

Task Force on the Arizona Rules of Criminal Procedure

Meeting Agenda

Friday, April 8, 2016

10:00 AM to 2:00 PM

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

Conference call-in number: (602) 452-3288 Access code: 4086

Item no. 1	Call to Order Introductory comments	<i>Judge Welty, Chair</i>
Item no. 2	Benefits and use of the OneDrive account	<i>Julie Graber</i>
Item no. 3	Approval of February 19, 2016 meeting minutes	<i>Judge Welty</i>
Item no. 4	Uniformity in rules of court procedure	<i>All</i>
Item no. 5 Pages 9-20 Pages 21-29 Pages 31-42 Pages 44-52	Discussion of workgroup drafts <ul style="list-style-type: none">- Workgroup 1: Rules 1 and 2- Workgroup 2: Rules 4 and 5- Workgroup 3: Rules 7 and 9- Workgroup 4: Rules 10 and 13	<i>Judge Duncan</i> <i>Judge Cattani</i> <i>Judge Jeffery</i> <i>Judge Tang</i>
Item no. 6	Roadmap and additional rule assignments <ul style="list-style-type: none">- Future Task Force meeting dates: April 8 May 13 June 17 July 29 September 16 October 27 December 9 <p>All of the meetings are on Friday, except for Thursday, October 27.</p>	
Item no. 7	Call to the Public Adjourn	<i>Judge Welty</i>

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

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

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

Task Force on the Arizona Rules of Criminal Procedure

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,

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.

I. General Provisions

Rule 1. Scope, Purpose and Construction, Computation of Time, Definitions, Size of Paper, and Other General Provisions

Rule 1.1. Scope

These rules govern procedures in all criminal proceedings in Arizona state courts, unless specifically stated otherwise in a particular rule.

Rule 1.2. Purpose and Construction

These rules are intended to provide for the just and speedy determination of every criminal proceeding. Courts and parties should construe these rules to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public welfare.

Rule 1.3. Computation of Time

(a) General Time Computation. When computing any time period more than 24 hours, prescribed by these rules, by court order, or by an applicable statute, the following rules apply:

- (1) *Day of the Event.*** Exclude the day of the act or event from which the designated time period begins to run.
- (2) *Last Day.*** Include the last day of the period, unless it is a Saturday, Sunday or legal holiday, in which case the period ends on the next day that is not a Saturday, Sunday, or legal holiday.
- (3) *Time Period Less Than 7 Days.*** If the time period is less than 7 days, exclude intermediate Saturdays, Sundays and legal holidays from the computation.
- (4) *Next Day.*** The “next day” is determined by counting forward when the period is measured after an event, and backward when measured before an event.
- (5) *Additional Time After Service Under Rule 1.8(c)(2)(C) or (D).*** If a party may or must act within a specified time after service and service is made under a method authorized by Rule 1.8(c)(2)(C) or (D), [DE1]5 [DE2]calendar days are added to the specified time period under this rule. However, this provision does not apply to the clerk’s distribution of notices, minute entries, or other court-generated documents.

(b) If an Arraignment Is Not Held. If an arraignment is not held under Rule 14.1(d), the date of arraignment for the purpose of computing time is the date the defendant receives notice of the next court date under Rule 5.8 and Rule 12.10.

Notes:

Draft Rule 1.3(a) is modeled on proposed Civil Rule 6(a), (c), and (d) [[pending rule petition number R-16-0010](#)]. Draft Rule 1.3(a) and draft Rule 1.8 expand and replace current Rule 35.5. Task Force members should consider whether requirements for service and filing should be fully set out in the criminal rules, as shown in the draft, or whether this draft rule should incorporate the requirements of the civil rules by reference, as done by current Rule 35.5.

The following language of current Rule 1.3(a) is omitted from draft Rule 1.3(a): “Mailing pursuant to Rule 5(c)(2)(C) of the Arizona Rule of Civil Procedure includes every type of service except same day hand delivery.” (What is this trying to convey?)

Rule 1.4. Definitions

(a) Defendant. “Defendant” is a person named as such in a complaint, indictment, or information. “Defendant” as used in these rules includes an arrested person who at the time of arrest is not named in a charging document. “Defendant” in the context of certain rules includes the attorney who represents the defendant.

(b) Limited Jurisdiction Court. A limited jurisdiction court is a justice court under Arizona Revised Statutes, Title 22, Chapter 1, or a municipal court under Arizona Revised Statutes, Title 22, Chapter 4.

(c) Magistrate. “Magistrate” means an officer having power to issue a warrant for the arrest of a person charged with a public offense and includes the chief justice and justices of the Supreme Court, judges of the superior court, judges of the court of appeals, justices of the peace, and judges of a municipal court, and judges pro tempore of these courts.

(d) Parties. “Parties” means the State of Arizona and the defendants in a case. Use of the word “party” in these rules means either, or any, party.

(e) Person. “Person” includes an entity.

(f) Presiding Judge.

(1) *For the Superior Court.* The superior court presiding judge is the county’s presiding judge. In a county that has only one superior court judge, that judge is the presiding judge. In other counties, the chief justice of the Supreme Court

designates the presiding judge, who may appoint other judges to carry out one or more of the presiding judge's duties.

(2) ***For a Limited Jurisdiction Court.*** If a court consists only of one judge, that judge is the presiding judge. In courts having more than one judge, the presiding judge is designated by the appropriate authority.

(g) **State.** "State" means the State of Arizona, or any other Arizona state or local governmental entity that files a criminal charge in an Arizona court. "State" in the context of certain rules includes the prosecuting attorney who represents the State.

Notes:

Descriptions in current Rule 1.4 for "initial appearance" and "arraignment" are located in draft Rules 4 and 14, respectively, and they are therefore not included in draft Rule 1.4.

Definitions are added in draft Rule 1.4 for "magistrate," "defendant," "State," "parties," and "person."

Regarding Rule 1.4(c), see ARS § 1-215(18).

Rule 1.5. Initial Appearance Masters^[DE3]

(a) **Appointment.** A county's presiding judge may appoint one or more masters to conduct initial appearances under Rule 4. Masters under this rule have a one year term and may be reappointed for additional terms.

(b) **Compensation.** The presiding judge will set masters' compensation, which will be paid from any available funding source the presiding judge identifies.

(c) **Qualifications and Training.** The presiding judge will determine whether an individual has sufficient education and work experience to conduct initial appearances as a master under this rule. Masters do not need to be members of the State Bar of Arizona. Before assignment, a master must successfully complete relevant training regarding the law, procedures and judicial conduct. Masters must receive annual training concerning changes in relevant statutes, rules and case law.

(d) **Authority and Assignment.** The master's authority is limited to conducting initial appearances. Presiding judges may assign masters only if no justice of the peace, magistrate, or judge pro tempore is reasonably available to conduct initial appearances.

Rule 1.6. Interactive Audiovisual Systems

(a) Generally. If the appearance of a defendant or counsel is required in any court, the appearance may be made by using an interactive audiovisual system that complies with the provisions of this rule. Any interactive audiovisual system must meet or exceed minimum operational guidelines adopted by the Administrative Office of the Courts.

(b) Requirements. If an interactive audiovisual system is used:

- (1)** the system must operate so the court and all parties can view and converse with each other simultaneously;
- (2)** a full record of the proceedings must be made consistent with the requirements of applicable statutes and rules; and
- (3)** provisions must be made to:
 - (A)** allow for confidential communications between the defendant and defendant's counsel before, during, and immediately after the proceeding;
 - (B)** allow a victim a means to view and participate in the proceedings and ensure compliance with all victims' rights laws;
 - (C)** allow the public a means to view the proceedings consistent with applicable law; and
 - (D)** allow for use of interpreter services when necessary and, if an interpreter is required, the interpreter must be present with the defendant absent compelling circumstances.

(c) When a Defendant May Appear by Videoconference.

