

Task Force on the Arizona Rules of Criminal Procedure

Meeting Agenda

Friday, August 26, 2016

9:30 AM to 4:30 PM

State Courts Building * 1501 West Washington * Conference Room 119 * Phoenix, AZ

Conference call-in number: (602) 452-3288 Access code: 9661

Item no. 1	Call to Order Introductory comments	<i>Judge Welty, Chair</i>
Item no. 2	Approval of July 29, 2016 meeting minutes	<i>Judge Welty</i>
Item no. 3	Discussion of workgroup drafts <ul style="list-style-type: none">- Workgroup 1: Rule 15 (further review), Rule 24 - Workgroup 3: Rules 8 and 9 (further review), Rules 22, 23, and 33 - Workgroup 4: Rule 16	<i>Judge Duncan, Mr. Euchner, Mr. Vick, Prof. Kreag</i> <i>Judge Jeffery, Mr. Eckstein</i> <i>Judge Tang, Ms. Kalman</i>
Item no. 4	Roadmap and additional rule assignments <ul style="list-style-type: none">- Future Task Force meeting dates: September 16 October 21 December 9	<i>Judge Welty</i>
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: 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)

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.

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 ~~regarding~~ the priority of cases for trial.
- (d) **Duty of Defense Counsel.** Defense counsel must advise the court of an impending expiration of time limits. 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.

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 in custody, except as provided in (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 (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 (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 defendant 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 must begin within 60 days after entry of the court's order. A trial ordered upon an appellate court's reversal of a judgment must begin within 90 days after the appellate court issues its mandate. **A new trial ordered under Rule 32 must begin within [90?] days after entry of the court's order**

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

(e) **Specific Date for Trial.** The superior court must set a specific trial date either at the arraignment or a pretrial conference, unless the court has suspended Rule 8.

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 the person's incarceration, the State 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 case is filed, and to the responsible prosecuting agency. 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 prosecuting agency that 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 (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 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;
- (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 good cause exists for denying severance, but in all other cases, severance should be granted to preserve the applicable time limits; 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. Continuing a Trial Date

(a) Motion. A party may ask to continue trial by filing a motion stating the specific reasons for the request.

(b) Grounds. A court may continue trial only on a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice, and only for so long as is necessary to serve the interests of justice. The court must consider the rights of the defendant and any victim to a speedy disposition of the case. The court must state specific reasons for continuing trial.

Rule 8.6. Denial of Speedy Trial

If the court determines, after excluding any applicable time periods, that a time limit established by these rules has been violated, the court must dismiss the prosecution, with or without prejudice.

Rule 8.7. Accelerating Trial

If there are special circumstances relating to the victim or other good cause, 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 begins 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's voluntary absence waives the right to be present at any proceeding. 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. Defendant's Forfeiture of the Right to Be Present Due to Disruptive Conduct

- (a) Generally.** A defendant who engages in disruptive conduct, after the court warned the defendant that such conduct will result in his or her expulsion from a proceeding, forfeits the right to be present at that proceeding. At the time of expelling a defendant, the court must inform the defendant that he or she can return upon a promise to the court of future orderly conduct.
- (b) Continuing Duty to Permit Participation.** After expulsion, the court must use every feasible means to allow the defendant to watch, hear, and be informed of the proceeding's progress, and to consult with counsel at reasonable intervals. The court may inquire periodically if the defendant wishes to reacquire the right to be present.
- (c) Reacquiring the Right.** The court must allow the defendant 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.
- (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.

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 15. Disclosure

Rule 15.1. The State's Disclosures

(a) Initial Disclosures in a Felony Case. Unless a local rule provides or the court orders otherwise:

- (1) the State must make available to the defendant all reports containing information identified in (b)(3) and (b)(4) that the charging attorney possessed when the charge was filed; and
- (2) the State must make these reports available by the preliminary hearing or, if no preliminary hearing is held, the arraignment.

(b) Supplemental Disclosure. Except as provided in Rule 39(b), the State must make available to the defendant the following material and information within the State's possession or control:

- (1) the name and address of each person the State intends to call as a witness in the State's case-in-chief and any relevant written or recorded statement of the witness;
- (2) any statement of the defendant and any co-defendant;
- (3) all existing original and supplemental reports prepared by a law enforcement agency in connection with the charged offense;
- (4) the name and address of each expert who has examined a defendant or any evidence in the case, and the results of any completed physical examination, scientific test, experiment, or comparison;
- (5) a list of all documents, photographs, and other tangible objects the State intends to use at trial or that were obtained from or purportedly belong to the defendant;
- (6) a list of the defendant's prior felony convictions the State intends to use at trial;
- (7) a list of the defendant's other acts the State intends to use at trial;
- (8) all existing material or information that tends to mitigate or negate the defendant's guilt or would tend to reduce the defendant's punishment;
- (9) whether there has been any electronic surveillance of any conversations to which the defendant was a party, or of the defendant's business or residence;
- (10) whether a search warrant has been executed in connection with the case; and

(11) whether the case involved an informant, and, if so, the informant's identity, subject to the restrictions under Rule 15.4(b)(2).

(c) **Time for Supplemental Disclosures.** Unless the court orders otherwise, the State must disclose the material and information listed in (b) no later than:

- (1) in the superior court, 30 days after arraignment.
- (2) in a limited jurisdiction court, the first pre-trial conference, or 20 days after arraignment, whichever occurs first.

(d) **Prior Felony Convictions.** The State must make available to a defendant a list of prior felony convictions of each witness the State intends to call at trial and a list of the prior felony convictions the State intends to use to impeach a disclosed defense witness at trial:

- (1) in a felony case, at least 30 days before trial or 30 days after the defendant's request, whichever occurs first; and
- (2) in a misdemeanor case, at least 10 days before trial.

(e) **Disclosures upon Request.**

(1) **Generally.** Unless the court orders otherwise, the State must make the following items available to the defendant for examination, testing, and reproduction within 30 days of a defendant's written request:

- (A) any of the items specified in the list submitted under (b)(5);
- (B) any 911 calls existing at the time of the request that the record's custodian can reasonably ascertain are related to the case; and
- (C) any completed written report, statement, and examination notes made by an expert listed in (b)(1) and (b)(4) related to the case.

(2) **Conditions.** The State may impose reasonable conditions, including an appropriate stipulation concerning chain of custody to protect physical evidence or to allow time for the examination or testing of any items.

