

Hon. Joseph Welty, Chair
Task Force on the Arizona Rules of Criminal Procedure, Petitioner
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SUPREME COURT OF ARIZONA

PETITION TO AMEND THE ARIZONA	)	Supreme Court No. R-17-_____
RULES OF CRIMINAL PROCEDURE	)	
	)	With a Request for a Modified
	)	Comment Period
_____	)	

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the Task Force on the Arizona Rules of Criminal Procedure (“Task Force”) requests this Court to amend the Arizona Rules of Criminal Procedure to restyle, simplify, and clarify the language of the existing rules, as well to make certain procedural and substantive changes to promote the just resolution of criminal cases.

Because the proposed amendments concern *all* of the current criminal rules, this petition presents the revisions as a complete new set of criminal rules rather than as individual rule amendments. Appendix A contains a clean version of the proposed set of rule amendments. The Task Force decided against preparing a “redline” version of the proposed changes because the changes are so extensive that a “redline” would be hopelessly confusing to a reader. Appendix B, however,

contains a detailed, rule-by-rule explanation of the amendments, including any proposed substantive changes.

Part I: Background. In December 2015, Chief Justice Bales established this Task Force by entering Administrative Order 2015-123. The Order directed the Task Force to:

review the Arizona Rules of Criminal Procedure to identify possible changes to conform to modern usage and to clarify and simplify language. These changes should promote the just resolution of cases without unnecessary delay or complexity. The Task Force shall seek input from various interested persons and entities with the goal of submitting a rule petition by January 2017 with respect to any proposed rule changes.

The Task Force includes ten judges, including representatives from the Arizona superior court, appellate courts, justice courts, and municipal courts. The Task Force also includes four prosecutors, four criminal defense attorneys, a representative of the court clerks, and a criminal law professor.

The proposed rule amendments are similar in kind to those proposed by the Court's Task Force on the Arizona Rules of Civil Procedure in Rule Petition R-16-0010, filed in January 2016. Last summer, the Court adopted those proposed amendments with modifications, effective January 1, 2017. Taking advantage of the fact that the Arizona civil rules are modeled mostly on the Federal Rules of Civil Procedure, the 2017 amendments incorporated many of the stylistic changes

that were made in the 2007 amendments to the federal rules as well as most of the substantive changes to the rules that were adopted in 2015.

The Criminal Rules Task Force has no corresponding federal rule model because the Arizona criminal rules differ substantially from the federal criminal rules. The Task Force, however, was able to use the restyling conventions and concepts adopted by the Civil Rules Task Force and generally followed in the recent federal rule restyling efforts. Like its civil rules predecessor, the Task Force proposes substantive changes as well as stylistic revisions.

Part II: General Principles. The Task Force was mindful that the criminal rules apply at multiple court levels and in cases with varying degrees of complexity. It was also aware that a significant number of defendants in criminal proceedings are self-represented. Accordingly, the Task Force adhered to the following principles in proposing rule amendments:

1. The rules should be clearly written and not present traps for the unwary.
2. If comments to a rule are necessary to understand the rule, then the rule is incomplete. Substantive matters belong in the rules, not in the comments.
3. If existing case law clarifies or interprets an ambiguity in a current rule, an effort should be made to remove the ambiguity and, if possible, to incorporate interpretative case law.
4. The rules should accommodate electronic filing and document management.
5. The rules should recognize best practices statewide.

6. Substantive changes should be made cautiously, and only if a consensus exists in favor of it. If substantial disagreement exists over a proposed substantive change, it should be presented in a separate rule petition to permit a full airing of views focused just on that change.
7. To avoid unnecessary confusion, rule renumbering should be minimized. Often cited rules should retain the same rule number, if possible.
8. The criminal rules should be freestanding and generally should not incorporate by reference other rules of procedure. The rules in Appendix A reflect that, although there are some exceptions (*e.g.*, Rule 15.3(c)(3) and (d)(1) regarding the noticing and conduct of depositions).

Part III: Methodology. The Arizona Rules of Criminal Procedure currently consist of forty-one rules. Most rules include subparts—there are about 250 of these—designated by numbers to the right of a decimal point, *e.g.*, Rule 1.1, Rule 26.10. The Task Force Chair divided the twenty Task Force members into four workgroups, and assigned each of the forty-one criminal rules to one of these workgroups. Each workgroup included at least one judge, one prosecutor, and one criminal defense attorney. Workgroups met more than sixty times between March and December 2016. The workgroups reviewed the rules in depth, and then presented proposed revisions to the full Task Force.

The Task Force met twelve times during 2016, with several meetings lasting a full day. Revisions to some rules were minor or stylistic, requiring little discussion. Other rules were complex or controversial, and were the subject of intense discussions at two or more meetings. The work product of the Task Force

as shown in Appendix A represents an investment of thousands of hours of its members' time.