- (1) *In the Court's Discretion.*** A court may require a defendant's appearance by use of an interactive audiovisual system without the parties' consent at any of the following:
 - (A)** an initial appearance;
 - (B)** an arraignment;
 - (C)** a hearing on a motion to continue that does not include a waiver of time under Rule 8;
 - (D)** a hearing on an uncontested motion;

(E) a pretrial or status conference;

(F) a change of plea in a misdemeanor case; or

(G) an informal conference held under Rule 32.7.

- (2) **Generally Not Permitted.** A court may not require a defendant's appearance by use of an interactive audiovisual system at any trial, contested probation violation hearing, felony sentencing, or felony probation disposition hearing, unless the court finds extraordinary circumstances and the parties consent by written stipulation or on the record.
- (3) **By Stipulation.** For any proceeding not included in (c)(1) and (c)(2), the parties may stipulate that the defendant can appear at the proceeding by use of an interactive audiovisual system. The parties must file a stipulation before the proceeding begins or state the stipulation on the record at the start of the proceeding. Before accepting the stipulation, the court must find that the defendant knowingly, intelligently and voluntarily agrees to appear at the proceeding by use of an interactive audiovisual system.
- (4) **Change in Hearing's Scope.** If the scope of a hearing expands beyond that specified in (c)(2) and (c)(3), the court must reschedule a videoconference and require the defendant's personal appearance.

Rule 1.7. Form of Documents

(a) **Caption.** Documents filed with the court must contain the following information as single-spaced text, typed or printed, on the first page of the document:

- (1) to the left of the center and at the top of the page:^[DE4]
- (A) the filing attorney's or self-represented litigant's name, address, telephone number, and email address; and
 - (B) if an attorney, the attorney's State Bar of Arizona attorney identification number, any State Bar of Arizona law firm identification number^[DE5], and the name of the party the attorney represents;
- (2) centered on the page and immediately below the filer information, the title of the court;
- (3) below the title of the court and to the left of the center of the page, the title of the action or proceeding;

- (4) opposite the title, in the space to the right of the center of the page, the case number of the action or proceeding; and
- (5) immediately below the case number, a brief description of the document.

(b) Document Format.

- (1) **Generally.** Unless the court orders otherwise, all filed documents, other than a document submitted as an exhibit or attachment to a filing, must be prepared as follows:
 - (A) **Text and Background.** The text must be black on a plain white background. All documents filed must be single-sided.
 - (B) **Type Size and Font.** Every typed document must use at least a 13-point type size. The court prefers proportionally spaced serif fonts. Footnotes must be in at least a 13-point type size and must not appear in the space required for the bottom margin.
 - (C) **Page Size.** Each page of a document must be 8 ½ by 11 inches.
 - (i) Exhibits, attachments to documents, or documents from jurisdictions outside Arizona that are larger than the specified size must be folded to the specified size or folded and fastened to pages of the specified size.
 - (ii) Exhibits or attachments to documents smaller than the specified size must be fastened to pages of the specified size.
 - (iii) A document that is not in compliance with these provisions may be filed only if compliance is not reasonably practicable.
 - (D) **Margins and Page Numbers.** Page margins must be at least one inch on the top and bottom of the page and between one inch and 1 ½ inches on each side. Except for the first page, the bottom margin must include a page number.
 - (E) **Handwritten Documents.** Handwritten documents are discouraged, but if a document is handwritten, the text must be legibly printed and not include cursive writing or script.
 - (F) **Line Spacing.** Text must be double-spaced and may not exceed 28 lines per page, but headings, quotations, and footnotes may be single-spaced. A single-spaced quotation must be indented on the left and right sides.

- (G) **Headings and Emphasis.** Headings must be underlined, in italics, or in bold type, or in any combination of the three. Underlining, italics, or bold type also may be used for emphasis.
- (H) **Citations.** Case names and citation signals must be in italics or underlined.
- (I) **Originals.** Unless filing electronically, only originals may be filed. If it is necessary to file more than one copy of a document, the additional copies may be photocopies or computer-generated duplicates.
- (J) **Court Forms.** Printed court forms may be single-spaced, but those requiring a judge's or commissioner's signature must be double-spaced. Printed court forms must be single-sided. All printed court forms must be on paper of sufficient quality and weight to assure legibility upon duplication, microfilming, or imaging.
- (c) **Electronically Filed Documents**^[DE6]. If a court has an electronic filing portal, a party may file a document electronically, unless a document is being filed under seal or in a sealed case.
- (1) **Format.**
- (A) **File Type.** A document filed electronically that contains text, other than a scanned document image that is submitted under this rule, must be in a text-searchable .pdf, .odt, or .docx format or other format permitted by Administrative Order. A text-searchable .pdf format is preferred. A proposed order must be in a form that permits it to be modified, such as .odt or .docx format or other format permitted by Administrative Order, and must not be password protected.
- (B) **File Size.** A document exceeding the file size limits allowed by the court's electronic filing portal may be broken up into multiple files to accommodate such a limit.
- (2) **Formats of Attachments.**
- (A) **Generally.** An exhibit and other attachment to an electronically filed document may be filed electronically if it is attached to the same submission as either a scanned image or an electronic copy using an approved file type and format.
- (B) **Official Records.** A scanned copy of an official record may be filed electronically if it contains an official seal of authority or its equivalent.

- (C) **Notarized Documents.** A scanned copy of a notarized document may be filed electronically if it contains the notary’s signature and stamp or seal.
- (D) **Certified Mail, Return Receipt Card.** When establishing proof of service by a form of mail that requires a signed and returned receipt, the return receipt may be filed electronically if both sides of the return receipt card are scanned and filed.
- (E) **National Courier Service.** When establishing proof of service by a national courier service, the receipt for such service may be filed electronically by scanning and filing the receipt.

(3) Bookmarks and Hyperlinks.

- (A) **Bookmarks.** A bookmark is a linked reference to another page within the same document. An electronically filed document may include bookmarks. A document that is incapable of bookmarking may be made accessible by a hyperlink. Bookmarks are encouraged.
 - (B) **Hyperlinks.** A hyperlink is an electronic link in a document to another document or to a website. An electronically filed document may include hyperlinks. Material that is not in the official court record does not become part of the official record merely because it is made accessible by a hyperlink. Hyperlinks are encouraged.
- (4) **Originals.** An electronically filed document (or a scanned copy of a document filed in hard copy) constitutes an “original” under Arizona Rule of Evidence 1002.
 - (5) **Signature.** All electronic filings must be signed. A person may sign an electronic document by placing the symbol “/s/” on the signature line above the person’s name. An electronic signature is equivalent to an ink signature on paper.

Note: Draft Rule 1.7 reflects proposed amendments to Civil Rule 5.2.

Rule 1.8. Filing and Service of Documents

(a) **“Filing with the Court” Defined.** The filing of a document with the court is accomplished only by filing it with the clerk.

(b) Effective Date of Filing.

- (1) **Paper Documents.** A [DE7] document is deemed filed on the date the clerk and accepts it. If a party is incarcerated, a document filed by that party is deemed

filed on the date that it is delivered to jail or prison authorities to deposit in the mail^[DE8].

(2) ***Electronically Filed Documents.*** An electronically filed document is filed on the date and time the clerk receives it. Unless the clerk later rejects the document based on a deficiency, the date and time shown on the email notification from the court's electronic filing portal or as displayed within the portal is the effective date of filing. If a filing is rejected, the clerk must promptly provide the filing party with an explanation for the rejection.

(3) ***Late Filing Because of an Interruption in Service.*** If a person fails to meet a deadline for filing a document because of a failure in the document's electronic transmission or receipt, the person may file a motion asking the court to accept the document as timely filed. On a showing of good cause, the court may enter an order permitting the document to be deemed filed on the date that the person originally attempted to transmit the document.

(c) **Service of All Documents Required; Manner of Service.** Every person filing a document with any court must serve a copy of the document on all other parties as follows:

(1) ***Serving an Attorney.*** If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) ***Service Generally.*** A document is served under this rule by any of the following:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it by U.S. mail to the person's last-known address—in which event service is complete upon mailing;

(D) delivering it by any other means, including electronic means other than that described in Rule 1.8(c)(2)(E), if the recipient consents in writing to that method of service or if the court orders service in that manner—in which event service is complete upon transmission; or

(E) transmitting it through an electronic filing service provider approved by the Administrative Office of the Courts, if the recipient is an attorney of record in the action—in which event service is complete upon transmission.