(f) **Scope of the State's Disclosure Obligation.** The State's disclosure obligation extends to material and information in the possession or control of any of the following:

- (1) the prosecutor, other attorneys in the prosecutor's office, and members of the prosecutor's staff; or

- (2) any state, county, or municipal law enforcement agency that has participated in the investigation of the case; and
- (3) any other person who is under the prosecutor's direction or control and participated in the investigation or evaluation of the case.

(g) Disclosure by Court Order.

- (1) ***Disclosure Order.*** On defendant's motion, a court may order any person to make available to the defendant material or information not included in this rule if the court finds:
 - (A) the defendant has a substantial need for the material or information to prepare the defendant's case; and
 - (B) the defendant cannot obtain the substantial equivalent by other means without undue hardship.
- (2) ***Modifying or Vacating Order.*** On the request of any person affected by the order, the court may vacate or modify an order if the court determines that compliance would be unreasonable or oppressive.

(h) Disclosure of Rebuttal Evidence. Upon receiving the defendant's notice of defenses under Rule 15.2(b), the State must disclose the name and address of each person the State intends to call as a rebuttal witness, and any relevant written or recorded statement of the witness.

(i) Additional Disclosures in a Capital Case.

- (1) ***Notice of Intent to Seek the Death Penalty.***
 - (A) ***Generally.*** No later than 60 days after a defendant's arraignment in superior court on a charge of first-degree murder, the State must provide notice to the defendant of whether the State intends to seek the death penalty.
 - (B) ***Time Extensions.*** The court may extend the State's deadline for providing notice by an additional 60 days if the parties file a written stipulation agreeing to the extension. If the court approves the extension, the case is considered a capital case for all administrative purposes including, but not limited to, scheduling, appointment of counsel under Rule 6.8, and the assignment of a mitigation specialist. The court may grant additional extensions if the parties file written stipulations agreeing to them.

(C) *Victim Notification.* If the victim has requested notice under A.R.S. § 13-4405, the prosecutor must confer with the victim before agreeing to extend the deadline.

(2) *Aggravating Circumstances.* If the State files a notice of intent to seek the death penalty, the State must, at the same time, provide the defendant with a list of aggravating circumstances that the State intends to prove in the aggravation phase of the trial.

(3) *Initial Disclosures.*

(A) *Generally.* No later than 30 days after filing a notice to seek the death penalty, the State must disclose the following to the defendant:

(i) the name and address of each person the State intends to call as a witness at the aggravation hearing to support each alleged aggravating circumstance, and any written or recorded statement of the witness;

(ii) the name and address of each expert the State intends to call at the aggravation hearing to support each alleged aggravating circumstance, and any written or recorded statement of the expert;

(iii) a list of all documents, photographs or other tangible objects the State intends to use to support each identified aggravating circumstance at the aggravation hearing; and

(iv) all material or information that might mitigate or negate the finding of an aggravating circumstance or mitigate the defendant's culpability.

(B) *Time Extensions.* The court may extend the deadline for the State's initial disclosures under (i)(3) or allow the State to amend those disclosures only if the State shows good cause or the parties stipulate.

(4) *Rebuttal and Penalty Phase Disclosures.* Within 60 days of receiving the defendant's disclosure under Rule 15.2(h)(1), the State must disclose the following to the defendant:

(A) the name and address of each person the State intends to call as a rebuttal witness on each identified aggravating circumstance, and any written or recorded statement of the witness;

(B) the name and address of each person the State intends to call as a witness at the penalty hearing, and any written or recorded statement of the witness;

- (C) the names and address of each expert the State intends to call at the penalty hearing, and any report the expert has prepared; and
- (D) a list of all documents, photographs or other tangible objects the State intends to use during the aggravation and penalty hearings.

(j) Items Prohibited by A.R.S. § 13-3551, et seq.

- (1) **Scope.** This rule applies to an item that cannot be produced or possessed under A.R.S. § 13-3551 et seq., but is included in the list disclosed under (b)(5).
- (2) **Disclosure Obligation.** The State is not required to reproduce the item or release it to the defendant for testing or examination except as provided by (j)(3) and (j)(4). The State must make the item reasonably available for inspection by the defendant, but only under such terms and conditions necessary to protect a victim's rights.
- (3) **Court-Ordered Disclosure for Examination or Testing.**
 - (A) **Generally.** The court may order the item's reproduction or its release to the defendant for examination or testing if the defendant makes a substantial showing that it is necessary for the effective investigation or presentation of a defense, including an expert's analysis.
 - (B) **Conditions.** A court must issue any order necessary to protect a victim's rights, document the chain of custody, or protect physical evidence.
- (4) **General Restrictions.** In addition to any court order issued, the following restrictions apply to the reproduction or release of any item to the defendant for examination or testing:
 - (A) the item must not be further reproduced or distributed except as the court order allows;
 - (B) the item may be viewed or possessed only by the persons authorized by the court order;
 - (C) the item must not be possessed or viewed by the defendant outside the direct supervision of defense counsel, advisory counsel, or a defense expert;
 - (D) the item must be delivered to defense counsel or advisory counsel, or if expressly permitted by court order, to a specified defense expert; and
 - (E) the item must be returned to the State by a deadline set by the court.

Rule 15.2. The Defendant's Disclosures

(a) Physical Evidence.

- (1) **Generally.** At any time after the filing of an indictment, information or complaint, and upon the State's written request, the defendant must, in connection with the particular offense with which the defendant is charged:

 - (A) appear in a line-up;
 - (B) speak for identification by one or more witnesses;
 - (C) be fingerprinted, palm-printed, foot-printed, or voice printed;
 - (D) pose for photographs not involving a re-enactment of an event;
 - (E) try on clothing;
 - (F) permit the taking of samples of hair, blood, saliva, urine, or other specified materials that does not involve an unreasonable intrusion of the defendant's body;
 - (G) provide handwriting specimens; and
 - (H) submit to a reasonable physical or medical inspection of the defendant's body, but such an inspection may not include a psychiatric or psychological examination.
- (2) **Presence of Counsel.** The defendant is entitled to have counsel present when the State takes evidence under this rule.
- (3) **Other Procedures.** This rule supplements and does not limit any other procedures established by law.

(b) Notice of Defenses.

