appearance under Rule 1.6 is deemed to personally appear.

(b) Voluntary and Intelligent Plea. A court may accept a plea of guilty or no contest only if the defendant enters the plea voluntarily and intelligently. Courts must use the procedures in Rules 17.2, 17.3, and 17.4 to assure compliance with this rule.

(c) No Contest Plea. A plea of no contest may be accepted only after the court gives due consideration to the parties' views and to the interest of the public in the effective administration of justice.

(d) Record of a Plea. The court must make a complete record of all plea proceedings.

(e) Waiver of Appeal. By pleading guilty or no contest in a noncapital case, a defendant waives the right to have the appellate courts review the proceedings on a direct appeal. A defendant who pleads guilty or no contest may seek review only by filing a petition for post-conviction relief under Rule 32 and, if it is denied, a petition for review.

(f) Limited Jurisdiction Court Alternatives for Entering a Plea.

(1) Telephonic Pleas.

(A) Eligibility. A limited jurisdiction court has discretion to accept a telephonic plea of guilty or no contest to an offense if the defendant provides written certification and the court finds the defendant:

- (i) resides out-of-state or more than 100 miles from the court in which the plea is taken; or
- (ii) has a serious medical condition so that appearing in person would be an undue hardship, regardless of distance to the court.

(B) Procedure. The defendant must submit the plea in writing substantially in the form set forth in Rule 41, Form 28. It must include the following:

- (i) a statement by the defendant that the defendant has read and understands the information in the form, waives applicable constitutional rights for a plea, and enters a plea of guilty or no contest to each of offenses in the complaint; and
 - (ii) a certification from a peace officer in the state in which the defendant resides—or, if the defendant is an Arizona resident, a peace officer in the county in which the defendant resides—that the defendant personally appeared before the officer and signed the certification described in (f)(1)(B)(i), and the officer affixes the defendant’s fingerprint to the form.
- (C) *Judicial Findings.* Before accepting a plea, the court must hold a telephonic hearing with the parties, inform the defendant that the offense may be used as a prior conviction, and find:
- (i) it has personally advised the defendant of the items set forth in the form;
 - (ii) a factual basis exists for believing the defendant is guilty of the charged offenses; and
 - (iii) the defendant’s plea is knowingly, voluntarily, and intelligently entered
- (2) *Plea by Mail.*
- (A) *Eligibility.* A limited jurisdiction court has discretion to accept by mail a written plea of guilty or no contest to a misdemeanor or petty offense if the court finds that a personal appearance by the defendant would constitute an undue hardship such as illness, physical incapacity, substantial travel distance, or incarceration. The presiding judge of each court must establish a policy for the State’s participation in pleas submitted by mail.
- (B) *When a Plea May Not Be Accepted by Mail.* A court may not accept a plea by mail in a case:
- (i) involving a victim;
 - (ii) in which the court may impose a jail term, unless the defendant is sentenced to time served or the defendant is currently incarcerated and the proposed term of incarceration would be served concurrently and not extend the period of incarceration;
 - (iii) in which the court may sentence the defendant to a term of probation;
 - (iv) involving an offense for which A.R.S. § 13-607 requires the taking of a fingerprint upon sentencing; or
 - (v) in which this method of entering a plea would not be in the interests of justice.
- (C) *Procedure.* The defendant must submit the plea in writing substantially in the form set forth in Rule 28, Form 28(a). The defendant must sign the plea form before a

notary public acknowledging the defendant's signature. The form must include the following;

- (i) a statement that the defendant has read and understands the information on the form, waives applicable constitutional rights for a plea, and enters a plea of guilty or no contest to each of the offenses in the complaint and consents to the entry of judgment; and
- (ii) a statement for the court to consider when determining the sentence.

(D) *Mailing.* The court must mail a copy of the judgment to the defendant.

Rule 17.2. Advising of Rights and Consequences of a Guilty or No Contest Plea

(a) **Generally.** Except as provided in Rule 17.1(f)(2), before accepting a plea of guilty or no contest, the court must address the defendant personally, inform the defendant of the following, and determine that the defendant understands:

- (1) the nature of the charges to which the defendant will plead;
- (2) the range of possible sentences for the offenses to which the defendant is pleading, any special conditions regarding sentencing, parole, or commutation imposed by statute;
- (3) the constitutional rights that the defendant foregoes by pleading guilty or no contest, including the right to counsel if defendant is not represented by counsel;
- (4) the right to plead not guilty; and
- (5) in a noncapital case, the defendant's plea of guilty or no contest will waive the right appellate court review of the proceedings on a direct appeal; and that the defendant may seek review only by filing a petition for post-conviction relief under Rule 32 and, if it is denied, a petition for review.

(b) Immigration Advisement and Disclosure of Immigration Status.

- (1) **Advisement.** If a defendant is not a citizen of the United States, the court also must disclose that the plea may have immigration consequences and specifically state:

“If you are not a citizen of the United States, pleading guilty or no contest to a crime may affect your immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. Your plea or admission of guilt could result in your deportation or removal, could prevent you from ever being able to get legal status in the United States, or could prevent you from becoming a United States citizen.”

- (2) **Advisement Before Admission of Facts.** A court also must give the advisement in (b)(1) before any admission of facts sufficient to warrant a finding of guilt, or before any submission on the record.

- (3) **Disclosure of Immigration Status.** A court may not require a defendant to disclose his or her legal status in the United States.

Rule 17.3. A Court's Duty to Determine Whether a Plea Is Entered Voluntarily and Intelligently

- (a) **Required Judicial Determination.** A court may not accept a plea of guilty or no contest unless it determines, after addressing the defendant personally in open court, that:
- (1) the defendant wishes to forego the constitutional rights of which the defendant has been advised; and
 - (2) the defendant's plea is voluntary and not the result of force, threats or promises (other than that which is included in the plea agreement).
- (b) **Determining a Factual Basis.** The court must find a factual basis for all guilty or no contest pleas. The court may make this finding at the time of the plea, or it may defer that determination until judgment is entered under Rule 26.2(d).

Rule 17.4. Plea Negotiations and Agreements

(a) **Plea Negotiations.**

- (1) **Generally.** The parties may negotiate and reach agreement on any aspect of a case.
 - (2) **Judicial Participation.** At either party's request or on its own, a court may order counsel for the parties to obtain settlement authority and participate in a good faith discussions to resolve the case in a manner that serves the interests of justice. The assigned trial judge may participate in this discussion only if the parties consent. In all other cases, the discussion must be before another judge. If settlement discussions do not result in an agreement, the case must be returned to the trial judge.
 - (3) **Victim Participation.** The victim must have an opportunity to confer with the prosecutor, if they have not already conferred, before any case resolution, and the prosecutor must inform the court and defense counsel of the victim's position. If the defendant is present during settlement discussions, the victim also must have the opportunity to be present and to state his or her position with respect to settlement.
- (b) **Plea Agreement.** The terms of a plea agreement must be in writing and be signed by the defendant, defense counsel (if any), and the prosecutor. The parties must file the agreement with the court. Any party may withdraw from an agreement before the court accepts it.
- (c) **Determining Accuracy, Voluntariness and Intelligent Acceptance of the Agreement.** Before accepting the plea agreement, the court must address the defendant personally and confirm orally that the written plea agreement contains all the agreement's terms and that the defendant understands and agrees to the terms. The oral confirmation ensures all parties, the court and the public are aware of the terms of the plea. The court also must comply with Rules 17.2 and 17.3.

- (d) Accepting the Plea.** After making the determinations required by this rule and after considering any comments expressed by the victim, the court must either accept or reject the submitted plea. The court is not bound by any provision in the plea agreement regarding the sentence or probation terms and conditions if, after accepting the agreement and reviewing a presentence report, the court rejects the provision as inappropriate.
- (e) Rejecting the Plea.** If the court rejects a plea agreement or any provision in the agreement, it must give the defendant an opportunity to withdraw the plea. The court must inform the defendant that if the plea is not withdrawn, the disposition of the case may be less favorable to the defendant than what the agreement provided.
- (f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.** Arizona Rule of Evidence 410 governs the admissibility of a plea, a plea discussion, and any related statement.
- (g) Automatic Change of Judge.** If the defendant withdraws a plea after a presentence report is submitted, the judge must disqualify himself or herself if the defendant asks the judge to do so, but no additional disqualification of judges is permitted under this rule.

Rule 17.5. Withdrawal of a Plea

The court may allow the defendant to withdraw a plea of guilty or no contest if it is necessary to correct a manifest injustice. Upon withdrawal of a plea, the charges against the defendant will be reinstated automatically as they existed before the plea agreement amended, reduced, or dismissed any charge.

COMMENT

The term manifest injustice is intended to include denial of effective assistance of counsel, failure to follow the procedures prescribed by Rule 17, an incorrect factual determination made under Rule 17.3, and such traditional grounds as “mistake and misapprehension,” *State v. Corvelo*, 91 Ariz. 52, 369 P.2d 903 (1962) and “duress and fraud,” *Silver v. State*, 37 Ariz. 418, 295 P. 311 (1931); *State v. Murray*, 101 Ariz. 469, 421 P.2d 317 (1966).

The rule makes clear that no preliminary hearing or grand jury determination is necessary in order to reinstate charges after withdrawal of a plea of guilty or no contest. See Forms 18(a) and (b).

Rule 17.6. Admitting a Prior Conviction

The court may accept the defendant’s admission to an allegation of a prior conviction only under the procedures of this rule, unless the defendant admits the allegation while testifying in open court.

COMMENT

This section governs the situation in which the defendant is pleading only to the prior offense before, during or after a trial on the subsequent charge. The section applies only to prior offenses which are an element of the crime. The parties may stipulate under Rule 16 to evidentiary use of any prior conviction without the Rule 17 formalities.

Under Rule 17.1(b), the court need not invoke in minor traffic cases the detailed procedures of Rules 17.2, 17.3 and 17.4. Therefore, an admission of a prior conviction for a minor traffic offense can also be taken without the use of the procedures of those sections.

Rule 20. Judgment of Acquittal or Unproven Aggravator

(a) Before Verdict.

- (1) **Acquittal.** After the close of evidence on either side, and on motion or on its own, **if there is no substantial evidence to support a conviction** the court must enter a judgment of acquittal on any offense charged in an indictment, information, or complaint.
- (2) **Aggravation.** After the close of evidence on either side in an aggravation phase, and on motion or on its own, the court must enter a judgment that an aggravating circumstance or other sentence enhancement was not proven if there is no substantial evidence to support the allegation.
- (3) **Timing.** The court must rule on a defendant's motion with all possible speed. Until the motion is decided, the defendant is not required to proceed.

(b) After Verdict.

A defendant may renew a motion for judgment of acquittal or unproven aggravator or other sentence enhancement on any conviction or allegation within 10 days after any verdict is returned. (REVISIT AT NEXT TF MEETING, include comment)
Notwithstanding the absence of a motion before verdict, the court may order a judgment of acquittal or find an aggravator or other sentence enhancement not proven if there is no substantial evidence to support the verdict.

Rule 26. Judgment, Presentence Report, Presentencing Hearing, Sentence

Rule 26.1. Definitions; Scope

- (a) **Determination of Guilt.** “Determination of guilt” means the court’s acceptance of a guilty or no contest plea, a jury verdict of guilty, or the court’s finding of guilt following a bench trial. [8/18-Revisit re whether a court may render a “verdict”; alternative: “the court’s acceptance of a guilty or no contest plea or a guilty verdict by a jury or the court”]
- (b) **Judgment.** “Judgment” means the court’s adjudication that the defendant is guilty or not guilty based on the jury’s verdict, the defendant’s plea, or its own finding following a bench trial. [8/18-Revisit; alternative: “based on the jury’s or the court’s verdict, or the defendant’s plea”]
- (c) **Sentence.** “Sentence” means the court’s pronouncement of the penalty imposed on the defendant after a judgment of guilty.
- (d) **Scope.** Rule 26 does not apply to minor traffic offenses. Rules 26.4, 26.5, 26.6, 26.7, 26.8, and 26.15 apply only to the superior court.

Rule 26.2. Time to Render Judgment

- (a) **Upon Acquittal.** If a defendant is found not guilty of any charge or any count of any charge, the court must immediately enter judgment pertaining to that count or charge.
- (b) **Upon Conviction.** Upon a determination of guilt on any charge or on any count of any charge, the court must enter judgment and pronounce sentence pertaining to that count or charge.
- (c) **Upon a Death Verdict.** Upon a death verdict, the court must immediately enter the judgment and sentence. The court must direct the clerk to send to the Department of Corrections the sentencing order and copies of all medical and mental health reports prepared for, or relating to, the defendant.
- (d) **Factual Determination.** If the court did not affirmatively make a finding of a factual basis for a plea under Rule 17.3, the court must make that determination before entering a judgment of guilty. The court may consider one or more of the following sources when finding a factual basis: the defendant’s statements; police reports; certified transcripts of grand jury proceedings; or other satisfactory information. [8/18-Refer rule to Workgroup #3 to see if the rule is needed (does this situation ever come up?). If deleted here, Rule 17.3 also would need to be deleted or changed. Other possibility is to move the rule to Rule 17.3.]

Rule 26.3. Sentencing Date and Time Extensions

(a) Sentencing Date.

(1) *Superior Court.*

- (A) *Generally.*** Upon a determination of guilt, the court must set a date for pronouncing sentence.
 - (B) *Deadline for Sentencing.*** The court must pronounce sentence no less than 15 nor more than 30 days after the determination of guilt unless the court, after informing the defendant of the right to a presentence report, grants the defendant's request that the court pronounce sentence earlier.
 - (C) *The Defendant's Presence or Absence.*** When setting a sentencing date, the court must order the defendant to be present for sentencing and, if the defendant fails to appear, issue a warrant for the defendant's arrest. Additionally, following a conviction based on a trial, the court must notify the defendant that if the defendant's absence prevents the court from sentencing the defendant within 90 days after the determination of guilt, the defendant will lose the right to have an appellate court review the trial proceedings by direct appeal.
- (2) *Limited Jurisdiction Courts.*** A limited jurisdiction court may pronounce sentence immediately upon determining guilt unless the court orders, on its own or on a party's or a victim's request, that the court will pronounce sentence at a later date that is not more than 30 days after the determination of guilt.

