

Task Force on the Arizona Rules of Criminal Procedure

Meeting Agenda

Friday, June 17, 2016

10:00 AM to 5:00 PM

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

Conference call-in number: (602) 452-3288 Access code: 3089

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| Item no. 1 | Call to Order Introductory comments | <i>Judge Welty, Chair</i> |
| Item no. 2 Page 3 | Approval of May 13, 2016 meeting minutes | <i>Judge Welty</i> |
| Item no. 3 Pages 19, 29, 77 Page 33 Pages 41, 49, 55, 75 Pages 57, 63, 67, 71 | Discussion of workgroup drafts - Workgroup 1: Rules 1, 3, and 35 - Workgroup 2: Rule 6 - Workgroup 3: Rules 7, 8, 9, and 34 - Workgroup 4: Rules 10, 13, 14, and 16 | <i>Judge Duncan, Mr. Euchner, Mr. Vick</i> <i>Judge Cattani</i> <i>Judge Jeffery</i> <i>Judge Tang, Mr. Nash, Ms. Kalman</i> |
| Item no. 4 | Roadmap and additional rule assignments - Future Task Force meeting dates: July 29 September 16 October 27 December 9 All of the meetings are on Friday, except for Thursday, October 27. | |
| Item no. 5 | 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 (“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. Workgroup 4. After the presentation of Rule 7, the Chair requested Judge Tang to present Rule 10.

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

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

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

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

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

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

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

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

QUESTION:

Is a motion for change of judge for cause pursuant to Rule 10.1 of the Arizona Rules of Criminal Procedure untimely if made after commencement of trial?

SHORT ANSWER:

After a trial judge holds a hearing or commences the trial, the parties no longer have the right to file a motion for change of judge for cause. Although time-barred under Rule 10.1, such allegations may serve as a basis for a defendant's motion for new trial grounded in the court's alleged lack of impartiality. Ariz.R.Crim.P. 24.1(c)(5).

ANALYSIS:

Rule 10.1(b) of the Arizona Rules of Criminal Procedure states, “[w]ithin 10 days after discovery that grounds exist for change of judge, **but not after commencement of a hearing or trial**, a party may file a motion verified by affidavit of the moving party and alleging specifically the grounds for the change.” Ariz.R.Crim.P. 10.1(b)(emphasis added). Thus, the clear language of Rule 10.1(b) provides that a party must file a motion for change of judge for cause: 1) within 10 days of the discovery of the grounds upon which the motion is based; and 2) prior to commencement of a hearing or trial. *Id.*

The language set forth in Rule 10.1 of the Arizona Rules of Criminal Procedure has been recognized by the Arizona Supreme Court as a time limitation on a party's ability to urge a motion for change of judge for cause. *See, e.g., State v. Carver*, 160 Ariz. 167, 172, 771 P.2d 1382, 1387 (1989)(“[A] party waives his rights to change a judge . . . under Rule 10.1 if he allows a proceeding to commence or continue without objection after learning of the cause for challenge.”); *State v. Poland*, 144 Ariz. 388, 698 P.2d 183 (1985) *aff'd*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986)(finding that the defendant's motion for change of judge for cause was untimely because the motion was filed approximately 29 days after the defendant discovered the grounds for the requested change of judge); *State v. Mincey*, 141 Ariz. 425, 443, 687 P.2d 1180, 1198 (1984)(finding that the motion for change of judge for cause was untimely and that the “imposition of a time limit . . . is not just a ‘technical’ requirement. . . . [but] a realistic provision necessary for the efficient and prompt determination of allegations of bias.”); *State v. Perkins*, 141 Ariz. 278, 686 P.2d 1248 (1984), *overruled on other grounds by State v. Noble*, 152 Ariz. 284, 287-88, 731 P.2d 1228, 1231-32 (1987)(expressly overruling *Perkins* to the extent it holds that A.R.S. § 13-604(H) in any way limits a judge's ability to impose consecutive sentences); *but see State v. Granados*, 235 Ariz. 321, 324, 332 P.3d 68, 71 (App. 2014)(noting that although judicial bias may constitute structural error, the defendant must allege a type of bias that would implicate the defendant's due process rights, such as bias based on a “direct, personal, substantial pecuniary interest”; bias such as “[p]ersonal bias or prejudice, . . . ‘would

not be [a] sufficient basis for imposing a constitutional requirement under the Due Process Clause” and thus would not require structural error review)(*citations omitted*).

In *State v. Perkins*, the Arizona Supreme Court directly addressed the untimeliness of a defendant’s motion for change of judge, urged after commencement of the trial. 141 Ariz. at 285-86, 686 P.2d at 1255-56. In *Perkins*, the defendant claimed that the trial judge’s knowledge of the defendant’s potential perjury combined with the trial court’s review of letters from the co-defendant prejudiced the trial judge. *Id.* During trial, the defendant moved for a “mistrial . . . or in the alternative a severance and a new trial in front of another [j]udge.” *Id.* at 286, 686 P.2d at 1256. The Arizona Supreme Court analyzed the defendant’s request as a request for a change of judge for cause under Rule 10.1 of the Arizona Rules of Criminal Procedure. The supreme court stated, “[u]nder Arizona Rules of Criminal Procedure, [R]ule 10.1, motions for change of judge for cause may not be made after commencement of trial.” *Id.* The supreme court held that the defendant’s motion was time-barred “[b]ecause the trial . . . was already in process when [the defendant] moved for a ‘mistrial or in the alternative a severance.’” *Id.* The supreme court stated that the defendant’s “means of redress was to move for a new trial after a finding of guilt.” *Id.*; *cf Fendler v. Phoenix Newspapers Inc.*, 130 Ariz. 475, 481, 636 P.2d 1257, 1263 (App. 1981)(under the Arizona Rules of Civil Procedure “[t]he right to apply for a change of judge for cause is waived if not timely filed.”); *State v. Gordon*, 213 Ariz. 499, 504 ¶ 31, 144 P.3d 513, 518 (2006) (noting that the Arizona Supreme Court “has held the rules of law pertaining to change of judge are essentially the same in civil as in criminal cases.”)(*citing State v. Neil*, 102 Ariz. 110, 112, 425 P.2d 842, 844 (1967); *Marsin v. Udall*, 78 Ariz. 309, 313, 279 P.2d 721, 724 (1955)).

Some argue that *State v. Rossi*, 154 Ariz. 245, 741 P.2d 1223 (1987), stands for the proposition that a motion for change of judge for cause is timely even if filed after commencement of trial. In *Rossi*, after remand, but prior to the second aggravation/mitigation hearing, the defendant in a capital case filed a motion to allow counsel to *voir dire* the trial judge to explore whether circumstances existed to support a challenge for cause. *Id.* at 247, 741 P.2d at 1225. In its decision, the Arizona Supreme Court acknowledged that our judicial system rests upon the tenet that each party is entitled to a fair trial and included in this tenet is the right to have the judge who presides over the trial completely impartial and free of bias or prejudice. *Id.* at 247, 741 P.2d at 1225. In reaching its decision, the supreme court did not address the timeliness of defendant’s motion; rather, the supreme court found that the right to *voir dire* a trial judge concerning possible bias or prejudice is not encompassed within the constitutional right to a fair trial before an impartial judge. *Id.* at 248, 741 P.2d at 1226.

