

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

State Courts Building, Phoenix

Meeting Minutes: July 29, 2016

**Members attending:** Hon. Joseph Welty (Chair), Paul Ahler, Hon. Kent Cattani, Hon. Sally Duncan, Timothy Eckstein, David Euchner, Hon. Maria Felix, Hon. Richard Fields (by telephone), Hon. Pamela Gates, Bill Hughes, Hon. Eric Jeffery, Kellie Johnson, Amy Kalman, Prof. Jason Kreag by his proxy Mikel Steinfeld, Jerry Landau, Hon. Mark Moran, Aaron Nash, Natman Schaye by his proxy Kirsty Davis, Hon. Paul Tang (by telephone), Kenneth Vick (all members present)

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

**Guests:** Joey Hamby

1. **Call to order; introductory comments; revised meeting schedule; approval of the meeting minutes.** The Chair called the meeting to order at 9:30 a.m. and introduced the proxies. The Chair commended the members' work and noted the workgroups have met 32 times to-date. The members have invested more than 600 hours of their time in Task Force and workgroup meetings, which does not include the members' additional time reviewing and researching rules outside of meetings. The Chair advised that the members' discussions during Task Force meetings add value to their work product, but those discussions are time-intensive. Accordingly, he made two suggestions for making the most efficient use of Task Force time during future rules presentations. First, a workgroup should request, if a rule is brief and the workgroup's restyling is non-substantive and uncontroversial, that the Task Force approve the rule by acclimation. Second, when presenting a rule to the Task Force, the presenter should try to proceed through the entire rule before opening the rule for discussion.

The Chair added that to meet the goal of distributing a vetting draft to stakeholders this fall, the Task Force should schedule an additional meeting. After discussion, the members agreed to convene on Friday, August 26, 2016, from 9:30 a.m. to 4:30 p.m. Also, the October 27 Task Force meeting conflicts with the Court's Leadership Conference, and the members agreed to reset that meeting to October 21, 2016.

The Chair then asked members to review the draft June 17, 2016 meeting minutes, and a member made the following motion:

**Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. CRTF-005

2. **Workgroup 2: Rule 6 ("Attorneys, appointment of counsel").** Judge Cattani presented this rule. He acknowledged several revisions Mr. Vick proposed before the

meeting, and then proceeded with an overview of the workgroup's revisions. The workgroup modified Rule 6.1(a) ("right to counsel, right to a court-appointed attorney; waiver of the right to counsel") to state clearly that there is a right to counsel regardless of the nature or level of the offense. However, there are distinctions in Rule 6.1(b), ("right to a court appointed attorney") concerning when appointment of counsel is a right, and when it is discretionary. The workgroup restyled Rule 6.2 ("appointment of counsel for indigent defendants"). Rule 6.3 concerns the duties of counsel and withdrawal. Section (c)(2) clarifies that when moving to withdraw from a case that is set for trial, counsel does not need to give the name of substitute counsel when withdrawal is on ethical grounds. Rule 6.3(d), the duty of defense counsel to preserve the file, currently applies only to capital cases; the workgroup's draft would apply the rule to all criminal cases. However, Rule 6.3(e), the duty of successor counsel to collect the file, would continue to apply to capital cases only. Rule 6.3(d) raises the issue of how long defense counsel need to retain the file. The members briefly discussed applicable rules and policies, including one that would require preservation as long as defendant remains in custody, and another that would require preservation until the judgment is no longer subject to modification. The members might consider codifying this time requirement when it reviews Rule 28.

Rule 6.4 concerns the determination of "indigency" and it includes a definition of that term. The members considered relocating the definition into Rule 1.4 ("definitions"), but decided it should remain in Rule 6. However, after further discussion, the members agreed that the definition should move to Rule 6.1. In Rule 6.5 ("manner of appointment"), and following their convention, the members changed the word "commenced" in section (d) to "begun." The members considered moving Rule 6.6 ("appointment of counsel on appeal") into Rule 31, but after discussion, it will stay where it is currently. Rule 6.7 ("compensation of appointed counsel") was restyled. The draft eliminates circumstances where the defendant makes partial payments directly to court-appointed counsel, although current Rule 6.7(d) allows this.

