**Workgroup Meeting**

**October 7, 2021**

Based on the workgroup discussion on October 1, 2021, we are providing draft amendments to the following: (1) Criminal Rules of Procedure; (2) Civil Rules of Procedure; (3) Justice Court Rule of Civil Procedure 134; and (2) Rule 12, to the Rules of Procedure for Eviction Actions. For both the Criminal and Civil Rules, the proposed amendments broadly incorporate the following concepts: (1) presumptive use of written questionnaires; (2) question topics for written questionnaires; (3) flexible *voir dire* that encourages questioning by the parties; and (4) juror privacy. For Justice Court and eviction matters, the proposed changes authorize written questionnaires, but do not create a presumption for their use.

Below is an explanation of the proposed modifications. When reviewing the modifications, the Supreme Court's recent rule changes are in black font with additions underscored and deletions struck-through. The proposed amendments are in blue font and underscored. Deletions are in red font and struck-through.

## 1. ARIZONA RULES OF CRIMINAL PROCEDURE

### *a. Rule 16.3(d)*

The amendment to Criminal Rule 16.3(d) recognizes that written jury questionnaires are part of *voir dire*, and it encourages the parties to determine the use and scope of written jury questionnaires, along with oral questioning, during a pretrial conference. This proposal has an incomplete comment pending the availability of a written questionnaire template.

### *b. Rule 18.3(a)*

The amendment to Criminal Rule 18.3(a) gives courts the option to use written questionnaires before the prospective jurors appear in court. Rule 18.3(b) addresses juror privacy concerns expressed by workgroup members by specifying that answers to written questionnaires are presumed confidential and may not be disclosed unless good cause is shown. This provision is intended to comply with the First Amendment and Arizona Constitution, article 2, § 11 ("Justice in all cases shall be administered openly, and without unnecessary delay."); *see State v. Beskurt*, 293 P.3d 1159, 1162 (Wash. 2013) (addressing an analogous Washington State constitutional provision and privacy rule). When considering open-court issues, Criminal Rule 18.5(d) is important because it requires *voir dire* be conducted on the record.

### *c. Rule 18.4(b)*

We discussed amending the comment to Rule 18.4, particularly the following sentence: "A challenge for cause can be based on a showing of facts from which an ordinary person would imply a likelihood of predisposition in favor of one of the parties." We, however, declined to alter the comment because we concluded it is consistent with the for-cause standard in Criminal Rule 18.5(f).

A workgroup member proposed adding the below language to the comment to Criminal Rule 18.4(b). We incorporated much of the proposal into a comment to Rule 18.4(b) and other proposed comments to Criminal Rule 18.5. Nevertheless, we are providing the entire suggested comment for the workgroup's consideration.

> Rule 18.4(b). Effective January 1, 2022, Rule 18.4(c), Peremptory Challenges, was abrogated, consistent with the elimination of peremptory challenges in the entire Arizona state court system. The purpose of the amendment is to reduce to the greatest degree possible the role of improper bias in selecting jurors, and the role of improper bias by jurors in the rendering of verdicts. Judges, lawyers, and jurors all carry unique perspectives and views, which in prospective jurors can rise to the level of improper bias justifying their excusal for cause. Arizona law bars judges and lawyers from manifesting bias or prejudice while selecting a jury, whether on the basis of race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. Arizona Supreme Court Rule 81, Code of Judicial Conduct, Rule 2.3(B), (C). And while prospective jurors are entitled not to be excluded from service on the basis of any of these characteristics, and defendants are entitled to juries not constituted by strikes made on the basis of any of these characteristics, the government is likewise entitled to a jury that does not include jurors who are unable to try a case fairly because of biases concerning government, law enforcement, or law enforcement personnel.
>
> To allow the process of striking jurors for cause to work effectively, the court is encouraged to utilize pre-trial questionnaires where feasible. The court is likewise encouraged to conduct voir dire, aided by counsel, that focuses on open-ended questioning of jurors to elicit their views narratively, where feasible, that may bear on the parties or the issues to be tried, and not only or generally in response to yes/no questions. The court should not rehabilitate jurors who have demonstrated some bias by asking leading, conclusory questions that amount to asking them to affirm that notwithstanding expressed biases, they can set aside their opinions and neutrally apply the law.

***d. Rule 18.5***

Criminal Rule 18.5(a) reinforces that written questionnaires are part of *voir dire*, and it directs the court to tell the prospective jurors the following information with the goal of eliciting more thoughtful, candid answers: (1) the purpose of *voir dire*; (2) how the court and parties will use the prospective jurors' information; and (3) who may have access to the prospective jurors' information.

Criminal Rule 18.5(b) address the following three items discussed by the workgroup: (1) a presumption of written questionnaires; (2) suggested criteria for questioning; and (3) juror privacy concerns.

*i. Presumption of questionnaires.*

The proposed amendment creates a default that courts will use written questionnaires by requiring an order to forgo their use. It additionally, gives courts discretion on how best to administer the questionnaires, both in form and manner. The proposed comment explains that courts may use paper or electronic questionnaires, administer questionnaires in advance of trial or immediately prior to oral *voir dire*, and use case specific questions or general questions.

*ii. Suggested Criteria*

The proposed amendment suggests broad categories of questions that courts should include on a written questionnaire, but it does not mandate any specific questions. We considered and rejected the following provision, opting instead for a narrower of list because some jurisdictions will not use case-specific questions: "The written questionnaire should identify the parties and their counsel; outline the nature of the case, including the criminal charges; and include questions about the prospective jurors' qualifications to serve in the case, any hardships that would prevent the prospective jurors from serving, and whether the prospective jurors could render a fair and impartial verdict."

Ultimately, the suggested questions focus on the three general areas of for-cause challenges: (1) failure to meet qualifications to serve (primarily statutory in §§ 21–201 and § –203); (2) hardships (including § 21–202); and (3) inability to render a fair and impartial verdict. We declined to reference the statutory cites because those could be viewed as limiting and inflexible.

*iii. Privacy.*

The last two sentences in the proposed rule were taken from Arizona Rule of Civil Procedure 47(b)(2): "Any party or counsel receiving a copy of the questionnaire and answers must keep the information strictly confidential and must not disclose the information. When jury selection is done, each recipient must return all copies of the juror questionnaires and answers to the clerk." Although possibly covered by the amendments to Criminal Rule 18.3(b), this further reinforces privacy concerns.

The proposed amendment to Criminal Rule 18.5(c) instructs that the court must conduct oral *voir dire*, and it preserves both the strike and replace and struck methods of jury selection. We included mandatory oral *voir dire* because written questionnaires are not a substitute for *voir dire*. We additionally proposed amendments to the 1995 Comment to authorize random juror replacement to incorporate Judge Napper's proposal.

Lastly, the proposed amendment to Criminal Rule 18.5(e) makes minor alterations to the *voir dire* examination procedure to encourage courts to give parties more time for oral questioning, and to ensure that failure to submit written or oral questions does not disqualify a party from asking questions during oral *voir dire*. We also added a comment that encourages open-ended questions, extended questioning from the parties, and discourages rehabilitation with close-ended questions.

**2. ARIZONA RULES OF CIVIL PROCEDURE**

Generally, the proposed amendments and comments to the Arizona Rules of Civil Procedure are analogous to the proposed amendments to the Criminal Rules. We briefly catalog and explain those changes below.

***a. Rule 16(d)***

The proposed amendment is identical to the amendment in Criminal Rule 16.3(d) and is intended to encourage pretrial resolution of *voir dire* questions, including the use and scope of written questionnaires.

***b. Rule 16(e)***

This proposed amendment is similar to the amendment to Rule 16(d) and is styled similar to the other provisions in Civil Rule 16(e).

