

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

State Courts Building, Phoenix

Meeting Minutes: August 26, 2016

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

Absent: Hon. Richard Fields, Jerry Landau, Hon. Paul Tang

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

Guests: John Belatti

1. Call to order, introductory comments, approval of the meeting minutes.

The Chair called the meeting to order at 9:41 a.m. He advised that there have been 8 workgroup meetings since the July 29 Task Force meeting, and 40 workgroup meetings to-date. He expressed appreciation for the continuing work of the members and staff.

Discussion of rules on today’s agenda will proceed in the following order: 23, 33, 16, 24, 22, and further review of 9.2 and 8(c). The Chair then asked members to review the draft July 29, 2016 meeting minutes.

Motion: To approve the draft minutes. Seconded, and the motion passed unanimously. CRTF-006

2. Workgroup 3: Rule 23 (“verdict”). Mr. Eckstein presented Rule 23. There is a new provision, analogous to an amendment to civil Rule 49 proposed by the Civil Rules Task Force, which permits a foreperson to affix initials and a juror number to a verdict form in lieu of a signature. The members concurred with this new provision. A change to Rule 23.1(b) requires jurors to assemble at “a specified time and place” rather than in the jury box.

Sections (a) through (d) of Rule 23.2 are substantively unchanged. However, unlike current section (e), which applies to aggravation verdicts in only capital cases, a revised section (e) would cover aggravation verdicts in both capital and non-capital cases. A judge member noted that if an element is inherent in an offense, the jury is not required to reach a separate aggravation verdict, e.g., if an offense is inherently dangerous, or if a prior conviction is an element of an offense. This is an issue the Task Force may discuss further when it considers Rule 19. However, to account for these circumstances and to clarify the rule, members changed the phrasing in section (e) to state that the jury must

render a verdict determining whether “...each of the alleged aggravation circumstances submitted to the jury was proven.” In Rule 23.2(f) and elsewhere, the workgroup changed the term “penalty hearing” to “penalty phase,” which is the statutory terminology, and the members agreed with this change.

The workgroup separated the two sentences of current Rule 23.3 into two sections. Although the term “lesser included” is commonly used, the workgroup preserved the use of “necessarily included,” a term that is in the current rule, and the members agreed. The workgroup also reorganized Rule 23.4 as two sections rather than one, although the rule is substantially the same. A member suggested changing the phrase “retire for further deliberations” to “further deliberate,” and the members agreed. The members also agreed to delete all of the comments to current Rule 23.

3. Workgroup 3: Rule 33 (“criminal contempt”). Mr. Eckstein began his presentation of Rule 33 by noting its historical context, including Justice Hugo Black’s remark about “the unrestrained power of judges” in the area of contempt. Mr. Eckstein then advised that Rule 33.1 is currently a single sentence, but the workgroup reorganized it into subparts, and used the active rather than the passive voice. The title of the rule is “criminal contempt,” and some members had concern with the circularity of describing contempt as “willfully contumacious conduct...” One member suggested “unreasonable” conduct. After further discussion, the members agreed to rephrase this as “any other willful conduct...” The members also discussed the workgroup’s recommendation to retain the comment to Rule 33.1, which includes references to statutes as well as to a leading Arizona case, *Ong Hing v Thurston*. The comment also distinguishes between civil and criminal contempt, and direct and indirect contempt. The U.S. Supreme Court citations, which are decades old, might be updated, but members agreed that the comment is helpful to judges and practitioners and should be retained.

Mr. Eckstein noted a change to the title of Rule 33.2 (formerly “summary procedure,” now “summary disposition of contempt.”) Rule 33.2 is substantively unchanged, but the workgroup changed the word “order” in section (a) to “citation,” and in section (b) changed “apprised” to “inform.” Members discussed the distinctions between a citation and an order. One member construed a citation as a notice of the charge, but because this rule provides a summary procedure for acts that occurred in the court’s presence, the court has already made a finding of the charge. The members thereafter agreed use the phrasing “written order reciting the grounds” in section (a), and “contempt finding” in section (b). The word “citation” remains in the title of section (a). The workgroup recommended, and the members agreed with, removal of the comment to Rule 33.2. The discussion continued with Rule 33.3. The restyled rule has a modified title, “disposition of contempt by notice and hearing.” The members agreed to retain the comment to Rule 33.3. This comment distinguishes between a Title 12 contempt, where

the act must independently be a crime, and contempt under the rule, which is “contumacious” but not necessarily a crime.

