Rules Review Committee

State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016

April 9, 2020
9:30 a.m.
Telephonic
1-877-217-8938
58968603#

General inquiries call: Patricia Seguin, 602-340-7236

Members of the public may attend the meeting by phone.

For any item listed on the agenda, the Committee may vote to go into Executive Session pursuant to the State Bar's Public Meetings Policy.

Meeting Agenda

1. CALL TO ORDER — Jennifer Rebholz, Chair

2. Review and Approval of March 24, 2020 Meeting Minutes (page 4) — Jennifer Rebholz

3. Proposed Revisions to Criminal Jury Instructions
(submitted by Criminal Jury Instructions Committee)
a. Reporting Form (page 6)
b. Proposed Revisions (page 9)
Presenter: *Todd Lawson, Member, Criminal Jury Instructions Committee*

4. Proposed Comment to **R-19-0045**, Petition to Amend Rules 38 and 39, Ariz. R. Protective Order P.
(submitted by Family Law Practice & Procedure Committee)
a. Petition (page 28)
b. Proposed Comment (page 37)
Presenter: Kelly Mendoza*, Chair, Family Law Practice & Procedure Committee*

5. Proposed Comment to **R-20-0002**, Petition to Amend Rule 38, Ariz. R. Protective Order P.
(submitted by Family Law Practice & Procedure Committee)
a. Petition (page 39)
b. Proposed Comment (page 45)
Presenter: Kelly Mendoza*, Chair, Family Law Practice & Procedure Committee*

6. Proposed Comment to **R-20-0021**, Petition to Create a Rule to Apply Juries in a Contested Proceeding Upon Request of a Litigant After the Bench Trial
   (submitted by Family Law Practice & Procedure Committee)
   a. Petition (page 47)
   b. Proposed Comment (page 48)
   Presenter: Kelly Mendoza*, Chair, Family Law Practice & Procedure Committee*

7. Proposed Comment to **R-20-0033**, Petition to Amend Rule 44(a), Ariz. R. Fam. L. P.
   (submitted by Family Law Practice & Procedure Committee)
   a. Petition (page 50)
   b. Proposed Comment (page 55)
   Presenter: Kelly Mendoza*, Chair, Family Law Practice & Procedure Committee*

8. Proposed Comment to **R-20-0006**, Petition for Technical and Clarifying Amendments to Rules 7, 8.1, 16, 37, 55, and Rule 84 Forms 11(a), 12(a), 13(a), and 14(a), Ariz. R. Civ. P.
   (submitted by Civil Practice & Procedure Committee)
   a. Petition (page 59)
   b. Reporting Form (page 118)
   c. Proposed Comment (page 120)
   Presenter: George H. King, *Member, Civil Practice & Procedure Committee*

9. Proposed Comment to **R-20-0009**, Petition to Amend Ariz. R. Sup. Ct. to Adopt New Rule 24
   (submitted by Civil Practice & Procedure Committee)
   a. Petition (page 123)
   b. Reporting Form (page 142)
   c. Proposed Comment (page 144)
   Presenter: Will Fischbach, *Member, Civil Practice & Procedure Committee*

10. Proposed Comment to **R-20-0012**, Petition to Permanently Adopt Rules for the Fast Trial and Alternative Resolution Program
    (submitted by Civil Practice & Procedure Committee)
    a. Petition (page 151)
    b. Reporting Form (page 193)
    c. Proposed Comment (page 196)
    Presenter: Joseph Roth, *Member, Civil Practice & Procedure Committee*

11. Proposed Comment to **R-20-0014**, Petition to Amend Rules 101 – 119 and Delete Rules 120 - 126, Rules for the Fast Trial and Alternative Resolution Program
    (submitted by Civil Practice & Procedure Committee)
    a. Petition (page 217)
    b. Reporting Form (page 229)
    c. Proposed Comment (page 232)
    Presenter: Andrew Jacobs, *Member, Civil Practice & Procedure Committee*

12. Two Proposed Comments to **R-20-0013**, Petition to Amend Various Rules of Procedure Related to Creating the Verbatim Record of Judicial Proceedings
    a. Petition (page 238)
    b. Reporting Form From Civil Committee (page 334)
    c. Proposed Comment from Civil Committee (page 337)
    Presenter: Jodi Knobel Feuerhelm, *Chair, Civil Practice & Procedure Committee*
    d. Proposed Comment from Criminal Committee (page 350)
    Presenter: Larry Matthew*, Co-Chair, Criminal Practice & Procedure Committee*

13. Proposed Comment to **R-20-0004**, Petition to Amend Rules 3.2, 4.1, 41, and Forms 2(a) and 2(b), Ariz. R. Crim. P.
    (submitted by Criminal Practice & Procedure Committee)
    a. Petition (page 358)
    b. Proposed Comment (page 373)
    Presenter: Larry Matthew*, Co-Chair, Criminal Practice & Procedure Committee*

14. Proposed Comment to **R-20-0011**, Petition to Amend Rule 404, Ariz. R. Evid.
    (submitted by Criminal Practice & Procedure Committee)
    a. Petition (page 378)
    b. Proposed Comment (page 390)
    Presenter: Larry Matthew*, Co-Chair, Criminal Practice & Procedure Committee*

15. Proposed Comment to **R-20-0015**, Petition to Amend Rule 22.5 Ariz. R. Crim. P.
    (submitted by Criminal Practice & Procedure Committee)
    a. Petition (page 395)
    b. Proposed Comment (page 417)
    Presenter: Larry Matthew*, Co-Chair, Criminal Practice & Procedure Committee*

16. Proposed Comment to **R-20-0031**, Petition to Amend Ariz. R. Crim. P.
    (submitted by Criminal Practice & Procedure Committee)
    a. Petition (page 422)
    b. Proposed Comment (page 507)
    Presenter: Larry Matthew*, Co-Chair, Criminal Practice & Procedure Committee*

17. Proposed Comment to **R-20-0026**, Petition to Amend Rule 32, Ariz. R. Sup. Ct.
    (submitted by State Bar of Arizona Staff)
    a. Petition (page 511)
    b. Proposed Comment (page 512)
    Presenter: Lisa M. Panahi*, General Counsel*

18. CALL TO THE PUBLIC — Jennifer Rebholz

19. ADJOURN

Next meeting date: May 15, 2020

Rules Review Committee
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, Arizona 85016

March 24, 2020
2:00 p.m.
Telephonic

Minutes

MEMBER ATTENDANCE:
P = present in person; T = present telephonically; A= absent.

Jennifer Rebholz, Chair = T
Leticia Marquez = T
Sam Saks = A
Robert McWhirter, Vice-Chair = A
Chris Russell = T
Dee-Dee Samet = T

OTHER ATTENDEES:

Guests: None

State Bar Staff: Lisa Panahi, Patricia Seguin, Richard L. Palmatier, Jr., Christine Davis, Maret Vessella, and Amy Rehm.

Minutes taken by: Patricia Seguin

1. CALL TO ORDER
   Called to Order by: Jennifer Rebholz, Chair
   Time: 2:04 p.m.

2. Review and approval of November 22, 2019 meeting minutes:
   Motion to approve the minutes:
   Seconded by:
   Motion: passed

3. Discussion Re R-20-0034, Petition to Restyle and Amend Rule 31, Adopt New Rule 33.1, and Amend Rules 32, 41, 42, 46-51, 54-58, 60, and 75-76, Ariz. R. Sup. Ct.
   a. Reporting Form submitted by Family Law Practice & Procedure Committee (*submitted by Staff*)
   Discussion: Christine Davis presented staff position to the Committee including 5 broad categories that will be focus of comment; Committee discussed Petition and plan re commenting period.

Motion/moved by: Dee-Dee Samet. Recommend to Executive Council that General Counsel post short comment by March 30th deadline indicating the State Bar will be filing a more robust comment by the second comment deadline of May 26th and request more time. Christine Davis to draft comment.
Seconded by: Chris Russell
Motion: passed

4. Discussion Re R-20-0030, Petition to Amend Rule 42, ERs 7.1 to 7.5, Ariz. R. Sup. Ct. (*submitted by Staff*)
   Discussion: Christine Davis presented. Committee discussed Petition.
   Motion/moved by: Dee-Dee Samet. Recommend to Executive Council that General Counsel file short comment on the Rules Forum requesting comment period align with R-20-0034 Petition.
   Seconded by: Chris Russell
   Motion: passed

5. Discussion Re R-20-0026, Petition to Amend Rule 32, Ariz. R. Sup. Ct
   Presenter: *Lisa M. Panahi, General Counsel*
   Discussion: Lisa Panahi presents Petition. Maret Vessella provided LRO position. Committee discussed Petition.
   Motion/moved by: Dee-Dee Samet. Draft comment in opposition for next meeting.
   Seconded by: Chris Russell
   Motion: passed

6. CALL TO THE PUBLIC
   No response

7. Meeting adjourned by: Jennifer Rebholz at 3:01 p.m.

BOG RULES REVIEW COMMITTEE

Reporting Form

NAME: Carlos Daniel Carrion (Dan Carrion) PHONE: 602-506-7711

EMAIL ADDRESS: carlos.carrion@maricopa.gov

REPRESENTING: Criminal Jury Instructions Committee

RULES MEETING DATE: March 24, 2020 at 2:00 pm

WISH TO APPEAR BEFORE THE BOARD? __**X**__YES _____NO

SUBJECT: Proposed Revisions to Criminal Jury Instructions

BACKGROUND OF ISSUE:

Annual update to criminal jury instructions based on 2019 legislative changes. Jury instructions were circulated to the criminal justice section, criminal practice and procedures in January 2020. One comment received was taken into consideration at the March 6, 2020 committee meeting.

ISSUE(S) (*please be specific*)

DISCUSSION/ANALYSIS: Unanimous approval was obtained by Criminal Jury Instructions Committee.

RECOMMENDED BOARD ACTION:

The Criminal Jury Instructions Committee requests approval of attached instructions.

VOTE OF THE COMMITTEE/SECTION (*if applicable*):

WAS A QUORUM PRESENT FOR THE VOTE? _X_ YES _____ NO
VOTE WAS: __X__UNANIMOUS ________ TO _________

IF YOUR COMMITTEE OR SECTION HAS A BREAKDOWN AMONG MEMBERS OF DEFENSE/PROSECUTION OR PLAINTIFF/DEFENSE COUNSEL, OR IF ANY OTHER SPLIT EXISTS, HOW WAS THE VOTE SPLIT AMONG THOSE GROUPS?

HOW WILL THIS PROPOSAL IMPACT THE STATE BAR'S BUDGET? STATE BAR STAFF?

It will not impact the State Bar's budget negatively. The State Bar of Arizona CLE has a publication agreement with Matthew Bender. They will print, market and fulfill orders for any future editions and the Bar will receive 50% for each edition sold. PDF versions are available on the Bar's website.

IS THE RECOMMENDED ACTION CONSISTENT WITH THE KELLER DECISION?
Yes

DOES THIS ISSUE RELATE TO (check any that apply):

_____ REGULATING THE PROFESSION

___X_ IMPROVING THE QUALITY OF LEGAL SERVICES

___X_ IMPROVING THE FUNCTIONING OF THE SYSTEM OF JUSTICE

_____ INCREASING THE AVAILABILITY OF LEGAL SERVICES TO THE PUBLIC

_____ REGULATION OF TRUST ACCOUNTS

_____ EDUCATION, ETHICS, COMPETENCY, AND INTEGRITY OF THE LEGAL PROFESSION

(Note that *Keller v. State Bar of California*, 496 U.S. 1 (1990), prohibits the expenditure of mandatory bar dues on political or ideological matters unrelated to these objectives.)

WHICH GOAL/OBJECTIVE OF THE STATE BAR'S LONG-RANGE PLAN IS ADVANCED BY THE RECOMMENDED ACTION?

Goal #1: Competency

Goal #4: Administration of and Access to Justice

IF NONE, WHY SHOULD THE BOARD OF GOVERNORS FOLLOW THE RECOMMENDATION?

N/A

BOARD ACTION TAKEN: (Passed, Failed or Other Notes)

11.05A3 − First-Degree Murder of a Law Enforcement Officer - Revised

The crime of first-degree murder of a law enforcement officer requires proof that:

1. The defendant engaged in conduct intending or knowing that the conduct would cause the death of a person, who the defendant ~~knows is~~knew was a law enforcement officer; and
2. The defendant caused the death of a law enforcement officer; and
3. The law enforcement officer was in the line of duty.

SOURCE: A.R.S. § 13-1105(A)(3) (statutory language as of August 12, 2005).

USE NOTE: Use Statutory Definition Instruction 1.0510(b) defining "knowingly."

Use Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2) defining "intent" and "intent – inference." 116

31.01.08 - Definition of "Prohibited Weapon" - Revised

"Prohibited weapon" means:

[an item that is a (bomb) (grenade) (rocket having a propellant charge of more than four ounces) (mine) *and* that is explosive, incendiary or poison gas]

[a device that is designed, made or adapted to muffle the report of a firearm.]

[a firearm that is capable of shooting more than one shot automatically, without manual reloading, by a single function of the trigger.]

[a rifle with a barrel length of less than sixteen inches.]

[a shotgun with a barrel length of less than eighteen inches.]

[any firearm that is made from a rifle or a shotgun and that, as modified, has an overall length of less than twenty-six inches.]

~~[an instrument, including a nunchaku, that consists of two or more sticks, clubs, bars or rods to be used as handles, connected by a rope, cord, wire or chain, in the design of a weapon used in connection with the practice of a system of self-defense.]~~

[a breakable container that contains a flammable liquid with a flashpoint of one hundred fifty degrees Fahrenheit or less and that has a wick or similar device capable of being ignited.]

[a chemical or combination of chemicals, compounds or materials, including dry ice, that is (possessed) (manufactured) for the purpose of generating a gas to cause a mechanical failure, rupture or bursting.]

[a chemical or combination of chemicals, compounds or materials, including dry ice, that is (possessed) (manufactured) for the purpose of generating an (explosion) (detonation) of the chemical or combination of chemicals compounds or materials.]

[an improvised explosive device.]

[any combination of parts or materials that is designed and intended for use in making or converting a device into an item that is (list prohibited weapon from A.R.S. §13- 3101(A)(8)(a)(i), ~~(vi)~~**(v)** or (vii).]

The term "prohibited weapon" does not include any fireworks that are imported, distributed or used in compliance with state laws or local ordinances, any propellant, propellant actuated devices or propellant actuated industrial tools that are manufactured, imported or distributed for their intended purposes or a device that is commercially manufactured primarily for the purpose of illumination.

[The term "prohibited weapon" does not include any firearms or devices that are ~~registered in the national firearms registry and transfer records of the United States Treasury Department or any firearm that has been classified as a curio or relic by the United States that has been classified as a curio or relic by the United States Treasury Department~~ **possessed, manufactured or transferred in compliance with federal law**.]

SOURCE: A.R.S. § 13-3101 (statutory language as of ~~September 30, 2009~~ **August 27, 2019**).

USE NOTE: Use language in brackets as appropriate to the facts.

The determination of whether a firearm is permanently inoperable under A.R.S. § 13-3101(A)(4) is a question of fact. *State v. Young*, 192 Ariz. 303, 306-307 (App. 1998) (noting that a disassembled or broken weapon may constitute a firearm if it can be made operable with reasonable preparation, including the addition of a readily replaceable part or the accomplishment of a quickly-effected repair).

Neither operability nor knowledge of operability of a firearm is an element of the offense; rather, permanent inoperability is an affirmative defense. *State v. Young*, 192 Ariz. 303, 307 (App. 1998).

If the State has alleged that the prohibited possessor has a felony conviction, the defendant has the burden of proof and the burden of persuasion to show by a preponderance of the evidence that the defendant's civil rights to possess or carry a gun or firearm has been restored. *State v. Kelly,* 210 Ariz. 460, 464-65 (App. 2005).

If the State has alleged that the prohibited possessor has been found to constitute a danger to himself/herself or others, the Court should insure that the finding was made under A.R.S. § 36-540.

If the State alleged that the prohibited possessor was a prohibited possessor as defined under federal law (18 U.S.C. § 922(g)(5)) pursuant to A.R.S. § 13-3101(A)(6)(e) prior to September 26, 2008,, the Court should insure that the federal finding was not made under 18 U.S.C. § 922(y) (pertaining to aliens admitted under non-immigrant visas). When the offense occurred on or between August 24, 2004 and September 25, 2008, the State must prove all of the provisions of 18 U.S.C. § 922(g)(5), including the requirement that any firearm or ammunition allegedly possessed by the defendant must have an interstate or foreign commerce nexus. *State ex rel. Thomas v. Contes*, 216 Ariz. 525, 530 ¶ 16 (App. 2007).

For alleged violations of A.R.S. § 13-3101(A)(6)(e) [recodified as A.R.S. § 13-3101(A)(7)(e)] occurring on or after September 26, 2008, the Committee was unable to find a definition of "undocumented alien" in either federal or state statutes or case law. The following definition of "alien" is taken from 8 U.S.C. §101(a)(3), which the court may choose to use in its instruction: "The term "alien" means any person not a citizen or national of the United States." The term "undocumented" appears to be the commonly understood meaning of the word. The categories of "nonimmigrant aliens" can be found in 8 U.S.C. §1101(a)(15)(A)–(V).

In a prosecution alleging the possession of a sawed-off rifle or sawed-off shotgun under A.R.S. § 13-3101(A)(7)(d) [now codified as A.R.S. § 13-3101(A)(8)(a)(iv)], the State must prove that the defendant knew that he or she possessed a sawed-off or short-barreled shotgun or rifle, but the State does not have to prove that the defendant knew the specific barrel or overall length that made it a statutorily prohibited weapon. *State v. Young*, 192 Ariz. 303, 311-12 (App. 1998).

The State is not required to prove the non-registration of a prohibited weapon by the United States Treasury Department, which is instead an affirmative defense to be proved by the defense. *State v. Berryman,* 178 Ariz. 617, 621 (App. 1994) (holding that the failure of the police to test the weapon or to determine registration did not call for a *Willits* instruction, because the burden of showing such is on the defendant).

In regard to a prohibited possessor under A.R.S. § 13-3101(A)(67)(d) who was at the time of possession serving a term of probation, parole, etc., as defined in Statutory Criminal Definition Instruction 31.01.06**7**, the offense is based upon the defendant being on probation, etc., at the time

of the possession, regardless of whether the underlying conviction was vacated after the time of possession. *State v. Mangum*, 214 Ariz. 165, 169 ¶ 13, 150 P.3d 252, 256 ¶ 13 (App. 2007) (holding that the subsequent invalidation of the underlying conviction is irrelevant and shall be precluded from evidence, argument and jury instructions.)

The last bracketed paragraph in 31.01.08 applies only to A.R.S. § 13-3101(A)(8)(a)(i), (ii), (iii) and (iv).

COMMENT: The reference to Arizona law in the first bracketed item in 31.01.07 is A.R.S. § 13-924 regarding the restoration of right to possess a firearm by mentally ill persons.

A flare gun is not a prohibited weapon. *In Re Robert A.*, 199 Ariz. 485, 487 (App. 2001) (holding that a flare gun falls within the exception in A.R.S. § 13-3101(A)(7) [now codified as A.R.S. § 13-3101(A)(8)(b)(ii)] regarding propellant actuated devices commercially manufactured for the purpose of illumination).

Effective September 29, 2019, it is no longer a criminal offense to possess a nunchaku. The offense of misconduct involving prohibited weapons does not apply to a nunchaku under A.R.S. § 13-3101(8)(a)(v) **(prior to amendment of statute effective September 29, 2019)** if the nunchaku is possessed for the purposes of preparing for, conducting or participating in lawful exhibition, demonstrations, contests or athletic events involving the use of such weapon. A.R.S. § 13-3102(H) **(prior to amendment of statute effective September 29, 2019).**

~~The offense of misconduct involving prohibited weapons does not apply to a nunchaku under A.R.S. § 13-3101(8)(a)(v) if the nunchaku is possessed for the purposes of preparing for, conducting or participating in lawful exhibition, demonstrations, contests or athletic events involving the use of such weapon. A.R.S. § 13-3102(H).~~

From August 25, 2004 to September 25, 2008, A.R.S. § 13-3101(A)(6)(e) provided that one was a prohibited possessor if that person was considered a prohibited possessor under federal law (18 U.S.C. § 922(g)(5)) As of September 26, 2008, A.R.S. §3-3101(A)(6)(e) was recodified as A.R.S. § 13-3101(A)(7)(e)] and rewritten to remove that definition and replaced with the requirement that the person was "an undocumented alien or a nonimmigrant alien traveling with or without documentation in this state for business or pleasure or who is studying in this state and who maintains a foreign residence abroad," with certain exceptions.

Therefore, in regard to A.R.S. § 13-3101(A)(6)(e), the following comments apply to any offenses that occurred on or between August 25, 2004 and September 25, 2008:

With respect to Statutory Criminal Definition Instruction 31.01.06, A.R.S. § 13-3101(A)(6)(e) provides that a person who would be a prohibited possessor under 18 U.S.C. § 922(g)(5), is also a prohibited possessor under Arizona law unless the person is exempted by a provision in 18 U.S.C. § 922(y). *See State ex rel. Thomas v. Contes*, 216 Ariz. 525, 530 ¶ 16 (App. 2007) (holding that the plain language of §13-3101(A)(6)(e) adopts all of 18 U.S.C. §922(g)(5), including the necessity to show a nexus to interstate or foreign commerce).

While A.R.S. § 13-3101(A)(6)(e) refers to the relevant federal statute by its U.S.C. number, Statutory Criminal Definitional Instruction 31.01.06 has included the text of the federal statute to make it more "jury friendly." The statutory language of A.R.S. § 13-3101(A)(6)(e) does not require that a defendant be previously convicted of a violation of 18 U.S.C. § 922(g)(5) in order to be a prohibited possessor, only that the State prove a defendant is in violation of the provisions of such federal statute. However, the trial court should be aware that a federal preemption argument could be asserted in regard to the element of proving a defendant's immigration status in the absence of a prior

federal conviction. The United States Supreme Court in *DeCanas v. Bica,* 424 U.S. 351, 354-58 (1975) held that a state statute could not regulate immigration, would be preempted if Congress demonstrated a manifest intent to occupy the field and could not conflict with federal law. In *State v. Hernandez-Mercado*, 879 P.2d 283, 290-291 (1994), the Washington Supreme Court, relying upon *DeCanas,* affirmed a conviction under a similar, but less specific, state firearms possession statute of a defendant who pled guilty to not being a citizen and who had not been previously convicted of a federal alienage offense. The court in *Hernandez-Mercado* held that the statute was not preempted by the Immigration and Nationality Act (8 U.S.C. § 1101 *et seq*.) and the federal firearms laws (18 U.S.C. §§ 921-930), and did not violate the Equal Protection Clause. Nonetheless, an Arizona appellate court has not ruled on this issue. Absent further appellate clarification, there is the possibility that a state court jury would be held to be preempted from finding a violation of federal law absent a prior federal conviction of 18 U.S.C. § 922(g)(5). If the preemption argument is accepted by the trial court, the following instruction is suggested:

"Prohibited possessor" means any person who is a prohibited possessor under federal law for a conviction in federal court of shipping or transporting any firearm or ammunition in interstate or foreign commerce, or possessing any firearm or ammunition in or affecting commerce, or receiving any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, while being an alien illegally or unlawfully in the United States or having been admitted to the United States under a non-immigrant visa of the Immigration and Nationality Act.

In regard to A.R.S. § 13-3101(A)(7)(e), the following comment applies to any offenses that occurred on or after September 26, 2008:

As of September 26, 2008, the legislature expanded the definition of prohibited possessor under A.R.S. § 13-3101(A)(7)(e) from its previous limitation of a federal prohibited possessor under 18 U.S.C. § 922(g)(5) to include all undocumented aliens and nonimmigrant aliens, subject to certain enumerated exceptions. Therefore, as of September 26, 2008, a prohibited possessor under the statute is no longer limited to the requirements of 18 U.S.C. § 922(g)(5).

NEW INSTRUCTION

11.99 – "MODIFIED LEBLANC" INSTRUCTION FOR FELONY MURDER

As an alternative to [First] [Second] Degree Murder, you must also consider [Second Degree Murder] [and] [Manslaughter]. If you unanimously agree the defendant committed a homicide, you must indicate on your verdict form the charge or charges on which you agree. If you believe a homicide was committed, but are uncertain as to which charge was proven, you must vote to convict the defendant of [insert less serious offense]. You may not find the defendant guilty of any offense unless you find that the state has proven each element of the charge beyond a reasonable doubt.

Source: *State v. Lua*, 237 Ariz. 301, 306-07 ¶¶ 19-20 (2015); *State v. Dansdill*, 246 Ariz. 593, 609 ¶ 64 (App. 2019).

Use Note: If the court instructs the jury not only on second-degree murder but also on manslaughter and/or negligent homicide, then the court should use the bracketed language for "homicide."

Comment: In *State v. Dansdill*, 246 Ariz. 593, 609 ¶ 64 (App. 2019), the court addressed the propriety of using the standard instruction for lesser-included offenses pursuant to *State v. LeBlanc*, 186 Ariz. 437, 924 P.2d 441 (1996), in a situation where the State charged the defendant with "first-degree felony murder, or in the alternative, second-degree murder." The court recognized that this was a duplicitous indictment because second-degree murder is not a lesser-included offense of first-degree felony murder. Because Dansdill's convictions were reversed on other grounds, and because Dansdill did not preserve an objection to the indictment or the instruction below, the court of appeals noted the impropriety of the *LeBlanc* instruction in this context but did not suggest a proper instruction, leaving it to the trial court in the first instance "to provide the correct instruction."

REVISED

12.03 – Assault

The crime of assault requires the proof that the defendant:

1. [Intentionally/knowingly/recklessly] caused a physical injury to another person; *or*
2. Intentionally put another person in reasonable apprehension of imminent physical injury; *or*
3. Knowingly touched another person with the intent to injure, insult, or provoke that person.

SOURCE: A.R.S. § 13-1203 (statutory language as of October 1, 1978).

USE NOTE: The court shall instruct on the culpable mental state.

"Intentionally," "knowingly," "recklessly," and "physical injury" are defined in A.R.S. § 13-105.

"Knowingly touching" does not require a direct, person-to-person physical contact. Instead, it is sufficient if the defendant sets in motion a force, process, or some substance that produces some sort of contact with the victim. *In re P.D.*, 216 Ariz. 336, 166 P.3d 127 (App. 2007), *State v. Matthews*, 130 Ariz. 46, 633 P.2d 1039 (App. 1981).

A special verdict form should be used to determine which subsection applies.

12.04 – Aggravated Assault – General

The crime of aggravated assault requires proof of the following:

1. The defendant committed an assault, *and*
2. The assault was aggravated by at least one of the following factors:
   - The defendant caused serious physical injury to another person; *or*
   - The defendant used a deadly weapon or dangerous instrument; *or*
   - The defendant committed the assault after entering the private home of another with the intent to commit the assault; *or*
   - The defendant was eighteen years of age or older and the person assaulted was fifteen years of age or under; *or*

- The defendant knew or had reason to know that the person assaulted was a peace officer; *or*
- The defendant knew or had reason to know that the person assaulted was someone summoned and directed by a peace officer; *or*
- The defendant knew or had reason to know that the person assaulted was a [code enforcement officer] [state park ranger] [municipal park ranger] [constable] [firefighter] [fire investigator] [fire inspector] [emergency medical technician] [paramedic] [prosecutor] [public defender] [judicial officer] [while engaged in the execution of any official duties] [if the assault results from the execution of his/her official duties]; *or*
- The defendant knew or had reason to know that the person assaulted was someone summoned and directed by a [code enforcement officer] [state park ranger] [municipal park ranger] [constable] [firefighter] [fire investigator] [fire inspector] [emergency medical technician] [paramedic] performing any official duties; *or*
- The defendant committed the assault while the person assaulted was bound or otherwise physically restrained; *or*
- The defendant committed the assault while the assaulted person's ability to resist was substantially impaired; *or*
- The defendant knew or had reason to know that the victim was a health care provider or a person summoned and directed by such person performing professional duties; *or*
- The assault was committed by any means of force that caused temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ or part, or a fracture of any body part; *or*
- The defendant was in violation of an order of protection issued against him or her pursuant to A.R.S. § 13-3602 or 13-3624.

SOURCE: A.R.S. § 13-1204 (statutory language as of August 9, 2017).

USE NOTE: The court shall instruct on the culpable mental state.

"Intentionally" is defined in A.R.S. §13-105 (Statutory Definitional Instruction 1.0510(a)).

"Knowingly" is defined in A.R.S. §13-105 (Statutory Definitional Instruction 1.0510(b)).

"Recklessly" is defined in A.R.S. §13-105 (Statutory Definitional Instruction 1.0510(c)).

"Code enforcement officer" is defined in A.R.S. § 39-123.

"Dangerous instrument" is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.058).

"Deadly weapon" is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.0510).

"Physical injury" is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.0529).

"Public defender" is not defined in A.R.S 13-1204. In a separate context, A.R.S. 13-2401 defines "public defender" as a federal public defender, county public defender, county legal defender or county contract indigent defense counsel and includes an assistant or deputy federal public defender, county public defender or county legal defender.

"Serious physical injury" is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.0534).

a. The court shall also instruct on assault (Statutory Criminal Instruction 12.03).

b. A special verdict form should be used to determine which subsection applies.

c. If assault is aggravated by a deadly weapon, dangerous instrument, or serious physical injury, a special verdict form should be used if the victim is under 15 years of age.

d. If assault is aggravated by a deadly weapon, dangerous instrument, serious physical injury, or if the means of force used caused a temporary but substantial disfigurement, temporary but substantial loss or impairment of any body organ of part, or a fracture of any body part, a special verdict form should be used if the victim is a peace officer.

e. If the person who commits the assault is seriously mentally ill, as defined in A.R.S. § 36-550, or is inflicted with Alzheimer's disease or related dementia, the specific provisions relating to aggravated assaults on licensed health care providers do not apply [13-1204(A)(10)].

f. When the offense is alleged to have arisen in violation of an order of protection, the assault must have occurred as defined by A.R.S. § 13-1203(A)(1) or (3).

A.R.S. §13-1204(D) provides that it is not a defense to a prosecution for assaulting a peace officer or a mitigating circumstance that the peace officer was not on duty or engaged in the execution of official duties.

12.04.10 – Aggravated Assault – Defendant in Custody

The crime of aggravated assault requires proof that:

1. The defendant committed an assault; *and*
2. At the time of the assault, the defendant was [imprisoned] [subject to custody] in [the state department of corrections] [the department of juvenile corrections] [a law enforcement agency] [a county/city jail] [a city/county juvenile detention facility] [an entity having responsibility for sentenced or unsentenced prisoners]; *and*
3. The defendant knew or had reason to know that the person assaulted was, at the time of the assault, acting in [his] [her] official capacity as an employee of [the state department of corrections] [the department of juvenile corrections] [a law enforcement agency] [a county/city jail] [a city/county juvenile detention facility] [an entity having responsibility for sentenced or unsentenced prisoners].

SOURCE: A.R.S. § 13-1204(A)(10) (statutory language as of January 1, 2009).

USE NOTE: The court shall also instruct on assault (Statutory Criminal Instruction 12.03).

The court shall instruct on the culpable mental state.

Use bracketed language as appropriate to the facts of the case.

Standard Criminal 52 – Closing Instruction - Revised

The case is now submitted to you for decision. When you go to the jury room you will choose a Foreperson. He or she will preside over your deliberations.

I suggest that you discuss and then set your deliberation schedule. You are in charge of your schedule, and may set and vary it by agreement and the approval of the Court. After you have decided on a schedule, please advise the bailiff.

You are to discuss the case and deliberate only when all jurors are together in the jury room. You are not to discuss the case with each other or anyone else during breaks or recesses. The admonition I have given you during the trial remains in effect when all of you are not in the jury room deliberating.

After setting your schedule, I suggest that you next review the written jury instructions and verdict [form] [forms]. It may be helpful for you to discuss the instructions and verdict [form] [forms] to make sure that you understand them. Again, during your deliberations you must follow the instructions and refer to them to answer any questions about applicable law, procedure and definitions.

Should any of you, or the jury as a whole, have a question for me during your deliberations or wish to communicate with me on any other matter, please utilize the jury question form that we will provide you. Your question or message must be communicated to me in writing and must be signed by you or the Foreperson.

I will consider your question or note and consult with counsel before answering it in writing. I will answer it as quickly as possible.

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, ~~iPhone, Blackberry~~ or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, ~~or~~ website, or social media ~~such as Facebook, My Space, LinkedIn, YouTube or Twitter~~, to communicate to anyone any information about this case or to conduct any research about this case until you are discharged ~~I accept your verdict~~.

Remember that you are not to tell anyone, including me, how you stand, numerically or otherwise, until after you have reached a verdict or have been discharged.

All [eight] [twelve] of you must agree on [the] [each] verdict. You must be unanimous. Once all [eight] [twelve] agree on a verdict, only the Foreperson need sign the verdict form on the line marked "Foreperson."

You will be given [insert number] form(s) of verdict. The verdict form(s) read as follows and there is no significance to the order in which the options of "guilty," "not guilty," ["unable to agree"] ["proven"] ["not proven"] are listed on the verdict [form] [forms]:

USE NOTE: Use bracketed language as appropriate to the case.

Preliminary Criminal 8 – Exclusion of Witnesses - Revised

The Rule of Exclusion of Witnesses is in effect and will be observed by all witnesses until the trial is over and a result announced. This means that all witnesses will remain outside the courtroom during the entire trial except when one is called to the witness stand. They will wait in the areas directed by the bailiff unless other arrangements have been made with the attorney who has called them. [However, [both the defendant and the State are nevertheless entitled to the presence of one investigator at counsel table] [and] [the victim has a right to be present during trial]]. The rule also forbids witnesses from telling anyone but the lawyers what they will testify about or what they have testified to. If witnesses do talk to the lawyers about their testimony, other witnesses and jurors should avoid being present or overhearing.

The lawyers are directed to inform all their witnesses of these rules and to remind them of their obligations from time to time, as may be necessary. The parties and their lawyers should keep a careful lookout to prevent any potential witness from remaining in the courtroom if they accidentally enter.

SOURCE: Bench Book for Superior Court Judges; Preliminary 12, RAJI (Civil) 5th.

USE NOTE: Give this instruction only if the Rule of Exclusion of Witnesses has been invoked.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

Both Rule 9.3, Arizona Rules of Criminal Procedure, and Rule 615, Arizona Rules of Evidence, deal with exclusion of witnesses from the courtroom.

Preliminary Criminal 13 – Admonition - REVISION

I am now going to say a few words about your conduct as jurors. I am going to give you some dos and don'ts, mostly don'ts, which I will call "The Admonition."

Do wear your juror badge at all times in and around the courthouse so everyone will know you are on a jury.

Each of you has gained knowledge and information from the experiences you have had prior to this trial. Once this trial has begun you are to determine the facts of this case only from the evidence that is presented in this courtroom. Arizona law prohibits a juror from receiving evidence not properly admitted at trial. Therefore, do not do any research or make any investigation about the case on your own. Do not view or visit the locations where the events of the case took place. Do not consult any source such as a newspaper, a dictionary, a reference manual, television, radio or the Internet for information. If you have a question or need additional information, submit your request **in writing** and I will discuss it with the attorneys.

Do not talk to anyone about the case, or about anyone who has anything to do with it, and do not let anyone talk to you about those matters, until the trial has ended, and you have been discharged as jurors. This prohibition about not discussing the case includes using any electronic device or media, such as a telephone, cell phone, smart phone, or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, website, social media ~~e-mail, Facebook, MySpace, Twitter, instant messaging, Blackberry messaging, I-Phones, I-Touches, Google, Yahoo, or any internet search engine~~, or any other form of electronic communication for any purpose whatsoever, if it relates in any way to this case. This includes, but is not limited to, blogging about the case or your experience as a juror on this case, discussing the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony or exhibits or any aspect of the case or your courtroom experience with anyone whatsoever, until the trial has ended, and you have been discharged as jurors. Until then, you may tell people you are on a jury, and you may tell them the estimated schedule for the trial, but do not tell them anything else except to say that you cannot talk about the trial until it is over.

One reason for these prohibitions is because the trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find. As I previously told you, the only evidence you are to consider in this matter is that which is introduced in the courtroom. The law that you are to apply is the law that I give you in the final instructions. This prohibits you from consulting any outside source.

If you have cell phones, laptops or other communication devices, please turn them off and do not turn them on while in the courtroom. You may use them only during breaks, so long as you do not use them to communicate about any matter having to do with the case. You are not permitted to take notes with laptops, phones ~~Blackberries~~, tape recorders or any other electronic device. You are only permitted to take notes on the notepad provided by the court. Devices that can take pictures are prohibited and may not be used for any purpose.

It is your duty not to speak with or permit yourselves to be addressed by any person on any subject connected with the trial. If someone should try to talk to you about the case, stop him or her or walk away. If you should overhear others talking about the case, stop them or walk away. If anything like this does happen, report it to me or any member of my staff [insert phone number] as soon as you can. To avoid even the appearance of improper conduct, do not talk to any of the parties, the lawyers, the witnesses or media representatives about anything until the case is over, even if your conversation

with them has nothing to do with the case. For example, you might pass an attorney in the hall, and ask what good restaurants there are downtown, and somebody from a distance may think you are talking about the case. So, again, please avoid even the appearance of improper conduct.

The lawyers and parties have been given the same instruction about not speaking with you jurors, so do not think they are being unfriendly to you. When you go home tonight and family and friends ask what the case is about, remember you cannot speak with them about the case. All you can tell them is that you are on a jury, the estimated schedule for the trial, and that you cannot talk about the case until it is over.

In a civil case, the jurors are permitted to discuss the evidence during the trial while the trial progresses. In a criminal case such as this, however, the jurors are not permitted to discuss the evidence until all the evidence has been presented and the jurors have retired to deliberate on the verdict. You may not discuss the evidence among yourselves until you retire to deliberate on your verdict. Therefore, during breaks and recesses whether you are assembled in the jury room or not, you shall not discuss any aspect of the case with each other until the case is submitted to you for your deliberations at the end of the trial. Again, if you have a question or need additional information, submit your request in writing and I will discuss it with the attorneys.

During the trial, you are not to engage in any conduct that impairs or interferes with your ability to hear and understand the court proceedings.

Do not form final opinions about any fact or about the outcome of the case until you have heard and considered all of the evidence, the closing arguments, and the rest of the instructions I will give you on the law. Keep an open mind during the trial. Form your final opinions only after you have had an opportunity to discuss the case with each other in the jury room at the end of the trial.

Please advise me in writing immediately if you believe that any juror has violated any provision of this admonition.

Before each recess, I will not repeat the entire Admonition I have just given you. I will probably refer to it by saying, "Please remember the Admonition," or something like that. However, even if I forget to make any reference to it, remember that the Admonition still applies at all times during the trial.

SOURCE: Bench Book for Superior Court Judges; Preliminary 9, RAJI (Civil) 5th, modified.

COMMENT: Rule 21.1, Arizona Rules of Criminal Procedure: "The law relating to instructions to the jury in civil actions shall apply to criminal actions, except as otherwise provided."

REVISED COMMENT

25.08 – Resisting Arrest

The crime of resisting arrest requires proof that:

1. A peace officer, acting under official authority, sought to arrest either the defendant or some other person; *and*
2. The defendant knew, or had reason to know, that the person seeking to make the arrest was a peace officer acting under color of such peace officer's official authority; *and*
3. The defendant intentionally prevented, or attempted to prevent, the peace officer from making the arrest; *and*
4. The means used by the defendant to prevent the arrest involved either the use or threat to use physical force or any other substantial risk of physical injury to either the peace officer or another.

[Whether the attempted arrest was legally justified is irrelevant.]

SOURCE: A.R.S. § 13-2508 (statutory language as of April 23, 1980).

USE NOTE: The court shall instruct on the culpable mental state.

"Intentionally" and "knowingly" are defined in A.R.S. § 13-105 (Statutory Instructions 1.0510(a)(1) and 1.0510(b)).

COMMENT: In *State v. Cagle*, 228 Ariz. 374, 377-78 ¶¶ 11, 13 (App. 2011), the court held that the statute requires proof of intent only to prevent the arrest and does not require proof of intent to create a substantial risk of physical injury.

Case law protects on-duty peace officers dressed in uniform because the uniform identifies the peace officer. It is less clear that this instruction should be used when the evidence involves an off-duty peace officer without a uniform. *See generally State v. Zavala*, 136 Ariz. 389 (App. 1982); *State v. Davis*, 119 Ariz. 529 (App. 1978). Generally, this instruction would not be warranted under a lesser-included offense analysis when the crime of disorderly conduct (A.R.S. § 13-2904) is charged. Resisting arrest may be committed without committing disorderly conduct. *State v. Diaz*, 135 Ariz. 496 (App. 1983).

Lawfulness of the arrest is not an issue. *See State v. Jurden*, 239 Ariz. 526, 530 ¶ 18 (2016). However, the use of excessive force by the peace officer may be a defense. *See* A.R.S. § 13-404(B)(2); use Statutory Criminal Instruction 4.04.01.

There may be a need to define "arrest." *See* A.R.S. §§ 13-3881 and 13-3888; *State v. Stroud*, 209 Ariz. 410, 103 P.3d 912 (2005).

The resisting arrest statute describes an event-directed unit of prosecution; therefore, the defendant should be charged with one count for a single, continuous act of resisting arrest. *State v. Jurden*, 239 Ariz. 526, 373 P.3d 543 (2016).

13.10 – Abduction of a Child from a State Agency [NEW]

The crime of abduction of a child from a state agency requires proof that the defendant, knowing or having reason to know that a child is entrusted by authority of law to the custody of a state agency~~, did either of the following:~~

~~1.~~ [took, enticed or kept the child from the lawful custody of the state agency.]

~~2.~~ [intentionally failed or refused to immediately return or impeded the immediate return of a child to the lawful custody of the state agency, including at the expiration of visitation or access.]

"State agency" means the department of child safety or the department of juvenile corrections.

Source: A.R.S. § 13-1310 (statutory language as of August 27, 2019).

Comment: A.R.S. § 13-1310 created two separate offenses.

29.10 – Cruelty to Animals (Addition)

The crime of [cruelty to animals] [interference with a working or service animal] requires proof that the defendant:

[intentionally, knowingly or recklessly subjected any animal under the defendant's custody or control to cruel neglect or abandonment.]

[intentionally, knowingly or recklessly failed to provide medical attention necessary to prevent protracted suffering to any animal under the defendant's custody or control.]

[intentionally, knowingly or recklessly inflicted unnecessary physical injury to any animal.]

[recklessly subjected any animal to cruel mistreatment.]

[intentionally, knowingly or recklessly killed any animal under the custody or control of another person without either legal privilege or consent of the owner.]

[recklessly interfered with, killed, or harmed a working or service animal without either legal privilege or consent of the owner.]

[intentionally, knowingly or recklessly left an animal unattended and confined in a motor vehicle under circumstances likely to result in physical injury to or death to the animal.]

[intentionally or knowingly subjected any animal under the defendant's custody or control to cruel neglect or abandonment that resulted in serious physical injury to the animal.]

[intentionally or knowingly subjected any animal to cruel mistreatment.]

[intentionally or knowingly interfered with, killed, or harmed a working or service animal without either legal privilege or consent of the owner.]

[intentionally or knowingly allowed any dog that was under the defendant's custody or control to interfere with, kill or cause physical injury to a service animal.]

[recklessly allowed any dog that was under the defendant's custody or control to interfere with, kill or cause physical injury to a service animal.]

[intentionally or knowingly obtained or exerted unauthorized control over a service animal with the intent to deprive the service animal handler of the service animal.]

[intentionally or knowingly subjected a domestic animal to cruel mistreatment.]

[intentionally or knowingly killed a domestic animal without legal privilege or the owner's consent.]

"Animal" means a mammal, bird, reptile or amphibian.

["Cruel mistreatment" means to torture or otherwise inflict unnecessary serious physical injury upon an animal or to kill an animal in a manner that caused protracted suffering to the animal.]

["Cruel neglect" means to fail to provide an animal with necessary food, water or shelter.]

["Handler" means a law enforcement officer or any other person who has successfully completed a course of training prescribed by the person's agency or the service animal owner and who used a specially trained animal under the direction of the person's agency or the service animal owner.]

["Service animal" means an animal that has completed a formal training program that assists its owner in one or more daily living tasks that are associated with a productive lifestyle and that is trained to not pose a danger to the health and safety of the general public.]

["Working animal" means a horse or dog that is used by a law enforcement agency that is specially trained for law enforcement work and that is under the control of a handler.]

SOURCE: A.R.S. § 13-2910 (statutory language as of August 27, 2019).

USE NOTE: Use the language in brackets as appropriate to the facts.

The court shall instruct on the culpable mental state.

"Intentionally" is defined in A.R.S. § 13-105 (Statutory Instruction 1.0510(a)(1)).

"Knowingly" is defined in A.R.S. § 13-105 (Statutory Instruction 1.0510(b)).

"Recklessly" is defined in A.R.S. § 13-105 (Statutory Instruction 1.0510(c)).

COMMENT: A specific defense exists under A.R.S. § 13-2910(B). The defense relates to the use of poisons in an attempt to protect people, livestock, and poultry or to control wild or domestic rodents on the property.

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	)	
	)	Supreme Court No. R-__-____ [Clerk's office will assign number]
PETITION TO AMEND	)	
RULE 28, [Rules of the Supreme Court]	)	

Petition to Amend 17B A. R. S.
Arizona Rules Protective Order Procedure
Part VIII
Rule 38 and Rule 39)

Pursuant to Rule 28, Rules of the Supreme Court, Ursula M. Johnston respectfully petitions this Court to adopt amendments to Rule 38 and Rule 39, Arizona Rules of Protective Order Procedure governing Contested Hearing Procedures, as proposed below.

I. Background, Problem and Purpose of the Proposed Rule Amendments

An overwhelming number of people (i.e., petitioners or plaintiffs) who petition and obtain a protective order do so honestly, in good faith, and with the primary motives of:

- Protecting their personal safety;

- Preventing an individual from further behaving in an unsafe, uncooperative or threatening manner toward the plaintiff; and
- Enabling law enforcement to be better informed of the situation so they can effectively protect and serve the parties involved.

Background. In Arizona, Orders of Protection (Orders) are costly and not easily obtained. People (i.e., petitioners or plaintiffs) undergo scrutiny and expense and must successfully convince courts that an Order is warranted. A judicial officer issues the Order after performing due diligence in accordance with Rule 38, Arizona Rules of Protective Procedure, including Arizona Rules of Family Law Procedure, where applicable. Then, to activate the Order, after legally obtaining it, plaintiffs must comply with all timelines, terms and conditions for having it served to the defendant.

For first-time filers in the state of Arizona, it can be a confusing, expensive and complicated process and an intimidating experience. There is no ombudsman. Individuals filing for a protective order will have a different experience depending upon the time, the day or the court where they file the petition. For example, someone may not be there to assist with completing the paperwork (which is unnecessarily complicated), or the person filing may be in an emotionally-weakened state of mind, unaware of the defendant's rights, or next steps.

The Committee on the Impact of Domestic Violence and the Courts (CIDCV) can and should be asked to provide insight into these dynamics from the perspective of judicial officers and individuals filing protective orders.

Problem. Most persons filing for an Order of Protection do so as self-litigants or without legal representation and because they truly fear for their safety. The brochures do not sufficiently inform individuals of what could potentially ensue regarding the defendant's appeal rights. For example, the brochures do not explain that should the defendant contest the Order, it is subject to revocation and quashing — and if quashed, the plaintiff must pay the defendant's attorney fees. Collectively, these dynamics create additional vulnerabilities and hardships for the person who already is vulnerable to the point of filing for the Order. The problem is exacerbated for people filing for a protective order for the first time; persons with limited English proficiency; those with limited education; or where the defendant's status in the community, income or financial resources exceed those of the plaintiff, or the defendant has legal representation but the plaintiff does not.

When a judicial officer issues an Order, obviously they do so within the confines of the law. In so doing, that judicial officer has deemed the plaintiff as meeting the standard of providing proof; and that judicial officer has considered such proof as sufficient evidence for issuing the Order. Therefore, should the defendant contest the Order, neither the plaintiff nor the judicial officer first issuing the Order should be subject to further scrutiny as to the soundness of issuing it in the first place.

The flaw in this law is the unbridled ability of a defendant to contest and quash a legally obtained Order. This can be particularly problematic when a civil

matter also exists (e.g., divorce, custody battle). Giving a defendant this ability creates an imbalance of power between the parties and compromises the integrity of this law. Rule 38, Arizona Rules of Protective Order Procedure governing Contested Hearing Procedures, as currently written, compromises safety and has the potential to bring harm to innocent persons who seek to prevent harm and protect themselves. This "legal loophole" clogs courts and sets the stage for retaliation and undue punishment against the plaintiff.

When an Order of Protection is contested, the governing rules regarding the hearing procedures are too stringent for plaintiffs and too lax for defendants. The court gives no deference to the due-process decision made by the judge who first granted the Order. There is no formal process for making every effort to include that judge as a witness at the contested hearing or to assign the same judicial officer as the contested hearing's presiding judge. Essentially excluding the judicial officer who first issued the Order from the contested hearing procedures creates a greater imbalance of power – in the defendant's favor.

When a contested hearing is underway, a plaintiff is subject to undue scrutiny in the form of satisfying the Standard of Proof described in Rule 38(g). Satisfying this standard is highly subjective when the nature of a plaintiff's complaint against a defendant is verbal, emotional, not apparent, or a defendant's demeanor toward others or communication with a plaintiff is covert or duplicitous. In such cases, it is next to impossible for a plaintiff to supply evidence that would satisfy the Standard of Proof described in Rule 38(g). Most troubling is this: When

a plaintiff is truthful and obedient and supplies evidence to the court — such as proof of perjury committed during a contested hearing — the presiding judge has the leeway to ignore evidence, revoke the Order and assess attorney fees against plaintiffs. These procedural loopholes can, and have caused financial harm, trauma, serious injury or death to untold numbers of plaintiffs in Arizona.

In matters of harassment, stalking, verbal or emotional abuse, having witnesses or obtaining evidence of a defendant's behavior can be daunting and traumatizing for plaintiffs, particularly those for whom this is a first-time Order of Protection. Helping a judge to understand why one has become fearful of another and how that fear constitutes "a preponderance of the evidence" is even more daunting and becomes even more traumatizing to first-time-filing plaintiffs whose abuser has more money or legal representation and who uses subtle manipulation and cunning tactics that many judicial officers do not comprehend.

Purpose. Because an Order of Protection is a civil matter where a defendant is neither declared guilty or innocent nor subject to legal action or punishment if they comply with the Order, there is no hardship imposed upon defendants by virtue of the existence of the Order. Likewise, amending the existing Rules as proposed herein will not impose hardship on the defendant; but will document and send the message that the Court values the plaintiff's safety and makes every effort to ensure both parties' safety via the intact Order.

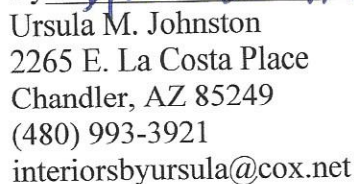
Proposal. When it comes to protective orders, there is a learning curve for both the litigants and judges presiding at contested hearings. This petition seeks to

amend Rule 38 to give the benefit of the doubt to both plaintiff and defendant when it is a first-time Order of Protection for the plaintiff. This would mean that in such cases the presiding judge at a contested hearing cannot revoke, shorten, quash or dismiss an Order *in its entirety* when it is the plaintiff's first time filing for and obtaining an Order of Protection from a court in the state of Arizona. Further, this would mean neither party is required to provide evidence at the contested hearing and any evidence provided will be taken into consideration solely for the purpose of modifying an Order to the plaintiff's explicit satisfaction.

II. Contents of the Proposed Rule Amendment

In the Appendix attached hereto, the proposed new language has been added using underscoring. The proposed new language to be taken into consideration would amend Part VIII of A.R.S. Rules of Protective Order Procedure, Rule 38. Contested Hearing Procedures; and Rule 39. Costs and Attorney Fees. No deletions are proposed.

RESPECTFULLY SUBMITTED this 5th day of December 2019.

By 

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Appendix

17B A.R.S. Rules Protect.Ord. Proc., Rule 38
Formerly cited as AZ ST RPOP Rule 8

Rule 38. Contested Hearing Procedures

Currentness

(a) Requesting a Hearing. At any time while a protective order or a modified protective order is in effect, a defendant may request one hearing in writing. *See* A.R.S. §§ 13-3602(I), 12-1809(H), 12-1810(G).

(b) Scheduling the Hearing. A judicial officer must hold the hearing at the earliest possible time.

(1) If an Order of Protection grants exclusive use of the residence, a judicial officer must hold a hearing within five court business days of the request.

(2) For all other protective orders, a judicial officer must hold a hearing within 10 court business days of the request unless the judicial officer finds good cause to continue the hearing for a longer period of time.

(c) Notice of Hearing. The court must notify the plaintiff of the hearing. There is no statutory requirement for personal service of the hearing notice.

(d) Court Security Measures. The court must take reasonable measures to ensure that the parties and any witnesses at the hearing are not subject to harassment or intimidation in the courthouse or on adjoining property. For each hearing, the judicial officer must determine whether there is a need to have a law enforcement officer or a security officer present to help ensure the hearing is orderly or to provide escort for either party. The court may direct the defendant to remain in the courtroom for a period of time after the plaintiff is excused.

(e) Parties' Right to Be Heard. The judicial officer must ensure that both parties have an opportunity to be heard, to present evidence, and to call and examine and cross-examine witnesses.

(f) Oath or Affirmation. The court must administer an oath or affirmation to all parties and witnesses at all hearings.

(g) Standard of Proof. Except in cases where it is the plaintiff's first time filing for and obtaining the Order of Protection, fFor a protective order to remain in effect as originally issued or as modified at a hearing, the plaintiff must prove the case by a preponderance of the evidence.

(h) Basis for Continuing, Modifying, or Revoking Protective Orders. At the conclusion of the hearing, the judicial officer must state the basis for continuing, modifying, or revoking the protective order. If it is the plaintiff's first Order of Protection filed in a court in the state of Arizona, the court and judicial officer:

(1) shall not discontinue, revoke or dismiss the protective order in its entirety;

(2) shall engage both plaintiff and defendant in agreeing to any terms or conditions for modifying the protective order;

(3) shall consider evidence and the lack thereof with impunity in determining protective order modification.

(i) Service of Modified Protective Order. The plaintiff or the court must arrange for service of a modified protective order on the defendant. A judicial officer should assist this process by asking the defendant to sign an acceptance of service form in the courtroom.

Credits

Formerly Rule 8, added Sept. 5, 2007, effective Jan. 1, 2008. Renumbered Rule 38 and amended Aug. 27, 2015, effective Jan. 1, 2016.

17B A. R. S. Rules Protective Order Proc., Rule 38, AZ ST RPOP Rule 38
Current with amendments received through 05/1/19

17B A.R.S. Rules Protect.Ord. Proc., Rule 39
Formerly cited as AZ ST RPOP Rule 2

Rule 39. Costs and Attorney Fees

Currentness

(a) Award. After a hearing with notice to the affected party, a judicial officer may order any party to pay the costs of the action, including reasonable attorneys' fees, if any. *See* A.R.S. §§ 13-3602(P), 12-1809(O), and 12-1810(O).

(b) Considerations. In determining whether to award costs or attorney fees, the judicial officer may consider:

(1) the merits of the claim or the defense asserted by the unsuccessful party;

(2) whether the award will pose an extreme hardship on the unsuccessful party; and

(3) whether the award may deter others from making valid claims;

(4) dismissing any claims for attorney fees or attorney fee awards for either party when it is the plaintiff's first time filing for and obtaining the Order of Protection.

Credits

Formerly Rule 2 in part, added Sept. 5, 2007, effective Jan. 1, 2008. Amended Sept. 16, 2008, effective Sept. 26, 2008. Adopted on a permanent basis effective Sept. 3, 2009. Renumbered Rule 39 and amended Aug. 27, 2015, effective Jan. 1, 2016.

17B A. R. S. Rules Protective Order Proc., Rule 39, AZ ST RPOP Rule 39
Current with amendments received through 05/1/19 1

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND RULES 38 AND 39, ARIZONA RULES OF PROTECTIVE ORDER PROCEDURE

Supreme Court No. R-19-0045

PROPOSED COMMENT

Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar of Arizona (the "State Bar") hereby submits the following as its comment to the above-captioned Petition.

The proposed amendments in R-19-0045 to Rule 38 and Rule 39 of the Arizona Rules of Protective Order Procedure inappropriately changes the burden of the plaintiff for sustaining an Order of Protection after a hearing if it is the plaintiff's first Order of Protection requested in the State of Arizona and facilitates the possibility of further abuse of the judicial system. Furthermore, whether a judicial officer awards attorney fees or costs is discretionary and should remain as such with the considerations currently enumerated in Rule 39.

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CONCLUSION

The State Bar of Arizona respectfully requests that R-19-0045 not be adopted.

RESPECTFULLY SUBMITTED this ____day of__________________, 2020.

____
Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this _____ day of ____________________, 2020.

by: ________________________________

Honorable Wendy Million
Tucson City Court
103 E. Alameda
Tucson, AZ 85701
Telephone (520) 791-3260
Chair, Committee on the Impact
of Domestic Violence and the Courts
Staff: kradwanski@courts.az.gov

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	)	
	)	
Petition to Amend Rule 38,	)	
Rules of Protective Order Procedure	)	Supreme Court No. R-20-_____
_________________________________	)	

Pursuant to Arizona Supreme Court Rule 28, Wendy A. Million, chair of the Committee on the Impact of Domestic Violence and the Courts, respectfully petitions this Court to amend Rule 38, Rules of Protective Order Procedure, as reflected in the accompanying Appendix to add clarity regarding requests for contested hearings, appearances, and procedures for conducting contested protective order hearings.

DISCUSSION

There is uncertainty surrounding the appearance or non-appearance of plaintiffs and defendants at contested protective order hearings. This is not a new issue, but recent discussion of it—and the resulting myriad of opinions—has brought it to the forefront. CIDVC is filing this petition with the goal of bringing resolution and clarity to the procedures for contested protective order[1] hearings.

[1] For purposes of this petition, "protective order" means an Order of Protection (A.R.S. § 13-3602), an Injunction Against Harassment (A.R.S. § 12-1809), or an Injunction Against Workplace Harassment (A.R.S. § 12-1810). The

Judge Bruce Cohen, presiding judge of the Family Department, Superior Court in Maricopa County, recently conducted an informal survey of family court judges in Maricopa and Pima counties to ascertain their practices when both the plaintiff and the defendant fail to appear at a contested protective order hearing that the defendant formally requested. Arizona statutes authorize contested protective order hearings[2], but the court rules lack specificity on the procedures to be followed when one or both parties fail to appear.

The responses to Judge Cohen's informal survey showed a lack of uniformity in procedures being followed when a party fails to appear at a contested protective order hearing. Opinions from a sampling of the responses are summarized as follows:

- If neither party appears, vacate the hearing and leave the order in effect.
- If neither party appears, dismiss the protective order.
- If the defendant appears but the plaintiff does not, dismiss the protective order.
- If the plaintiff appears but the defendant does not, require the plaintiff to prove, by a preponderance of the evidence, that the protective order should remain in effect, even though the plaintiff has already carried the burden of proof for issuance of the order at an *ex parte* hearing.
- If the defendant fails to appear, affirm the protective order but allow the defendant a second chance to ask for another contested hearing.

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procedures for requesting a contested hearing are the same, regardless of the type of protective order. See Part VIII. Contested Protective Order Hearings, Rules of Protective Order Procedure.

[2] *See* A.R.S. §§ 13-3602(L), 12-1809(H), and 12-1810(G).

- The court rules do not require the defendant to attend the hearing that the defendant requested.

Because of the divided opinions and the disparate treatment that parties may be experiencing in these two counties, Judge Cohen shared the survey results with Judge Million, in her capacity as CIDVC chair, and Judge Paul McMurdie, chair of the Family Court Improvement Committee.

CIDVC proposes revisions to Rule 38 to resolve the conflicting opinions, ensuring that contested hearing procedures are applied uniformly statewide.

Requesting a Hearing. The proposed amendment to Rule 38(a) resolves the question of whether the defendant is entitled to request a second contested hearing if the defendant voluntarily fails to appear at the first requested contested hearing. It gives a person of ordinary intelligence a reasonable opportunity to know what the consequence will be if a defendant's failure to appear is voluntary and without good cause shown.

Appearance at the Contested Hearing. The proposed addition of Rule 38(e) clarifies the actions the court is to take when either the plaintiff, the defendant, or both fail to appear at a contested hearing.

Procedure. Rule 38(f), as reorganized, instructs on the procedures that are to be followed if both parties appear and the contested hearing goes forward.

To resolve this issue expediently, Judge Million sought consent from CIDVC members to file this petition on the committee's behalf. A quorum of CIDVC members met by conference call on January 6, 2020, and unanimously authorized the filing of the attached proposal. By these revisions, the committee is attempting to clarify Rule 38, so

the parties understand the importance of attending contested hearings and the consequences for failure to attend. This plain language supports the purpose of the protective order laws, which is to make sure that the plaintiff remains safe and the defendant gets access to a full contested hearing. It also supports the public policy of requiring the plaintiff to be present at court for only one contested hearing and that the *ex parte* order remains in place in the absence of a contested hearing.

CONCLUSION

For the reasons stated above, CIDVC respectfully asks the Court to adopt the proposed amendments to Rule 38, Rules of Protective Order Procedure, as set forth in the Appendix.

Respectfully submitted this seventh day of January, 2020.

/s/______________
Honorable Wendy A. Million
Magistrate, Tucson City Court

APPENDIX

Additions are shown by underline; deletions are shown by ~~strikethrough~~.

RULES OF PROTECTIVE ORDER PROCEDURE

38. Contested hearing procedures

(a) Requesting a Hearing. At any time while a protective order or a modified protective order is in effect, a defendant ~~may request~~ is entitled to only one hearing, which must be requested in writing. A defendant waives the right to contest the protective order if the defendant fails to appear at the requested hearing, unless it can be shown that the defendant did not have actual notice of the requested hearing or for other good cause shown. *See* A.R.S. §§ 13-3602(I), 12-1809(H), 12-1810(G).

(b) Scheduling the Hearing. A judicial officer must hold the hearing at the earliest possible time.

(1) If an Order of Protection grants exclusive use of the residence, a judicial officer must hold a hearing within five court business days of the request.

(2) For all other protective orders, a judicial officer must hold a hearing within 10 court business days of the request unless the judicial officer finds good cause to continue the hearing for a longer period of time.

(c) Notice of Hearing. The court must notify the plaintiff of the hearing. There is no statutory requirement for personal service of the hearing notice.

(d) Court Security Measures. The court must take reasonable measures to ensure that the parties and any witnesses at the hearing are not subject to harassment or intimidation in the courthouse or on adjoining property. For each hearing, the judicial officer must determine whether there is a need to have a law enforcement officer or a security officer present to help ensure the hearing is orderly or to provide escort for either party. The court may direct the defendant to remain in the courtroom for a period of time after the plaintiff is excused.

(e) Appearance at the Contested Hearing.

(1) *Defendant fails to appear.* If the plaintiff appears for the contested hearing and the defendant fails to appear, and the defendant received actual notice of the hearing, the protective order will remain in effect.

(2) *Plaintiff fails to appear.* If the defendant appears for the contested hearing and the plaintiff fails to appear, and the plaintiff received actual notice of the hearing, the protective order will be dismissed.

(3) *Neither party appears.* If neither party appears for the contested hearing, and each party received actual notice, the hearing will be vacated, and the protective order will remain in effect.

(f) Procedure. If both parties appear and a contested hearing is conducted, the following rules apply:

~~(e)~~ (1) *Parties' Right to Be Heard.* The judicial officer must ensure that both parties have an opportunity to be heard, to present evidence, and to call and examine and cross-examine witnesses.

~~(f)~~ (2) *Oath or Affirmation*. The court must administer an oath or affirmation to all parties and witnesses at all hearings.

~~(g)~~ (3) *Standard of Proof*. For a protective order to remain in effect as originally issued or as modified at a hearing, the plaintiff must prove the case by a preponderance of the evidence.

~~(h)~~ (4) *Basis for Continuing, Modifying, or Revoking Protective Orders*. At the conclusion of the hearing, the judicial officer must state the basis for continuing, modifying, or revoking the protective order.

~~(i)~~ (5) *Service of Modified Protective Order*. ~~The plaintiff or the court must arrange for service of a~~ A modified protective order must be served on the defendant. ~~the judicial officer should assist this process by asking the defendant to sign an acceptance of service form in the courtroom~~ Procedures for serving a defendant who is present in the courtroom are set forth in Rule 31(f)-(g).

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: **PETITION TO AMEND RULE 38, RULES OF PROTECTIVE ORDER PROCEDURE**	Supreme Court No. R-20-0002 **PROPOSED COMMENT**

Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar of Arizona (the "State Bar") hereby submits the following as its comment to the above-captioned Petition.

The Petition filed by the Honorable Wendy Million requests a modification to Rule 38 of the Arizona Rules of Protective Order Procedure to clarify the procedures for contested protective order hearings, specifically dealing with the appearance of the parties at a contested hearing.

The State Bar of Arizona concurs with the logic of the Petition and supports the proposed modification.

CONCLUSION

The State Bar of Arizona respectfully requests that this Court adopt the proposed changes to Rule 38 of the Arizona Rules of Protective Order Procedure as stated in the Petition.

RESPECTFULLY SUBMITTED this ____day of__________________, 2020.

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Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this _____ day of ___________________, 2020.

by: _______________________________

Petitioner: Martin Lynch
We the People Court Services
Legislative Committee Chairman – AZFR
1120 W Broadway Rd #55, Tempe AZ, 85282
602-550-6304
MDL2222222222@gmail.com

Returning Power and
Constitutional Authorities of Self Government
to the People

IN THE SUPREME COURT

STATE OF ARIZONA

PETITION to CREATE a Rule to Apply Juries in a Contested Proceeding upon request of a Litigant After the Bench Trial (see Federalist 83 ¶1, 2, 17 & 19))	Supreme Court Petition Number R-20-xxxx

To the Honorable Chief Justice Brutinel of the Arizona State Supreme Court,

¶1 The People respectfully request that Family Rules be amended in conformance with AZ Art 2 Sect 23 "Right to a Jury is inviolate" and the 10th Amendment "State Courts may provide the Juries, if not the People provide their own". The People want juries to be applied only if necessary upon request of a litigant after the bench trial, because most Judges makes honest reasonable orders. We do not wish to produce Jury verdicts. We think the Courts should do that.

¶2 The People are working on producing Statutes but regardless, the Constitution is the Supreme Law of the Land and everybody swears an oath per US Constitution Art 6 Sect 3.

Sincerely, **January 10, 2020**
/s/ Martin Lynch

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:

PETITION TO CREATE A RULE TO APPLY JURIES IN A CONTESTED PROCEEDING UPON REQUEST OF A LITIGANT AFTER THE BENCH TRIAL

Supreme Court No. R-20-0021

PROPOSED COMMENT

Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar of Arizona (the "State Bar") hereby submits the following as its comment to the above-captioned Petition.

The Petition was filed by Martin Lynch of We the People Court Services and requests modification of the Arizona Rules of Family Law Procedure. The Petition, however, is not clear as to the specific changes requested. The State Bar of Arizona, therefore, opposes the Petition.

CONCLUSION

The State Bar of Arizona respectfully requests that this Court deny the proposed changes to the Arizona Rules of Family Law Procedure as stated in the Petition.

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2 RESPECTFULLY SUBMITTED this ____day of__________________, 2020.
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5 ________________________________
Lisa M. Panahi
General Counsel
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9 Electronic copy filed with the
Clerk of the Supreme Court of Arizona
10 this _____ day of ___________________, 2020.
11 by: _______________________________
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Judge Bruce R. Cohen
Family Department Presiding Judge
Maricopa County Superior Court
125 West Washington, Suite 101
Phoenix, Arizona 85003

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	Supreme Court
	)	No.
PETITION TO AMEND RULE 44(A)	)	
OF ARIZONA RULES OF FAMILY	)	
LAW PROCEDURE	)	

BACKGROUND

This is a proposal to amend Rule 44(a) of the *Arizona Rules of Family Law Procedure* (ARFLP) to clarify the requirements for applications for default in family court cases.

Presently, Rule 44(A)(2)(E) provides that "a copy of the proof or acceptance of service establishing the date and manner of service on the party in default" must be attached to the written application for default. The rule does not provide whether the failure to attach the proof of service renders the application defective and invalid.

This rule equally impacts parties represented by counsel and those who are self-represented. However, the failure to comply disproportionately

arises for self-represented litigants. Further, and more importantly, there has been disparate treatment as to the impact a failure to attach the proof of service may have on the default process. Through informal gathering of information, there have been some judicial officers and counties who have treated the failure to attach the proof of service to be fatal to the default process, thereby vacating the default and requiring that the default application process begin anew. Often, the vacating of the default is decided at the time of the default hearing, thereby vacating the hearing after the party has taken the time to appear at court. There have been other judicial officers and counties who have treated the failure to attach the proof of service to be a non-issue if there is proof of service otherwise accessible to the judicial officer within the court file.

When this inconsistency in approach was first brought to the undersigned's attention, contact was made with members of the committee that recommended the last set of changes to the ARFLP, including this provision. When informed that some courts have treated the failure to attach the proof of service as a defect that rendered the default invalid, certain members of the prior committee noted that Rule 44(A) should be read in concert with Rule 1 (which provides that the rules should be construed "in a manner that ensures just, prompt, and inexpensive determination in every

action and proceeding.”). Based thereon, certain members of the prior rules committee suggested that if there is proof of service within the court record but no such proof of service is attached to the application for default, the default should proceed as that would meet the intent and spirit of Rule 1, ARFLP.

During the informal inquiry, some feedback focused on the unavailability of proof of service. Those professionals who dedicate services to the self-represented population noted that self-represented parties often fail to retain copies of proof of service, whether by filing the original without making copies or never having seen the proof of service because it was filed directly with the court by the process server.

From further inquiry, it was discovered that the reasoning behind Rule 44(A)(2)(E) was two-fold: First, it allowed the assigned judicial officer to determine with ease that service of process had been effectuated. This justification should not be sufficient to vacate an application for default if the only defect was that a party failed to attach the proof of service.

The second reason given is that by attaching the proof of service to the application for default, the defaulted party would have notice of how and when service of process was completed. In circumstances where the defaulted party may challenge the validity of service, this would afford that

party with information as to the means by which service of process was allegedly effectuated.

Given the disparate treatment among courts within Arizona, the concern that rendering the application for default to be invalid places too much weight on something that is "form over substance," and the lack of clear guidance as to the impact of a failure to comply, it is suggested that the rule be amended. The following proposal will ensure that the spirit and intent of Rule 1 is employed while also protecting the defaulted party.

PROPOSAL

The current Rule 44(A)(2)(E) of the Arizona Rules of Family Law Procedure should be amended as follows (new language in red):

(E) establishes that service of process has been effectuated either by attaching a copy of the proof or acceptance of service or setting forth in the application (substantially in the form set forth in Form 17, Rule 97) the date and manner of service on the party in default; and

As noted, it is suggested that a new form be created to ensure that applications for default in family law cases comply fully with the rule and to assist those who are seeking entry of a default.

CONCLUSION

This proposed rule change will serve to clarify Rule 44(A), ease compliance and meet the intent behind the provision. It is respectfully requested that the amendment proposed above be adopted.

RESPECTFULLY SUBMITTED, this 15th day of January, 2020.

Bruce R. Cohen

BRUCE R. COHEN
Family Court Presiding Judge
Superior Court of Arizona
Maricopa County
125 West Washington, Suite 101
Phoenix, AZ 85003

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: **PETITION TO AMEND RULE 44(a) OF THE RULES OF FAMILY LAW PROCEDURE**	Supreme Court No. R-20-0033 **PROPOSED COMMENT OF THE STATE BAR OF ARIZONA**

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar of Arizona (the "State Bar") hereby submits the following as its comment to the above-captioned Petition.

The Petition, filed by Judge Bruce R. Cohen, Presiding Judge of the family court department of the Maricopa County Superior Court, requests to amend Rule 44(a) of the Arizona Rules of Family Law Procedure.

Rule 44(a)(2)(E) currently provides that "a copy of the proof or acceptance of service establishing the date and manner of service on the party in default" must be attached to the written application for default.

The Petition notes that by an applicant attaching proof of service or an acceptance of service, the judicial officer presiding over the case may easily determine if the opposing party has been served. The Petition also notes that by including this attachment, the opposing party would have notice of how and when process was effectuated.

However, the Petition points out that the Rule does not provide whether the failure to include such an attachment renders the application defective and invalid. The Petition seeks to clarify confusion regarding this failure by modifying the Rule to prevent the failure to attach to the default application proof of service or acceptance of service from being treated as grounds to vacate the default application.

The Petition requests that the following language replace the current language of Rule 44(a)(2)(E):

> establishes that service of process has been effectuated either by attaching a copy of the proof or acceptance of service or setting forth in the application (substantially in the form set forth in Form 17, Rule 97) the date and manner of service on the party in default; and

The State Bar concurs with the purpose of adding language that prevents an otherwise valid application for default from being invalidated simply by failure to attach proof of service or acceptance of service. However, the State Bar proposes that a change be made to the language of the Petition to allow for the judicial officer

presiding over the case to make a determination that service has been effectuated when proof of service or acceptance of service appears in the court record. Furthermore, the State Bar proposes a change in the language of the Petition to allow a defaulting party to obtain information regarding service upon that party while simultaneously ensuring that the applicant's claim of effectuated service is supported by the court record.

Therefore, including the above-suggested language, Rule 44(a)(2)(E) would read as follows:

> establishes that service of process has been effectuated by either attaching a copy of the proof or acceptance of service on the party in default or, if proof or acceptance of service appears in the court record, by setting forth in the application the date and manner of service on the party in default; and

CONCLUSION

The State Bar of Arizona respectfully requests that the Petition be granted with the proposed revisions described above.

RESPECTFULLY SUBMITTED this ____day of__________________, 2020.

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Lisa M. Panahi
General Counsel

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Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this _____ day of ___________________, 2020.

by: _______________________________

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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:

PETITION FOR TECHNICAL AND CLARIFYING AMENDMENTS TO RULES 7, 8.1, 16, 37, 55, AND RULE 84 FORMS 11(a), 12(a), 13(a), AND 14(a), OF THE ARIZONA RULES OF CIVIL PROCEDURE

Supreme Court No. R-20-_________

Petition for Technical and Clarifying Amendments to Rules 7, 8.1, 16, 37, 55, and Rule 84 Forms 11(a), 12(a), 13(a), and 14(a), of the Arizona Rules of Civil Procedure

Pursuant to Rule 28, Rules of the Arizona Supreme Court, the undersigned respectfully petitions this Court to adopt certain technical and other minor clarifying amendments to the Arizona Rules of Civil Procedure, as proposed in the attached Appendices. Appendix A contains a clean copy of the impacted rules and forms with the proposed amendments. Appendix B contains a blackline showing additions with underlining and deletions with ~~strikethrough.~~ Given the scope and nature of the changes, which are minor in nature but impact multiple rules, this rule change Petition is the most efficient method of accomplishing these changes.

Section I, below, addresses the following proposed amendments that are purely technical in nature:

(1) Correcting erroneous cross-references in Rule 55 and Rule 84 Form 14(a), which were recently identified as a result of the extensive rule amendments that took effect in 2017 and 2018; and

(2) Modifying the title of Rule 7 to correspond to the content of the rule as amended effective January 1, 2017.

Section II, below, addresses the following proposed amendments to clarify the apparent intent of the rules and/or to simplify aspects of the rules following the 2017 and 2018 amendments:

(1) Revising Rule 8.1 to include a former provision providing that "[n]otwithstanding any contrary language in Rule 26.2(d)(1), from the filing of the complaint unless and until the commercial court assigns the case to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3." As explained below, it appears that this language was deleted when Rule 8.1 was permanently adopted based on an assumption that with the adoption of the $300,000 monetary limitation in Rule 8.1(c), all commercial court cases would presumptively qualify for Tier 3 pursuant to Rule 26.2(c)(3)(C). As explained below, however, this is not strictly the case, as some cases that qualify

for a commercial court assignment may fall under Tier 2—specifically, those seeking only nonmonetary relief alone or in conjunction with damage claims under $300,000. *See* Ariz. R. Civ. P. 26.2(c)(3)(D). The proposed amendments will clarify that all cases in commercial court are deemed assigned to Tier 3, unless and until the commercial court assigns a different tier during the Rule 16 scheduling conference;

(2) Revising Rule 37(g) to clarify that certain portions of that rule should apply to both persons (nonparties) and to parties, and to clarify when a duty to preserve arises under Rule 37(g)(1)(C)(i);

(3) Revising Rule 16(h) to eliminate the term "Comprehensive Pretrial Conference," as that term is no longer used in the current version of Rule 16;

(4) Revising Rule 16 and related portions of Forms 11(a), 12(a), 13(a), and 14(a) to eliminate the requirement that parties file a separate Rule 7.1 certificate and to reinforce that the Joint Report must itself contain the parties' certification that they conferred in good faith, either in person or by telephone as required by Rule 7.1(h), on the required topics; and

(5) Revising Form 11(a), Items 7 and 8 relating to "short causes" and trial preferences, to eliminate a reference to a "one hour" limit on short causes. The one-hour definition of short causes was eliminated from Ariz. R. Civ. P. 38.1 in approximately 2014 and is now governed by local court rules, which specify varying hour limitations on a "short cause."

The changes described herein and set forth in the Appendices were identified by Petitioner, or in some cases brought to Petitioner's attention by other members of the Bar, over the course of her work as a member of and current Chair of the State Bar of Arizona's Committee on the Rules of Civil Practice and Procedure.[1]

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[1] This Petition was not submitted through the State Bar of Arizona's petition process due to timing constraints and the minor nature of the proposed amendments.

I. PROPOSED TECHNICAL AMENDMENTS

A. Correcting Erroneous Cross-Reference in Rule 55

Rule 55(c) provides that "[t]he court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(c)."

Following the 2017 restyling amendments, however, Rule 60(c) was renumbered and restyled as Rule 60(b) ["Grounds for Relief from a Final Judgment, Order, or Proceeding"]. In an apparent oversight, a corresponding amendment was not made to Rule 55(c)'s cross-reference. Accordingly, the Petition proposes to correct the erroneous cross reference in Rule 55(c) so that it references Rule 60(b), and not Rule 60(c). *See* Appendices A (clean) and B (blackline) for proposed amendment.

B. Correcting Erroneous Cross-Reference in Rule 84, Form 14(a)

Rule 84, Form 14(a) references Rule 8.1(f) in Item 5 ("Commercial case management [Rule 8.1(f)])." With the Supreme Court's adoption of Rule 8.1 on a permanent basis with amendments, former subdivision (f) of Rule 8.1 was renumbered as subdivision (e) ["Case Management"]. [*See* Order Permanently Adopting and Amending Experimental Rule 8.1, No. R-18-0033 (12/13/2018)] A corrective order was issued that amended the erroneous cross-reference to Rule 8.1(f) appearing in the first sentence of Form 14(a), but that order inadvertently omitted a necessary correction to the similar reference appearing under Item 5. Accordingly, the Petition proposes to update Item 5's cross-reference so that it refers to Rule 8.1(e), and not Rule 8.1(f). *See* Appendices A (clean) and B (blackline) for proposed amendment.

C. Modifying the Title of Rule 7 to Correspond to its Content

Rule 7 was amended as part of the 2017 restyling to conform in part to Rule 7 of the Federal Rules of Civil Procedure. At that time, its title was amended to read:

"Pleadings Allowed; Form of Motions and Other Documents," corresponding to the title of Federal Rule 7. However, Arizona's Rule 7 only addresses allowed pleadings, and does not address the form of motions and other documents, which are addressed in other rules (including, for example, Rule 7.1 governing motions). The Petition proposes to amend the title of Rule 7 so that it reads, "Pleadings Allowed," which was its title before the 2017 amendments and corresponds to its current content. *See* Appendices A (clean) and B (blackline) for proposed amendment.