***c. Rule 16(f)(2)(G***

The proposed amendment would authorize a brief statement of the case on written questionnaires in additional to oral *voir dire*.

***d. Rule 16(f)(4)***

Although this provision references *voir dire* questions, we did not believe any amendments were necessary.

***e. Rule 47(b)(1)***

The proposed amendment is analogous to the proposed amendment to Criminal Rule 18.3(a)-(b). We also included a comment to Civil Rule 47(b) that is identical to the proposed comment to Criminal Rule 18.5(b), which defers to the court's discretion the method and form of using written questionnaires.

***f. Rule 47(b)(2)***

The proposed amendment is analogous to the proposed amendment to Criminal Rule 18.5(b).

***g. Rule 47(c)(2)***

The proposed amendment is analogous to the proposed amendment to Criminal Rule 18.5(a).

***h. Rule 47(c)(4)***

The proposed amendment is analogous to the proposed amendment to Criminal Rule 18.5(e), and includes a proposed comment that is identical to the prosed criminal rule comment.

***i. Rule 47(d)***

We elected not to propose changes to the "Challenge for cause" provisions. Although more detailed than the criminal rules, the civil rules do not include a comment similar to the 1973 Comment to Rule 18.4(b). Additionally, the list in Rule 47(d) is primarily illustrative, providing that "A party may challenge a prospective juror for cause on one or more of the following grounds."

***j. 1995 Comment* to Rule 47(a) and (e)**

The proposed amendment authorizes random juror replacement to incorporate Judge Napper's proposal.

**3. JUSTICE COURT RULES OF CIVIL PROCEDURE**

***a. Rule 134(a)(1)***

The proposed amendment authorizes juror questionnaires but does not create a presumption. It additionally includes conforming changes. Given the limited scope of the amendment, we did not believe a comment was warranted.

***4. Rules of Procedure for Eviction Matters***

***a. Rule 12***

The proposed amendment authorizes juror questionnaires but does not create a presumption. It additionally includes conforming changes. Given the limited scope of the amendment, we did not believe a comment was warranted.

## Rule 16.3. Pretrial Conference

**(a) Generally.** A court may conduct one or more pretrial conferences. The court may establish procedures and requirements that are necessary to accomplish a conference's objectives, including identifying appropriate cases for pretrial conferences, identifying who must attend, and determining sanctions for failing to attend. A superior court must conduct at least one pretrial conference.

**(b) Objectives.** The objectives of a pretrial conference may include:

(1) providing a forum and a process for the fair, orderly, and just disposition of cases without trial;

(2) permitting the parties, without prejudice to their rights to trial, to engage in disclosure and to conduct negotiations for dispositions without trial;

(3) discussing compliance with discovery requirements set forth in these rules and constitutional law; and

(4) enabling the court to set a trial date.

**(c) Duty to Confer.** The court may require the parties to confer and submit memoranda before the conference.

**(d) Scope of Proceeding.** At the conference, the court may:

(1) hear motions made at or filed before the conference;

(2) set additional pretrial conferences and evidentiary hearings as appropriate;

(3) obtain stipulations to relevant facts; ~~and~~

(4) determine the areas of inquiry and specific questions to be asked by the court and the parties during voir dire, including any limitations on examination and giving brief pre-voir dire opening statements. Before the conference, the court may require that the parties submit in writing all written and oral questions to be asked of prospective jurors; and

(~~4~~5) discuss and determine any other matters that will promote a fair and expeditious trial, including imposing time limits on trial proceedings, using juror notebooks, giving ~~brief pre-voir dire opening statements and~~ preliminary instructions, and managing documents and exhibits effectively during trial.

(e) **Stipulated Evidence.** At a pretrial conference or any time before the start of an evidentiary hearing, the parties may submit any issue to the court for decision based on stipulated evidence.

(f) **Record of Proceedings.** Proceedings at a pretrial conference must be on the record.

**COMMENTS**

**2021 Comment to Rule 16.3(d).**
**[INSERT FUTURE COMMENT REGARDING AVAILABILITY OF QUESTIONNAIRE TEMPLATES].**

**Rule 18.3. Jurors' Information**

(a) Information Provided to the Parties. Before conducting oral voir dire examination, the court must furnish each party with a list of the names of the prospective jurors on the panel called for the case. The list must include each prospective juror's zip code, employment status, occupation, employer, residency status, education level, prior jury duty experience, ~~and~~ any prior felony conviction, and the prospective jurors' answers to a written questionnaire within a specified time established by the jury commissioner or the court.

(b) Confidentiality. The court must obtain and maintain juror information in a manner and form approved by the Supreme Court, and this information may be used only for the purpose of jury selection. The court must keep all jurors' home and business telephone numbers, ~~and~~ addresses, and responses to written questionnaires confidential, and may not disclose them unless good cause is shown.

**Rule 18.4. Challenges**

**(a) Challenge to the Panel.** Any party may challenge the panel on the ground that its selection involved a material departure from the requirements of law. Challenges to the panel on this ground must be in writing, specify the factual basis for the challenge, and make a showing of prejudice to the party. A party must make, and the court must decide, a challenge to a panel before the examination of any individual prospective juror.

**(b) Challenge for Cause.** ~~On motion or on its own, the court must~~ The court, on motion or on its own, must excuse a prospective juror or jurors from service in the case if there is a reasonable ground to believe that the juror or jurors cannot render a fair and impartial verdict. A challenge for cause may be made at any time, but the court may deny a challenge if the party was not diligent in making it.

~~**(c) Peremptory Challenges.**~~

~~(1) *Generally*. The court must allow both parties the following number of peremptory challenges:~~

~~(A) 10, if the offense charged is punishable by death;~~

~~(B) 6, in all other cases tried in superior court; and~~

~~(C) two, in all cases tried in limited jurisdiction courts.~~

~~(2) *If Several Defendants Are Tried Jointly*. If there is more than one defendant, each defendant is allowed one-half the number of peremptory challenges allowed to one defendant. The State is not entitled to any additional peremptory challenges.~~

~~(3) *Agreement Between the Parties*. The parties may agree to exercise fewer than the allowable number of peremptory challenges~~.

**COMMENT**

**2021 Comment to Rule 18.4(b).** Effective January 1, 2022, peremptory challenges were eliminated in the entire Arizona state court system to reduce to the greatest degree possible the role of improper bias in selecting jurors, and the role of improper bias by jurors in the rendering of verdicts. Judges, lawyers, and jurors all carry unique perspectives and views, which in prospective jurors can rise to the level of improper bias justifying their excusal for cause. Arizona law bars judges and lawyers from manifesting bias or prejudice while selecting a jury, whether on the basis of race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. Arizona Supreme Court Rule 81, Code of Judicial Conduct, Rule 2.3(B), (C).

**1973 Comment to Rule 18.4(b).** When the predecessor to this section was adopted in 1973, it replaced the catalog of 15 grounds set forth in the 1956 Arizona Rules of Criminal Procedure, Rule 219. The omission of the list is carried over to this amended rule and is intended to direct the attention of attorneys and judges to the essential question--whether a juror can try a case fairly. A challenge for cause can be based on a showing of facts from which an ordinary person would imply a likelihood of predisposition in

favor of one of the parties.

