

Task Force on the Arizona Rules of Criminal Procedure

State Courts Building, Phoenix

Meeting Minutes: February 19, 2016

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

Absent: Jerry Landau, Natman Schaye

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

1. **Call to order; remarks by the Chief Justice.** The Chair called the first Task Force meeting to order at 10:04 a.m. and welcomed the members. He then invited remarks from Chief Justice Scott Bales.

The Chief Justice said this Task Force was part of a broader Court project for restyling Arizona's rules of court procedure. The Court has previously adopted restyled rules for civil appellate and protective order procedure, and another Task Force filed a rule petition last month requesting adoption of restyled rules of civil procedure. Restyling simplifies and clarifies the rules, and updates the rules to conform to modern practices. The Chief Justice noted that this Task Force may not reach consensus on every policy issue, and he would like the Task Force to raise those issues for the Court's consideration. He emphasized the importance of this Task Force, and he looked forward to a collaborative and productive effort from its members. The Chair thanked the Chief Justice for his remarks.

2. **Member introductions; Task Force administration; review of Administrative Order.** The Chair asked the members and staff to introduce themselves. He then advised that the Task Force must comply with the Court's open meeting policy, and he explained the policy. He requested that members review proposed rules for conducting Task Force business, which included a proxy form and were contained in the meeting materials.

Motion: To approve the proposed rules for conducting Task Force business. Seconded, and the motion passed unanimously. **CRTF-001**

The Chair noted language in Administrative Order 2015-123, which established the Task Force. The Order directed the Task Force to:

“...review the Arizona Rules of Criminal Procedure to identify possible changes to conform to modern usage and to clarify and simplify language. These changes should promote the just resolution of cases without unnecessary delay or complexity. The Task Force shall seek input from various interested persons and entities with the goal of submitting a rule petition by January 2017 with respect to any proposed rule changes.”

The Chair advised that staff would provide members with preliminary drafts of restyled rules, and members would then discuss and further revise those drafts. He encouraged the members to reach out to colleagues and constituencies and to seek input regarding proposed changes as the Task Force progresses through its work. The Task Force will need to request Court and State Bar committees, among others, to review and comment on proposed amendments to the criminal rules before it files a rule petition in January 2017. He reminded the members that this is primarily a restyling project, but the Task Force can recommend substantive changes where there is consensus among the members to do so. However, substantive changes that represent a “sea change” may be better suited for separate rule petitions rather than submitting them to the Court as part of a large restyling effort. As directed by the Chief Justice at the beginning of the meeting, the Task Force’s rule petition should note substantive issues for the Court.

The Chair invited Mr. Rogers to summarize the Rule 28 rule petition process. Mr. Rogers explained that the rule petition process operates on an annual cycle. The filing deadline for petitions is January 10. The Court customarily opens petitions for public comment until May 20. Complex petitions, including the one this Task Force will file, may have a modified timeline that permits two comment periods. The Supreme Court considers rule petitions and comments in August, and for those petitions it grants, it usually enters implementation orders in September. Implementation orders typically make rule changes applicable to cases that are pending on the effective date, but occasionally there are exceptions. The implementation orders usually make the rule amendments effective on January 1, and Thomson Reuters publishes the amendments a month or two before that date.

3. Establishment of workgroups. The Chair then provided a handout that assigned each Task Force member to one of four workgroups. Each workgroup will include at least one judge, a prosecutor, and a defense attorney, and will be composed of members from at least two counties. A designated judge-member of the Task Force will coordinate each workgroup. The Chair will assign each criminal rule to a workgroup, and the members of the workgroup should carefully examine the rule, discuss relevant issues, and propose appropriate revisions. The Chair noted that the first group of rules assigned to the workgroups should be relatively straightforward and not controversial, although the workgroups may find otherwise. The Task Force will set its meetings about six weeks apart, and the workgroups will meet in the intervals between those meetings. The workgroups will report their findings and suggestions to the Task Force. All Task

Force members therefore will have an opportunity to review and comment on every rule. The Chair asked for questions and comments, and a discussion ensued.

- A member inquired if Rules 30, 31, and 32 concerning appeals and petitions for post-conviction relief could be treated as a separate set of procedural rules, similar to the manner in which the civil appellate rules are separate from civil trial rules. A couple other members voiced support for this approach. The Chair did not take immediate action on this suggestion because the assignments do not yet include those rules.
- The Chair confirmed that a workgroup could recommend reorganizing a rule.
- Unlike prior Court committees that restyled the Arizona Rules of Evidence and the Arizona Rules of Civil Procedure, this Task Force will not need to model its recommendations to conform to federal criminal rules.
- Redline versions may assist the members in reviewing proposed changes. Mr. Rogers added that on the civil rules project, short memos from workgroup chairs were helpful in flagging substantive issues for discussion by the full Task Force.
- Workgroups can conduct their meetings telephonically. Some members believe it is better to meet personally at the onset to develop working relationships. Others believe that it is just as effective to have telephonic meetings at the beginning, and more in-person dialogue as the workgroups progress. These are decisions each workgroup can make. The Chair noted that the manner in which workgroups conduct their discussions might depend on its pending tasks, deadlines, and geographic and other considerations.
- The Chair advised that members should let him know if they are interested in working on particular rules. Members can attend meetings of any workgroups, and not just the one to which they are assigned. He added that staff would like to attend workgroup meetings.

4. General principles of restyling. The Chair then invited Mr. Rogers, who has worked on previous rule restyling projects, to comment generally on restyling. Mr. Rogers reminded the members that the meeting materials included “style conventions” that he prepared in the course of those other projects, as well as Bryan Garner’s “Guidelines for Drafting and Editing Court Rules.” Mr. Rogers also circulated examples of restyled criminal rules, which he used to illustrate his conventions.

Mr. Rogers explained that restyling offers an opportunity to make the rules clearer, more concise, and internally consistent. Court rules have proliferated over the past few decades. The last comprehensive revision of Arizona's criminal rules was in 1973. At that time there were 36 rules covering 152 pages. Arizona now has 41 criminal rules that occupy 246 pages. Text in the softcover volume of the 1973 rules was a single column of large font. Now the rules are in a double column of considerably smaller font. Mr. Rogers briefly reviewed previous federal and Arizona restyling projects. He then summarized several restyling principles, including the following.

- Improved formatting and organization helps users more easily find what they want. A number of the current rules lack continuity in their themes and ideas. Reorganized provisions should connect them.
- Run-on sentences are exhausting to read. Avoid archaic terms such as "thereto" or "hereinafter." Good restyling uses simpler words and proper word choice.
- Avoid redundant terms, such as the often-found phrase, "the court in its discretion may...." "May" means the court has discretion. Use the phrase "court clerk," which is more direct than "clerk of the court."
- Eliminate ambiguous terms. "Shall" has various meanings, but "must," "may," "will" or "should" are usually more specific.
- Use the active voice. It is more vivid and comprehensible.
- Many comments may have outlived their usefulness and become barnacles on the rules. The Civil Rules Task Force eliminated a majority of existing comments to the civil rules. Relocate substantive requirements contained in a comment to the body of a rule. If a comment is necessary to understand a rule, there may be a need to rewrite the rule more clearly.
- The Civil Rules Task Force proposed, and the Arizona Rules of Civil Appellate Procedure include, a prefatory comment that generally explains the purpose of restyling and provides general guidance concerning use of those new rules.

The Chair said Mr. Rogers' restyling conventions should assist the workgroups in making uniform revisions. The Chair noted that the meeting materials also contain a summary of pending criminal rule petitions, which the workgroups should review.

5. Roadmap; call to the public; adjourn. The Chair proposed Friday as the best day of the week for future meetings, and 10:00 a.m. until 2:00 p.m. as the best time,

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and the members agreed to this schedule. The Chair encouraged members to send a proxy if they are unable to attend a Task Force meeting.

The next Task Force meeting will be on **Friday, April 8, 2016**, beginning at 10:00 a.m., at the State Courts Building.

There was no response to a call to the public. The meeting adjourned at 11:57 a.m.

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

State Courts Building, Phoenix

Meeting Minutes: April 8, 2016

Members attending: Hon. Joseph Welty (Chair), Paul Ahler, Hon. Kent Cattani, Hon. Sally Duncan, Timothy Eckstein, David Euchner by his proxy Mikel Steinfeld, Hon. Maria Felix, Hon. Richard Fields (by telephone), Hon. Pamela Gates, Hon. Eric Jeffery, Kellie Johnson, Amy Kalman, Prof. Jason Kreag (by telephone), Jerry Landau, Hon. Mark Moran, Aaron Nash, Natman Schaye, Hon. Paul Tang, Kenneth Vick

Absent: Bill Hughes

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

Guests: Kathryn Pierce, John Belatti, Joey Hamby

1. Call to order; explanation of OneDrive; approval of draft minutes. The Chair called the second Task Force meeting to order at 10:00 a.m. and introduced the proxy and guests. He commended the efforts of the workgroups, each of which has met at least twice since the February 19 Task Force meeting. Today the Task Force will begin its discussion of eight rules (Rules 1, 2, 4, 5, 7, 9, 10, and 13), with two rules presented by each workgroup.

The Chair advised that the members prospectively would make rule revisions on OneDrive. He invited Ms. Graber to introduce OneDrive features. Ms. Graber first explained that each Task Force member must establish a Microsoft account; this is necessary to log-on to OneDrive. Portal.office.com is the URL for Microsoft’s Office website. Once a member has logged on, a search for the “criminal rules task force” will direct the member to the criminal rules page. Each workgroup has a separate folder on that page, although Task Force members have permission to view all workgroup folders. Ms. Graber explained the difference between “edit in Word,” which is a “full version” that shows tracked changes, and “edit in Word online,” which does not show tracked changes. Hitting the “save” button while editing in the full version will allow synchronization of changes in that version with the online version. OneDrive will also enable members to see who has made particular changes. The Chair thanked Ms. Graber for her presentation and encouraged members to contact her if they have additional questions. He informed the members that Ms. Graber will “lock” the workgroup versions ten days before each Task Force meeting to assure that every member will be reviewing the same documents at that meeting. He requested workgroups to be mindful of the ten-day limitation when scheduling their sessions.

The Chair directed the members to draft minutes of the February 19 meeting that were included in the packet of meeting materials. A member then made the following motion:

Motion: To approve the draft minutes. Seconded, and the motion passed unanimously. **CRTF-002**

2. Uniformity in rules of court procedure. The Chair then raised two issues for discussion. First, should the draft rules incorporate other rules by reference, as current Rule 35.5 has done, or should the rules “stand on their own?” Second, should provisions concerning such matters as format, time, and service be uniform across different sets of rules? The Chair stated his understanding that the Court prefers uniformity on these matters when possible, and they should differ only if there is a reason for the difference.

A judge member opposed cross-references and stated that criminal practitioners should only need to take a single volume of criminal rules to court. An attorney member advised that he practices only criminal law, and prefers to have all of the applicable rules in a single set. Another attorney follows criminal rule petitions, but not civil rule petitions, and cross-referencing might lead to criminal practitioners being uninformed of important civil rule changes proposed by a rule petition.

Mr. Rogers made an argument for cross-referencing. He said that when civil rules are amended, necessary and corresponding amendments to criminal rules do not always follow. Over time, the differences between these sets of rules increase. However, by cross-referencing a civil rule within a criminal rule, the criminal rule is effectively and simultaneously updated whenever a civil rule changes.

The Chair concluded the discussion by noting that a majority of members expressed a preference for a self-contained volume of criminal rules, without cross-references to civil rules. However, the criminal rules should attempt to maintain uniformity with corresponding civil rule provisions. He added that his directions are not the result of a formal vote on these issues, but they nonetheless should guide the member’s drafts as they proceed through the rules. On the subject of voting, the Chair added that the members would not vote to approve each rule following a discussion of the rule, but they should identify when they have achieved consensus concerning the rule, or whether the members should send a rule back to a workgroup for further review and revision. The Task Force will include rules on which there is consensus in a “vetting draft” that will be circulated to stakeholders before the Task Force files a rule petition. Accordingly, consensus on a rule is not the equivalent of ultimate Task Force approval of a rule. He also reminded the members to keep a record of any proposed substantive changes to a rule, which will allow the Task Force to identify those changes when it files its rule petition.

The Chair proceeded to the workgroup discussions of their draft rules.

3. Workgroup 1. Mr. Vick led the discussion of Rules 1 and 2.

Rule 1: General Provisions. Mr. Vick advised that Workgroup 1 restyled Rule 1.1 (“Scope”) and Rule 1.2 (“Purpose and Construction”), but it did not make any substantive changes. The workgroup reorganized Rule 1.3 (“Computation of Time”). It added a definition of “next day” that is consistent with a draft civil rule; this provision governs counting time backwards from a particular date. The members discussed draft Rule 1.3(a)(5), which allows additional time when service is made by specified methods’ the discussion included whether parties should add the extra 5 days before or after the basic time calculation. Mr. Rogers suggested, and the members approved, a revision to add 5 calendar days at the end of the initial calculation, starting with the first workday thereafter. The revision is, “after the specified time period would otherwise expire under Rule 1.3(a)(1)-(3)...” Ms. Graber memorialized this revision, as well as other revisions the members agreed to today, on the OneDrive version, which she displayed on a large screen during the meeting.

Draft Rule 1.4 (“Definitions”) moved the current definitions of “initial appearance” and “arraignment” to Rules 4 and 14, respectively, which detail those proceedings. The workgroup added definitions to Rule 1.4, including “defendant,” “magistrate,” “parties,” “person,” and “State.” The proposed definition of “magistrate” exceeded the definition in A.R.S. § 1-215, because it added the words “and judges pro tempore of these courts.” The definition does not include “commissioners,” and this led to a discussion of whether all commissioners in Arizona are also judges pro tempore. Members noted that not every county in Arizona uses commissioners. On the other hand, every judge pro tempore has the authority of a judge and therefore “pro tempore” does not need to be in the rule’s definition. The members concluded that in this instance, the rule definition should be identical to the statutory definition, and accordingly they agreed to delete the draft rule’s reference to judges pro tempore.

The members also discussed the definition of “State.” Mr. Rogers advised that the members should use “State” rather than “prosecutor” when drafting rules, except when the rule intends to refer to duties that are specific obligations of a prosecutor. The members agreed to this convention. They also agreed to use the term “defense counsel” rather than “defendant’s counsel.”

Draft Rule 1.5 (“Initial Appearance Masters”) derives from current Rule 1.7, which has the same title as the draft rule. The members agreed with the workgroup’s recommendation to relocate this rule under Rule 4. The Task Force will renumber the remaining provisions of Rule 1 accordingly.

Workgroup 1 did not intend to include any substantive changes in its draft of Rule 1.6 (“Interactive Audiovisual Systems”), but it significantly restyled the existing provisions of Rule 1.6(c)-(f) into a single new section (c). The goal of the workgroup was to add clarity to the rule. Mr. Vick asked for the members’ suggestions on a provision

that allows the use of video on guilty plea arraignments, and which would exclude from its application a felony guilty plea at arraignment. Based on the ensuing discussion, the workgroup will revise this portion of the rule so it includes separate provisions for misdemeanor and felony arraignments. One member asked if the Task Force should revise the awkward title of this rule, but the members made no changes to the title. As a convention to follow in all the rules, the members agreed to hyphenate “not-guilty” when used as an adjective, e.g., a non-guilty arraignment. A judge member raised concerns about a provision in Rule 1.6(b) that requires an interpreter to be present with the defendant during a video proceeding “absent compelling circumstances.” His county uses the remote interpreter service, so the interpreter may not be present with a defendant. The consensus was that this could be a “compelling circumstance,” but the members agreed it did not warrant a change to the substance of the provision.

Draft Rule 1.7 (“Form of Documents”) is an addition to Rule 1, and derives from pending amendments to the corresponding rule of civil procedure. The civil rule requires the use of paper with line numbers in the left margin. At least one Task Force judge member supported the usefulness of line numbers in drawing the parties' attention to particular contentions and cases during oral argument. The judge also felt the criminal and civil rules should be consistent on this point. Other members opposed lined paper, and commented that parties can add lines even if the rules don't require it; that the clerk has some issues processing lined paper; that line numbers don't always align with text; and that lines are “a nightmare” for limited jurisdiction courts. On a straw poll, a few members supported the line number requirement, but a large majority was in opposition. The Chair concluded that the rule should neither require nor prohibit the use of line numbers, and the current draft is consistently with that conclusion.

The members also discussed draft Rule 1.7(a)(1)(B) and a requirement that the caption include the name of the party the attorney represents. Some members questioned whether this should simply require the type of party (i.e., “the State” or “the defendant”), but in a multi-party case, the name of individual defendants would be useful. The consensus was to leave the rule as drafted, which is consistent with the corresponding civil rule that requires the party's name. The members discussed whether the caption should be in the same font size, 13-point, as the remainder of the document, but the members agreed that the rule did not need to specify that. Draft Rule 1.7(c) concerns electronically filed documents. The members discussed whether to delete any language in the introduction to this draft rule, but they decided to leave it as written. This proposed rule may require amendment when electronic filing becomes mandatory, but the draft as written appropriately reflects current practices. The draft rule expresses a preference for documents in a “text-searchable .pdf format,” which is the language used in the proposed civil rule. The members discussed deleting this preference, but Mr. Rogers noted that the Court will rule on the civil rule petition this summer, and the Criminal Rules Task Force should make its rule consistent in this regard with whatever the Court decides in that

civil petition. Finally, the members agreed that draft Rule 1.7 satisfactorily dealt with the matter of electronic exhibits and attachments.

Rule 1.8 (“Filing and Service of Documents”) also derives from the proposed civil rule amendments. However, an added provision in Rule 1.8(b) deals with filing by an incarcerated person. (The inmate also is required to serve the filing on the State, but that is a subject of a different rule.) Other than that circumstance, Mr. Vick noted that the workgroup’s proposal provided that the filing of a document is accomplished “only by filing it with the clerk.” This provision deviates from the proposed civil rule, which permits filing a document with a judge. The workgroup believed that judges did not effectively deal with filings, or always assure the timely transmission of documents to the clerk. One judge member observed that he liked the clarity of the proposed rule; litigants frequently hand documents to him in open court, but he always hands the document to a clerk, who file stamps it. An attorney member said that a family member often hands her a letter in the courtroom on the day of sentencing, and because she is unable to photocopy the letter in that circumstance, she hands the original letter directly to the judge. Nonetheless, she wants the letter to become part of the record, and prefers the rule specify that the judge transmit the document to the clerk for filing. The majority of members agreed with the attorney’s view, and the Chair requested the workgroup to revise this rule accordingly. Documents filed under seal upon order of the court may deviate from the general rule, depending on the specific language of an order. The Task Force may revisit this draft rule after the Court decides the language of the corresponding civil rule.

Rule 2: Commencement of Criminal Proceedings. Draft Rule 2.1(b) includes a process for commencing a misdemeanor action in the superior court. The draft rule derives from current Rule 2.5. However, members were uncertain about the purpose of that current rule, or whether the State ever uses Rule 2.5. The consensus was to include draft Rule 2.1(b) in the vetting draft, with a comment that the utility of the rule is unclear and stakeholders should consider whether to remove it from the rule set. The remainder of Rule 2 revisions consisted of restyling, and members suggested no additional changes.

4. Workgroup 2. Judge Cattani led the discussion of Rules 4 and 5.

Rule 4: Initial Appearance and Arraignment. Workgroup 2 restyled this rule but made no substantive changes, and the members had no other edits. Judge Cattani agreed with Workgroup 1’s suggestion to relocate draft Rule 1.5 as a new Rule 4.3, and Workgroup 2 will revise Rule 4 accordingly. Regarding the release provisions of Rule 4.2(a)(7), staff reminded the members of a new Fair Justice for All Task Force, and the CRTF may need at a future meeting to consider the recommendations of that Task Force concerning pretrial release and detention.

Rule 5: Preliminary Hearing. The members had suggestions on several sections of this rule.

Rule 5.4 (“Determining Probable Cause”) includes a phrase in Rule 5.4(c), “such evidence may be in the form of hearsay....” After discussion, the members agreed to change this to, “may include hearsay in the following forms....” Draft Rule 5.4(d) had the title, “Discharging the Defendant.” The members agreed to change this to “Lack of Probable Cause.” They also agreed to reorganize the provision so it begins rather than concludes with the phrase, “The magistrate must dismiss the complaint and discharge the defendant....”

Some members believe that subsection (c) of Rule 5.5 (“Review of a Magistrate’s Probable Cause Determination”) should require the reviewing judge to consider exhibits as well as a “certified transcript of the proceedings,” as the rule currently provides. Other members suggested even a broader change that would the reviewing judge to consider a written offer of proof not admitted as an exhibit, or the entire justice court record. The members agreed to revise the rule so it allows a reviewing judge to consider “a certified transcript of the proceedings and exhibits admitted at the preliminary hearing.” The members recognized that this is a substantive change, but also agreed it was meritorious.

The members also considered the time line established by Rule 5.6 (“Transmittal and Transcription of the Record”). Is it adequate with regard to the time for filing a motion? The members agreed that it was, especially because defense counsel would have been present at the preliminary hearing and would be sufficiently familiar with the issues to prepare a motion without a transcript. The members agreed with deleting the contempt provision in the current rule, and noted that there is no corresponding provision concerning a court reporter’s preparation of a grand jury transcript. The members prefer a rephrasing of Rule 5.6 in an active voice, and stating the concepts in the draft rule separately. Workgroup 2 will reconsider the rule for those purposes.

The members discussed reorganizing the provisions of Rule 5.8 (“Notice if an Arraignment is Not Held”), but agreed that no changes were appropriate. However, the words “and prepare” were deleted from section (a)(1), which requires the magistrate to “enter a plea of not guilty for the defendant ~~and prepare~~ and provide the defendant....” The members also agreed to change the title of Rule 5.8(a) from “When an Arraignment Is Not Held” to the simpler title, “Notice.”

5. Workgroup 3.

Rule 7: Release. Judge Jeffery began but did not conclude a discussion of this rule.

Rule 7.1 (“Definitions”) clarifies that an appearance bond can be secured or unsecured. The members discussed the definition of “own recognizance.” A member noted that the current rule makes an important distinction about an O.R. release,

specifically, that it is “without any condition of an undertaking relating to, or deposit of, security.” The draft definition excludes this phrase. The members discussed adding to the definition of “own recognizance” the words, “without any appearance bond.” Another member then referred to distinctions between an O.R. release and release on bail that appear in A.R.S. § 13-3997. The member suggested that a better approach to the definition of “own recognizance” would be deleting all of the language in the present draft, and simply saying that it is a release “without an appearance bond.” The member further noted that the other conditions of an O.R. release in the draft definition are included in draft Rule 7.3 (“Conditions of Release”), which apply to every release, so they do not need to be restated in the definition. Judge Jeffery stated that draft Rule 7.1(e) (“Professional Bondsman”) retained the six specified requirements in the current rule because they are not codified elsewhere. With regard to Rule 7.1(e)(5), the members agreed to add the word “outstanding” before the word “judgments,” and to delete the phrase, “outstanding against him or her.”

The members ended their discussion of Rule 7 at this point.

6. Roadmap and additional rule assignments; call to the public; adjourn.

The meeting agenda identified future meeting dates: May 13, June 17, July 29, September 16, October 27, and December 9. All of these dates are Fridays, with the exception of Thursday, October 27. These meetings will be set from 10:00 a.m. until 2:00 p.m. The Chair added that he would reschedule any meeting if a quorum was unavailable, and depending on the Task Force’s progress, he might schedule additional meetings. His goal is to have a complete vetting draft by the end of August. Staff would circulate the vetting draft to stakeholders for comment, and the Task Force would consider those comments before filing a rule petition in January. In addition, the Task Force may present its draft to the Arizona Judicial Council at the Council’s October 27 meeting.

The Chair assigned additional rules to the workgroups as follows:

Workgroup 1: Rules 15 and 35

Workgroup 2: Rules 31 and 36

Workgroup 3: Rules 12 and 34

Workgroup 4: Rule 11

Each workgroup now has five assigned rules. The Chair reminded the members that Ms. Graber would lock their drafts ten days before the next meeting, and to schedule their workgroup meetings accordingly.

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Ms. Kalman advised that Mr. Hamby, a guest at the meeting, had provided comments to her. The Chair requested that she transmit Mr. Hamby's comments to staff, and staff will append his comments to the meeting minutes.

There was no response to a call to the public. The meeting adjourned at 2:00 p.m.

Addendum to the April 8, 2016 meeting minutes: Ms. Kalman sent the following email to staff on April 8, 2016 at 3:02 p.m.

Mr. Joey Hamby of the Law Offices of David Cantor wished to convey the following comments as a member of the public, but had to leave before the public comment period was opened:

- Rule 1.5(d). The definition of magistrate appears redundant.
- Rule 1.6(b)(3)(d)-this rule states “absent compelling circumstances” without clarification as to who finds the compelling circumstances. Should it be the criminal presiding judge or the hearing judge? Must they make a finding on the record?
- (c). Concerns regarding lack of clarity of term “not-guilty arraignment”. While it is a common term of art, should probably be more clearly defined, as an out-of-state practitioner could come in and not be clear on what this means. Suggested alternative wording: “A felony arraignment where a plea of ‘not guilty’ is entered on behalf of a defendant.”
- Rule 1.7-it would be very helpful to create uniformity across the rules.
 - Rule 1.7(c)-the title sentence should be removed completely-unless you can guarantee that a document can be filed electronically (under seal is one example, but some courts cannot accept notices of appearance electronically). Otherwise the rule as worded risks confusion when it authorizes something that may not even be possible.
 - (c)(1)(a) – the file extension preferences are way too temporal (formats may change as technology evolves, these rules are meant to be lasting). Additional concern – cost. Many people have not made the switch to Microsoft or pdf due to cost, but use WordPerfect (an older software) or OpenOffice, which is a free software. This would seem to preclude them from using the software they rely upon. The Court should not get into purchasing decisions of counsel.