Judge Cattani noted that the workgroup spent considerable time on Rule 6.8 ("standards for appointment and performance of counsel in capital cases"). He advised that the workgroup met earlier this week, and the version of Rule 6.8 projected on-screen in the meeting room contains the workgroup's additional revisions. The workgroup's earlier draft had incorporated the comment to Rule 6.8 in the body of the rule; the most recent version reversed that decision and retained the substance of the provision, with modifications, as a separate comment. One of these modifications requires counsel to demonstrate for the court a specific need concerning how the guidelines apply in a particular case; merely citing a guideline is insufficient, for example, to support a request for additional resources. The draft of Rule 6.8(a) ("generally") reorganized the requirements for trial, appellate, and post-conviction counsel so each of the subsequent sections did not repeat qualifications that applied to all three. The draft of Rule 6.8(a)(2)

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refers to practice “in the area of state criminal litigation.” A member suggested that the rule require experience “in the area of criminal defense litigation,” which would preclude prosecutorial experience; the current rule does not contain this limitation, and the members did not add it. Another member thought the rule should simply allow practice “in the area of criminal litigation” to permit federal court practitioners to qualify. After discussion, the members agreed that the rule should require “criminal litigation in Arizona state court....” A similar modification was made to Rule 6.8(b)(1)(A). Non-capital federal experience would qualify under Rule 6.8(b)(1)(B). Rule 6.8(a)(5) added the 2008 “supplementary guidelines,” which the workgroup believes is necessary and appropriate, although this is a substantive change because it is not in the current rule. In Rule 6.8(c)(2), the members agreed to add “merits briefing,” so appellate counsel who had prepared only *Anders* briefs would not qualify under the rule.

The Chair then asked if there were other suggestions concerning Rule 6, which led to the following comments (shown in italics).

- *Rule 6.1(a) should include the right “to retain” as well as “to be represented by” counsel. After discussion, the members declined to add, “to retain.”* The members also discussed moving the second sentence of the draft rule (which states in part that the right “includes the right to consult, etc.”) to a subsequent section, but they also declined to make that change.
- *Rule 6.1(d) (“unreasonable delay in retaining counsel) needs further revisions for clarity.* The members then agreed to on-screen changes that distinguished between (1) an indigent defendant who refused an appointed attorney, and (2) a defendant who is not indigent but who had a reasonable opportunity to obtain counsel. A judge member emphasized that in either situation, the court should engage in a colloquy with the defendant to confirm the underlying circumstance; this is a best practice rather than a procedural rule.
- *Rule 6.4(b), the rule on the financial resources questionnaire, should contain a specific reference to Rule 41, Form 5(a).* However, the members noted this would be inappropriate because some jurisdictions utilize other Supreme Court-approved forms. A member suggested a phrase that the court “may” question a defendant should be changed to “must,” but after discussion the members agreed that the judge may have no need to ask questions, and the draft retained the discretionary “may.”
- *Should the last sentence of Rule 6.8(a) refer to Rule 6.8(a)(2), or to Rule 6.8(a)(1-3)?* The members agreed that it should refer only to (a)(2).

The members had no further comments or suggestions concerning Rule 6.

**3. Workgroup 4: Rule 14 (“Arrestment”).** Judge Tang began his presentation by noting that a new Rule 14.1 entitled “general provisions” incorporates a comment

preceding current Rule 14.1. The rule is otherwise substantively the same, although it is reorganized. Judge Tang acknowledged that the workgroup considered comments submitted by Mr. Vick and Mr. Landau in preparing its draft. The workgroup's draft included alternative versions of Rule 14.4 ("proceedings at arraignment"). The members agreed to a version that permits contested release motions at arraignment. They also reorganized that version and concurred that it adequately recognized victims' rights at arraignment. The Chair then asked the members for additional comments.

The current draft of Rule 14.1 states in part that a purpose of an arraignment is to assure defendants are provided counsel. The members agreed to add the words "if applicable" after that phrase. They also inserted "to enter a plea" into the purposes specified in Rule 14.1. Although the Task Force convention is to write rules that refer to people in the singular, they agreed that use of the plural was appropriate in Rule 14.1. They clarified Rule 14.2(c) by adding the words "notice of" in the phrase, "to receive notice of a court date by mail." Members suggested other revisions to Rule 14.2 ("when an arraignment is held") that made the rule clearer by deleting verbiage. They similarly deleted a redundant phrase - "to inform the defendant" - in Rule 14.4. In Rule 14.4(a), the members added the words "and the court accepts the plea" to address concerns that the draft language would otherwise not permit the court discretion to decline a guilty or no contest plea at arraignment.

