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

State Courts Building, Phoenix

Meeting Minutes: May 13, 2016

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. **<u>Workgroup 4.</u>** After the presentation of Rule 7, the Chair requested Judge Tang to present Rule 10.

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

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

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

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

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

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

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

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