(b) Time Extension. If a presentencing hearing is requested under Rule 26.7 or for good cause, the court may reset the sentencing date, but the new date should not be no later than 60 days after the determination of guilt.

Rule 26.4. Presentence Report

(a) When Required. The court must order a presentence report in every case in which it has discretion over the penalty. However, a presentence report is optional if:

- (1)** the defendant may only be sentenced to imprisonment for less than one year;
- (2)** the court granted a request under Rule 26.3(a)(1); or
- (3)** a presentence report concerning the defendant is already available.

(b) When Prepared. A presentence report may not be prepared until after the court makes a determination of guilt or the defendant enters a plea of guilty or no contest.

(c) **When Due.** Unless the court grants a request under Rule 26.3(a)(1) for an earlier sentencing, the presentence report must be delivered to the sentencing judge and to all counsel at least two days before the date set for sentencing.

(d) **Inadmissibility.** Neither a presentence report nor any statement made in connection with its preparation is admissible as evidence in any proceeding bearing on the issue of guilt.

Rule 26.5. Diagnostic Evaluation and Mental Health Examination

At any time before the court pronounces sentence, it may order the defendant to undergo a mental health examination or diagnostic evaluation. Unless the court orders otherwise, any report concerning such an examination or evaluation is due at the same time as the presentence report.

Rule 26.6. Court Disclosure of Reports Before Sentencing

(a) **Disclosure to the Parties.** The court must permit the State, defense counsel, and a self-represented defendant to review all presentence, diagnostic, and mental health reports concerning the defendant. If the court makes a portion of any report unavailable to one party, it must not make that portion available to any other party.

(b) **Disclosure to a Victim.** The court must permit the victim to review the presentence report after it makes the report available to the defendant, excluding any portions the court excises or that are confidential by law.

(c) **Date of Disclosure.** A report prepared under Rule 26.7(c) must be available to the parties no more than two days after it is delivered to the court and no less than two days before a presentencing hearing, unless the parties agree otherwise.

(d) Excision.

(1) **Generally.** The court may excise from copies of presentence, diagnostic and mental health reports disclosed to the parties:

(A) diagnostic opinions that might seriously disrupt a program of rehabilitation;

(B) sources of information obtained on a promise of confidentiality; and

(C) information that would disrupt an ongoing law enforcement investigation.

(2) **Disclosure.** The court must inform the parties if a portion of a report is not disclosed, and must state on the record its reasons for not disclosing it.

(e) Court Disclosure of Reports After Sentencing

(1) **Disclosure to Personnel Responsible for the Defendant.** After sentencing, the court must furnish to persons having direct responsibility for the defendant's custody, rehabilitation, treatment, or release all diagnostic, mental health, and presentence reports, except for portions excised under (d)(1)(B) and (C).

(2) **Disclosure to Courts.** The court must make an unexcised version of any report listed in (e)(1) available to:

(A) a reviewing court when a relevant issue has been raised; and

(B) a court sentencing the defendant after a later conviction.

(f) **Public Disclosure of Reports.** A report prepared under Rules 26.4, 26.5, or 26.7(c) is a public record unless the court orders otherwise or it is confidential by law.

Rule 26.7. Presentencing Hearing; Prehearing Conference

(a) **Request for a Presentencing Hearing.** If the court has discretion concerning the imposition of a penalty, it may—and, on any party's request, must—hold a presentencing hearing before sentencing.

(b) Timing and Conduct of a Presentencing Hearing.

(1) **Timing.** The court may not hold a presentencing hearing until the parties have had an opportunity to review all reports concerning the defendant prepared under Rules 26.4 and 26.5.

(2) **Presenting Evidence.** At the hearing, any party may introduce any reliable, relevant evidence, including hearsay, to show aggravating or mitigating circumstances, to show why the court should not impose a particular sentence, or to correct or amplify the presentence, diagnostic, or mental health reports.

(3) **Record.** A presentencing hearing must be held in open court, and the court must make a complete record of the proceedings.

(c) Prehearing Conference.

(1) **Generally.** On motion or on its own, the court may hold a prehearing conference to determine what matters are in dispute, and to limit or otherwise expedite a presentencing hearing.

(2) **Attendance of Probation Officer.** The court may order the probation officer who prepared the presentence report to attend a prehearing conference.

(3) **Postponing Sentencing and Presentencing Hearing.** At the conference, the court may postpone the date of sentencing for no more than 10 days beyond the maximum extension permitted by Rule 26.3(b), and may delay the presentencing

hearing accordingly, to allow the probation officer to investigate any matter the court specifies, or to refer the defendant for mental health examinations or diagnostic tests.

Rule 26.8. The State's Disclosure Duty; Objections and Corrections to a Presentence Report

- (a) **The State's Disclosure Duty.** The State must disclose any information in its possession or control it has not already disclosed that would tend to reduce the defendant's punishment.
- (b) **Notice of Objections.** At least one day before the presentencing hearing, each party must notify the court and other parties of the party's objections, if any, to the contents of any report prepared under Rules 26.4, 26.5 or 26.7(c).
- (c) **Corrections to a Presentence Report.** If the court sustains any objection to a presentence report's contents, it may take appropriate action, including but not limited to:
- (1) excising portions of the report, including any objectionable language;
 - (2) ordering a new presentence report to be prepared with specific instructions and directions;
 - (3) directing that a different probation officer prepare a new presentence report; or
 - (4) ordering the presentence report sealed.

Rule 26.9. The Defendant's Presence

The defendant has a right to be present at a presentencing hearing and must be present at sentencing.

Rule 26.10. Pronouncing Judgment and Sentence

- (a) **Pronouncing Judgment.** In pronouncing judgment on any noncapital count, the court must indicate whether the defendant's conviction is pursuant to a plea or trial, the offense for which the defendant was convicted, and whether the offense falls in the categories of dangerous, non-dangerous, repetitive, or non-repetitive offenses.
- (b) **Pronouncing Sentence.** When the court pronounces sentence, it must:
- (1) give the defendant an opportunity to address the court;
 - (2) state that it has considered the time the defendant has spent in custody on the present charge;
 - (3) explain to the defendant the terms of the sentence or probation;

- (4) specify the beginning date for the term of imprisonment and the amount of time to be credited against the sentence as required by law;
- (5) for any felony offense or a violation of A.R.S. §§ 13-1802, 12-1805, 28-1381, or 28-1382, permanently affix the defendant's right index fingerprint to the sentencing document or order; and
- (6) if the court sentences the defendant to a prison term, direct the clerk to send to the Department of Corrections, along with the sentencing order, copies of all presentence reports, probation violation reports, and medical and mental health reports prepared for, or relating to, the defendant.

Rule 26.11. A Court's Duty After Pronouncing Sentence

(a) Disclosures. After pronouncing judgment and sentence, the court must:

- (1) inform the defendant of the right to appeal the judgment, sentence, or both, and advise the defendant that failure to file a timely notice of appeal will result in the loss of the right to appeal;
- (2) advise that:
 - (A) if the defendant is indigent, as defined in Rule 6.4(a), the court will appoint counsel to represent the defendant on appeal; and
 - (B) if the defendant is unable to pay for certified copies of the record on appeal and a certified transcript, the county will provide them; and
- (3) advise the defendant of the right to waive the right to appellate counsel by filing a written notice no later than 30 days after filing the notice of appeal.

(b) Written Notice. After making the disclosures in (a), the court must provide the defendant with a written notice of the rights set forth in (a) and the procedures the defendant must follow to exercise them. The record must show affirmatively the defendant's receipt of the notice.

COMMENT

The defendant's trial counsel has a duty under Rule 6.3(b) to advise the client whether or not an appeal would be beneficial and to continue representing the defendant if an appeal is taken, unless counsel shows good cause why counsel should be allowed to withdraw. Form 23 should be used to notify the defendant of the rights to appeal and to counsel on appeal.

In non-record courts, the defendant will be informed of the right to *de novo* appeal under Rule 30, and the right to counsel, if any, under Rule 6.1(b).

Rule 26.12. Defendant's Compliance with Monetary Terms of a Sentence

- (a) **Method of Payment—Installments.** The court may permit the defendant to pay any fine, restitution, or other monetary obligation within a specified period of time or in specified installments. The defendant must pay restitution as promptly as possible, given the defendant's ability to pay.
- (b) **Method of Payment—to Whom.** The defendant must pay a fine, restitution, or other monetary obligations to the court, unless the court orders otherwise. The court must apply defendant's payments first to satisfy the restitution order and the payment of any restitution in arrears. The court must forward restitution payments to the victim as promptly as practicable.
- (c) **Failure to Pay a Monetary Obligation.**
- (1) ***Defendants Not on Supervised Probation.*** If a defendant who is not on supervised probation fails to pay a fine, restitution, or other monetary obligation, the court must promptly notify the State.
 - (2) ***Defendants on Supervised Probation.*** If a defendant who is on supervised probation fails to pay a fine, restitution, or other monetary obligation, the court must promptly notify the defendant's probation officer.
 - (3) ***Court Action upon Failure of Defendant to Pay a Fine, Restitution, or Other Monetary Obligation or to Comply with Court Orders.*** If the defendant fails to timely pay a fine, restitution, or other monetary obligation, the court may issue an arrest warrant or a summons and require the defendant to show cause why he or she should not be held in contempt for nonpayment.

Rule 26.13. Consecutive Sentences

If the court imposes separate sentences of imprisonment on a defendant for two or more offenses, the sentences run consecutively unless the judge expressly directs otherwise or unless consecutive sentences would be illegal. This rule applies even if the offenses are not charged in the same indictment or information.

Rule 26.14. Resentencing

If a judgment or sentence, or both, have been set aside—either on appeal, by collateral attack, or on a post-trial motion—the court may not impose a sentence for the same offense, or a different offense based on the same conduct, which is more severe than the earlier sentence unless the court determines:

- (a) the earlier sentence is no longer appropriate based on evidence about the defendant's conduct occurring after the court pronounced the earlier sentence;

- (b) the earlier sentence was unlawful and it is corrected so the court may impose a lawful sentence; or
- (c) other circumstances exist and there is no reasonable likelihood that an increase in the sentence is the product of actual vindictiveness by the sentencing judge.

Rule 26.15. Special Procedures Upon Imposing a Death Sentence

After imposing a sentence of death, the court must order the clerk to file a notice of appeal from the judgment and sentence.

Rule 26.16. Entry of Judgment and Sentence; Warrant of Authority to Execute Sentence

(a) **Entry of Judgment and Sentence.** The judgment of conviction and sentencing on the judgment are complete and valid at the time the court orally pronounces them in open court.

(b) **Warrant of Authority.**

- (1) *Entry of Judgment and Sentence.* The court must enter the exact terms of the judgment and sentence in the court's minutes.
- (2) *Notice to Appropriate Officer.* The court must furnish a certified copy of the minute entry, signed by the sentencing judge, to the appropriate officer and no other authority is necessary to execute any sentence the court imposes. If the sentence is for death or imprisonment, the appropriate officer must receive the defendant for execution of the sentence upon delivery to him or her of a signed, certified copy of the minute entry in the court's docket.

Rule 29. Restoring Civil Rights or Vacating a Conviction

Rule 29.1. Grounds; Notice

(a) Generally. A person who has completed probation or a sentence may ask the court to restore civil rights, to withdraw a plea of guilty or no contest, or to set aside a conviction under A.R.S. § 13-907. The probation officer, or the court if there is no probation officer, must provide a person with written notice of this opportunity before the person's absolute discharge.

(b) Sex Trafficking Victims. A sex trafficking victim may request the court that pronounced sentence to vacate a conviction under A.R.S. §§ 13-3214 and 13-907 if the offense was committed before July 24, 2014.

COMMENT

Rule 29 implements A.R.S. §§ 13-905 to -911.

Rule 29.1 implements A.R.S. § 13-907. The rights of which a person is deprived upon conviction of a felony include the right to vote (Ariz.Const. art. 7, § 2); the right to bear arms if the conviction was for a crime of violence (A.R.S. §§ 13-3101 to -3102); the right to serve on a jury (A.R.S. § 21-201); the right to practice a number of professions and occupations, including law (Sup. Ct. Rules 51, 52(a), 52(b), and 57(a)-(d)); accounting (A.R.S. § 32-741); beauty culture (A.R.S. § 32-553); and, if a life sentence is imposed, the rights negated by a declaration of civil death (A.R.S. §§ 13-904, 13-4301).

Rule 29.2. Application

(a) Contents. An application under this rule must include the applicant's name, address, and signature, the offenses for which the applicant was convicted, the place and date of conviction, the sentence imposed, and the relief the applicant is requesting. The applicant must attach to the application any documents and affidavits required by law, and may attach other supporting documents and affidavits.

(b) Place of Filing and Filing Fee. The applicant must file an application with the court specified by law. The court may not charge a fee for filing or docketing an application.

(c) Processing of Application. The court having jurisdiction must process the application. It must send a copy of the application to the prosecuting agency and, if it concerns a felony conviction, to the Attorney General.

COMMENT

Rule 29.2(a). The rule sets forth the minimum requirements. *See* Rule 41, Form 21. Applicants who were sentenced by an Arizona state court and not placed on probation must attach a certificate of absolute discharge from the director of the department of corrections. A.R.S. § 13-906. Applicants who were federal probationers must attach an affidavit of discharge from the discharging judge, and applicants who were federal inmates must attach, if possible, a certificate of absolute discharge from the director of the federal bureau of prisons. A.R.S. §§ 13-909 to -910. Absolute discharge occurs after a person has served his entire sentence or term of probation, or has received early termination under A.R.S. §§ 13-901, 31-414.