Because the current rule is unclear about when there is a right to a jury trial, the workgroup added a new first sentence to Rule 33.4, which says, “the person has a right to jury trial under this rule.” However, while the statutes treat contempt as a class 2 misdemeanor, contempt under the rule has no classification. The members acknowledged that if the contemptuous conduct rises to the level of a criminal act, the person could be charged with that crime and punished accordingly. However, members were unsure about the maximum punishment for contempt under Rule 33.4 for a person found guilty by a jury without a concurrent conviction for a criminal violation. A.R.S. § 12-864 suggests that an unclassified contempt might be punished as provided by the common law. Members believed that the proposed new first sentence contradicts other parts of the rule, and they deleted the sentence. Even after that, members had concerns with the rule’s potential constitutional deficiencies, and classification and sentencing issues. The members initially agreed not to make any substantive changes to Rule 33.4, but thereafter Mr. Eckstein suggested that the workgroup could reconsider the issues raised by the Task Force. The issues include identifying circumstances where the person has no right to a jury trial, and an upper limit of punishment for contempt under this rule. If the workgroup can fashion a solution, the Task Force can include it in the petition. However, they also agreed that a separate rule petition might be the most appropriate manner of requesting those changes, rather than including the changes as a component of the Task Force’s restyling package.

4. Workgroup 4: Rule 16 (“*pretrial motions and hearings*”). Ms. Kalman advised that the workgroup considered comments from Mr. Landau and Mr. Vick when revising this rule. Rule 16.1(a) is substantially the same. Rule 16.1(b) has improved readability. Some members expressed concern that Rule 16.1(b) permits oral as well as written motions. Oral motions may be appropriate if they are brief and not controversial. However, oral motions might also be problematic for the court to assure victims’ rights, and members agreed that substantive motions, especially in a high volume court, should be in writing. To avoid the issue about whether a motion is or is not substantive, the members agreed to modify the draft of Rule 16.1(b) by deleting words that allow motions to be made “orally in court or filed in writing.” The court therefore has discretion to permit simple oral motions and to require that substantive motions be in writing. The last sentence of the draft rule is, “the court may modify deadlines for good cause.” This raised an issue of whether the court could modify motion deadlines generally, or only in a specific case for good cause. The members accordingly agreed to delete the words “for good cause.” The members also agreed to delete verbiage in draft Rule 16.1(c).

Draft Rule 16.1(d) would permit the court to rule on motions “when it concludes it can render a reasoned decision” without a hearing or memoranda. The members agreed that the court has this authority without a rule provision, and they agreed to delete section (d). Draft Rule 16.1(e) would preclude horizontal appeals, that is, a second decision on a previously decided motion after the court reassigns a case to a different judge. After discussion of the good cause requirement in this provision, the members agreed to keep the substance of the draft, but with the words in a different sequence. In doing so, the members’ intent was to permit the filing of motions to reconsider, which might be necessary to preserve the record, but the court need not re-determine the issue raised by the motion. Draft Rule 16.1(f) states that Rule 16 does not preclude a defendant from presenting relevant issues and properly disclosure defenses to a jury, such as voluntariness or identification. Ms. Kalman explained that section (f) is new and derives from a comment to the current rule. The members agreed that the provision was a correct statement, but one member thought the provision did not belong in the rules, or if it did, it did not belong in Rule 16. After further discussion, the members decided to delete section (f) but maintain its substance as a comment to Rule 16. Another member suggested that the comment also mention “reliability of experts,” and Ms. Kalman agreed. Except for this comment, the members agreed to delete all other comments to Rule 16.1.