The members had no further comments or revisions to Rule 14.

**4. Workgroup 1: Rule 15 ("Disclosure").** Mr. Euchner presented Rule 15 on behalf of Workgroup 1. The workgroup made few changes to Rule 15.1(a) ("initial disclosure in a felony case"), but changed the word "items" in the current rule to "information" in the draft. In Rule 15.1(b) ("supplemental disclosure"), subpart 2, the workgroup changed a reference in the current rule concerning statements of a person who will be tried with the defendant, to simply co-defendant. The members discussed whether this is substantively different, and concluded it was not. They also discussed whether it should be limited to statements concerning the charged offense. For example, if a co-defendant engages in "free-talk" with the State about unrelated crimes, does the State have a duty to disclose those statements? The members agreed that any limitation to the term "statement," which has no limitation in the current rule, would be an unwarranted, substantive change. The workgroup suggested adding a reference in subpart 4 to "cold" experts. After discussion, the members agreed that this would be a beneficial addition, although it would be substantive, and the Chair directed the workgroup to prepare recommended text.

Rule 15.1(f) concerns the scope of the State's disclosure obligation. The workgroup recommended deleting a comment to this rule because it is inconsistent with the State's obligations. For example, there is no shield from disclosure for materials in the

possession of a prosecutor's secretary, although the comment suggests otherwise. Rule 15.1(g) ("disclosure by court order") allows a third party affected by a court order requiring disclosure to request that the order be modified or vacated. However, the draft rule did not specify whether the request would be made by the third party, or by the State on behalf of the third party. Accordingly, the members added to the draft the words "on the request of any person affected by the order." Rule 15.1(h) ("disclosure of rebuttal evidence") provides that the State must disclose the identity of witnesses the State "intends" to call on rebuttal. The members discussed changing that word to "may," but decided to retain the word "intends." The workgroup deleted existing Rule 15.1(j)(5), which holds defense counsel responsible for violating a duty under the rule, because that consequence is presumed. Members changed the words "court-ordered deadline" in Rule 15.1(j)(4)(E) to "deadline set by the court."

In Rule 15.2 ("the defendant's disclosures"), the members made minor edits in section (a), "physical evidence," in section (b), "notice of defenses," and in section (c), "contents of disclosure." Portions of Rule 15.2 were restyled similarly to provisions in Rule 15.1. Rule 15.3 concerns depositions. The workgroup at first intended to incorporate in this rule corresponding provisions of the Arizona Rules of Civil Procedure, but later decided to draft a standalone criminal rule. The workgroup discussed whether A.R.S. § 13-4072 applied to deposition subpoenas as well as trial subpoenas, and concluded that it did. However, A.R.S. § 13-4072(F) requires law enforcement officers to serve subpoenas, and members discussed whether this statutory duty should extend to service of deposition subpoenas. One concern was that this might be the customary method of serving deposition subpoenas in rural counties, and excluding this method might be problematic in those counties. Another concern was that even if the rule did not allow service under section (F), the statute would continue to authorize service in that manner. A straw vote indicated a majority of members would leave the statutory reference in the rule without specifying or limiting service to particular sections of the statute (12 in favor, 5 opposed).

Members shorted the title of Rule 15.4 by deleting the word "general" from the draft's title, "general disclosure standards." The draft of Rule 15.4(a) ("statements") began with the phrase, "the term statement includes...." By a straw poll, the members agreed to retain the word "includes" (9 in favor) rather than "means" (8 in favor). Although Rule 15.4(a) defines a "statement," that term first appears in Rule 15.1, and members discussed, but did not agree to, moving the definition to Rule 15.1. The members agreed to remove "an expert's report" from the list of items included in the definition of "statement." The members discussed, but did not change, a provision in Rule 15.4(b) ("materials not subject to disclosure") that extends the work product privilege to law enforcement officers. The members also discussed eliminating draft Rule 15.4(e) ("requests for disclosure") as being self-evident, but agreed to retain the rule

to avoid an inference that the Task Force was making a change to the process. Rule 15.4(d) concerns “use of materials.” In connection with that rule, Mr. Rogers advised that the State Bar’s Civil Practice and Procedure Committee recently drafted a civil rule that deals with sealed documents, and which might culminate in a rule petition during the 2017 rules cycle. The members agreed that a corresponding rule might be appropriate in the criminal rules – possibly in Rule 1 – and the Task Force should consider a sealing rule later this year. Members changed the words “a court may order that a party may defer” to “a court may grant a request to defer” in section (a) of Rule 15.5 (“excision and protective orders”).