Rule 29.2(b). Applications from persons sentenced by an Arizona court must be filed with the clerk of the sentencing court. Those from persons sentenced by a federal court must be filed with the clerk of the superior court of the county in which the applicant now resides. A.R.S. §§ 13-905, -907, -909, -910.

Rule 29.2(c). This provision is taken directly from A.R.S. §§ 13-905, -906, -909, and -910. It clarifies the clerk's duties regarding applications to vacate convictions as well as restoration of rights. A.R.S. § 13-907. A.R.S. §§ 13-905 and -906 direct the superior court to cause the county attorney to be served.

Rule 29.3. Hearing Date

The court must set a date for hearing the application that is at least 30 days after the application's filing.

Rule 29.4. State's Response

At least 10 days before the hearing, the State may file a written response stating any reasons for opposing the application. The State must send a copy of the response to the applicant's attorney or the applicant if unrepresented. If the State does not oppose the application or does not timely respond, the court may grant the application without a hearing and may enter an order vacating the conviction.

Rule 29.5. Disposition

If the court denies an application, its order must state the reasons for the denial.

COMMENT

The court has full discretion with respect to restoration of rights and vacation of conviction applications. A.R.S. § 13-908. Under Rule 1.8, a copy of an order disposing of an application must be sent to the applicant. This copy is often necessary to secure for the applicant his restored rights.

Rule 29.6. Special Provisions for Sex Trafficking Victims

- (a) Confidentiality.** If a court grants an application submitted by a sex trafficking victim, all paper and electronic records of the vacated conviction become confidential. The record may be disclosed upon request to the sex trafficking victim but otherwise may be disclosed only by court order for good cause. The court must order that the pertinent law enforcement agencies and prosecuting agencies make notations in their records that the conviction was vacated and the applicant was a crime victim.
- (b) The Order's Transmission.** The clerk must transmit a copy of an order vacating the conviction of a sex trafficking victim to the arresting agency, the prosecuting agency, the Department of Public Safety, and the victim.

Rule 31. Appeal from the Superior Court

Section One: General Provisions

Rule 31.1. Scope of Rule; Precedence; Definitions

- (a) **Scope.** Rule 31 governs procedures for criminal appeals from the superior court to the Court of Appeals and the Supreme Court.
- (b) **Precedence of Criminal Appeals.** Appeals in criminal cases have precedence over all other appeals except those from juvenile actions or if otherwise provided by law. Capital case appeals have precedence over all other appeals.
- (c) **Definitions.** As used in this rule, the following terms have the following meanings:
- (1) **“Appellate clerk”** means the clerk of the court in which an appeal is pending.
 - (2) **“Appellate court”** means the Supreme Court and the Court of Appeals, Divisions One and Two.
 - (3) **“Appellant”** is a party that commences an appeal. An appellant also may be a cross-appellee.
 - (4) **“Appellee”** is a party that responds to an appeal. An appellee also may be a cross-appellant.
 - (5) **“Decision”** is a written disposition of an appeal, as provided in Rule 31.19.
 - (6) **“Entry”** of a court order or decision occurs when it is filed by the clerk.
 - (7) **“Judgment”** is an appealable order, whether identified as a “judgment,” an “order,” a “pronouncement of sentence,” or another term.
 - (8) **“Motion”** is a written request, other than in an appellate brief for entry of a court order or for other relief.
 - (9) **“Stipulation”** means a signed written agreement that parties file with a court.

Rule 31.2. Notice of Appeal or Notice of Cross-Appeal

(a) Notice of Appeal or Cross-Appeal.

- (1) **Filing a Notice.** Except as provided in Rule 31.2(b), a party appeals or cross-appeals a judgment or sentence by signing and filing a notice of appeal or a notice of cross-appeal with the superior court clerk.
- (2) **Time for Filing.**

(A) A *notice of appeal* from a judgment of conviction and imposition of sentence **must** be filed within 20 days after the oral pronouncement of sentence.

(B) A notice of appeal from a judgment or order other than (A) **must** be filed within 20 days after entry of the judgment or order.

(C) A *notice of cross-appeal*, if any, **must** be filed within 20 days after the appellant's notice of appeal is filed.

(3) **Delayed Appeal.** A notice of delayed appeal must be filed within 20 days of entry of the order granting a delayed appeal under Rule 32.1(f),

(b) **Automatic Appeal for a Defendant Sentenced to Death.** As provided in Rule 26.15, when a defendant has been sentenced to death, the superior court clerk must file a notice of appeal on defendant's behalf after the oral pronouncement of sentence. That notice constitutes a notice of appeal by the defendant with respect to all judgments entered and sentences imposed in that case. Within 10 days after the notice of appeal is filed, the clerk must notify all assigned court reporters or transcribers that they are required to transmit their portions of the certified transcript to the Supreme Court clerk.

(c) **Content of the Notice of Appeal or Cross-Appeal.**

(1) **The Appeal's Subject.** A notice of appeal or cross-appeal must identify the order, judgment, or sentence that is being appealed.

(2) **Victim's Rights Certification.** If the State's notice of appeal or cross-appeal is based in whole or in part on a victims' rights violation, the State must certify in the notice of appeal or opening brief that the victim requested the appeal or cross-appeal.

(3) **Other Requirements.** A notice of appeal also must include:

(A) the defendant's name and address;

(B) the name and address of defense counsel, if any;

(C) the name and address (if known) of any co-defendant at trial; and

(D) whether the defendant was indigent when sentenced or when the appealable order was entered.

(d) **Joint Notice of Appeal or Cross-Appeal.** If two or more defendants are entitled to appeal from judgments, sentences, or orders arising out of the same proceeding, and they have common interests of law and fact, they may file a joint notice of appeal or cross-appeal.

(e) Distribution of Notices by the Superior Court Clerk.

- (1) *When a Defendant Appeals.*** Within 8 days of the defendant filing a notice of appeal, the superior court clerk must distribute a copy of the notice to:
 - (A)** the pro prosecuting agency that tried the case;
 - (B)** the attorney general;
 - (C)** the defendant, and each co-defendant at trial who is not a joint-appellant;
 - (D)** defense counsel of record, if any;
 - (E)** the appropriate certified reporter or reporters or, if the record was made by electronic or other means, to the court's designated transcript coordinator; and
 - (F)** the clerk of the proper appellate court.
- (2) *When the State Appeals.*** Within 8 days of the State filing a notice of appeal or cross-appeal, the superior court clerk must distribute a copy of the notice to:
 - (A)** each defendant and defense counsel of record, if any;
 - (B)** the appropriate certified reporter or reporters, or if the record was made by electronic or other means, to the court's designated transcript coordinator; and
 - (C)** the clerk of the proper appellate court.
- (3) *Notice to Unrepresented Defendant.*** When distributing the notice of appeal or cross-appeal, the superior court clerk must distribute a notice advising an unrepresented defendant of the right to counsel under Rule 6.
- (4) *Notice to the Appellate Court of Pending Post-Trial Motions.*** When the superior court clerk sends a notice of appeal or cross-appeal to an appellate court, the clerk must include a copy of any motion filed by a party under Rule 24 that the superior court has not yet decided.

(f) Entry by the Superior Court Clerk. When any party files a notice of appeal or cross-appeal, the superior court clerk must enter in the docket:

- (1)** whether the defendant was indigent when sentenced or when the appealable order was entered; and
- (2)** the name and address of each party to whom the clerk distributed copies of the notice of appeal or notice of cross-appeal, and when the each notice was distributed.

(g) Assignment of Appellate Case Number.

- (1) **Timing.** Within 10 days after receiving a notice of appeal from the superior court clerk, the appellate clerk must assign an appellate case number to the appeal.
- (2) **Case Title.** The appellate clerk must use same case title used in the superior court. If the title does not contain the name of the appellant, the appellate clerk may modify the title. The clerk also must designate the parties as appellants, appellees, cross-appellants, or cross-appellees, as they will appear in the appellate court.
- (3) **Notice.** The appellate clerk must promptly notify each individual identified in Rule 31.2(e)(1) or (2) of the assignment of the appellate case number.

(h) Amended Notice. If the superior court enters an order granting or denying relief under Rule 24 after a notice of appeal or cross-appeal has been filed, a party seeking review of the order must file an amended notice within 20 days of sup entry of the order.

Notes:

Provisions concerning the time to file a notice of appeal or notice of cross-appeal, which currently are in Rule 31.3, have been relocated to draft Rule 31.2.

A provision in current Rule 31.2(c) concerning joining appeals following the filing of separate notices of appeal is omitted. Draft Rule 31.4(a) (“consolidation by appellate court order”) should cover that circumstance. The remaining joint appeal provision of draft Rule 31.2(d) refers to “common interests of law or fact” rather than the current language, “their interests are such as to make joinder practicable.”

Draft Rule 31.2(g) derives from current Rule 31.7 (“docketing in the appellate court; designation of the parties”).

Draft Rule 31.2(h) is new.

Rule 31.3. Suspension of These Rules; Suspension of an Appeal; Perfection of an Appeal; Modifying a Deadline

- (a) **Suspension of Rule 31.** For good cause, an appellate court, on motion or on its own may suspend any provision of Rule 31 in a particular case, and may order such proceedings as the court directs.

(b) Suspension of an Appeal.

- (1) **Generally.** An appellate court on motion or on its own may suspend an appeal if a motion under Rule 24 or a petition under Rule 32 is pending to permit the superior court to decide those matters.
- (2) **Notice.** If an appeal is suspended, the appellate clerk must notify the parties, the superior court clerk, and, if certified transcripts have not yet been filed, the certified reporters or transcribers.
- (3) **Later Notification.** Within 20 days after the superior court’s decision on the Rule 24 motion or Rule 32 petition, the appellant must file with the appellate clerk either a notice of reinstatement of the appeal or a motion to dismiss the appeal under Rule 31.25, and must serve a copy of such documents on all persons entitled to notice under (b)(2).

(c) New Matters. Other than a petition for post-conviction relief that is not otherwise precluded under Rule 32.2, a party to an appeal may not, without the appellate court’s consent, file any new matter in the superior court later than 15 days after the appellate clerk distributes a notice under Rule 31.9(e) that the record on appeal has been filed.

(d) Modifying a Deadline. A party seeking to modify a deadline in the appellate court must obtain an appellate court order authorizing the modified deadline. An appellate court for good cause may shorten or extend the time for doing any act required by Rule 31, a court order, or an applicable statute.

Notes: Draft Rule 31.3 combines three current rules: Rule 31.4 (“motion to stay appeal; notice of reinstatement of appeal” excluding “consolidation of appeals,” which has been relocated as Rule 31.4); Rule 31.20 (“suspension of these rules”); and Rule 31.11 (“perfection of the appeal.”)

ARCAP Rule 3(b) refers to a “suspension of an appeal,” and that terminology is used in draft Rule 31.3(b). This terminology promotes consistency, and is also helpful in distinguishing from a “stay of execution of sentence” and a “stay order” under current Rules 31.6 and 31.16, respectively.

Draft Rule 31.3(d) derives from ARCAP Rule 5(b).

Rule 31.4. Consolidation of Appeals

(a) Consolidation by Appellate Court Order. On motion, by stipulation, or on its own an appellate court may order appeals or cross-appeals consolidated at any time:

- (1) if those appeals or cross-appeals raise a common question of law or fact; and
- (2) the court has given the parties an opportunity to object.

(b) Consolidation with the Appeal of a Post-Judgment Proceeding. Unless good cause exists not to do so, an appellate court must consolidate an appeal from a judgment or sentence with an appeal from a final decision on a Rule 24 motion or a petition for review from a final decision on a Rule 32 petition if the motion or petition was filed:

- (1) before a notice of appeal is filed; or
- (2) while an appeal is pending and the motion or petition was decided while the appeal is stayed.

Note: This draft rule derives from current Rule 31.4(b), “consolidation of appeals.”

Rule 31.5. Appointment of Counsel on Appeal; Waiver of the Right to Appellate Counsel

(a) Determination that the Defendant Is Indigent.

- (1) ***If Indigent in Superior Court.*** A defendant who was indigent when sentenced may proceed on appeal as indigent without further authorization, unless after a notice of appeal is filed, the superior court finds that the defendant is financially able to employ counsel and pay for a certified copy of the record on appeal, including a certified transcript.
- (2) ***If Not Indigent in Superior Court.*** A defendant who was not indigent when sentenced may proceed as indigent on appeal by filing in the superior court a request to proceed as indigent, together with a completed sworn questionnaire required under Rule 6.4(b). The superior court clerk must immediately provide a copy of the defendant’s request and questionnaire to the State. The superior court may require the defendant to appear for an inquiry into his or her ability to pay. The court must promptly grant or deny the defendant’s request.
- (3) ***Definition.*** The term “indigent” is defined in Rule 6.4(a).

(b) Contribution by the Defendant. The superior court may order an indigent defendant to contribute to the costs of appeal and the services of counsel in the manner provided in Rule 6.7(d).

