Supplemental

APPENDIX B

Rule-by-Rule Analysis

I. GENERAL PROVISIONS

Rule 1. Scope, Purpose and Construction, Computation of Time, Definitions, Size of Paper, and Other General Provisions

In addition to stylistic changes, the Task Force proposes several organizational modifications to Rule 1, including relocating the substance of Rule 35 to Rule 1, and expanding the current criminal rules to incorporate various civil rules regarding the form, filing, and service of documents.

Rule 1.1. Scope

In response to comments submitted after the filing of the Task Force's initial petition, the Task Force proposes adding a reference to "crime victims" in the rule's second sentence, so it refers to "[c]ourts, parties, and crime victims should construe these rules . . ." The Task Force also proposes various stylistic changes to this rule, but no other substantive changes are intended.

Rule 1.2. Purpose and Construction

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 1.3. Computation of Time

The Task Force proposes various stylistic and organization changes to this rule, modeling it on Rule 6 of the Arizona Rules of Civil Procedure, as amended in January 2017.

The Task Force does not propose any substantive changes in proposed Rule 1.3(a)(1) through (3), but it proposes making a few minor substantive amendments to the rest of the rule:

(a) The Task Force proposes the adding a definition of "next day" in Rule 1.3(a)(4). This addition is intended to clarify deadlines when a time period in the rules is measured backwards (for example, "20 days before trial"). This change is modeled on Rule 6(a)(4) the Arizona Rules of Civil Procedure and would clarify when documents are due when the deadline counting backwards lands on a weekend or holiday—the document would be due on the last business day *before* the weekend or holiday, and not the day *after*.

(b) Proposed Rule 1.3(a)(5) corresponds to the current civil rules and retains the five additional days to respond to service accomplished by any method other than hand delivery. To avoid misunderstanding about whether additional time is added to

the response time after electronic service of an appellate filing, the Task Force added the words, "except as provided in Rule 31.3(d)." The proposed rule also would clarify that the five-day provision does not apply to the clerk's distribution of court documents, including minute entries. The Task Force proposes to eliminate the references currently in the rule to the Arizona Rules of Civil Procedure because the text of the referenced civil procedure provisions are substantially incorporated into the proposed amendments to the rule.

Rule 1.4. Definitions

In addition to proposing stylistic changes to the existing definitions, the Task Force proposes to add definitions for other terms that are frequently used within these rules:

(a) The proposed rule includes a definition for "the Defendant" and "the State" and specifies that, when used in the rules, those terms may include the defendant's attorney and the prosecutor, depending how the term is used.

(b) A definition for "magistrate" is proposed because that term is used frequently in the rules. The definition was taken from A.R.S. § 1-215(18).

(c) Definitions also were proposed for "parties" and "person," terms that are frequently used the rules but are not currently defined.

(d) In response to comments submitted after the filing of the Task Force's initial petition, the Task Force proposes moving the definition of "victim," currently in Rule 39(a)(1), to a new proposed Rule 1.4(h).

The Task Force also proposes to move the current rule's definitions of "Initial Appearance" and "Arraignment" to Rules 4 and 14, respectively, which set forth the specific procedures governing those subjects.

Rule 1.5. Interactive Audiovisual Systems

Current Rule 1.5 governs the size of paper filings and attachments. The Task Force proposes to move the rule and include a restyled version of those requirement into proposed new Rule 1.6(b)(1)(C).

Proposed Rule 1.5 is substantially the same as current Rule 1.6, governing interactive audiovisual systems, but it has been significantly restyled to improve the rule's clarity. No substantive changes are intended.

Rule 1.6. Form of Documents

To spare courts and practitioners from having to refer to another set of rules, the Task Force decided that the Arizona Rules of Criminal Procedure should generally be a stand-alone set of rules and not incorporate by reference provisions of the Arizona Rules

of Civil Procedure. To accomplish that aim, the Task Force's proposed rule frequently incorporates into a criminal rule the text of a currently cross-referenced civil rule, but modifies it as necessary for criminal practice.

Proposed Rule 1.6 is a new rule that largely duplicates Rule 5.2 of the recently amended Arizona Rules of Civil Procedure and also includes the substance of current Rule 1.5. The proposed rule, however, goes significantly beyond current Rule 1.5 to include specific formatting rules that are not part of the current criminal rules.

In several instances, however, the Task Force proposals depart from the civil rules. For example, the Arizona Rules of Civil Procedure require the use of numbered pleading paper. The current criminal rules do not have any such requirement and most criminal practitioners do not use line-numbered pleading paper. Because of that, proposed Rule 1.6 does not require the use of line numbers, but the rule does permit it if a party chooses to use it.

Proposed rules regarding page margins, line limits, and font sizes were all taken from the Arizona Rules of Civil Procedure. Like the civil rules, the text of any typed document must employ a typeface no smaller than 13-point, which is a little larger than the 12-point typeface that is now in common use and is prescribed by the local rules of Maricopa and Pima counties. To accommodate this increase in typeface size, proposed Rule 1.9 calls for a slight increase in the page limitations for motions and related filings.

Proposed Rule 1.6(b)(1)(J) provides that none of the formatting rules apply to printed court forms, court-generated forms, or forms generated by a court-authorized electronic filing system or vendor. The concern was that many of these forms currently do not comply with the proposed rule's formatting requirements and that it would be burdensome to require the courts and county clerks to reformat them.

The proposed rule also provides specific instructions for the use of electronic filing and the formatting of electronically filed documents, but it does not require electronic filing as some jurisdictions do not have this capacity at this time.

Rule 1.7. Filing and Service of Documents

Currently, Rule 1.7 governs initial appearance masters. The Task Force proposes relocating the provisions of that rule to proposed Rule 4, which deals more generally with the subject of initial appearances. The rule would be restyled and renumbered as Rule 4.3.

In place of the current rule, the Task Force proposes a new Rule 1.7, which is derived from Rules 5 and 5.1 of the recently amended Arizona Rules of Civil Procedure. The proposed rule explains how documents must be filed and the effective dates of filing, depending on whether the item is filed in paper or electronic form. Rule 1.7(c) also provides detailed rules for service of documents. Currently, Rule 35.5 governs that subject

but does nothing more than cross-reference the provisions of the Arizona Rules of Civil Procedure. The Task Force decided that organizationally it was better to have the filing and service rules under general provisions in Rule 1 so the proposal would eliminate current Rule 35.5 and move the substance of that rule into Rule 1.7.

Although the proposed rule incorporates much of what is in Rules 5 and 5.1 of the Arizona Rules of Civil Procedure, it also supplements those rules in some important respects to account for issues common to criminal practice. For example, proposed Rule 1.7(b)(4) addresses the timeliness of documents filed by incarcerated persons. Although this specific provision is not included in the current rules or the civil rule, the Task Force believes it is a correct statement of the law and would provide important guidance to self-represented defendants who are incarcerated.

Rule 1.8. Clerk's Distribution of Minute Entries and Other Documents

The substance of proposed Rule 1.8 is taken from current Rule 35.6, but it is slightly expanded to clarify that electronic distribution of documents is complete upon transmission. No other substantive changes are intended.

Rule 1.9. Motions, Oral Argument, and Proposed Orders

Proposed Rule 1.9 is a new rule that combines the substance of current Rules 35.1, 35.2, 35.3, 35.6, 35.7 and Rule 80(e) of the Arizona Rules of Civil Procedure into one general rule covering the mechanics of motion practice. The Task Force believes that these general rules logically fit better at the beginning of the criminal rules rather than at the end, and that the requirements are easier to read and understand when consolidated into one rule. The proposed rule's motion content and service requirements are restyled but are substantively the same as the current rules.

To accommodate the use of a 13-point typeface required in proposed Rule 1.6, the page limitation for motions and responses would be slightly increased from ten pages to eleven pages, and the page limitations for reply briefs would be slightly increased from five pages to six pages.

II. PRELIMINARY PROCEEDINGS

Rule 2. Commencement of Criminal Proceedings

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 2.1. Misdemeanors

In addition to restyling this rule, the Task Force proposes to relocate current Rule 2.5, which also deals with the beginning of a misdemeanor case, into this rule. Currently,

Rule 2.5 provides that the State may commence a misdemeanor action that is triable in superior court by filing a complaint in Justice Court and prosecuting it according to the procedures applicable to felony cases. A slightly restyled version of this provision appears in the second sentence of proposed Rule 2.1(b).

It also should be noted, however, that the Task Force could not understand why current Rule 2.5 is needed or why the State would choose to prosecute a misdemeanor in the manner described in the rule. None of the members of the Task Force knew of any instances in which this method of filing a misdemenor has been used in any county. Conceivably, the procedure might be followed if the State desires to preserve testimony in a misdemeanor case by requiring a preliminary hearing in the Justice Court. Current and proposed Rule 15.3, however, permit the State to ask for leave to take a deposition, which appears to provide a better means for preserving testimony without the use of this particular rule. Despite the Task Force's reservations about this rule, it decided to propose retaining it in the off-chance that it fulfills a function that the Task Force has not yet divined.