Therefore, based on the clear language of Rule 10.1 of the Arizona Rules of Criminal Procedure and case law, after a trial judge holds a hearing or commences the trial, the parties no longer have the right to file a motion for change of judge for cause.

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 prevent 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 ~~the a~~ hearing or trial commences. The motion must state specific grounds for the change of judge and be supported by an affidavit.

(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 assign the motion to another 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 under this rule. ~~after trial commences, a motion for mistrial. [Tabled at 5/16 Workgroup Meeting. Judge Gates to conduct additional research.]~~

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

(1) Hearing and Ruling. Promptly after a party files a timely 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.

~~Notes: Is the process in this rule feasible for counties that have only a single judge?~~

~~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.~~

Rule 10.2. Change of Judge as a Matter of Right

(a) Entitlement.

(1) Generally. In any criminal case, each~~Each~~ side 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 as a matter of right.

(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. 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 RemandFollowing Remand. Unless previously exercised, a party may exercise a change of judge as a matter of right following an appellate court’s remand for new trial, and no event connected with the first trial constitutes a waiver. A party may not exercise a change of judge as a matter of right following a remand for resentencing. 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 if the party or side seeking a change of judge has not previously exercised a change of judge as a matter of right in the action. 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. [5/16 Workgroup Meeting—Judge Gates to review further.]~~

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 pretrial conference ~~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).~~

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.*** 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), 5 calendar days are added after the specified time period would otherwise expire under Rule 1.3(a)(1)-(3). 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) The Defendant.** “The defendant” is a person named as such in a complaint, indictment, or information. “The defendant” as used in these rules includes an arrested person who at the time of arrest is not named in a charging document. “The 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.
- (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) **The State.** "The State" means the State of Arizona, or any other Arizona state or local governmental entity that files a criminal charge in an Arizona court. "The 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. 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) a misdemeanor arraignment;
 - (C) a not-guilty felony arraignment;
 - (D) a hearing on a motion to continue that does not include a waiver of time under Rule 8;
 - (E) a hearing on an uncontested motion;
 - (F) a pretrial or status conference;
 - (G) a change of plea in a misdemeanor case; or
 - (H) 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 1.6. 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:
 - (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, 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.** If a court has an electronic filing portal, a party may file a document electronically.
- (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 1.6 reflects proposed amendments to Civil Rule 5.2.

Rule 1.7. 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. If a judge permits, a party may submit a document directly to a judge, who must transmit it to the clerk for filing and notify the clerk of the date of its receipt.

(b) Effective Date of Filing.

- (1) **Paper Documents.** A document is deemed filed on the date the clerk receives and accepts it. If a document is submitted to a judge and is later transmitted to the clerk for filing, the document is deemed filed on the date the judge receives it.
- (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.
- (4) **Incarcerated Parties.** If a party is incarcerated and another party contends that the incarcerated party did not timely file a document, the court must deem the filing date to be the date when the document was delivered to jail or prison authorities to deposit in the mail.

(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/emailed/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 1.7 reflects proposed amendments to Civil Rules 5 and 5.1.

Rule 1.8. Clerk's Distribution of Minute Entries and Other Documents

(a) Generally. The clerk must distribute, either by U.S. mail, electronic mail, or attorney drop box, copies of every minute entry to all parties.

(b) Electronic Distribution. The clerk may distribute minute entries, notices and other court-generated documents to a party or a party's attorney by electronic means. Electronic distribution of a document is complete when the clerk transmits it to the email address that the party or attorney has provided to the clerk.

Rule 1.9. Motions, Oral Argument, and Proposed Orders

(a) Content. A motion must include a memorandum that states pertinent facts, arguments, and authorities supporting the motion.

(b) Service of Motion; Response; Reply. The moving party must serve the motion on all other parties. Within 10 days after service, another party may file and serve a response, and, within 3 days after service of a response, the moving party may file and serve a reply. A reply must be directed only to matters raised in a response. If no response is filed, the court may deem the motion submitted on the record.

(c) Length. Unless the court orders otherwise, a motion or response, including a supporting memorandum, may not exceed 11 pages, exclusive of attachments, and a reply may not exceed 6 pages, exclusive of attachments

(d) Waiver of Requirements. On a party's request or on its own, the court may waive a requirement specified in this rule, or it may overlook a formal defect in a motion.

(e) Oral Argument. On a party's request or on its own, the court may set a motion for argument or hearing, or it may limit or deny them.

(f) Proposed Orders. A proposed order must be prepared as a separate document and may not be included as part of a motion, stipulation, or other document. There must be at least two lines of text on the signature page of a proposed order. A party must serve the proposed order on all other parties. A party must not file a proposed order, and the court will not docket it, until a judge has reviewed and signed it.

Note: Rule 1.9 derives from current Rules 35.1, 35.2, and 35.3. Draft Rule 1.10 derives from current Rules 35.6 and 35.7, and proposed Civil Rule 80(e).

Rule 3. Arrest Warrant or Summons upon Commencement of Criminal Proceedings

Rule 3.1. Issuance of Summons or Warrant

- (a) **Issuance.** A summons commands a defendant to appear before a magistrate. A warrant commands the arrest of a defendant by a peace officer for the purpose of bringing a defendant before a magistrate.
- (1) ***Return of Indictment.*** If a grand jury returns an indictment, the court must promptly issue a warrant or summons, or a notice of supervening indictment under Rule 12.7(c).
 - (2) ***Finding of Probable Cause.*** If a magistrate makes a finding of probable cause under Rule 2.4(a), the court must promptly issue a warrant or summons.
 - (3) ***Prosecutor's Complaint.*** If a prosecutor presents a signed complaint, the court must promptly issue a summons or, if the court finds probable cause, the court may issue a warrant.
- (b) **Preference for Summons.** Unless there is good cause to issue a warrant, a summons should issue if the defendant is not in custody, the offense charged is bailable as a matter of right, and there is reason to believe that the defendant will appear. If a prosecutor requests a warrant, the prosecutor must state the reasons for issuing a warrant rather than a summons.
- (c) **Initial Arrest Warrant.** Before issuing an arrest warrant, the magistrate must determine that probable cause exists that the defendant committed the offense or find that such a determination was previously made. The court may issue an initial arrest warrant if:
- (1) a defendant failed to appear after being served with a summons;
 - (2) there is good cause to believe that the defendant will not appear; or
 - (3) a summons cannot readily be served or delivered.
- (d) **Pre-Disposition Warrant.** After the initial appearance and before the disposition of a case, the court may issue a warrant to secure a defendant's appearance if the defendant fails to appear after receiving proper notice.
- (e) **Warrants in ATTC Cases.** If a person served with an Arizona Traffic Ticket and Complaint provides a written promise to appear in court at a designated time and date and fails to appear, personally or by counsel, on or before that date, the court may

issue a warrant. Additionally, if a complaint is filed under A.R.S. § 13-3903(F), the court must issue a warrant for that proceeding.

