

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

**State Courts Building, Phoenix**

**Meeting Minutes: October 21, 2016**

**Members attending:** Hon. Joseph Welty, Paul Ahler, Hon. Kent Cattani, Hon. Sally Duncan, Timothy Eckstein, David Euchner (by telephone), Bill Hughes (by telephone), Kellie Johnson, Amy Kalman, Prof. Jason Kreag (by telephone), Hon. Mark Moran, Aaron Nash, Natman Schaye, Hon. Paul Tang (by telephone), Kenneth Vick

**Absent:** Hon. Maria Felix, Hon. Richard Fields, Hon. Pamela Gates, Hon. Eric Jeffery, Jerry Landau,

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

**Guests:** Linley Wilson

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

Judge Welty called the ninth Task Force meeting to order at 9:32 a.m. He welcomed the guest and members on the telephone. He noted that there have been 53 workgroup meetings to date. He believes the Task Force should have a complete draft of the rules in November. As reminders, the Chair stated that the Task Force would file a rule petition in January, that he would like to obtain pre-petition comments, and that this is primarily a restyling effort. He also reminded the workgroups that they would need to prepare a narrative summary of the changes to each rule. The Task Force will include these narratives in an appendix to the petition that will inform stakeholders about proposed revisions. The narrative could be a single sentence stating that a rule was restyled, or it could be much longer to describe significant changes to a proposed rule.

At a later point in the meeting, the Chair asked members to review the October 7, 2016 draft meeting minutes. Members had no corrections to the draft.

**Motion:** A member moved to approve the draft October 7 meeting minutes. Seconded, and the motion passed unanimously. **CRTF-009**

**2. Workgroup 1.** Workgroup 1 then presented two new rules (Rules 39 and 26). Judge Duncan also briefly discussed Rule 37.

*Rule 39 (“victims’ rights”):* Mr. Vick, who presented this rule, noted that the rule is generally more readable and contains fewer, long block paragraphs. For example, the definition of “victim” is a long paragraph in current Rule 39(a) (“definitions”), but it is broken into subparts in the draft rule. The draft provision allows victims who are in or out of custody to submit a written or recorded statement to the court, but it deletes the current qualifier, “if legally permissible and in the court’s discretion,” as superfluous. The definition of “criminal proceeding” in draft Rule 39(a) is substantially shorter, and

Mr. Vick noted that the definition aligns with the pertinent statutes. (The statutes are A.R.S. §§ 13-4401, et seq.) The workgroup also added a definition of the term “identifying and locating information” that allows use of the defined term elsewhere in the rule without a long explanation of its meaning.

Draft Rule 39(b) (“victims’ rights”) makes no substantive changes to the current provisions, but the workgroup restyled and reorganized the rule for increased clarity. For example, (b)(7) is set out as a list of items in the draft rather than as a block of text, which is the format of the current rule. Draft subpart (b)(9) combines current subparts (b)(8) and (b)(9). The “exception” in (b)(10) reverts to the “as necessary to protect the defendant’s constitutional rights” standard rather than “good cause,” which is the standard provided by the 2016 amendment. The members also discussed particular paragraphs in subpart (b)(11). In paragraph (A), the members agreed to delete the proposed additional words, “after charges are filed,” to make the rule compatible with the statutes. They also agreed on the most appropriate conjunction (“and” or “but”) to use between paragraphs (B) and (C) (they agreed to “and.”) They modified language in (b)(13) (which concerns the right to terminate) so it applies to interviews but not to depositions, which are ordered by the court.

The workgroup restyled Rule 39(c) (“assistance and representation.”) The Task Force discussed subpart (3), which the workgroup titled “conflicts of interest.” Members inquired whether the intent of the provision was to address a prosecutor’s actual, ethical conflicts of interest, or whether it instead addressed routine conflicts between the points of view of a prosecutor and a victim. The members agreed that “conflict of interest” implies that the State represents the victim, and they agreed to change this title to “conflicts.” However, if the prosecutor is not enforcing a victim’s rights, it would be appropriate for the prosecutor to refer the victim to an organization that could put the victim in touch with independent counsel. They therefore added the words “in asserting the victim’s rights” to this provision. Current Rule 39(c)(3) uses the phrase “appropriate legal referral, legal assistance, or legal aid agency.” The members changed this to “the appropriate state or local bar association for referral to a lawyer.” Notwithstanding the Task Force’s use of the term “the State” rather than “the prosecutor” throughout the draft criminal rules, the members concurred that in this rule, it was appropriate to use the term “prosecutor” because it refers to an individual.