Thank you for giving me the opportunity to make sure they are part of the record.

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

State Courts Building, Phoenix

Meeting Minutes: May 13, 2016

Members attending: Hon. Joseph Welty (Chair), Paul Ahler, Hon. Kent Cattani, Hon. Sally Duncan, Timothy Eckstein, David Euchner, Hon. Richard Fields (by telephone), Hon. Pamela Gates, Bill Hughes by his proxy Patti Wortman, Hon. Eric Jeffery, Kellie Johnson, Amy Kalman, Prof. Jason Kreag, Hon. Mark Moran, Aaron Nash, Hon. Paul Tang, Kenneth Vick

Absent: Hon. Maria Felix, Jerry Landau, Natman Schaye

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

Guests: John Belatti, Chris Manes, Alex Fernandez de Jauregui

1. **Call to order; approval of meeting minutes; introductory comments.** The Chair called the third meeting of the Task Force to order at 10:00 a.m. He introduced Ms. Wortman, who was attending as Mr. Hughes’ proxy. The Chair noted there have been 17 workgroup meetings since February, each workgroup has another meeting pending, and he appreciates the diligence of the workgroups. The Chair reminded the members that the Task Force referred certain rules back to workgroups at the April meeting, and while those rules were not on today’s agenda, the Task Force would revisit those rules at future meetings.

The Chair then asked the members to review draft minutes of the April 8, 2016 meeting. A member noted a grammatical error at page 4 of those minutes (“consistently” should be “consistent”), and with this correction, a member made the following motion:

Motion: To approve the draft minutes. Seconded, and the motion passed unanimously. CRTF-003

2. **One Drive.** Some Task Force members had expressed difficulty with the OneDrive application, and the Chair said he would reconsider use of the application for this project if it became problematic. One member on behalf of his workgroup voiced some initial frustration, but added that the issues are being resolved and when they are, the OneDrive should be satisfactory. Another member said that her workgroup was making progress in document sharing, but the workgroup might need additional help and guidance. The Chair noted that two AOC specialists, Mr. Manes and Mr. Fernandez, were present in the meeting room today to assist members with technology-related issues. Mr. Fernandez advised that Word versions 2010 and 2013 work well with OneDrive, but he cautioned that a member might unintentionally lock other members

out while using Word 2007 during a shared document session. He also stated that members should log on with the email address they provided to Ms. Graber, and not with a personal or other address. He informed the members the AOC was moving the CRTF folder in OneDrive to address some of these issues, and that Ms. Graber soon would be sending the members a link to the new folder location.

3. Workgroup 3. Ms. Graber showed changes suggested by the members during today's session on a large screen in the meeting room, or on WebEx for those attending the meeting telephonically.

Rule 7: Release. Judge Jeffery continued the explanation of Rule 7 he had started at the April meeting.

Draft Rule 7.1 ("definitions") combined into a single section (b) the separate definitions of an "appearance bond" and a "secured appearance bond" that are in current Rules 7.1(b) and (c). The workgroup made no substantive changes to the other sections of Rule 7.1. One member suggested, and the Task Force agreed, to add at the end of the rule these two words: "...withhold a professional bondsman's capacity to act as surety if the bondsman violates...etc."

The members had an extensive discussion of draft Rule 7.2 ("right to release"). The discussion began with draft Rule 7.2(a) ("before conviction...bailable"). The draft stated that the court would "impose the least onerous condition of release...that will reasonably assure the person's appearance and compliance with the conditions of release." A couple members criticized the circularity of this language. One member suggested breaking this single sentence into two to clarify its intended meaning. A judge member recommended placing a period after the word "appearance" to make the draft consistent with the current rule. Another judge member would place a period after "compliance." Judge Jeffery noted that the intent of the additional phrase is to assure that a defendant not only makes court appearances, but also that he or she complies with conditions that ensure the safety of witnesses and the community. The members then reviewed A.R.S. § 13-3967 ("release on bailable offenses before trial"), and the multiple statutory factors a judicial officer must take into account when making a release determination. The Chair requested the workgroup to reconsider the draft rule in light of the statute, and to consider whether the rule should cross-reference the statute. Ms. Kalman will join Workgroup 3's further discussion. The members agreed that a judicial officer should consider all of the factors when making a release determination, but that complete information pertinent to each factor may not always be available, especially at an initial appearance.

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The discussion continued with Rule 7.2(b) (“before conviction...not bailable”). Initially, Mr. Rogers reminded the members of a convention not to capitalize prepositions appearing in the title of a rule, such as “with” in the titles to Rules 7.2(a) and (b), if the word is less than five letters. A member suggested eliminating one of the long titles by combining these rules. He believes everyone agrees a judge should not release on bail a person who is not entitled to bail, and Rule 7.2(b) is either unnecessary or should be reduced to a single sentence of a combined rule. Judge Jeffery noted this provision currently is a separate rule. Combining the rules would require renumbering Rule 7.2(c) as Rule 7.2(b), and some members thought this might be of concern to stakeholders when doing legal research. The members resolved the matter by shortening the titles of Rules 7.2(a) and (b). The title of these two rules will be, respectively, “before conviction: bailable offenses” and “before conviction: nonbailable offenses.”

The members proceeded to draft Rule 7.2(c), the right to release “after conviction.” The first provision the members discussed was release after conviction in the superior court. They expressed concern with the length of the sentence in the paragraph titled “generally.” They also discussed whether the court “may not” or “must not” release a person after conviction, and whether, under Rule 17.4(a), the parties can negotiate conditions of release independent of court approval. Although Rule 17.4(a) permits the parties to negotiate agreements concerning “any aspect of the case,” some judge members would like to incorporate that principle in Rule 7.2(c). Another judge member believes that while the parties are free to do so, the court has discretion to reject the parties’ agreements. She noted parenthetically that even a jury does not have to accept the parties’ stipulations. As a practical matter, most agreements reached by the parties concerning release after conviction are in conjunction with a plea agreement, where there may be good reasons for a short reprieve. The members discussed reorganizing the “generally” paragraph of Rule 7.2(c)(1)(A), and Ms. Graber made a series of changes as the discussion progressed. Eventually the provision was broken into two subsections to sharpen the meaning of “unless.” Subsection (i) includes much of the current draft language, and subsection (ii) states, “unless the parties agree otherwise and the court approves the stipulation.”

The discussion of Rule 7.2(c) continued on the subject of the phrase “all reasonable probability.” One member thought this was superfluous and suggested deleting it. A judge member opposed that, first because it would require a judge to make a release determination prior to receiving a presentence report, and without a standard for the determination; and also because it would fail to distinguish between probation-eligible and mandatory prison offenses. Removing the phrase might also imply a substantive change when the Task Force did not intend one. The members were not satisfied that changing “all reasonable probability” to “likely” made the provision more meaningful;

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further, it also might imply a different standard where none was intended. A straw poll indicated that 10 members preferred to retain the phrase “all reasonable probability,” 4 preferred “likely,” and one abstained. The draft rule will accordingly use the current phrase. In another provision of Rule 7.2(c), one member suggested changing “diligently prosecute an appeal” to “diligently pursue an appeal,” and the members agreed to this.

A provision in current Rule 7.2(c)(2)(A) requires that a defendant held in custody pending appeal be released if the sentence is completed before the appeal is decided. The members believed that this is a undisputed principle, but to avoid any misapprehension, they retained it in draft Rule 7.2(c)(1) and (2). The members discussed the right to representation by counsel on appeal, as provided in draft Rule 7.2(c)(2)(C)(ii), and decided to keep the provision as it appears. Other than minor grammatical edits, the members had no other changes to Rule 7.2(c).

In Rule 7.3 (“conditions of release”), section (a), the workgroup changed the language of paragraph 1 simply to say the defendant “must appear at all court proceedings.” One member asked why the workgroup removed the current verbiage that requires a defendant to “submit to the orders and process of the court;” but after discussion, the members were satisfied that paragraph 5 of the “additional provisions” of Rule 7.3(c) (which permits the court to impose “any other condition the court deems reasonably necessary”) encompassed this concept. For consistency with changes made to Rule 7.2(c), the members changed the words “diligently prosecute” the appeal in Rule 7.3(a)(4) to “diligently pursue.” The members had no changes to draft Rule 7.3(b) concerning conditions required by A.R.S. § 13-610(O)(3). A member inquired why a provision of current Rule 7.3(b) about “return to custody after specified hours” was not included in draft Rule 7.3(c). When the workgroup reviews Rule 7 and the previously noted issues about public safety, it will reconsider whether this omission was appropriate.

Rule 7.4 concerns “procedure.” Draft Rule 7.4(a) uses the term “initial appearance” rather than “initial decision,” which the current rule uses. The workgroup generally reorganized draft Rule 7.4(b) (“later review of conditions”) and substituted “later review” for “subsequent review.” Task Force members changed the phrasing of draft Rule 7.4(b)(2) from “Rule 39’s victims’ rights requirements” to the “victims’ rights requirements of Rule 39.” The members had no changes to draft Rule 7.4(c) (“evidence”). However, the members rearranged the text of Rule 7.4(d) (“review of conditions of release for misdemeanors”) – as shown on the screen by Ms. Graber – for improved emphasis and clarity.

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The members had a discussion that spanned the lunch break concerning draft Rule 7.5 (“review of conditions; revocation of release”). Amendments to Rule 7.5(a), (b), and (c), which became effective in January 2016 under R-15-0005, drove the discussion. There was initially a belief that the Task Force should do little to change these provisions since the Court recently adopted them. On the other hand, the history of these provisions indicated that the amendments emerged from disjointed proposals, and if the new rule lacked clarity, the members agreed that the Task Force should take this opportunity to improve it. Members’ concerns with these three sections of Rule 7.5 centered on matters such as what documents gets served, who gets served, who serves the documents, and what does the court do if exigent circumstances exist? Ms. Graber made on-screen changes during the ensuing discussion, and eventually draft Rules 7.5(a) and (b) stated that the respective report or notice is “provided” (not “served”), that under Rule 7.5(b) the court may issue a warrant or a notice but not a summons, and that a notice must include the setting of a hearing. In practice, a prosecuting agency usually serves a summons or warrant, but a pretrial services officer may serve a notice. Ms. Graber also made other edits suggested by the members, including a change in section (c) from “personal recognizance” to “own recognizance release.”

In Rule 7.5(d) (“hearing, modification of conditions, revocation”), and to avoid duplication, the members agreed to remove the phrase “proof is evident or the presumption great” from subsections 2(A) and (B), and to relocate the phrase to the beginning of the provision, where it would apply to both subsections. The members agreed that this phrase refers to the current charge against a defendant, rather than a new one.

The members had no changes to draft Rule 7.5(e) or (f). Judge Jeffery explained the workgroup’s revisions to Rule 7.6 (“transfer and disposition of bond”), including the following. The workgroup changed “released person” to “the defendant,” and “electronic means” to “electronically.” It deleted the words “as soon as practicable” that appear in current Rule 7.6(c). In Rule 7.6(d)(2), it changed the current term “may” to “must.” In the same provision, it changed a period after the word “jurisdiction” to a semicolon and added the word “and” to clarify that all of the conditions must be met before the court exonerates a bond based on a surrender of the defendant. The members had no further edits to Rule 7.

4. Workgroup 4. After the presentation of Rule 7, the Chair requested Judge Tang to present Rule 10.

Rule 10: Change of Judge or Place of Trial. Judge Tang noted that the current rule has 6 sections; the draft rule has 4, because current Rules 10.5 and 10.6 were absorbed into other provisions of draft Rule 10.

Judge Tang began with a discussion of Rule 10.1 (“change of judge for cause”). Rule 10.1(a) specifies the “grounds” for a change of judge for cause. The workgroup rephrased Rule 10.1(a) in the active voice, but did not intend to change the substance of this brief rule. The current rule states that a fair trial “cannot be had,” and the restyled draft stated that the judge’s interest or prejudice would “impair” a party’s right to a fair trial. Members suggested that “negate” or “prevent” would be a better word choice than “impair.” The members decided to use “prevent.” Judge Tang noted that the restyling eliminated the current rule’s superfluous introductory phrase “in a criminal case.”

Rule 10.1(b) concerns the “procedure” for a change of judge for cause. The current rule is a single paragraph; the draft rule consists of three distinct provisions (“motion, timing, and form,” “further action by judge,” and “preserving error.”) The current rule states that a party “may” file a motion supported by an affidavit requesting a change, but the draft rule, based on a comment to the current rule, changed this to “must.” The words “of the moving party” after the word “affidavit” were deleted as superfluous. The members discussed the timing of the motion, and whether the provisions of the rule should allow a party to move for a change of judge for cause after a hearing or trial begins if the moving party discovers new information at that time. Some members believed that the current rule explicitly prohibits this, it would be disruptive to allow the motion after the start of trial, and making this change would be substantive rather than stylistic. Other members believed it would serve judicial economy to allow consideration of the motion, even if a trial was in progress, because it might avoid a retrial if an appellate court later reversed the verdict because the trial judge was prejudiced. One member took a middle ground and suggested the rule should permit the motion, but only if the grounds were other than remarks the judge made during the course of proceedings. The members also considered the cases of *State v Rossi* and *State v Curry*, but they were unable to reconcile the language of these opinions. The Chair requested the workgroup to review the cases further and to make its recommendations at a future meeting.

With regard to the provision concerning further action by the judge, Judge Tang explained that the workgroup considered its practical application in a jurisdiction with one judge or a limited number of judges. The last sentence of the draft allows the challenged-presiding judge the administrative authority to assign the case to another judge, but not to hear the motion. The workgroup will reexamine the provision on “preserving error” in connection with the issue discussed in the preceding paragraph.

The title of Draft Rule 10.2 is “change of judge as a matter of right” because the rule uses this term in its body. (The current rule is “change of judge upon request.”) The workgroup did not make changes to Rule 10.2(a) (“entitlement”), but the draft reorganized the provisions of this rule. The members proceeded to discuss the avowal requirement of Rule 10.2(b) (“procedure”). The draft rule mirrors the current rule by requiring an avowal, including an avowal by an attorney as an officer of the court, that the party is not requesting a change of judge under this rule for one of 7 specified reasons. The members’ focus was on the seventh reason, reason (G) of the draft, which requires an avowal that the request is not to “obtain an advantage or avoid a disadvantage in connection with a plea bargain or sentencing....” A judge member characterized this avowal as disingenuous because those advantages are probably the most common purpose for requesting a change of judge, and because those advantages are in the clients’ best interests. He thought the rule had the unintended consequence of causing attorneys to be less than candid with the court. Members discussed the history of the avowals, which began on an experimental basis and subjected attorneys to discipline for any breach. Attorneys can abuse the right to a change of judge, especially in smaller jurisdictions or those with elected judges. However, another member noted that the avowals were the result of a compromise with those who believed the right to a preemptory change of judge should not even exist. At the Chair’s suggestion, the members agreed to recommend that the Court eliminate the seventh avowal, but concurrently to note for the Court that this would be a substantive change in the rule.

The members concluded with a brief discussion of the meaning of a “side” under Rule 10.2, and if a request by one defendant requires severance of any co-defendants who had not filed a request. In practice, the court frequently reassigns the co-defendants to the new judge. However, the court may sever the defendants’ cases if the co-defendants have significantly different arraignment dates, or for other reasons. The rule should permit judges to have discretion. The discussion ended at draft Rule 10.2(b)(3).

5. Roadmap; call to the public; adjourn. The next meeting is set for June 17, 2016. The Chair will assign additional rules to the workgroups before that date. The Chair again acknowledged the importance of fully discussing the issues, but added that the Task Force needs more time for these discussions. Rather than set additional meeting dates, the Chair proposed lengthening the times of currently scheduled meetings. The June 17 meeting therefore will begin at 10 a.m. and conclude at 5 p.m. If a longer meeting is not productive, the Chair may instead schedule meetings that are more frequent.

In response to a call to the public, Mr. Belatti commended the work of Task Force members. The meeting then adjourned at 2:05 p.m.

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

State Courts Building, Phoenix

Meeting Minutes: June 17, 2016

Members attending: Hon. Joseph Welty (Chair), Hon. Kent Cattani, Hon. Sally Duncan, Timothy Eckstein, David Euchner, Hon. Richard Fields, Hon. Pamela Gates, Bill Hughes by his proxy Josh Fisher, Hon. Eric Jeffery, Kellie Johnson, Amy Kalman, Prof. Jason Kreag, Jerry Landau, Hon. Mark Moran, Aaron Nash, Natman Schaye, Hon. Paul Tang, Kenneth Vick

Absent: Paul Ahler, Hon. Maria Felix

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

1. **Call to order; introductory comments; approval of meeting minutes.** The Chair called the fourth meeting of the Task Force to order at 10:02 a.m. He introduced Mr. Fisher, who is attending as Mr. Hughes’ proxy. There have been 26 workgroup meetings to date, and the Chair commended the workgroups for their diligence. The Chair requested members to submit to workgroup chairs any comments on pending rules, and that they inform workgroups of issues that require further consideration. Workgroups should attempt to reach consensus on those issues in advance of Task Force meetings, or they should flag potential issues in advance of the plenary meeting. The Chair added that members should not construe his request as limiting comments during a meeting, which will continue to be open for full and complete discussions. The Chair then asked members to review the draft May 13, 2016 meeting minutes, and a member made the following motion:

Motion: To approve the draft minutes. Seconded, and the motion passed unanimously. CRTF-004

The Chair advised that today’s meeting materials included a memo from Judge Gates concerning Rule 10. The Task Force will revisit that rule, as well as Rule 7, Rule 1, and Rule 35, which Rule 1 now incorporates. The members will then proceed to Rules 13, 3, 8, 14, 9, 16, 34, and 6. Ms. Graber will continue to make on-screen changes during the course of the meeting to allow members to review changes in real time. The Chair will assess at the end of the session whether a seven-hour meeting has been productive and effective, and whether another extended meeting would be appropriate.

2. **Assignment of new rules to the workgroups.** Before discussing the above-referenced rules, the Chair assigned new rules to the workgroups, as follows:

Workgroup 1 – Rules 20 and 24

Workgroup 2 - Rule 32

Workgroup 3 - Rules 17, 22, and 23

Workgroup 4 - Rules 18, 19, 21, and 25

3. **Workgroup 1.** Judge Duncan and Mr. Rogers led the discussion on Rules 1 and 35.

Rule 1 (“Scope, purpose and construction, computation of time, definitions, size of paper, and other general provisions”) and Rule 35 (“form, content, and service of motions and requests”). Judge Duncan noted that she received a comment concerning Rule 1 from Judge Gates, and the workgroup will consider this comment at its next meeting. Mr. Rogers specifically explained how the workgroup’s draft of new Rule 1.9 incorporates current Rule 35. The workgroup agreed that these provisions were more appropriately located within Rule 1, along with other rules for filing and service, and that they belong at the beginning of the set of criminal rules rather than being one of the last rules. Mr. Rogers suggested that the text of Rule 16 also include a brief cross-reference to Rule 1.9. The adoption of Rule 1.9 would result in the abrogation of Rule 35, and this may require renumbering of subsequent rules, or Rule 35 may be a placeholder for a new rule.

A member suggested, and the Task Force agreed, to change a provision in draft Rule 1.9(a). The current draft states that a motion must include a memorandum that states “pertinent facts, arguments, and authorities supporting the motion.” The change uses the phrase, “facts, arguments, and authorities that are pertinent to the motion.” This change should permit briefer motions on routine matters, such as a motion to continue or a stipulated motion. The members also discussed the mechanism under draft Rule 1.9(f) for submitting a proposed order. Attorneys often submit the order directly to a judge’s chamber; some also file a “notice of lodging” with the clerk. Mr. Rogers noted that a judge may not make changes to a filed document, so it is important that parties not file proposed orders. Mr. Nash noted that Civil Rule 5(j) precludes the filing of a proposed order. Maricopa County has different systems for electronic filing in civil and criminal cases. Proposed orders pass through the civil e-filing system without actual filing. Mr. Nash said that Court may amend the civil rule later this year, and Task Force members should be alert for those amendments. Meanwhile, members criticized the current draft of Rule 1.9(f) for providing insufficient guidance to filers about what they need to do with a proposed order. But the Chair noted that although vague, the current process for submitting proposed orders has functioned adequately over recent years. As a compromise, members agreed to add the following sentence to draft Rule 1.9(f): “Absent a notice of lodging, proposed orders will not be part of the record.”

Other Rule 1 topics of discussion included the following:

- Mr. Rogers explained how an increase in the font size to 13 point [Rule 1.6(b)(1)(B)] resulted in corresponding increases in the page limits of a motion, response, and reply under Rule 1.9(c).
- In response to a question about the meaning of “next day” in Rule 1.3(a)(4), Mr. Rogers explained the derivation of this definition from the federal rules, and how it was incorporated into the civil rules restyling. The concept of “next day” is a protocol for counting days before and after an event. It provides a method of counting backward from a date, for example, when a judge says that parties must file memorandum 10 days before a hearing. In addition, it provides for counting forward when calculating a deadline after an event, e.g., the judge says the memo is due 10 days from today. The Chair agreed that because Arizona’s civil rules and the federal rules use the “next day” terminology, it is likewise appropriate to include this in the criminal rules.
- A judge member inquired about the meaning of the phrase “public welfare” in the second sentence of Rule 1.2. Members proposed alternative phrases, but decided to retain the draft as it now appears.
- Members also reviewed the definitions in draft Rule 1.4. They were satisfied that the definition of “defendant” included defense counsel when it is warranted by the context. The inclusion of “chief justice and justices” in the definition of “magistrate” was not redundant but rather conforms to the corresponding statutory definition. Mr. Landau submitted several pre-meeting comments concerning these definitions that the workgroup will review at its next meeting.

4. Workgroup 4. Judge Tang and Judge Gates followed up on pending issues under Rule 10.

Rule 10 (Change of judge or place of trial). Does a party’s failure to assert a change of judge for cause before the start of trial preclude a later request based on something the party learns during the proceeding? How does a party preserve for appeal a Rule 10.1 request for a change of judge? Judge Gates characterized these issues as complex. A party in these circumstances must take some action, and cannot simply wait for the outcome of the trial. This concept is codified in draft Rule 10.1(b)(4), which is derived from a comment to the existing rule. However, the rule does not specifically address how a party preserves a challenge for cause for appeal. One member suggested that a rejected challenge might be a structural error, which is inherently preserved. Another member thought an appellate court might review the record for fundamental

error. A judge member wanted to include more guidance on how a party could preserve the challenge, and noted that a motion for new trial may be untimely because a party has a limited time to raise a Rule 10.1 challenge. Another judge suggested that the rule should provide only that the challenge “may be appropriately preserved for appeal.” Judge Tang observed there are so many potential scenarios where the issue might arise that the Task Force should simply defer to case law rather than incorporate anything into a rule. The Chair suggested as an alternative that the rule instruct that a party has a right to make a record for review. After further discussion, the members agreed to the following changes.

- The first two sentences of draft Rule 10.1(b)(1) were consolidated into a single sentence by the elimination of extraneous verbiage.
- The last sentence of draft Rule 10.1(b)(1) now includes the principle expressed in draft Rule 10.1(b)(3), and the latter provision was deleted. Rule 10.1(b)(1) now provides that a party may preserve for appeal any allegations of prejudice that arise after commencement of a trial “by making an appropriate motion.” The members believed that this language was preferable because it did not specify what the motion should be; that motion is contingent on the circumstances. An “appropriate motion” may, but need not be, a motion for new trial. The members left as an open question whether the phrase “preserved for appeal” encompasses a special action proceeding. A straw vote indicated the members’ approval of the modified provision, with 10 in favor and 3 opposed.
- The members agreed to delete draft Rule 10.1(b)(4) (“waiver”), although the Task Force may retain the principle stated in that provision as a comment to the rule.
- The members also discussed whether the operative word in Rule 10.1 should be after a trial “commences” or after a trial “begins.” Some members believed that “commences” has legal meaning, but others thought that “begins” would have an equivalent meaning. The preference of most members was to use “begins,” and although exceptions might exist, they will attempt to use the term “begins” throughout the rules. (For examples, the members changed Rule 10.2(e) from “commencement of trial” to “beginning of trial,” and Rule 10.3(d) from “allows a proceeding to commence” to “allows a proceeding to begin.”)

Rule 10.2(a)(1) provides in part that “each side in a criminal case” is entitled to a peremptory change of judge. The members initially believed the phrase “in a criminal case” was obvious and superfluous, but Judge Gates explained the significance of those words under applicable case law, and the draft will retain them. The members also

discussed language in Rule 10.2(b)(2) that provides, “an attorney’s avowal is in the attorney’s capacity as an officer of the court.” Does that phrase need to be included whenever the rules refer to an attorney’s representations to the court? If not, why are those words included in Rule 10.2(b)(2)? Judge Gates provided the history of the rule. She stated it was the result of compromise, and the rule incorporates this language to remind attorneys of the significance of this avowal. The members agreed to retain the “avowal” phrase in Rule 10.2(b)(2), and also agreed that it did not require inclusion elsewhere. Rule 10.2(d)(3) regarding multiple defendants derives from current Rule 10.5(a). Members noted with approval that the language in the draft rule was discretionary. A member had a question concerning the interpretation of Rule 10.2(f). After discussion, the members believed that a party who had an unused 10.2 right following a remand could then notice the judge who did the original trial and sentencing. The draft rule does not resolve whether that right still exists following the remand of an aggravation or penalty phase in a capital case.

Because of revisions to draft Rule 16, the workgroup changed a reference in current Rule 10.3(c) from “omnibus hearing” to “pretrial conference” in the draft rule. Draft Rule 10.3(e) renews rights under Rule 10 upon an appellate remand “on one or more offenses charged in an indictment or information...” The members agreed to delete the words “in an indictment or information” so that the rule is applicable to remands of offenses charged by complaint. In draft Rule 10.4, the members agreed to change “transferor county” to “transferring county” and “transferee county” to “receiving county.” They also changed a requirement that the sheriff “transfer the defendant” to one that requires the sheriff to “transport the defendant.”