Rule 3.2. Content of a Warrant or Summons

(a) Warrant. A warrant must:

- (1) be signed by the issuing magistrate;
- (2) contain the defendant's name or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty;
- (3) state the charged offense and whether the offense is one to which victims' rights provisions apply;
- (4) command that the defendant be arrested and brought before the issuing magistrate or, if the issuing magistrate is absent or unable to act, the nearest or most accessible magistrate in the same county or in the county of arrest if the defendant is arrested outside the county where the warrant was issued; and
- (5) state the amount of a secured appearance bond, if the defendant is bailable as a matter of right.

(b) Summons.

- (1) ***Form.*** A summons must be in the same form as a warrant except it must summon the defendant to appear at a date, time and place no more than 30 days after an indictment, information, or complaint is filed.
- (2) ***Photograph and Fingerprints.*** At the prosecutor's request or by court order, the summons may command the defendant to report to a designated place to be photographed and fingerprinted before the defendant's appearance in response to the summons. If the defendant fails to report to be photographed and fingerprinted as directed, the defendant may be arrested when he or she appears in response to the summons and the magistrate must order the defendant to report immediately for photographing and fingerprinting.
- (3) ***10-Print Fingerprints Required.*** If a summons is issued for a defendant who is charged with a felony offense, a violation of Title 13, Chapter 14, a violation of Title 28, Chapter 41, or a domestic violence offense as defined in A.R.S. § 13-3601, the summons must direct the defendant to provide 10-print fingerprints to the applicable law enforcement agency.

Rule 3.3. Execution and Return of Warrant; Defective Warrants

- (a) **By Whom.** The warrant is directed to, and may be executed by, all peace officers in Arizona.
- (b) **Manner of Execution.** A warrant is executed by arresting the defendant named in the warrant. The officer does not need to possess the warrant when the arrest is made, but the officer must show the warrant to the defendant as soon as possible if the defendant asks to see it. If the officer does not have the warrant when the arrest is made, the officer must inform the defendant of the charged offense and the fact that a warrant has been issued.
- (c) **Return.** Return of the warrant must be made either to the magistrate who issued it or to the magistrate at the initial appearance.
- (d) **Defective Warrant.** An arrest warrant is not invalid, and any person in custody on a warrant need not be released, because of a defect in the warrant's form. A magistrate may amend a warrant to correct a defect in form.

Rule 3.4. Service of Summons

- (a) **Territorial Limits of Effective Service.** A summons may be served anywhere within Arizona.
- (b) **Service by Mail.** A summons may be served by first class mail or by certified mail, return receipt requested. Return of the signed receipt is presumptive evidence of service.
- (c) **Serving an Individual.** Unless (d), (e), or (f) applies, an individual may be served by:

 - (1) delivering the summons to that individual personally;
 - (2) leaving the summons at that individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
 - (3) delivering the summons to an agent authorized by appointment or by law to receive service of process.
- (d) **Serving a Minor.** Unless (e) applies, a minor less than 16 years old may be served by delivering the summons to the minor in the manner set forth in (c) and also delivering the summons:

 - (1) to the minor's parent or guardian, if any of them reside or may be found within Arizona; or

(2) if none of them resides or is found within Arizona, to any adult having the care and control of the minor, or any person of suitable age and discretion with whom the minor resides.

(e) **Serving a Minor Who Has a Guardian.** If a court has appointed a guardian for a minor, the minor must be served by serving the guardian in the manner set forth in (c), and separately serving the minor in that same manner.

(f) **Serving a Person Adjudicated Incompetent Who Has a Guardian.** If a court has declared a person to be insane, gravely disabled, incapacitated, or mentally incompetent to manage that person's property and has appointed a guardian for the person, the person must be served by serving the guardian in the manner set forth in (c), and separately serving the person in that same manner.

(g) **Serving a Corporation, Partnership, or Other Unincorporated Association.** A domestic or foreign corporation, partnership, or other unincorporated association may be served by delivering the summons to a partner, an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing the summons to the defendant.

(h) **Serving a Corporation if an Authorized Officer or Agent Is Not Found Within Arizona.**

(1) **Generally.** If a domestic corporation, or a foreign corporation authorized to transact business in Arizona, does not have an officer or an agent within Arizona on whom process can be served, the corporation may be served by depositing two copies of the summons with the Arizona Corporation Commission. Following this procedure constitutes personal service on that corporation.

(2) **Evidence.** If the sheriff of the county in which the action is pending states in the return that, after diligent search or inquiry, the sheriff has been unable to find an officer or agent of such corporation on whom process may be served, the statement constitutes prima facie evidence that the corporation does not have such an officer or agent in Arizona.

(3) **Commission's Responsibilities.** The Arizona Corporation Commission must retain one of the copies of the summons being served for its records and immediately mail the other copy, postage prepaid, to the corporation or any of the corporation's officers or directors, using any address obtained from the corporation's articles of incorporation, other Corporation Commission records, or any other source.

III. Rights of Parties

Rule 6. Attorneys, Appointment of Counsel

Rule 6.1. Right to Counsel; Right to a Court-Appointed Attorney; Waiver of the Right to Counsel

- (a) **Right to Be Represented by Counsel.** A defendant has the right to be represented by counsel in any criminal proceeding. The right to be represented by counsel includes the right to consult privately with an attorney, or the attorney's agent, as soon as feasible after a defendant has been taken into custody, at reasonable times after being taken into custody, and sufficiently in advance of a proceeding to allow counsel to adequately prepare for the proceeding.
- (b) **Right to a Court-Appointed Attorney.**
- (1) *As of Right.* An indigent defendant is entitled to a court-appointed attorney in any criminal proceeding that may result in punishment involving a loss of liberty.
 - (2) *Discretionary.* In any other criminal proceeding, the court may appoint an attorney for an indigent defendant if required by the interests of justice.
- (c) **Waiver of Right to Counsel.** A defendant may waive the right to counsel under (a) and (b) if the waiver is in writing, and if the court finds that the defendant's waiver is knowing, intelligent and voluntary. After a defendant waives the right to counsel, the court may appoint advisory counsel for defendant at any stage of the proceedings. Advisory counsel must be given notice of all further matters for which the defendant is notified.
- (d) **Unreasonable Delay in Retaining Counsel.** If a defendant appears at a proceeding without counsel, the court may proceed - with or without appointing advisory counsel - if the defendant waives counsel under (c), or the court finds that:
- (1) the defendant is not indigent or, although indigent, has refused appointed counsel in order to retain counsel; and
 - (2) the defendant has had a reasonable opportunity to retain counsel.
- (e) **Withdrawal of Waiver.** A defendant may withdraw a waiver of the right to counsel at any time. But the fact that counsel is later appointed or retained does not establish a basis for repeating any proceeding previously held or waived.