The workgroup shorted the title of Rule 39(d) to “victim’s duties” and reorganized the section into subparts. Because one provision of the rule requires the prosecutor to notify the defendant and the court of an entity’s designation of a representative, the members agreed that the rule should require a corresponding notification when the entity changes the designation. Rules 39(e) (“waiver”) and 39(f) (“court enforcement of victim notice requirements”) were restyled. The members

discussed whether in Rule 39(g) (“appointment of a victim’s representative”) the court “may” or “must” appoint a representative for a minor or an incapacitated victim. The members concurred on using “must,” and noted that A.R.S. § 13-4403 provides further direction on this subject.

The members agreed to delete comments to the current rule. They had no further changes to Rule 39.

*Rule 26 (“judgment, presentence report, presentencing hearing, sentence”)*: Mr. Euchner began his presentation of this rule by noting that the workgroup recommended deleting almost all the current comments, except for a portion of the comment to Rule 26.11 discussed below. With regard to Rule 26.1(a) and (b) (“definitions”), he inquired whether the judge makes a “finding” of guilt after a bench trial, or renders “a verdict.” The members preferred the latter. The members agreed to revise the text in Rule 26.2(b) (“time to render judgment.”) The revised draft provides that the court must enter judgment and “either pronounce sentence or set a date for sentencing under Rule 26.3.”

Mr. Euchner raised an issue under Rule 26.2(c) (“upon a death verdict”): does the court immediately enter a death sentence after a penalty phase verdict, or does the court defer entry if the defendant is pending sentencing on non-capital counts? During the discussion, it appeared that judges in Maricopa County enter the capital sentence immediately to facilitate defendant’s immediate removal to the Department of Corrections. The court may sentence the defendant on the non-capital counts at the same time, usually at defense counsel’s request, or the defendant may return later for sentencing on those counts. In Pima County, the judge defers entry of the death sentence until sentencing on the non-capital counts. The members did not reach consensus on whether the rule should make one of these procedures uniform statewide. However, Rule 31.2 provides that a notice of appeal in a capital case is sufficient as a notice “with respect to all judgments entered and sentences imposed in the case,” which forecloses the possibility of multiple appeal notices and appeals if the court sentences defendant on different counts at different times. However, Rule 24.1 requires a new trial motion “no later than 10 days after the verdict.” The immediate entry of a death sentence may preclude the defendant’s opportunity to make a Rule 24.1 motion, and the Chair suggested that the Task Force note this circumstance in its rule petition.

The title of draft Rule 26.2(d) is “factual determination.” In its revisions to Rule 17, Workgroup 3 addressed a situation when the defendant enters a plea with a later determination of its factual basis. Members accordingly agreed to delete Rule 26.2(d), subject to its discussion of Rule 17 later during the meeting and potential modifications to that rule.

In Rule 26.3(a) (“sentencing date”), the members added the word “trial” before “proceedings” in section (a)(1)(C). In Rule 26.3(b) (“time extension”), the members changed the word “must” in the phrase, “the new date must be no later than...” to “should.” The members moved draft Rule 26.6(e)(3) regarding the “admissibility” of certain statements to a more prominent location, Rule 26.4(d), and they retitled the provision, “inadmissibility.” The members discussed whether the statements referred to in the rule are by the defendant or by someone else, but they decided to make no change because the draft rule tracks the current one. The members discussed the comment to Rule 26.5 (“diagnostic evaluation”) and they agreed it was not necessary to retain it. The workgroup restyled Rules 26.6 (“court disclosure of reports”), 26.7 (“presentence hearing”), and 26.8 (“the State’s disclosure duty”), and the Task Force made no further changes of significance to these rules. The members agreed to delete the second sentence of Rule 26.9 (“the defendant’s presence”) because Rule 19.2 addresses the same subject. The members made syntactical changes to Rule 26.10 (“pronouncing judgment and sentence”).