In addition, a juror may be challenged who:
(1) has been convicted of a felony;
(2) lacks any of the qualifications prescribed by law to render a person a competent juror;
(3) is of such unsound mind or body as to render him incapable of performing the duties of a juror;
(4) is related by consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or to the defendant;
(5) stands in the relationship of guardian and ward, attorney and client, master and servant, or landlord and tenant, or is an employee of or member of the family of the defendant, or of the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;
(6) has been a party adverse to the defendant in a civil action, or has complained against or been accused by him in a criminal prosecution;
(7) has served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment or information;
(8) has served on the trial jury which has tried another person for the offense charged in the indictment or information;
(9) has been a member of the jury formerly sworn to try the same charge and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it;
(10) has served as a juror in a civil action brought against the defendant for the act charged as an offense;
(11) is on the bond of the defendant or engaged in business with the defendant or with the person alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;
(12) is a witness on the part of the prosecution or defendant or has been served with a subpoena or bound by an undertaking as such;
(13) has a state of mind in reference to the action or to the defendant or to the person alleged to have been injured by the offense charged or on whose complaint the prosecution was instituted, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party;
(14) if the offense charged is punishable by death, entertains conscientious opinions which would preclude his finding the defendant guilty, in which case he must neither be permitted nor compelled to serve as a juror; or
(15) does not understand the English language sufficiently well to comprehend the testimony offered at the trial.
This section also permits a challenge for cause to be made whenever the cause appears. Under Rule 18.4(b), the trial court may deny the challenge if not seasonably made, but there is no absolute time limitation imposed by rule. Once the trial has begun, the prosecutor may be unable, because of double jeopardy, to invoke the right to challenge, unless there are sufficient alternate jurors to enable the trial to continue with one less juror.

## Rule 18.5. Procedure for Jury Selection

**(a) Swearing the Jury Panel.** All members of the jury panel must swear or affirm that they will truthfully answer all questions concerning their qualifications. The court must explain at the beginning of any written or oral examination the purpose of voir dire, how the court and parties will use the prospective jurors' information, and who may have access to the information prospective jurors provide.

**(b) Written Questionnaires.** Unless the court orders otherwise, the court shall order prospective jurors to complete a written questionnaire in a manner and form approved by the court. The written questionnaire should include questions about the prospective jurors' qualifications to serve in the case, any hardships that would prevent the prospective jurors from serving, and whether the prospective jurors could render a fair and impartial verdict. Any party or counsel receiving a copy of the questionnaire and answers must keep the information strictly confidential and must not disclose the information. When jury selection is done, each recipient must return all copies of the juror questionnaires and answers to the clerk.

**(~~b~~c) Calling Jurors for Examination.** The court must conduct voir dire orally. During oral examination, ~~T~~the court may call to the jury box a number of prospective jurors equal to the number to serve plus the number of alternates ~~plus the number of peremptory challenges that the parties are permitted~~. Alternatively, and at the court's discretion, all members of the panel may be examined.

**(~~c~~d) Inquiry by the Court; Brief Opening Statements.** Before examining the prospective jurors, the court must identify the parties and their counsel, briefly outline the nature of the case, and explain the purpose of the examination. The court must then ask any necessary questions about the prospective jurors' qualifications to serve in the case. With the court's permission and before voir dire examination, the parties may present brief opening statements to the entire jury panel.

**(~~d~~e) Voir Dire Examination.** In courts of record, voir dire examination must be conducted on the record. The court must conduct a thorough oral examination of the prospective jurors and control the voir dire examination. Upon request, the court must allow the parties ~~a reasonable~~ sufficient time, with other reasonable limitations, to conduct a further oral examination of the prospective jurors. A party's failure to submit questions to the court prior to examination should not be grounds to deny a party the opportunity to conduct an oral examination. However, the court may limit or terminate the parties' voir dire on grounds of abuse. Nothing in this rule precludes submitting written questionnaires to the prospective jurors or examining individual prospective jurors outside the presence of other prospective jurors.

**(~~e~~f) Scope of Examination.** The court must ensure the reasonable protection of the prospective jurors' privacy. Questioning must be limited to inquiries designed to elicit information relevant to asserting a possible challenge for cause ~~or enabling a party to intelligently exercise the party's peremptory challenges~~.

**(~~f~~g) Challenge for Cause.** Challenges for cause must be on the record and made out of the hearing of the prospective jurors. The party challenging a juror for cause has the burden to establish by a preponderance of the evidence that the juror cannot render a fair and impartial verdict. If the court grants a challenge for cause, it must excuse the affected prospective juror. If insufficient prospective jurors remain on the list, the court must add a prospective juror from a new panel. ~~All challenges for cause must be made and decided before the court may call on the parties to exercise their peremptory challenges.~~

**(~~g~~h) Stipulation to Remove a Prospective Juror.** The parties may stipulate to the removal of a juror. ~~**Exercise of Peremptory Challenges.** After examining the prospective jurors and completing all challenges for cause, the parties must exercise their peremptory challenges on the list of prospective jurors~~

~~by alternating strikes, beginning with the State, until the peremptory challenges are exhausted or a party elects not to exercise further challenges. Failure of a party to exercise a challenge in turn operates as a waiver of the party's remaining challenges, but it does not deprive the other party of that party's full number of challenges. If the parties fail to exercise the full number of allowed challenges, the court will strike the jurors on the bottom of the list of prospective jurors until only the number to serve, plus alternates, remain.~~

**(~~h~~i) Selection of Jury; Alternate Jurors.**

(1) *Trial Jurors.* After the completion of the procedures in (g), the court has resolved any challenges for cause, the prospective jurors remaining in the jury box or on the list of prospective jurors constitute the trial jurors.

(2) *Selection of Alternates and Instruction.* Just before the jury retires to begin deliberations, the clerk or court official must determine the alternate juror or jurors by lot or stipulation. When the jury retires to deliberate, the alternate or alternates may not participate, but the court must instruct the alternate juror or jurors to continue to observe the admonitions to jurors until the court informs them that a verdict has been returned or the jury has been discharged.

(3) *Replacing a Deliberating Juror.* If the court excuses a deliberating juror due to the juror's inability or disqualification to perform the required duties, the court may substitute an alternate juror to join the deliberations, choosing the alternate from among the qualified alternates in the order previously designated. If an alternate joins the deliberations, the court must instruct the jury to begin its deliberations anew.

**(~~i~~j) Deliberations in a Capital Case.**

(1) *Retaining Alternates.* In a capital case, alternate jurors not selected to participate in the guilt phase deliberations must not be excused if the jury returns a guilty verdict of first-degree murder. This rule governs their continued participation in the case.

(A) Aggravation Phase. During the aggravation phase, the alternate jurors must listen to the evidence and argument presented to the jury. When the jury retires to deliberate on aggravation, the alternate or alternates may not participate, but the court must instruct the alternates to continue to observe the admonitions to jurors until the court informs the alternates that they are discharged.

(B) Penalty Phase. If the jury returns a verdict finding one or more aggravating factors, the alternate jurors must listen to the evidence and argument presented at the penalty phase. When the jury retires to deliberate on the penalty, the alternate or alternates may not participate, but the court must instruct the alternates to continue to observe the admonitions to jurors until the court informs the alternates that they are discharged.

(2) *Replacing a Deliberating Juror.*

(A) Generally. If a deliberating juror is excused during either the aggravation or penalty phases due to the juror's inability or disqualification to perform required duties, the court may substitute an alternate juror to join the deliberations, choosing from among the qualified alternates in the order previously designated.

(B) Scope of Deliberations. If an alternate or alternates are substituted during the aggravation or penalty deliberations, the jurors must begin their deliberations anew only for the phase that they are currently deliberating. The jurors may not deliberate anew a verdict already reached and entered.

**COMMENT**

**2021 Comment to Rule 18.5(b).** To allow the process of challenging jurors for cause to work effectively Rule 18.5(b) creates a presumption that the court will use pre-trial questionnaires during *voir dire* where feasible, deferring to the court on the method and manner for their administration. Courts may use paper or electronic questionnaires, administer questionnaires in advance of trial or immediately prior to oral *voir dire*, or use general or case-specific questions.