II. PROPOSED AMENDMENTS TO CLARIFY AND SIMPLIFY ASPECTS OF THE RULES

A. Amending Rule 8.1 to Clarify that Commercial Court Cases are Deemed to be Assigned to Tier 3, Unless and Until the Commercial Court Assigns a Different Tier

On its permanent adoption effective January 2019, Rule 8.1 deleted a provision contained in former Experimental Rule 8.1, which had provided that "[n]otwithstanding any contrary language in Rule 26.2(d)(1), from the filing of the complaint unless and until the commercial court assigns the case to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3."

This provision initially was retained in the Petition to Permanently Adopt and Amend Rule 8.1 (No. R-18-0033), *see* Appendix A at Rule 8.1(e). Thereafter, one Commenter recommended deleting this language, noting that it was no longer necessary, and was potentially confusing, based on the Petition's proposed "restriction of commercial court cases to those seeking damages of $300,000 or more." *See* Comment of A. Jacobs (9/24/2018), Items 7 & 8 at p. 3. The Reply in support of the Petition adopted this recommendation and the former language was stricken in the final version of Rule 8.1 adopted by the Court. *See* Order Permanently Adopting and Amending Experimental Rule 8.1 (filed 12/13/2018), at Rule 8.1(e).

As permanently adopted, however, the language of Rule 8.1 did not restrict commercial court cases to those seeking damages of $300,000 or more. Rather, it now provides that "[a] case that seeks *only* monetary relief in an amount less than $300,000 is not eligible for the commercial court" (emphasis supplied). While this difference is subtle, as adopted the $300,000 damages threshold only applies to cases that seek "*only*" monetary relief. The language as adopted does not preclude otherwise-eligible case types seeking nonmonetary relief alone or in conjunction with damages of less than $300,000. Under Rule 26.2(c)(3)(D), such cases are deemed to be assigned to Tier 2 (unless otherwise ordered), not Tier 3.

Based on the history of Rule 8.1 as outlined above, it was clearly intended that commercial court cases should be deemed assigned to Tier 3, even if those cases would otherwise fall under Tier 2 if not in commercial court. Indeed, this intent is still reflected in Rule 8.1(e)(3)(E), which provides that the parties' Joint Report must address "whether the commercial court should assign the case to a tier other than Tier 3" and if so, "why." *See* Ariz. R. Civ. P. 8.1(e)(3)(E). Likewise, Rule 84 Form 14(a), also continues to reflect the former rule's presumption that a commercial court case is deemed to be assigned to Tier 3 unless otherwise ordered by the court.[2] The Petition thus proposes to add back the identical language of former Experimental Rule 8.1(e) [now (f)], which provides: "Notwithstanding any contrary language in Rule 26.2(d)(1), from the filing of the complaint unless and until the commercial court assigns the case to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3." The proposed

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[2] Form 14(a) thus contains a provision allowing the parties to request a tier *other than* Tier 3, providing as follows: "The commercial court should assign this case to a tier other than Tier 3 for the following reasons…." If the amendment to Rule 8.1 proposed in this Petition is not adopted, Form 14(a) should be modified to reflect that some commercial court cases may presumptively be Tier 2 cases, and not Tier 3 cases.

revisions are shown in Appendices A (clean) and B (blackline).

B. Amendments to Rule 37(g) to Clarify the Application of Certain Provisions to Persons *and* Parties and to Clarify Provisions of Rule 37(g)(1)(C)(i)

Rule 37(g), added by the 2017 amendments, addresses the duties of a "party or person" to preserve electronically stored information and provides remedies and sanctions if such information "that should have been preserved is lost."

The Petition proposes, first, to clarify that certain aspects of Rule 37(g) extend both to "parties" and to "persons." As adopted, the duty to preserve in Rule 37(g)(1)(A) extends by its terms to both parties and "persons" (i.e., those not yet parties to an action). Rule 37(g)(1)(A) thus provides that "[a] *party or person* has a duty to take reasonable steps to preserve electronically stored information relevant to an action once it commences the action, once it learns that it is a party to the action, or once it reasonably anticipates the action's commencement" (emphasis supplied).

Notwithstanding the Rule's imposition of a duty to preserve on a "party or person," however, subparts (B) and (C), which define what constitutes "Reasonable Anticipation" and "Reasonable Steps to Preserve," only use the term "party" and omit the term "person." While it can be argued that these definitions are subject to the general provisions of Rule 37(g)(1)(A) which clearly provide that the duty to preserve applies both to parties and to persons (not yet parties), to avoid uncertainty on this important topic, the Petition proposes to amend Rule 37(g)(1)(B) and (C)(i) and (ii) to make clear that the duties therein apply both to persons and to parties. The proposed amendments are shown in Appendices A (clean) and B (redline), attached hereto.

The Petition also proposes to clarify Rule 37(g)(1)(C)(i), which provides that a party or person "must take reasonable steps to prevent the routine operation of an

electronic information system or application of a document retention policy from destroying information that should be preserved." The foregoing duty only comes in to play if the threshold requirements of Rule 37(g)(1)(A), which trigger a duty to preserve, exist. While this limitation is arguably implicit in Rule 37(g)(1)(C)(i), given the serious consequences that flow from a violation of Rule 37(g), Petitioner believes the rule should be clarified to expressly state that the obligation in (C)(i) only applies where there is a duty to preserve under Rule 37(g)(1)(A).

Accordingly, the Petition proposes the following amendment to the language of Rule 37(g)(1)(C)(i) (additions are shown by underlining, and deletions are shown by ~~strike-throughs~~):

(i) If Rule 37(g)(1)(A) applies, a ~~A~~ party or person must take reasonable steps to prevent the routine operation of an electronic information system or application of a document retention policy from destroying information that should be preserved.

The foregoing proposed amendments are set forth in Appendices A (clean) and B (redline), attached hereto.

C. Amendments to Clarify and Simplify Rule 16 and Related Provisions of Rule 84 Joint Report Forms 11(a), 12(a), 13(a), and 14(a)

The Petition proposes two modest amendments to clarify and simplify Rule 16:

First, Rule 16(h) ["Sanctions"] uses the term "Comprehensive Pretrial Conference" in three places, *see* Rule 16(h)(1)(B), (C), and (D), providing for sanctions if a party or attorney fails to appear or to participate in good faith at a Rule 16 Comprehensive Pretrial Conference. The term "Comprehensive Pretrial Conference" is outdated and no longer applicable under current Rule 16. The term was last used in the pre-2017 version of Rule 16(e), which addressed the timing and

requirements for setting a "comprehensive pretrial conference" in medical malpractice actions. The current version of Rule 16 instead sets forth requirements for Scheduling Conferences, Trial-Setting Conferences, and Trial Management Conferences that apply to all actions. Accordingly, the Petition proposes to delete the three outdated references to a "Comprehensive Pretrial Conference" that appear in Rule 16(h).

Second, Rule 16(c)(2), governing the content of the Joint Report, requires that in addition to attaching the proposed Scheduling Order, the parties must "attach a good faith consultation certificate under Rule 7.1(h) and certify that the parties conferred regarding the subjects set forth in Rule 16(b)(2) and (c)(3)." The Petition proposes to delete the requirement that parties must file a separate Rule 7.1(h) certificate along with their Joint Report, because it is superfluous and adds an unnecessary layer of additional paperwork for the parties and for the court. Instead, the Petition proposes to replace this requirement with the following modified language:[3] "The Joint Report must certify that the parties conferred in good faith, either in person or by telephone as required by Rule 7.1(h), regarding ~~attach a good faith consultation certificate under Rule 7.1(h) and certify that the parties conferred regarding~~ the subjects set forth in Rule 16(b)(2) and (c)(3)."

If the Court adopts the foregoing amendment to Rule 16(c)(2), Forms 11(a), 12(a), 13(a), and 14(a) also should be modified to add the language "in good faith, either in person or by telephone as required by Rule 7.1(h)," to the parties' certification appearing in the first line of each of those forms, which reinforces the Rule's requirement of good faith consultation. Forms 11(a), 12(a), and 13(a) also should be modified to delete the last sentence, which states that "[t]he parties must

[3] Additionally, it appears that parties are not consistently filing the separate Rule 7.1(h) certificate in any event.

attach a good faith consultation certificate under Rule 7.1(h) to this Joint Report." (This sentence does not appear in Form 14(a), making this proposed amendment unnecessary with respect to that form.) The proposed amendments are shown in Appendices A (clean) and B (redline).

D. Changes to Rule 84 Form 11(a) on "Short Causes"

Before 2014, Rule 38.1 provided that "short causes" were entitled to a trial-setting preference. The rule also defined a "short cause" as an action that could be heard in one hour or less. The rule's definition of "short cause" was later deleted, but the reference to "short causes" remained. Current Rule 38.1 thus provides that "preference is given to short causes and actions that are entitled to priority by statute, rule, or court order."

Although a "short cause" is no longer defined in Rule 38.1, a number of local court rules contain varying definitions of what constitutes a "short cause" entitled to a trial preference. *Cf.* Rule 13, Cochise County Superior Court Local Rules (specifying a "short cause" is any civil case that can be heard in 3 hours or less) *with* Rule 1.5, Pima County Superior Court Local Rules (specifying a short cause is any civil case that can be heard in 1 hour or less).

Rule 84, Form 11(a) contains an Item 7 that continues to reference the now-obsolete one-hour limitation on a short cause. The Petition proposes to eliminate the one-hour reference and to modify the language of Item 7 as follows (changes shown with ~~strike-through~~/underlining), with a corresponding amendment to Item 8:

7. Short cause: ~~A non-jury trial will not exceed one hour. Yes no.~~ This case is a short cause entitled to a preference for trial pursuant to [identify statute or rule]. The anticipated length of trial is ____ hours.

CONCLUSION

The Court should adopt the proposed technical and clarifying amendments for the reasons stated herein.

January 8, 2020

Respectfully submitted,

PERKINS COIE LLP

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Copy of the foregoing electronically filed
with the Clerk of the Arizona Supreme Court
on January 8, 2020

/s/ Marie van Olffen

50757-0013/32133214.3

Appendix A

(Clean Copy of Rules with Proposed Amendments)

Rule 7. Pleadings Allowed

Only these pleadings are allowed: a complaint; an answer to a complaint; a counterclaim; an answer to a counterclaim designated as a counterclaim; an answer to a crossclaim; a third-party complaint; an answer to a third-party complaint; and, if the court orders one, a reply to an answer.

Rule 8.1. Assignment and Management of Commercial Cases

(a) Application; Definitions. This rule applies in counties that have established specialized programs for commercial cases, which are referred to in this rule as "the commercial court." The commercial court will hear eligible "commercial cases" assigned to it in accordance with this rule. To be eligible for the commercial court, a commercial case must meet the requirements of Rule 8.1(b).

(1) A "commercial case" is one in which:

(A) at least one plaintiff and one defendant are "business organizations;"

(B) the primary issues of law and fact concern a "business organization;" or

(C) the primary issues of law and fact concern a "business contract or transaction."

(2) A "business organization" includes a sole proprietorship, corporation, partnership, limited liability company, limited partnership, master limited partnership, professional association, joint venture, business trust, or a political subdivision or government entity that is a party to a business contract or transaction. A "business organization" excludes an individual, a family trust, or a political subdivision or government entity that is not a party to a business contract or transaction.

(3) A "business contract or transaction" is one in which a business organization sold, purchased, licensed, transferred, or otherwise provided goods, materials, services, intellectual property, funds, realty, or other obligations.

(b) Eligible Case Types. A commercial case is generally eligible for the commercial court if it meets one of the following descriptions:

(1) concerns the internal affairs, governance, dissolution, receivership, or liquidation of a business organization;

(2) arises out of obligations, liabilities, or indemnity claims between or among owners of the same business organization (including shareholders, members, and partners), or which concerns the liability or indemnity of individuals within a business organization (including officers, directors, managers, member managers, general partners, and trustees);

(3) concerns the sale, merger, or dissolution of a business organization, or the sale of substantially all of the assets of a business organization;

(4) relates to trade secrets or misappropriation of intellectual property, or arises from an agreement not to solicit, compete, or disclose;

(5) is a shareholder or member derivative action;

(6) arises from a commercial real estate transaction;

(7) arises from a relationship between a franchisor and a franchisee;

(8) involves the purchase or sale of securities or allegations of securities fraud; ~~or~~

(9) concerns a claim under state antitrust law;

(10) arises from a business contract or transaction governed by the Uniform Commercial Code;

(11) is a malpractice claim against a professional, other than a medical professional, that arises from services the professional provided to a business organization;

(12) arises out of tortious or statutorily prohibited business activity, such as unfair competition, tortious interference, misrepresentation or fraud; or

(13) arises from any dispute between a business organization and an insurer under a commercial insurance policy, including an action by either the business or the insurer related to coverage or bad faith.

(c) Ineligible Case Types. A case that seeks only monetary relief in an amount less than $300,000 is not eligible for the commercial court. The following case types are generally not commercial cases unless business issues predominate:

(1) evictions;

(2) eminent domain or condemnation;

(3) civil rights;

(4) motor vehicle torts and other torts involving personal injury to a plaintiff;

(5) administrative appeals;

(6) domestic relations, protective orders, or criminal matters, except a criminal contempt arising in a commercial court case; or

(7) wrongful termination of employment and statutory employment claims; or

(8) disputes concerning consumer contracts or transactions. A "consumer contract or transaction" is one that is primarily for personal, family, or household purposes.

(d) Assignment of Cases to the Commercial Courts.

(1) ***Request.*** A party to an eligible commercial case may request assignment of the case to the commercial court.

(2) ***By Plaintiff.*** A plaintiff seeking assignment of an eligible case to the commercial court must do so at the time of filing the complaint by (A) including in the initial complaint's caption the words "commercial court assignment requested," and (B) completing a civil cover sheet that indicates the action is an eligible commercial case.

(3) ***By Other Parties.*** If a plaintiff has not sought assignment to the commercial court, another party, within 20 days after that party's appearance, may file a separate notice stating that the case is eligible for, and requesting assignment of the case to, the commercial court.

(4) ***Assignment.*** Upon the filing of a complaint by a plaintiff requesting assignment to the commercial court under subpart (d)(2), or the filing by another party of a Notice Requesting Assignment to the Commercial Court under subpart (d)(3), the case will be assigned to the commercial court.

(5) ***Transfer out of Commercial Court by the Presiding Judge.*** After assignment of a case to the commercial court, if the commercial court judge determines the matter is not an eligible commercial case, then the judge may either keep the case or request that the presiding judge or designee transfer the case out of the commercial court. If the presiding judge or designee agrees to transfer the case out of the commercial court, the presiding judge or designee may either leave the case with the judge to whom it is currently assigned or reassign the case to a general civil court.

(6) ***Discretion of Presiding Judge.*** The presiding judge or designee may reassign any case that qualifies under Rule 8.1(b)(6), (7), (10), or (11) to a general civil court.

(7) ***Judicial Request to Transfer to the Commercial Court.*** Within 20 days after the filing of the first responsive pleading or Rule 12 motion, a judge of a general civil court may request the presiding judge or designee to transfer a case to the commercial court if that judge determines the matter is an eligible commercial case.

(8) ***Complex Cases.*** Assignment of a case to the commercial court does not impair the right of a party to request reassignment of the case to the Maricopa County complex civil litigation program under applicable local rules.

(e) Case Management. Notwithstanding any contrary language in Rule 26.2(d)(1), from the filing of the complaint unless and until the commercial court assigns the case to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3. Rules 16(a) through 16(j) apply to cases in the commercial court, except:

(1) ***Scheduling Conference.*** Scheduling conferences under Rule 16(d) are mandatory.

(2) ***Early Meeting.*** Before filing a Rule 16(c) Joint Report, and in addition to conferring about the subjects in Rule 16(b)(1), the parties must confer, as set forth in the commercial court's checklist governing the production of electronically stored information, and attempt to reach agreements that may be appropriate in the case concerning the disclosure and production of such information, including:

(A) requirements and limits on disclosure and production of electronically stored information;

(B) the form or formats in which the electronically stored information will be disclosed or produced; and

(C) if appropriate, sharing or shifting of costs incurred by the parties for disclosing and producing electronically stored information.

(3) ***Joint Report and Proposed Scheduling Order*****.** The parties' Rule 16(b) Joint Report and Proposed Scheduling Order must address the items specified in Forms 14(a) and 14(b), including:

(A) whether the parties expect electronically stored information to be an issue in the case and, if so, whether they have reached an agreement regarding the discovery of electronically stored information, have filed a stipulated order, and have or anticipate disputes concerning electronically stored information;

(B) whether the parties have reached an agreement regarding the inadvertent production of privileged material pursuant to Arizona Rule of Evidence 502, and, if so, whether they have filed a stipulated order;

(C) whether any issues have arisen or are expected to arise regarding claims of privilege or protection of trial preparation materials under Rules 26(b)(6) and 26.1(h);

(D) whether the parties believe that a protective order is necessary and, if so, whether they have filed a stipulated protective order; and

(E) whether the commercial court should assign the case to a tier other than Tier 3 after the Rule 16(d) scheduling conference, and, if so, why.

(4) ***Motions to Dismiss*****.** Any motion to dismiss pursuant to Rule 12(b)(6) must attach a good faith consultation certificate complying with Rule 7.1(h) certifying that the parties have been unable to agree that the pleading is curable by a permissible amendment.

(f) Motions. With notice to the parties, a commercial court judge may modify the formal requirements of Rule 7.1(a) and may adopt a different practice for the efficient and prompt resolution of motions.

(g) Cases Not in the Commercial Court. The case management procedures in Rule 8.1(e) are available to any judge who finds those procedures beneficial, wholly or partially, in managing a commercial case that is not assigned to the commercial court, or that is pending in a county that has not established a commercial court.

Rule 16. Scheduling and Management of Actions

***

(b) Required Early Meeting About Expected Course of Case, Tiering.

(1) ***Timing; Purpose.*** At the earliest practicable time, but no later than 30 days after a party answers or files a motion directed at the complaint, or 120 days after the action commences—whichever occurs first—that party and the plaintiff must meet and confer about the anticipated course of their case, including the tier to which it should be assigned under Rule 26.2 and the subjects set forth in Rule 16(b)(2) and (c). The parties must discuss whether and how they can agree to streamline and limit claims and affirmative defenses to be asserted, discovery to be taken, and motions to be brought. The purpose of the conference is to plan cooperatively for the case, and to facilitate the case's placement in one of three tiers for discovery. The attorneys of record and all unrepresented parties who have appeared in the action are jointly responsible for arranging and participating in the Early Meeting.

(2) ***Topics for Early Meeting.*** The parties should discuss at least:

(A) their anticipated disclosures concerning witnesses, including the number of fact witnesses, whether they will seek to use expert witnesses, and how much deposition testimony they expect will be necessary;

(B) their anticipated disclosures of documents, including any issues already known to them concerning electronically stored information;

(C) motions they expect to file, so that the parties can determine whether any of the motions can be avoided by stipulations, amendments, or other cooperative activity;

(D) any agreements that could aid in the just, speedy, and inexpensive resolution of the case;

(E) the discovery tier to which the case should be assigned under Rule 26.2, and whether the parties wish to stipulate—or any party wishes to move for—assignment to a tier other than that to which the case would be assigned given the amount in controversy; and

(F) the subjects set forth in Rule 16(c).

(c) Filing of Joint Report and Proposed Scheduling Orders.

(1) ***Timing.*** No later than 14 days after the Early Meeting, the parties must file a Joint Report and a Proposed Scheduling Order. The attorneys of record and

all unrepresented parties who have appeared in the action are jointly responsible for attempting in good faith to agree on a Proposed Scheduling Order, and for filing the Joint Report and the Proposed Scheduling Order with the court. The court must issue a Scheduling Order as soon as practicable either after receiving the parties' Joint Report and Proposed Scheduling Order or after holding a Scheduling Conference.

(2) ***Content of Joint Report.*** The Joint Report must state—to the extent practicable—the parties' positions on the subjects set forth in Rule 16(b)(2) and (c)(3) and must attach a proposed Scheduling Order. The parties are not required to describe their Early Meeting in the Joint Report, but may do so. Any summary must describe the case with respect to the characteristics in Rule 26.2(b) and (c) to be used in assigning cases to a discovery tier, and must set forth any agreements the parties have reached to streamline the case. In the Joint Report, the parties are not permitted to discuss or criticize the rejection of proposed agreements or to argue that the other party has taken unreasonable positions. Unless ordered by the court, a summary must not exceed 4 pages of text, which length must be split evenly between separate statements of the parties if they do not agree on the summary's contents. The Joint Report must certify that the parties conferred in good faith, either in person or by telephone as required by Rule 7.1(h), regarding the subjects set forth in Rule 16(b)(2) and (c)(3).

(7) ***Forms.*** The parties must file the Joint Report and the Proposed Scheduling Order using the forms approved by the Supreme Court and set forth in Rule 84, Forms 11 through 13. They must use Forms 11(a) and (b) for Tier 1 cases, Forms 12(a) and (b) for Tier 2 cases, and Forms 13(a) and (b) for Tier 3 cases.

(h) Sanctions.

(1) ***Generally.*** Except on a showing of good cause, the court—on motion or on its own—must enter such orders as are just, including, among others, any of the orders in Rule 37(b)(2)(A)(ii) through (vii), if a party or attorney:

(A) fails to obey a scheduling or pretrial order or fails to meet the deadlines set in the order;

(B) fails to appear at a Scheduling Conference, Trial-Setting Conference, or Trial Management Conference;

(C) is substantially unprepared to participate in a Scheduling Conference, Trial-Setting Conference, or Trial Management Conference;

(D) fails to participate in good faith in a Scheduling Conference, Trial-Setting Conference, or Trial Management Conference; or

(E) fails to participate in good faith in the preparation of a Joint Report and Proposed Scheduling Order or a Joint Pretrial Statement.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(g) Failure to Preserve Electronically Stored Information.

(1) ***Duty to Preserve.***

(A) *Generally.* A party or person has a duty to take reasonable steps to preserve electronically stored information relevant to an action once it commences the action, once it learns that it is a party to the action, or once it reasonably anticipates the action's commencement, whichever occurs first. A court order or statute also may impose a duty to preserve certain information.

(B) *Reasonable Anticipation.* A party or person reasonably anticipates an action's commencement if:

(i) it knows or reasonably should know that it is likely to be a defendant in a specific action; or

(ii) it seriously contemplates commencing an action or takes specific steps to do so.

(C) *Reasonable Steps to Preserve.*

(i) If Rule 37(g)(1)(A) applies, a party or person must take reasonable steps to prevent the routine operation of an electronic information system or application of a document retention policy from destroying information that should be preserved.

(ii) Factors that a court should consider in determining whether a party or person took reasonable steps to preserve relevant electronically stored information include the nature of the issues raised in the action or anticipated action, the information's probative value, the accessibility of the information, the difficulty in preserving the information, whether the information was lost as a result of the good-faith routine operation of an electronic information system or the good-faith and consistent application of a document retention policy, the timeliness of the actions taken, and the relative burdens and costs of a preservation effort in light of the importance of the issues at stake, the resources and technical sophistication of the party or person subject to a duty to preserve, and the amount in controversy.

***

Rule 55. Default; Default Judgment

***

(c) **Setting Aside a Default or a Final Default Judgment.** The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

Form 11(a). Joint Report: Tier 1 Case

In the Superior Court of Arizona

__________ County

	)	
Plaintiffs	)	Case number ....
	)	
v	)	**Joint Report**
	)	
Defendants	)	*(Tier 1 case)*
	)	Assigned to:

The parties signing below certify that they have conferred in good faith, either in person or by telephone as required by Rule 7.1(h), about the matters contained in Rule 16(b)(2) and (c)(3), and they further certify that:

(a) Every defendant has been served or dismissed, and every defendant who has not been defaulted has filed a responsive pleading;

(b) There are no third party claims; and

(c) This case is not subject to the mandatory arbitration provisions of Rule 72.

Optional Summary of Rule 16(b) Early Meeting (not to exceed 4 pages of text), split evenly between separate statements of the parties if they do not agree on the summary's contents:
____
____

With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 12 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

1. Brief description of the case:

____

____

• If a claimant is seeking other than monetary damages, specify the relief sought:

____

2. Settlement: The parties agree to engage in settlement discussions with a settlement judge assigned by the court, or a private mediator.

• The parties will be ready for a settlement conference or a private mediation by __________.

• If the parties will not engage in a settlement conference or a private mediation, state the reason(s): ____________.

3. Readiness: This case will be ready for trial by __________.

4. Jury:

• There is a right to a trial by jury. yes no

• If there is such a right, it has been waived by the parties. yes no

5. Length of trial: The estimated length of trial is ___ days.

6. Summary jury: The parties agree to a summary jury trial. yes no

7. Short cause: This case is a short cause entitled to a preference for trial pursuant to [identify statute or rule]. The anticipated length of trial is ____ hours.

8. Other Trial Preference: This case is entitled to preference for trial under this statute or rule:

____

9. Special requirements: At a pretrial conference or at trial, a party will require disability accommodations (specify) ____

an interpreter (specify language) ____

10. Scheduling conference: The parties request a Rule 16(d) scheduling conference. yes no. If requested, the reasons for having a conference are:

____

11. Other matters: Other matters that the parties wish to bring to the court's attention that

may affect management of this case: ____

12. Items upon which the parties do not agree: The parties certify that they were unable in good faith to agree upon the following items, and the position of each party as to each item is as follows:

____

Dated this ___ day of __________, 20 ___.

For Plaintiff   For Defendant

Added Sept. 2, 2016, effective Jan. 1, 2017. Amended Aug. 31, 2017, effective July 1, 2018; Aug. 28, 2018, effective Jan. 1, 2019.

Form 12(a). Joint Report: Tier 2 Case

In the Superior Court of Arizona

__________ County

	)	
Plaintiffs	)	Case number ....
	)	
v	)	**Joint Report**
	)	
Defendants	)	*(Tier 2 case)*
	)	Assigned to:

The parties signing below certify that they have conferred in good faith, either in person or by telephone as required by Rule 7.1(h), about the matters set forth in Rule 16(b)(2) and (c)(3), and that this case is not subject to the mandatory arbitration provisions of Rule 72. With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 13 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

Optional Summary of Rule 16(b) Early Meeting (not to exceed 4 pages of text), split evenly between separate statements of the parties if they do not agree on the summary's contents:
____
____

1. Brief description of the case:

____

• If a claimant is seeking other than monetary damages, specify the relief sought

____

2. Current case status: Every defendant has been served or dismissed. yes no

• Every party who has not been defaulted has filed a responsive pleading. yes no

• Explanation of a “no” response to either of the above statements:
____

3. Amendments: A party anticipates filing an amendment to a pleading that will add a new party to the case: yes no

4. Settlement: The parties agree to engage in settlement discussions with a settlement judge assigned by the court, or a private mediator.

The parties will be ready for a settlement conference or a private mediation by __________.

If the parties will not engage in a settlement conference or a private mediation, state the reason(s):
____

5. Readiness: This case will be ready for trial by __________.

6. Jury:

• There is a right to a trial by jury. yes no

• If there is such a right, it has been waived by the parties. yes no

7. Length of trial: The estimated length of trial is ___ days.

8. Summary jury: The parties agree to a summary jury trial. yes no

9. Preference: This case is entitled to a preference for trial pursuant to the following statute or rule: ____

10. Special requirements: At a pretrial conference or at trial, a party will require disability accommodations (specify) ____

an interpreter (specify language) ____

11. Scheduling conference: The parties request a Rule 16(d) scheduling conference. yes no. If requested, the reasons for having a conference are

____

12. Other matters: Other matters that the parties wish to bring to the court’s attention that may affect management of this case:

____

13. Items upon which the parties do not agree: The parties certify that they were unable in good faith to agree upon the following items, and the position of each party as to each item is

as follows:

____

Dated this ___ day of __________, 20 ___.

For Plaintiff For Defendant

Added Sept. 2, 2016, effective Jan. 1, 2017. Amended Aug. 31, 2017, effective July 1, 2018; Aug. 28, 2018, effective Jan. 1, 2019.

Form 13(a). Joint Report: Tier 3 Case

In the Superior Court of Arizona

__________ County

	)	
Plaintiffs	)	Case number ....
	)	
V	)	**Joint Report**
	)	
Defendants	)	*(Tier 3 case)*
	)	Assigned to:

The parties signing below certify that they have conferred in good faith, either in person or by telephone as required by Rule 7.1(h), about the matters set forth in Rule 16(b)(2) and (c)(3). With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 13 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

Optional Summary of Rule 16(b) Early Meeting (not to exceed 4 pages of text), split evenly between separate statements of the parties if they do not agree on the summary's contents:

1. Brief description of the case: ____

• If a claimant is seeking other than monetary damages, specify the relief sought

____

2. Current case status: Every defendant has been served or dismissed. yes no

• Every party who has not been defaulted has filed a responsive pleading. yes no

• Explanation of a "no" response to either of the above statements:

____

3. Amendments: A party anticipates filing an amendment to a pleading that will add a new party to the case: yes no

4. Settlement: The parties agree to engage in settlement discussions with a settlement judge assigned by the court, or a private mediator.

The parties will be ready for a settlement conference or a private mediation by __________.

If the parties will not engage in a settlement conference or a private mediation, state the reason(s): ____

5. Readiness: This case will be ready for trial by __________.

6. Jury:

- There is a right to a trial by jury. yes no
- If there is such a right, it has been waived by the parties. yes no

7. Length of trial: The estimated length of trial is ___ days.

8. Summary jury: The parties agree to a summary jury trial. yes no

9. Preference: This case is entitled to a preference for trial pursuant to the following statute or rule: ____

10. Special requirements: At a pretrial conference or at trial, a party will require disability accommodations (specify) ____

an interpreter (specify language) ____

11. Scheduling conference: The parties request a Rule 16(d) scheduling conference. yes no. If requested, the reasons for having a conference are

____

12. Other matters: Other matters that the parties wish to bring to the court's attention that may affect management of this case:

____

13. Items upon which the parties do not agree: The parties certify that they were unable in good faith to agree upon the following items, and the position of each party as to each item is as follows:

____

Dated this ___ day of __________, 20 ___.

For Plaintiff For Defendant

Added Aug. 31, 2017, effective July 1, 2018. Amended Aug. 28, 2018, effective Jan. 1, 2019.

Form 14(a). Joint Report: Commercial Case

In the Superior Court of Arizona

__________ County

	)	
Plaintiffs	)	Case number ....
	)	
v	)	**Joint Report**
	)	
Defendants	)	*(Commercial case)*
	)	Assigned to:

The parties signing below certify that they have conferred in good faith, either in person or by telephone as required by Rule 7.1(h), about the matters set forth in Rules 8.1(e) and 16(b)(2) and (c)(3), and that this case is not subject to the mandatory arbitration provisions of Rule 72. With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 14 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

1. Brief description of the case: ____

• If a claimant is seeking other than monetary damages, specify the relief sought

____

• This is a commercial case under Rule 8.1 because (refer to the specific provisions of Rule 8.1 that apply):

____

2. Current case status: Every defendant has been served or dismissed. yes no

• Every party who has not been defaulted has filed a responsive pleading. yes no
• Explanation of a "no" response to either of the above statements:

____

3. Amendments: A party anticipates filing an amendment to a pleading that will add a new party to the case: yes no

4. Special case management: Special case management procedures are appropriate: yes no If "yes," the following case management procedures are appropriate because: ____.

5. Commercial case management [Rule 8.1(e)]:

a. Approximate Amount in Controversy $ __________

b. The commercial court should assign this case to a tier other than Tier 3 for the following reasons:

____

c. Anticipated Areas of Expert Testimony (not binding):

____

____

d. Electronically Stored Information

[] The parties do not expect electronically stored information to be at issue in this case.

[] The parties do expect electronically stored information to be at issue in this case.

Have the parties reached an agreement regarding the discovery of electronically stored information? yes no

If yes, have the parties filed a stipulated order? [] yes [] no

Do the parties currently have disputes or anticipate particular disputes over electronically stored information? [] yes [] no

If yes, please describe the dispute(s):

____

e. Privilege Issues and Protective Order

Have the parties reached an agreement regarding the inadvertent production of privileged material pursuant to Rule 502 of the Rules of Evidence? [] yes [] no

If so, have the parties filed a stipulated order? [] yes [] no

Have any issues arisen or do you expect any issues to arise regarding claims of privilege or protection of trial preparation materials pursuant to Rule 26(b)(6) or Rule 26.1(h)? [] yes [] no

If so, have the parties filed a stipulated protective order? [] yes [] no

6. Settlement: The parties agree to engage in settlement discussions with a settlement judge assigned by the court, or a private mediator.

The parties will be ready for a settlement conference or a private mediation by __________.

If the parties will not engage in a settlement conference or a private mediation, state the reason(s): ____

7. Readiness: This case will be ready for trial by __________.

8. Jury:

• There is a right to a trial by jury. yes no

• If there is such a right, it has been waived by the parties. yes no

9. Length of trial: The estimated length of trial is ___ days.

10. Summary jury: The parties agree to a summary jury trial. yes no

11. Preference: This case is entitled to a preference for trial under the following statute or rule: ____

12. Special requirements: At a pretrial conference or at trial, a party will require disability accommodations (specify) _____

an interpreter (specify language) ____

13. Other matters: Other matters that the parties wish to bring to the court's attention that may affect management of this case:

____

14. Items upon which the parties do not agree: The parties certify that they were unable

in good faith to agree upon the following items, and the position of each party as to each item is as follows:

____

Dated this ___ day of __________, 20 ___.

For Plaintiff For Defendant

Added Sept. 2, 2016, effective Jan. 1, 2017. Amended effective Feb. 8, 2017; Aug. 31, 2017, effective July 1, 2018; Aug. 28, 2018, effective Jan. 1, 2019.

Appendix B

(Blackline showing proposed Amendments with underlining and ~~strikethrough~~)

Rule 7. Pleadings Allowed~~; Form of Motions and Other Documents~~

Only these pleadings are allowed: a complaint; an answer to a complaint; a counterclaim; an answer to a counterclaim designated as a counterclaim; an answer to a crossclaim; a third-party complaint; an answer to a third-party complaint; and, if the court orders one, a reply to an answer.

Rule 8.1. Assignment and Management of Commercial Cases

(a) Application; Definitions. This rule applies in counties that have established specialized programs for commercial cases, which are referred to in this rule as "the commercial court." The commercial court will hear eligible "commercial cases" assigned to it in accordance with this rule. To be eligible for the commercial court, a commercial case must meet the requirements of Rule 8.1(b).

(1) A "commercial case" is one in which:

(A) at least one plaintiff and one defendant are "business organizations;"

(B) the primary issues of law and fact concern a "business organization;" or

(C) the primary issues of law and fact concern a "business contract or transaction."

(2) A "business organization" includes a sole proprietorship, corporation, partnership, limited liability company, limited partnership, master limited partnership, professional association, joint venture, business trust, or a political subdivision or government entity that is a party to a business contract or transaction. A "business organization" excludes an individual, a family trust, or a political subdivision or government entity that is not a party to a business contract or transaction.

(3) A "business contract or transaction" is one in which a business organization sold, purchased, licensed, transferred, or otherwise provided goods, materials, services, intellectual property, funds, realty, or other obligations.

(b) Eligible Case Types. A commercial case is generally eligible for the commercial court if it meets one of the following descriptions:

(1) concerns the internal affairs, governance, dissolution, receivership, or liquidation of a business organization;

(2) arises out of obligations, liabilities, or indemnity claims between or among owners of the same business organization (including shareholders, members, and partners), or which concerns the liability or indemnity of individuals within a business organization (including officers, directors, managers, member managers, general partners, and trustees);

(3) concerns the sale, merger, or dissolution of a business organization, or the sale of substantially all of the assets of a business organization;

(4) relates to trade secrets or misappropriation of intellectual property, or arises from an agreement not to solicit, compete, or disclose;

(5) is a shareholder or member derivative action;

(6) arises from a commercial real estate transaction;

(7) arises from a relationship between a franchisor and a franchisee;

(8) involves the purchase or sale of securities or allegations of securities fraud; ~~or~~

(9) concerns a claim under state antitrust law;

(10) arises from a business contract or transaction governed by the Uniform Commercial Code;

(11) is a malpractice claim against a professional, other than a medical professional, that arises from services the professional provided to a business organization;

(12) arises out of tortious or statutorily prohibited business activity, such as unfair competition, tortious interference, misrepresentation or fraud; or

(13) arises from any dispute between a business organization and an insurer under a commercial insurance policy, including an action by either the business or the insurer related to coverage or bad faith.

(c) Ineligible Case Types. A case that seeks only monetary relief in an amount less than $300,000 is not eligible for the commercial court. The following case types are generally not commercial cases unless business issues predominate:

(1) evictions;

(2) eminent domain or condemnation;

(3) civil rights;

(4) motor vehicle torts and other torts involving personal injury to a plaintiff;

(5) administrative appeals;

(6) domestic relations, protective orders, or criminal matters, except a criminal contempt arising in a commercial court case; or

(7) wrongful termination of employment and statutory employment claims; or

(8) disputes concerning consumer contracts or transactions. A "consumer contract or transaction" is one that is primarily for personal, family, or household purposes.

(d) Assignment of Cases to the Commercial Courts.

(1) ***Request.*** A party to an eligible commercial case may request assignment of the case to the commercial court.

(2) ***By Plaintiff.*** A plaintiff seeking assignment of an eligible case to the commercial court must do so at the time of filing the complaint by (A) including in the initial complaint's caption the words "commercial court assignment requested," and (B) completing a civil cover sheet that indicates the action is an eligible commercial case.

(3) ***By Other Parties.*** If a plaintiff has not sought assignment to the commercial court, another party, within 20 days after that party's appearance, may file a separate notice stating that the case is eligible for, and requesting assignment of the case to, the commercial court.

(4) ***Assignment.*** Upon the filing of a complaint by a plaintiff requesting assignment to the commercial court under subpart (d)(2), or the filing by another party of a Notice Requesting Assignment to the Commercial Court under subpart (d)(3), the case will be assigned to the commercial court.

(5) ***Transfer out of Commercial Court by the Presiding Judge.*** After assignment of a case to the commercial court, if the commercial court judge determines the matter is not an eligible commercial case, then the judge may either keep the case or request that the presiding judge or designee transfer the case out of the commercial court. If the presiding judge or designee agrees to transfer the case out of the commercial court, the presiding judge or designee may either leave the case with the judge to whom it is currently assigned or reassign the case to a general civil court.

(6) ***Discretion of Presiding Judge.*** The presiding judge or designee may reassign any case that qualifies under Rule 8.1(b)(6), (7), (10), or (11) to a general civil court.

(7) ***Judicial Request to Transfer to the Commercial Court.*** Within 20 days after the filing of the first responsive pleading or Rule 12 motion, a judge of a general civil court may request the presiding judge or designee to transfer a case to the commercial court if that judge determines the matter is an eligible commercial case.

(8) ***Complex Cases.*** Assignment of a case to the commercial court does not impair the right of a party to request reassignment of the case to the Maricopa County complex civil litigation program under applicable local rules.

(e) Case Management. Notwithstanding any contrary language in Rule 26.2(d)(1), from the filing of the complaint unless and until the commercial court assigns the case to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3. Rules 16(a) through 16(j) apply to cases in the commercial court, except:

(1) ***Scheduling Conference.*** Scheduling conferences under Rule 16(d) are mandatory.

(2) ***Early Meeting.*** Before filing a Rule 16(c) Joint Report, and in addition to conferring about the subjects in Rule 16(b)(1), the parties must confer, as set forth in the commercial court's checklist governing the production of electronically stored information, and attempt to reach agreements that may be appropriate in the case concerning the disclosure and production of such information, including:

(A) requirements and limits on disclosure and production of electronically stored information;

(B) the form or formats in which the electronically stored information will be disclosed or produced; and

(C) if appropriate, sharing or shifting of costs incurred by the parties for disclosing and producing electronically stored information.

(3) ***Joint Report and Proposed Scheduling Order.*** The parties' Rule 16(b) Joint Report and Proposed Scheduling Order must address the items specified in Forms 14(a) and 14(b), including:

(A) whether the parties expect electronically stored information to be an issue in the case and, if so, whether they have reached an agreement regarding the discovery of electronically stored information, have filed a stipulated order, and have or anticipate disputes concerning electronically stored information;

(B) whether the parties have reached an agreement regarding the inadvertent production of privileged material pursuant to Arizona Rule of Evidence 502, and, if so, whether they have filed a stipulated order;

(C) whether any issues have arisen or are expected to arise regarding claims of privilege or protection of trial preparation materials under Rules 26(b)(6) and 26.1(h);

(D) whether the parties believe that a protective order is necessary and, if so, whether they have filed a stipulated protective order; and

(E) whether the commercial court should assign the case to a tier other than Tier 3 after the Rule 16(d) scheduling conference, and, if so, why.

(4) ***Motions to Dismiss.*** Any motion to dismiss pursuant to Rule 12(b)(6) must attach a good faith consultation certificate complying with Rule 7.1(h) certifying that the parties have been unable to agree that the pleading is curable by a permissible amendment.

(f) Motions. With notice to the parties, a commercial court judge may modify the formal requirements of Rule 7.1(a) and may adopt a different practice for the efficient and prompt resolution of motions.

(g) Cases Not in the Commercial Court. The case management procedures in Rule 8.1(e) are available to any judge who finds those procedures beneficial, wholly or partially, in managing a commercial case that is not assigned to the commercial court, or that is pending in a county that has not established a commercial court.

Rule 16. Scheduling and Management of Actions

***

(b) Required Early Meeting About Expected Course of Case, Tiering.

(1) ***Timing; Purpose.*** At the earliest practicable time, but no later than 30 days after a party answers or files a motion directed at the complaint, or 120 days after the action commences—whichever occurs first—that party and the plaintiff must meet and confer about the anticipated course of their case, including the tier to which it should be assigned under Rule 26.2 and the subjects set forth in Rule 16(b)(2) and (c). The parties must discuss whether and how they can agree to streamline and limit claims and affirmative defenses to be asserted, discovery to be taken, and motions to be brought. The purpose of the conference is to plan cooperatively for the case, and to facilitate the case's placement in one of three tiers for discovery. The attorneys of record and all unrepresented parties who have appeared in the action are jointly responsible for arranging and participating in the Early Meeting.

(2) ***Topics for Early Meeting.*** The parties should discuss at least:

(A) their anticipated disclosures concerning witnesses, including the number of fact witnesses, whether they will seek to use expert witnesses, and how much deposition testimony they expect will be necessary;

(B) their anticipated disclosures of documents, including any issues already known to them concerning electronically stored information;

(C) motions they expect to file, so that the parties can determine whether any of the motions can be avoided by stipulations, amendments, or other cooperative activity;

(D) any agreements that could aid in the just, speedy, and inexpensive resolution of the case;

(E) the discovery tier to which the case should be assigned under Rule 26.2, and whether the parties wish to stipulate—or any party wishes to move for—assignment to a tier other than that to which the case would be assigned given the amount in controversy; and

(F) the subjects set forth in Rule 16(c).

(c) Filing of Joint Report and Proposed Scheduling Orders.

(1) ***Timing.*** No later than 14 days after the Early Meeting, the parties must file a Joint Report and a Proposed Scheduling Order. The attorneys of record and

all unrepresented parties who have appeared in the action are jointly responsible for attempting in good faith to agree on a Proposed Scheduling Order, and for filing the Joint Report and the Proposed Scheduling Order with the court. The court must issue a Scheduling Order as soon as practicable either after receiving the parties' Joint Report and Proposed Scheduling Order or after holding a Scheduling Conference.

(2) ***Content of Joint Report.*** The Joint Report must state—to the extent practicable—the parties' positions on the subjects set forth in Rule 16(b)(2) and (c)(3) and must attach a proposed Scheduling Order. The parties are not required to describe their Early Meeting in the Joint Report, but may do so. Any summary must describe the case with respect to the characteristics in Rule 26.2(b) and (c) to be used in assigning cases to a discovery tier, and must set forth any agreements the parties have reached to streamline the case. In the Joint Report, the parties are not permitted to discuss or criticize the rejection of proposed agreements or to argue that the other party has taken unreasonable positions. Unless ordered by the court, a summary must not exceed 4 pages of text, which length must be split evenly between separate statements of the parties if they do not agree on the summary's contents. The Joint Report must certify that the parties conferred in good faith, either in person or by telephone as required by Rule 7.1(h), ~~attach a good faith consultation certificate under Rule 7.1(h) and certify that the parties conferred~~ regarding the subjects set forth in Rule 16(b)(2) and (c)(3).

(7) ***Forms.*** The parties must file the Joint Report and the Proposed Scheduling Order using the forms approved by the Supreme Court and set forth in Rule 84, Forms 11 through 13. They must use Forms 11(a) and (b) for Tier 1 cases, Forms 12(a) and (b) for Tier 2 cases, and Forms 13(a) and (b) for Tier 3 cases.

(h) Sanctions.

(1) ***Generally.*** Except on a showing of good cause, the court—on motion or on its own—must enter such orders as are just, including, among others, any of the orders in Rule 37(b)(2)(A)(ii) through (vii), if a party or attorney:

(A) fails to obey a scheduling or pretrial order or fails to meet the deadlines set in the order;

(B) fails to appear at a Scheduling Conference, ~~Comprehensive Pretrial Conference,~~ Trial-Setting Conference, or Trial Management Conference;

(C) is substantially unprepared to participate in a Scheduling Conference, ~~Comprehensive Pretrial Conference,~~ Trial-Setting Conference, or Trial Management Conference;

(D) fails to participate in good faith in a Scheduling Conference, ~~Comprehensive Pretrial Conference,~~ Trial-Setting Conference, or Trial Management Conference; or

(E) fails to participate in good faith in the preparation of a Joint Report and Proposed Scheduling Order or a Joint Pretrial Statement.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(g) Failure to Preserve Electronically Stored Information.

(1) ***Duty to Preserve.***

(A) *Generally.* A party or person has a duty to take reasonable steps to preserve electronically stored information relevant to an action once it commences the action, once it learns that it is a party to the action, or once it reasonably anticipates the action's commencement, whichever occurs first. A court order or statute also may impose a duty to preserve certain information.

(B) *Reasonable Anticipation.* A party or person reasonably anticipates an action's commencement if:

(i) it knows or reasonably should know that it is likely to be a defendant in a specific action; or

(ii) it seriously contemplates commencing an action or takes specific steps to do so.

(C) *Reasonable Steps to Preserve.*

(i) If Rule 37(g)(1)(A) applies, a~~A~~ party or person must take reasonable steps to prevent the routine operation of an electronic information system or application of a document retention policy from destroying information that should be preserved.

(ii) Factors that a court should consider in determining whether a party or person took reasonable steps to preserve relevant electronically stored information include the nature of the issues raised in the action or anticipated action, the information's probative value, the accessibility of the information, the difficulty in preserving the information, whether the information was lost as a result of the good-faith routine operation of an electronic information system or the good-faith and consistent application of a document retention policy, the timeliness of the ~~party's~~ actions taken, and the relative burdens and costs of a preservation effort in light of the importance of the issues at stake, the resources and technical sophistication of the party or person subject to a duty to preserve, ~~the parties' resources and technical sophistication,~~ and the amount in controversy.

***

Rule 55. Default; Default Judgment

***

(c) Setting Aside a Default or a Final Default Judgment. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(~~c~~b).

Form 11(a). Joint Report: Tier 1 Case

In the Superior Court of Arizona

__________ County

	)	
Plaintiffs	)	Case number ....
	)	
v	)	**Joint Report**
	)	
Defendants	)	*(Tier 1 case)*
	)	Assigned to:

The parties signing below certify that they have conferred in good faith, either in person or by telephone as required by Rule 7.1(h), about the matters contained in Rule 16(b)(2) and (c)(3), and they further certify that:

(a) Every defendant has been served or dismissed, and every defendant who has not been defaulted has filed a responsive pleading;

(b) There are no third party claims; and

(c) This case is not subject to the mandatory arbitration provisions of Rule 72.

Optional Summary of Rule 16(b) Early Meeting (not to exceed 4 pages of text), split evenly between separate statements of the parties if they do not agree on the summary's contents:
____
____

With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 12 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

1. Brief description of the case:

____

____

• If a claimant is seeking other than monetary damages, specify the relief sought:

____

2. Settlement: The parties agree to engage in settlement discussions with a settlement judge assigned by the court, or a private mediator.

• The parties will be ready for a settlement conference or a private mediation by __________.

• If the parties will not engage in a settlement conference or a private mediation, state the reason(s): ____________.

3. Readiness: This case will be ready for trial by __________.

4. Jury:

• There is a right to a trial by jury. yes no

• If there is such a right, it has been waived by the parties. yes no

5. Length of trial: The estimated length of trial is ___ days.

6. Summary jury: The parties agree to a summary jury trial. yes no

7. Short cause: ~~A non-jury trial will not exceed one hour. yes no~~ This case is a short cause entitled to a preference for trial pursuant to [identify statute or rule]. The anticipated length of trial is _____ hours.

8. Other Trial Preference: This case is entitled to preference for trial under this statute or rule:

____

9. Special requirements: At a pretrial conference or at trial, a party will require disability accommodations (specify) ____

an interpreter (specify language) ____

10. Scheduling conference: The parties request a Rule 16(d) scheduling conference. yes no. If requested, the reasons for having a conference are:

____

11. Other matters: Other matters that the parties wish to bring to the court's attention that may affect management of this case: ____

12. Items upon which the parties do not agree: The parties certify that they were unable in good faith to agree upon the following items, and the position of each party as to each item is as follows:

____

~~The parties must attach a good faith consultation certificate under Rule 7.1(h) to this Joint Report.~~

Dated this ___ day of __________, 20 ___.

For Plaintiff

For Defendant

Added Sept. 2, 2016, effective Jan. 1, 2017. Amended Aug. 31, 2017, effective July 1, 2018; Aug. 28, 2018, effective Jan. 1, 2019.

Form 12(a). Joint Report: Tier 2 Case

In the Superior Court of Arizona

__________ County

	)	
Plaintiffs	)	Case number ....
	)	
v	)	**Joint Report**
	)	
Defendants	)	*(Tier 2 case)*
	)	Assigned to:

The parties signing below certify that they have conferred in good faith, either in person or by telephone as required by Rule 7.1(h), about the matters set forth in Rule 16(b)(2) and (c)(3), and that this case is not subject to the mandatory arbitration provisions of Rule 72. With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 13 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

Optional Summary of Rule 16(b) Early Meeting (not to exceed 4 pages of text), split evenly between separate statements of the parties if they do not agree on the summary's contents:
____
____

1. Brief description of the case:

____

• If a claimant is seeking other than monetary damages, specify the relief sought

____

2. Current case status: Every defendant has been served or dismissed. yes no

• Every party who has not been defaulted has filed a responsive pleading. yes no

• Explanation of a “no” response to either of the above statements:
____

3. Amendments: A party anticipates filing an amendment to a pleading that will add a new party to the case: yes no

4. Settlement: The parties agree to engage in settlement discussions with a settlement judge assigned by the court, or a private mediator.

The parties will be ready for a settlement conference or a private mediation by __________.

If the parties will not engage in a settlement conference or a private mediation, state the reason(s):
____

5. Readiness: This case will be ready for trial by __________.

6. Jury:

• There is a right to a trial by jury. yes no

• If there is such a right, it has been waived by the parties. yes no

7. Length of trial: The estimated length of trial is ___ days.

8. Summary jury: The parties agree to a summary jury trial. yes no

9. Preference: This case is entitled to a preference for trial pursuant to the following statute or rule: ____

10. Special requirements: At a pretrial conference or at trial, a party will require disability accommodations (specify) ____

an interpreter (specify language) ____

11. Scheduling conference: The parties request a Rule 16(d) scheduling conference. yes no. If requested, the reasons for having a conference are

____

12. Other matters: Other matters that the parties wish to bring to the court’s attention that may affect management of this case:

____

13. Items upon which the parties do not agree: The parties certify that they were unable in good faith to agree upon the following items, and the position of each party as to each item is

as follows:

____

~~The parties must attach a good faith consultation certificate under Rule 7.1(h) to this Joint Report.~~

Dated this ___ day of __________, 20 ___.

For Plaintiff

For Defendant

Added Sept. 2, 2016, effective Jan. 1, 2017. Amended Aug. 31, 2017, effective July 1, 2018; Aug. 28, 2018, effective Jan. 1, 2019.

Form 13(a). Joint Report: Tier 3 Case

In the Superior Court of Arizona

__________ County

	)	
Plaintiffs	)	Case number ....
	)	
V	)	**Joint Report**
	)	
Defendants	)	*(Tier 3 case)*
	)	Assigned to:

The parties signing below certify that they have conferred <u>in good faith, either in person or by telephone as required by Rule 7.1(h),</u> about the matters set forth in Rule 16(b)(2) and (c)(3). With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 13 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

Optional Summary of Rule 16(b) Early Meeting (not to exceed 4 pages of text), split evenly between separate statements of the parties if they do not agree on the summary's contents:

1. Brief description of the case: ____

• If a claimant is seeking other than monetary damages, specify the relief sought

____

2. Current case status: Every defendant has been served or dismissed. yes no

• Every party who has not been defaulted has filed a responsive pleading. yes no

• Explanation of a "no" response to either of the above statements:

____

3. Amendments: A party anticipates filing an amendment to a pleading that will add a new party to the case: yes no

4. Settlement: The parties agree to engage in settlement discussions with a settlement judge assigned by the court, or a private mediator.

The parties will be ready for a settlement conference or a private mediation by __________.

If the parties will not engage in a settlement conference or a private mediation, state the reason(s): ____

5. Readiness: This case will be ready for trial by __________.

6. Jury:

• There is a right to a trial by jury. yes no

• If there is such a right, it has been waived by the parties. yes no

7. Length of trial: The estimated length of trial is ___ days.

8. Summary jury: The parties agree to a summary jury trial. yes no

9. Preference: This case is entitled to a preference for trial pursuant to the following statute or rule: ____

10. Special requirements: At a pretrial conference or at trial, a party will require disability accommodations (specify) ____

an interpreter (specify language) ____

11. Scheduling conference: The parties request a Rule 16(d) scheduling conference. yes no. If requested, the reasons for having a conference are

____

12. Other matters: Other matters that the parties wish to bring to the court's attention that may affect management of this case:

____

13. Items upon which the parties do not agree: The parties certify that they were unable in good faith to agree upon the following items, and the position of each party as to each item is as follows:

____

~~The parties must attach a good faith consultation certificate under Rule 7.1(h) to this Joint Report.~~

Dated this ___ day of __________, 20 ___.

For Plaintiff For Defendant

Added Aug. 31, 2017, effective July 1, 2018. Amended Aug. 28, 2018, effective Jan. 1, 2019.

Form 14(a). Joint Report: Commercial Case

In the Superior Court of Arizona

__________ County

	)	
Plaintiffs	)	Case number ....
	)	
v	)	**Joint Report**
	)	
Defendants	)	*(Commercial case)*
	)	Assigned to:

The parties signing below certify that they have conferred in good faith, either in person or by telephone as required by Rule 7.1(h), about the matters set forth in Rules 8.1(e) and 16(b)(2) and (c)(3), and that this case is not subject to the mandatory arbitration provisions of Rule 72. With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 14 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

1. Brief description of the case: ____

• If a claimant is seeking other than monetary damages, specify the relief sought

____

• This is a commercial case under Rule 8.1 because (refer to the specific provisions of Rule 8.1 that apply):

____

2. Current case status: Every defendant has been served or dismissed. yes no

• Every party who has not been defaulted has filed a responsive pleading. yes no
• Explanation of a "no" response to either of the above statements:

____

3. Amendments: A party anticipates filing an amendment to a pleading that will add a new party to the case: yes no

4. Special case management: Special case management procedures are appropriate: yes no If "yes," the following case management procedures are appropriate because: ____.

5. Commercial case management [Rule 8.1(~~f~~e)]:

a. Approximate Amount in Controversy $ __________

b. The commercial court should assign this case to a tier other than Tier 3 for the following reasons:

____

c. Anticipated Areas of Expert Testimony (not binding):

____

____

d. Electronically Stored Information

[] The parties do not expect electronically stored information to be at issue in this case.

[] The parties do expect electronically stored information to be at issue in this case.

Have the parties reached an agreement regarding the discovery of electronically stored information? yes no

If yes, have the parties filed a stipulated order? [] yes [] no

Do the parties currently have disputes or anticipate particular disputes over electronically stored information? [] yes [] no

If yes, please describe the dispute(s):

____

e. Privilege Issues and Protective Order

Have the parties reached an agreement regarding the inadvertent production of privileged material pursuant to Rule 502 of the Rules of Evidence? [] yes [] no

If so, have the parties filed a stipulated order? [] yes [] no

Have any issues arisen or do you expect any issues to arise regarding claims of privilege or protection of trial preparation materials pursuant to Rule 26(b)(6) or Rule 26.1(h)? [] yes [] no

If so, have the parties filed a stipulated protective order? [] yes [] no

6. Settlement: The parties agree to engage in settlement discussions with a settlement judge assigned by the court, or a private mediator.

The parties will be ready for a settlement conference or a private mediation by __________.

If the parties will not engage in a settlement conference or a private mediation, state the reason(s): ____

7. Readiness: This case will be ready for trial by __________.

8. Jury:

• There is a right to a trial by jury. yes no

• If there is such a right, it has been waived by the parties. yes no

9. Length of trial: The estimated length of trial is ___ days.

10. Summary jury: The parties agree to a summary jury trial. yes no

11. Preference: This case is entitled to a preference for trial under the following statute or rule: ____

12. Special requirements: At a pretrial conference or at trial, a party will require disability accommodations (specify) _____

an interpreter (specify language) ____

13. Other matters: Other matters that the parties wish to bring to the court's attention that may affect management of this case:

____

14. Items upon which the parties do not agree: The parties certify that they were unable

in good faith to agree upon the following items, and the position of each party as to each item is as follows:

____

Dated this ___ day of __________, 20 ___.

For Plaintiff For Defendant

Added Sept. 2, 2016, effective Jan. 1, 2017. Amended effective Feb. 8, 2017; Aug. 31, 2017, effective July 1, 2018; Aug. 28, 2018, effective Jan. 1, 2019.

BOG'S RULES REVIEW COMMITTEE
Reporting Form

Please begin typing in the shaded box.

NAME: George H. King PHONE: 480-534-4875

EMAIL ADDRESS: gking@lang-klain.com

REPRESENTING: Civil Practice & Procedure Committee

WHO WILL APPEAR BEFORE THE COMMITTEE? George H. King

SUBJECT: Rule Change Petition R-20-0006

BACKGROUND OF ISSUE:

Jodi Knobel Feuerhelm filed Petition R-20-0006 to make technical and clarifying amendments to Rules 7, 8.1, 16, 27, 55, and Rule 84 Forms 11(a), 12(a), 13(a), and 14(a), of the Arizona Rules of Civil Procedure. None of these proposed amendments are substantive.

ISSUE(S) (*please be specific*):

Whether to support the technical and clarifying amendments proposed in Petition R-20-0006.

DISCUSSION/ANALYSIS:

The Civil Practice and Procedure Committee ("CPPC") reviewed Petition R-20-0006 and agrees that the amendments proposed therein are appropriate and helpful. The CPPC's proposed Comment suggests a slightly different approach to one technical issue, namely how to harmonize tiering rules as between Rule 8.1 and Rule 26.2(d)(1). The Petitioner supports this approach, and the Comment.

RECOMMENDED RULES REVIEW COMMITTEE ACTION:

The CPPC recommends the State Bar file the proposed Comment in support of Petition R-20-0006.

VOTE OF THE COMMITTEE/SECTION (*if applicable*):

WAS A QUORUM PRESENT FOR THE VOTE? __X__YES __________NO

VOTE WAS: __X__UNANIMOUS __________ TO __________

IF YOUR COMMITTEE OR SECTION HAS A BREAKDOWN AMONG MEMBERS OF DEFENSE/PROSECUTION OR PLAINTIFF/DEFENSE COUNSEL, OR IF ANY OTHER SPLIT EXISTS, HOW WAS THE VOTE SPLIT AMONG THOSE GROUPS?

HOW WILL THIS PROPOSAL IMPACT THE STATE BAR'S BUDGET? STATE BAR STAFF?

__No impact__

IS THE RECOMMENDED ACTION CONSISTENT WITH THE KELLER DECISION?

__X__YES __________NO

DOES THIS ISSUE RELATE TO (check any that apply):

__________REGULATING THE PROFESSION

__________ IMPROVING THE QUALITY OF LEGAL SERVICES

____X____ IMPROVING THE FUNCTIONING OF THE SYSTEM OF JUSTICE

__________ INCREASING THE AVAILABILITY OF LEGAL SERVICES TO THE PUBLIC

__________ REGULATION OF TRUST ACCOUNTS

__________EDUCATION, ETHICS, COMPETENCY, AND INTEGRITY OF THE LEGAL PROFESSION

(Note that *Keller v. State Bar of California*, 496 U.S. 1 (1990), prohibits the expenditure of mandatory bar dues on political or ideological matters unrelated to these objectives.)

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:

PETITION FOR TECHNICAL AND CLARIFYING AMENDMENTS TO RULES 7, 8.1, 16, 37, 55, AND RULE 84 FORMS 11(a), 12(a), 13(a), AND 14(a), OF THE ARIZONA RULES OF CIVIL PROCEDURE

Supreme Court No. R-20-0006

PROPOSED COMMENT OF THE STATE BAR OF ARIZONA

Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona ("State Bar") writes in support of Petition R-20-0006 (the "Petition" seeking "Technical Amendments"). The State Bar has reviewed the Petition, and agrees that the Technical Amendments are needed to correct and clarify a handful of technical issues in the *Arizona Rules of Civil Procedure* caused by recent amendments. These issues include such minor items as incorrect cross-references and inconsistencies in the descriptions of particular litigation events.

The State Bar does have one suggestion for a slightly different approach to resolving an issue with respect to the Tier assignment for commercial cases. As

explained in the Petition, under Rule 8.1, an action may be assigned to the commercial court if the action involves certain business disputes except if the action "seeks ***only*** monetary relief in an amount less than $300,000." Rule 8.1(c) (emphasis added). This means that an eligible business dispute could be referred to the commercial court if the amount in controversy was less than $300,000 if a party sought non-monetary relief as well as monetary relief.

Prior to the 2019 Amendments thereto, Rule 8.1 recognized that such disputes should be presumptively assigned to Tier 3 for discovery purposes and to accomplish that result, contained a provision stating, "Notwithstanding any contrary language in Rule 26.2(d)(1)" commercial cases would be deemed assigned to Tier 3 until unless a different assignment was made. This provision was removed when Rule 8.1 was permanently adopted.

The Petition requests that this provision be reinserted in Rule 8.1, to allow eligible commercial cases to be presumptively assigned to Tier 3 even if the monetary relief sought is less than $300,000. Without restoring this provision, cases seeking less than $300,000 in monetary relief but otherwise eligible for commercial court would be assigned to Tier 2 under Rule 26.2(c)(3)(B).

The State Bar agrees with this result. It respectfully suggests a slightly different approach to accomplish that result. Specifically, the State Bar suggests that instead of having Rule 8.1 reference Rule 26.2(d)(1), it might be more clear to amend Rule 26.2(c)(3) to reference Rule 8.1. The State Bar proposes adding the underlined language to Rule 26.2(c)(3):

> <u>Except as provided in Rule 8.1</u>, all cases not assigned a tier by the procedures in Rule 26.2(c)(1) or (2) are deemed to be assigned a tier based on the damages claims in the action, as defined by Rule 26.2(e).

Rule 8.1(e) would also be amended to restore the deleted language presumptively assigning commercial cases to Tier 3, except for the "Notwithstanding" language referenced above. Rule 8.1 would then read:

> **(e) Case Management.** <u>From the filing of the complaint unless and until the commercial court assigns the case to a different tier after the Rule 16(d) scheduling conference, cases in the commercial court are deemed to be assigned to Tier 3.</u> Rules 16(a) through 16(j) apply to cases in the commercial court, except:

These two changes would clarify that the presumptive tier assignments in Rule 26.2(c)(3) may be trumped by the commercial court provisions contained in Rule 8.1, and would centralize the starting point for tier assignments in Rule 26.2.

CONCLUSION

With the slight modification set forth above, the State Bar recommends that the Court adopt the Technical Amendments sought in the Petition.

RESPECTFULLY SUBMITTED this ____day of________________, 2020.

____
Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Arizona Supreme Court
this ____day of _________, 2020.

by: ______________________________

CENTRAL ARIZONA NATIONAL LAWYERS GUILD
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IN THE ARIZONA SUPREME COURT

IN THE MATTER OF: PETITION TO AMEND THE RULES OF THE SUPREME COURT OF ARIZONA: RULE 24 – JURY SELECTION	R- PETITION TO AMEND THE RULES OF THE SUPREME COURT OF ARIZONA: RULE 24 – JURY SELECTION

Pursuant to Rule 28 of the Rules of the Supreme Court of Arizona, the Central Arizona National Lawyers Guild (Central AZ NLG), respectfully submits this petition to amend the Rules of the Supreme Court of Arizona by adopting a new rule, proposed here as Rule 24: Jury Selection, to eliminate the unfair exclusion of potential jurors based on race or ethnicity. The proposed rule would apply to all jury trials conducted by any court in Arizona.

Central AZ NLG's proposed amendment is incorporated into this pleading and attached to this petition.

I. INTERESTS OF PETITIONER

The Central Arizona National Lawyers Guild is a local chapter of the National Lawyers Guild located in the greater Phoenix metropolitan area.

The National Lawyers Guild (NLG) is the nation's oldest and largest progressive bar association and was the first one in the US to be racially integrated. Our mission is to use law for the people, uniting lawyers, law students, legal workers, and jailhouse lawyers to function as an effective force in the service of the people by valuing human rights and the rights of ecosystems over property interests**.** This is achieved through the work of our members, and the Guild's numerous organizational committees, caucuses and projects, reflecting a wide spectrum of intersectional issues. Guild members effectively network and hone their legal skills in order to help create change at the local, regional, national, and international levels.

The NLG is dedicated to the need for basic change in the structure of our political and economic system. Our aim is to bring together all those who recognize the importance of safeguarding and extending the rights of workers, women, LGBTQ people, farmers, people with disabilities and people of color, upon whom the welfare of the entire nation depends; who seek actively to eliminate racism; who work to maintain and protect our civil rights and liberties in the face of persistent

attacks upon them; and who look upon the law as an instrument for the protection of the people, rather than for their repression.

The proposed rule goes to the heart of Central AZ NLG's mission by ensuring that no person is ever denied a fair trial because a juror was excluded from serving on the jury because of racial or ethnic bias.

II. THE PURPOSE OF THE PROPOSED AMENDMENT

There is a strong consensus among legal scholars that racial and ethnic discrimination persists during jury selection. Reform is needed to address the subtle and persistent forms of discrimination that current procedures have permitted to continue unchecked.

A. *Batson v. Kentucky* has failed to eliminate racial and ethnic discrimination from jury selection.

"From its inception, the United States Supreme Court's landmark decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), has been roundly criticized as ineffectual in addressing the discriminatory use of peremptory challenges during jury selection, largely because it fails to address the effect of implicit bias or lines of voir dire questioning with a disparate impact on minority jurors." State v. Holmes, 334 Conn. 202, 204–05 (2019) (citing *Batson* v. *Kentucky*, supra, 476 U.S. at 106, 106 S.Ct. 1712 (Marshall, J., concurring); *State* v. *Veal*, 930 N.W.2d 319, 359–61 (Iowa 2019) (Appel, J., concurring in part and dissenting in part); *State* v. *Saintcalle*, 178 Wash. 2d 34, 46–49, 309 P.3d 326 (overruled in part on other grounds by *Seattle* v. *Erickson*, 188 Wash. 2d 721, 398 P.3d 1124 [2017]), cert. denied, 571 U.S. 1113, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013); J. Bellin & J. Semitsu, "Widening *Batson*'s

Net To Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 Cornell L. Rev. 1075, 1077–78 (2011); N. Marder, "*Foster* v. *Chatman*: A Missed Opportunity for *Batson* and the Peremptory Challenge," 49 Conn. L. Rev. 1137, 1182–83 (2017); A. Page, "*Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge," 85 B.U. L. Rev. 155, 178–79 and n.102 (2005); T. Tetlow, "Solving *Batson*," 56 Wm. & Mary L. Rev. 1859, 1887–89 (2015).).

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held the Equal Protection Clause of the Fourteenth Amendment is violated when the State exercises peremptory strikes in a discriminatory manner. 476 U.S. at 85–86. The right to a jury that represents a fair cross section of society extends to all defendants, regardless of whether the defendant is a member of a minority group.

To evaluate whether a prosecutor struck a juror for discriminatory reasons, courts must engage in a three-step process:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Miller-El v. Cockrell, 537 U.S. 322, 328–29 (2003) (internal citations omitted); *accord State v. Hardy*, 230 Ariz. 281, ¶ 12 (2012).

At the second step, "the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez v. New York*, 500 U.S. 352, 360 (1991). The second step "does not demand an explanation that is persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995). Thus, even "implausible or fantastic justifications" satisfy the second step. *Id*. at 768.

The third step is when the trial court evaluates the proffered reasons. *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). The proffer of a pretextual reason for striking a juror "naturally gives rise to an inference of discriminatory intent." *Id.* at 485.

However, trial courts are reluctant to find that a member of the bar has committed misconduct by providing a pretextual reason to mask discriminatory intent that served as the basis for striking the juror. *See* J. Bellin & J. Semitsu, "Widening *Batson*'s Net To Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 Cornell L. Rev. 1075, 1113 (2011) ("so long as a personally and professionally damning finding of attorney misconduct remains a prerequisite to awarding relief under *Batson*, trial courts will be understandably reluctant to find *Batson* violations"); M. Bennett, "Unraveling the Gordian Knot of

Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of *Batson*, and Proposed Solutions," 4 Harv. L. & Policy Rev. 149, 162–63 (2010) (noting dual difficulties that "[m]ost trial court judges will ... find such deceit [only] in extreme situations," while other troubling cases indicated that "some prosecutors are explicitly trained to subvert *Batson*"); R. Charlow, "Tolerating Deception and Discrimination After *Batson*," 50 Stan. L. Rev. 9, 63–64 (1997) ("[S]hould courts apply *Batson* vigorously, it would be even less appropriate to sanction personally those implicated. Moreover, judges may be hesitant to find *Batson* violations, especially in close cases, if doing so means that attorneys they know and see regularly will be punished personally or professionally as a result."); T. Tetlow, "Solving *Batson*," 56 Wm. & Mary L. Rev. 1859, 1897–98 (2015) ("[The *Batson* rule's focus on pretext] requires personally insulting prosecutors and defense lawyers in a way that judges do not take lightly, calling them liars and implying that they are racist. Technically, as some have argued, lying to the court constitutes an ethics violation that the judge should then report to the bar for disciplinary proceedings. Disconnecting the regulation of jury selection from the motives of lawyers will make judges far more likely to enforce the rule." [Footnotes omitted.]).

Even if trial judges were not reluctant to find that a member of the bar sought to strike a juror for discriminatory reasons, the existing *Batson* framework does

nothing to address the problems that implicit biases inject into our justice system's efforts to root out discrimination during jury selection.

B. Implicit bias is difficult to assess, and discriminatory motives are easily veiled.

"Implicit biases" are discriminatory biases based on either implicit attitudes-feelings that one has about a particular group-or implicit stereotypes-traits that one associates with a particular group." *See* Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 Calif. L. Rev. 945, 948-51 (2006).

The Connecticut Supreme Court recently explained why an understanding of implicit bias is paramount to addressing the evil of discrimination in our justice systems:

> In a leading article on implicit bias, Professor Antony Page makes the following observation with respect to a lawyer's own explanations for striking a juror peremptorily: "[W]hat if the lawyer is wrong? What if her awareness of her mental processes is imperfect? What if she does not know, or even cannot know, that, in fact, but for the juror's race or gender, she would not have exercised the challenge?" (Emphasis omitted.) A. Page, "*Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge," 85 B.U. L. Rev. 155, 156 (2005). "The attorney is both honest and discriminating based on race or gender. Such unconscious discrimination occurs, almost inevitably, because of normal cognitive processes that form stereotypes." (Emphasis omitted.) *Id.*, 180. Professor Page's landmark article "examines the findings from recent psychological research to conclude that the

lawyer often will be wrong, will be unaware of her mental processes, and would not have exercised the challenge but for the juror's race or gender. As a result (and not because of lying lawyers), the *Batson* peremptory challenge framework is woefully ill-suited to address the problem of race and gender discrimination in jury selection." (Emphasis omitted.) *Id*., 156.

The studies reviewed by Professor Page demonstrate that "few attorneys will always be able to correctly identify the factor that caused them to strike or not strike a particular potential juror. The prosecutor may have actually struck on the basis of race or gender, but she plausibly believes she was actually striking on the basis of a [race neutral] or [gender] neutral factor. Because a judge is unlikely to find pretext, the peremptory challenge will have ultimately denied potential jurors their equal protection rights." (Footnote omitted.) *Id*., 235. Although Professor Page argues that the social psychology research supports addressing implicit bias by eliminating peremptory challenges entirely; *id*., 261; in the alternative, he proposes (1) to eliminate the *Batson* procedure's requirement of subjective discriminatory intent, which also relieves judges of "mak[ing] the difficult finding that the lawyers before them are dishonest," (2) to instruct jurors about the concepts of unconscious bias and stereotyping, (3) to require educating attorneys about unconscious bias, with a requirement that they "actively and vocally affirm their commitment to egalitarian [nondiscriminatory] principles," and (4) to increase the use of race blind and gender blind questionnaires. *Id*., 260–61.

Similarly, Judge Mark W. Bennett, an experienced federal district judge, considers the "standards for ferreting out lawyers' potential explicit and implicit bias during jury selection ... a shameful sham"; he, too, urges (1) the inclusion of jury instructions and presentations during jury selection on the topic of implicit bias, to adequately explore a juror's impartiality, and (2) the administration of implicit bias testing to prospective jurors. M. Bennett,

> supra, 4 Harv. L. & Policy Rev. 169–70. *But see* J. Abel, "*Batson*'s Appellate Appeal and Trial Tribulations," 118 Colum. L. Rev. 713, 762–66 (2018) (discussing *Batson*'s greater value in direct and collateral postconviction review proceedings, particularly in habeas cases that afford access to evidence beyond trial record to prove discrimination).

State v. Holmes, 334 Conn. 202, 238–40 (2019).

In *Holmes*, the Connecticut Supreme Court concluded that it should follow the lead of the Washington Supreme Court by exploring ways that discrimination during jury selection could be ameliorated with the adoption of new rules. *Id*. at 248-249. This petition invites this Court to adopt the same rule that Washington promulgated as Washington General Rule 37.

C. The proposed rule provides guidance to litigants and the courts by creating standards that ameliorate the lack of guidance offered by *Batson* and its progeny.

To date, Arizona law has not been especially concerned with the failure of *Batson* to remedy the ongoing evil of discrimination during the jury selection process; rather Arizona law has emphasized whether its *Batson* approach is merely "sufficient" under the Fourteenth Amendment. *See*, *e.g*., *State v. Urrea*, 244 Ariz. 443, ¶ 10 (2018) (assessing the sufficiency of a trial court's remedy of a *Batson* violation). Arizonans deserve more than a "minimally adequate" framework to root out discrimination in jury selection. *Id*. at ¶ 20.

Rather than permit juries to be selected in a manner that is minimally adequate under the Fourteenth Amendment, the proposed rule will ensure that Arizona's *Batson* procedures are robust enough to effectively combat discrimination in the selection of juries. The proposed rule accomplishes this goal by providing explicit guidance to parties and the courts by outlining the procedures for conducting a *Batson* inquiry during jury selection.

The proposed rule is the product of extensive consideration of a working group established by the Washington Supreme Court. *See* "Proposed New GR 37-Jury Selection Workgroup: Final Report" (available at https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf).

In addition to outlining the procedures for courts, subsection (e) of the proposed rule accounts for implicit bias by modifying the third prong of the *Batson* analysis to establish an objective observer test. This objective observer test ameliorates the well-documented problems that judges face when confronted with the proposition that a member of the bar has committed misconduct by intentionally misleading a court about the party's discriminatory intent. Instead of requiring a finding of purposeful discrimination, the court would be tasked with assessing whether an objective observer would, under the totality of the circumstances, view race or ethnicity as a factor in the use of the peremptory strike.

The objective observer test would also empower appellate courts to remedy discriminatory acts during jury selection. In *State v. Jefferson*, the Washington Supreme Court explained the impact of the adoption of the objective-observer test:

> Whether "an objective observer could view race as a factor in the use of the peremptory challenge" is an objective inquiry. It is not a question of fact about whether a party intentionally used "purposeful discrimination," as step three of the prior *Batson* test was. It is an objective inquiry based on the average reasonable person—defined here as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in non-explicit, or implicit, unstated, ways. For that reason, we stand in the same position as does the trial court, and we review the record and the trial court's conclusions on this third *Batson* step *de novo*. This is a change from *Batson*'s deferential, "clearly erroneous" standard of review of the purely factual conclusion about "purposeful discrimination."

State v. Jefferson, 192 Wash. 2d 225, 249–50, 429 P.3d 467, 480 (2018).

Perhaps most importantly, subsections (h) and (i) of the proposed rule eliminate pretextual justifications for discriminatory strikes by establishing that certain explanations for striking a juror are presumptively invalid because they are historically connected to the life experiences of jurors who are often subject to racial and ethnic discrimination.

The proposed rule is easy to comprehend, provides fair notice to all parties about the applicable standards, and is fair.

III. THE PROPOSED AMENDMENT

Rules of the Supreme Court of Arizona: Rule 24

a) **Policy and Purpose.** The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) Scope. This rule applies in all jury trials.

(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.

(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors.

(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of Questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to Question the prospective juror about the alleged concern or the types of Questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more Questions or different Questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection, the following are presumptively invalid reasons for a peremptory challenge;

(i) having prior contact with law enforcement officers;

(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;

(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

(iv) living in a high-crime neighborhood;

(v) having a child outside of marriage;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

IV. CONCLUSION

"Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019). There is great "constitutional value in having diverse juries," insofar as "equally fundamental to our democracy is that all citizens have the opportunity to participate in the organs of government, including the jury. If we allow the systematic removal of minority jurors, we create a badge of inferiority, cheapening the value of the jury verdict. And it is also fundamental that the defendant who looks at the jurors sitting in the box have good reason to believe that the jurors will judge as impartially and fairly as possible. Our democratic system cannot tolerate any less." *State* v. *Saintcalle*, 178 Wash. 2d 34, 49–50, 309 P.3d 326 (overruled in part on other grounds by *Seattle* v. *Erickson*, 188 Wash. 2d 721, 398

P.3d 1124 [2017]), *cert. denied*, 571 U.S. 1113, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013).

Yet, there is a strong consensus that discrimination during jury selection has not been remedied by the existing procedures established by this Court and the United States Supreme Court.

Reform is necessary to ensure the integrity of our justice systems.

The proposed rule provides the reform needed to root out discrimination during jury selection.

For these reasons, this Court should adopt the proposed rule.

Respectfully submitted January 09, 2020.

CENTRAL ARIZONA NATIONAL LAWYERS GUILD

BY: /s/ *Kevin D. Heade*
KEVIN D. HEADE

THE PROPOSED AMENDMENT

Rules of the Supreme Court of Arizona: Rule 24

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BOG'S RULES REVIEW COMMITTEE
Reporting Form

Please begin typing in the shaded box.

NAME: Will Fischbach PHONE: 602.255.6036

EMAIL ADDRESS: wmf@thaw.com

REPRESENTING: Civil Practice & Procedure Committee

WHO WILL APPEAR BEFORE THE COMMITTEE? ______________________

SUBJECT: Proposed Comment regarding Petition to add Supreme Court Rule 24: Jury Selection

BACKGROUND OF ISSUE:

The Petition seeks to add a new Supreme Court Rule 24 to address perceived challenges in the ability of trial courts to enforce the holding in *Batson v. Kentucky*, 476 U.S. 79 (1986) and its civil counterpart *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991).