- (c) **Motion in the Appellate Court.** If the superior court finds that a defendant is not entitled to proceed as indigent, the defendant may file a motion in the appellate court for permission to proceed as indigent, together with a copy of the sworn questionnaire required by Rule 31.5(a)(2). The appellate court, or a single judge of that court, must promptly rule on the motion.
- (d) **Notice of an Order to Proceed as Indigent.** The clerk of the court that enters an order allowing defendant to proceed as indigent on appeal must send a copy of that order to:
- (1) the superior court clerk or the appellate clerk, as the case may be;
 - (2) the parties; and
 - (3) the appropriate certified reporters or, if the record was made by electronic or other means, the court's designated transcript coordinator.
- (e) **Appointment of Counsel.** If a court allows a defendant's appointed attorney to withdraw, the superior court or the appellate court must appoint new counsel if the defendant is legally entitled to counsel on appeal.
- (f) **Waiver of Right to Counsel.**
- (1) **Filing Deadline.** A defendant may waive the right to appellate counsel by filing a written waiver no later than 30 days after filing a notice of appeal.
 - (2) **Where to File.** If the waiver is filed before or when the defendant files a notice of appeal, the waiver must be filed with the superior court clerk. If the waiver is filed after filing a notice of appeal, the waiver must be filed with the superior court clerk and the appellate clerk.
 - (3) **Superior Court Determination.** If the superior court determines that the defendant's waiver of the right to appellate counsel is made knowingly, intelligently, and voluntarily, the defendant will be allowed to represent himself or herself on appeal.
 - (4) **Advisory Counsel.** The superior court or the appellate court may appoint advisory counsel for a self-represented defendant during any stage of the appellate proceedings. Advisory counsel must be given notice of all matters for which the defendant is entitled to notice.
 - (5) **Withdrawal of Waiver.** In the interest of justice, the appellate court may grant a defendant's written request to withdraw a waiver of the right to appellate counsel. The defendant is not entitled to repeat any proceeding previously held or waived merely because counsel is later appointed or retained.

Note: See the Order entered on 12/16/2015 in R-15-0028 regarding this rule.

Rule 31.6. Filing Documents with an Appellate Court; Document Format; Service and Proof of Service

- (a) **Filing.** Documents filed in an appellate court must be filed with the appellate clerk. Rule 1.8(b) defines when a document is deemed filed.
- (b) **Document Format.** Documents filed with the appellate clerk other than briefs must comply with the formatting requirements of Rule 1.6(a)-(c), except that every typed document and footnote must use at least a 14-point typeface. Briefs must comply with the formatting requirements in Rule 31.12(b).
- (c) **Service and Proof of Service.** If a party files a document other than a brief with the appellate clerk, the party must serve on the same day a copy of the document on all other parties as provided in Rule 1.7(c) unless a proper showing of a need for confidentiality is made as provided in Rule 15.9(b). Rule 31.13(c) governs service of briefs. The appellate clerk may permit a document to be filed without a proof of service, but the filing party must file one within 5 days after filing the document.
- (d) **Word Limits.** A document must average no more than 280 words per page, including footnotes and quotations. Word limits specified in Rules 31.12(a), 31.14(a), 31.18(b), 31.20(e), and 31.21(g) do not include the cover page, the caption, the table of contents, the table of citations, paragraph numbers appearing at the beginning of each paragraph (if any), the date and signature block, a certificate of service, a certificate of compliance, or any appendix.

Note: Draft Rule 31.6 derives from current Rule 31.21 (“manner of filing and service; copies”), which was previously adapted from its counterpart in the civil rules of procedure.

Draft Rule 31.6(b) substitutes for current Rule 31.12 (“form of motions”). Current Rule 31.12 in essence repeats the requirements of draft Rule 1.5.

Draft Rule 31.6(c) excludes an existing provision for an “acknowledgement of service.” (Do parties still use acknowledgements?)

Rule 31.7. Stay of Proceedings

(a) During a Defendant’s Appeal.

- (1) **Sentence of Imprisonment; Credit.** If a defendant is released from custody pending appeal under Rule 7.2(c), a sentence of imprisonment is stayed pending appeal. A defendant who remains in custody during an appeal’s pendency must receive credit for the time of incarceration pending the appeal’s disposition.

(2) *Sentence of a Fine.* A sentence to pay a fine is stayed pending appeal.

(b) **During an Appeal by the State.** An appeal by the State does not stay an order in favor of the defendant, except when the State appeals from:

(1) an order granting a new trial; or

(2) an order granting a motion to suppress that directs the return of seized evidence.

Note: Draft Rule 31.7 derives from current Rule 31.6 (“stay of execution of sentence and credit pending appeal”) and Rule 31.16 (“appeal by state is inoperative to stay order in favor of defendant”).

Section Two: The Record on Appeal; Briefs and Argument

Note: Draft Rule 31.8 derives from current Rule 31.8 (“the record on appeal; transcript; duty of the authorized transcriber”). Portions of draft Rule 31.8 are modeled on ARCAP Rule 11 (“the record on appeal”).

Rule 31.8. The Record on Appeal

(a) Composition of the Record on Appeal.

(1) *Generally.* The record on appeal consists of:

(A) all documents (including minute entries, exhibit lists, transcripts, and other items) filed in the superior court before and including the effective date of the filing of a notice of appeal, a notice of cross-appeal, or an amended notice of appeal;

(B) the index prepared under Rule 31.9(b);

(C) all documents, papers, books, and photographs introduced into evidence; and

(D) certified transcripts of oral proceedings, as provided in Rule 31.8(b).

(2) *Additions and Deletions.*

(A) *By Appellant.* [Within 5 days after filing a notice of appeal,] The appellant may file with the superior court clerk a designation to include in the record any item not within (1)(C) that the appellant deems necessary, and to delete from the record all the documents, papers, books, and photographs he or she deems unnecessary.

(B) *By Appellee.* [Within 12 days after a notice of appeal is filed,] The appellee may file with the superior court clerk a designation to include in the record

any item not within (1)(C) that the appellee deems necessary, and any document, paper, book, or photograph deleted by the appellant.

(C) *By the Appellate Court.* An exhibit other than those listed in (a)(1)—including the excised portion, if any, of a presentence, diagnostic, or mental health report—may be added to the record on appeal only by order of the appellate court. The court may enter such an order at any time.

(D) *Notice to Other Parties.* An appellant or appellee must serve any designation or request made under this rule on all other parties when the party submits the designation or request.

Note: In addition, the current rule does not provide a process when there is a cross-appeal. The application of the current rule in cross-appeal situations, and the general utility of the current provision concerning additions to and deletions from the record on appeal, including circumstances where the appellate court may be required to review the record for fundamental error, should be discussed by the Task Force.

NOTE: add back in the provisions of current 31.8(a)(2) per WG discussion 8/18/16
DONE (JWR)

(b) Certified Transcripts.

(1) *Generally.* The record on appeal includes certified transcripts as follows.

(A) if the defendant is sentenced to death, the record on appeal must include a certified transcript of all recorded proceedings, including grand jury proceedings; and

(B) in all other cases, the record on appeal must include a certified transcript of the following proceedings:

(i) any voluntariness hearing or hearing to suppress the use of evidence;

(ii) all trial proceedings, excluding the record of voir dire unless a party specifically designates it;

(iii) any aggravation or mitigation hearing;

(iv) proceedings for the entry of judgment and sentence; and

(v) any probation violation proceeding.

(2) Additions and Deletions.

(A) By Appellant. [Within 5 days after filing a notice of appeal,] The appellant may request from the certified court reporter or, if the record was made by electronic or other means, the court’s designated transcript coordinator:

- (i)** a certified transcript of any proceeding not automatically included under Rule 31.8(b)(2); and
- (ii)** to exclude from a certified transcript any portion of the proceedings the appellant deems unnecessary for a proper hearing of the appeal.

(B) By Appellee. [Within 12 days after a notice of appeal is filed,] The appellee may request from the certified court reporter or, if the record was made by electronic or other means, the court’s designated transcript coordinator, a certified transcript of:

- (i)** any portion of a certified transcript deleted by the appellant; and
- (ii)** a proceeding not automatically included under Rule 31.8(b)(2).

(C) Notice to Other Parties. An appellant or appellee must serve any designation or request made under this rule on all other parties when the party submits the designation or request.

(c) Authorized Transcriber: Time to Prepare, and Payment Arrangements for, Certified Transcripts.

(1) Generally. Every transcript in the record on appeal must be prepared by an authorized transcriber. An “authorized transcriber” as used in this rule means a certified reporter or a transcriber under contract with an Arizona court. There may be multiple authorized transcribers for a single case.

(2) Court Reporter. If a certified reporter attended a proceeding in the superior court, a party must order a certified transcript of proceedings directly from that reporter.

(3) Audio or Video Recording. If the superior court created only an audio or audio-video recording of the proceeding, a party must order a certified transcript of the proceedings directly from an authorized transcriber. Unless the ordering party is an indigent defendant, the superior court will furnish the transcriber with a copy of the designated electronic recording upon receiving a notice from the transcriber that the transcriber has reached a satisfactory arrangement for payment. All parties to the appeal must cooperate with the transcriber by providing information that is necessary to facilitate transcription.

- (4) ***Time to Prepare.*** The authorized transcriber must prepare the certified transcript promptly upon receiving a notice of appeal either:
- (A) by the State; or
 - (B) by the defendant if the notice indicates that the defendant was represented by appointed counsel when found guilty or when sentenced.
- (5) ***Non-Indigent Defendant.*** Within 5 days after filing a notice of appeal or after the denial of a request during the appeal to proceed as indigent, a non-indigent defendant must make payment arrangements with the authorized transcriber for the certified transcript. The authorized transcriber then must promptly prepare the certified transcript. The authorized transcriber must notify the appellate court if the defendant fails to make satisfactory payment arrangements within the prescribed time.
- (6) ***Additions and Deletions.*** The authorized transcriber must promptly make any additions and deletions requested by the parties. Non-indigent defendants must pay for all portions of the record on appeal and certified transcripts that they have designated or requested.

Notes:

Rule 31.8(c)(1)-(3), which describe a certified transcript and an authorized transcription, are new. These provisions are taken from ARCAP Rule 11(b).

The second sentence of Rule 31.8(c)(6) is derived from current Rule 31.8(e), which results in renumbering of sections of Rule 31.8 after section (e).

The second sentence of current Rule 31.8(e) is not included in draft Rule 31.8(c)(6). That sentence says, “In addition, non-indigent appellants shall pay for those portions of the record on appeal and certified transcript [sic] required under Sections (a)(1), (b)(1), and (b)(2) and not deleted.”

(d) Authorized Transcriber: Manner of Delivering Transcripts.

- (1) ***Delivery to the Appellate Court.*** The authorized transcriber must file a certified electronic transcript of proceedings with the appellate clerk within the time allowed for the superior court clerk to transmit the record to the appellate court under Rule 31.9(c).
- (2) ***Delivery to the State.***

- (A) *If an Appellee.* If the State is the appellee, the authorized transcriber must deliver an electronic copy of the certified transcript to the Office of the Attorney General and the appropriate county attorney's office, if any.
- (B) *If an Appellant.* If the State is the appellant, the authorized transcriber must deliver an electronic copy of the certified transcript to the agency that prosecuted the case in the superior court.

(3) *Delivery to the Defendant.*

- (A) *Electronic.* The authorized transcriber must submit the electronic transcript for the defendant to the superior court clerk, who will provide the electronic transcript to the defendant's appellate counsel or to the defendant, if self-represented.
- (B) *Paper.* If defense counsel or a self-represented defendant requires or requests a paper transcript rather than an electronic transcript, the authorized transcriber must submit the defendant's paper copy to the superior court clerk, who will transmit the copy to the defendant's appellate counsel or to a self-represented defendant.
- (C) *Exception.* If a local rule or administrative order prescribes a procedure different from (A) or (B), the authorized transcriber must distribute the defendant's copy as provided in that rule or order.

- (4) *Notice of Service.* The authorized transcriber must file with the appellate court a notice of service of the certified transcript. The notice must state when and on whom service was made.

Notes: The foregoing draft of section (d) does not include the analog of current Rule 31.8(d)(3)(i) concerning the transcriber's preparation of "non-electronically filed transcripts," i.e., paper transcripts. A paragraph for paper transcripts can be added to a future draft if the Task Force concludes that it's necessary and appropriate. However, draft Rule 31.8(d)(3) includes a provision that allows the transcriber to provide a paper transcript to the defendant when required or requested.

Also, the draft of section (d) does not require, as the current rule does, that the authorized transcriber file an "original" electronic transcript, which is indistinguishable from a certified electronic copy.

This draft rule does not include current Rule 31.8(d)(3)(iii), which provides, "Copies of transcripts retained under this rule shall be retained for 90 days."

(e) Narrative Statement if No Record Is Available.

- (1) **Clerk's Duty.** If the court did not make a record of evidence or of an oral proceeding at trial, or if the transcript is unavailable, the superior court clerk must promptly notify the parties and the appellate clerk.
- (2) **Narrative Statement.**

 - (A) **Preparation.** If no record or transcript is available of evidence or of an oral proceeding, the appellant may prepare and file a narrative statement of the evidence or proceeding from the best available means, including the appellant's recollection.
 - (B) **Filing and Service.** The appellant must file the narrative statement in the superior court within 30 days after filing a notice of appeal and must serve it on all other parties.
 - (C) **Objections.** Any other party may file objections or proposed amendments to the narrative statement within 10 days after the statement is served.
 - (D) **If the Appellant Does Not File a Statement.** If the appellant does not file a narrative statement within the time specified in (2)(B), any other party may prepare, file, and serve such a narrative statement. The appellant may file objections or proposed amendments to that statement within 10 days after the statement is served.
 - (E) **Court Review and Transmittal.** After considering a narrative statement and any objections or proposed amendments, the superior court must settle and approve the narrative statement. The superior court clerk must then include it in the record transmitted to the appellate court under Rule 31.9(c).

(f) Agreed Statement.

- (1) **Generally.** Instead of providing a transcript of oral proceedings to the appellate court, the parties may prepare an agreed statement that contains the evidence or proceedings that are essential to a decision of the issues presented by the appeal, and submit the statement to the superior court for settlement and approval. The agreed statement must include a statement of the issues the appellant and any cross-appellant intend to present on the appeal.
- (2) **Notice.** The parties must notify the superior court clerk and authorized transcribers at the earliest practical time of the parties' intent to submit an agreed statement.

- (3) **Filing.** The parties must file the agreed statement in the superior court within 30 days after a notice of appeal is filed.
- (4) **Court Review and Transmittal.** The superior court may make any additions and corrections it considers necessary to the issues presented by the appeal. The superior court clerk will then include the agreed statement, as corrected and modified by the court, in the record transmitted to the appellate court under Rule 31.9(c).