5. **Workgroup 3.** Judge Jeffery updated the members on proposed changes to Rule 7.

Rule 7 (“Release”). Judge Jeffery noted that draft Rule 7.2 now includes an express reference to A.R.S. § 13-3967(b), as previously suggested by the Task Force. The workgroup considered reiterating the statutory factors within the body of the rule, but there are numerous factors and the cross-reference should sufficiently alert stakeholders to the existence of those factors. Mr. Landau noted that Rule 7 includes references to both “bail” and “bond,” and the Court’s Fair Justice for All Task Force is having on-going discussions about the distinctions between these two terms. Those discussions may result in proposals for statutory changes, but those distinctions are not a matter the CRTF needs to consider at this time. Judge Cattani noted that unlike the current rule, Rule 7.1 does not describe an appearance bond as a written form. The members therefore agreed to modify draft Rule 7.1(b) by defining an appearance bond as a “written promise.”

6. **Workgroup 4.** Mr. Nash presented a new rule to the Task Force, Rule 13.

Rule 13 (“Indictment and Information”). Rule 13.1, “definitions and nature,” was restyled. The members added the words “and dismissal” to the title of Rule 13.2, which is now “timeliness of an information and dismissal.” Rule 13.3 concerns “joinder.” Rule 13.3(c) concerns “consolidation,” and provides that the court may consolidate proceedings “on motion or on its own.” The members discussed whether it was necessary to use that phrase, but decided to retain it for clarification. A member of Workgroup 2 noted that Rule 6 uses similar phrasing. Rule 13.4 deals with severance. One member proposed revisions to draft Rule 13.4(a) that included deletion of the phrase “necessary to promote a fair determination.” A Workgroup 4 member noted that this phrase is significant in the applicable case law, and the members accordingly retained it in the draft rule. The member also suggested that draft Rule 13.4(a) contained unnecessary verbiage in a single long sentence. Without changing the meaning of the rule, the members agreed to revisions that deleted that verbiage. Draft Rule 13.4(b), “as of right,” as well as the current rule, includes a reference to the rules of evidence. Inasmuch as the rule requires “admissible evidence,” a member thought the subsequent phrase, “under the rules of evidence,” was unnecessary. The members agreed and deleted that phrase. The members made minor edits to Rule 13.4(c) (“timeliness and waiver”). The workgroup’s changes to Rule 13.5 (“amending charges; defects in the changing document”) were primarily stylistic.

7. **Workgroup 1.** Mr. Vick presented Rule 3.

Rule 3 (“Arrest warrant or summons upon commencement of criminal proceedings”). Mr. Vick noted that this rule uses the term “peace officer,” which is the term utilized in corresponding statutes. A member suggested, and the Task Force agreed, that the title of Rule 3.1(e) (“warrants in ATTC cases”) should include the word “criminal” before “ATTC” to distinguish criminal citations from civil traffic citations. In Rule 3.2(a)(5), the members also agreed to delete the word “secured” before the words “appearance bond,” so the rule now encompasses secured as well as unsecured bonds. A member suggested that Rule 3.2(b)(3), which requires a defendant to appear for ten-printing, specify that a defendant charged with a felony must report to the sheriff. However, the members thought the current language, which requires the defendant to report to the “applicable law enforcement agency,” was sufficient.

Draft Rule 3.3(b), concerning the execution of warrants, stated in part, “the officer does not need to possess the warrant when the arrest is made.” The members discussed whether “possess” should instead be “present,” but decided on the former. They made stylistic revisions to draft Rule 3.3(c). Draft Rule 3.3(d) concerns a defective warrant. The

members discussed whether the most appropriate word was “invalid” or “invalidated,” and ultimately rephrased the first sentence of this rule to state, “A defect in form does not invalidate the warrant or require release of a person in custody.” The members did not change the second sentence of this draft rule, which states, “A magistrate may amend a warrant to correct a defect in form.” Rule 3.4(c)(2) permits service of a summons on an individual “at the individual’s dwelling or usual place of abode....” The members discussed whether the rule should instead refer to the individual’s “residence,” but they retained the existing language because it conforms to the proposed civil rules on service. Similarly, and following discussion, the members retained the draft provisions regarding service on a minor because they too conform to proposed civil rules.

8. Workgroup 3. Judge Jeffery presented Rules 8, 34, and 9.

Rule 8 (“Speedy trial”). Draft Rule 8.1(b) provides a preference for the trial of a defendant “whose pretrial liberty may present unusual risks....” The members discussed how this phase might apply. One member suggested that it might be applicable where a defendant has a medical issue. In any event, because the phrase appears in the current rule, the members retained it in the draft. The members made restyling changes to draft Rule 8.1(c) (“duty of the prosecutor”), and deleted unnecessary verbiage in draft Rule 8.1(d) (“duty of defense counsel.”) They made no changes to Rule 8.1(e) (“suspension of Rule 8.”)

To improve clarity, the members made a couple revisions to Rule 8.2(a): they changed “subject to Rule 8.4’s exclusions” to “subject to Rule 8.4;” and they shortened the phrase “the court having jurisdiction over an offense” to simply, “the court.” They made minor restyling changes to the remainder of Rule 8.2(a). In Rule 8.2(b), the members changed “person” to “defendant.” Time limits for complex cases specified in current Rule 8.2(a)(3) include a special provision for cases filed between December 1, 2002 and December 1, 2005. The members did not discern why those cases were exceptional, and regardless, there are probably very few such cases, if any, that now are still pending, and accordingly, the members deleted the provision. The members changed the time requirement for a new trial under draft Rule 8.2(c) from “60 days after the court order is filed” to “60 days after entry of the court’s order.” This change recognized that there could be a delay between the entry and the filing of the order, which should not reduce the time for a speedy retrial. Although the members agreed to change the phrase in Rule 8.2(c) from “must commence” to “must begin,” it precipitated another discussion about the legal significance of the word “commence.” The members then agreed to include a comment, which would state that by changing “commence” to “begin,” the members did not intend a substantive change or an alteration of existing case law. The anticipated comment may be either to a specific rule, or within a general prefatory comment. Draft Rule 8.2(e) provides that the superior court must set a specific trial date at the

arraignment or at a pretrial conference. The members discussed whether this provision enhanced or posed an obstacle to good case management. The members made no substantive changes to the rule after that discussion, but they did reorder the phrases of this section for better syntax.

The draft of Rule 8.3 (“prisoner’s right to a speedy trial”) referred to “the prosecutor with the duty of prosecuting” the charge. The members agreed to change this to “the responsible prosecuting agency.” The members also agreed that “the State” was not an appropriate substitute for this phrase in the context of this particular rule.

Draft Rule 8.4 (“excluded periods”) includes in paragraph (a) the phrase “whether or not willful or intentional.” This phrase does not appear in the current rule, but similar language is contained in the comment to the current rule, and the members agreed to retain this phrase in the draft. Draft Rule 8.4(e) excludes delays “resulting from continuances under Rule 8.5.” The members discussed whether this applied to continuances requested by a defendant, or also to a continuance requested by another party. The members decided that no changes to this provision were required. The draft of Rule 8.4(f) failed to include particular language of the current rule, which provides that in certain circumstances involving joinder, “severance should be granted to preserve the applicable time limits.” After discussing Rules 13.3 and 13.4, the members agreed to add that phrase to the draft.

The title of draft Rule 8.5 is “postponing a trial date.” A member noted that the word “continuances” is part of the court’s everyday vernacular, and the Task Force should use forms of that word rather than variations of “postponements.” Another member supported this change and observed that “continue” suggests the proceeding has already started, whereas “postpone” implies delay. The members agreed to revert to the word “continuance.” The member also agreed to a more concise phrasing for Rule 8.5(a) (“motion”), but retained in the rule a requirement that the motion state the specific reasons for the request. The members also agreed to rephrase Rule 8.5(b) (“grounds”) to reduce its verbosity. The members rejected a suggestion that a motion to continue should include a certificate of good faith. They also discussed Maricopa County’s Rule 8 Guidelines, which appear after the current rule, and whether to retain them in whole, in part, or as a modified comment. The members agreed to delete the guidelines from the draft in their entirety.

The members improved the phrasing of draft Rule 8.6 (“denial of speedy trial”) following several proposed changes shown on-screen. In draft Rule 8.7 (“accelerating trial”), the members discussed whether special circumstances might exist, other than those particular to the victim, which might warrant acceleration of a trial date. The members concluded it would be appropriate to add to this provision these words: “...special circumstances relating to the victim or other good cause...” A judge member

noted that although this change conforms to current practice, it is a substantive change that the Task Force should note for the Court.

Rule 34 (“Subpoenas”). Judge Jeffery noted that the workgroup added a new Rule 34(a) as an introduction to the rule on subpoenas. The workgroup restyled Rule 34(b) concerning the alternative form of subpoena. In Rule 34(c), it changed “magistrate court” to “municipal court.” It also deleted a portion of the text of the comment to the current rule, but it retained statutory references in this comment that govern subpoena requirements in criminal cases. Rule 41 includes two pertinent forms. To link these forms to Rule 34, the Task Force agreed to add a new sentence to Rule 34(a), “the subpoena must be substantially in the form shown in Rule 41, Form 27(a).” It also added a new sentence to Rule 34(b), “the alternative subpoena must be substantially in the form shown in Rule 41, Form 27(b).”

Rule 9 (“presence of the defendant, witnesses, and spectators”). Mr. Vick proposed simplified language for Rule 9.1, which the members adopted. Rule 9.1 includes the phrase “if the defendant had notice....” The members discussed whether notice needed to be actual and personal, or whether it could be implied or constructive notice. The members decided that the rule did not require this level of specificity, and that “notice is notice.” The final provision the members discussed at the meeting was Rule 9.2(b). There were two issues. First, does the phrase “if the defendant personally assures the court” permit defense counsel to make assurances to the court on defendant’s behalf? Second, “must” or “may” the court grant the defendant a reasonable opportunity to return to the proceeding if the defendant gives those assurances? The workgroup will consider these issues when it reconvenes.

9. Roadmap; call to the public; adjourn. The Chair reminded the members to send any comment on pending rules to the workgroup chairs early enough to allow for their consideration by the workgroups. This preliminary review process should expedite Task Force meetings. The Chair believes that another extended Task Force meeting is necessary to stay on schedule. The next meeting is Friday, July 29, 2016. The members’ preferred hours for the meeting were 9:30 a.m. to 4:30 p.m.

There was no response to a call to the public. The meeting adjourned at 4:46 p.m.

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

State Courts Building, Phoenix

Meeting Minutes: July 29, 2016

Members attending: Hon. Joseph Welty (Chair), Paul Ahler, Hon. Kent Cattani, Hon. Sally Duncan, Timothy Eckstein, David Euchner, Hon. Maria Felix, Hon. Richard Fields (by telephone), Hon. Pamela Gates, Bill Hughes, Hon. Eric Jeffery, Kellie Johnson, Amy Kalman, Prof. Jason Kreag by his proxy Mikel Steinfeld, Jerry Landau, Hon. Mark Moran, Aaron Nash, Natman Schaye by his proxy Kirsty Davis, Hon. Paul Tang (by telephone), Kenneth Vick (all members present)

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

Guests: Joey Hamby

1. **Call to order; introductory comments; revised meeting schedule; approval of the meeting minutes.** The Chair called the meeting to order at 9:30 a.m. and introduced the proxies. The Chair commended the members' work and noted the workgroups have met 32 times to-date. The members have invested more than 600 hours of their time in Task Force and workgroup meetings, which does not include the members' additional time reviewing and researching rules outside of meetings. The Chair advised that the members' discussions during Task Force meetings add value to their work product, but those discussions are time-intensive. Accordingly, he made two suggestions for making the most efficient use of Task Force time during future rules presentations. First, a workgroup should request, if a rule is brief and the workgroup's restyling is non-substantive and uncontroversial, that the Task Force approve the rule by acclimation. Second, when presenting a rule to the Task Force, the presenter should try to proceed through the entire rule before opening the rule for discussion.

The Chair added that to meet the goal of distributing a vetting draft to stakeholders this fall, the Task Force should schedule an additional meeting. After discussion, the members agreed to convene on Friday, August 26, 2016, from 9:30 a.m. to 4:30 p.m. Also, the October 27 Task Force meeting conflicts with the Court's Leadership Conference, and the members agreed to reset that meeting to October 21, 2016.

The Chair then asked members to review the draft June 17, 2016 meeting minutes, and a member made the following motion:

Motion: To approve the draft minutes. Seconded, and the motion passed unanimously. CRTF-005

2. **Workgroup 2: Rule 6 ("Attorneys, appointment of counsel").** Judge Cattani presented this rule. He acknowledged several revisions Mr. Vick proposed before the

meeting, and then proceeded with an overview of the workgroup's revisions. The workgroup modified Rule 6.1(a) ("right to counsel, right to a court-appointed attorney; waiver of the right to counsel") to state clearly that there is a right to counsel regardless of the nature or level of the offense. However, there are distinctions in Rule 6.1(b), ("right to a court appointed attorney") concerning when appointment of counsel is a right, and when it is discretionary. The workgroup restyled Rule 6.2 ("appointment of counsel for indigent defendants"). Rule 6.3 concerns the duties of counsel and withdrawal. Section (c)(2) clarifies that when moving to withdraw from a case that is set for trial, counsel does not need to give the name of substitute counsel when withdrawal is on ethical grounds. Rule 6.3(d), the duty of defense counsel to preserve the file, currently applies only to capital cases; the workgroup's draft would apply the rule to all criminal cases. However, Rule 6.3(e), the duty of successor counsel to collect the file, would continue to apply to capital cases only. Rule 6.3(d) raises the issue of how long defense counsel need to retain the file. The members briefly discussed applicable rules and policies, including one that would require preservation as long as defendant remains in custody, and another that would require preservation until the judgment is no longer subject to modification. The members might consider codifying this time requirement when it reviews Rule 28.

Rule 6.4 concerns the determination of "indigency" and it includes a definition of that term. The members considered relocating the definition into Rule 1.4 ("definitions"), but decided it should remain in Rule 6. However, after further discussion, the members agreed that the definition should move to Rule 6.1. In Rule 6.5 ("manner of appointment"), and following their convention, the members changed the word "commenced" in section (d) to "begun." The members considered moving Rule 6.6 ("appointment of counsel on appeal") into Rule 31, but after discussion, it will stay where it is currently. Rule 6.7 ("compensation of appointed counsel") was restyled. The draft eliminates circumstances where the defendant makes partial payments directly to court-appointed counsel, although current Rule 6.7(d) allows this.

Judge Cattani noted that the workgroup spent considerable time on Rule 6.8 ("standards for appointment and performance of counsel in capital cases"). He advised that the workgroup met earlier this week, and the version of Rule 6.8 projected on-screen in the meeting room contains the workgroup's additional revisions. The workgroup's earlier draft had incorporated the comment to Rule 6.8 in the body of the rule; the most recent version reversed that decision and retained the substance of the provision, with modifications, as a separate comment. One of these modifications requires counsel to demonstrate for the court a specific need concerning how the guidelines apply in a particular case; merely citing a guideline is insufficient, for example, to support a request for additional resources. The draft of Rule 6.8(a) ("generally") reorganized the requirements for trial, appellate, and post-conviction counsel so each of the subsequent sections did not repeat qualifications that applied to all three. The draft of Rule 6.8(a)(2)

Draft Meeting Minutes

refers to practice “in the area of state criminal litigation.” A member suggested that the rule require experience “in the area of criminal defense litigation,” which would preclude prosecutorial experience; the current rule does not contain this limitation, and the members did not add it. Another member thought the rule should simply allow practice “in the area of criminal litigation” to permit federal court practitioners to qualify. After discussion, the members agreed that the rule should require “criminal litigation in Arizona state court....” A similar modification was made to Rule 6.8(b)(1)(A). Non-capital federal experience would qualify under Rule 6.8(b)(1)(B). Rule 6.8(a)(5) added the 2008 “supplementary guidelines,” which the workgroup believes is necessary and appropriate, although this is a substantive change because it is not in the current rule. In Rule 6.8(c)(2), the members agreed to add “merits briefing,” so appellate counsel who had prepared only *Anders* briefs would not qualify under the rule.

The Chair then asked if there were other suggestions concerning Rule 6, which led to the following comments (shown in italics).

- *Rule 6.1(a) should include the right “to retain” as well as “to be represented by” counsel. After discussion, the members declined to add, “to retain.”* The members also discussed moving the second sentence of the draft rule (which states in part that the right “includes the right to consult, etc.”) to a subsequent section, but they also declined to make that change.
- *Rule 6.1(d) (“unreasonable delay in retaining counsel) needs further revisions for clarity.* The members then agreed to on-screen changes that distinguished between (1) an indigent defendant who refused an appointed attorney, and (2) a defendant who is not indigent but who had a reasonable opportunity to obtain counsel. A judge member emphasized that in either situation, the court should engage in a colloquy with the defendant to confirm the underlying circumstance; this is a best practice rather than a procedural rule.
- *Rule 6.4(b), the rule on the financial resources questionnaire, should contain a specific reference to Rule 41, Form 5(a).* However, the members noted this would be inappropriate because some jurisdictions utilize other Supreme Court-approved forms. A member suggested a phrase that the court “may” question a defendant should be changed to “must,” but after discussion the members agreed that the judge may have no need to ask questions, and the draft retained the discretionary “may.”
- *Should the last sentence of Rule 6.8(a) refer to Rule 6.8(a)(2), or to Rule 6.8(a)(1-3)?* The members agreed that it should refer only to (a)(2).

The members had no further comments or suggestions concerning Rule 6.

3. Workgroup 4: Rule 14 (“Arrestment”). Judge Tang began his presentation by noting that a new Rule 14.1 entitled “general provisions” incorporates a comment

preceding current Rule 14.1. The rule is otherwise substantively the same, although it is reorganized. Judge Tang acknowledged that the workgroup considered comments submitted by Mr. Vick and Mr. Landau in preparing its draft. The workgroup's draft included alternative versions of Rule 14.4 ("proceedings at arraignment"). The members agreed to a version that permits contested release motions at arraignment. They also reorganized that version and concurred that it adequately recognized victims' rights at arraignment. The Chair then asked the members for additional comments.

The current draft of Rule 14.1 states in part that a purpose of an arraignment is to assure defendants are provided counsel. The members agreed to add the words "if applicable" after that phrase. They also inserted "to enter a plea" into the purposes specified in Rule 14.1. Although the Task Force convention is to write rules that refer to people in the singular, they agreed that use of the plural was appropriate in Rule 14.1. They clarified Rule 14.2(c) by adding the words "notice of" in the phrase, "to receive notice of a court date by mail." Members suggested other revisions to Rule 14.2 ("when an arraignment is held") that made the rule clearer by deleting verbiage. They similarly deleted a redundant phrase - "to inform the defendant" - in Rule 14.4. In Rule 14.4(a), the members added the words "and the court accepts the plea" to address concerns that the draft language would otherwise not permit the court discretion to decline a guilty or no contest plea at arraignment.

The members had no further comments or revisions to Rule 14.

4. Workgroup 1: Rule 15 ("Disclosure"). Mr. Euchner presented Rule 15 on behalf of Workgroup 1. The workgroup made few changes to Rule 15.1(a) ("initial disclosure in a felony case"), but changed the word "items" in the current rule to "information" in the draft. In Rule 15.1(b) ("supplemental disclosure"), subpart 2, the workgroup changed a reference in the current rule concerning statements of a person who will be tried with the defendant, to simply co-defendant. The members discussed whether this is substantively different, and concluded it was not. They also discussed whether it should be limited to statements concerning the charged offense. For example, if a co-defendant engages in "free-talk" with the State about unrelated crimes, does the State have a duty to disclose those statements? The members agreed that any limitation to the term "statement," which has no limitation in the current rule, would be an unwarranted, substantive change. The workgroup suggested adding a reference in subpart 4 to "cold" experts. After discussion, the members agreed that this would be a beneficial addition, although it would be substantive, and the Chair directed the workgroup to prepare recommended text.

Rule 15.1(f) concerns the scope of the State's disclosure obligation. The workgroup recommended deleting a comment to this rule because it is inconsistent with the State's obligations. For example, there is no shield from disclosure for materials in the

possession of a prosecutor's secretary, although the comment suggests otherwise. Rule 15.1(g) ("disclosure by court order") allows a third party affected by a court order requiring disclosure to request that the order be modified or vacated. However, the draft rule did not specify whether the request would be made by the third party, or by the State on behalf of the third party. Accordingly, the members added to the draft the words "on the request of any person affected by the order." Rule 15.1(h) ("disclosure of rebuttal evidence") provides that the State must disclose the identity of witnesses the State "intends" to call on rebuttal. The members discussed changing that word to "may," but decided to retain the word "intends." The workgroup deleted existing Rule 15.1(j)(5), which holds defense counsel responsible for violating a duty under the rule, because that consequence is presumed. Members changed the words "court-ordered deadline" in Rule 15.1(j)(4)(E) to "deadline set by the court."

In Rule 15.2 ("the defendant's disclosures"), the members made minor edits in section (a), "physical evidence," in section (b), "notice of defenses," and in section (c), "contents of disclosure." Portions of Rule 15.2 were restyled similarly to provisions in Rule 15.1. Rule 15.3 concerns depositions. The workgroup at first intended to incorporate in this rule corresponding provisions of the Arizona Rules of Civil Procedure, but later decided to draft a standalone criminal rule. The workgroup discussed whether A.R.S. § 13-4072 applied to deposition subpoenas as well as trial subpoenas, and concluded that it did. However, A.R.S. § 13-4072(F) requires law enforcement officers to serve subpoenas, and members discussed whether this statutory duty should extend to service of deposition subpoenas. One concern was that this might be the customary method of serving deposition subpoenas in rural counties, and excluding this method might be problematic in those counties. Another concern was that even if the rule did not allow service under section (F), the statute would continue to authorize service in that manner. A straw vote indicated a majority of members would leave the statutory reference in the rule without specifying or limiting service to particular sections of the statute (12 in favor, 5 opposed).

Members shorted the title of Rule 15.4 by deleting the word "general" from the draft's title, "general disclosure standards." The draft of Rule 15.4(a) ("statements") began with the phrase, "the term statement includes...." By a straw poll, the members agreed to retain the word "includes" (9 in favor) rather than "means" (8 in favor). Although Rule 15.4(a) defines a "statement," that term first appears in Rule 15.1, and members discussed, but did not agree to, moving the definition to Rule 15.1. The members agreed to remove "an expert's report" from the list of items included in the definition of "statement." The members discussed, but did not change, a provision in Rule 15.4(b) ("materials not subject to disclosure") that extends the work product privilege to law enforcement officers. The members also discussed eliminating draft Rule 15.4(e) ("requests for disclosure") as being self-evident, but agreed to retain the rule

to avoid an inference that the Task Force was making a change to the process. Rule 15.4(d) concerns “use of materials.” In connection with that rule, Mr. Rogers advised that the State Bar’s Civil Practice and Procedure Committee recently drafted a civil rule that deals with sealed documents, and which might culminate in a rule petition during the 2017 rules cycle. The members agreed that a corresponding rule might be appropriate in the criminal rules – possibly in Rule 1 – and the Task Force should consider a sealing rule later this year. Members changed the words “a court may order that a party may defer” to “a court may grant a request to defer” in section (a) of Rule 15.5 (“excision and protective orders”).

The words “excluded time” in Rule 15.6(e)(3) (“extensions of time for completion of discovery”) were changed to “extending time” to avoid confusion with Rule 8 exclusions. Mr. Euchner noted that the workgroup retained a comment to Rule 15.6, which could be helpful for judges and practitioners. He asked for members’ comments on whether Rule 15.7(c) (“failure to comply”) promoted a sound policy. The workgroup left intact the substance of a recently adopted Rule 15.8 (“disclosure before a plea agreement expires or is withdrawn”). The workgroup made a change in Rule 15.9 (“appointment of investigators and expert witnesses for indigent defendants”) that would permit the court to appoint a mitigation specialist in a non-capital case. However, the workgroup recommended relocating Rule 15.9 in Rule 6. The members agreed, and the Chair directed Workgroup 2 to determine the appropriate location for these provisions in Rule 6. The Chair then asked for comments concerning Rule 15.

Members made several comments concerning rules where the Task Force could pare words, or reorganize provisions for enhanced clarity. Among them was Rule 15.1(d) (“prior felony convictions”), where the on-screen rephrasing and reorganizing process resulted in the elimination of several lines of text.

The members also discussed particular provisions of Rules 15.6 and 15.7. The members criticized Rule 15.7(c), first, for conflicting with other provisions concerning the duty to disclose; and second, for allowing a party to engage in “self-help,” that is, allowing a party to withhold disclosure without court intervention and a judicial determination that the other side failed to comply with its disclosure obligations. Several members suggested eliminating the rule. Another member proposed a modification whereby the court would suspend a party’s duty to disclose pending a judicial determination of whether the other party was not complying. However, the essence of the problem under Rule 15.7(c) is not whether one party should stop disclosure, which the rule currently allows, but whether the noncomplying party should start disclosure, which might require a court order. The workgroup should determine the process under these circumstances for a party to seek judicial relief against the noncomplying party, rather than allowing non-judicial self-help. The Chair requested a poll on eliminating

Rule 15.7(c) from the draft; 13 members were in favor and 5 were opposed, so the provision will be deleted.