- (1) **Generally.** By the deadline specified in (d), the defendant must provide written notice to the State specifying all defenses the defendant intends to assert at trial, including, but not limited to, alibi, insanity, self-defense, defense of others,

entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identity, and good character.

- (2) **Witnesses.** For each listed defense, the notice must specify each person, other than the defendant, that the defendant intends to call as a witness at trial in support of the defense.
- (3) **Signature and Filing.** Defense counsel—or if the defendant is self-represented, the defendant—must sign the notice and file it with the court.

(c) Content of Disclosure. At the same time the defendant files a notice of defenses under (b), the defendant must provide the following information:

- (1) the name and address of each person, other than the defendant, the defendant intends to call as a witness at trial, and any written or recorded statement of the witness;
- (2) the name and address of each expert the defendant intends to call at trial, the results of any physical examination of the defendant, and the results of any completed scientific test, experiment or comparison; and
- (3) a list of all documents, photographs, and other tangible objects the defendant intends to use at trial.

(d) Time for Disclosures. Unless the court orders otherwise, the defendant must disclose the material and information listed in (b) and (c) no later than:

- (1) in superior court, 40 days after arraignment, or within 10 days after the State's disclosure under Rule 15.1(b), whichever occurs first;
- (2) in a limited jurisdiction court, 20 days after the State's disclosure under Rule 15.1(b).

(e) Additional Disclosures upon Request.

- (1) **Generally.** Unless the court orders otherwise, the defendant must make the following items available to the State for examination, testing, and reproduction within 30 days of the State's written request:
 - (A) any of the items specified in the list submitted under (c)(3); and
 - (B) any completed written report, statement, and examination notes made by an expert listed in (c)(2) in connection with the particular case.

(2) **Conditions.** The defendant may impose reasonable conditions, including an appropriate stipulation concerning chain of custody to protect physical evidence or to allow time for the examination or testing of any items.

(f) **Scope of Disclosure.** A defendant's disclosure obligation extends to material and information within the possession or control of the defendant, defense counsel, staff, agents, investigators, or any other persons who have participated in the investigation or evaluation of the case and who are under the defendant's direction or control.

(g) Disclosure by Court Order.

(1) **Disclosure Order.** On the State's motion, a court may order any person to make available to the State material or information not included in this rule if the court finds:

- (A) the State has a substantial need for the material or information for the preparation of the State's case;
- (B) the State cannot obtain the substantial equivalent by other means without undue hardship; and
- (C) the disclosure of the material or information would not violate the defendant's constitutional rights.

(2) **Modifying or Vacating Order.** The court may vacate or modify an order if the court determines that compliance would be unreasonable or oppressive.

(h) Additional Disclosures in a Capital Case.

(1) **Initial Disclosures.**

(A) **Generally.** Within 180 days after receiving the State's initial disclosure under Rule 15.1(i)(3), the defendant must disclose the following to the State:

- (i) a list of all mitigating circumstances the defendant intends to prove;
- (ii) the name and address of each person, other than the defendant, the defendant intends to call as a witness during the aggravation and penalty hearings, and any written or recorded statement of the witness;
- (iii) the name and address of each expert the defendant intends to call during the aggravation and penalty hearings, and any written or recorded statements of the expert, excluding any portions containing statements by the defendant; and

- (iv) a list of all documents, photographs, or other tangible objects the defendant intends to use during the aggravation and penalty hearings.
- (B) *Time Extensions.* The court may extend the deadline for the defendant's initial disclosures under (h)(1) or allow the defendant to amend those disclosures only if the defendant shows good cause or if the parties stipulate.
- (2) *Later Disclosures.* Within 60 days of receiving the State's supplemental disclosure under Rule 15.1(i)(4), the defendant must disclose the following to the State:
 - (A) the name and address of each person the defendant intends to call as a rebuttal witness, and any written or recorded statement of the witness; and
 - (B) the name and address of each expert the defendant intends to call as a witness at the penalty hearing, and any report the expert has prepared.

Rule 15.3. Depositions

- (a) **Availability.** A party or a witness may file a motion requesting the court to order the examination of any person, except the defendant and those excluded by Rule 39(b), by oral deposition under the following circumstances:
 - (1) a party shows that the person's testimony is material to the case and that there is a substantial likelihood that the person will not be available at the time of trial; or
 - (2) a party shows that the person's testimony is material to the case or necessary to adequately prepare a defense or investigate the offense, that the person was not a witness at the preliminary hearing or at the probable cause phase of the juvenile transfer hearing, and that the person will not cooperate in granting a personal interview; or
 - (3) a witness is incarcerated for failing to give satisfactory security that the witness will appear and testify at a trial or hearing.
- (b) **Follow-up Examination.** If a witness testifies at a preliminary hearing or probable cause phase of a juvenile transfer hearing, the court may order the person to attend and give testimony at a follow-up deposition if:
 - (1) the magistrate limited the person's previous testimony under Rule 5.3; and
 - (2) the person will not cooperate in granting a personal interview.
- (c) **Motion for Taking Deposition; Notice; Service.**
 - (1) *Motion's Requirements.* A motion to take a deposition must:

- (A) state the name and address of the person to be deposed;
 - (B) show that a deposition may be ordered under (a) or (b);
 - (C) specify the time and place for taking the deposition; and
 - (D) designate any non-privileged documents, photographs, or other tangible objects that the person must produce at the deposition.
- (2) **Order.** If the court grants the motion, it may modify any of the moving party's proposed terms and specify additional conditions governing how the deposition will be conducted.
- (3) **Notice and Subpoena.** If the court grants the motion, the moving party must notice the deposition in the manner provided in Arizona Rule of Civil Procedure 30(b). The notice must specify the terms and conditions in the court's order granting the deposition. The moving party also must serve a subpoena on the deponent in the manner provided in A.R.S. § 13-4072.

(d) Manner of Taking.