On Rule 16.2(a), Mr. Euchner suggested that the rule should distinguish a motion to suppress, which is the subject of this rule, from a motion to preclude the use of evidence, for example, on *Daubert* grounds. The members agreed, and they added a new section (a) to state, “For purposes of this rule, ‘suppress’ refers to the exclusion of evidence that was unlawfully obtained due to a constitutional violation.” However, this new section would require the renumbering of the remaining sections of Rule 16.2. To preserve the designation of Rule 16.2(b), which practitioners commonly cite, the members renumbered draft Rule 16.2(a) (“duty of the court to inform the defendant”) as draft Rule 16.2(c). The members also discussed “defendant’s burden” under draft Rule 16.2(b), and whether that burden was to “come forward,” “present,” or “allege” specific circumstances and establish a prima facie case. The members agreed that “allege” was the most suitable term. They also agreed in (b)(2)(A) that “search and seizure” should be changed to “search or seizure” because one may not necessarily require the other.

Draft Rule 16 now dispenses with omnibus hearings under current Rule 16.3, and other descriptions and requirements for pretrial conferences under current Rules 16.4 and 16.5. Draft Rule 16 instead incorporates the most effective features of those current rules into a new draft Rule 16.3 entitled “pretrial conference.” Members discussed the significance of the first and last sentences of Rule 16.3(a) (“a court must conduct one or more pretrial conferences” and “in the superior court, the court must conduct at least one pretrial conference”) and decided to delete the first sentence and to retain the last

sentence with a minor modification. The members also discussed the “objectives” of a pretrial conference that are specified in draft Rule 16.3(b), some of which derive from the current rule on omnibus hearings. One member thought that in practice, pretrial conferences had little value beyond setting a trial date. Another noted the value of pretrial conferences for resolving discovery issues. A judge member observed that judges have a responsibility to engage in active case management, and this rule provides tools for fulfilling that purpose. Another judge noted that pretrial conferences provide meaningful opportunities for the court to dialogue with self-represented litigants. The members made one change to the “objectives” -- “complying with discovery requirements” is now “discussing compliance with discovery requirements.”

The members removed unneeded text from draft Rule 16.3(c) so it now simply states, “the court may require the parties to confer and submit memoranda before the conference.” A judge member observed that it might not be intuitive that judges can require parties to confer outside of court before the conference; this rule provides that authority. The members agreed that draft Rule 16.3(d) (“scope of proceeding”) may overlap with draft Rule 16.3(b) (“objectives”), but they made no changes to (d), (e), or (f).

The members then discussed the provisions of draft Rule 16.4 (“dismissal of prosecution.”) Section (a) provides that the court “may” order dismissal on the State’s motion and for good cause. Members disagreed on whether “good cause” should be a requirement, but case law appears to support the inclusion of this phrase. However, if there is not good cause to dismiss, or if the purpose of the State’s motion is to avoid Rule 8 time limits, a judge can deny the motion and require the matter to proceed, which could lead to a dismissal after jeopardy attaches. The members agreed that section (a) should provide that a dismissal on the State’s motion should be “without prejudice,” and the members added those two words to the rule. Rule 16.4(b) concerns dismissal “on a defendant’s motion.” The members agreed that the court must order dismissal if the charging document is “insufficient as a matter of law,” but the State might cure an insufficiency concerning a factual matter under Rule 13.5. However, the members also agreed to delete the second sentence of section (b) (“alternatively, the court may order amendment of the indictment under Rule 13.5.”) The members had no other suggestions concerning draft Rules 16.4 (c), (d), or (e), and they agreed to delete comments to Rule 16 except for the one to Rule 16.2 noted above.

5. Workgroup 1: Rule 24 (“post-trial motions”). Professor Kreag led the discussion of this rule. He noted use of the term “phase of trial” in Rule 24.1(a) and elsewhere in Rule 24. The restyled version of Rule 24.1(a) permits the court to order a new “phase of trial.” The workgroup added the words “on the court’s own initiative” to mirror language of the current rule, although the phrase “with the defendant’s consent,” which is already in the draft, implied that the court could make the motion.