Rule 2.2. Felonies

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 2.3. Content of Complaint

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended. In Rule 2.3(c), the Task Force corrected an erroneous cross-reference to a Supreme Court rule.

Rule 2.4. Duty of Magistrate upon Presentation of Complaint

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 2.5. Refusal to Provide a DNA Sample

As noted earlier, the Task Force proposes relocating current Rule 2.5 to proposed Rule 2.1. If that change is made, current Rule 2.6 would be renumbered as Rule 2.5. The Task Force proposes various stylistic changes to that rule, but no substantive changes are intended.

Rule 3. Arrest Warrant or Summons upon Commencement of Criminal Proceedings

Rule 3.1. Issuance of Warrant or Summons

The Task Force proposes to add the word "criminal" before the word "ATTC" in the title of Rule 3.1(e) to distinguish criminal from civil traffic citations. The Task Force's other proposed changes to this rule are stylistic.

Rule 3.2. Content of Warrant or Summons

The Task Force proposes to delete the "secured" before "appearance bond" so the rule would apply to secured and unsecured bonds. The Task Force's other proposed changes to this rule are stylistic.

Rule 3.3. Execution and Return of Warrant; Defective Warrants

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 3.4. Service of Summons

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 4. Initial Appearance or Summons upon Commencement of Criminal Proceedings

The Task Force proposes relocating the provisions of current Rule 1.7, governing initial appearance masters, to proposed Rule 4, which deals more generally with initial appearances. The Task Force proposes restyling the rule and renumbering it as Rule 4.3. The Task Force's other proposed changes to Rule 4 are stylistic.

The Task Force recognizes that the Fair Justice for All Task Force has made recommendations that, if adopted, will require changes to provisions relating to pretrial release and detention.

Rule 5. Preliminary Hearing

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) Currently, Rule 5.5(c) allows a judge who is reviewing a magistrate's preliminary hearing ruling to consider only "the certified transcript of the proceedings." The Task Force proposes amending the rule to allow a judge also to consider the "exhibits admitted at the preliminary hearing."

(b) Currently, Rule 5.6 provides that a court reporter's failure to timely file a certified transcript of a preliminary hearing "may be treated as a contempt of court." The Task Force proposes to delete the provision in proposed Rule 5.6(b) because it is unnecessary.

III. RIGHTS OF PARTIES

Rule 6. Attorneys, Appointment of Counsel, Experts, and Investigators

Rule 6.1. Right to Counsel; Right to a Court-Appointed Attorney; Waiver of the Right to Counsel.

The Task Force's proposed changes to this rule are stylistic with ~~two~~ three exceptions:

(a) Currently, Rule 6.1(a) seems to suggest (likely inadvertently) that a defendant does not have a right to counsel for petty offenses if there is no prospect of imprisonment or confinement. Proposed Rule 6.1(a) clarifies that a defendant has a right to counsel regardless of the nature or level of the offense, but Rule 6.1(b) also clarifies that a defendant has a right to court-appointed counsel only in certain specified circumstances, including when a charge may result in punishment involving a loss of liberty.

(b) In a December 2016 order adopting recommendations of the Fair Justice for All Task Force (Rule Petition No. R-16-0041), the Supreme Court adopted an amendment requiring counsel to be appointed in a misdemeanor case for the limited purpose of representing a defendant at or following an initial appearance regarding release conditions. New conforming language was incorporated in proposed amended Rule 6.1(b)(1)(B).

(~~b~~c) Proposed Rule 6.1(b)(3) defines "indigent," which is currently defined in Rule 6.4(a).

The Task Force also made a small clarification in Rule 6.1(e), as initially proposed in January 2017, to provide that if a defendant withdraws a waiver of the right to counsel, the later appointment of counsel does not "*alone* establish a basis for repeating any proceeding previously held or waived." (Addition shown in italics.)

Rule 6.2. Appointment of Counsel for Indigent Defendants

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 6.3. Duties of Counsel; Withdrawal

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) Currently, Rule 6.3(c) seems to say (perhaps inadvertently) that unless counsel identifies substitute counsel, counsel may not withdraw from a case even if counsel is ethically required to do so. Proposed Rule 6.3(c)(2) clarifies that if counsel moves to withdraw from a case that has been set for trial, counsel is not required to give the name of proposed substitute counsel if the withdrawal is based on ethical grounds.

(b) The Task Force proposes amending Rule 6.3(d) to impose a duty on defense counsel to preserve the attorney's file in all cases. The current rule imposes that requirement only in capital cases.

Rule 6.4. Determining Whether a Person Is Indigent

The Task Force's proposed changes to this rule are stylistic except for the following organizational and substantive changes:

(a) As discussed above, the Task Force proposes relocating current Rule 6.4(a), defining "indigent," to proposed Rule 6.1(b)(3). The Task Force proposes shortening current Rule 6.7(d) and relocating it to proposed new Rule 6.4(c). In the Task Force's opinion, Rule 6.4 is a better place for the rule because it relates to the court's determination of whether a defendant is indigent.

(b) Current Rule 6.7(d) provides that if the court determines that a defendant can afford to pay for part of the costs of an appointed attorney, the court may order the defendant to pay that amount to either the appointed attorney or the clerk. The Task Force does not know of any instance in which a court has ordered payment directly to an appointed attorney, and is concerned that doing so may create a conflict of interest and may be subject to abuse. As such, proposed Rule 6.4(c)(1) omits the reference to direct payment to the attorney and provides that if the court determines that a defendant can afford to pay for part of the costs of an appointed attorney, it may order payment to the clerk.

Rule 6.5. Manner of Appointment

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 6.6. Compensation of Appointed Counsel

The Task Force proposes relocating current Rule 6.6, regarding the appointment of counsel on appeal, to Rule 31, which deals more generally with appeals. The proposed rule is restyled and renumbered as Rule 31.5(e).

Because current Rule 6.6 would be moved to Rule 31, the Task Force proposes renumbering current Rule 6.7 as Rule 6.6. Also, current Rule 6.7(d) would be relocated to proposed Rule 6.4(c).

The Task Force's other proposed changes to this rule are stylistic.

Rule 6.7. Appointment of Investigators and Expert Witnesses for Indigent Defendants

Currently, Rule 15.9 governs the appointment of investigators and expert witnesses. The Task Force proposes relocating the rule to proposed new Rule 6.7. Rule 6 deals largely with the appointment of counsel for indigent defendants. In the Task Force's opinion, it makes sense to include the appointment of investigators and experts in that rule because of the similarity in subject matter. In response to a comment submitted after the filing of the Task Force's initial petition, the Task Force limited a court's authority to appoint a mitigation specialist to "felony matter[s]." The Task Force also proposes various stylistic changes to the rule, but no other substantive changes are intended.

Rule 6.8. Standards for Appointment and Performance of Counsel in Capital Cases

The Task Force's proposed changes to this rule are stylistic with three exceptions:

(a) The Task Force proposes adding a requirement that counsel be familiar with and guided by the 2008 ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases. The current rule refers only to the 2003 ABA Guidelines. The reference also would be included in the comment to the rule.

(b) The Task Force proposes to retain the current comment to Rule 6.8, but to revise it because it inaccurately states that the ABA Guidelines are "a compendium of best practices." In fact, "[t]hey embody the current consensus about what is required to provide effective defense representation in capital cases." HISTORY OF GUIDELINE 1.1 (reprinted at 31 Hofstra L. Rev. 913, 920 (Summer 2003)). Consistent with that, the revised comment states that the Guidelines "constitute a compendiums of effective capital defense representation practices."

(c) Proposed Rule 6.8(c)(2) also adds a requirement that for appellate counsel, prior appellate briefing experience must relate to "merits" briefing, rather than to *Anders* briefing.

In response to comments submitted after the filing of the Task Force's initial petition, the Task Force further clarified proposed amended Rule 6.8 in the following respects:

(a) The Task Force modified the last sentence of proposed amended Rule 6.8(a) to provide that an attorney's practice in a federal jurisdiction or in another state may

be considered for the purposes of satisfying the requirements of (a)(1), i.e., membership in the State Bar of Arizona for at least 5 years immediately before the appointment. The intent is that so long as the applicant is currently a member of the State Bar of Arizona, time practicing in a federal jurisdiction or in another state can count against the 5-year requirement.

(b) The Task Force changed proposed amended Rule 6.8(b)(2) to clarify that co-counsel does not need to meet all the requirements in Rule 6.8(a), and instead needs only to: (1) be a member of the State Bar of Arizona; (2) satisfy the training requirements in Rule 6.8(a)(4); and (3) be familiar with guided by the performance standards listed in Rule 6.8(a)(5).

(c) The Task Force modified proposed amended Rule 6.8(c) to clarify that the alternative set of qualifications in (c)(2) need not occur within 3 years immediately before appointment.

(d) The Task Force made a similar modification to proposed Rule 6.8(d), clarifying that the alternative set of qualifications in (d)(2) need not occur within 3 years immediately before appointment. The Task Force also modified the subsection to clarify that the prior experience need not be as a defense counsel, i.e., experience as a prosecutor qualifies.