ISSUE(S) (*please be specific*):

In *Batson*, the United States Supreme Court held that the Equal Protection Clause is violated where the prosecution uses peremptory challenges to exclude black members of the jury solely on the basis of their race. *Batson* created a framework for trial courts to analyze cases of alleged discrimination in jury selection, namely by requiring the prosecution to proffer a racially neutral explanation for challenging the potential juror. In *Edmonson*, the Supreme Court held that *Batson*'s holding applied in civil jury cases.

Many courts and commentators have argued that *Batson*'s framework has been ineffectual in eliminating the use of racially motivated peremptory challenges. The Petition seeks to address these issues by proposing that the Court adopt Washington's General Rule ("GR") 37, which was enacted by the Washington Supreme Court on April 24, 2018, following lengthy study and issuance of a report and recommendations by Washington's "Jury Selection Workgroup."

DISCUSSION/ANALYSIS:

The elimination of racially discriminatory peremptory challenges in jury selection is critical to the functioning of the justice system and integrity of the legal profession. Recognizing the seriousness of the issue, the State Bar's Civil Practice & Procedure Committee and its Criminal Practice & Procedure Committee proactively initiated the formation of a joint working group to study the Petition and evaluate how these issues can best be addressed in Arizona, following discussions with Petitioner. The State Bar's working group will be comprised of members of the Criminal Practice & Procedure Committee on both the criminal defense and the prosecution side, members of the Civil Practice &

Procedure Committee, and other interested stakeholders, including the Petitioner. While Washington's approach provides a helpful framework and starting point for that analysis, the State Bar believes that further consideration will be helpful in developing an Arizona rule that has broad support.

RECOMMENDED RULES REVIEW COMMITTEE ACTION:

The State Bar therefore recommends that consideration of the Petition be continued to the August 2021 Rules Agenda so that the State Bar's working group can study the efficacy of GR 37 and other possible frameworks to achieve the Petition's goal. The proposed Comment has been reviewed and approved by leadership for the Criminal Practice & Procedure Committee.

VOTE OF THE COMMITTEE/SECTION (*if applicable*):

WAS A QUORUM PRESENT FOR THE VOTE? __X__YES _________NO

VOTE WAS: __X__UNANIMOUS _________ TO _________

IF YOUR COMMITTEE OR SECTION HAS A BREAKDOWN AMONG MEMBERS OF DEFENSE/PROSECUTION OR PLAINTIFF/DEFENSE COUNSEL, OR IF ANY OTHER SPLIT EXISTS, HOW WAS THE VOTE SPLIT AMONG THOSE GROUPS?

HOW WILL THIS PROPOSAL IMPACT THE STATE BAR'S BUDGET? STATE BAR STAFF?

No impact anticipated

IS THE RECOMMENDED ACTION CONSISTENT WITH THE KELLER DECISION?

__X__YES _________NO

DOES THIS ISSUE RELATE TO (check any that apply):

_________REGULATING THE PROFESSION

_________ IMPROVING THE QUALITY OF LEGAL SERVICES

__X__ IMPROVING THE FUNCTIONING OF THE SYSTEM OF JUSTICE

_________ INCREASING THE AVAILABILITY OF LEGAL SERVICES TO THE PUBLIC

_________ REGULATION OF TRUST ACCOUNTS

__X__EDUCATION, ETHICS, COMPETENCY, AND INTEGRITY OF THE LEGAL PROFESSION

(Note that *Keller v. State Bar of California*, 496 U.S. 1 (1990), prohibits the expenditure of mandatory bar dues on political or ideological matters unrelated to these objectives.)

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: **PETITION TO AMEND THE RULES OF THE SUPREME COURT OF ARIZONA: RULE 24 – JURY SELECTION**	Supreme Court No. R-20-0009 **PROPOSED COMMENT OF THE STATE BAR OF ARIZONA**

11 Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona ("State Bar")
12 submits the following comment with respect to Petition R-20-0009 (the "Petition")
13 filed by Kevin Heade on behalf of the Central Arizona National Lawyers Guild.
14 The Petition seeks to add a new Supreme Court Rule 24 to address perceived
15 challenges in the ability of trial courts to enforce the holding in *Batson v. Kentucky*,
16 476 U.S. 79 (1986) and its civil counterpart *Edmonson v. Leesville Concrete Co.,*
17 *Inc.*, 500 U.S. 614 (1991). The Petition does this by proposing that the Court adopt
18 Washington's General Rule ("GR") 37, which was enacted by the Washington
19 Supreme Court on April 24, 2018, following lengthy study and issuance of a report
20 and recommendations by Washington's "Jury Selection Workgroup."
21
22

The goal of the Petition is unquestionably laudable and desirable: the elimination of racially discriminatory peremptory challenges in jury selection. Recognizing the seriousness of the issue, the State Bar's Civil Practice & Procedure Committee and its Criminal Practice & Procedure Committee proactively initiated the formation of a joint working group to study the Petition and evaluate how these issues can best be addressed in Arizona, following discussions with Petitioner.[1] While Washington's approach provides a helpful framework and starting point for that analysis, the State Bar believes that further consideration will be helpful in developing an Arizona rule that has broad support.

The State Bar therefore recommends that consideration of the Petition be continued to the August 2021 Rules Agenda so that the State Bar's working group can study the efficacy of GR 37 and other possible frameworks to achieve the Petition's goal.

DISCUSSION

I. THE HOLDING IN *BATSON* AND THE CHALLENGES IN ITS ENFORCEMENT.

Batson is among the pantheon of notable United States Supreme Court civil rights cases decided in the past 50 years. James Kirby Batson, a black man, was

[1] The State Bar's working group is comprised of members of the Criminal Practice & Procedure Committee on both the criminal defense and the prosecution side, members of the Civil Practice & Procedure Committee, and other interested stakeholders, including the Petitioner. The State Bar understands that the Petitioner may agree to voluntarily continue or withdraw the Petition to allow further time for the working group to study these issues.

1 indicted in Kentucky on charges of second-degree burglary and receipt of stolen
2 goods. The prosecutor used all of his peremptory challenges to remove all of the
3 black jurors. Batson moved to discharge the jury, arguing that the removal of all
4 black members of the jury violated his rights under the Sixth and Fourteenth
5 Amendments to the United States Constitution. The trial court denied the motion,
6 reasoning that litigants can use peremptory challenges to "strike anybody they want
7 to." The jury convicted Batson and the Supreme Court of Kentucky affirmed.

8 The Supreme Court of the United States granted certiorari and reversed. The
9 opinion by Justice Powell held that the Equal Protection Clause is violated where
10 the prosecution excludes black members of the jury solely on the basis of their race.
11 *Batson* created a framework for the lower courts to analyze cases of alleged
12 discrimination in jury selection:

13 - The defendant must make a prima facie showing of discriminatory
14 purpose by demonstrating that he or she is a member of a specific racial
15 group and the prosecutor has used a peremptory challenge to remove a
16 juror of the same racial group.
17 - The prosecutor may rebut the inference of discrimination by offering a
18 racially neutral explanation for challenging the potential juror.
19 - The trial court must determine whether the reasoning given by the
20 prosecutor was indeed neutrally based or merely a pretext for racial
21 discrimination.
22

Five years later, in *Powers v. Ohio*, 499 U.S. 400 (1991), the Court held that a criminal defendant may object to race-based exclusions of jurors regardless of whether or not the defendant and excluded jurors share the same race, reasoning that a prospective juror has an independent Constitutional right to sit on a jury regardless of their race. Finally, in *Edmonson*, *supra*, the Court held that *Batson*'s holding applied in civil jury cases.

Decades later, many courts and commentators have argued that *Batson*'s framework has been ineffectual in eliminating the use of racially motivated peremptory challenges. *See, e.g.*, *State v. Holmes*, 334 Conn. 202, 204–05 (2019) ("From its inception, the United States Supreme Court's landmark decision in [*Batson*] has been roundly criticized as ineffectual in addressing the discriminatory use of peremptory challenges during jury selection, largely because it fails to address the effect of implicit bias or lines of voir dire questioning with a disparate impact on minority jurors."); *see also* Petition at 4-5 (citing cases and articles).

II. WASHINGTON'S EXAMPLE AND THE NEED TO STUDY *BATSON* REFORM.

Washington has led the way in enacting reform to respond to this criticism. In 2017, the Supreme Court of Washington adopted a "bright line rule" stating that the "trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury." *City of Seattle v. Erickson*, 188 Wash. 2d 721, 734 (2017). Then, on April 24, 2018, the

Supreme Court of Washington adopted GR 37, on which the instant Petition is modeled. Later that same year, the Supreme Court of Washington applied GR 37 to add an "objective observer" component to the third prong of the *Batson* framework:

> The question at the third step of the *Batson* framework is not whether the proponent of the peremptory strike is acting out of purposeful discrimination. Instead, the relevant question is whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." If so, then the peremptory strike shall be denied.

State v. Jefferson, 192 Wash. 2d 225, 249 (2018) (applying GR 37).

Appellate courts in other states have cited to Washington and GR 37 to call for reforms to the *Batson* framework. *See, e.g., People v. Bryant,* 40 Cal. App. 5th 525, 548 (Ct. App. 2019), review denied (Jan. 29, 2020) (Humes, P.J., concurring) ("The State of Washington has shown that other reforms are also possible."); *State v. Veal*, 930 N.W.2d 319, 340 (Iowa 2019), reh'g denied (July 15, 2019) (Wiggins, Justice, concurring in part and dissenting in part) ("In the majority of the cases, the reasons given by prosecutors in response to a *Batson* challenge appear to be pretextual. Washington General Rule 37 . . . helps but does not solve the problem."); *State v. Curry*, 298 Or. App. 377, 389, (2019) ("Washington's experience, and whether a similarly concrete set of rules would improve our

handling of peremptory challenges, are questions that may be appropriate for the Council on Court Procedures and the legislature to consider.").

At least two states are actively examining *Batson* reforms in the task force and work group setting: California and Connecticut. *See, e.g., Holmes, supra*, 334 Conn. at 206 (creating a "Jury Selection Task Force, appointed by the Chief Justice, to consider measures intended to promote the selection of diverse jury panels in our state's court-houses"); Announcement of the Supreme Court of California, January 15, 2020, available at: https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20200/SupCt20200129.pdf.

III. CONCLUSION

Given the seriousness and importance of the issues, Arizona should join Washington and other states in actively studying how *Batson* can be more effectively enforced in our trial courts. Accordingly, the State Bar recommends continuing the Petition to the August 2021 Rules Agenda to allow the joint working group of its Criminal Practice & Procedure and Civil Practice & Procedure Committees, along with other stakeholders, to study the issue—to include examining the successes and challenges in implementing Washington's GR 37, as well as exploring other possible frameworks.[2]

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[2] For example, although Washington's Jury Selection Workgroup identified several recommendations, there was not complete consensus. The Washington Jury Selection

In recommending continuing the Petition, the State Bar does not mean to discount the urgency in eliminating the specter of racial discrimination in the jury selection process. The State Bar believes, however, that the collective experience of this working group will aid the Court in examining how reforms can be most effective in achieving *Batson*'s objectives in Arizona's trial courts.

RESPECTFULLY SUBMITTED this ____day of________________, 2020.

____
Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Arizona Supreme Court
this ____day of _________, 2020.

by: _______________________________

Workgroup's final report is available at https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf.

Hon. Kyle Bryson, Petitioner
Presiding Judge
Superior Court of Arizona in Pima County
110 W. Congress St., Tucson, AZ 85701

IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO PERMANENTLY	)	No. R-20-
ADOPT RULES FOR THE FAST TRIAL	)	
AND ALTERNATIVE RESOLUTION	)	
PROGRAM ("FASTAR")	)	
______________________________	)	

By Administrative Order No. 2017-116, this Court adopted Rules of the Fast Trial and Alternative Resolution Program, commonly referred to by the acronym "FASTAR," for a pilot program in the Superior Court of Arizona in Pima County. The pilot program has made significant progress in accomplishing its objectives. In anticipation of making the program a permanent feature in Pima County, and to facilitate the implementation of similar programs in other counties, Petitioner now requests the Court to permanently adopt those rules, with several modifications. The proposed modifications to the FASTAR rules and forms appear in the Appendix and are shown by strikethrough, underline, and yellow highlights.

- Bullet points in this petition discuss the reasons for each of the requested modifications.

(1) Background. Supreme Court Administrative Order No. 2015-126 established the Committee on Civil Justice Reform ("CJRC"). In October 2016, the CJRC submitted to the Arizona Judicial Council ("AJC") its final report with more than a dozen recommendations. Several of these recommendations culminated in the Court's adoption by Order No. R-17-0010 of amendments to the Arizona Rules of Civil Procedure ("Civil Rules"), including a tiering system of differentiated case management.

The CJRC also recommended the implementation of a pilot program in Pima County that allowed plaintiffs whose complaints requested a limited amount of money damages (essentially, Tier 1 cases) to opt for a short trial rather than proceeding to compulsory arbitration under current Civil Rules 72 through 77. The compulsory arbitration program was originally intended to provide a speedy and economical alternative to a jury trial. However, after years of experience with the compulsory arbitration program, the CJRC determined that these goals were not uniformly achieved.

The CJRC found that the time from filing a complaint to the entry of judgment on an arbitration award could require as much time as if the matter had initially gone to trial. The CJRC also found that court-appointed arbitrators occasionally have no

experience in the subject matter they are arbitrating, or that setting arbitration hearings and deciding cases are lesser priorities for arbitrators than attending to their clients' cases. Some litigants reportedly felt they did not have their day in court when their case was heard in an attorney's office rather than a courtroom.[1] Compulsory arbitration provides a right to appeal an arbitration award, but "appeal" is a misnomer; it is really a trial de novo that often involves new witnesses and evidence—increasing rather than mitigating litigation costs—rather than strictly an appeal on the record of the arbitration. Moreover, defendants who prevail at the new trial can obtain potentially draconian sanctions, including attorney's fees and expert witness fees, against a plaintiff who nonetheless prevailed at the arbitration. (See Civil Rule 68(g) regarding sanctions on an offer of judgment, and Civil Rule 77(h) concerning sanctions on an appeal from a compulsory arbitration award.)

(2) The FASTAR Program. The proposed FASTAR rules were previously adopted by Administrative Order No. 2017-116 in conjunction with a FASTAR pilot program in the Superior Court of Arizona in Pima County. The three-year pilot began in November 2017, and these rules provided a procedure for cases in the pilot. The rules apply in superior court cases in which a plaintiff requests only monetary damages, and the amount sought by any party does not exceed $50,000. The rules

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[1] One commentator observed that a hearing before a conscripted lawyer in a law office is not the equivalent of a day in court.

allow claimants to choose either Alternative Resolution, which is like compulsory arbitration, or a Fast Trial before a judge or a jury. The Fast Trial option allows plaintiffs to have their day in court, eliminates the need for an expensive trial de novo following an arbitration award, provides trial experience for attorneys, and underscores the historic and cultural role of juries in the American justice system.[2]

(3) The FASTAR Rules. The FASTAR rules were vetted by members of the Pima County Bar during judicial outreach before the start of the pilot program. To easily differentiate these rules from the Rules of Civil Procedure, each FASTAR rule is identified by a three-digit number. The FASTAR rules are in three parts. Part One applies to all FASTAR cases. Three FASTAR forms are associated with the rules in Part One. Parts Two and Three respectively apply to cases in the Fast Trial and Alternative Resolution Tracks.

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[2] A recent phenomenon is known as the "vanishing jury trial." See, for example, an article by Rosalind Greene and Jan Mills Spaeth, "The Vanishing Jury," in the April 2010 issue of the *Arizona Attorney*: "In 2001, of the total number of civil cases disposed of in Arizona, five percent were tried before a jury (2,331 versus 49,333, excluding appeals). This percentage has dropped consistently since then. In 2008, this percentage was one percent (346 jury trials versus 65,502 dispositions, excluding appeals)." See further an article by Kelly Wilkins and Troy Daniel Roberts, "Arizona Civil Verdicts: 2018," *Arizona Attorney,* June 2019: "The number of reported verdicts is still declining. The number of Arizona cases that are tried all the way to verdict started to decline in 2009. Each year since then except for 2016, the number of trials dropped." With so few civil jury trials, how do counsel get trial experience? The FASTAR program promotes the use of jury trials and provides new attorneys with jury trial experience.

Part One: Rules for the Fast Trial and Alternative Resolution Program (Rules 101 through 109).

Rule 101: Fast Trial and Alternative Resolution Generally. Rule 101(a) introduces the FASTAR acronym and allows citations to these rules by that acronym. Rule 101(a) also recites the program's objective, which is "to achieve a more efficient and inexpensive, yet fair, resolution of eligible cases."

- Petitioner is requesting a noteworthy change to Rule 101(a). The current provision says that the FASTAR rules "apply in counties designated for the superior court's pilot program for a fast trial with an alternative resolution option." Petitioner proposes modifying this clause to say that the rules "apply in counties where the superior court has established a program for a fast trial with an alternative resolution option." This modification would allow any of Arizona's 15 counties to establish a permanent FASTAR program by local rule, administrative order, or policy.

Rule 101(b) requires the court administrator to assign civil actions to the program that meet these four eligibility criteria: (1) the plaintiff requests only monetary damages, and not injunctive or non-monetary relief; (2) the amount of money sought by each plaintiff exceeds the limit set by local rule for compulsory

arbitration[3]; (3) the amount of money sought by any party, including punitive damages but excluding attorney fees, does not exceed $50,000; and (4) the plaintiff will not need to complete service on any defendant in a foreign country. This last criterion excludes cases involving international service because that might require more time than contemplated by Rule 104, discussed below. Rule 101(c) provides that these rules supplement the Arizona Rules of Civil Procedure, and that the Civil Rules—excluding Rules 72 through 77, the rules on compulsory arbitration—continue to apply to FASTAR cases. However, Rule 101(c) also says that a FASTAR rule applies when a civil rule is inconsistent with a FASTAR rule, or if the FASTAR rules specifically provide otherwise.

- In Rule 101(b), Petitioner proposes adding the words "or Clerk," i.e., "the court administrator or Clerk will assign to the FASTAR program…." This modification would account for different county-by-county practices in who has responsibility for assigning cases.

Rule 102: Certificates; Forms. Rule 102(a) requires a plaintiff who files any civil case that requests money damages not exceeding $50,000 for any one claimant to concurrently file a certificate (Form 102(a)) stating whether the case meets the four eligibility criteria specified in Rule 101, and to serve the certificate with the

[3] In conjunction with the pilot program, the Superior Court in Pima County lowered its limit for compulsory arbitration to $1,000.

summons and complaint. Rule 102(b) requires a defendant who disagrees with plaintiff's certificate to timely file a controverting certificate (Form 102(b)).

- In Rule 102(a), Petitioner requests a clarifying amendment that adds the word "only," i.e., "At the time of filing any civil complaint requesting only money damages not exceeding $50,000…."

Petitioner also proposes adding to Rule 102 a new section (d) titled "Exceptions." The text of this new section says,

> If extraordinary case characteristics indicate that an otherwise eligible case is not suitable for FASTAR, a party for good cause shown may request the court under Civil Rule 26.2 to assign the case to a different tier.

This provision would act as a safety value and allow the court in exceptional circumstances to assign an otherwise eligible case to a different tier under Civil Rule 26.2, thereby removing the case from FASTAR. The term "case characteristics," as well as a standard of good cause shown, are also used in Civil Rule 26.2, which further link this new FASTAR provision to the court's authority to reassign cases under Civil Rule 26.2(c).

Rule 103: Plaintiff's Choice. Rule 103(a) states that for every case in the FASTAR program, the plaintiff alone has the choice of whether the case should proceed by Fast Trial or Alternative Resolution. Under Rule 103(b), the plaintiff must file a "Choice Certificate," making this election when filing the complaint or within 20 days after the first filing by a defendant. A key provision of Rule 103(b)

provides that if the plaintiff elects the Alternative Resolution option, the plaintiff waives two rights: the right to have a trial before a judge or jury, and the right to appeal the Alternative Resolution award to the superior court (i.e., waives the right to a trial de novo) or to an appellate court. If the plaintiff does not timely file a Choice Certificate, the case proceeds to Fast Trial under Rule 103(c). Rule 103(d) describes the effect of a counterclaim. The rule provides that if the plaintiff chose Alternative Resolution and the defendant thereafter filed a counterclaim, the plaintiff retains the right to appeal the award on the counterclaim, Rule 103(b) notwithstanding.

- Petitioner is requesting a non-substantive change, specifically, that the Choice Certificate, which is unnumbered in the current FASTAR rules, have a numerical designation: Form 103(b). A reference to Form 103(b) was added to Rule 103(b)(1).

Rule 104: Modification of Civil Rule 4(i). Rule 104(a) states that Civil Rule 4(i), which provides a 90-day limit for service of process, does not apply to FASTAR cases. Instead, the plaintiff must serve process within 60 days. If the plaintiff does not do so, then under Rule 104(b), the court will notify the plaintiff of its intent to dismiss the case, without prejudice, in 15 days. Rule 104(c) permits the plaintiff to request a 30-day extension to complete service. Under Rule 104(d), if a served defendant has not filed a response to the complaint, and if the plaintiff has not

applied to default that defendant, then the court, after notice, will dismiss that defendant on the 120th day after the complaint was filed.

Some attorneys reported challenges in meeting the FASTAR service deadline. If a case presents extraordinary circumstances concerning service of a complaint—rather than difficulties resulting from tardiness in attempting service—proposed Rule 102(d), discussed above, might provide an avenue for relief.

Rule 105: Modification of Civil Rules 4.1 and 4.2 Regarding Waiver of Service. Civil Rule 4(f) distinguishes accepting service and waiving service. Waivers of service are further governed by Civil Rules 4.1(c) and 4.2(d). FASTAR 105 modifies the time specified in the Civil Rules for responding to a summons and complaint after a waiver of service.

Rule 106: Assignment of a Judge. The rule requires the assignment of a judge to every FASTAR case and allows notices of change of judge as provided by Civil Rules 42.1 and 42.2.

Rule 107: Medical Authorizations. Rule 107 is a codification of a best practice and is intended to mitigate discovery disputes and concomitant delay. In a personal injury action, and except for records subject to a properly asserted privilege claim, Rule 107 requires a plaintiff to provide the defendant with a written authorization that allows the defendant to obtain copies of records identified in a

disclosure statement or that otherwise relate to the condition that is the subject of the action.

Rule 108: Disclosure and Discovery Disputes. FASTAR Rule 111(d) currently provides that Civil Rule 16(b), which requires parties to file a joint report and proposed scheduling order, does not apply to Fast Trial Cases. Petitioner believes the requirements also should not apply to cases in the Alternative Resolution track. Accordingly, a new Rule 108(a) ("generally") now includes a broader provision that exempts all FASTAR cases from the requirements of Civil Rule 16(c). New Rule 111(a) also clarifies that the requirements of Civil Rule 16(b), which pertains to the required early meeting, do apply in FASTAR cases.

Rule 108(b) ("disclosure and discovery disputes") contains the text of current Rule 108. This provision requires parties who have disclosure or discovery disputes that they cannot satisfactorily resolve to present their dispute to the court in a joint motion, with each side's position stated in no more than 1-½ pages. A modification to the provision would no longer allow the arbitrator to rule on such motions. Instead, and because the plaintiff in an Alternative Resolution proceeding has no right to appeal, the motion would be presented to the assigned judge.

Rule 109: Application of Civil Rule 68 Regarding Offers of Judgment. The rule provides that Rule 68 (an offer of judgment) does not apply to a Fast Trial but such an offer is permitted in an Alternative Resolution proceeding. This rule

ameliorates the chilling effect that Rule 68 can have on plaintiffs who exercise the right to trial, but as a compromise, the rule leaves the Rule 68 option intact for Alternative Resolution.

Part Two: Rules for a Fast Trial (Rules 110 through 119).

Rule 110: Role of the Assigned Judge. This rule simply provides that the assigned judge will make all legal rulings in the case, including rulings on motions, and will conduct a trial.

Rule 111: Conferences; Trial. Rules 111(a) and (b) require the judge to set a status and trial setting conference within 120 days—and a trial date at least 190 but not more than 270 days—after the complaint was filed. Rule 111(c) permits the judge to set one or more Rule 16 pretrial conferences. FASTAR Rule 111(d), which currently provides that Civil Rule 16(b) is inapplicable in Fast Trial cases, would be abrogated and replaced by new FASTAR Rule 108(a), discussed above. Rule 111(e), which allows the judge to impose sanctions against a party who is unprepared to participate in a court conference in good faith, would be renumbered as FASTAR Rule 111(d).

Rule 112: Disclosure and Discovery in Fast Trial Cases. Rule 112(a) requires the exchange of disclosure statements within 20 days after the filing date of the first answer. Compare Rule 26.1(f), which has a 30-day deadline, and FASTAR Rule 122(a), which also has a 30-day deadline.

- To conform the Fast Trial disclosure deadline with the other mentioned deadlines, Petitioner requests the Court to modify Rule 112(a) so that it also provides a 30-day deadline for the initial disclosure.

The discovery limits in Rule 112(b) correspond with the discovery limits in Tier 1 cases under Civil Rule 26.2. Under Rule 112(c), the parties must complete discovery within 120 days after the filing of the first answer, or 190 days after the filing of the complaint, whichever is sooner.

Rule 113: Depositions of Medical Providers and Other Experts. Rule 113 contains several special provisions for deposing an expert or a medical provider, regardless of whether the medical provider is identified as an expert witness. Under Rule 113(a), and to mitigate costs, the duration of these depositions is limited to one hour per side and a total of two hours. To minimize disruption, the parties must endeavor to take the deposition at the expert's or provider's usual place of business. Rule 113(b) limits the expert's or provider's deposition fee to that person's usual fee, but it may not exceed $500 per hour without good cause. Moreover, the fee must be paid by the attorneys attending the deposition in proportion to the time each attorney used for asking questions. Under Rule 113(c), a party may record the deposition by any unobtrusive or reliable device without leave of court and must promptly provide a copy of the recording to the other parties without charge.

Rule 114: Summary Judgment Motions. Civil Rule 56(b) requires that a motion for summary judgment be filed 90 days before trial. Rule 114 reduces that time to 60 days and provides shorter periods than Civil Rule 56(c) for filing a response or reply.

Rule 115: Settlement. Rule 115(a) requires parties who settle a Fast Trial case to file an appropriate stipulation for entry of judgment or for dismissal. If the parties fail to timely notify the court of a settlement, they are responsible for payment of jury fees.

Rule 116: Defaults. This rule allows the court to conduct Civil Rule 55 default proceedings against any defaulted defendant, and to proceed with a Fast Trial for the remaining parties.

Rule 117: Fast Trial. Under Rule 117(a), the court sets each Fast Trial case for a jury trial, without the necessity of a jury demand, but the parties may stipulate to waive a jury. The parties also may stipulate to having 6 jurors decide the case, rather than 8, and in that event, 5 of the 6 jurors must agree on a verdict. Alternate jurors are not required. Rule 117(b) specifies the required contents for the parties' pretrial statement and provides that a party may not call a witness or offer an exhibit not identified in the pretrial statement. Rule 117(c) details additional documents the parties must file for a jury trial, such as questions for jury selection, jury instructions, and verdict forms.

Rule 117(d) provides that the Arizona Rules of Evidence apply to a Fast Trial. However, certain documents listed in the joint pretrial statement—including medical bills, records, and reports; repair bills; records of regularly conducted activity; and a witness' deposition—are admissible if there is no objection. Subject to objections, a party who deposed and made a video recording of an expert or medical provider under Rule 113(c) may introduce the recording to avoid the cost of calling the person at trial. Rule 117(f) authorizes the issuance of subpoenas for a Fast Trial pursuant to Civil Rule 45. Rule 117(g) specifies the order of a Fast Trial —it's as described in Civil Rule 40—and provides that the Civil Rules govern such things as jury selection, juror notebooks, questions from the jury, deliberations, and the return of a verdict. Rule 117(g) also has a presumptive 2-day limit on the length of a Fast Trial, with per side limits of 15 minutes for voir dire, 20 minutes for opening statements, 3 hours for a case-in-chief and cross-examination, and 30 minutes for closing argument.

Rule 118: Post-Trial Procedures; Appeal. Under Rule 118(a), the process by which the prevailing party must prepare a statement of costs and request for attorneys' fee (if any), and for the entry of judgment, are as provided in Civil Rules 54 and 58. In the event the jury verdict exceeds the FASTAR monetary limit, Rule 118(b) provides that the court must enter judgment for the full verdict amount.

Under Rule 118(c), a party may file post-trial motions as in other civil cases. Rule 118(d) allows the appeal of a final Fast Trial judgment as provided by law.

Part Three: Rules for Alternative Resolution (Rules 120 through 126). FASTAR Rules 120 through 126 generally correspond to Civil Rules 72 through 77, as noted in the table below. Noteworthy differences between these Civil Rules and the FASTAR rules are discussed in the text that follows the table.

FASTAR Rule #	FASTAR Rule Title	Civil Rule #	Civil Rule Title
--	none	72	Suitability for Arbitration
120	Assignment of an Arbitrator	73	Appointment of Arbitrator
121 122	General Duties of an Arbitrator Prehearing Procedures	74	General Proceedings and Prehearing Procedures
123	Hearing Procedures	75	Hearing Procedures
124 125	Arbitrator's Decision, Award, and Judgment Arbitrator's Compensation	76	Posthearing Procedures
126	Appeal	77	Appeal

There is no equivalent to Civil Rule 72 ("suitability for arbitration") in Part Three of the FASTAR Rules because suitability for Alternative Resolution is determined by two preliminary FASTAR Rules, Rules 102 and 103.

Rule 120: Assignment of an Arbitrator. Unlike Civil Rule 73, FASTAR Rule 120(a) begins with this general statement: "An arbitrator conducts an Alternative Resolution Proceeding." So, although a proceeding under the Civil Rules is called "compulsory arbitration" and under FASTAR it is called "Alternative Resolution," both proceedings are conducted by an arbitrator. FASTAR 120 is unlike Civil Rule 73 because it includes a provision (section (c)) allowing the court administrator to maintain a list of specialty arbitrators with designated areas of specialization, concentration, or expertise. This provision is intended to match the arbitrator's experience with the subject matter of the case. Also, FASTAR 120, section (i), allows duties otherwise performed by the court administrator to be performed by the court clerk, as provided by local rules, administrative orders, or policies. This provision might be of special benefit to the superior court in smaller counties. Civil Rule 73 includes a provision for "arbitration by agreement of reference," whereas FASTAR 120 contains no corresponding provision.

Rule 121: General Duties of an Arbitrator, and ***Rule 122: Prehearing Procedures.*** Civil Rule 74 was separated into two FASTAR rules to focus on the distinct subject matters of that civil rule. FASTAR Rule 121(a) ("arbitrator's powers) is like Civil Rule 74(a), except it adds a new second sentence that says, "An arbitrator is personally immune from suit with respect to actions taken under this and the following rules." FASTAR Rule 121(d) ("offer of judgment"), although

somewhat redundant to FASTAR Rule 109, is a reminder that parties to an Alternative Resolution proceeding may make Civil Rule 68 offers of judgment.

FASTAR Rule 122(a) provides a 30-day period for exchanging disclosures in the Alternative Resolution track. Because it is procedural in nature, the scheduling of an arbitration hearing (Civil Rule 74(c)) has been relocated to FASTAR Rule 122(b), within the rule on prehearing procedures.

- The Alternative Resolution rules do not currently include a deadline for completing discovery, nor do they contain discovery limits. To have similar limits as Fast Trial Rule 112(b) and a similar deadline as FASTAR Rule 112(c), Petitioner proposes amending FASTAR Rule 122 by adding a new section (f), which would provide as follows:

> **(f) Discovery Limits and Deadline.** Discovery limits in an Alternative Resolution proceeding are the same as specified in FASTAR Rule 112(b). The parties must complete discovery within 120 days after the filing date of the first answer, or by another deadline established by the court.

Rule 123: Hearing Procedures. Rule 123 largely mirrors Civil Rule 75. However, a provision in Civil Rule 75(e) ("assessing damages against defaulted parties") has been relocated to the prehearing provisions of FASTAR Rule 122.

Rule 124: Arbitrator's Decision, Award, and Judgment, and ***Rule 125: Arbitrator's Compensation.*** Rule 124 eliminates Civil Rule 76(a)(1), which requires the arbitrator to "make a decision," because that is implicit in a subsequent provision that requires the arbitrator to "file a notice of decision." As in current Civil

Rule 76(b), FASTAR Rule 124(b) allows the entry of an award exceeding the prescribed monetary limit, if appropriate. The section on "judgment" is similar to the current Civil Rule 76 provision, but to enhance the clarity of the FASTAR rule, the provision is separated into subparts. FASTAR Rule 124(f) ("application of Civil Rule 38.1(d)") has no counterpart in Civil Rule 76, but this FASTAR provision allows stagnant Alternative Resolution cases to be placed on the dismissal calendar.

Rule 126: Appeal. There are several notable differences between FASTAR Rule 126 and Civil Rule 77 ("Appeal"). First, under Rule 126(a), a plaintiff who chose Alternative Resolution under Rule 103 may not file a notice of appeal. Rule 126(a) allows any other party to appeal, but the right to appeal is waived if a party failed to appear and participate at the Alternative Resolution hearing. (Compare Civil Rule 77(a): "Any party who appears and participates in the arbitration proceedings may appeal an arbitrator's award….") FASTAR Rule 126(d) elaborates on the misnomer "trial de novo." This rule provides, "Although the proceeding is denominated as an 'appeal,' the parties are entitled to a trial on all issues determined by the arbitrator. The arbitrator's legal rulings and factual findings are not binding on the court or the parties." FASTAR Rule 126(d) also says, "If, however, the court finds that further proceedings before the arbitrator are appropriate, it may remand the action to the assigned arbitrator." Compare Civil Rule 77(i), which says, "A court may contact an arbitrator regarding the arbitration award or other matters

relating to the arbitration." FASTAR Rule 126(d) goes further by permitting a remand of the proceeding.

(4) Pima County's FASTAR Pilot Program. The Pima County FASTAR pilot program began on November 1, 2017. Its December 2019 report to the AJC indicated that the pilot had processed more than 1,000 cases in two years. Attorneys in slightly more than half of those cases chose the Alternative Resolution track. In the Fast Trial track, there were 5 trials in the first year of the pilot, and 15 trials in the second year. There was one appeal in the first year, and there were no appeals in the second year. Apples-to-apples comparison of times to disposition for FASTAR cases and pre-2017 compulsory arbitration cases are not precise, but the times to disposition in FASTAR seem to be shorter.

The Pima County bench supports the FASTAR program. The program has not been a burden on the civil bench or court administrators. The program furthers the Court's strategic goal of improving access to justice. Although Petitioner has received positive feedback from some attorneys and jurors about the program, other attorneys have been critical, especially about FASTAR's shortened time periods. The changes proposed in this petition might at least partially address those criticisms. Opening this petition for public comment should produce stakeholder input regarding any other concerns.

5. Conclusion. Petitioner therefore requests that the Court open this petition for public comment, allow Petitioner to subsequently file a reply to those comments, and ultimately, adopt modified FASTAR rules.

RESPECTFULLY SUBMITTED this 9th day of January 2020.

__________/s/__________________________
Hon. Kyle Bryson
Presiding Judge
Superior Court of Arizona in Pima County

Appendix

Deleted text is shown by ~~strikethrough~~. New text is underlined. All changes are highlighted in yellow.

~~PIMA COUNTY~~ RULES FOR THE FAST TRIAL AND ALTERNATIVE RESOLUTION PROGRAM ("FASTAR") ~~PILOT PROGRAM~~

Part One: Rules for the Fast Trial and Alternative Resolution Program ("FASTAR")

Rule 101. Fast Trial and Alternative Resolution Generally

(a) Application and Objective. Rules 101 through 126 ("these rules") apply in counties ~~designated for~~ where the superior court~~'s pilot~~ has established a program for a fast trial with an alternative resolution option. These rules use the acronym "FASTAR" to refer to the program. The program's objective is to achieve a more efficient and inexpensive, yet fair, resolution of eligible cases. One of these rules may be cited as "FASTAR ###."

(b) Eligibility Criteria. The court administrator or Clerk will assign to the FASTAR program all civil actions that meet each of the four following eligibility criteria:

(1) The plaintiff requests monetary damages only, and is not requesting injunctive or other non-monetary relief.

(2) The amount of money sought by each plaintiff exceeds the limit set by local rule for compulsory arbitration.

(3) The amount of money sought by any party does not exceed $50,000, including punitive damages but excluding interest, costs, and attorneys' fees.

(4) The plaintiff will not need to serve the summons and complaint on any defendant in a foreign country.

(c) Civil Rules. The FASTAR rules supplement the Arizona Rules of Civil Procedure (the "civil rules"), and the civil rules, excluding Rules 72 through 77, continue to apply to FASTAR cases. However, a FASTAR rule applies if a civil rule is inconsistent with these rules or these rules specifically provide otherwise.

(d) Plurals. The use of the words "plaintiff" and "defendant" in these rules includes the respective plurals.

Rule 102. Certificates; Forms

(a) FASTAR Certificate. At the time of filing any civil complaint requesting only money damages not exceeding $50,000 for any claimant, the plaintiff must file a separate FASTAR certificate. The FASTAR certificate must state whether the action meets the four FASTAR eligibility criteria listed in Rule 101(b). The plaintiff must serve the FASTAR certificate on each defendant with the summons and complaint.

(b) Controverting Certificate. Any defendant who disagrees with the plaintiff's FASTAR certificate must file a controverting certificate that specifies the reason for disagreement. The defendant must file the controverting certificate with the answer or with a Rule 12 motion, whichever is filed first. If the defendant files a controverting certificate, the matter must be referred to the assigned judge for a determination of whether the case is eligible for the FASTAR program.

(c) Forms. Forms for the "FASTAR Certificate" (Rule 102(a)), a controverting certificate (Rule 102(b)), and the "Choice Certificate" (Rule 103(b)) are available on the superior court website of each county participating in the program.

(d) Exceptions. If extraordinary case characteristics indicate that an otherwise eligible case is not suitable for FASTAR, a party for good cause shown may request the court under Rule 26.2 to assign the case to a different tier.

Rule 103. Plaintiff's Choice

(a) Plaintiff's Choice. For every case in the FASTAR program, the plaintiff alone has the choice of proceeding by Fast Trial or Alternative Resolution.

(b) Manner of Choosing.

(1) ***"Choice Certificate."*** When filing the complaint, or not later than 20 days after the first filing by any defendant, the plaintiff must file and serve on the defendant a Form 103(b) "Choice Certificate." The Choice Certificate must state whether the plaintiff chooses to proceed by Fast Trial or by Alternative Resolution.

(2) ***"Waiver."*** If the plaintiff chooses Alternative Resolution, then plaintiff's Choice Certificate must include express waiver of the rights:

(A) to have a trial before a judge or jury, and

(B) to appeal the Alternative Resolution decision, award, or judgment to the superior court or to an appellate court.

(c) Failure to Choose. If the plaintiff does not timely file a Choice Certificate, the case will proceed by Fast Trial.

(d) Effect of a Counterclaim, Cross-claim, or Third-Party Complaint.

(1) If the case includes a counterclaim, cross-claim, or third-party complaint, the action will proceed by Fast Trial if the plaintiff timely made that choice in the plaintiff's Choice Certificate, or if the plaintiff failed to file a timely Choice Certificate. A defendant, counterclaimant, cross-claimant, or third-party plaintiff has no right under these rules to make the choice or to file a Choice Certificate.

(2) If the case includes a counterclaim, cross-claim, or third-party complaint, the action will proceed by Alternative Resolution if the plaintiff timely made that choice in the plaintiff's Choice Certificate. In that circumstance, and notwithstanding the waiver under Rule 103(b)(2), the plaintiff retains the right to appeal and to have a trial before a judge or jury regarding the decision or award on the counterclaim, crossclaim, or third-party complaint.

Rule 104. Modification of Civil Rule 4(i) Regarding Time for Service; Dismissal of an Unserved or Timely-Served Defendant

(a) General Limitation. The time limit of Civil Rule 4(i) does not apply to FASTAR cases. Instead, a plaintiff must serve the summons and complaint on every defendant within 60 days after the filing date of the complaint.

(b) Dismissal of an Unserved Defendant. If the plaintiff does not complete service within 60 days after filing the complaint, the court will notify the plaintiff that it will dismiss the action without prejudice as to any unserved defendant 15 days after the date of the court's notice, and without further notice, unless the plaintiff completes service within those 15 days.

(c) Extension. Within 60 days after filing the complaint, the plaintiff may request, and the court may extend the time for completing service, but the court may not extend the time limit for service more than 90 days after the filing date of the complaint.

(d) Dismissal of a Timely-Served Defendant. The court will dismiss without prejudice any timely-served defendant who did not file an answer or other response within 120 days after the filing date of the complaint, unless the plaintiff has filed a Rule 55 application for the entry of default of that defendant before the 120th day. The court will provide the plaintiff at least 20 days' notice before dismissing that defendant in a multi-defendant case, or before dismissing a case that has only one defendant.

Rule 105. Modification of Civil Rules 4.1 and 4.2 Regarding Waiver of Service

(a) Generally. The time limits provided in Civil Rules 4.1(c) and 4.2(d) regarding waiver of service do not apply in FASTAR cases. Rules 105(b) and 105(c) modify

those time limits. The other provisions of Civil Rules 4.1(c) and 4.2(d) apply to FASTAR cases with these modifications.

(b) Returning the Waiver. Regardless of whether a defendant is within or outside of Arizona, a defendant must return a request for waiver of service within 15 days after the plaintiff sent it.

(c) Time to Respond. A defendant who is within Arizona must file a response to the complaint within 35 days after the plaintiff sent the waiver of service. A defendant who is outside Arizona must file a response to the complaint within 45 days after the waiver was sent.

Rule 106. Assignment of a Judge

The court will promptly assign a judge to every FASTAR case. The assigned judge may be a superior court judge or commissioner, or a judge pro tempore. Parties may challenge the assigned judge as provided by Civil Rules 42.1 and 42.2.

Rule 107. Medical Authorizations

The plaintiff in a personal injury action, if requested by the defendant, must provide a written authorization that allows the defendant to obtain copies of records plaintiff produced or identified under Civil Rule 26.1, or that are otherwise relevant to the condition that is the subject of the action. The plaintiff is not required to provide a written authorization for records that are subject to a claim of privilege properly asserted under Civil Rule 26.1(h).

Rule 108. Disclosure and Discovery ~~Disputes~~

(a) Generally. The requirements of Civil Rule 16(b) (the required early meeting) apply to all FASTAR cases, but the requirements of Civil Rule 16(c) (the filing of a joint report and proposed scheduling order) do not apply.

(b) Disclosure and Discovery Disputes. If the parties are unable to satisfactorily resolve a disclosure or discovery dispute in a FASTAR case, they must present the dispute to the assigned judge ~~or arbitrator~~ in a single joint motion that states the parties' positions. The joint motion must not exceed 3 pages of text (1-1/2 pages per side). The parties must include with their joint motion a good faith consultation certificate that complies with Civil Rule 7.1(h).

Rule 109. Application of Civil Rule 68 Regarding Offers of Judgment

Civil Rule 68 on offers of judgment does not apply to Fast Trial proceedings. An offer of judgment is permitted in an Alternative Resolution Proceeding under Rule 121(d).

Part Two: Rules for a Fast Trial

Rule 110. Role of the Assigned Judge

The assigned judge will make all legal rulings in the case, including rulings on motions, and will conduct a trial.

Rule 111. Conferences; Trial Date

(a) Status and Trial Setting Conference. The judge will set a status and trial setting conference no later than 120 days after the filing date of the complaint.

(b) Trial Date. The court will set a trial date that is at least 190 days, but not more than 270 days, after the filing date of the complaint. On stipulation and with the judge's consent, the court may set a trial date that is less than 190 days after the filing date of the complaint.

(c) Pretrial Conferences. The judge may set one or more Civil Rule 16 pretrial conferences.

~~**(d) Joint Report and Proposed Scheduling Order Not Required.** Civil Rule 16(b), which requires parties to file a joint report and proposed scheduling order, does not apply in Fast Trial cases.~~

(d) Sanctions. The judge may impose a sanction against a party or a party's counsel who is substantially unprepared to participate in good faith in a conference under this rule.

Rule 112. Disclosure and Discovery in Fast Trial Cases

(a) Disclosure Deadline. The parties must exchange Civil Rule 26.1 disclosure statements within ~~20~~ 30 days after the filing date of the first answer. Disclosure statements of any subsequently appearing defendant must be exchanged within 20 days of the filing of that defendant's answer. The parties have a duty to make continuing and supplemental disclosures without a specific request from any other party.

(b) Discovery Limits.

(1) ***Written Discovery*.** Each side in a Fast Trial case has the following discovery limits: 5 Civil Rule 33 interrogatories, 5 Civil Rule 34 requests for production, 10 Civil Rule 36 requests for admissions, and one Civil Rule 35 examination.

(2) ***Depositions*.** A party is entitled to a total number of witness deposition hours equal to the number of witnesses that party is entitled to depose under Civil Rule 30(a)(1) (i.e., parties, experts, and documents custodians) multiplied by two hours.

(c) Discovery Deadline. Parties in a Fast Trial case must complete all discovery under Civil Rules 26 through 36 within 120 days after the filing date of the first answer or 190 days after the filing of the complaint, whichever is sooner. The judge may extend this deadline only for good cause.

Rule 113. Depositions of Medical Providers and Experts

(a) Generally.

(1) ***Two-Hour Time Limit.*** Depositions of a medical provider, whether testifying as a fact witness or as an expert, and depositions of a non-medical expert witness, are limited to one hour per side and a total of two hours for all sides.

(2) ***Location.*** Parties must endeavor to take a deposition of a medical provider or expert at the witness' usual place of business, if requested by the witness.

(b) Fee.

(1) ***Fee Limit.*** The deposition fee of a medical provider or expert witness is limited to that person's usual fee, but the fee may not exceed $500 per hour. A party or expert witness may file a motion showing good cause for exceeding this limit.

(2) ***Apportionment of Fee.*** Each party who asks questions during the deposition of a medical provider or expert is responsible for the witness' fee in proportion to the witness' time used by that party during the deposition. The judge can order reasonable, fair, and appropriate cost-shifting or cost-sharing of the expert's fee.

(c) Video Recording. Any party may video record the deposition of a medical provider or expert by any unobtrusive and reliable device, and without leave of court, but the party must provide a copy of the video, without charge, to other parties within 10 days after the deposition.

Rule 114. Summary Judgment Motions

Parties must file motions for summary judgment at least 60 days before the trial date. Parties must file a response within 15 days after service of the motion, and a reply within 5 days of service of the response.

Rule 115. Settlement

(a) Judgment or Dismissal. If the parties settle a Fast Trial case, they must file an appropriate stipulation for entry of a final judgment or a stipulation and order of dismissal.

(b) Responsibility for Jury Fees. All parties and their attorneys will be jointly and severally responsible for payment of jury fees if they fail to notify the court by noon on the business day before the scheduled trial date that their case has settled.

Rule 116. Defaults

If the court has entered a default against one or more but fewer than all defendants, the court may conduct proceedings against the defaulted defendants under Civil Rule 55 and may proceed with a Fast Trial for the remaining parties.

Rule 117. Fast Trial

(a) Trial by Jury. The court will set each Fast Trial case for a jury trial. A demand for a jury is not required. The parties may waive a jury by written stipulation filed at least 10 days before trial. The parties also may stipulate to 6 rather than 8 jurors serving at trial, with 5 of the 6 jurors necessary for returning a verdict or finding. The court will empanel a jury as provided in Civil Rule 47. The court need not empanel alternate jurors.

(b) Pretrial Statement. No later than 15 days before trial, the parties must confer, prepare, file, and submit to the judge a joint pretrial statement. The parties are encouraged to agree on facts and issues. The statement must contain the following:

(1) a brief statement of the nature of each party's claims or defenses;

(2) a witness list including the subject matter of a witness's testimony for each witness who will testify;

(3) an exhibit list and specific legal objections to any exhibits;

(4) the parties' stipulations concerning undisputed facts and issues; and

(5) the estimated time required for trial.

Unless the parties agree otherwise, or the offering party shows good cause, a party may not call a witness or offer an exhibit at trial other than those listed and exchanged. Legal objections to any exhibits listed are deemed waived unless specifically stated.

(c) Additional Filings Required for a Jury Trial. Unless the parties have stipulated to waive a jury, no later than 10 days before the trial date the parties must file an agreed upon set of jury instructions, verdict forms, and voir dire questions. A party at the same time may file any additional jury instructions, verdict forms, and voir dire questions the party requests, but which the parties have not agreed upon.

(d) Evidence. The Arizona Rules of Evidence apply to a Fast Trial. However, and unless there is a specific legal objection in the joint pretrial statement, the following documents are admissible in evidence:

(1) Medical bills of licensed or authorized providers, provided the party requesting admission of a bill establishes a foundation that the amount of the bill is reasonable, and the treatment or service described in the bill was medically necessary;

(2) Property repair bills or estimates containing costs or estimates for labor and material, if a bill is dated and itemized, and if the bill states whether the property was repaired in full or in part;

(3) Records of regularly conducted business activity under Rule 803(6) and certified records of a regularly conducted activity under Rules 902 (11) and (12) of the Arizona Rules of Evidence;

(4) A witness's deposition, whether or not the witness is available to appear in person;

(5) Medical records and medical reports, if a copy of the record or report was disclosed at least 40 days before trial, unless the opposing party shows good cause not to admit it.

(e) Video Recording of Medical Providers and Experts. A party who deposed and made a video recording of a medical provider or expert under Rule 113(c) may introduce the recording at trial to avoid the cost of calling the expert. However, any party may object to the form or foundation of a question or to the responsiveness of an answer in the video record.

(f) Subpoenas. The court may issue and enforce a subpoena, and a party may serve a subpoena, as provided by Civil Rule 45 and by law.

(g) Order of the Fast Track Trial; Limits. A Fast Trial proceeds in the order described in Civil Rule 40. The manner of selecting a jury, juror notebooks, juror questions of witnesses, jury instructions, deliberations, and the return and entry of the verdict are as provided in other civil trials in the superior court, except for the following presumptive time limits:

(1) Voir dire:15 minutes per side

(2) Opening statements:20 minutes

(3) Presenting a case in chief, cross examination, and rebuttal:3 hours per side

(4) Closing arguments:30 minutes

(5) Length of trial: 2 full days

Rule 118. Post-Trial Procedures; Appeal

(a) Form of Judgment, Costs and Attorneys' Fees. After the jury returns its verdict, the judge must direct the prevailing party to prepare a statement of costs, a request for attorney's fees, if any, and a judgment, as provided in Civil Rules 54 and 58. Other parties may file objections as provided by the Civil Rules. The judge may then proceed to enter judgment on the verdict.

(b) Verdict Exceeding Limit. If a jury verdict exceeds the monetary limit for the FASTAR program or a limit set by statute, the court must nevertheless enter a judgment for the full verdict amount.

(c) Post-trial Motions. A party may file post-trial motions as provided in other civil cases.

(d) Appeal. A final judgment entered at the conclusion of a Fast Trial is appealable to the Court of Appeals as provided by law.

Rule 119. Dismissal Calendar

The court may place a Fast Trial case on the dismissal calendar under Civil Rule 38.1(d) if the case has not concluded by the entry of judgment within 270 days after the filing date of the complaint.

Part Three: Rules for Alternative Resolution

Rule 120. Assignment of an Arbitrator

(a) Arbitrator. An arbitrator conducts an Alternative Resolution proceeding.

(b) Assignment of an Arbitrator by Stipulation. If (1) all of the parties in a case agree on an arbitrator, (2) the agreed-upon arbitrator provides written consent, and (3) a copy of the stipulation that includes the arbitrator's consent is delivered to the court administrator, the court administrator will assign that person to serve as arbitrator.

(c) Assignment of an Arbitrator in Other Circumstances. Unless the parties agree to an arbitrator under (b), the court administrator must assign the arbitrator from a list of eligible arbitrators. To be eligible for inclusion on the list, an arbitrator must be a resident of the county, and an active member of the State Bar of Arizona in good standing, for at least four years. The court administrator must randomly or by another method select and then assign one arbitrator from the list. Alternatively, the court administrator may select and assign an arbitrator as provided in (d).

(d) List of Specialty Arbitrators. The court administrator, under the supervision of the presiding judge, may prepare a list of arbitrators with designated areas of specialization, concentration, or expertise. A court administrator who has prepared such a list should endeavor to select and assign to a case an arbitrator with experience in the subject matter of the action. If such an arbitrator is unavailable, the court administrator must select an arbitrator as provided in (c).

(e) Time of Assignment. The court administrator must assign an arbitrator no later than 30 days after an answer is filed.

(f) Notice of Assignment. The court administrator must promptly distribute a notice of the arbitrator's assignment to the parties and the arbitrator. The notice must advise the parties of the deadline specified in Civil Rule 38.1(d) for placing an action on the dismissal calendar.

(g) Change of Arbitrator as of Right. Each side is entitled to one change of arbitrator as of right. Even if consolidated with another action, a case is treated as having only two sides. A party waives the right to change of arbitrator by not exercising the right within 10 days after the date on the notice of assignment. If a party appears in the case after the arbitrator's assignment, the party waives the right to a change of arbitrator by not exercising it within 10 days after that party's appearance. A motion for recusal or a challenge of the arbitrator for cause tolls the time to exercise a change of arbitrator as of right.

(h) Disqualifying or Excusing an Arbitrator.

(1) ***Disqualifying an Arbitrator.*** On written motion, the court may disqualify an assigned arbitrator from serving in a particular action. The motion must establish that the arbitrator has an ethical conflict of interest or that other good cause exists under A.R.S. § 12-409 or § 21-211. The motion must be submitted to and considered by the judge assigned to the action in accordance with the procedures provided in Civil Rule 42.2.

(2) ***Excusing an Arbitrator from a Case.*** The presiding judge may excuse an arbitrator from serving in a particular case on the arbitrator's showing that the arbitrator has completed at least two cases during the current calendar year. If the court disqualifies an arbitrator under (h)(1) or excuses an arbitrator under (h)(2), the court administrator must assign a new arbitrator.

(3) ***Excusing an Arbitrator from the Assignment List.*** On written motion showing good cause, the presiding judge may excuse a lawyer from the list of arbitrators described in Rule 120(c).

(i) Clerk and Presiding Judge. Whenever this rule refers to duties performed by a court administrator, those duties also may be performed by the court clerk, as provided by local rules, administrative orders, or policies. Whenever this rule refers to duties performed by a presiding judge, they also may be performed by the judge's designee.

Rule 121. General Duties of an Arbitrator

(a) Arbitrator's Powers. The arbitrator has the power to administer oaths or affirmations to witnesses, determine the admissibility of evidence, and decide the law and the facts in a case. An arbitrator is personally immune from suit with respect to actions taken under this and the following rules.

(b) Arbitrator's Rulings.

(1) Authorized Rulings. After assignment of a case, the arbitrator will make all legal rulings, including rulings on motions, except on:

(A) motions to continue on the dismissal calendar or otherwise extend the time allowed under Civil Rule 38.1(d);

(B) motions to consolidate actions under Civil Rule 42;

(C) motions to dismiss;

(D) motions to withdraw as attorney of record under Civil Rule 5.3;

(E) motions for summary judgment that, if granted, would dispose of the entire case as to any party; ~~and~~

(F) motions for sanctions under Civil Rule 68(g)~~.~~; and

(G) motions concerning disclosure and discovery.

(2) Procedure. The parties must deliver to the arbitrator copies of all documents requiring the arbitrator's consideration. The arbitrator may hear motions and testimony by telephone.

(3) Discovery Motions. The arbitrator may limit discovery when appropriate to accomplish the objectives of FASTAR described in Rule 101(a).

(4) Interlocutory Appeal of Discovery Ruling. If an arbitrator makes a discovery ruling requiring the disclosure of matters that a party claims are privileged or otherwise protected from disclosure, the party may appeal the ruling by filing a motion with the assigned judge within 10 days after the arbitrator transmits the ruling to the parties. A party need not respond to the motion unless the court orders a response, but no such motion may be granted without the court providing

an opportunity for a response. The arbitrator's ruling is subject to de novo review by the court. If the court finds that the motion is frivolous or was filed for the purpose of delay or harassment, the court must impose sanctions on the party filing the motion, including an award of reasonable attorney's fees incurred in responding to the motion. The time for conducting an Alternative Resolution hearing is tolled while the motion is pending.

(c) Receipt of Court File. If the arbitrator believes the court file contains materials needed to conduct the Alternative Resolution hearing, the arbitrator may, within 4 days before the hearing, sign for and receive the original superior court file from the clerk, if the file exists in paper form. Otherwise, the clerk must provide the arbitrator access to an electronic copy of the file. The clerk may deliver documents electronically to any arbitrator who files a consent acceptable to the clerk. Alternatively, the arbitrator may order the parties to provide pleadings and other documents the arbitrator deems necessary.

(d) Offer of Judgment. A party to an action subject to Alternative Resolution may serve an offer of judgment under Civil Rule 68.

Rule 122. Prehearing Procedures

(a) Initial Disclosure. Unless the parties agree or the arbitrator orders otherwise, the parties must serve their initial disclosure no later than 30 days after the filing date of the first answer.

(b) Scheduling an Alternative Resolution Hearing. The arbitrator must set a hearing date not earlier than 60 days but no later than 120 days after the arbitrator's notice of assignment. For good cause, the arbitrator may set an earlier or a later date for the hearing. The arbitrator must provide the parties with at least 30 days' written notice of the date, time, and place of the hearing. The hearing may not be held on a Saturday, Sunday, legal holiday, or during the evening, unless the parties agree.

(c) Time for Filing a Summary Judgment Motion. A party must file a motion for summary judgment at least 40 days before the hearing date. The moving party must provide a copy of the motion to the arbitrator and assigned judge. A pending summary judgment motion tolls the time for conducting an Alternative Resolution hearing. If the court finds that a summary judgment motion is frivolous or was filed for the purpose of delay or harassment, it must impose sanctions on the party filing the motion, including an award of reasonable attorney's fees incurred in responding to the motion.

(d) Assessing Damages Against Defaulted Parties. If default has been entered against one or more but fewer than all the defendants before the date of the Alternative Resolution hearing, the arbitrator must refer proceedings involving the defaulted defendants to the assigned judge, and the arbitrator must proceed with the Alternative Resolution hearing for the remaining parties.

(e) Settlement of Actions Assigned to Alternative Resolution. If the parties settle an action assigned to Alternative Resolution, they must file with the court an appropriate stipulation for entry of a final judgment or a dismissal order and must mail or deliver a copy to the arbitrator. The Alternative Resolution terminates on entry of the judgment or order.

(f) Discovery Limits and Deadline. Discovery limits in an Alternative Resolution proceeding are the same as specified in FASTAR Rule 122(b). The parties must complete discovery within 120 days after the filing date of the first answer, or by another deadline established by the court.

Rule 123. Hearing Procedures

(a) Subpoenas. The court may issue and enforce a subpoena, and a party may serve a subpoena, as provided by Civil Rule 45 and by law.

(b) Prehearing Statement.

(1) ***Requirement.*** No later than 10 days before the hearing, the parties must confer, prepare, and submit to the arbitrator a joint written prehearing statement. The parties are encouraged to agree on facts and issues.

(2) ***Content.*** The statement must contain the following:

(A) a brief statement of the nature of each party's claims or defenses;

(B) a witness list including the subject matter of witness testimony for each witness who will be called to testify;

(C) an exhibit list; and

(D) the estimated time required for the Alternative Resolution hearing.

(3) Evidence Excluded. Unless the parties agree otherwise or the offering party shows good cause, no witness or exhibit may be offered at the hearing other than those listed and exchanged.

(c) Evidence. The Arizona Rules of Evidence apply to Alternative Resolution hearings, except as provided in (d). Certificates or controverting certificates under Rule 102 are not admissible evidence concerning the merits of the case.

(d) Documentary Evidence. Unless a document is not what it appears to be and an objection is stated in the prehearing statement, the arbitrator must admit into evidence the following documents without further proof, if relevant and listed in the prehearing statement:

(1) hospital bills, if on the hospital's official letterhead or billhead, dated, and itemized;

(2) bills of doctors and dentists, if dated and stating the date of each visit and the incurred charges;

(3) bills of registered nurses, licensed practical nurses, or physical therapists, if dated and stating the date and hours of service, and the incurred charges;

(4) bills for medicine, eyeglasses, prosthetic devices, medical belts, or similar items, if dated and itemized;

(5) property repair bills or estimates setting forth the costs or estimates for labor and material, if dated, itemized, and stating whether the property was, or is estimated to be, repaired in full or in part;

(6) a witness's deposition testimony, whether or not the witness is available to appear in person;

(7) an expert's sworn written statement, other than a doctor's medical report, whether or not the expert is available to appear in person, but only if:

(A) the statement is signed by the expert and summarizes the expert's qualifications; and

(B) the statement contains the expert's opinions, and the facts on which each opinion is based;

(8) in a personal injury action, a doctor's medical report, if a copy of the report was disclosed at least 20 days before the hearing, unless the opposing party shows good cause;

(9) records of regularly conducted business activity qualified under Arizona Rule of Evidence 803(6) and certified records of a regularly conducted activity under Rules 902 (11) and (12) of the Arizona Rules of Evidence; and

(10) a sworn witness statement, except from an expert witness, whether or not the witness is available to appear in person, if listed in the prehearing statement.

(e) Record of Proceedings. The arbitrator is not required to make a record of the hearing. If any party wants a court reporter to transcribe the hearing, the party must pay for and provide the reporter. The reporter's charges are not considered costs in the action.

Rule 124. Arbitrator's Decision, Award, and Judgment

(a) Arbitrator's Decision. Within 10 days after completing the hearing, the arbitrator must:

(1) file a notice of decision with the court;

(2) notify the parties of the decision in writing.

(3) notify the parties that their exhibits are available for retrieval;

(4) if an original paper file was obtained from the superior court, return it to the clerk by messenger or certified mail;

(b) Arbitrator's Award.

(1) Submission of Proposed Award. Within 10 days after the notice of decision is filed, either party may submit a proposed form of award to the arbitrator. The proposed award may include blank spaces for requested amounts for attorneys' fees and costs.

(2) Award Exceeding Limit. If an arbitrator finds that the appropriate award exceeds the limit for Alternative Resolution set by these rules or statute, the arbitrator must render an award for the full amount.

(3) Objections to Proposed Award. Within 5 days of receiving the proposed form of award, an opposing party may file objections.

(4) Final Award. Within 10 days of receiving the objections, the arbitrator must rule on the objections and file one signed original award with the clerk. On the same day, the arbitrator must mail or otherwise deliver copies of the award to all parties.

(c) Arbitrator's Failure to File Award. If the arbitrator does not file an award within 40 days after filing the notice of decision, the notice of decision will constitute the arbitrator's award.

(d) Judgment.

(1) *Motion to Enter Judgment.* Any party may file a motion to enter judgment on the award if no appeal is filed by the deadline for filing an appeal under Rule 126.

(2) *Dismissal of the Action.* If no party files a motion to enter judgment within 90 days of the filing of the notice of decision and if no appeal is pending, the clerk or court administrator must notify the parties in writing that the action will be dismissed without prejudice unless a motion to enter judgment is filed within 30 days after the date of the notice. If no motion is filed within that time, the court must dismiss the action without prejudice and enter an appropriate order regarding any posted security. No further notice to the parties is required before dismissing the action.

(e) Referral of an Action to the Assigned Judge. If the arbitrator does not file a notice of decision with the clerk within the later of 145 days after the arbitrator's assignment or 30 days after a noticed hearing, the clerk or the court administrator must refer the matter to the assigned judge for appropriate action.

(f) Application of Civil Rule 38.1(d). Civil Rule 38.1(d) ("dismissal calendar") applies to cases in Alternative Resolution, except the words "alternative resolution" are substituted for the word "arbitration," and "Rule 124" is substituted for "Rule 76."

Rule 125. Arbitrator's Compensation

(a) Generally. An arbitrator assigned to a case under these rules is entitled to receive as compensation for services a fee not to exceed the amount allowed by A.R.S. § 12133(G) per day for each day, or part of a day, necessarily expended in hearing the case. For this rule's purposes, "hearing" means any fact-finding proceeding or oral argument resulting in the filing of an award, or at which the parties agree to settle and stipulate to dismissal of the case. When more than one action arising out of the same transaction is heard at the same hearing, it will be considered as one case for purposes of compensating the arbitrator.

(b) Amount of Compensation. The compensation paid in each county must be provided by local rule.

(c) Right to Compensation. The arbitrator is only entitled to receive compensation after the arbitrator files an award, or, if the parties agree to settle and stipulate to dismiss the case at a proceeding before the arbitrator, after the case is dismissed.

Rule 126. Appeal

(a) Filing a Notice of Appeal.

(1) ***Plaintiff May Not Appeal.*** Except as provided in Rule 103(d), the plaintiff who filed a Certificate under Rule 103(b) and chose Alternative Resolution may not file a notice of appeal of a decision, award, or judgment that was entered in an Alternative Resolution proceeding.

(2) ***Other Parties May Appeal.*** Any other party who appears and participates in an Alternative Resolution proceeding may appeal an arbitrator's award by filing a notice of appeal. However, absent good cause, a party waives the right to appeal if the party fails to appear or to participate in good faith at the Alternative Resolution hearing. A notice of appeal must be entitled "Appeal from Alternative Resolution and Motion for Trial Setting." The notice must request that the case be set for trial in the superior court and must state whether a jury trial is demanded and the estimated length of trial.

(b) Time for Filing. To appeal an award, a party must file a notice of appeal no later than 20 days after (1) the award is filed or (2) the date on which the notice of decision becomes an award under Rule 124(c), whichever occurs first.

(c) Deposit on Appeal. At the time of filing the notice of appeal, the appellant must deposit with the clerk a sum equal to one hearing day's compensation of the arbitrator or 10 percent of the amount in controversy, whichever is less. The court may waive the deposit only on a showing that the appellant is financially unable to make such a deposit.

(d) Appeal De Novo. Although the proceeding is denominated as an "appeal," the parties are entitled to a trial on all issues determined by the arbitrator. The arbitrator's legal rulings and factual findings are not binding on the court or the parties. If, however, the court finds that further proceedings before the arbitrator are appropriate, it may remand the action to the assigned arbitrator.

(e) Waiver of Right to Appeal. At any time before the entry of an award by the arbitrator, the parties may stipulate in writing that the award so entered is binding on the parties. If the parties enter such a stipulation, no party may appeal or collaterally attack the award except as allowed by A.R.S. § 12-1501, et seq.

(f) Discovery and Listing of Witnesses and Exhibits on Appeal.

(1) Any discovery conducted while the action was assigned to Alternative Resolution may be used on appeal.

(2) Simultaneous with the filing of the notice of appeal, the appellant may serve a "List of Witnesses and Exhibits Intended to be Used at Trial" that complies with Rule 26.1.

(3) No later than 20 days after the Notice of Appeal is served, the appellee may serve a "List of Witnesses and Exhibits Intended to be Used at Trial" that complies with Rule 26.1.

(4) If any party does not serve a timely "List of Witnesses and Exhibits Intended to be Used at Trial," that party's trial witnesses and exhibits will be deemed to be those set forth in any such list previously filed in the action or in the prehearing statement submitted under Rule 123(b).

(5) The parties have 80 days after the filing of the notice of appeal to complete discovery under Civil Rules 26 through 37.

(6) For good cause, the court may extend the time to conduct discovery or to serve a supplemental list of witnesses and exhibits.

(g) Refund of Deposit on Appeal. The clerk must refund the deposit on appeal to the appellant if:

(1) the judgment on the trial de novo is at least 23 percent more favorable than the monetary relief or other type of relief granted by the Alternative Resolution award; or

(2) there is no order from the court for the disposition of the deposit on appeal upon the action's final disposition.

(h) Forfeiture of Deposit on Appeal; Sanctions on Appeal. If the judgment on the trial de novo is not at least 23 percent more favorable than the monetary relief or other type of relief granted by the Alternative Resolution award, the court must order that the deposit on appeal be used to pay the following costs and fees:

(1) to the county, the compensation actually paid to the arbitrator;

(2) to the appellee, those costs taxable in civil actions together with reasonable attorney's fees as determined by the trial judge for services necessitated by the appeal; and

(3) reasonable expert witness fees incurred by the appellee in connection with the appeal.

If the deposit is insufficient to pay those costs and fees, the court must order that the appellant pay them, unless the court, on motion, finds that imposing costs and fees would create a substantial economic hardship that is not in the interests of justice.

(i) Contact by Court. A court may contact an arbitrator regarding the Alternative Resolution award or other matters relating to the Alternative Resolution.

Form 102(a): FASTAR Certificate

NAME: ______________________________
ADDRESS: ____________________________
____
TELEPHONE: __________________________
REPRESENTING: _______________________

ARIZONA SUPERIOR COURT, PIMA COUNTY

________________________________ Plaintiff, v. ________________________________ Defendant.	**CASE NO**: ______________ **RULE 102(a) FASTAR CERTIFICATE**

The undersigned certifies that he or she knows the eligibility criteria set by FASTAR Rule 101(b) and certifies that this case:

(NOTE – YOU MUST CHECK ONE OF THE BOXES BELOW OR THE CLERK WILL NOT ACCEPT THIS FORM.)

☐ **DOES** meet the eligibility criteria established by Rule 101(b); or

☐ **DOES NOT** meet the eligibility criteria established by Rule 101(b).

Dated: _________________

____
SIGNATURE

Form 102(b): Controverting Certificate

NAME: ______________________________
ADDRESS: ____________________________
____
TELEPHONE: __________________________
REPRESENTING: _______________________

ARIZONA SUPERIOR COURT, PIMA COUNTY

____
Plaintiff,

v.

____
Defendant.

CASE NO: ______________

RULE 102(b) FASTAR CONTROVERTING CERTIFICATE

The undersigned certifies that he or she has read and understands the Rules Applicable to the Fast Trial and Alternative Resolution Program ("FASTAR"), and hereby **CONTROVERTS** the Plaintiff(s)' Rule 102(a) FASTAR Certificate for the following reasons: ____
____
____
____
____
____

Dated: __________________

____
SIGNATURE

Form 103(b): Choice Certificate

NAME: ______________________________

ADDRESS: ____________________________

____

TELEPHONE: __________________________

REPRESENTING: _______________________

ARIZONA SUPERIOR COURT, PIMA COUNTY

__________________________________ Plaintiff, v. __________________________________ Defendant.	**CASE NO**: ______________ **CHOICE CERTIFICATE: FAST TRIAL OR ALTERNATIVE RESOLUTION**

The undersigned certifies that he or she has read FASTAR Rule 103 and makes the following choice regarding a Fast Trial or Alternative Resolution pursuant to FASTAR Rule 103 of the FASTAR Rules:

(NOTE – YOU MUST CHECK ONE OF THE BOXES BELOW OR THIS FORM WILL NOT BE ACCEPTED)

☐ **Fast Trial**

☐ **Alternative Resolution:** By checking this box and choosing Alternative Resolution, I hereby knowingly and voluntarily waive Plaintiff(s)' constitutional and statutory rights to a trial (jury or bench), including the right to appeal the Alternative Resolution result.

Dated: __________________

____

SIGNATURE

BOG'S RULES REVIEW COMMITTEE
Reporting Form

Please begin typing in the shaded box.

NAME: Joseph Roth PHONE: (602) 640-9320

EMAIL ADDRESS: jroth@omlaw.com

REPRESENTING: Civil Practice and Procedure Committee

WHO WILL APPEAR BEFORE THE COMMITTEE? Joseph Roth

SUBJECT: Proposed comment regarding the Petition to Permanently Adopt Rules for the Fast Trial and Alternative Resolution Program ("FASTAR").

BACKGROUND OF ISSUE:

The Civil Practice and Procedure Committee (CPPC) evaluated a petition filed by Judge Kyle Bryson, Presiding Judge of the Pima County Superior Court, seeking the permanent adoption of the FASTAR program. The FASTAR program is a pilot program in Pima County under which plaintiffs can opt for a short trial in court instead of compulsory arbitration. The FASTAR pilot program was put in operation by Administrative Order 2017-116. Under the administrative order, the pilot program is set to expire after three years on October 31, 2020.

The petition proposes that the Court permanently adopt the FASTAR rules for Pima County and amend the rules to make the program available in every county's superior court, if the superior court decides to implement the program.

Following review of the petition and related information concerning the FASTAR program, the CPPC prepared a proposed comment declining to endorse the petition's proposal for permanent adoption at this time but voicing support for the FASTAR program and its continuance in Pima County while additional data is gathered.

ISSUE(S) (*please be specific*):

Whether the State Bar should file a comment neither supporting nor opposing Judge Bryson's Petition (R-20-0012) seeking permanent adoption of rules for the FASTAR program.

DISCUSSION/ANALYSIS:

In 2017, based on the recommendation of the Committee on Civil Justice Reform, the Court established the FASTAR pilot program. The pilot program was for three years; it is currently set to expire

on October 31, 2020. The FASTAR program allows a plaintiff suing only for monetary damages of less than $50,000 to choose either (1) a fast trial before a judge or jury, or (2) arbitration. Before FASTAR, such cases were subject to compulsory arbitration.

The superior court and the Administrative Officer of Courts is required to monitor the program and submit an annual progress report. Reports from the first two years have been issued. The results have been promising: there has been an uptick in the use of jury trials and a significantly decreased time from case initiation to disposition. The data set available, however, is limited to the two years of experience and the pilot is still in the middle of its third year.

Accordingly, the CPPC concluded that the State Bar should voice support for the FASTAR program and its results so far, but should decline to endorse permanent adoption of the program at this time. Instead, the CPPC recommends that the State Bar encourage the Court to extend the pilot program for an additional three years through an administrative order.

The CPPC also recommends that the State Bar support adoption of Judge Bryson's other proposed modifications to the FASTAR rules (with one small change, noted in the draft proposed comment). Those changes would allow (but not require) other counties to implement the FASTAR program. The CPPC understands that a number of other counties desire to implement the FASTAR program. Expansion of the pilot program in other counties would provide valuable feedback that could be considered when formulating a permanent set of FASTAR rules.

RECOMMENDED RULES REVIEW COMMITTEE ACTION:

The CPPC recommends that the State Bar adopt the draft proposed comment, which encourages extension and expansion of the FASTAR pilot program but declines to endorse making the FASTAR rules permanent at this time.

VOTE OF THE COMMITTEE/SECTION (*if applicable*):

WAS A QUORUM PRESENT FOR THE VOTE? ____X__YES ________NO

VOTE WAS: ___X______UNANIMOUS ________ TO ________

IF YOUR COMMITTEE OR SECTION HAS A BREAKDOWN AMONG MEMBERS OF DEFENSE/PROSECUTION OR PLAINTIFF/DEFENSE COUNSEL, OR IF ANY OTHER SPLIT EXISTS, HOW WAS THE VOTE SPLIT AMONG THOSE GROUPS?

HOW WILL THIS PROPOSAL IMPACT THE STATE BAR'S BUDGET? STATE BAR STAFF?

__No impact anticipated.__

IS THE RECOMMENDED ACTION CONSISTENT WITH THE KELLER DECISION?

__x__YES __________NO

DOES THIS ISSUE RELATE TO (check any that apply):

__________REGULATING THE PROFESSION

__________ IMPROVING THE QUALITY OF LEGAL SERVICES

__X______ IMPROVING THE FUNCTIONING OF THE SYSTEM OF JUSTICE

__X.______ INCREASING THE AVAILABILITY OF LEGAL SERVICES TO THE PUBLIC

__________ REGULATION OF TRUST ACCOUNTS

__X.______EDUCATION, ETHICS, COMPETENCY, AND INTEGRITY OF THE LEGAL PROFESSION

(Note that *Keller v. State Bar of California*, 496 U.S. 1 (1990), prohibits the expenditure of mandatory bar dues on political or ideological matters unrelated to these objectives.)

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO PERMANENTLY ADOPT RULES FOR THE FAST TRIAL AND ALTERNATIVE RESOLUTION PROGRAM ("FASTAR")	Supreme Court No. R-20-0012 PROPOSED COMMENT OF THE STATE BAR OF ARIZONA

The State Bar of Arizona is encouraged by the progress of the FASTAR pilot program in Pima County. Data from the program's first two years indicates an uptick in use of jury trials and a significantly decreased time from case initiation to disposition. This initial data indicates that the FASTAR program has at least partially achieved its objectives of increasing access to the jury trial system, while still providing for efficient, streamlined resolution of lower-dollar cases.

Because the FASTAR program has only been in effect for two full years, however, the State Bar does not at this time endorse the proposed permanent adoption of the FASTAR rules. Instead, the State Bar recommends that the Court extend the current pilot program for an additional three years through an administrative order. At the same time, the State Bar recommends that the Court adopt the Petitioner's other proposed modifications to the FASTAR rules (with one proposed change, discussed below). Among other things, the Petitioners' proposed modifications would permit other

counties to implement the FASTAR program, which will provide valuable feedback that can be taken into account in formulating a permanent set of FASTAR rules following the conclusion of the proposed extended pilot program.

I. BACKGROUND

In 2017, based on the recommendation of the Committee on Civil Justice Reform, the Court established a "pilot program in Pima County under which plaintiffs can opt for a short trial in court instead of compulsory arbitration." *See* Admin. Order 2017-116 (Ariz. Oct. 26, 2017). The pilot program, called the "Fast Trial and Alternative Resolution Program" or "FASTAR," was for three years and is currently set to expire on October 31, 2020.

Under the FASTAR rules, a plaintiff suing only for monetary damages and only amounts less than $50,000 may opt for either (1) a fast trial before a judge or jury or (2) arbitration. Before the pilot program, such cases were subject to compulsory arbitration. The choice is plaintiff's to make. FASTAR 103. A party may appeal a final judgment from a FASTAR trial to the court of appeals. FASTAR 118(d). If a plaintiff chooses arbitration via FASTAR's "Alternative Resolution" rather than a trial, then the plaintiff may not appeal the arbitrator's decision, but other parties may appeal to the superior court. FASTAR 126(a). If appealed, the parties are entitled to a trial de novo on all issues determined by the arbitrator. FASTAR 126(d).

During the three-year pilot, the superior court and the Administrative Office of Courts is required to monitor the program and submit an annual progress report. *Id*. The first of three reports was issued on March 4, 2019 and is attached as **Exhibit A**. The second report was issued on December 12, 2019 and is attached as **Exhibit B.** Because the program is currently in its third year, the third report is not yet available. The reports disclose that:

- plaintiffs chose the "Fast Trial" option in approximately 43% of eligible cases in year 1 and in 40.2% of eligible cases in year 2;
- on average, a case's time to disposition shrunk from approximately 8 months pre-FASTAR to approximately 5 months;
- there were 5 FASTAR trials during year 1 and 15 FASTAR trials during year 2;
- there was 1 appeal from a FASTAR trial.

Ex. B at 3-4. The reports also note that there is a case pending before the Arizona Supreme Court challenging the FASTAR program. **Ex. B** at 4; *see Duff v. Lee*, 246 Ariz. 418, 439 P.3d 1199 (App. 2019), *review granted Duff v. Lee*, Case No. CV-19-0128-PR. Oral argument was held on February 18, 2020, but the case remains under consideration by the Court. Among other things, the case challenges that the FASTAR program conflicts with A.R.S. § 12-133, which states that the "superior court, by rule of court, shall . . . [r]equire arbitration" in cases seeking monetary damages of less than certain threshold amounts.

In both reports, "there are no recommendations now for changes to the FASTAR program." **Ex. B** at 4. The December 2019 report states that the "data continues to be promising" due to the decrease in time to disposition, the significant number of cases in the Fast Trial track, and the low rate of appeals.

II. THE PETITION

In Petition R-20-0012, the Presiding Judge of Pima County Superior Court (Judge Kyle Bryson) asks the Court to permanently adopt the FASTAR rules, based on Pima County's positive experience with the pilot program. The Petitioner also requests that the FASTAR rules be amended so that they are available for use in every county's superior court if the superior court decides to "establish[] a program for a fast trial with

an alternative resolution option." Petition at 5. As Petitioner explains, "[t]his modification would allow any of Arizona's 15 counties to establish a permanent FASTAR program by local rule, administrative order, or policy." *Id.*

In addition to making the rules permanent and allowing for expansion to other counties, the Petition proposes various other substantive and non-substantive amendments to the rules. *See* Petition at 5-18 (describing rules and proposed changes).