- (1) **Generally.** Unless this rule provides or the court orders otherwise, the parties must conduct a deposition as provided in Rules 28(a) and 30 of the Arizona Rules of Civil Procedure.
- (2) **Deposition by Written Questions.** If the parties consent, the court may order that a deposition be taken on written interrogatories as provided in Rule 31 of the Arizona Rules of Civil Procedure.
- (3) **Deponent Statement.** Before the deposition, a party who possesses a statement of a deponent must make it available to any other party who would be entitled to the statement at trial.
- (4) **Recording.** A deposition may be recorded by other than a certified court reporter. If someone other than a certified court reporter records the deposition, the party taking the deposition must provide every other party with a copy of the recording within 14 days after the deposition, or no less than 10 days before trial, whichever is earlier.
- (5) **Remote Means.** The parties may agree or the court may order that the parties conduct the deposition by telephone or other remote means.
- (e) **The Defendant's Right to Be Present.** A defendant has the right to be present at any deposition ordered under (a)(1) or (a)(3). If a defendant is in custody, the moving party must notify the custodial officer of the deposition's time and place. Unless the

defendant waives in writing the right to be present, the officer must produce the defendant at the deposition and remain with defendant until it is completed.

- (f) **Use.** A party may use a deposition in the same manner as former testimony under Rule 19.3(c).

Rule 15.4. Disclosure Standards

(a) Statements.

- (1) **Definition of a “Statement.”** In Rule 15, the term “statement” includes:
- (A) a writing prepared, signed or otherwise adopted or approved by a person;
 - (B) a recording of a person’s oral communications or a transcript of the communication; or
 - (C) a written record or summary of a person’s oral communications.
- (2) **Definition of a “Writing.”** A “writing” consists of words or their equivalent in physical, electronic, or other form.
- (3) **Exclusion of Superseded Notes.** Handwritten notes are not a statement if they were substantially incorporated into a document or report within 30 calendar days of their creation, or were preserved electronically, mechanically, or by verbatim dictation.

(b) Materials Not Subject to Disclosure.

- (1) **Work Product.** A party is not required to disclose legal research or records, correspondence, reports, or memoranda to the extent they contain the opinions, theories, or conclusions of the prosecutor or defense counsel, members of their respective legal or investigative staff, or law enforcement officers.
- (2) **Informants.** A party is not required to disclose the existence or identity of an informant who will not be called to testify if:
- (A) disclosure would result in substantial risk to the informant or to the informant’s operational effectiveness; and
 - (B) a failure to disclose will not infringe on the defendant’s constitutional rights.
- (c) **Failure to Call a Witness or Raise a Defense.** At trial, a party may not comment on the fact that a witness’s name or a defense is on a list furnished under Rule 15, yet not called or raised, unless the court allows the comment after finding that inclusion of the witness’s name or the defense constituted an abuse of the applicable disclosure rule.

(d) **Use of Materials.** Any materials furnished to a party or counsel under Rule 15 must not be disclosed to the public, and may only be disclosed to the extent necessary for the proper conduct of the case.

(e) **Requests for Disclosure.** All requests for disclosure must be made to the opposing party.

(f) **Filing of Papers; Exception for Misdemeanors and Petty Offenses Filed in Limited Jurisdiction Courts.** For misdemeanor and petty offenses triable in limited jurisdiction courts, parties must not file materials disclosed under Rules 15.1 and 15.2, or notices of their service, unless the court orders otherwise or they are filed as attachments or exhibits to other documents relevant to the determination of an issue before the court.

COMMENT

Rule 15.4(a). It is intended that an attorney's actual trial notes, such as his outline of questions to ask a witness will be encompassed within the work product exception of Rule 15.4(b)(1), even though they fall within the definition of statement.

Rule 15.5. Excision and Protective Orders

(a) A Court's Discretion to Deny, Defer or Regulate Disclosure.

(1) **Witness Identity.** For good cause, a court may grant a request to defer disclosing a witness's identity for a reasonable period of time, but no later than 5 days before trial.

(2) **Other Matters.** A court may order that other disclosures required by Rule 15 be denied, deferred, or regulated if it finds that:

(A) disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and

(B) the risk cannot be eliminated by a less substantial restriction of discovery rights.

(b) **A Court's Discretion to Authorize Excision.** If the court finds that only a portion of material or other information is subject to disclosure under Rule 15, it may enter an order authorizing the disclosing party to excise the portion that is not subject to disclosure.

(c) **Protective and Excision Order Proceedings.** If a party files a motion seeking a protective or excision order or requesting the court to determine whether any material

or other information is subject to disclosure, the court may conduct an in camera inspection of the material. Counsel for all parties have the right to be heard on the matter before any in camera inspection is conducted.

- (d) **Preserving the Record.** If the court orders that any portion of any material or information is not subject to disclosure under Rule 15, the entire text of the material or information must be sealed and preserved in the record for appeal.
- (e) **Claims of Privilege or Protection.** A party who redacts a portion of a disclosed document must clearly identify the redaction and state the legal basis, if it is not clear from the context.

Rule 15.6. Continuing Duty to Disclose; Final Disclosure Deadline; Extension

(a) **Continuing Duties.** The parties' duties under Rule 15 are continuing duties without awaiting a specific request from any other party.

(b) **Additional Disclosures.** Any party who anticipates a need to provide additional disclosure within 30 days before trial must immediately notify both the court and all other parties of the circumstances and when the party will make the additional disclosure.

(c) **Final Deadline for Disclosure.** Unless otherwise permitted, all disclosure required by Rule 15 must be completed at least 7 days before trial.

(d) Disclosure After the Final Deadline.

(1) ***Motion to Extend Disclosure.*** If a party seeks to use material or information that was disclosed less than 7 days before trial, the party must file a motion to extend the disclosure deadline and to use the material or information. The moving party also must file a supporting affidavit setting forth facts justifying an extension.

(2) ***Order Granting Motion.*** The court must extend the disclosure deadline and allow the use of the material or information if it finds the material or information:

(A) could not have been discovered or disclosed earlier with due diligence; and

(B) was disclosed immediately upon its discovery.

(3) ***Order Denying Motion or Granting Continuance; Sanctions.*** If the court finds that the moving party has failed to establish facts sufficient to justify an extension under (d)(2), it may:

(A) deny the motion to extend the disclosure deadline and deny the use of the material or information; or

(B) extend the disclosure deadline and allow the use of the material or information and, if it extends the deadline, the court may impose any sanction listed in Rule 15.7 except preclusion or dismissal.

(e) Extension of Time for Completion of Testing.