(e) The Task Force modified the comment to proposed amended Rule 6.8(a) by adding a reference to the "2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases."

Rule 7. Release

Rule 7.1. Definitions

The Task Force's proposed changes to this rule are stylistic with ~~three~~ the following exceptions:

(a) The Task Force proposes deleting the phrase "applicability of rule" in the rule's title because it is unnecessary.

~~(b) Proposed Rule 7.1(b) clarifies the definition of "Appearance Bond" to provide that an appearance bond can be either secured with a deposit or unsecured based on the promise to post an amount if the defendant fails to appear as scheduled. This is consistent with the current rules. If this change is made, it is unnecessary to define "a secured appearance bond" and the Task Force proposes deleting current Rule 7.1(c), which defines that phrase.~~

(b) The Task Force made certain changes to the proposed amended rule to conform to recent amendments to the rule adopted by the Supreme Court in December

2016. *See* Order, *In re Rules 6, 7, and 41, Rules of Criminal Procedure*, No. R-16-0041 (Ariz. Sup. Ct. filed Dec. 14, 2016). Among other things, the Court redefined "Own Recognizance" and replaced the definition of "Appearance Bond" with three new definitions for "Unsecured Appearance Bond," "Cash Bond," and "Deposit Bond." The Task Force inserted corresponding changes into the proposed amended Rule 7.1. It also made minor stylistic revisions to the definitions.

(c) In response to comments submitted after the filing of the Task Force's initial petition, the Task Force modified the definition of "Surety" in proposed amended Rule 7.1(g) to include not only a "person," but also a "company," so it says that that "A 'surety' is a person or company . . ."

(~~c~~d) The Task Force proposes ~~two~~ several small changes to Rule 7(~~e~~h), governing professional bondsmen.

(1) The Task Force proposes adding a new subsection (h)(2), requiring a professional bondsman to be "licensed with the Arizona Department of Insurance under A.R.S. § 20-340.01."

(2) Proposed amended Rule 7.1(e)(5) inserts the word "outstanding" immediately before the word "judgments" and deletes the phrase "outstanding against him or her" that now follows that word. ~~Also,~~

(3) T~~t~~he last sentence of proposed Rule 7.1(e) adds the words "to act as a surety" to clarify the bondman's function.

Rule 7.2 Right to Release

~~The Task Force's proposed changes to this rule are stylistic except for the following organizational and substantive changes:~~ The Task Force extensively modified proposed amended Rule 7.2(a) to incorporate the rule amendments in the Supreme Court's December 2016 order regarding Rule Petition No. R-16-0041. Consistent with those amendments, the proposed rule now begins with a statement that a defendant charged with a crime is presumed innocent until convicted. It also incorporates the amendments' provision that a defendant should not be released if the court determines that a release would not "protect others or the community from risk of harm." To facilitate the readability of the additions, the Task Force also broke up the revised draft of Rule 7.2(a) into three subparts. Proposed amended Rule 7.2(a)(3) adds a reference to A.R.S. § 13-3967(B), which sets forth the factors a court must consider in determining the method of release or the amount of bail.

The Task Force's proposed changes to Rule 7.2(b) are stylistic.

In proposed amended Rule 7.2(c), the Task Force proposes reorganizing the current rule to make it easier to follow. It also proposes adding a new Rule 7.2(c)(1)(A)(ii) to

clarify that a person may be released after being convicted if the parties stipulate to the release and the court approves it. The current rule lacks such a provision.

In response to comments submitted after the filing of the Task Force's initial petition, the Task Force substantially modified the rest of proposed amended Rule 7.2(c)(1). Initially, the Task Force proposed a provision similar to current Rule 7.2(c)(1), providing that "[a]fter a person 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 . . . the court finds that reasonable grounds exist to believe that the conviction may be set aside on a motion for new trial, reversed on appeal, or vacated in a post-conviction proceeding."

In a comment submitted after the Task Force filed its initial petition, the Office of the Attorney General contends that this provision—as well as the current rule—is invalid because it is contrary to A.R.S. § 13-3961.01. Instead of permitting the release of a defendant if the court determines that a "reasonable probability" exists that "the conviction may be set aside" in a later phase of the case, the statute permits post-sentencing release pending appeal *only* if incarceration "would endanger his life":

> A person shall not be continued at large on bail or be admitted to bail after conviction of a felony offense for which the person has received a sentence of imprisonment except when the superior court or a judge thereof is satisfied upon investigation that the person in custody is in such physical condition that continued confinement would endanger his life.

A.R.S. § 13-3961.01 (West 2010).

The comment of the Office of the Attorney General also points out that to the extent that current Rule 7.2(c)(1) is interpreted as allowing the post-sentencing release of a defendant pending appeal if the court determines that the conviction is likely to be later overturned, the Court of Appeals has held that the rule is invalid because it conflicts with the statute. *See State v. Hawkins*, 140 Ariz. 88, 89-90, 680 P.2d 522, 523-24 (App. 1984) (vacating order releasing sentenced defendant on bond pending appeal; statute governed over rule, and no showing regarding the defendant's physical health); *accord State v. Kearney*, 206 Ariz. 547, 549 ¶ 4 n.1, 81 P.3d 338, 340 n.1 (App. 2003) (Pelander, J.) (dictum) (although the last line of Rule 7.2(c)(1) appears to authorize release on bond pending appeal if one of the exceptions applies, the rule is contrary to A.R.S. § 13-3961.01, "which specifically prohibits any such bond after sentencing unless a court finds incarceration would endanger the defendant's life").

The Task Force does not entirely agree with this analysis. It agrees that if the current rule is interpreted to permit release after sentencing, it is contrary to A.R.S. § 13-3961.01. But it is not clear that the rule authorizes post-sentencing release. Instead, it authorizes release if one of the exceptions apply and the court determines that the defendant "*will, in*

all reasonable probability, receive a sentence of imprisonment." (Emphasis added.) The highlighted text is in the future tense, which suggests that the rule applies only *before* a sentence is imposed.

If the Task Force's analysis is correct, then the current rule would apply to a defendant *after* conviction but *before* sentencing, and the statute would apply *after* a defendant is convicted and sentenced to prison. Consistent with this interpretation, the Task Force has rewritten proposed amended Rule 7.2(c)(1) as follows:

(a) Proposed amended Rule 7.2(c)(1)(A) retains the text proposed in January 2017, but the heading "Generally" is replaced with "Before Sentencing." Thus, the current rule would continue to operate after conviction, but before sentencing. As modified, the rule would refer to a "motion for new trial, judgment of acquittal, or other post-trial motion," but the Task Force deleted the reference to "reversed on appeal, or vacated in a post-conviction proceeding" because those proceedings could occur only after sentencing.

(b) A new Rule 7.2(c)(1)(B) has been added, reflecting the terms of the statute. Thus, like the statute, the provision would apply after conviction and sentencing to a term of imprisonment.

Rule 7.3. Conditions of Release

The Task Force's proposed changes to ~~this rule~~ Rule 7.3(a) are stylistic with ~~three~~ two exceptions:

(a) Proposed Rule 7(a)(1) replaces the murky language in current Rule 7.3(a)(1) to provide that "the defendant must appear at all court proceedings," which captures what the current rule is apparently trying to say.

(b) Currently, Rule 7.3(a)(4) requires the court to condition release on the defendant "diligently prosecut[ing]" his or her appeal. Given that "prosecute" is generally used the criminal rules to refer to initiating and maintaining a criminal prosecution, proposed Rule 7.3(a)(4) replaces "prosecute" with "pursue" to avoid any confusion.

~~(c) Currently, Rule 7.3(b)(6) provides that a court condition a release on the defendant "[r]eturn[ing] to custody after specified hours." The Task Force proposes removing the provision because it is not used in practice. Moreover, if the condition is warranted, a court could use the "catch-all" in proposed Rule 7.3(c)(5), which provides, like current Rule 7.3(b)(5), that a court may impose any additional condition "the court deems reasonably necessary."~~

The Task Force extensively revised proposed amended Rule 7.3(c) to incorporate a restyled version of the Supreme Court's amendments to the rule in its December 2016 order regarding Rule Petition No. R-16-0041. Specifically, the Task Force deleted proposed

amended Rule 7.3(c) ("Additional Conditions") and replaced it with a new proposed Rule 7.3(c) ("Discretionary Conditions in General") that incorporates the Supreme Court's amended Rule 7.3(b). In restyling the rule, no substantive changes in the recent amendments were intended.

Rule 7.4. Procedure

The Task Force added a new proposed Rule 7.4(e) providing that "[t]he court must appoint counsel in any case in which the defendant is eligible for the appointment of counsel under Rule 6.1(b)." The provision is identical to a new Rule 7.4(e) the Supreme Court recently adopted in its December 2016 order regarding Rule Petition R-16-0041. The Task Force also proposes various stylistic changes to this rule, but no additional substantive changes are intended.

Rule 7.5. Review of Conditions; Revocation of Release

This rule was recently amended, effective January 1, 2016. The Task Force's proposed changes to this rule are stylistic with three exceptions:

(a) In proposed Rule 7.5(b), the Task Force proposes to replace the word "served" in the last line with the word "provided." Current practice is not to serve the pretrial services report on the State, but merely to transmit it.