(g) Correcting or Modifying the Record.

- (1) **Generally.** If anything material to either party is omitted from or misstated in the record, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:
 - (A) on stipulation of the parties; or
 - (B) by the superior court before or after the record has been forwarded.
- (2) **Superior Court Review.** If a dispute arises about whether the record accurately discloses what occurred in the superior court, the dispute must be submitted to and settled by the superior court and the record conformed accordingly.
- (3) **Appellate Court Review.** The parties must present all other questions as to the form and content of the record to the appellate court.
- (4) **Order to Correct the Record.** The appellate court may order the parties to correct an omission or misstatement in the record.

Note: The last five provisions of Rule 31.8 [sections (e) through (i)] are derived from corresponding provisions in ARCAP Rule 11. Section (e) [“narrative statement”], section (f) [“agreed statement”], and section (h) [“correction or modification of the record”] have analogous sections in current Rule 31.8, but section (g) [“video or audio recording”] and section (i) [“multiple appeals from the same judgment”] are new provisions of Rule 31.8.

Rule 31.9. Transmission of the Record to the Appellate Court

- (a) **Transcripts.** The authorized transcriber provides transcripts of superior court proceedings to the appellate court as provided in Rule 31.8(d).
- (b) **Official Documents; Index.** After a party files a notice of appeal, the superior court clerk must prepare a numerical index of the documents in the superior court’s file (the “*index*”). The superior court clerk must promptly distribute a copy of the index to every party to the superior court judgment that is the subject of the appeal.

(c) Electronic Transmission by the Superior Court Clerk.

- (1) *Generally.*** Within 45 days after a notice of appeal is filed, the superior court clerk must electronically transmit to the appellate clerk:
 - (A)** all documents filed in the superior court before the effective date of the filing of the notice of appeal, a notice of cross-appeal, or an amended notice of appeal, including minute entries, notices of appeal and cross-appeal, and the index;
 - (B)** every exhibit listed or designated under Rule 31.8(a) in paper, electronic, or photographic form, unless relieved by the appellate court of an obligation to do so, or unless the size of an exhibit makes transmission cumbersome; and
 - (C)** any other items requested by the appellate clerk.
- (2) *Extension and Reduction of Time.*** For good cause, the appellate court may grant one 20-day extension for transmitting the record on appeal. The appellate court also may order the superior court clerk to transmit the electronic record, or a portion of the record, at an earlier time or it may order physical transmission of the entire record or portions of the record under (d). The appellate clerk must distribute a copy of any order entered under this rule to the parties, the superior court clerk, and to the requesting authorized transcriber.
- (3) *Supplementation.*** At any time during the appeal, the appellate court may direct the superior court clerk by an order or written request to transmit portions of the record that were not included in previous transmissions.

(d) Physical Transmission by the Superior Court Clerk. The superior court clerk must notify the appellate clerk and the parties to the appeal of any items in the superior court's record of a size, bulk, or condition that makes their electronic transmission impractical. If any of those items are necessary for a determination of issues raised on appeal, the appellate court, on motion or on its own, may order that the superior court clerk transmit to the appellate court any or all of these items in physical form. Alternatively, the parties may stipulate to the method of transmitting the item.

(e) Notice that the Record Was Received. When the appellate clerk receives all of the record on appeal, the appellate clerk must promptly give all parties notice of that fact and the date on which the clerk received the complete record.

Note: Draft Rule 31.9, except for sections (a) and (e), derives from ARCAP Rule 11.1. Draft Rule 31.9(e) derives from current Rule 31.10.

Rule 31.10. Content of Briefs

Note: Rule 31.10 is modeled on ARCAP Rule 13.

(a) Appellant’s Opening Brief. An appellant’s opening brief must set forth under headings and in the following order all of the items listed below, except for items (3) and (9), which are optional:

- (1) a “*table of contents*” with page references. If the brief is filed electronically, if feasible, the table of contents should include bookmarks to sections of the brief described in items (2) through (9) below.
- (2) a “*table of citations*” that alphabetically arranges and indexes the cases, statutes and other authorities cited in the brief, and that refers to the pages of the brief on which each citation appears.
- (3) a short “*introduction.*”
- (4) a “*statement of the case*” that concisely states the nature of the case, the course of the proceedings, the disposition in the court from which the appeal is taken, and the basis of the appellate court’s jurisdiction. The statement must include appropriate references to the record.
- (5) a “*statement of facts*” that is are relevant to the issues presented for review, with appropriate references to the record. A party may combine a statement of facts with a statement of the case.
- (6) a “*statement of the issues*” presented for review. The statement of issues presented for review includes every subsidiary issue fairly comprised within the statement.
- (7) an “*argument*” that contains:
 - (A) appellant’s contentions with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies. The argument may include a summary.
 - (B) for each issue, references to the record on appeal where the issue was raised and ruled on, and the applicable standard of appellate review with citation to supporting legal authority.
- (8) a short “*conclusion*” stating the precise relief sought.
- (9) an “*appendix,*” as provided in Rule 31.11.

- (b) Appellee’s Answering Brief.** The appellee’s answering brief must follow the requirements of Rule 31.10(a), except that it does not need to include a statement of the case, a statement of facts, or a statement of the issues, unless the appellee finds the appellant’s statements to be insufficient or incorrect.
- (c) Reply Brief.** If the appellant files a reply brief, it must be strictly confined to the rebuttal of points made in the appellee’s answering brief. A party may file additional briefs other than a reply only with the appellate court’s permission.
- (d) References to the Record.** In any brief, references to evidence or other parts of the record must include a citation to the index, exhibit, or page of a certified transcript, authorized transcription, narrative statement, or agreed statement where such evidence or other material appears. In Division One, a brief may cite to a document in the appendix in lieu of citing to the record, but only if the table of contents of the appendix complies with the requirements of Rule 31.11(c). If a party refers to a video or audio recording, the party must provide specific, time-coded references to the relevant portions of the recording.
- (e) References to Parties.** In briefs and at oral argument, parties should minimize use of the terms “appellant” and “appellee.” For clarity, briefs should use the parties’ actual names or the designations used in the superior court proceeding, or such descriptive terms as “the defendant” or “the State.”
- (f) Substitute Victim Identifier.** Appellate briefs must use a victim identifier in place of the victim’s name in any case in which the defendant was charged with an offense listed in A.R.S. tit. 13, ch. 14, 32, 35 or 35.1 or in any case in which the victim was a juvenile at the time of the offense. For purposes of this rule, “victim identifier” means a victim’s initials, a pseudonym, or other substitute for the victim’s actual name.
- (g) References to Case Law.** Citation of Arizona case law must be to the volume, page number and, if available, the paragraph number, of the official Arizona reporters. Citation of non-Arizona case law must be to the volume and page number of the applicable regional or federal reporter.
- (h) Briefs in Cases Involving Cross-Appeals.** If a cross-appeal is filed, the combined brief under Rule 31.13(a)(4) must include a statement of the issues that are presented in the cross-appeal.
- (i) Briefs Involving Multiple Appellants or Appellees.** In cases involving more than one appellant or more than one appellee, including consolidated cases, multiple parties may join in a single brief, or an appellant or appellee may adopt by reference any part of the brief of another party. Parties having contentions in common must make a good faith effort to join in a single brief. If there is a contention common to

other parties, the filing party must make a good faith effort to adopt by reference the pertinent part of the previously filed brief of another party.

- (j) Briefs of Amicus Curiae.** A brief of amicus curiae must comply with Rule 31.10(a)(1), (2), (6), (7), (8), and (9), and Rule 31.15.

Rule 31.11. Appendix

- (a) Applicability.** A party may file an appendix with the party's brief in the Supreme Court and in Division One of the Court of Appeals. A party's appendix must be filed by the same method—paper or electronic—as the party's brief. An electronically filed brief in Division Two of the Court of Appeals must include electronic links when citing to the record on appeal and the brief must not include an appendix. A party may file an appendix in Division Two only if filing a paper brief.
- (b) Content of the Appendix.** The appendix should include only those portions of the record and legal authorities that are cited in the briefs and that are essential to decide an issue on appeal.
- (c) Table of Contents.** If there is more than a single item in the appendix, the appendix must begin with a table of contents that identifies each item included in the appendix. The table of contents must identify items in both of the following ways:
- (1) Location in the Record.** If the item is included in the record on appeal, the table of contents must identify where each item is located in the record—by item number in the clerk's index (see Rule 31.9(b)), by transcript date, or by exhibit number, as appropriate.
 - (2) Location in the Appendix.** The table of contents also must identify the item's location in the appendix by page number, or by volume and page number.
- (d) Appendix Filed Electronically.** A party that electronically files a brief may file a separate appendix or may file a combined brief and appendix as a single document, with the appendix following the brief. A combined filing must not exceed the size limits of the filing portal.
- (1) Page Numbering.** The pages in an appendix must be numbered sequentially. An appendix page number should match the electronic page number of the viewing software. If a party files a combined brief and appendix, the first page of the appendix must include a number sequential to the last page of the brief. For a separately filed appendix, the numbers should start with the cover page of the appendix.

- (2) **Multiple Volumes.** If a separate appendix is more than one volume, page numbering should restart for each volume and include an identifier that distinguishes each volume (e.g., APPV1-001, APPV2-001).
- (3) **Bookmarks and Hyperlinks.** Each item in the appendix table of contents must include a bookmark or hyperlink to the item in the appendix. If feasible, a combined brief and appendix filed as a single document must contain bookmarks or hyperlinks to items in the appendix when these items are cited in the brief.

(e) Appendix Filed in Paper.

- (1) **Page Numbering.** Pages of the appendix must be numbered sequentially, beginning with the appendix cover page.
- (2) **Combined Filing.** A party that files a brief in paper form may file a combined brief and appendix. If combined, the appendix must be located after the brief, and a blank page of distinctive color must separate the last page of the brief from the first page of the appendix.
- (3) **Separate Filing.** A party filing a paper appendix that is not combined with the brief must securely bind the appendix (for example, the pages of the appendix may be clipped or banded), but the binding must not use adhesives. The Supreme Court and Division One discourage the use of devices such as staples or two-pronged fasteners that perforate the pages of the appendix.

Rule 31.12. Length and Form of Briefs

(a) Length of Briefs.

- (1) **Opening/Answering Briefs.** Opening briefs and answering briefs must not exceed 14,000 words.
- (2) **Reply Briefs.** Reply briefs must not exceed 7,000 words.
- (3) **Combined Briefs.** If a party is filing a combined brief involving a cross-appeal, each separate portion of the combined brief must not exceed the number of words that each of the separate briefs may contain.
- (4) **Amicus Curiae Briefs.** Amicus curiae briefs or responses to amicus curiae briefs must not exceed 12,000 words.
- (5) **Certificate of Compliance.** Every brief must be accompanied by a certificate that confirms compliance with the word limits in (a)(1)-(4). Form XX is a template certificate of compliance. A party preparing a certificate of compliance

may rely on the word count of the word processing system used to prepare the brief if it counts the required words, including any footnotes.

(b) Format. Paper and electronic briefs must comply with the format requirements of Rule 1.7(b)-(c), except that the text and any footnotes in a typed brief must use at least a 14-point typeface and the information in Rule 1.7(a)(1) must appear below the caption on the brief's first page. The first page must include a caption that is substantially the same as shown in Form XX.

(c) Paper Filing.

- (1) Binding.** A party must securely bind a paper brief, for example by clipping or banding the pages, but the binding must not use adhesives. The Supreme Court and Division One discourage the use of devices such as staples or two-pronged fasteners that perforate the pages of the brief.
- (2) Cover Page.** A paper brief must have a separate cover page that contains the caption.

Rule 31.13. Due Dates; Filing and Service of Briefs

(a) Time for Filing a Brief in a Noncapital Case.

- (1) Opening Brief.** The appellant must file an opening brief within 40 days after the appellate clerk mails or otherwise distributes an initial notice under Rule 31.9(e). If an appellant does not timely file an opening brief, the appellate court may dismiss the appeal on motion or on its own.
- (2) Answering Brief.** The appellee must file an answering brief within 40 days after the appellant's brief is served. If the appellee does not timely file an answering brief, the appellate court may deem the appeal submitted for decision based on the opening brief and the record.
- (3) Reply Brief.** The appellant may file a reply brief within 20 days after the answering brief is served. In lieu of filing a reply brief, the appellant may file a notice that the appellant will not be filing a reply brief.
- (4) Combined Brief on Cross-Appeal.** A cross-appealing party must file a combined answering brief on appeal and opening brief on cross-appeal within 40 days after the appellant's opening brief is served. The appellant/cross-appellee must then file a combined reply brief on appeal and answering brief on cross-appeal within 40 days after service of the combined answering brief on appeal/opening brief on cross-appeal.

(5) **Reply Brief on Cross-Appeal.** The cross-appellant may file a reply brief within 20 days after the cross-appellee’s combined brief is served. The reply brief must address only matters raised in the answering brief on cross-appeal. In lieu of filing a reply brief, the cross- appellant may file a notice that the cross-appellant will not be filing a reply brief.

(6) **Amicus Curiae Brief.** An amicus curiae must file its brief by the deadlines provided in Rule 31.15(c) or (d).

(7) **Response to Amicus Curiae Brief.** A party may respond to an amicus curiae brief. If the amicus curiae files a brief with the consent of the parties or if a government entity or agency files an amicus curiae brief, a party has 30 days after the brief is served to file a response. If the appellate court grants a motion for leave to file an amicus curiae brief that has been lodged with the appellate court, a party has 30 days from entry of that order to file a response.

(b) **“At Issue.”** The appeal will be deemed to be “at issue” when the final reply brief or a notice that no reply brief will be submitted is filed, or when the reply brief is due, whichever is earlier.

(c) Manner of Filing Briefs.

(1) **Electronic Filing.** If a party is represented by counsel, the party must file a brief electronically. Electronic filing of a brief is timely only if the appellate clerk actually receives it within the time allowed for filing.