The Petition explains that the FASTAR program allows plaintiffs their day in court but "eliminates the need for an expensive trial de novo following an arbitration, provides trial experience for attorneys, and underscores the historic and cultural role of juries in the American justice system." Petition at 4.

III. THE STATE BAR RECOMMENDS THAT THE PILOT PROGRAM BE EXTENDED AND THAT PETITIONER'S PROPOSED CHANGES BE IMPLEMENTED THROUGH ADMINISTRATIVE ORDER, RATHER THAN AS A PERMANENT RULE

A. The Pilot Program Should Be Extended By Administrative Order For An Additional Three-Year Period.

The State Bar is generally supportive of the FASTAR program and its goals, and shares in Petitioner's view that the results so far are promising in that they indicate that the FASTAR program may be achieving at least some of its objectives. The State Bar believes, however, that it is premature to permanently adopt the program. Instead, the State Bar recommends that the pilot program be extended for an additional three years, with certain modifications as proposed by Petitioner--including that the pilot program be expanded to allow other counties to participate.

The FASTAR pilot program still has another year of its initial three years with another year of experience and data to gather. The progress reports filed with the Arizona Judicial Council for the program's first two years show promising but limited data concerning use of court resources, case-type, litigant satisfaction, and other

measurements of the program's goals. The only information on litigant experience is "Anecdotal Information" contained in the initial report to the Arizona Judicial Council (Exhibit A), stating that "[c]omments from lawyers about the FASTAR system have been split," and noting: (i) concerns from plaintiffs' personal injury lawyers about the cost of securing the testimony of treating physicians; and (ii) concerns about a plaintiff's inability to appeal an arbitrator's decision under the Alternative Resolution Track. *See* Exhibit A, at pp. 3-4.[1]

It also appears from the available data that the use of the Fast Trial option has not been selected as often in tort motor vehicle cases as in other types of cases, such as contract/debt collection cases. Statistics from Pima County show, for example, that since the program's inception, approximately 73% of motor-vehicle tort case plaintiffs have selected the Alternative Resolution option rather than the Fast Trial option, compared with approximately 49% of contract cases, 50% of non-motor-vehicle tort cases, and 19% of unclassified civil cases. Thus, the FASTAR program is not currently appealing to a large category of litigants, i.e., those in low-dollar value motor-vehicle tort cases, that it was intended to attract. This disparity suggests that additional study is warranted to determine if other rule modifications should be made to expand the use of the program in tort cases.

Additionally, the State Bar understands that Maricopa County is currently evaluating implementation of the FASTAR program, and that other smaller counties (Yuma and Yavapai) are also considering doing so. It would be useful to gain additional information from the experience of counties both larger and smaller than Pima County, before the FASTAR rules are adopted on a permanent basis. For example, there is a

[1] This type of information may be forthcoming through the Comment process from the Pima County Bar Association or other litigants who have participated in the program.

concern that the program's increased reliance on courts for trials may present unique challenges in a larger county such as Maricopa. Additional data over a longer period of time would allow the Court and stakeholders to better evaluate the benefits and costs of the program, including its feasibility in other counties. Thus, any extension of the pilot program as proposed by the State Bar should include Petitioner's proposed modifications to the FASTAR rules to permit other counties to participate. The Court also should continue to require periodic reporting to the Arizona Judicial Council.

Finally, the pending *Duff v. Lee* matter leaves the FASTAR program under a cloud of uncertainty. That case should be resolved before the Court considers permanent changes to the program.

Taking all of the foregoing into account, the State Bar believes that extending the pilot program for an additional three years will allow more flexibility to modify the applicable rules to address gaps and other issues with the program's implementation as its use expands to other counties. This is preferable to adopting the rule permanently at this time, which would make it more difficult to adjust as additional data and experience is gained.

B. Petitioner's Proposed Modifications Should be Adopted, With One Proposed Change.

The Petition proposes several modifications to existing FASTAR rules. With one minor exception, the State Bar agrees that the proposed changes should be adopted, either as part of the extended pilot program as recommended by the State Bar, or in any permanent rule that the Court may adopt.

The State Bar proposes one modification to Petitioner's proposed changes, as follows. Petitioner proposes adding a new section (d) to Rule 102, titled "Exceptions," which provides that: "If extraordinary case characteristics indicate that an otherwise eligible case is not suitable for FASTAR, a party for good cause shown may request the

court under Civil Rule 26.2 to assign the case to a different tier." However, FASTAR eligibility is not expressly tied to Rule 26.2's tiering system. The objective of the Petition would be better served if new section (d) to Rule 102 instead read as follows: "If extraordinary case characteristics indicate that an eligible case is not suitable for FASTAR, a party for good cause shown may request the court to exclude the case from the FASTAR program and allow it to proceed under the Arizona Rules of Civil Procedure applicable to non-FASTAR cases." This language more clearly implements the Petition's stated intent of providing a "safety valve" that allows the court to remove a case from the FASTAR program.

C. If the Court Permanently Adopts the FASTAR Rules, It Should Do So as Part of the Arizona Rules of Civil Procedure.

Finally, if the Court is inclined to grant the Petition and adopt the FASTAR rules on a permanent basis, it should do so through amendments to the Arizona Rules of Civil Procedure rather than by administrative order. This approach would be similar to that taken in Ariz. R. Civ. P. 8.1, which implements the commercial court program and expressly provides that the rule only applies in those counties that have elected to establish a commercial court. If the Court does elect to permanently adopt the FASTAR rules as part of the Arizona Rules of Civil Procedure, some additional modifications would be needed to conform them with existing rules, including Rules 72 through 77 governing mandatory arbitration.

CONCLUSION

For the stated reasons, the State Bar recommends that the Court not permanently adopt the FASTAR program at this time, but instead, that the pilot program be extended for an additional three years to allow further study. Additionally, whether or not the Court adopts the rules on a permanent basis, it should amend them as proposed by Petitioner, with the one modification suggested by the State Bar herein.

RESPECTFULLY SUBMITTED this ______day of ___________, 2020.

____

Lisa Panahi
General Counsel, State Bar of Arizona

Electronic copy filed with the
Clerk of the Supreme Court of
Arizona this ____ day of _____, 2020.

EXHIBIT A

March 4, 2019

Hon. Scott Bales, Chair
Arizona Judicial Council
1501 West Washington Street
Phoenix Arizona 85007

Re: First Progress Report to the AJC Regarding the FASTAR Pilot Program

Dear Chief Justice Bales:

Administrative Order No. 2017-116 established a "FASTAR" pilot program in the Superior Court of Arizona in Pima County. This is the first of three progress reports to the Arizona Judicial Council concerning the program.

1. <u>Background.</u> In December 2015, the Supreme Court directed the Committee on Civil Justice Reform to develop recommendations, including rule amendments and pilot projects, to reduce the cost and time of resolving civil cases in the Superior Court of Arizona.

The committee's subsequent report discussed Arizona's system of compulsory arbitration, which is currently used statewide for resolving civil cases involving relatively small amounts of money damages. The committee's report noted drawbacks of that system. First, compulsory arbitration puts litigants before an arbitrator who may have significantly less knowledge than a judge about the substantive area of the case, have little or no experience in conducting an adversary proceeding, or lack the time and inclination to schedule an arbitration hearing. Moreover, a litigant who is dissatisfied with the arbitrator's award has a right to appeal the award. The appeal is really a new trial in the superior court rather than a record-based appeal. To complicate matters, a party can present new evidence at the trial. Particularly in personal injury cases, a plaintiff who received a favorable arbitration award but a less favorable verdict at trial may wind up bearing the substantial cost of defense experts who were hired solely to testify at the retrial.

Furthermore, compulsory arbitration contributes to a phenomenon referred to as the "vanishing trial." Arbitration diverts cases from juries, and this serves to undermine the historic constitutional and cultural roles of jury trials in our communities. Also, because arbitration hearings are customarily conducted outside the courthouse, arbitration decreases the exposure of young attorneys to the courtroom and the experience and competency that comes with courtroom trials.

2. **FASTAR.** Among its other proposals, the Committee on Civil Justice Reform recommended the establishment of a pilot program to reduce the cost and time of resolving smaller value cases, and secondarily, to enhance opportunities for courtroom trials. The committee's recommended pilot was titled "Fast Trial and Alternative Resolution Program," but it is usually referred to by its acronym, "FASTAR." The Arizona Judicial Council approved the committee's recommendation, and Supreme Court Administrative Order No. 2017-116 thereafter authorized the FASTAR Pilot Program for Pima County. At the request of the presiding judge in Pima County, the Order lowered the jurisdictional limit for compulsory arbitration to $1,000, effectively replacing compulsory arbitration in Pima County with FASTAR. The Order established a 3-year term for the pilot, from November 1, 2017 until October 31, 2020. It also adopted a set of rules and forms for use in the FASTAR program.

Under the FASTAR rules, cases that request only monetary damages not exceeding $50,000 are eligible for the program. In lieu of filing a certificate of compulsory arbitration, as the Civil Rules currently require, FASTAR requires the plaintiff to certify whether the case is eligible for FASTAR. Within 20 days after the first filing by any defendant, the plaintiff must also file a "Choice Certificate." This certificate requires the plaintiff to choose either a "Fast Trial" or "Alternative Resolution."

Fast Trial track. If the plaintiff chooses a Fast Trial, the court will set a trial date (it can be either a bench or a jury trial) within 6 to 9 months after the filing date of the complaint. There are rules for expedited disclosure and discovery in the Fast Trial track. There are special provisions for depositions of medical providers to help contain the length of those depositions and limit the provider's hourly charge. These provisions also allow video recording of the medical provider's deposition by any unobtrusive and reliable device, and the introduction of the recording at trial. The length of trial is limited to two days. A final judgment after a fast trial is appealable to the Court of Appeals, as provided by law.

Alternative Resolution track. A plaintiff who chooses Alternative Resolution must (a) waive the right to a trial before a judge or a jury, and (b) waive the right to appeal an alternative resolution decision or award to the superior court or to an appellate court. A court-appointed arbitrator conducts the Alternative Resolution proceeding. The parties can agree to the arbitrator, or the court administrator can assign one. The court administrator also may keep a list of arbitrators with designated areas of expertise. Arbitrators must set a hearing date within 2 to 4 months after their appointment. The arbitration proceeding and the process for entry of an award correspond to current provisions in the Civil Rules for compulsory arbitration. Although a plaintiff who choses Alternative Resolution waives the right to appeal the award, a defendant may appeal and, like compulsory arbitration, receive a new trial in the superior court.

3. Comparative Data.

Before implementation of FASTAR: In the Superior Court of Arizona in Pima County in 2015, civil filings included:

- 793 compulsory arbitration cases.
- 220 arbitration awards.
- 73 appeals requesting a trial *de novo* (this figure represents about 9% of the cases, and about 33% of the awards).

During compulsory arbitration (i.e. pre-FASTAR), the average time to case disposition was 8 months. However, in those cases in which there was an appeal from the compulsory arbitration award and a trial *de novo,* case resolution took up to 2 years. For the last full year of the compulsory arbitration system in Pima County, when any party could appeal the arbitration award, the court conducted 5 trials *de novo.*

After implementation of FASTAR: From November 1, 2017, to October 4, 2018, choice certificates were filed in 804 cases. In 455 cases (55.3%) the plaintiff chose the Alternative Resolution track. In 349 cases (44.7%), the plaintiff selected the Fast Trial.

The times to disposition are encouraging when compared with the compulsory arbitration system.

- For the Fast Trial track, the average time to case disposition was 154 days (about 5 months).
- For the Alternative Resolution track, the average time to case disposition was 140 days (less than 5 months).

The first FASTAR trial was conducted in June 2018. There have been 9 more FASTAR trials since then, for a total of 10 trials over a 9-month period.

There have been no appeals from the Fast Trial track to the Court of Appeals, or from the Alternative Resolution track to the superior court.

4. Anecdotal Information. **C**omments from jurors after Fast Trials, although limited, have been overwhelmingly positive. Surprisingly, jurors' main complaints were that "the trial took too long" and that "lawyers kept repeating things."

Comments from lawyers about the FASTAR system have been split. Many of them support the program, but a sizable number do not. Notwithstanding the special medical provider provisions described above, the most common complaint about the Fast Trial track, from plaintiffs' personal injury lawyers, concerns the cost and inconvenience of securing the testimony of treating physicians. The most common complaint about the

Alternative Resolution track revolves around a plaintiff's inability to appeal the arbitrator's decision.

5. **Other Information.** One plaintiff challenged aspects of the FASTAR system in a personal injury case filed in May 2018. The superior court overruled the challenge, and the plaintiff thereafter sought relief by special action in the Court of Appeals. Division Two heard oral argument in this case on February 20, 2019. As of the submission of this report, a final decision is still pending.

Pima County judges have been approached by judges in at least two other counties who have expressed interest in the FASTAR program. To date, the pilot program operates only in Pima County. However, Yavapai County has a somewhat comparable local program titled "Expedited Trial Process," or ETP.

6. **Conclusion.** There are no recommendations at this time for changes to the FASTAR program. And because the program is still relatively new, it is too soon to know whether the FASTAR program over a longer term will consistently result in speedier or less costly case resolution. However, the data in this regard appears promising, and other counties have shown interest in participating in the program.

Thank you for the opportunity to provide this report. We look forward to continuing the work to make the pilot program a success.

Respectfully submitted,

/s/____________________________
Charles V. Harrington
Civil Presiding Judge
Superior Court of Arizona in Pima County

/s/____________________________
Mark Meltzer
Court Services Division
Administrative Office of the Courts

EXHIBIT B

December 12, 2019

Hon. Robert Brutinel, Chair
Arizona Judicial Council
1501 West Washington Street
Phoenix Arizona 85007

Re: Second Progress Report to the AJC Regarding the FASTAR Pilot

Dear Chief Justice Brutinel:

Administrative Order No. 2017-116 established a "FASTAR" pilot program in the Superior Court of Arizona in Pima County. This is the second of three progress reports to the Arizona Judicial Council concerning the program. The first progress report was dated March 4, 2019 and covered the first year of the pilot's operation. This report provides an update on the pilot's second year.

1. <u>Background.</u> We reiterate the background of the FASTAR pilot as it was described in the first progress report.

> In December 2015, the Supreme Court directed the Committee on Civil Justice Reform to develop recommendations, including rule amendments and pilot projects, to reduce the cost and time of resolving civil cases in the Superior Court of Arizona.
>
> The Committee's subsequent report discussed Arizona's system of compulsory arbitration, which is currently used statewide for resolving civil cases involving relatively small amounts of money damages. The committee's report noted drawbacks of that system. First, compulsory arbitration puts litigants before an arbitrator who may have significantly less knowledge than a judge about the substantive area of the case, have little or no experience in conducting an adversary proceeding, or lack the time and inclination to schedule an arbitration hearing. Moreover, a litigant who is dissatisfied with the arbitrator's award has a right to appeal the award. The appeal is really a new trial in the superior court rather than a record-based appeal. To complicate matters, a party can present new evidence at the trial. Particularly in personal injury cases, a plaintiff who received a favorable arbitration award but a less favorable verdict at trial may wind up bearing the substantial cost of defense experts who were hired solely to testify at the retrial.
>
> Furthermore, compulsory arbitration contributes to a phenomenon referred to as the 'vanishing trial.' Arbitration diverts cases from juries, and this serves to

undermine the historic constitutional and cultural roles of jury trials in our communities. Also, because arbitration hearings are customarily conducted outside the courthouse, arbitration decreases the exposure of young attorneys to the courtroom and the experience and competency that comes with courtroom trials.

Among its other proposals, the Committee on Civil Justice Reform recommended the establishment of a pilot program to reduce the cost and time of resolving smaller value cases, and secondarily, to enhance opportunities for courtroom trials. The Committee's recommended pilot was titled 'Fast Trial and Alternative Resolution Program,' but it is usually referred to by its acronym, 'FASTAR.' The Arizona Judicial Council approved the Committee's recommendation, and Supreme Court Administrative Order No. 2017-116 thereafter authorized the FASTAR Pilot Program for Pima County. At the request of the presiding judge in Pima County, the Order lowered the jurisdictional limit for compulsory arbitration to $1,000, effectively replacing compulsory arbitration in Pima County with FASTAR. The Order established a 3-year term for the pilot, from November 1, 2017 until October 31, 2020. It also adopted a set of rules and forms for use in the FASTAR program.

Under the FASTAR rules, cases that request only monetary damages not exceeding $50,000 are eligible for the program. In lieu of filing a certificate of compulsory arbitration, as the Civil Rules currently require, FASTAR requires the plaintiff to certify whether the case is eligible for FASTAR. Within 20 days after the first filing by any defendant, the plaintiff must also file a 'Choice Certificate.' This certificate requires the plaintiff to choose either a 'Fast Trial' or 'Alternative Resolution.'

Fast Trial track. If the plaintiff chooses a Fast Trial, the court will set a trial date (it can be either a bench or a jury trial) within 6 to 9 months after the filing date of the complaint. There are rules for expedited disclosure and discovery in the Fast Trial track. There are special provisions for depositions of medical providers to help contain the length of those depositions and limit the provider's hourly charge. These provisions also allow video recording of the medical provider's deposition by any unobtrusive and reliable device, and the introduction of the recording at trial. The length of trial is limited to two days. A final judgment after a fast trial is appealable to the Court of Appeals, as provided by law.

Alternative Resolution track. A plaintiff who chooses Alternative Resolution must (a) waive the right to a trial before a judge or a jury, and (b) waive the right to appeal an alternative resolution decision or award to the superior court or to an

appellate court. A court-appointed arbitrator conducts the Alternative Resolution proceeding. The parties can agree to the arbitrator, or the court administrator can assign one. The court administrator also may keep a list of arbitrators with designated areas of expertise. Arbitrators must set a hearing date within 2 to 4 months after their appointment. The arbitration proceeding and the process for entry of an award correspond to current provisions in the Civil Rules for compulsory arbitration. Although a plaintiff who choses Alternative Resolution waives the right to appeal the award, a defendant may appeal and, like compulsory arbitration, receive a new trial in the superior court.

2. Comparative Data.

Before implementation of FASTAR: In the Superior Court of Arizona in Pima County in 2015, civil filings included:

- 793 compulsory arbitration cases.
- 220 arbitration awards.
- 73 appeals requesting a trial *de novo.* (This figure represents about 9% of the total number of compulsory arbitration cases, and about 33% of the awards.)

During compulsory arbitration (i.e. pre-FASTAR), the average time to case disposition was 8 months. However, in those cases in which there was an appeal from the compulsory arbitration award and a trial *de novo,* case resolution took up to 2 years. For the last full year of the compulsory arbitration system in Pima County, when any party could appeal the arbitration award, the court conducted 5 trials *de novo.*

FASTAR data: A table displaying FASTAR data for the first two years of the pilot is appended to this report. In summary, it shows as follows.

First year of FASTAR: From November 1, 2017, to October 31, 2018, choice certificates were filed in 967 cases. In 540 cases (55.8%) the plaintiff chose the Alternative Resolution track. By comparison, 414 cases (42.8%) were in the Fast Trial track. (In about 56% of these Fast Trial cases, the plaintiff chose Fast Trial; for the other 44%, cases were defaulted to the Fast Trial track, as the FASTAR rules provide, in the absence of a timely choice.)

- For cases in the Fast Trial track, the average time to case disposition was 160 days (about 5.3 months).
- For cases in the Alternative Resolution track, the average time to case disposition was 175 days (about 5.8 months).

There were 5 FASTAR trials during the first year. One case was appealed.

Second year of FASTAR: From November 1, 2018, to October 31, 2019, choice certificates were filed in 1,002 cases. In 586 cases (58.5%) the plaintiff chose the Alternative Resolution track. By comparison, 403 cases (40.2%) were in the Fast Trial track, including cases defaulted to that track in the absence of a timely choice.

- For cases in the Fast Trial track, the average time to case disposition was 143 days (about 4.7 months).
- For cases in the Alternative Resolution track, the average time to case disposition was 117 days (about 3.9 months).

There were 15 FASTAR trials during the second year. There were no appeals.

3. Other Information. One plaintiff challenged aspects of the FASTAR system in a personal injury case filed in May 2018. The superior court overruled the challenge, and the plaintiff thereafter sought relief by special action in the Court of Appeals. Division Two heard oral argument in this case on February 20, 2019 and on March 29, 2019, it filed an opinion accepting jurisdiction and essentially denying relief. The opinion concluded:

> FASTAR and local rules governing [A.R.S.] § 12-133 arbitration limits are procedural matters subject to the supreme court's constitutional authority. We conclude the change in those limits and the implementation of FASTAR in Pima County were an appropriate exercise of that authority, effective November 1, 2017, as set forth in Administrative Order No. 2017-116. [Plaintiff's] case is subject to those provisions. Accordingly, we accept jurisdiction and deny relief, with the exception of affording [Plaintiff] the opportunity to file a FASTAR 'Choice Certificate,' electing a FASTAR short trial or binding alternative dispute resolution, within twenty days of this order.

The Plaintiff thereafter filed a petition for review in the Supreme Court. On November 19, 2019, the Court granted review and set the matter for oral argument.

Yuma County continues to express interest in implementing a FASTAR program. However, its program would require modification of its local rules and technical enhancements to its case management system, both of which are under review.

4. Conclusion. As with the first report, there are no recommendations now for changes to the FASTAR program. The data continues to be promising. For both FASTAR tracks, times to disposition are shorter than under the previous program of compulsory arbitration. A significant number of cases in the pilot program have proceeded in the Fast Trial track and have concluded with trials by jury, expanding the

use of this bedrock of the common law. Appeals in FASTAR cases are almost nil. Litigant satisfaction, although not scientifically measured, is anecdotally high.

We would like to express our gratitude to the Honorable Charles Harrington, who retired from the Superior Court of Arizona in Pima County at the end of October. Judge Harrington was a strong advocate for the FASTAR program. As a member of the Committee on Civil Justice Reform, he was instrumental in the program's conception and design. He then educated the local legal community regarding the program's operation and benefits, which garnered the community's support and laid the foundation for an effective pilot project.

We appreciate the opportunity to provide this report. We look forward to submitting our third report in late 2020.

Respectfully submitted,

/s/____________________________
Jeffrey T. Bergin
Associate Presiding Judge
Superior Court of Arizona in Pima County

/s/____________________________
Mark Meltzer
Court Services Division
Administrative Office of the Courts

FASTAR Cases 11/1/17 – 10/31/19

	11/1/17 – 10/31/18	11/1/18 – 10/31/19
Total FASTAR Cases	2060	2334
Choice Certificates Filed	967	1002
Chose Alternative Resolution Track	540	586
Percentage of Alt. Res.	55.8%	58.5%
Chose Fast Trial Track	231	243
Defaulted to Fast Trial Track	183	160
Total Fast Trial Track cases	414	403
Percentage of Fast Trial Track	42.8%	40.2%
Change in Case track – no longer FASTAR	13	13
Percentage of Change in Track	1.3%	1.3%
Trials Held	5	15
Appealed to Appellate Court	1	0
Terminations for Lack of Service	474	405
Terminations for Lack of Prosecution	103	53

Time to Disposition		
Case Tracks	11/1/17 – 10/31/18	11/1/18 – 10/31/19
All FASTAR cases	148 days	111 days
Alternative Resolution	175 days	117 days
Alternative Resolution cases after Choice deadline *	195 days	125 days
Fast Trial Track	160 days	143 days
Fast Trial Track cases after Choice deadline*	175 days	139 days

*excludes Terminated cases for lack of service, lack of prosecution, dismissed, or transferred out

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	)	
	)	Supreme Court No. R-____-____________
PETITION TO AMEND	)	
FASTAR RULES 101 – 119,	)	**Petition to Amend and Delete Certain**
and, DELETE 120 - 126	)	**FASTAR Rules**
	)	
	)	
__________________________	)	

Pursuant to Rule 28, Rules of the Arizona Supreme Court, Petitioner James E. Abraham respectfully petitions this Court to adopt amendments to the civil FASTAR Rules, a pilot program for civil procedure rules that have been in effect for over two years in the Superior Court, in and for the County of Pima.

Petitioner requests that those parts of the FASTAR rules that created and govern "Alternative Resolution" (FASTAR Rules 120 through 126) be deleted, and that FASTAR (Trial) Rule 117(d)(1), be amended, so that the Medical bills of licensed or authorized providers submitted by Plaintiff are presumed reasonable in amount, but allowing any other party to offer evidence to rebut and dispute the presumed reasonableness of submitted medical bills.

I. Background and Purpose of the Proposed Rule Amendments

OVERVIEW

The FASTAR pilot program needs surgery to remove a terminal cancer that is killing the program's goals of: 1) reducing the diversion of cases away from juries and judges, 2) reducing the likelihood that cases will be decided by randomly assigned, involuntary lawyers, who have little to no knowledge about the legal issues in a case, 3) avoiding the inefficiencies and potential unfairness of an arbitration process, and 4) reversing the "vanishing trial" culture in which some lawyers avoid trials because they do not know how to competently try a case. (*Arizona Attorney*, February 2018, "Pilot FASTAR Program Aims for Improved Civil Justice", the excellent article authored by the Honorable Judge Jeffrey T. Bergin, with the ideas and quote taken from p. 29, second column, 4th paragraph, lines 1-7, 3rd paragraph, line 1, third column, 3rd paragraph, lines 1-11)

(Petitioner argues below that another major reason why some lawyers avoid trying cases is because they have a justified fear of not being reimbursed for significant costs expended while conducting discovery, including the hiring experts, to prove the reasonableness of the amounts of medical bills.)

The surgery that needs to be performed on the FASTAR Rules program includes: 1) the removal of the arbitration process ("Alternative Resolution"), and 2) the insertion of a rebuttable presumption that the Plaintiff's submitted medical

bills are reasonable in amount but allowing any party to offer evidence challenging the reasonableness of any submitted medical bill. (The Plaintiff should retain the burden of proving that medical bills were necessary, since proving causation is much easier and less costly than the difficult, sometimes impossible, task of marshalling evidence to prove that a medical bill is reasonable.)

The Evidence Relied Upon by the Petitioner

Since November 2017, while attending hearings at Superior Court, the Petitioner has had discussions with judges and counsel about whether or not the FASTAR program was successful. Apparently, there was a recognized suspicion by bench and bar that a large amount of debt-collection lawsuits, which are frequently ignored by defaulted defendants, were skewing the understanding of the effect of the new FASTAR rules. There was no group of *contested* cases, where the Plaintiffs could reasonably expect that a judgment would be paid, that could provide information or data to decide whether the goals of the pilot program were being achieved.

The Integrity of the Data Used:

The Petitioner works for the third largest auto insurance company and has had the privilege of representing fifty-four (54) insured defendants whose auto injury actions were resolved under the FASTAR pilot program, between November 2017 through December 2019. These 54 cases represent over 50% of the total

cases resolved by Petitioner in the past 26 months. Petitioner presented herein an accurate and complete picture of his *entire* resolved FASTAR case load, for a true and fair analysis of the FASTAR program. The Pima County Superior Court Clerk's case numbers for all cases cited herein have been provided in the attached Appendix A. All information cited in this petition is contained in the public record for these cases, for independent verification.

The Criteria Used for the Analysis of the Fifty-four (54) Resolved FASTAR cases:

The specific facts garnered from each of the 54 resolved FASTAR case were: 1) the Superior Court case number (to allow independent verification of information), 2) a) whether a "Choice Certificate" was filed by Plaintiff pursuant to FASTAR Rule 104(a), and if so, b) whether the Plaintiff chose the "Alternative Resolution" (hereinafter "AR"), or c) chose a FASTAR jury trial, or d) whether the Plaintiff failed to file a Choice Certificate, causing the Clerk to default the case to a FASTAR trial option, and 3) whether the case ultimately was resolved by settlement, AR hearing, or a two-day FASTAR jury trial.

The Facts of the Resolved 54 FASTAR cases:

Six (6) of the fifty-four (54) FASTAR Plaintiffs chose a two-day jury trial. Of those six (6) cases, five settled before trial, and one (1) case voluntarily went to jury trial, with a result of a defense verdict.

Eleven (11) of the Plaintiffs failed to file a Choice Certificate, so the Clerk automatically set them for a FASTAR trial, pursuant to FASTAR Rule 103(c). Of these eleven (11) cases, ten (10) cases settled before trial, and one (1) case "involuntarily" (no choice was made to go to trial) went to trial, with a result of a defense verdict.

Thirty-seven (37) of the fifty-four (54) FASTAR Plaintiffs chose AR, and thirty (30) settled before trial, and seven (7) cases were resolved through the AR arbitration process, with no appeals by the defense.

Summary

Two (2) of the 54 cases went to a jury trial (3.7% of the 54 cases)

Seven (7) of the 54 cases went through the AR process (12.9% of the 54 cases)

Forty-five (45) of the 54 cases settled (83.3% of the 54 cases)

(The Petitioner has over twenty-five (25) pending FASTAR cases, and the criteria trends for the above *resolved* cases are the same as for the *pending* cases.)

Suggested Changes to Help the FASTAR pilot program meet its goals:

Only two (2) of the fifty-four (54) FASTAR cases were resolved through jury trial. The FASTAR process failed to meet its goal of encouraging jury trials. Why? There are at least two reasons to explain this unfortunate and unintended failure.

Eliminate AR:

First, the AR process continues to exist, despite all of its well-known, negative attributes. The elimination of the negatively-viewed AR process will increase the amount of jury trials, since the removal of AR would leave only two choices available to the parties for case resolution. These two choices would be a either a settlement or have a two day jury trial.

(The elimination of AR will also save a great deal of time for many people. The "involuntary" arbitrator lawyers will no longer have to be bothered by scheduling and then conducting arbitrations, when *most* of them do not even practice *any* civil litigation. Also, the elimination of AR will allow lawyers for both sides to have to prepare for a contested matter only once, for the trial. Now, with AR in place, for those cases that are appealed, the lawyers have to prepare and attend the arbitration, and if the award is appealed, then a few months later, the lawyers have to go back to the case, and re-learn all the facts that they have already forgotten.

More importantly, in an appeal of an arbitration award all of the witnesses and parties will have to have their lives interrupted, again, to attend the jury trial. Any expert's report is usually not understood by the non-litigator arbitrator, and thus given no weight, and ignored. The FASTAR Rules have eliminated the hiring of experts after the award, but since experts cannot be hired after the award, they are frequently hired and disclosed as a safety net in case the award needs to be appealed.

The data shows that 83.3% of the cases settle, so all of that money spent on unused experts is wasted, too.)

Medical bills should be subject to a rebuttable presumption that the bill are reasonable

Second, to be fair, the Plaintiff lawyers and their clients need some relief from the burden of being required to prove that submitted medical bills are reasonable. (Plaintiff should retain the burden to prove that the medical care was caused by the Defendant's negligence.) For the past several decades, the practice in injury jury trials in Arizona was to admit all of the medical bills into evidence. The parties agreed to dispute the causation (the necessity) of the medical bills, but the parties rarely disputed the amount (the reasonableness) of the medical bills.

However, the spike in the cost of medical care over at least the past 8-9 years has placed the counsel for the defense in the position where the reasonableness of the amount of a medical bill no longer may be *un*disputed at trial. Petitioner requests that the FASTAR Rules be changed so that the rules provide for a rebuttable presumption that the Plaintiff's submitted medical bills are reasonable in amount, but still allowing any party to offer evidence challenging the reasonableness of any submitted medical bill.

The shifting of this burden of proof to the defense is fair. Typically, a collision-injured Plaintiff will see at least four health care providers, such as an

ER/Urgent Care provider, a PCP/chiropractor, a radiology provider, and often a specialist, such as an orthopedist or a neurologist. At trial, under the current trend, the Plaintiff would have to call at least four to five fact witnesses from medical providers to explain why their bills are reasonable, or, the Plaintiff would need to hire an expert to review all the medical bills, and then explain their opinions to the jury. These are both time-consuming and expensive processes for all parties.

Auto insurance carriers carefully examine all medical bills. Anecdotally, based on 24 years of insurance defense work in auto collisions, for five (5) large auto insurance carriers, the undersigned Petitioner knows that the carriers usually only challenge the amount of a medical bill when the charge seems to be *grossly* unreasonable. Usually, medical bills are disputed with expert testimony when thousands of dollars are at stake, rather than hundreds of dollars.

The only practical way to dispute the amount of a medical bill is with expert testimony. If a medical bill appears to be is *grossly* overpriced, then it is likely to be disputed by the carrier, no matter who has the burden of proof for the reasonableness of that particular bill. The burden of proof should be on the industry, as that's it's business, not the Plaintiff, who did not choose to be in an auto accident, and often was carted away by ambulance to the nearest hospital.

II. Contents of the Proposed Rule Amendment

Petitioner requests that the FASTAR rules that create and govern "Alternative Resolution" (FASTAR Rules 120 through 126) be deleted, and that FASTAR (Trial) Rule 117(d)(1), be amended so that the Medical bills of licensed or authorized providers submitted by Plaintiff are presumed reasonable in amount, but allowing any other party to offer evidence to rebut and dispute the presumed reasonableness of submitted medical bills. Such change may be made, by changing FASTAR Rule 117(d)(1), by deleting the language "… the amount of the bill is reasonable and…", and then inserting language at the end of FASTAR Rule 117(d)(1) that says "…the amounts of all medical bills shall be presumed reasonable, but any party may offer evidence to dispute the presumption of reasonableness of any medical bill."

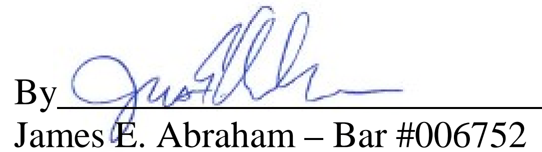
These two changes should be viewed as *inseparable*. If the AR process was eliminated without making a rebuttable presumption of reasonableness for the medical bills, then the Plaintiff would be snatched out of the frying pan and dropped into the fire, where the money spent proving the reasonableness of medical bills could exceed the total damages awarded by the jury. If the bills were presumed reasonable within the AR process, then Plaintiff counsel would further retreat from the courtroom, and the vanishing trial culture will finally fade away behind the closed doors of the arbitrator's conference room.

(The FASTAR Rules have been in effect since November 2017, and it does not appear that anyone else has asked for these rule changes.)

Conclusion:

These changes are needed to save the civil jury system in Arizona.

RESPECTFULLY SUBMITTED this 10th day of January 2020.

By
James E. Abraham – Bar #006752

Appendix A

Pima County Superior Court case numbers for those cases surveyed in support of Petition to Amend the FASTAR Rules

C20185971
C20185933
C20182835
C20175930
C20185395
C20182229
C20194329
C20175375
C20181905
C20182692
C20185548
C20181971
C20191785
C20191727
C20180209
C20175605
C20185209
C20185508
C20180816
C20190033
C20193000

C20175479
C20181223
C20185314
C20185791
C20190256
C20190090
C20190064
C20190406
C20183757
C20183738
C20184296
C20192407
C20186257
C20184896
C20190063
C20185561
C20190225
C20182591
C20175989
C20182249
C20183211

C20182327
C20181968
C20183338
C20192012
C20186278
C20181076
C20180352
C20190497
C20181972
C20185830
C20182916
C20185209

<u>FASTAR Rules requested to be deleted or to be deleted and/or changed:</u>

<u>Deleted:</u>

All of "Part Three: Rules for Alternative Resolution" (Rule 120 through Rule 126), and any reference to "Alternative Resolution" throughout Rule 101 through Rule 119)

<u>Changed:</u>

Rule 117(d)

(d) Evidence. The Arizona Rules of Evidence apply to a Fast Trial. However, and unless there is a specific legal objection in the joint pretrial statement, the following documents are admissible in evidence:

(1) Medical bills of licensed or authorized providers, provided the party requesting admission of a bill establishes a foundation that the ~~amount of the~~ bill ~~is reasonable~~ and the treatment or service described in the bill was medically necessary;

<u>Inserting language at the end of FASTAR Rule 117(d)(1) that says:</u>

> "…the amounts of all medical bills shall be presumed reasonable, but any party may offer evidence to dispute the presumption of reasonableness of any medical bill."

BOG'S RULES REVIEW COMMITTEE
Reporting Form

NAME: Andrew Jacobs PHONE: (520) 975-7091

EMAIL ADDRESS: ajacobs@swlaw.com

REPRESENTING: Civil Practice and Procedure Committee

WHO WILL APPEAR BEFORE THE COMMITTEE? Andrew Jacobs and Jodi Knobel Feuerhelm

SUBJECT: Proposed Comment to Petition No. R-20-0014, A Petition To Amend and Delete Certain FASTAR Rules

BACKGROUND OF ISSUE:

In November 2018, the Arizona Supreme Court established a three-year pilot program in Pima County to promote rapid resolution of matters under $50,000 by jury trial called FASTAR. FASTAR also retains an option in those cases for arbitration. There are two petitions pending before the Supreme Court even as it will consider this fall whether to make FASTAR permanent. The first petition is one from the Chief Judge of Pima County, the Hon. Kyle Bryson, who in Petition R-20-012 asks the Supreme Court to make FASTAR permanent, but with certain modifications. (The Civil Practice and Procedure Committee has submitted a proposed comment on that separate petition herewith.)

The second petition – at issue here – proposes two changes to the FASTAR program rules. First, it proposes to delete the rules permitting arbitration as an alternative to the early jury trial at the core of FASTAR. Second, it proposes to create by rule a rebuttable presumption that services billed for in medical records were reasonable in amount. It does not explain the proposed presumption in detail.

ISSUE(S)

Should the State Bar support the proposals to eliminate arbitration in FASTAR cases, and to establish the rebuttable presumption that billed amounts in medical records are presumed reasonable?

DISCUSSION/ANALYSIS:

The State Bar should oppose abrogating the practice of arbitration in connection with FASTAR. It is possible that FASTAR will govern all Tier 1 cases soon. This Petition is an improper vehicle to essentially abrogate arbitration statewide. Arbitration is a longstanding policy of the Arizona courts, provided for by legislation, and while FASTAR limits it, the Petition could functionally end it, which is different and a bad idea. The Petition does not make the case for this sweeping change, aside from its lone individual author's disagreement with the practice of arbitration. No data are marshalled for this broad-based reform. And many participants in FASTAR still choose arbitration, undercutting Petitioner's argument.

Separately, however, the State Bar should support the Petition's proposal for a presumption that the dollar amount of services billed in a FASTAR matter is reasonable. This is a subject that engenders unnecessary litigation and which is often the subject of stipulations. The presumption would discourage such litigation unless there was a true dispute, and would still allow such litigation if there is. There was a broad consensus in the Civil Practice and Procedure Committee that the presumption was a good idea. We were unclear on whether it would be a true presumption, requiring rebuttal, or a "bursting-bubble" presumption that vanishes when any contrary evidence is introduced, and so we addressed that as an open question the Supreme Court could resolve in either manner. We did not believe it necessary to take a position on that point, and did not have a consensus on it, or a debate that went into depth on that point.

RECOMMENDED RULES REVIEW COMMITTEE ACTION:

We recommend that the Rules Review Committee submit the attached comment, which reflects the above analysis.

VOTE OF THE COMMITTEE/SECTION (*if applicable*):

WAS A QUORUM PRESENT FOR THE VOTE? __x__YES __________NO

VOTE WAS: __X__UNANIMOUS __________ TO __________

IF YOUR COMMITTEE OR SECTION HAS A BREAKDOWN AMONG MEMBERS OF DEFENSE/PROSECUTION OR PLAINTIFF/DEFENSE COUNSEL, OR IF ANY OTHER SPLIT EXISTS, HOW WAS THE VOTE SPLIT AMONG THOSE GROUPS?

HOW WILL THIS PROPOSAL IMPACT THE STATE BAR'S BUDGET? STATE BAR STAFF?

__N/A_

IS THE RECOMMENDED ACTION CONSISTENT WITH THE KELLER DECISION?

X__YES __________NO

DOES THIS ISSUE RELATE TO (check any that apply):

__________REGULATING THE PROFESSION

__________ IMPROVING THE QUALITY OF LEGAL SERVICES

__X__ IMPROVING THE FUNCTIONING OF THE SYSTEM OF JUSTICE

__X__ INCREASING THE AVAILABILITY OF LEGAL SERVICES TO THE PUBLIC

__________ REGULATION OF TRUST ACCOUNTS

__________EDUCATION, ETHICS, COMPETENCY, AND INTEGRITY OF THE LEGAL PROFESSION

(Note that *Keller v. State Bar of California*, 496 U.S. 1 (1990), prohibits the expenditure of mandatory bar dues on political or ideological matters unrelated to these objectives.)

IN THE ARIZONA SUPREME COURT

In the Matter of: PETITION TO AMEND AND DELETE CERTAIN FASTAR RULES	Supreme Court No. R-20-0014 PROPOSED COMMENT OF THE STATE BAR OF ARIZONA

A pilot program of novel court rules designed to speed case resolution and promote jury trials ("FASTAR") is in its third year in Pima County. While that program continues, there are two petitions before this Court concerning FASTAR. First, in Petition 20-0012, the Presiding Judge of the Pima County Superior Court petitions this Court to permanently adopt within Arizona's civil rules the FASTAR rules, with some modifications. Second, in Petition 20-0014, a practitioner with experience in FASTAR cases asks this Court to significantly modify FASTAR rules, easing the admission and use of medical records and abolishing the option within FASTAR for arbitration before a lawyer. Because the State Bar recommends extending the pilot program for further study of FASTAR in response to Petition 20-0012, it suggests deferring considering the second petition. But if this Court considers it now in substance, the State Bar recommends adopting the changes with respect to medical records but not arbitration.

I. This Court Should Defer Consideration of This Petition Until It Determines Whether to Adopt the FASTAR Program Permanently, or to Extend the Pilot Program For a Further Period.

As noted in the State Bar's Comment on Petition No. 20-0012, filed concurrently herewith, this Court in October 2017 established a three-year "pilot program in Pima County under which plaintiffs can opt for a short trial in court instead of compulsory arbitration," called FASTAR. *See* Admin. Order 2017-116 (Ariz. Oct. 26, 2017). The purpose of the program was to study the short trial program and to consider whether the innovation was effective, and if so, whether it should be used more widely than in Pima County. This Court has already received two reports concerning FASTAR. The FASTAR pilot program presently continues through October 31, 2020. After the program is complete, this Court can determine whether it wishes to adopt the program, extend the study, or proceed in any other fashion. (As noted above, the State Bar recommends further study of FASTAR.)

Whatever approach this Court takes, amending the rules in the middle of the program would injure this Court's experimental design. It would in essence create two different FASTAR pilot programs to analyze – one preceding the date of the in-program amendments, the other, following the date of the in-program amendments. The amendments proposed are meant to significantly impact the operation of FASTAR, changing how medical records are used in FASTAR cases, and abolishing arbitration. The FASTAR program is a serious and thoughtful justice reform proposal that emerged from this Court's Committee on Civil Justice Reform. This Court ordered a three-year trial of the proposal. To amend the rules midway through the experimental trial of FASTAR would limit the usefulness of the data previously collected, for it would arguably render those data obsolete and unhelpful to consideration of broader use of FASTAR rules.

This Court's recent experience with the three-year experiment with the Commercial Court is instructive in this regard and suggests that Petition 20-0014 is premature. There, this Court allowed the three-year trial to run its course, and considered as it concluded what changes should be made to then-experimental Rule 8.1 in adopting it. That design gave the three-year experiment the chance to work and to inform a truly longitudinal evaluation of the program's promise and improvement opportunities. It should do so here with respect to the changes proposed in Petition 20-0014, allowing other stakeholders to voice their views in a process driven by this Court. If the suggestions in Petition 20-0014 are meritorious, they will still be so when the third report concerning FASTAR is delivered to the Court. That timing will allow all stakeholders to weigh in and react to them, such as the Pima County bench, other judicial officers from around the state who have interest in the program, counsel who have participate in the program, and the Pima County Bar Association, among others.

II. If This Court Reaches the Merits of Petition 20-0014, It Should Reject the Call to Abolish Arbitration But Embrace the Proposal to Ease the Admission of Medical Records.

A. The Petition's Request To Abolish Arbitration in FASTAR Cases Is Not Well-Founded and Should Be Denied.

The Petition asks this Court to abolish Alternative Resolution, which is a species of mandatory arbitration as an alternative to the FASTAR trial option. This is unwise, for several reasons.

First, as noted above, the design of FASTAR's pilot program was to permit participants the election between arbitration and a FASTAR trial. This change would undo the usefulness of those data by beginning a new pilot project in which only a FASTAR trial is allowed. Not only would that undo this Court's experimental design, but it would ignore the fact that most in the FASTAR program elect Alternative

Resolution – 37 of 54, according to the Petition's own data. (Petition, at page 5). It is hardly true that Alternative Resolution in FASTAR is a failure when 70% of those in the program elect to use it. The request to abolish it is unfounded for that reason.

Second, if FASTAR is adopted in the general civil rules, as suggested by Petition 20-0012, then abolishing arbitration would create an undesirably stark difference among counties in Arizona's legal culture. Instead of FASTAR trials as something that parties could chose to opt into, leaving arbitration secure and continuously present in all counties of the state, the state could become a hodgepodge of counties in which there was only arbitration or only FASTAR. Especially given that most cases filed in Arizona concern dollar amounts under $50,000, that discontinuity would be very stark. The degree of variation in local practice should not be that great in a state in which there is one set of general civil rules and lawyers are licensed to practice throughout the state.

Third, the resulting outright abolition of arbitration in counties adopting FASTAR is in significant tension with the design of A.R.S. § 12-133, which requires the Superior Court in each county to maintain compulsory arbitration.

Fourth, the Petition's argument that lawyer arbitration is bad because arbitrators supposedly lack civil litigation expertise and do not want to be "bothered," is a quarrel with A.R.S. § 12-133 and Ariz. R. Civ. P. 72-77. It does not belong in a petition directed at FASTAR, nor are its conclusions about mandatory arbitration consistent with Arizona's justice system outside FASTAR. It would be incongruous to act on these general quarrels with lawyer arbitration in FASTAR alone, especially as doing so also defeats the design of the FASTAR pilot program.

Fifth, a nontrivial number of cases in the FASTAR program still select arbitration: 110 of 373 cases in 2018, and 59 of 398 cases in 2019. This shows that arbitration is chosen by many and continues to serve its intended function in the FASTAR program.

This Court should reject the Petition's proposal to eliminate Alternative Resolution.

B. The Petition's Proposal to Ease the Admission and Use of Medical Records Is Helpful and Should Be Adopted in Some Fashion.

The Petition is right that medical records take up too much expense in many smaller-dollar lawsuits, eroding the benefit and promise of litigation. For this reason, while the State Bar favors continuing to study FASTAR, if this Court reaches the merits of this Petition, the State Bar favors its proposal to ease the admission of medical records. The Petition's proposal of a rebuttable presumption of the reasonability of the dollar amounts billed in medical records is one that would keep litigation leaner, cheaper, and faster on the whole, consistent with the spirit of FASTAR and the goals of the Committee on Civil Justice Reform. As the Petition correctly notes, medical bills will likely only be challenged for their reasonability when the amounts are very significantly unreasonable. The proposed change would thus reduce unnecessary friction and noise in the litigation process. Both defense and plaintiff practitioners, as well as some trial judges, see merit in this proposal.

Because the proposal would change the balance between plaintiff and defendant in injury litigation, the State Bar believes that a broader and more deliberate discussion of this change could be helpful. One of the issues to be discussed, which the State Bar flags without expressing a preferred answer at this time, could be whether the presumption of the reasonability of the dollar amounts billed in medical records would be a "bursting bubble" presumption, ended by one party adducing any contrary evidence, or whether it would be a stronger evidentiary presumption, requiring the other party to carry the burden of demonstrating the unreasonability of the dollar amounts billed in those records. It is likewise possible that further altering rules of evidence in FASTAR

proceedings to suspend the collateral source rule in some circumstances, or to permit expert testimony by affidavit, or other innovations, could speed and streamline FASTAR proceedings while serving justice. As suggested above, these considerations could form part of a deliberation about the future of FASTAR at the close of the pilot program, whether that is at the end of this year, as presently scheduled, or later, as the State Bar's Comment on Petition 20-0012 suggests.

Conclusion

For these reasons, this Court should either defer consideration of this Petition to allow further study of FASTAR, or if it reaches the Petition's merits, it should deny the Petition's request to abolish Alternative Resolution in FASTAR, but should grant the Petition's request to ease the admission of medical records in FASTAR cases.

RESPECTFULLY SUBMITTED this ______day of ___________, 2020.

____

Lisa Panahi
General Counsel, State Bar of Arizona

Electronic copy filed with the
Clerk of the Supreme Court of
Arizona this ____ day of _____, 2020.

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the matter of:	)	
	)	
PETITION TO AMEND VARIOUS	)	Supreme Court No. 20-_____
RULES OF PROCEDURE RELATED	)	
TO CREATING THE VERBATIM	)	
RECORD OF JUDICIAL PROCEEDINGS	)	
	)	
___________________________________	)	

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, David K. Byers, Administrative Director, petitions this Court to approve the amendments to several rules of procedure contained in Appendix A. The changes are designed to allow courts to supplement the use of court reporters by expanding courts' ability to use electronic recording technology to make a record of court proceedings. On October 24, 2019, these proposals were presented in the Report and Recommendations of the Arizona Task Force to Supplement Keeping of the Record by Electronic Means (dated August 30, 2019)[1] to the Arizona Judicial Council. The Council unanimously supported the report and recommendations.

[1] Attached as Appendix B.

I. Grounds for Petition Approval.

In recent years, and increasingly, there has been a decrease in the number of court reporters, resulting in significant vacancies. For example, a 2019 survey of Arizona's superior courts revealed that of the 138 court reporter positions, 27.5 were vacant, many of which were longstanding vacancies. As another example, the 2018 Annual Report of the South Carolina Judicial Branch noted: "South Carolina is one of many states experiencing a shortage of court reporters. This established trend has been noted by industry experts for quite some time, and the South Carolina Judicial Branch works diligently to minimize the impact of the shortage on court proceedings."[2]

Along with efforts to recruit and attract more court reporters, South Carolina has "incorporated digital recording as a supplemental measure in select courtrooms." South Carolina is not alone in these efforts; a National Center for State Courts (NCSC) survey revealed that, nationwide, many courts have been successfully using electronic recording for several years to create the court record.

It is in this context that the Supreme Court of Arizona established the Arizona Task Force to Supplement Keeping of the Record by Electronic Means. Specifically, on May 21, 2019, Arizona Supreme Court Chief Justice Scott Bales issued Administrative Order No. 2019-49, establishing the task force. Noting that

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[2] South Carolina Judicial Branch 2018 Annual Report at 8. *See* *https://www.sccourts.org/whatsnew/SOJ2019/2019SCJBAnnualReport.pdf*.

Arizona, consistent with nationwide trends, is experiencing a shortage and unavailability of court reporters, the administrative order states "[t]his situation may require courts to reschedule or delay scheduling judicial proceedings, negatively impacting the ability to secure a speedy trial, hearing, or other resolution and ultimately delaying the administration of justice to the parties, victims, and all involved in the legal system broadly. The shortage also impacts court reporters' ability to transcribe the proceedings in a timely manner."

"Given these issues," the administrative order continues, "electronic recording technology has been deployed in many Arizona courts to supplement the use of a court reporter in making a record of court proceedings. Use of electronic recording technology is limited, however, by statutes and rules enacted at a time when such technology did not exist or was not available or dependable." For these same reasons, courts are not afforded the flexibility, discretion, and authority to determine how the court record is made.

The administrative order also notes that transcript production is "one of the major factors contributing to delay in resolving appeals. Transcript production, which is required before any briefing can occur on appeal, can take months, delaying all types of appeals, including those where critical liberty interests are involved, such as criminal appeals and termination of parental rights appeals."

Such delays are particularly significant where an individual is in custody awaiting resolution of criminal charges or, in juvenile court, a delinquency petition. But delays have a significant negative impact in other types of proceedings, including abuse and neglect (dependency) proceedings, where a child is in foster care pending resolution of the proceedings; family court matters, where child custody and the best interests of the child are cornerstone issues to be resolved; and civil litigation, where resolution of a claim for damages may have enormous consequences to the parties.

The Arizona Supreme Court's strategic agenda – "Justice for the Future Planning for Excellence 2019-2024" – establishes a call to action. Goal 3 "Promoting Judicial Branch Excellence and Innovation" states the following in addressing "Keeping the Record:" "With a growing shortage of qualified court reporters at both the state and national level, courts are faced with the ever-increasing challenge of keeping an accurate record of court proceedings. Through emerging innovations, including digital recording and remote court reporting, we will take necessary steps to ensure courts continue to create a complete and accurate record for each and every case." To achieve this goal, the strategic agenda added a target to "[m]odernize statutes, rules, and the administrative code permitting courts to create and maintain a complete and accurate court record

electronically to supplement court reporters and to reduce the time needed to produce a record and transcript for cases on appeal."

The administrative order repeats the same call to action set forth in the strategic agenda and directs that "[t]he Task Force shall develop recommended changes to statutes, rules, and the Arizona Code of Judicial Administration to permit courts to create and maintain a complete and accurate court record electronically to supplement court reporters and to prevent delay in resolving disputes in the trial court and on appeal." The task force was directed to consider the issues involved and to "submit its recommendations, together with recommended changes to statutes, rules, and the Arizona Code of Judicial Administration . . . for circulation for comment and for presentation to the Arizona Judicial Council . . . ." As noted above, the task force's report and recommendations were presented to, and unanimously approved by, the Committee on Superior Court on September 6, 2019, the Superior Court Presiding Judges on October 22, 2019, and the Arizona Judicial Council on October 24, 2019.

II. Background.

Appendix A contains changes, identified by the task force, to Arizona procedural rules to permit courts to create and maintain a complete and accurate court record electronically to supplement court reporters and to prevent delay in resolving disputes in the trial court and on appeal. Appendix A is intended to be

comprehensive based on what the task force identified, with verbiage additions underlined and verbiage removals stricken.

The task force considered numerous Arizona statutes, Arizona procedural rules, and the Arizona Code of Judicial Administration. As a result of this consideration, the task force elected not to identify changes where at least one of the following applied: (1) the current provision already contemplated electronic recording in the discretion of the court; or (2) the current provision did not address the issue of how the verbatim record of a court proceeding is captured and preserved.

Several limitations and caveats are essential to provide clarity about what the proposed rule changes do and do not address. First, the proposed rule changes deal with creating and maintaining a verbatim record of court proceedings. Unless arising in provisions that include both the judiciary and other governmental entities, these changes do not address law directing how a verbatim record is created and maintained in non-judicial proceedings, such as administrative agency or political subdivision proceedings.

Second, relatedly, the proposed changes do not address law directing how a verbatim record is created and maintained in court-adjacent proceedings, such as a deposition.

Third, the proposed changes do not alter when a verbatim record of court proceedings must be created and maintained. Instead, the changes deal with what

discretion a court has in deciding how (not whether) to create and maintain a verbatim record of court proceedings.

Fourth, the proposed changes would provide a court additional discretion in deciding how to create and maintain a verbatim record of court proceedings. The changes do not direct or suggest how a court should exercise discretion granted to it in deciding how to do so.

Fifth, the proposed changes would afford courts discretion to determine how the verbatim record of court proceedings should be created and maintained in all instances, including instances where current law does not afford such discretion. *See* Ariz. R. Sup. Ct. 30(b)(3). Adopting such changes, particularly as they apply to grand jury proceedings where no judicial officer is present, may implicate policy issues. However, determining how to handle such policy matters was beyond the scope of the charge of the task force and requires decision-making that is better left to courts at the local level.

III. Contents of the Proposed Rules.

The proposed rule amendments are designed to allow courts to supplement the use of court reporters by expanding courts' ability to use electronic recording technology to make a record of court proceedings. To this end, the proposed rule amendments will provide courts with the discretion in granting or denying a

party's request to have a proceeding recorded by a court reporter and to determine how the verbatim record will be captured.

The proposed rule amendments will also provide courts with the discretion to use court reporters *or* electronic recording to capture the verbatim record in grand jury proceedings, capital case proceedings, felony jury trials, the initial determination of sexually violent person status, and requests for authorization of abortion without parental consent. Accordingly, the proposed amendments will allow a person authorized by the court to be present for grand jury proceedings to ensure that the verbatim record is captured. This provision can be attributed to the task force recognizing that if a court uses an electronic recording system to capture the verbatim record of grand jury proceedings in lieu of a court reporter, adequate quality controls must be in place to ensure that the record is properly captured.

The proposed rule amendments include amended verbiage in the corresponding rule comments to expand on and clarify the factors that should be considered when a court decides how the verbatim record of these court proceedings should be captured.

The proposed rule amendments also provide provisions for making the record in the absence of a court reporter, requiring courts to use an electronic recording system in accordance with procedures established by local rule. Nonetheless, if the court is using an electronic recording system to capture the verbatim record, the

proposed amendments would allow the parties to provide their own court reporter to also record the proceedings. Further, the proposed amendments identify which recording is the official record in a scenario where the court's court reporter records a proceeding, the court uses an electronic recording system, and/or a party has provided their own court reporter.

The proposed rule amendments also remove the requirement for a court reporter to attend preliminary hearings, but require the magistrate to ensure the ability to capture a verbatim recording of the proceeding.

The proposed rule amendments also include changes intended to update language for objectives not affecting the procedural substance of the rules. Among the amendments are the following categories of non-substantive changes:

- Amending "court reporter" to "certified reporter" for consistency in statute, rule, and the Arizona Code of Judicial Administration.

- Elimination of unnecessary descriptions of alternative means available for making and preserving a record and rewording rules for simplified reading.

- Elimination of outdated descriptors such as "audiotape."

- Rules dealing with the mechanics of ordering transcripts from "reporters" were revised to accommodate those situations in which the transcript of an electronic recording may be prepared by someone other than a certified court reporter.

IV. Conclusion

For the foregoing reasons, petitioner respectfully requests that the Court circulate this petition for comment, pursuant to Supreme Court Rule 28, with the aim of adopting the proposed amendments as they appear here or as modified in light of comments received from the public.

Respectfully submitted this 9th day of January, 2020.

By /s/ David K. Byers
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Appendix A

Proposed amendments

Deletions are shown by strikethrough. Additions are shown by underline.

Rules of Civil Procedure

43. Taking Testimony

(a) through **(f)** No change

(g) Preserving Recording of Court Proceedings.

(1) Transcripts and Other Recordings. The official verbatim recording of any court proceeding is an official record of the court. The original recording must be kept by the person ~~who recorded it, a court-designated custodian, or the clerk in a place~~ designated by the court. The recording must be retained according to the records retention and disposition schedules adopted by the Supreme Court, unless the court specifies a different retention period.

(2) *Transcription*. If a ~~court~~ certified reporter's verbatim recording is to be transcribed, the ~~court~~ certified reporter who made the recording must be given the first opportunity to make the transcription, unless that ~~court~~ certified reporter no longer serves in that position or is unavailable for any other reason.

75. Hearing Procedures

(a) through **(e)** No change

(f) Record of Proceedings. The arbitrator is not required to make a record of the hearing. If any party wants a ~~court~~ certified reporter to transcribe the hearing, the party must pay for and provide the reporter. The reporter's charges are not considered costs in the action.

(g) No change

Rules of Criminal Procedure

5.1 Right to a Preliminary Hearing; Waiver; Continuance

(a) through **(c)** No change

(d) Hearing Demand. A defendant who is in custody may demand that the court hold a preliminary hearing as soon as practicable. In that event, the magistrate must set a hearing date and must not delay its commencement more than necessary to secure the attendance of counsel, ~~a court reporter, and~~ necessary witnesses, and ensure the ability to capture a verbatim recording of the proceeding.

5.2 Summoning Witnesses; Record of Proceedings

(a) No change

(b) Record of Proceedings. The magistrate must make a verbatim record of the preliminary hearing. Proceedings may be recorded by a certified ~~court~~ reporter or by electronic or other means authorized by the ~~superior court~~ presiding judge of the superior court or an individual designated by the presiding judge of the superior court. ~~But if a party requests that a certified court reporter record the proceedings, the court must record the proceedings in that manner, unless the court is located in an area where a certified court reporter is not reasonably available.~~

5.6 Transmittal and Transcription of the Record

(a) No change

(b) Transcript Preparation and Filing. If a party makes a written request and avows that there is a material need for a transcript, the court must order a certified ~~court~~ reporter or an authorized transcriber of an electronic recording to prepare a transcript. The ~~court~~ certified reporter or transcriber must file the transcript in the superior court no later than 20 days after the order's filing.

5.7 Preservation of Recording

The clerk must retain and preserve any electronic recording of a preliminary hearing in the same manner as required for the original notes of a certified ~~court~~ reporter under Rule 28.1(c).

12.4 Who May be Present During Grand Jury Sessions

(a) General. Only the following individuals may be present during grand jury sessions:

(1) the witness under examination;

(2) counsel for a witness if the witness is a person under investigation by the grand jury;

(3) a law enforcement officer or detention officer accompanying an in-custody witness;

(4) prosecutors authorized to present evidence to the grand jury;

(5) a certified ~~court~~ reporter or person authorized by the court to ensure the verbatim record is captured; and

(6) an interpreter, if any.

(b) No change

12.7 Record of Grand Jury Proceedings

(a) ~~Court Reporter~~Recording Arrangments. The presiding or impaneling judge must ~~assign a certified court reporter~~ make arrangements to ~~record~~ capture all grand jury proceedings, except its deliberations. Any arrangements must ensure that no images of grand jurors are taken or captured.

(b) Foreperson. The foreperson must keep a record of how many grand jurors voted for and against an indictment, but must not record how each grand juror voted. If the grand jury returns an indictment, the foreperson's record of the vote must be transcribed ~~by the court reporter~~ and filed with the court no later than 20 days after the return of the indictment, and may be made available only to the court, the State, and the defendant.

(c) Filing the Transcript and Minutes. The ~~court reporter's~~ record of grand jury proceedings must be transcribed and the transcript must be filed with the superior court clerk no later than 20 days after return of the indictment, and may be made available only to the court, the State, and the defendant.

15.3 Depositions

(a) through **(c)** No change

(d) Manner of Taking.

(1) *Generally.* Unless this rule provides or the court orders otherwise, the parties must conduct depositions in the manner 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 questions in the manner 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 someone 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 no later than 14 days after the deposition, or no later 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) through **(f)** No change

28.1 Duties of Clerk

(a) through **(b)** No change

(c) ~~Court~~ <u>Certified</u> Reporter Notes. ~~Court~~ <u>Certified</u> reporters' notes must be retained under retention and destruction schedules established by the Supreme Court.

31.2 Notice of Appeal or Notice of Cross-Appeal

(a) No change

(b) Automatic Appeal for a Defendant Sentenced to Death. As provided in Rule 26.15, when a defendant has been sentenced to death, the superior court clerk must file a notice of appeal on the defendant's behalf after the oral pronouncement of sentence. That notice constitutes a notice of appeal by the defendant with respect to all judgments entered and sentences imposed in that case. No later than 10 days after the notice of appeal is filed, the clerk must notify all assigned ~~court~~ certified reporters or transcribers that they are required to transmit their portions of the certified transcript to the Supreme Court clerk.

(c) through **(h)** No change

31.8. The Record on Appeal

(a) No change

(b) Certified Transcripts.
(1) *Generally.* The record on appeal includes certified transcripts as follows:
(A) if the defendant is sentenced to death, the record on appeal must include a certified transcript of all recorded proceedings, including grand jury proceedings; and
(B) in all other cases, the record on appeal must include a certified transcript of the following proceedings:
(i) any voluntariness hearing or hearing to suppress the use of evidence;
(ii) all trial proceedings, excluding the record of voir dire unless a party specifically designates it;
(iii) any aggravation or mitigation hearing;
(iv) proceedings for the entry of judgment and sentence; and
(v) any probation violation proceeding.
(2) *Additions and Deletions*.
(A) By Appellant. No later than 30 days after filing a notice of appeal, the appellant may request from the certified ~~court~~ reporter or, if the record was made by electronic or other means, the court's designated transcript coordinator:
(i) a certified transcript of any proceeding not automatically included under (b)(1); and
(ii) to exclude from a certified transcript any portion of the proceedings the appellant deems unnecessary for a proper hearing of the appeal.
(B) By Appellee. No later than 30 days after the opening brief is filed, the appellee may request from the certified ~~court~~ reporter or, if the record was made by

electronic or other means, the court's designated transcript coordinator, a certified transcript of:

(i) any portion of a proceeding deleted by the appellant; and

(ii) a proceeding not automatically included under (b)(1).

(C) Untimely Request. For good cause shown, a party may request an addition to the record under (b)(2)(A) and (B).

(D) Notice to Other Parties. An appellant or appellee must serve any designation or request made under this rule on all other parties when the party submits the designation or request.

(c) Authorized Transcriber: Time to Prepare, and Payment Arrangements for, Certified Transcripts.

(1) *Generally.* Every transcript in the record on appeal must be prepared by an authorized transcriber. An "authorized transcriber" as used in this rule means a certified reporter or a transcriber under contract with an Arizona court. There may be multiple authorized transcribers for a single case.

(2) ~~*Court*~~ *Certified Reporter.* If a certified reporter attended a proceeding in the superior court, a party must order a certified transcript of proceedings directly from that reporter.

(3) *Audio or Video Recording.* If the superior court created only an audio or audio-video recording of the proceeding, a party must order a certified transcript of the proceeding directly from an authorized transcriber. Unless the ordering party is an indigent defendant, the superior court will furnish the transcriber with a copy of the designated electronic recording upon receiving a notice from the transcriber that the transcriber has reached a satisfactory arrangement for payment. All parties to the appeal must cooperate with the transcriber by providing information that is necessary to facilitate transcription.

(4) *Time to Prepare.* The authorized transcriber must prepare the certified transcript promptly upon receiving a notice of appeal either:

(A) by the State; or

(B) by the defendant if the notice indicates that the defendant was represented by appointed counsel when found guilty or when sentenced.

(5) *Non-Indigent Defendant.* No later than 5 days after filing a notice of appeal or after the denial of a request during the appeal to proceed as indigent, a non-indigent defendant must make payment arrangements with the authorized transcriber for the certified transcript. The authorized transcriber then must promptly prepare the certified transcript. The authorized transcriber must notify the appellate court if the defendant fails to make satisfactory payment arrangements within the prescribed time.

(6) *Additions and Deletions.* The authorized transcriber must promptly add or delete any portions requested by the parties. Non-indigent defendants must pay for all portions of the record on appeal and certified transcripts that they have designated or requested.

(d) through **(g)** No change

Rules of the Supreme Court

30. Verbatim Recording of Judicial Proceedings

(a) No change

(b) Use of Court Reporting Resources.
1. Request for certified reporter. Any party to any action in superior court may request that any proceeding in that action be recorded by a certified ~~court~~ reporter. The court ~~shall~~ may grant the request if it is made at least three days prior to the proceeding to be recorded unless a different time frame has been established by local rule.

2. Making the record in the absence of a ~~timely request for a court~~ certified reporter. ~~Except as provided in (3) below, i~~In the absence of a ~~timely request for a~~ certified ~~court~~ reporter, the record will be made ~~in a manner within~~ using an electronic recording system to record the ~~sound discretion of the court~~ proceeding as established by local rule.

3. ~~Proceedings requiring~~ If the court is using an electronic recording system to record the proceedings, a party has the right to provide a certified ~~court~~ reporter to also record the proceedings. The ~~following proceedings shall be recorded by a~~ party providing the certified ~~court~~ reporter must bear the cost. The official record, however, is the record designated by ~~and not solely by electronic means, unless this requirement is waived by the parties and~~ the court ~~approves the waiver:~~ as set forth in section (b)(4) of this rule.
~~a. Grand jury proceedings;~~
~~b. All proceedings in a first degree murder case, pursuant to A.R.S. § 13-1105, once the intention to seek the death penalty notice has been filed;~~
~~c. Felony jury trials;~~

~~d. Initial determinations of sexually violent person status, pursuant to A.R.S. § 36-3706;~~
~~e. Proceedings on a request for authorization of abortion without parental consent, pursuant to A.R.S. § 36-2152.~~

4. Official record. When a~~n Arizona~~ court's certified ~~court~~ reporter records a proceeding in a superior court that is simultaneously recorded by electronic recording equipment, the court's certified reporter's record shall be the official record. For a proceeding not recorded by a court's certified reporter, the official record is the transcript prepared by an authorized transcriber as defined in Rule 30(a)(2)(b) or (c). The transcript in any case certified by the court's certified reporter or other authorized transcriber as defined in Rule 30(a)(2)(a)-(c) shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the court's certified reporter or other authorized transcriber as defined in Rule 30(a)(2)(b) or (c), unless otherwise ordered by the court.

[20~~06~~20] COMMENT

Rule 30(a). This rule is not intended to prevent a party from retaining a transcriber, at the party's expense, to prepare an unofficial transcript of all or part of a proceeding. An unofficial transcript cannot be referenced or used in any court proceeding.

Rule 30(b)(1). Nothing in this rule precludes the court from granting a party's untimely request for a certified reporter.

Rule 30(b)~~(2)~~. ~~In the absence of a timely request for a certified court reporter, t~~The court may approve use of a certified court reporter, audio or video recording to capture the record of court proceedings. In exercising its discretion ~~under subsection (B), giving due deference to the parties' preference~~ of how proceedings should be captured, the court ~~may~~ should consider the following factors when requiring the presence of the court's certified reporter or otherwise designating the official record: unique demands of the preservation of the official court record by a certified reporter in grand jury proceedings, felony jury trials, particularly first degree murder cases in which the State filed a death penalty notice, initial determinations of sexually violent person status, and proceedings on a request for authorization of abortion without parental consent. Moreover, the court should

consider the availability of a certified reporter; the probability that a transcript will be requested; the number of litigants; convenience of the parties and the court's schedule; sufficiency of another form of record to convey the substance of the matters discussed at the proceeding; whether testimonial evidence will be presented at the proceeding; presence of non-native English speakers as witnesses or parties; the likelihood that technical or otherwise difficult terminology will be used; the need for formal or informal proceedings; the need for a real-time transcript; the likelihood that daily transcripts will be required; and any other factor which in the interests of justice warrants a particular form of record, or as otherwise required to serve the interests of justice.

75. Jurisdiction; Definitions

(a) No change

(b) Definitions. The following definitions shall apply in unauthorized practice of law proceedings.
1. All definitions in Rule 31(a)(2) shall apply.
2. "Bar counsel" means staff counsel employed by the state bar or volunteer counsel appointed to represent the state bar in discipline and other proceedings. "Chief bar counsel" means that person employed by the state bar to administer the discipline and disability system under the direction of the executive director.
3. "Charge" means any allegation of misconduct or incapacity of a lawyer or misconduct or incident of unauthorized practice of law brought to the attention of the state bar.
4. "Committee" means the Attorney Discipline Probable Cause Committee of the Supreme Court of Arizona.
5. "Complainant" means a person who initiates a charge or later joins in a charge to the state bar against a non-lawyer regarding the unauthorized practice of law. The state bar or any bar counsel may be a complainant.
6. "Complaint" means a formal complaint prepared and filed in the superior court pursuant to these rules.
7. "Court" means Supreme Court of Arizona.
8. "Costs" means all sums taxable as such in a civil action.
9. "Expenses" means all obligations in money, other than costs, necessarily incurred by the state bar in the performance of their duties under these rules. Expenses shall include, but are not limited to, administrative expenses, necessary expenses of bar counsel or staff, charges of expert witnesses, charges of ~~court~~

certified reporters and authorized transcribers and all other direct, provable expenses.
10. "Order" means an order signed by the superior court or the supreme court in unauthorized practice of law matters.
11. "Record" means the complaint and other documents that commence formal unauthorized practice of law proceedings, and every later-filed document or exhibit.
12. "Respondent" is any person subject to the jurisdiction of the court against whom a charge is received for violation of these rules.
13. "State bar" means the State Bar of Arizona created by rule of this court.
14. "State bar file" means the original of every document, recording and transcript of testimony or exhibit created or received by the state bar in relation to an unauthorized practice of law proceeding, but shall not include work product of bar counsel and working files of state bar staff.
15. "Unauthorized practice of law counsel" means staff or bar counsel employed by the state bar appointed to represent the state bar in unauthorized practice of law proceedings.
16. "Unauthorized practice of law proceeding" means any action involving a respondent pursuant to the rules relating to the unauthorized practice of law.

78. Initial Proceedings

(a) No change

(b) Screening and Investigation. Upon the commencement of an unauthorized practice of law proceeding against a respondent, the matter shall proceed as provided in this section.
1. *Screening*. Unauthorized practice of law counsel shall evaluate all information coming to his or her attention, in any form, by charge or otherwise alleging the respondent engaged in unauthorized practice of law. If the allegations, if true, would not constitute unauthorized practice of law under these rules, the matter shall be dismissed. If the information alleges facts which, if true, would constitute unauthorized practice of law, unauthorized practice of law counsel shall conduct an investigation.
2. *Investigation*. All investigations shall be conducted by unauthorized practice of law counsel, volunteer bar counsel, or staff investigators. Unauthorized practice of law counsel may request information through an investigative subpoena pursuant to Rule 78(b)(4). Following an investigation, unauthorized practice of law counsel may dismiss the matter; enter into a consent to cease and desist agreement with the

respondent pursuant to Rule 78(c); or file a complaint in superior court seeking injunctive relief, assessment of costs and expenses, and restitution. Unauthorized practice of law counsel shall not commence a superior court proceeding until the respondent is afforded an opportunity to respond in writing to the charge. Respondent shall have twenty days from notice of the request for information to respond.

3. *Failure of Respondent to Provide Information; Deposition*. When a respondent has failed to comply with any request for information made pursuant to these rules for more than thirty days, unauthorized practice of law counsel may notify respondent that failure to so comply within ten days may necessitate the taking of the deposition of the respondent pursuant to subpoena.

A. Venue. Any deposition conducted after the expiration of that ten day period and necessitated by the continued failure to cooperate by the respondent may be conducted at any place within the State of Arizona.

B. Imposition of Costs. When a respondent's failure to cooperate results in a deposition being conducted pursuant to the preceding subsection (b)(3)(A), the respondent shall be liable for the actual costs of conducting the deposition, including but not limited to service fees, certified ~~court~~ reporter fees, travel expenses and the cost of transcribing the deposition, regardless of the ultimate disposition of the unauthorized practice of law proceeding. Upon application of chief bar counsel to the committee, itemizing the costs and setting forth the reasons necessitating the deposition, and after giving the respondent ten days to respond, the committee shall, by order, assess such costs as appear appropriate against the respondent. An order assessing costs under this rule may be appealed to the superior court.

4. *Investigative Subpoenas*. During the course of an investigation and prior to the filing of a complaint, unauthorized practice of law counsel may obtain issuance of a subpoena to compel the attendance of witnesses, the production of pertinent books, papers and documents, and answers to written interrogatories, by filing a written request with the chief bar counsel or the chair or vice-chair of the committee. A copy of the request, which shall contain a statement of facts to support the requested subpoena, shall be provided to respondent or respondent's counsel, if represented. Upon receipt of a request for subpoena, a party may, within five days of service by first class mail, file a written objection with the committee. The committee may rule on the objection without oral argument.

5. *Dismissal by Unauthorized Practice of Law Counsel*. After conducting an investigation, unauthorized practice of law counsel may dismiss an unauthorized practice of law proceeding if there is no probable cause to determine that unauthorized practice of law occurred. Unauthorized practice of law counsel shall provide complainants with a right-to-sue letter upon dismissal of the charge.

(c) No change

125. Defining Minute Entry, Order, Ruling, and Notice; Party Responsibility

(a) Minute entry. A minute entry is the memorialization, electronic or otherwise, either by form or narrative of events occurring during a court proceeding or of matters required to be performed by statute or rule. It is not intended to be a verbatim record of the court proceeding. A court proceeding includes those matters heard in chambers when one or more parties are present or represented by counsel. In addition to the date and starting and ending times of a proceeding and the identity of the certified ~~court~~ reporter, alternative recording method and operator, or the absence thereof, a minute entry shall include all official acts occurring during the proceeding, which may consist of any or all of the following as applicable:
(1) nature of the hearing;
(2) appearances of counsel and parties;
(3) identification and admission of exhibits;
(4) administration of oaths and to whom administered;
(5) names of witnesses who are called to testify;
(6) parties' motions;
(7) findings of fact and conclusions of law by the court as required by law or rule;
(8) court rulings, orders, decisions and notices to the parties made in the course of the proceeding;
(9) verdicts; and/or
(10) any other matter directed by the court.
Nothing in this rule shall be read to require minute entries in any proceeding or to inhibit innovations or programs that would eliminate minute entries.

(b) through **(e)** No change

<u>Arizona Rules of Civil Appellate Procedure</u>

10. Appeals in Expedited Election Matters

(a) through **(e)** No change

(f) Preparation of the Record on Appeal.

(1) *Index*. The superior court clerk must prepare an index of the record and transmit the index and the superior court's record to the appellate court within 5 business days after the notice of appeal is filed.
(2) *Transcripts; Stipulated Record*.
(A) The appellant must promptly order and ask the ~~court~~ certified reporter or authorized transcriber to expedite the preparation of any transcripts necessary for determination of the appeal.
(B) No later than one business day after filing the notice of appeal in the superior court, the appellant must notify every other party of the portions of every transcript of court proceedings that the appellant intends to include in the record on appeal. If any other party considers a transcript of additional portions of the proceedings to be necessary, that party must notify the appellant and all other parties within one business day of the additional portions to be included in the record on appeal. If the appellant declines to order those additional portions, that other party may order them, or may instead request an appropriate order from the superior court judge who entered the judgment.
(C) The party that orders a transcript must make payment arrangements with the ~~court~~ certified reporter or authorized transcriber, and upon receipt of the transcript, must promptly file it with the appellate court and serve other parties with a copy.
(D) If necessary, a party may request the appellate court to order expedited preparation of the record.
(E) In lieu of transcripts, the parties may agree on a stipulated record and submit copies of the stipulated record to the appellate court.

(g) through **(j)** No change

11. The Record on Appeal

(a) No change

(b) Transcripts of Oral Proceedings. A transcript of an oral proceeding in the superior court must be prepared by a certified ~~court~~ reporter or by an authorized transcriber. A party that wants the record on appeal to include a transcript of an oral proceeding that was not previously filed as a part of the official record must order the transcript as follows:
(1) *Certified Transcript*. If a certified ~~court~~ reporter attended a proceeding in the superior court, a party must order a certified transcript of proceedings directly from that reporter.

(2) *Authorized Transcription*. If the superior court created only an audio or audio-video recording of the proceeding, a party must order a certified transcript of the proceeding directly from an authorized transcriber. The superior court must furnish the transcriber with a copy of the designated electronic recording upon receipt of a notice from the transcriber that the transcriber has reached a satisfactory arrangement for payment. All parties to the appeal must cooperate with the transcriber by providing information that is necessary to facilitate transcription.

(c) Appellant's Duty to Order Transcripts and Other Parties' Transcript Designations.

(1) *What to Order*.

(A) The appellant must order transcripts of superior court proceedings not already in the official record that the appellant deems necessary for proper consideration of the issues on appeal.

(B) If the appellant will contend on appeal that a judgment, finding or conclusion, is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record transcripts of all proceedings containing evidence relevant to that judgment, finding or conclusion.

(C) A complete transcript of superior court proceedings does not need to include juror qualifications, jury impaneling, opening statements, or argument of counsel to the jury, unless appellant will raise an issue concerning one of those proceedings.

(2) *When to Order*. The appellant must order transcripts directly from a certified ~~court~~ reporter or an authorized transcriber within 10 days after filing the notice of appeal, or within 10 days after entry of an order disposing of the last timely remaining motion under Rule 9(e), whichever is later.

(3) *Notice of Transcript Order and Statement of Issues on Appeal*. Within 15 days after filing the notice of appeal, or within 15 days after entry of an order disposing of the last timely remaining motion under Rule 9(e), whichever is later, the appellant must file in the superior court and serve on the other parties the following:

(A) A notice of transcript order that either: (i) states that the appellant has ordered a complete transcript of superior court proceedings; (ii) identifies the particular proceedings for which the appellant has ordered transcripts; or (iii) states that the appellant has not ordered any transcripts; and

(B) If the appellant orders less than a complete transcript of superior court proceedings, a statement of the issues that the appellant intends to raise on appeal.