(3) ***Certificate of Service.*** The date and manner of service must be noted on the last page of the original of the served document or in a separate certificate, in a form substantially as follows:

A copy has been or will be mailed/mailed/hand-delivered [select one]

on [insert date] to:

[Name of opposing party or attorney]

[Address of opposing party or attorney]

If the precise manner in which service has actually been made is not noted, it will be presumed that the document was served by mail. This presumption will only apply if service in some form has actually been made.

Note: Draft Rule 1.8 reflects proposed amendments to Civil Rules 5 and 5.1.

II. Preliminary Proceedings

Rule 2. Commencement of Criminal Proceedings

Rule 2.1.^[A1] Misdemeanors

(a) **Limited Jurisdiction Courts.** The State may commence misdemeanor and petty offense actions triable in limited jurisdiction courts by filing with the court:

- (1) an Arizona Traffic Ticket and Complaint;
- (2) any complaint form approved by the Arizona Supreme Court; or
- (3) a complaint under Rule 2.3.

(b) **Superior Court.** The State may commence a misdemeanor action by filing an indictment or information directly in the superior court. ^[A2]

Note: The second sentence of Rule 2.1(b) is adapted from current Rule 2.5.

Rule 2.2. Felonies

The State may commence a felony action by the following:

- (a) the return of an indictment under Rule 12 which may, but need not, be preceded by a complaint; or
- (b) filing a complaint in a limited jurisdiction court, or in superior court with permission of a judge of such court.

Note: The second sentence of Rule 2.2(a) derives from the comment to Rule 2.2(a), now deleted.

Rule 2.3.^[A3] Content of Complaint

(a) **Complaint, Generally.** A complaint is a written statement of the essential facts constituting a public offense. A complaint must be:

- (1) signed by a prosecutor;
- (2) sworn before a magistrate; or
- (3) made in compliance with A.R.S. § 13-3903.

(b) **Electronic Oath or Signature.** The constitutional requirement that a complaint must be under oath is satisfied by an electronic oath or by an affidavit containing an

electronic signature of a law enforcement officer or a law enforcement agency representative under penalty of perjury.

- (c) **Notice to the Clerk.** If a complaint, indictment, or information charges a defendant with any offense listed in A.R.S. Title 13, chapters 14, 32, 35, or 35.1, or an offense in which the victim was a juvenile at the time of the offense, the prosecuting agency must advise the clerk at the time of filing the charge that the case is subject to Supreme Court Rule 123(g)(1)(C)(ii)(h).

Rule 2.4. ^[A4] **Duty of Magistrate upon Presentation of Complaint**

- (a) **Complaint Under Oath.** If a complaint is presented under Rule 2.3(a)(2), the magistrate must determine whether there is probable cause to believe an offense has been committed and whether the defendant committed the offense. If the magistrate finds probable cause, the magistrate must proceed under Rule 3.1. If the magistrate does not find probable cause, the magistrate must dismiss the complaint.
- (b) **Complaint Signed by a Prosecutor.** If a complaint is signed by a prosecutor, the magistrate must proceed under Rule 3.1.

Note: Current Rule 2.5 regarding an “Alternative procedure for commencing misdemeanor actions triable in superior court” is deleted because the substance was relocated in draft Rule 2.1(a). Accordingly, Rule 2.6 below is renumbered as Rule 2.5.

Rule 2.5. Refusal to Provide a DNA Sample

If an arresting authority or custodial agency files a petition under penalty of perjury stating that a person in custody for an offense listed in A.R.S. § 13-610(O)(3) refused to provide buccal cells or other bodily substances for DNA testing, the court must order that the person appear at a designated time and place and permit the taking of buccal cells or other bodily substances for DNA testing. The arresting authority or custodial agency must serve the person with a copy of the court order before or at the time of taking the sample.

Rule 4. Initial Appearance and Arraignment

Rule 4.1. Procedure Upon Arrest

- (a) Prompt Initial Appearance.** An arrested person must promptly be taken before a magistrate. At the initial appearance, the magistrate will advise the arrested person of those matters set forth in Rule 4.2. If the initial appearance does not occur within 24 hours after arrest, the arrested person must be immediately released from custody.
- (b) On Arrest Without a Warrant.** A person arrested without a warrant must be taken before the nearest or most accessible magistrate in the county of arrest. A complaint, if not already filed, must be promptly prepared and filed. If a complaint is not filed within 48 hours from the time of the initial appearance before the magistrate, the arrested person must be immediately released from custody and any pending preliminary hearing dates must be vacated.
- (c) On Arrest with a Warrant.**
- (1) Arrest in the County of Issuance.** A person arrested in the county where the warrant was issued must be taken before the magistrate who issued the warrant for an initial appearance. If the magistrate is absent or unable to act, the arrested person must be taken to the nearest or most accessible magistrate in the same county.
 - (2) Arrest in Another County.** A person arrested in a county other than the one where the warrant was issued, must be taken before the nearest or most accessible magistrate in the county of arrest. If eligible for release as a matter of right, the person must then be released under Rule 7.2. If not released immediately, the arrested person must be taken to the issuing magistrate in the county where the warrant originated, or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the county where the warrant originated.
- (d) Assurance of Availability of Magistrate and the Setting of a Time for Initial Appearance.** Each presiding judge must make a magistrate available every day of the week to hold the initial appearances required under Rule 4.1(a). The presiding judge also must set at least one fixed time each day for conducting initial appearances and must notify local law enforcement agencies of the fixed time(s).
- (e) Sample for DNA Testing; Proof of Compliance.** An arresting authority that is required to secure a sample of buccal cells or other bodily substances for DNA testing

under A.R.S. § 13-610(K) must provide proof of compliance to the court before the initial appearance.

Rule 4.2. Initial Appearance

(a) Generally. At an initial appearance, the magistrate must:

- (1) determine the defendant's true name and address and, if necessary, amend the formal charges to correct the name and instruct the person to promptly notify the court of any change of address;
- (2) inform the defendant of the charges and, if available, provide the person with a copy of the complaint, information, or indictment;
- (3) inform the defendant of the right to counsel and the right to remain silent;
- (4) determine whether there is probable cause for purposes of release from custody, and, if no probable cause is found, immediately release the person from custody;
- (5) appoint counsel if the defendant requests and is eligible for appointed counsel under Rule 6;
- (6) permit and consider any victim's oral or written comments concerning the defendant's possible release and conditions of release;
- (7) determine the conditions of release under Rule 7.2, including whether the defendant is non-bailable under Arizona Constitution art. 2 § 22 and A.R.S. § 13-3961;
- (8) order a summoned defendant to be 10-print fingerprinted within 20 calendar days by the appropriate law enforcement agency at a designated time and place if:
 - (A) the defendant is charged with a felony offense, a violation of A.R.S. § 13-1401, et seq. or A.R.S. § 28-1301 et seq., or a domestic violence offense as defined in § 13-3601; and
 - (B) the defendant does not present a completed mandatory fingerprint compliance form to the court, or if the court has not received the process control number; and
- (9) order the arresting agency to secure a sample of buccal cells or other bodily substances for DNA testing if:

(A) the defendant is in-custody and was arrested for an offense listed in A.R.S. § 13-610(O)(3); and

(B) the court has not received proof of compliance with A.R.S. § 13-610(K).

(b) Felonies Charged by Complaint. If a defendant is charged in a complaint with a felony, in addition to following Rule 4.2(a)'s procedures, the magistrate must:

(1) inform the defendant of the right to a preliminary hearing and the procedures by which that right may be waived; and

(2) unless waived, set the time for a preliminary hearing under Rule 5.1.