(2) **Paper Filing.** A defendant may file a paper brief only if self-represented. The filing of a paper brief is timely if:

(A) the filing party places the brief in the United States Postal Service mail within the time allowed for filing;

(B) the filing party delivers the brief to a third-party commercial carrier within the time allowed for filing, for the carrier’s delivery to the appellate clerk within 3 calendar days;

(C) the filing party hand-delivers the brief to the appellate clerk within the time allowed for filing; or

(D) if the party is incarcerated, the party delivers the brief to jail or prison authorities for mailing within the time allowed for filing.

(d) Service of Briefs and Appendices.

(1) *Service.* A party must serve a brief and any separate appendix on all other parties to the appeal, as provided by Rule 1.8(c). A party that files a paper brief or separate paper appendix must serve two copies of the brief and appendix on every separately represented party. If a party files an electronic brief or appendix that includes bookmarks or hyperlinks, the party must serve on all other parties to the appeal an electronic copy of the brief or appendix that contains the same functioning bookmarks or hyperlinks.

(2) *Certificate of Service.*

(A) *Generally.* The party serving the brief and any separate appendix must file a certificate of service with the appellate clerk, as provided by Rule 1.8(c)(3). The filing party also must serve this certificate on all other parties.

(B) *Mailing or Carrier Delivery.* If a brief is filed under Rule 31.13(c)(2)(A) or (B), the certificate also must include the date the brief was delivered to the commercial carrier or placed in the United States Postal Service mail.

(C) *Hand Delivery.* If a brief is filed under Rule 31.13(c)(2)(C), the certificate also must include the date of delivery to the clerk.

(D) *Delivery to Prison Authorities.* If a brief is filed under 31.13(c)(2)(D), the certificate also must include the date the brief was delivered to jail or prison authorities for mailing.

(e) Extension of Time to File a Brief.

(1) *Extension Due to Transcript Unavailability.*

(A) *Generally.* If a party moves to extend the time for filing a brief based on a transcript's unavailability, the motion must:

(i) certify that the party timely ordered and, if applicable, made payment arrangements for the transcript under Rule 31.8(c);

(ii) provide the reason for the reporter's or transcriber's inability to have the transcript completed; and

(iii) state the reporter's or transcriber's estimated date of completing and filing the transcript.

(B) *Order.* If the appellate court grants a motion to extend time based on a transcript's unavailability, it will extend the time for filing the brief to 30 days after the transcript's estimated filing date.

- (2) ***Extensions for Other Reasons.*** A motion or stipulation to extend the time for filing a brief for any reason other than a transcript's unavailability must comply with Rule 31.3(d).

Rule 31.14. Provisions Applicable Only to Briefs in Capital Case Appeals

(a) **Length of Briefs.** Opening briefs and answering briefs in a capital case appeal must not exceed 28,000 words. Reply briefs must not exceed 14,000 words.

(b) **Time for Filing.** An opening brief in a capital case must be filed within 90 days after the court issues a notice that the record is complete. An answering brief must be filed within 60 days after the appellant's brief is served. A reply brief must be filed within 30 days after the appellee's brief is served.

(c) **Request for an Extension of Time to File a Brief.**

(1) ***Factors a Court Must Consider.*** In ruling on any request for an extension of a time limit to file a brief, the court must consider the rights of the defendant and the rights of the victim to a prompt and final conclusion of the case.

(2) ***Notice to the Victim.***

(A) ***Generally.*** If the victim in a capital case has filed a notice of appearance as provided in A.R.S. § 13-4042, a party requesting an extension of time to file a brief must provide notice of the request to the victim.

(B) ***Who Must Receive Notice.***

(i) The victim may specify in the notice of appearance whether notification should be provided directly to the victim or to another person, including the prosecutor.

(ii) Unless the victim specifies a different method in the notice of appearance, notice must be provided through the prosecutor's office handling the appeal.

(C) ***Timing.***

(i) If the victim has requested direct notification, the party requesting an extension of time must provide notice to the victim within 24 hours after filing the request.

(ii) If the prosecutor has the duty to notify the victim on behalf of the defendant, the prosecutor must provide notice to the victim within 24 hours after receiving the request.

(D) Manner of Providing Notice.

- (i)** The victim’s notice of appearance may specify whether notice must be provided electronically, by telephone, or by regular mail.
- (ii)** Notice must be provided in the manner specified in the victim’s notice of appearance. If no method is specified, notice must be provided by regular mail.

Notes:

Draft Rules 31.14(a) and (b) derive from current Rule 31.13(f).

Draft Rule 31.14(c) derives from current Rule 31.27 (“extension of time; notification of victims”).

Rule 31.15. Amicus Curiae

(a) Generally. Amicus curiae is not a party to the appeal and must be independent of any party to the appeal. Counsel for a party may not author an amicus curiae brief in whole or in part.

(b) Requirements for Filing.

(1) Allowance. An applicant may file a brief as amicus curiae only if:

- (A)** the brief is filed with the written consent of the parties and states that on its cover;
- (B)** the applicant is the State of Arizona or an officer or agency of the State of Arizona, or is an Arizona county, city, or town; or
- (C)** the appellate court grants a motion to file it.

(2) Motion to File.

(A) Requirements. If an applicant files a motion to file a brief as amicus curiae, the applicant must lodge the brief with the motion. The motion must identify the interest of the applicant, state that the applicant has read the relevant brief, petition or motion, and state the reasons why the appellate court’s acceptance of applicant’s brief as amicus curiae would be desirable.

(B) Grounds for Granting a Motion. An appellate court may grant a motion to permit the filing of an amicus curiae brief if:

- (i)** a party has incompetent representation or is self-represented;

- (ii) amicus curiae has an interest in another case that the decision in the present case may affect; or
 - (iii) amicus curiae can provide information, perspective, or argument that can help the appellate court beyond the help that the parties' lawyers provide
 - (3) **Disclosure of Sponsor.** Amicus curiae's brief must clearly identify the group or organization sponsoring the brief and the interests of the sponsoring entity in the outcome of the appeal.
 - (4) **Other Requirements.** Except as these rules provide otherwise, briefs and other documents filed by amicus curiae must comply with the form, formatting, filing, certification of compliance, and service requirements applicable to briefs and other documents filed by parties.
- (c) **Time to File or Submit Amicus Curiae Briefs in the Court of Appeals.** In a case that is not a special action, a person filing a brief as amicus curiae in the Court of Appeals must file the brief, or lodge the brief with a motion, within 21 days after the deadline for filing the final reply brief.
- (d) **Time to File Amicus Curiae Briefs in the Supreme Court.** An applicant seeking to file a brief as amicus curiae in the Supreme Court must file the brief as provided by this rule.
- (1) **Briefs Filed Before a Decision by the Supreme Court to Grant Review.** Unless the Supreme Court orders otherwise, applicants must file (or, if by motion, lodge) amicus curiae briefs in support of a petition for review or a response to a petition for review no later than 21 days after the filing of the response or, if none is filed, the deadline for filing the response to the petition for review. Amicus curiae briefs must comply with the form and length requirements of Rule 31.21(h)(2), exclusive of any appendix.
 - (2) **Briefs Filed After the Supreme Court Grants Review.** After the Supreme Court grants review, and unless the Court orders otherwise, amicus curiae must file (or, if by motion, lodge) a brief no later than 10 days after the date ordered by the Court for the parties to file supplemental briefs. Amicus curiae briefs must not exceed the word or page limitation imposed for the parties' supplemental briefs.
 - (3) **Briefs Filed in Direct Appeals in Capital Cases.** In a direct appeal in a capital case that is not a special action, a person filing a brief as amicus curiae in the Supreme Court must file the brief, or lodge the brief with a motion, within 21 days after the deadline for filing the final reply brief.

(e) **Oral Argument.** Amicus curiae may participate in oral argument only with the appellate court's permission.

Rule 31.16. Supplemental Citation of Legal Authority

(a) **Generally.** A party may file a notice of supplemental legal authority at any time before the court enters its decision. If the court has set oral argument, the notice should be filed at least 5 days before argument, unless the party shows good cause for a later filing.

(b) **Form.** The notice of supplemental legal authority must state concisely and without argument the legal proposition supported by the supplemental authority. The notice also must clearly identify the page numbers of the party's brief that the party intends to supplement and the relevant pages of the supplemental authority. ~~The party must further.~~

Rule 31.17. Oral Argument in the Court of Appeals

(a) Request for Oral Argument.

(1) **Request.** A party may file a separate request for oral argument no later than 10 days after the due date for the final reply brief, or no later than 10 days after the date the appellant or cross-appellant actually files the final reply brief, whichever is earlier. A party requesting extended oral argument must state the reasons as part of the request.

(2) **Order and Notice.** If the Court of Appeals grants a request for oral argument, or if the Court of Appeals orders oral argument on its own, the Court of Appeals clerk will notify the parties of the time and place for oral argument and the allocation of time for each side. The Court of Appeals clerk will provide the notice at least 20 days before the date set for oral argument.

(b) Declining a Request for Oral Argument.

(1) **Generally.** Notwithstanding a party's request under (a)(1), the Court of Appeals may decide an appeal without oral argument if it determines that:

(A) the appeal is frivolous;

(B) the Court of Appeals has recently decided in another case the dispositive issues presented; or

(C) the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the decisional process.

(2) **Notice.** The Court of Appeals clerk must give the parties prompt written notice if the Court of Appeals determines the case will be submitted without the requested oral argument.

~~(c) **Precedence of Criminal Appeals.** Appeals in criminal cases have precedence over all other appeals except those from juvenile actions or if otherwise provided by law. Capital case appeals have precedence over all other appeals. [moved to 31.1]~~

Note: Draft Rule 31.17(d) derives from current Rule 31.14(b). If it is a rule of general application, i.e., if the principle stated in the rule applies to appeals generally and not just oral argument, the rule should be relocated.

Section 3: Appellate Court Procedures and Decisions

Rule 31.18. Petition for Transfer

(a) **Grounds for Transfer.** The Supreme Court may permit the transfer of an appeal pending in the Court of Appeals to the Supreme Court if:

- (1) the appeal requests that a decision of the Supreme Court be overruled or qualified;
- (2) there are conflicting Court of Appeals decisions concerning an issue on appeal;
or
- (3) other extraordinary circumstances justify transfer.

(b) **Transfer on Petition of a Party.** A party to a case that is pending before the Court of Appeals may request the Supreme Court to transfer the case by filing a petition with the Supreme Court clerk on or before the date the appeal is at issue under Rule 31.13(b).

(c) **Transfer on Petition by the Court of Appeals.** The chief judge of the division of the Court of Appeals in which the appeal is pending may request transfer of the case by filing a petition with the Supreme Court at any time after the appeal is at issue under Rule 31.13(b).

(d) **Form of a Petition.** A petition filed under Rule 31.13(b) must be no more than 1400 words, must be in the form required by Rule 31.6(b), and must concisely explain why the Supreme Court should take jurisdiction of the case. The petitioner must serve a copy of the petition on each of the parties.

(e) **Response to Petition.** A party may file a response to a petition to transfer within 5 days after the petition is served. The length of a response and its form must be the same as required for a petition under (d).

(f) Transfer on Motion of the Supreme Court. On its own motion, the Supreme Court may order the transfer of a case pending before the Court of Appeals to the Supreme Court. The Supreme Court also may transfer a case filed in that court to the Court of Appeals.

Rule 31.19. An Appellate Court's Orders and Decisions

(a) Notice of an Order or a Decision. When an appellate court enters an order or a decision, the appellate clerk must promptly notify all parties and amicus curiae by mail or electronic distribution. The notice must state the date the appellate court filed the order or decision or order, and the appellate clerk must include with the notice a copy of the order or decision or a hyperlink to the order or decision. The appellate clerk must note the date of mailing or electronic distribution in the appellate court's docket.

(b) Order Pending a Decision. An appellate court may issue any order during the course of an appeal that it deems necessary or appropriate to facilitate or expedite the appeal's consideration.

(c) Decision. The appellate court may reverse, affirm, or modify the action of a lower court, and it may issue any necessary and appropriate order in connection with its decision.

(d) Modification of a Judgment upon Finding of Insufficient Evidence at Trial. An appellate court may modify a judgment to one of conviction for a lesser-included offense and remand the case for resentencing if:

- (1) the evidence introduced at trial is not legally sufficient to establish the defendant's guilt for the offense for which the defendant was convicted; but
- (2) the evidence is legally sufficient to establish defendant's guilt of a necessarily lesser-included offense.

(e) ~~Brief Form of Opinion.~~ ~~The appellate court may issue a brief opinion where the facts and issues of law are clear and the interests of justice will be served.~~

(f) Publication of Decisions; Depublication; Decisions as Precedent. Supreme Court Rule 111 governs the types of dispositions, the publication of decisions, depublication, and the precedential effect of decisions.

(g) Partial Publication. If an appellate court concludes that only a portion of its decision meets the criteria for publication as an opinion, the court may issue that portion of the decision as a published opinion and the remainder of the decision as a separate memorandum decision not intended for publication.

Notes:

Draft Rule 31.18(a) derives from ARCAP Rule 20.

Draft Rule 31.18(e) derives from current Rule 31.24.

Draft Rule 31.18(f) derives from current Rule 31.26.

Is Rule 31.19(d) &(e) necessary?