- (1) **Motion.** Before the final disclosure deadline in (c), a party may move to extend the deadline to permit the completion of scientific or other testing. The motion must be supported by an affidavit from a crime laboratory representative or other scientific expert stating that additional time is needed to complete the testing or a report based on the testing. The affidavit must specify how much additional time is needed.
- (2) **Order.** If a motion is filed under (e)(1), the court must grant reasonable time to complete disclosure unless the court finds that the need for the extension resulted from dilatory conduct or neglect, or that the request is being made for an improper reason by the moving party or a person listed in Rule 15.1(f) or 15.2(f).
- (3) **Extending Time.** If the court grants a motion under (e)(2), the court may extend other disclosure deadlines as necessary.

Rule 15.7. Disclosure Violations and Sanctions

- (a) **Motion.** Any party may move to compel disclosure or request an appropriate sanction for a disclosure violation of Rule 15 or both. Any motion to compel disclosure or for sanctions must include a separate statement that the moving party has personally consulted with opposing counsel and has made good faith efforts to resolve the matter. Any motion filed without the separate statement will not be heard or scheduled for a hearing.
- (b) **Order.** If the court finds that a party violated a disclosure obligation under Rule 15, it must order disclosure as necessary and impose an appropriate sanction, unless the court finds that:
 - (1) the failure to comply was harmless; or
 - (2) the party could not have disclosed the information earlier with due diligence and the party disclosed the information immediately upon its discovery.
- (c) **Sanctions.** In considering an appropriate sanction for nondisclosure or untimely disclosure, a court must determine the significance of the information not timely disclosed, the violation's impact on the overall administration of the case, the sanction's impact on the party and the victim, and the stage of the proceedings when

the party ultimately made the disclosure. Available sanctions include, but are not limited to:

- (1) precluding or limiting a witness, the use of evidence, or an argument supporting or opposing a charge or defense;
- (2) dismissing the case with or without prejudice;
- (3) granting a continuance or declaring a mistrial if necessary in the interests of justice;
- (4) holding in contempt a witness, a party, or a person acting under the direction or control of a party;
- (5) imposing costs of continuing the proceeding; or
- (6) any other appropriate sanction.

Rule 15.8. Disclosure Before a Plea Agreement Expires or Is Withdrawn; Sanctions

(a) Disclosure Obligation. If the State has filed an indictment or information in superior court and extends a plea offer to a defendant, the State must disclose to the defendant when it makes the offer the items listed in Rule 15.1(b) to the extent that it possesses the required information and has not previously made such a disclosure.

(b) Violation. If the State makes the disclosure less than 30 days before the offer expires or is withdrawn, a court may sanction the State under (c) unless the State shows that the prosecutor reasonably believed, based on newly discovered information, that an offer should be withdrawn because it was contrary to the interests of justice.

(c) Effect on Other Required Disclosures. This rule does not affect any disclosure obligation otherwise imposed by law. While a plea offer is pending, the prosecutor must continue to comply with Rule 15.6, but additional disclosures under that rule do not extend the 30-day period specified in (b). Disclosure of evidence after the offer expires or is withdrawn, including the results of any scientific testing, does not violate this rule if the evidence did not exist, or the State was not aware of it, when the State extended the offer.

(d) Sanctions. On a defendant's motion alleging a violation of this rule, the court must consider the impact of any violation of (a) on the defendant's decision to accept or reject a plea offer. If the court finds that the State's failure to provide a required disclosure materially affected the defendant's decision and if the State declines to reinstate the lapsed or withdrawn plea offer, the court—as a presumptive minimum sanction—must preclude the admission at trial of any evidence not disclosed as required by (a).

Rule 15.9. Appointment of Investigators and Expert Witnesses for Indigent Defendants

- (a) Appointment.** On application, if the court finds that such assistance is reasonably necessary to adequately present a defense at trial or at sentencing, the court may appoint an investigator, expert witnesses, and/or mitigation specialist for an indigent defendant at county or city expense.
- (b) Ex Parte Proceeding.** A defendant may not make an ex parte request under this rule without showing a need for confidentiality. The court must make a verbatim record of any ex parte proceeding, communication, or request, which must be available for appellate review.
- (c) Mitigation Specialist.** As used in this rule, a “mitigation specialist” is a person qualified by knowledge, skill, experience, or other training as a mental health or sociology professional to investigate, evaluate, and present psycho-social and other mitigation evidence.
- (d) Capital Case.** In a capital case, a defendant should make any motion for an expert or mitigation specialist no later than 60 days after the State makes its disclosure under Rule 15.1(i)(3).

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) **Pretrial Motions.** All motions must meet the requirements of Rules 1.6 and 1.9 and must be served as provided in Rule 1.7. Parties must make all motions—orally in court or filed in writing—no later than 20 days before trial, except that lack of jurisdiction may be raised at any time. Responsive pleadings are allowed as provided in Rule 1.9. The court may modify motion 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 (b), unless the basis was not then known and could not have been known through reasonable diligence, and the party raises it promptly after the basis is known.
- (d) **Court Review.** 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, the 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 (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 evidence involves a confession, identification, or search and seizure and the defendant is entitled under Rule 15 to discover how the evidence was obtained;
 - (B) defense counsel was present when the evidence was taken; or
 - (C) the evidence was obtained pursuant to a warrant.

Rule 16.3. Pretrial Conference

- (a) **Generally.** A court may conduct one or more pretrial conferences. The court may establish procedures and requirements that are necessary to accomplish a conference's objectives, including identifying appropriate cases for pretrial conferences, identifying who must attend, and determining sanctions for failing to attend. In the superior court, the court must conduct 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; and
 - (4) 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.** At the conference the court may:

- (1) hear motions made at or filed before the conference;
 - (2) set additional pretrial conferences and evidentiary hearings as appropriate;
 - (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 may order a prosecution dismissed if it finds that the dismissal is not to avoid Rule 8 time limits.
- (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 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, the court 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 22. Deliberations

Rule 22.1. Instructions and Retirement

(a) Retirement.

- (1) **Instructions.** Before the jury retires to begin its deliberations, the court must instruct the jury on the applicable law, the procedures it must follow during deliberations, and the appropriate method to report the results of its deliberations. The instructions must be recorded or in writing and be available to the jurors during deliberations.
- (2) **Foreperson.** The court must appoint, or instruct the jurors to elect, a foreperson.
- (3) **Retirement.** After instructing the jury, the court must direct the jury to retire under the charge of a court officer to begin its deliberations.