Note: Draft Rule 6.1(a)(3) is derived from a comment to the existing rule.

Rule 6.2. Appointment of Counsel for Indigent Defendants

- (a) **Procedure.** The presiding judge of each county must establish a procedure for the superior court and limited jurisdiction courts to appoint counsel for indigent defendants.
- (b) **Capital Trial Proceedings.** In all capital trial proceedings where the defendant is indigent, the presiding judge must appoint two attorneys—lead counsel and co-counsel—under Rule 6.8(b). The appointed lead counsel may designate co-counsel if co-counsel is willing to accept the appointment and meets the requirements of Rule 6.8. If lead counsel does not promptly designate co-counsel, the presiding judge or the judge’s designee must do so.

Rule 6.3. Duties of Counsel; Withdrawal

(a) Notice of Appearance.

- (1) **Generally.** Before appearing in court on behalf of a defendant, counsel—whether privately retained or appointed by the court—must file a notice of appearance.
- (2) **Earlier Appearance in a Limited Jurisdiction Court.** Counsel who has filed a notice of appearance in a felony case in a limited jurisdiction court does not need to file a new notice of appearance if the defendant is bound over to superior court.

- (b) **Duty of Continuing Representation.** Unless the court files an order permitting counsel to withdraw, counsel who represents a defendant at any stage of a case has a continuing duty to represent that defendant in all further proceedings in the trial court, including the filing of a notice of appeal.

(c) Withdrawal.

- (1) **If the Defendant Is Ineligible for Appointed Counsel.** Appointed counsel may withdraw after arraignment on the ground that the defendant is ineligible for appointed counsel only if counsel shows that withdrawal will not disrupt the orderly processing of the case.
- (2) **If the Case Is Set for Trial.** After a case has been set for trial, an attorney may withdraw only if counsel files a motion to withdraw and the court grants it. The motion must include the name and address of another attorney who will substitute as counsel and a statement signed by the substituting attorney that he

or she is advised of the trial date and will be prepared for trial, unless the withdrawal is based on legal or ethical grounds.

(d) Duty of Defense Counsel to Preserve the File. Defense counsel must:

- (1) maintain the records of the proceeding in a manner that will inform successor counsel of all significant developments relevant to the case; and
- (2) provide the client's complete records and files, as well as all information regarding every aspect of the representation, to successor counsel.

(e) Duty of Successor Counsel to Collect the File in a Capital Case. Immediately upon undertaking representation of a defendant in a capital case in which the defendant was previously represented by counsel, defense counsel must collect the complete file from prior counsel and maintain the records and files in a manner that complies with Rule 6.3(d).

Note: Draft Rule 6.3(a)(2) is derived from a comment to the existing rule.

Rule 6.4. Determining Whether a Person Is Indigent

(a) Definition. As the term is used in Rule 6.1(b), “indigent” means a person who is not financially able to retain counsel.

(b) Questionnaire. To show indigency, a defendant must complete under oath a financial resources form approved by the Supreme Court. A judicial officer responsible for determining whether a defendant is indigent may examine the defendant under oath regarding the defendant's financial resources. Before questioning, the court must advise the defendant of the penalties for perjury set forth in A.R.S. § 13-2701, et seq.

(c) Reconsideration. If there is a material change in circumstances, the defendant, defense counsel, or the State may request that the court reconsider the indigency determination.

(d) Payment by the Defendant.

- (1) **Generally.** If a court finds that a defendant can afford to pay part of the cost of appointed counsel without incurring substantial hardship, the court may order the defendant to pay that amount to the court clerk.
- (2) **Failure to Pay.** If a defendant fails to pay an amount ordered by the court, the court may not find the defendant in contempt and appointed counsel may not withdraw solely on this ground. But the county or municipality may enforce an order under Rule 6.4(d)(1) as a civil judgment.

- (3) **Court Order Required.** Without court approval, an attorney, organization, or agency may not otherwise request or accept payment from the defendant for providing legal services under the court appointment.

Note to Rule 6.4(a). This standard is drawn from Arizona Revised Statutes § 11-584(1).

Rule 6.5. Manner of Appointment

- (a) **Appointment Order.** The court must appoint counsel by a written order, and must provide a copy of the order to the defendant, the appointed attorney, and the State.
- (b) **Public Defender Appointment.** In counties that have a public defender, the court must appoint the public defender to represent persons entitled to appointed counsel whenever the public defender is authorized by law to undertake the representation and is able to do so.
- (c) **Other Appointments.** If the court does not appoint a public defender, the court must appoint a private attorney. In appointing private counsel, the court must take into account the skill likely to be required in handling the case.
- (d) **Requests for Representation before a Grand Jury.** A request for appointment of counsel under Rule 12.6 must be made and processed as if proceedings had already commenced in superior court.

Rule 6.6. Appointment of Counsel on Appeal

If a court permits counsel to withdraw after conviction, either the trial court or an appellate court must appoint new counsel for a defendant who is eligible for court-appointed counsel on appeal.

Rule 6.7. Compensation of Appointed Counsel

- (a) **Where to File a Compensation Claim.** A private attorney appointed to represent an indigent defendant must file a claim for compensation as provided by local rule in the county in which the appointment was made, or from which the appeal was taken.
- (b) **When to File a Compensation Claim.**
- (1) **Trial Court.** Trial counsel may file a claim for compensation at such intervals as permitted by the court, and must file a claim for compensation upon the completion of all trial, sentencing, or post-conviction proceedings.
 - (2) **Appellate Court.** Appellate counsel may file a claim for compensation at such intervals as permitted by the court, and must file a claim upon the completion of all appellate proceedings.

(c) **Proceedings in a Limited Jurisdiction Court.** An attorney is entitled to compensation for services rendered in a limited jurisdiction court.

(d) **Amount of Compensation.** An attorney must be reasonably compensated for the services performed, considering the hours worked, the experience of counsel, the seriousness and complexity of the case, the quality of the work performed, and any other relevant factors. The manner of determining reasonable compensation is provided by local rule and A.R.S. § 13-4013.

Note: Although allowed under current Rule 6.7(d), this draft rule eliminates circumstances where a defendant makes partial payments directly to court-appointed counsel. A defendant makes partial payments directly to the county or municipality, through the clerk of its court, as provided in draft Rule 6.4(d).

Rule 6.8. Standards for Appointment and Performance of Counsel in Capital Cases

(a) **Generally.** To be eligible for appointment in a capital case, an attorney must:

- (1) have been a member in good standing of the State Bar of Arizona for at least 5 years immediately before the appointment;
- (2) have practiced in the area of state criminal defense litigation for 3 years immediately before the appointment;
- (3) attended and successfully completed, within one year prior to the initial appointment, at least 6 hours of relevant training or educational programs in the area of capital defense, and attended and successfully completed within one year before any later appointment, at least 12 hours of relevant training or educational programs in the area of criminal defense;
- (4) have demonstrated the necessary proficiency and commitment that exemplifies the quality of representation appropriate to capital cases;
- (5) have familiarity with the performance standards in the 2003 American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“ABA Guidelines”), and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases. Some guidelines may not be applicable to Arizona practice or to the circumstances of a particular case, but counsel should be guided by the performance standards when applicable.