(4) *Designation of Additional Transcripts; Notice of Intention Not to Order; Response*.

(A) Designation of Additional Transcripts. If another party considers a transcript of a proceeding necessary for proper consideration of the issues on appeal, and if the appellant has not ordered the transcript, the other party must file in the superior court, and serve on the appellant and all other parties, a designation of the additional transcript as part of the record on appeal. This designation must be filed and served within 10 days after service of the appellant's notice and statement under Rule 11(c)(3).
(B) Notice of Intention Not to Order. If the appellant does not intend to order a transcript designated by another party, the appellant must file in the superior court and serve on the other parties a notice stating that intention. This notice must be filed and served within 5 days after the service of a designation under Rule 11(c)(4)(A). If the appellant does not timely file and serve such a notice of intention, the appellant must order the transcript designated by the other party.
(C) Response to a Notice of Intention Not to Order. If the appellant timely files and serves a notice of intention not to order under Rule 11(c)(4)(B), the party that designated the transcript must respond within 5 days by:
(i) Filing and serving a notice withdrawing the designation;
(ii) Ordering the designated transcript, making arrangements for payment under Rule 11(c)(5), and filing and serving a notice identifying the transcript that was ordered; or
(iii) Filing a motion in the superior court for an order that would require the appellant to order, and to pay for, the designated transcript. The superior court may enter such an order upon a finding that it is in the interests of justice.
(5) *Payment*. When ordering transcripts, a party must make satisfactory arrangements with the certified ~~court~~ reporter or authorized transcriber for timely paying the cost of the transcripts the party has ordered.
(6) *Cross-Appellant*. When used in this Rule 11(c), the term “appellant” includes a cross-appellant, and the term “notice of appeal” includes a notice of cross-appeal.

(d) through **(h)** No change

11.1. Transmitting the Record to the Appellate Court

(a) through **(c)** No change

(d) Delivery and Filing of Transcripts.
(1) *Delivery and Filing*. If the ordering party has made payment, within 30 days after the date of a party's order the ~~court~~ certified reporter or authorized transcriber must provide the ordering party with a certified electronic transcript, or with a

certified paper transcript if one was requested by the ordering party. Within 5 days after receipt of a certified transcript, the ordering party must file it with the appellate clerk.
(2) *Extension of Time*. If a reporter or transcriber cannot complete a transcript within 30 days after a party's order, the ordering party may request the appellate clerk to grant additional time for the reporter or transcriber to provide it. Under Rule 15(e)(1), the unavailability of a transcript may be a basis for an extension of time to file a brief.
(3) *Service on Other Parties*. Within 5 days after receipt of a certified transcript from the reporter or transcriber, the ordering party must serve a copy of the transcript on all other parties. An ordering party that receives an electronic transcript must serve the transcript in either electronic or paper format, as requested by the other parties.
(4) *Additional Transcripts*. A party may file a motion with the appellate court at any time before the appeal is at issue under Rule 15(b) to include additional transcripts of superior court proceedings in the record on appeal.

Rules of Procedure for Direct Appeals from Decisions of the Corporation Commission to the Arizona Court of Appeals

7. Record on Direct Appeal of Commission Decisions or Orders

(a) through **(e)** No change

(f) Transcript Defined; Several Appeals; Inability to Provide Timely Transcript. "Transcript" for purposes of this rule shall refer to a ~~reporter's~~ transcript prepared by a certified reporter or authorized transcriber. When more than one direct appeal is taken from the same Commission decision, a single transcript shall be prepared. If a transcript cannot be obtained within the time limitations provided in this rule for transmission of the Commission record, application for relief may be made by the Commission to the Court of Appeals.

(g) No change

Rules of Procedure for Direct Appeals from Decisions of the Governing Bodies of Public Power Entities

7. Record on Direct Appeal of Decisions or Orders

(a) through **(e)** No change

(f) Transcript Defined; Several Appeals; Inability to Provide Timely Transcript. "Transcript" for purposes of this rule shall refer to a ~~reporter's~~ transcript prepared by a certified reporter or authorized transcriber. When more than one direct appeal is taken from the same Governing Body decision, a single transcript shall be prepared. If a transcript cannot be obtained within the time limitations provided in this rule for transmission of the record, application for relief may be made by the Governing Body to the Court of Appeals.

(g) No change

Arizona Rules of Family Law Procedure

8. Telephonic Appearances and Testimony

(a) No change

(b) Appearance of a Party at a Non-Evidentiary Proceeding. The court may allow a party to appear telephonically at a non-evidentiary proceeding if each person will be audible to every other person participating in the proceeding, including the judge, and, if applicable, to the ~~court~~ certified reporter or an electronic recording system.

(c) through **(f)** No change

12. Court Interviews of Children

(a) through **(b)** No change

(c) Record of the Interview.
(1) *Generally.* Unless the parties stipulate otherwise on the record or in writing, the court must record the interview, either by having a ~~court~~ certified reporter transcribe it or by recording it ~~through another retrievable and perceivable~~ by electronic ~~medium~~ means. However, any interview conducted by a judicial officer must be recorded.

(2) *Sealing*. For good cause and after considering the child's best interests, the court may seal from the public all or part of the record of the interview.
(3) *Availability to the Parties.* The parties may stipulate that the court not provide them with a record of the interview. If a party makes a request for recording, the court must make the record available to the parties not later than 14 days before the hearing at which the court will consider the interview, unless the court finds good cause for a different deadline.

(d) No change

18. Preserving a Recording of a Court Proceeding

(a) No change

(b) Transcription. If a ~~court~~ certified reporter's verbatim recording will be transcribed, the ~~court~~ certified reporter who made the recording must be given the first opportunity to make the transcription, unless that ~~court~~ certified reporter no longer serves in that position or is unavailable for any other reason.

57. Depositions by Oral Examination

(a) No change

(b) Notice of a Deposition; Method of Recording; Deposition by Remote Means; Deposition of an Entity; Other Formal Requirements.
(1) *Notice Generally.* Unless all parties agree or the court orders otherwise, a party who wants to depose a person must serve written notice to every other party at least 10 days before the date of the deposition. The notice must state the date, time, and place of the deposition and, if known, the deponent's name and address. If the deponent's name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.
(2) *Producing Materials.* If a subpoena for documents, electronically stored information, or tangible things has been or will be served on the deponent, the materials designated for production in the subpoena must be listed in the deposition notice or in an attachment to the notice. A deposition notice to a deponent who is a party to the action may be accompanied by a separate request under Rule 62 to produce documents, electronically stored information, or tangible things at the deposition. The procedures under Rule 62 apply to any such request.

(3) *Method of Recording.*
(A) Permitted Methods. Unless all parties agree or the court orders otherwise, testimony under oath or affirmation must be recorded by a certified reporter and in addition may be recorded by audio or audiovisual means.
(B) Notice of Method of Recording. With at least two days' written notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to a certified reporter. Unless the parties agree or the court orders otherwise, that party bears the expense of the additional recording.
(C) Transcription. Any party may request that the testimony be transcribed. If the testimony is transcribed, the party who originally noticed the deposition is responsible for the cost of the original transcript. Any other party may, at its expense, arrange to receive a certified copy of the transcript.
(4) *By Remote Means.* The parties may agree, or the court may order that a deposition be taken by telephone or other remote means. The deposition takes place where the deponent answers the questions, but an Arizona certified ~~court~~ reporter may record the testimony in Arizona. If the deponent is not in the officer's physical presence, the officer may nonetheless place the deponent under oath or affirmation with the same force and effect as if the deponent was in the officer's physical presence.
(5) *Notice or Subpoena Directed to an Entity.* In a deposition notice or subpoena, a party may name as the deponent a public or private corporation, a limited liability company, a partnership, an association, a governmental agency, or other entity, and must then describe with reasonable particularity the matters for examination. The named entity must then designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf. If the entity designates more than one person to testify, it must set out the matters on which each designated person will testify. Each designated person must testify about information known or reasonably available to the entity. This subpart does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Conferences Between Deponent and Counsel.
(1) *Examination and Cross-Examination.* The examination and cross-examination of a deponent must proceed as they would at trial under the Arizona Rules of Evidence including Rule 615. Parties may not make evidentiary objections, including relevance objections. Any party not present within 30 minutes after the time specified in the notice of deposition waives any objection that the deposition was taken without the party's presence. After putting the deponent under oath or affirmation, the certified ~~court~~ reporter personally--or a person acting in the

presence and under the direction of the officer--must record the testimony by the method(s) designated under Rule 57(b)(3).
(2) *Objections.* A certified ~~court~~ reporter must note on the record any objection made during the deposition--whether to evidence, to a party's, deponent's, or counsel's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition. An objection must be stated concisely, in a nonargumentative manner, and without suggesting an answer to the deponent. Unless requested by the person who asked the question, an objecting person must not specify the defect in the form of a question or answer. Counsel may instruct a deponent not to answer--or a deponent may refuse to answer--only when necessary to preserve a privilege, to enforce a limit ordered by the court, or to present a motion under Rule 57(d)(3). Otherwise, the deponent must answer, and the testimony is taken subject to any objection.
(3) *Conferences Between Deponent and Counsel.* The deponent and his or her counsel may not engage in continuous and unwarranted conferences off the record during the deposition. Unless necessary to preserve a privilege, the deponent and his or her counsel may not confer off the record while a question is pending.

(d) through **(g)** No change

69. Binding Agreements

(a) Validity. An agreement between the parties is valid and binding on the parties if:
(1) the agreement is in writing and signed by the parties personally or by counsel on a party's behalf;
(2) the agreement's terms are stated on the record before a judge, commissioner, judge pro tempore, or ~~court~~ certified reporter; or
(3) the agreement's terms are stated in an audio recording made before a mediator or a settlement conference officer appointed by the court.

(b) through **(c)** No change

73. Family Law Conference Officer

(a) through **(b)** No change

(c) Procedures.

(1) *Conducting a Conference.* The conference officer should conduct the proceedings in an informal manner but must give the parties an opportunity to present their positions. The conference officer may record the proceedings by ~~audiotape~~ electronic means or by a ~~court~~ certified reporter. A party represented by an attorney has the right to have the attorney present at the conference.
(2) *Agreements.* If the parties agree on issues raised during the conference, the conference officer may prepare a stipulation, consent decree, consent judgment, written agreement, or order for signature by the parties or their attorneys. If the parties are unable to agree on all issues, the conference officer may assist the parties in preparing a partial agreement and any documents necessary to effectuate that agreement. The conference officer must forward these documents to the assigned judge for approval and signature.
(3) *Exceptions.* A conference officer may not conduct a hearing required by statute, including a denial of parenting time, license suspension, UCCJEA, or establishment or modification of legal decision-making.

(d) No change

Arizona Rules of Protective Order Procedure

18. Record of Hearings

A judicial officer must cause all contested protective order hearings and, where practicable, all *ex parte* hearings to be recorded electronically or by a ~~court~~ certified reporter. An appeal from a contested hearing that was not electronically recorded or otherwise reported results automatically in a new hearing in the original trial court.

Arizona Rules of Probate Procedure

12. Telephonic and Video Attendance and Testimony

(a) No change

(b) When Permitted. Parties and their attorneys are expected to appear in open court for court proceedings unless the court, in its discretion, permits telephonic attendance under this rule. The court may allow a person to telephonically attend, or testify at, a proceeding if both of the following are true:

(1) the person can be heard by every other person participating in the proceeding, including the judicial officer and, if applicable, the ~~court~~ certified reporter or an electronic recording system; and
(2) no party will be unfairly prejudiced by the telephonic attendance or testimony.

(c) through **(h)** No change

22. Settlement Conference

(a) through **(d)** No change

(e) Record. Settlement discussions are not recorded by a ~~court~~ certified reporter or an electronic recording system. If the parties reach a settlement, the terms of the settlement must either be placed on the record and entered in the minutes or be included in a writing signed by the parties.

(f) through **(g)** No change

Rules of Procedure for the Juvenile Court

1. Applicability; Definitions; Required Format of Stipulations, Motions and Orders

(A) through **(B)** No change

(C) For the purposes of these rules, an "authorized transcriber" is a certified ~~court~~ reporter or a transcriber under contract with an Arizona court.

(D) No change

81. Consent to Adopt

(A) No change

(B) Procedure. At the hearing, the person seeking to give consent is responsible for the following:

1. Providing the court with proof of identification which shall include a photograph of the person so that the court can verify the identity of the person before taking a consent to adopt;
2. Making arrangements for the presence of a certified ~~court~~ reporter at the hearing if one is required to effectuate an out-of-state adoption; and
3. Providing the court with copies of the consents for signature if required, which shall include an additional copy for the court. All copies for signature shall be accompanied by self-addressed, stamped envelopes if the person consenting will request that the court mail the consents to the state where the adoption will occur.

(C) through **(D)** No change

104. Time Within Which an Appeal May be Taken and Notice Thereof; Preparation of Certified Transcript and Record on Appeal

(A) through **(B)** No change

(C)(1) Within two business days following the filing of a notice of appeal, the clerk of the superior court shall serve copies of the notice of appeal on all parties or their counsel; on each certified ~~court~~ reporter who reported any juvenile court proceeding that is part of the certified transcript as defined by subsection D.2. of this rule or the court's designated transcript coordinator, if the record was made by electronic or other means, and on the clerk of the court of appeals. The clerk of the superior court shall include with the copy of the notice of appeal served on the clerk of the court of appeals a copy of the order from which the appeal is taken and the names of the persons who were sent a copy of the notice of appeal.
(2) No later than 10 calendar days after the clerk of the superior court has served copies of the notice of appeal pursuant to subsection (C)(l) of this rule, any party to the proceeding from which the appeal arises or any fiduciary who appeared in the proceeding on behalf of a party thereto may file with the clerk of the superior court and serve on all persons on whom service was made under subsection (C)(l) of this rule a notice stating that the party or fiduciary does not intend to participate actively in the appeal and instead adopts and agrees in advance to be bound by the appellate positions, filings, representations, actions, and omissions of another party or parties, who shall be specifically identified. A notice under this subsection may not be used or relied upon as a substitute for a notice of appeal, notice of cross-appeal, petition for review, or cross-petition for review. By filing a notice under this subsection, a party or fiduciary does not waive the right to continue to receive service of orders, notices, or other documents issued by the juvenile court or the

appellate court, or motions, briefs, notices, or other documents filed by any other party in connection with the appeal. Filing a notice under this subsection does not relieve a party or fiduciary of the obligation to serve upon the remaining parties, or other persons or entities entitled by law or court rule to receive them, any motions, briefs, notices, or other documents filed by the party or fiduciary in the juvenile court or the appellate court in connection with the appeal.

(D) No change

(E) No later than five days after filing the notice of appeal the appellant may file with the clerk of the superior court and serve a pleading entitled "designation of record" (1) requesting that the clerk of the superior court add to the record on appeal specifically identified subpoenas or praecipes, or specifically identified studies, reports or medical or psychological evaluations, or compilations of such studies, reports or evaluations, prepared as required by statute, court rule or order for the use of the juvenile court in the proceedings resulting directly or indirectly in the order from which the appeal is taken and not otherwise part of the record; (2) requesting that the clerk of the superior court delete from the record specifically identified items otherwise automatically included in the record on appeal; and (3) requesting that one or more certified ~~court~~ reporters or the court's designated transcript coordinator, if the record was made by electronic or other means, add to the transcript any proceeding or part thereof not automatically included, and to exclude from the transcript any portion thereof otherwise automatically included. The appellant shall serve the designation of record on all parties, on each ~~court~~ certified reporter who reported a designated portion of the proceedings, and on the court's designated transcript coordinator, if the record was made by electronic or other means.

(F)(1) No later than 12 days after the filing of the notice of appeal any appellee may file with the clerk of the superior court and serve a pleading entitled "supplemental designation of record" (1) requesting that the clerk of the superior court add to the record on appeal specifically identified subpoenas or praecipes, or specifically identified studies, reports or medical or psychological evaluations, or compilations of such studies, reports or evaluations, prepared as required by statute, court rule, or order for the use of the juvenile court in the proceedings resulting directly or indirectly in the order from which the appeal is taken and not otherwise part of the record, or any specifically identified items deleted by appellant's designation of record; and (2) requesting that one or more ~~court~~ certified reporters or authorized transcribers add to the transcript any proceeding or part thereof deleted by appellant's designation of record or not automatically part

of the transcript as defined in Rule 104(D)(2). The supplemental designation of record shall be served on all parties and on each affected ~~court~~ certified reporter and authorized transcriber.
(2) If any dispute arises about whether the record discloses what actually occurred in the juvenile court, it shall be submitted to and resolved by the juvenile court. If anything material to any party to the appeal is omitted from or misstated in the record, the parties by stipulation, the juvenile court, either before or after the record is transmitted to the appellate court, or the appellate court on motion or on its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions concerning the form and content of the record shall be presented to the appellate court.

(G) No change

(H) The ~~court~~ certified reporter or reporters or authorized transcribers shall prepare the original certified transcript and one copy for each party to the appeal who has not filed a notice pursuant to subsection C.2. of this rule promptly upon receiving a notice of appeal filed by a governmental entity or a notice of appeal stating that the appellant was proceeding with appointed counsel in the juvenile court when the final order that is the subject of the appeal was filed.

(I) No later than five days after the filing of the notice of appeal or five days after the denial of a request to proceed with appointed counsel, an appellant who is not proceeding with appointed counsel shall make arrangements with the certified ~~court~~ reporter or authorized transcriber to pay for the transcript. The certified ~~court~~ reporter or authorized transcriber shall immediately notify the appellate court in writing if an appellant fails to make satisfactory arrangements within the prescribed time. When satisfactory payment arrangements are made, the certified ~~court~~ reporter or authorized transcriber shall promptly prepare the certified original transcript and one copy for each party to the appeal who has not filed a notice pursuant to subsection C.2. of this rule.

(J) No change

105. Docketing of Appeal; Transmission and Filing of Record on Appeal; Filings in Juvenile Court after Commencement of Appeal

(A) No change

(B) The ~~court~~ certified reporter or reporters or authorized transcriber shall file the completed certified transcript with the clerk of the court of appeals, marked with the number assigned to the appeal by the court of appeals, no later than
(1) 30 days after the filing of a notice of appeal by a governmental agency or of a notice of appeal stating that appellant proceeded with appointed counsel in the juvenile court when the final order that is the subject of the appeal was filed, or
(2) 30 days after service of an order of the presiding judge of the juvenile court appointing counsel to represent the appellant on appeal, or
(3) 30 days after the appellant makes satisfactory arrangements to pay for the certified transcript, whichever event first occurs. At the time of filing the certified transcript, the ~~court~~ certified reporter or reporters or authorized transcriber shall serve one copy of the certified transcript on each appellant and each appellee who has not filed a notice pursuant to 104(C)(2). The ~~court~~ certified reporter or reporters or authorized transcriber shall contemporaneously file notice of service of the certified transcript with the appellate court, reflecting when, upon whom, and by what means service was made. Service of certified transcript copies shall be made in the manner prescribed by any applicable local rule or administrative order, or otherwise in accordance with the prevailing custom in the juvenile court from which the appeal originates.

(C) If the certified transcript is not timely filed with the clerk of the court of appeals, the noncomplying ~~court~~ certified reporter or reporters or authorized transcriber shall be subject to such orders or sanctions as the court of appeals deems appropriate in its discretion.

(D) through **(G)** No change

106. Briefing, Consideration and Disposition in the Court of Appeals

(A) through **(D)** No change

(E) The appellate court, upon motion of the appellee, or upon its own initiative after notice to all parties, may dismiss an appeal for any legal cause including want of prosecution, unless an affected party makes a showing of good cause why the appeal should not be dismissed. The clerk of the court of appeals shall give prompt notice of dismissal of an appeal to the parties, the clerk of the superior court, and if the certified transcript has not yet been filed, to the appropriate ~~court~~ certified reporter or reporters or the court's designated transcript coordinator.

(F) through **(H)** No change

Superior Court Rules of Appellate Procedure—Civil

1. Scope of Rules; Definitions

(a) No change

(b) All appeals from the limited jurisdiction courts shall be on the record. The record may be made by a certified ~~court~~ reporter or other electronic means approved by the Supreme Court. A trial de novo shall not be granted when a party who had opportunity to request that a verbatim record of the limited jurisdiction court proceedings be made, failed to do so.

(c) through **(g)** No change

(h) For the purposes of these rules, an "authorized transcriber" is a certified ~~court~~ reporter or a transcriber under contract with an Arizona court.

Superior Court Rules of Appellate Procedure—Criminal

1. Scope; Definitions

(a) through **(e)** No change

(f) For the purposes of these rules, an "authorized transcriber" is a certified ~~court~~ reporter or a transcriber under contract with an Arizona court.

2. Record of Proceedings

(a) A record in the trial court shall be made by a certified ~~court~~ reporter or other electronic means approved by the Supreme Court.

(b) through **(d)** No change

Rule of Procedure for Judicial Review of Administrative Decisions

5. Record on Appeal

(a) through **(c)** No change

(d) Preparation and Certification of Transcript. The transcript of the administrative hearing, or designated portions thereof, must be included in the record on appeal if requested by appellant in the notice of appeal or in writing filed by any other party within 10 days after that party is served with a notice of appeal.
1. A party requesting a transcript not already contained in the administrative record of a hearing stenographically reported by a ~~court~~ certified reporter must make satisfactory arrangements with the reporter for payment of the cost of the transcript. That party must file the original transcript with the superior court within 30 days of the request.
2. A party requesting a transcript not already contained in the administrative record of a hearing created by recording must obtain a copy of the tape recording from the agency that conducted the hearing and cause a written transcript to be prepared at the requesting party's expense. The requesting party must file the transcript with the clerk of the superior court within 30 days of the request.

(e) No change

Justice Court Rules of Civil Procedure

123. Depositions

(a) Definition; before whom a deposition may be taken. A deposition is an opportunity to question another party or a witness while the other party or witness is under oath. A deposition is taken out of court before an officer authorized to administer oaths, without a judge present. A court clerk or a certified ~~court~~ reporter in Arizona may administer oaths. An out-of-state deposition may be taken before an officer who is authorized to administer an oath by the law or by a court of that state. A deposition may be taken in a foreign country before an officer authorized to administer an oath by the law of the place where the examination is held.

Questions and answers at a deposition are recorded by a certified ~~court~~ reporter, or by another method that is agreed to by the parties. A deposition may not be recorded by a party, by a person who is a relative, a friend, or an employee of a party, by an attorney for a party or an employee or relative of an attorney for a party, or by a person who is financially interested in the lawsuit. **[ARCP 28(a)-(c)]**

(b) No change

(c) Notice of deposition; deposition of a representative of a public or private entity. At least ten (10) days before the date of the deposition, a notice of deposition must be provided to ("served on") (1) the person who will be deposed and (2) the other parties to the lawsuit. The notice of deposition must state the name of the person who will be deposed; the location of the deposition; the date and starting time of the deposition; and the name of the person who will record the deposition and the method of recording. When a party deposes another party, a notice of deposition must also include the following language:

"The Justice Court Rules of Civil Procedure allow a party to take the deposition of another party. A deposition is an opportunity to ask questions to another person while the person who is deposed is under oath. A deposition takes place out of court and a judge is not present. A deposition is recorded by a ~~court~~ certified reporter or by another method agreed to by the parties. A deposition may not take longer than four (4) hours, unless agreed to by the parties or unless ordered by the court.
"If you fail to appear for your deposition, the party who sent this notice may file a motion asking that the court order you to appear. If the court orders you to appear for your deposition, the court may also order that you pay the expenses, including attorneys' fees, incurred by the other party as a result of your failure to appear. If you fail to appear for your deposition after the court has ordered you to appear, the court may impose additional penalties against you, including an order that you may not introduce evidence of some or all or your claims or defenses in this lawsuit; if you are a plaintiff, that your lawsuit be dismissed; or if you are a defendant, that your answer be stricken and that judgment be entered against you."

A notice of deposition may be served on a public or private entity, such as a governmental body or agency, a corporation, or a partnership, whether or not the entity is a party to the lawsuit, and the notice may describe with reasonable specificity the topics that will be asked about during the deposition. The entity must then designate one or more of its officers, directors, or employees who have knowledge of the specified topics and who will appear at the deposition and testify concerning those subjects. **[ARCP 30(b), (d)]**

d. Procedure. The attendance of a witness who is not a party at a deposition may be required by serving the witness with a subpoena, as provided in Rule 137(b). A

party may be required to produce documents at a deposition pursuant to Rule 125. The party requesting the deposition must pay the cost of recording, unless the court orders or the parties agree otherwise.

The deposition must start within thirty (30) minutes of the time provided in the notice, and any party not present within thirty (30) minutes of the time provided in the notice of deposition waives any objection to the deposition starting without the party's presence. The officer specified in section (a) of this rule must administer the oath to the person who is deposed before the start of testimony. If a deposition is recorded by means other than a certified ~~court~~ reporter, the person operating the recording equipment must be sworn to fully and fairly record the proceeding. The person or persons recording the deposition will note the starting and ending times of the deposition, and the times of any breaks during the deposition.

Any objections at a deposition, including objections to a specific question, will also be recorded, and evidence is taken subject to the objections. Objections to the form of a question, or to the responsiveness of an answer, must be concise, and must not suggest answers to the person being deposed. Continuous or unwarranted off-the-record conferences with the person being deposed, following questions and before answers, are not permitted, and this conduct is subject to penalties under Rule 127(d).

The ~~court~~ certified reporter or other person recording the deposition must identify and maintain any exhibits used at the deposition, although copies of original exhibits may be substituted by agreement of the parties. Before concluding the deposition, the ~~court~~ certified reporter or other recorder must ask the witness if the witness would like an opportunity to review the transcript or recording to affirm its accuracy, or if the witness waives that right. A witness who asks to review the transcript or recording will have thirty (30) days after notification that the transcript or recording is available to review and to submit a statement concerning any inaccuracy of the transcript or recording, and a statement submitted by the witness to the ~~court~~ certified reporter or other recorder within that time must be included with the transcript or recording of the deposition.

Upon motion, the court may impose an appropriate penalty under Rule 127(d) against any party, attorney, or witness who engages in unreasonable, groundless, abusive or obstructionist conduct at a deposition, or against a party or attorney who takes a deposition in bad faith, or to annoy or embarrass the person being deposed. **[ARCP 30(b)-(d), 32(d)]**

(e) No change

Rules of Procedure for Eviction Actions

11. Initial Appearance and Trial Procedures

(a) In General. All proceedings in eviction actions shall be recorded, either through a recording device or by a ~~court~~ certified reporter. On the date and at the time set for the initial appearance, and after announcing the name of the plaintiff and the defendant, the court shall:
(1) Call the case, identify the parties and any attorneys or representatives present and ascertain that they are properly authorized to represent the parties to the action. As provided by Arizona Supreme Court Rule 31, no property manager or other agent shall be allowed to represent a party unless he or she is the property owner, a sub lessor entitled to possession, or an attorney licensed to practice law and in good standing in Arizona.
(2) State or summarize the material allegations contained in the complaint.
(3) Ask the defendant whether the defendant contests the allegations contained in the complaint.

(b) through **(e)** No change

Appendix B

Report and Recommendations of the Arizona Task Force to Supplement Keeping of the Record by Electronic Means

August 30, 2019

Table of Contents

MEMBERS 1

EXECUTIVE SUMMARY 4

Creation and Charge of the Task Force 4

Overview of this Report 5

The Task Force and the Task Force Process 5

Summary of Task Force Report and Recommendations 6

DISCUSSION 8

Background 8

Possible Changes to Statutes, Rules, and the Arizona Code of Judicial Administration 13

Arizona Efforts to Attract, Retain, and Further Enhance the Capacity of Court Reporters 14

Suggested Best Practices When Electronic Recording is Used 18

APPENDIX 1—Administrative Order 21

APPENDIX 2—Possible Changes to Statutes, Rules, and the Arizona Code of Judicial Administration 24

Arizona Task Force to Supplement Keeping of the Record by Electronic Means

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Report and Recommendations of the Arizona Task Force to Supplement Keeping of the Record by Electronic Means

August 30, 2019

EXECUTIVE SUMMARY

Creation and Charge of the Task Force

Arizona Supreme Court Chief Justice Scott Bales issued Administrative Order No. 2019-49, establishing the Arizona Task Force to Supplement Keeping of the Record by Electronic Means, on May 21, 2019. Noting that Arizona, consistent with nationwide trends, is experiencing a shortage and unavailability of court reporters, the administrative order states "[t]his situation may require courts to reschedule or delay scheduling judicial proceedings, negatively impacting the ability to secure a speedy trial, hearing, or other resolution and ultimately delaying the administration of justice to the parties, victims, and all involved in the legal system broadly. The shortage also impacts court reporters' ability to transcribe the proceedings in a timely manner."

> *"The Task Force shall develop recommended changes to statutes, rules, and the Arizona Code of Judicial Administration to permit courts to create and maintain a complete and accurate court record electronically to supplement court reporters and to prevent delay in resolving disputes in the trial court and on appeal."*
> Administrative Order No. 2019-49 ("Establishment of the Task Force to Supplement Keeping of the Record by Electronic Means")

"Given these issues," the administrative order continues, "electronic recording technology has been deployed in many Arizona courts to supplement the use of a court reporter in making a record of court proceedings. Use of electronic recording

technology is limited, however, by statutes and rules enacted at a time when such technology did not exist or was not available or dependable."

In describing its purpose, the administrative order directs that "[t]he Task Force shall develop recommended changes to statutes, rules, and the Arizona Code of Judicial Administration to permit courts to create and maintain a complete and accurate court record electronically to supplement court reporters and to prevent delay in resolving disputes in the trial court and on appeal." The task force is directed to consider the issues involved and to submit this report and "recommendations, together with recommended changes to statutes, rules, and the Arizona Code of Judicial Administration, by September 1, 2019 for circulation for comment and for presentation to the Arizona Judicial Council on October 24, 2019."

Overview of this Report

This report begins with a summary of the membership of the task force, the process used to develop this report and these recommendations, and a summary of the recommendations themselves. The report then provides background information considered by the task force on the topic, with additional details available on the task force's website: https://www.azcourts.gov/cscommittees/Task-Force-to-Supplement-Keeping-of-the-Record-by-Electronic-Means. The report includes, at Appendix 2, possible changes to statutes, rules, and the Arizona Code of Judicial Administration (sometimes referred to as the ACJA).

The Task Force and the Task Force Process

Members of the task force were selected, quite intentionally, to represent a wide variety of different perspectives. Members include an urban superior court judge; an appellate court judge; a rural county attorney; public and private court reporters, who also serve in leadership in the Arizona Court Reporters Association; rural and urban superior court administrators; an urban director of public defense services; an attorney in private practice; a representative of county management designated by the County Supervisors' Association as well as staff support from the Arizona Administrative Office of the Courts (AOC). The intent was to make sure the task force included diverse perspectives in its work while keeping the number of members manageable.

The task force held three face-to-face meetings - June 25, 2019; August 1, 2019 and August 26, 2019 - and met by telephone on August 29, 2019. During these meetings, the task force learned about and discussed various issues, gathered and shared relevant information, considered approaches to use and recommendations to make, and then discussed and refined this report. These discussions included gathering and discussing

information about a wide variety of topics related to keeping the court record, with a particular focus on electronic recording. That effort prompts the structure of this report, which consists of three substantive sections: (1) possible changes to statutes, rules, and the Arizona Code of Judicial Administration to afford local superior courts in individual counties, through their presiding judges adopting policies and procedures, flexibility to create and maintain a complete and accurate court record electronically to supplement court reporters and prevent delay in resolving disputes in the trial court and on appeal; (2) efforts in Arizona to attract, retain and further enhance the reach and capacity of court reporters and (3) suggested best practices to apply when electronic recording is used to help ensure that courts continue to create and maintain a complete and accurate court record regardless of how the record is prepared.

Summary of Task Force Report and Recommendations

1. As directed by the administrative order, the task force developed possible changes to statutes, rules, and the Arizona Code of Judicial Administration to permit courts to create and maintain a complete and accurate court record electronically to supplement court reporters and to prevent delay in resolving disputes in the trial court and on appeal. These changes, which are addressed in more detail below, are attached as Appendix 2.

2. Given the current shortage and unavailability of court reporters in Arizona, numerous efforts are underway to help attract, retain and further enhance the reach and capacity of court reporters. Regardless of whether changes to statutes, rules, and the ACJA are implemented, these efforts - which are discussed in more detail below - should be continued.

3. Best practices for electronic recording need to be enhanced and communicated to help ensure that courts continue to create and maintain a complete and accurate court record regardless of how the record is prepared. The ACJA contains helpful policy guidance for such practices. But particularly if electronic recording is used to create the court record in new areas and new ways, those standards should be enhanced to account for such new use. Moreover, those standards regularly should be

evaluated, at set intervals, to ensure that they account for changes in technology and any expansion of use of electronic recording to create the court record to help ensure that a complete and accurate court record is created and maintained.

A more detailed description of the background and reasoning supporting these recommendations follows.

DISCUSSION

Background

"Production and preservation of a record of proceedings in a court of record are fundamental functions of the Judicial Branch." This introductory sentence from Administrative Order 2019-49 repeats what has been the case in Arizona since territorial days, and for far longer elsewhere. Court reporters have been a key component of producing and preserving records of legal proceedings.

In recent years, and increasingly, there has been a decrease in the number of court reporters resulting in significant vacancies. As one example, the 2018 Annual Report of the South Carolina Judicial Branch noted: "South Carolina is one of many states experiencing a shortage of court reporters. This established trend has been noted by industry experts for quite some time, and the South Carolina Judicial Branch works diligently to minimize the impact of the shortage on court proceedings."[3] Along with efforts to recruit and attract more court reporters, South Carolina has "incorporated digital recording as a supplemental measure in select courtrooms." South Carolina is not alone in these efforts; a National Center for State Courts (NCSC) survey revealed that, nationwide, many courts are using electronic recording to create the court record.

It is in this context that Arizona established the task force. The shortage and unavailability of court reporters in Arizona "may require courts to reschedule or delay scheduling judicial proceedings, negatively impacting the ability to secure a speedy trial, hearing, or other resolution and ultimately delaying the administration of justice to the parties, victims, and all involved in the legal system broadly. The shortage also impacts court reporters' ability to transcribe the proceedings in a timely manner."

The administrative order also notes that transcript production is "one of the major factors contributing to delay in resolving appeals. Transcript production, which is required before any briefing can occur on appeal, can take months, delaying all types of appeals, including those where critical liberty interests are involved, such as criminal appeals and termination of parental rights appeals." These delays in transcript production

[3] South Carolina Judicial Branch 2018 Annual Report at 8. *See* *https://www.sccourts.org/whatsnew/SOJ2019/2019SCJBAnnualReport.pdf*.

may be attributed to both court reporters and authorized transcribers.

Such delays are particularly significant where an individual is in custody awaiting resolution of criminal charges or, in juvenile court, a delinquency petition. But delays have a significant negative impact in other types of proceedings, including abuse and neglect (dependency) proceedings, where a child is in foster care pending resolution of the proceedings; family court matters (where child custody and the best interests of the child are cornerstone issues to be resolved) and in civil litigation, where resolution of a claim for damages may have enormous consequences to the parties.

To date, as noted in the administrative order, "[g]iven these issues, electronic recording technology has been deployed in many Arizona courts to supplement the use of a court reporter in making a record of court proceedings. Use of electronic recording technology is limited, however, by statutes and rules enacted at a time when such technology did not exist or was not available or dependable." For these same reasons, courts are not afforded the flexibility, discretion, and authority to determine how the court record is made.

Along with the administrative order, the Arizona Supreme Court's strategic plan – "Justice for the Future Planning for Excellence 2019-2024" – echoes this same call. Goal 3 "Promoting Judicial Branch Excellence and Innovation" states the following in addressing "Keeping the Record:" "With a growing shortage of qualified court reporters at both the state and national level, courts are faced with the ever-increasing challenge of keeping an accurate record of court proceedings. Through emerging innovations, including digital recording and remote court reporting, we will take necessary steps to ensure courts continue to create a complete and accurate record for each and every case." To achieve this goal, the strategic plan added a target to "[m]odernize statutes, rules, and the administrative code permitting courts to create and maintain a complete and accurate court record electronically to supplement court reporters and to reduce the time needed to produce a record and transcript for cases on appeal."

This background and context provided the call to action for the task force.

Task Force Meetings

The task force met three times in person and once by telephone.

The first meeting on June 25, 2019 started with introductions, adoption of rules for conducting task force business, a discussion of the charge of the task force

and the timelines set forth in the administrative order. During this meeting, the task force learned more about the court reporter shortage nationwide but, in particular, in Arizona. A court reporter staffing survey illustrated the situation in the superior courts in Arizona's 15 counties. That survey revealed that five counties employ no court reporters. Of the remaining 10 counties, just two had no court reporter vacancies. All told, of the 132 authorized court reporter positions in these superior courts, 26.5 (or 20 percent) were vacant. The reported duration of those vacancies ranged from "1 Month," to "Continuous," to "5 years" and, in one county, "10 years."

This first meeting included a comparatively unstructured, open discussion of the issues involved from various perspectives. In the end, the task force identified several "to-do" items to investigate and report back at the next meeting, including: (1) circulating text of relevant statutes, rules, and portions of the ACJA; (2) obtaining additional information on the Request a Reporter program; (3) asking Mark Wilson, Certification and Licensing Division Director, to attend the next meeting to discuss court reporter licensing; (4) gathering information about what other states and jurisdictions may be doing in addressing the issues; (5) surveying court reporter salaries in Arizona and (6) ensuring that court record retention schedules account for the work of the task force. During its work, the task force also learned that Arizona Revised Statutes section 12-224 governing, among other things, fees for transcripts, has not been updated since 1987, and the page rate has not been changed since the late 1970s.

After this first meeting, these "to-do" list items were researched and relevant information was provided to the task force in advance of, or at, the second meeting.

The second meeting on August 1, 2019 started with a recap of the prior meeting, including the charge of the administrative order. Director Mark Wilson presented, addressing court reporter licensure, as well as how new legislation regarding reciprocity may impact the court reporter licensing process, and answered questions from task force members.

The meeting then involved presentations from three different, but frequently overlapping, perspectives: (1) a national perspective; (2) a court reporter perspective and (3) a court management perspective. These thoughtful presentations included questions and suggestions from task force members and provided the foundation for a broader conversation about next steps for the task

force. At the close of this second meeting, a general consensus was discussed for the structure of this report and the next task force meetings were scheduled.

Between this second meeting and the third meeting on August 26, 2019, a first draft of this report was prepared (based on the discussions at the first two meetings) and circulated to the task force for review via email on August 8, 2019. The task force was asked to review that draft and provide suggestions and comments by close of business on August 19, 2019. Those comments were then incorporated into a second draft that was circulated to the task force on August 21, 2019, in anticipation of the third task force meeting on August 26, 2019.

This third in-person task force meeting focused largely on the concepts and text in the second draft report and recommendations. In response to a question raised at the August 1, 2019 meeting, the task force received information from Director Mark Wilson. In Arizona, certified reporters renew their certification every even year. In February 2018 there were 440 Arizona certified reporters at the time of renewal; 376 renewed, 53 did not renew and 11 went inactive. Currently, Arizona has 402 certified reporters. These numbers suggest that, during February 2018, 64 court reporters did not renew or went inactive while since February 2018, 26 additional court reporters were certified.

At the end of this third in-person meeting, the task force approved, by a vote of 7-2, Section 2 ("Arizona Efforts to Attract, Retain and Further Enhance the Capacity of Court Reporters") and Section 3 ("Suggested Best Practices When Electronic Recording is Used") and related text, subject to the editorial prerogative to account for suggestions offered. Section 1 ("Possible Changes to Statutes, Rules, and the Arizona Code of Judicial Administration") and Appendix 2 were then revised and recirculated on August 27, 2019 in advance of the last task force meeting.

The last task force meeting was held telephonically on August 29, 2019. The purpose of this meeting was to account for changes, suggestions and additions to the report discussed at the August 26, 2019 meeting. At this last meeting, the task force considered revised Section 1 and Appendix 2 recirculated on August 27, 2019. Additional changes to Appendix 2 were suggested and, after discussion, a motion was made and seconded to approve Appendix 2, with those additional changes.

That version of revised Appendix 2 would have required a written request to be made for grand jury proceedings to be transcribed. After discussion, a motion to

amend was made and seconded, and passed by a vote of 7-2, so that the motion to approve as amended did not include language in Appendix 2 changing the current requirement that a grand jury transcript be prepared where an indictment issues. After further discussion, the motion as amended passed by a vote of 6-3. After a discussion, a motion was made and seconded to approve Section 1 ("Possible Changes to Statutes, Rules, and the Arizona Code of Judicial Administration") and related text, subject to the editorial prerogative to account for suggestions offered. That motion passed by a vote of 6-3. Revised versions of the documents were then circulated to task force members for any final proofreading issues later in the day.

This report and recommendations reflect the product of this deliberative process.

Possible Changes to Statutes, Rules, and the Arizona Code of Judicial Administration

Attached as Appendix 2 are changes, identified by the task force, to Arizona statutes, Arizona procedural rules, and the Arizona Code of Judicial Administration to permit courts to create and maintain a complete and accurate court record electronically to supplement court reporters and to prevent delay in resolving disputes in the trial court and on appeal. Appendix 2, which is intended to be comprehensive based on what the task force identified, is provided as directed by the administrative order.

In preparing Appendix 2, the task force considered numerous additional Arizona statutes, Arizona procedural rules and the ACJA. As a result of this consideration, the task force elected not to identify changes where at least one of the following applied: (1) the current provision already contemplated electronic recording in the discretion of the court; or (2) the current provision did not address the issue of how the verbatim record of a court proceeding is captured and preserved.

Several limitations and caveats are essential to provide clarity about what Appendix 2 does and does not address.

First, the changes in Appendix 2 deal with creating and maintaining a verbatim record of court proceedings. Unless arising in provisions that include both the judiciary and other governmental entities (such as agencies), these changes do not address law directing how a verbatim record is created and maintained in non-judicial proceedings, such as agencies or political subdivision proceedings.

Second, relatedly, the changes reflected in Appendix 2 do not address law directing how a verbatim record is created and maintained in court-adjacent proceedings such as a deposition.

Third, the changes reflected in Appendix 2 do not alter when a verbatim record of court proceedings must be created and maintained. Instead, the changes deal with what discretion a court has in deciding how (not whether) to create and maintain a verbatim record of court proceedings.

Fourth, if pursued and enacted, the changes reflected in Appendix 2 would provide a court additional discretion in deciding how to create and maintain a verbatim record of court proceedings. The changes do not direct or suggest how

a court should exercise discretion granted to it in deciding how to do so.

Fifth, consistent with the directives in the administrative order, Appendix 2 suggests changes that would afford courts discretion to determine how the verbatim record of court proceedings should be created and maintained in all instances, including instances where current law does not afford such discretion. *See* Ariz. R. Sup. Ct. 30(b)(3). Adopting such changes, particularly as they apply to "[g]rand jury proceedings" where no judicial officer is present, would implicate significant policy issues, which are beyond the scope of the charge of the task force, and quality control and training issues, some of which are addressed in the next part of this report.

Finally, and to amplify on the prior paragraph, given the directive in the administrative order and the time and deadline set for the task force, the issues discussed in this Report, and any resulting changes that may be pursued, implicate significant policy issues, which are beyond the scope of the charge of the task force. The chair made this point throughout the work of the task force. Moreover, those policy issues were not the focus of the work of the task force. Instead, given the primary directive in the administrative order and the press of time, the task force focused on the important, but largely mechanical, task of identifying and capturing possible changes to statutes, rules, and the Arizona Code of Judicial Administration to permit courts to create and maintain a complete and accurate court record electronically to supplement court reporters and to prevent delay in resolving disputes in the trial court and on appeal.

Arizona Efforts to Attract, Retain, and Further Enhance the Capacity of Court Reporters

Nationwide efforts are underway to attract and recruit individuals to the court reporting profession to overcome the nationwide shortage. Two organizations in particular are making significant efforts in this area, namely the National Court Reporters Association (NCRA) and Project Steno.

In October 2016, NCRA launched an A to Z steno program,[4] launched online in 2018. This free program is open to anyone interested in learning the steno keyboard

[4] https://www.ncra.org/discoversteno; https://www.ncra.org/home/forms/learnsteno-a-to-z-intro-to-machine-shorthand-sign-up-form, August 6, 2019.

once per week (three hours per session) for six to eight weeks. After those learning sessions, the program assists the individual with locating an educational institution the person can attend to become a court reporter.

More than 2,000 students have participated in the program in a comparatively short period of time. It is unclear, however, how many of these participants have gone on to seek to pursue a career in court reporting.

Project Steno is an organization formed in 2017. Its mission is to "promote the stenographic court reporting/captioning profession through social media and community outreach with the goal of building a robust pipeline of students into school and graduating them in two years."[5]

Project Steno also offers a Basic Training program, similar to NCRA's A to Z program. Participants who complete either the Basic Training Program or NCRA's A to Z program are eligible for Project Steno's tuition assistance. Project Steno partners with schools, provides coaching, and mentoring, and is working with the United States government to focus on recruiting military spouses into the court reporting profession.

[5] https://projectsteno.org/why-project-steno/, August 6, 2019.

Project Steno also is present in vocational high schools and career educational programs. Over the past two years, the program has worked with high schools in four states and launched programs in high schools within these states.

The Arizona Court Reporters Association (ACRA) is taking action to expand court reporter services in Arizona. It has reinstituted the Request a Reporter program, has notified its members and has notified outlying counties. This program allows counties to let ACRA know when there is a trial or other need for court reporting services that otherwise would be unmet. An email is sent by ACRA to its members and the need posted on ACRA's Facebook page to try to secure a court reporter to provide services to meet that need.

Remote reporting also is a solution that ACRA referenced. This concept allows court reporters in different locations to provide contemporaneous reporting services. Remote video reporting is also currently in use in some Arizona courts.

In addition, ACRA is facilitating advertising to attract and retain court reporters in Arizona and providing transcription solutions.

Recent Arizona legislation, passed effective August 27, 2019, will allow

licensing reciprocity in Arizona, which includes court reporter licensing. This means that court reporters licensed in other states no longer have to pass the Registered Professional Reporter (RPR) licensing requirements for Arizona, which may be attractive to out-of-state court reporters seeking to relocate to Arizona. This legislation just became effective, meaning that it is too early to tell whether this reciprocity will result in more court reporters moving to Arizona. That said, given that there are approximately 400 certified court reporters in Arizona, even a small percentage increase in court reporters relocating to Arizona could have a significant benefit.

It is hoped that these significant efforts will yield results to lessen the shortage of court reporters in Arizona. Outside of Arizona, the shortage also is significant, with a stated unmet need for court reporters ranging from 5,000 - 6,000 nationwide. Court reporting schools have reported declining enrollments and 200 schools have closed in the last 20 years.

Recommendations:

1. Efforts should be made to encourage local community colleges to provide and expand court reporter programs.
2. Courts and court reporters are encouraged to work together to cover courtroom calendars via workforce exchange, remote reporting from a dedicated location, utilizing the Request a Reporter program, etc.
3. Superior court administrators should ensure that licensing reciprocity information is included in job announcements and advertising.
4. Court reporters are encouraged to continue their community outreach and recruiting efforts.

* * * * *

Along with these recommendations, the task force encourages efforts to ensure that the certification process for court reporters in Arizona be expedited as much as possible to avoid losing qualified candidates to other states during the process. Arizona has a stringent quality-control based certification process that is not shared by many other states. Although not suggesting any change to the showing required to obtain certification in Arizona, the expressed hope is that the time period required to consider applications for certification in Arizona is competitive with other states so that candidates do not receive certification more promptly in another state and decide to move there instead of moving to (or remaining in) Arizona.

Another suggestion discussed by the task force, and noted here, is to determine whether the time permitted for providing

trial transcripts for a court reporter might vary depending upon the number of trial days reported by that court reporter. To use a hypothetical, for transcript production, it may be that the rules should require a smaller number of days for a five-day trial than that for a 25-day trial.

In addition, the lack of prompt and timely notice to the court reporter(s) of the need for transcript(s), particularly for an appeal, is an issue that at times has caused transcript delay. Further addressing the processes involved to provide that notice, and ensuring that such notice is effective, could avoid such delay.

Finally, a task force member provided information about a California program that allows courts to appoint certified shorthand reporters to serve as official court reporter pro tempores when an official reporter is unavailable.[6] The task force encourages further research into this and other similar programs that provide these types of alternatives for consideration in Arizona.

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6 http://www.lacourt.org/generalinfo/courtreporter/GI_RE001.aspx, August 27, 2019.

Suggested Best Practices When Electronic Recording is Used

Operation of a credible, reliable and accurate electronic recording (ER) program requires adoption of governing policies, procedures and a clear delineation of job responsibilities, both for court staff and transcription services. The Conference of State Court Administrators (COSCA) has advocated that courts "develop standards for topics including equipment, operation, security, storage, backup, retrieval, transcription and certification, redaction, retention, custody and public access."[7]

To this end, the NCSC has published a comprehensive set of recommendations and minimum standards for digital recording programs, addressing the following areas:

- Governance, organization and structure;
- Ownership of the official record;
- Access to digital recordings;
- Oversight of digital recording monitors;
- Procedures and best practices;
- Signage;
- Opening colloquy;
- Procedures for courtroom monitors;
- Procedures for attorneys and courtroom participants;
- Transcription and delivery of the record;
- Access to recordings;
- Preparation and distribution of the transcript;
- State court practices and rules on management of transcript production;
- Equipment and technology standards;
- Digital recording format standards;
- Digital recording system specifications;
- Courtroom equipment, electrical connections, and wiring;
- Chambers equipment, electrical connections, and wiring;
- The record and transcription; and
- Facilities design recommendations.[8]

The Arizona Supreme Court has adopted administrative policies and procedures (ACJA § 1-602: Digital Recording of Court Proceedings)

[7] Lee Suskin & Daniel J. Hall, "Making the Record Utilizing Digital Electronic Recording," National Center for State Courts and State Justice Institute, September 2013, pg 6. See *https://www.ncsc.org/Services-and-Experts/Court-reengineering/~/media/Files/PDF/Services%20and%20Experts/Court%20reengineering/09012013-making-the-digital-record.ashx*.

[8] *Id.* at 9-51.

governing many, but not all, of the foregoing areas of electronic recording, including:

- Technical requirements: equipment standards, annotation, playback, storage and back-up;
- Operational requirements: staffing, equipment checks, security, transcription and records management; and
- Best practices: procurement, staff training, alternative means of making the record in the event of equipment failure and public access fees.

These ACJA provisions, which govern ER currently authorized in Arizona, need to be communicated and complied with (and likely enhanced) if the use of ER expands in Arizona's courts.

Recommendations:

Given the critical importance of creating and maintaining the court record, recommendations to identify and implement best practices when ER is used include:

1. Expanding the Arizona Supreme Court's policy on Digital Recording of Court Proceedings set forth in ACJA § 1-602 to encompass all applicable areas of the foregoing minimum standards promulgated by the NCSC and update the Arizona Manual of Transcript Procedures to reflect changes in transcript production and how the record is captured.

2. Implementing measures to ensure full implementation of the Arizona Supreme Court's policies and procedures governing electronic recording through:

- Designation of court staff to serve as courtroom monitors;
- Checklists for systems maintenance and operation, transcription services and record management;
- Specialized job descriptions for electronic recording program staff;
- Develop and implement training programs to account for and enhance skills sets identified in specialized job descriptions for individuals involved in all aspects of electronic recording systems;
- Periodic certification of electronic recording systems by local courts, periodic quality control and assessments and annual re-certification of electronic recording systems: and
  - Revocation of the local court's discretion to allow electronic recording if standards are not met.

The Arizona Supreme Court's administrative policy governing criminal court hearings conducted via video communications (ACJA § 5-208) is instructive in terms of system equipment maintenance, serving as a possible model for the oversight of electronic recording systems in the trial courts. Specifically, the policy (ACJA § 5-208(C)) expressly requires that courts conducting such video hearings certify - on an annual basis - that the video system meets operational standards. A checklist is also provided for the annual system certification process. CHECKLIST and CERTIFICATION ACJA § 5-208.

3. Court employees and contractors involved in the operation of the electronic recording program and/or transcription services must comply with governing statutes, court rules and policies. The NCSC recommends that courts adopt a code of "conduct and confidentiality" for staff and contractors, similar to that of the Code of Professional Ethics adopted by the American Association of Electronic Reporters and Transcribers (AAERT).[9]

It is recommended that separate governing codes of conduct be developed as applicable to the work of court staff and contract employees. For court staff working in the electronic recording program, the provisions of the Arizona Supreme Court's Code of Conduct for Judicial Employees (ACJA § 1-303) may well suffice. That said, the Arizona Supreme Court has established specialized codes of conduct governing court reporters (ACJA § 7-206(J)) and court interpreters (Administrative Order No. 2015-98), which may be instructive in this analysis.

It is recommended that a separate code of conduct be developed to govern the work of contract employees who provide transcription or electronic monitoring services. The recommended expansion of the Arizona Supreme Court's policy on Digital Recording of Court Proceedings should include a provision requiring adoption of the recommended code of conduct for contract employees in all vendor contracts for electronic recording services.

It is also recommended that education efforts regarding ER include all involved in the judicial system, including court staff, counsel, parties and judicial officers. To that end, best practices information should be included in judicial training and in Bench books promulgated by the Administrative Office of the Courts for use by judicial officers.

[9] Lee Suskin & Daniel J. Hall, "Making the Record Utilizing Digital Electronic Recording," National Center for State Courts and State Justice Institute, September 2013, Appendix E, pgs 45-46.

APPENDIX 1—Administrative Order

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	
ESTABLISHMENT OF THE TASK FORCE TO SUPPLEMENT KEEPING OF THE RECORD BY ELECTRONIC MEANS	Administrative Order No. 2019 - 49

Production and preservation of a record of proceedings in a court of record are fundamental functions of the Judicial Branch. Arizona Revised Statutes and Arizona Rules of Procedure require that courts produce a verbatim record of certain judicial proceedings.

Consistent with trends nationwide, several Arizona counties are experiencing a shortage and unavailability of court reporters. This situation may require courts to reschedule or delay scheduling judicial proceedings, negatively impacting the ability to secure a speedy trial, hearing, or other resolution and ultimately delaying the administration of justice to the parties, victims, and all involved in the legal system broadly. The shortage also impacts court reporters' ability to transcribe the proceedings in a timely manner.

Delays in transcript production also are one of the major factors contributing to delay in resolving appeals. Transcript production, which is required before any briefing can occur on appeal, can take months, delaying all types of appeals, including those where critical liberty interests are involved, such as criminal appeals and termination of parental rights appeals.

Given these issues, electronic recording technology has been deployed in many Arizona courts to supplement the use of a court reporter in making a record of court proceedings. Use of electronic recording technology is limited, however, by statutes and rules enacted at a time when such technology did not exist or was not available or dependable.

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED that the Task Force to Supplement Keeping of the Record by Electronic Means is established as follows:

1. **Purpose.** The Task Force shall develop recommended changes to statutes, rules, and the Arizona Code of Judicial Administration to permit courts to create and maintain a

complete and accurate court record electronically to supplement court reporters and to prevent delay in resolving disputes in the trial court and on appeal.

2. **Membership.** The individuals listed in Appendix A are appointed as members of the Task Force effective immediately and ending November 30, 2019. The Chief Justice may appoint additional members as may be necessary.

3. **Meetings.** The Task Force shall meet at the discretion of the Chair. All meetings shall comply with the public meeting policy of the Arizona Judicial Branch, Arizona Code of Judicial Administration § 1-202: Public Meetings.

4. **Recommendations.** The Task Force shall submit its recommendations, together with recommended changes to statutes, rules, and the Arizona Code of Judicial Administration, by September 1, 2019 for circulation for comment and for presentation to the Arizona Judicial Council on October 24, 2019.

Dated this 21st day of May, 2019.

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SCOTT BALES
Chief Justice

Attachment: Appendix A

APPENDIX A

MEMBERSHIP LIST

TASK FORCE TO SUPPLEMENT KEEPING OF THE RECORD BY ELECTRONIC MEANS

Chair

Honorable Samuel A. Thumma, Chief Judge
Arizona Court of Appeals, Division One

Members

Honorable Pamela Gates
Superior Court of Arizona in Maricopa County

Mr. Rolf Eckel
Court Administrator
Superior Court of Arizona in Yavapai County

Mr. Bob James
Deputy Court Administrator
Superior Court of Arizona in Maricopa County

Ms. Sheila Polk
County Attorney
Yavapai County

Mr. Dean Brault
Director of Public Defense Services
Pima County

Mr. Ed Gilligan
Cochise County
County Administrator

Ms. Kate Roundy
President
Arizona Court Reporters Association

Ms. Tracy Johnston
President Elect
Arizona Court Reporters Association

Jacob Jones
Attorney
Snell & Wilmer, LLP

AOC Staff

Ms. Marretta Mathes
Court Project Specialist

Ms. Amy Love, Legislative Liaison
Intergovernmental Relations

Possible Changes to Statutes, Rules, and the Arizona Code of Judicial Administration

Arizona Revised Statutes

Arizona Revised Statutes Annotated
Title 8. Child Safety (Refs & Annos)
Chapter 2. Juvenile Court
Article 3. Juvenile Proceedings (Refs & Annos)

A.R.S. § 8-233. Record of proceeding

The provisions of title 12, chapter 2, article 3, ~~providing for~~regarding the appointment and oath of a ~~court~~certified reporter shall apply at any juvenile court hearing conducted by a judge.

Arizona Revised Statutes Annotated
Title 12. Courts and Civil Proceedings (Refs & Annos)
Chapter 2. Judicial Officers and Employees
Article 3. ~~Court~~Certified Reporter (Refs & Annos)

A.R.S. § 12-221. Appointment and oath

~~Each~~A judge of the superior court ~~shall~~may appoint a ~~court~~certified reporter.
Before entering upon ~~his~~the certified reporter's duties, the ~~court~~certified reporter

shall take and subscribe the official oath to be administered by ~~the~~a judge of the court.

A.R.S. § 12-223. Attendance at and report of proceedings; sale of transcripts

A. ~~The court~~When directed by the judge, the certified reporter shall attend court during the hearing of ~~all~~ matters before it~~ unless excused by the judge. He~~. The certified reporter shall make stenographic notes of all oral proceedings before the court, but unless requested by court or counsel, ~~he~~the certified reporter need not make stenographic notes of arguments of counsel to a jury, nor of argument of counsel to the court in the absence of a jury.

B. Upon payment or tender of the fees therefor, ~~he~~the certified reporter, unless otherwise prohibited by law or order of the court, shall furnish to any person a typewritten transcript of all or any part of the proceedings reported by ~~him~~the certified reporter, and upon request, certify that such transcript is a correct and complete statement of such proceedings.

~~A.R.S. § 12-225. Appointment of deputies; compensation~~

~~A. The court reporter may employ deputies who shall be compensated by him.~~

~~B. When the reporter is prevented from performing his duties because of absence on public business, or when more than one judge is holding court at the same time in the county or any division thereof, the reporter may appoint a deputy to perform the services of reporter during the period and at the compensation the judge provides by order. Such compensation shall be a county charge.~~

Arizona Revised Statutes Annotated
Title 12. Courts and Civil Proceedings (Refs & Annos)
Chapter 3. Fees and Costs
Article 1. Fees in General (Refs & Annos)

A.R.S. § 12-302. Extension of time for payment of fees and costs; relief from default for nonpayment; deferral or waiver of court fees and costs; definitions

H. The following court fees and costs may be deferred or waived, except that the county shall pay the fees and costs in paragraphs 6, 7 and ~~7~~8 of this subsection on the granting of an application for deferral or waiver and an applicant who has been granted a deferral shall reimburse the county for the fees and costs in paragraphs 6, 7 and ~~7~~8 of this subsection:

1. Filing fees.

2. Fees for issuance of either a summons or subpoena.

3. Fees for obtaining one certified copy of a temporary order in a domestic relations case.

4. Fees for obtaining one certified copy of a final order, judgment or decree in all civil proceedings.

5. Sheriff, marshal, constable and law enforcement fees for service of process if any of the following applies:

(a) The applicant established by affidavit that the applicant has attempted without success to obtain voluntary acceptance of service of process.

(b) The applicant's attempt to obtain voluntary acceptance of service of process would be futile or dangerous.

(c) An order of protection or an injunction against harassment in favor of the applicant and against the party sought to be served exists and is enforceable.

6. The fee for service by publication if service is required by law and if the applicant establishes by affidavit specific facts to show that the applicant has exercised due diligence in attempting to locate the person to be served and has been unable to do so.

7. ~~Court~~Certified reporter's fees for the preparation of court transcripts if the ~~court~~certified reporter is employed by the court.

8. Authorized transcriber's fees for the preparation of court transcripts if the authorized transcriber is employed by the court.

9. Appeal preparation and filing fees at all levels of appeal and photocopy fees for the preparation of the record on appeal pursuant to sections 12-119.01, 12-120.31 and 12-2107 and section 12-284, subsection A.

Arizona Revised Statutes Annotated
Title 21. Juries (Refs & Annos)
Chapter 2. Jurors
Article 4. Misconduct by or Involving Jurors (Refs & Annos)

A.R.S. § 21-235. Recording, listening to, observing proceedings unlawful; classification

A. A person who knowingly, by any means whatsoever, records all or part of the proceedings of any grand jury while it is in session or listens to or observes the proceedings of any grand jury of which he is not a member while such jury is in session is guilty of a class 2 misdemeanor.

B. This section does not prohibit:

1. The prescribed activities of the court, which includes the court's use of an electronic recording system, the prosecuting officer, a ~~court~~certified reporter designated by the court, or an interpreter designated by the court.

2. The taking of notes by a grand juror in connection with and solely for the purpose of assisting him in the performance of his duties as such juror.

3. The appearance, for the purposes of giving the testimony, of a witness.

4. The appearance, for the purpose of presenting evidence when permitted pursuant to section 21-412, of a person being investigated and his counsel.

Arizona Revised Statutes Annotated
Title 21. Juries (Refs & Annos)

Chapter 4. Grand Juries

Article 1. General Provisions (Refs & Annos)

A.R.S. § 21-411.Appointment of reporter; transcript

A. The presiding judge of the superior court or an individual designated by the presiding judge of the superior court may ~~shall~~ appoint a ~~regularly appointed court~~ certified reporter or direct the use of an electronic recording system to record the proceedings before the grand jury, except the deliberations of the grand jury. The reporter's notes or electronic recording containing the proceedings from which an indictment is returned shall be transcribed, any exhibits shall be secured, and the transcript shall be filed with the clerk of the superior court not later than twenty days following the return of the indictment, unless the court otherwise orders. Such transcript shall be made available to the prosecuting officer and the defendant. The transcript or electronic recording, or a portion of the transcript or electronic recording, may be denied to a defendant by the court upon a showing of extraordinary circumstances by a prosecuting officer. The reporter's notes or electronic recording which are not transcribed as provided in this section shall be ~~filed with~~secured by the clerk of the superior court and impounded and shall be transcribed only when ordered by the presiding judge of the superior court~~.~~ or an individual designated by the presiding judge of the superior court.

B. The ~~reporter and typists~~persons who transcribe the reporter's notes or electronic recording of grand jury proceedings shall be sworn by the foreman ~~or~~, acting foreman, clerk of superior court, the presiding judge of the superior court, or an individual designated by the presiding judge of the superior court not to disclose any testimony or the name of any witness except to the county attorney or other prosecuting officer or when testifying in court.

Arizona Revised Statutes Annotated

Title 36. Public Health and Safety (Refs & Annos)

Chapter 5. Mental Health Services

Article 5. Court-Ordered Treatment (Refs & Annos)

A.R.S. § 36-539. Conduct of hearing; record; transcript

A. The medical director of the evaluation agency shall issue instructions to the physicians or the psychiatric and mental health nurse practitioner of the evaluation agency who is treating the proposed patient to take all reasonable precautions to ensure that at the time of the hearing the proposed patient shall not be so under the influence of or so suffer the effects of drugs, medication or other treatment as to be hampered in preparing for or participating in the hearing. If the proposed patient is being treated as an inpatient by the evaluation agency, the court at the time of the hearing shall be presented a record of all drugs, medication or other treatment that the person has received during the seventy-two hours immediately before the hearing.

B. The patient and the patient's attorney shall be present at all hearings, and the patient's attorney may subpoena and cross-examine witnesses and present evidence. The patient may choose to not attend the hearing or the patient's attorney may waive the patient's presence. The evidence presented by the petitioner or the patient shall include the testimony of two or more witnesses acquainted with the patient at the time of the alleged mental disorder, which may be satisfied by a statement agreed on by the parties, and testimony of the two physicians who participated in the evaluation of the patient, which may be satisfied by stipulating to the admission of the evaluating physicians' affidavits as required pursuant to section 36-533, subsection B. The physicians shall testify as to their personal observations of the patient. They shall also testify as to their opinions concerning whether the patient is, as a result of mental disorder, a danger to self or to others or has a persistent or acute disability or a grave disability and as to whether the patient requires treatment. Such testimony shall state specifically the nature and extent of the danger to self or to others, the persistent or acute disability or the grave disability. If the patient has a grave disability, the physicians shall testify concerning the need for guardianship or conservatorship, or both, and whether or not the need is for immediate appointment. Other persons who have participated in the evaluation of the patient or, if further treatment was requested by a mental health treatment agency, persons of that agency who are directly involved in the care of the patient shall testify at the request of the court or of the patient's attorney. Witnesses shall testify as to placement alternatives appropriate and available for the care and treatment of the patient. The clinical record of the patient

for the current admission shall be available and may be presented in full or in part as evidence at the request of the court, the county attorney or the patient's attorney.

C. If the patient, for medical or psychiatric reasons, is unable to be present at the hearing and cannot appear by other reasonably feasible means, the court shall require clear and convincing evidence that the patient is unable to be present at the hearing and on such a finding may proceed with the hearing in the patient's absence.

D. The requirements of subsection B of this section are in addition to all rules of evidence and the Arizona rules of civil procedure, not inconsistent with subsection B of this section.

E. A verbatim record of all proceedings under this section shall be made ~~by stenographic means by a court reporter if a written request for a court reporter is made by any party to the proceedings at least twenty-four hours in advance of such proceedings. If stenographic means are not requested in the manner provided by this subsection, electronic means shall be directed by the presiding judge. The stenographic notes or electronic tape~~and shall be retained as provided by statute.

F. A patient who has been ordered to undergo treatment may request a certified transcript of the hearing. To obtain a copy, the patient shall pay for a transcript or shall file an affidavit that the patient is without means to pay for a transcript. If the affidavit is found true by the court, the expense of the transcript is a charge on the county in which the proceedings were held, or, if an intergovernmental agreement by the counties has required evaluation in a county other than that of the patient's residence, such expense may be charged to the county of the patient's residence or in which the patient was found before evaluation.

Arizona Revised Statutes Annotated
Title 36. Public Health and Safety (Refs & Annos)
Chapter 6. Public Health Control
Article 6. Tuberculosis Control (Refs & Annos)

A.R.S. § 36-727. Hearings; procedure; confidentiality

A. The afflicted person or, if a minor or incapacitated person, the afflicted person's parent or guardian and that person's attorney have the right to be present at all hearings, subject to any conditions or procedures that are deemed appropriate or necessary by order of the court to protect the health and safety of all participants. The afflicted person may waive any appearance before the court.

B. If the afflicted person is unable or unwilling to be present at the hearing or the hearing cannot be reasonably conducted where the afflicted person is being treated or confined or cannot be reasonably conducted in the afflicted person's presence, the court shall enter a finding and may proceed with the hearing on the merits of the petition.

C. The court may impose conditions or procedures that it deems necessary to protect the health and safety of all participants in the hearing and to ensure humane treatment with due regard to the comfort and safety of the afflicted person and others. These measures may include video or telephonic conference appearances. If necessary the court shall provide language interpreters and persons skilled in communicating with vision impaired and hearing impaired persons pursuant to applicable law.

D. Parties to the proceedings may present evidence and subpoena and cross-examine witnesses. The evidence presented may include the testimony of experts on infectious diseases or public health matters or a physician who performed an examination or evaluation of the afflicted person. The petitioner may prove its case on the affidavit or affidavits filed in support of the initial petition. The clinical record of the afflicted person for the current admission shall be available and may be presented in full or in part as evidence at the request of the court, the afflicted person or the afflicted person's attorney or any party in interest.

E. At the hearing the court shall be advised of any drugs known to have been administered to the afflicted person before the hearing that would affect the afflicted person's judgment or behavior.

F. Persons appointed to conduct an examination and evaluation of the afflicted person shall make their reports in writing to the court. The reports shall include a recommendation as to the least restrictive alternative measures available to the court.

G. A verbatim record of all proceedings under this section shall be made ~~by stenographic or electronic means. The stenographic notes or electronic tape~~and shall be retained as provided by statute.

H. The court hearing shall not be open to the public and all records, notices, exhibits and other evidence are confidential and shall not be released to the public. The court may order any portion released or a public hearing to be held on a request from the afflicted person or, if a minor or incapacitated person, the afflicted person's parent or guardian or the afflicted person's attorney. The court's records and exhibits are available to the petitioner, the afflicted person, the department, the tuberculosis control officer, the local health officer or a legal representative of any of these persons or agencies.

I. An afflicted person who is ordered by the court to undergo examination, monitoring, treatment, isolation or quarantine or, if a minor or incapacitated person, the afflicted person's parent or guardian may request a certified transcript of the hearing. To obtain a copy the person shall pay for the transcript or shall file an affidavit that the afflicted person cannot afford to pay for a transcript. If the affidavit is found true by the court, the court shall charge the expense of the transcript to the county in which the proceedings were held. If an intergovernmental agreement by the counties has required an evaluation in a county other than that of the afflicted person's residence, this expense may be charged to the county of the afflicted person's residence or in which the afflicted person was found before the evaluation.

Arizona Revised Statutes Annotated
Title 38. Public Officers and Employees (Refs & Annos)
Chapter 3. Conduct of Office
Article 3. Records (Refs & Annos)

A.R.S. § 38-424. Use of ~~tape recorders or other recording devices~~certified reporters; electronic means; exception

This state or any agency of this state, including the judiciary, and each political subdivision of this state, including any courts of law, may for any purpose use ~~tape recorders or other recording devices~~electronic means in lieu of reporters or

stenographers. This section does not apply if the matter to be recorded arises out of for court proceedings and either party requests that may provide a court certified reporter or stenographer be in addition to the electronic means used. by courts to record the proceedings. The official record, however, is the record prepared by the court as established by the procedural rules established by the Supreme Court.

Consistent with these changes, change "court reporter" to "certified reporter" as applicable where used in any other statutes, rules, or Arizona Code of Judicial Administration provisions.

A.R.S. § 8-323. Juvenile hearing officer; appointment; term; compensation; hearings; required attendance; contempt
[no changes]

A.R.S. § 12-224. Salary; fees for transcripts; free transcripts; office supplies
[no changes]

A.R.S. § 13-4102. Order for examination; notice; proof of service
[no changes]

A.R.S. § 12-143. Payment of salaries and other expenses; providing facilities; judicial employees.
[no changes]

A.R.S. § 13-3952. Compensation of court certified reporter appearing at preliminary hearing; fees for transcribing notes
[no changes]

A.R.S. § 23-674. Procedure in rendering decisions and orders; rights of parties; representation
[no changes]

A.R.S. § 26-1028. Detail or employment of reporters and interpreters.

[no changes]

A.R.S. § 26-1054. Record of trial
[no changes]

A.R.S. § 32-3632. Hearing and judicial review; costs and fees; appeal
[no changes]

A.R.S. § 32-4001. Scope of chapter
[no changes]

A.R.S. § 32-4003. Reporter certification; violation
[no changes]

A.R.S. §32-4004. Board of certified reporters
[no changes]

A.R.S. § 32-4006. Enforcement and disciplinary procedures
[no changes]

A.R.S. § 32-4022. Examination; requirements; exemption
[no changes]

A.R.S. § 32-4041. Revocation or suspension of certificate
[no changes]

A.R.S. § 38-317. Compensation of impeachment personnel
[no changes]

A.R.S. § 36-539. Conduct of hearing; record; transcript
[no changes]

A.R.S. § 40-360.04. Hearings; procedures
[no changes]

A.R.S. § 41-324. ~~Court~~Certified reporters; notarial acts
[no changes]

A.R.S. §41-1092.07. Hearings
[no changes]

A.R.S. § 48-704. Hearing on objections
[no changes]

A.R.S. § 48-1034. Objections; hearing on formation
[no changes]

A.R.S. § 49-287.06. Allocation hearing
[no changes]

Arizona Procedural Rules

Rules of the Supreme Court of Arizona

Rule 30. Verbatim Recording of Judicial Proceedings

(a) [no changes]

(b) Use of Court Reporting Resources.

1. Request for certified reporter. Any party to any action in superior court may request that any proceeding in that action be recorded by a certified ~~court~~ reporter. The court ~~shall~~may grant the request if it is made at least three days prior to the proceeding to be recorded unless a different time frame has been established by local rule.

2. Making the record in the absence of a ~~timely request for a court~~ certified reporter. ~~Except as provided in (3) below, in~~In the absence of a ~~timely request for a~~ certified ~~court~~ reporter, the record will be made ~~in a manner within~~using an electronic recording system to record the ~~sound discretion of the court~~proceeding as established by local rule.

3. Proceedings requiringIf the court is using an electronic recording system to record the proceedings, a party has the right to provide a certified court reporter. to also record the proceedings. The following proceedings shall be recorded by a party providing the certified reporter must bear the cost. The official record, however, is the record designated by the court reporter and not solely by electronic means, unless as set forth in section (b)(4) of this rule requirement is waived by the parties and the court approves the waiver:

a. Grand jury proceedings;

b. All proceedings in a first degree murder case, pursuant to A.R.S. § 13-1105, once the intention to seek the death penalty notice has been filed;

c. Felony jury trials;

d. Initial determinations of sexually violent person status, pursuant to A.R.S. § 36-3706;

e. Proceedings on a request for authorization of abortion without parental consent, pursuant to A.R.S. § 36-2152.

4. Official record. When an Arizona a court's certified court reporter records a proceeding in a superior court that is simultaneously recorded by electronic recording equipment, the court court's certified reporter's record shall be the official record. For a proceeding not recorded by a court's certified reporter, the official record is the transcript prepared by an authorized transcriber as defined in Rule 30(a)(2)(b) or (c). The transcript in any case certified by the court's certified reporter or other authorized transcriber as defined in Rule 30(a)(2)(a)-(c) shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the court's certified reporter or other authorized transcriber as defined in Rule 30(a)(2)(b) or (c), unless otherwise ordered by the court.

[DATE] COMMENT (Redline compared to [2006] Comment)

Rule 30(b)(1). Nothing in this rule precludes the court from granting a party's untimely request for a certified reporter.

Rule 30(b)(2). In the absence of a timely request for a certified court reporter, The court may approve use of a certified court reporter, audio or video recording to capture the record of court proceedings. In exercising its discretion under

~~subsection (B), giving due deference to the parties' preference~~of how court proceedings should be captured, the court ~~may~~ should consider the following factors when requiring the presence of the court's certified reporter or otherwise designating the official record: unique demands of the preservation of the official court record by a certified reporter in grand jury proceedings, felony jury trials, particularly first degree murder cases in which the State filed a death penalty notice, initial determinations of sexually violent person status, and proceedings on a request for authorization of abortion without parental consent. Moreover, the court should consider the availability of a certified reporter; the probability that a transcript will be requested; the number of litigants; convenience of the parties and the court's schedule; sufficiency of another form of record to convey the substance of the matters discussed at the proceeding; whether testimonial evidence will be presented at the proceeding; presence of non-native English speakers as witnesses or parties; the likelihood that technical or otherwise difficult terminology will be used; the need for formal or informal proceedings; the need for a real-time transcript; the likelihood that daily transcripts will be required; and any other factor which in the interests of justice warrants a particular form of record, or as otherwise required to serve the interests of justice.

Rule 75. Jurisdiction; Definitions

Rule 75(b) Definitions

9. "Expenses" means all obligations in money, other than costs, necessarily incurred by the state bar in the performance of their duties under these rules. Expenses shall include, but are not limited to, administrative expenses, necessary expenses of bar counsel or staff, charges of expert witnesses, charges of ~~court~~certified reporters and authorized transcribers and all other direct, provable expenses.

Rule 78. Initial Proceedings

[no changes]

Rule 125. Defining Minute Entry, Order, Ruling, and Notice; Party Responsibility

[no changes]

<u>Rules of Civil Procedure</u>

Rule 30. Deposition by Oral Examination

[no changes]

Rule 43. Taking Testimony

(a) [no changes]

(b) [no changes]

(c) [no changes]

(d) [no changes]

(e) [no changes]

(f) [no changes]

(g) Preserving Recording of Court Proceedings.

(1) *Transcripts and Other Recordings*. The official verbatim recording of any court proceeding is an official record of the court. The original recording must be kept by the person ~~who recorded it, a court-designated custodian, or the clerk in a place~~ designated by the court. The recording must be retained according to the records retention and disposition schedules adopted by the Supreme Court, unless the court specifies a different retention period.

(2) [no changes]

Rule 75. Hearing Procedures

[no changes]

<u>Rules of Criminal Procedure</u>

Rule 5.1. Right to a Preliminary Hearing; Waiver; Continuance

(a) [no changes]

(b) [no changes]

(c) [no changes]

(d) Hearing Demand. A defendant who is in custody may demand that the court hold a preliminary hearing as soon as practicable. In that event, the magistrate must set a hearing date and must not delay its commencement more than necessary to secure the attendance of counsel, ~~a court reporter, and~~ necessary witnesses, and ensure the ability to capture a verbatim recording of the proceeding.

Rule 5.2. Summoning Witnesses; Record of Proceedings

(a) [no changes]

(b) Record of Proceedings. The magistrate must make a verbatim record of the preliminary hearing. Proceedings may be recorded by a certified ~~court~~ reporter or by electronic or other means authorized by the superior court ~~presiding judge. But if a party requests that a certified court reporter record the proceedings, the court must record the proceedings in that manner, unless the court is located in an area where a certified court reporter is not reasonably available~~.

Rule 5.6. Transmittal and Transcript of the Record

[no changes]

Rule 5.7. Preservation of Recording

[no changes]

Rule 11. Initial Appearance and Trial Procedures

[no changes]

Rule 12.4. Who May Be Present During Grand Jury Sessions

(a) General. Only the following individuals may be present during grand jury sessions:

(1) the witness under examination;

(2) counsel for a witness if the witness is a person under investigation by the grand jury;

(3) a law enforcement officer or detention officer accompanying an in-custody witness;

(4) prosecutors authorized to present evidence to the grand jury;

(5) a certified ~~court reporter~~reporter or person authorized by the court to ensure the verbatim record is captured; and

(6) an interpreter, if any.

(b) [no changes]

Rule 12.7. Record of Grand Jury Proceedings

(a) ~~Court Reporter.~~Recording Arrangements. The presiding or impaneling judge must ~~assign a certified court reporter~~ make arrangements to ~~record~~capture all grand jury proceedings, except its deliberations. Any arrangements must ensure that no images of grand jurors are taken or captured.

(b) Foreperson. The foreperson must keep a record of how many grand jurors voted for and against an indictment, but must not record how each grand juror voted. If the grand jury returns an indictment, the foreperson's record of the vote must be transcribed ~~by the court reporter~~ and filed with the court no later than 20 days after the return of the indictment, and may be made available only to the court, the State, and the defendant.

(c) Filing the Transcript and Minutes. The court reporter's record of grand jury proceedings must be transcribed and filed with the superior court clerk no later than 20 days after return of the indictment, and may be made available only to the court, the State, and the defendant.

Rule 15.3. Depositions

[no changes]

Rule 28.1. Duties of the Clerk

[no changes]

Rule 31.2. Notice of Appeal or Notice of Cross-Appeal

[no changes]

Rule 31.8. The Record on Appeal

[no changes]

Rule 31.9. Transmission of the Record to the Appellate Court

[no changes]

Rule 32.4(e). Filing of Notice and Petition, and Other Initial Proceedings

[no changes]

Rule 32.8(e). Evidentiary Hearing

[no changes]

Rule 32.9(e). Review

[no changes]

Rules of Civil Appellate Procedure

Rule 1. Scope of Rules; Definitions

[no changes]

Rule 10. Appeals in Expedited Election Matters

(a) [no changes]

(b) [no changes]

(c) [no changes]

(d) [no changes]

(e) [no changes]

(f) Preparation of the Record on Appeal.