The members also discussed the draft comment to Rule 15.6. Some preferred relocating the last sentence of the comment (“the entire structure of pretrial proceedings embodied in these rules depends on early and complete evidentiary disclosures”) into a new introductory provision of Rule 15.7. Other members thought the second sentence of the comment (“the court should consider the imposition of appropriate sanctions for untimely disclosure as well as nondisclosure”) needs to be in the body of either Rule 15.6 or 15.7. Otherwise, the comment is insufficient for the imposition of Rule 15.7 sanctions, because that rule deals with the failure to disclose, not untimely disclosure. The Chair directed the workgroup to review this issue and determine the process under these rules for a party to seek judicial relief, including sanctions outside the 7-day window in Rule 15.6(d), for untimely disclosure. These would be substantive changes. Judge Duncan invited members to send suggestions to her for Workgroup 1’s consideration. Meanwhile, the members agreed to delete the comment to Rule 15.6 in its entirety.

5. Call to the public. Mr. Hamby responded to the Chair’s call to the public. With regard to Rule 6.3(c)(2), Mr. Hamby noted that attorneys are not always able to provide elaborate grounds when withdrawing for ethical reasons. The Chair advised that the draft rule does not require elaboration. Mr. Hamby expressed concerns with Rule 6.3(d) and defense counsel’s duty to preserve the file. He stated that court rules do not clearly define the duration of the duty, and he cited the expense, for example, of maintaining a misdemeanor file for 7 years. The Chair responded that the Task Force thought it was reasonable to apply this rule to non-capital cases, and on occasion, it might be useful to have information from closed non-capital files in capital post-conviction proceedings. However, the Task Force might reconsider its decision if broader application of this rule does not solve any existing problems but only creates a new one.

6. Assignment of new rules; adjourn. The Chair assigned new rules to the workgroups as follows:

- Workgroup 1: Rule 26
- Workgroup 2: Rules 30, 32, and 38
- Workgroup 3: Rule 33
- Workgroup 4: Rule 27

The Chair reminded the members that the next meeting is set for August 26, 2016. The meeting adjourned at 4:17 p.m.

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

State Courts Building, Phoenix

Meeting Minutes: August 26, 2016

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

Absent: Hon. Richard Fields, Jerry Landau, Hon. Paul Tang

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

Guests: John Belatti

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

The Chair called the meeting to order at 9:41 a.m. He advised that there have been 8 workgroup meetings since the July 29 Task Force meeting, and 40 workgroup meetings to-date. He expressed appreciation for the continuing work of the members and staff.

Discussion of rules on today’s agenda will proceed in the following order: 23, 33, 16, 24, 22, and further review of 9.2 and 8(c). The Chair then asked members to review the draft July 29, 2016 meeting minutes.

Motion: To approve the draft minutes. Seconded, and the motion passed unanimously. CRTF-006

2. Workgroup 3: Rule 23 (“verdict”). Mr. Eckstein presented Rule 23. There is a new provision, analogous to an amendment to civil Rule 49 proposed by the Civil Rules Task Force, which permits a foreperson to affix initials and a juror number to a verdict form in lieu of a signature. The members concurred with this new provision. A change to Rule 23.1(b) requires jurors to assemble at “a specified time and place” rather than in the jury box.

Sections (a) through (d) of Rule 23.2 are substantively unchanged. However, unlike current section (e), which applies to aggravation verdicts in only capital cases, a revised section (e) would cover aggravation verdicts in both capital and non-capital cases. A judge member noted that if an element is inherent in an offense, the jury is not required to reach a separate aggravation verdict, e.g., if an offense is inherently dangerous, or if a prior conviction is an element of an offense. This is an issue the Task Force may discuss further when it considers Rule 19. However, to account for these circumstances and to clarify the rule, members changed the phrasing in section (e) to state that the jury must

render a verdict determining whether "...each of the alleged aggravation circumstances submitted to the jury was proven." In Rule 23.2(f) and elsewhere, the workgroup changed the term "penalty hearing" to "penalty phase," which is the statutory terminology, and the members agreed with this change.

The workgroup separated the two sentences of current Rule 23.3 into two sections. Although the term "lesser included" is commonly used, the workgroup preserved the use of "necessarily included," a term that is in the current rule, and the members agreed. The workgroup also reorganized Rule 23.4 as two sections rather than one, although the rule is substantially the same. A member suggested changing the phrase "retire for further deliberations" to "further deliberate," and the members agreed. The members also agreed to delete all of the comments to current Rule 23.

3. Workgroup 3: Rule 33 ("criminal contempt"). Mr. Eckstein began his presentation of Rule 33 by noting its historical context, including Justice Hugo Black's remark about "the unrestrained power of judges" in the area of contempt. Mr. Eckstein then advised that Rule 33.1 is currently a single sentence, but the workgroup reorganized it into subparts, and used the active rather than the passive voice. The title of the rule is "criminal contempt," and some members had concern with the circularity of describing contempt as "willfully contumacious conduct..." One member suggested "unreasonable" conduct. After further discussion, the members agreed to rephrase this as "any other willful conduct..." The members also discussed the workgroup's recommendation to retain the comment to Rule 33.1, which includes references to statutes as well as to a leading Arizona case, *Ong Hing v Thurston*. The comment also distinguishes between civil and criminal contempt, and direct and indirect contempt. The U.S. Supreme Court citations, which are decades old, might be updated, but members agreed that the comment is helpful to judges and practitioners and should be retained.

Mr. Eckstein noted a change to the title of Rule 33.2 (formerly "summary procedure," now "summary disposition of contempt.") Rule 33.2 is substantively unchanged, but the workgroup changed the word "order" in section (a) to "citation," and in section (b) changed "apprised" to "inform." Members discussed the distinctions between a citation and an order. One member construed a citation as a notice of the charge, but because this rule provides a summary procedure for acts that occurred in the court's presence, the court has already made a finding of the charge. The members thereafter agreed use the phrasing "written order reciting the grounds" in section (a), and "contempt finding" in section (b). The word "citation" remains in the title of section (a). The workgroup recommended, and the members agreed with, removal of the comment to Rule 33.2. The discussion continued with Rule 33.3. The restyled rule has a modified title, "disposition of contempt by notice and hearing." The members agreed to retain the comment to Rule 33.3. This comment distinguishes between a Title 12 contempt, where

the act must independently be a crime, and contempt under the rule, which is “contumacious” but not necessarily a crime.

Because the current rule is unclear about when there is a right to a jury trial, the workgroup added a new first sentence to Rule 33.4, which says, “the person has a right to jury trial under this rule.” However, while the statutes treat contempt as a class 2 misdemeanor, contempt under the rule has no classification. The members acknowledged that if the contemptuous conduct rises to the level of a criminal act, the person could be charged with that crime and punished accordingly. However, members were unsure about the maximum punishment for contempt under Rule 33.4 for a person found guilty by a jury without a concurrent conviction for a criminal violation. A.R.S. § 12-864 suggests that an unclassified contempt might be punished as provided by the common law. Members believed that the proposed new first sentence contradicts other parts of the rule, and they deleted the sentence. Even after that, members had concerns with the rule’s potential constitutional deficiencies, and classification and sentencing issues. The members initially agreed not to make any substantive changes to Rule 33.4, but thereafter Mr. Eckstein suggested that the workgroup could reconsider the issues raised by the Task Force. The issues include identifying circumstances where the person has no right to a jury trial, and an upper limit of punishment for contempt under this rule. If the workgroup can fashion a solution, the Task Force can include it in the petition. However, they also agreed that a separate rule petition might be the most appropriate manner of requesting those changes, rather than including the changes as a component of the Task Force’s restyling package.

4. Workgroup 4: Rule 16 (“pretrial motions and hearings”). Ms. Kalman advised that the workgroup considered comments from Mr. Landau and Mr. Vick when revising this rule. Rule 16.1(a) is substantially the same. Rule 16.1(b) has improved readability. Some members expressed concern that Rule 16.1(b) permits oral as well as written motions. Oral motions may be appropriate if they are brief and not controversial. However, oral motions might also be problematic for the court to assure victims’ rights, and members agreed that substantive motions, especially in a high volume court, should be in writing. To avoid the issue about whether a motion is or is not substantive, the members agreed to modify the draft of Rule 16.1(b) by deleting words that allow motions to be made “orally in court or filed in writing.” The court therefore has discretion to permit simple oral motions and to require that substantive motions be in writing. The last sentence of the draft rule is, “the court may modify deadlines for good cause.” This raised an issue of whether the court could modify motion deadlines generally, or only in a specific case for good cause. The members accordingly agreed to delete the words “for good cause.” The members also agreed to delete verbiage in draft Rule 16.1(c).

Draft Rule 16.1(d) would permit the court to rule on motions “when it concludes it can render a reasoned decision” without a hearing or memoranda. The members agreed that the court has this authority without a rule provision, and they agreed to delete section (d). Draft Rule 16.1(e) would preclude horizontal appeals, that is, a second decision on a previously decided motion after the court reassigns a case to a different judge. After discussion of the good cause requirement in this provision, the members agreed to keep the substance of the draft, but with the words in a different sequence. In doing so, the members’ intent was to permit the filing of motions to reconsider, which might be necessary to preserve the record, but the court need not re-determine the issue raised by the motion. Draft Rule 16.1(f) states that Rule 16 does not preclude a defendant from presenting relevant issues and properly disclosure defenses to a jury, such as voluntariness or identification. Ms. Kalman explained that section (f) is new and derives from a comment to the current rule. The members agreed that the provision was a correct statement, but one member thought the provision did not belong in the rules, or if it did, it did not belong in Rule 16. After further discussion, the members decided to delete section (f) but maintain its substance as a comment to Rule 16. Another member suggested that the comment also mention “reliability of experts,” and Ms. Kalman agreed. Except for this comment, the members agreed to delete all other comments to Rule 16.1.

On Rule 16.2(a), Mr. Euchner suggested that the rule should distinguish a motion to suppress, which is the subject of this rule, from a motion to preclude the use of evidence, for example, on *Daubert* grounds. The members agreed, and they added a new section (a) to state, “For purposes of this rule, ‘suppress’ refers to the exclusion of evidence that was unlawfully obtained due to a constitutional violation.” However, this new section would require the renumbering of the remaining sections of Rule 16.2. To preserve the designation of Rule 16.2(b), which practitioners commonly cite, the members renumbered draft Rule 16.2(a) (“duty of the court to inform the defendant”) as draft Rule 16.2(c). The members also discussed “defendant’s burden” under draft Rule 16.2(b), and whether that burden was to “come forward,” “present,” or “allege” specific circumstances and establish a prima facie case. The members agreed that “allege” was the most suitable term. They also agreed in (b)(2)(A) that “search and seizure” should be changed to “search or seizure” because one may not necessarily require the other.

Draft Rule 16 now dispenses with omnibus hearings under current Rule 16.3, and other descriptions and requirements for pretrial conferences under current Rules 16.4 and 16.5. Draft Rule 16 instead incorporates the most effective features of those current rules into a new draft Rule 16.3 entitled “pretrial conference.” Members discussed the significance of the first and last sentences of Rule 16.3(a) (“a court must conduct one or more pretrial conferences” and “in the superior court, the court must conduct at least one pretrial conference”) and decided to delete the first sentence and to retain the last

sentence with a minor modification. The members also discussed the “objectives” of a pretrial conference that are specified in draft Rule 16.3(b), some of which derive from the current rule on omnibus hearings. One member thought that in practice, pretrial conferences had little value beyond setting a trial date. Another noted the value of pretrial conferences for resolving discovery issues. A judge member observed that judges have a responsibility to engage in active case management, and this rule provides tools for fulfilling that purpose. Another judge noted that pretrial conferences provide meaningful opportunities for the court to dialogue with self-represented litigants. The members made one change to the “objectives” -- “complying with discovery requirements” is now “discussing compliance with discovery requirements.”

The members removed unneeded text from draft Rule 16.3(c) so it now simply states, “the court may require the parties to confer and submit memoranda before the conference.” A judge member observed that it might not be intuitive that judges can require parties to confer outside of court before the conference; this rule provides that authority. The members agreed that draft Rule 16.3(d) (“scope of proceeding”) may overlap with draft Rule 16.3(b) (“objectives”), but they made no changes to (d), (e), or (f).

The members then discussed the provisions of draft Rule 16.4 (“dismissal of prosecution.”) Section (a) provides that the court “may” order dismissal on the State’s motion and for good cause. Members disagreed on whether “good cause” should be a requirement, but case law appears to support the inclusion of this phrase. However, if there is not good cause to dismiss, or if the purpose of the State’s motion is to avoid Rule 8 time limits, a judge can deny the motion and require the matter to proceed, which could lead to a dismissal after jeopardy attaches. The members agreed that section (a) should provide that a dismissal on the State’s motion should be “without prejudice,” and the members added those two words to the rule. Rule 16.4(b) concerns dismissal “on a defendant’s motion.” The members agreed that the court must order dismissal if the charging document is “insufficient as a matter of law,” but the State might cure an insufficiency concerning a factual matter under Rule 13.5. However, the members also agreed to delete the second sentence of section (b) (“alternatively, the court may order amendment of the indictment under Rule 13.5.”) The members had no other suggestions concerning draft Rules 16.4 (c), (d), or (e), and they agreed to delete comments to Rule 16 except for the one to Rule 16.2 noted above.

5. Workgroup 1: Rule 24 (“post-trial motions”). Professor Kreag led the discussion of this rule. He noted use of the term “phase of trial” in Rule 24.1(a) and elsewhere in Rule 24. The restyled version of Rule 24.1(a) permits the court to order a new “phase of trial.” The workgroup added the words “on the court’s own initiative” to mirror language of the current rule, although the phrase “with the defendant’s consent,” which is already in the draft, implied that the court could make the motion.

The workgroup included a new sentence in Rule 24.1(b), which concerns timeliness: “This deadline [10 days after return of the verdict that is being challenged] is jurisdictional and the court may not extend it.” The sentence derived from a comment to the current rule. In connection with this new sentence, the members discussed the Supreme Court’s 2013 opinion in *State v. Fitzgerald*, which interpreted current Rule 24.1, and a requirement that a new trial motion must be filed within 10 days after the verdict regardless of the phase in which the jury returned the verdict. The members further discussed whether it might be more desirable for the rule to permit the filing of a new trial motion within 10 days after a verdict in the final phase of trial. For example, it might not be possible to investigate juror misconduct, which is grounds for the motion, until after the court discharges a jury at the conclusion of the final phase. One member noted that the Court adopted the current version of Rule 24.1 when multi-phase trials were uncommon, and the Task Force has an opportunity to revise the rule to reflect current processes. The members anticipate that if the Court adopts a revised rule, counsel may file a motion for new trial earlier than the conclusion of the final phase, because the motion may avoid subsequent phases of trial, and that attorneys still have a duty to timely raise issues to protect the record. However, a revised rule also would allow the filing of new trial motions after the completion of a multi-phase trial. The members agreed to refer this issue back to the workgroup for its further consideration.

In Rule 24.1(c) (“grounds”), the members discussed whether the word “prejudicial” needed to precede the word “misconduct.” Although one member suggested that this adjective should appear before the word “misconduct” in several places in Rule 24.1(c), other members thought this would be an incorrect statement of the law. For example, deciding a verdict by lot is misconduct and inherently improper. The members agreed that a comment should explain the significance of “prejudice,” and the Chair referred to the workgroup the task of drafting a comment to this rule. The members concurred with the workgroup’s recommendation in Rule 24.1(d) to change “court officer” to “court official,” and to delete the comment to current Rule 24.1(d).

Rule 24.2 is “motion to vacate judgment.” With regard to section (a) (“grounds”), and after discussing each of three specified grounds, the members agreed that the court “must” vacate a judgment if it finds any of those grounds. The current rule uses “may.” The most challenging analysis concerned the third ground, the conviction was obtained in violation of the constitution. However, members concluded “must” was appropriate because the ground is not evidence that was obtained in violation of the constitution, which could be “harmless,” but rather the conviction itself was obtained in violation of the constitution. The members agreed to delete Rule 24.2(b), entitled “previous rulings.” The members will need to revisit Rule 24.2(c), “time for filing,” once Workgroup 2 agrees on terminology regarding “perfection” of an appeal. The members maintained the distinction between non-capital and capital cases in Rule 24.2(d). They had no comments

concerning Rule 24.2(e). The workgroup recommended keeping some comments to Rule 24.2 that contain helpful practice pointers, and the members agreed.

Rule 24.3 (“modification of sentence”), like Rule 24.2(c), uses the concept of “perfection” of an appeal, and the members will similarly need to revisit Rule 24.3 on this point. The members agreed to delete the comment to Rule 24.3. In Rule 24.4 (currently “clerical mistakes” but restyled as “clerical error”), the members agreed to add back in a provision that the workgroup omitted. This is now a new last sentence to Rule 24.4 (“the court must notify the parties of any correction.”) Usually the court will provide notice by minute entry, but if a limited jurisdiction court does not use minute entries, it will need to use another method.

6. **Workgroup 3: Rule 22 (“deliberations”).** Judge Jeffery, who presented this rule on behalf of the workgroup, noted that the workgroup changed the title of Rule 22.1(a), from “retirement of jurors” to “instructions and retirement.” Some members disliked the use of the term “retirement,” but that term is used in the current rule as well as in the vernacular (a jury “retires” to consider its verdict). The workgroup also reorganized draft Rule 22.1 into three subparts. To be consistent with other revised rules, the jury retires in the charge of a “court official” rather than a “court officer.” In draft Rule 22.1(b), the court must “admonish the jury” rather than “giving the admonition” under the current rule. Current Rule 22.2(a) does not allow the verdict forms to indicate whether the charged offense is a felony or misdemeanor “unless the statute upon which the charge is based directs that the jury make this determination.” Draft Rule 22.2(b) also used this phrase. However, the members could not identify any statutes that required that determination, and they accordingly deleted the phrase from the draft rule.

Current Rule 22.3 allows the court to “read” testimony to the jury if requested. The members added that the court may order testimony “replayed.” The members made no changes to Rules 22.4 or 22.5. The members discussed retaining the impasse instruction, which is contained in the comment to Rule 22.4. However, the instruction recently was added to the RAJI, and the members agreed that rather than retaining the instruction in the comment, the comment can refer users to the RAJI. The members agreed to retain the portion of the comment to Rule 22.4 that precedes the instruction, with a minor modification (“...when it would be appropriate and might be helpful” is now “even though it might be appropriate and helpful.” The members agreed to delete the other comments to current Rule 22. They had no other changes to this rule.

7. **Workgroup 3: Rule 9.2 (“defendant’s forfeiture of the right to be present due to disruptive conduct”).** At a previous meeting, the Task Force referred this rule back to the workgroup for further review. The principle issue was whether, after the court has excluded a defendant from the courtroom, it is mandatory for the judge to allow the

defendant to return upon the defendant's personal assurance of future good behavior. The workgroup concluded that it was mandatory during the first occurrence of disruptive behavior, but discretionary thereafter, and it revised Rule 9.2(c) to incorporate this concept. The revisions from the workgroup also require the court when expelling a defendant to inform the defendant that he or she can return upon a promise to the court of future orderly conduct; that the assurance referred to above must come from the defendant and from not defense counsel (i.e., a "personal assurance"); and that it is a best practice, codified in Rule 9.2(c), that the court make periodic inquiries about whether the defendant wishes to return. The members agreed with these revisions, and found that the use of the passive voice in the draft rule was appropriate. Draft Rule 9.2(d) ("contempt") derived from a comment to the current rule, and after further discussion, and in light of the previous discussion concerning Rule 33 contempt, the members agreed to delete draft Rule 9.2(d) as well as the comment.

8. **Workgroup 3: Rule 8.2(c) ("time limits/new trial")**. The Chair requested the workgroup to reconsider this section. Current Rule 32.8(d) authorizes the trial court following a Rule 32 proceeding, to "enter an appropriate order with respect to...any further proceedings, including a new trial," but it does not specify a "speedy trial" limit. Rule 8.2(c) specifies a time limit for a new trial following an appellate court remand. The workgroup recommended a corresponding provision in Rule 8.2(c) when the court orders a new trial after a Rule 32 proceeding. This will enable the trial court to establish a new "last day." The members agreed that 90 days was the appropriate limit. However, some members distinguished this scenario from an appellate court mandate, and suggested that the 90-day limit may cause practical difficulties in some situations involving new trials under Rule 32. Others noted that the State's petition for review of a new trial order operates to stay the order under Rule 32.9(d), which mitigates the 90-day limit. The members agreed to include a new trial order from a federal court in this new provision. The new Rule 8.2(c) provision provides, "a new trial ordered by a state court under Rule 32 or a federal court under collateral review must begin within 90 days after entry of the court's order."

9. **Roadmap; call to the public; adjourn**. The Chair advised that the members have now reached consensus on 20 of the 41 criminal rules. He requested that members advise staff next week of their availability for additional meetings on Friday, October 7, and Friday, November 18. He affirmed the existing meeting dates of September 16, which is the next meeting, October 21, and December 9.

The Chair then assigned additional rules to the workgroups as follows:

Workgroup 1:	Rules 37, 39, and 40
Workgroup 3:	Rules 29 and 41
Workgroup 4:	Rule 28

This completes the assignment of all 41 rules to a workgroup.

There was no response to a call to the public. The meeting adjourned at 4:33 p.m.

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

State Courts Building, Phoenix

Meeting Minutes: September 16, 2016

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

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

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

Guests: John Belatti

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CRTF: Draft minutes rev
09.16.2016

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

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

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

State Courts Building, Phoenix

Meeting Minutes: October 7, 2016

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

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

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

Guests: None

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Elsewhere in Rule 15,

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

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

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

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

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

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

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

State Courts Building, Phoenix

Meeting Minutes: October 21, 2016

Members attending: Hon. Joseph Welty, Paul Ahler, Hon. Kent Cattani, Hon. Sally Duncan, Timothy Eckstein, David Euchner (by telephone), Bill Hughes (by telephone), Kellie Johnson, Amy Kalman, Prof. Jason Kreag (by telephone), Hon. Mark Moran, Aaron Nash, Natman Schaye, Hon. Paul Tang (by telephone), Kenneth Vick

Absent: Hon. Maria Felix, Hon. Richard Fields, Hon. Pamela Gates, Hon. Eric Jeffery, Jerry Landau,

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

Guests: Linley Wilson

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

Judge Welty called the ninth Task Force meeting to order at 9:32 a.m. He welcomed the guest and members on the telephone. He noted that there have been 53 workgroup meetings to date. He believes the Task Force should have a complete draft of the rules in November. As reminders, the Chair stated that the Task Force would file a rule petition in January, that he would like to obtain pre-petition comments, and that this is primarily a restyling effort. He also reminded the workgroups that they would need to prepare a narrative summary of the changes to each rule. The Task Force will include these narratives in an appendix to the petition that will inform stakeholders about proposed revisions. The narrative could be a single sentence stating that a rule was restyled, or it could be much longer to describe significant changes to a proposed rule.

At a later point in the meeting, the Chair asked members to review the October 7, 2016 draft meeting minutes. Members had no corrections to the draft.

Motion: A member moved to approve the draft October 7 meeting minutes. Seconded, and the motion passed unanimously. **CRTF-009**

2. Workgroup 1. Workgroup 1 then presented two new rules (Rules 39 and 26). Judge Duncan also briefly discussed Rule 37.

Rule 39 (“victims’ rights”): Mr. Vick, who presented this rule, noted that the rule is generally more readable and contains fewer, long block paragraphs. For example, the definition of “victim” is a long paragraph in current Rule 39(a) (“definitions”), but it is broken into subparts in the draft rule. The draft provision allows victims who are in or out of custody to submit a written or recorded statement to the court, but it deletes the current qualifier, “if legally permissible and in the court’s discretion,” as superfluous. The definition of “criminal proceeding” in draft Rule 39(a) is substantially shorter, and

Mr. Vick noted that the definition aligns with the pertinent statutes. (The statutes are A.R.S. §§ 13-4401, et seq.) The workgroup also added a definition of the term “identifying and locating information” that allows use of the defined term elsewhere in the rule without a long explanation of its meaning.

Draft Rule 39(b) (“victims’ rights”) makes no substantive changes to the current provisions, but the workgroup restyled and reorganized the rule for increased clarity. For example, (b)(7) is set out as a list of items in the draft rather than as a block of text, which is the format of the current rule. Draft subpart (b)(9) combines current subparts (b)(8) and (b)(9). The “exception” in (b)(10) reverts to the “as necessary to protect the defendant’s constitutional rights” standard rather than “good cause,” which is the standard provided by the 2016 amendment. The members also discussed particular paragraphs in subpart (b)(11). In paragraph (A), the members agreed to delete the proposed additional words, “after charges are filed,” to make the rule compatible with the statutes. They also agreed on the most appropriate conjunction (“and” or “but”) to use between paragraphs (B) and (C) (they agreed to “and.”) They modified language in (b)(13) (which concerns the right to terminate) so it applies to interviews but not to depositions, which are ordered by the court.

The workgroup restyled Rule 39(c) (“assistance and representation.”) The Task Force discussed subpart (3), which the workgroup titled “conflicts of interest.” Members inquired whether the intent of the provision was to address a prosecutor’s actual, ethical conflicts of interest, or whether it instead addressed routine conflicts between the points of view of a prosecutor and a victim. The members agreed that “conflict of interest” implies that the State represents the victim, and they agreed to change this title to “conflicts.” However, if the prosecutor is not enforcing a victim’s rights, it would be appropriate for the prosecutor to refer the victim to an organization that could put the victim in touch with independent counsel. They therefore added the words “in asserting the victim’s rights” to this provision. Current Rule 39(c)(3) uses the phrase “appropriate legal referral, legal assistance, or legal aid agency.” The members changed this to “the appropriate state or local bar association for referral to a lawyer.” Notwithstanding the Task Force’s use of the term “the State” rather than “the prosecutor” throughout the draft criminal rules, the members concurred that in this rule, it was appropriate to use the term “prosecutor” because it refers to an individual.