If an attorney is a member in good standing of the State Bar of Arizona, the attorney's practice in a federal jurisdiction or in another state may be considered for purposes of satisfying the requirements of Rule 6.8(a) (1) through (3).

(b) Trial Counsel.

(1) **Lead Counsel.** To be eligible for appointment as lead trial counsel, an attorney must meet the requirements of Rule 6.8(a) and must have:

(A) practiced in the area of state criminal litigation for 5 years immediately before the appointment; and

(B) been lead counsel in at least 9 felony jury trials that were tried to completion, and have been lead counsel or co-counsel in at least one capital jury trial.

(2) **Co-counsel.** To be eligible for appointment as co-counsel, an attorney must meet the requirements of Rule 6.8(a).

(c) Appellate Counsel. To be eligible for appointment as appellate counsel, an attorney must meet the qualifications set forth in Rule 6.8(a) and within 3 years immediately before the appointment, the attorney must:

(1) have been lead defense counsel in an appeal in a case in which a death sentence was imposed (including petitions for review of post-conviction proceedings); and have prior experience as lead defense counsel in the appeal of at least 3 felony convictions; or,

(2) alternatively, have prior experience as lead defense counsel in the appeal of at least 6 felony convictions, including two appeals from first or second degree murder convictions.

(d) Post-conviction Counsel. To be eligible for appointment as post-conviction counsel, an attorney must meet the qualifications set forth in Rule 6.8(a) and within 3 years immediately before the appointment, the attorney must:

(1) have been lead defense counsel in a trial in which a death sentence was sought or in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, and have prior experience as lead defense counsel in the appeal of at least 3 felony convictions and a trial or post-conviction proceeding with an evidentiary hearing; or

(2) have been lead defense counsel in the appeal of at least 6 felony convictions, including two appeals from first or second degree murder convictions, and lead

defense counsel in at least two felony trials or post-conviction proceedings with evidentiary hearings.

(e) Exceptions in Appointment Qualifications. A court may appoint an attorney who does not meet the qualifications set forth in this rule if:

- (1) the Supreme Court consents;
- (2) the attorney meets the educational requirements set forth in Rule 6.8(a)(3);
- (3) the attorney's experience, stature, and record establishes that the attorney's ability significantly exceeds the standards set forth in this rule; and
- (4) the attorney associates with a lawyer who does meet the qualifications set forth in this rule.

~~**(g) Court Assurance.** The court must assure that appointed counsel in a capital case meets the qualifications established by this rule.~~ [This provision is new. The workgroup decided it should not be included in the rule, but consideration should be given to including it in a comment as a best practice. It contemplates a colloquy between the trial court and counsel to assure that counsel is qualified.]

Rule 7. Release

Rule 7.1. Definitions

- (a) **Own Recognizance.** “Own recognizance” is a release of a defendant without an appearance bond.
- (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 to 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 outstanding judgments arising out of surety undertakings; 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 to act as surety if the bondsman violates this rule's provisions.

Rule 7.2. Right to Release

(a) Before Conviction: Bailable Offenses. Any person charged with an offense bailable as a matter of right must be released pending trial on the person's own recognizance or on the execution of bail. In determining the method of release or the amount of bail, the court must consider the factors set forth in A.R.S. § 13-3967(b) and must impose the least onerous conditions of release set forth in Rule 7.3(b) that will reasonably assure the person's appearance. **Send back to workgroup to incorporate 13-3967**

(b) Before Conviction: Non-Bailable Offenses. 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:

(i) 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 a post-conviction proceeding; or

(ii) the parties stipulate otherwise and the court approves the stipulation.

(B) Lack of Diligence on Appeal. If a defendant is released pending appeal but fails to diligently pursue 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 pursue 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 concludes.

(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 its 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 pursue 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. Flag re Rule 7.1

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 victims' rights requirements under Rule 39.
- (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.

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

(d) Review of Conditions of Release for Misdemeanors. Within 10 days after arraignment, for any defendant held in custody on bond for a misdemeanor, the court 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 provided 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 setting a hearing, 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 provided 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 under (a), the victim may petition the court to revoke the bond or own recognizance release of the defendant, or otherwise modify the conditions of the defendant's release. The petition must include a statement under oath by the victim asserting 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.* After a hearing on the matters set forth in the petition or report, the court may impose different or additional conditions of release if it finds that the defendant has willfully violated the 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 a hearing, the court finds that the proof is evident or presumption great as to the present charge and:

(A) probable cause exists to believe that the person committed another felony during the period of release; or

(B) the person poses a substantial danger to another person or the community, and no other conditions of release will reasonably assure the safety of the other person or the community.

(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 the 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 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; and
- (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 8. Speedy Trial

Rule 8.1. Priorities in Scheduling Criminal Cases

- (a) **Priority of Criminal Trials.** A trial of a criminal case has priority over a trial of a civil case.
- (b) **Preferences.** The trial of a defendant in custody, and the trial of a defendant whose pretrial liberty may present unusual risks, have preference over other criminal cases.
- (c) **Duty of the Prosecutor.** The prosecutor must advise the court of facts relevant to a determination of the order in which the court should try its assigned criminal cases.
- (d) **Duty of Defense Counsel.** Defense counsel must advise the court of an impending expiration of time limits in the defendant's case. A court may sanction counsel for failing to do so, and should consider a failure to timely notify the court of an expiring time limit in determining whether to dismiss an action with prejudice under Rule 8.6.
- (e) **Suspension of Rule 8.** Within 25 days after a superior court arraignment, either party may move for a hearing to establish extraordinary circumstances requiring a suspension of Rule 8. Within 5 days after the motion is filed, the court must hold a hearing on the motion and make findings of fact about whether extraordinary circumstances exist that justify the suspension of Rule 8. If the trial court finds that Rule 8 should be suspended, the court must immediately transmit its findings to the Supreme Court Chief Justice. If the Chief Justice approves the findings, the trial court may suspend Rule 8's provisions and reset the trial for a later specified date. [Cross-reference Rule 8.4(d)]

Rule 8.2. Time Limits

- (a) **Generally.** Subject to Rule 8.4's exclusions, the court having jurisdiction over an offense must try every defendant against whom an indictment, information, or complaint is filed within the following times:
 - (1) ***Defendants in Custody.*** No later than 150 days from arraignment if the defendant is held in custody, except as provided in Rule 8.2(a)(3).
 - (2) ***Defendants Out of Custody.*** No later than 180 days from arraignment if the defendant is released under Rule 7, except as provided in Rule 8.2(a)(3).
 - (3) ***Defendants in Complex Cases.*** No later than 270 days from arraignment if the defendant is charged with any of the following:
 - (A) first degree murder, except as provided in Rule 8.2(a)(4);

(B) offenses that will require the court to consider evidence obtained as the result of an order permitting the interception of wire, electronic or oral communication; or

(C) any case the court determines by written factual findings to be complex.