(b) In proposed Rule 7.5(c), the Task Force proposes to change "personal recognizance" to "own recognizance release" for consistency of terminology.

(c) In proposed Rule 7.5(d)(2), the Task Force proposes relocating the last sentence in the rule to the beginning of the rule to clarify that a finding that "the proof is evident or the presumption great as to the present charge" is a precondition for release revocation in addition to either Rule 7.5(d)(2)(A) (probable cause exists for the commission of another felony) or Rule 7.5(d)(2)(B) (danger to another person or the community).

Rule 7.6. Transfer and Disposition of Bond

~~The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.~~ In response to comments submitted after the filing of the Task Force's initial petition, the Task Force made three changes to the proposed amended rule.

(a) The Task Force added a new proposed Rule 7.6(d)(2) providing that "[w]hen 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)(2) or the bond depositor authorizes it to be applied to a financial obligation." The first two-thirds of this proposed provision (up to "or the bond depositor") is a slightly restyled version of new Rule 7.6(d)(2) that the Supreme Court recently adopted in response to Rule Petition No. R-16-0041. The

last clause is new, and was added because it is common for a defendant to want to apply all or part of posted security to a fine or other court-imposed financial obligation.

(b) The Task Force replaced the text of its previously proposed amended Rule 7.6(d)(5) to reincorporate the text of the current rule. The Task Force had previously restyled the provision, but the retention of the current rule's language in the Supreme Court's order concerning Rule Petition No. R-16-0041 led the Task Force to return to the current language.

(c) The Task Force made a minor change in the draft of amended Rule 7.6(b), as proposed by the Task Force in its initially filed petition. The proposed amended rule (similar to the current Rule 7.6(b)) provided that "[a] defendant must file an appearance bond and security with the clerk of court in which a case is pending or the court which the initial appearance is held." This sentence, however, assumes that the court has ordered the defendant to post an appearance bond or other security, which overlooks the possibility that a court may have released the defendant on his or her own recognizance without a bond or security requirement. To correct this oversight, the phrase "if ordered" was inserted after the phrase "and security" so the beginning of the sentence reads: "[a] defendant must file an appearance bond and security, *if ordered*, with the clerk of court." (Addition shown in italics.)

It should be noted that Rule 7.6(d) was recently amended, effective January 1, 2017, and a restyled version of the amendment is incorporated in the rule. All other changes to the rule are stylistic.

Rule 8. Speedy Trial

Rule 8.1. Priorities in Scheduling Criminal Cases

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 8.2. Time Limits

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) Currently, Rule 8.2(a)(3) contains a transition provision that was applicable if an indictment, information, or complaint was filed between December 1, 2002 and December 1, 2005. The Task Force proposes eliminating this provision because it is no longer necessary.

(b) Currently, Rule 8.2(c) provides a deadline for the beginning of trial if a new trial is ordered as part of the granting of a new trial motion or a remand on direct appeal. The rule, however, does not provide a deadline if a new trial is ordered as part of post-conviction relief. To remedy this oversight, proposed Rule 8.2(c) provides that if a

state court orders a new trial under Rule 32 or a federal court orders one as part of a collateral review proceeding, the new trial must begin no later than ninety days after entry of the court's order.

Rule 8.3. Prisoner's Right to a Speedy Trial

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) Currently and in the proposed rule, Rule 8.3(b)(1) provides that a prisoner may request the final disposition of any untried indictment, information or complaint pending in Arizona. The current rule states that the request must be sent to the "prosecutor" as well as the court. As the particular prosecutor who tried the defendant's case may no longer be employed by the prosecuting agency, the Task Force proposes replacing "prosecutor" with "the responsible prosecuting agency."

(b) Currently, Rule 8.3(b)(1) requires that a request for final disposition be in writing to "the prosecutor." Proposed Rule 8.3.(b)(1) changes "the prosecutor' to "the responsible prosecuting agency."

Rule 8.4. Excluded Periods

The Task Force's proposed changes to this rule are stylistic except for the following organizational and substantive changes:

(a) The proposed rule reorganizes and internally renumbers current Rule 8.4. Rather than listing in separate paragraphs the types of delays excluded from the calculation of time, the proposed rule lists all delays under Rule 8.4(a) and puts each type of delay in a separate subpart.

(b) Proposed Rule 8.4(b) incorporates and slightly restyles a recently adopted amendment to Rule 8.4 concerning the exclusion of time after a finding of competence or restoration of competence.

(c) Like the current rule, proposed Rule 8.4(a)(1) excludes time "caused by or on behalf of the defendant." The proposed rule adds the phrase "whether or not willful or intentional," which adds a caveat currently found in a comment to the rule.

Rule 8.5. Continuing a Trial Date

Currently, Rule 8.5(c) provides that "[n]o further continuances shall be granted except as provided in Rules 8.1(e), 8.2(e) and 8.4(d)." The Task Force proposes to eliminate this provision because it is unnecessary. The Task Force's other proposed changes to this rule are stylistic.

Rule 8.6. Denial of Speedy Trial

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 8.7. Accelerating Trial

The current and proposed Rule 8.7 permits a trial to be accelerated if "special circumstances relating to the victim" exist that warrant it. Because other reasons might justify accelerating trial, the Task Force proposes adding the phrase "or other good cause" to the rule to permit a court to accelerate trial if good cause exists. The Task Force's other proposed changes to this rule are stylistic.

Rule 9. Presence of the Defendant, Witnesses, and Spectators

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

In response to comments submitted after the filing of the Task Force's initial petition, the Task Force made one minor change to Rule 9.1, which provides that a defendant's "voluntary absence waives the right to be present at any proceeding." The current rule provides that a court may infer that the absence is voluntary if, among other things, "the defendant had *personal* notice" of the date and time of proceeding. The Task Force's initial proposal, accompanying its January 2017 petition, proposed to take out the word "personal" because it did not appear to add anything to the rule's substance. One comment urges the reinsertion of the word because its absence "will create confusion in cases where the defendant's counsel received notice, but the defendant did not." The Task Force has its doubts about this argument, as it is unlikely that a court would want to proceed in such circumstances. But, to respond to the concern, it has inserted the word "actual" before "notice." In the Task Force's view, "actual" is more accurate in conveying the intent than "personal"—if the defendant *actually* knows the date and time of a proceeding, it should not matter whether the court told the defendant of the proceeding's date and time *in person*.

Rule 10. Change of Judge or Place of Trial

In addition to restyling the rule, the Task Force proposes several significant organizational changes:

(a) The Task Force proposes folding two current rules, Rule 10.4 ("Waiver and renewal") and Rule 10.6 ("Duty of judge upon filing of motion or request under Rules 10.1 or 10.2") into the remaining rules.

(b) Current Rule 10.5(a) would become part of proposed Rules 10.1(c)(2), 10.2(a)(3), and 10.2(d).

(c) Current Rule 10.5(b) would go into proposed new Rule 10.4, and current Rule 10(a) would become part of proposed Rule 10.2(d).

(d) These changes leave four rules as follows: Rule 10.1 ("Change of Judge for Cause"); Rule 10.2 ("Change of Judge as a Matter of Right"); Rule 10.3 ("Changing the Place of Trial"); and Rule 10.4 ("Transfer to Another County").

Rule 10.1. Change of Judge for Cause

The Task Force's proposed changes to this rule are stylistic except for the following organizational and substantive changes:

(a) Proposed Rule 10.1(b)(2) ("Further Action by the Judge") is derived from current Rule 10.6.

(b) Proposed Rule 10.1(c)(3) ("Effect on Other Defendants") is derived from current Rule 10.5(a).

(c) Based on a comment to the current rule, the Task Force proposes amending Rule 10.1(b)(1) to provide that a party seeking a change of judge for cause "must" follow the procedures in the rule rather "may" do so.

(d) Proposed Rule 10.1(b)(1) requires a party to "file a motion" when seeking to change a judge for cause. This modification would afford a party the means to preserve for appellate review any allegations of prejudice or interest that prevent a fair or impartial hearing or trial. This proposed amendment squares with a comment in Rule 10.4. Ariz. R. Crim. P. 10.4 cmt. ("The rights to change of judge without cause are waived by commencement of proceedings before the judge, whether or not new grounds for challenge, not amounting to cause under Rules 10.1 or 10.3, later arise. The right to challenge for cause is waived only by knowing relinquishment; a party will not be allowed, however, to let a proceeding continue in the hope of prevailing, and then assert a challenge for cause if he loses.").

Rule 10.2. Change of Judge as a Matter of Right

The Task Force's proposed changes to this rule are stylistic except for the following organizational or substantive changes:

(a) Proposed Rule 10.2(a)(3), dealing with limits on a party's exercise of a change of judge as a matter of right, and proposed Rule 10.2(d)(2), dealing with reassignment, come from current Rule 10.5(a).

(b) Proposed Rule 10.2(b)(3) ("Further Action by the Judge") is derived from current Rule 10.6.

(c) Proposed Rule 10.2(d)(3) ("Effect on Other Defendants") is derived from current Rule 10.5(a).