(c) Combining an Initial Appearance with an Arraignment. If the defendant is charged with a misdemeanor or indicted for a felony^[GJ1] and the defendant's counsel^[we2] is present or the defendant waives the presence of counsel, the magistrate may arraign a defendant under Rule 14 during an initial appearance under Rule 4.2(a). If, however, the magistrate lacks jurisdiction to try the offense, the magistrate may not arraign the defendant and must instead transfer the case to the proper court for arraignment. If the court finds that delaying the defendant's arraignment is indispensable to the interests of justice, the court when setting a date for the continued arraignment must provide sufficient notice to victims under Rule 39(b)(2) when setting a new arraignment date.

Rule 5. Preliminary Hearing

Rule 5.1. Right to a Preliminary Hearing; Waiver; -Continuance

(a) **Right to a Preliminary Hearing.** A defendant has a right to a preliminary hearing if charged in a complaint^[RJW1] ^[GJ2] with a felony. A preliminary hearing must commence before a magistrate within 10 days after the defendant's initial appearance if the defendant is in custody, or within 20 days after the defendant's initial appearance if the defendant is not in custody, unless:

- (1) the complaint is dismissed;
- (2) the hearing is waived;
- (3) the defendant has been transferred from the juvenile court for criminal prosecution on specified charges; or
- (4) the magistrate orders the hearing continued under Rule 5.1(c).

(b) **Waiver.** The parties may waive a preliminary hearing but the waiver must be in writing and the defendant, the defendant's counsel^[RJW3] ^[GJ4], and the State must sign it.

(c) Continuance.

- (1) **Release Absent Continuance.** If a preliminary hearing for an in-custody defendant did not commence within 10 days as required under Rule 5.1(a) and was not continued, the defendant must be released from custody, unless the defendant is charged with a non-bailable offense, in which case the magistrate must immediately notify that county's presiding judge of the reasons for the delay.
- (2) **Continuance.** On motion or on its own, a magistrate may continue a preliminary hearing beyond the 20-day deadline specified in Rule 5.1(a). A magistrate may continue the hearing only if it finds that extraordinary circumstances exist and that delay is indispensable to the interests of justice. The magistrate must also file a written order detailing the reasons for these findings. The court must promptly notify the parties of the order.
- (3) **Resetting Hearing Date.** If the magistrate orders a continuance, the order **must** ^[RJW5] reset the preliminary hearing for a specific date to avoid uncertainty and additional delay.

(d) Hearing Demand. A defendant who is in custody may demand that the court hold a preliminary hearing as soon as practicable. In that event, the magistrate must set a hearing date and must not delay its commencement more than necessary to secure the attendance of counsel, a court reporter, and necessary witnesses.

Note: The last sentence of draft Rule 5.1(c) was taken from a comment to the current rule.

Rule 5.2. Summoning Witnesses; Record of Proceedings

(a) Summoning Witnesses. If requested, the magistrate must issue subpoenas to secure the attendance of witnesses.

(b) Record of Proceedings. The magistrate must make a verbatim record of the preliminary hearing. Proceedings may be recorded by a certified court reporter, or by electronic or other means authorized by the superior court presiding judge. But if a party requests that a certified court reporter record the proceedings, the court must record the proceedings in that manner, unless the court is located in an area where a certified court reporter is not reasonably available.

Rule 5.3. Nature of the Preliminary Hearing

(a) Procedure.

- (1) Permitted Evidence.** During a preliminary hearing, a magistrate may admit evidence only if it is material to whether there is probable cause to hold the defendant for trial.
- (2) Cross-Examination; Witness Statements.** All parties have the right to cross-examine a witness who testifies in person at the hearing, and to review any of the witness' previous written statements before conducting cross-examination.
- (3) Probable Cause Ruling.** At the close of the State's case, [CK6][we7]the magistrate must determine and state for the record whether the State's case establishes probable cause.
- (4) Offer of Proof.** If the magistrate rules that there is probable cause, the defendant may make a specific offer of proof to the contrary, including the identities of witnesses who would testify or produce the offered evidence. The magistrate must allow the defendant to present the offered evidence, unless the magistrate determines that, even if true, the evidence would be insufficient to rebut the probable cause finding.

(b) Unlawfully Obtained Evidence. A court -must not exclude evidence during a preliminary hearing solely on the ground that it was obtained unlawfully.

Rule 5.4. Determining Probable Cause

(a) Holding a Defendant to Answer. If a magistrate finds that there is probable cause to believe that an offense has been committed and that the defendant committed it, the magistrate must file a written order holding the defendant to answer for the offense before the superior court. Upon request, the magistrate may reconsider the conditions of release.

(b) Amending the Complaint. A magistrate may grant a motion to amend a complaint so that its factual allegations conform to the evidence, but the magistrate must not hold the defendant to answer for crimes different than those charged in the original complaint.

(c) Evidence. A magistrate must base a probable cause finding on substantial evidence. Such evidence may be in the form of hearsay and may include the following:

- (1)** written report of an expert witnesses;
- (2)** documentary evidence, even without foundation, if there is a substantial basis for believing that foundation will be available at trial and the document is otherwise admissible;
- (3)** a witness’s testimony about another person’s declarations if such evidence is cumulative or if there are reasonable grounds to believe that the declarant will be personally available for trial.

(d) Discharging the Defendant. If a magistrate finds that there is not probable cause to believe that an offense has been committed or that the defendant committed it, the magistrate must dismiss the complaint and discharge the defendant.

Note: The addition of the phrase “factual allegations” in Rule 5.4(b) is derived from an existing comment.

Rule 5.5. Review of a Magistrate’s Probable Cause Determination

(a) Grounds. The superior court may review a magistrate's determination to bind over a defendant only if the defendant files a motion for a new probable cause finding. The motion may be granted only if [RJW8]the defendant was denied a substantial procedural right or the magistrate’s probable cause finding was not supported by any credible evidence. If the motion challenges the sufficiency of the evidence supporting the

probable cause finding, it must state specifically the ways in which credible evidence was lacking.

- (b) **Timeliness.** A motion under this rule must be filed no later than 25 days after the preliminary hearing is completed.
- (c) **Evidence.** A superior court's review of the evidence is limited to the certified transcript of the preliminary hearing.
- (d) **Relief.** If the court grants a motion for a new probable cause finding, the court must remand the action to the magistrate with appropriate instructions. Unless a new preliminary hearing is commenced within 15 days after the remand order is filed, the case must be dismissed.

Rule 5.6. Transmittal and Transcription of the Record

Within 3 days after a preliminary hearing is waived or completed, the magistrate must transmit to the superior court clerk the record of any preliminary hearing, any documents or exhibits submitted at the hearing^[RJW9], and a prescribed transmittal form. The record of the preliminary hearing may be transcribed only if a party makes a written request for it and avows that a material need exists for the transcript. ~~If a request is made, the court must authorize a certified court reporter or an authorized transcriber of an electronic recording to prepare a transcript, to be filed with the clerk within 20 days after receipt of the request, unless the court grants an extension.~~

Note: The timing under Rule 5.6 for requesting and filing a transcript (3 days + 20 days) appears incompatible with the time (25 days) required to file a motion under Rule 5.5, because the motion needs to show why evidence in the transcript is lacking. Also, there is no time requirement for requesting a transcript; should a deadline be provided in this rule?^{[we10][we11]}

Is the last sentence of Rule 5.6 necessary?

Rule 5.7. Preservation of Recording

The clerk must retain and preserve any electronic recording of a preliminary hearing in the same manner as required for the original notes of a certified court reporter under Rule 28.1(c).

Rule 5.8. Notice if an Arraignment Is Not Held

(a) When an Arraignment Is Not Held. If a defendant is held to answer in a county where an arraignment is not held as provided in Rule 14.1(d), the magistrate must:

- (1) enter a plea of not guilty for the defendant and prepare and provide the defendant and the defendant's counsel^[RJW12] with a notice specifying that a plea of not guilty has been entered;
- (2) set dates for a trial or pretrial conference;
- (3) advise the parties in writing of the dates set for further proceedings and other important deadlines;
- (4) advise the defendant of the defendant's right to be present at all future proceedings, that any proceeding may be held in the defendant's absence, and that if the defendant fails to appear, the defendant may be charged with an offense and a warrant may be issued for the defendant's arrest; and
- (5) advise the defendant of the right to a jury trial, if applicable.