Part IV: Restyling Changes. The proposed amendments, like their new civil rule counterparts, include stylistic revisions that make the rules more comprehensible and user-friendly. The elements of restyling include:

1. using informative headings and subheadings;
2. breaking up long sentences, or collapsing them into fewer words;
3. converting a lengthy rule into shorter subparts, which makes it easier to find particular provisions;
4. using lists;
5. avoiding repetition;
6. using “plain English” and the active voice;
7. stating things in a positive form; and
8. avoiding legal jargon and ambiguous terminology, including the word “shall” (which is replaced in the proposed amendments with “must,” “may,” “should,” or “will,” depending on the context).

The proposed rules utilize consistent formatting and nomenclature. The stylistic revisions generally follow the conventions recommended in Bryan Garner's *Guidelines for Drafting and Editing Court Rules* (1996). With a few exceptions, the restyled rules kept the same rule numbers to minimize confusion and facilitate legal research.

Part V: Substantive and Major Organizational Changes. Appendix B

details the proposed amendments on a rule-by-rule basis. All of the criminal rules were restyled, but some of the proposed rules also include substantive and major organizational changes. The following list is illustrative but it is not exhaustive.

Rule 1: The Task Force reorganized this introductory rule so it includes a variety of provisions of general application throughout the set. It includes revised provisions for calculating time (Rule 1.3), a new set of definitions (Rule 1.4), and new sections concerning the form of documents, filing, and service partly derived from current Rule 35 and consistent with recent changes to the formatting and service requirements in the civil rules. Similar to a recent amendment in the civil rules, the rule would require filings to use 13-point typeface to make text easier to read (Rule 1.6), and the Task Force proposes to slightly increase the page limits throughout the rules (such as in Rule 1.9) to accommodate that change. Additionally, the rule addresses the formatting and filing of electronic-filed documents. The Task Force also relocated current Rule 1.7 concerning initial appearance masters to Rule 4, the rule on initial appearances.

Rule 6: The proposed rule would make it clear that a defendant has a right to counsel regardless of the nature or level of the charged offense, and clarifies when a defendant has a right to court-appointed counsel. The rule adds a definition of “indigency.” It also modifies the requirements for counsel to withdraw from a

case. The Task Force proposes relocating current Rule 15.9, which deals with the appointment of investigators and experts, to a proposed new Rule 6.7. The Task Force also reorganized Rule 6.8, clarified the qualifications for capital case counsel, and modified the comment to the rule. Additionally, the Task Force revised Rules 6 and 7 in an effort to make its draft compatible with certain recommendations of the FAIR Justice Task Force.

Rule 11: The proposed rule includes a new Rule 11.8, which differentiates the process for determining a defendant’s mental status at the time of an offense from the defendant’s mental status, or competence, when a criminal proceeding is initiated or while it is pending.

Rule 14: Currently, Rule 12.10 provides a procedure for entering a plea of not guilty in a county that does not hold an arraignment. The Task Force is not aware of any counties where this is still the case, but decided to retain the provision. However, it relocated the provision to a new proposed Rule 14.5, which puts it in a rule set that deals more generally with arraignments.

Rule 16: The proposed rule eliminates current Rule 16.3 concerning an omnibus hearing, and instead adopts a clearer and more generally applicable rule governing all pretrial conferences.

Rule 17: Currently, Rule 26.2(d) permits a court to make a finding of a factual basis for a plea just before the entry of judgment if “the court did not

affirmatively make a finding of a factual basis for a plea under Rule 17.3.” The Task Force proposes relocating this provision to a new proposed Rule 17.3(b), which puts it in a rule that deals more generally with determining a factual basis for a plea.

Rule 19: Currently, Rule 19.3 provides that the “law of evidence relating to civil actions shall apply to criminal actions except as otherwise provided” and goes on to provide specific rules about the admissibility of prior inconsistent statements and prior recorded testimony. The Task Force proposes eliminating the rule because the Arizona Rules of Evidence governs the admissibility of evidence in criminal proceedings and the specific rules set forth Rule 19.3 are duplicative of what is already covered in those rules.

Rule 20: After having extensive discussions over the issue, the Task Force proposes to modify the rule to permit a defendant to move for acquittal under Rule 20(b) without first making a motion under Rule 20(a).

Rule 21: Currently, Rule 23.3 includes a provision for submitting forms of verdict to the jury on necessarily included offenses. The Task Force proposes relocating this provision to a new proposed Rule 21.4, which puts it in a rule set that deals more generally with instructions and verdict forms.

Rule 27: Among numerous changes to this rule, the Task Force proposes abrogating Rule 27.10, which concerns the revocation of probation in absentia. It

believes that courts generally do not use this rule, and that other rules adequately address this subject.

Rule 28: Proposed Rule 28.2 would clarify that a law enforcement agency's responsibility to notify a defendant about the disposal of evidence would apply only if the State has filed a case. Unlike the current rule, the proposed rule would not govern items in a law enforcement agency's possession that were obtained during an investigation that did not result in a criminal prosecution.

