

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

State Courts Building, Phoenix

Meeting Minutes: June 17, 2016

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

Absent: Paul Ahler, Hon. Maria Felix

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

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

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

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

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

Workgroup 1 – Rules 20 and 24

Workgroup 2 - Rule 32

Workgroup 3 - Rules 17, 22, and 23

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

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

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

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

Other Rule 1 topics of discussion included the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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