(b) Notice Form. The magistrate must notify the defendant of the matters in Rule 5.8(a) in writing. The defendant and the defendant's counsel^[RJW13] must sign the notice and return it to the court.

Rule 7. Release

Rule 7.1. Definitions

- (a) **Own Recognizance.** “Own recognizance” is a release of a defendant on the court’s order that defendant appear at court proceedings and comply with the court’s conditions of release.
- (b) **Appearance Bond.** An “appearance bond” is a promise by a defendant or by a third party to pay to the clerk a specified sum of money if the defendant fails appear at a court proceeding or comply with the conditions of release. An appearance bond can be secured or unsecured. A secured appearance bond is secured by a deposit with the clerk of security equal to the full amount of the bond.
- (c) **Security.** “Security” is cash, a surety's undertaking, or any property of value, deposited with the clerk to secure an appearance bond. The value of that property is determined by the clerk, or at the clerk's or a party's request, by a magistrate.
- (d) **Surety.** A “surety” is a person, other than the defendant, who executes an appearance bond and agrees to pay the amount of the bond if the defendant fails to comply with its conditions. A surety must file an affidavit with an appearance bond stating that the surety is not an attorney or person authorized to take bail, and that the surety owns property in Arizona (or is a resident of Arizona owning property) with a value equal to or more than the amount of the appearance bond. The property’s value is calculated after deducting the amount exempt from execution and all liabilities, including the amount of any other outstanding appearance bonds that the surety has entered into involving the same property.
- (e) **Professional Bondsman.** Any person who is a surety simultaneously on more than 4 appearance bonds is a “professional bondsman.” A person may not be a professional bondsman unless the person annually certifies in writing under oath to the superior court clerk that the person:
- (1) is an Arizona resident;
 - (2) has sufficient financial net worth to satisfy reasonable obligations as a surety;
 - (3) agrees to assume an affirmative duty to the court to remain in regular contact with any defendant released under an appearance bond on which the person is a surety;

- (4) has not been convicted of a felony, except as otherwise provided in A.R.S. § 20-340.03;
- (5) has no judgments arising out of surety undertakings outstanding against him or her; and
- (6) has not, within a period of two years, violated any provisions of these rules or any court order.

The clerk or the court may revoke or withhold a professional bondsman's capacity as surety if the bondsman violates this rule's provisions.

Rule 7.2. Right to Release

- (a) **Before Conviction; Persons Charged With an Offense Bailable as a Matter of Right.** Any person charged with an offense bailable as a matter of right must be released on the person's own recognizance pending or during trial, unless the court finds that the release will not reasonably assure the person's required appearances and compliance with the conditions of release. If the court makes that finding, it must impose the least onerous condition of release set forth in Rule 7.3(b) that will reasonably assure the person's appearance and compliance with the conditions of release.
- (b) **Before Conviction; Persons Charged With an Offense Not Bailable as a Matter of Right.** The court must not release a defendant on bail if it finds the person is not bailable under applicable law.
- (c) **After Conviction.**
 - (1) **Superior Court.**
 - (A) *Generally.* After a person is convicted of any offense for which the person will, in all reasonable probability, receive a sentence of imprisonment, the court may not release the person on bail or on the person's own recognizance unless the court finds that reasonable grounds exist to believe that the conviction may be set aside on a motion for new trial, reversed on appeal, or vacated in any post-conviction proceeding.
 - (B) *Lack of Diligence on Appeal.* If a defendant is released pending appeal but fails to diligently prosecute the appeal, the court must revoke the release.

(C) *Release Upon Sentence Completion.* A defendant held in custody pending appeal must be released if the person's term of incarceration is completed before the appeal is decided.

(2) *Limited Jurisdiction Courts.*

(A) *Conditions of Release on Appeal.* If a defendant files a timely notice of appeal of a conviction for an offense for which the court has imposed a sentence of incarceration, the defendant may remain out of custody under the same conditions for release imposed at or after the defendant's initial appearance or arraignment.

(B) *Lack of Diligence on Appeal.* If a defendant is released pending appeal but fails to diligently prosecute the appeal, the court must revoke the release.

(C) *Motion to Amend Conditions of Release.*

(i) Upon the filing of a timely notice of appeal, the court—on motion or on its own—may amend the conditions of release if it finds a substantial risk exists that the defendant presents a danger to another person or the community, or the defendant is unlikely to return to court if required to do so after the appeal's conclusion.

(ii) The court must hear a motion under this rule within 3 days after filing, although it may continue the hearing for good cause. The defendant may be detained pending the hearing. The hearing must be on the record, and the defendant is entitled to representation by counsel. Any testimony by the defendant is not admissible in another proceeding except as it relates to compliance with prior conditions of release, perjury, or impeachment. The court must state findings on the record.

(iii) The court may amend the conditions of release in accordance with the standards set forth in Rule 7.3 and Rule 7.4(b). In determining the method of release or the amount of bail, the court must consider the nature and circumstances of the offense, family or local ties, employment, financial resources, the defendant's character and mental condition, the length of residence in the community, the record of arrests or convictions, and appearances at prior court proceedings.

(D) Release upon sentence completion. A defendant held in custody pending appeal must be released if the defendant's term of incarceration is completed before the appeal is decided.

(E) Superior Court Review. If the trial court enters an order setting a bond or requiring incarceration during the appeal, the defendant may petition the superior court to stay the execution of sentence and to allow the defendant's release either without bond, or on a reduced bond.

(d) Burden of Proof. A court must determine issues under Rules 7.2 (a) and (c) by a preponderance of the evidence. The prosecutor bears the burden of establishing factual issues under Rule 7.2 (a), (b) and (c)(2). The defendant bears the burden of establishing factual issues under Rule 7.2(c)(1).

Rule 7.3. Conditions of Release

(a) Mandatory Conditions. Every order of release must contain the following conditions:

- (1) the defendant must appear at all court proceedings;
- (2) the defendant must not commit any criminal offense;
- (3) the defendant must not leave Arizona without the court's permission; and
- (4) if a defendant is released during an appeal after judgment and sentence, the defendant will diligently prosecute the appeal.

(b) Mandatory Condition if Charged with an Offense Listed in A.R.S. § 13-610(O)(3).

(1) **Generally.** If a defendant is charged with an offense listed in A.R.S. § 13-610(O)(3) and has been summoned to appear in court, the magistrate must order the defendant to report to the arresting law enforcement agency or its designee within 5 days after release, and submit a sample of buccal cells or other bodily substances for DNA testing as directed. The defendant must provide proof of compliance at the next scheduled court proceeding.

(2) **Required Notice.** The court must inform a defendant that a willful failure to comply with an order under (b)(1) will result in revocation of release.

(c) Additional Conditions. The court may impose as a condition of release one or more of the following conditions if the court finds the condition is reasonably necessary to secure a person's appearance:

- (1) an unsecured appearance bond;
- (2) placing the person in the custody of a designated person or organization that agrees to supervise the person;
- (3) a secured appearance bond;
- (4) restrictions on the person's travel, associations, or residence; or
- (5) any other condition the court deems reasonably necessary.

Rule 7.4. Procedure

(a) Initial Appearance. At an initial appearance, the court must issue an order containing the conditions of release. The order must inform the defendant of the conditions and possible consequences for violating a condition, and that the court may immediately issue a warrant for the defendant's arrest if there is a violation.

(b) Later Review of Conditions.

- (1) **Generally.** On motion or on its own, a court may reexamine the conditions of release if the case is transferred to a different court or a motion alleges the existence of material facts not previously presented to the court.
- (2) **Motion Requirements and Hearing.** The court may modify the conditions of release only after giving the parties an opportunity to respond to the proposed modification. A motion to reexamine the conditions of release must comply with Rule 39's victims' rights requirements.
- (3) **Non-Bailable Offenses.** If the motion involves whether the person should be held without bail, it need not allege new material facts. The court must hold a hearing on the record as soon as practicable, but no later than 7 days after the motion's filing.