(b) Permitting the Jury to Disperse. The court may permit the jurors to disperse after they begin their deliberations. The court must instruct the jurors when to reassemble and admonish the jury under Rule 19.4.

(c) Length of Jury Deliberations. The court must not require a jury to deliberate after normal working hours unless the court, after consulting with the jury and the parties, determines that evening or weekend deliberations are necessary in the interest of justice and does not impose an undue hardship on the jurors.

Rule 22.2. Materials Used During Deliberations

(a) Generally. Upon retiring for deliberations, jurors must take into the jury room:

- (1) forms of verdict approved by the court;
- (2) jurors' copies of the court's instructions;
- (3) jurors' notes; and
- (4) tangible evidence as the court directs.

(b) Verdict Form Limitation. The form of verdict must not indicate whether the described offense is a felony or a misdemeanor, unless the statute on which the offense is based directs that the jury make this determination.

Rule 22.3. Repeating Testimony and Additional Instructions

(a) Repeating Testimony. If after retiring to consider their verdict, jurors request that any testimony be repeated, the court may recall the jury to the courtroom and order

the testimony read or replayed. The court also may order other testimony repeated so as not to give undue emphasis to particular testimony.

(b) Additional Instructions. If, after the jury retires, the jury or a party requests additional instructions, the court may recall the jury to the courtroom and further instruct the jury as appropriate.

(c) Notice. The court must give the parties notice before testimony is repeated, or before giving additional instructions.

Rule 22.4. Assisting Jurors at Impasse

If the jury advises the court that it has reached an impasse in its deliberations, the court may, in the parties' presence, ask the jury to determine whether and how court and counsel can assist the jury's deliberations. After receiving the jurors' response, if any, the judge may direct further proceedings as appropriate.

RULE 22.4, COMMENT TO 1995 AMENDMENT [Note: Consider keeping this comment.]

Many juries, after reporting to the judge that they have reached an impasse in their deliberations, are needlessly discharged very soon thereafter and a mistrial declared when it would be appropriate and might be helpful for the judge to offer some assistance in hopes of improving the chances of a verdict. The judge's offer would be designed and intended to address the issues that divide the jurors, if it is legally and practically possible to do so. The invitation to dialogue should not be coercive, suggestive or unduly intrusive.

The judge's response to the jurors' report of impasse could take the following form:

“This instruction is offered to help your deliberations, not to force you to reach a verdict.

“You may wish to identify areas of agreement and areas of disagreement. You may then wish to discuss the law and the evidence as they relate to areas of disagreement.

“If you still have disagreement, you may wish to identify for the court and counsel which issues or questions or law or fact you would like counsel or court to assist you with. If you elect this option, please list in writing the issues where further assistance might help bring about a verdict.

“I do not wish or intend to force a verdict. We are merely trying to be responsive to your apparent need for help. If it is reasonably probable that you could reach a verdict as a result of this procedure, it would be wise to give it a try.”

If the jury identifies one or more issues that divide them, the court, with the help of the attorneys, can decide whether and how the issues can be addressed. Among the obvious

options are the following; giving additional instructions; clarifying earlier instructions; directing the attorneys to make additional closing argument; reopening the evidence for limited purposes; or a combination of these measures. Of course, the court might decide that it is not legally or practically possible to respond to the jury's concerns.

Rule 22.5. Discharging a Jury

(a) Generally. The court must discharge the jury:

- (1) when its verdict has been recorded under Rule 23;
- (2) if the court determines there is no reasonable probability that the jurors can agree upon a verdict; or
- (3) when the court determines a necessity exists for its discharge.

(b) Disclosures and Release from Confidentiality. When discharging a jury at the conclusion of the case, the court must advise the jurors that they are released from service. If appropriate, the court must release them from their duty of confidentiality and explain their rights regarding inquiries from counsel, the media, or any person.

Rule 23. Verdict

Rule 23.1. Form of Verdict; Sealed Verdict

(a) Form of Verdict. The jury's verdict must be in writing, signed by the foreperson, and returned to the judge in open court. The foreperson may sign the verdict, either by affixing his or her signature on the verdict or by writing his or her juror number and initials on the verdict.

(b) Sealed Verdicts.

(1) Procedure. The court may instruct the jurors that if they agree on a verdict during a temporary adjournment of the court, the foreperson may sign the verdict as provided by (a), seal it in an envelope, and deliver it to the officer in charge. The jurors then may separate and reassemble at a specified time and place. The officer must deliver the sealed verdict to the clerk as soon as practical. When the jurors have reassembled in the courtroom, the clerk must return the envelope to the judge in open court.

(2) Admonition. If the court authorizes a sealed verdict, it must admonish the jurors not to make any disclosure concerning its verdict, or speak with others concerning the case, until the verdict has been returned and the jury has been discharged.

Rule 23.2. Types of Verdicts

(a) General Verdicts. Except as this rule specifies otherwise, in every case the jury must render a verdict finding the defendant either guilty or not guilty.

(b) Insanity Verdicts. If a jury that determines a defendant is guilty except insane, it must state this determination in its verdict.

(c) Different Offenses. If an indictment or information charges different counts or offenses, the verdict must specify each count or offense for which the jury has found the defendant guilty or not guilty.

(d) Different Degrees. If the verdict of guilty is to an offense that is divided into degrees, the verdict must specify the degree of the offense for which the jury has found the defendant guilty.

(e) Aggravation Verdict. After a guilty verdict and an aggravation phase in a capital or a non-capital case, the jury must render a verdict determining whether each of the alleged aggravating circumstances was proven.

(f) **Penalty Verdict in a Capital Case.** At the conclusion of the penalty phase in a capital case, the jury must render a verdict stating whether to impose a sentence of death or life.

Rule 23.3. Conviction of Necessarily Included Offenses or Attempts

(a) **Generally.** The court must submit forms of verdicts to the jury for:

- (1) all offenses necessarily included in the offense charged;
- (2) an attempt to commit the offense charged if such an attempt is a crime; and
- (3) all offenses necessarily included in an attempt.

(b) **If No Form Is Provided.** If the court did not submit to the jury a form of verdict for an offense, the jury may not find the defendant guilty of that offense.

Rule 23.4. Polling the Jury

(a) **Generally.** After the jury returns a verdict and before the court dismisses the jury, the court must poll the jury at the request of any party or on the court's own initiative. If the jurors' responses to the poll do not support the verdict, the court may direct them to retire for further deliberations or the court may dismiss the jury.