The workgroup included a new sentence in Rule 24.1(b), which concerns timeliness: “This deadline [10 days after return of the verdict that is being challenged] is jurisdictional and the court may not extend it.” The sentence derived from a comment to the current rule. In connection with this new sentence, the members discussed the Supreme Court’s 2013 opinion in *State v. Fitzgerald*, which interpreted current Rule 24.1, and a requirement that a new trial motion must be filed within 10 days after the verdict regardless of the phase in which the jury returned the verdict. The members further discussed whether it might be more desirable for the rule to permit the filing of a new trial motion within 10 days after a verdict in the final phase of trial. For example, it might not be possible to investigate juror misconduct, which is grounds for the motion, until after the court discharges a jury at the conclusion of the final phase. One member noted that the Court adopted the current version of Rule 24.1 when multi-phase trials were uncommon, and the Task Force has an opportunity to revise the rule to reflect current processes. The members anticipate that if the Court adopts a revised rule, counsel may file a motion for new trial earlier than the conclusion of the final phase, because the motion may avoid subsequent phases of trial, and that attorneys still have a duty to timely raise issues to protect the record. However, a revised rule also would allow the filing of new trial motions after the completion of a multi-phase trial. The members agreed to refer this issue back to the workgroup for its further consideration.

In Rule 24.1(c) (“grounds”), the members discussed whether the word “prejudicial” needed to precede the word “misconduct.” Although one member suggested that this adjective should appear before the word “misconduct” in several places in Rule 24.1(c), other members thought this would be an incorrect statement of the law. For example, deciding a verdict by lot is misconduct and inherently improper. The members agreed that a comment should explain the significance of “prejudice,” and the Chair referred to the workgroup the task of drafting a comment to this rule. The members concurred with the workgroup’s recommendation in Rule 24.1(d) to change “court officer” to “court official,” and to delete the comment to current Rule 24.1(d).

Rule 24.2 is “motion to vacate judgment.” With regard to section (a) (“grounds”), and after discussing each of three specified grounds, the members agreed that the court “must” vacate a judgment if it finds any of those grounds. The current rule uses “may.” The most challenging analysis concerned the third ground, the conviction was obtained in violation of the constitution. However, members concluded “must” was appropriate because the ground is not evidence that was obtained in violation of the constitution, which could be “harmless,” but rather the conviction itself was obtained in violation of the constitution. The members agreed to delete Rule 24.2(b), entitled “previous rulings.” The members will need to revisit Rule 24.2(c), “time for filing,” once Workgroup 2 agrees on terminology regarding “perfection” of an appeal. The members maintained the distinction between non-capital and capital cases in Rule 24.2(d). They had no comments

concerning Rule 24.2(e). The workgroup recommended keeping some comments to Rule 24.2 that contain helpful practice pointers, and the members agreed.

Rule 24.3 (“modification of sentence”), like Rule 24.2(c), uses the concept of “perfection” of an appeal, and the members will similarly need to revisit Rule 24.3 on this point. The members agreed to delete the comment to Rule 24.3. In Rule 24.4 (currently “clerical mistakes” but restyled as “clerical error”), the members agreed to add back in a provision that the workgroup omitted. This is now a new last sentence to Rule 24.4 (“the court must notify the parties of any correction.”) Usually the court will provide notice by minute entry, but if a limited jurisdiction court does not use minute entries, it will need to use another method.

6. **Workgroup 3: Rule 22 (“deliberations”).** Judge Jeffery, who presented this rule on behalf of the workgroup, noted that the workgroup changed the title of Rule 22.1(a), from “retirement of jurors” to “instructions and retirement.” Some members disliked the use of the term “retirement,” but that term is used in the current rule as well as in the vernacular (a jury “retires” to consider its verdict). The workgroup also reorganized draft Rule 22.1 into three subparts. To be consistent with other revised rules, the jury retires in the charge of a “court official” rather than a “court officer.” In draft Rule 22.1(b), the court must “admonish the jury” rather than “giving the admonition” under the current rule. Current Rule 22.2(a) does not allow the verdict forms to indicate whether the charged offense is a felony or misdemeanor “unless the statute upon which the charge is based directs that the jury make this determination.” Draft Rule 22.2(b) also used this phrase. However, the members could not identify any statutes that required that determination, and they accordingly deleted the phrase from the draft rule.