(d) The Task Force proposes that Rule 10.2's title change to "Change of Judge as a *Matter of Right*" rather than "Change of Judge *Upon Request.*" The body of the current rule already uses that terminology.

(e) The Task Force also proposes that the phrase "self-represented defendant" be added after "counsel" in Rule 10.2(b)(1) to make it clear that a self-represented defendant has the right to exercise a change of judge as a matter of right.

(f) Proposed Rule 10.2(c) provides that a party has a 10-day deadline to file a notice of change of judge after certain events occur "[e]xcept as provided in (c)(2)," which applies when a new judge is assigned to a case less than 10 days before trial. Some municipal courts in Maricopa County, however, have long-standing local rules extending that deadline. To accommodate such a practice, the proposed rule now refers to "[e]xcept as provided in (c)(2) or extended by local rule."

The Task Force also considered—but is not proposing in this petition—a substantive change to Rule 10.2(b)(2)(G). Like the current rule, the proposed rule requires an avowal by counsel as an officer of the court that a request for change of judge as a matter of right be made in good faith and not motivated by one of seven specified "improper" reasons. One of those reasons, set forth in proposed Rule 10.2(b)(2)(G), requires a party to avow that the Rule 10.2 notice is not being filed to "obtain an advantage or avoid a disadvantage in connection with a plea bargain or at sentencing."

The Task Force is concerned about this provision because a defense counsel may very well exercise a notice because of a judge's reputation in sentencing. The Task Force would expect a competent lawyer to do no less, but the existing rule may create an ethical conflict. Thus, the lawyer may be violating an obligation not to knowingly make misstatements to the court (ER 3.3(a)(1) ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer") and be engaging misconduct (ER 8.4 ("It is professional misconduct for a lawyer to . . . file a notice of change of judge under Rule 10.2, Arizona Rules of Criminal Procedure, for an improper purpose, such as obtaining a trial delay or other circumstances enumerated in Rule 10.2(b)")). In a separate written submission to the Chief Justice, the Task Force will be proposing that the Arizona Supreme Court consider eliminating Rule 10.2(b)(G) as a specified improper basis for exercising a notice.

Rule 10.3. Changing the Place of Trial

The Task Force's proposed changes to this rule are stylistic except for the following organizational and substantive changes:

(a) Proposed Rules 10.3(d) and (e), addressing respectively "Waiver" and "Renewal on Remand," are derived from current Rules 10.4(a) and (b).

(b) The Task Force proposes replacing the reference to "omnibus hearing" in Rule 10.3(c) with "pretrial conference" to conform the proposed rule to the proposed elimination of "omnibus hearings" in Rule 16.

Rule 10.4. Transfer to Another County

The Task Force proposes relocating the provisions of current Rule 10.5(b) to proposed new Rule 10.4. The Task Force's other proposed changes to this rule are stylistic.

Rule 11. Incompetence and Mental Examination

Rule 11.1. Definitions, Effect of Incompetence, and Right to Counsel

The Task Force's proposed changes to this rule are stylistic except for the following organizational and substantive changes:

(a) The Task Force proposes adding a definition of "incompetence." The definition appears in proposed Rule 11.1(a)(2), and comes from the first sentence of current Rule 11.1.

(b) The Task Force proposes adding a provision in proposed Rule 11.1(a)(3) stating that during Rule 11 proceedings, a defendant is entitled to representation by counsel as provided in Rule 6.

Rule 11.2. Motion for an Examination of a Defendant's Competence to Stand Trial

The Task Force's proposed changes to this rule are stylistic except for the following organizational and substantive changes:

(a) Current Rule 11.2(a) has additional provisions regarding motions to evaluate the defendant's state of mind at the time of the offense and in capital cases. For clarity, the Task Force proposes relocating these provisions to proposed new Rules 11.8 and 11.9.

(b) The Task Force proposes revising current Rule 11.2(a)(3) to incorporate the current rule's comments into the rule. Among other things, it provides that any party, including a co-defendant, may move for a competence evaluation. However,

under proposed Rule 11.4(b), a co-defendant would not have the right to have access to another defendant's private mental health information.

(c) The Task Force proposes changing Rule 11.2(b) to state that the parties must provide the examining mental health experts with the defendant's medical and criminal history records "within 3 days of the appointment of experts" rather than within three days of filing the motion to appoint the experts. Significantly, the court may not grant a party's request for Rule 11 evaluation within three days and may deny it altogether. In either event, it makes no sense to force the parties to assemble records under a false deadline or under a faulty assumption that the court will grant the motion. In the Task Force's opinion, it would make more sense to trigger the deadline from the day the court appoints the experts.

(d) The Task Force also proposes changing Rule 11.2(b) to provide that the parties should transmit the records directly to the experts rather than transmitting them to the court, as is required under the current rule. The change would cut out an unnecessary middle party and better preserve the defendant's privacy rights. This proposed rule change conflicts with the statute, but it is unlikely to be a controversial change. If the conflict gives the Court concern, the Task Force recommends that the statute be amended to incorporate the change.

(e) The Task Force proposes modifying the jurisdictional provisions in current Rule 11.2(d) to account for proposed changes stemming from the Fair Justice Project and the experimental projects in Glendale and Mesa. Proposed Rule 11.2(d) does so by qualifying the statement that the superior court has exclusive jurisdiction over all competence hearings with the clause "unless otherwise authorized by superior court administrative order."

(f) To conform to current practice, proposed Rule 11.2(e) provides that if a defendant is determined competent or restored to competence, "regular proceedings must proceed without delay." The current rule says that the case must be "immediately set for trial," which is unrealistic and is seldom done in practice.

(g) Proposed Rule 11.2(f) provides that if a court finds that a person has been previously adjudicated incompetent to stand trial, "the court may hold a hearing to dismiss any misdemeanor charge against the incompetent person under A.R.S. § 13-4504." The Task Force proposes adding the provision to help ensure compliance with the statute and to give courts and practitioners a readily accessible cross-reference to the statute.

Rule 11.3. Appointment of Experts

Currently, Rule 11.3(c) provides that a court must appoint an expert from "its approved list." Proposed Rule 11.3(a)(2) deletes reference to an "approved list" because some counties do not use "approved lists" and because deleting the requirement would give

a court greater flexibility in dealing with unusual competence situations (neurological, dementia, etc.). The Task Force's other proposed changes to this rule are stylistic.

Rule 11.4. Disclosure of Experts' Reports

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) Currently, Rule 11.4(a) provides that before the State may see an expert's report, defense counsel may redact statements about "the offense charged." Proposed Rule 11.4(a)(2) expands that to include not only statements about the "charged offense," but also statements about "any other charged or uncharged offense."

(b) Currently, Rule 11.4(a) provides that after an expert report is redacted and submitted to the court, it must be made available "to all parties," which apparently includes co-defendants. Proposed Rule 11.4(b) clarifies this rule to provide that the reports are made available only to the "examined defendant and the State," which would exclude co-defendants.

After the filing of the initial petition, the Maricopa County Attorney's Office submitted a comment suggesting two clarifying changes, which the Task Force adopted: (1) the Task Force slightly changed proposed amended Rule 11.4(a) to clarify that it applies only to reports of experts appointed under Rule 11.3; and (2) the Task Force modified proposed amended Rule 11.4(b) to clarify that it refers to reports of a mental health expert other than those covered under (a).

Rule 11.5. Hearing and Orders

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) Proposed Rule 11.5(a) clarifies that the rule applies only to experts appointed under Rule 11.3, as opposed to those appointed under proposed Rule 11.8.

(b) Currently, Rule 11.5(a) provides that once the expert reports are submitted to the court, the court must hold a competency hearing within thirty days. Because that deadline is frequently unrealistic (and often ignored), proposed Rule 11.5(a) provides that this deadline may be extended "for good cause."

(c) Proposed Rule 11.5(a) also clarifies that if the State and the defendant reach a stipulation, it must be "in writing or on the record."

(d) Proposed Rules 11.5(b)(2) and (3) group the provisions of their current rule counterparts under the headings of "If Incompetent but Restorable" and "If Incompetent and Not Restorable," respectively.

(e) Based on part of the comment to the current rule, proposed Rule 11.5(b)(2)(E) provides that "[t]reatment orders are effective for no longer than 6 months." The objective is to return the defendant to court regularly and to avoid a defendant becoming "lost" in the system. Some Task Force members believe that six months is too long and prefer requiring the defendant to return to court every sixty days. After discussion and because case law refers to the comment to this rule, Task Force retained this concept as a proposed comment to the rule. The proposed comment states "[t]he court should hold review hearings every two to three months to monitor a defendant's treatment status and progress."

(f) Proposed Rule 11.5(b)(3) clarifies that the court may order one or more of the dispositional alternatives in the rule but only if requested by the examined defendant or the State.

(g) Currently, Rule 11.5(d) provides for the submission of periodic progress reports on a defendant's condition, but is silent on whether defense counsel has the right to redact the reports for potentially inculpatory statements, which appears to be the current but uncodified practice. The Task Force believes that the rule should include such a right and, consequently, proposed Rule 11.5(c)(1) states that "[d]efense counsel may redact the report under Rule 11.4(a)(2) before returning it to the court to be provided to the State."