Rule 31.20. Motion for Reconsideration

- (a) Purpose and Necessity.** A party may file a motion for reconsideration requesting an appellate court to reconsider whether its decision contained erroneous determinations of fact or law. A party need not file a motion for reconsideration in the Court of Appeals before filing a petition for review under Rule 31.21.
- (b) Required Showing.** A motion for reconsideration must state with particularity the points of law or fact that the party believes the appellate court has erroneously determined, or any changes in the law after briefing or oral argument that may entitle the party to relief.
- (c) Filing and Timing.** A party desiring reconsideration of a decision must file a motion for reconsideration in the appellate court within 15 days after entry of the decision. A motion to extend this deadline must be filed in the appellate court that issued the decision. A party may amend a motion for reconsideration only with the court's permission.
- (d) Response.** A party may not file a response to a motion for reconsideration unless requested by the appellate court to do so, but the court will not grant the motion without requesting the opposing party to file a response.
- (e) Form and Length.** A motion for reconsideration or a response to a motion for reconsideration must comply with Rule 31.6(b). A motion for reconsideration or response to a motion for reconsideration may not exceed 3,500 words. A certificate of compliance, as provided in Form 2, must accompany a motion for reconsideration or a response. A party preparing this certificate may rely on the word count of the processing system used to prepare the motion or response if it counts the required words including any footnotes.
- (f) Motions Not Permitted.** Unless permitted by specific appellate court order, no party may file a motion for reconsideration of an order denying a motion for reconsideration, an order denying a petition for review, or an order declining to accept jurisdiction of a petition for special action.

Note: Draft Rule 31.19 derives from ARCAP Rule 22.

Rule 31.21. Petition for Review

(a) Purpose. A party may ask the Supreme Court to review a decision of the Court of Appeals by filing a petition for review.

(b) Place and Time for Filing.

(1) *Place for Filing.* Any petition for review, cross-petition for review, response to a petition for review or cross-petition for review, or motion to extend the time for filing any of these documents, must be filed with the Supreme Court clerk.

(2) *Timing.*

(A) *Petition.* A party must file a petition for review within 30 days after the Court of Appeals enters its decision, unless a party files a timely motion for reconsideration in the Court of Appeals and, in that event, a party must file a petition for review within 15 days after the motion's final disposition.

(B) *Cross-Petition.* A party may file a cross-petition for review within 15 days after service of a petition for review or within 30 days after the Court of Appeals enters its decision, whichever is later.

(c) Stay Pending Motion for Reconsideration.

(1) *Generally.* A petition for review is automatically stayed if the petition is filed before the Court of Appeals decides a timely filed motion for reconsideration.

(2) *Duration of the Stay.*

(A) *If the Motion Is Denied.* If the Court of Appeals denies the motion for reconsideration, the stay remains in effect until the Court of Appeals clerk notifies the parties and the Supreme Court clerk that the Court of Appeals has denied the motion.

(B) *If the Motion Is Granted.* If the Court of Appeals grants the motion for reconsideration, the stay remains in effect until the Court of Appeals has made a final disposition.

(3) *Timing for Response or Cross-Petition.* The time for filing a response to a petition for review, or a cross-petition, is computed as if that petition's filing occurred on the date the stay is lifted, as described in (c)(2)(A).

(4) *Mootness.* If a petition or cross-petition becomes moot because of the final disposition of a motion for reconsideration by the Court of Appeals, the

petitioner or cross-petitioner must promptly file a written notice of mootness with the Supreme Court clerk.

(d) Contents.

- (1) **Generally.** A petition or cross-petition must contain concise statements of the following:
 - (A) the issues that were decided by the Court of Appeals that the petitioner is presenting for Supreme Court review. The petition must also list, separately and without argument, additional issues presented to, but not decided by, the Court of Appeals that the Supreme Court may need to decide if review is granted.
 - (B) the facts material to a consideration of the issues presented to the Supreme Court for review, with appropriate references to the record on appeal. No evidentiary matter should be included if it is not material to proper consideration of the issues. If an evidentiary matter is material, the party must include a reference to the record where that evidence appears, as provided in Rule 31.10(d).
 - (C) the reasons the petition should be granted, which may include, among others, that no Arizona decision controls the point of law in question, that a decision of the Supreme Court should be overruled or qualified, that there are conflicting decisions by the Court of Appeals, or that important issues of law have been incorrectly decided.
- (2) **Attachments.** A copy of the Court of Appeals' decision must accompany the petition. If the Court of Appeals' decision is an order declining to accept jurisdiction of a special action, a copy of the superior court's decision that was the subject of the special action also must accompany the petition.

(e) Appendix.

- (1) **Necessity.** If there are documents in the record on appeal that are necessary for determination of the issues raised by the petition or cross-petition, and hyperlinking to the record is unavailable, the petitioner and cross-petitioner must file with the petition or cross-petition; an appendix that contains only those documents.
- (2) **Form.** An appendix must comply with the requirements of Rule 31.11.

(f) Response.

- (1) **Timing and Necessity.** A party may respond to a petition or cross-petition by filing a response with the Supreme Court clerk within 30 days after service of the petition or cross-petition. A party's failure to file a response to a petition or cross-petition will not be treated as an admission that the Supreme Court should grant the petition or cross-petition.
- (2) **Additional Issues.** A response must list, separately and without argument, any additional issues not listed by the petitioner that the parties presented to the Court of Appeals but were not decided and that the Supreme Court may need to decide if it grants review.
- (3) **Appendix.** The response may include an appendix as provided in Rule 31.21(e), but the appendix to the response may only include documents that were not within the appendix to the petition or cross-petition.
- (4) **Reply.** The petitioner or cross-petitioner may not file a reply unless the Supreme Court enters an order specifically authorizing it, and then the petitioner or cross-petitioner must file the reply within the time set by that order.

(g) Form and Length of Petition, Cross-Petition, and Responses.

- (1) **Form.** The caption of the petition must designate the parties as designated in the caption of filings in the Court of Appeals. The formatting requirements of Rule 31.6(b) apply to a petition, a cross-petition, and a response to a petition or cross-petition.
 - (2) **Length.** A petition, a cross-petition, or a response to a petition or cross-petition must not exceed 3,500 words. A cross-petition combined with a response to a petition may not exceed 6,500 words.
 - (3) **Certificate of Compliance.** A petition, a cross-petition, or a response to a petition or cross-petition must include a certificate of compliance as shown in Form XX. A party preparing this certificate may rely on the word count of the processing system used to prepare the petition, cross-petition, or response..
- (h) Service.** A party filing a petition, a cross-petition, a response, a reply, or an appendix must serve a copy of the document in the manner provided in Rule 31.13(d) on all parties who were entitled to service in the Court of Appeals. The party also must file and serve a certificate of service in the manner provided in Rule 31.13(d)(2).
- (i) Availability of Briefs.** ~~If the Supreme Court clerk notifies the Court of Appeals clerk that a party has filed a petition for review, the Court of Appeals clerk will make available to the Supreme Court the briefs the parties filed in the Court of Appeals. The~~

~~Court of Appeals clerk also must make available other portions of the record requested by the Supreme Court or its staff attorneys.~~

- (j) Order Denying Review.** The Supreme Court clerk must promptly notify the parties and the Court of Appeals clerk if the Supreme Court has denied a petition or cross-petition for review. An order of the Supreme Court denying review must identify those Supreme Court justices, if any, who voted to grant review.
- (k) Order Granting Review.**
- (1) Notice.** The Supreme Court clerk must promptly notify the parties and the Court of Appeals clerk if the Supreme Court grants a petition or cross-petition for review.
 - (2) Issues.** A Supreme Court order granting review must specify the issue or issues the Supreme Court will review, and whether it will consider issues raised in, but not decided by, the Court of Appeals.
 - (3) Supplemental Briefs and Oral Argument.** The Supreme Court may permit the parties to file supplemental briefs, or it may set oral argument, or both. Unless otherwise ordered, oral argument may not be scheduled less than 30 days after entry of a written notice of oral argument or, if supplemental briefs are permitted, less than 30 days after the deadline for filing supplemental briefs.
 - (4) Motion for Supplementation or Oral Argument.** If an order granting review does not provide for supplemental briefs or oral argument, any party may file a motion specifying the reasons that supplementation or oral argument, or both, would be appropriate. A party must file this motion within 15 days after the Supreme Court clerk sends notice to the parties of the order granting review.
- (l) Availability of the Remaining Record.** The Court of Appeals clerk must make the remaining record available to the Supreme Court clerk upon notification that the Supreme Court has granted a petition or cross-petition for review.
- (m) Disposition.** If the Supreme Court grants review, it may decide the appeal in any manner specified in Rule 31.19(c) or (d). Additionally, the Supreme Court may do the following:
- (1)** remand the appeal to the Court of Appeals for reconsideration in light of specified authority;
 - (2)** if issues were raised in, and not decided by, the Court of Appeals, the Supreme Court may consider and decide those issues, remand the appeal to the Court of Appeals to decide them, or dispose of those issues as deemed appropriate; or

- (3) if the parties by agreement resolve the appeal after a petition for review is filed, the Supreme Court may vacate the disposition of the Court of Appeals or order republication of an opinion of the Court of Appeals.

Note: Draft Rule 31.20 derives from ARCAP Rule 23.

Rule 31.22. Appellate Court Mandates

- (a) **Definition.** The mandate is the final order of the appellate court, which may command another appellate court, superior court, or agency to take further proceedings or to enter a certain disposition of a case. An appellate court retains jurisdiction of an appeal until it issues the mandate.
- (b) **Generally.** Except in a capital case appeal in which the Supreme Court has affirmed a death sentence, an appellate court will issue the mandate in an appeal as follows:
 - (1) if the parties did not file a petition for review, the Court of Appeals clerk will issue the mandate when the time for filing that petition expires;
 - (2) if a party filed a petition for review, the Court of Appeals clerk will issue the mandate 15 days after the clerk receives a Supreme Court order denying the petition for review; and
 - (3) when the Supreme Court has filed any disposition that requires the issuance of a the mandate, the Supreme Court clerk will issue the mandate 15 days after the disposition is filed, or, if a party files a motion for reconsideration, 15 days after the motion's final disposition.
- (c) **Capital Case Appeals.**
 - (1) **Generally.** In an appeal in which the Supreme Court has affirmed a death sentence, the Supreme Court clerk will issue the mandate:
 - (A) when the time expires for filing a petition for writ of certiorari in the United States Supreme Court challenging the decision affirming the defendant's conviction or sentence on direct appeal; or
 - (B) if the defendant has filed a petition for writ of certiorari, when the Supreme Court clerk receives notice from the United States Supreme Court of a denial of the petition or, in a case in which the United States Supreme Court grants the petition, receives notice that the United States Supreme Court has issued its mandate.

- (2) ***Petition for Rehearing.*** If the defendant files a petition for rehearing of a denial of a petition for writ of certiorari, the petition for rehearing does not stay or otherwise delay the Supreme Court's clerk's issuance of the mandate.

(d) Return of Papers. After the appellate court issues the mandate:

- (1) the appellate clerk will return to the superior court clerk or other transmitting body any original exhibit or record provided to the appellate court under Rule 31.9; and
- (2) the appellate clerk may destroy copies of the record as authorized by rule or appellate court administrative order.

(e) Stay of Mandate Pending Application for Writ of Certiorari.

- (1) ***Request for Stay.*** A party may request an appellate court to stay issuance of the mandate pending application to the United States Supreme Court for a writ of certiorari as follows:

- (A) a party may file an application for a stay of issuance of the mandate with the Arizona Supreme Court clerk within 15 days after the filing of the Court's opinion, memorandum decision, or order denying a motion for reconsideration; or
- (B) a party may file an application for a stay of issuance of the mandate with the Court of Appeals clerk within 15 days after the Arizona Supreme Court enters an order denying a petition for review, or within 15 days in any other situation requiring the Court of Appeals to issue the mandate.

- (2) ***Duration.*** A stay may not exceed 90 days unless the appellate court extends the time for good cause. If during the period of the stay a party files a notice with the appellate clerk stating that the party has filed a petition for a writ of certiorari, the stay will continue until the appellate clerk receives notice from the United States Supreme Court of the denial of the petition or, in a case in which the United States Supreme Court grants the petition, receives notice that the United States Supreme Court has issued its mandate.

- (f) **Mandates from the United States Supreme Court.** Upon receiving a mandate from the United States Supreme Court, an Arizona appellate court will take action consistent with that mandate, including issuing its own mandate to the superior court that entered the original judgment. The Arizona appellate court's mandate will contain a verbatim recital of the United States Supreme Court mandate and command the superior court to take action as provided in the mandate.

Rule 31.23. Warrant of Execution.

(a) Issuance of Warrant. After affirming a death sentence, the Supreme Court must issue a warrant of execution if the State files a notice stating that:

- (1) the defendant has not filed a first Rule 32 petition for post-conviction relief and the time for filing a petition has expired;
- (2) the defendant has not filed a petition for review with the Court of Appeals seeking review of a superior court denial of the defendant's first Rule 32 petition for post-conviction relief and the time for filing a petition for review has expired;
or
- (3) the defendant has not initiated habeas corpus proceedings in federal district court within 15 days after the Supreme Court's denial of a petition for review seeking review of the denial of the defendant's first Rule 32 petition for post-conviction relief.

(b) Post-Habeas Warrant. On the State's motion, the Supreme Court must issue a warrant of execution when federal habeas corpus proceedings and habeas appellate review conclude.

(c) Date and Time of Execution. The warrant of execution must specify an execution date that is 35 days after the warrant's issuance. If the Supreme Court finds that it is impracticable to carry out an execution on that date, it may extend the execution date but may not extend it more than 60 days after the warrant's issuance. Additionally, the warrant must:

- (1) state the date for starting the execution time period;
- (2) state that the warrant is valid for 24 hours beginning at an hour to be designated by the director of the Arizona Department of Corrections;
- (3) order the director to provide written notice of the designated hour of execution to the Supreme Court and each party at least 20 calendar days before the execution date; and
- (4) authorize the director to carry out the execution at any time during the warrant's duration.

(d) Return on Warrant. The superintendent of the state prison must make a return on the warrant to the Supreme Court showing the manner and time of execution.