Rule 26.11 concerns “a court’s duty after pronouncing sentence.” The workgroup revised the current rule to make it gender neutral. In section (b), Task Force members deleted “after making the disclosures in (a)” as superfluous. They agreed to retain a portion of the comment to this rule about defense counsel’s duties concerning the notice of appeal. A member noted that the comment does not include text that requires counsel to advise a pleading defendant of the opportunity to file a Rule 32 of-right petition. Although Rule 32 describes the of-right petition, the member said that Rule 26.11 should expressly provide for notice to the defendant of the right. A member of Workgroup 1 suggested a new provision in Rule 26.11(a) to address this, and the Chair sent the rule back to the workgroup to draft language for this new provision.

Draft Rule 26.12 (“defendant’s compliance with monetary terms of a sentence”) has three subparts, one less than the current rule. The members agreed that it was not necessary to include current subpart (c)(3) (“time limits – restitution and non-monetary obligations”) in the revised rule because this provision explicitly deals with the payment of obligations that do not involve the court.

The members proceeded to discuss Rule 26.13 (“consecutive sentences”). Some members wanted to remove this provision to avoid a presumption for consecutive sentences. Members reviewed A.R.S. § 13-711 and concluded that the statute does not create a presumption, but rather requires the sentencing judge to provide reasons for concurrent sentences. Members were concerned that if the Task Force removed this rule, judges may overlook the statutory requirement, which would result in more, not fewer, consecutive sentences. Removal would also imply a substantive change. To address the issue, the members agreed to keep the rule but added a new last sentence that states,

“There is no presumption for consecutive sentences.” In addition, members agreed to delete from the draft the phrase “unless consecutive sentences would be illegal” because the Department of Corrections when consulting this rule might improperly determine whether a sentence “would be illegal.”

The workgroup restyled Rules 26.14 (“resentencing”), 26.15 (“special procedure for imposing a death sentence”), and 26.16 (“entry of judgment and sentence; warrant of authority to execute sentence.”) Task Force members had no significant revisions to the workgroup drafts, which concluded the discussion of Rule 26.

*Rule 37 (“report of court dispositions”)*: Judge Duncan advised that Workgroup 1 reviewed and made restyling changes to this rule. However, the workgroup’s presentation of this rule to the Task Force is pending its further review by Mr. Nash, and anticipated comments from Mr. Landau at the November 4 Task Force meeting.

**3. Workgroup 3.** Ms. Johnson and Mr. Eckstein presented two new rules, Rules 17 and 29, on behalf of the workgroup.

*Rule 17 (“pleas of guilty and no contest”)*: Ms. Johnson began by noting a modification to the title of current Rule 17.1 (currently “pleading by defendant;” now “the defendant’s plea.”) The workgroup reorganized the body of the rule. Telephonic pleas and pleas by mail, which are currently in the middle of Rule 17.1, are at the end of the draft version. Draft Rule 17.1(f) requires a certification of defendant’s medical condition as a requisite to entering a telephonic plea. The workgroup deleted the comments to Rule 17.1 as unnecessary for an understanding of the rule, as well as other comments except as expressly noted below.

The title of draft Rule 17.2 (“advising of rights and consequences of a guilty or no contest plea”) is considerably shorter than the current title. The shortened title does not include the phrase “submitting on the record,” but this is in the immigration provision of the rule. The Task Force deleted a phrase in current Rule 17.2(f) and in the workgroup’s corresponding draft that requires the court to make an immigration statement “if [the defendant] is not a citizen of the United States.” They agreed to this deletion because another portion of the same rule precludes the court from requiring the defendant to disclose his or her legal status in this country. The workgroup restyled and reorganized Rule 17.3 (“a court’s duty, etc.”). Rule 17.3(b) is a provision for “determining a factual basis.” The members relocated text from Rule 26.2(d) to Rule 17.3(b), with modifications to the text as shown by Ms. Graber on-screen.