**1995 Comment Rule 18.5(~~b~~c).** Before a 1995 amendment, Rule 18.5(b) was interpreted to require trial judges to use the traditional "strike and replace" method of jury selection, where only a portion of the jury panel is examined, the remaining jurors being called upon to participate in jury selection only upon excusing for cause a juror in the initial group. A juror excused for cause leaves the courtroom, after which the excused juror's position is filled by a panel member who responds to all previous and future questions of the potential jurors.

As currently drafted, the trial judge is allowed to use the "struck" method of selection if the judge chooses. This procedure is thought by some to offer more advantages than the "strike and replace" method. *See* T. Munsterman, R. Strand and J. Hart, *The Best Method of Selecting Jurors*, THE JUDGES' JOURNAL 9 (Summer 1990); A.B.A. Standards Relating to Juror Use and Management, Standard 7, at 68-74 (1983); and "The Jury Project," Report to the Chief Judge of the State of New York 58-60 (1994). The "struck" method calls for all of the jury panel members to participate in voir dire examination by the judge and counsel. ~~Following disposition of the for cause challenges, the juror list is given to counsel for the exercise of their peremptory strikes. When all the peremptory strikes have been taken and the court has resolved all related issues under *Batson v. Kentucky*, 476 U.S. 79 (1986), the clerk calls the first 8 or 12 names, as the law may require, from those remaining on the list, plus the number of alternate jurors thought necessary by the judge who become the trial jury.~~

Whether using strike and replace, or the struck method, the rules do not prescribe a method for replacing an excused prospective juror in the juror jury box with a member of the panel, deferring to the discretion of the court on the appropriate method.

**2021 Comment Rule 18.5(e).** Studies demonstrate that extended *voir dire*, questioning by the parties, and open-ended questions, elicit more candid answers from prospective jurors than minimal *voir dire*, questioning by the court, and close-ended questions. When feasible, the trial court should permit liberal and probing examination by the parties, should refrain from imposing inflexible time limits, and use open-ended questions that elicit prospective jurors' views narratively. Questions should not be close-ended, generally seeking yes or no answers. The court should refrain from rehabilitating prospective jurors by asking leading, conclusory questions that encourage prospective jurors to affirm that they can set aside their opinions and neutrally apply the law. The court should be particularly sensitive to the prejudice that can arise from voir dire by an unrepresented defendant.

## Rule 16. Scheduling and Management of Actions

**(a) Objectives.** In accordance with Rule 1, the court must manage a civil action with the following objectives:

(1) expediting a just disposition of the action;

(2) establishing early and continuing control so that the action will not be protracted because of lack of management;

(3) ensuring that discovery is proportional to the needs of the action, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of proposed discovery outweighs its likely benefit;

(4) discouraging wasteful, expensive, and duplicative pretrial activities;

(5) improving the quality of case resolution through more thorough and timely preparation;

(6) facilitating the appropriate use of alternative dispute resolution;

(7) conserving parties' resources;

(8) managing the court's calendar to eliminate unnecessary trial settings and continuances; and

(9) adhering to applicable standards for timely resolution of civil actions.

**(b) Required Early Meeting About Expected Course of Case, Tiering.**

(1) *Timing; Purpose*. At the earliest practicable time, but no later than 30 days after a party files an answer or files a motion directed at the complaint, or 120 days after the action commences--whichever occurs first--that party and the plaintiff must meet and confer about the anticipated course of their case, including the tier to which it should be assigned under Rule 26.2 and the subjects set forth in Rule 16(b)(2) and (c). The parties must discuss whether and how they can agree to streamline and limit claims and affirmative defenses to be asserted, discovery to be taken, and motions to be brought. The purpose of the conference is to plan cooperatively for the case, and to facilitate the case's placement in one of three tiers discovery. The attorneys of record and all unrepresented parties who have appeared in the action are jointly responsible for arranging and participating in the Early Meeting.

(2) *Topics for Early Meeting*. The parties should discuss at least:

(A) their anticipated disclosures concerning witnesses, including the number of fact witnesses, whether they will seek to use expert witnesses, and how much deposition testimony they expect will be necessary;

(B) their anticipated disclosures of documents, including any issues already known to them concerning electronically stored information;

(C) motions they expect to file, so that the parties can determine whether any of the motions can be avoided by stipulations, amendments, or other cooperative activity;

(D) any agreements that could aid in the just, speedy, and inexpensive resolution of the case;

(E) the discovery tier to which the case should be assigned under Rule 26.2, and whether the parties wish to stipulate--or any party wishes to move for--assignment to a tier other than that to which the case would be assigned given the amount in controversy; and

(F) the subjects set forth in Rule 16(c).

**(c) Filing of Joint Report and Proposed Scheduling Order.**

(1) *Timing*. No later than 14 days after the Early Meeting, the parties must file a Joint Report and a Proposed Scheduling Order. The attorneys of record and all unrepresented parties who have appeared in the action are jointly responsible for attempting in good faith to agree on a Proposed Scheduling Order, and for filing the Joint Report and the Proposed Scheduling Order with the court. The court must issue a Scheduling Order as soon as practicable either after receiving the parties' Joint Report and Proposed Scheduling Order or after holding a Scheduling Conference.

(2) *Content of Joint Report.* The Joint Report must state--to the extent practicable--the parties' positions on the subjects set forth in Rule 16(b)(2) and (c)(3) and must attach a proposed Scheduling Order. The parties are not required to describe their Early Meeting in the Joint Report, but may do so. Any summary must describe the case with respect to the characteristics in Rule 26.2(b) and (c) to be used in assigning cases to a discovery tier, and must set forth any agreements the parties have reached to streamline the case. In the Joint Report, the parties are not permitted to discuss or criticize the rejection of proposed agreements or to argue that the other party has taken unreasonable positions. Unless ordered by the court, a summary must not exceed 4 pages of text, which length must be split evenly between separate statements of the parties if they do not agree on the summary's contents. The Joint Report must certify that the parties conferred in good faith, either in person or by telephone as required by Rule 7.1(h), regarding the subjects set forth in Rule 16(b)(2) and (c)(3).

(3) *Content of Proposed Scheduling Order*. The proposed Scheduling Order must state the discovery tier to which the case is assigned, and must specify deadlines for the following by calendar date, month, and year:

(A) serving initial disclosures under Rule 26.1 if they have not already been served;

(B) identifying areas of expert testimony;

(C) identifying and disclosing expert witnesses and their opinions under Rule 26.1(d);

(D) propounding written discovery;

(E) disclosing nonexpert witnesses;

(F) completing depositions;

(G) completing all discovery other than depositions;

(H) final supplementation of Rule 26.1 disclosures;

(I) unless the court orders otherwise for good cause, a deadline for holding a Rule 16.1 settlement conference or private mediation to occur no more than 15 months after the action commenced, but in no event later than 60 days after the date discovery is set to complete consistent with the discovery tier to which the case is assigned under Rule 26.2(f);

(J) filing dispositive motions;

(K) a proposed trial date; and

(L) the anticipated number of days for trial.

(4) *Dates Certain*. The Scheduling Order must include calendar deadlines specifying the month, date, and year for each of the items included in the Proposed Scheduling Order, consistent with the discovery tier to which the case is assigned under Rule 26.2(f). The Scheduling Order must also set either: (A) a trial date; or (B) a date for a Trial-Setting Conference under Rule 16(e) at which a trial date may be set. Absent leave of court, no trial may be set unless the parties certify that they engaged in a settlement conference or private mediation, or that they will do so by a date certain approved by the court. The Scheduling Order also may address other appropriate matters.

(5) *Modification of Dates Established by Scheduling Order*. The parties may modify the dates established in a Scheduling Order that govern court filings or hearings only by court order for good cause. Once a trial date is set, the parties may modify that date only under Rule 38.1.

(6) *Request for Discovery Tier*.