(b) **Juror Confidentiality.** When polling a jury, the court must not identify individual jurors by name, but must use such other methods or form of identification that are appropriate to ensure the jurors' privacy and an accurate record of the poll.

Rule 24. Post-Trial Motions

Rule 24.1. Motion for New Trial

- (a) **The Court's Authority.** After a verdict in any phase of trial, capital or non-capital, the court may order a new trial or phase of trial on the defendant's motion or with the defendant's consent.
- (b) **Timeliness.** A party must file a motion for a new trial no later than 10 days after return of the verdict being challenged. This deadline is jurisdictional and the court may not extend it.
- (c) **Grounds.** The court may grant a new trial or phase of trial if:
- (1) the verdict is contrary to law or the weight of the evidence;
 - (2) the State is guilty of misconduct;
 - (3) one or more jurors committed misconduct by:
 - (A) receiving evidence not admitted during the trial or phase of trial;
 - (B) deciding the verdict by lot;
 - (C) perjuring himself or herself, or willfully failing to respond fully to a direct question posed during the voir dire examination;
 - (D) receiving a bribe or pledging his or her vote in any other way;
 - (E) becoming intoxicated during the course of the trial or deliberations; or
 - (F) conversing before the verdict with any interested party about the outcome of the case;
 - (4) the court erred in deciding a matter of law or in instructing the jury on a matter of law to the substantial prejudice of a party; or
 - (5) for any other reason, not due to the defendant's own fault, the defendant did not receive a fair and impartial trial or phase of trial.
- (d) **Admissibility of Juror Evidence to Impeach the Verdict.** If a verdict's validity is challenged under (c)(3), the court may receive the testimony or affidavit of any witness, including members of the jury, that relates to the conduct of a juror, a court official, or a third person. But the court may not receive testimony or an affidavit that relates to the subjective motives or mental processes leading a juror to agree or disagree with the verdict.

COMMENT

Rule 24.1(d). This rule reverses the traditionally strict Arizona rule against the admission of juror testimony or affidavits to impeach a verdict. See *State v. Pearson*, 98 Ariz. 133, 402 P.2d 557 (1965); *State v. Mangrum*, 98 Ariz. 279, 403 P.2d 925 (1965). See ABA, Standards Relating to Trial by Jury § 5.7 (Approved Draft, 1968). See Arizona Code of Professional Responsibility, DR 7-108(D) (1971); Van Slyck, Ethical Propriety of Post-Trial Interrogation of Jurors, 4 Ariz.B.J., no. 2, p. 7 (1968); Ethical Opinion No. 319, 53 A.B.A.J. 1127 (1967). Rule 24.1(d) adheres closely to the ABA, Standards Relating to Trial by Jury (Approved Draft, 1968).

New trial motions involving the use of juror testimony should be heard and decided in the same way as any other new trial motion.

Rule 24.2. Motion to Vacate Judgment

(a) Grounds. The court must vacate a judgment if it finds that:

- (1) the court did not have jurisdiction;
- (2) newly discovered material facts exist satisfying the standards in Rule 32.1(e); or
- (3) the conviction was obtained in violation of the United States or Arizona Constitutions.

(b) Time for Filing. A party must file a motion under this rule no later than 60 days after the entry of judgment and sentence, but before the defendant's appeal, if any, is perfected under Rule 31.11.

(c) Motion Filed After Notice of Appeal. If a party files a motion to vacate judgment after a notice of appeal was filed, the superior court clerk must immediately send copies of the motion to the Attorney General and to the clerk of the appellate court in which the appeal was filed.

(d) Appeal from a Decision on the Motion.

- (1) *Noncapital Cases.* In noncapital cases, the party appealing a final decision on the motion must file a notice of appeal with the trial court clerk within 20 days after entry of the decision for superior court cases, or within 14 days after entry of the decision for limited jurisdiction court cases.
- (2) *Capital Cases.* In capital cases, if the court denies the motion, it must order the clerk to file a notice of appeal from that denial.

(e) State's Motion to Vacate Judgment. Notwithstanding (b), the State may move the court to vacate the judgment at any time after the entry of judgment and sentence if:

- (1) clear and convincing evidence exists establishing that the defendant was convicted of an offense that the defendant did not commit; or
- (2) the conviction was based on an erroneous application of the law.

COMMENT

Rules 24.2 and 24.3 are to replace Arizona Rules of Civil Procedure, Rule 60(c) with specifically criminal post-trial remedies of similarly broad scope. Arizona Rules of Civil Procedure, Rule 60(c) (Supp.1972) does not have any further application to criminal cases.

Rule 24.2(a).

When a motion under Rule 24.2 has been filed but not decided at the time of perfection, both trial and appellate courts will have jurisdiction of the case. If the trial court grants the Rule 24.2 motion the appeal may be mooted after the record for the appeal has been completed. The rules include the following mechanism to alleviate most confusion-- notice to the appellate court of the Rule 24.2 motion (Rules 31.2(f)(4) and 24.2(c)); the appellate court's power to stay the appeal pending determination of the Rule 24.2 motion (Rule 31.4(a)); and the direction in Rule 31.11 that, after perfection, all new matters be addressed to the appellate court.

Rule 24.2(b). Rule 24.2(b) is intended to insure that problems caused by concurrent jurisdiction in the trial and appellate courts will be minimized. The section requires that notice be given only of Rule 24.2 motions brought after a notice of appeal has been filed. Although A. R. S § 13-121 states as a jurisdictional requirement that notice of all proceedings brought in the trial court after judgment and sentence be sent to the attorney general, the requirement does not apply to motions filed within the ambit of the trial court's original trial jurisdiction.

Rule 24.3. Modification of Sentence

(a) Generally. Within 60 days of the entry of judgment and sentence but before the defendant's appeal is perfected, the court may correct any unlawful sentence or one imposed in an unlawful manner.

(b) Appeal.

- (1) ***Noncapital Cases.*** In noncapital cases, the party appealing a final decision under (a) must file a notice of appeal with the trial court clerk within 20 days after entry of the decision in superior court cases, or within 14 days after entry of the decision in limited jurisdiction court cases.

- (2) *Capital Cases.* In capital cases, after denying modification of a sentence of death, the court must order the clerk to file a notice of appeal from the denial.