(4) **Capital Cases.** No later than 24 months from the date the State files a notice of intent to seek the death penalty under Rule 15.1(i).

(b) **Waiver of Appearance at Arraignment.** If a person waives an appearance at arraignment under Rule 14.2, the date of an arraignment held in the defendant's absence is deemed to be the arraignment date.

(c) **New Trial.** A trial ordered after a mistrial or the granting of a new trial motion must commence within 60 days after the court order is filed. A trial ordered upon an appellate court's reversal of a judgment must commence within 90 days after the appellate court issues its mandate.

(d) **Extension of Time Limits.** The court may extend these time limits under Rule 8.5.

(e) **Specific Date for Trial.** In all superior court cases except those in which the court has suspended Rule 8 under Rule 8.1(e), the court, either at the superior court arraignment or at a pretrial conference, must set trial for a specified date.

Rule 8.3. Prisoner's Right to a Speedy Trial

(a) **Prisoner in Another State.** Within 90 days after receiving a written request from a person charged with a crime who is incarcerated in another state, or within a reasonable time after otherwise learning of such person's incarceration, the prosecutor must take action as required by law to obtain that person's presence for trial. The defendant must be brought to trial within 90 days after having been delivered into the custody of the appropriate authority of the State of Arizona.

(b) Prisoner in Arizona.

(1) **Request for Final Disposition.** A defendant imprisoned in Arizona may request the final disposition of any untried indictment, information or complaint pending in Arizona. The request must be in writing, addressed to the court in which the charge is filed and to the prosecutor charged with the duty of prosecuting it. The request must state the defendant's place of imprisonment.

(2) **Detainer.** Within 30 days after a detainer is filed against a defendant incarcerated in Arizona, the prosecutor who is prosecuting the charge that

resulted in the detainer must inform the defendant about the detainer and about the defendant's right to request its final disposition under Rule 8.3(b)(1).

- (3) ***Deadline for Acting on a Request.*** The defendant must be brought to trial on the charge within 90 days after sending a request for final disposition to the court and prosecutor.
- (4) ***Escape from Custody.*** A defendant's request for final disposition is void if he the defendant later escapes from custody.

Rule 8.4. Excluded Periods

The following periods are excluded from the time computations set forth in Rules 8.2 and 8.3:

- (a) delays caused by or on behalf of the defendant, whether or not intentional or willful, including, but not limited to, delays caused by an examination and hearing to determine competency or intellectual disability, the defendant's absence or incompetence, or the defendant's inability to be arrested or taken into custody in Arizona;
- (b) delays resulting from a remand for a new probable cause determination under Rules 5.5 or 12.9;
- (c) delays resulting from a time extension for disclosure under Rule 15.6;
- (d) delays necessitated by trial calendar congestion, but only if the congestion is due to extraordinary circumstances, in which case the presiding judge must promptly apply to the Supreme Court Chief Justice to suspend Rule 8 or any other Rule of Criminal Procedure; [Cross-reference Rule 8.1(e).]
- (e) delays resulting from continuances granted under Rule 8.5;
- (f) delays resulting from joinder for trial with another defendant for whom the time limits have not run, if they are properly joined or consolidated under Rule 13.3; and
- (g) delays resulting from the setting of a transfer hearing under Rule 40.

Note: Draft Rule 8.4(a) includes the words, “whether or not intentional or willful.” These words were derived from a comment to the current rule.

Rule 8.5. Postponing a Trial Date

(a) Motion. A party may seek to postpone trial by filing a motion. The motion must be in writing and state the specific reasons and supporting facts justifying postponement.

(b) Grounds. A court may grant a motion to postpone trial only on a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice. It may postpone trial only for so long as is necessary to serve the interests of justice. In reaching its decision, the court must consider the rights of the defendant and any victim to a speedy disposition of the case. If it grants the motion, the court must state on the record specific reasons for postponing trial.

Notes: Should a motion under Rule 8.5 require a certificate of good faith?

Consider keeping as a comment the following portion of the Maricopa County Rule 8 Guidelines, which currently appear after Rule 8.7:

As provided in Rule 8.5(b), any Motion to Continue must establish the existence of extraordinary circumstances and must justify any delay as being indispensable to the interests of justice for the court to grant the motion. In determining whether extraordinary circumstances exist and a delay is indispensable to the interests of justice, although not exclusive, the following factors will be considered by the court.

1. Were the circumstances cited as reasons for the continuance unforeseeable?
2. Were the circumstances due to lack of preparation?
3. Are the reasons relevant?
4. Is any other party prejudiced?

Motions to Continue must set forth grounds with specificity. Motions which contain only conclusory statements such as plea negotiations are ongoing, additional time is needed to prepare for trial or investigate the matter, or that all witnesses have not been interviewed will be denied.

Finally, any Motion to Continue that is filed in an untimely manner under these guidelines will be denied unless the motion sets forth with specificity the reason for filing the motion within 5 days of the trial.

Rule 8.6. Denial of Speedy Trial

On the defendant's motion or on its own, the court must dismiss a prosecution—with or without prejudice—if it determines, after excluding the time periods listed in Rule 8.4, that a time limit established by Rules 8.2(a), 8.2(b), 8.2(c), 8.2(d), 8.3(a), 8.3(b)(2), or 8.3(b)(3) has been violated.

Rule 8.7. Accelerating Trial

If there are special circumstances relating to the victim, the court may accelerate the trial to the earliest possible date consistent with the defendant's right to a fair trial. The presiding judge may assign another judge to preside at trial to ensure that the trial commences on the scheduled date.

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 prevent 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 state specific grounds for the change of judge and be supported by an affidavit.
- (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 assign the motion to another judge.
- (3) *Preserving Error.*** Allegations of interest or prejudice that prevent a fair and impartial hearing or trial may be preserved for appeal.
- (4) *Waiver.*** 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 the party loses.

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

- (1) *Hearing and Ruling.*** Promptly after a party files a timely 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.

Notes:

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

Suggest adding a comment to Rule 10.1, derived from a comment to existing Rule 10.4, as follows:

Rule 10.2. Change of Judge as a Matter of Right

(a) Entitlement.

- (1) **Generally.** Each side in a criminal case 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 as a matter of right.
- (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. 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, a proceeding under Rule 17, or the commencement of trial.
- (f) **Following Remand.** Unless previously exercised, a party may exercise a change of judge as a matter of right following an appellate court’s remand for new trial, and no event connected with the first trial constitutes a waiver. A party may not exercise a change of judge as a matter of right 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 a pretrial conference.

(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 as the court otherwise orders. 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 Allegation; 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.

Rule 14. Arraignment

Rule 14.1. General Provisions

The purpose of arraignments is to formally advise defendants of their legal rights and of the charges against them, to assure they are provided counsel, and to set a trial date or a later court date. At an arraignment, a magistrate informs a defendant of the matters in Rule 14.4.