(A) Stipulations. The parties may include in the Joint Report a proposed stipulation to a discovery tier, setting forth good cause for the requested tiering in compliance with Rule 26.2(c)(1).

(B) Motions; Timing. Any motion to vary the tier to which a case is deemed to be assigned under Rule 26.2(c)(3) must be made by the date on which the parties must file their Joint Report. Any such motion must be filed separately from the Joint Report and may not exceed three pages in length. Any responsive memorandum may not exceed three pages in length and must be filed within 5 days after service of the motion. No reply memorandum is permitted.

(7) *Forms*. The parties must file the Joint Report and the Proposed Scheduling Order using the forms approved by the Supreme Court and set forth in Rule 84, Forms 11 through 13. They must use Forms 11(a) and (b) for Tier 1 cases, Forms 12(a) and (b) for Tier 2 cases, and Forms 13(a) and (b) for Tier 3 cases.

(8) *Applicability*. The requirements of Rule 16(b) and (c) apply to all civil actions except:

(A) the requirements of Rule 16(b) apply to actions subject to compulsory arbitration under Rule 72(b), but the requirements of Rule 16(c) do not. In actions subject to compulsory arbitration, no later than 14 days after the Early Meeting, the parties must file a Report of Early Meeting stating the date(s) on which the Early Meeting occurred, and containing either a proposed stipulation to a discovery tier, or the parties' positions regarding the appropriate discovery tier. The Report of Early Meeting must attach a good faith consultation certificate under Rule 7.1(h); and

(B) the requirements of Rule 16(b) and (c) do not apply to actions seeking the following relief:

(i) change of name;

(ii) forcible entry and detainer;

(iii) enforcement, domestication, transcript, or renewal of a judgment;

(iv) an order pertaining to a subpoena sought under Rule 45.1(e)(2);

(v) restoration of civil rights;

(vi) injunction against harassment or workplace harassment;

(vii) delayed birth certificate;

(viii) amendment of birth certificate or marriage license;

(ix) civil forfeiture;

(x) distribution of excess proceeds;

(xi) review of a decision of an agency or a court of limited jurisdiction;

(xii) declarations of factual innocence under Rule 57.1 or factual improper party status under Rule 57.2; and

(xiii) petitions under Rule 45.2(e).

**(d) Scheduling Conferences**. On a party's written request the court must--or on its own the court may--set a Scheduling Conference. At any Scheduling Conference under this Rule 16(d), the court may:

(1) determine what additional disclosures, discovery and related activities will be undertaken and establish a schedule for those activities, including whether and when any examinations will take place under Rule 35;

(2) discuss which form of Joint Report and Scheduling Order is appropriate under Rule 16(c)(7);

(3) determine whether the court should enter orders addressing one or more of the following:

(A) setting forth any requirements or limits for the disclosure or discovery of electronically stored information, including the form or forms in which the electronically stored information should be produced and, if appropriate, the sharing or shifting of costs incurred by the parties in producing the information;

(B) setting forth any measures the parties must take to preserve discoverable documents or electronically stored information; and

(C) adopting any agreements the parties reach for asserting claims of privilege or of protection for work-product materials after production;

(4) determine a schedule for disclosing expert witnesses and whether the parties should be required to provide signed reports from retained or specially employed experts in compliance with Rule 26.1(d)(4);

(5) determine the number of expert witnesses or designate expert witnesses as set forth in Rule 26(b)(4)(D);

(6) determine a date for disclosing nonexpert witnesses and the order of their disclosure;

(7) determine a deadline for filing dispositive motions;

(8) resolve any discovery disputes;

(9) eliminate nonmeritorious claims or defenses;

(10) permit amendment of the pleadings;

(11) assist in identifying those issues of fact that are still contested;

(12) obtain stipulations for the foundation or admissibility of evidence;

(13) determine the desirability of special procedures for managing the action;

(14) consider alternative dispute resolution and determine a deadline for the parties to participate in a settlement conference or private mediation;

(15) determine whether any time limits or procedures set forth in these rules or local rules should be modified or suspended;

(16) determine whether the parties have complied with Rule 26.1;

(17) determine a date for filing the Joint Pretrial Statement required by Rule 16(f);

(18) set a trial date and determine the anticipated number of days needed for trial;

(19) determine the areas of inquiry and specific questions to be asked by the court and the parties during voir dire, including any limitations on examination and giving brief pre-voir dire opening statements. Before the conference, the court may require that the parties submit in writing all written and oral questions to be asked of prospective jurors;

(~~19~~20) discuss any time limits on trial proceedings, juror notebooks, ~~brief pre-voir dire opening statements,~~ and preliminary jury instructions, and the effective management of documents and exhibits;

(~~20~~21) determine how a verbatim record of future proceedings in the action will be made; and

(~~21~~22) discuss other matters and enter other orders that the court deems appropriate.

**(e) Trial-Setting Conference.**

(1) *Generally*. If the court has not already set a trial date in a Scheduling Order or otherwise, the court must hold a Trial-Setting Conference--as set by the Scheduling Order--for the purpose of setting a trial date. The Conference must be attended in person--or telephonically, as permitted by the court--by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties. If a trial date is not set at the Trial-Setting Conference, the court must schedule another Trial-Setting Conference as soon as practicable for the setting of a trial date.

(2) *Subject Matter*. In addition to setting a trial date, the court may discuss at the Trial-Setting Conference:

(A) the status of discovery and any dispositive motions that have been or will be filed;

(B) a date for holding a Trial Management Conference under Rule 16(f);

(C) imposing time limits on trial proceedings;

(D) ~~using juror questionnaires~~ the areas of inquiry and specific questions to be asked by the court and the parties during voir dire, including any limitations on examination and giving brief pre-voir dire opening statements;

(E) using juror notebooks;

(F) giving ~~brief pre-voir dire opening statements and~~ preliminary jury instructions;

(G) effective management of documents and exhibits; and

(H) other matters that the court deems appropriate.

**(f) Joint Pretrial Statement; Trial Management Conference.**

(1) *Preparation of Joint Pretrial Statement*. Counsel or the unrepresented parties who will try the action and who are authorized to make binding stipulations must confer and prepare a written Joint Pretrial Statement, signed by each counsel or unrepresented party. The parties must file the Joint Pretrial Statement no later than 10 days before the date of the Trial Management Conference, or if no conference is scheduled, no later than 10 days before trial. A plaintiff must deliver its part of the Joint Pretrial Statement to all other parties no later than 20 days before the date the Statement must be filed. All other parties must deliver their part of the Joint Pretrial Statement to all other parties no later than 15 days before the date the Statement must be filed.

(2) *Contents of Joint Pretrial Statement*. The parties must prepare the Joint Pretrial Statement as a single document containing the following:

(A) stipulations of material fact and applicable law;

(B) contested issues of fact and law that the parties agree are material or applicable;

(C) a separate statement by each party of other issues of fact and law that the party believes are material;

(D) a list of witnesses each party intends to call to testify at trial, identifying those witnesses whose testimony will be presented solely by deposition. Each party must list any objection to a witness and the basis for that objection. Unless the court orders otherwise for good cause, no witness may testify at trial other than those listed;

(E) each party's final list of exhibits to be used at trial for any purpose, including impeachment. Each party must list any objection to an exhibit and the basis for that objection. Unless the court orders otherwise for good cause, no exhibit may be used at trial other than those listed. The parties should identify any exhibits that they stipulate can be admitted into evidence, with such stipulations being subject to court approval;

(F) a statement by each party identifying any proposed deposition summaries or designating parts of any deposition testimony to be offered by that party at trial, other than for impeachment purposes. The parties must designate deposition testimony by transcript page and line numbers. The parties must file with the Joint Pretrial Statement a copy of any proposed deposition summary and the written transcript of designated deposition testimony. Each party must list any objection to the proposed deposition summaries and designated deposition testimony and the basis for that objection. Unless the court orders otherwise for good cause, no deposition testimony may be used at trial other than that designated or counter-designated in the Joint Pretrial Statement or that used solely for impeachment purposes;

(G) a brief statement of the case to be included on written questionnaires or read to the jury during voir dire. If the parties cannot agree on this statement, then each party must submit a separate statement for the court's consideration;

(H) requested technical equipment;

(I) requested interpreters;

(J) if the trial is to a jury, the number of jurors and alternates, whether the alternates may deliberate, and the number of jurors required to reach a verdict;

(K) whether any party is invoking Arizona Rule of Evidence 615 regarding the exclusion of witnesses from the courtroom;

(L) a brief description of settlement efforts; and

(M) how a verbatim record of the trial will be made.