(1) *Index*. The superior court clerk must prepare an index of the record and transmit the index and the superior court's record to the appellate court within 5 business days after the notice of appeal is filed.

(2) *Transcripts; Stipulated Record*.

(A) The appellant must promptly order and ask the ~~court~~certified reporter or authorized transcriber to expedite the preparation of any transcripts necessary for determination of the appeal.

(B) **[no changes]**

(C) The party that orders a transcript must make payment arrangements with the ~~court~~certified reporter or authorized transcriber, and upon receipt of the transcript, must promptly file it with the appellate court and serve other parties with a copy.

(D) **[no changes]**

(E) **[no changes]**

(g) [no changes]

(h) [no changes]

(i) [no changes]

(j) [no changes]

Rule 11. The Record on Appeal

[no changes]

Rule 11.1. Transmitting the Record to the Appellate Court

[no changes]

Rules of Procedure for Special Actions

[no changes]

Rules of Procedure for Direct Appeals from Decisions of the Corporation Commission to the Arizona Court of Appeals

Rule 7. Record on Direct Appeal of Commission Decisions or Orders

Rule 7(f). Transcript Defined; Several Appeals; Inability to Provide Timely Transcript.

"Transcript" for purposes of this rule shall refer to a ~~reporter's~~ transcript prepared by a certified reporter or authorized transcriber. When more than one direct appeal is taken from the same Commission decision, a single transcript shall be prepared. If a transcript cannot be obtained within the time limitation provided in this rule for transmission of the Commission record, application for relief may be made by the Commission to the Court of Appeals.

Rules of Procedure for Direct Appeals from Decisions of the Governing Bodies of Public Power Entities

Rule 7. Record on Direct Appeal of Decisions or Orders

Rule 7(f). Transcript Defined; Several Appeals; Inability to Provide Timely Transcript.

"Transcript" for purposes of this rule shall refer to a ~~reporter's~~ transcript prepared by a certified reporter or authorized transcriber. When more than one direct appeal is taken from the same Governing Body decision, a single transcript shall be prepared. If a transcript cannot be obtained within the time limitation provided in this rule for transmission of the record, application for relief may be made by the Governing Body to the Court of Appeals.

Rules of Family Law Procedure

Rule 12. Court Interviews of Children

Rule 12(c)(1) Record of the Interview

(1) *Generally.* Unless the parties stipulate otherwise on the record or in writing, the court must record the interview, either by having a ~~court~~certified reporter transcribe it or by recording it ~~through another retrievable and perceivable~~by electronic ~~medium~~means. However, any interview conducted by a judicial officer must be recorded.

Rule 8. Telephonic Appearances and Testimony

[no changes]

Rule 18. Preserving a Record of a Court Proceeding

[no changes]

Rule 69. Binding Agreements

[no changes]

Rule 73. Family Law Conference Officer

Rule 73(c)(1) Procedures

Conducting a Conference. The conference officer should conduct the proceedings in an informal manner but must give the parties an opportunity to present their positions. The conference officer may record the proceedings by ~~audiotape~~electronic means or by a ~~court~~certified reporter. A party represented by an attorney has the right to have the attorney present at the conference.

Rules of Protective Order Procedure

Rule 18. Record of Hearings

[no changes]

Rules of Probate Procedure

Rule 11. Telephonic or Electronic Appearances and Testimony

[no changes]

Rules of Procedure for the Juvenile Court

Rule 1. Applicability; Definitions; Required Format of Stipulations, Motions and Orders

[no changes]

Rule 81. Consent to Adopt

[no changes]

Rule 106

[no changes]

<u>Tax Court Rules of Practice</u>

[no changes]

LOCAL RULES

<u>Apache County Superior Court Local Rules</u>

[no changes]

<u>Cochise County Superior Court Local Rules</u>

<u>Rule 12.2. Rules of Procedure for Arbitration Services in the Courts of Limited Jurisdiction.</u>

[no changes]

<u>Rule 15. Audio, Video, and Other Sound Reproduction Exhibits.</u>

(a) In the interest of a complete and accurate record in the event of an appeal, when audiotapes, videotapes, or other exhibits that reproduce sound are intended to be offered in evidence to demonstrate the substance of conversation, a transcription of that portion intended to be played for the trier of fact shall be made and concurrently offered in evidence as the court's exhibit. The proponent of the exhibit shall cause that portion to be transcribed and shall present it to opposing counsel for comparison against the audio exhibit sufficiently in advance of trial or hearing so that a good faith stipulation may be entered into by counsel as to its accuracy. The proponent may nevertheless establish the accuracy of the transcription sufficient for its admission into evidence by appropriate testimony. When the recording is played for the trier of fact, the transcription shall be incorporated in the record of the trial by the ~~court reporter's~~ reference to its exhibit number.

<u>Coconino County Superior Court Local Rules</u>

[no changes]

Gila County Superior Court Local Rules

Rule 16. Briefs, Memoranda, Argument, and ~~Court~~Certified Reporter Services.

. . .

F. Presence of ~~Court~~Certified Reporter. ~~Except in criminal, dependency, and delinquency actions, counsel are~~Counsel or a self-represented party is required to advise the court in advance of hearing whether a ~~court~~certified reporter is requested. If such a timely request is made, the court has the discretion whether to grant such a request. The failure to make a timely request may be deemed a waiver of a ~~court~~certified reporter or result in the postponement of a scheduled matter.

Rule 27. ~~Court~~Certified Reporters

Rule 27(A). Scope. This rule applies to all ~~court~~certified reporters' notes taken in trials or proceedings in any division of this court or before any commissioner or judge pro tempore. "Reporter's notes" mean paper notes, electronic records of proceedings on hard drive, floppy disc or other electronic medium. "Reporter's notes" does not include ~~tape~~recordings that are the result of the court's use of an electronic recording system, recordings of the proceedings utilized by a reporter for his or her own personal verification of the accuracy of the official notes; nor electronic files prepared as work product for use by court staff in preparation of such things as minute entries.

Rule 31. Appeals from Limited jurisdiction Courts.

[no changes]

Graham County Superior Court Local Rules

Rule 1.19. Appeals from Limited jurisdiction Courts.

[no changes]

Greenlee County Superior Court Local Rules

[no changes]

La Paz County Superior Court Local Rules

[no changes]

Maricopa County Superior Court Local Rules

Rule 1.4. Court Proceedings in Other Locations

. . .

h. ~~Court~~Certified Reporter. No ~~court~~certified reporter will be available for such proceedings unless counsel shall, before 5:00 p.m. on the second day preceding the day on which the attendance of said reporter will be required, notify the assigned judicial officer that the services of a ~~court~~certified reporter are ~~required. The~~requested. If the request is approved by the assigned judicial officer, the assigned judicial officer shall thereupon arrange for a ~~court~~certified reporter at county expense.

Rule 1.10. ~~Court~~Certified Reporters' Notes, Electronic Recordings, Duties of Clerk and Reporters and Destruction of Notes

[no changes]

Rule 2.22. Record, ~~Court~~Certified Reporter Requests, ~~Court~~Certified Reporter Fees

. . .

b. Request and Fees. If a party desires a ~~court~~certified reporter for any proceeding ~~in which a court reporter is not mandated by Arizona Supreme Court Rule 30~~, the party must submit a written request to the assigned judicial officer at least ten (10) judicial days in advance of the hearing. If the request is approved by the assigned judicial officer, the party must pay any fee authorized by law for the court reporting services at least two (2) judicial days prior to the proceeding.

3.2. Civil Motions; Stipulations, Notices of Settlement, and Proposed Forms of Order

[no changes]

Rule 10.5. ~~Court~~Certified Reporters, Interpreters and Equipment Requested

[no changes]

Mohave County Superior Court Local Rules

Rule AD-10. ~~Court~~Certified Reporters, ~~Court~~Certified Reporters' Notes

[no changes]

Rule AD-14. Audio, Video, and Other Sound Reproduction Exhibits.

A. In order to ensure a complete and accurate record in the event of an appeal, when audiotapes, videotapes, or other exhibits that reproduce sound are intended to be offered in evidence to demonstrate the substance of conversation, a transcription of that portion intended to be played for the trier of fact shall be made and concurrently offered in evidence as the court's exhibit. The proponent of the exhibit shall cause that portion to be transcribed and shall present it to opposing counsel for comparison against the audio exhibit sufficiently in advance of the trial or hearing so that a good faith stipulation may be entered into by counsel as to its accuracy. A stipulation as to the accuracy of such a transcript shall not affect the admissibility, or non-admissibility of the recording itself. Absent a stipulation as to the admissibility of such a recording, admissibility shall be determined in accordance with the rules of evidence. The proponent may nevertheless establish the accuracy of the transcription sufficient for its admission into evidence by

appropriate testimony. When the recording is played for the trier of fact, the transcription shall be incorporated in the record of the trial by the ~~court reporter's~~ reference to its exhibit number.

Rule AD-17. Telephonic Conference Calls.

[no changes]

Navajo County Superior Court Local Rules

[no changes]

Pima County Superior Court Local Rules

Rule 1.6. ~~Court~~Certified Reporters, Special Needs and Interpreters

(A) ~~Absent an advance request, court reporters will be available only for regularly scheduled trials or other matters as required by law.~~ If a certified ~~court~~ reporter is ~~needed for any other matter, including juvenile matters~~requested, counsel or a self-represented party must notify the division to which the case is assigned and the Manager of the Court Reporters by 12:00 noon of the preceding court day of the request to have a ~~court~~certified reporter present. If such a timely request is made, the court [Manager of the Court Reporters] has the discretion whether to grant such a request. No matter will be continued for a lack of a ~~court~~certified reporter unless such required notification has been given to the division to which the case is assigned and the Manager of the Court Reporters. ~~Absent a timely request, the availability of a court reporter may be limited by the priorities stated in Rule 30, Rules of the Supreme Court of Arizona.~~

Pinal County Superior Court Local Rules

Rule 2.2. Motions; Requirements

2.2(e). Telephonic Argument and Conference.

[no changes]

Santa Cruz County Superior Court Local Rules

Rule 1.4. ~~Court~~Certified Reporters' Notes, Duties of Clerk and Reporters, and Destruction of Notes and Electronic Recordings

[no changes]

Rule 8.6. Presence of ~~Court~~Certified Reporter

a. Notice to Court. All matters may be electronically recorded unless the parties or counsel advise the court at least five (5) court days in advance of hearing that a ~~court~~certified reporter is requested~~.~~ and the court grants that request. Failure to make a timely request may be deemed a waiver of a ~~court~~certified reporter or result in the postponement of a scheduled matter.

b. Waiver of ~~Court~~Certified Reporter. Where a ~~court~~certified reporter has been requested, the party who originally requested the same shall notify the court within twenty-four (24) hours of the commencement of the hearing, if the ~~court~~certified reporter will no longer be necessary. Failure to notify the court may result in the assessment of the cost to provide the ~~court~~certified reporter.

Yavapai County Superior Court Local Rules

Rule 2. Administration

[no changes]

Rule 13. ~~Court~~Certified Reporters, ~~Court~~Certified Reporters' Notes

[no changes]

Yuma County Superior Court Local Rules

Rule 8. Criminal Appeals from Lower Courts on the Record

[no changes]

Superior Court Rules of Appellate Procedure – Civil

Rule 2. Record of Proceedings

[no changes]

Superior Court Rules of Appellate Procedure – Criminal

Rule 1. Scope; Definitions

[no changes]

Rules of Procedure for Enforcement of Tribal Court Involuntary Commitment Orders

[no changes]

Rules of Procedure for the Recognition of Tribal Court Civil Judgments

[no changes]

Rules of Procedure for Judicial Review of Administrative Decisions

Rule 5. Record on Appeal

[no changes]

Rules of Court Procedure for Civil Traffic and Civil Boating Violations

[no changes]

Justice Court Rules of Civil Procedure

[no changes]

Rules of Procedure for Eviction Actions

[no changes]

Local Rules of Practice and Procedure – City Court – City of Phoenix

Rule 2.18. Record

[no changes]

<u>Local Rules of Practice and Procedure In City Court Civil Proceedings City of Tucson</u>

[no changes]

<u>Local Rules of Practice and Procedure For the Yuma Municipal Court</u>

[no changes]

<u>Local Rules Pima County Justice of the Peace Courts Providing for Pre-Trial Conferences in Criminal Cases</u>

[no changes]

<u>Pima County Rules for the Fast Trial and Alternative Resolution Program ("FASTAR") Pilot Program</u>

Rule 123. Hearing Procedures

[no changes]

<u>Arizona Administrative Code</u>

[no changes]

Arizona Code of Judicial Administration

Section 1-108: Committee on Judicial Education and Training

[no changes]

Section 2-101: Records Retention and Destruction Schedule

2-101(D) Retention and Disposition Schedule

15. Direct Criminal Appeals (Death Penalty) and Petitions for Review of Post-Conviction Relief related to these cases:

b.(1) Record on Appeal: The record on appeal, including ~~court reporter~~ transcripts (with the exception of the grand jury transcript) shall be retained in the Clerk's Office until execution of sentence or earlier death. At that time, certified copies of the instruments and minutes shall be destroyed. Original (paper) instruments and minutes shall be returned to the Superior Court consistent with Rule 31.23(a)(5), Rules of Criminal Procedure. Original (paper) Grand Jury transcripts and Juror Questionnaires shall be returned to the Superior Court at the time of the mandate. Copies shall be destroyed.

c.(1) Record on Appeal: When conviction and sentence is reversed: The record on appeal, including ~~court reporter~~ transcripts (with the exception of the grand jury transcript) shall be retained in the Clerk's Office until notification that defendant was re-sentenced to life or released. At that time certified copies of the instruments and minutes shall be destroyed. Original (paper) instruments and minutes shall be returned to the Superior Court. Grand Jury transcripts and Juror Questionnaires shall be returned to the Superior Court at the time of the mandate or destroyed if copies.

c. Record on Appeal: The record on appeal, including ~~court reporter~~ transcripts (with the exception of the grand jury transcript) shall be retained in the Clerk's Office unless transfer requested by the Superior Court. At that time, certified copies of the instruments and minutes shall be retained. Original instruments and minutes shall be returned to the Superior Court consistent with Rule 31.23(a)(5), Rules of Criminal Procedure. Original Grand Jury transcripts and Juror Questionnaires shall be returned to the Superior Court.

Section 5-206: Fee Deferrals and Waivers

5-206(A) Definitions

"Fees and costs", as provided in A.R.S. § 12-302(H) means:

. . .

7. ~~Court~~Certified reporter's fees for the preparation of court transcripts if the ~~court~~certified reporter is employed by the court.

8. Authorized transcriber's fees for the preparation of court transcripts if the authorized transcriber is employed by the court.

9. Appeal preparation and filing fees at all levels of appeal and photocopy fees for the preparation of the record on appeal pursuant to sections 12-119.01, 12-120.31 and 12-2107 and section 12-284, subsection A.

5-206(H) County-Paid Fees.

2. *Service by publication and courtcertified reporter fees.* As provided in A.R.S. § 12-302(H)(6)&(), (7) & (8) the county shall pay the fees and costs for service by publication when required by law and; for the preparation of the courtcertified reporter's transcript, if the courtcertified reporter is employed by the court; and for the preparation of the transcript prepared by the authorized transcriber, if the authorized transcriber is employed by the court, upon granting a deferral or waiver. An applicant granted a deferral shall reimburse the county for these fees and costs.

Section 5-208: Operational Standards for Interactive Audiovisual Proceedings in Criminal Cases

[no changes]

Section 7-206: Certified Reporter

[no changes]

BOG'S RULES REVIEW COMMITTEE
Reporting Form

Please begin typing in the shaded box.

NAME: Hon. Sara J. Agne & Jodi Knobel Feuerhelm PHONE: Jodi—602-351-8015

EMAIL ADDRESS: JFeuerhelm@perkinscoie.com

REPRESENTING: Civil Practice and Procedure Committee

WHO WILL APPEAR BEFORE THE COMMITTEE? Jodi Knobel Feuerhelm

SUBJECT: Proposed Comment to Petition to Amend Various Rules of Procedure Related to Creating the Verbatim Record of Judicial Proceedings (R-20-0013)

BACKGROUND OF ISSUE:

The rule change petition—developed as part of the work of the Task Force to Supplement Keeping of the Record by Electronic Means—seeks to modify several rules of procedure in different rule sets to allow courts throughout the State to create and maintain a complete and accurate record electronically. There is a nationwide shortage of court reporters, and Arizona is not exempt. Changes to existing rules are needed not only to modernize language and to acknowledge technological changes, but to give latitude and direction to courts grappling with that court-reporter shortage and the need to still maintain a complete and accurate record.

ISSUE(S) (*please be specific*):

Whether to submit the proposed comment supporting R-20-0013 and suggesting minor stylistic and conforming changes.

DISCUSSION/ANALYSIS:

The proposed comment and its accompanying appendix solely suggest some small changes to the Petition's proposals to ensure clarity in existing rulesets and that the changes eventually adopted are worded to achieve the Petition's full aims. The proposed comment is in support of the Petition and does not propose any independent changes—it merely suggests revisions to the existing proposals based on stylistic conventions, based on recently adopted rules orders, and for clarity.

RECOMMENDED RULES REVIEW COMMITTEE ACTION:

The CPPC recommends that the Rules Review Committee and State Bar adopt the draft proposed comment in support of R-20-0013, which comment suggests stylistic and conforming changes to the proposed amended rulesets.

VOTE OF THE COMMITTEE/SECTION (*if applicable*):

WAS A QUORUM PRESENT FOR THE VOTE? __X__ YES ________ NO

VOTE WAS: __X__ UNANIMOUS ________ TO ________

IF YOUR COMMITTEE OR SECTION HAS A BREAKDOWN AMONG MEMBERS OF DEFENSE/PROSECUTION OR PLAINTIFF/DEFENSE COUNSEL, OR IF ANY OTHER SPLIT EXISTS, HOW WAS THE VOTE SPLIT AMONG THOSE GROUPS?

Not applicable.

HOW WILL THIS PROPOSAL IMPACT THE STATE BAR'S BUDGET? STATE BAR STAFF?

No impact.

IS THE RECOMMENDED ACTION CONSISTENT WITH THE KELLER DECISION?

__X__ YES ________ NO

DOES THIS ISSUE RELATE TO (check any that apply):

________ REGULATING THE PROFESSION

__X__ IMPROVING THE QUALITY OF LEGAL SERVICES

__X__ IMPROVING THE FUNCTIONING OF THE SYSTEM OF JUSTICE

__X__ INCREASING THE AVAILABILITY OF LEGAL SERVICES TO THE PUBLIC

________ REGULATION OF TRUST ACCOUNTS

__X__ EDUCATION, ETHICS, COMPETENCY, AND INTEGRITY OF THE LEGAL PROFESSION

(Note that *Keller v. State Bar of California*, 496 U.S. 1 (1990), prohibits the expenditure of mandatory bar dues on political or ideological matters unrelated to these objectives.)

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND VARIOUS RULES OF PROCEDURE RELATED TO CREATING THE VERBATIM RECORD OF JUDICIAL PROCEEDINGS

Supreme Court No. R-20-0013

PROPOSED COMMENT OF THE STATE BAR OF ARIZONA

Pursuant to Rule 28(e) of the Rules of the Supreme Court of Arizona, the State Bar of Arizona (the "State Bar") hereby submits the following as its Comment to the above-captioned Petition.

The State Bar endorses the Petition proposed by David K. Byers, the Administrative Director of the Administrative Office of the Courts, based on the work of the Arizona Task Force to Supplement Keeping of the Record by Electronic Means ("Task Force"). The Petition is based on the Task Force's compelling and

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thorough report of August 30, 2019 (Appendix B to the Pet'n), which was unanimously approved by the Arizona Judicial Council on October 24, 2019.[1]

The Petition notes an approximate vacancy rate among court reporter positions of nearly twenty percent in just Arizona's superior court statewide in 2019, with many of those vacancies longstanding. Thus, Arizona is not immune from the nationwide trend of shortages and unavailability of court reporters, and the Administrative Order establishing the Task Force cogently relays the deleterious effects on the justice system as a whole. Rescheduled or delayed judicial proceedings, including trials and other dispositive hearings, because of court-reporter unavailability, significantly impact the State Bar's members.

A dwindling number of court reporters[2] who face an exponential pile of transcription work cannot be expected to work to make up for the vacant positions in the profession. State Bar members who need timely—sometimes daily turnaround—transcriptions to provide competent legal services to their clients ultimately suffer when the vacancies delay the keeping of the record. As the Petition

[1] The Task Force's Report and Recommendations were also unanimously approved by the Committee on the Superior Court on September 6, 2019, and the Superior Court Presiding Judges on October 22, 2019, before the consideration by the Arizona Judicial Council. (Pet'n, at 5.)

[2] The State Bar endorses the Petition's proposal to change references to 'court reporter' to "certified reporter" for consistency (*see* Pet'n, at 9), and so uses the terms interchangeably herein.

and Admin. Order No. 2019-49 note, such delays ultimately delay the administration of justice, whether in trial or on appeal. (Pet'n, at 3.) The State Bar therefore wholeheartedly supports the Task Force's and Petition's aim to 'modernize rules permitting courts to create and maintain a complete and accurate court record electronically to supplement court reporters and to reduce the time needed to produce a record and transcript for cases on appeal.' (*See* Pet'n, at 4–5.)

This Comment of the State Bar and the accompanying appendix solely suggest some small changes to the Petition's proposals to ensure clarity in existing rulesets and that the changes eventually adopted are worded to achieve the Petition's full aims. It should be noted that the State Bar does not propose any independent rule changes with the Comment, but merely addresses those already proposed by the Petition. For example, though the State Bar's Civil Practice and Procedure Committee continues to examine and discuss possible changes to the rules directing how a verbatim record is created and maintained in "court-adjacent proceedings" like depositions, the Petition's proposals do not encompass those rules, nor do the proposals made by this Comment. (*See* Pet'n, at 6.)

Summary of Comment's Proposals

Avoiding "capture" and related phrasing: The State Bar notes that in five places in the Petition's proposed rule set the word "capture" is used in somewhat novel fashion, usually in reference to making a 'verbatim recording of the

proceeding.' The State Bar respectfully submits suggested changes to the Petition's proposals for change to Arizona Rules of Criminal Procedure 5.1(d), 12.4(a)(5),[3] and 12.7(a), and the comments to Rule 30,[4] Rules of the Arizona Supreme Court, to eliminate the word "capture" and retain more plain language in the rules and comments about 'recording' or 'making' the record.

Rule 5.2(b), Arizona Rules of Criminal Procedure, already refers to "electronic or other" alternatives to certified reporters and already uses the words "recorded" and "record," in lieu of a word like 'capture.' The Petition does not propose to change that sensible wording. In fact, it appears the only place where the word 'capture' appears in relevant rule sets is in Arizona Supreme Court Rule 122(b)(8)—in the definition of a recording device.[5] The word 'capture' seems best used to refer to *what* a recording device might do—and not *how* a verbatim record

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[3] The word "Be" is capitalized in the title of Rule 12.4, Rules of Criminal Procedure, in the Arizona Rules of Court rulebook, so the State Bar proposes retaining that capitalization. The State Bar also corrects a typographical error in the Petition's version of the heading to Rule 12.7(a).

[4] The State Bar also suggests correcting in the comments to Rule 30, Rules of the Arizona Supreme Court, one instance of "certified court reporter" to "certified reporter," as the retention of the word "court" appears to be a typographical error.

[5] "[A]n electronic or mechanical apparatus and related equipment used to capture and store sound or images, or both . . . ."

of proceedings may be made. The State Bar suggests that—for clarity—the Court omit use of "capture" and its various forms in adopting the Petition's proposals.

Incorporating the most recent Justice Court Rules of Civil Procedure: In adopting the changes proposed by Petition R-19-0020, this Court issued a December 12, 2019, Amending Order for Rules 123, 124, 125, and 126, of the Justice Court Rules of Civil Procedure. The State Bar notes that the Petition's appendices do not include the most recent version of Rule 123(c), as very recently made effective by this Court's Amending Order on R-19-0020. The State Bar suggests that the Court use the now-in-effect version of Rule 123(c), Justice Court Rules of Civil Procedure, as the backdrop for the changes sought by the Petition to that rule.

Adhering to Restyling Conventions: The State Bar referenced the Restyling Conventions[6] typically used by this Court's task forces on rules restyling and used those to make suggested changes to further of the Petition's rules. These rules include Rules 30(b) and 78(b), Rules of the Arizona Supreme Court, and Rule 123(d) of the Justice Court Rules of Civil Procedure. The State Bar understands that a Task Force appointed by this Court currently has the Rules of Procedure for

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[6] *Available at* https://www.azcourts.gov/Portals/74/JRTF/MeetingPacket092719JRTF.pdf?ver=2019-09-19-155806-507, at PDF page 55 of 70.

the Juvenile Court under review, so the State Bar did not suggest restyling changes to those rules included in the Petition's proposals.

Conclusion

A blackline of the State Bar's suggested changes to the Petition's proposals[7] is reflected in **Appendix A**. The State Bar respectfully requests that the Court consider and adopt the Petition's proposals and that it include the State Bar's suggested changes in the Court's adopting orders on this Petition.

RESPECTFULLY SUBMITTED this _1st_day of___May________, 2020.

Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this __1st___ day of ____May___________,
2020.

by: ________________________________

[7] Because the State Bar endorses the Petition and only makes the small changes noted herein, Appendix A notes only blackline changes to the Petition's proposals, with the exception of the Justice Court Rules of Procedure noted above, for which Appendix A shows the corrected ruleset, with the Petition's proposals as blackline.

Appendix A to State Bar Comment

Comment's Proposals

Unless otherwise noted herein, deletions are shown by strikethrough, and additions are shown by underline. The "***" is used to indicate that portions of the Petition's proposals left unchanged by the State Bar's Comment are omitted from this Appendix.

***

Rules of Criminal Procedure

5.1 Right to a Preliminary Hearing; Waiver; Continuance

(a) through **(c)** No change

(d) Hearing Demand. A defendant who is in custody may demand that the court hold a preliminary hearing as soon as practicable. In that event, the magistrate must set a hearing date and must not delay its commencement more than necessary to secure the attendance of counsel, necessary witnesses, and ensure the ability to ~~capture a verbatim~~ record~~ing of~~ the proceeding verbatim.

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12.4 Who May ~~b~~Be Present During Grand Jury Sessions

(a) General. Only the following individuals may be present during grand jury sessions:
(1) the witness under examination;
(2) counsel for a witness if the witness is a person under investigation by the grand jury;
(3) a law enforcement officer or detention officer accompanying an in-custody witness;
(4) prosecutors authorized to present evidence to the grand jury;
(5) a certified reporter or person authorized by the court to ensure the~~ verbatim~~ proceeding is recorded verbatim~~ is captured~~; and
(6) an interpreter, if any.

(b) No change

12.7 Record of Grand Jury Proceedings

(a) Recording Arrangements. The presiding or impaneling judge must make arrangements to record ~~capture~~ all grand jury proceedings, except its deliberations. Any arrangements must ensure that no images of grand jurors are taken or ~~captured~~recorded.

(b) Foreperson. The foreperson must keep a record of how many grand jurors voted for and against an indictment, but must not record how each grand juror voted. If the grand jury returns an indictment, the foreperson's record of the vote must be transcribed and filed with the court no later than 20 days after the return of the indictment, and may be made available only to the court, the State, and the defendant.

(c) Filing the Transcript and Minutes. The record of grand jury proceedings must be transcribed and the transcript must be filed with the superior court clerk no later than 20 days after return of the indictment, and may be made available only to the court, the State, and the defendant.

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Rules of the Supreme Court

30. Verbatim Recording of Judicial Proceedings

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(b) Use of Court Reporting Resources.

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3. If the court uses~~is using~~ an electronic recording system to record the proceedings, a party has the right to provide a certified reporter to also record the proceedings. The party providing the certified reporter must bear the cost. The official record, however, is the record designated by the court as set forth in Rule~~section~~ 30(b)(4)~~ of this rule~~.

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[2020] COMMENT

Rule 30(a). This rule is not intended to prevent a party from retaining a transcriber, at the party's expense, to prepare an unofficial transcript of all or part of a proceeding. An unofficial transcript cannot be referenced or used in any court proceeding.

Rule 30(b)(1). Nothing in this rule precludes the court from granting a party's untimely request for a certified reporter.

Rule 30(b)(2). The court may approve use of a certified ~~court~~ reporter, audio or video recording to ~~capture the~~ record ~~of court~~the proceedings. In exercising its discretion~~ of how proceedings should be captured~~, the court should consider the following factors when requiring the presence of the court's certified reporter or otherwise designating the official record: unique demands of the preservation of the official court record by a certified reporter in grand jury proceedings, felony jury trials, particularly first degree murder cases in which the State filed a death penalty notice, initial determinations of sexually violent person status, and proceedings on a request for authorization of abortion without parental consent. Moreover, the court should consider the availability of a certified reporter; the probability that a transcript will be requested; the number of litigants; convenience of the parties and the court's schedule; sufficiency of another form of record to convey the substance of the matters discussed at the proceeding; whether testimonial evidence will be presented at the proceeding; presence of non-native English speakers as witnesses or parties; the likelihood that technical or otherwise difficult terminology will be used; the need for formal or informal proceedings; the need for a real-time transcript; the likelihood that daily transcripts will be required; and any other factor which in the interests of justice warrants a particular form of record, or as otherwise required to serve the interests of justice.

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78. Initial Proceedings

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(b) Screening and Investigation. Upon the commencement of an unauthorized practice of law proceeding against a respondent, the matter shall proceed as provided in this Rule~~section~~.

1. *Screening*. Unauthorized practice of law counsel shall evaluate all information coming to his or her attention, in any form, by charge or otherwise alleging the respondent engaged in unauthorized practice of law. If the allegations, if true, would not constitute unauthorized practice of law under these rules, the matter shall be dismissed. If the information alleges facts which, if true, would constitute unauthorized practice of law, unauthorized practice of law counsel shall conduct an investigation.

2. *Investigation*. All investigations shall be conducted by unauthorized practice of law counsel, volunteer bar counsel, or staff investigators. Unauthorized practice of law counsel may request information through an investigative subpoena pursuant to Rule 78(b)(4). Following an investigation, unauthorized practice of law counsel may dismiss the matter; enter into a consent to cease and desist agreement with the respondent pursuant to Rule 78(c); or file a complaint in superior court seeking injunctive relief, assessment of costs and expenses, and restitution. Unauthorized practice of law counsel shall not commence a superior court proceeding until the respondent is afforded an opportunity to respond in writing to the charge. Respondent shall have twenty days from notice of the request for information to respond.

3. *Failure of Respondent to Provide Information; Deposition*. When a respondent has failed to comply with any request for information made pursuant to these rules for more than thirty days, unauthorized practice of law counsel may notify respondent that failure to so comply within ten days may necessitate the taking of the deposition of the respondent pursuant to subpoena.

A. Venue. Any deposition conducted after the expiration of that ten~~–~~-day period and necessitated by the continued failure to cooperate by the respondent may be conducted at any place within the State of Arizona.

B. Imposition of Costs. When a respondent's failure to cooperate results in a deposition being conducted pursuant to ~~the preceding subsection~~ Rule 78(b)(3)(A), the respondent shall be liable for the actual costs of conducting the deposition, including but not limited to service fees, certified reporter fees, travel expenses and the cost of transcribing the deposition, regardless of the ultimate disposition of the unauthorized practice of law proceeding. Upon application of chief bar counsel to the committee, itemizing the costs and setting forth the reasons necessitating the deposition, and after giving the respondent ten days to respond, the committee

shall, by order, assess such costs as appear appropriate against the respondent. An order assessing costs under this rule may be appealed to the superior court.
4. *Investigative Subpoenas*. During the course of an investigation and prior to the filing of a complaint, unauthorized practice of law counsel may obtain issuance of a subpoena to compel the attendance of witnesses, the production of pertinent books, papers and documents, and answers to written interrogatories, by filing a written request with the chief bar counsel or the chair or vice-chair of the committee. A copy of the request, which shall contain a statement of facts to support the requested subpoena, shall be provided to respondent or respondent's counsel, if represented. Upon receipt of a request for subpoena, a party may, within five days of service by first class mail, file a written objection with the committee. The committee may rule on the objection without oral argument.
5. *Dismissal by Unauthorized Practice of Law Counsel*. After conducting an investigation, unauthorized practice of law counsel may dismiss an unauthorized practice of law proceeding if there is no probable cause to determine that unauthorized practice of law occurred. Unauthorized practice of law counsel shall provide complainants with a right-to-sue letter upon dismissal of the charge.

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The Comment Sets Forth Below the Version of Rule 123(c), Justice Court Rules of Civil Procedure*, effective 1/1/2020*, and Shows the Petition's Changes Therefrom

123. Depositions

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(c) Notice of deposition; deposition of a representative of a public or private entity. At least ten (10) days before the date of the deposition, a notice of deposition must be provided to ("served on") (1) the person who will be deposed and (2) the other parties to the lawsuit. The notice of deposition must state the name of the person who will be deposed; the location of the deposition; the date and starting time of the deposition; and the name of the person who will record the deposition and the method of recording. When a party deposes another party, a notice of deposition must also include the following language:

"The Justice Court Rules of Civil Procedure allow a party to take the deposition of another party. A deposition is an opportunity to ask questions to another person while the person who is deposed is under oath. A deposition takes place out of court and a judge is not present. A deposition is recorded by a ~~court~~ <u>certified</u>

reporter or by another method agreed to by the parties. A single deposition may not take longer than four (4) hours, unless agreed to by the parties or unless ordered by the court.
“If you fail to appear for your deposition, the party who sent this notice may file a motion asking that the court order you to appear. If the court orders you to appear for your deposition, the court may also order that you pay the expenses, including attorneys’ fees, incurred by the other party as a result of your failure to appear. If you fail to appear for your deposition after the court has ordered you to appear, the court may impose additional penalties against you, including an order that you may not introduce evidence of some or all or your claims or defenses in this lawsuit; if you are a plaintiff, that your lawsuit be dismissed; or if you are a defendant, that your answer be stricken and that judgment be entered against you.”

A notice of deposition may be served on a public or private entity, such as a governmental body or agency, a corporation, or a partnership, whether or not the entity is a party to the lawsuit, and the notice may describe with reasonable specificity the topics that will be asked about during the deposition. The entity must then designate one or more of its officers, directors, or employees who have knowledge of the specified topics and who will appear at the deposition and testify concerning those subjects. **[ARCP 30(b), (d)]**

d. Procedure. The attendance of a witness who is not a party at a deposition may be required by serving the witness with a subpoena, as provided in Rule 137(b). A party may be required to produce documents at a deposition pursuant to Rule 125. The party requesting the deposition must pay the cost of recording, unless the court orders or the parties agree otherwise.

The deposition must start within thirty (30) minutes of the time provided in the notice, and any party not present within thirty (30) minutes of the time provided in the notice of deposition waives any objection to the deposition starting without the party’s presence. The officer specified in ~~section~~ Rule 123(a) ~~of this rule~~ must administer the oath to the person who is deposed before the start of testimony. If a deposition is recorded by means other than a certified reporter, the person operating the recording equipment must be sworn to fully and fairly record the proceeding. The person or persons recording the deposition will note the starting and ending times of the deposition, and the times of any breaks during the deposition.

Any objections at a deposition, including objections to a specific question, will also be recorded, and evidence is taken subject to the objections. Objections to the form of a question, or to the responsiveness of an answer, must be concise, and must not suggest answers to the person being deposed. Continuous or unwarranted off-the-record conferences with the person being deposed, following questions and before answers, are not permitted, and this conduct is subject to penalties under Rule 127(d).

The certified reporter or other person recording the deposition must identify and maintain any exhibits used at the deposition, although copies of original exhibits may be substituted by agreement of the parties. Before concluding the deposition, the certified reporter or other recorder must ask the witness if the witness would like an opportunity to review the transcript or recording to affirm its accuracy, or if the witness waives that right. A witness who asks to review the transcript or recording will have thirty (30) days after notification that the transcript or recording is available to review and to submit a statement concerning any inaccuracy of the transcript or recording, and a statement submitted by the witness to the certified reporter or other recorder within that time must be included with the transcript or recording of the deposition.

Upon motion, the court may impose an appropriate penalty under Rule 127(d) against any party, attorney, or witness who engages in unreasonable, groundless, abusive or obstructionist conduct at a deposition, or against a party or attorney who takes a deposition in bad faith, or to annoy or embarrass the person being deposed. **[ARCP 30(b)-(d), 32(d)]**

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: **PETITION TO AMEND VARIOUS RULES OF PROCEDURE RELATED TO CREATING THE VERBATIM RECORD OF JUDICIAL PROCEEDINGS**	Supreme Court No. R-20-0013 **PROPOSED COMMENT OF THE STATE BAR OF ARIZONA**

Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar of Arizona (the "State Bar") hereby submits the following as its comment to the above-captioned Petition.

***Discussion*:**

Arizona provides its citizens with a state constitutional right to appeal in criminal cases. *Ariz. Const. art. 2, §24; see also State v. Bolding*, 227 Ariz. 82, 87-88 ¶¶16-17 (App. 2011) (noting that in other jurisdictions the right to appeal in criminal cases is statutory rather than constitutional.). The right to appeal in criminal cases includes the right to a complete record of the trial proceedings; a record of sufficient completeness to enable the appellant to have any issues properly

considered by the appellate court. *State v. Schackart,* 175 Ariz. 494, 498-99 (1993).

The Petition proposes to remove all limitations on the use of electronic/digital recording of the record in all cases. The State Bar understands that this Court's Task Force[1] was given a mandate to recommend changes for supplementing court reporters by utilizing electronic means. The State Bar also acknowledges that our courts must use a system that utilizes both court reporters and electronic/digital recordings. But as this Court rightly noted in its Administrative Order establishing the Task Force, "Production and preservation of a record of proceedings in a court of record are fundamental functions of the Judicial Branch." *Admin. Order 2019-49.*

The State Bar believes that Petition R-20-0013 is premature in its proposal to modify Rule 30(b)(3) of the Rules of the Supreme Court to permit electronic/digital recording and transcription of capital trials, felony trials, and grand jury proceedings. Anecdotal evidence suggests there will be problems with the transition from utilizing court reporters exclusively for Rule 30(b)(3) proceedings. The experience of the courts in Florida is highly illuminating.

In *Moorman v. Hatfield,* 958 So.2d 396 (Fla. App. 2007), the court discussed significant problems that arose during the "shift away from using trained professional court reporters" to the use of "digital recording and transcription." *Id.*

[1] Task Force to Supplement Keeping of the Record by Electronic Means.

at 397. One case in *Moorman* involved the appeal of a criminal contempt proceeding that had been electronically recorded. The transcript of the hearing that was prepared from the audio recording contained significant errors. For example, it indicated an appearance by an attorney who did not exist, and the transcription errors were so numerous that a new, corrected transcript was required. *Id.*

Moorman was not limited to discussing the problems arising from a single proceeding. The petitioners sought a writ of mandamus to compel a court order requiring a change in the method of creating a record of all criminal case proceedings, arguing that "errors in the transcripts under the new methods of electronic or digital recording [were] so pervasive" as to require court intervention. *Id.* at 397-98. The Florida Office of the Attorney General agreed "that digital recording [had] resulted in a substantial decline in the quality of transcription." *Id.* at 398.

Although the *Moorman* Court ultimately declined to issue a writ, one judge on the panel noted his agreement with the petitioner and the Florida Attorney General's Office: ". . . [T]here appears to have been a marked decline in the quality of transcripts since the trial courts began increasing their reliance upon electronic recording and minimizing the use of trained professional court reporters." *Id.* at 399 (Altenbernd, J., concurring).

With regard to the transcriptionists employed in Arizona to transcribe

electronic/digital recordings, the Arizona Court Reporters Association raises several critical questions:

> A transcript will always be only as good as the recording and the transcriptionist listening to it. Since there is no set of standards for transcriptionists, one must ask: Do they have a minimal educational requirement? Do they have a criminal record? What assurance is there they will recuse themselves if they have a connection to a party or lawyer? Are they even fluent in English? Have they been trained in legal terminology? Medical terminology? Can they accurately differentiate between numerous speakers?[2]

Certified court reporters, however, must meet licensing requirements, and possess a proficiency in understanding and recording complex, technical vocabulary. There is also a code of ethics for certified court reporters.

It's not just transcription errors that raise concerns. Digital recording is subject to failure at any time for an indefinite length. Case law provides examples of cases where problems with the recordings or the equipment resulted in the lack of an adequate record. *See, e.g.,* People v. Henderson, 140 A.D.3d 1761, 32 N.Y.S.3d 429 (App. 2016) (proceedings could not be transcribed due to inaudibility of digital recording.); *Williams v. LeBeau*, 988 So.2d 1276 (Fla. App. 2008) (Due to a

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[2] Minority Position Statement of the Arizona Court Reporters Association made in response to the final report of the Arizona Task Force to Supplement Keeping of the Record by Electronic Means, at p. 4, found at: https://acraonline.org/resources/Documents/ACRA's%20Dissenting%20Opinion%20to%20SKREM%20Final%20Report.pdf (last visited 3/16/2020).

technical problem with the digital recording equipment, a significant portion of the evidence was not recorded. Remanded.).

Currently, the courtroom electronic recording systems are not individually monitored. Consequently, any system malfunction may not be discovered until well after the fact, even as late as when transcripts are ordered for appeal. Running out of disc space or other glitches, as simple as forgetting to start recording, means that objections, arguments, and testimony may be lost. Preservation of the record is at risk in this situation.

Other concerns also exist:

- Microphones – recording systems require microphones. If a microphone fails to pick up audio, it may not be discovered until the transcript is created – days or weeks after the trial is complete.

- Quality of the recording – When a recording is played back there may be noise, feedback, static, or even varying volume levels that may lead to transcription errors, changing the words of a witness.

- Multiple people speaking at once – this happens all too often during trials. Court reporters know when multiple speakers are preventing an accurate record from being made and will immediately interrupt to make sure only one person speaks at a time in order to preserve an accurate record.

- Speed of speech – Many attorneys and witnesses tend to speak very rapidly at

various times during trials. Court reporters regularly slow the attorneys and witnesses down and make sure that everyone takes their time in order to preserve the accuracy of the record.

- Identity of Speakers – In cases involving multiple defendants, and even in some cases not involving multiple defendants, there will be many individuals involved and this increases the difficulty in accurately identifying the speakers. In all cases, there will be times when voices will sound similar to the person transcribing an electronic recording. There will also be times when an unidentified voice will suddenly be heard. A certified court reporter assures that speakers are accurately identified.

The Petition notes that when a court elects to use an electronic recording system to make a verbatim record of the proceedings, the parties will be free to provide their own court reporter to also record the proceedings. (Petition at pp. 8-9). In criminal cases where the defendant is indigent, this is a virtual impossibility. Public Defender agencies do not have the funds to cover such an expense for capital and felony trials and even if they did, the proposed rules state that the official record will be the electronic record. (*See* Petition at Appendix A, pp. A-7 and A-8). Further, an unofficial transcript may not be referenced or used in any court proceeding. (*Id.* at A-8, Comment to Rule 30(a)). Consequently, there is virtually no benefit for

either side in a criminal case to utilize a certified court reporter in an electronically recorded proceeding.

The proposed comment to Supreme Court Rule 30(b) states that in determining whether to utilize electronic recording or a certified court reporter, the court should consider such matters as the probability that a transcript will be requested; whether testimony will be presented; whether the parties or witnesses are non-native English speakers; whether difficult or technical terminology will be used; and whether it is likely that daily transcripts will be needed. (*Id.* at A-9, Comment to Rule 30(b)). The State Bar submits that there is an extremely high likelihood that most or all these factors exist capital cases, and that many will also be present in most felony cases. The required presence of a certified court reporter in these cases, as well as at grand jury proceedings, will assure that the best possible record of the proceedings is created and the possibility of mechanical or human error will be all but nonexistent. This results in the fairest, most accurate record for the State, the Defendant, and the Victim.

While we live in a technology-dependent world, we should not succumb to technology-dependent trials, especially when life and liberty are at stake in capital cases, felony cases, grand jury proceedings, and evidentiary hearings for capital and felony trials.

CONCLUSION

For the foregoing reasons, the State Bar of Arizona respectfully requests that this Court not modify the Criminal Rules and Rules of the Supreme Court to permit electronic/digital recording of capital cases, felony cases, and grand jury proceedings, and that certified court reporters be required to record and transcribe all such proceedings.

RESPECTFULLY SUBMITTED this ____day of__________________, 2020.

____
Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this _____ day of ___________________, 2020.

by: ________________________________

David K. Byers, Administrative Director
Administrative Office of the Courts
1501 W. Washington St.
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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND RULE 3.2, RULE 4.1, AND RULE 41, FORMS 2(a) AND 2(b), ARIZONA RULES OF CRIMINAL PROCEDURE	)))))	No. R-20-

Pursuant to Rule 28, Rules of the Supreme Court, Petitioner requests the Court to amend Rule 3.2 ("Content of a Warrant or Summons"), Rule 4.1 ("Procedure Upon Arrest"), and Rule 41, Forms 2(a) ("Arrest Warrant: Superior Court") and 2(b) ("Arrest Warrant: Limited Jurisdiction Courts") of the Arizona Rules of Criminal Procedure. The proposed amendments are shown in the Appendix.

(1) Background. Petitioner convened an Arrest Warrant Workgroup shortly before the June 2019 Judicial Conference. The workgroup was led by Jerry Landau, the Government Affairs Director of the Administrative Office of the Courts ("AOC"). Workgroup members included judicial officers from general and limited jurisdiction courts in four counties (Coconino, Maricopa, Mohave, and Pima), as

well as AOC attorneys and specialists.[1] The workgroup met 4 times before filing this petition.

Establishment of the workgroup was prompted by memos prepared by the Maricopa County Attorney's Office ("MCAO") and the Pinal County Attorney's Office ("PCAO"). Here is the issue posed in those memos:

> If a defendant is arrested pursuant to a warrant and the warrant includes a predetermined bond amount, may the defendant be released upon posting the bond and without appearing before a magistrate for a Rule 4.2 initial appearance?

After discussing statutes, court rules, and case law, the MCAO concluded, and advised the Maricopa County Sheriff, that all arrested defendants, even those who post a pre-set bond, should be seen by the initial appearance magistrate, who could then determine the totality of release conditions. In response, the Maricopa County Sheriff distributed a May 8, 2019 memo to its "Maricopa County Law Enforcement Partners" that said,

> Based on the legal guidance received, effective immediately, the Maricopa County Sherriff's Office can no longer accept bond payments for individuals circumventing a required initial appearance with the court. Additionally, the MCSO bonds and fines window can no longer accept bond payments by individuals with warrants to avoid arrest and booking into the MCSO jail system. I understand that this has been a practice in

[1] Judge members on the workgroup were the Hon. Patti Starr (Maricopa Superior), Hon. Dan Slayton (Coconino Superior), Hon. Jill Davis (Mohave [Lake Havasu City] Justice), Hon. Tony Riojas (Tucson City), and Hon. Elizabeth Finn (Glendale Municipal). The Hon. Ronda Fisk and the Hon. Melissa Zabor (both from Maricopa Superior) also participated in the discussions. AOC members included David Withey (AOC Legal), Paul Julien (AOC Judicial Education Officer), and Don Jacobson (AOC Court Services). Theresa Barrett and Mark Meltzer (AOC Court Services) served as the workgroup's staff persons.

> the past to avoid taking officers off the street, but based on the legal opinion received, law enforcement officers can no longer facilitate release on warrants prior to defendants appearing in front of a judge in person prior to release from custody.

The PCAO reached a similar conclusion as its Maricopa counterpart:

> … to fulfill the actions necessitated by a warrant arrest, the arrestee must be held until he/she has also appear[ed] before the magistrate who issued the warrant or the nearest or most accessible magistrate in the same county before he/she can be released from custody—even if he/she posts bond prior to the Warrant-Arrest IA.

<u>(2)</u> <u>Discussion</u>. A.R.S. § 13-3897 ("duty of officer after arresting with a warrant") is foundational for the proposition that a person arrested on a warrant must have an initial appearance before a magistrate. The statute provides,

> The officer making the arrest shall without unnecessary delay take the person arrested before the magistrate who issued the warrant or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in that county.

Rule 4.1(c) of the Rules of Criminal Procedure ("on arrest with a warrant") is consistent with the statutory directive. This rule provides that "a person arrested in the county where the warrant was issued must be taken before the magistrate who issued the warrant for an initial appearance…." Rule 3.2(a)(4) ("content of a warrant or summons") includes similar language. Rule 41, Forms 2(a) (currently titled, "arrest warrant: superior court") and 2(b) (currently titled, "arrest warrant: limited jurisdiction courts") are also in accord. Both warrant forms begin with the words, "You are commanded to arrest and bring the defendant before this court."

Notwithstanding these authorities, workgroup members made observations and expressed concerns that supported a defendant's release upon posting the bond amount, without requiring an initial appearance:

- When a magistrate puts a bond amount in the warrant, the magistrate has explicitly expressed the objective of releasing, and the desire to promptly release, the defendant when that bond amount is posted.
- Even a short time in jail could increase the possibility of recidivism, so the defendant should be released as soon as the bond is posted.
- If the defendant is arrested on a warrant for failure to pay a financial obligation, the defendant should be released upon payment of the bond.
- As a practical matter, victims are not notified of a defendant's arrest on a misdemeanor warrant.
- There is a significant cost for incarcerating a defendant on a misdemeanor warrant.

On the other hand, workgroup members recognized the benefit of requiring an initial appearance before a magistrate prior to the arrested defendant being released:

- On an arrest pursuant to a warrant, the initial appearance magistrate may not have access to a completed Form 4 or a report from pre-trial services, in which case the magistrate is "flying blind" and needs to have a colloquy with the defendant (particularly if the defendant was arrested on a warrant from another county) to determine release conditions.
- Even if the warrant indicates a bond amount, the length of time between issuance of the warrant and the arrest could be substantial, and circumstances supporting the original amount might no longer apply.
- In non-warrant arrests, the magistrate does not determine a bond amount until the magistrate has conducted an initial appearance.

The workgroup concluded:

(1) the Criminal Rules should distinguish warrants concerning a felony from warrants concerning misdemeanors;

(2) the Criminal Rules should permit a defendant arrested on a misdemeanor warrant—at the issuing magistrate's discretion—to post a bond without the need to see an initial appearance magistrate; and

(3) a defendant who is arrested on a felony warrant should see a magistrate before being released, even if the warrant contains a recommended bond amount and the defendant is able to immediately post that bond.

As the result of a suggestion by a workgroup member and participants from the Superior Court in Maricopa County, the workgroup proposes that the issuing magistrate should have the ability to "recommend" the bond type and amount on a felony warrant. The issuing magistrate might have more information concerning an individual defendant's circumstances than an initial appearance magistrate with only scant information, and therefore could more knowledgably propose the type and amount of a bond. However, the bond is "recommended" because the initial appearance magistrate who sees the defendant would have discretion to disregard the issuing magistrate's recommendations and make an independent determination concerning the bond.

(3) <u>Proposed Rule Changes.</u> The lynchpin of the recommendations in this petition is a differentiation in the procedure for misdemeanor and felony warrants. This petition proposes that a defendant arrested on a misdemeanor warrant can be released upon posting the bond and without the necessity of an initial appearance. A defendant arrested on a felony warrant must have an initial appearance prior to release. Petitioner accordingly proposes the following rule changes.

(a) <u>Rule 3.2 ("Content of a Warrant or Summons").</u> Current Rule 3.2(a) ("warrant") specifies the contents of a warrant. Rule 3.2(a) has 5 untitled subparts. Petitioner proposes that the first 4 subparts be preceded by a new subtitle, "mandatory provisions," followed by the content of the 4 current subparts without changes to their text. The fifth subpart currently requires the warrant to "state the amount of an appearance bond, if the defendant is bailable as a matter of right." Petitioner proposes to eliminate this text and to instead add two new subparts, one with the title, "bond for felony warrants," and the other titled "bond for misdemeanor warrants."

The new provision for a felony warrant would allow the issuing magistrate, if the defendant is eligible for release, to include on the warrant "a recommended bond (deposit, cash, unsecured, or secured appearance) and a recommended bond amount." The subpart would then say, "However, when the warrant is issued for a felony offense, the defendant must not be released on bond without having an initial

appearance before a magistrate." Therefore, a defendant must have a mandatory initial appearance following arrest on a felony warrant, even if the defendant is able to post the bond before that appearance.

The subpart on misdemeanor warrants similarly allows the warrant to "state the amount of a deposit, cash, unsecured, or secured appearance bond." However, because the proposed amendments to Rule 4.1 permit a defendant arrested on a misdemeanor warrant to post bond before the initial appearance, the bond amount is not qualified as "recommended."

(b) <u>Rule 4.1 ("Procedure Upon Arrest").</u> The proposed rule would change the title of section (a), from "prompt initial appearance" to "prompt appearance before a magistrate," and the text of the first sentence would change accordingly. Essentially, the proposed rule would require, like the current rule, that an arrested person be taken before a magistrate for an initial appearance within 24 hours after arrest. The most significant change to section (a) is the addition of a new last sentence that correlates with the above change to Rule 3.2. The new sentence says,

> If a misdemeanor warrant states the amount of a deposit, cash, unsecured, or secured appearance bond, as provided in Rule 3.2(a)(2), and the arrested person has posted the bond prior to the initial appearance, the arrested person must be promptly released from custody.

This new sentence would permit the release from custody of an arrested misdemeanant as soon as the bond is posted, without the necessity of an initial appearance.

(c) Rule 41, Forms 2(a) (currently titled "Arrest Warrant: Superior Court") and 2(b) (currently titled "Arrest Warrant: Limited Jurisdiction Courts"). These two warrants forms would need to be conformed to the foregoing rule changes. However, as a preliminary matter, Petitioner proposes changing the current titles of Forms 2(a) and 2(b). Either the superior court or a limited jurisdiction court has the authority to issue, and in practice do issue, warrants for felonies and misdemeanors. The critical distinction concerning these warrants is not identifying the level of the court issuing the warrant, but rather, whether the court is issuing the warrant for a felony or a misdemeanor. Accordingly, and as shown in the Appendix, Petitioner proposes changing the title of Form 2(a) to "Felony Arrest Warrant," and the title of Form 2(b) to "Misdemeanor Arrest Warrant."

The felony warrant, Form 2(a), would include this new bolded sentence: "**The defendant must not be released on bond without having an initial appearance before a magistrate.**" The issuing magistrate could still include a bond amount on the felony warrant form underneath that sentence, but the amount would be "recommended" and could be changed by the initial appearance magistrate. The form would also allow the issuing magistrate to provide an explanation for the recommended amount (for example. "the defendant has had several prior failures to appear," or "the defendant has strong ties to the community"), information that might benefit the initial appearance magistrate. Alternatively, the form would allow the

issuing magistrate to indicate "no recommendation" concerning the amount. The revised form would also permit the issuing magistrate to indicate the type of bond (i.e., secured appearance, unsecured appearance, deposit, or cash) being recommended.

By comparison, the misdemeanor warrant, Form 2(b), would be modified so that the corresponding sentence would say, "□ Yes □ No The defendant may be released without having an initial appearance before a magistrate upon the posting of a [] secured appearance [] unsecured appearance [] deposit or [] cash bond in the amount of $____." Because the posting of that amount would result in the defendant's release, it is an actual amount rather than a recommended amount. If the defendant is unable to post that amount following arrest, or if the issuing magistrate declines to include a bond amount on a misdemeanor warrant, the initial appearance magistrate would determine the defendant's release conditions as provided in Rule 4.2(a)(7).

There are other changes to both Form 2(a) and Form 2(b) that improve their organization and clarity. One change concerns the location of the fingerprinting requirement. The requirement to fingerprint a defendant now appears midway through the form, where it can easily be overlooked by the arresting agency. Petitioner recommends moving the requirement into the caption of the form, directly

below the words “Arrest Warrant,” where a law enforcement officer can readily see it.

There is another noteworthy, recommended change to the first paragraph of these forms. The forms currently say,

> **YOU ARE COMMANDED** to arrest and bring the defendant before this court. If this court is unavailable or if the arrest is made in another county, you must take the defendant before the nearest or most accessible magistrate.

The workgroup believed this was an incomplete statement of the requirements of A.R.S. § 13-3897 (the statute is set out verbatim at page 3 of this petition), and suggests modifying it to say,

> **YOU ARE COMMANDED** to arrest and bring the defendant before this court. If this court is unavailable, you must take the defendant to the nearest or most accessible magistrate in this county. If the arrest is made in another county, you must take the defendant before the nearest or most accessible magistrate in that county.

The appendix contains revised versions of Forms 2(a) and 2(b). Petitioner recommends that the Court abrogate current Rule 41, Forms 2(a) and 2(b), and adopt the revised versions of Forms 2(a) and 2(b). Petitioner has not included redline versions because of the extent of the changes to both forms.

(4) Pre-filing Vetting. The workgroup presented earlier versions of its proposed rule changes to the Committee on Superior Court (“COSC”) and the Committee on Limited Jurisdiction Courts (“LJC”). These presentations did not result in noteworthy modifications to the drafts (modifications were primarily

generated within the workgroup), with the understanding that COSC and the LJC would entertain motions to support the proposed changes after the filing of this rule petition. The workgroup similarly deferred a request for pre-petition comments by other stakeholders, such as prosecutors and defense counsel, until after the filing date of the petition.

(5) Conclusion. Petitioner accordingly requests that the Court open this petition to amend Rules 3.2, 4.1, and 41, Forms 2(a) and 2(b) for public comments.

RESPECTFULLY SUBMITTED this 8th day of January 2020.

____

David K. Byers, Administrative Director
Administrative Office of the Courts

Appendix

Proposed amendments to the Rules of Criminal Procedure, Rules 3.2(a) and 4.1(a). Deletions are shown by ~~strikethrough~~. Additions are shown by underline.

Rule 3.2. Content of a Warrant or Summons

(a) Warrant.

(1) *Mandatory Provisions*. A warrant must:

(~~1~~ A) be signed by the issuing magistrate;

(~~2~~ B) contain the defendant's name or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty;

(~~3~~ C) state the charged offense and whether the offense is one to which victims' rights provisions apply;

(~~4~~ D) command that the defendant be arrested and brought before the issuing magistrate or, if the issuing magistrate is absent or unable to act, the nearest or most accessible magistrate in the same county or in the county of arrest if the defendant is arrested outside the county where the warrant was issued;

(2) Bond for Felony Warrants. If the defendant is eligible for release at the initial appearance, the issuing magistrate may include on the felony warrant a recommended bond (deposit, cash, unsecured, or secured appearance) and a recommended bond amount. However, when the warrant is issued for a felony offense, the defendant must not be released on bond without having an initial appearance before a magistrate.

(~~5~~3) *Bond for Misdemeanor Warrants.* If the offense for which the warrant is issued is a misdemeanor, the warrant may state the amount of a~~n~~ deposit, cash, unsecured, or secured appearance bond~~, if the defendant is bailable as a matter of right~~.

(b) Summons. [No change]

Rule 4.1. Procedure upon Arrest

(a) Prompt ~~Initial~~ Appearance Before a Magistrate. An arrested person must be promptly taken before a magistrate for an initial appearance. At the initial appearance, the magistrate will advise the arrested person of those matters set forth in Rule 4.2. If the

initial appearance does not occur within 24 hours after arrest, the arrested person must be immediately released from custody. If a misdemeanor warrant states the amount of a deposit, cash, unsecured, or secured appearance bond, as provided in Rule 3.2 (a)(3), and the arrested person has posted the bond prior to the initial appearance, the arrested person must be promptly released from custody.

(b) through (e). [No change]

Form 2(a): Felony Arrest Warrant

____________________COURT ______________________County, Arizona

STATE OF ARIZONA, Plaintiff -vs Defendant(s) (First, MI, Last) Address: ________________________________	CASE NO. ARREST WARRANT Fingerprint instruction upon arrest: [] 01 criminal history [check if required]

TO: ANY AUTHORIZED LAW ENFORCEMENT OFFICER

YOU ARE COMMANDED to arrest and bring the defendant before this court. If this court is unavailable, you must take the defendant to the nearest or most accessible magistrate in this county. If the arrest is made in another county, you must take the defendant before the nearest or most accessible magistrate in that county.

The defendant is accused of an offense or violation based on the following (examples: initial arrest warrant, failure to appear in court, probation violation): ____

This offense or violation is described as follows:

Offense Date **Statute/Rule & Literal Description** **Class**

___________ ____ __________

The defendant must NOT be released on bond without having an initial appearance before a magistrate.
If the defendant is eligible for release at the initial appearance, the recommended amount for a
[□ secured appearance] [□ unsecured appearance] [□ deposit] or *[□ cash]* bond is $_______

□ Explanation regarding the recommended amount: ___________________________________

□ There is no recommendation.

□ The defendant is not eligible for release on bond. [Explain / add additional orders of the court]

□ Yes □ No □ Unknown The offense is, or is materially related to, a victims' rights applicable offense.

*BY ORDER OF: The Honorable*___________, *Judge of* ___________ *Court. [If signed by the Deputy Clerk]*

_____________________ ____

Date [Printed name of the Judge or Deputy Clerk of the Superior Court]

SEX:	**RACE**:	**DOB**:	**HGT**:	**WGT**:	**EYES**:	**HAIR**:
ADDRESS: [TYPE:]						

COURT ORI:	WARRANT #: *	EXTRADITION: *
DL#: *	STATE: *	PURGE DATE: *
LE AGENCY: [Arresting Agency]	CITATION #: *	DR #: *

[*optional information can vary by court and may include the last four digits of the defendant's SSN]

CERTIFICATE OF EXECUTION

I certify that the defendant was arrested at ________ a.m./p.m. on _______________ ______,20_____,
(month) (day) (year)
and presented defendant before Judge _________________________________ at ___________________.

________________________ ____

Date Agency

____

Deputy Sheriff / Officer Badge #

Form 2(b): Misdemeanor Arrest Warrant

____________COURT ____________County, Arizona

STATE OF ARIZONA, Plaintiff vs. ___________________ **Defendant(s) (First, MI, Last)** Address: _________________________________	**CASE NO.** **ARREST WARRANT** **Fingerprint instruction upon arrest:** [] 01 criminal history [check if required]

TO: ANY AUTHORIZED LAW ENFORCEMENT OFFICER

YOU ARE COMMANDED to arrest and bring the defendant before this court. If this court is unavailable, you must take the defendant to the nearest or most accessible magistrate in this county. If the arrest is made in another county, you must take the defendant before the nearest or most accessible magistrate in that county.

The defendant is accused of an offense or violation based on the following: (examples: initial arrest warrant, failure to appear in court, probation violation): ____
This offense or violation is described as follows:

Offense Date **Statute/Rule & Literal Description** **Class**

__________ ____ _________

□ Yes □ No The defendant may be released without having an initial appearance before a magistrate upon the posting of a *[□ secured appearance] [□ unsecured appearance] [□ deposit]* or *[□ cash]* bond in the amount of $ _________.

□ Yes □ No □ Unknown The offense is, or is materially related to, a victims' rights applicable offense.

____________________ ____

Date Judge [Judge's Name Printed]

SEX:	**RACE:**	**DOB:**	**HGT:**	**WGT:**	**EYES:**	**HAIR:**
ADDRESS: [TYPE:]						
COURT ORI:		WARRANT #: *		EXTRADITION: *		
DL#: *		STATE: *		PURGE DATE: *		
LE AGENCY: [Arresting Agency]		CITATION #: *		DR #: *		

[*optional information can vary by court and may include the last four digits of the defendant's SSN]

CERTIFICATE OF EXECUTION

I certify that the defendant was arrested at ________ a.m./p.m. on _______________ ______,20_____,
(month) (day) (year)
and presented defendant before Judge ________________________________ at ____________________.

_______________________ ____

Date Agency

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Deputy Sheriff / Officer Badge #

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND RULE 3.2, RULE 4.1, AND RULE 41. FORMS 2(a) AND 2(b), ARIZONA RULES OF CRIMINAL PROCEDURE

Supreme Court No. R-20-0004

PROPOSED COMMENT

Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar of Arizona (the "State Bar") hereby submits the following as its comment to the above-captioned Petition.

Discussion:

The Petition seeks to amend the Rules of Criminal Procedure and their related forms to prohibit an arrestee from posting the bond previously set by the magistrate who issued the arrest warrant *prior to* the arrestee's initial appearance before the court.

The Petition acknowledges that magistrates issuing arrest warrants in felony cases "might have more information concerning an individual defendant's circumstances than an Initial Appearance magistrate [who possesses] only scant

information, and therefore could more knowledgably propose the type and amount of a bond" necessary to secure the arrestee's future court appearances—including his/her first "Initial Appearance" before the court. (Petition at 5). Nonetheless, the Petition avers that local Sheriff's Offices have implemented the practice of holding arrested persons in custody—"even if he/she posts bond prior to the warrant-arrest [Initial Appearance]" before the court. (*Id.* at 3). Petitioner contends the Rules of Criminal Procedure should be amended to allow this practice. The proposed procedure, however, violates an individual's liberty interest, which is protected by the federal and Arizona constitutions.

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Simpson v. Miller,* 241 Ariz. 341, 345 (2017), quoting *Rasmussen by Mitchell v. Fleming,* 154 Ariz. 207, 215-16 (1987), *Union Pac. Ry. Co. v. Botsford,* 141 U.S. 250, 251 (1891). "Thus, '[i]n our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception.'" *Simpson, supra.,* quoting *United States v. Salerno,* 481 U.S. 739, 755 (1987).

"The United States Supreme Court has characterized the right to be free from bodily restraint as 'fundamental'." *Simpson, supra.,* at 347. "[D]etention requires a case-specific inquiry." *Id.* at 349. The magistrate issuing a felony arrest warrant

establishes a bond congruent with a case-specific inquiry. The Petition would relegate the magistrate's determination of bond to one of merely "a recommendation"—subject to enforcement or modification only *after* an arrestee is jailed and brought before an initial appearance (IA) judge.

Regulatory procedures which operate to automatically deny bond in all felony cases, or which have the effect of denying bond after *the previously set bond amount is posted,* are unconstitutional. *Cf., Simpson, supra.* at 349-350 (holding Arizona Constitution and statute categorically denying bail for all persons charged with sexual conduct with a minor, are unconstitutional on their face.) Bond or bail for a felony may only be denied under the provisions and procedure afforded in A.R.S. §13-3961(D), which requires a motion *by the state* and implicitly includes the accused's Sixth Amendment right to assistance of counsel in challenging that motion. *Accord, Rule 7.1, Ariz.R.Crim.Pro.* (governing release and bond)

An accused felon's liberty interests are protected by the posting of the bond set in the arrest warrant; the state's interest in compelling those accused of felony offenses to appear in court are similarly protected. Once bond is posted, the accused's appearance before an IA judicial officer provides no justification for the latter's increase of the previously set, posted bond amount. However, other facts might be brought to the IA officer's attention warranting a change in the previously set bond or release conditions. Where such articulable facts or circumstances come

to light, the IA officer possesses the discretion to modify the bond amount or any other release condition—whether the accused is in custody or not—provided the accused is afforded counsel. *See, Kirby v. Illinois,* 406 U.S. 682, 688-89 (1972)(right to counsel attaches at or after initiation of adversary judicial criminal proceeding). On the other hand, where an accused felon fails to appear for his Initial Appearance, the IA officer may justifiably *sua sponte* modify the conditions of his/her release.

Consequently, automatically holding an arrestee without bond—regardless of the duration and regardless of convenience for law enforcement agencies—is unconstitutional.

Other reasons exist to explain why the proposed modifications are untenable. The implementation of the rules vary with locality. Often failure to appear warrants issue from Superior Court for failure to appear without a bond amount. A bond is set at the initial appearance on the failure to appear warrant. If the Defendant posts the bond he/she will be released. But in this case the Defendant is seen and a bond is set.

For misdemeanor cases, at initial appearances it is known that if a Defendant has a $2999 bond amount, that trial judge wants that bond imposed and no other. It also occurs that a bond amount will correspond to the fine amount for a particular misdemeanor offense.

The rules regarding release presume a certain order of events, arrest or

summons, initial appearance, release conditions and perhaps a bond set, then payment of a bond. But they do not preclude the payment of a bond and release once the bond is paid, and they shouldn't.

CONCLUSION

The State Bar of Arizona respectfully requests that this Court reject the proposed modifications to the criminal rules and forms.

RESPECTFULLY SUBMITTED this ____day of__________________, 2020.

____
Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this _____ day of ___________________, 2020.

by: _______________________________

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of ARIZONA RULE OF EVIDENCE 404	) Arizona Supreme Court No. R-20-____ PETITION TO AMEND ARIZONA RULE OF EVIDENCE 404(b)

PETITION TO AMEND RULE 404(b) OF THE ARIZONA RULES OF EVIDENCE

Pursuant to Rule 28, Rules of the Supreme Court, the Advisory Committee on Rules of Evidence, by and through its Co-Chairs, the Honorable Sara Agne and the

Honorable Maria Elena Cruz, petitions the Court to amend Arizona Rule of Evidence 404(b), as reflected in the attachment hereto, effective January 1, 2021.

I. INTRODUCTION AND BACKGROUND

The Arizona Rules of Evidence were first adopted by this Court in September 1977, and were based on the Federal Rules of Evidence, which had been adopted in 1975. In the more than forty years since the adoption of the Arizona Rules of Evidence, the Federal Rules of Evidence have been amended on several occasions, but not all of these amendments have become part of the Arizona Rules of Evidence.

In June 2012, the Arizona Supreme Court established the Advisory Committee on Rules of Evidence with the following purpose:

> The Committee shall periodically conduct a review and analysis of the *Arizona Rules of Evidence*, review all proposals to amend the *Arizona Rules of Evidence*, compare the rules to the *Federal Rules of Evidence*, recommend revisions and additional rules as the Committee deems appropriate, entertain comments concerning the rules, and provide reports to this Court, as appropriate.

Arizona Supreme Court Administrative Order 2012-43, dated June 11, 2012.

At its regular meeting on September 6, 2019, the Advisory Committee unanimously recommended that Arizona Rule of Evidence 404(b) be amended to be consistent with proposed amendments to Federal Rule of Evidence 404(b), which are expected to become effective December 1, 2020.

II. SUMMARY OF THE PROPOSED AMENDMENTS TO ARIZONA RULE OF EVIDENCE 404(b)

The proposed amendments are intended to conform Arizona Rule of Evidence 404(b) (the use of other crimes, wrongs, or acts to prove something other than character or propensity) to proposed Federal Rule of Evidence 404(b), while maintaining consistency between Arizona Rule of Evidence 404(b) and (c). Several Circuit courts had noted the expansive use of other acts evidence, which is sometimes—contrary to the Rule—admitted for purposes that seem to be little other than character or propensity. *See, e.g.*, *United States v. Banks*, 884 F.3d 998, 1025-26 (10th Cir. 2018) (acknowledging the trend in other circuits to more carefully analyze other acts evidence, but rejecting the effort and admitting other drug crimes to prove "knowledge"); *see also United States v. Mehrmanesh*, 689 F.2d 822, 831-32 (9th Cir. 1982) (lamenting the lack of record made by the proffering party showing that the evidence was not admitted for propensity, but noting that precedent compelled affirmance of the admission of some because there was "at least some logical connection, however weak" and finding harmless the Rule 404(b) error in the admission of other).

The Federal Advisory Committee determined that Federal Rule of Evidence 404(b) could better protect criminal defendants' rights by expanding prosecutors' notice obligations and requiring prosecutors to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that

supports that purpose." Federal rules bodies debated, but declined to impose, a definite time limit on the notice, and instead, the proposed federal rule requires the prosecutor to provide this notice "in writing sufficiently ahead of trial to give the defendant a fair opportunity to meet the evidence." In addition, the federal amendments clarify certain portions of the text and headings.

After their September 2019 approval by the Judicial Conference of the United States, the proposed federal amendments are to be considered by the United States Supreme Court and eventually, Congress. If the proposed amendments proceed in due course, it is expected that the amendments to the federal rule would become effective December 1, 2020. The Advisory Committee recommends that Arizona Rule of Evidence 404(b) be amended to keep it in conformity with Federal Rule of Evidence 404(b).

The Advisory Committee has identified other areas of Rule 404(b) that may be ripe for amendment, including whether any enhanced notice requirements should be imposed in civil cases and/or expanded to require notice by defendants in criminal cases and whether the rule should be amended to clarify whose other crimes, wrongs, and acts are covered (*i.e.*, just the defendant's or other witnesses' as well). These issues go beyond the federal amendment, are still percolating, and are not part of this Petition.

III. SPECIFICS OF THE PROPOSED AMENDMENTS TO ARIZONA RULE OF EVIDENCE 404(b)

The primary purpose of the amendments to Federal Rule of Evidence 404(b) is to ensure fairness to criminal defendants by imposing a heightened notice requirement when prosecutors seek to admit evidence of other crimes, wrongs, or acts in criminal prosecutions. The proposed amendments to the Arizona rule serve these same laudatory goals, but also seek to align the time for disclosing the use of this other acts evidence under Arizona Rule of Evidence 404(b) with the time for disclosing character evidence under Arizona Rule of Evidence 404(c) (character evidence in sexual misconduct cases); that is, unlike the amended federal rule, the proposed Arizona rule does contain a definite time limit on the notice, and it is recommended that Arizona Rule of Evidence 404(b) remain consistent with Arizona Rule of Evidence 404(c). *See* ARIZ. R. EVID. 404(c)(3) (for criminal cases, cross-referencing Rule 15.1 of the Arizona Rules of Criminal Procedure and requiring the state to make disclosure "no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause"); *see also State v. Vitasek*, No. 1 CA-CR 12-0050, 2017 WL 525963, at *6 ¶32 (App. Feb. 9, 2017) (mem.) (highlighting one reason for proper and timely disclosure—the need for adequate jury instruction on the proper purpose(s) of such evidence) (cited for persuasive value only pursuant to Ariz. R. Supreme Ct. 111(c)(1)(C)). In addition, the Advisory

Committee proposes minor clarifications to the text and headings, both for readability and to better conform the Arizona rule to its federal counterpart.

The notice requirements of the proposed Arizona rule largely mirror those of the amended federal Rule. Now numbered like the federal rule, proposed Arizona Rule of Evidence 404(b)(3)(B) requires the state to "articulate in the disclosure the permitted purpose for which the state intends to offer the evidence and the reasoning that supports the purpose." The differences between this proposal and the amended federal rule are twofold: the Arizona rule uses the word "disclosure" rather than "notice" and the word "state" rather than "prosecutor" to maintain conformity with the remainder of Arizona Rule of Evidence 404. Neither difference is substantive. In addition, proposed Arizona Rule of Evidence 404(b) repeats the phrase "other crimes, wrongs, or acts," while the amended federal rule shortens the phrase to "such evidence." That difference is not substantive, either, and the proposed Arizona language is in conformity with both the proposed revision to the Rule's title and to the language used throughout the Rule.

Thus, under both the federal rule and the Arizona rule, the prosecution must identify the evidence that it intends to offer pursuant to the rule and must also articulate a permitted non-character purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. This

amendment requires the prosecutor to clearly set forth a relevant purpose for the evidence other than propensity or character.

Although the federal Advisory Committee declined to set forth a specific timeframe for the prosecutor's notice in Federal Rule of Evidence 404(b) cases, Arizona Rule of Evidence 404(c) already contains a specific time for the prosecutor's notice of use of character evidence in sexual misconduct cases. Proposed Arizona Rule of Evidence 404(b) imports this familiar timeframe from Rule 404(c) into 404(b). Newly renumbered, proposed Arizona Rule of Evidence 404(b)(3)(A) requires the state to:

> make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause;

As noted, this language is absent from the federal rule, but maintains conformity with Arizona Rule of Evidence 404(c). To continue that conformity, the defendant's right of rebuttal from Arizona Rule of Evidence 404(c) is then noted in proposed Arizona Rule of Evidence 404(b)(3)(B), after the requirement that the state "articulate in the disclosure the permitted purpose for which the state intends to offer the evidence and the reasoning that supports the purpose."

Proposed Arizona Rule of Evidence 404(b) includes some other minor edits, clarifications, and renumbering. The heading for Arizona Rule of Evidence 404 heading capitalizes the word "not" in "Character Evidence Not Admissible to Prove

Conduct" to highlight the importance of the word. In addition, the heading, which currently contains the phrase "Other Crimes," is amended to include the entire phrase—"Other Crimes, Wrongs, or Acts"—both to comport with the federal rule and to align the title of the Rule with the subheading of Arizona Rule of Evidence 404(b) ("Other crimes, wrongs, or acts") and the substance of the Rule, which uses the phrase "other crimes, wrongs, or acts," not merely "other crimes."

Current Arizona Rule of Evidence 404(b) contains a single paragraph, while proposed Rule 404(b) contains three main subheadings, all retitled to conform to the federal rule, which contains subparts (b)(1)-(b)(3). Proposed Arizona Rule of Evidence 404(b)(1) is titled "*Prohibited uses*"; proposed Arizona Rule of Evidence 404(b)(2) is titled "*Permitted uses*"; and proposed Arizona Rule of Evidence 404(b)(3) is titled "*Notice in a criminal case*." These are the same headings found in the federal rule. Additionally, for clarification, in proposed Arizona Rule of Evidence 404(b)(2), the word "[i]t" is replaced with "[t]his evidence." The federal rule already uses the phrase "[t]his evidence."

Finally, the Advisory Committee recommends a single comment to the 2021 amendment: "Rule 404(b) was amended effective January 1, 2021, to conform to the changes made to Federal Rule of Evidence 404(b) that took effect on December 1, 2020."

CONCLUSION

Petitioners respectfully request that the Court consider this Petition and proposed rule change at its earliest convenience. Petitioners additionally request that the Petition be circulated for public comment until May 1, 2019, and that the Court adopt the proposed rule as presented, or as modified in light of comments received from the public, with an effective date of January 1, 2021.

DATED this 9th day of January, 2020.

______*/s/ Sara J. Agne*__________
Sara J. Agne
Co-Chair, Advisory Committee on Rules of Evidence

____*/s/ Maria Elena Cruz w/ permission*_______
Maria Elena Cruz
Co-Chair, Advisory Committee on Rules of Evidence

ATTACHMENT[1]

ARIZONA RULE OF EVIDENCE 404

Rule 404. Character Evidence ~~n~~Not Admissible to Prove Conduct; Exceptions; Other Crimes, Wrongs, or Acts

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused or civil defendant.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or evidence of the aberrant sexual propensity of the accused or a civil defendant pursuant to Rule 404(c);

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts.

(1) *Prohibited uses.* Except as provided in Rule 404(c) evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

(2) *Permitted uses.* ~~It~~ This evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[1] Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

(3) *Notice in a criminal case.* In all criminal cases in which the state intends to offer evidence of other crimes, wrongs, or acts pursuant to this subdivision of Rule 404, the state shall:

(A) make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause; and

(B) articulate in the disclosure the permitted purpose for which the state intends to offer the evidence and the reasoning that supports the purpose. The defendant shall make disclosure as to rebuttal evidence pertaining to such acts as required by Rule 15.2, no later than 20 days after receipt of the state's disclosure or at such other time as the court may allow for good cause.

(c) Character evidence in sexual misconduct cases. In a criminal case in which a defendant is charged with having committed a sexual offense, or a civil case in which a claim is predicated on a party's alleged commission of a sexual offense, evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.

(1) In all such cases, the court shall admit evidence of the other act only if it first finds each of the following:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged.

(C) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:

(i) remoteness of the other act;
(ii) similarity or dissimilarity of the other act;

(iii) the strength of the evidence that defendant committed the other act;
(iv) frequency of the other acts;
(v) surrounding circumstances;
(vi) relevant intervening events;
(vii) other similarities or differences;
(viii) other relevant factors.

(D) The court shall make specific findings with respect to each of (A), (B), and (C) of Rule 404(c)(1).

