

Hon. Timothy Dickerson
Committee on Limited Jurisdiction Courts
C/o Administrative Office of the Courts
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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND RULE 17.1(a),) Supreme Court No. R-10-0037
AND TO ADOPT FORM 28(a) IN)
RULE 41, ARIZONA RULES OF) Petitioner’s Reply
CRIMINAL PROCEDURE)
)
)
_____)

Petitioner, the Committee on Limited Jurisdiction Courts (“LJC”), offers the following reply to issues noted in the comments.

1. Should the rule require a showing of a “hardship” rather than an “undue hardship”? The State Bar believes that the phrase “undue hardship” lacks a definitional standard, and recommended that the word “undue” be deleted from the proposed rule.

The phrase “undue hardship” has precedents in the nomenclature of Arizona rules. Rule 12.22(d) and Rule 15.1 of the Arizona Rules of Criminal Procedure, and Rule 26(b) of the Arizona Rules of Civil Procedure, use the phrase “undue hardship.” Petitioner’s proposed Rule 17.1(a)(4) was modeled after existing Rule

17.1(a)(3), which permits telephonic pleas in limited jurisdiction courts. Rule 17.1(a)(3) requires a defendant to have “an undue burden or hardship” that justifies the use of that rule.

However, in the practical application of the proposed rule for pleas by mail, the LJC does not anticipate distinctions being made between a “hardship” and an “undue hardship”. Petitioner therefore concurs that the word “undue” may be removed, as suggested by the State Bar.

2. Should categories (i) through (iv) of the proposed rule be deleted?

Petitioner’s proposed rule has a provision that pleas by mail are not available in five categories of cases. Four of these categories are cases involving a victim; cases where a jail term, or a term of probation, may be imposed; and cases requiring the court to take a defendant’s fingerprint. The State Bar recommends that those four categories be removed, so that only the fifth category (cases where the entry of a plea by mail would not be in the interests of justice), would remain within the rule.

Petitioner disagrees with the State Bar’s recommendation. The specificity provided by these categories will benefit those who will use the rule. This detail will specifically advise defendants, many of whom are self-represented, of those cases that are inappropriate for disposition by mail. It will assist court clerks in processing plea by mail forms that undoubtedly will be submitted in cases that are

not suitable for disposition through the mail. And it will inform judges, some of whom may be sitting as judges pro tempore, of those cases that are not amenable to resolution by mail.

While the State Bar is correct in noting that “each case presents its own unique facts”, it’s also true that certain types of cases have special legal requirements. For examples, pursuant to A.R.S. § 13-607, a fingerprint must be affixed in open court on a judgment of guilt for driving under the influence or for theft; and under A.R.S. §§ 13-4423 and 13-4426, a victim has guaranteed rights at change of plea and sentencing proceedings. The categories of cases that were specifically excluded by the members of the LJC in this proposed rule were based on statutory, practical, and other considerations. All five categories of excluded cases should remain within the rule as essential provisions of a plea by mail procedure.

3. Should language in proposed form 28(a) that would require the defendant to plead guilty to “each and every offense” be deleted? Mr. Cantor has suggested this change so that defendant or defense counsel “may negotiate with the prosecution for a modified offer and submit that offer to the court in place of the form.”

While the process envisioned by Mr. Cantor is not clear, Form 28(a) does not preclude plea bargaining. Form 28(a) is designed for the simple,

straightforward resolution of all charges. It's contemplated that the form may be commonly used prior to defendant's arraignment, that is, prior to the time that the prosecutor becomes involved in the proceeding. However, the defendant or defendant's counsel can negotiate a plea with the prosecutor and, if the prosecutor agrees to file a notice of dismissal of one or more of the pending charges in consideration for a guilty plea to one or more other charges, Form 28(a) could still be utilized to enter a guilty plea to those remaining charges by mail.¹ If a remote defendant's plea agreement involves a higher degree of complexity, then a telephonic plea should be used rather than a plea by mail.

4. Should a fingerprint be required for every plea by mail? Petitioner does not support Mr. Cantor's suggestion that defendant's fingerprint be required for every plea by mail. Defendant's fingerprint is required for a telephonic plea (see Form 28), and while the proposed plea by mail procedure shares some of the characteristics of a telephonic plea, a plea by mail is not a substitute for a telephonic plea. The most notable distinction between the two procedures is that in a telephonic plea, the defendant engages in a dialogue with the court; with a plea by mail, there would be no colloquy between the court and the defendant.

Mr. Cantor's comment suggests that including the defendant's fingerprint on the plea by mail form could facilitate a guilty plea by mail on a DUI, but Petitioner

¹ There is no signature line for the prosecutor on proposed Form 28(a).

disagrees with adapting Rule 17.1(a)(4) to DUI cases. When the court accepts a plea on a DUI charge, a conversation between the court and the defendant is critical. The defendant who pleads guilty to a DUI may be serving jail time outside the state. The court needs to have a conversation with an out-of-state defendant about such things as where and when the defendant is going to serve that sentence, or where and when the defendant is going to obtain court-ordered counseling. The mere addition of a fingerprint on plea by mail form under these circumstances would not fully satisfy the interests of the court. The court's opportunity to engage in an essential dialogue with a defendant during plea proceedings in certain types of cases, including DUIs, is paramount to the defendant's convenience in entering a plea by mail.

RESPECTFULLY SUBMITTED this 8th day of June, 2011.

By _____
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