(3) *Delivery of Exhibits.* A plaintiff must deliver copies of all its exhibits to all other parties no later than 10 days before the date the Joint Pretrial Statement must be filed. All other parties must deliver copies of all their exhibits to all other parties no later than 5 days before the date the Joint Pretrial Statement must be filed. Any exhibit that cannot be reproduced must be made available for inspection to all other parties on or before these deadlines.

(4) *Additional Documents to File if Trial Is to a Jury*. If the trial is to a jury, the parties must--on the same day they file the Joint Pretrial Statement--file: (A) an agreed-on set of jury instructions, verdict forms, and voir dire questions; and (B) any additional jury instructions, verdict forms, and voir dire questions requested, but not agreed on.

(5) *Juror Notebooks*. A party intending to submit a notebook to the jurors must serve a copy of the notebook on all other parties no later than 5 days before the Trial Management Conference, or, if no Conference is scheduled, no later than 5 days before the trial.

(6) *Trial Memoranda*. A party must file any trial memorandum no later than 5 days before the Trial Management Conference, or, if no Conference is scheduled, no later than 5 days before the trial.

(7) *Trial Management Conference*. Any Trial Management Conference scheduled by the court should be held as close to the time of trial as is reasonable under the circumstances. The Conference must be attended by at least one of the attorneys who will conduct the trial for each of the parties and by all unrepresented parties.

(8) *Modifications*. Rule 16(f)'s provisions may be modified by court order.

**(g) Pretrial Orders.** After any conference held under this rule, the court must enter an order reciting the action taken. This order controls the later course of the action unless modified by a later court order. The order entered after a Trial Management Conference under Rule 16(f) may be modified only to prevent manifest injustice.

**(h) Sanctions.**

(1) *Generally.* Except on a showing of good cause, the court--on motion or on its own--must enter such orders as are just, including, among others, any of the orders in Rule 37(b)(2)(A)(ii) through (vii), if a party or attorney:

(A) fails to obey a scheduling or pretrial order or fails to meet the deadlines set in the order;

(B) fails to appear at a Scheduling Conference, Trial-Setting Conference, or Trial Management Conference;

(C) is substantially unprepared to participate in a Scheduling Conference, Trial-Setting Conference, or Trial Management Conference;

(D) fails to participate in good faith in a Scheduling Conference, Trial-Setting Conference, or Trial Management Conference; or

(E) fails to participate in good faith in the preparation of a Joint Report and Proposed Scheduling Order or a Joint Pretrial Statement.

(2) *Award of Expenses*. Unless the court finds the conduct substantially justified or that other circumstances make an award of expenses unjust, the court must--in addition to or in place of any other sanction--require the party, the attorney representing the party, or both, to pay:

(A) another party's reasonable expenses, including attorney's fees, incurred as a result of the conduct;

(B) an assessment to the clerk; or

(C) both.

(3) *Trial Date*. The fact that a trial date has not been set does not preclude sanctions under this rule, including the sanction of excluding from evidence untimely disclosed information.

**(i) Alternative Dispute Resolution.** On motion--or on its own after consulting with the parties--the court may direct the parties to submit the dispute that is the subject matter of the action to an alternative dispute resolution program created or authorized by appropriate local court rules.

**(j) Time Limits.** The court may impose reasonable time limits on trial proceedings.

## COMMENTS

### 2021 Amendment to Rule 16(d)

**[INSERT FUTURE COMMENT REGARDING AVAILABILITY OF QUESTIONNAIRE TEMPLATES].**

### 2014 Amendment to Rule 16(c)

A primary goal of civil case management is the creation of public confidence in a predictable court calendar. Courts should avoid overlapping trial settings that necessitate continuances when the court is unable to hold a trial on the date scheduled. Continuances of scheduled trial dates impose unnecessary costs and inconvenience when counsel, parties, witnesses, and courts are required to engage in redundant preparation. Although early trial settings may be appropriate, a court should employ a case management system that ensures it will be in a position to conduct each trial on the date it has been set.

## STATE BAR COMMITTEE NOTE

### 2008 Amendment to Rule 16(d) [Formerly Rule 16(b)]

[Rule 16(d) (formerly Rule 16(b))] was amended to clarify that a court has the power under Rule 16 to enter orders governing the disclosure and discovery of electronically stored information, the preservation of discoverable documents and electronically stored information, and the enforcement of party agreements regarding post-production assertions of privilege or work product protection. Because these issues typically arise at the beginning of a case, a court need not wait until the parties are ready to address other issues under Rule 16[d] before holding a hearing under this Rule on these and related subjects.

Orders regarding the disclosure or discovery of electronically stored information may specify the forms and manner in which such information shall be produced. The court also may enter orders limiting (or imposing conditions upon) the disclosure of such information, and may take into account the relative accessibility of the electronically stored information at issue, the costs and burdens on parties in making such information available, the probative value of such information, and the amount of damages (or the

type of relief) at issue in the case. *See* CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION 5 (approved August 2006) (noting that in determining discovery issues relating to electronically stored information, a court should consider these factors, among others).

Document retention and preservation issues are especially likely to arise with electronically stored information because the "ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information." Fed. R. Civ. P. 26(f), Advisory Committee Notes on 2006 Amendment. A court has the power under this Rule to incorporate into an order any agreement the parties might reach regarding preservation issues or, absent an agreement, to enter an order in appropriate circumstances imposing such requirements and limitations. In considering such an order, a court should take into account not only the need to preserve potentially relevant evidence, but also any adverse effects such an order may have on a party's on-going activities and computer operations. A preservation order entered over objections should be narrowly tailored to address specific evidentiary needs in a case, and ex parte preservation orders should issue only in exceptional circumstances. *Cf. id.* (stating that preservation orders should be narrowly tailored where objections are made and cautioning against "blanket" or ex parte preservation orders); CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION 10 (approved August 2006) ("When issuing an order to preserve electronically stored information, a judge should carefully tailor the order so that it is no broader than necessary to safeguard the information in question.").

If the amount of documents and electronic data to be disclosed is voluminous, an agreement among the parties minimizing the risks associated with the inadvertent production of privileged or otherwise protected material may be helpful in lessening discovery costs and expediting the litigation. As with its counterpart in the Federal Rules of Civil Procedure, this Rule does not provide the court with authority to enter such an order without party agreement, or limit the court's authority to act on motions to resolve privilege issues. *Cf.* Fed. R. Civ. P. 16(b), Advisory Committee Notes on 2006 Amendment (clarifying the rule's scope).

## Rule 47. Jury Selection; Juror Information; Voir Dire; Challenges

**(a) Jury Selection.** The initial jury panel will consist of persons summoned for jury service who have appeared. The clerk will randomly select--either manually or by electronic means--a sufficient number of persons from this group for consideration as jurors. The clerk will then prepare a list of these prospective jurors' names in random order, and deliver it to the court. The clerk will read the names of prospective jurors in the order in which they appear on the list until a jury is fully selected or the list is exhausted. If the list is exhausted before a jury is selected, the clerk will prepare an additional list of prospective jurors in the same manner as provided in this rule.