Rule 11.6. Later Hearings

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 11.7. Privilege and Confidentiality

Proposed Rule 11.7 combines current Rules 11.7 and 11.8. The Task Force's proposed changes to the rules are stylistic with two exceptions:

(a) Proposed Rule 11.7(c)(2) clarifies when a report must be sealed, which the current rule leaves unresolved. As revised, the proposed rule provides that "[a]fter the defendant is found competent or unable to regain competence, the court must order the mental health experts' reports sealed."

(b) Current Rule 11.8 sets forth certain circumstances in which sealed reports may be disclosed. Proposed Rule 11.7(c)(2) provides that in addition to those instances, a sealed report may be disclosed "to assist in the examined defendant's mitigation investigation." In the Task Force's opinion, this purpose is consistent with the currently listed reasons.

Rule 11.8. Examination of a Defendant's Mental Status at the Time of the Offense

The Task Force proposes a new Rule 11.8 providing for the evaluation of a defendant's mental status at the time of the offense. The proposed rule derives from current Rules 11.2(a) and 11.3(f), and A.R.S. § 13-4506. The proposed rule departs from current Rules 11.2(a) and 11.3(f) in three respects:

(a) Unlike current Rule 11.2(a) but like current Rule 11.3(f), proposed Rule 11.8(b) requires that the defendant consent to the examination. Unlike a competence evaluation under proposed Rule 11.2, an examination under this rule necessarily requires a discussion of the underlying offense, which implicates a defendant's Fifth Amendment rights.

(b) Unlike current Rule 11.3(f), proposed Rule 11.8(c) does not condition an examination on a finding that the offense "involves death or serious injury." The Task Force decided against including the condition in the rule because it is not in A.R.S. § 13-4506.

(c) Consistent with the proposed changes in proposed Rule 11.2(b), proposed Rule 11.8(d) provides that medical and criminal history reports would be provided directly to the experts and that they are to be provided within three days of the expert's appointment, rather than three days after a Rule 11.8(b) motion is filed.

Rule 11.9. Capital Cases

The Task Force proposes a new Rule 11.9, dealing with examinations in capital cases. The rule is derived from current Rule 11.2(a), and updates the statutory references.

IV. PRETRIAL PROCEDURES

Rule 12. The Grand Jury

Rule 12. The Grand Jury

Rule 12.1. Selection and Preparing Grand Jurors

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 12.2. Grounds to Disqualify a Grand Juror

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 12.3. Challenge to a Grand Jury or Grand Juror

The Task Force proposes renumbering current Rule 12.3 as Rule 12.8 so that it is more proximately located to Rule 12.9, and renumbering Rules 12.4 through 12.7 accordingly. The Task Force's other proposed changes to this rule are stylistic.

Rule 12.3. Grand Jury Foreperson

The Task Force proposes relocating current Rule 12.3, dealing with challenges to a grand jury or grand juror, to proposed new Rule 12.8, and proposes renumbering current Rule 12.4 as Rule 12.3. The Task Force's other proposed changes to this rule are stylistic.

Rule 12.4. Who May Be Present During Grand Jury Sessions

The Task Force proposes renumbering current Rule 12.5 as Rule 12.4. The Task Force's other proposed changes to this rule are stylistic.

Rule 12.5. Appearance of a Person Under Investigation

The Task Force proposes renumbering current Rule 12.6 as Rule 12.5. Additionally, the proposed rule clarifies that the foreperson has discretion (replacing "shall" with "may") in deciding whether to expel counsel from the grand jury session for attempting to communicate with anyone other than the person under investigation. The Task Force's other proposed changes to this rule are stylistic.

Rule 12.6. Indictment

The Task Force proposes renumbering current Rule 12.7 as Rule 12.6. Additionally, under the proposed rule, the foreperson's obligation to inform the court when no indictment is returned for a person who is in custody or has posted bond is: (a) moved from current Rule 12.7(a) to the proposed new Rule 12.6(d); and (b) to be made "through the prosecutor" and not directly to the court. The Task Force's other proposed changes to this rule are stylistic.

Rule 12.7. Record of Grand Jury Proceedings

The Task Force proposes renumbering current Rule 12.8 as Rule 12.7, and slightly modifying the title (from "Transcript of Grand Jury Proceeding" to "Record of Grand Jury Proceedings"). Also, in addition to making the record of vote (Rule 12.7(b)) and transcript (Rule 12.7(c)) available to the State and the defendant, the proposed rule provides that the court reporter also may make them available "to the court." The Task Force's other proposed changes to this rule are stylistic.

Rule 12.8. Challenge to a Grand Jury or a Grand Juror

To place the rule in proximity to the rule governing challenges to grand jury proceedings (Rule 12.9), the Task Force proposes relocating current Rule 12.3 to proposed new Rule 12.8. The Task Force's other proposed changes to this rule are stylistic.

Rule 12.9. Challenge to Grand Jury Proceedings

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Current Rule 12.10. Entering a Not Guilty Plea

Until recently, courts in Yavapai County have used the procedure described in the current Rule 12.10, but they no longer do so. Moreover, to the Task Force's knowledge, no other Arizona county currently uses the procedure described in the rule. Nonetheless, because some county may decide to adopt the procedure in the future, the Task Force proposes retaining the rule but relocating it to proposed new Rule 14.5. The Task Force believes the rule belongs in Rule 14 because it describes a post-indictment arraignment process and Rule 14 deals more generally with arraignments.

Rules for State Grand Juries

Rule 12.21. Applicability of Other Provisions of Rule 12

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 12.22. Selection and Preparation of State Grand Jurors

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 12.23. Size of State Grand Jury

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 12.24. Location of State Grand Jury Sessions

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 12.25. Preservation of State Grand Jury Evidence

The Task Force proposes changing the title of Rule 12.25(b) from "restitution" to "release or retention" as the former is a term that is used elsewhere in these rules to describe a defendant's post-conviction financial obligations. In contrast, this rule covers the disposition of property held by a state grand jury. The Task Force's other proposed changes to this rule are stylistic.

Rule 12.26. Return of Indictment

The Task Force proposes changing the rule to provide that an indictment is to be kept secret until the defendant is in custody or "served with a summons" rather than "has given bail." Most defendants appear in court by summons rather than an arrest warrant, and the current rule provides no mechanism for the unsealing of an indictment for these defendants. The Task Force's other proposed changes to this rule are stylistic.

Rule 12.27. Disclosure of Lack of Indictment

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 12.28. Challenge to State Grand Jury, Grand Juror, or Grand Jury Proceedings

The Task Force's proposed changes to this rule are stylistic except for the following organizational and substantive changes:

(a) The Task Force proposes that Rule 12.28 be reorganized to correspond to the proposed changes for county grand juries.

(b) Proposed Rule 12.28(a)(3) makes explicit the currently-implied right to challenge a statewide grand jury under Rule 12.9.

(c) Proposed Rule 12.28(c) adds the phrase "on motion or on its own" to encourage the defendant to alert the court if the prosecutor has not taken specified action following the granting of a Rule 12.9 motion.

Rule 12.29. Expenses of Prospective and Selected State Grand Jurors

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 13. Indictment and Information

Rule 13.1. Definitions and Nature

The Task Force proposes various organizational changes to Rule 13 to better define its content and the point at which the information appears in the rule. The Task Force's other proposed changes to this rule are stylistic.

Rule 13.2. Timeliness of an Information and Dismissal

The Task Force proposes organizational changes to Rule 13 to better define its content and the point at which the information appears in the rule. In response to comments submitted after the filing of the Task Force's initial petition, the Task Force replaced the word "may" with "must" in the rule's second sentence so that the proposed amended rule provides that "a court must dismiss the information" if the State fails to file a timely information and the defendant moves for dismissal. The Task Force's other proposed changes to this rule are stylistic.

Rule 13.3. Joinder

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 13.4. Severance

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended. In response to comments submitted after the filing of the Task Force's initial petition, the Task Force modified (a) to replace "may" with "must" so the proposed amended rule provides that "a court must order a severance of counts, defendants, or both" if the conditions set forth in the rule apply.

Rule 13.5 Amending Charges; Defects in the Charging Document

The Task Force proposes to incorporate current Rule 13.5(d)'s provision about challenging noncapital allegations into proposed Rule 13.5(a) and to delete the rest of Rule 13.5(d). The Task Force's other proposed changes to this rule are stylistic.

Rule 14. Arraignment

Rule 14.1. General Provisions

Proposed Rule 14.1 is new, and incorporates the substance of the comment that appears just before current Rule 14.1. The proposed rule differs from the current comment in two respects. First, it indicates that a defendant should be advised of the right to

appointed counsel "if applicable." Second, it states that another purpose for an arraignment is "to enter a plea."

Rule 14.2. When an Arraignment Is Held

To accommodate adding proposed new Rule 14.1, the Task Force proposes renumbering current Rule 14.1 as Rule 14.2. The Task Force also clarified Rule 14.2(c) by adding "notice of" in the phrase, "to receive notice of a court date by mail." The Task Force's other proposed changes to this rule are stylistic.