The workgroup shorted the title of Rule 39(d) to “victim’s duties” and reorganized the section into subparts. Because one provision of the rule requires the prosecutor to notify the defendant and the court of an entity’s designation of a representative, the members agreed that the rule should require a corresponding notification when the entity changes the designation. Rules 39(e) (“waiver”) and 39(f) (“court enforcement of victim notice requirements”) were restyled. The members

discussed whether in Rule 39(g) (“appointment of a victim’s representative”) the court “may” or “must” appoint a representative for a minor or an incapacitated victim. The members concurred on using “must,” and noted that A.R.S. § 13-4403 provides further direction on this subject.

The members agreed to delete comments to the current rule. They had no further changes to Rule 39.

Rule 26 (“judgment, presentence report, presentencing hearing, sentence”): Mr. Euchner began his presentation of this rule by noting that the workgroup recommended deleting almost all the current comments, except for a portion of the comment to Rule 26.11 discussed below. With regard to Rule 26.1(a) and (b) (“definitions”), he inquired whether the judge makes a “finding” of guilt after a bench trial, or renders “a verdict.” The members preferred the latter. The members agreed to revise the text in Rule 26.2(b) (“time to render judgment.”) The revised draft provides that the court must enter judgment and “either pronounce sentence or set a date for sentencing under Rule 26.3.”

Mr. Euchner raised an issue under Rule 26.2(c) (“upon a death verdict”): does the court immediately enter a death sentence after a penalty phase verdict, or does the court defer entry if the defendant is pending sentencing on non-capital counts? During the discussion, it appeared that judges in Maricopa County enter the capital sentence immediately to facilitate defendant’s immediate removal to the Department of Corrections. The court may sentence the defendant on the non-capital counts at the same time, usually at defense counsel’s request, or the defendant may return later for sentencing on those counts. In Pima County, the judge defers entry of the death sentence until sentencing on the non-capital counts. The members did not reach consensus on whether the rule should make one of these procedures uniform statewide. However, Rule 31.2 provides that a notice of appeal in a capital case is sufficient as a notice “with respect to all judgments entered and sentences imposed in the case,” which forecloses the possibility of multiple appeal notices and appeals if the court sentences defendant on different counts at different times. However, Rule 24.1 requires a new trial motion “no later than 10 days after the verdict.” The immediate entry of a death sentence may preclude the defendant’s opportunity to make a Rule 24.1 motion, and the Chair suggested that the Task Force note this circumstance in its rule petition.

The title of draft Rule 26.2(d) is “factual determination.” In its revisions to Rule 17, Workgroup 3 addressed a situation when the defendant enters a plea with a later determination of its factual basis. Members accordingly agreed to delete Rule 26.2(d), subject to its discussion of Rule 17 later during the meeting and potential modifications to that rule.

In Rule 26.3(a) (“sentencing date”), the members added the word “trial” before “proceedings” in section (a)(1)(C). In Rule 26.3(b) (“time extension”), the members changed the word “must” in the phrase, “the new date must be no later than...” to “should.” The members moved draft Rule 26.6(e)(3) regarding the “admissibility” of certain statements to a more prominent location, Rule 26.4(d), and they retitled the provision, “inadmissibility.” The members discussed whether the statements referred to in the rule are by the defendant or by someone else, but they decided to make no change because the draft rule tracks the current one. The members discussed the comment to Rule 26.5 (“diagnostic evaluation”) and they agreed it was not necessary to retain it. The workgroup restyled Rules 26.6 (“court disclosure of reports”), 26.7 (“presentence hearing”), and 26.8 (“the State’s disclosure duty”), and the Task Force made no further changes of significance to these rules. The members agreed to delete the second sentence of Rule 26.9 (“the defendant’s presence”) because Rule 19.2 addresses the same subject. The members made syntactical changes to Rule 26.10 (“pronouncing judgment and sentence”).

Rule 26.11 concerns “a court’s duty after pronouncing sentence.” The workgroup revised the current rule to make it gender neutral. In section (b), Task Force members deleted “after making the disclosures in (a)” as superfluous. They agreed to retain a portion of the comment to this rule about defense counsel’s duties concerning the notice of appeal. A member noted that the comment does not include text that requires counsel to advise a pleading defendant of the opportunity to file a Rule 32 of-right petition. Although Rule 32 describes the of-right petition, the member said that Rule 26.11 should expressly provide for notice to the defendant of the right. A member of Workgroup 1 suggested a new provision in Rule 26.11(a) to address this, and the Chair sent the rule back to the workgroup to draft language for this new provision.

Draft Rule 26.12 (“defendant’s compliance with monetary terms of a sentence”) has three subparts, one less than the current rule. The members agreed that it was not necessary to include current subpart (c)(3) (“time limits – restitution and non-monetary obligations”) in the revised rule because this provision explicitly deals with the payment of obligations that do not involve the court.

The members proceeded to discuss Rule 26.13 (“consecutive sentences”). Some members wanted to remove this provision to avoid a presumption for consecutive sentences. Members reviewed A.R.S. § 13-711 and concluded that the statute does not create a presumption, but rather requires the sentencing judge to provide reasons for concurrent sentences. Members were concerned that if the Task Force removed this rule, judges may overlook the statutory requirement, which would result in more, not fewer, consecutive sentences. Removal would also imply a substantive change. To address the issue, the members agreed to keep the rule but added a new last sentence that states,

“There is no presumption for consecutive sentences.” In addition, members agreed to delete from the draft the phrase “unless consecutive sentences would be illegal” because the Department of Corrections when consulting this rule might improperly determine whether a sentence “would be illegal.”

The workgroup restyled Rules 26.14 (“resentencing”), 26.15 (“special procedure for imposing a death sentence”), and 26.16 (“entry of judgment and sentence; warrant of authority to execute sentence.”) Task Force members had no significant revisions to the workgroup drafts, which concluded the discussion of Rule 26.

Rule 37 (“report of court dispositions”): Judge Duncan advised that Workgroup 1 reviewed and made restyling changes to this rule. However, the workgroup’s presentation of this rule to the Task Force is pending its further review by Mr. Nash, and anticipated comments from Mr. Landau at the November 4 Task Force meeting.

3. Workgroup 3. Ms. Johnson and Mr. Eckstein presented two new rules, Rules 17 and 29, on behalf of the workgroup.

Rule 17 (“pleas of guilty and no contest”): Ms. Johnson began by noting a modification to the title of current Rule 17.1 (currently “pleading by defendant;” now “the defendant’s plea.”) The workgroup reorganized the body of the rule. Telephonic pleas and pleas by mail, which are currently in the middle of Rule 17.1, are at the end of the draft version. Draft Rule 17.1(f) requires a certification of defendant’s medical condition as a requisite to entering a telephonic plea. The workgroup deleted the comments to Rule 17.1 as unnecessary for an understanding of the rule, as well as other comments except as expressly noted below.

The title of draft Rule 17.2 (“advising of rights and consequences of a guilty or no contest plea”) is considerably shorter than the current title. The shortened title does not include the phrase “submitting on the record,” but this is in the immigration provision of the rule. The Task Force deleted a phrase in current Rule 17.2(f) and in the workgroup’s corresponding draft that requires the court to make an immigration statement “if [the defendant] is not a citizen of the United States.” They agreed to this deletion because another portion of the same rule precludes the court from requiring the defendant to disclose his or her legal status in this country. The workgroup restyled and reorganized Rule 17.3 (“a court’s duty, etc.”). Rule 17.3(b) is a provision for “determining a factual basis.” The members relocated text from Rule 26.2(d) to Rule 17.3(b), with modifications to the text as shown by Ms. Graber on-screen.

In Rule 17.4 (“pleas negotiations and agreements”), the members changed the current term used in section (d) (“acceptance of plea”) from “negotiated plea” to “submitted plea” in the draft. The workgroup’s draft Rule 17.4(a)(2) requires the parties at a settlement conference “to obtain settlement authority.” Some members felt this

provision is necessary to avoid prosecutors appearing at a conference without authority. However, others felt that a prosecutor without settlement authority still could attend the conference in good faith, consider discussions at the conference, and make a settlement offer thereafter. The members then revised Rule 17.4(a)(2) in a manner that conforms to this discussion. In section (a)(3), the members also added a provision for “the victim’s representative.” The workgroup’s draft of Rule 17.4(c) (“determining accuracy, voluntariness, etc.”) included language derived from a comment to the current rule, but the members removed it because it was still like a comment (it said that an oral procedure existed to ensure that the public was aware of the terms of the plea) and it had no substantive impact. The members also deleted as surplusage a provision in this section that stated the court “also must comply with Rules 17.2 and 17.3.” Rule 17.4(g) concerns an “automatic change of judge.” Members revised this section to clarify the defendant has only one change of judge under either Rule 17.4(g) or Rule 10.2.

Members approved the workgroup’s draft of Rule 17.5 (“withdrawal of a plea”), including the term “manifest injustice,” but they improved the clarity of the second sentence. One member suggested a revision that would permit “a party” to withdraw from a plea, but other members thought this would be an incorrect statement of law and maintained the term “a defendant.” In Rule 17.6 (“admitting a prior conviction”), the members discussed whether the proper term at the end of this one-sentence rule was “in open court” or “on the stand.” They concluded with an agreement to use the term “in court.” They deferred a review of the second paragraph of the comment to Rule 17.6 until Judge Jeffery was present.

Rule 29 (“restoring civil rights or vacating a conviction”): Mr. Eckstein noted that the workgroup revised the title of this rule by using verbs rather than nouns. Current Rule 29(a) refers to “probationers.” The draft version instead uses the term “persons,” which is more apt in the context of the rule. The members split on whether to retain the comment to Rule 29.1. Some found it helpful; others thought it would require repeated updating due to new statutes or changes in statutory references. On a straw vote and by a slim majority, the members agreed to retain the comment. Following discussion, the members agreed to delete the comment to Rule 29.2 (“application, etc.”) The workgroup changed “prosecutor” in Rule 29.2 to “prosecuting agency.” On the “hearing date” in Rule 29.3, the members changed the workgroup’s use of “no sooner than 30 days” to “at least 30 days.” The members modified language in Rule 29.4 (“State’s response”) to provide that the State must send its response to the applicant only if the applicant has no attorney. The workgroup rephrased Rule 29.5 (“disposition”) in the active voice and deleted the comment to the rule. Current Rules 29.6 and 29.7 pertain to sex trafficking victims. The workgroup combined both rules into a single Rule 29.6 (“special provisions for sex trafficking victims.”) It added a requirement that the clerk transmit a copy of the

order vacating the conviction to the victim. Task Force members had no other revisions or suggestions concerning Rule 29.

4. Workgroup 2. Judge Cattani presented Workgroup 2's drafts of Rules 31 and 38.

Rule 31 ("appeal from the superior court"): Judge Cattani began his presentation by requesting the members' input on several particular provisions of this lengthy rule, so the members did not discuss the rule's contents sequentially.

Draft Rule 31.8 ("the record on appeal") includes a new provision (b)(1)(B)(ii) that requires a certified transcript of "all trial proceedings" excluding voir dire. Unlike the current rule, the draft rule encompasses preparation of transcripts of opening statements and final arguments. After discussion, members agreed with the exclusion of voir dire transcripts, which might be costly and not particularly helpful on appeal, although a party may still request these transcripts. Members also agreed with inclusion of the opening and closing statements, which some counsel currently request. Members also discussed the times proposed by the draft rule. The workgroup's draft follows the current rule and requires the appellant to provide additional designations within 5 days after filing the notice of appeal; appellee's designations are due within 12 days after the notice. The appellee often does not even assess the record to determine appropriate designations until the appellee receives the opening brief and reviews the issues on appeal. If the appellant files an *Anders* brief, appellee might need nothing additional. Members agreed that these limits were impractical and should be longer. Accordingly, they agreed that the appellant would have 30 days after filing the notice to make additional designations, and that appellee would have 30 days after the filing of the opening brief to designate. These expanded times apply both to designating records under Rule 31.8(a), and to transcripts under Rule 31.8(b). If appellee designates additional records, and because the superior court would have transmitted the record to the appellate court before the filing of the opening brief, the members added a requirement that in this event, "the superior court must supplement the record accordingly." In draft Rule 31.9 ("transmission of the record to the appellate court"), members discussed the feasibility of the proposed provisions for rural counties, but made no changes to the draft during the discussion.

In the "definitions" section of Rule 31.1, members agreed to delete as unnecessary the definitions of "motion" and "stipulation," which came from the civil appellate rules ("ARCAP"). Members discussed moving the definition of "entry" to Rule 1 so it had general application, but others favored retaining it in Rule 31.1 because it illuminates the time provisions of Rule 31.2. The workgroup will discuss this. Members agreed to the appropriateness of phrasing for the timing provisions of Rule 31.2. In this regard, they also considered whether draft Rule 31.2(a)(3) should require a defendant who receives an

order for a delayed appeal under to subsequently file a notice of appeal, or whether the order should serve as the notice. Because a notice of appeal specifically operates as a trigger for a variety of subsequent events, they agreed to leave the provision as it is, which requires the defendant to file a subsequent notice.

The members' revisited Rule 31.2 (they had discussed this in conjunction with Rule 26.2), and again concurred that a notice of appeal in a capital case includes subsequent sentencing on non-capital counts in that case. To avoid a "trap for the unwary," they repeated a recommendation that Rule 24.1 specifically state that an order under that rule requires the filing of a separate notice of appeal. [Staff's proposed language for a new Rule 24.1(e): Notice of Appeal. A party may appeal an order granting or denying a motion under this rule by filing a separate notice of appeal.] In the title of draft Rule 31.3 ("suspension of these rules, etc."), members deleted the words "perfection of an appeal" from the title. In draft Rule 31.4 ("consolidation of appeals"), members deleted the words "while an appeal is pending" and "while the appeal is stayed" and substituted revised text as shown on-screen. This led to a discussion about whether the appellate court "stays" an appeal, a term commonly used, or whether it "suspends" an appeal, which is the terminology used in draft Rule 31.3. The ARCAP uses the term "suspension." The workgroup will discuss further which term is most appropriate.

The members corrected a cross-reference in Rule 31.5. They discussed a new provision in Rule 31.6(d) regarding word limits. They modified the provision and deleted a requirement that "a document must average no more than 280 words per page." In Rule 31.10 ("content of briefs") section (a) ("appellant's opening brief"), the members added the word "suggested" to a phrase that now says, "in the following suggested order." They also moved up in that suggested order a "statement of the issues" so it now follows a "table of citations" and precedes an "introduction." Members made conforming changes to the numbering in Rule 31.10(j) ("amicus briefs.") In Rule 31.15 ("amicus briefs"), subpart (b)(1), they deleted a requirement in the workgroup's draft that an amicus brief state on its cover that it is filed with the parties' consent. They also modified (b)(1) to clarify that the amicus must file the consent. The members made a variety of corrections and grammatical changes elsewhere in Rule 31. Task Force approval of this rule is pending workgroup review of items noted above.

Rule 38 ("suspension of prosecution for a deferred prosecution program"): Judge Cattani noted the workgroup's straightforward restyling of this rule. After a review of pertinent statutes, the workgroup concluded that if the prosecutor files a motion for deferred prosecution under Rule 38.1 ("application for a suspension order"), and if the defendant is eligible, the court has no discretion to deny the motion; the court must grant it. A similar principle applies to a notice to resume prosecution under Rule 38.2 ("resuming prosecution.") The workgroup changed references to "the prosecutor" in this

rule to “the State.” Members agreed to delete the comments because the body of the rule incorporates Rule 8 concepts. Members had no other changes.

5. Roadmap; call to the public; adjourn. The Chair advised that the next Task Force meeting would be on Friday, November 4, 2016. He requested the members to contact staff to confirm their availability. Workgroup 4 has multiple meetings next week, and Ms. Kalman invited suggestions from Task Force members concerning Rule 11. Workgroup 2 intends to complete Rule 32 before November 4 during an extended Saturday meeting. There was no response to a call to the public. The meeting adjourned at 3:59 p.m.

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

State Courts Building, Phoenix

Meeting Minutes: November 4, 2016

Members attending: Hon. Joseph Welty, Paul Ahler, Hon. Kent Cattani, Hon. Sally Duncan, Timothy Eckstein, David Euchner, Hon. Maria Felix (by telephone), Hon. Pamela Gates, personally and by her proxy Angela Walker, Bill Hughes by his proxy Patti Wortman, Hon. Eric Jeffery, Amy Kalman, Prof. Jason Kreag, Jerry Landau, Hon. Mark Moran (by telephone), Aaron Nash, Natman Schaye by his proxies John Canby and Dan Carrion, Hon. Paul Tang (by telephone), Kenneth Vick

Absent: Hon. Richard Fields, Kellie Johnson

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

Guests: Kathy Waters

1. Call to order, introductory comments, approval of the meeting minutes.
Judge Welty called the tenth Task Force meeting to order at 9:37 a.m. He expressed his appreciation for the progress of the workgroups in reviewing all 41 rules. He reminded them to focus now on the rule-by-rule explanations that will be contained in an appendix to the Task Force’s rule petition. These explanations should be particularly helpful because the rule petition will not include a redline version of the proposed changes. To assist the workgroups in this endeavor, the meeting materials contain a table that shows the dates of meeting minutes when the Task Force discussed a particular rule. The Chair noted that the State Bar agreed to do an email blast to its members with a link to the draft rules, and the email would request pre-petition comments on a vetting draft. The Chair would like to include the members contact information in a cover message so stakeholders can contact Task Force members with any questions.

The Chair then asked members to review the October 21, 2016 draft meeting minutes. Members had no corrections to the draft.

Motion: A member moved to approve the draft October 21 meeting minutes. Seconded, and the motion passed unanimously. **CRTF-010**

2. Workgroup 4. Workgroup 4 presented two new rules (Rules 27 and 28). Kathy Waters, director of the AOC’s Adult Probation Services Division, was present during the discussion of Rule 27.

Rule 27 (“probation and probation revocation”): Judge Gates presented Rule 27. She noted that the workgroup changed the title of Rule 27.1, currently “manner of imposing probation,” to “terms and conditions of probation. The workgroup also recommended retaining a portion of the existing comment to this rule concerning probation services in

justice courts. The members discussed the comment's application, whether justice courts provide probation services for misdemeanors under state or local authority or by virtue of a memorandum of understanding, and the provision of probation services by municipal courts. Following this discussion, members agreed to delete the entire comment but added a new last sentence to this rule that states, "Unless there is an intergovernmental agreement to the contrary, references to and notice requirements for probation officers do not apply in limited jurisdiction courts."

Rule 27.2 concerns "intercounty transfers." Judge Gates explained that with a "courtesy transfer," there is no transfer of jurisdiction; the originating county retains the court's original file, and it continues to collect fines and adjudicate violations. With a "transfer of probation jurisdiction," the transferee county handles those functions. Judge Gates proposed a new Rule 27.2(a) for "definitions" of these two types of transfers, which will be forthcoming. Members revised references in Rule 27.2(b) to "the sending county" and "the receiving county" to conform to these proposed definitions, and made other restyling changes to this rule. In Rule 27.2(b)(4), members shortened the term "review hearing" to "hearing." Rule 27.2(b)(6) concerns remands for a new trial. Mr. Euchner proposed adding resentencing to this provision, but the current rule only refers to a new trial and most members believed that the transferee county would conduct resentencing following a remand. By comparison, a remand of an aggravator would give rise to a new trial, which the county of origin would conduct. Mr. Euchner will review the issue of jurisdiction and venue for resentencing following remand, and he will report back if he finds anything significant.

The current title of Rule 27.3 is "modification and clarification of conditions and regulations." The workgroup changed this to "modification of conditions." This led to a discussion about "conditions" that are imposed by the court, and "regulations" imposed by a probation officer. Although "condition" in common parlance refers to both, a probation officer can only modify a regulation. To clarify the distinction, members added definitions of these two words in Rule 27.3(a). They also changed the title of the rule to "modification of conditions or regulations." The members concurrently changed the title of Rule 27.1 to "conditions and regulations of probation" and deleted the word "term," which is a word that is in the definition of "condition," when "term" appears elsewhere in Rule 27. (An exception is where "term" refers to the duration of probation." This usage remains in the draft.) The members moved a portion of a proposed comment to Rule 27.3(c) to the body of subpart (1), which now provides that the court's authority to modify probation "must comply with due process, statutory limitations, and party agreement." [See *State v. Rutherford*, 154 Ariz. 486, 744 P.2d 13 (App.1987)] The draft rule permits the court to modify a regulation as well as a condition of probation. The members also discussed the need for oral modification of a regulation, which they concluded could be necessary in an emergency. The members relocated into draft Rule 27.3(d) the

substance of a provision in a comment to the current rule regarding oral modification, but they added that an oral modification cannot be the “sole” basis for revoking probation, and the probationer must receive a copy of the regulation “before the violation.” [Mr. Carrion arrived at this point and replaced Mr. Canby as proxy.]

In Rule 27.4 (“early termination of probation”), members discussed whether to retain in the draft two current references to “as provided by law,” or to substitute a statutory reference. They noted that the FAIR Justice Task Force may propose future revisions to this rule, and they agreed to retain the current phrasing. They also agreed to delete the words “of the offense” after the word “victim.” In Rule 27.5 (“order and notice of discharge”), they deleted the words “absolute” and “absolutely” because the order may not discharge financial obligations, including restitution, and they added the words “from probation” after the word “discharge” for further clarity. The draft rule maintains the distinction between orders entered in the superior court and in limited jurisdiction courts, because the latter may not enter formal orders in these circumstances. Members concurred with the workgroup’s recommendation to combine the two sections of current Rule 27.6 (“petition to revoke probation and securing the probationer’s presence”) into a single rule, and to delete the comments to the current rule.

The workgroup’s modifications to Rule 27.7 (“initial appearance after arrest”) include a new reference to A.R.S. § 13-901. [At this point, the Chair left the room for a presentation to the Committee on Superior Court concerning the Task Force, and the meeting continued in his absence.] Draft Rule 27.7 also reorganizes the single section of the current rule into three new sections. In Rule 27.8 (“probation revocation”), subpart (b)(1), the members deleted as unnecessary the words “in open court” after the phrase “on the record.” Members modified Rule 27.8(c)(2) so it refers to Rule 26 generally, and they rephrased the rule for clarity. The workgroup restyled Rule 27.9 (“admissions by the probationer”) and made it gender neutral.

The members proceeded to draft Rule 27.10 (“revocation of probation in absentia”). [Judge Welty returned in the course of that discussion.] Two members observed that Pima County does not utilize the procedures in this rule, and other members expressed concern with its legal basis. After a further review of Rule 27.6, members agreed to delete Rule 26.10. The members accordingly revised Rule 27.8(b)(2), which concerns the “probationer’s right to be present,” by deleting the phrase “and there is no good cause for the failure to appear.” Under the revised provision, a probation hearing may proceed in the probationer’s absence if the court previously conducted an arraignment under Rule 27.8.

Because the members deleted Rule 27.10, Ms. Graber renumbered subsequent portions of Rule 27. In renumbered Rule 27.10 (“victims’ rights in probation proceedings”), the members agreed to remove the words “as defined by Rule 39” after

the word “victim;” but they added, “who has requested notice under Rule 39.” Section (a) of the draft rule includes a reference to “probation or intensive probation.” Members changed this to “any type of probation.” The members made a few revisions to what is now Rule 27.11 (“probation review hearing regarding sex offender registration,” including inserting the word “timely” before the word “request” in section (d)(1), and deleting the words “supervising the probationer” following the words “the probation officer” in section (d)(2). In section (e), the members substituted a specific reference to A.R.S. § 13-923 for the words “by statute.” Members had no additional changes to Rule 27.

Rule 28 (“retention and destruction of records and evidence”): [Before proceeding with this rule, Ms. Walker arrived as proxy for Judge Gates.] Mr. Nash presented Rule 28 on behalf of the workgroup. The workgroup simplified Rule 28.1(a) (“retention of records and evidence”). With regard to Rule 28.1(b) (“destruction of certain records”), Mr. Nash noted that Supreme Court Rule 94 covered some of the subject matter of this rule, while the Arizona Code of Judicial Administration (“ACJA”) addressed other portions, so the workgroup only restyled Rule 28.1(b). The workgroup changed the title of Rule 28.1(c) from “original verbatim records” to “court reporter notes.” Some members questioned the necessity of this section, and observed that the criminal rules are the only court rules that contain such a provision. The Court adopted the ACJA after the criminal rules, and the ACJA includes provisions for court reporter notes. However, the members agreed to keep Rule 28.1(c), which applies to court reporters, because deleting it might suggest that reporters no longer need to retain their notes. Members modified the text with the passive voice in a manner that permits the clerk to maintain the notes. The workgroup recommended, and the members agreed, to delete comments to this rule.

The workgroup also restyled Rule 28.2 (“disposition of evidence in the custody of prosecuting agencies or law enforcement agencies”). This rule raises the issue of separation of powers, that is, whether a court rule can or should direct action by law enforcement agencies. However, the rule has existed for a considerable time, there have not been challenges to the rule on this constitutional ground, and the members’ consensus was to keep the rule. They agreed to shorten the title of the rule to “disposition of evidence.” Members then discussed whether to delete a provision in section (b) that requires an agency to dispose of an item within 30 days after a case is no longer subject to modification. A member suggested that agencies are looking for Court concerning when they can dispose of evidence. Another member believes a statute should address this subject. On a straw vote, the members with one abstention agreed to retain this provision. However, the members deleted section (a), which would have applied in circumstances when the State did not file a case. They rewrote section (b) as a new section (a) (“manner of disposition”) to provide that after a case is no longer subject to modification, and unless the court orders otherwise, the clerk must return evidence to the

party who submitted it. They discussed, but decided against, adding that the clerk could release evidence to a party's designee. Members also began rewriting the "notice" provisions of Rule 28.2, but were unable to resolve an issue about with who or where someone would request a stay of disposal when the State had not filed a case. The Chair sent this rule back to the workgroup to propose a process for this scenario.