Rule 31.24. Sanctions

~~An appellate court may impose sanctions on an attorney or party if it determines that an appeal or a motion is frivolous, or filed solely for the purpose of delay. An appellate court also may impose sanctions on an attorney or party for violation of these rules. An appellate court may impose sanctions that are appropriate in the circumstances of the case, and to discourage similar conduct in the future. Sanctions may include contempt or dismissal.~~

Rule 31.25. Voluntary Dismissal

- (a) Dismissal by the Superior Court.** If the appellate clerk has not assigned an appellate case number under Rule 31.2(g), the superior court may dismiss the appeal on the filing of a stipulation signed by all parties, or on the appellant's motion with notice to all parties.
- (b) Dismissal by the Appellate Court.** An appellate clerk may dismiss an appeal if the parties file a signed stipulation requesting dismissal. The appellate clerk, however, may not issue a mandate or other process without an order from the appellate court. The appellant also may file a motion to dismiss the appeal, which the appellate court may grant on terms as agreed upon by the parties or as determined by the appellate court.

Rule 37. Report of Court Dispositions

Rule 37.1. Final Disposition Report

- (a) Definition.** A “final disposition report” is a report on a Supreme Court approved form containing information that a court or clerk must provide to the Department of Public Safety concerning the details of the termination of a criminal proceeding.
- (b) Scope.** The court must submit a final disposition report to the Department of Public Safety’s central state repository in every criminal case if the defendant was fingerprinted or incarcerated.
- (c) Timing.** The court must send a final disposition report to the Department of Public Safety’s central state repository within 10 days of the final disposition.

COMMENT

Rule 37.1 is a restatement of A.R.S. § 41-1751.

Rule 37.2. State’s Duty to File a Disposition Form with the Court

- (a) Generally.** When the State files a criminal charge against a defendant who was incarcerated or fingerprinted, the State also must file a disposition form.
- (b) When Filing a Complaint.** If the State begins an action by complaint, the State must attach a disposition form to the complaint. If a magistrate holds the defendant to answer before the superior court, the magistrate must forward the disposition form with the records listed in Rule 5.6 to the superior court.
- (c) When Filing an Indictment or Information.** The State must file a disposition form when it files an indictment or information in the superior court.
- (d) When the Defendant Is Fingerprinted.** Within 5 days after the defendant is fingerprinted under Rule 3.2(b), the State must file a disposition form in the same court where the complaint, information, or indictment was filed.

Rule 37.3. Reporting Procedure

- (a) In the Superior Court.** If the final disposition of a case occurs in superior court, the clerk must complete the disposition form and forward it to the Department of Public Safety’s central state repository. The clerk must retain a copy of the completed disposition form in the court’s file.
- (b) In a Limited Jurisdiction Court.** If the final disposition of a case occurs in a limited jurisdiction court, the magistrate must retain the disposition form until the clerk has transmitted the record on appeal or the time for an appeal has expired. If the clerk has

transmitted the record on appeal, the magistrate must forward the disposition form to the court where the appeal is pending. If the time for appeal has expired and no timely notice of appeal was filed, the magistrate must forward the disposition form to the Department of Public Safety's central state repository.

Rule 37.4. Procedure on Appeal

(a) In the Superior Court. When the superior court clerk transmits the record on appeal, the court must forward a copy of the disposition form to the appellate court.

(b) Reversed or Remanded Case. If the appellate court reverses a conviction or remands a case for a new trial or a new proceeding, the appellate court must forward to the Department of Public Safety's central state repository a copy of the disposition form that notes the change in the status of the disposition.

(c) New Proceedings. If an appellate court remands a case for a new trial or a new proceeding, the State must file a new disposition form with the trial court.

Note: Why is current Rule 37.4(a) limited to "courts of record?" Isn't there a similar rationale for LJ courts to forward a copy of the disposition form to the appellate [superior] court?

Rule 38. Suspension of Prosecution for a Deferred Prosecution Programs

Rule 38.1. Application for a Suspension Order

- (a) **Generally.** After filing a complaint, indictment, or information, but before adjudication, the prosecutor may file a motion requesting that the court suspend further proceedings to allow a defendant to participate in a deferred prosecution program.
- (b) **Motion's Content.** The motion must state facts establishing that the defendant is legally eligible for participation in a deferred prosecution program. The motion must be accompanied by the defendant's signed consent agreeing to participate in the program. The consent also must be signed by defense counsel, if any.
- (c) **Suspension Order.** After reviewing the motion and the defendant's signed consent, and upon finding the defendant legally eligible for a deferred prosecution program, the court must suspend further proceedings for the period specified in the motion, not exceeding two years. If the defendant is in custody, the court may order the defendant's release.

COMMENT

The provisions of Rule 38 are intended to implement the Deferred Prosecution Program authorized by A.R.S. § 11-361 et seq.

When the court suspends further prosecution so that a defendant may participate in a deferred prosecution program, the normal time limits required by Rule 8 for the commencement of trial of a criminal case are suspended.

Rule 38.2. Resuming Prosecution

- (a) **Notice of Failure to Fulfill Deferred Prosecution Conditions.** A prosecutor who is not satisfied that the defendant has fulfilled the conditions of the deferred prosecution program may file a written notice to that effect and request that the court vacate its order suspending prosecution. The prosecutor must serve a copy of the notice on the defendant.
- (b) **Order to Resume Prosecution.** After receiving a notice of the defendant's failure to fulfill the deferred prosecution conditions, the court must vacate the suspension order and order that the prosecution resume. The court must mail a copy of the order to the defendant and defense counsel, if any.

(c) Time for Trial. Subject to Rule 8.4 and irrespective of the phase of the case when the prosecution was suspended, the defendant must be tried within 90 days after the filing of the order to resume prosecution.

COMMENT

~~38.2(b). After prosecution is ordered resumed the court will make any other appropriate orders to resume the prosecution of the case from the phase it was in at the time prosecution was suspended.~~

~~38.2(c). A new time limit for commencement of trial is provided when prosecution is ordered resumed. The 90-day time limit applies irrespective of the phase the case was in at the time prosecution was suspended.~~

Rule 38.3. Dismissal of Prosecution

(a) At the End of Two Years. Two years after an order suspending prosecution is filed, the court may order the prosecution dismissed without prejudice.

(b) On Successful Completion. If the prosecutor notifies the court that the defendant has satisfactorily completed the terms of the deferred prosecution program, the court must order a dismissal of the charges.

~~**COMMITTEE COMMENT TO 1993 AMENDMENT**~~

~~The 1993 amendment to Rule 38.3 deleted the term “superior” to adapt the rule to all courts.~~

Rule 39. Victims' Rights

(a) Definitions.

(1) *Victim.*

- (A) *Generally.*** As used in these rules, a “victim” is defined in accordance with the definition provided in A.R.S. § 13-4401.
 - (B) *Cessation of Victim Status.*** A victim retains the rights provided in these rules until the rights are no longer enforceable under A.R.S. § 13-4402.
 - (C) *Victims in Custody.*** If a victim is in custody for an offense, the victim’s right to be heard under this rule is satisfied by affording the victim the opportunity to submit a written statement.
 - (D) *Victims Not in Custody.*** A victim who is not in custody may exercise the right to be heard under this rule by appearing personally or by submitting a written or recorded statement.
 - (E) *Legal Entities.*** The victim’s rights of any corporation, partnership, association, or other similar legal entity are limited as provided in statute.
- (2) *Criminal Proceeding.*** As used in this rule, a “criminal proceeding” is any matter scheduled and held before a trial court at which the defendant has the right to be present.
- (3) *Identifying and Locating Information.*** As used in this rule, “identifying and locating information” includes a person’s date of birth, social security number, official state or government issued driver license or identification number, the person’s address, telephone number, email addresses, and place of employment.

(b) *Victims' Rights.* These rules must be construed to preserve and protect a victim’s rights to justice and due process. Notwithstanding the provisions of any other rule, a victim has and is entitled to assert each of the following rights:

- (1)** the right to be treated with fairness, respect and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process;
- (2)** the right to written notice regarding rights available to a victim under this rule and any other provision of law;
- (3)** upon request, the right to reasonable notice of the date, time, and place of any criminal proceeding;
- (4)** the right to be present at all criminal proceedings;

- (5) the right to be notified if a defendant escapes;
- (6) upon request, the right to be informed of any permanent or temporary release or any proposed release of the defendant;
- (7) upon request, the right to confer with the State regarding:
 - (A) any decision about the preconviction release of the defendant;
 - (B) any pretrial resolution including any diversion program or plea offer;
 - (C) a decision not to initiate a criminal prosecution or to dismiss charges; and
 - (D) the trial, before the trial begins;
- (8) upon request, the right to be heard at any court proceeding involving:
 - (A) the initial appearance;
 - (B) the accused's post-arrest release or release conditions;
 - (C) the court's consideration of a negotiated plea resolution; and
 - (D) sentencing;
- (9) the right to be accompanied at any interview, deposition, or criminal proceeding by:
 - (A) a parent or other relative, unless the person's testimony is required in the case;
 - (B) an appropriate support person named by a victim, including a victim's caseworker, unless the person's testimony is required in the case; and
 - (C) if the court finds under (b)(8)(A) or (B) that a party's claim that a person is a prospective witness is not made in good faith, it may impose sanctions, including holding counsel in contempt;
- (10) the right to require the prosecutor to withhold, during discovery and other proceedings, the victim's identifying and locating information.
 - (A) *Exception.* A court may order disclosure of the victim's identifying and locating information as necessary to protect the defendant's constitutional rights. If disclosure is made to defense counsel, counsel must not disclose the information to any person other than counsel's staff and designated investigator, and must not convey the information to the defendant without prior court authorization.
 - (B) *Redactions.* Rule 15.5(e) applies to information withheld under this rule;

- (11) the right to refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on the defendant's behalf, and:
 - (A) the defense must communicate requests to interview a victim to the prosecutor, not the victim;
 - (B) a victim's response to such requests must be communicated through the prosecutor; and
 - (C) if there is any comment or evidence at trial regarding a victim's refusal to be interviewed, the court must instruct the jury that a victim has the right under the Arizona Constitution to refuse an interview;
- (12) at any interview or deposition conducted by defense counsel, the right to condition the interview or deposition on specification of a reasonable date, time, duration, and location of the interview or deposition, including a requirement that it be held at the victim's home, at the prosecutor's office, or at an appropriate location in the courthouse;
- (13) the right to terminate an interview at any time or refuse to answer any question during the interview;
- (14) the right to a copy of any presentence report provided to the defendant except those parts that are excised by the court or are confidential by law;
- (15) the right to be informed of the disposition of the case;
- (16) the right to a speedy trial or disposition and a prompt and final conclusion of the case after conviction and sentence; and
- (17) the right to be informed of a victim's right to restitution upon conviction of the defendant, of the items of loss included within the scope of restitution, and of the procedures for invoking the right.

(c) Assistance and Representation.

- (1) ***Right to Prosecutor's Assistance.*** A victim has the right to the prosecutor's assistance in asserting rights enumerated in this rule or otherwise provided by law. The prosecutor must inform a victim of these rights and provide a victim with notices and information that a victim is entitled to receive from the prosecutor by these rules and by law.

- (2) **Standing.** The prosecutor has standing in any criminal proceeding, upon the victim's request, to assert any of the rights to which a victim is entitled by this rule or by any other provision of law.
- (3) **Conflicts.** If any conflict arises between the State and a victim, the prosecutor must direct the victim to seek independent legal counsel and provide contact information to the appropriate state or local bar association for referral to a lawyer.
- (4) **Representation by Counsel.** In asserting any of the rights enumerated in this rule or provided by any other provision of law, a victim has the right to engage and be represented by personal counsel of the victim's choice.

(d) Victim's Duties.

- (1) **Generally.** Any victim desiring to claim the notification rights and privileges provided in this rule must provide his or her full name, address, and telephone number to the entity prosecuting the case and to any other entity from which the victim requests notice.
- (2) **Legal Entities.**
 - (A) **Designation of a Representative.** If a victim is a corporation, partnership, association, or other legal entity that has requested notice of the hearings to which it is entitled by law, that legal entity must promptly designate a representative by giving notice to the prosecutor and to any other entity from which the victim requests notice. The notice must include the representative's address and telephone number.
 - (B) **Notice.** The prosecutor must notify the defendant and the court if the prosecutor receives notice under (d)(2)(A).
 - (C) **Effect.** After notice is provided under (d)(2)(B), only the representative designated under (d)(2)(A) may assert the victim's rights on behalf of the legal entity.
 - (D) **Changes in Designation.** The legal entity must provide any change in designation in writing to the prosecutor and to any other entity from which the victim requests notice. The prosecutor must notify the defendant and court of any change in designation.
- (e) **Waiver.** A victim may waive the rights and privileges enumerated in this rule. A prosecutor or a court may consider a victim's failure to provide a current address and

telephone number, or a legal entity's failure to designate a representative, to be a waiver of notification rights under this rule.

(f) Court Enforcement of Victim Notice Requirements.

(1) ***Court's Duty to Inquire.*** At the beginning of any proceeding that takes place more than 7 days after the filing of charges by the State and at which the victim has a right to be heard, the court must inquire of the State or otherwise determine whether the victim has requested notice and has been notified of the proceeding.

(2) ***If the Victim Has Been Notified.*** If the victim has been notified as requested, the court must further inquire of the State whether the victim is present. If the victim is present and the State advises the court that the victim wishes the court to address the victim, the court must inquire whether the State has advised the victim of the rights conferred by this rule. If the victim has not been so advised, the court must recess the hearing and the State must immediately comply with (c)(1). The court also must provide the victim with a written list of the victim's rights under (b).

(3) ***If the Victim Has Not Been Notified.*** If the victim has not been notified as requested, the court may not proceed unless public policy, the specific provisions of a statute, or the interests of due process require otherwise. In the absence of such considerations, the court may reconsider any ruling made at a proceeding at which the victim did not receive notice as requested.

(g) Appointment of Victim's Representative. Upon request or on its own, the court may appoint a representative for a minor victim or for an incapacitated victim, as provided in A.R.S. § 13-4403. The court must notify the parties that it appointed the representative.