COMMENT

This rule allows the court to correct an unlawful sentence or one imposed in an unlawful manner within 60 days of the entry of judgment and pronouncement of sentence, but before the perfection of the defendant's appeal, whichever is sooner. An unlawful sentence is one not authorized by law; a sentence imposed in an unlawful manner is one imposed without due regard to the procedures required by statute or Rule 26. The Rule 24.2 motion to vacate judgment attacks the validity of the judgment itself; the Rule 24.3 motion assumes the correctness of the judgment, but attacks the validity of the sentence.

Rule 24.4. Clerical Error

After giving any notice it considers appropriate, the court may, at any time, correct clerical errors, omissions, and oversights in the record. [Alternative: "On motion or on its own, the court may at any time correct clerical errors, omissions, and oversights in the record."]

IX. Powers of Court

Rule 33. Criminal Contempt

Rule 33.1. Definition

A court may hold a person in contempt of court if the person:

- (a) willfully disobeys a lawful writ, process, order, or judgment of a court by doing or not doing an act or thing forbidden or required; or
- (b) engages in any other willfully contumacious conduct that obstructs the administration of justice or lessens the court's dignity and authority.

Note: Suggest retaining the comment below.

COMMENT

This rule is applicable to all types of contempt except the comparatively narrow class of direct criminal contempts covered by Ariz.Rev.Stat. Ann. §§ 12-861 to -863 (1956) which must, according to the terms of the statutes, be prosecuted in the manner set forth therein.

Rule 33.1 defines criminal contempt. The definition is derived from Ariz.Rev.Stat. Ann. § 12-861 (1956) and the supreme court's statements in *Ong Hing v. Thurston*, 101 Ariz. 92, 416 P.2d 416 (1966). This definition, and the succeeding sections, apply only to criminal contempt. Civil contempt, which is certainly possible in a criminal case (*e.g.*, in the case of a witness who refuses to submit to a deposition) is not treated herein. The general distinction between civil and criminal contempt is the purpose for which the punishment is imposed. A person is imprisoned for civil contempt to force compliance with a lawful order of the court; he holds the keys to the jail and can gain release at any time by complying with the order. See *Shillitani v. United States*, 86 S.Ct. 1531, 384 U.S. 364, 16 L.Ed.2d 622 (1966). A criminal contempt citation, on the other hand, is intended to vindicate the dignity of the court. It is a criminal offense for which a specific punishment is meted out, over which the defendant has no control. See *United States v. Barnett*, 84 S.Ct. 984, 376 U.S. 681, 12 L.Ed.2d 23 (1964), rehearing denied 84 S.Ct. 1642, 377 U.S. 973, 12 L.Ed.2d 742.

Rule 33.2. Summary Disposition of Contempt

- (a) **Citation.** The court may summarily find a person in contempt if the person commits a criminal contempt in the court's presence. The court must immediately notify the person of this finding, and prepare and file a written citation reciting the grounds for the finding, including a statement that the court saw or heard the conduct constituting

the contempt. [Note: the word citation is used in lieu of ‘order,’ which is in the current rule]

(b) Punishment. The court must inform the person [Note: the current rule says the court must “apprise” the person] of the specific conduct on which the citation is based, and provide the person a brief opportunity to present evidence or argument regarding the punishment the court will impose. The court may not impose punishment during the course of the proceeding at which the contempt occurs, unless prompt punishment is imperative.

Rule 33.3. Disposition of Contempt by Notice and Hearing

Except as provided by law or Rule 33.2, the court may not find a person in criminal contempt without notifying the person of the charge and holding a hearing. The court must set the hearing on a date that will allow the person reasonable time to prepare a defense. The notice of hearing must state the hearing’s time and place, and the essential facts constituting the charged contempt. A court may give the notice orally in open court in the presence of the person charged, or by an order to show cause. The person charged with contempt [Note: the current rule refers to ‘the defendant’] has the right to subpoena witnesses for the hearing, and to release under Rule 7 pending the hearing.

COMMENT

Rule 33.3 does not apply to the class of indirect contempts covered by Ariz.Rev.Stat. Ann. §§ 12-861 to -863 (1956), which must be tried under the procedures of those statutes. See *State v. Cohen*, 15 Ariz.App. 436, 489 P.2d 283 (1971).

Rule 33.4. Jury Trial; Disqualification of the Citing Judge

(a) Jury Trial. The person has a right to jury trial under this rule. The court may not punish a person under this rule by imprisonment for longer than 6 months, or by a fine greater than \$300, or both, unless the person either has been found guilty of contempt by a jury or has waived the right to a jury trial.

(b) Disqualification of Judge. Unless prompt punishment is imperative, the citation must be transferred to another judge if the contumacious conduct involves gross disrespect or a personal attack on the citing judge’s character, or if the citing judge’s conduct is so integrated with the contempt that the citing judge contributed to or was otherwise involved in it. The judge to whom the citation is transferred must hold a hearing to determine the person’s guilt and punishment.

COMMENT

Rule 33.4 applies to both Rules 33.2 and 33.3. It imposes two constitutional limitations on the contempt power. Rule 33.4(a) is derived from *Bloom v. State of Illinois*, 88 S.Ct. 1477, 391 U.S. 194, 20 L.Ed.2d 522 (1968), in which the Supreme Court held that no sentence greater than the maximum possible for a petty offense could be imposed unless the defendant had received a jury trial.

See also *Mayberry v. Pennsylvania*, 91 S.Ct. 499, 400 U.S. 455, 27 L.Ed.2d 372 (1971); *Offutt v. United States*, 75 S.Ct. 11, 348 U.S. 11 (1954); ABA, Standards Relating to the Function of the Trial Judge § 7.5 (Tentative Draft, 1972) (This section approved July 1971).

The last sentence requires that a new judge hold a hearing to determine the guilt of the contemnor, as well as to impose punishment. Thus, whenever the trial judge must disqualify himself under this section any adjudication of guilt made under Rule 33.2(a) is void and the matter must be redetermined.

The self-disqualification of the judge required by this section must be distinguished from the peremptory challenge of a judge granted the parties by 1956 Arizona Rules of Criminal Procedure 196-200 and Rule 10.2. This section does not give the contemnor a pre-sentence challenge of the judge; it does give him a ground of appeal when a judge who should have disqualified himself imposes sentence.