**(b) Juror Information.**

(1) *Personal Information*. Before jury selection and oral voir dire examination starts, the clerk must provide the parties with the following information for each prospective juror: name, zip code, employment status, occupation, employer, residency status, education level, prior jury experience, ~~and~~ felony conviction status, and the prospective jurors' answers to a written questionnaire. The clerk must keep all prospective jurors' home and business telephone numbers ~~and~~ addresses confidential, and responses to written questionnaires and may not disclose them unless good cause is shown.

(2) *Written Questionnaires*. Unless the court orders otherwise, ~~T~~the court ~~may~~ shall order prospective jurors to complete a written questionnaire in a manner and form approved by the court ~~prepared by the parties and submitted to the court for approval before trial~~. The should include questions about the prospective jurors' qualifications to serve in the case, any hardships that would prevent the prospective jurors from serving, and whether the prospective jurors could render a fair and impartial verdict. Unless the court orders otherwise, the clerk must provide copies of any such juror questionnaire and answers to the parties and their respective counsel. Any party or counsel receiving a copy of the questionnaire and answers must keep the information strictly confidential and must not disclose the information. When jury selection is done, each recipient must return all copies of the juror questionnaires and answers to the clerk.

**(c) Voir Dire Oath and Procedure.**

(1) *Voir Dire Oath*. The prospective jurors must take an oath administered by the clerk before they are examined about their qualifications. The oath's substance must be as follows: "You do solemnly swear (or affirm) that you will truthfully answer all questions about your qualifications to serve as a trial juror in this action, so help you God." If a prospective juror elects to affirm rather than swear the oath, the clause "so help you God" must be omitted.

(2) *Explanation of Voir Dire*. The court must explain at the beginning of any written or oral examination the purpose of voir dire, how the court and parties will use the prospective jurors' information, and who may have access to the information prospective jurors provide.

(~~2~~3) *Brief Opening Statements*. Before voir dire begins, the court may allow or require the parties to present brief opening statements to the prospective jurors.

(~~3~~4) *Extent of Voir Dire*.

(A) Questioning by Court and Parties. The court must thoroughly question the jury panel to ensure that prospective jurors are qualified, fair, and impartial. The court must permit each of the parties to ask the panel additional questions, but may impose reasonable limits on the questioning. Written questions also may be used as provided in Rule 47(b)(2). A party's failure to submit questions to the court prior to examination should not be grounds to deny a party the opportunity to conduct an oral examination.

(B) Extent of Questioning. Voir dire questioning of a jury panel is not limited to the grounds listed in Rule 47(d) and may include questions about any subject that might disclose a basis for the exercise of for cause ~~a peremptory~~ challenge.

**(d) Challenges for Cause.**

(1) *Grounds*. A party may challenge a prospective juror for cause on one or more of the following grounds:

(A) the prospective juror lacks one or more of the required statutory qualifications specified in A.R.S. § 21-211;

(B) the prospective juror is a party's:

(i) family member;

(ii) guardian or ward;

(iii) master or servant;

(iv) employer or employee;

(v) principal or agent;

(vi) business partner or associate; or

(vii) surety or obligee on a bond or obligation;

(C) the prospective juror was a witness or served as a juror in a previous trial between the same parties in the same action; or

(D) the prospective juror has--by words or actions--shown bias or prejudice for or against any party or otherwise demonstrated their unfitness to serve as a juror.

(2) *Procedure*. The court must rule on challenges for cause. A prospective juror who is challenged for cause may be examined under oath by the court or, with the court's permission, by a party.

**~~(e) Peremptory Challenges.~~**

~~(1) *Procedure*. When the voir dire is finished and the court has ruled on all challenges for cause, the clerk will give the parties a list of the remaining prospective jurors for the exercise of peremptory challenges. The parties must exercise their challenges by alternate strikes, beginning with the plaintiff, until each party's peremptory challenges are exhausted or waived. If a party fails to exercise a peremptory challenge, it waives any remaining challenges, but it does not affect the right of other parties to exercise their remaining challenges.~~

~~(2) *Number*. Each side is entitled to 4 peremptory challenges. For this rule's purposes, each action--whether a single action or two or more actions consolidated for trial--must be treated as having only two sides. If it appears that two or more parties on a side have adverse or hostile interests, the court may allow them to have additional peremptory challenges, but each side must have an equal number of peremptory challenges. If the parties on a side are unable to agree on how to allocate peremptory challenges among them, the court must determine the allocation.~~

**~~(f)~~ (e)Alternate Jurors.**

(1) *Generally*. The court may order that up to 6 additional jurors be called and impaneled in the same manner as other jurors under this rule, to allow the court to later designate some of the jurors as alternates.

(2) *Instructions*. The court should explain to the jury why alternate jurors are needed and how they will be selected at the end of trial.

(3) *Selecting and Excusing an Alternate Juror*. The court will determine the identities of the alternate jurors by a drawing held in open court after closing arguments and final jury instructions are given but before deliberations begin. If an alternate juror is excused, the court must instruct him or her to continue to observe the juror admonitions until a verdict is returned or the jury is discharged.

(4) *Substituting an Alternate Juror*. If a deliberating juror is disqualified or unable to perform the required duties, the court may substitute an alternate juror in the juror's place. If an alternate juror joins the deliberations, the court must instruct the jury to start over in its deliberations.

~~(5) *Additional Peremptory Challenges*. In addition to the peremptory challenges otherwise allowed by law, each side is entitled to one peremptory challenge if one or two alternate jurors will be impaneled, two peremptory challenges if 3 or 4 alternate jurors will be impaneled, and 3 peremptory challenges if 5 or 6 alternate jurors will be impaneled.~~

## COMMENTS

### 2021 Amendment to Rule 47(b)

To allow the process of challenging jurors for cause to work effectively, Rule 47(b) creates a presumption that the court will use pre-trial questionnaires during *voir dire* where feasible, deferring to the court on the method and manner for their administration. Courts may use paper or electronic questionnaires, administer questionnaires in advance of trial or immediately prior to *voir dire*, or use general or case-specific questions.

### 2021 Amendment to Rule 47(c)

Studies demonstrate that extended *voir dire*, questioning by the parties, and open-ended questions, elicit more candid answers from prospective jurors than minimal *voir dire*, questioning by the court, and close-ended questions. When feasible, the trial court should permit liberal and probing examination by the parties, should refrain from imposing inflexible time limits, and use open-ended questions that elicit prospective jurors' views narratively. Questions should not be close ended, generally seeking yes or no answers. The court should refrain from rehabilitating prospective jurors by asking leading, conclusory questions that encourage prospective jurors to affirm that they can set aside their opinions and neutrally apply the law. The court should be particularly sensitive to the prejudice that can arise from voir dire by an unrepresented defendant.

### 2021 Comment to Rule 47(d).

Effective January 1, 2022, peremptory challenges were eliminated in the entire Arizona state court system to reduce to the greatest degree possible the role of improper bias in selecting jurors, and the role of improper bias by jurors in the rendering of verdicts. Judges, lawyers, and jurors all carry unique perspectives and views, which in prospective jurors can rise to the level of improper bias justifying their excusal for cause. Arizona law bars judges and lawyers from manifesting bias or prejudice while selecting a jury, whether on the basis of race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. Arizona Supreme Court Rule 81, Code of Judicial Conduct, Rule 2.3(B), (C).