(d) Evidence. A court may base a release determination under this rule on evidence that is not admissible under the Arizona Rules of Evidence.

(e) Review of Conditions of Release for Misdemeanors. Within 10 days after arraignment, the court must review the conditions of release of any defendant held in

custody on bond for a misdemeanor. It must determine whether to amend the conditions of release.

Note: Consider retaining the following comment regarding Rule 7.4(d): The intent of the rule is to assure that a person will not spend more time in jail on bond than the person would spend after a sentence imposed for the charge, and to assure that no one becomes lost in the system. The court shall document the review of the case file. Hold for reconsideration.

Rule 7.5. Review of Conditions; Revocation of Release

- (a) On State's Petition.** If the State files a verified petition stating facts or circumstances showing the defendant has violated a condition of release, the court may issue a summons or warrant under Rule 3.2, or a notice setting a hearing, to secure the defendant's presence in court and to consider the matters raised in the petition. A copy of the petition must be served with the summons, warrant, or notice.
- (b) On Pretrial Services' Report.** If pretrial services submits a written report to the court stating facts or circumstances showing the defendant has violated a condition of release, the court may issue a summons or warrant under Rule 3.2, or a notice, to secure the defendant's presence in court, and to consider the matters raised in the report. A copy of the report must be provided to the State and served with the summons, warrant, or notice.
- (c) On Victim's Petition.** After consultation with the prosecutor, and if the prosecutor decides not to file a petition pursuant to section (a), the victim may petition the court to revoke the bond or release on personal recognizance of the defendant, or otherwise modify the conditions of the defendant's release. The petition must include a statement under oath by the victim concerning any harassment, threats, physical violence, or intimidation by the defendant, or on the defendant's behalf, against the victim or the victim's immediate family.
- (d) Hearing; Modification of Conditions; Revocation.**
- (1) *Modification of Conditions of Release.*** If the court finds that defendant has willfully violated the conditions of release, after a hearing on the matters set forth in the petition or report, it may impose different or additional conditions of release.
 - (2) *Revocation of Release on a Felony Offense.*** The court may revoke release of a person charged with a felony if, after hearing, the court finds:

(A) probable cause exists to believe that the person committed another felony during the period of release and the proof is evident or the presumption great as to the present charge; or

(B) the person poses a substantial danger to another person or the community, no other conditions of release will reasonably assure the safety of the other person or the community, and the proof is evident or the presumption great as to the present charge.

(e) **Revocation of Release: DNA Testing.** The State may file a motion asking the court to revoke a defendant's release for failing to comply with the court's order to provide a sample of buccal cells or other bodily substances for DNA testing under A.R.S. § 13-3967(F)(4) and to provide proof of compliance. The motion must state facts establishing probable cause to believe that a defendant has not complied with the order. At defendant's next court appearance, the court must proceed in accordance with this rule's requirements and A.R.S. § 13-3967(F)(4).

(f) **Revocation of Release: 10-print Fingerprinting.** If a defendant fails to timely present a completed mandatory fingerprint compliance form or if the court has not received the process control number, the court may remand the defendant into custody for 10-print fingerprinting. If otherwise eligible for release, the defendant must be released from custody after being 10-print fingerprinted.

Rule 7.6. Transfer and Disposition of Bond

(a) **Transfer Upon Supervening Indictment.** An appearance bond or release order issued following the filing of a felony complaint in justice court will automatically be transferred to a criminal case in superior court after an indictment is filed that alleges the same charges.

(b) **Filing and Custody of Appearance Bonds and Security.** A defendant must file an appearance bond and security with the clerk of the court in which a case is pending or the court in which the initial appearance is held. If the case is transferred to another court, the transferring court also must transfer any appearance bond and security.

(c) **Forfeiture Procedure.**

(1) **Arrest Warrant and Notice to Surety.** If the court is informed that the defendant has violated a condition of an appearance bond, it may issue a warrant for the

person's arrest. Within 10 days after issuance of the warrant, the court must notify the surety, in writing or electronically, that the warrant was issued.

- (2) **Hearing and Notice.** After issuing the arrest warrant, the court must set a hearing within a reasonable time, no more than 120 days after it issued the warrant, requiring the parties and any surety to show cause why the bond should not be forfeited. The court must notify the parties and any surety of the hearing in writing or electronically. The forfeiture hearing may be combined with a Rule 7.5(d) hearing.
- (3) **Forfeiture.** If the court finds that the violation is not excused, it may enter an order forfeiting all or part of the amount of the bond, and the State may enforce that order as a civil judgment. The order must comply with Arizona Rule of Civil Procedure 58(a).

(d) Exoneration.

- (1) **Generally.** If the court finds before a violation, if the court finds that there is no further need for an appearance bond, it must exonerate the bond and order the return of any security.
- (2) **Surrender of the Defendant.** The court must exonerate the bond if the following conditions are met:
 - (A) the surety, in compliance with the requirements of A.R.S. § 13-3974:
 - (i) surrenders the defendant to the sheriff of the county in which the prosecution is pending; or
 - (ii) delivers an affidavit to the sheriff stating that the defendant is incarcerated in this or another jurisdiction.
 - (B) the sheriff reports the surrender or status to the court.
- (3) **Other Circumstances.** In all other instances, the court may exonerate a bond if appropriate.

(e) Post-Forfeiture Notice. After filing an order of forfeiture, the court must provide

- (1) a copy of the order to the State, the defendant, the defendant's attorney, and the surety; and
- (2) a copy of a signed order to the county attorney for collection.

Note: The last sentence of draft Rule 7.5(c)(1) is derived from a comment to the current rule.

Rule 9. Presence of the Defendant, Witnesses, and Spectators

Rule 9.1. The Defendant's Waiver of the Right to Be Present

Except for sentencing or as these rules otherwise provide, a defendant waives the right to be present at any proceeding, by the defendant's voluntary absence. The court may infer that a defendant's absence is voluntary if the defendant had notice of the date and time of the proceeding, the right to be present, and notice that the proceeding would go forward in the defendant's absence.

Rule 9.2. The Defendant's Forfeiture of the Right to Be Present

- (a) **Disruptive Conduct.** A defendant who engages in disruptive conduct, after having been warned by the court that the conduct will result in the defendant's expulsion from a proceeding, forfeits the right to be present at that proceeding.
- (b) **Reacquiring the Right.** If a defendant is excluded from a proceeding under Rule 9.2(a), the court may grant the defendant a reasonable opportunity to return to the proceeding if the defendant personally assures the court of future good behavior. If the defendant later engages in disruptive conduct, the court may exclude the defendant from the proceeding without additional warning.
- (c) **Continuing Duty to Permit Participation.** If the court excludes a defendant from a proceeding, it must use every feasible means to enable the defendant to hear, observe, and be informed of the proceeding's progress, and to consult with counsel at reasonable intervals.
- (d) **Contempt.** In addition to the authority granted under this rule, the court may treat a defendant's disruptive conduct as contempt under Rule 33.

Note: Draft Rule 9.2(d) is derived from an existing comment to Rule 9.2.

Rule 9.3. Exclusion of Witnesses and Spectators

(a) Witnesses.

- (1) **Generally.** The court may and, at the request of either party must, exclude prospective witnesses from the courtroom during opening statements and other witnesses' testimony. If the court finds that a party's claim that a person is a prospective witness is not made in good faith, it may not exclude the person
- (2) **Exceptions.**

(A) *Victim.* A victim as defined in Rule 39(a) has a right to be present at all proceedings at which the defendant has that right.

(B) *Investigator.* If the court enters an exclusion order, both the defendant and State are nevertheless entitled to the presence of one investigator at counsel table.

(3) *Instruction.* As part of its exclusion order, the court must instruct the witnesses not to communicate with each other about the case until all of them have testified.