The workgroup recommended retaining Rule 28.3 ("retroactive application") because evidence, in particular old evidence, is on infrequent occasions lost or overlooked.

3. Workgroup 1. At the October 21 Task Force meeting, Workgroup 1 deferred its presentation of Rule 37 to allow Mr. Landau, who was not then present, to provide additional comments. Workgroup 1 also presented a new rule, Rule 40, at today's meeting, and provided further reviews of Rules 1, 20, 24, and 26.

Rule 37 ("report of court dispositions"): Mr. Landau supports a restyling of this rule, but he does not recommend any substantive changes. Mr. Landau noted that too many inmates are in state prison without having a proper disposition report on file with the DPS. He has been working with a group of stakeholders that is proposing alterations in the process for submitting disposition reports to the Department of Public Safety ("DPS"), and he advised that remedial efforts of that group are continuing. A statutory change effective on January 1, 2017 will also benefit the process. That change will require the sheriff to "ten-print" every person arrested on a felony.

A disposition report is a Supreme Court-approved form that courts must provide to the DPS. With regard to the draft of Rule 37.1 ("final disposition report"), Mr. Landau suggested adding a provision in section (a) ("definition") that allows the electronic creation and transmission of the form. The "scope" in draft section (b) requires submission of a final disposition report in every criminal case "if the defendant was fingerprinted as a result of the charge or incarcerated. Draft section (c) ("timing") requires the court to send a final disposition report to the DPS within 10 days of the final disposition.

Members reorganized Rule 37.2 ("State's duty to file a disposition form with the court"). The members combined the workgroup's draft of Rule 37.2(a), (b), and (c) into a single section (a) ("generally"), with two new subparts: (1), when filing a complaint; and (2) when filing an indictment or information. Members renumbered the workgroup's draft Rule 37.2(d) as 37.2(b) ("when the defendant is fingerprinted"). The members made no significant changes to Rules 37.3 ("reporting procedure") or 37.4 ("procedure on appeal"). They agreed to delete the current comments to Rule 37. They had no other edits concerning Rule 37.

Rule 40 ("transfer for juvenile prosecution"): Mr. Euchner, who presented this rule, advised that the workgroup's changes were primarily stylistic. However, the workgroup updated a statutory reference in Rule 40(a) ("scope"). Rule 40(b) ("initiation") describes two circumstances that might give rise to a hearing. Members considered whether the court "must" hold a hearing in those circumstances, as the workgroup indicated in its draft, or whether the court had discretion to hold a hearing. After discussion and a review of A.R.S. § 13-501, members affirmed that "must" was appropriate. Current Rule 40(h) ("transfer hearing") refers to "factors provided by statute." The workgroup modified this by adding the statutory reference, A.R.S. § 13-504(D). The members also discussed language in current Rule 40(j) ("order of transfer") that requires the court to make its determination "at the conclusion of the hearing." This might be impractical, especially because another provision of this rule requires that the court state its reasons in writing. Members agreed with the workgroup's decision to restate the timing by providing that the court must make its determination "with all possible speed." Members had no further comments concerning Rule 40.

Rule 1 ("scope, purpose and construction, etc."): A definition of "entry" appears in Rule 31. During the discussion of that rule, members suggested that a corresponding explanation of "entry" should also be included in the general provisions of Rule 1. This explanation now appears as a new Rule 1.3(c), which the members approved.

Rule 20 ("judgment of acquittal or unproven aggravator"): The Task Force discussed this rule at the October 7 meeting but it did not reach consensus on Rule 20(b) ("after verdict"). The Chair directed the workgroup to reconsider the issue of whether the defendant must make a motion under section (a) ("before verdict") to preserve the opportunity for a motion under section (b). Rule 20(b) currently provides that the motion "may be renewed." Some members proposed deleting "renewed" and substituting that the defendant "may make" the motion after the verdict. These members cited *State v West* in support of their position that the defendant should always be permitted to raise an issue of insufficient evidence, which constitutes "fundamental error." Other members took the view that the intent of section (a) was to incentivize the defendant to raise an issue before submission of a case to the jury, when the issue is still curable. After discussion, the Chair requested a straw vote, which showed the members evenly divided. The Chair resolved this tie in favor of the "renew" language.

The members then discussed whether the court could enter a judgment of acquittal under section (b) on its own initiative even though a defendant had failed to make a motion under section (a). Some members believe this prerogative is of constitutional magnitude, others believed that it is part of the court's role as a "thirteenth juror," and others believed that this is simply an extension of the court's *sua sponte* authority under section (a). Whatever the basis, all of the members agreed that the court

has inherent authority to enter a judgment of acquittal after the verdict. Members then reorganized section (b), “after verdict,” into two subparts. Subpart (1) is for the defendant’s motion, and subpart (2) is on the court’s own initiative. To be consistent with section (a), section (b) provides that the court “must:” order an acquittal if it determines there is no substantial evidence to support the verdict. After further discussion, the members agreed that if the rule allows a post-verdict acquittal on the court’s motion, as a practical matter the defendant will argue that the court should entertain the motion, which is tantamount to the defendant making the motion. Therefore, the members agreed to revise subpart (b)(1) to provide that a defendant may “make or renew” the motion. Members had no further revisions to Rule 20.

Rule 24 (“post-trial motions”): Professor Kreag explained that following a discussion at a prior Task Force meeting about a potential trap for the unwary, the workgroup proposed adding a new Rule 24.1(e) to provide that “a party may appeal an order granting or denying a motion under this rule by filing a separate notice of appeal.” Members from Pima County advised that filing a separate notice appealing from the denial of a motion for new trial is not required in Division Two as a matter of practice. Furthermore, and statewide, the court customarily decides motions for new trial before sentencing, and a notice of appeal filed thereafter includes the new trial proceeding. The only possible exception would be a motion for new trial decided in a Maricopa County capital case after immediate sentencing, but the automatic notice of appeal in a capital case should extend to any Rule 24.1 issue. Members concluded that proposed Rule 24.1(e) was unnecessary.

Rule 26 (“judgment, presentence report, presentence hearing, sentence”): Professor Kreag also explained that the workgroup revised portions of Rule 26.11(a) to include in the court’s “disclosures” to a defendant the defendant’s right to seek post-conviction relief. Members approved this change. Some suggested that subpart (a)(1), which says that the court must “inform” the defendant, and subpart (a)(2), which provides that the court must “advise” the defendant, should be combined, but the members did not change this. Rule 26.16(b) (“warrant of authority”) requires the court to furnish the appropriate officer with a certified “minute entry.” Mr. Nash proposed changing this to “sentencing order” because the court now transmits these electronically. Members agreed to this change. There were no additional changes to Rule 26.

4. Roadmap; call to the public; adjourn. The Chair advised that the next Task Force meeting would be on Friday, November 18, 2016. He requested the members to focus on larger concepts in the upcoming rules, which will include new Rules 11, 30, and 32. Ms. Kalman noted that the workgroup’s draft of Rule 11 differentiates competency at the time of trial from insanity at the time of the offense, and she invited comments in

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advance of the next Task Force meeting. The Chair noted his goal of concluding these rules at the November 18 meeting.

There was no response to a call to the public. The meeting adjourned at 4:30 p.m.

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

State Courts Building, Phoenix

Meeting Minutes: November 18, 2016

Members attending: Hon. Joseph Welty, Paul Ahler, Hon. Kent Cattani, Hon. Sally Duncan, Timothy Eckstein, David Euchner, Hon. Maria Felix, Hon. Richard Fields (by telephone), Hon. Pamela Gates, Hon. Eric Jeffery, Kellie Johnson (by telephone), Amy Kalman, Prof. Jason Kreag (by telephone), Jerry Landau, Hon. Mark Moran (by telephone), Aaron Nash, Natman Schaye personally and by his proxy Dan Carrion, Hon. Paul Tang, Kenneth Vick

Absent: Bill Hughes

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

Guests: None

1. **Call to order, approval of the meeting minutes.** Judge Welty called the eleventh Task Force meeting to order at 9:34 a.m. He requested members to review the November 4, 2016 draft meeting minutes. Members had no corrections to the draft.

Motion: A member moved to approve the draft November 4 meeting minutes. Seconded, and the motion passed unanimously. **CRTF-011**

2. **Workgroup 4.** Ms. Kalman presented Rule 11 on behalf of the workgroup.

Rule 11 (“incompetence and mental examinations”): Ms. Kalman noted that she had received additional comments from Task Force members this week, including suggested edits from Professor Kreag. She declined to make one of Professor Kreag’s suggested edits in subpart (a)(2) of Rule 11.1 (“definitions, effect of incompetence, counsel”), which would change “assist in his or her defense” to “assist the defense team.” However, she incorporated all of his other edits in the OneDrive draft version that Ms. Graber projected on-screen. Ms. Kalman further noted that because a defendant’s incompetence can affect any proceeding and not just trial, the workgroup shortened the title of Rule 11.1(a)(2) from “incompetence to stand trial” to simply “incompetence.” Draft Rule 11.1(a)(2) provides that a defendant “may not be tried, convicted, sentenced, or punished for a public offense” while incompetent. A member asked about the implications of a defendant who was competent when sentenced, but who became incompetent while serving the punishment, including, for example, while on probation. Members then agreed to remove the words “or punished” from this provision. They also concurred that the words “for a public offense” were unnecessary and deleted those words from the draft rule.

The workgroup's draft of Rule 11.2 ("motion for an examination of a defendant's competence to stand trial") provided, among other things, that a party could make the motion after the filing of a misdemeanor complaint. The current rule does not include the word "misdemeanor," and one member suggested that adding this word changed the substance of the rule. The member's view was that the State would file an indictment or information after a felony complaint, but a party still could make a motion under Rule 11 before the subsequent filing. However, other members believed that adding "misdemeanor" is consistent with a comment to the current rule, that a finding of probable cause must precede a Rule 11 motion in a felony case, and that a justice of the peace has no authority to rule on a Rule 11 motion. Ms. Kalman observed that draft Rule 11.2 allows a co-defendant to be a moving party, but she noted there are limitations elsewhere in Rule 11 on the information a co-defendant might receive concerning the examined defendant. Current Rule 11.2(b) requires parties to provide available medical records, for use by the examining expert, to the court within 3 days of filing the motion. The workgroup recommended two changes to this provision. The first change is that parties provide records directly to the expert, rather than to the court, which should expedite the process and enhance the defendant's privacy rights. The second change alters the timing from 3 days of filing the motion, which could possibly be before the court even ruled on the motion, to 3 days after the court's appointment of the expert. These changes deviate from a pertinent statute, and stakeholders might consider proposing a conforming statutory change.

Members also discussed the "jurisdiction" provision in Rule 11.2(d). A proposed statutory revision from the FAIR Justice Task Force would permit limited jurisdiction courts to determine competence in specified circumstances, as designated by the presiding superior court judge. A limited jurisdiction court might do this on a regional basis, and its judges would serve as superior court judges pro tempore. To address this potential statutory revision, the members added to the phrase "the superior court has exclusive jurisdiction over all competence hearings" the additional phrase "unless otherwise authorized by superior court administrative order." There are two new sections in Rule 11.2. Draft section (e) ("if defendant is competent") modifies nomenclature used in current Rule 11.2(d), "immediately set for trial," to "regular proceedings must proceed without delay." Draft section (f) ("dismissal of misdemeanor charges") derives from A.R.S. § 13-4504.

In Rule 11.3 ("appointment of experts"), subpart (a)(1), members discussed changing the string of statutory citations to chapter references, but decided against it. Ms. Kalman noted that in subpart (a)(1), the workgroup deleted the words "from its approved list," first, because some counties may not maintain such a list, and second, because it gives the court flexibility to appoint a specialist who might not be on the list when circumstances warrant such an appointment. In subpart (a)(2)(B), the workgroup added

"10 business days." The "examiner qualifications" provision, subpart (a)(5), requires that the examiner be familiar with available "treatment, training, and restoration programs." Members were not certain why the word "training" was included in this provision, but it is in the current rule and they did not remove the word.

Ms. Kalman advised that the workgroup did not reach agreement on the scope of redactions under Rule 11.4 ("disclosure of experts' reports"). One workgroup member interpreted the rule to require disclosure of a defendant's statements, but not to permit use of those statements. However, a Task Force member believed that the Fifth Amendment privilege is sufficiently broad to require redaction of anything a defendant says, and noted that if the State wants to use a statement, regardless of how innocuous it might appear, it probably has inculpatory value. This principle would also apply to statements concerning aggravating factors. A majority of members joined this view, and observed that statements in a Rule 11 proceeding are compelled, because a defendant typically does not voluntarily submit to a Rule 11 proceeding; and even if the State did not directly use a statement, disclosure of a statement could provide other investigative leads. Members then approved changes, shown on screen, which allowed redaction of "any" statement about the charged offense "or any other charged or uncharged offense," including a summary of such a statement. Members also discussed process and timing issues under this rule. They agreed to add to subpart (a)(1), "the expert must inform the court if the report cannot be made available at least 7 days before the scheduled hearing." A couple members thought it would be more expedient if defense counsel transmitted the redacted report directly to the prosecutor. However, defense counsel may not know the identity of the assigned prosecutor, and members agreed that the rule should require defense counsel to provide the redacted version to court staff, who will make it available to the State. Members also clarified Rule 11.4(b) so an examined defendant, but not a codefendant, has access to a report.

In Rule 11.5 ("hearing and orders"), members added to the section (a) "hearing" provision that "the court may grant additional time for good cause." Courts customarily grant additional time, but this revision supports their authority to do so. In the same section, members added that in addition to a written stipulation, the parties may stipulate "on the record" to submit the matter on the experts' reports. They removed the word "examined" in two instances before the word "defendant." In subpart (b)(2)(B), members substituted for the words "making progress toward restoration of competence" the words "progressing toward competence." Members also discussed whether under Rule 11.5 the court could enter an order that a defendant is subject to treatment for 21 months. Case law suggests that might be permissible. On the other hand, the court may not be able to make this determination at the onset of treatment. The statute provides for 15 months and an additional 6 months, which implies the need for an intermediate finding that the defendant is making progress. Based on a current comment, the workgroup

proposed a new Rule 11.5(e), which stated, "Treatment orders under this section are effective for no longer than 6 months." The objective was to return the defendant to court regularly and to avoid a defendant becoming "lost" in the system. Some members believed that 6 months was too long and preferred the defendant return every 60 days. After discussion, and because case law refers to a comment to this rule, the members retained this concept as a comment. The comment now states, "The court should hold review hearings every 2 to 3 months to monitor a defendant's treatment status and progress." Members also revised the title and content of Rule 11.5(b)(2)(E). After "modification" in the title of this subpart, members added the words "and limitation." The new content of this subpart is a sentence that provides, "Treatment orders are effective for no longer than 6 months." Members also agreed that the principle of redaction applies to progress reports under Rule 11.5(c), which appears to be current but uncodified practice. Accordingly, members added a sentence to subpart (c)(1) that states, "defense counsel may redact the report under Rule 11.4(a)(2) before returning it to the court to be provided to the State."

Members had a minor change (they changed "commence" to "begin") in Rule 11.6 ("later hearings"). In Rule 11.7 ("privilege and confidentiality"), members agreed that a criminal proceeding determines "guilt" rather than "innocence," and they deleted the latter word from this disjunctive in section (a) ("generally"). In subpart (c)(2) ("sealing"), members modified a portion of the provision concerning when expert reports are sealed (it was changed from "after the case is resolved" to "after the defendant is found competent"). In the same subpart, the members added that the court might later grant access to a sealed report for "the examined defendant's mitigation investigation."

Ms. Kalman then introduced a new Rule 11.8 entitled "examination of a defendant's mental status at the time of offense." She advised that workgroup members did not reach consensus on whether an exam under this rule required defendant's consent. Ms. Kalman suggested that if the State moves for an exam under section (b) ("screening report"), the defendant's consent should be required. A member advised that there is no Arizona case law on whether an unwilling defendant must submit to an exam. After discussion, Task Force members agreed to retain the words "with the defendant's consent" in section (b), and to delete the words "and the defendant consents" in section (c). They discussed the production of expert reports and after noting that there is case law on this subject (for example, *Hegyí v Rasmussen*), they agreed not to address this issue in the body of the draft rule. Members agreed to modify the title of section (c) to "if the guilty except insane defense is raised." In the body of section (c), they deleted the words "and if the offense involves death or serious physical injury" because this is already provided by statute. In section (d) ("required records"), members deleted as unnecessary the second sentence of the draft, which provided that "the court may not appoint the expert until the court receives notice that the records are ready for production to the

expert.” The members had no issues or modifications concerning Rule 11.9 (“capital cases”). Members had no other changes to Rule 11. [Mr. Schaye arrived at this time.]

3. Workgroup 2. Workgroup 2 presented two new rules, Rules 30 and 32.

Rule 30 (“appeals from limited jurisdiction courts”): Judge Welty, who is a member of Workgroup 2, advised that the workgroup restyled this rule, and the meeting materials included its restyled version. However, Judge Welty observed that even as restyled, the rule is not particularly easy to follow. On the other hand, the Superior Court Rules of Appellate Procedure – Criminal (also known as SCRAP-Criminal) address the topics covered in Rule 30, but probably in a better fashion. He proposed that the members recommend abrogation of Rule 30, and that they include a cross-reference in Rule 31 to guide parties in limited jurisdiction appeals to the SCRAP. Members agreed with this proposal. Judge Welty authorized staff to prepare the necessary amendment to Rule 31, including if appropriate a modification of the title to Rule 31.

Rule 32 (“post-conviction relief”): Judge Cattani, who presented this rule, noted that Rule 32.1 (“scope of remedy”) preserved the format of the current rule, notwithstanding that the format deviates from Task Force restyling conventions, because case law frequently cites the rule by its current section and subpart designations. A paragraph at the beginning of this draft rule clarifies the meaning of an “of-right” petition. The workgroup recommended retaining some of the current comments to this rule, with modifications, because self-represented filers often use this rule and they would find these comments informative. Members changed “State of Arizona constitution” to “Arizona constitution.” A member commented that the Task Force rule petition should suggest that the Court establish another group to review the substance of Rule 32; this review would be beyond the scope of the Task Force. The Chair generally agreed with the comment, except he believes the Task Force should communicate this suggestion to the Court other than through the rule petition.

In Rule 32.2 (“preclusion of remedy”), a member proposed deleting from section (b) (“exceptions”) a requirement that the defendant include the specific exception. After discussion, the members retained the requirement, but added after “specific exception” the words “to preclusion.” In Rule 32.3 (“nature of a post-conviction proceeding and relation to other remedies”), another member proposed adding to the end of section (b) (“habeas corpus”) the words “unless the court finds that Rule 32 is inadequate to protect the defendant’s rights.” A judge member opposed this addition because it would be a significant substantive change, and members declined to include those words. Rule 32.4 (“filing of notice and petition, etc.”) includes a requirement in the “notice” provisions of section (a) that the clerk make “blank notice forms” available. Members agreed that the

word “blank” was unnecessary and they deleted it. In subpart (a)(2)(D), members changed “within [number of] days” to “no later than [number of days].”

Rule 32.4(b) concerns “appointment of counsel.” The current rule refers to “the list described in A.R.S. § 13-4041.” Members first agreed to delete a reference to a “list,” and after further discussion, they changed the concluding phrase of draft Rule 32.4(b)(1) to provide, “who meets the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041.” They added a reference to Rule 6.5 in the first sentence of subpart (b)(1) preceding the reference to Rule 6.8. In subpart (b)(2), they deleted from the title the words “rule 32 of-right and” so it refers simply to “noncapital cases.” (Of-right petitions are a subset of noncapital cases.) Judge Cattani discussed the restyling of section (c) (“time for filing a petition for post-conviction relief”) and section (d) (“duty of counsel”). Rule 32.4(d)(2) described that duty when counsel in an of-right proceeding finds no colorable claims. Members discussed an oversight mechanism to help assure that of-right counsel is effective; one alternative they discussed was that in this situation, the of-right attorney could submit an “*Anders*” type brief. One member believes that a post-conviction proceeding differs from an appeal because the original trial court judge hears most of-right petitions and already knows the background and posture of the case. However, a judge member noted that the court often assigns an of-right petition to a judge who did not previously have the case. After discussion, members agreed to add to the “counsel’s notice” provision of Rule 32.4(d)(2)(A) a new sentence that states, “The notice should include a summary of the facts and procedural history of the case.” This is comparable to the *Anders* requirement, and it will help to assure that assigned counsel has familiarity with the matter. A member proposed also including a requirement for an avowal by of-right counsel that they met with their client, but other members declined to include this ethical requirement in the criminal rule.

Rule 32.5 (“contents of a petition for post-conviction relief”) includes modified page limits to account for the proposed 14-point font. The title of Rule 32.6 is “response and reply; amendments; review.” Members discussed the “review and further proceedings” provisions of section (d). The current rule requires the court to review pleadings within 20 days after the reply was due. The draft rule extends this time to 60 days in a capital case. An extension of these limits is available in both capital and noncapital cases for “good cause,” but generally, 60 days is the outside limit. Another provision in section (d) requires the court, if it does not summarily dismiss the petition, to set a “hearing” within 30 days. Some interpret “hearing” to mean an evidentiary hearing, but this was not the interpretation of the Task Force. To avoid ambiguity, they modified the provision to require that the court set “a status conference or hearing” within 30 days.

Rule 32.7 (“informal conference”) allows the court to hold an informal conference at any time “to expedite a proceeding” under Rule 32. A member suggested deleting the quoted words because the court might hold a conference for other reasons, but members agreed to retain this phrase. In Rule 32.8 (“evidentiary hearing”), members discussed a provision in Rule 32.8(b) (“evidence”), which states, “the defendant may be called to testify at the hearing.” The implication is that the State may call the defendant as a witness. The consensus was that the defendant, if called, could still assert a self-incrimination privilege with regard to the underlying crime. However, because an ineffective assistance claim waives the attorney-client privilege, a defendant who declines to answer questions concerning ineffective assistance may face the consequence of losing the claim. Members accordingly agreed to retain the provision that allows calling the defendant at the hearing. Members also discussed section (d) (“timing”), and a requirement that the court must rule within 10 days after the hearing ends. Members agreed to delete the phrase “in extraordinary circumstances,” although it is in the current rule, because the provision goes on to specify those circumstances (“if the volume of the evidence or the complexity of the issues require additional time.”)

Rule 32.9 (“review”), section (c) (“petition and cross-petition for review”) includes provisions concerning page limits. A member proposed changing these to word limits because attorneys file the majority of these petitions. However, page limits are easier for self-represented defendants and clerks to count. The compromise was to amend the draft to allow for a specified number of words if the document is typewritten and a specified number of pages if it is handwritten. Another requirement of this draft rule directs parties to cite to supporting legal authority “if known.” Members agreed that the “if known” clause was appropriately included and it would not discourage a self-represented litigant who might not have access to legal materials from filing a petition. Draft section (c) includes a new subpart (7) regarding amicus curiae. Draft Rule 32.9 includes a new section (i) (“notice to the victim”). Members made grammatical improvements throughout Rule 32.9.

The workgroup added the words “in capital cases” to the current title of Rule 32.10, which clarifies this rule applies only to a review of an intellectual disability determination in those types of cases. In Rule 32.11 (“extension of time; victim notice and service”), members reorganized and revised subpart (b)(2) regarding service through the prosecutor. Rule 32.11 in general duplicates portions of Rule 39, but the members agreed to retain this part of Rule 32 because it is in the current rule. One member observed that the Rule 32.11(d) “factors” are apparent and suggested deleting this section, but members did not want to raise victims’ concerns by deleting this section and they kept it in the draft. Members made grammatical edits to Rule 32.12 (“post-conviction deoxyribonucleic acid testing”). A provision in section (d) (“court orders”) requires the court to find that the evidence is still in existence “and is in a condition that allows conducting of DNA

testing.” A member observed that the court would not be able to make this second finding until a lab actually did the test, and he suggested deleting that portion of the rule. Members agreed with the suggestion. With regard to a testing lab, members also deleted the words “that meets the standards of the DNA advisory board” and substituted “accredited laboratory.” Members discussed deleting the last sentence of section (f) (“preservation of evidence”), which concerns sanctions, but they decided to retain it. Members had no further comments on Rule 32.

4. Revisited rules. Members reviewed several rules that workgroups had further modified after Task Force discussions.

Workgroup 1: The Chair deferred a discussion of Workgroup 1’s responses to recent COVIC member comments to Rule 39 (“victims’ rights”), as shown in the meeting materials, because COVIC members submitted additional comments that the workgroup will consider further. The Chair suggested when doing its review that the workgroup defer changes to the rule when the comments raise broad policy issues. Professor Kreag noted a new comment to Rule 24.2(d) concerning an appeal from a Rule 24.1 motion decided after an earlier notice of appeal; the comment notes the necessity of filing an amended notice. Because the Task Force eliminated the term “perfection” in Rule 31, Professor Kreag also removed the term in various places where it appeared in draft Rule 24. He substituted in those places, “after the appellate court distributes a notice under Rule 31.9(e) that the record on appeal has been filed.” This is a longer phrase but it is more descriptive. Members concurred with these workgroup changes.

Workgroup 2: Judge Jeffery presented two rule provisions that Workgroup 2 revised because of action the Supreme Court took at its August 2016 rules agenda. The workgroup revised Rule 7.6 (“transfer and disposition of bond”), section (d) (“exoneration”) with a new subpart (3) (“conditions when not required to exonerate bond”). Mr. Landau noted that the Court’s FAIR Justice Task Force might propose additional changes to Rule 7. Judge Jeffery also reviewed Rule 8.4 (“excluded periods”), and a new section (b) (“excluding time after a finding of competency or restoration”). He added that the workgroup further restyled section (a) of this rule (“generally”) to reduce repetitive use of the word “delay.” Mr. Eckstein also noted recent revisions to Rule 33 (“criminal contempt”). Case references in the comment to draft Rule 33.1 (“definition”) are unchanged. New Rules 33.2 (b) (“procedure”) and (c) (“punishment”) conform to previous Task Force discussions. Mr. Eckstein noted the deletion of most comments to Rule 33.4 (“jury trial; disqualification of the citing judge”), except one comment remains to distinguish disqualification under this rule from a challenge under Rule 10.2. Members concurred with these workgroup changes.