(2) In all cases in which evidence of another act is admitted pursuant to this subsection, the court shall instruct the jury as to the proper use of such evidence.

(3) In all criminal cases in which the state intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the state shall make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause. The defendant shall make disclosure as to rebuttal evidence pertaining to such acts as required by Rule 15.2, no later than 20 days after receipt of the state's disclosure or at such other time as the court may allow for good cause. In all civil cases in which a party intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the parties shall make disclosure as required by Rule 26.1, Rules of Civil Procedure, no later than 60 days prior to trial, or at such later time as the court may allow for good cause shown.

(4) As used in this subsection of Rule 404, the term "sexual offense" is as defined in A.R.S. Sec. 13-1420(C) and, in addition, includes any offense of first-degree murder pursuant to A.R.S. Sec. 13-1105(A)(2) of which the predicate felony is sexual conduct with a minor under Sec. 13-1405, sexual assault under Sec. 13-1406, or molestation of a child under Sec. 13-1410.

Comment to 2021 Amendment

Rule 404(b) was amended effective January 1, 2021, to conform to the changes made to Federal Rule of Evidence 404(b) that took effect on December 1, 2020.

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND ARIZONA RULE OF EVIDENCE 404

Supreme Court No. R-20-0011

PROPOSED COMMENT OF THE STATE BAR OF ARIZONA

Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar of Arizona (the "State Bar") hereby submits the following as its comment to the above-captioned Petition.

***Discussion*:**

The State Bar opposes the Petition to Amend Rule 404 of the Arizona Rules of Evidence because the current Rule already permits the admission of many types of other act evidence for the purposes of explaining aspects of a domestic violence relationship. Additionally, the Petition does not explain why the current Rule is insufficient in this regard. Moreover, the proposed language does not sufficiently address the need to explain the cycle of domestic violence.

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The Petition notes that a domestic violence relationship is cyclical and "includes a tension-building stage, an acute battering incident, and then a phase of extreme repentance by the abuser." Petition at 2, *citing* Isabell Scott & Nancy McKenna, *Domestic Violence Practice and Procedure*, § 1:4 (2018). The Petition also correctly explains that a single act of domestic violence is only one part of a "larger scheme of dominance and control." *Id*. at 3, *citing* De Sanctis, *Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence*, 8 Yale J.L. & Feminism, 359, 388 (1996).

The language of the proposed amendment is nearly identical to the language of Alaska R. Evid. 404(b)(4), which permits admission of certain narrowly defined domestic violence "crimes." The Petition's proposed language would only permit admission of a limited number of acts covering the "acute battering" stage of the domestic violence cycle. This narrowly tailored language would not help the jury understand the "larger scheme of dominance and control."

The Petition notes several other states that have adopted rules permitting other domestic violence acts, including Michigan,[1] which permits the admission of "other

[1] Mich. Comp. Laws Ann. § 768.27b.

acts of domestic violence" but defines "domestic violence" more broadly than Alaska. For purposes of that rule, "domestic violence" is defined as:

> (*i*) Causing or attempting to cause physical or mental harm to a family or household member.
>
> (*ii*) Placing a family or household member in fear of physical or mental harm.
>
> (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
>
> (*iv*) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

Mich. Comp. Laws Ann § 768.27b(6)(a).

This definition of domestic violence encompasses more than just criminal acts and permits the inclusion of other acts in the cycle of domestic violence that can explain or rebut a victims' recantation.

As the Petition points out, certain aspects of the controlling nature of a domestic violence relationship are important to contravene "the myth that 'the victim would leave her abuser if she really experienced the alleged violence.'" Petition at 5, *citing* Letendre, *Beating Again and Again and Again: Why Washington Needs A New Rule of Evidence Admitting Prior Acts of Domestic Violence*, 75 Wash. L. Rev. 973, 980-82, 999-1000 (2000). Not all those factors are necessarily DV crimes as

defined in § 13-3601. For example, a victim may feel frightened or intimidated into staying with an abuser and recanting her allegation because she fears losing a custody battle over a child or losing necessary financial support from the abuser. Such concerns are relatively common for domestic violence victims, but an abuser's threats or intimidation of this nature would not constitute a domestic violence "crime" because A.R.S. § 13-1202 only criminalizes threats to cause physical injury or serious property damage. However, this type of intimidation or mental abuse would meet the definition of "domestic violence" under the Michigan rule and would be admissible as relevant other act evidence.

The State Bar agrees that domestic violence cases present unique challenges to understand the dynamics of a relationship between the defendant and the victim but disagrees that the currently proposed language is sufficient to meet the challenge to admit relevant, other act evidence that would help jurors understand the evidence in a criminal domestic violence prosecution.

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CONCLUSION

The State Bar of Arizona respectfully requests that this Court reject the proposed amendment to Rule 404 of the Arizona Rules of Evidence.

RESPECTFULLY SUBMITTED this ____day of__________________, 2020.

____
Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this _____ day of ___________________, 2020.

by: _______________________________

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ARIZONA SUPREME COURT

In the Matter of: PETITION TO AMEND RULE 22.5, ARIZONA RULES OF CRIMINAL PROCEDURE	Supreme Court No. R-____________ **PETITION TO AMEND ARIZONA RULE OF CRIMINAL PROCEDURE, RULE 22.5, TO REGULATE POST-TRIAL JUROR CONTACT**

Pursuant to Rule 28, Rules of Supreme Court, the Maricopa County Attorney respectfully requests this Court adopt amendments to Rule 22.5 of the Arizona Rules of Criminal Procedure to regulate post-trial juror contact.

I. Introduction.

Various Arizona rules and statutes protect jurors' privacy during their service in a criminal trial. Prospective jurors are informed through court pamphlets and websites that their privacy will be protected. But there is no rule or statute protecting jurors' privacy once their civic duty ends. Thus, jurors are subject to unwarranted, and sometimes invasive, contact by the parties years and decades after their service.

The proposed amendment to Rule 22.5, which governs the discharge of jurors, is not intended to preclude juror contact, but to simply regulate post-trial juror contact and require court oversight to prevent unwarranted and unwanted post-trial contact.[1] Because the Rules of Criminal Procedure limit the admissibility of information obtained from jurors and the time-period in which the information may be admitted, discharged or excused jurors should be protected from unwarranted post-trial contact after the 10-day jurisdictional time-period under Rule 24.1 expires.

II. Background

Although the current Rules provide some privacy protections to persons summoned for jury service, Arizona jurors receive no statutory protection after discharge. Jury service is not optional. It is a required civic duty of all qualified summoned jurors. *See State v. Bojorquez*, 111 Ariz. 549 (1975) ("Jury service is not a matter of choice or right, but is a duty imposed by the state on such terms as the state may set."). Absent postponement or excuse, a juror may be fined for failing to appear on the date scheduled. A.R.S. § 21–223. Jury service, however, is not *perpetual*. A juror's term of service is fulfilled upon excuse or discharge. A.R.S. § 21–332(A)(1).

Several Arizona rules and statutory provisions protect jurors' personal

[1] Rule changes were proposed in 2019 by the Maricopa County Attorney's Office to accomplish a similar goal. Those proposed changes were not adopted, but the current petition is a new means to achieve the same ends.

information, demonstrating an intent to protect jurors from unsolicited contact and harassment. Rule 18.3(b) of the Arizona Rules of Criminal Procedure provides that juror information "may be used only for the purpose of jury selection" and requires the court to "keep all jurors' home and business numbers and addresses confidential, and may not disclose them unless good cause is shown." Other rules also reflect an intent to protect juror privacy, including Rule 18.5(e), which limits the scope of examination of jurors to "ensure the reasonable protection of the prospective jurors' privacy," and Rule 23.3(b), which prohibits the court from identifying the jury by name when polling the jury to ensure juror confidentiality and privacy.

The Legislature also acted to keep jurors' personal information private, prohibiting the release of juror names and information "unless specifically required by law or ordered by the court." A.R.S. § 21–312.

This Court acknowledges these protections on its website:

> **Privacy/Confidentiality of Jurors**: Both prospective and impaneled jurors have the right to privacy and confidentiality. . . .
>
> 2. Your home or mailing address is known only to the court. Only the judge can order the release of jurors' addresses, usually to the lawyers in the case, and only for a good, legal reason. This very rarely happens. At the conclusion of the trial, should you be contacted by the lawyers in a case in which you sat as a juror, remember that you are not obligated to divulge any information concerning the deliberations, the verdict, or your opinions about anything concerning the case unless ordered to do so by the court.
> 3. Occasionally television reporters will ask the judge for permission to film courtroom activities. If the judge approves, the reporters are instructed to be unobtrusive and to not film jurors. You will not

appear on television.

4. Reporters may interview the lawyers or parties in a case, and once the trial is over may request to interview the jurors. It is your decision whether or not to consent to an interview. You are not obligated to divulge any information concerning the deliberations, the verdict, or your opinions about anything concerning the case.[2]

Notably, jurors are assured that their address will be released *only* for "a good, legal reason," and this occurs "very rarely." Additionally, Arizona Supreme Court Rule 123(e)(10) protects jurors' personal information, requiring a court order to release jurors' addresses and phone numbers.

Recognizing these protections of confidentiality guaranteed to jurors, the Maricopa County Superior Court Criminal Presiding Judge recently precluded juror contact in post-conviction proceedings absent a showing of good cause, citing the rules and provisions protecting juror's contact information and questioning how defense counsel would "locate jurors without violating that confidentiality." (*See State v. Acuna-Valenzuela*, CR 2011-140108, ME 8/7/19; *State v. Sanders*, CR 2009-157459, ME 8/7/19, 11/12/19.)

The Maricopa County Superior Court's website and a juror handbook/pamphlet for the Superior Court of Arizona in Maricopa County entitled "A Guide To Jury Service," available to jurors pursuant to Arizona Rule of Criminal

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[2] "Jury Service – What to Expect" viewed at https://www.azcourts.gov/juryduty/Jury-Service-What-to-Expect, on January 3, 2020.

Procedure 18.6(a), includes a "**Confidentiality**" section informing jurors:

> Prospective and empaneled jurors have the right to privacy and confidentiality. At the conclusion of trial, jurors are not obligated to divulge any information about the deliberations, the verdict or opinions about anything concerning the case unless ordered to do so by the court.
>
> . . .
>
> Once the trial ends, news reporters may ask to interview jurors. It is a juror's decision whether or not to consent to an interview.[3]

These rules, statutes, and advisements are aimed at protecting jurors' privacy, and assuring jurors that they do not forfeit their right to privacy and confidentiality by performing their civic duty. It therefore follows that a rule should regulate post-trial juror contact to ensure those assurances of privacy and confidentiality are enforced. The proposed amendment to Rule 22.5 would do just that. Indeed, the Arizona Court of Appeals already approved the practice that Petitioners are proposing. *See State v. Paxton*, 145 Ariz. 396, 397 (App. 1985), (affirming the trial court's order "that there be no contact or communication with the jurors unless a motion with accompanying affidavit establishing good cause was granted." (aff'd in *State v. Olague*, 240 Ariz. 475, 481 (App. 2016)).

III. Reasons for the proposed amendment to Rule 22.5

In addition to supporting the assurances of privacy and confidentiality courts

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[3] "A Guide to Jury Service" viewed at http://www.superiorcourt.maricopa.gov/JuryServices/docs/JuryDutyGuide2.pdf, on January 3, 2020.

make to jurors, other compelling reasons also support adoption of this amendment regulating post-trial contact with jurors, including: (1) a juror's right to privacy; (2) protection of the integrity and finality of the jury verdict; (3) the limited grounds and time in which a motion for new trial may be filed; (4) prevention of potential juror harassment, fear, and anxiety; and (5) regulating against fishing expeditions.

A. *A juror's right to privacy.*

Jurors who have performed their civic duty should not have to worry about their privacy after their discharge from service. Furthermore, the civic duty to serve on a jury and a defendant's right to due process do not negate a juror's right to privacy. The Court of Appeals recognized this principle rejecting a defendant's constitutional challenge to a statute allowing certain prospective jurors to opt out of jury service and prohibiting public disclosure of statements submitted by jurors asking to be excused for "mental or physical" reasons:

> Individuals who are called for jury duty *do not forfeit their privacy rights when they are called for jury duty.* As a matter of policy, *we wish to encourage jury service.* Requiring prospective jurors to run the risk of having their private mental or physical conditions made public hardly encourages jury service. Further, as our supreme court has recognized, the open-courts requirement "does not guarantee a defendant access to information that he or she desires. Any constitutional right to this information must be found elsewhere."

Stewart v. Carroll, 214 Ariz. 480, ¶ 20 (App. 2007) (emphasis added) (quoting *State v. Ramirez*, 178 Ariz. 116, 127 (1994)).

California courts likewise recognize the importance of protecting the privacy

of discharged jurors. "Absent a showing of good cause for the release of the [juror contact] information, the public interest in the integrity of the jury system and the jurors' right to privacy outweighs the defendant's interest in disclosure." *People v. McNally*, 236 Cal. App. 4th 1419, 1430 (App. 2015). "[S]trong public policies protect discharged jurors from improperly intrusive conduct in all cases," and that "the uncontrolled invasion of juror privacy following completion of service on a jury is, moreover, a substantial threat to the administration of justice." *Townsel v. Superior Court*, 20 Cal. 4th 1084, 1092 (1999) (citations omitted). In construing a rule governing post-trial juror contact a court "must consider the declared statutory purpose of protecting the lives and safety of jurors who serve in criminal cases. . . The disclosure of jurors' addresses and telephone numbers involves a sensitive issue. Most jurors are greatly concerned about their privacy, and rightly so." *People v. Winston*, 43 Cal. App. 4th 839, 852 (App. 1996).

This Court should continue protecting these privacy rights post-trial by amending the rules to regulate juror contact by parties after discharge from service.

B. *Protecting the integrity and finality of jury verdicts.*

Public policy also supports court oversight of juror contact to prevent improper inquiries into the jury's deliberative process. *See Hyde v. United States*, 225 U.S. 347, 383–84 (1912); *State v. Landrum*, 25 Ariz. App. 446, 448 (1975). Guidelines and limitations governing post-trial juror contact protect the integrity and

finality of the jury's verdict—something which the State, this Court, the community, and crime victims have an interest. *See State v. Callahan*, 119 Ariz. 217, 219 (App. 1978); *see also* Ariz. Const. Art. 2.1(A)(10) (victims have a right to final conclusion of the case after conviction and sentence).

"[L]ong-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry." *Tanner v. United States*, 483 U.S. 107, 127 (1987). The Supreme Court explained these concerns:

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct.

Id. at 120–21 (internal citations omitted). Similarly, the Fifth Circuit Court of Appeals observed that, "[h]istorically, interrogations of jurors have not been favored by federal courts except where there is some showing of illegal or prejudicial intrusion into the jury process. . . . Courts simply will not denigrate jury trials by afterwards ransacking the jurors in search of some ground, not previously supported by evidence, for a new trial." *United States v. Riley*, 544 F. 2d 237, 242 (5th Cir. 1976). The California Supreme Court also stated that "policy-based" reasons for

preventing disclosure of juror information include "reducing incentives for jury tampering; promoting free and open discussion among jurors in deliberations; and protecting the finality of verdicts." *Townsel*, 20 Cal. 4th at 1093.

The Supreme Court further explained that "[b]y the beginning of [the twentieth] century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict." *Tanner*, 483 U.S. at 117. This is supported by "substantial policy considerations" that necessitate "shielding jury deliberations from public scrutiny," including contact from the defeated party who may attempt to secure evidence from the jurors to establish misconduct sufficient to set aside a verdict. *Id.* at 119-20 (quoting *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915)).

Finally, the Constitution does not require courts to permit post-verdict interviews of jurors. *See Tanner*, 483 U.S. at 113–128; *see also United States v. Griek*, 920 F. 2d 840, 843–44 (11th Cir. 1991) (restrictions on juror interviews do not violate Sixth or First Amendment); *Smith v. Cupp*, 457 F. 2d 1098, 1100 (9th Cir. 1972) ("[T]here is no federal constitutional problem involved in the denial of a motion to interrogate jurors where, as here, there has been no specific claim of jury misconduct."). Even in the recent case of *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017), the Supreme Court recognized that the narrow racial animus exception to the no-impeachment rule does not give the parties carte blanche access

to jurors. *Id.* at 869 (noting that both state rules of professional ethics and local court rules "often limit counsel's post-trial contact with jurors.").

C. *Limitations on raising juror misconduct claims.*

A motion for new trial filed within 10 days after the verdict is the proper vehicle for raising a juror misconduct claim. Ariz. R. Crim. P. Rule 24.1(b) and (c). The necessity for this limited time-period is illustrated by this Court's analysis addressing whether an evidentiary hearing regarding a claim of juror misconduct was required four years after the verdict:

> The arguments against ordering a hearing at this late date are understandable. Memories fade with time. Assuming the jurors can be reassembled, testimony obtained now might be suspect, and its reliability subject to challenge. Moreover, the judge who saw the witnesses and heard the case on its merits has long since retired. Ordering a hearing now will leave another judge who had no involvement in the trial with the difficult task of determining whether the communication prejudiced the verdict.

State v. Miller, 178 Ariz. 555, 557 (1994). The ideal time for interviewing jurors, likewise, comes immediately after trial, when events are fresh in the jurors' minds.[4]

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[4] *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 861 (2017) (two jurors spoke with defense counsel immediately following discharge of the jury); *United States v. Villar*, 586 F. 3d 76, 78–88 (1st Cir. 2009) (juror emailed defense counsel within hours of verdict to report racial bias); *Williams v. Price*, 343 F. 3d 223, 226–39 (3d Cir. 2003) (juror misconduct claim raised in motion for new trial shortly after verdict); *Doan v. Brigano*, 237 F. 3d 722, 726–27 (6th Cir. 2001) (juror misconduct raised during juror interviews occurring after conviction but before sentencing); *United States v. Swinton*, 75 F. 3d 374, 380–82 (8th Cir. 1996) (juror contacted defendant after trial to report consideration of extrinsic evidence); *Keller v. Petsock*, 853 F. 2d 1122, 1124–30 (3rd Cir. 1988) (jurors visited attorney within 10 days of verdict to report

Furthermore, juror testimony or affidavits may not be used in Arizona courts to impeach the verdict except in strictly limited cases of juror misconduct. Arizona Rule of Criminal Procedure 24.1(d) prohibits courts from even *receiving* testimony or affidavits "which inquire[] into the subjective motives or mental processes which led to a juror assent or dissent from the verdict." This Court declined defendant's "invitation to abandon this rule" in *State v. Nelson*, 229 Ariz. 180, 190–91, ¶¶ 47-49 (2012) (citing Lord Mansfield's rule and *State v. Poland*, 132 Ariz. 269, 282 (1982)), finding that the rule serves "to protect the process of frank and conscientious jury deliberations and the finality of jury verdicts."

The Ninth Circuit Court of Appeals also concluded that because "neither a trial court nor an appellate court has the authority to inquire into the jury's decisional processes, even when information pertaining to the deliberations is volunteered by one of the jurors . . . in a federal case, [] it is improper and unethical for lawyers to interview jurors to discover what was the course of deliberation of a trial jury." *Smith*, 457 F. 2d at 1100 (citations omitted).

The proposed amendment to Rule 22.5 would not preclude post-trial juror

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juror misconduct); *United States v. Perkins*, 748 F. 2d 1519, 1529–34 (11th Cir. 1984) (jurors contacted appellant, his counsel, and the court immediately after the verdict to report jury misconduct); *Bulger v. McClay*, 575 F. 2d 407, 408–09 (2d Cir. 1978) (defense counsel questioned jurors as they left the courtroom and discovered basis for jury-misconduct claim); *United States v. Kum Seng Seo*, 300 F. 2d 623, 623–26 (3d Cir. 1962) (juror contacted defense attorney to report jurors' consideration of newspaper article).

contact past the 10-day time-period under Rule 24.1, but simply regulate any contact by requiring good cause and notice to the juror. These regulations certainly do not impede or encumber a defendant's post-trial investigation because they simply regulate, not preclude, post-trial juror contact.

D. *Prevention of potential juror harassment.*

Prevention of juror harassment is yet another legitimate and compelling reason to regulate post-trial juror contact. *McDonald*, 238 U.S. at 267–68. *See also United States v. Gutman*, 725 F. 2d 417, 422 (7th Cir. 1984) (the practice of obtaining affidavits from jurors is "inherently intimidating"); *United States v. Moten*, 582 F. 2d 654, 665 (2d Cir. 1978) ("in order to insure that jurors are protected from harassment, a district judge has the power, and sometimes the duty, to order that post-trial investigation of jurors shall be under his supervision"); *People v. Cox*, 53 Cal. 3d 618, 700 (1991) ("after being apprised of juror anxiety resulting from contacts by defense investigators," trial court acted within its authority directing "that all further communication would be through the court clerk unless jurors were already agreeable").

The possibility of being subjected to post-trial contact years after the verdict creates a "possible deterrence of prospective jurors from fulfilling their obligation to serve." *Townsel*, 20 Cal. 4th at 1093. Jurors might reasonably experience fear and anxiety when contacted by the representative of a convicted person they found

guilty. *See e.g., Gutman*, 725 F. 2d at 422 (practice of obtaining juror affidavits is "inherently intimidating" and must not be encouraged). Further, if obtaining post-trial juror affidavits "ever becomes widespread [it] will make it even more difficult than it already is to get competent people to serve on juries." *Id.*

Moreover, a party's agent at a juror's doorstep years after trial is different than speaking with jurors in the courtroom immediately after trial:

> We do not encourage or suggest approval of post-verdict contact with jurors, seeking information with which to impeach the verdict, where such contacts are initiated without any cause to believe that improprieties occurred. . . . To some jurors, a post-verdict contact by a convicted murderer's agent may be an event of particular stress and fear. Such contacts may or may not invite accurate responses that recount events as they occurred. Instead, because of the difficult position in which a juror is placed, such contact may invite statements which the contacted juror may think necessary to satisfy the agent.

State v. Chesnel, 734 A. 2d 1131, 1139-40 (Me. 1999).

E. *Regulating against fishing expeditions.*

Because jurors are not percipient or otherwise permissible "witnesses," to the trial itself a party who pursues juror interviews without good cause, after the 10-day time-period under Rule 24.1, necessarily engages in a "fishing expedition." "Arizona has long been committed to a broad interpretation of its discovery rules, but mere 'fishing expeditions' are not countenanced." *State v. Kevil*, 111 Ariz. 240, 242 (1974); *Corbin v. Superior Court (Maricopa)*, 103 Ariz. 465, 469 (1968); *State v. Fields*, 196 Ariz. 580, 583, ¶ 9 (App. 1999). Federal courts agree that post-trial

jury hearings should not be held simply for a convicted defendant to conduct a "fishing expedition." *United States v. Moten*, 582 F. 2d 654, 667 (2d Cir. 1978).

This Court and the Arizona Court of Appeals have upheld trial court rulings denying requests to interview jurors where the requests were speculative and did not warrant further investigation. For example, after the trial in *State v. West*, 176 Ariz. 432 (1993), the defendant requested contact information for the grand jury, "contending he was entitled to this information to investigate and see whether any juror was guilty of misconduct." *Id.* at 446–47. The trial court denied this request. *Id.* On appeal, the defendant claimed that "because this is a capital case, it justifies 'the exercise of judicial authority to order more liberal discovery than usual.'" *Id.* This Court disagreed, citing to *State ex rel. Hastings v. Sult*, 162 Ariz. 112 (1989).

In *Sult*, defense counsel requested permission to question the grand jury following the defendant's indictment. 162 Ariz. at 112. This Court reversed the trial court's grant of the request, finding it improper because defense counsel's request was "unaccompanied by any showing or hint of bias or prejudice on the part of the grand jurors"; thus the request was "no less than a 'fishing expedition' designed to establish the basis for a motion to challenge the indictment." *Id.* at 113–14.

Finally, in *State v. Paxton*, 145 Ariz. 396 (App. 1985), the trial court denied the defendant's post-trial request to interview the jurors based on assertions that two of them were visibly upset and one was crying after the verdict. *Id.* at 397. The

Arizona Court of Appeals affirmed the denial because the affidavit supporting the motion was "speculative at best and does not provide sufficient grounds to warrant further investigation." *Id.* *West*, *Paxton*, and *Sult*, therefore illustrate Arizona's strong policy against fishing expeditions, especially in the context of protecting jurors and their role in the judicial system.

Other jurisdictions have likewise prohibited fishing expeditions in the context of post-trial juror contact. In *Orbe v. True*, a federal district court found that glares from the defendant's family members did not constitute "impermissible extrajudicial contact" and "to the extent that Orbe intends to inquire about other instances in which the jurors may have been exposed to extraneous influences, his request to depose the trial jurors is merely an impermissible fishing expedition to attempt to find other instances of wrongdoing." 201 F. Supp. 2d 671, 682 (E.D. Va. 2002). In *People v. Williams*, 807 N.E. 2d 448, 455 (Ill. 2004), after defense counsel "admitted that the identities of the jurors were being sought so that they could be asked what they read, whom they talked to, and what they observed during the trial that might have influenced their deliberations," the court found the defendant's "effort to discover the identity of the jurors was precisely the type of "fishing expedition" that our rule [] was designed to avoid." *Id.*

This case law aligns with the intention of the rule amendments—to *regulate* post-trial juror contact. Notwithstanding that these courts imposed a good cause

requirement on juror contact on a case-by-case basis, this Court should adopt the proposed rule amendments to provide uniform and consistent regulation of post-trial juror contact. Based on the limited admissibility of information obtained from jurors, post-trial juror contact without a showing of good cause is unwarranted.

F. *Guidance from other jurisdictions.*

1. Other states. Recognizing the need to balance juror protection with a defendant's rights, many states require a showing of good cause before post-trial juror contact may occur and thereafter regulate the contact.[5] The Idaho Supreme Court explained that the purpose of the good cause requirement is to protect jurors "from unwanted contact and potential harassment" while also acknowledging a

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[5] *See, e.g., People v. Wilson*, 43 Cal. App. 4th 839, 852 (App. 1996) (speculation on how the jurors might have arrived at their verdict was insufficient to establish good cause for disclosure of juror contact information); *People v. Barton*, 37 Cal. App. 4th 709, 716 (App. 1995); (a defendant has no right to personal juror information and a trial court may deny such request "[a]bsent a sufficient showing of good cause"); *Hall v. State*, 253 P.3d 716, 722 (Idaho 2010) (trial court "did not err in using its inherent authority to enter an order prohibiting post-verdict juror contacts absent a showing of good cause to believe that juror misconduct occurred"); *Gatewood v. Sampson*, 812 So.2d 212, 217 (Miss. 2002) (to warrant an investigation into an allegation of juror misconduct, "[a]t the very minimum, it must be shown that there is sufficient evidence to conclude that good cause exists to believe that there was in fact an improper outside influence or extraneous prejudicial information"); *Cyr v. State*, 308 S.W.3d 19, 30 (Tex. App. 4 Dist. 2009) (good cause to disclose juror contact information is "more than a mere possibility that jury misconduct might have occurred; it must have a firm foundation"); *State v. Beskurt*, 293 P.3d 1159, 1162 (Wash. 2013) (juror information is private and a showing of good cause must be made to access the information."); *State v. Blazina*, 301 P.3d 492, 493–94 (Wash. 2013) (trial court cannot consider facts inherent in verdict when evaluating good cause requirement).

defendant's fair trial right by not "unduly restrict[ing] the discovery of evidence suggesting juror misconduct." *Hall*, 253 P.3d at 724-25. Consequently, after a finding of good cause, the party seeking post-verdict contact is required to send a letter advising the juror that they "have complete discretion to decline any contacts, or to terminate any agreed-upon contact once initiated." *Id.* at 722. The *Hall* court also found that the trial courts have inherent authority to review the letters and edit them as necessary. *Id.* Indeed, numerous states have codified guidelines in court rules and statutes designed to protect jurors' personal information and prohibit post-trial contact absent a showing of good cause.[6]

2. **Federal jurisdictions.** Recognizing the importance of a formal process

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[6] Cal. Code Civ. P. § 206 (criminal actions) (court to inform jurors upon discharge right not to discuss deliberations or verdict; parties contacting jurors more than 24 hours after the verdict must inform the jurors of their right not to participate and to review any declaration filed with court; requiring petition to court to obtain juror information); *Id.* § 237 (sealing juror identifying information); Fla. R. Civ. P. 1.431 (party seeking juror interviews must file motion within 15 days after verdict; court may prescribe place, manner, conditions, and scope of interviews); Haw. R. Prof. Conduct 3.5 (lawyers must obtain leave of court to interview jurors after dismissal and must do so in manner not calculated to harass or embarrass or influence juror's actions in future jury service; within 10 days of verdict lawyer make request in-court questioning of jurors for good cause shown)[6]; Ill. 12th Jud. Cir. Local R. 3.03 (jurors' addresses and telephone numbers released to parties only upon good cause shown and finding that failure to do so would cause material prejudice); Ky. Fayette Cir. Ct. Local R. 32 & Knox and Laurel Cir. Ct. R. 26 (no communication with jurors absent leave of court on good cause shown; court may prescribe conditions for contact); N.J. R. Ct. 1:16–1 (no juror contact except by leave of court on good cause shown); Ohio Cuyahoga County Ct. Common Pleas Local R. 22(e) (same); Tex. Code Crim. P. art. 35.29 (same); Wash. Gen. R. 31(j) (same).

for obtaining information from jurors, and generally disfavoring post-verdict juror interviews, federal courts also regulate post-trial juror contact, requiring a showing of good cause. The First Circuit "prohibits the post-verdict interview of jurors by counsel, litigants or their agents except under the supervision of the district court, and then only in such extraordinary situations as are deemed appropriate." *United States v. Kepreos*, 759 F. 2d 961, 967 (1st Cir. 1985). The Fifth Circuit uniformly refuses requests to contact jurors post-trial "unless specific evidence of misconduct was shown by testimony or affidavit," because "[p]rohibiting post-verdict interviews protects the jury from an effort to find grounds for post-verdict charges of misconduct, reduces the 'chances and temptations' for tampering with the jury, increases the certainty of civil trials, and spares the district courts time-consuming and futile proceedings." *Haeberle v. Texas Intern. Airlines*, 739 F. 2d 1019, 1020 (5th Cir. 1984) (citation omitted). *See also Gutman*, 725 F. 2d at 422 (request to contact the jurors requires a "showing of adequate need."); *Griek*, 920 F. 2d at 842 (post-trial juror contact requires showing of good cause). And the Ninth Circuit found that the "better practice" is to "seek leave of the court to approach the jury." *Hard v. Burlington Northern R.R.*, 812 F. 2d 482, 485 n.3 (9th Cir. 1987).

Additionally, many federal district courts have enacted rules intended to protect the privacy and security of jurors, and/or prohibit post-trial juror contact absent a showing of good cause. For example, the District of Arizona's Local Rule

of Civil Procedure 39.2, governing communications with trial jurors, provides:

> **(b) After Trial.** Interviews with jurors after trial by or on behalf of parties involved in the trial are prohibited except on condition that the attorney or party involved desiring such an interview file with the Court written interrogatories proposed to be submitted to the juror(s), together with an affidavit setting forth the reasons for such proposed interrogatories, within the time granted for a motion for a new trial. Approval for the interview of jurors in accordance with the interrogatories and affidavit so filed will be granted only upon the showing of good cause. See Federal Rules of Evidence, Rule 606(b). Following the interview, a second affidavit must be filed indicating the scope and results of the interviews with jurors and setting out the answers given to the interrogatories.
>
> **(c) Juror's Rights.** Except in response to a Court order, no juror is compelled to communicate with anyone concerning any trial in which the juror has been a participant.

Other federal district courts have enacted similar rules requiring a showing of good cause or prior approval from the court for juror contact/interviews.[7]

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[7] Alabama, LR ("Local Rule") 47.1, 47.2; Alaska, LR 83.1(g); Arkansas. LR 47.1; Colorado, LR 47.2; Connecticut, Rule 12(e); Florida, Middle Dist. LR 5.01(d), Southern Dist. LR 11.1 E; Illinois, Northern Dist. Crim LR 31.1, Central Dist. LR 47.2; Indiana, LR 47.2; Iowa, Northern and Southern Dists. LR 47.1; Northern Dist. Crim LR 24.2; Kansas, LR 47.1, Kentucky, LR 47.1; Louisiana, Eastern Dist. LR 47.5E(c), Middle and Western Dists. LR 47.5M & W (d); Maryland, LR 107.16, Minnesota, LR 47.2, Mississippi, LR 83.1(B)(4); Missouri, Eastern Dist. LR 47-7.01(B)(1); Nevada, LR 48.1; New Hampshire, LR 47.3, New Jersey, LR 47.1(e), Crim. R. 24.1(g); North Carolina, Middle Dist. LR 47.1(4), Western Dist. LR 47.2; Ohio, LR 47.1; Oklahoma, Northern Dist. LR 47.2, Western Dist. LR Civ. LR 47.1; Oregon, LR 48.4; Pennsylvania, Eastern Dist. Crim. LR 24.1(c); South Carolina, LR 47.05; South Dakota. LR 47.2; Tennessee, Eastern Dist. LR 48.1, Middle Dist. LR 12(h); Western Dist. LR 47.1; Texas, Eastern Dist. LR CV 47, Northern Dist. Civil LR 47.1, Crim. LR 24.1, Southern Dist. Civil LR 47, Crim. LR 24.1; Utah, LR 47-2(b); Washington, Eastern Dist. LR 47.1(d), Western Dist. LR CR 047(b); Washington, DC, LR 47.2(b); West Virginia, LR 3.04; Wisconsin, Eastern Dist. LR 47.3, Western Dist. LR, Rule 4 (LR 47.2); and Wyoming, LR 47.2(b).

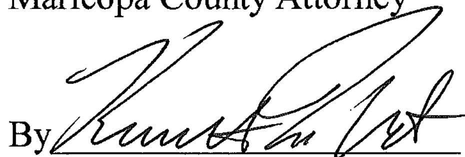
The rules and procedures promulgated by state and federal jurisdictions provide a model for the protections that should be provided to Arizona's jurors.

IV. Proposed Amendment

The Proposed Amendment to Rule 22.5 would allow courts to regulate juror contact after the 10-day jurisdictional time-period of Rule 24.1. The amendment would require counsel to show good cause to speak with a juror after that 10-day period. If the court finds good cause and permits juror contact, the amendment also requires the party to inform the juror in writing, at least 48 hours prior to the contact, of specific details about the nature of the contact and the juror's rights to refuse or terminate any contact and to set reasonable conditions on the contact. The proposed amendment does not prohibit all post-trial juror contact; it simply imposes reasonable, court-controlled limits on how our jurors are treated after their jury service.

Respectfully submitted this 10th day of January 2020.

ALLISTER ADEL
Maricopa County Attorney



By ____________________
KENNETH N. VICK
Chief Deputy

APPENDIX

Contents of the Proposed amendment to Ariz. R. Crim. P. 22.5

(a) – (b) *No Change*

(c) After the 10-day time period in Rule 24.1, contact with jurors about the case by a party or a party's representative or agent is prohibited unless specifically authorized by the court upon motion of a party and finding of good cause. If contact is authorized, the juror(s) must be informed in writing at least 48 hours before any contact of the following:

(1) the case name and number,

(2) the party seeking the contact,

(3) the subject matter of the interview, and

(4) the absolute right of the juror to:

(A) discuss or not discuss the case,

(B) terminate the contact at any time,

(C) request the presence of a representative from all parties, and

(D) review and have a copy of any subsequent declaration about the contact that is filed with the court.

(d) Except in response to a court order, no juror is required to communicate with anyone at any time concerning any trial in which they have been a juror.

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND RULE 22.5, ARIZONA RULES OF CRIMINAL PROCEDURE

Supreme Court No. R-20-0015

PROPOSED COMMENT

Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar of Arizona (the "State Bar") hereby submits the following as its comment to the above-captioned Petition.

Discussion:

Petitioner seeks to amend Rule 22.5 of the Arizona Rules of Criminal Procedure to regulate post-trial juror contact. A substantially similar petition was filed by the same Petitioner, opposed by the State Bar of Arizona, and rejected by the Arizona Supreme Court in 2019. (*See,* R-19-0008).

The stated aim of the current Petition is to protect jurors from unwarranted post-trial contact after the 10-day jurisdictional time period within which a defendant must

file a Motion for New Trial pursuant to Rule 24.1, Ariz. R. Crim. Pro. The proposed amendment would not preclude post-trial juror contact after the 10-day period but would regulate any juror contact by requiring a lawyer to first establish "good cause" before a judge prior to any contact occurring.

Couching the aim of the Petition in terms of juror privacy is unavailing since privacy rights of citizens remain the same whether a person is a juror or not: One's mere "contact" with a citizen simply doesn't constitute a violation of the latter's right to privacy. The privacy right guaranteed by the state and federal constitutions protects citizens from *governmental* intrusions—not intrusions by other citizens, including lawyers. "However broad the federal constitutional right to privacy may be, it applies only to intrusions by the *government* or where there is 'state action'." *Hart v. Seven Resorts, Inc.,* 190 Ariz. 272, 276-77 (App.1997)(*emphasis* in original). "An individual successfully can assert his or her constitutional right to privacy only against governmental acts and not against acts of a private defendant unless 'state action' exists. * * * [N]othing [in Arizona law] suggests the Arizona right applies against private individuals." *Id.*

At the end of each criminal trial, jurors are told by trial judges that they may communicate with the trial attorneys about the case, or may decline to do so, and attorneys are bound to respect those wishes. This procedure ensures another constitutionally guaranteed right: The freedom of association.

The proposed rule change is legally unsound and practically unworkable. It's legally unsound because Petitioner repeatedly relies on federal authorities prohibiting post-trial juror contact. The federal rule, however, is different from Arizona's rule. Federal Rule of Evidence 606(b) adopted the Senate's version broadly prohibiting inquiry into what transpired during juror deliberations. *Tanner v. United States,* 483 U.S. 107, 121 (1987). The House version of the rule, ultimately adopted by Arizona, permits "the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of conduct in the jury room." *Id.,* at 123-124; *see also, A.R.E. 606(b); Rule 24.1(d), Ariz.R.Crim.Pro*.

The petition ignores this important distinction, and thus ignores the fact that juror testimony involving internal misconduct may be received by a trial court when necessary to ensure fundamental fairness. In this vein, it fails to recognize that claims of juror misconduct don't involve the deliberative process—a process protected from inquiry or intrusion. Rather, such claims involve *conduct* occurring during deliberations, such as: premature deliberations occurring before the close of the case; intoxicated or sleeping jurors; non-participating jurors; juror refusal to follow instructions; receipt of information from external sources; juror threats or intimidation of other jurors; coerced verdicts; or statements indicative of reliance on racial or other stereotypes or animus to convict a defendant – to name but a few. *See, e.g., Rule 24.1(c)(3)*, *Ariz. R. Crim Pro.* All of these implicate a criminal defendant's Sixth

Amendment right to a fair trial.

The proposed rule change is unworkable in practice for at least two reasons. First, in capital trials, after the guilt-phase verdict(s) are rendered, the case proceeds to the aggravation phase followed by the penalty phase. These latter two phases can encompass weeks or months. Thus, although a Motion for New Trial – which includes the ground of juror misconduct – must be filed within 10 days of the guilt-phase verdict(s), lawyers and jurors will still be participating in the remaining two phases of the capital trial. Lawyer/juror communication is impossible because it is prohibited during all phases of a capital trial.

Second, in Arizona, "juror misconduct warrants a new trial if the defense shows actual prejudice or if prejudice may fairly be presumed from the facts." *State v. Miller,* 178 Ariz. 555, 558 (1994)(emphasis removed). A showing of "good cause" to permit juror contact past the 10-day time frame within which a Motion for New Trial may be filed is an impossibility absent counsel's possession of *some facts* gleaned from one or more jurors in the first instance. Lawyer speculation will not suffice as "good cause."

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CONCLUSION

The State Bar of Arizona respectfully requests that this Court reject the rule modifications as proposed in the Petition.

RESPECTFULLY SUBMITTED this ____day of__________________, 2020.

____
Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this _____ day of ___________________, 2020.

by: _______________________________

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IN THE ARIZONA SUPREME COURT

IN THE MATTER OF: PETITION TO AMEND THE ARIZONA RULES OF CRIMINAL PROCEDURE	R- PETITION TO AMEND THE ARIZONA RULES OF CRIMINAL PROCEDURE

Pursuant to Rule 28(a) of the Arizona Rules of the Supreme Court, Arizona Voice for Crime Victims (AVCV) respectfully submits this petition to amend the Arizona Rules of Criminal Procedure by fully integrating the rights guaranteed to victims by our constitution, Ariz. Const. art. II, § 2.1, and its implementing legislation, Ariz. Const. art. II, §§ 2.1(D) and A.R.S. §§ 13-4401-43, throughout each applicable rule provision. AVCV's proposed amendments are attached to this petition.

Arizona Voice for Crime Victims (AVCV), founded in 1996, is a non-profit organization located in Phoenix, Arizona that provides pro bono legal representation and social services to victims of crime in state and federal criminal proceedings. AVCV seeks to foster a fair and compassionate justice system in which all crime victims are informed of their rights under the Arizona Victims' Bill of Rights (VBR), fully understand their rights, and have a meaningful way to participate and assert these constitutional guarantees throughout the criminal justice process. To achieve these goals, AVCV empowers victims of crime through legal advocacy and social services. Another key part of AVCV's mission is to provide information and policy insights in an effort to ensure victims' rights are upheld during the practical day-to-day application of victims' rights in Arizona's courtrooms. When criminal court judges and the attorneys involved in each criminal case fully understand when and how victims' rights apply in each situation, victims can truly have the meaningful participation that the VBR intended.

Currently, Rule 39 of the Arizona Rules of Criminal Procedure generally addresses victims' rights. After voters adopted the VBR in November 1990, Rule 39 had to be amended to conform to the mandates of the state constitution. Rule 39, as currently presented in the criminal rules, provides an overview of the rights of crime victims. However, the context in which victims' rights will apply is

lacking. Unlike the rights of the accused or the rights of the state, which are appropriately and carefully presented in the criminal rules, Rule 39 does not provide proper guidance to trial courts and attorneys on when victims' rights apply in relation to the remainder of the rules. A comprehensive approach to victims' rights will require full integration into the criminal rules so that trial courts and attorneys are properly instructed on what the VBR mandates in each situation.

AVCV has previously petitioned this Court to repeal Rule 39 after full integration of victims' rights into the rules. After considering stakeholder concerns over repealing Rule 39, this petition does not propose a repeal of Rule 39. However, AVCV proposes one amendment to Rule 39(a) in the event a future conflict arises between a rule and a provision of Rule 39. AVCV proposes adding subsection (3)(C) that states: "If any provision of Rule 39 conflicts with a rule provision where a victim's right is addressed, the individual rule provision where the victim's rights has been integrated shall prevail."

Proposition 104 aimed to change the criminal justice culture for victims in Arizona by providing constitutional rights that would take victims from the sidelines of the criminal justice system to becoming active participants. Steven J. Twist & Keelah E.G. Williams, *Twenty-Five Years of Victims' Rights in Arizona*, 47 Ariz. St. L.J. 421 (2015)· Notably, Proposition 104 received overwhelming support of Arizona's voters and the Arizona Victims' Bill of Rights (VBR) became

effective on November 27, 1990. Gessner H. Harrison, *The Good, the Bad, and the Ugly: Arizona's Courts and the Crime Victims' Bill of Rights*, 34 Ariz. St. L.J. 531, 532 (2002). The VBR preserved and protected specific rights to justice and due process, including rights:

> 1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.
>
> 2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
>
> 3. To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.
>
> 4. To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.
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> 5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.
>
> 6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.
>
> 7. To read pre-sentence reports relating to the crime against the victim when they are available to the defendant.
>
> 8. To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.
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> 9. To be heard at any proceeding when any post-conviction release from confinement is being considered.
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> 10. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.

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> 11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.
>
> 12. To be informed of victims' constitutional rights.

Ariz. Const. art. II, §§ 2.1(A)(1)-(12)

Integrating victims' rights into each applicable rule would be consistent with the right established in paragraph 11 of the VBR, namely that "*all rules* governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights." (emphasis added.) Ariz. Const. art. II., § 2.1(A)(11). Full integration is further justified by the constitutional right to be treated with fairness, respect, and dignity and to be free from intimidation, harassment, or abuse throughout the criminal justice process. Ariz. Const. art. II, § 2.1(A)(1). This Court has acknowledged that the VBR broadly recognizes these rights to fairness, respect, and dignity. *J.D.;M.M. v. Hegyi*, 236 Ariz. 39, 42 (Ariz. 2014). The purpose of the VBR and its implementing legislation is to provide crime victims with the "basic rights of respect, protection, participation and healing of their ordeals." *Champlain v. Sargeant*, 192 Ariz. 371, 375 (Ariz. 1998) (citing 1991 Ariz. Sess. Laws ch. 229, § 2). The constitutional mandate requiring that victims be treated with "fairness" throughout the criminal justice process can be best achieved by fully integrating victims' rights into the Arizona Rules of Criminal Procedure, which, in turn, will "integrate victims into the day to day workings of

the process." Paul Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 Utah L. Rev. 861, 863 (2007).

It is important to point out that in seeking integration, AVCV is not asserting that victims are parties to a criminal case nor is AVCV seeking to elevate victims to party status. Arizona case authority is clear that victims of crime are not parties to a criminal prosecution. *State v. Lamberton*, 183 Ariz. 47 (1995) (victim is not an aggrieved party with standing to file her own petition for review in a Rule 32 proceeding); *Lindsay R. v. Cohen*, 236 Ariz. 565 (App. 2015) (noting VBR did not make victims parties). AVCV proposes an amendment to Rule 1.2(a) to clarify that fully integrating victims' rights throughout the rules of procedure will not make victims parties to a criminal case. AVCV proposes adding subsection (3) to read: "*Victims Are Not Parties*. These rules are not to be construed to make victims parties to a criminal case." Although victims are not parties, they are important participants with enforceable rights throughout the entirety of Arizona's criminal justice process. AVCV merely seeks to ensure that trial courts and attorneys are aware of each applicable situation where a victim may assert a right guaranteed under the VBR or the VRIA.

Our legislature recognizes that victims have a right to meaningful participation during a criminal prosecution. This right has been upheld by our Court of Appeals. A "victim has standing to seek an order, to bring a special

action or to file a notice of appearance in an appellate proceeding, seeking to enforce any right to challenge an order denying any right…" A.R.S. § 13-4437(A); *State ex rel. Montgomery v. Padilla*, 238 Ariz. 560, 566 (App. 2015) (A request for an order in a criminal case must be timely, in writing, served and filed with the court. For victims, the subject matter of such a request is limited and must be directed to enforcing any right or to challenging an order denying any right guaranteed to victims). Additionally, "[o]n the filing of a notice of appearance, counsel for the victim shall be endorsed on all pleadings and, if present, be included in all bench conferences and in chambers meetings and sessions with the trial court that directly involve a victim's right…" A.R.S. § 13-4437(D). Because victims have participatory rights, it is essential that Arizona's trial courts and attorneys are provided proper guidance through this Court's rule-making authority regarding when victims' rights apply in relation to the remainder of the criminal rules. Because this guidance is lacking in Rule 39, which states what rights victims have but fails to provide the context in which they apply, some trial courts have overlooked victims' rights.

The following cases are not an exhaustive list[1] of instances where trial courts have violated victims' rights, but are presented for this Court's consideration.

[1] AVCV has additional case examples available upon request of this Court..

State v. Simcox, CR 2013-428563-001. In *State v. Simcox*, the trial court[2] failed to recognize Rule 39(b)(1) (the right to be treated with fairness, respect and dignity, and to be free from intimidation, harassment, or abuse throughout the criminal justice process) and Rule 39(d)(4) (In asserting any of the rights enumerated in this rule or provided by any other provision of law, a victim has a right to be represented by personal counsel of the victim's choice). When victim's counsel attempted to object to a pro per defendant directly questioning the victim representative at a pretrial evidentiary hearing, the trial court advised that the victim's counsel did not have standing to make argument to the trial court. Instead, he advised, that the victim's counsel would have to make argument to the assigned deputy county attorney (DCA) and that the DCA could decide whether the victim's arguments were worthy of the court's consideration. Having each of these rules integrated as indicated below would have assisted the trial court in understanding victims' rights during the proceedings and the role of the victim's counsel in asserting victims' rights.

AVCV proposes placing Rule 39(b)(1) in a prominent place, the very first rule– Rule 1.2 because Rule 1.2 addresses the purpose and construction of the rules. It is crucial that trial courts know that victims' rights are applicable

[2] This victims' rights violation occurred at a July 23, 2015 hearing. AVCV has a copy of the transcript on file. Ariz. R. Sup. Ct. (a)(4)(B) sets a 20 page limit on the petition and supporting documentation, excluding the text of the proposed rules.

throughout the criminal justice process and that they must be construed to protect the rights enumerated in the VBR including the right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse. Placing this important right in Rule 1.2 not only makes sense, but it would emphasize the importance this Court places on victims' rights to trial court judges and practitioners throughout Arizona.

AVCV also proposes replacing Rule 39(d)(4) with a newly created rule, Rule 1.10(b)(4). Placement in Section 1 of the rules where other preliminary matters including motions, time for filing, service, distribution of minute entries, etc. are covered is appropriate. While no one questions whether the government or a criminal defendant can have an attorney, some still question whether a victim can have an attorney. This is a matter that should be addressed for trial court judges and practitioners at the beginning of the rules.

State v. Temple, CR 2015-150007-001. In *State v. Temple*, the trial court[3] judge failed to recognize Rule 39(b)(1) and Rule 39(d)(4). The victim in *Temple* was a DPS trooper who was called to testify at a pretrial evidentiary hearing. At the hearing, defense counsel objected to the victim's counsel being in the well of the courtroom. Despite the fact that the victim was testifying at this hearing, the trial court asked victim's counsel to leave the well of the courtroom denying the

[3] This victims' rights violation occurred at an April 4, 2017 hearing. AVCV has requested the transcript.

victim his right to have his own counsel participate as needed while the victim testified. In this case, having Rules 39(b)(1) and 39(d)(4) integrated as indicated in the Simcox example would have assisted the trial court in understanding victims' rights during the criminal proceedings and the role of counsel in representing a victim who is called to testify during a pre-trial evidentiary hearing.

State v. Main, CR 2015503594. In *State v. Main*, the trial court[4] failed to acknowledge and consider Rule 39(b)(12) (the right to refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on the defendant's behalf…). Defendant Main is facing the death penalty for the murder of a 4 year old child who was in her care. The 4 year old homicide victim's brothers are victims under A.R.S. § 13-4401(19). Additionally, two of them are listed as victims of child abuse on the indictment. Defense counsel, without citing any authority regarding discovery or any authority that would warrant an exception to the rights of the child-victims in this case, sought all medical, counseling, education, and WIC records that currently existed and those that would come into existence at a future time. The trial court did ask for the child-victims' *guardian ad litem* (GAL) in the dependency case to appear at the next hearing. The GAL did appear as ordered, but posed no objection on behalf of the child-victims to having their privileged and confidential records submitted

[4] This victims' rights violation occurred at an October 31, 2016 hearing. AVCV has the transcript on file.

for an in camera review despite the fact that defense counsel had not shown a substantial need or sufficiently specific basis to warrant an exception to the child-victims' constitutional rights.

AVCV proposes replacing Rule 39(b)(12) with newly numbered Rule 15.3 (g)(2). Rule 15 addresses discovery. Rule 15.3 currently address depositions. This petition proposes integrating Rule 39(b)(12) by amending Rule 15.3 to include when a victim has a constitutional right to refuse a request of a defendant, whether a deposition or other discovery request. Had Rule 39(b)(12) already been fully integrated into the rules as Rule 15(g)(2) rather than tucked away in Rule 39 without any guidance to the trial courts on when and how victims may refuse a defendant's discovery request, the trial court may have known not to order an *in camera* review of the child-victims' privileged and confidential records absent the requisite showing to warrant an exception to their constitutional right to refuse a discovery request.

State v. Gilchrist, JC 2015-148974-001. In *State v. Gilchrist*, the justice court[5] failed to consider Rule 39(b)(1) and was indifferent to the crime victim's constitutional right to receive prompt restitution from the person convicted of the criminal conduct that caused the victim's injury under Ariz. Const. art. II, § 2.1(A)(8). The victim had been attacked by the defendant's dog, at the direction of

[5] This victims' rights violation occurred at a March 23, 2017 hearing. AVCV has a copy of the transcript on file.

the defendant, and left with severe injuries that required multiple reconstructive surgeries. In a separate civil suit, a small settlement had been reached. Defense counsel argued that restitution was precluded because of the civil settlement. During a restitution hearing, the justice court questioned the victim's need for the reconstructive surgeries and without regard for her right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, and abuse made an inappropriate and harassing comment about the victim, who was present at the hearing, on the record. The justice court stated: "…how do I know if the doctor hasn't said, you know, we've taken care of the bite, but, you know, you're a pretty lady, and this will get you even kind of a Hollywood smile here."

This case presents an extreme example of indifference towards victims' rights, specifically the right to be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse throughout the criminal justice process. As discussed above in the Simcox example, integrating Rule 39(b)(1) by placing it in a prominent place, Rule 1.2 makes sense and is necessary, especially when needed to prevent a judge from being disrespectful to a victim.

State v. Bruce, CR 2017-121025-001. In *State v. Bruce*, the trial court[6] failed to acknowledge and consider Rule 39(b)(7)(B) (upon request, the right to notice of and to be heard at any criminal proceeding involving the accused's post-

[6] This victims' rights violation occurred on October 12, 2017. AVCV has a copy of the FTR and is requesting a copy of the transcript.

arrest release or release conditions). The victims attended and wished to be heard at a hearing where the defendant's motion to modify release conditions was being considered so that they could oppose the defendant's request. In this case, the trial court conditioned the right of the victims to be heard on whether they had personal knowledge of the defendant. Rule 39(b)(7)(B), as well as our statutory and constitutional provisions related to a victim's right to be heard regarding a post-arrest release decision, are not conditioned on whether they have personal knowledge of the defendant.

The trial court started by saying:

> Let me make clear what I think is the focus of this hearing. The issue in this hearing is not what the defendant did or did not do. The issue is not the seriousness of the offense, and by that I don't, in any way, trivialize the charge. And, the issue is not what effect his conduct may have had on others. The very narrow issue for this hearing is whether or not the defendant will appear for all proceedings that are scheduled to take place in the future in this court. So, therefore, what I would like to hear and ***only*** what I want to hear is what conditions are necessary to make sure the defendant appears and what facts support that. Or, alternatively, what makes the defendant a flight risk and what facts support that.

FTR, October 12, 2017, 5:36-6:33 (emphasis added).

When the assigned prosecutor brought up the fact that the victims are opposed to modification, the trial court responded:

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> Right, I don't mean them any disrespect…but…I can't say it any differently from I did at the outset. The issue here is whether the defendant is going to show up for future court proceedings…and the law is…the least invasive, the least demanding conditions are the only conditions that can be imposed.

FTR, October 12, 2017, 13:13-14:00.

The prosecutor again brought up the victims towards the end of the hearing.

FTR, October 12, 2017, 15:56.

The Court again responded:

> Again, I mean them no disrespect. But, unless they have ***personal knowledge*** of facts that bear on the likelihood of the defendant appearing for court proceedings, for purposes of this hearing, …the only thing relevant that I need to hear, and, I suspect they are like most victims, ***they don't have that personal knowledge***. So…I've identified the facts that bear on the decision.

FTR, October 12, 2017, 16;06-16:45 (emphasis added).

AVCV proposes integrating Rule 39(b)(7)(B) into Rule 7.4(c)(2). Rule 7.4(c)(2) currently states that a motion to reexamine the conditions of release must comply with victims' rights requirements provided in Rule 39. AVCV proposes amending the language to remove the reference to Rule 39 and instead inform the trial court that: "[a] victim has the right to notice of and the right to be heard at any hearing regarding any motion to modify release conditions." In this instance, integration of Rule 39(b)(7)(B) may have assisted the trial court in knowing that

the victims did indeed have a constitutional right to be heard that was not conditioned on having personal knowledge of the defendant.

State v. Moreno, CR 2014-101861-001. In *State v. Moreno*, the trial court[7] failed to acknowledge and consider Rule 39(b)(4) (the right to be present at all criminal proceedings) and Rule 39(b)(7)(E) (the right to be heard at sentencing) when he would only allow child-victims to attend and make a victim impact statement only if their counselor or therapist would provide a note that attending sentencing would not traumatize them further. Here, the trial court conditioned the victims' rights to be present and heard at sentencing on receiving confirmation that the victims would not be further traumatized. Rule 39(b)(4) and Rule 39(b)(7)(E), as well as our statutory and constitutional provisions related to a victim's right to be present and heard at sentencing, are not conditioned on trial courts receiving approval from counselors.

AVCV proposes amending Rule 26.10(b)(1) to make clear to trial courts that victims must also have an opportunity to address the court at sentencing. Additionally, AVCV proposes newly numbered rule 1.10(a)(4) that will place exercising the right to be heard in a more prominent place. In this instance, having Rule 1.10(a)(4) in a more prominent place and amending Rule 26.10(b)(1) to

[7] This victims' rights violation occurred at a November 7, 2017 hearing. AVCV has a copy of the transcript on file.

include victims may have made the trial court aware that conditions, regardless of the intent, cannot be placed on victims' rights.

Integration of Rule 39 into each individual rule of procedure will provide comprehensive guidance to criminal justice professionals using the constitutional and statutory mandates that already exist to specifically lay out when victims' rights are implicated and must be considered throughout the criminal justice process. Maintaining Rule 39 as the only guide to victims' rights in Arizona's Rules of Criminal Procedure welcomes misunderstanding of their applicability by trial courts and attorneys at it only provides a general overview of victims' rights. Full integration of the VBR into the applicable rules would not create new victims' rights or violate the rights of the accused. Rather, it would give effect to the VBR by allowing victims meaningful participation in the day-to-day workings of the process. Ensuring each applicable rule fully complies with the constitutional and statutory provisions will safeguard the rights of crime victims, especially for the majority who do not have the benefit of their own counsel.

Arizona has traditionally been on the forefront of victims' rights. It was one of the first states in the country to provide victims of crime with constitutional rights. Harrison, 34 Ariz. St. L.J. at 532 (2002). Since then, this Court has been tasked with balancing the rights of victims with those of the accused and has addressed issues of first impression that have both protected and upheld victims'

rights in Arizona and provided guidance to other jurisdictions in the country. AVCV asks the Court to leave a legacy for future criminal justice professionals by fully integrating victims' rights throughout the Arizona Rules of Criminal Procedure and providing victims the medium needed to have meaningful participation throughout the entire criminal justice process.

Respectfully submitted January 10, 2020.
ARIZONA VOICE FOR CRIME VICTIMS

BY: __/s/___________________________________
COLLEEN CLASE

Appendix

Proposed Amendments to Arizona Rules of Criminal Procedure

Submitted January 10, 2020

List of Proposed Amendments to the Arizona Rules of Criminal Procedure

Rule 1.2. Purpose and Construction 4

Rule 1.3. Computation of Time 4

Rule 1.4. Definitions 5

Rule 1.5. Interactive Audiovisual Systems 6

Rule 1.7. Filing and Service of Documents 8

Rule 1.8. Clerk's Distribution of Minute Entries and Other Documents 9

Rule 1.9. Motions, Oral Argument, and Proposed Orders 10

Rule 1.10. Victims' Rights: Exercising the Right to be Heard, The Right to Representation; Victim and Court Obligations. 10

Rule 4.1. Procedure upon Arrest 13

Rule 4.2. Initial Appearance 14

Rule 5.1. Right to a Preliminary Hearing; Waiver; Continuance 16

Rule 5.4. Determining Probable Cause 17

Rule 5.8. Notice if an Arraignment Is Not Held 17

Rule 6.3. Duties of Counsel; Withdrawal 18

Rule 6.7. Appointment of Investigators and Expert Witnesses for Indigent Defendants 19

Rule 7.2. Right to Release 20

Rule 7.3. Conditions of Release 24

Rule 7.4. Procedure 26

Rule 7.5. Review of Conditions; Revocation of Release 27

Rule 7.6. Transfer and Disposition of Bond 29

Rule 8.1. Priorities in Scheduling Criminal Cases 30

Rule 8.2. Time Limits 31

Rule 8.5. Continuing a Trial Date 32

Rule 10.2. Change of Judge as a Matter of Right 32

Rule 10.3. Changing the Place of Trial 34

Rule 15.1. The State's Disclosures 35
Rule 15.2. The Defendant's Disclosures 40
Rule 15.3. Depositions; Victims' Right to Refuse 43
Rule 15.6. Continuing Duty to Disclose; Final Disclosure Deadline; Extension.....46
Rule 16.3. Pretrial Conference...47
Rule 16.4. Dismissal of Prosecution 48
Rule 17.1. The Defendant's Plea 48
Rule 18.1. Trial by Jury..51
Rule 19.7. Victim's Right to Use of Facility Dog..51
Rule 19.8. Victim Testimony 52
Rule 24,3. Modification of Sentence……………………………………………52
Rule 26.4. Presentence Report 53
Rule 26.7. Presentencing Hearing; Prehearing Conference 52
Rule 26.10. Pronouncing Judgment and Sentence 54
Rule 26.17. Victim's Right to Information 55
Rule 27.3. Modification of Conditions or Regulations 55
Rule 27.4. Early Termination of Probation 56
Rule 27.7. Initial Appearance After Arrest 56
Rule 27.8. Probation Revocation……………………………………………..57
Rule 27.10. Victims' Rights in Probation Proceedings..58
Rule 31.3. Suspension of These Rules; Suspension of an Appeal; Computation of Time; Modifying a Deadline..59
Rule 32.7. Petition for Post-Conviction Relief 60
Rule 32.9. Response and Reply; Amendments 61
Rule 33.7. Petition for Post-Conviction Relief…………………………………….62
Rule 33.9. Response and Reply; Amendments……………………………………63
Rule 39. Victims' Rights 64

Rule 1.2. Purpose and Construction

These rules are intended to provide for the just and speedy determination of every criminal proceeding. Courts, parties, and crime victims should construe these rules to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the ~~individual~~ accused and the victim while preserving the public welfare. These rules must be construed to protect the constitutional rights of victims enumerated in Article II, Section 2.1(A) of the Arizona Constitution, including the rights to justice and due process and to be treated with fairness, respect, and dignity and to be free from intimidation, harassment, or abuse throughout the criminal justice process.

(a) Limitations on Victims' Rights.

(1) *Cessation of Victim Status.* A victim retains the rights provided in these rules until the rights are no longer enforceable under A.R.S. §§ 13-4402 and 13-4402.01.

(2) *Legal Entities.* The victims' rights of any corporation, partnership, association, or other similar legal entity are limited as provided in statute.

(3) *Victims Are Not Parties*. These rules are not to be construed to make victims parties to a criminal case.

Rule 1.3. Computation of Time

(a) General Time Computation. When computing any time period more than 24 hours prescribed by these rules, by court order, or by an applicable statute, the following rules apply:

(1) *Day of the Event.* Exclude the day of the act or event from which the designated time period begins to run.

(2) *Last Day.* Include the last day of the period, unless it is a Saturday, Sunday or legal holiday, in which case the period ends on the next day that is not a Saturday, Sunday, or legal holiday.

(3) *Time Period Less Than 7 Days.* If the time period is less than 7 days, exclude intermediate Saturdays, Sundays and legal holidays from the computation.

(4) *Next Day.* The "next day" is determined by counting forward when the period is measured after an event, and backward when measured before an event.

(5) *Additional Time After Service.* If a party or crime victim may or must act within a specified time after service and service is made under a method authorized by Rule 1.7(c)(2)(C), (D), or (E), 5 calendar days are added after the specified time period would otherwise expire under (a)(1)-(4), except as provided in Rule 31.3(d). This provision does not apply to the clerk's distribution of notices, minute entries, or other court-generated documents.

(b) If an Arraignment Is Not Held. If an arraignment is not held under Rule 14.5, the date of arraignment for the purpose of computing time is the date the defendant receives notice of the next court date under Rule 5.8.

(c) Entry. A court order is entered when the clerk files it.

Rule 1.4. Definitions

(a) The Defendant. "The defendant" is a person named as such in a complaint, indictment, or information. "The defendant" as used in these rules includes an arrested person who at the time of arrest is not named in a charging document. "The defendant" in the context of certain rules includes the attorney who represents the defendant.

(b) Criminal Proceeding. A "criminal proceeding" is any matter scheduled and held before a trial court, telephonically or in person, at which the defendant has the right to be present, including any post-conviction matter.

(c) Identifying and Locating Information. As used in this rule, "identifying and locating information" includes a person's date of birth, social security number, official state or government issued driver license or identification number, the person's address, telephone number, email addresses, and place of employment.

(d) ~~(b)~~ **Limited Jurisdiction Court.** A "limited jurisdiction court" is a justice court under A.R.S. §§ 22-101 et seq., or a municipal court under A.R.S. §§ 22-401 et seq.

(e) ~~(c)~~ **Magistrate.** "Magistrate" means an officer having power to issue a warrant for the arrest of a person charged with a public offense and includes the Chief Justice and justices of the Supreme Court, judges of the superior court, judges of the court of appeals, justices of the peace, and judges of a municipal court.

(f) ~~(d)~~ **Parties.** "Parties" means the State of Arizona and the defendants in a case. Use of the word "party" in these rules means either, or any, party.

(g) ~~(e)~~ **Person.** "Person" includes an entity.

(h) ~~(f)~~ **Presiding Judge.**

(1) *For the Superior Court*. The superior court presiding judge is the county's presiding judge. In a county that has only one superior court judge, that judge is the presiding judge. In other counties, the Chief Justice of the Supreme Court designates the presiding judge, who may appoint other judges to carry out one or more of the presiding judge's duties.

(2) *For a Limited Jurisdiction Court*. If a court consists only of one judge, that judge is the presiding judge. In courts having more than one judge, the presiding judge is designated by the appropriate authority.

(i) ~~**(g)**~~ **The State.** "The State" means the State of Arizona, or any other Arizona state or local governmental entity that files a criminal charge in an Arizona court. "The State" in the context of certain rules includes the prosecutor representing the State.

(j) ~~**(h)**~~ **Victim.** "Victim" means a person or persons as defined in A.R.S. § 13-4401.

(1) *Cessation of Victim Status*. A victim retains the rights provided in these rules until the rights are no longer enforceable under A.R.S. §§ 13-4402 and 13-4402.01.

(2) *Legal Entities*. The victims' rights of any corporation, partnership, association, or other similar legal entity are limited as provided in statute.

Rule 1.5. Interactive Audiovisual Systems

(a) Generally. If the appearance of a defendant or counsel is required in any court, the appearance may be made by using an interactive audiovisual system that complies with the provisions of this rule. Any interactive audiovisual system must meet or exceed minimum operational guidelines adopted by the Administrative Office of the Courts.

(b) Requirements. If an interactive audiovisual system is used:

(1) the system must operate so the court and all parties can view and converse with each other simultaneously;

(2) a full record of the proceedings must be made consistent with the requirements of applicable statutes and rules; and

(3) provisions must be made to:

(A) allow for confidential communications between the defendant and defendant's counsel before, during, and immediately after the proceeding;

(B) allow a victim a means to view and participate in the proceedings and ensure

compliance with all victims' rights laws;

(C) allow the public a means to view the proceedings consistent with applicable law; and

(D) allow for use of interpreter services when necessary and, if an interpreter is required, the interpreter must be present with the defendant absent compelling circumstances.

(c) When a Defendant May Appear by Videoconference.

(1) *In the Court's Discretion.* A court may require a defendant's appearance by use of an interactive audiovisual system without the parties' consent at any of the following:

(A) an initial appearance;

(B) a misdemeanor arraignment;

(C) a not-guilty felony arraignment;

(D) a hearing on a motion to continue that does not include a waiver of time under Rule 8;

(E) a hearing on an uncontested motion;

(F) a pretrial or status conference;

(G) a change of plea in a misdemeanor case; or

(H) an informal conference held under Rule 32.7.

(2) *Generally Not Permitted.* A court may not require a defendant's appearance by use of an interactive audiovisual system at any trial, contested probation violation hearing, felony sentencing, or felony probation disposition hearing, unless the court finds extraordinary circumstances and the parties consent by written stipulation or on the record.

(3) *By Stipulation.* For any proceeding not included in (c)(1) and (c)(2), the parties may stipulate that the defendant may appear at the proceeding by use of an interactive audiovisual system. The parties must file a stipulation before the proceeding begins or state the stipulation on the record at the start of the proceeding. Before accepting the stipulation, the court must find that the defendant knowingly, intelligently, and voluntarily agrees to appear at the proceeding by use of an interactive audiovisual system~~.~~ and that the system will allow a victim means to view and participate in the proceedings and ensure compliance with all victims' rights laws.

(4) *Change in Hearing's Scope.* If the scope of a hearing expands beyond that specified

in (c)(1) and (c)(3), the court must reschedule a videoconference, give notice to counsel and the victim, and require the defendant's personal appearance.

Rule 1.7. Filing and Service of Documents

(a) "Filing with the Court" Defined. The filing of a document with the court is accomplished only by filing it with the clerk. If a judge permits, a document may be submitted directly to a judge, who must transmit it to the clerk for filing and notify the clerk of the date of its receipt.

(b) Effective Date of Filing.

(1) Paper Documents. A document is deemed filed on the date the clerk receives and accepts it. If a document is submitted to a judge and is later transmitted to the clerk for filing, the document is deemed filed on the date the judge receives it.

(2) Electronically Filed Documents. An electronically filed document is filed on the date and time the clerk receives it. Unless the clerk later rejects the document based on a deficiency, the date and time shown on the email notification from the court's electronic filing portal or as displayed within the portal is the effective date of filing. If a filing is rejected, the clerk must promptly provide the filing party with an explanation for the rejection.

(3) Late Filing Because of an Interruption in Service. If a person fails to meet a deadline for filing a document because of a failure in the document's electronic transmission or receipt, the person may file a motion asking the court to accept the document as timely filed. On a showing of good cause, the court may enter an order permitting the document to be deemed filed on the date that the person originally attempted to transmit the document.

(4) Incarcerated Parties. If a party is incarcerated and another party contends that the incarcerated party did not timely file a document, the court must deem the filing date to be the date when the document was delivered to jail or prison authorities to deposit in the mail.

(c) Service of All Documents Required; Manner of Service. Every person filing a document with any court must serve a copy of the document on all other parties and to any victim's attorney as follows:

(1) *Serving an Attorney*. If a party or victim is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) *Service Generally.* A document is served under this rule by any of the following:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it by U.S. mail to the person's last-known address—in which event service is complete upon mailing;

(D) delivering it by any other means, including electronic means other than that described in (c)(2)(E), if the recipient consents in writing to that method of service or if the court orders service in that manner—in which event service is complete upon transmission; or

(E) transmitting it through an electronic filing service provider approved by the Administrative Office of the Courts, if the recipient is an attorney of record in the action—in which event service is complete upon transmission.
(3) *Certificate of Service*. The date and manner of service must be noted on the last page of the original of the served document or in a separate certificate, in a form substantially as follows:

A copy has been or will be mailed/emailed/hand-delivered [select one] on [insert

date] to:

[Name of opposing party or attorney] [Address of

opposing party or attorney] <u>*[Name of victim's attorney]*</u>

<u>*[Address of victim's attorney]*</u>

If the precise manner in which service has actually been made is not noted, it will be presumed that the document was served by mail. This presumption will only apply if service in some form has actually been made.

Rule 1.8. Clerk's Distribution of Minute Entries and Other Documents

(a) Generally. The clerk must distribute, either by U.S. mail, electronic mail, or attorney drop box, copies of every minute entry to all parties <u>and to any victim's attorney.</u>

(b) Electronic Distribution. The clerk may distribute minute entries, notices and other court-generated documents to a party or a party's <u>or victim's</u> attorney by electronic means. Electronic distribution of a document is complete when the clerk transmits it to

the email address that the party or attorney has provided to the clerk.

Rule 1.9. Motions, Oral Argument, and Proposed Orders

(a) Content. A motion must include a memorandum that states facts, arguments, and authorities pertinent to the motion.

(b) Service of Motion; Response; Reply. The moving party must serve the motion on all other parties. No later than 10 days after service, another party may file and serve a response, and, no later than 3 days after service of a response, the moving party may file and serve a reply. A reply must be directed only to matters raised in a response. If no response is filed, the court may deem the motion submitted on the record. When addressing matters that impact any victims' rights, a victim may file motions, responses, and replies that comply with these rules.

(c) Length. Unless the court orders otherwise, a motion or response, including a supporting memorandum, may not exceed 11 pages, exclusive of attachments, and a reply may not exceed 6 pages, exclusive of attachments.

(d) Waiver of Requirements. ~~On a party's request or on its own,~~ The court may waive a requirement specified in this rule, or it may overlook a formal defect in a motion.

(e) Oral Argument. ~~On a party's request or on its own,~~ The court may set a motion for argument or hearing.

(f) Proposed Orders. A proposed order must be prepared as a separate document and may not be included as part of a motion, stipulation, or other document. There must be at least two lines of text on the signature page of a proposed order. A party or victim's attorney must serve the proposed order on the court and all other parties and victim's attorney. A party or victim's attorney must not file a proposed order, and the court will not docket it, until a judge has reviewed and signed it. Absent a notice of filing, proposed orders will not be part of the record.

Rule 1.10. Victims' Rights: Exercising the Right to be Heard, The Right to Representation; Victim and Court Obligations.

(a) Exercising the Right to Be Heard

(1) *Nature of the Right*. If a victim exercises the right to be heard, the victim does not do so as a witness and the victim is not subject to cross-examination. A victim is not required to disclose any statement to any party and is not required to submit any written statement to the court. The court must give any party the opportunity to explain,

support, or refute the victim's statement. This rule does not apply to victim impact statements made in a capital case under A.R.S. § 13-752(R).

(2) *Victims in Custody*. If a victim is in custody for an offense, the victim's right to be heard under these rules is satisfied by affording the victim the opportunity to submit a written statement.

(3) *Victims Not in Custody.* A victim who is not in custody may exercise the right to be heard under these rules through an oral statement or by submitting a written or recorded statement.

(4) *At Sentencing*. The right to be heard at sentencing allows the victim to present evidence, information, and opinions about the criminal offense, the defendant, the sentence, or restitution. The victim also may submit a written or oral impact statement to the probation officer for use in any presentence report.

(b) Assistance and Representation.

(1) *Right to Prosecutor's Assistance.* A victim has the right to the prosecutor's assistance in asserting rights enumerated in these rules or otherwise provided by law. The prosecutor must inform a victim of these rights and provide a victim with notices and information that a victim is entitled to receive from the prosecutor by these rules and by law.

(2) *Standing*. The prosecutor has standing in any criminal proceeding, upon the victim's request, to assert any of the rights to which a victim is entitled by these rules or by any other provision of law.

(3) *Conflicts.* If any conflict arises between the prosecutor and a victim in asserting the victim's rights, the prosecutor must advise the victim of the right to seek independent legal counsel and provide contact information to the appropriate state or local bar association for referral to a lawyer.

(4) *Representation by Counsel.* In asserting any of the rights enumerated in this rule or provided by any other provision of law, a victim has the right to be represented by personal counsel of the victim's choice. After a victim's counsel files a notice of appearance, all parties must endorse the victim's counsel on all pleadings. When present, the victim's counsel must be included in all bench conferences and in chambers meetings with the trial court that directly involve the victim's constitutional rights. At any proceeding to determine restitution, the victim has the right to present information and make argument to the court personally or through counsel.

(5) *Appointment of Victim's Representative.* Upon request, the court must appoint a representative for a minor victim or for an incapacitated victim, as provided in A.R.S. §

13-4403. The court must notify the parties if it appoints a representative.

(c) Victim's Duties.

(1) *Generally.* Any victim desiring to claim the notification rights and privileges provided in these rules must provide his or her full name, address, and telephone number to the entity prosecuting the case and to any other entity from which the victim requests notice, and to keep this information current.

(2) *Legal Entities.*

(A) Designation of a Representative. If a victim is a corporation, partnership, association, or other legal entity that has requested notice of the hearings to which it is entitled by law, that legal entity must promptly designate a representative by giving notice to the prosecutor and to any other entity from which the victim requests notice. The notice must include the representative's address and telephone number.

(B) Notice. The prosecutor must notify the defendant and the court if the prosecutor receives notice under (c)(2)(A).

(C) Effect. After notice is provided under (c)(2)(B), only the representative designated under (c)(2)(A) may assert the victim's rights on behalf of the legal entity.

(D) Changes in Designation. The legal entity must provide any change in designation in writing to the prosecutor and to any other entity from which the victim requests notice. The prosecutor must notify the defendant and court of any change in designation.

(d) Waiver. A victim may waive the rights and privileges enumerated in these rules. A prosecutor or a court may consider a victim's failure to provide a current address and telephone number, or a legal entity's failure to designate a representative, to be a waiver of notification rights under these rules.

(e) Court Enforcement of Victim Notice Requirements.

(1) *Court's Duty to Inquire.* At the beginning of any proceeding that takes place more than 7 days after the filing of charges by the State and at which the victim has a right to be heard, the court must inquire of the State or otherwise determine whether the victim has requested notice and has been notified of the proceeding.

(2) *If the Victim Has Been Notified.* If the victim has been notified as requested, the court must further inquire of the State whether the victim is present. If the victim is present and the State advises the court that the victim wishes the court to address the victim, the court must inquire whether the State has advised the victim of their rights. If not, the court must recess the hearing and the State must immediately comply with (b)(1).

(3) *If the Victim Has Not Been Notified.* If the victim has not been notified as requested, the court may not proceed unless public policy, the specific provisions of a statute, or the interests of due process require otherwise. In the absence of such considerations, the court may reconsider any ruling made at a proceeding at which the victim did not receive notice as requested.

(f) Appointment of Victim's Representative. Upon request, the court must appoint a representative for a minor victim or for an incapacitated victim, as provided in A.R.S. § 13-4403. The court must notify the parties if it appoints a representative.

Rule 4.1. Procedure upon Arrest

(a) Prompt Initial Appearance. An arrested person must be promptly taken before a magistrate. At the initial appearance, the magistrate will advise the arrested person of those matters set forth in Rule 4.2. If the initial appearance does not occur within 24 hours after arrest, the arrested person must be immediately released from custody. Upon request, the victim must be informed of the date, time, and place for the initial appearance.

(b) On Arrest Without a Warrant. A person arrested without a warrant must be taken before the nearest or most accessible magistrate in the county of arrest. A complaint, if not already filed, must be promptly prepared and filed. If a complaint is not filed within 48 hours after the initial appearance before the magistrate, the arrested person must be immediately released from custody and any pending preliminary hearing dates must be vacated. The victim must be notified of any release.

(c) On Arrest with a Warrant.

(1) *Arrest in the County of Issuance.* A person arrested in the county where the warrant was issued must be taken before the magistrate who issued the warrant for an initial appearance. If the magistrate is absent or unable to act, the arrested person must be taken to the nearest or most accessible magistrate in the same county. Upon request, the victim must be informed of the date, time, and place for the initial appearance.

(2) *Arrest in Another County.* If a person is arrested in a county other than the one where the warrant was issued, the person must be taken before the nearest or most accessible magistrate in the county of arrest. If eligible for release as a matter of right, the person must then be released under Rule 7.2. If not released immediately, the arrested person must be taken to the issuing magistrate in the county where the warrant originated, or, if that magistrate is absent or unable to act, before the nearest

or most accessible magistrate in the county where the warrant originated. <u>The victim must be notified of any release.</u>

(d) Assurance of Availability of Magistrate and the Setting of a Time for Initial Appearance. Each presiding judge must make a magistrate available every day of the week to hold the initial appearances required under Rule 4.1(a). The presiding judge also must set at least one fixed time each day for conducting initial appearances, and notify local law enforcement agencies of the fixed time(s).

(e) Sample for DNA Testing; Proof of Compliance. If the arresting authority is required to secure a sample of buccal cells or other bodily substances for DNA testing under A.R.S. § 13-610(K), it must provide proof of compliance to the court before the initial appearance.