In Rule 17.4 (“pleas negotiations and agreements”), the members changed the current term used in section (d) (“acceptance of plea”) from “negotiated plea” to “submitted plea” in the draft. The workgroup’s draft Rule 17.4(a)(2) requires the parties at a settlement conference “to obtain settlement authority.” Some members felt this

provision is necessary to avoid prosecutors appearing at a conference without authority. However, others felt that a prosecutor without settlement authority still could attend the conference in good faith, consider discussions at the conference, and make a settlement offer thereafter. The members then revised Rule 17.4(a)(2) in a manner that conforms to this discussion. In section (a)(3), the members also added a provision for “the victim’s representative.” The workgroup’s draft of Rule 17.4(c) (“determining accuracy, voluntariness, etc.”) included language derived from a comment to the current rule, but the members removed it because it was still like a comment (it said that an oral procedure existed to ensure that the public was aware of the terms of the plea) and it had no substantive impact. The members also deleted as surplusage a provision in this section that stated the court “also must comply with Rules 17.2 and 17.3.” Rule 17.4(g) concerns an “automatic change of judge.” Members revised this section to clarify the defendant has only one change of judge under either Rule 17.4(g) or Rule 10.2.

Members approved the workgroup’s draft of Rule 17.5 (“withdrawal of a plea”), including the term “manifest injustice,” but they improved the clarity of the second sentence. One member suggested a revision that would permit “a party” to withdraw from a plea, but other members thought this would be an incorrect statement of law and maintained the term “a defendant.” In Rule 17.6 (“admitting a prior conviction”), the members discussed whether the proper term at the end of this one-sentence rule was “in open court” or “on the stand.” They concluded with an agreement to use the term “in court.” They deferred a review of the second paragraph of the comment to Rule 17.6 until Judge Jeffery was present.

*Rule 29 (“restoring civil rights or vacating a conviction”)*: Mr. Eckstein noted that the workgroup revised the title of this rule by using verbs rather than nouns. Current Rule 29(a) refers to “probationers.” The draft version instead uses the term “persons,” which is more apt in the context of the rule. The members split on whether to retain the comment to Rule 29.1. Some found it helpful; others thought it would require repeated updating due to new statutes or changes in statutory references. On a straw vote and by a slim majority, the members agreed to retain the comment. Following discussion, the members agreed to delete the comment to Rule 29.2 (“application, etc.”) The workgroup changed “prosecutor” in Rule 29.2 to “prosecuting agency.” On the “hearing date” in Rule 29.3, the members changed the workgroup’s use of “no sooner than 30 days” to “at least 30 days.” The members modified language in Rule 29.4 (“State’s response”) to provide that the State must send its response to the applicant only if the applicant has no attorney. The workgroup rephrased Rule 29.5 (“disposition”) in the active voice and deleted the comment to the rule. Current Rules 29.6 and 29.7 pertain to sex trafficking victims. The workgroup combined both rules into a single Rule 29.6 (“special provisions for sex trafficking victims.”) It added a requirement that the clerk transmit a copy of the

order vacating the conviction to the victim. Task Force members had no other revisions or suggestions concerning Rule 29.

**4. Workgroup 2.** Judge Cattani presented Workgroup 2's drafts of Rules 31 and 38.

*Rule 31 ("appeal from the superior court"):* Judge Cattani began his presentation by requesting the members' input on several particular provisions of this lengthy rule, so the members did not discuss the rule's contents sequentially.

Draft Rule 31.8 ("the record on appeal") includes a new provision (b)(1)(B)(ii) that requires a certified transcript of "all trial proceedings" excluding voir dire. Unlike the current rule, the draft rule encompasses preparation of transcripts of opening statements and final arguments. After discussion, members agreed with the exclusion of voir dire transcripts, which might be costly and not particularly helpful on appeal, although a party may still request these transcripts. Members also agreed with inclusion of the opening and closing statements, which some counsel currently request. Members also discussed the times proposed by the draft rule. The workgroup's draft follows the current rule and requires the appellant to provide additional designations within 5 days after filing the notice of appeal; appellee's designations are due within 12 days after the notice. The appellee often does not even assess the record to determine appropriate designations until the appellee receives the opening brief and reviews the issues on appeal. If the appellant files an *Anders* brief, appellee might need nothing additional. Members agreed that these limits were impractical and should be longer. Accordingly, they agreed that the appellant would have 30 days after filing the notice to make additional designations, and that appellee would have 30 days after the filing of the opening brief to designate. These expanded times apply both to designating records under Rule 31.8(a), and to transcripts under Rule 31.8(b). If appellee designates additional records, and because the superior court would have transmitted the record to the appellate court before the filing of the opening brief, the members added a requirement that in this event, "the superior court must supplement the record accordingly." In draft Rule 31.9 ("transmission of the record to the appellate court"), members discussed the feasibility of the proposed provisions for rural counties, but made no changes to the draft during the discussion.