Workgroup 4: Judge Gates reviewed new definitions in Rule 27.2 (“intercounty transfers”) for the terms “courtesy transfer of probation supervision” and “transfer of

probation jurisdiction.” Members approved those definitions. She said that informal comments from the probation department of her court supported the Task Force abrogation of current Rule 27.10 on “revocation of probation in absentia.” She reminded the members that Rule 19.3 (“evidence”), which the Task Force had previously referred to the Court’s Advisory Committee on Rules of Evidence, was in the process of reviewing that rule; but until the Advisory Committee recommends relocating the content of draft Rule 19.3 to another set of rules, it should remain where it currently is. Mr. Nash discussed a restyling change to Rule 28.1(c) (“court reporter notes”) and more substantive revisions to Rule 28.2 (“disposition of evidence”). The revised draft of Rule 28.2 clarifies that it applies to filed-cases. However, Task Force members had further questions concerning the process provided by Rule 28.2. In the discussion that followed, members made further revisions to the draft rule, as shown by Ms. Graber on-screen. These revisions included combining sections (b) and (c) of the previous draft, and modifying the titles of the combined section and subparts. The Chair noted that the workgroup would need to prepare a succinct explanation of changes to Rule 28.2 for inclusion in an appendix to the rule petition.

5. Roadmap; call to the public; adjourn. The Chair reminded members that the Task Force would discuss the workgroups detailed explanations for all of the proposed criminal rules at the next meeting, December 9, 2016. Staff will need to format and organize those explanations in a single document for inclusion in the petition, and the Chair encouraged workgroups to forward their explanations to staff as soon as practicable. Appendix C of the civil rules petition, and minutes of previous CRTF meetings that include discussions of each rule, are available and might assist the workgroups in preparing these rule-by-rule explanations. The Chair recommended that explanations focus on changes that the Task Force actually made, and not changes the members discussed but did not make. Workgroups do not need to mention general restyling changes in the explanations. However, they should explain what judges and practitioners should and would want to know about changes to each rule. The Chair concluded by noting that at the December 9 meeting, the Task Force would make necessary corrections to the draft rules, but it would not reconsider at that time substantive issues it previously decided.

There was no response to a call to the public. The meeting adjourned at 4:37 p.m.

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

State Courts Building, Phoenix

Meeting Minutes: December 9, 2016

Members attending: Hon. Joseph Welty, Hon. Kent Cattani (by telephone), Hon. Sally Duncan, Timothy Eckstein, David Euchner, Hon. Maria Felix, Hon. Richard Fields, Hon. Pamela Gates, Bill Hughes by his proxy Patti Wortman, Hon. Eric Jeffery, Kellie Johnson, Amy Kalman, Prof. Jason Kreag (by telephone), Jerry Landau, Hon. Mark Moran, Aaron Nash, Natman Schaye (by telephone), Hon. Paul Tang, Kenneth Vick

Absent: Paul Ahler

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

Guests: Theresa Barrett, Denise Lundin

1. Call to order, introductory remarks, approval of the meeting minutes:
Judge Welty called the twelfth Task Force meeting to order at 9:33 a.m. He noted that today’s discussion would include Rule 39, Rule 15.9, and issues that may come up concerning other rules. He requested members to send any typographical or grammatical corrections to staff. The Chair observed that members might not have had the opportunity to review “Appendix B,” which includes rule-by-rule explanations, so the Task Force will not discuss that today. However, if members note any errors concerning that document, they should bring them to the attention of the Chair and staff. The Chair also noted that staff’s draft rule petition includes a summary of restyling conventions, which is similar to the summary in the civil rules restyling petition.

The Chair then directed members to the November 18, 2016 draft meeting minutes. Members had no corrections to the draft.

Motion: A member moved to approve the draft November 18 meeting minutes. Seconded, and the motion passed unanimously. **CRTF-012**

2. Rule 39 (“victims’ rights”): Mr. Vick summarized several revisions to draft Rule 39 that Workgroup 1 is proposing following its review of additional comments from COVIC and a further review of pertinent Title 13 statutes. Among the revisions are the following.

- The definition of “victim” in draft Rule 39(a) now includes a reference to A.R.S. § 13-4402.01.
- Rule 39(b), “victims’ rights,” includes a new sentence in subpart (2) that contains a reference to A.R.S. § 13-4438 and related text. Subpart (3) includes a reference to A.R.S. § 13-4409. Subpart 5 (“the right to be notified if a defendant escapes”) is a law enforcement obligation, and this was deleted.

Subpart (8), the right to be heard, identifies three new proceedings at which the victim has a right to be heard (probation modification, probation revocation disposition, and post-conviction release.)

A member inquired whether this rule should duplicate provisions that are contained within a statute. After discussion, the members agreed that Rule 39 provides detailed directives for the court, and they retained those rule provisions notwithstanding the statutes.

Mr. Vick then continued by noting a new subpart (10) concerning “the right to the assistance of a facility dog,” which is based on a new statute. One member suggested changing “dog” to “animal,” because the companion animal may not always be a canine. Because the statute refers to “dog,” the members agreed to use “dog” in the rule. Another member noted that subpart (10) is included in a section on “victims’ rights,” yet the assistance of a facility dog is a qualified rather than an absolute right. The members therefore added to subpart (10) the words, “if the victim is eligible under the Arizona Revised Statutes.” A few members raised an issue concerning the constitutionality of the new statute; they believe the subject matter of the statute is solely within the court’s purview. A member accordingly requested the Task Force to strike subpart (10). Another member responded that subpart (10) contains helpful guidance for judges. After discussion, the Chair called for a straw vote on striking the provision. Seven members were in favor of striking it, but ten favored retaining it, and it will therefore remain in the draft rule. However, a second straw vote showed that members unanimously had concerns over the constitutionality of the statute, and by extension this rule, and Mr. Vick and Mr. Euchner will express these concerns in a revision to the summary of Rule 39 in Appendix B.

The Rule 39 revisions include a new section (c) that includes two provisions (“victims in custody” and “victims not in custody”) previously located in the definitions of section (a), that are not actually definitions and that are more appropriate in section (c) (“exercising the right to be heard.”) Another provision in this new section concerns the “nature of the right,” which includes a reference to A.R.S. § 13-752(R). A member suggested, and the other members concurred, that this provision should include not just a statutory reference, but also text that refers to the capital subject matter of the statute. Ms. Graber made suggested on-screen changes. Subpart (c)(3) previously provided that a victim might be heard by “appearing personally.” To conform to a statutory provision, members changed this to “through an oral statement.” A new subpart (c)(4) regarding the right to be heard at sentencing is also based on statute.

Subpart (d)(4) (“representation by counsel”) includes a new concluding sentence that permits a victim at a restitution hearing to present information and argument personally or through counsel. Subpart (g)(2) (“if the victim has been notified”) includes

minor restyling changes. Members had no additional issues or other suggested changes concerning Rule 39.

3. **Rule 15.9** (*“appointment of investigators and expert witnesses for indigent defendants”*): Members had restyled Rule 15.9, but they made no substantive changes to this rule. They had previously agreed (meeting minutes, July 29, 2016) to move this rule to Rule 6, but the draft did not include show this. The members discussed what the most appropriate place in Rule 6 would be for relocating the provisions of Rule 15.9. They agreed that it should become Rule 6.7, which would permit the rule on “standards for appointment and performance of counsel in capital cases” to retain the number it has in the current rules, Rule 6.8.

In conjunction with this move, the members discussed whether section (d) (“capital case”) was useful. This provision requires the defendant to make a motion for an expert or mitigation specialist no later than 60 days after the State files its notice of intent to seek the death penalty. One member believed it would be unreasonable to wait 60 days to move for appointment of a mitigation specialist. In addition, counsel may not perceive a need for an expert until after 60 days. The member therefore thought the rule had minimal practical utility. However, another member believed that on occasion, finding an available mitigation specialist who “fit” with the case might take some time, and that immediate appointment of a specialist might be inappropriate. In addition, the draft rule uses the word “should,” unlike the current rule that uses “shall,” so the draft rule is aspirational rather than mandated. Members agreed to retain section (d) as part of the relocated rule. In recognition of the relocation, they also agreed to change the title of Rule 6 to “attorneys, appointment of counsel, investigators, and expert witnesses.” The Chair will prepare an amended rule summary that explains these changes.

4. **Rule 19.3** (*“evidence”*): Judge Gates reported that the Advisory Committee on Rules of Evidence concluded that Rule 19.3 contains no meaningful differences from corresponding rules in the Rules of Evidence. The Advisory Committee therefore recommended deleting Rule 19.3 in its entirety. Judge Gates supported this recommendation and the members agreed. Members briefly discussed retaining Rule 19.3(a) (“generally”), which provides that “the Arizona Rules of Evidence govern all evidentiary issues in criminal proceedings,” but they concluded that the Rules of Evidence already make this clear. Judge Gates suggested that the Task Force add a comment at the bottom of Rule 19 to explain the deletion of Rule 19.3 as duplicative, and the members concurred. Mr. Eckstein will prepare the comment.

5. **Rule 1.6** (*“form of documents”*): Staff proposed two changes to Rule 1.6. The first change was to Rule 1.6(b)(1)(J) (“court forms”). Court forms may deviate from party-filed documents in a variety of ways, including spacing, font size, font type, and margins. Staff’s revisions would allow the court to promulgate forms that do not strictly comply

with Rule 1.6; this change would assure that Rule 1.6 did not compromise the validity of current and future forms. The other change would add a new Rule 1.6(b)(2) concerning “signatures.” There is a rule on electronic signatures (Rule 1.6(c)(5)), but no general rule on signatures, and this new rule would address that omission. Members concurred with both of these changes.

6. **Other rules:** Rule 31.9 requires the superior court clerk to transmit the electronic trial court record to the appellate court. Mr. Euchner suggested that because the superior court has the capability of providing the record to the appellate court, the rule should state that the superior court should also provide this electronic record to the parties. Members agreed with the intent of the proposal, although some were concerned that the clerk might have difficulty providing the electronic record to certain parties, such as private defense counsel. Members will make the change and explain it in Appendix B. Clerks then can comment about whether this would be infeasible or burdensome. Mr. Landau suggested changing the word “contumacious” in Rule 33.4(b) to “unreasonable” so it is consistent with the verbiage in Rule 33.1, and the members agreed. In Rule 26.2(c), the members agreed to rephrase the second sentence, which currently says, “the court must direct the clerk to send,” to provide instead that “the court must send, or must direct the clerk to send....” Members made a similar change in Rule 26.10(b)(6).

Judge Cattani would like to change the phrase “common interests” in the draft of Rule 31.2(d) to “common issues,” and the members concurred. Ms. Kalman will discuss with Mr. Landau proposed statutory revisions resulting from Task Force changes to Rule 11, which deviate from the current statutes. The Chair noted that some of the proposed changes to Rule 32 also are inconsistent with statutes, but the changes are appropriate, they are procedural in nature, and Appendix B will note them. He added that Rule 32.6 contains a “safety-valve” (“absent good cause”) that the current rule does not, and if the court adopts the proposed changes, statutory revisions should reflect the changes to these rules.

Workgroups had no other rules that required discussion.

7. **Substantive changes:** Part V of the draft rule petition is a discussion of proposed substantive changes to the criminal rules. The Chair asked members whether the petition should mention additional substantive changes. Members noted the following, which staff will include in the petition. (1) Rule 15.9 moved to Rule 6.7, Rule 35 moved to Rule 1, and the petition should note other relocated rules. (2) Rule 11.2 modifications require that parties provide records directly to the expert, rather than to the court, and the time requirement for providing records would change. (3) The proposed rules abrogate Rule 19.3. (4) In Rule 8, there is a time limit for a new trial when required by a Rule 32 or federal habeas order. The Chair encouraged members to send

him and staff a note regarding any additional substantive changes. At this point, a member made the following motion.

Motion: The Chair and staff have the members' authority to make grammatical and other minor changes to the rules and petition. Seconded, and the motion passed unanimously. **CRTF-013**

Members further agreed that the Chair and staff have discretion concerning the content of the prefatory comment. Staff will circulate revised documents to the members prior to the filing deadline.

The Chair also recommended separate correspondence with the Chief Justice concerning substantive changes to certain rules that would exceed the scope of this Task Force. The Court, if it deems appropriate, can establish separate groups to review those rules and make further recommendations. These rules would include the following:

- (1) Remedies in Rules 31 and 32, and Rule 32 generally;
- (2) Rule 33;
- (3) The avowal requirements in Rule 10.2;
- (4) The timeliness of a motion for new trial in a capital case when the defendant is sentenced immediately after return of a death verdict; and
- (5) Does the State has a duty under Rule 15 to disclose a witness' testimony before a grand jury when the grand jury did not return an indictment, if that testimony constitutes *Brady* material?

The Chair requested that members advise him if there are additional rules or topics to include in the correspondence.

8. Roadmap; call to the public; adjourn. The Chair reviewed the next steps. Mr. Rogers will work on making the style, grammar, and format of the members' individual rule-by-rule summaries consistent. He will circulate a revised document to members when it is complete. The Chair noted that the rule petition would request a "staggered" comment period, which he described. After the receipt of a comment, staff will direct it to the workgroup assigned to the rule to which the comment pertains. The workgroup should then make recommendations to the Task Force. The Task Force will meet at least once after the conclusion of each comment period. The rule petition will include proposed comment deadlines.

Members discussed a list of stakeholders from whom the Task Force should solicit comments. A partial list already is in the draft rule petition. Members added to the list the following:

State Bar sections on criminal law
The Federal Public Defender

Arizona Association of Chiefs of Police
Law Enforcement Legal Advisors' Association
American Friends Service Committee
Arizona Attorneys for Criminal Justice
Arizona Prosecuting Attorneys Advisory Council
Adult Probation Chiefs
COVIC
Arizona Voice for Crime Victims
Presiding judges of limited jurisdiction courts
Arizona Capital Representation Project

If the Chair receives inquiries on the petition from stakeholders, he may refer them to particular Task Force members for further information. The members concurred with this approach.

Because the Task Force may not meet again until the spring of 2017, a member made the following motion:

Motion: The Chair has authority to finalize the minutes of today's meeting. Seconded, and the motion passed unanimously. **CRTF-014**

The Chair reminded the members to continue to send grammatical and similar corrections to staff. Ms. Graber will control the master drafts of the petition, rules, and Appendix B, and members should send any corrections to her.

The Chair thanked the members and staff for their tremendous contributions of time and effort. The members also recognized the Chair's leadership throughout this project.

There was no response to a call to the public. The meeting adjourned at 11:25 a.m.

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

State Courts Building, Phoenix

Meeting Minutes: April 7, 2017

Members attending: Hon. Joseph Welty, Paul Ahler by his proxy Linley Wilson, Hon. Kent Cattani, Timothy Eckstein, David Euchner, Hon. Maria Felix, Hon. Richard Fields by his proxy Donna Hughes, Hon. Pamela Gates, Bill Hughes, Hon. Eric Jeffery, Kellie Johnson, Amy Kalman, Prof. Jason Kreag by his proxy Mikel Steinfeld, Jerry Landau, Hon. Mark Moran, Aaron Nash, Natman Schaye (by telephone), Hon. Paul Tang, Kenneth Vick (by telephone)

Absent: Hon. Sally Duncan

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

Guests: Colleen Clase, Krystle Johnson, Suzie Wong, Marcus Reinkensmeyer, Theresa Barrett

1. Call to order, introductory remarks, approval of the meeting minutes: Judge Welty called the thirteenth Task Force meeting to order at 10:06 a.m. He noted the following. The first round of comments concerning the Task Force’s rule petition, number R-17-0002, concluded on March 14. Each workgroup met at least once thereafter and prepared recommendations concerning those comments, which the Task Force will review today. A supplemental rule petition is due by April 26. Redline versions of the original Appendices A and B will accompany the supplemental petition and will show Task Force revisions subsequent to the January filing.

The Chair directed members to the December 9, 2016 draft meeting minutes. Members had no corrections to the draft.

Motion: A member moved to approve the draft December 9 meeting minutes. Seconded, and the motion passed unanimously. **CRTF-015**

2. Call to the Public. The Chair then made a call to the public. Colleen Clase, an attorney with the Arizona Voice for Crime Victims (“AVCV”) responded. Ms. Clase elaborated on a formal comment the AVCV filed during the initial comment period, and posed the issue of whether victims’ rights should be incorporated in various and separate criminal rules, or whether those rights should continue to be centrally and comprehensively located in Rule 39. Her preference was to incorporate the rights in various rules. She said that judges routinely consult a variety of rules for defendants’ rights, and they similarly should be able to review individual rules to determine the respective rights of victims. The Chair opened Ms. Clase’s issue for discussion.

One member suggested that Rule 39 was the “handiest” place for aggregating victims’ rights. But Ms. Clase responded that occasionally judges and counsel are unaware of specific victims’ rights in Rule 39, or how they apply to a particular proceeding. The member also observed that the AVCV’s recommendations expanded victims’ rights, for example, that they ostensibly conferred on a victim the right to be heard on Rule 16 motions. Ms. Clase said the intent was to give victims the right to be heard only when a motion implicated a victims’ right. Ms. Clase added that in her experience, judges don’t always allow victims to present their views in situations where they have that right. She said that having victims’ rights specified in individual rules would heighten judges’ awareness of when those rights arise.

Another member inquired whether Ms. Clase was proposing, if the victims’ provisions were “sprinkled” throughout the rules, to shrink or abrogate the provisions of Rule 39. Ms. Clase responded affirmatively. Although the AVCV’s formal comment omitted that portion of the proposal, Ms. Clase explained that the Court adopted Rule 39 before the Arizona Constitution and statute adopted the Victims’ Bill of Rights; the Court could now abrogate Rule 39 because the rule’s enumerated rights exist elsewhere. A member of Workgroup 1, which has responsibility for Rule 39, noted the workgroup’s concern that the AVCV’s brief comment and 54-page appendix did not include explanations for individual rule changes, or identify any changes that might be substantive. Ms. Clase acknowledged this concern.

Two members joined in the view that if the AVCV was proposing to abrogate Rule 39, it should be done by a separate rule change petition, rather than included in this restyling project. The Chair asked Ms. Clase to specify in the AVCV’s next comment which victims’ rights judges most commonly overlook, and suggested that the Task Force might make revisions only to those rules in order to enhance judicial recognition of victims’ rights. A judicial member also asked Ms. Clase to provide information about any special actions that might have been taken to enforce victims’ rights. Ms. Clase will confer with other members of the AVCV about these items and prepare a response for further consideration by the Task Force.

3. Workgroup 3. Workgroup 3 reviewed comments concerning Rules 7, 8, 9, 12, and 17. The Task Force adopted workgroup recommendations unless otherwise noted.

Rule 7 (“release”): Judge Jeffery, who presented this rule, noted the workgroup, in addition to considering comments, also merged the January Task Force version of Rule 7 with the changes to Rule 7 specified in the Court’s Order number R-16-0041, which became effective April 3, 2017. For example, the workgroup added to Rule 7.1 (“definitions”) several new definitions in R-16-0041, such as “unsecured appearance bond,” “cash bond,” “deposit bond,” and “secured appearance bond.” For an

“unsecured appearance bond,” the workgroup declined to make a change suggested by the Arizona Bail Bondsmen Association (“ABBA”) from “failure to comply with the conditions of the bond,” which was the verbiage in R-16-0041, to “failure to comply with the conditions of release.” The members’ agreed the chosen verbiage furthers the Court’s intent to allow forfeiture of a bond for reasons other than violations of release conditions. The workgroup modified the definition of “surety” to include not only a “person” but also a “company.” It also added that a requirement “professional bondsman” must be “licensed with the Arizona Department of Insurance under A.R.S. § 20-340.01.” In the definition of “security,” the workgroup declined the ABBA’s proposal to limit property to “real property.”

In Rule 7.2 (“right to release”), the workgroup incorporated language from R-16-0041 concerning the presumption of innocence. It declined to add references to “victims” in this rule, as proposed by the AVCV. Judge Jeffery explained an issue arising under Rule 7.2(c), which deals with release after conviction in the superior court. The Attorney General’s (“AGO’s) comment requested that the language of this rule conform to the limitations of A.R.S. § 13-3961.01; the statute precludes release after a felony conviction except when confinement might endanger the defendant’s life because of the defendant’s physical condition. Members concluded that the proposed rule, as well as the current one, conflicts with the statute. The members’ conclusion is in accord with *State v Hawkins*, 140 Ariz. 88 (1984) and *State v Kearney*, 206 Ariz. 547 (2003). After discussion, the members agreed to separate Rule 7.2(c) into two provisions, one titled “before sentencing” and the other titled “after sentencing.” The members should add a comment advising that the rule was revised to be consistent with the statute. The workgroup further recommended that Rule 7.2(c)(1)(A)(ii) not include (1) ABBA’s suggestion that would elevate the surety to the status of an “interested party;” and (2) the AVCV’s suggestion about adding a reference to “the victim.” On the second point, the rule already refers to “any other person or the community,” which includes the victim.

The workgroup merged draft Rule 7.3 (“discretionary conditions in general”) with the text of R-16-0041. Judge Jeffery advised that the workgroup did not intend the merger to result in substantive changes to the new R-16-0041 conditions. The AVCV wanted the “no contact with the victim” provision as a mandatory rather than a discretionary term of release, but it appears that in limited jurisdiction courts at least, there is no request in a majority of cases for a “no contact” provision. R-16-0041 also located the “no contact” provision in the discretionary section, and the members agreed to retain it as provided by this recent Court order.

The workgroup proposed in Rule 7.4 (“procedure”) a new provision concerning the appointment of counsel that is identical to one in R-16-0041. The workgroup recommended that the Task Force not adopt an AVCV proposal to allow “the victim” as

well as parties to be heard on the modification of a release condition. The workgroup believed the victim's right to be heard is managed better under the umbrella of Rule 39, and that "sprinkling" such rights throughout the rules might actually dilute them. During the ensuing discussion, members expressed that not all victims "opt in," and the court should not be required to hear from victims in every case; and that regardless, the prosecutor will customarily present the victim's views on release conditions. Other members believed the AVCV comment on Rule 7.4 was meritorious, and suggested various edits to the rule to address its issue. The members discussed but declined several alternative edits as unsatisfactory, and they ultimately agreed to make no changes to the workgroup's draft. The workgroup also recommended against adopting two changes proposed by the AVCV concerning Rule 7.5 ("review of conditions; revocation of release"). One of the proposed changes would add the word "abuse" to Rule 7.5(c); the other proposed change, in Rule 7.5(d), would add "victim" before the words "another person." Members agreed with the workgroup's recommendations and declined to make these changes.

In Rule 7.6 ("transfer and disposition of the bond"), the workgroup added a new provision in section (d) that would allow the bond depositor, upon exoneration of the bond, to authorize the application of funds to the defendant's financial obligations, i.e., a fine or restitution. The members agreed with this change, as well as a change in Rule 7.6(b) that added the words "if ordered" to a requirement that the defendant file a bond. Members declined to add a provision in Rule 7.6(c) that would allow the victim to be heard on a bond forfeiture, as proposed by the AVCV, because forfeitures are civil proceedings. They also declined two ABBA proposals - one which would require exoneration if the defendant is in custody in another jurisdiction, the other which would require exoneration if the defendant was returned to court within 180 days after a failure to appear - as being substantive and more appropriately adopted by legislation rather than by rule.

Rule 8 ("speedy trial"): Mr. Eckstein presented Rule 8. The AVCV proposed a revision to this rule that would provide victims a right to be heard on a suspension of Rule 8. The workgroup alternatively proposed that this right, and the right of a victim to be heard on a motion to continue a trial date, be codified in Rule 39, as a new section (b)(7). The members' consensus was to adopt this workgroup proposal. The workgroup recommended, and the members also agreed, not to adopt the AVCV's other proposal to add victim references to Rules 8.1, 8.2, and 8.4 because they were impractical, substantive, or cumulative. The members deemed the AVCV's proposed change to Rule 8.5 unnecessary because the rule already included a provision that "the court must consider the rights of the defendant and any victim to a speedy disposition of the case."

Rule 9 (“presence of the defendant, witnesses, and spectators”): Mr. Eckstein also presented Rule 9. The Federal Public Defender (“FPD”) suggested adding the word “personal” before the word “notice” in Rule 9.1. The workgroup instead recommended adding the word “actual” before “notice,” and the members agreed. The workgroup concurred with ACVC’s suggestion to delete in Rule 9.3 these words: “the victim as defined in Rule 39(a).” They declined the AVCV’s proposal to amend Rule 9.3, which would have added substantive language concerning the right of a victim “to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, and abuse.”

Rule 12 (“the grand jury”): Mr. Landau, who presented this rule, noted comments from the FPD concerning Rules 12.7(c) and 12.7(d) that suggested changing the word “may” to “must.” The workgroup believed that the purpose of this change would be better achieved by changing “may be made” to “is” as follows: “...filed with the court [or court clerk] no later than 20 days after the return of the indictment and ~~may be made~~ is available only to the court, the State, and the defendant.”

Motion: A member moved to retain the original proposed rule’s use of the words “may be made.” The motion received a second and it carried, 10 in favor and 7 opposed. **CRTF-016**

Rule 17 (“pleas of guilty and no contest”): Ms. Johnson presented three issues concerning Rule 17. The first issue involved Rule 17.2. A portion of the title of the current rule includes the phrase, “or of submitting on this record,” but the Task Force deleted that phrase because there was no provision in the rule for submission of a case on the record. The AGO noted this omission, and in response, the workgroup added a proposed new Rule 17.7 titled “submitting a case to the court on a stipulated record.” Members agreed with the content of the proposed new rule, which describes the process of a submission. However, several members believed that this new provision was inappropriately located in Rule 17 because a submission is not a plea. Members then discussed alternate locations, including Rule 18 (“trial by jury, etc.”) and Rule 19 (“trial”). The discussion concluded with the Chair directing Workgroup 4 to determine the most apt place for this new rule.

