

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.

Criminal Rules Task Force: Draft minutes
04.08.2016

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.