Rule 14.2. When an Arraignment Is Held

(a) Generally. Except as provided in (b), (c), and (d), these time limits apply:

- (1) for defendants in custody,** an arraignment must be held within 10 days after the filing of an indictment, information, or complaint.
- (2) for defendants not in custody,** an arraignment must be held within 30 days after the filing of an indictment, information, or complaint.

(b) Exception for Special Situations. If the court cannot hold the arraignment within the time specified, in Rule 14.2(a) because the defendant has not yet been arrested or summoned, or is in custody elsewhere, the court must hold the arraignment as soon as possible after those time periods.

(c) Exceptions for Limited Jurisdiction Courts. An arraignment is not necessary if:

- (1)** the defendant's attorney has entered a plea of not guilty; or
- (2)** the court permits a defendant to enter a not-guilty plea by mail and to receive a court date by mail. Delivery of the notice is presumed if the notice is deposited in the U.S. mail, addressed to the defendant's last known address, and the notice is not returned to the court.

(d) Exception for Superior Court. The superior court is not required to conduct an arraignment after the filing of an indictment or information if the presiding judge issues an order that Rule 14 does not apply to superior court cases in that county.

(e) Combined Proceedings. If the defendant's first court appearance occurs after the complaint's filing, the court may hold the arraignment in conjunction with the initial appearance before the magistrate, if the initial appearance is held in the trial court. If the initial appearance is not held in the trial court, the court must order the defendant to appear for arraignment in the trial court within 10 days after the initial appearance, and a written notice of the arraignment date must be delivered to the defendant.

Rule 14.3. The Defendant's Presence

- (a) **Personal Presence Required.** A defendant must be arraigned personally before the trial court or by an interactive video appearance under Rule 1.6.
- (b) **Personal Presence Not Required if Waived.** A defendant who personally appeared at an initial appearance may waive his or her presence at an arraignment in superior court by filing a waiver of personal appearance at arraignment at least two days before the arraignment date. The defendant and the defendant's attorney must sign the waiver, which must be notarized. A defendant who waives personal presence must file an affidavit within 20 days after arraignment stating the defendant is aware of all scheduled court appearances in the matter and understands that failure to appear at sentencing may result in losing the right to a direct appeal.

Rule 14.4. Proceedings at Arraignment

At an arraignment, the court must:

- (a) enter the defendant's plea of not guilty, unless the defendant pleads guilty or no contest;
- (b) hear and decide motions concerning the conditions of release under Rule 7, provided at least 5 days' notice is given for a contested release motion if notice is not waived by all parties, unless the arraignment is held in conjunction with the defendant's initial appearance before a magistrate under Rule 4.2;

[current Rule 14.3(b) version] hear and decide motions concerning the conditions of release under Rule 7. Unless the arraignment is held in conjunction with the defendant's initial appearance before a magistrate under Rule 4.2, a contested release motion shall be heard upon at least 5 days prior notice, unless such time is waived by all parties.

[proposed amended version] hear and decide any motion concerning conditions of release under Rule 7, including a contested release motion at an arraignment held in conjunction with the defendant's initial appearance before a magistrate under Rule 4.2 after at least 5 days' notice, unless this notice is waived by all parties.

- (c) set the date for trial or a pretrial conference;
- (d) inform the parties in writing of the dates set for further proceedings and other important deadlines;
- (e) inform the defendant of the right to be present at all future proceedings, that all proceedings other than sentencing may be held in the defendant's absence, and that the defendant may be charged with an offense and a warrant issued for defendant's arrest without further notice;

- (f) inform the defendant that if the defendant's absence prevents sentencing from occurring within 90 days following conviction, the defendant may lose the right to a direct appeal to an appellate court;
- (g) inform the defendant of the right to jury trial, if applicable;
- (h) for misdemeanors, inform the defendant of the right to counsel and the right to court-appointed counsel if eligible, and appoint counsel if necessary; and
- (i) 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:
 - (1) 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 A.R.S. § 13-3601; and
 - (2) 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.

Notes:

Draft Rule 14.1 derives from a comment preceding current Rule 14.1.

Rule 16. Pretrial Motions and Hearings

Rule 16.1. General Provisions

- (a) **Scope.** Rule 16 governs court procedures between arraignment and trial, unless another rule provides a specific procedure.
- (b) **Motions Before Trial.** Parties must file or make in open court all motions no later than 20 days before trial, unless the court orders otherwise. Lack of jurisdiction may be raised at any time. Motions must meet the requirements of Rule 1.9. Unless the court orders otherwise, the opposing party must file any responsive memorandum within 10 days after a written motion is served. A judge may extend these deadlines for good cause.
- (c) **Effect of a Failure to File or Make a Timely Motion.** The court may preclude any motion, defense, objection, or request not timely raised by motion under Rule 16.1(b), unless the basis for the motion, defense, objection, or request was not then known, and could not have been known by the exercise of reasonable diligence, and the party raises it promptly upon learning the basis for it.
- (d) **Court Review.** The court may review with counsel the grounds offered in support of a motion. The court may rule on motions when it concludes it can render a reasoned decision without setting an evidentiary hearing, reviewing written memoranda, or taking the matter under advisement.
- (e) **Finality of Pretrial Determinations.** Except for good cause or as these rules provide otherwise, a court may not reconsider an issue that it previously decided.
- (f) **Relevant Issues for Jury Determination.** This rule does not preclude the defendant from presenting relevant issues and properly disclosed defenses to the jury, such as voluntariness or identification.

Rule 16.2. Procedure on Pretrial Motions to Suppress Evidence

- (a) **Duty of Court to Inform the Defendant.** If an issue arises before trial concerning the constitutionality of using specific evidence against the defendant and the defendant is not represented by counsel, the court must inform the defendant that:
- (1) the defendant may, but is not required to, testify at a pretrial hearing about the circumstances surrounding the acquisition of the evidence;
 - (2) if the defendant testifies at the hearing, the defendant will be subject to cross-examination;

- (3) by testifying at the hearing, defendant does not waive the right to remain silent at trial; and
- (4) the defendant's testimony at the hearing will not be disclosed to the jury unless the defendant testifies at trial concerning the same matters.

(b) Burden of Proof on Pretrial Motions to Suppress Evidence.

- (1) **Generally.** Subject to Rule 16.2(b)(2), the State has the burden of proving by a preponderance of the evidence the lawfulness in all respects of the acquisition of all evidence that the prosecutor will use at trial.
- (2) **Defendant's Burden.** If any of the conditions listed below are present, the State's burden of proof under Rule 16.2(b)(1) arises only after the defendant comes forward/presents/alleges specific circumstances that establish a prima facie case supporting the suppression of the evidence at issue:
 - (A) the defendant is entitled under Rule 15 to discover the circumstances surrounding the taking of any evidence by confession, identification, or search and seizure;
 - (B) defense counsel was present at the taking; or
 - (C) the evidence was obtained under a valid search warrant.