Rule 4.2. Initial Appearance

(a) Generally. At an initial appearance, the magistrate must:

(1) determine the defendant's true name and address and, if necessary, amend the formal charges to correct the name and instruct the person to promptly notify the court of any change of address;

(2) inform the defendant of the charges and, if available, provide the person with a copy of the complaint, information, or indictment;

(3) inform the defendant of the right to counsel and the right to remain silent;

(4) determine whether there is probable cause for purposes of release from custody, and, if no probable cause is found, immediately release the person from custody;

(5) appoint counsel if the defendant requests and is eligible for appointed counsel under Rule 6;

(6) permit and consider any victim's oral or written comments concerning the defendant's possible release and conditions of release;

(7) unless the magistrate determines under (a)(8) that release on bail is prohibited, determine the conditions of release under Rule 7.2(a);

(8) determine whether probable cause exists to believe:

(A) the defendant committed a capital offense, or any felony offense committed while the person was on pretrial release for a separate felony charge; or

(B) the defendant committed a felony for which release on bail is prohibited because the defendant poses a substantial danger and no conditions of release will reasonably assure the safety of the victim, any other person, or the community based on the considerations provided in Rule 7.2(b)(3);

(9) if the court determines that the defendant is not eligible for bail based on a determination under (a)(8)(A) or (B), schedule a bail eligibility hearing in superior court as required under Rule 7.2(b)(4);

(10) order a summoned defendant to be 10-print fingerprinted no later than 20 calendar days by the appropriate law enforcement agency at a designated time and place if:

(A) the defendant is charged with a felony offense, a violation of A.R.S. §§ 13-1401 et seq. or A.R.S. §§ 28-1301 et seq., or a domestic violence offense as defined in A.R.S. § 13-3601; and

(B) the defendant does not present a completed mandatory fingerprint compliance form to the court, or if the court has not received the process control number; and

(11) order the arresting agency to secure a sample of buccal cells or other bodily substances for DNA testing if:

(A) the defendant is in-custody and was arrested for an offense listed in A.R.S. § 13-610(O)(3); and

(B) the court has not received proof of compliance with A.R.S. § 13- 610(K).

(b) Felonies Charged by Complaint. If a defendant is charged in a complaint with a felony, in addition to following the procedures in (a), the magistrate must:

(1) inform the defendant of the right to a preliminary hearing and the procedures by which that right may be waived; and

(2) unless waived, set the time for a preliminary hearing under Rule 5.1.

(c) Combining an Initial Appearance with an Arraignment. If the defendant is charged with a misdemeanor or indicted for a felony and defense counsel is present or the defendant waives the presence of counsel, <u>and, if requested, the victim has been given notice and an opportunity to be present and heard,</u> the magistrate may arraign a

defendant under Rule 14 during an initial appearance under (a). If, however, the magistrate lacks jurisdiction to try the offense, the magistrate may not arraign the defendant and must instead transfer the case to the proper court for arraignment. If the court finds that delaying the defendant's arraignment is indispensable to the interests of justice, the court when setting a date for the continued arraignment must provide sufficient notice to victims. ~~under Rule 39(b)(2).~~

Rule 5.1. Right to a Preliminary Hearing; Waiver; Continuance

(a) Right to a Preliminary Hearing. A defendant has a right to a preliminary hearing if charged in a complaint with a felony. The victim, if requested, must be given notice of the preliminary hearing. A preliminary hearing must commence before a magistrate no later than 10 days after the defendant's initial appearance if the defendant is in custody, or no later than 20 days after the defendant's initial appearance if the defendant is not in custody, unless:

(1) the complaint is dismissed;

(2) the hearing is waived;

(3) the defendant has been transferred from the juvenile court for criminal prosecution on specified charges; or

(4) the magistrate orders the hearing continued under (c).

(b) Waiver. The parties may waive a preliminary hearing but the waiver must be in writing and the defendant, defense counsel, and the State must sign it.

(c) Continuance.

(1) *Release Absent Continuance.* If a preliminary hearing for an in-custody defendant did not commence within 10 days as required under (a) and was not continued, the defendant must be released from custody, unless the defendant is charged with a non-bailable offense, in which case the magistrate must immediately notify that county's presiding judge of the reasons for the delay.

(2) *Continuance.* On motion or on its own, a magistrate may continue a preliminary hearing beyond the 20-day deadline specified in (a). A magistrate may continue the hearing only ~~if it~~, if after consideration of the victim's right to a speedy trial, the court finds that extraordinary circumstances exist and that delay is indispensable to the interests of justice. The magistrate also must file a written order detailing the reasons for these findings. The court must promptly notify the parties and, if requested, the victim of the order.

(3) *Resetting Hearing Date.* If the magistrate orders a continuance, the order must reset the preliminary hearing for a specific date to avoid uncertainty and additional

delay.

(d) Hearing Demand. A defendant who is in custody may demand that the court hold a preliminary hearing as soon as practicable. In that event, the magistrate must set a hearing date and must not delay its commencement more than necessary to secure the attendance of counsel, a court reporter, and necessary witnesses., and to provide notice to any victims.

Rule 5.4. Determining Probable Cause

(a) Holding a Defendant to Answer. If a magistrate finds that there is probable cause to believe that an offense has been committed and that the defendant committed it, the magistrate must file a written order holding the defendant to answer for the offense before the superior court. Upon request, the magistrate may reconsider the conditions of release., after giving the victim the right to be heard. Upon the State's request, this rule's requirements are satisfied if a probable cause or proof evident presumption great finding was made at a bail eligibility hearing under Rule 7.2(b)(4).

(b) Amending the Complaint. A magistrate may grant a motion to amend a complaint so that its factual allegations conform to the evidence, but the magistrate must not hold the defendant to answer for crimes different than those charged in the original complaint.

(c) Evidence. A magistrate must base a probable cause finding on substantial evidence, which may include hearsay in the following forms:

(1) a written report of an expert witness;

(2) documentary evidence, even without foundation, if there is a substantial basis for believing that foundation will be available at trial and the document is otherwise admissible; or

(3) a witness's testimony about another person's declarations if such evidence is cumulative or if there are reasonable grounds to believe that the declarant will be personally available for trial.

(d) Lack of Probable Cause. The magistrate must dismiss the complaint and discharge the defendant if a magistrate finds that there is not probable cause to believe that an offense has been committed or that the defendant committed it.

Rule 5.8. Notice if an Arraignment Is Not Held

(a) Notice. If a defendant is held to answer in a county where an arraignment is not held as provided in Rule 14.2(d), the magistrate must:

(1) enter a plea of not guilty for the defendant and provide the defendant and defense counsel with a notice specifying that a plea of not guilty has been entered;

(2) set dates for a trial or pretrial conference;

(3) advise the parties <u>and, if requested, the victim,</u> in writing of the dates set for further proceedings and other important deadlines;

(4) advise the defendant of the defendant's right to be present at all future proceedings, that any proceeding may be held in the defendant's absence, and that if the defendant fails to appear, the defendant may be charged with an offense and a warrant may be issued for the defendant's arrest; and

(5) advise the defendant of the right to a jury trial, if applicable.

(b)Notice Form. The magistrate must provide written notice to the defendant of the matters in (a). The defendant and defense counsel must sign the notice and return it to the court.

Rule 6.3. Duties of Counsel; Withdrawal

(a) Notice of Appearance.

(1) *Generally.* Before representing the defendant in court, counsel--whether privately retained or appointed by the court--must file a notice of appearance.

(2) *Earlier Appearance in a Limited Jurisdiction Court.* Counsel who has filed a notice of appearance in a felony case in a limited jurisdiction court does not need to file a new notice of appearance if the defendant is bound over to superior court.

(b) Duty of Continuing Representation. Unless the court permits counsel to withdraw, counsel who represents a defendant at any stage of a case has a continuing duty to represent the defendant in all further proceedings in the trial court, including the filing of a notice of appeal.

(c) Withdrawal.

<u>(1) *Before Granting a Motion to Withdraw.* Before granting a motion to permit counsel to withdraw, the court must consider the victim's right to a speedy trial.</u>

~~(1)~~ <u>(2)</u> *If the Defendant Is Ineligible for Appointed Counsel.* Appointed counsel may not withdraw after arraignment on the ground that the defendant is ineligible for appointed counsel unless counsel shows that withdrawal will not disrupt the orderly processing of the case.

~~(2)~~ (3) *If the Case Is Set for Trial.* After a case is set for trial, the court may not permit counsel to withdraw unless counsel files a motion that provides:

(A) the name and address of new counsel and a signed statement from the new counsel that acknowledges the trial date and avows that the new counsel will be prepared for trial; or

(B) ethical grounds for withdrawing.

(d) Duty of Defense Counsel to Preserve the File. Defense counsel must:

(1) maintain records of the case in a manner that will inform successor counsel of all significant developments relevant to the case; and

(2) make available to successor counsel the client's complete records and files, as well as all information regarding every aspect of the representation.

(e) Duty of Successor Counsel to Collect the File in a Capital Case. Immediately upon undertaking representation of a defendant in a capital case in which the defendant was previously represented by counsel, defense counsel must collect the complete file from prior counsel and maintain the records and files in a manner that complies with (d).

Rule 6.7. 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. After considering the victim's right to a speedy trial, the court should impose reasonable deadlines on anyone appointed under this rule.

(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) Definition of a "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 7.2. Right to Release

(a) Before Conviction; Bailable Offenses.

(1) *Presumption of Innocence*. A defendant charged with a crime but not yet convicted is presumed to be innocent.

(2) *Right to Release*. Except as these rules otherwise provide, any defendant charged with an offense bailable as a matter of right must be released pending and during trial on the defendant's own recognizance with only the mandatory conditions of release required under Rule 7.3(a). This rule does not apply if the court determines that such a release will not reasonably assure the defendant's appearance or protect the victim, any other person, or the community from risk of harm by the defendant. If the court makes such a determination, it must impose the least onerous conditions of release set forth in Rule 7.3(c).

(3) *Determining Method of Release or Bail Amount*. In determining the method of release or the amount of bail, the court must consider the factors set forth in A.R.S. § 13-3967(B).

(b) Before Conviction: Defendants Charged with an Offense Not Eligible for Bail.

(1) *Not Eligible Based on Commission of a Specified Felony or Any Felony While on Pretrial Release.* A defendant must not be released if the court finds the proof is evident or the presumption great that the defendant committed:

(A) a capital offense;

(B) any felony offense while the defendant was on pretrial release for a separate felony charge.

(2) *Not Eligible Based on Commission of any Felony and Other Factors.* Under article 2, section 22(A)(3) of the Arizona Constitution, the court may not release any defendant charged with a felony if the court finds all of the following:

(A) the proof is evident or the presumption great that the defendant committed one or more of the charged felony offenses;

(B) clear and convincing evidence that the defendant poses a substantial danger to the victim, any other person, or the community or, on certification by motion of the state,

the defendant engaged in conduct constituting a dangerous crime against children or terrorism; and

(C) no condition or combination of conditions of release will reasonably assure the safety of the victim, any other person, or the community.

(3) *Bail Eligibility Considerations.* In making the determinations required by (b)(2)(B) and (b)(2)(C), the court must consider:

(A) the nature and circumstances of the offense charged, including whether the offense is a "dangerous offense" as defined in A.R.S. § 13-105;

(B) the weight of the evidence against the defendant;

(C) the history and characteristics of the defendant, including the defendant's character, physical and mental condition, past conduct including membership in a criminal street gang, history relating to drug or alcohol abuse, and criminal history;

(D) the nature and seriousness of the danger to the victim, any other person, or the community that would be posed by releasing the defendant on bail, including any threat to a victim or other participants in the judicial process;

(E) the recommendation of the pretrial services program based on an appropriate risk assessment instrument;

(F) any victim statement about the offense and release on bail; and

(G) any other factor relevant to the determination required under (b)(2)(B) and (b)(2)(C).

(4) *Bail Eligibility Hearing.*

(A) Generally. The superior court must hold a hearing to determine whether a defendant held in custody under Rule 4.2(a)(8) is not eligible for bail as required under (b)(1) or (b)(2), unless the defendant waives this hearing. <u>A victim has the right to notice of the hearing and the right to be heard regarding any conditions of release.</u>

(B) Timing. If the State makes an oral motion under A.R.S. § 13-3961(E), the court must hold this hearing within 24 hours of the initial appearance, subject to continuances as provided in A.R.S. § 13-3961. If this motion is not made, the hearing must be held as soon as practicable, but no later than 7 days after the initial appearance unless the detained defendant moves for a continuance or the court finds that extraordinary circumstances exist and delay is indispensable to the interests of justice. For this purpose, extraordinary circumstances are events that would prohibit

the hearing from occurring and that are beyond the prosecutor's control. Upon a finding of extraordinary circumstances, the court may continue the hearing once and for no more than 3 calendar days.

(C) Determination of Probable Cause and Release Conditions. If the court does not find the proof evident or the presumption great under (b)(1) or (b)(2)(A) and there has been no prior finding of probable cause for the charges by a grand jury or through a preliminary hearing, the court must determine whether there is probable cause to believe that an offense was committed and that the defendant committed it.

(i) Probable Cause Found. If the court finds probable cause, or probable cause for the charges was previously determined by a grand jury or through a preliminary hearing, the court must determine the release conditions under (a).

(ii) No Probable Cause Found. Unless there was a finding of probable cause for the charges by a grand jury or through a preliminary hearing, if the court does not find probable cause, the defendant must be released from custody. Upon the State's request, the court must schedule a preliminary hearing as provided in Rule 5.1(a). If the state does not request a preliminary hearing, the court must dismiss the complaint and discharge the defendant, unless probable cause for the charges was previously determined by a grand jury or through a preliminary hearing.

(D) Effect of Findings. If the court finds the proof is evident or the presumption great or finds probable cause, upon the State's request, the court will hold the defendant to answer before the superior court as provided in Rule 5.4 (a).

(E) Findings on the Record. The court's findings must be on the record.

(c) After Conviction.

(1) *Superior Court.*

(A) *Before Sentencing.* After a defendant is convicted of an offense for which the person will, in all reasonable probability, receive a sentence of imprisonment, the court may not release the person on bail or on the person's own recognizance unless:

(i) the court finds that reasonable grounds exist to believe that the conviction may be set aside on a motion for new trial, judgment of acquittal, or other post-trial motion; or

(ii) the parties stipulate otherwise and the court approves the stipulation.

(B) *After a Sentencing Involving Imprisonment.* If a defendant is convicted of a felony offense and is sentenced to prison, the court may not release the defendant on bail or on the defendant's own recognizance pending appeal unless the court,

after considering the views of the victim, finds the defendant is in such physical condition that continued confinement would endanger the defendant's life.

(C) Protecting Safety. In determining release conditions if the defendant is released under (c)(1)(A) or (B), the court must impose conditions that will protect the victim, any other person, and the community from risk of harm by the defendant.

(D) *After Sentence, Pending Appeal.* If a defendant is released pending appeal but fails to diligently pursue the appeal, the court must revoke the release.

(E) *Release upon Sentence Completion*. A defendant held in custody pending appeal must be released if the term of incarceration is completed before the appeal is decided.

(2) *Limited Jurisdiction Courts.*

(A) Conditions of Release on Appeal. If a defendant files a timely notice of appeal of a conviction for an offense for which the court has imposed a sentence of incarceration, the defendant may remain out of custody under the same conditions of release imposed at or after the defendant's initial appearance or arraignment.

(B) Lack of Diligence on Appeal. If a defendant is released pending appeal but fails to diligently pursue the appeal, the court must revoke the release.

(C) Motion to Amend Conditions of Release.

(i) Upon the filing of a timely notice of appeal, the court—on motion or on its own—may amend the conditions of release if it finds a substantial risk exists that the defendant presents a danger to the victim, another person or the community, or the defendant is unlikely to return to court if required to do so after the appeal concludes.

(ii) The court must hear a motion under this rule no later than 3 days after filing, although it may continue the hearing for good cause. The defendant may be detained pending the hearing. The hearing must be on the record, and the defendant is entitled to representation by counsel. Any testimony by the defendant is not admissible in another proceeding except as it relates to compliance with prior conditions of release, perjury, or impeachment. The court must state its findings on the record.

(iii)The court may amend the conditions of release in accordance with the standards set forth in Rule 7.3 and Rule 7.4(b). In determining the method of release or the amount of bail, the court must consider the nature and circumstances of the offense, family or local ties, employment, financial resources, the defendant's character and mental condition, the length of residence in the community, the record of arrests or convictions, the risk of harm to the victim, other persons, or the community, and

appearances at prior court proceedings.

(D*)* Release upon Sentence Completion. A defendant held in custody pending appeal must be released if the defendant's term of incarceration is completed before the appeal is decided.

(E) Superior Court Review. If the trial court enters an order setting a bond or requiring incarceration during the appeal, the defendant may petition the superior court to stay the execution of sentence and to allow the defendant's release either without bond or on a reduced bond.

(d) Burden of Proof. A court must determine issues under (a) and (c) by a preponderance of the evidence. The State bears the burden of establishing factual 35 issues under (a), (b) and (c)(2). The defendant bears the burden of establishing factual issues under (c)(1).

Rule 7.3. Conditions of Release

(a) Mandatory Conditions. Every order of release must contain the following conditions:

(1) the defendant must appear at all court proceedings;

(2) the defendant must not commit any criminal offense;

(3) the defendant must not leave Arizona without the court's permission; ~~and~~

(4) the defendant must not contact the victim, unless the court clearly finds good cause to conclude the victim's safety would be protected without a no-contact order; and

~~(4)~~ (5) if a defendant is released during an appeal after judgment and sentence, the defendant will diligently pursue the appeal.

(b) Mandatory Condition if Charged with an Offense Listed in A.R.S. § 13- 610(O)(3).

(1) *Generally.* If a defendant is charged with an offense listed in A.R.S. § 13-610(O)(3) and has been summoned to appear in court, the magistrate must order the defendant to report to the arresting law enforcement agency or its designee no later than 5 days after release, and submit a sample of buccal cells or other bodily substances for DNA testing as directed. The defendant must provide proof of compliance at the next scheduled court proceeding.

(2) *Required Notice.* The court must inform a defendant that a willful failure to comply with an order under (b)(1) will result in revocation of release.

(c) Additional Conditions. ~~The court must order the defendant not to contact a victim if such an order is reasonable and necessary to protect a victim from physical harm, harassment, intimidation, or abuse~~. The court ~~also~~ may impose as a condition of release one or more of the following conditions, if the court finds the condition is reasonable and necessary to secure the defendant's appearance or to protect another person or the community from risk of harm by the defendant. In making determinations under this rule, the court must consider, if provided, the results of a risk assessment approved by the Supreme Court and a law enforcement's lethality assessment.

(1) *Non-Monetary Conditions*. A court may impose the following non-monetary conditions:

(A) placing the defendant in the custody of a designated person or organization that agrees to provide supervision;

(B) restricting the defendant's travel, associations, or residence;

(C) prohibiting the defendant from possessing any dangerous weapon;

(D) engaging in certain described activities, or consuming intoxicating liquors or any controlled substance that is not properly prescribed;

(E) requiring the defendant to report regularly to and remain under the supervision of an officer of the court;

(F) returning the defendant to custody after specified hours; or

(G) imposing any other non-monetary condition that is reasonably related to securing the defendant's appearance or protecting others or the community from risk of harm by the defendant.

(2) *Monetary Conditions*.

(A) Generally. A court's imposition of a monetary condition of release must be based on an individualized determination of the defendant's risk of non- appearance, risk of harm to the victim, or to others or the community, and the defendant's financial circumstances. The court may not rely on a schedule or charge-based bond amounts, and it must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the defendant is unable to pay the imposed monetary condition.

(B) Least Onerous Alternative. If the court determines a monetary condition is necessary, it must impose the least onerous type of condition in the lowest amount necessary to secure the defendant's appearance or protect the victim, or other persons

or the community from risk of harm by the defendant.

(C) Types of Conditions. The types of monetary conditions a court may impose include the following:

(i) an unsecured appearance bond;

(ii) a deposit bond;

(iii) another type of secured bond; and

(iv) a cash bond.

Rule 7.4. Procedure

(a) Initial Appearance. At an initial appearance, the court must determine bail eligibility and the conditions for release. If the court decides that the defendant is eligible for release, the court must issue an order containing the conditions of release. The order must inform the defendant of the conditions and possible consequences for violating a condition, and that the court may immediately issue a warrant for the defendant's arrest if there is a violation.

(b) Bail Eligibility Hearing.

(1) *Right to Secure Witnesses, Cross-Examine, and Review Witness Statements.* At a bail eligibility hearing, each party has the right to secure the attendance of witnesses, cross-examine any witness who testifies, and to review any previous written statement by the witness before cross-examination.

(2) *Victims.* ~~Notwithstanding the time limits of Rule 39(g)(1), a victim must be afforded the rights provided in Rule 39(g).~~ A victim has the right to confer with the State about any decision regarding the preconviction release of the defendant. A victim must be given notice of a bail eligibility hearing and the victim has the right to be present and be heard by the court before the court modifies release conditions. If a victim objects to being called as a witness in a bail eligibility hearing, the court must require the party wishing to present the victim’s testimony to make an offer of proof and the court may require a victim to testify only if the court finds that the evidence in the offer of proof would likely impact the court’s decision on the matters under consideration at the hearing. If the opposing party stipulates to the information in the offer of proof, the victim will not be required to testify.

(3) *Admissibility.* Evidence is admissible at the hearing only if it is material to whether, and under what conditions, to release the defendant on bail and whether probable cause exists to hold the defendant for trial on each charge. Rules or objections calling for the

exclusion of evidence are inapplicable at a bail eligibility hearing.

(c) Later Review of Conditions.

(1) *Generally.* On motion or on its own, a court may reexamine bail eligibility or the conditions of release if the case is transferred to a different court or a motion alleges the existence of material facts not previously presented to the court.

(2) *Motion Requirements and Hearing.* The court may modify the conditions of release only after giving the parties an opportunity to respond to the proposed modification. ~~A motion to reexamine the conditions of release must comply with victims' rights requirements provided in Rule 39~~. A victim has the right to notice of and the right to be heard at any hearing regarding any motion to modify release conditions.

(3) *Eligibility for Bail.* If the motion is by the State and involves a defendant previously held eligible for bail at the initial appearance, it need not allege new material facts. The court must hold a hearing on the record as soon as practicable, but no later than 7 days after the motion's filing.

(d) Evidence. A court may base a release determination under this rule on evidence that is not admissible under the Arizona Rules of Evidence.

(e) Defendant's Bail Status. If the court makes the findings required under Rule 7.2(b)(1) or (b)(2) to deny bail, the court must order the defendant held without bail until further order. If not, the court must order the defendant released on bail under Rule 7.2(a).

(f) Review of Conditions of Release for Misdemeanors. No later than 10 days after arraignment, the court must determine whether to amend the conditions of release for any defendant held in custody on bond for a misdemeanor.

(g) Appointment of Counsel. The court must appoint counsel in any case in which the defendant is eligible for the appointment of counsel under Rule 6.1(b).

Rule 7.5. Review of Conditions; Revocation of Release

(a) On State's Petition. If the State files a verified petition stating facts or circumstances showing the defendant has violated a condition of release, the court may issue a summons or warrant under Rule 3.2, or a notice setting a hearing, to secure the defendant's presence in court and to consider the matters raised in the petition. A copy of the petition must be provided with the summons, warrant, or notice.

(b) On Pretrial Services' Report. If pretrial services submits a written report to the

court stating facts or circumstances showing the defendant has violated a condition of release, the court may issue a summons or warrant under Rule 3.2, or a notice setting a hearing, to secure the defendant's presence in court and to consider the matters raised in the report. A copy of the report must be provided to the State and provided with the summons, warrant, or notice.

(c) On Victim's Petition. If the prosecutor decides not to file a petition under (a), the victim may petition the court to revoke the defendant's bond or own recognizance release, or otherwise modify the conditions of the defendant's release. Before filing a petition, the victim must consult with the prosecutor about the requested relief. The petition must include a statement under oath by the victim asserting any harassment, threats, physical violence, abuse, or intimidation by the defendant, or on the defendant's behalf, against the victim or the victim's immediate family.

(d) Hearing; Modification of Conditions; Revocation.

(1) *Modification of Conditions of Release.* After a hearing on the matters set forth in the petition or report, the court may impose different or additional conditions of release if it finds that the defendant has willfully violated the conditions of release.

(2) *Revocation of Release on a Felony Offense.* The court may revoke release of a person charged with a felony if, after a hearing, the court finds that the proof is evident or presumption great as to the present charge and:

(A) probable cause exists to believe that the person committed another felony during the period of release; or

(B) the person poses a substantial danger to the victim, another person or the community, and no other conditions of release will reasonably assure the safety of the victim, other person or the community.

(e) Revocation of Release: DNA Testing. The State may file a motion asking the court to revoke a defendant's release for failing to comply with the court's order to provide a sample of buccal cells or other bodily substances for DNA testing under A.R.S. § 13-3967(F)(4) and to provide proof of compliance. The motion must state facts establishing probable cause to believe that the defendant has not complied with the order. At the defendant's next court appearance, the court must proceed in accordance with this rule's requirements and A.R.S. § 13-3967(F)(4).

(f) Revocation of Release: 10-print Fingerprinting. If a defendant fails to timely present a completed mandatory fingerprint compliance form or if the court has not received the process control number, the court may remand the defendant into custody for 10-print fingerprinting. If otherwise eligible for release, the defendant must be released from custody after being 10-print fingerprinted.

Rule 7.6. Transfer and Disposition of Bond

(a) Transfer upon Supervening Indictment. An appearance bond or release order issued following the filing of a felony complaint in justice court will automatically be transferred to a criminal case in superior court after an indictment is filed that alleges the same charges.

(b) Filing and Custody of Appearance Bonds and Security. A defendant must file an appearance bond and security, if ordered, with the clerk of the court in which a case is pending or the court in which the initial appearance is held. If the case is transferred to another court, the transferring court also must transfer any appearance bond and security.

(c) Forfeiture Procedure.

(1) *Arrest Warrant and Notice to Surety.* If the court is informed that the defendant has violated a condition of an appearance bond, it may issue a warrant for the defendant's arrest. No later than 10 days after the warrant's issuance, the court must notify the surety, in writing or electronically, that the warrant was issued.

(2) *Hearing and Notice.* After issuing the arrest warrant, the court must set a hearing within a reasonable time, no later than 120 days after it issued the warrant, requiring the parties and any surety to show cause why the bond should not be forfeited. The court must notify the parties and, if requested, the victim, and any surety of the hearing in writing or electronically. The forfeiture hearing may be combined with a Rule 7.5(d) hearing.

(3) *Forfeiture.* If the court finds that the violation is not excused, it may enter an order forfeiting all or part of the bond amount, and the State may enforce that order as a civil judgment. The order must comply with Arizona Rule of Civil Procedure 58(a).

(d) Exoneration.

(1) *Generally.* If the court finds before a violation that there is no further need for an appearance bond, it must exonerate the bond and order the return of any security.

(2) *Amount Returned.* When a deposit bond or cash bond is exonerated, the court must order the return of the entire amount deposited unless forfeited under Rule 7.6(c)(3) or the bond depositor authorizes it be applied to a financial obligation.

(3) *If the Defendant Is Surrendered, In-Custody, or Transferred.* The court must exonerate the bond if:

(A) the surety surrenders the defendant to the sheriff of the county in which the prosecution is pending, and:

(i) the surrender is on or before the day and time the defendant is ordered to appear in court; and

(ii) the sheriff informs the court of the defendant's surrender;

(B) the defendant is in the custody of the sheriff of the county in which the prosecution is pending on or before the day and time the defendant is ordered to appear in court under the following conditions:

(i) the surety provides the sheriff with an affidavit of surrender of the appearance bond; and

(ii) the sheriff reports the defendant is in custody and that the surety has provided an affidavit of surrender of the appearance bond; or

(C) before the defendant was released to the custody of the surety, the defendant was released or transferred to the custody of another government agency, preventing the defendant from appearing in court on the scheduled court date and the surety establishes:

(i) the surety did not know and could not have reasonably known of the release or transfer or that a release or transfer was likely to occur; and

(ii) the defendant's failure to appear was a direct result of the release or transfer.

(4) *Conditions When Not Required to Exonerate Bond.* The court is not required to exonerate the bond under (d)(2)(C) if a detainer was placed on the defendant before the bond was posted or the release or transfer to another government agency was for 24 hours or less.

(5) *Other Circumstances.* In all other instances, the decision whether or not to exonerate a bond is within the discretion of the court.

(6) *Post-Forfeiture Notice.* After filing an order of forfeiture, the court must provide:

(A) a copy of the order to the State, the defendant, the defendant's attorney, and the surety; and

(B) a copy of a signed order to the county attorney for collection.

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 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. No later than 25 days after a superior court arraignment, either party may move for a hearing to establish extraordinary circumstances requiring a suspension of Rule 8. No later than 5 days after the motion is filed , the court must hold a hearing on the motion, permit the victim to be heard, and, after considering the victim's right to a speedy trial, 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, the court 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 after arraignment if the defendant is in custody, except as provided in (a)(3).
(2) *Defendants out of Custody.* No later than 180 days after 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 after 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 after 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 14.3, 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 no later than 60 days after entry of the court's order. A trial ordered upon an appellate court's reversal of a judgment must begin no later than 90 days after the appellate court issues its mandate. A new trial ordered by a state court under Rule 32 or a federal court under collateral review must begin no later than 90 days after entry of the court's order.

(d) Extension of Time Limits. The court may extend the time limits in (a) and (c) 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. In setting the date, the court must consider the views of the victim, as well as the rights of both the defendant and the victim to a speedy trial.

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 after considering a victim's and the defendant's right to a speedy trial and 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 state specific reasons for continuing trial.

Rule 10.2. Change of Judge as a Matter of Right

(a) Entitlement.

(1) *Generally.* Each side in a criminal case is entitled to one change of judge as a matter of right. If two or more parties on a side have adverse or hostile interests, the presiding judge or that judge's designee may allow additional changes of judge as a matter of right.

(2) *Meaning of "Side."* Each case, including one that is consolidated, is treated as having only two sides.

(3) *Per Party Limit.* A party exercising a change of judge as a matter of right is not entitled to another change of judge as a matter of right.

(4) *Inapplicability to Certain Proceedings.* A party is not entitled to a change of

judge as a matter of right in a proceeding under Rule 32 or a remand for resentencing.

(b) Procedure.

(1) *Generally.* A party may exercise a right to change of judge by filing a "Notice of Change of Judge" signed by counsel or a self-represented defendant, and stating the name of the judge to be changed. The notice also must include an avowal that the party is making the request in good faith and not for an improper purpose. An attorney's avowal is in the attorney's capacity as an officer of the court.

(2) *"Improper Purpose."* "Improper purpose" means:

(A) for the purpose of delay;

(B) to obtain a severance;

(C) to interfere with the judge's reasonable case management practices;

(D) to remove a judge for reasons of race, gender or religious affiliation;

(E) for the purpose of using the rule against a particular judge in a blanket fashion by a prosecuting agency, defender group, or law firm;

(F) to obtain a more convenient geographical location; or

(G) to obtain an advantage or avoid a disadvantage in connection with a plea bargain or at sentencing, except as permitted under Rule 17.4(g).

(3) *Further Action by the Judge.* If a notice of change of judge is timely filed, the judge should proceed no further in the action, except to enter any necessary temporary orders before the action can be transferred to the presiding judge or the presiding judge's designee. If the named judge is the presiding judge, that judge may continue to perform the functions of the presiding judge.

(c)Timing.

(1) *Generally.* Except as provided in (c)(2), a party must file a notice of change of judge no later than 10 days after any of the following:

(A) the arraignment, if the case is assigned to a judge and the parties are given actual notice of the assignment at or before the arraignment;

(B) the superior court clerk's filing of a mandate issued by an appellate court; or

(C) in all other cases, actual notice to the requesting party of the assignment of the case to a judge.

(2) *Exception.* Despite (c)(1), if a new judge is assigned to a case less than 10 days before trial (inclusive of the date of assignment), a notice of change of judge must be filed, with appropriate actual notice to the other party or parties and any counsel for the victim, no later than by 5:00 p.m. on the next business day following actual receipt of a notice of the assignment or by the start of trial, whichever occurs earlier.

(d) Assignment to a New Judge and Effect on Other Defendants.

(1) *On Stipulation.* If a notice of change of judge is timely filed, the notice may inform the court that all the parties have agreed on a judge who is available and willing to accept the assignment. Such an agreement may be honored and, if so, it bars further changes of judge as a matter of right, unless the agreed-on judge later becomes unavailable. If a judge to whom the action has been assigned by agreement later becomes unavailable because of a change of calendar assignment, death, illness, or other legal incapacity, the parties may assert any rights under this rule that existed immediately before the assignment of the action to that judge.

(2) *Absent Stipulation.* If a timely notice of judge has been filed and no judge has been agreed on, the presiding judge must immediately reassign the action to another judge.

(3) *Effect on Other Defendants.* If there are multiple defendants, a notice of change of judge filed by one or more defendants does not require a change of judge as to the other defendants, even though the notice of change of judge may result in severance for trial purposes.

(e) Waiver. A party loses the right to a change of judge under this rule if the party participates before that judge in any contested matter in the case, a proceeding under Rule 17, or the beginning of trial.

(f) Following Remand. Unless previously exercised, a party may exercise a change of judge as a matter of right following an appellate court's remand for new trial, and no event connected with the first trial constitutes a waiver. A party may not exercise a change of judge as a matter of right following a remand for resentencing.

Rule 10.3. Changing the Place of Trial

(a) Grounds. A party is entitled to change the place of trial to another county if the party shows that the party cannot have a fair and impartial trial in that place for any reason other than the trial judge's interest or prejudice.

(b) Prejudicial Pretrial Publicity. If the grounds to change the place of trial are based on pretrial publicity, the moving party must prove that the dissemination of the prejudicial material probably will result in the party being deprived of a fair trial.

(c) Procedure. A party seeking to change the place of trial must file a motion seeking that relief. The motion must be filed before trial, and, in superior court, at or before a pretrial conference. The victim has the right to be heard on the matter. The court must consider the victim's right to be present and consider alternatives to moving the trial that will protect the defendant's right to a fair trial while reasonably allowing the victim to exercise the right to be present.

(d) Waiver. A party loses the right to change the place of trial if the party allows a proceeding to begin or continue without raising a timely objection after learning of the cause for challenge.

(e) Renewal on Remand. If an appellate court remands an action for a new trial on one or more offenses charged in an indictment or information, all parties' rights to change the place of trial are renewed, and no event connected with the first trial constitutes a waiver.

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~~) (f)(2), 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) for each expert who has examined a defendant or any evidence in the case, or who the State intends to call at trial:

(A) the expert's name, address, and qualifications;

(B) any report prepared by the expert and the results of any completed physical

examination, scientific test, experiment, or comparison conducted by the expert; and

(C) if the expert will testify at trial without preparing a written report, a summary of the general subject matter and opinions on which the expert is expected to testify;

(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, at the first pretrial conference.

(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, no later than 30 days before trial or 30 days after the defendant's request, whichever occurs first; and

(2) in a misdemeanor case, no later than 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 no later than 30 days after receiving 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.~~

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

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

~~(2)~~ (B) any law enforcement agency that has participated in the investigation of the case and is under the prosecutor's direction and control; and

~~(3)~~ (C) any other person who is under the prosecutor's direction or control and who participated in the investigation or evaluation of the case.

(i) Limitations. The State is not required to disclose a victim's identifying or locating information unless the court finds that disclosure is required to protect the defendant's constitutional rights. If disclosure of personal identifying or locating information is made to defense counsel, counsel must not disclose the information to any person other than counsel's staff and designated investigator, and must not provide the information to the defendant without prior court authorization and after considering the rights and views of the victim.

(ii) Redactions. Rule 15.5(e) applies to information withheld under this rule.

(g) Disclosure by Court Order.

(1) *Disclosure Order.* On the defendant's motion, a court may order any person other than the victim 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 an order, the court may modify or vacate the 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 under (i)(1)(B).

(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 of intent 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 or other disclosure as required in (b)(4);

(iii) a list of all documents, photographs, or other tangible objects, or electronically stored information 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 to the deadline extension.

(4) *Rebuttal and Penalty Phase Disclosures.* No later than 60 days after 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 name and address of each expert the State intends to call at the penalty hearing, and any report the expert has prepared or other disclosure as required in (b)(4); and

(D) a list of all documents, photographs or other tangible objects the State intends to use during the aggravation and penalty hearings.

(j) Item Prohibited by A.R.S. §§ 13-3551 et seq., or Is the Subject of a Prosecution Under A.R.S. § 13-1425.

(1) *Scope.* This rule applies to an item that cannot be produced or possessed under A.R.S. §§ 13-3551 et seq. or is an image that is the subject of a prosecution under A.R.S. § 13-1425, 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 in (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 if doing so 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) for each expert the defendant intends to call at trial:

(A) the expert's name, address, and qualifications;

(B) any report prepared by the expert and the results of any completed physical examination, scientific test, experiment, or comparison conducted by the expert; and

(C) if the expert will testify at trial without preparing a written report, a summary of the general subject matter on which the expert is expected to testify; and

(3) a list of all documents, photographs, other tangible objects, and electronically stored information 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 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 no later than 30 days after receiving 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 for 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 modify or vacate 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. No later than 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 or other disclosure as required in (c)(2), excluding any portions containing statements by the defendant; and

(iv) a list of all documents, photographs, other tangible objects, or electronically stored information 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 to the deadline extension and only after considering the victim's right to a speedy trial.

(2) *Later Disclosures.* No later than 60 days after 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; Victims' Right to Refuse

(a) Availability. A party or a witness may file a motion requesting the court to order the examination of any person, except the defendant or a victim that a defendant or someone working on their behalf seeks to examine ~~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 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) *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 nonprivileged documents, photographs, other tangible objects, or electronically stored information 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(A)-(E) or as otherwise ordered by the court.

(d) Manner of Taking.

(1) *Generally.* Unless this rule provides or the court orders otherwise, the parties must conduct depositions in the manner 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 questions in the manner 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 someone 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 no later than 14 days after the deposition, or no later 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 the right to be present, the officer must produce the defendant for the deposition and remain with the defendant until it is completed.

(f) Use. A party may use a deposition in the same manner as former testimony.

(g) Interviews, Depositions, and Other Discovery Requests of a Victim.

(1) *Communication.* The defense must communicate the request to interview the victim to the prosecutor or to the victim's attorney if the victim is represented. A victim's response to any request must be communicated through the prosecutor or the victim's attorney if the victim is represented. A defendant, a defendant's attorney, or any person acting on the defendant's behalf may not contact the victim.

(2) *Right to Refuse*. A victim has the right to refuse a defense request for interview, deposition, or any other discovery. If a victim consents to an interview, the victim has the right to refuse to answer any question and to terminate the interview at any time.

(3) *Right to assistance and to set conditions*. If a victim consents to a defense interview, the victim has the right to be accompanied by a parent or other relative, or by an appropriate support person named by a victim, including a victim's caseworker or advocate unless the testimony of the person accompanying the victim is required in the case. If the court finds that a party's claim that a person is a prospective witness is not made in good faith, it may impose sanctions, including holding counsel in contempt. A victim also has the right to condition the interview or deposition on specification of a reasonable date, time, duration, and location of the interview or deposition including a

requirement that it be held at the victim's home, at the prosecutor's office, or at an appropriate location in the courthouse.

(4) *Jury Instruction if a victim's refusal is commented on at trial.* If there is any comment or evidence at trial regarding a victim's refusal to be interviewed, the court must instruct the jury that a victim has the right under the Arizona Constitution to refuse an interview.

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 no later than 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. In determining new deadlines under this rule, the court must consider the victim's and defendant's right to a speedy trial.

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. A superior 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) discussing compliance 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. The court may require the parties to confer and submit memoranda before the conference.

(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 after considering the rights and views of the victim, the victim's right to a speedy trial, and the victim's right to be present at all proceedings;

(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, after considering the views of the victim, may order a prosecution dismissed without prejudice 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.

(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. Before dismissing any case with prejudice, the court must consider a victim's right to justice and due process.

(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 the defendant also is being held on another charge. It also must exonerate any appearance bond.

Rule 17.1. The Defendant's Plea

(a) Jurisdiction; Personal Appearance.

(1) *Jurisdiction*. Only a court having jurisdiction to try the offense may accept a

plea of guilty or no contest.

(2) *Personal Appearance*. Except as provided in these rules, a court may accept a plea only if the defendant makes it personally in open court. If the defendant is a corporation, defense counsel or a corporate officer may enter a plea for the corporation. For purposes of this rule, a defendant who makes an appearance under Rule 1.5 is deemed to personally appear.

(b) Voluntary and Intelligent Plea. A court may accept a plea of guilty or no contest only if the defendant enters the plea voluntarily and intelligently. Courts must use the procedures in Rules 17.2, 17.3, and 17.4 to assure compliance with this rule.

(c) No Contest Plea. A plea of no contest may be accepted only after the court gives due consideration to the parties' views and to the interest of the public in the effective administration of justice.

(d) Record of a Plea. The court must make a complete record of all plea proceedings.

(e) Waiver of Appeal. A defendant who pleads guilty or no contest in a noncapital case, waives the right to file a notice of appeal and to have an appellate court review the proceedings on a direct appeal under Rule 31. A defendant who pleads guilty or no contest may seek relief under Rule 33 by filing a Notice Requesting Post-Conviction Relief and a Petition for Post-Conviction Relief in the trial court.

(f) Limited Jurisdiction Court Alternatives for Entering a Plea.

(1) *Telephonic Pleas*.

(A) Eligibility. A limited jurisdiction court has discretion to accept a telephonic plea of guilty or no contest to an offense if the defendant provides written certification and the court finds the defendant:

(i) resides out-of-state or more than 100 miles from the court in which the plea is taken; or

(ii) has a serious medical condition so that appearing in person would be an undue hardship, regardless of distance to the court.

(B) Procedure. The defendant must submit the plea in writing substantially in the form set forth in Rule 41, Form 28. It must include the following:

(i) a statement by the defendant that the defendant has read and understands the information in the form, waives applicable constitutional rights for a plea, and enters a plea of guilty or no contest to each of offenses in the complaint; and

(ii) a certification from a peace officer in the state in which the defendant resides—or, if the defendant is an Arizona resident, a peace officer in the county in which the defendant resides—that the defendant personally appeared before the officer and signed the certification described in (f)(1)(B)(i), and the officer affixes the defendant's fingerprint to the form.

(C) *Judicial Findings.* Before accepting a plea, the court must hold a telephonic hearing with the parties, the victim if any, inform the defendant that the offense may be used as a prior conviction, and find:

(i) it has personally advised the defendant of the items set forth in the form;

(ii) a factual basis exists for believing the defendant is guilty of the charged offenses; and

(iii) the defendant's plea is knowingly, voluntarily, and intelligently entered.

(2) *Plea by Mail.*

(A) Eligibility. A limited jurisdiction court has discretion to accept by mail a written plea of guilty or no contest to a misdemeanor or petty offense if the court finds that a personal appearance by the defendant would constitute an undue hardship such as illness, physical incapacity, substantial travel distance, or incarceration. The presiding judge of each court must establish a policy for the State's participation in pleas submitted by mail.

(B) When a Plea May Not Be Accepted by Mail. A court may not accept a plea by mail in a case:

(i) involving a victim;

(ii) in which the court may impose a jail term, unless the defendant is sentenced to time served or the defendant is currently incarcerated and the proposed term of incarceration would be served concurrently and not extend the period of incarceration;

(iii) in which the court may sentence the defendant to a term of probation;

(iv) involving an offense for which A.R.S. § 13-607 requires the taking of a fingerprint upon sentencing; or

(v) in which this method of entering a plea would not be in the interests of justice.

(C) Procedure. The defendant must submit the plea in writing substantially in the form set forth in Rule 41, Form 28(a). The defendant must sign the plea form, which must include the following:

(i) a statement that the defendant has read and understands the information on the form, waives applicable constitutional rights for a plea, and enters a plea of guilty or no contest to each of the offenses in the complaint and consents to the entry of judgment; and

(ii) a statement for the court to consider when determining the sentence.

(D) Mailing. The court must mail a copy of the judgment to the defendant.

Rule 18.1 Trial by Jury.

(a) By Jury. The number of jurors required to try a case and render a verdict is provided by law.

(b) Waiver.

(1) *Generally.* The defendant may waive the right to a trial by jury if the State and the court consent. If the State and the court agree, a defendant also may waive the right to have a jury determine aggravation or the penalty in a capital case.

(2) *Voluntariness.* Before accepting a defendant's waiver of a jury trial, the court must address the defendant personally, inform the defendant of the defendant's right to a jury trial, and determine that the defendant's waiver is knowing, voluntary, and intelligent.

(3) *Form of Waiver.* A defendant's waiver of a jury trial must be in writing or on the record in open court.

(4) *Withdrawal of Waiver.* With the court's permission, a defendant may withdraw a waiver of jury trial, but a defendant may not withdraw a waiver after the court begins taking evidence.

(c) Victim Participation. Upon request of the victim, the victim must have an opportunity to confer with the prosecutor about trial before the trial begins.

Rule 19.7. Victim’s Right to Use of Facility Dog.

(a) Definition. For the purposes of this rule, a “facility dog” means a dog that is a graduate of an assistance dog organization that is a member of an organization or entity whose main purpose is to improve the areas of training, placement and utilization of assistance dogs, staff and volunteer education and to establish and promote standards of excellence in all areas of assistance dog acquisition, training, and partnership.

(b) Mandatory. A court must allow a victim who is under eighteen at the time of testifying to have a facility dog accompany the victim while testifying if a facility dog is available.

(c) Discretionary. A court may permit any victim or witness to use a facility dog.

(d) Notice. A party seeking to use a facility dog must file a notice that includes the certification of the dog, the name of the certifying person or entity, and proof that the dog is insured.

(e) Jury Instruction. The court must take reasonable measures to ensure that the presence of a facility dog does not influence the jury or reflect on the truthfulness of any testimony that is offered during the use of a facility dog including instructing the jury on the role of the facility dog and that the facility dog is a trained animal.

Rule 19.8. Victim Testimony.

(a) A victim has the right to refuse to testify regarding any identifying or locating information unless the court orders disclosure after finding a compelling need for the information, and any proceeding on any motion to require such testimony must be in camera.

Rule 24.3. Modification of Sentence

(a) Generally. No later than 60 days of the entry of judgment and sentence or, if a notice of appeal has already been filed under Rule 31, no later than 15 days after the appellate clerk distributes a notice under Rule 31.9(e) that the record on appeal has been filed, the court may correct any unlawful sentence or one imposed in an unlawful manner.

(b) Mitigation. Unless otherwise provided by law, the court may mitigate a monetary obligation imposed at sentencing. ~~The provisions of Rule 39~~ Victims' rights apply to any criminal proceeding concerning mitigation of a monetary obligation.

(c) Appeal.

(1) *Noncapital Cases.* In noncapital cases, the party appealing a final decision under Rule 24.3 must file a notice of appeal with the trial court clerk no later than 20 days after entry of the decision in superior court cases, or no later than 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.

Rule 26.4. Presentence Report.

(a) When Required. The court must order a presentence report in every case in which it has discretion over the penalty. However, a presentence report is optional if:

(1) the defendant may only be sentenced to imprisonment for less than one year;

(2) the court granted a request under Rule 26.3(a)(1)(B); or

(3) a presentence report concerning the defendant is already available.

(b) When Prepared. A presentence report may not be prepared until after the court makes a determination of guilt or the defendant enters a plea of guilty or no contest.

(c) When Due. Unless the court grants a request under Rule 26.3(a)(1)(B) for an earlier sentencing, the presentence report must be delivered to the sentencing judge and to all counsel at least two days before the date set for sentencing. A victim or victim's attorney has the right to a copy of the presentence report provided to the defendant except those parts that are excised by the court or are confidential by law.

(d) Inadmissibility. Neither a presentence report nor any statement made in connection with its preparation is admissible as evidence in any proceeding bearing on the issue of guilt.

Rule 26.7. Presentencing Hearing; Prehearing Conference

(a) Request for a Presentencing Hearing. If the court has discretion concerning the imposition of a penalty, it may—and, on any party's request, must—hold a presentencing hearing before sentencing.

(b) Timing and Conduct of a Presentencing Hearing.

(1) *Timing.* The court may not hold a presentencing hearing until the parties have had an opportunity to review all reports concerning the defendant prepared under Rules 26.4 and 26.5.

(2) *Presenting Evidence.* At the hearing, the victim must be afforded the right to be heard and any party may introduce any reliable, relevant evidence, including hearsay, to show aggravating or mitigating circumstances, to show why the court should not impose

a particular sentence, or to correct or amplify the presentence, diagnostic, or mental health reports.

(3) *Record.* A presentencing hearing must be held in open court, and the court must make a complete record of the proceedings.

(c) Prehearing Conference.

(1) *Generally.* On motion or on its own, the court may hold a prehearing conference to determine what matters are in dispute, and to limit or otherwise expedite a presentencing hearing.

(2) *Attendance of Probation Officer.* The court may order the probation officer who prepared the presentence report to attend a prehearing conference.

(3) *Postponing Sentencing and Presentencing Hearing.* At the conference, the court may postpone the date of sentencing for no more than 10 days beyond the maximum extension permitted by Rule 26.3(b), and may delay the presentencing hearing accordingly, to allow the probation officer to investigate any matter the court specifies, or to refer the defendant for mental health examinations or diagnostic tests.

Rule 26.10. Pronouncement of judgment and sentence

(a) Judgment. In pronouncing judgment on any noncapital count, the court must indicate whether the defendant's conviction is pursuant to a plea or trial, the offense for which the defendant was convicted, and whether the offense falls in the categories of dangerous, non-dangerous, repetitive, or non-repetitive offenses.

(b) Sentence. When the court pronounces sentence, it must:

(1) give the defendant <u>and the victim</u> an opportunity to address the court;

(2) state that it has considered the time the defendant has spent in custody on the present charge;

(3) explain to the defendant the terms of the sentence or probation;

(4) specify the beginning date for the term of imprisonment and the amount of time to be credited against the sentence as required by law;

(5) For any felony offense or a violation of §§ 13-1802, 13-1805, 28-1381, or 28-1382, permanently affix the defendant's right index fingerprint to the sentencing document or order; and

(6) if the court sentences the defendant to a prison term, the court must send, or direct the clerk to send, to the Department of Corrections the sentencing order and copies of all presentence reports, probation violation reports, and medical and

mental health reports prepared for, or relating to, the defendant.

Rule 26.17. Victim's Right to Information

(a) Sentencing. After sentencing, the victim has a right to be informed of the disposition of the case.

(b) Restitution. A victim has a right to be informed of the right to restitution upon conviction of the defendant, of the items of loss included within the scope of restitution, and of the procedures for invoking that right.

(c) Post-Conviction Notification. A victim has a right to be informed of the procedures to opt into post-conviction notification.

Rule 27.3. Modification of Conditions or Regulations

(a) By a Probation Officer. A probation officer may modify or clarify any regulation imposed.

(b) By the Court.

(1) *Generally.* Any modification of probation must comply with case law and statutes, due process, and statutory limitations. The court may modify or clarify any condition or regulation of probation after:

(A) Giving notice to the State, the probationer, the probation department, and a victim who has the right to notice under Rule 27.10; ~~and~~

(B) Considering and investigation report, when required by (b)(3) of this rule~~.~~; and

(C) The Due Process Rights of the Victim**.** The Due Process Rights of the victim include giving the victim notice of any proceedings involving a probation modification and an opportunity to be heard by the court regarding the modification and of any term of probation that will substantially affect the victim's safety, the defendant's contact with the victim, or restitution.

(2) *Who May Request Modification or Clarification.* At any time before the probationer's absolute discharge, a probationer, probation officer, the State, or any other person the court designates, may ask the court to modify or clarify any condition or regulation.

(3) *Required Investigation Report*. Upon any request for modification from supervised to unsupervised probation, the probation department must prepare and file an investigative report describing the probationer's compliance with conditions and

regulations and recommending either for or against a request to modify.

(4)*Restitution.* At any time before the probationer's absolute discharge, persons entitled to restitution under a court order may ask the court, based on changed circumstances, to modify or clarify the manner in which restitution is paid.

(5) *Hearing.* The court may hold a hearing on any request for modification or clarification under (c)(2) or (c)(3).

(c) Written Copy and Effect. The probationer and the probation department must be given a written copy of any modification or clarification of a condition or regulation of probation. A modification of a regulation may go into effect immediately. An oral modification may not be the sole basis for revoking probation unless the condition or regulation is in writing and both the probationer and the probation department received a copy before the violation.

Rule 27.4. Early Termination of Probation

(a) Discretionary Probation Termination.

(1) *Generally.* At any time during the term of probation, the court may terminate probation and discharge the probationer as provided by law after:

(A) Giving notice to the State, the probationer, the probation department, and the victim who has the right to notice under Rule 27.10; ~~and~~

(B) Considering an investigation report~~.~~; and

(C) Considering the rights and views of the victim.

(2) *Who May Request Termination.* At any time before a probationer's discharge from probation, the court may terminate probation and discharge the probationer on motion of the probationer, probation department, the State or the court.

(3) *Required Investigation Report*. Upon any request for termination, the probation department must prepare and file an investigative report describing the probationer's compliance with conditions and regulations recommending either for or against a request to modify.

(4) *Hearing*. The court may hold a hearing on any request for early termination.

(b) Earned Time Credit Probation Termination. The court may reduce the term or duration of supervised probation for earned time credit as provided by law.

(c) Written Copy and Effect. The court must provide probationer and the probation department a copy of the order terminating probation and specifying the effective date.

Rule 27.7. Initial Appearance After Arrest

(a) Probationer Arrested. If a probationer is arrested on a warrant issued under Rule 27.6 or is arrested by the probationer's probation officer under A.R.S. § 13-901(D), the probationer must be taken without unreasonable delay to the court with jurisdiction over the probationer.

(b) Notice. If a probationer is arrested on a warrant issued under Rule 27.6, the court must immediately notify the probationer's probation officer of the initial appearance.

(c) Procedure. At the initial appearance, the court must advise the probationer of the probationer's right to counsel under Rule 6, inform the probationer that any statement the probationer makes before the hearing may be used against the probationer, set the date of the revocation arraignment, and make a release determination~~.~~, after considering the rights and views of the victim.

Rule 27.8. Probation Revocation

(a) Revocation Arraignment.

(1) *Timing.* The court must hold a revocation arraignment no later than 7 days after the summons is served or after the probationer's initial appearance under Rule 27.7.

(2) *Conduct of the Proceeding.* The court must inform the probationer of each alleged probation violation, and the probationer must admit or deny each allegation.

(3) *Setting a Violation Hearing*. If the probationer does not admit to a violation or if the court does not accept an admission, the court must set a violation hearing, unless both parties agree that a violation hearing may proceed immediately after the arraignment.

(b) Violation Hearing.

(1) *Timing.* The court must hold a hearing to determine whether a probationer has violated a written condition or regulation of probation no less than 7 and no more than 20 days after the revocation arraignment, unless the probationer in writing or on the record requests, and the court agrees, to set the hearing for another date.

(2) *Probationer's Right to Be Present.* The probationer and the victim ~~has~~ have a right to be present at the violation hearing. If the probationer was previously arraigned under Rule 27.8, the hearing may proceed in the probationer's absence under Rule 9.1.

(3) *Conduct of the Hearing.* A violation must be established by a preponderance of

the evidence. Each party may present evidence and has the right to cross- examine any witness who testifies. The court may receive any reliable evidence, including hearsay, that is not legally privileged.

(4) *Admissions.* An admission by the probationer at any hearing in the same case relating to the probationer's failure to pay a monetary obligation imposed in the case is inadmissible in the probation violation hearing, unless the probationer was represented by counsel at the hearing in which the admission was made.

(5) *Findings and Setting a Disposition Hearing.* If the court finds that the probationer committed a violation of a condition or regulation of probation, it must make specific findings of the facts that establish the violation and then set a disposition hearing.

(c) Disposition Hearing.

(1) *Timing.* The court must hold a disposition hearing no less than 7 nor more than 20 days after making a determination that the probationer has violated a condition or regulation of probation.

(2) *Disposition.* Upon finding that the probationer violated a condition or regulation of probation, the court may revoke, modify, or continue probation. If the court revokes probation, the court must pronounce sentence in accordance with Rule 26. The court may not find a violation of a condition or regulation that the probationer did not receive in writing.

(d) Waiver of Disposition Hearing. If a probationer admits, or the court finds, a violation of a condition or regulation of probation, the probationer may waive a disposition hearing. If the court accepts the waiver, it may proceed immediately to a disposition under (c)(2).

(e) Disposition upon Determination of Guilt for a Later Offense. If a court makes a determination of guilt under Rule 26.1(a) that the probationer committed a later criminal offense, the court need not hold a violation hearing and may set the matter for a disposition hearing at the time set for entry of judgment on the criminal offense.

(f) Record. The court must make a record of the revocation arraignment, violation hearing, and disposition hearing.

Rule 27.10. Victims' Rights in Probation Proceedings.

The court must afford a victim who has requested notice ~~under Rule 39~~ the opportunity to be present and to be heard at any proceeding involving:

(a) the termination of any type of probation;

(b) probation revocation dispositions;

(c) a modification of probation or intensive probation conditions or regulations that would substantially affect the probationer's contact with, or safety of, the victim or that would affect restitution or incarceration status; or

(d) transfers of probation jurisdiction.

Rule 31.3. Suspension of These Rules; Suspension of an Appeal; Computation of Time; Modifying a Deadline

(a) Suspension of Rule 31. For good cause, an appellate court, on motion or on its own, may suspend any provision of this rule in a particular case, and may order such proceedings as the court directs.

(b) Suspension of an Appeal.

(1) *Generally.* An appellate court on motion or on its own, after considering the rights of the victim including the right to prompt and final conclusion of the case after conviction and sentence, may suspend an appeal if a motion under Rule 24 or a petition under Rule 32 is pending to permit the superior court to decide those matters.

(2) *Notice.* If an appeal is suspended, the appellate clerk must notify the parties, the superior court clerk, and, if certified transcripts have not yet been filed, the certified reporters or transcribers.

(3) *Later Notification.* No later than 20 days after the superior court's decision on the Rule 24 motion or Rule 32 petition, the appellant must file with the appellate clerk either a notice of reinstatement of the appeal or a motion to dismiss the

appeal under Rule 31.24(b), and must serve a copy of such documents on all persons entitled to notice under (b)(2).

(c) New Matters. Other than a petition for post-conviction relief that is not otherwise precluded under Rule 32.2, a party to an appeal may not, without the appellate court's consent, file any new matter in the superior court later than 15 days after the appellate clerk distributes a notice under Rule 31.9(e) that the record on appeal has been filed.

(d) Computation of Time. Rule 1.3(a) governs the computation of any time period in Rule 31, an appellate court order, or a statute regarding a criminal appeal, except that 5 calendar days are not added to the time for responding to an electronically served

document.

(e) Modifying a Deadline. A party seeking to modify a deadline in the appellate court must obtain an appellate court order authorizing the modified deadline. For good cause and after considering the rights of the victim, an appellate court may shorten or extend the time for doing any act required by Rule 31, a court order, or an applicable statute.

Rule 32.7. Petition for Post-Conviction Relief

(a) Deadlines for Filing a Petition for Post-Conviction Relief.

(1) *Noncapital Cases.*

(A) Generally. In every case except those in which the defendant was sentenced to death:

(i) Appointed counsel must file a petition no later than 60 days after the date of appointment.

(ii)A self-represented defendant must file a petition no later than 60 days after the notice is filed or the court denies the defendant's request for appointed counsel, whichever is later.

(B) Time Extensions. For good cause and after considering the rights of the victim, including the right to a prompt and final conclusion after conviction and sentence, the court may grant a defendant in a noncapital case a 30-day extension to file the petition. The court may grant additional 30-day extensions only on a showing of extraordinary circumstances.

(2) *Capital Cases.*

(A) Generally. In a capital case, the defendant must file a petition no later than 12 months after the first notice is filed.

(B) Filing Deadline for Any Successive Petition. On a successive notice in a capital case, the defendant must file the petition no later than 30 days after the notice is filed.

(C) Time Extensions. For good cause, the court may grant a capital defendant one 60-day extension in which to file a petition. After considering the rights of the victim, including the right to a prompt and final conclusion after conviction and sentence, the court may grant additional extensions for good cause.

(b) Form of Petition. A petition for post-conviction relief should contain the information shown in Rule 41, Form 25, and must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities.

(c) Length of Petition.

(1) *Non-Capital Cases.* In noncapital cases, the petition must not exceed 28 pages.

(2) *Capital Cases.* In capital cases, the petition must not exceed 160 pages.

(d) Declaration. A petition by a self-represented defendant must include a declaration stating under penalty of perjury that the information contained in the petition is true to the best of the defendant's knowledge and belief.

(e) Attachments. The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition.

(f) Effect of Non-Compliance. The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 40 days after that order is entered to revise the petition to comply with this rule, and to return it to the court for refiling. If the defendant does not return the petition within 40 days, the court may dismiss the proceeding with prejudice. The State's time to respond to a refiled petition begins on the date of refiling.

Rule 32.9. Response and Reply; Amendments

(a) State's Response.

(1) *Deadlines.* The State must file its response no later than 45 days after the defendant files the petition. The court for good cause may grant the State a 30-day extension to file its response and may grant the State additional extensions only on a showing of extraordinary circumstances and after considering the rights of the victim~~.~~, including the right to a prompt and final conclusion after conviction and sentence.

(2) *Contents.* The State's response must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities, and must attach any affidavits, records, or other evidence that contradicts the petition's allegations. The State must plead and prove any ground of preclusion by a preponderance of the evidence.

(b) Defendant's Reply. The defendant may file a reply 15 days after a response is served. The court for good cause may grant one extension of time, and additional extensions only for extraordinary circumstances~~.~~ after considering the rights of the victim, including the right to a prompt and final conclusion after conviction and sentence.

(c) Length of Response and Reply. (1) *Non-Capital Cases.* In noncapital cases, the State's response must not exceed 28 pages, and defendant's reply, if any, must not exceed 11 pages.

(2) *Capital Cases.* In capital cases, the State's response must not exceed 160 pages, and defendant's reply must not exceed 80 pages.

(d)Amending the Petition. After the defendant files a petition for post-conviction relief, the court may permit amendments to the petition only for good cause.

Rule 33.7. Petition for Post-Conviction Relief

(a) Deadlines for Filing a Petition for Post-Conviction Relief.

(1) *Defendant with Counsel*. Appointed counsel must file a petition no later than 60 days after the date of appointment.

(2) *Self-Represented Defendant.* A self-represented defendant must file a petition no later than 60 days after the notice is filed or the court denies the defendant's request for appointed counsel, whichever is later.

(3) *Time Extensions.* For good cause and after considering the rights of the victim, including the right to a prompt and final conclusion after conviction and sentence, the court may grant a defendant a 30-day extension to file the petition. The court may grant additional 30-day extensions only on a showing of extraordinary circumstances.

(b) Form of Petition. A petition for post-conviction relief should contain the information shown in Rule 41, Form 25, and must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities.

(c) Length of Petition. The petition must not exceed 28 pages.

(d) Declaration. A petition by a self-represented defendant must include a declaration stating under penalty of perjury that the information contained in the petition is true to the best of the defendant's knowledge or belief.

(e) Attachments. The defendant must attach to the petition any affidavits, records, or other evidence currently available to the defendant supporting the allegations in the petition.

(f) Effects of Non-Compliance. The court will return to the defendant any petition that fails to comply with this rule, with an order specifying how the petition fails to comply. The defendant has 40 days after that order is entered to revise the petition to comply with this rule, and to return it to the court for refiling. If the defendant does not return the petition within 40 days, the court may dismiss the proceeding with prejudice. The State's time to respond to a refiled petition begins on the date of refiling.

Rule 33.9. Response and Reply; Amendments

(a) State's Response.

(1) *Deadlines.* The State must file its response no later than 45 days after the defendant files the petition. The court for good cause may grant the State a 30-day extension to file its response and may grant the State additional extensions only on a showing of extraordinary circumstances and after considering the rights of the victim~~.~~, including the right to a prompt and final conclusion after conviction and sentence.

(2) *Contents.* The State's response must include a memorandum that contains citations to relevant portions of the record and to relevant legal authorities, and must attach any affidavits, records, or other evidence that contradicts the petition's allegations. The State must plead and prove any ground of preclusion by a preponderance of the evidence.

(b) Defendant's Reply. The defendant may file a reply 15 days after a response is served. The court for good cause may grant one extension of time, and additional extensions only for extraordinary circumstances.

(c) Length of Response and Reply. The State's response must not exceed 28 pages, and defendant's reply, if any, must not exceed 11 pages.

(d) Amending the Petition. After the defendant files a petition for post-conviction relief, the court may permit amendments to the petition only for good cause.

Rule 39. Victims' Rights

(a) Definitions and Limitations.

(1) *Criminal Proceeding.* As used in this rule, a "criminal proceeding" is any matter scheduled and held before a trial court, telephonically or in person, at which the defendant has the right to be present, including any post-conviction matter.

(2) *Identifying and Locating Information*. As used in this rule, "identifying and locating information" includes a person's date of birth, social security number, official state or government issued driver license or identification number, the person's address, telephone number, email addresses, and place of employment.

(3) *Limitations.*

(A) Cessation of Victim Status. A victim retains the rights provided in these rules until the rights are no longer enforceable under A.R.S. §§ 13-4402, 13-4402.01, and 13-4433.

(B) Legal Entities. The victim's rights of any corporation, partnership, association, or other similar legal entity are limited as provided in statute.

(C) Conflicts Between Rule Provisions. If any provision of Rule 39 conflicts with a rule provision where a victim's right is addressed, the individual rule provision where the victim's right has been integrated shall prevail over Rule 39.

(b) Victims' Rights. These rules must be construed to preserve and protect a victim's rights to justice and due process. Notwithstanding the provisions of any other rule, a victim has and is entitled to assert each of the following rights:

(1) the right to be treated with fairness, respect and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process;

(2) the right to notice regarding the rights available to a victim under this rule and any other provision of law, and the court must prominently post or read the statement of rights in accordance with A.R.S. § 13-4438;

(3) upon request, the right to reasonable notice of the date, time, and place of any criminal proceeding in accordance with A.R.S. § 13-4409;

(4) the right to be present at all criminal proceedings;

(5) upon request, the right to be informed of any permanent or temporary release or any proposed release of the defendant;

(6) upon request, the right to confer with the State regarding:

(A) any decision about the preconviction release of the defendant;

(B) any pretrial resolution including any diversion program or plea offer;

(C) a decision not to initiate a criminal prosecution or to dismiss charges; and

(D) the trial, before the trial begins;

(7) upon request, the right to notice of and to be heard at any criminal proceeding involving:

(A) the initial appearance;

(B) the accused's post-arrest release or release conditions;

(C) a proposed suspension of Rule 8 or a continuance of a trial date;

(D) the court's consideration of a negotiated plea resolution;

(E) sentencing;

(F) the modification of any term of probation that will substantially affect the victim's safety, the defendant's contact with the victim, or restitution;

(G) the early termination of probation;

(H) a probation revocation disposition; and

(I) post-conviction release.

(8) the right to be accompanied at any interview, deposition, or criminal proceeding by a parent or other relative, or by an appropriate support person named by a victim, including a victim's caseworker or advocate, unless testimony of the person accompanying the victim is required in the case. If the court finds that a party's claim that a person is a prospective witness is not made in good faith, it may impose sanctions, including holding counsel in contempt;

(9) if the victim is eligible, the right to the assistance of a facility dog when testifying as provided in A.R.S. § 13-4442;

(10) the right to refuse to testify regarding any identifying or locating information unless the court orders disclosure after finding a compelling need for the information, and any proceeding on any motion to require such testimony must be in camera;

(11) the right to require the prosecutor to withhold, during discovery and other proceedings, the victim's identifying and locating information.

(A) Exception. A court may order disclosure of the victim's identifying and locating information as necessary to protect the defendant's constitutional rights. If disclosure is made to defense counsel, counsel must not disclose the information to any person other than counsel's staff and designated investigator, and must not convey the information to the defendant without prior court authorization.

(B) Redactions. Rule 15.5(e) applies to information withheld under this rule;

(12) the right to refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on the defendant's behalf, and:

(A) the defense must communicate requests to interview a victim to the prosecutor, not the victim;

(B) a victim's response to such requests must be communicated through the prosecutor; and

(C) if there is any comment or evidence at trial regarding a victim's refusal to be interviewed, the court must instruct the jury that a victim has the right under the Arizona Constitution to refuse an interview;

(13) at any interview or deposition conducted by defense counsel, the right to condition the interview or deposition on specification of a reasonable date, time, duration, and location of the interview or deposition, including a requirement that it be held at the victim's home, at the prosecutor's office, or at an appropriate location in the courthouse;

(14) the right to terminate an interview at any time or refuse to answer any question during the interview;

(15) the right to a copy of any presentence report provided to the defendant except those parts that are excised by the court or are confidential by law;

(16) the right to be informed of the disposition of the case;

(17) the right to a speedy trial or disposition and a prompt and final conclusion of the case after conviction and sentence; and

(18) the right to be informed of a victim's right to restitution upon conviction of the defendant, of the items of loss included within the scope of restitution, and of the procedures for invoking the right.

(c) Exercising the Right to Be Heard.

(1) *Nature of the Right*. If a victim exercises the right to be heard, the victim does not do so as a witness and the victim is not subject to cross-examination. A victim is not required to disclose any statement to any party and is not required to submit any written statement to the court. The court must give any party the opportunity to explain, support, or refute the victim's statement. This subsection does not apply to victim impact statements made in a capital case under A.R.S. § 13-752(R).

(2) *Victims in Custody.* If a victim is in custody for an offense, the victim's right to be heard under this rule is satisfied by affording the victim the opportunity to submit a written statement.

(3) *Victims Not in Custody.* A victim who is not in custody may exercise the right to be heard under this rule through an oral statement or by submitting a written or recorded

statement.

(4) *At Sentencing.* The right to be heard at sentencing allows the victim to present evidence, information, and opinions about the criminal offense, the defendant, the sentence, or restitution. The victim also may submit a written or oral impact statement to the probation officer for use in any presentence report.

(d) Assistance and Representation.

(1) *Right to Prosecutor's Assistance.* A victim has the right to the prosecutor's assistance in asserting rights enumerated in this rule or otherwise provided by law. The prosecutor must inform a victim of these rights and provide a victim with notices and information that a victim is entitled to receive from the prosecutor by these rules and by law.

(2) *Standing.* The prosecutor has standing in any criminal proceeding, upon the victim's request, to assert any of the rights to which a victim is entitled by this rule or by any other provision of law.

(3) *Conflicts.* If any conflict arises between the prosecutor and a victim in asserting the victim's rights, the prosecutor must advise the victim of the right to seek independent legal counsel and provide contact information for the appropriate state or local bar association.

(4) *Representation by Counsel.* In asserting any of the rights enumerated in this rule or provided by any other provision of law, a victim has the right to be represented by personal counsel of the victim's choice. After a victim's counsel files a notice of appearance, all parties must endorse the victim's counsel on all pleadings. When present, the victim's counsel must be included in all bench conferences and in chambers meetings with the trial court that directly involve the victim's constitutional rights. At any proceeding to determine restitution, the victim has the right to present information and make argument to the court personally or through counsel.

(e) Victim's Duties.

(1) *Generally.* Any victim desiring to claim the notification rights and privileges provided in this rule must provide his or her full name, address, and telephone number to the entity prosecuting the case and to any other entity from which the victim requests notice, and to keep this information current.

(2) *Legal Entities.*

(A) Designation of a Representative. If a victim is a corporation, partnership, association, or other legal entity that has requested notice of the hearings to which it is entitled by law, that legal entity must promptly designate a representative by giving notice to the prosecutor and to any other entity from which the victim requests notice. The notice must include the representative's address and telephone number.

(B) Notice. The prosecutor must notify the defendant and the court if the prosecutor receives notice under (e)(2)(A).

(C) Effect. After notice is provided under (e)(2)(B), only the representative designated under (e)(2)(A) may assert the victim's rights on behalf of the legal entity.

(D) Changes in Designation. The legal entity must provide any change in designation in writing to the prosecutor and to any other entity from which the victim requests notice. The prosecutor must notify the defendant and court of any change in designation.

(f) Waiver. A victim may waive the rights and privileges enumerated in this rule. A prosecutor or a court may consider a victim's failure to provide a current address and telephone number, or a legal entity's failure to designate a representative, to be a waiver of notification rights under this rule.

(g) Court Enforcement of Victim Notice Requirements.

(1) *Court's Duty to Inquire.* At the beginning of any proceeding that takes place more than 7 days after the filing of charges by the State and at which the victim has a right to be heard, the court must inquire of the State or otherwise determine whether the victim has requested notice and has been notified of the proceeding.

(2) *If the Victim Has Been Notified.* If the victim has been notified as requested, the court must further inquire of the State whether the victim is present. If the victim is present and the State advises the court that the victim wishes the court to address the victim, the court must inquire whether the State has advised the victim of their rights. If not, the court must recess the hearing and the State must immediately comply with (d)(1).

(3) *If the Victim Has Not Been Notified.* If the victim has not been notified as requested, the court may not proceed unless public policy, the specific provisions of a statute, or the interests of due process require otherwise. In the absence of such considerations, the court may reconsider any ruling made at a proceeding at which the victim did not receive notice as requested.

(h) Appointment of Victim's Representative. Upon request, the court must appoint a representative for a minor victim or for an incapacitated victim, as provided in A.R.S. § 13-4403. The court must notify the parties if it appoints a representative.

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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO AMEND THE ARIZONA RULES OF CRIMINAL PROCEDURE	Supreme Court No. R-20-0031 **PROPOSED COMMENT**

Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar of Arizona (the "State Bar") hereby submits the following as its comment to the above-captioned Petition.

Discussion:

The Petition seeks to modify a vast majority of the Arizona Rules of Criminal Procedure to insert victim rights into most of the rules, while simultaneously maintaining Rule 39 which contains these rights. This is the third such petition submitted by Arizona Voice for Crime Victims in as many years; its former, similar petitions have been rejected. (*See,* R-18-001; R-19-0016). Similar rule changes were also requested and rejected by the Committee established by this Court to re-write the

1 Rules of Criminal Procedure in 2018.

2 Rule 39 sets forth the rights granted to crime victims as codified in the Victim's
3 Bill of Rights set forth in the Arizona Constitution, article 2, section 2.1 ("VBR") and
4 A.R.S. 13-4401 et. seq., known as the Victim Rights Implementation Act ("VIRA").

5 Decisions of the Arizona Supreme Court have made clear that victim rights must
6 be narrowly construed to deal only with procedural rules pertaining to victims. *Slayton*
7 *v. Shumway,* 166 Ariz. 87 (1990). This means those rules that "define, implement,
8 preserve and protect *the specific* rights *unique* and *peculiar* to crime victims as
9 guaranteed and *created by* the VBR." *State v. Brown,* 194 Ariz. 340, 343 (1999);
10 *Champlin v. Sargeant,* 192 Ariz. 371, 373 n. 2 (1998) (rulemaking power under VBR
11 "extends only so far as necessary to protect rights *created by* the [VBR] and not
12 beyond."); *State v. Hansen,* 25 Ariz. 287, 290 (2007) (same).

13 Like the prior petitions, the instant Petition will effectively expand victim
14 rights to procedural rules which neither pertain to nor directly implicate specific
15 rights unique and peculiar to victims created by VBR. As Petitioner states, the goal
16 of the proposed rule changes is to make "*all rules* governing criminal procedure"
17 protect victim rights to be heard and to participate in criminal proceedings. (Petition
18 at 5). This stance ignores the narrow construction given victim rights and essentially
19 elevates crime victims to the status of party in a criminal proceeding—which crime
20 victims are not. *Lindsay R. v. Cohen,* 236 Ariz. 565 (App. 2015) (noting VBR did

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not make victims parties). Moreover, Petitioner's repeated reliance upon VBR's general aims of affording victims "due process," as well as its insistence that victims be "treated with fairness, dignity and respect", are not rights "created by" VBR peculiar and unique to crime victims. Due process is a right similarly afforded criminal defendants by the federal and state constitutions, while the right to be "treated with fairness, respect and dignity" is afforded *all* participants in the civil and criminal process. *See, R.Sup.Ct., Rule 81, Canon 2, Rule 2.2* ("Impartiality and Fairness"); *Rule 2.8(B)*("Decorum, Demeanor…"). Both such rights pre-existed the VBR.

Rule 39 of the Arizona Rules of Criminal Procedure sets forth *all* rights afforded crime victims on matters unique and peculiar to them. Of course, trial courts are bound by and must follow the provisions of that rule. Although Petitioner sets forth five cases in which it claims victim rights were violated by the trial court, whether violations actually occurred in the matters described is dubious. Even assuming the contrary, every victim has "standing to seek an order, [or] to bring a special action…seeking to enforce any right or to challenge an order denying any right guaranteed to victims." *A.R.S. §13-4437(A).*

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CONCLUSION

The State Bar of Arizona respectfully requests that this Court reject the proposed amendments to the ARIZONA Rules of Criminal Procedure.

RESPECTFULLY SUBMITTED this ____day of__________________, 2020.

____
Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this _____ day of ___________________, 2020.

by: _______________________________

Petitioner: Martin Lynch
We the People Court Services
Legislative Committee Chairman – AZFR
1120 W Broadway Rd #55, Tempe AZ, 85282
602-550-6304
MDL2222222222@gmail.com

Returning Power and
Constitutional Authorities of Self Government
to the People

IN THE SUPREME COURT

STATE OF ARIZONA

PETITION to Amend SC Rule 32 – the People exercising the Final Authority over Attorney Licensure and Discipline after the State Bar has Made Their Decision – Attorneys have Rights Also)	Supreme Court Petition Number R-20-xxxx

To the Honorable Chief Justice Brutinel of the Arizona State Supreme Court,

¶1 The People respectfully request that Supreme Court Rule 32 be amended in conformance with AZ Art 2 Sect 23 "Jury Inviolate" such that the People make the final decision on Attorney Licensure and Discipline upon request of the Attorney. Attorneys should now be providing Jury verdicts in Civil Courts but there are many things they can't do for fear of losing their License. This would also correct pervasive violations of separation of powers. Don't Attorneys have Rights also?

¶2 The People are working on producing Statutes but regardless, the Constitution is the Supreme Law of the Land and everybody swears an oath per US Constitution Art 6 Sect 3.

Sincerely, **January 10, 2020**
/s/ Martin Lynch

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State Bar of Arizona
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Phoenix, AZ 85016-6288
(602) 340-7236

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND RULE 32 OF THE ARIZONA RULES OF SUPREME COURT

Supreme Court No. R-20-0026

PROPOSED COMMENT OF THE STATE BAR OF ARIZONA

Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar of Arizona (the "State Bar") hereby submits the following as its comment to the above-captioned Petition.

The Petition appears to be seeking to amend Rule 32, Ariz. R. Sup. Ct., by inserting the right to a jury trial in attorney disciplinary proceedings. Although not specifically stated in the Petition, the introductory comments on the Court's Rules Forum indicate the Petitioner seeks not only a jury trial, but with a jury panel inconsistent with the constitutional structure of either twelve or six jurors (Forum comment, Jan. 10, 2020, 9:12 pm).

Additionally, Petitioner seeks to vest original jurisdiction in a *de novo* proceeding, in the Superior Court. Such a structure would upend the existing

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attorney-discipline appellate process, somehow vesting jurisdiction on the ultimate issue in a court which is inferior to the court which has the original and exclusive jurisdiction in the matter. The imposition of sanctions, under Rules 58 and 59, are the province of the Supreme Court. Yet, this petition proposes a subsequent right to a jury trial as the final finder of fact in a structure that would overrule the findings of the disciplinary process and usurp the Court's authority.

The State Bar submits that a jury trial is inappropriate for proceedings under the Arizona Supreme Court's original jurisdiction over attorney disciplinary proceedings, which are "neither civil nor criminal, but are *sui generis*," Rule 48(a).

CONCLUSION

For the reasons stated above, the State Bar of Arizona respectfully requests that this Petition be denied.

RESPECTFULLY SUBMITTED this ____day of__________________, 2020.

____

Lisa M. Panahi
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this _____ day of ___________________, 2020.

1 by: ________________________________
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