### 1995 Amendment to Rule 47(a) and (e)
### [Formerly Rule 47(a)]

Prior to the 1995 amendment, [Rule 47(a) and (e) (Jury Selection and Peremptory Strikes) (formerly Rule 47(a)(1))] was read to require trial judges to use the traditional "strike and replace" method of jury selection, where only a portion of the jury panel is examined, the remaining jurors being called upon to participate in jury selection only upon excusal for cause of a juror in the initial group. Challenges for cause are heard and decided with the jurors being examined in the box. A juror excused for cause leaves the courtroom in the presence and view of the other panel members, after which the excused juror' s position is filled by a panel member who responds to all previous and future questions of the potential jurors.

The purpose of this amendment is to allow the trial judge to use the "struck" method of selection if the judge chooses. This procedure is thought by some to offer more advantages than the "strike and replace" method. See T. Munsterman, R. Strand and J. Hart, The Best Method of Selecting Jurors, The Judges' Journal 9 (Summer 1990); A.B.A. Standards Relating to Juror Use and Management, Standard 7, at 68-74 (1983); and "The Jury Project," Report to the Chief Judge of the State of New York 58-60 (1984).

The “struck” method calls for all of the jury panel members to participate in voir dire examination by the judge and counsel. Although the judge may excuse jurors for cause in the presence of the panel, challenges for cause are usually reserved until the examination of the panel has been completed and a recess taken. ~~Following disposition of the for cause challenges, the juror list is given to counsel for the exercise of their peremptory strikes. When all the peremptory strikes have been taken, and all legal issues arising therefrom have been resolved, the clerk calls the first eight names remaining on the list, plus the number of alternate jurors thought necessary by the judge, who shall be the trial jury.~~

Whether using strike and replace, or the struck method, the rules do not prescribe a method for replacing an excused prospective juror in the juror jury box with a member of the panel, deferring to the discretion of the court on the appropriate method.

~~**1961 Amendment to Rule 47(e)**~~
~~**[Formerly Rule 47(a)(3)]**~~
~~[Rule 47(e) (formerly Rule 47(a)(3))] now compels the plaintiff to exercise all of his peremptory challenges prior to the defendant. The amended rule provides that the parties shall exercise their peremptory challenges alternately. Under the present rule, while the plaintiff receives the same number of peremptory challenges as the defendant, the order of exercising them resulted in an obvious inequity. The purpose of the proposed rule is to eliminate this inequity by giving both parties peremptory challenges which are not only equal in number but also in practical weight and value.~~

## Rule 134. Trials

**a. Trial procedures.** The court may impose reasonable time limits for a trial or for any portion of a trial. The order of proceedings in a trial by jury, so far as applicable, also governs a trial to a judge without a jury. A jury will be summoned, and a trial to a jury will proceed, as provided by Title 22, Chapter 2 of the Arizona Revised Statutes, and as provided by this rule. Unless the parties agree otherwise, the number of individuals selected as trial jurors, and the number of jurors needed to render a verdict, shall be as provided by Title 21, Chapter 1, of the Arizona Revised Statutes, or as otherwise provided by law. The order of trial is as follows:

(1) Potential jurors are summoned to the court and are given an oath to truthfully answer questions about their qualifications to serve as trial jurors. The court may conduct an initial examination of prospective jurors by written questionnaire, orally, or by both methods. If used, written questionnaires must be approved by the court and may be administered before potential jurors are summoned to the court. Either after prospective jurors complete a written questionnaire, or during an initial oral examination, ~~T~~the judge, and the parties, as the judge may allow, then ask questions to prospective jurors concerning their qualifications and fitness to serve as jurors. Potential jurors may be challenged for cause based on answers on a written questionnaire or during the course of questioning. Upon request, the judge may allow the parties to make brief opening statements to the prospective jurors before the questioning process. ~~After the questioning process, each side may exercise two peremptory challenges, or some other reasonable number of peremptory challenges as the court directs, of potential jurors.~~ The jurors then selected to hear the case are sworn, and the judge gives the jury preliminary instructions concerning the jury's duties, its conduct, the order of proceeding, and elementary legal principles that govern the trial. The judge will instruct the jurors that each of them may take handwritten notes during the trial, which the jurors can take to the jury room, and the court will provide jurors with note-taking materials.

(2) The plaintiff or plaintiff's counsel may make an opening statement. Opening statements of every party must be brief and must be limited to facts that the party expects the evidence will establish.

(3) The defendant or defendant's counsel may make an opening statement, or may defer making an opening statement until the close of plaintiff's evidence.

(4) Other parties, if any, may make opening statements in the order directed by the judge.

(5) The plaintiff will introduce evidence.

(6) The defendant will introduce evidence.

(7) Other parties, if any, may introduce evidence in the order directed by the judge.

(8) The plaintiff may then introduce evidence in rebuttal.

(9) Before a time set by the judge, a party may request that the judge give certain instructions to the jury. The judge will determine the final instructions after consultation with the parties, and the judge will then give the jury its concluding instructions of law. The instructions will be available in writing for the jury during its deliberations.

(10) Each party, in the order set forth above, may provide a summation to the jury. The party having the burden of proof on the case as a whole is entitled to provide a rebuttal.

(11) The jury will retire with trial exhibits and the jurors' notes to a private and convenient place for its deliberations in the charge of a proper officer of the court, who will not allow any communication to be made to them, except to ask if they have agreed upon a verdict, or as ordered by the judge. If the jury wishes to communicate with the judge, it shall make the desire known to the officer orally or in writing, who will then inform the court.

(12) A verdict reached by a jury will be announced in open court in the presence of the jurors and the parties, and noted in the court's records, and the jurors may then be discharged. Judgment will be given on the verdict.

(13) If it appears after a reasonable time that it is unlikely that the jury will reach a verdict, the jury may be discharged, and the matter may be tried again. **[ARCP 16(h), 38, 39, 47, 48, 49, 51]**

**b. Motion for judgment as a matter of law.** Motions for judgment as a matter of law during a jury trial must be made before the jury retires for deliberations. The motion contends that there is no legally sufficient evidence for a reasonable jury to find for a party on a contested issue. **[ARCP 50]**

## Rule 12. Trial by Jury

**a.** When an action is called for trial by jury, the jury panel shall be assembled. Voir dire may be conducted by the court, and the parties as the judge may allow, by written questionnaire, orally, or by both methods. If the court uses written questionnaires, they shall be administered in a manner and form approved by the court and may be administered before potential jurors are summoned to the court. Failure to submit written voir dire questions a day before the panel is assembled, or by a date ordered by the court, waives the right to submit questions. ~~When,~~ ~~a~~After challenges for cause are exercised, a panel of ~~thirteen~~ seven jurors in justice court or ~~fifteen~~ nine jurors in superior court ~~is available,~~ shall be assembled. ~~the court shall permit three peremptory challenges per side to reduce the jury to seven in justice court or nine in superior court.~~ One of the jurors shall be selected as the alternate after the evidence is presented and before deliberations.

**b.** Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, and the elementary legal principles that will govern the proceeding. At least one day prior to the commencement of a jury trial, any party may file written requests that the court instruct the jury on the law as set forth in the requests. A party shall be deemed to have waived request for other instructions except those that could not reasonably have been anticipated prior to trial.

**c.** The order of trial shall be as follows: The plaintiff or the plaintiff's counsel may read the complaint to the jury and make a statement of the case; the defendant or the defendant's counsel may read the answer and counterclaim, if any, and may make a statement of the case to the jury, but may defer making such statement until after the close of the evidence on behalf of the plaintiff; the plaintiff shall then introduce evidence; the defendant shall then introduce evidence; the plaintiff may then introduce rebutting evidence; the defendant may then introduce rebutting evidence in support of any counterclaim(s). The parties then may make closing arguments in the same order.

**d.** If the jurors are permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with or permit themselves to be addressed by any person on any subject connected with the trial. When the jurors retire to deliberate, they shall be kept together in a convenient place, in the charge of a proper officer who shall not allow any communication to be made to them, or make any, except to ask them if they have agreed upon their verdict.