Rule 16.3. Pretrial Conference

- (a) **Generally.** On motion or on its own, any superior court or limited jurisdiction court may conduct one or more pretrial conferences. The court may designate the types of cases for which the court will hold a pretrial conference, identify the persons who are required to attend, provide for sanctions if a person fails to attend, and establish other procedures and requirements that are reasonable and necessary to conduct and to carry out a pretrial conference's objectives. In superior court, the court must hold at least one pretrial conference.
- (b) **Objectives.** The objectives of a pretrial conference may include:
 - (1) providing a forum and a process for the fair, orderly, and just disposition of cases without trial;
 - (2) permitting the parties, without prejudice to their rights to trial, to engage in disclosure and to conduct negotiations for dispositions without trial;
 - (3) providing an opportunity for complying with discovery requirements set forth in these rules and constitutional law;

(4) eliminating the need for setting trial dates for cases that may be resolved without a trial; and

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

(c) Duty to Confer; Memoranda. The court may require the parties to confer before the conference or to file memoranda before the conference if it concludes that either would be helpful to the court. The court may set the requirements for what the memoranda should contain.

(d) Scope of Proceeding. The court has broad authority at a pretrial conference. At the conference the court may:

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

(2) set further hearings as needed for the taking of evidence or argument on motions;

(3) obtain stipulations to relevant facts; and

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

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

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

Rule 16.4. Dismissal of Prosecution

(a) On the State's Motion. On the State's motion and for good cause, the court at any time may order a prosecution's dismissal if it finds that the dismissal's purpose is not to avoid Rule 8.

(b) On a Defendant's Motion. On a defendant's motion, the court must order a prosecution's dismissal if it finds that the indictment, information, or complaint is insufficient as a matter of law. Alternatively, the court may order amendment of the indictment under Rule 13.5.

(c) Record. If the court grants a motion to dismiss a prosecution, it must state on the record its reasons for ordering dismissal.

(d) Effect of Dismissal. Dismissal of a prosecution is without prejudice to commencing another prosecution, unless the court order finds that the interests of justice require that the dismissal to be with prejudice.

(e) Release of Defendant; Exoneration of Bond. If a court dismisses a prosecution, it must order the release of the defendant from custody, unless he or she also is being held on another charge. It also must exonerate any appearance bond.

Rule 34. Subpoenas

Rule 34. Subpoenas

- (a) **Generally.** The process by which attendance of a witness before a court or magistrate is required is a subpoena.
- (b) **Alternative Form of Subpoena.** If requested, a subpoena requiring a person to appear at a criminal proceeding may allow the person to appear in court on 30 minutes notice. If the subpoenaed person agrees to this option, the return of service must provide a telephone number where the subpoenaed person can be contacted during regular court hours on the appearance date, and the person must promise to appear when called.
- (c) **Multiple Subpoenas.** A person served with two or more subpoenas that require simultaneous attendance in different courts must honor them in the following order: United States District Court, Superior Court, Justice of the Peace Court, and Municipal Court), and then must honor them based on the date of service. The person must immediately notify the parties requesting the subpoenas of the conflict.
- (d) **ADA Notification.** The subpoena must state that “Requests for reasonable accommodation for persons with disabilities must be made to the court by parties at least 3 working days in advance of a scheduled court proceeding.”

COMMENT

This rule supplements the statutory provisions governing criminal subpoenas. See Ariz.Rev.Stat. Ann. §§ 13-13-4071 to 13-4075 and 13-4077; 13-4081 to 13-4084; 13-4091 to 13-4096; 13-4101 to 13-4105; and 13-4111 to 13-4116.

Rule 35. For Motions and Requests

Rule 35.1 Motions

- (a) **Content.** A motion must include a memorandum that states pertinent facts, arguments, and authorities supporting the motion.
- (b) **Service of Motion; Response; Reply.** The moving party must serve the motion on all other parties. Within 10 days after service, another party may file and serve a response, and, within 3 days after service of a response, the moving party may file and serve a reply. A reply must be directed only to matters raised in a response. If no response is filed, the court may deem the motion submitted on the record.
- (c) **Length.** Unless the court orders otherwise, a motion or response, including a supporting memorandum, may not exceed 11 pages, exclusive of attachments, and a reply may not exceed 6 pages, exclusive of attachments
- (d) **Waiver of Requirements.** On a party's request or on its own, the court may waive a requirement specified in this rule or overlook a formal defect in a motion.

Rule 35.2. Oral Argument

On a party's request or on its own, the court may set a motion for hearing, or limit or deny oral argument.

Note: Rule 35.5 is no longer necessary because the substance of Civil Rule 5 is in draft Rules 1.7 and 1.8.

COMMENT

The former rules contained no standard governing service of motions, requests and other pleadings. The provisions of the civil rules are adequate.

To emphasize the adequacy of service by mail for most documents under these rules (but see Rules 3.4 and 31.5(a)(2)) the term "send" is used interchangeably with the term "serve." "Send" is used most often; however, "serve" has been retained in some cases for textual reasons only.

2006 COURT COMMENT

Rule 5(c), Arizona Rules Civil Procedure, was amended in 2006 specifically to include service by electronic and other means if the recipient consents in writing or the court so orders. *See* State Bar Committee Note, 2006 Amendment, to Rule 5(c). These new provisions also apply, as appropriate, in criminal proceedings.

COMMENT (2007 AMENDMENT)

Rule 5(j)(2) of the Arizona Rules of Civil Procedure was added in 2004 to reduce the clerks' burden of producing and distributing minute entries by requiring counsel to submit with their stipulations and motions proposed forms of orders along with a sufficient number of copies to be conformed and pre-addressed stamped envelopes for each party to the action. This subdivision of the rule, like other provisions in Rule 5, is to be followed by attorneys in criminal cases, unless otherwise provided for by the presiding judge.

Rule 35.6. Notice of Orders

Immediately upon the entry of any order, other than in open court, the clerk must distribute a copy of the order to all parties by U.S. mail, electronic mail, or attorney drop box.

Note: Because of the general nature of this rule, the Task Force should consider moving the substance of Rule 35.6 to Rule 1, possibly as Rule 1.9. Proposed Civil Rule 80(e) provides:

(e) Clerk's Distribution of Minute Entries and Other Court Records.

- (1) *Minute Entries.*** The clerk must distribute, either by U.S. mail, electronic mail, or attorney drop box, copies of all minute entries to all parties.
- (2) *Electronic Distribution.*** The clerk may distribute minute entries, notices and other court-generated documents to a party or a party's attorney by electronic means. Electronic distribution of a document is complete when the clerk transmits it to the email address that the party or attorney has provided to the clerk.

COMMENT

The former rules do not contain this requirement, although notice of orders is standard practice. The language of the section follows Federal Rules of Criminal Procedure 49(c); it is broadened to apply to all orders in criminal cases, with the exception of those entered in open court.

Rule 35.7. Proposed Orders

A proposed order must be prepared as a separate document and not be included as part of a motion, stipulation, or other document. There must be at least two lines of text on the signature page. A party must serve the proposed order on other parties. A party must not file a proposed order, and the court will not docket it, until a judge has reviewed and signed it. The court will not issue a minute entry if the court has signed a party's proposed form of order.