Rule 14.3. The Defendant's Presence

To accommodate adding proposed new Rule 14.1, the Task Force proposes renumbering current Rule 14.2 as Rule 14.3. The Task Force's other proposed changes to this rule are stylistic.

Rule 14.4. Proceedings at Arraignment

To accommodate adding proposed new Rule 14.1, the Task Force proposes renumbering current Rule 14.3 as Rule 14.4. Additionally, in proposed Rule 14.4(a), the Task Force proposes adding the phrase "and the court accepts the plea" to make it clear that a court has the discretion to decline a guilty or no contest plea at arraignment. Currently, Rule 14.3(a) does not contain this qualification. The Task Force's other proposed changes to this rule are stylistic.

Rule 14.5. Proceedings in Counties Where No Arraignment Is Held

Because the rule relates to a procedure in a county where arraignments are not held under proposed Rule 14.2(d), the Task Force proposes relocating current Rule 12.10 to proposed new Rule 14.5. The Task Force also proposes adding a provision to proposed Rule 14.5 that permits a defendant to waive personal presence in accordance with Rule 14.3(b). The Task Force's other proposed changes to this rule are stylistic.

Rule 15. Disclosure

Throughout Rule 15, the Task Force proposes replacing the references to "the prosecutor" with "the State" because the disclosure rules are intended to impose duties on the party and not any particular lawyer representing that party.

Rule 15.1. The State's Disclosures

Most of the Task Force's proposed changes to this rule are stylistic, but the Task Force is proposing substantive changes affecting three sets of rules:

(a) The first set of changes is embodied in proposed Rules 15.1(b)(4)(C) and (i)(3)(A)(ii), and would require additional disclosures if a party notices as a witness a "cold expert," i.e., a witness who will testify about general principles without reference to any of the facts in a case.

(1) Under the current rules, a party is required to disclose only the witness's identity along with records of any examinations the witness has conducted or testing the witness has performed. But if a witness is a "cold expert," the witness by definition will not have examined any of the evidence in a case or performed any testing. As a result, the disclosure will not provide an opposing party with any useful information before interviewing the witness.

(2) The Arizona Rules of Civil Procedure have long required parties to disclose a summary of expected expert testimony, and the Task Force proposes expanding the criminal rules' disclosure requirements to rectify this problem. If a disclosed expert will be testifying at trial and has not prepared a written report, the State would be required to disclose "a summary of the general subject matter and opinions on which the expert is expected to testify." The same language appears in proposed Rules 15.2(c)(2)(C) & (h)(1)(A)(iii), imposing the same disclosure obligation on defendants.

(3) In response to comments submitted after the filing of the Task Force's initial petition, the Task Force also proposes a small change in Rules 15.1(b)(4)(A) and 15.2(c)(2)(A) to require the disclosing party to disclose not only the expert's name and address, but also the expert's "qualifications."

(b) The second set of changes change appears in proposed Rule 15.1(f), which modifies the rule in two respects to clarify the scope of the State's disclosure requirements:

(1) The Task Force proposes to modify Rule 15.1(f)(1) to require the disclosure of material in the possession or control of not only "the prosecutor, or members of the prosecutor's staff," but also such material in the possession or control of "other attorneys in the prosecutor's office." That proposed change is intended to prevent a prosecutor from avoiding a disclosure obligation by reassigning a case within a prosecuting agency.

(2) Currently, Rule 15.1(f)(2) requires a prosecutor to disclose material and information in the possession and control of "[a]ny law enforcement agency" that "has participated in the investigation and of the case and that is under the prosecutor's direction and control." ~~The Task Force proposes modifying the provision to include only "state, county, or municipal law enforcement agenc[ies]," which would exclude federal law enforcement agencies. *See State v. Briggs*, 112 Ariz. 379, 383, 542 P.2d 804, 808 (1975) (holding that the trial court properly ruled that the prosecution was not required to procure a FBI "rap sheet" on a murder victim because the agency was "not under the control of the~~

~~prosecutor").~~ After a proposed revision was roundly criticized during the comment period by both prosecutors and defense counsel, the Task Force decided to retain the language that is currently in the rule.

(c) The third set of substantive changes are in proposed Rule 15.1(j). The Task Force is proposing two changes:

(1) Currently, Rule 15.1(j)(5) provides that the reproduction or release of evidence for examination or testing is subject to the condition that "defense counsel or advisory counsel shall be held accountable to the court for any violation of the court order or this Rule." The Task Force proposes deleting this provision because consequences against counsel are presumed for violation of any court order and the phrase "shall be held accountable" does not inform anyone of what consequences are presumed.

(2) During the December 2016 Rules Agenda, the Supreme Court adopted a rule amendment that expanded the scope of Rule 15.1(j) to images prohibited under A.R.S. § 13-1425. *See* Order, R-16-0035 (Ariz. Sup. Ct. filed Dec. 14, 2016). The proposed rule incorporates that amendment.

Rule 15.2. The Defendant's Disclosures

~~Other than~~The current rule's provisions were modified to include the proposed addition of provisions regarding "cold experts" as described above in the discussion of Rule 15.1~~,~~. In response to comments submitted after the filing of the Task Force's initial petition, the Task Force also proposes a small change in proposed amended Rule 15.2(a)(1)(H), which governs "inspections of the defendant's body." In that provision, the Task Force changed the word "may" to "must," i.e., the inspection "must not include a psychiatric or psychological examination." Other than these modifications, the Task Force is proposing only stylistic changes to this rule.

Rule 15.3. Depositions.

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended. One of the stylistic changes is to replace "those excluded by Rule 39(b)" with "victim."

Rule 15.4. Disclosure Standards.

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) Proposed Rule 15.4(a)(2) includes a definition of "writing" which is implied through the myriad definitions of "statement." In response to comments submitted after the filing of the Task Force's initial petition, the Task Force slightly modified the definition to clarify that a "writing" must be "recorded."

(b) Proposed Rule 15.4(a)(3) modifies the time period during which superseded notes may be destroyed from "20 working days" after their creation to "30 calendar days" because police officers' shifts are not necessarily eight hours per day and five days per week.

Rule 15.5. Excision and Protective Orders.

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 15.6. Continuing Duty to Disclose; Final Disclosure Deadline; Extension

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 15.7. Sanctions.

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) The Task Force proposes clarifying Rule 15.7(a) so it is apparent that if a Rule 15 violation occurs, the aggrieved party may move to compel disclosure, move for sanctions, or move for both disclosure and for sanctions.

(b) Currently, Rule 15.7(c) provides that one party's failure to comply with Rule 15.1 or 15.2 absolves the opposing party of any continuing duty to disclose. The Task Force proposes deleting this provision entirely because it is bad public policy.

Rule 15.8. Disclosure Before a Plea Agreement Expires or is Withdrawn; Sanctions.

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Current Rule 15.9. Appointment of Investigators and Expert Witnesses for Indigent Defendants

The Task Force proposes relocating current Rule 15.9 to proposed new Rule 6.7. Rule 6 deals largely with the appointment of counsel for indigent defendants. In the Task Force's opinion, it makes sense to include the appointment of investigators and experts in the same rule because they all relate to the same general subject matter.

Rule 16. Pretrial Motions and Hearings

Rule 16.1. General Provisions

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) Proposed Rule 16.1 deletes current Rule 16.1(b)'s references to "omnibus hearings" because proposed Rule 16.3 replaces such hearings with a more generalized rule authorizing pretrial conferences.

(b) A proposed comment, similar to a comment to the current rule, clarifies that proposed Rule 16.1(e) does not preclude a defendant from presenting relevant issues and properly disclosed defenses to a jury, such as voluntariness, reliability of experts, or identification.

One other item is worth noting. Currently, Rule 16.1(d) bars "horizontal appeals," that is, a second decision on a previously decided motion after the court reassigns a case to a different judge. Proposed Rule 16.1(e) rewords this provision slightly, but still permits a court to reconsider a matter for good cause or as otherwise allowed by the rules.

Rule 16.2. Procedure on Pretrial Motions to Suppress Evidence

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) The Task Force proposes adding a new Rule 16.2(a) to state "[f]or purposes of this rule, 'suppress' refers to the exclusion of evidence that was unlawfully obtained due to a constitutional violation" to clarify the distinction between a motion to suppress and a motion to preclude. Adding this new rule would require renumbering the remaining parts of Rule 16.2. But to preserve the designation of Rule 16.2(b), which practitioners commonly cite, the Task Force proposes renumbering current Rule 16.2(a) ("duty of the court to inform the defendant") as Rule 16.2(c) (with the same title.).

(b) Currently, Rule 16.2(b) provides that the State's burden does not arise until the defendant "comes forward" with evidence establishing a prima facie case that evidence should be suppressed. The Task Force discussed at length what "comes forward" means, and finally agreed that that "allege" was the most suitable term. Consequently, proposed Rule 16.2(b) employs that term.

(c) Current Rule 16(b)(2) refers to "search *and* seizure." Proposed Rule 16(b)(2) refers instead to "search *or* seizure" because one may not necessarily require the other.