Rule 30: The Task Force proposes abrogating Rule 30 because it is largely duplicative of the Superior Court Rules of Appellate Procedure-Criminal. Also proposed is a companion amendment to Rule 31 that advises parties in appeals from limited jurisdiction courts to utilize those rules.

Rule 31: The Task Force proposes a number of administrative, formatting, and procedural changes that conform Rule 31 to changes to the Arizona Rules of Civil Appellate Procedure adopted by the Court in 2015 and 2017.

Rule 32: The Task Force proposes only a handful of substantive changes to Rule 32 and, to avoid confusion, proposes to retain the rule's current structure and most of its numbering. Among other changes, counsel representing a defendant in an "of-right" petition who finds no colorable claims would be required to include a summary of the facts and procedural history of the case in counsel's notice to the court. Additionally, a judge in a capital case would have sixty days, rather than

twenty days, after the filing of a reply to determine if there are issues of law or fact that require a hearing. If the court decides that a hearing is required, it would have the option of first setting the matter for a status conference within the specified time limit. Also, the length limitation for a petition for review would be changed from a page limit to a word limit for typed briefs, and a provision is proposed for the submission of an amicus brief when an appellate court is considering a petition for review.

Rule 35: The Task Force proposes incorporating the substance of current Rule 35, which governs the form, content, and service of motions, into proposed Rule 1. The Task Force proposes that Rule 35 be “reserved” as a placeholder for a future rule.

Rule 36: The Court’s Order in R-16-0033, effective January 1, 2017, abrogated Rule 36, which formerly governed the adoption of local rules. The Task Force proposes that the rule be “reserved” as a placeholder for a future rule.

Part VI: Rule Comments. The proposed amendments delete comments in the existing rules that are no longer accurate or have otherwise outlived their usefulness. Also, when an existing comment includes a substantive requirement, the Task Force attempted to include the requirement in the body of the rule. The proposed rules retain some comments that continue to provide users with essential information or practical guidance. The Task Force also added a few new

comments and revised others when necessary to provide courts and practitioners with essential background, references to relevant statutes, and suggestions about how a rule should operate in practice.

The proposed rules also add a “prefatory comment.” A similar comment was included in the 2012 amendments to the Arizona Rules of Evidence, the 2015 amendments to the Arizona Rules of Civil Appellate Procedure, and the 2017 amendments to the Arizona Rules of Civil Procedure. The proposed prefatory comment to the criminal rules identifies significant reasons for these revisions; describes the two general types of changes (stylistic and substantive), and gives examples of substantive changes; provides direction on the use of existing case law; and provides guidance for using comments contained in earlier versions of the rules.

Part VII: Preliminary Stakeholder Comments. The Task Force completed its draft of all forty-one criminal rules only weeks before the deadline for filing this petition. As such, key stakeholders have not yet had an opportunity to review a comprehensive draft of the proposed amendments. Task Force members, however, made introductory presentations about the proposed amendments to the Committee on Superior Court and the Committee on Limited Jurisdiction Courts. The Task Force provided a draft of Rule 39 to the Commission on Victims in the Court, which has provided pre-filing comments.

Task Force members also presented several rules of interest to the Capital Case Oversight Committee.

After this petition is filed, the Task Force intends to solicit comments from other key stakeholders, including: the State Bar of Arizona, the Attorney General, the Arizona Prosecuting Attorneys Advisory Counsel, Arizona Attorneys for Criminal Justice, Arizona Voice for Crime Victims, the Arizona Capital Representation Project, the Federal Public Defender's Office, American Friends Service Committee, Arizona Association of Chiefs of Police, Law Enforcement Legal Advisors Association, county and local prosecuting agencies and public defenders, presiding judges, presiding limited jurisdiction court judges, appellate judges and staff attorneys, probation officers, and local, county, and appellate clerks.

Part VIII: Request for a Modified Comment Period. The Task Force acknowledges that this petition proposes a large number of changes to the criminal rules, and it anticipates receiving a commensurately large number of comments. Comments may address items that the Task Force overlooked, or may suggest other changes that would improve the proposed amendments. The Task Force therefore requests that the Court allow a modified comment period to accommodate the filing of a supplement to the petition after an initial round of public comments. That would permit the Task Force to submit a revised set of

amendments for public review and comment. The Task Force would present and discuss any additional changes in its reply after the close of a second round of comments.

The Task Force suggests the following schedule:

March 14, 2017:	First round of comments due
April 26, 2017:	Supplement to Petition due
May 31, 2017:	Second round of comments due
July 7, 2017:	Reply due

Part IX: Conclusion. The Task Force requests that the Court: (a) open this petition for comments during the modified periods described above; and (b) abrogate the current rules and, subject to any modifications proposed by the Task Force's supplement or reply, adopt the proposed new set of criminal rules shown in Appendix A.

RESPECTFULLY SUBMITTED this 8th day of January, 2017

By /s/ Judge Joseph Welty
Hon. Joseph Welty, Chair