The words “excluded time” in Rule 15.6(e)(3) (“extensions of time for completion of discovery”) were changed to “extending time” to avoid confusion with Rule 8 exclusions. Mr. Euchner noted that the workgroup retained a comment to Rule 15.6, which could be helpful for judges and practitioners. He asked for members’ comments on whether Rule 15.7(c) (“failure to comply”) promoted a sound policy. The workgroup left intact the substance of a recently adopted Rule 15.8 (“disclosure before a plea agreement expires or is withdrawn”). The workgroup made a change in Rule 15.9 (“appointment of investigators and expert witnesses for indigent defendants”) that would permit the court to appoint a mitigation specialist in a non-capital case. However, the workgroup recommended relocating Rule 15.9 in Rule 6. The members agreed, and the Chair directed Workgroup 2 to determine the appropriate location for these provisions in Rule 6. The Chair then asked for comments concerning Rule 15.

Members made several comments concerning rules where the Task Force could pare words, or reorganize provisions for enhanced clarity. Among them was Rule 15.1(d) (“prior felony convictions”), where the on-screen rephrasing and reorganizing process resulted in the elimination of several lines of text.

The members also discussed particular provisions of Rules 15.6 and 15.7. The members criticized Rule 15.7(c), first, for conflicting with other provisions concerning the duty to disclose; and second, for allowing a party to engage in “self-help,” that is, allowing a party to withhold disclosure without court intervention and a judicial determination that the other side failed to comply with its disclosure obligations. Several members suggested eliminating the rule. Another member proposed a modification whereby the court would suspend a party’s duty to disclose pending a judicial determination of whether the other party was not complying. However, the essence of the problem under Rule 15.7(c) is not whether one party should stop disclosure, which the rule currently allows, but whether the noncomplying party should start disclosure, which might require a court order. The workgroup should determine the process under these circumstances for a party to seek judicial relief against the noncomplying party, rather than allowing non-judicial self-help. The Chair requested a poll on eliminating

Rule 15.7(c) from the draft; 13 members were in favor and 5 were opposed, so the provision will be deleted.

The members also discussed the draft comment to Rule 15.6. Some preferred relocating the last sentence of the comment (“the entire structure of pretrial proceedings embodied in these rules depends on early and complete evidentiary disclosures”) into a new introductory provision of Rule 15.7. Other members thought the second sentence of the comment (“the court should consider the imposition of appropriate sanctions for untimely disclosure as well as nondisclosure”) needs to be in the body of either Rule 15.6 or 15.7. Otherwise, the comment is insufficient for the imposition of Rule 15.7 sanctions, because that rule deals with the failure to disclose, not untimely disclosure. The Chair directed the workgroup to review this issue and determine the process under these rules for a party to seek judicial relief, including sanctions outside the 7-day window in Rule 15.6(d), for untimely disclosure. These would be substantive changes. Judge Duncan invited members to send suggestions to her for Workgroup 1’s consideration. Meanwhile, the members agreed to delete the comment to Rule 15.6 in its entirety.

**5. Call to the public.** Mr. Hamby responded to the Chair’s call to the public. With regard to Rule 6.3(c)(2), Mr. Hamby noted that attorneys are not always able to provide elaborate grounds when withdrawing for ethical reasons. The Chair advised that the draft rule does not require elaboration. Mr. Hamby expressed concerns with Rule 6.3(d) and defense counsel’s duty to preserve the file. He stated that court rules do not clearly define the duration of the duty, and he cited the expense, for example, of maintaining a misdemeanor file for 7 years. The Chair responded that the Task Force thought it was reasonable to apply this rule to non-capital cases, and on occasion, it might be useful to have information from closed non-capital files in capital post-conviction proceedings. However, the Task Force might reconsider its decision if broader application of this rule does not solve any existing problems but only creates a new one.

**6. Assignment of new rules; adjourn.** The Chair assigned new rules to the workgroups as follows:

Workgroup 1:	Rule 26
Workgroup 2:	Rules 30, 32, and 38
Workgroup 3:	Rule 33
Workgroup 4:	Rule 27

The Chair reminded the members that the next meeting is set for August 26, 2016. The meeting adjourned at 4:17 p.m.