The second issue concerned Rule 17.4(g), which Appendix A titled, “automatic change of judge.” The Appendix A version allowed a defendant who withdrew a plea after a presentence report had been submitted to change the judge if that defendant had not previously exercised that right under Rule 10.2. The FPD contended that the right exists in this circumstance even if defendant had a previous change under Rule 10.2. The workgroup disagreed, and cited case law that supported its position. (See *Hill v Hall* 194 Ariz. 255 (1999).) The workgroup conceded that the Appendix A version represented a change from the current rule, but the Appendix A version nonetheless aligns with case

law interpreting the current rule. However, to clarify that the right is not “automatic,” the members agreed to change the title of the rule to “change of judge if plea withdrawn.” The members also agreed to add a comment to this rule advising that “this change comports with existing case law.”

The third issue related to a comment from the AVCV that would have required a limited jurisdiction court conducting a telephonic plea proceeding to include the victim in the telephone call. The workgroup noted that Rule 39 does not expressly contemplate a victim’s right to be heard in a telephonic proceeding, and some limited jurisdiction courts don’t allow victim appearances by telephone. However, if a rule change is warranted, the workgroup recommended adding it to Rule 39, and the members should discuss this proposal in conjunction with that rule.

4. Workgroup 4. Judge Tang let the discussion of Workgroup 4’s rules, which included Rules 10, 11, 13, 16, 18, 19, and 27.

Rule 10 (“change of judge or place for trial”): The workgroup declined to add references to the victim in this rule, as proposed by the AVCV. It also declined to adopt a substantive change proposed by attorney Treasure VanDreumel that would engraft in this rule a due process right to a change of judge.

Rule 11 (“incompetence and mental examinations”): The Arizona Prosecuting Attorneys Advisory Counsel (“APAAC”) commented on the Task Force’s removal of an “approved list” in Rule 11.3. “Approved list” is in current Rule 11.3(c) but the Task Force deleted the term in Appendix A. The workgroup recommended adding the words “from its approved list, if any,” as suggested by the Maricopa County Attorney (“MCAO”), which recognizes that some courts might not have a list. The members discussed the benefits and drawbacks of adding the term back to the rule. They noted in particular that the expert’s qualification is a separate criteria than whether the expert is on the list, and the local rules or practice would probably determine whether individual courts maintain a list. At that point a member made a motion:

Motion: To exclude from the rule a reference to a list of experts. The motion received a second and it passed with one nay vote. **CRTF-017**

A defense attorney submitted an informal comment regarding Rule 11.5(b)(3) and the options available to a judge when a defendant is incompetent and non-restorable. Appendix A language suggested that the judge could select no more than one option. The workgroup modified this provision to allow the selection of more than one option, and Task Force members agreed with this change. The workgroup further noted that *State v Hegyi (Rasmussen)*, which is now pending before the Arizona Supreme Court, could require further changes to Rules 11.4 and 11.8.

Rule 13 (“indictment and information”): Following a comment from the FPD, the workgroup recommended changing the word “may” to “must” in a provision in Rule 13.2 concerning a dismissal when the State fails to timely file an information. And in light of the FPD’s comment, the workgroup also changed “may” to “must” in Rule 13.4(a), which concerns situations where a severance is necessary for a fair determination of the case. The workgroup also reorganized the sentence structure of Rule 13.4(a) for greater clarity. Members agreed with these changes.

Rule 16 (“pretrial motions and hearings”): The FPD also noted that a provision of Rule 16.2(c) was incomplete and it suggested adding the words “including the fact that such testimony occurred.” The workgroup and the Task Force agreed. The workgroup concluded that the AVCV’s suggested changes to Rules 16.3 and 16.4 were unnecessary because the subject matters were addressed in Rule 39.

Rule 18 (“trial by jury; waiver; selection and preparation of jurors”): The FPD objected to the word “may” in Rule 18.5(d) concerning the court allowing parties to conduct an oral examination of prospective jurors. The members discussed *State v Anderson* 197 Ariz. 314 (2000) and thereafter agreed to change the word “may” to “must.” Members also agreed it is a universal Arizona custom that counsel personally conduct the exam, rather than the court conducting all of voir dire on behalf of counsel, and that no further specification in the rule regarding this practice is necessary.

Rule 19 (“trial”): Members noted that Rule 19.3 omitted a comment previously prepared by Mr. Eckstein that provided, “Arizona Rule of Criminal Procedure 19.3 has been abrogated as unnecessary in light of Arizona Rules of Evidence 801(d)(1)(A) and 804(b)(1).” This comment will be added to the next draft of Appendix A.

Ms. Van Dreumel’s comment proposed adding to Rule 19 (1) a bifurcated process for *Enmund/Tison* findings in a felony murder case; and (2) a process for a judicial determination of intellectual disability. Members agreed that these proposed changes are substantive and they would be more appropriately raised by separate rule petitions. Ms. VanDreumel also proposed a change allowing the court to dismiss aggravating factors, but members believe this procedure is already encompassed within the Task Force’s revisions to Rule 20.

Rule 27 (“probation and probation revocation”): The AVCV proposed a change to Rule 27.1 that would require the court not only to impose conditions that promote the probationer’s rehabilitation, but that also “protect the victim.” Some members either believed this would be a substantive change, or that protection of the victim is subsumed under the broader topic of rehabilitation. (How could a term of rehabilitation put the victim at risk of harm?) Other members noted that Rule 39 does not include this requirement, and although the change might be substantive, it raises a consideration that is not always intuitive for judges but should nevertheless be a component of the

probationer's terms. It also should be included in Rule 27 because a victim might not always be present at sentencing, or if present, might not always articulate. A member then made this motion:

Motion: To include in Rule 27.1 a requirement that the court impose conditions of probation that protect the victim. The motion received a second and passed, 9 in favor and 5 opposed. **CRTF-018**

The AVCV suggested a modification to Rule 27.4 that would require the court on a motion for early termination of probation to provide the victim with an opportunity to be heard. The members' discussion included a proposal to allow the probationer to make this motion. The members agreed to include both proposals, but the first would be fashioned as an addition to Rule 39; the Chair directed Workgroup 1 to draft appropriate language for a Rule 39 amendment.

Finally, the members discussed a proposed cross-reference to Rule 7.2, the general rule on release, within Rule 27.7(c), which concerns release determinations following an arrest on a probation violation. The members agreed that the cross-reference would be a substantive change, and not necessarily an appropriate one, and they declined to include it.

5. **Workgroup 1.** Mr. Euchner presented Rules 1, 2, 15, 20, and 26. He began by noting that the workgroup considered the AVCV's comments, believed the AVCV's suggested revisions were generally duplicative of Rule 39 provisions, and declined most of its proposed changes. However, the workgroup will reconsider its recommendations if it receives additional analysis and information from the AVCV.

Rule 1 ("scope, purpose and construction, etc."): Notwithstanding the workgroup's decision to decline most of the AVCV's proposed changes, the workgroup agreed with its suggested change to Rule 1.2. The proposed change in this rule on "purpose and construction" would add these underlined words to the second sentence: "Courts, and parties, and crime victims should construe these rules... [etc.]" The workgroup believed this was a correct statement of a general principle, and that the change was appropriate. Mr. Euchner also noted that the workgroup relocated the definition of "victim," which is a word used in a variety of rules, from Rule 39 to the earlier "definitions" in Rule 1.4.

In the time computation provisions of Rule 1.3(a)(5), and to avoid misunderstanding about whether there is additional time to respond after electronic service of an appellate filing, the workgroup added the words, "except as provided in Rule 31.3(d)." The workgroup revised Rule 1.6(b)(1)(J) on forms to allow, in addition to printed forms, "court-generated forms and forms generated by a court-authorized electronic filing system" to deviate from prescribed formatting requirements. The workgroup declined to adopt the Clerks Association suggestions (1) in Rule 1.6(b), to add

a requirement for a two-inch margin at the top of the first page of filings (this appeared unnecessary and might pose word-processing problems for practitioners); and to disallow filing with the judge under Rule 1.7(a) (the Task Force rule is permissive, the judge is not compelled to permit it.) In recognition that victims, who are not parties, might be document filers, the workgroup rephrased portions of Rule 1.6 in the passive voice so the rule is not directed solely to “parties.” Members agreed with the workgroup’s changes to Rule 1.

Rule 2 (“commencement of criminal proceedings”): In Rule 2.3(c), the workgroup corrected an erroneous cross reference to a Supreme Court Rule, as noted by APAAC.

Rule 15 (“disclosure”): Rule 15.1(b)(2) requires the disclosure of “any statement of the defendant and any co-defendant.” The MCAO’s comment suggested that “any” was too burdensome. Members discussed adding qualifiers to the provision, such as “relevant” or “connected to the case,” or requiring disclosure if the prosecutor “knows” about the statement. They concluded that the language of this rule, which mirrors the current rule, is not being abused, that attorneys and judges would continue to apply it in a practical manner, and that no change was necessary.

The workgroup proposed adding to Rule 15.1(b)(4), and the companion provision under Rule 15.2, a new subpart (D) that would require disclosure of “the expert’s opinions, the bases and reasons for those opinions, and the expert’s qualifications.” This provoked several comments, including the following:

- This is a significant substantive change.
- If the expert does not prepare a statement of opinions and the basis and reasons for the opinions, who is obligated to do this? Will counsel have this responsibility?
- This seems to require more than a “summary,” which is the term used in subpart (C). Should (C) and (D) have different requirements?
- How would this affect limited jurisdiction courts that process a high volume of DUI cases? How would this impact local crime labs? There are a number of distinctions in each DUI case, and a “one-size-fits-all” expert disclosure would be inadequate for those cases.
- Counsel cannot satisfactorily prepare for an interview without this additional disclosure.
- Criminal disclosure should be more similar to disclosure in civil cases.

At the conclusion of the discussion, members agreed to the following changes to Rule 15.1(b)(4) (similar changes will need to be included in Rule 15.2):

In subpart (A), adding the words “and qualifications” (“the expert’s name, address, and qualifications”)

In subpart (B), adding the word “and” at the end of the provision;

In subpart (C), adding after “a summary of the general subject matter” the words “and opinions” on which the expert is expected to testify;

In subpart (D), deleting the workgroup’s proposed new provision.

In Rule 15.1(f) concerning disclosure of participating law enforcement agencies, Mr. Euchner noted that APAAC’s comment suggested that the provision was too broad, while the FPD’s comment believed it was too narrow. Members discussed alternatives, and the resulting consensus was to revert to the language of the current rule.

In Rule 15.2(a)(1)(H), members agreed to change the word “may” to “must,” i.e., “must not include a psychiatric or psychological examination.” In the introduction to Rule 15.3(a), they agreed to substitute the words “a victim” for the phrase “those excluded by Rule 39(b).” They agreed to add the word “recorded” to the definition of a “writing” in Rule 15.4(a)(2) (“...words or their equivalent, recorded in physical, electronic, or other form.”)

Rule 20 (“judgment of acquittal or unproven aggravator”): Mr. Euchner noted APAAC’s comment reserving its support of the MCAO’s petition to delete Rule 20, and that no further action of the workgroup was required.

Rule 26 (“judgment, presentence report, etc.”): The workgroup considered and declined to adopt (1) a suggestion from the AVCV as being a redundant emphasis on victims’ rights; and (2) a suggestion from the FPD concerning deletion of the words “concerning the defendant” in Rule 26.6(a).

Finally, Mr. Euchner noted that the workgroup added one item to Rule 39(d)(4) as a result of recent legislation that did not appear in the workgroup’s summary. Discussion of that item would be deferred to the April 21 meeting, but Mr. Euchner wanted members to be aware of that issue since it did not appear in the summary.

6. Roadmap; adjourn. The Chair confirmed April 21, 2017 as the next Task Force meeting date. Workgroup 1 will conclude its presentation, including Rule 39 at the next meeting; and Workgroup 2 will make its presentation. Members will schedule a meeting in mid-June to review comments received during the second comment period.

The meeting adjourned at 2:58 p.m.

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

State Courts Building, Phoenix

Meeting Minutes: April 21, 2017

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

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

Staff: John Rogers, Mark Meltzer, Julie Graber, Karla Williams, Sabrina Nash

Guests: Colleen Clase, Samantha Dumond, Darrel Luth, Arturo Rosales, Joshua Burns

1. Call to order, introductory remarks, approval of the meeting minutes:
Judge Welty called the fourteenth Task Force meeting to order at 2:01 p.m.

Judge Welty noted that this is the Task Force’s last opportunity to review initial comments concerning rule petition number R-17-0002 prior to the April 26 deadline for filing a supplemental petition. Before continuing the discussion that began at the April 7 meeting, the Chair asked members if there were any corrections to the draft April 7, 2017 meeting minutes. There were two corrections. The first, regarding Rule 17.4(g), should say in the last sentence of this paragraph that members agreed to add a comment in Appendix B about this rule change “comporting to existing case law,” rather than adding this as a comment to the rule itself. The second correction concerned Rule 27.4. The current rule includes a reference to Rule 7.2, and the proposed rule deleted the reference. The minutes should reflect that after consideration, members declined to reinstate the reference to Rule 7.2. There were no further corrections, and a member then made this motion:

Motion: To approve the draft April 7, 2017 meeting minutes. Seconded, and the motion passed unanimously. **CRTF-019**

2. Workgroup 1. The Task Force adopted workgroup recommendations reported in these minutes unless otherwise noted.

Rule 39 (“*victims’ rights*”): Mr. Vick, who presented this rule on behalf of the workgroup, noted that relocating the definition of “victim” from Rule 39(a) to Rule 1.4 resulted in a reorganization of the remaining provisions of Rule 39(a)(1). In addition, in Rule 39(a)(1)’s definition of “criminal proceeding,” and in response to a comment from

the Arizona Voice for Crime Victims (“AVCV”) concerning a victim’s right to participate in a telephonic proceeding, the workgroup expanded the defined term to include any matter the court holds “telephonically or in person.” In Rule 39(b), the workgroup declined to include the victim’s right to be notified of a defendant’s escape because a law enforcement agency would furnish the notice, not the court or the prosecutor. The workgroup modified Rule 39(b)(7) to provide the right to notice of a criminal proceeding, in addition to the right to be heard. The workgroup made two revisions to Rule 39(d). In Rule 39(d)(3), and in the event of a conflict between the prosecutor and the victim, the prosecutor also could refer the victim to “the Attorney General’s Victims’ Rights Program.” [See further the discussion under the “call to the public.”] The workgroup also inserted new text in the second and third sentences of Rule 39(d)(4) to make the provision compliant with HB 2241 (2017).

3. Workgroup 4. Judge Tang discussed two previously omitted comments from the Federal Public Defender (“FPD”) regarding Rule 21.

Rule 21(“jury instructions and verdict forms”): The FPD objected to the inclusion of the last sentence of draft Rule 21.3(b), which says, “If a party does not make a proper objection, appellate review is limited to a review for fundamental error only.” The FPD stated that standards of appellate review are not specified in other rules, and Rule 21.3(b) should not be an exception. However, members noted that the FPD did not suggest that the last sentence of Rule 21.3(b) was an incorrect statement. Moreover, the corresponding provision in current Rule 21.3(c) is incorrect; and deleting this last sentence might imply (especially to self-represented litigants) that there are no negative consequences for a failure to object. After further discussion, members voted on two motions.

Motion: To strike the last sentence of Rule 21.3(b). The motion failed on a vote of 5 in favor, 8 opposed, and one abstention. **CRTF-020**

Motion: To modify the last sentence of Rule 21.3(b) as follows: “If a party does not make a proper objection, appellate review may be is limited ~~to a review for fundamental error only.~~” The motion passed unanimously. **CRTF-021**

The FPD also objected to language in draft Rule 21.4(a) that requires the court to submit verdict forms for lesser included offenses “on request by any party and if supported by the evidence.” The FPD contended that courts have this duty even in the absence of a party’s request, and it suggested deleting the words “on request by any party.” Some members supported the FPD’s recommendation. Others expressed that lesser included verdict forms should not be submitted to the jury over the defendant’s opposition, and that case law lends support to trial judges who are “loathe” to give lesser included verdict forms. Members were undecided about which view was more correct, and they deferred this issue until the second comment period.

Rule 17 (*pleas of guilty and no contest*): Judge Tang also reported that after reconsidering the most appropriate location for the provisions on “submissions,” he recommends maintaining it where it is currently, as new Rule 17.7, pending the second comment period.

4. Workgroup 2. Judge Welty presented rules on behalf of Workgroup 2.

Rule 4 (*initial appearance and arraignment*): Judge Welty noted the Task Force had already collectively discussed the general principles of the AVCV’s comment, and the workgroup did not make any of the AVCV’s suggested changes to its assigned rules. The workgroup also declined to adopt Treasure VanDreumel’s suggested revision to Rule 4, which would require the presence of defense counsel at the initial appearance. The workgroup believed that regardless of its merits, this would be a substantive change with significant impact on funding authorities.

Rule 6 (*attorneys, appointment of counsel, investigators, and experts*): A member observed that Rule 6.1(b)(1)(B) is counterintuitive because it requires the court to appoint counsel for release conditions on misdemeanor charges, but not for felonies. The member explained that Rule 6.1(b) does not expressly require appointment of counsel at the initial appearance for people detained on a felony, and this new provision created a disparity in treatment between felonies and misdemeanors. After discussion, the members did not make changes to this rule. However, Judge Welty noted the workgroup restyled Rule 6.1(b)(1) and language that was previously proposed by the Administrative Office of the Courts. In Rule 6.1(e) (*withdrawal of waiver*), the workgroup adopted the FPD’s suggestion to insert the word “alone” in the second sentence.

The Phoenix City Prosecutor asked for clarification about whether the Task Force intended that revised Rule 6.7(a) provide the defendant with a right to a mitigation specialist in a non-capital case. Members noted that this rule derived from current Rule 15.9, which allowed the court to appoint a mitigation specialist only in a capital case. When members relocated the provision to Rule 6.7(a), they revised the rule because they believed appointment of a mitigation specialist could be appropriate in a non-capital case that was nonetheless complex. Members were now concerned that the rule inadvertently expands the appointment of a mitigation specialist to any case, and this could result in a high volume of motions in limited jurisdiction courts for such appointments. At this point a member made the following motion:

Motion: To clarify Rule 6.7(a) by an amendment that allows the appointment of a mitigation specialist only “in a felony matter.” The motion passed with one nay vote. **CRTF-022**

In Rule 6.8, the workgroup adopted several changes proposed by Supreme Court staff attorney Donna Hallam to assure that the qualification requirements of the

proposed rule are consistent with the current one. However, it declined her suggestion to delete in Rule 6.8(e)(4) the words “and the associating attorney is appointed by the court for this purpose.” The workgroup believed that court appointment of a specific associated attorney will help assure counsel’s accountability, and that a generic appointment of an associated attorney is insufficient. At the FPD’s suggestion, the workgroup modified the comment to Rule 6.8(a) by adding a reference to the “2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases.”

Rule 31 (“*appeals*”): Workgroup 2 considering two suggestions from the clerk of Division One. The first item, arising under Rule 31.8(d)(1), would require a court reporter to transmit transcripts to the superior court, as well as to the appellate court. The workgroup had concerns with the superior court’s storage requirements if it received these transcripts. But Judge Cattani’s follow-up revealed that the appellate court is currently, and automatically, sending reporters’ transcripts to the superior court, and the workgroup’s concerns with storage limits were unfounded. Accordingly, members amended Rule 31.8(d)(1) to add “trial” courts to the title and “trial court clerks” to the body of this provision, which would require the authorized transcriber to send transcripts to both trial and appellate courts. The Chair requested Mr. Nash to present this change to the Arizona Association of Superior Court Clerks (“Clerks Association”) and to determine if this group has any objection. The second item was a request to advance the deadline for filing an amicus brief in the Court of Appeals. An amicus brief is currently due 21 days after the reply, but the clerk observed that amicus briefs are rarely filed and this time frame results in additional delay in processing all criminal cases. A member urged the Task Force to keep the current rule, first, because reply briefs are common in Division Two, and also, because amicus briefs are typically filed only in cases in which a reply brief was filed. Members agreed to leave the draft provision as-is.

The Clerks Association had logistical concerns with a requirement in Rule 31.9(c) that the superior court clerk make the record on appeal “available electronically to all parties.” The workgroup agreed with its concerns and deleted the word “electronically” from this phrase. The Supreme Court clerk noted that the Task Force draft omitted a provision that is currently in Rule 31.13(e). The workgroup agreed that this omission was inadvertent and added an identical provision as a new Rule 31.10(k): “**Non-Compliance.** The appellate court may strike a brief or other filing that does not substantially conform to the requirements of these rules.” Ms. Hallam noted that Rule 31.23(a), which concerns the issuance of an execution warrant, inappropriately refers to a defendant who has not filed a petition for review “with the Court of Appeals.” A capital defendant would not file a petition for review in the Court of Appeals, and the workgroup deleted that phrase. (The FPD made a similar comment.) Ms. Hallam also observed that in Rule 31.23(d), the

reference to the “superintendent of the state prison” should instead be to the “director of the Arizona Department of Corrections.” The workgroup made this correction.

In response to a comment concerning five extra days for service by mail, the Task Force confirmed that a party does not get that extra time only if the party is served electronically; a document that simply is filed electronically does not bear on the time calculation, and no change was needed to the rules on this issue. Another comment raised an issue about providing paper transcripts, but members agreed this was appropriately addressed in draft Rule 31.8(d)(3).

Rule 32 (“*post-conviction relief*”): The FPD noted that in a capital case, the Arizona Supreme Court clerk rather than the defendant files a notice of PCR. The workgroup accordingly agreed with the FPD’s suggestion to add “or the Supreme Court” to Rule 32.4(a)(4)(A). The FPD also commented on the appointment of counsel provision in non-capital cases, Rule 32.4(b)(2). Workgroup 2 had an extended discussion on whether the right arises “after the timely filing of a notice of defendant’s first Rule 32 proceeding or in any of-right proceeding,” which was the text in Appendix A; or whether it arises “after the filing of a notice of a defendant’s timely or first Rule 32 proceeding.” The workgroup deferred the issue to the Task Force, and after discussion, the Task Force decided to use the FPD’s proposed language, which conforms to the current rule. The workgroup agreed with the FPD’s suggestion concerning Rule 32.4(c)(1)(D) and in two places changed the phrase “no later than 12 months” to “within 12 months.” The workgroup declined the FPD’s proposal to increase the page limits in Rule 32.5(b), which would more than double the number of pages. The workgroup believed this would be a substantive change. In Rule 32.5(e), the FPD suggested that the time limit be measured from the defendant’s receipt of the referenced order rather than the filing date of the order; however, the workgroup did not see a way to determine the defendant’s date of receipt and kept the starting point as the filing date. But to assure the defendant had adequate time to respond to the order, the workgroup *sua sponte* recommended changing the time from 30 days to 40 days.

Another comment suggested that in Rule 32.9(c)(3), the word “promptly” be added to the provision on when the court must decide a motion for extension of time. The workgroup agreed and added that word. Proposed Rule 32.9(c)(5)(A) stated, “The petition or cross-petition must not incorporate any document by reference, except the appendix.” The Attorney General requested, and the workgroup agreed, to modify this by deleting the words “except the appendix.” However, after discussion, a Task Force member made this motion:

Motion: To add back to the rule the words “except the appendix.” The motion carried with one member opposed. **CRTF-023**

Rule 32.4(e)(5) provides that preparation of transcripts for an indigent defendant is a county expense. The Arizona Prosecuting Attorneys Advisory Council requested the provision clarify when this cost is the expense of a municipality. The workgroup as well as the Task Force declined to make this substantive change.

5. **Miscellaneous comments.** The Chair then inquired if members had comments concerning any of the rules. Judge Jeffery had two comments. First, he noted that after the April 7 meeting, Workgroup 3 prepared revisions to Rule 7.2 that conformed to the Task Force's discussion. The revisions included a provision that addressed the Attorney General's comment about release after sentencing. Judge Jeffery's other comment concerned the time for filing a notice of change of judge as a matter of right under Rule 10.2. He noted that the Phoenix Municipal Court has for years had a local rule that extends the time, which is an acknowledgement of when defense counsel is appointed, and both prosecutors and defense counsel support this practice. He therefore requested adding to draft Rule 10.2(c)(1) the words "or extended by local rule." Members unanimously concurred with this amendment.

6. **Call to the Public.** Two people addressed the Task Force following a call to the public. Samantha Dumond spoke on behalf of the Arizona Bail Bondsmen's Association. She believes recent amendments to Rule 7.1(a) that disallow a professional bondsman from posting a cash bond or a deposit bond are contrary to statute, and may inhibit a defendant's release from custody. She also requested the Task Force to consider changing the word "must" in Rule 7.3(c)(2)(A) to "may." Colleen Clase on behalf of the AVCV addressed Rule 39(d)(3). She requested that the rule be amended to permit prosecutor referrals to "victims' rights advocacy organizations." Although her request came during a call to the public, because this is the last meeting before the Task Force files a supplemental petition and because Rule 39(d)(3) was discussed during today's meeting, the Chair asked the members to discuss and consider her request. After discussion, and on a voice vote, the members declined to amend Rule 39(d)(3) as she requested, but they might reconsider this matter during the second comment period.

7. **Roadmap; adjourn.** The Chair advised the members that he would confer with staff about setting a Task Force meeting following the conclusion of the second comment period.

The meeting adjourned at 4:08 p.m.