In the "definitions" section of Rule 31.1, members agreed to delete as unnecessary the definitions of "motion" and "stipulation," which came from the civil appellate rules ("ARCAP"). Members discussed moving the definition of "entry" to Rule 1 so it had general application, but others favored retaining it in Rule 31.1 because it illuminates the time provisions of Rule 31.2. The workgroup will discuss this. Members agreed to the appropriateness of phrasing for the timing provisions of Rule 31.2. In this regard, they also considered whether draft Rule 31.2(a)(3) should require a defendant who receives an

order for a delayed appeal under to subsequently file a notice of appeal, or whether the order should serve as the notice. Because a notice of appeal specifically operates as a trigger for a variety of subsequent events, they agreed to leave the provision as it is, which requires the defendant to file a subsequent notice.

The members' revisited Rule 31.2 (they had discussed this in conjunction with Rule 26.2), and again concurred that a notice of appeal in a capital case includes subsequent sentencing on non-capital counts in that case. To avoid a "trap for the unwary," they repeated a recommendation that Rule 24.1 specifically state that an order under that rule requires the filing of a separate notice of appeal. [Staff's proposed language for a new Rule 24.1(e): Notice of Appeal. A party may appeal an order granting or denying a motion under this rule by filing a separate notice of appeal.] In the title of draft Rule 31.3 ("suspension of these rules, etc."), members deleted the words "perfection of an appeal" from the title. In draft Rule 31.4 ("consolidation of appeals"), members deleted the words "while an appeal is pending" and "while the appeal is stayed" and substituted revised text as shown on-screen. This led to a discussion about whether the appellate court "stays" an appeal, a term commonly used, or whether it "suspends" an appeal, which is the terminology used in draft Rule 31.3. The ARCAP uses the term "suspension." The workgroup will discuss further which term is most appropriate.

The members corrected a cross-reference in Rule 31.5. They discussed a new provision in Rule 31.6(d) regarding word limits. They modified the provision and deleted a requirement that "a document must average no more than 280 words per page." In Rule 31.10 ("content of briefs") section (a) ("appellant's opening brief"), the members added the word "suggested" to a phrase that now says, "in the following suggested order." They also moved up in that suggested order a "statement of the issues" so it now follows a "table of citations" and precedes an "introduction." Members made conforming changes to the numbering in Rule 31.10(j) ("amicus briefs.") In Rule 31.15 ("amicus briefs"), subpart (b)(1), they deleted a requirement in the workgroup's draft that an amicus brief state on its cover that it is filed with the parties' consent. They also modified (b)(1) to clarify that the amicus must file the consent. The members made a variety of corrections and grammatical changes elsewhere in Rule 31. Task Force approval of this rule is pending workgroup review of items noted above.

*Rule 38 ("suspension of prosecution for a deferred prosecution program"):* Judge Cattani noted the workgroup's straightforward restyling of this rule. After a review of pertinent statutes, the workgroup concluded that if the prosecutor files a motion for deferred prosecution under Rule 38.1 ("application for a suspension order"), and if the defendant is eligible, the court has no discretion to deny the motion; the court must grant it. A similar principle applies to a notice to resume prosecution under Rule 38.2 ("resuming prosecution.") The workgroup changed references to "the prosecutor" in this

rule to “the State.” Members agreed to delete the comments because the body of the rule incorporates Rule 8 concepts. Members had no other changes.

**5. Roadmap; call to the public; adjourn.** The Chair advised that the next Task Force meeting would be on Friday, November 4, 2016. He requested the members to contact staff to confirm their availability. Workgroup 4 has multiple meetings next week, and Ms. Kalman invited suggestions from Task Force members concerning Rule 11. Workgroup 2 intends to complete Rule 32 before November 4 during an extended Saturday meeting. There was no response to a call to the public. The meeting adjourned at 3:59 p.m.