(4) *After Testifying.* Once a witness has testified on direct examination and has been made available to all parties for cross-examination, the court must allow the witness to remain in the courtroom, unless a party requests continued exclusion because the witness may be recalled or the court finds that the witness's presence would be prejudicial to a fair trial.

(b) Spectators.

(1) *Generally.* All proceedings must be open to the public, including news media representatives, unless the court finds, on motion or on its own, that an open proceeding presents a clear and present danger to the defendant's right to a fair trial by an impartial jury.

(2) *Record.* The court must keep a complete record of any closed proceedings and make it available to the public following the trial's completion, or, if no trial occurs, disposition of the case.

(c) **Protection of a Witness.** The court may exclude all spectators except press representatives during a witness's testimony if the court finds it is reasonably necessary to protect the witness's safety or to protect the witness from embarrassment or emotional disturbance.

~~(d) **Investigator.** If the court enters an exclusion order, both the defendant and the prosecutor are nevertheless entitled to the presence of one investigator at counsel table.~~

Note: Draft Rule 9.3(c) includes the phrase "if the court finds" to provide a basis for reviewing the court's discretion to exclude spectators.

Rule 10. Change of Judge or Place of Trial

Rule 10.1. Change of Judge for Cause

(a) Grounds. A party is entitled to a change of judge if the party shows that the assigned judge's interest or prejudice would impair the right to a fair and impartial hearing or trial.

(b) Procedure.

(1) *Motion, Timing, and Form.* A party seeking a change of judge for cause must file a motion requesting that relief. The party must file the motion within 10 days after discovering that grounds exist for a change of judge for cause, but may not file such a motion after a hearing or trial commences. The motion must be supported by an affidavit of the moving party and must state specific grounds for the change of judge..

(2) *Further Action by Judge.* If a party files a timely motion for change of judge under this rule, the judge should proceed no further in the action, except to enter necessary temporary orders before the action can be transferred to the presiding judge or the presiding judge's designee. However, if the named judge is the presiding judge, that judge may continue to perform the functions of the presiding judge.

(3) *Preserving Error.* Allegations of interest or prejudice that prevent a fair and impartial hearing or trial may be preserved for appeal by filing, and obtaining a ruling on, a motion to change a judge for cause.

(c) Hearing, Disposition, and Effect on Other Defendants.

(1) *Hearing and Ruling.* Promptly after a party files a motion under this rule, the presiding judge must provide for a hearing on the motion before a judge other than the challenged judge. After holding the hearing, the hearing judge must decide the issues by a preponderance of the evidence and enter an order stating findings and ruling on the motion. The hearing judge will then return the matter to the presiding judge.

(2) *Assignment or Reassignment.* The presiding judge will promptly assign the action back to the original judge if the motion is denied, or will make a new assignment if the motion is granted.

(3) *Effect on Other Defendants.* If there are multiple defendants, the grant of a motion for change of judge filed by one or more defendants does not require a

change of judge as to the other defendants, even though the change of judge may result in severance for trial purposes.

[AK1]Notes:

Is the process in this rule feasible for counties that have only a single judge?[AK2]

Suggest adding a comment to Rule 10.1, derived from a comment to existing Rule 10.4, as follows: The right to challenge for cause is waived only by knowing relinquishment; a party will not be allowed to let a proceeding continue in the hope of prevailing, and then assert a challenge for cause if he loses.[AK3]

Rule 10.2. Change of Judge as a Matter of Right

(a) Entitlement.

- (1) **Generally.** Each side [AK4]is entitled as a matter of right to one change of judge.
- (2) **Meaning of “Side.”** Each case, including one that is consolidated, is treated as having only two sides; but whenever two or more parties on a side have adverse or hostile interests, the presiding judge or that judge's designee may allow additional changes of judge as a matter of right.
- (3) **Per Party Limit.** A party exercising a change of judge as a matter of right is not entitled to another change of judge under this rule.
- (4) **Inapplicability to Certain Proceedings.** A party is not entitled to a change of judge as a matter of right in a proceeding under Rule 32 or a remand for resentencing.

(b) Procedure.

- (1) **Generally.** A party may exercise a right to change of judge by filing a “Notice of Change of Judge” signed by counsel, if any, and otherwise by the party, and stating the name of the judge to be changed. The notice also must include an avowal that the party is making the request in good faith and not for an improper purpose. [AK5]An attorney’s avowal is in the attorney’s capacity as an officer of the court.
- (2) **“Improper Purpose.”** “Improper purpose” means:
 - (A) for the purpose of delay;
 - (B) to obtain a severance;
 - (C) to interfere with the judge’s reasonable case management practices;

- (D) to remove a judge for reasons of race, gender or religious affiliation;
- (E) for the purpose of using the rule against a particular judge in a blanket fashion by a prosecuting agency, defender group, or law firm;
- (F) to obtain a more convenient geographical location; or
- (G) to obtain an advantage or avoid a disadvantage in connection with a plea bargain or at sentencing, except as permitted under Rule 17.4(g).

(3) **Further Action by the Judge.** If a notice of change of judge is timely filed, the judge should proceed no further in the action, except to enter any necessary temporary orders before the action can be transferred to the presiding judge or the presiding judge's designee. However, if the named judge is the presiding judge, that judge may continue to perform the functions of the presiding judge.

(c) Timing.

- (1) **Generally.** Except as provided in (c)(2), a party must file a notice of change of judge within 10 days after any of the following:
- (A) the arraignment, if the case is assigned to a judge and the parties are given actual notice of the assignment at or before the arraignment;
 - (B) the superior court clerk's filing of a mandate issued by an appellate court; or
 - (C) in all other cases, actual notice to the requesting party of the assignment of the case to a judge.
- (2) **Exception.** Despite (c)(1), if a new judge is assigned to a case fewer than 10 days before trial (inclusive of the date of assignment), a notice of change of judge must be filed, with appropriate actual notice to the other party or parties, no later than by 5:00 p.m. on the next business day following actual receipt of a notice of the assignment or by the start of trial, whichever occurs earlier.

(d) Assignment to a New Judge and Effect on Other Defendants.

- (1) **On Stipulation.** If a notice of change of judge is timely filed, the notice may inform the court that all the parties have agreed on a judge who is available and willing to accept the assignment. Such an agreement may be honored and, if so, it bars further changes of judge as a matter of right, unless the agreed on judge later becomes unavailable. If a judge to whom the action has been assigned by agreement later becomes unavailable because of a change of calendar assignment, death, illness, or other legal incapacity, the parties may assert any

rights under this rule that existed immediately before the assignment of the action to that judge.

- (2) ***Absent Stipulation.*** If a timely notice of judge has been filed and no judge has been agreed on, the presiding judge must immediately reassign the action to another judge.
- (3) ***Effect on Other Defendants.*** If there are multiple defendants, a notice of change of judge filed by one or more defendants does not require a change of judge as to the other defendants, even though the notice of change of judge may result in severance for trial purposes.

- (e) **Waiver.** A party loses the right to a change of judge under this rule if the party participates before that judge in any contested matter in the case, an omnibus hearing, any pretrial hearing, a proceeding under Rule 17, or the commencement of trial.
- (f) **Renewal on Remand.** If an appellate court remands an action for a new trial on one or more offenses charged in the indictment or information, all parties' rights to change of judge or place of trial are renewed, and no event connected with the first trial constitutes a waiver. A party, however, has no right to a change of judge following a remand for resentencing.

Notes:

The third sentence of draft Rule 10.2(a) is derived from the second sentence of current Rule 10.5(a).

“Remands for resentencing” in current Rule 10.2(a) was deleted because the subject is addressed in draft Rule 10.2(f).

The substance of Rule 10.4 (“Waiver and renewal”) has been relocated in Rule 10.2(e) and (f).

Rule 10.3. Changing the Place of Trial

- (a) **Grounds.** A party is entitled to change the place of trial to another county if the party shows that the party cannot have a fair and impartial trial in that place for any reason other than the trial judge's interest or prejudice.
- (b) **Prejudicial Pretrial Publicity.** If the grounds to change the place of trial are based on pretrial publicity, the moving party must prove that the dissemination of the prejudicial material probably will result in the party being deprived of a fair trial.