Current Rule 22.3 allows the court to “read” testimony to the jury if requested. The members added that the court may order testimony “replayed.” The members made no changes to Rules 22.4 or 22.5. The members discussed retaining the impasse instruction, which is contained in the comment to Rule 22.4. However, the instruction recently was added to the RAJI, and the members agreed that rather than retaining the instruction in the comment, the comment can refer users to the RAJI. The members agreed to retain the portion of the comment to Rule 22.4 that precedes the instruction, with a minor modification (“...when it would be appropriate and might be helpful” is now “even though it might be appropriate and helpful.” The members agreed to delete the other comments to current Rule 22. They had no other changes to this rule.

7. **Workgroup 3: Rule 9.2 (“defendant’s forfeiture of the right to be present due to disruptive conduct”).** At a previous meeting, the Task Force referred this rule back to the workgroup for further review. The principle issue was whether, after the court has excluded a defendant from the courtroom, it is mandatory for the judge to allow the

defendant to return upon the defendant's personal assurance of future good behavior. The workgroup concluded that it was mandatory during the first occurrence of disruptive behavior, but discretionary thereafter, and it revised Rule 9.2(c) to incorporate this concept. The revisions from the workgroup also require the court when expelling a defendant to inform the defendant that he or she can return upon a promise to the court of future orderly conduct; that the assurance referred to above must come from the defendant and from not defense counsel (i.e., a "personal assurance"); and that it is a best practice, codified in Rule 9.2(c), that the court make periodic inquiries about whether the defendant wishes to return. The members agreed with these revisions, and found that the use of the passive voice in the draft rule was appropriate. Draft Rule 9.2(d) ("contempt") derived from a comment to the current rule, and after further discussion, and in light of the previous discussion concerning Rule 33 contempt, the members agreed to delete draft Rule 9.2(d) as well as the comment.

8. **Workgroup 3: Rule 8.2(c) ("time limits/new trial")**. The Chair requested the workgroup to reconsider this section. Current Rule 32.8(d) authorizes the trial court following a Rule 32 proceeding, to "enter an appropriate order with respect to...any further proceedings, including a new trial," but it does not specify a "speedy trial" limit. Rule 8.2(c) specifies a time limit for a new trial following an appellate court remand. The workgroup recommended a corresponding provision in Rule 8.2(c) when the court orders a new trial after a Rule 32 proceeding. This will enable the trial court to establish a new "last day." The members agreed that 90 days was the appropriate limit. However, some members distinguished this scenario from an appellate court mandate, and suggested that the 90-day limit may cause practical difficulties in some situations involving new trials under Rule 32. Others noted that the State's petition for review of a new trial order operates to stay the order under Rule 32.9(d), which mitigates the 90-day limit. The members agreed to include a new trial order from a federal court in this new provision. The new Rule 8.2(c) provision provides, "a new trial ordered by a state court under Rule 32 or a federal court under collateral review must begin within 90 days after entry of the court's order."

9. **Roadmap; call to the public; adjourn**. The Chair advised that the members have now reached consensus on 20 of the 41 criminal rules. He requested that members advise staff next week of their availability for additional meetings on Friday, October 7, and Friday, November 18. He affirmed the existing meeting dates of September 16, which is the next meeting, October 21, and December 9.

The Chair then assigned additional rules to the workgroups as follows:

Workgroup 1:	Rules 37, 39, and 40
Workgroup 3:	Rules 29 and 41
Workgroup 4:	Rule 28

This completes the assignment of all 41 rules to a workgroup.

There was no response to a call to the public. The meeting adjourned at 4:33 p.m.