- (c) **Procedure.** A party seeking to change the place of trial must file a motion seeking that relief. The motion must be filed before trial, and, in superior court, at or before the omnibus hearing.
- (d) **Waiver.** A party loses the right to change the place of trial if the party allows a proceeding to commence or continue without raising a timely objection after learning of the cause for challenge.
- (e) **Renewal on Remand.** If an appellate court remands an action for a new trial on one or more offenses charged in an indictment or information, all parties' rights to change the place of trial are renewed, and no event connected with the first trial constitutes a waiver.

Rule 10.4. Transfer to Another County

If the court transfers a case to another county, the clerk in the transferor county must transmit to the clerk in the transferee county the court file, any evidence in the clerk's custody, and any appearance bond or security. If the defendant is in custody, the sheriff in the transferor county must transfer the defendant to the sheriff of the transferee county. The action will retain the case number and geographic designation of the matter while it was in the transferor county.

Notes: Because current Rule 10.4 was relocated to Rule 10.2, current Rule 10.5 has been renumbered as draft Rule 10.4

Rule 10.6 ("Duty of judge upon filing of motion or request under Rules 10.1 or 10.2) has been eliminated because the provisions of that rule are relocated in Rule 10.1(b)(2) and Rule 10.2(b)(2).

Rule 13. Indictment and Information

Rule 13.1. Definitions and Nature

- (a) General Definition.** An indictment or information is a plain, concise statement of the facts sufficiently definite to inform the defendant of a charged offense.
- (b) Indictment Defined.** An indictment is a written statement charging the defendant with the commission of a public offense, endorsed as a “true bill,” signed by a grand jury foreperson, and presented to the court by a grand jury.
- (c) Information Defined.** An information is a written statement charging the defendant with the commission of a public offense, signed and presented to the court by the State.
- (d) Charging the Offense.** Each count of an indictment or information must state the official or customary citation of the statute, rule, regulation or other provision of law the defendant allegedly violated.
- (e) Necessarily Included Offenses.** An offense specified in an indictment, information, or complaint is a charge of that offense and all necessarily included offenses.

Rule 13.2. Timeliness of an Information and Dismissal

The State must file an information in superior court within 10 days after a magistrate finds probable cause or the defendant waives a preliminary hearing. If the State fails to file a timely information, a court may dismiss the information if the defendant files a motion seeking that relief under Rule 16.1(b). A dismissal under this rule is without prejudice, but if the prosecution is refiled, the time limits under Rule 8.2 must be computed from the defendant’s initial appearance on the original complaint.

Rule 13.3. Joinder

- (a) Of Offenses.** Two or more offenses may be joined in an indictment, information, or complaint if they are each stated in a separate count, and if they:
 - (1)** are of the same or similar character;
 - (2)** are based on the same conduct or are otherwise connected together in their commission; or
 - (3)** are alleged to have been a part of a common scheme or plan.
- (b) Of Defendants.** Two or more defendants may be joined if each defendant is charged with each alleged offense, or if the alleged offenses are part of an alleged common

conspiracy, scheme, or plan, or are otherwise so closely connected that it would be difficult to separate proof of one from proof of the others.

- (c) **Consolidation.** If offenses or defendants are charged in separate proceedings, the court, on motion or on its own, may wholly or partly consolidate the proceedings in the interests of justice.

Rule 13.4. Severance

- (a) **Generally.** On motion or on its own, a court may order a severance if two or more offenses or two or more defendants are joined for trial, and severance of any or all of the offenses, or of any or all of the defendants, or both, is necessary to promote a fair determination of any defendant's guilt or innocence of any offense.
- (b) **As of Right.** A defendant is entitled to a severance of offenses joined solely under Rule 13.3(a)(1), unless evidence of the other offense or offenses would be admissible under the Arizona Rules of Evidence if the offenses were tried separately.
- (c) **Timeliness and Waiver.** A defendant must move to sever offenses or defendants at least 20 days before trial or at the omnibus hearing. If the motion is denied, the defendant must renew the motion during trial before or upon the close of evidence. If a ground for severance previously unknown to a defendant arises during trial, the defendant must move for severance before or upon the close of evidence. The right to severance is waived if the defendant fails to timely file and renew a proper motion seeking severance.
- (d) **Jeopardy.** The court may not grant the State's motion to sever offenses after trial begins unless the defendant consents. Offenses severed during trial on the defendant's motion or with the defendant's consent will not bar a later trial of that defendant on the severed offenses.

Rule 13.5. Amending Charges; Defects in the Charging Document

- (a) **Prior Convictions and Other Non-Capital Sentencing Allegations; Challenges.** Within the time limits of Rule 16.1(b), the State may amend an indictment, information or complaint to add allegations of one or more prior convictions and other non-capital sentencing allegations that must be found by a jury. A defendant may challenge the legal sufficiency of the State's allegations by filing a motion under Rule 16.
- (b) **Altering Charges; Amending to Conform to the Evidence.** A preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate's order or the grand jury indictment. Unless the defendant consents, a charge may be amended only to correct mistakes of fact or remedy formal or technical

defects. The charging document is deemed amended to conform to the evidence admitted during any court proceeding. Nothing in this Rule precludes the defendant from consenting to the addition of a charge as part of a plea agreement.

(c) Amending to Conform to Capital Sentencing Allegations; Challenges. The filing of a notice to seek the death penalty that includes aggravating circumstances amends the charging document, and the State is not required to file any further pleading. A defendant may challenge the legal sufficiency of the State's allegation by filing a motion under Rule 16.

(d) Defects in Charging Document. A defendant may object to a defect in the charging document only by filing a motion under Rule 16.

From: Rogers, John W

Sent: Wednesday, March 16, 2016 9:55 AM

To: Euchner, David <david.euchner@pima.gov>; Meltzer, Mark <MMeltzer@courts.az.gov>; Duncan, Sally <duncans@superiorcourt.maricopa.gov>; Fields, Richard <rfields@sc.pima.gov>; Vick, Kenneth <vick@mcao.maricopa.gov>; Kreag, Jason <jkreag@email.arizona.edu>

Subject: RE: Adopted changes from Rules 1 and 2 (Rule 1.3(a)(5)--5 day mailing rule)

All:

In reviewing the revisions, it dawned on me that that the revisions to Rule 1.3(a)(5)—governing the addition of 5 calendar days to the response period for mailed or electronically served filings—inadvertently revived an ambiguity in the rule that the Supreme Court resolved back in 2009.

Before the revisions were made, the draft read that “5 calendar days are added after the specified period would otherwise expire under Rule 1.3(a)(1), (2) and (3).” Nearly identical language was added to Civil Procedure Rule 6(e) in 2009 to resolve an ambiguity about when you should add the 5 days. Should they be added *before* including the prescribed response period (e.g., 10 days for a response to a motion) or *after*? And, if after, what do you do if the last day of the period falls on a Saturday—do you start counting the 5 days on Sunday or do you apply the “next business day” rule first and start counting on Tuesday? The amendment made it clear that the 5 calendar days are counted after the prescribed response period is calculated, and that you apply “the next business day” rule (if it is applicable) before adding the 5 calendar days. The rule petition and the State Bar comment (the latter of which explains the ambiguity better) are attached.

The edits to Rule 1.3(a)(5) changed this language as follows: “5 calendar days are added ~~after~~ to the specified time period ~~would otherwise expire~~ under this ~~Rule~~~~rule 1.3(a)(1),(2), and (3).~~” The changes inadvertently reintroduced the pre-2009 ambiguity back into the rule. May I suggest that for the sake of clarity and in deference to the Supreme Court’s amendment to Rule 6(e) in 2009, that the Workgroup change the rule back to something closer to what it was? Perhaps “5 calendar days are added after the specified time period would otherwise expire under Rule 1.3(a)(1),(2), and (3).”

Sorry for not noticing this earlier.

John