(d) In response to comments submitted after the filing of the Task Force's initial petition, the Task Force modified proposed amended Rule 16.2(c)(4) to add the phrase "including the fact that such testimony occurred" into the rule so that it provides that "the defendant's testimony at the hearing, including the fact that such testimony occurred, will not be disclosed to the jury . . . ." This provision is in current Rule16.2(a)(4), and was inadvertently omitted when the rule was restyled.

Rule 16.3. Pretrial Conference

The Task Force simplified the multiple "hearing" provisions in current Rules 16.3, 16.4, and 16.5 by combining all the hearing provisions into proposed new Rule 16.3 that permits the court to control its pretrial hearings without artificial distinctions and unworkable titles. Few, if any, counties still use "omnibus hearings" described in Rule 16.3, warranting the current rule's elimination. Likewise, the Task Force proposes eliminating "mandatory prehearing conference" and instead proposes including a provision in proposed Rule 16.3(a) stating that all superior court cases must have at least one pretrial conference.

Proposed Rule 16.3 incorporates the most effective features of the current rules into one hearing rule governing "pretrial conference." Among other features:

(a) Proposed Rule 16.3(b) retains the objectives of pretrial conferences set forth in current Rule 16.5.

(b) Proposed Rule 16.3(c) authorizes a court to require the parties to confer and submit memoranda in advance of a pretrial conference. One of the judges on the Task Force observed that it was not obvious that courts have that authority, leading the Task Force to propose an addition to the rule to explicitly grant courts that authority.

Rule 16.4 Dismissal of Prosecution.

With the proposed combining of current Rules 16.3, 16.4, and 16.5 into proposed new Rule 16.3, the Task Force proposes renumbering current Rule 16.6 as Rule 16.4. Additionally, the Task Force proposes that a dismissal under Rule 16.4(a) should be without prejudice, an issue the current rule does not address. The Task Force's other proposed changes to this rule are stylistic.

Two other issues are noteworthy:

(a) Current 16.7(a) and proposed Rule 16.4(a) provide that the court "may" order dismissal on the State's motion and for good cause. Task Force members debated whether "good cause" should be required, but case law appears to support the requirement's inclusion.

(b) Current Rule 16.7(b) and proposed Rule 16.4(b) provide that a court must order dismissal if the charging document is "insufficient as a matter of law." It should be noted, however, that the State might cure an insufficiency concerning a factual matter under Rule 13.5.

Rule 17. Pleas of Guilty and No Contest

Rule 17.1. The Defendant's Plea

The Task Force's other proposed changes to this rule are stylistic except for the following organizational and substantive changes:

(a) The Task Force proposes reorganizing the rule so it is divided into a set of general provisions (proposed Rules 17.1(a) through (e)) and ending with a set of rules specifically applicable to limited jurisdiction courts (proposed Rule 17(f)). The current rule places the limited jurisdiction rules as the second part of Rule 17.1(a), breaking up the content of the generally applicable provisions to sections preceding and following the provisions relating specifically to the limited jurisdiction courts.

(b) Proposed Rule 17.1(f)(1) provides that if a defendant wishes to enter a telephonic plea because of a medical condition, the defendant must submit a written certificate that the defendant has a medical condition preventing the defendant from personally appearing in court. The current rule requires a certificate only if the defendant wishes to appear by phone because of his or her distance from the court.

(c) Proposed Rule 17.1(f)(1)(A) requires that before accepting a plea telephonically, the court must make a finding that either (f)(1)(A)(i) (distance) or (f)(1)(A)(ii) (medical condition) applies.

(d) Proposed Rule 17.1(f)(1)(A) adds the word "discretion' to the rule to clarify that it is discretionary with the court whether to permit a defendant to make a plea telephonically.

(e) Proposed Rule 17.1(f)(1)(C) adds that the court must hold a telephonic hearing and make findings to clarify that the court must still engage in the plea proceeding process even if all the required paperwork is signed.

(e) Proposed Rule 17.1(f)(2)(A) adds the word "discretion" to the rule to clarify it is discretionary with the court whether to permit a defendant make a plea by mail.

Rule 17.2. Advising of Rights and Consequences of a Guilty or No Contest Plea

The Task Force proposing reorganizing the rule slightly to divide the rule into two parts: the provisions that are always supposed to be read before accepting a plea, and the

provisions relating to the "immigration advisement." The Task Force's other proposed changes to this rule are stylistic.

Rule 17.3. A Court's Duty to Determine Whether a Plea is Entered Voluntarily and

The Task Force's proposed changes to this rule are stylistic except for the following organizational and substantive changes:

(a) Proposed Rule 17.3(b) adds the requirement that "[t]he court must find a factual basis for all guilty or no contest pleas." This addition is intended to clarify that a factual basis is required for no contest pleas as well as guilty pleas, and comes from one of the comments to the current rule.

(b) Currently, Rule 26.2(d) provides that if the court does not make a factual basis for a plea at the time it is entered, it must do so before entering judgment. The Task Force proposes relocating this provision to proposed Rule 17.3(b) because the latter rule relates more generally to determining a factual basis. The proposed rule provides that "[t]he court may make this finding at the time of the plea, or it may defer that determination until judgment is entered."

Rule 17.4. Plea Negotiations and Agreements

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) Proposed Rule 17.4(a)(3) incorporates a portion of what is now in current Rule 17.4(a) regarding a victim's rights. It also adds a reference to the "victim's representative" to allow such a representative, rather than the prosecutor, to inform the court of a victim's position.

(c) Proposed Rule 17.4(c) adds the word "confirm" to clarify that the court must confirm that the written plea agreement contains all of the agreement's terms." The added requirement is taken from one of the comments to the current rule.

(d) Proposed Rule 17.4(d) adds the words "the submitted plea" to clarify that the victim is allowed to comment on a plea before the plea is accepted or rejected.

(e) Proposed Rule 17.4(g) modifies current Rule 17.4(g) to clarify that if a defendant withdraws a plea, the defendant may request a change of judge under Rule 10.2 but only if the defendant has not previously exercised that right. That qualification is consistent with existing case law. *See Hill v. Hall ex rel. Yuma Cnty.*, 194 Ariz. 255, 258 ¶ 10, 980 P.2d 967, 970 (App. 1999) (a defendant who has exercised his right to a change of judge under Rule 10.2 is not entitled to an automatic change of judge under Rule 17.4(g) because a defendant may exercise "only one peremptory challenge of a judge by way of either Rule 10.2 or Rule 17.4(g)"). In response to comments submitted after the filing of

the Task Force's initial petition, the Task Force made a small modification to the rule's title to say "Change of Judge if Plea Withdrawn" rather than "Automatic Change of Judge." Because a defendant may not have a right to notice a judge if such a right was previously exercised, it may be misleading to suggest that the right to notice the judge is "automatic."

Rule 17.5. Withdrawal of a Plea

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended. Among other things, the Task Force proposes rewording the second sentence in the current rule to enhance its clarity.

Rule 17.6. Admitting a Prior Conviction

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended. Among other things, the Task Force proposes to refer to testifying in "court" rather than "testifying on the stand."

New Rule 17.7. Submitting a Case to the Court on a Stipulated Record

The Task Force proposes adopting a new Rule 17.7 governing procedures for submitting a case to a court on a stipulated record. Currently, the title to Rule 17.2 refers to the "[d]uty of court to advise of defendants right and consequences . . . of submitting on the record," but the Task Force did not include that last phrase in its title to proposed amended Rule 17.2.

After the filing of the Task Force's initial petition, the Office of the Attorney General submitted a comment expressing concern that this deletion in the title of Rule 17.2 is a substantive change in the rule, effectively eliminating the option of submitting a case on the record. That was not the Task Force's intent, as cases are frequently submitted on the record when a defendant or the State wishes to take an immediate appeal after losing a suppression motion or some other critical pretrial motion. The problem is that while the title of current Rule 17.2 refers to submitting a case on the record, the rule itself does not discuss the procedure for doing so and instead focuses only on the required disclosures for a guilty or no contest plea.

To resolve the issue, Task Force proposes adopting a new Rule 17.7 that sets forth appropriate disclosures, along with a required finding that a defendant's agreement to submit a case on the record was made voluntarily and intelligently. The rule draws largely on the requirements set forth by the Supreme Court in *State v. Avila*, 127 Ariz. 21, 24, 617 P.2d 1137, 1140 (1980).

Rule 17's title also was slightly modified to refer to submissions on a stipulated record.

Rule 18. Trial by Jury; Waiver; Selection and Preparation of Work

Rule 18.1. Trial by Jury

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) The Task Force proposes adding an additional three-sentence paragraph for inclusion in the comment to Rule 18.1(a) concerning the right to a jury trial for misdemeanor offenses.

(b) The Task Force proposes adding a new Rule 18.1(b)(1) that provides a general discussion of waiver and specifically authorizes a defendant to waive the right to have a jury determine aggravation or the penalty in a capital case.

Rule 18.2. Additional Jurors

To enhance the rule's clarity, the Task Force proposes to replace the current rule's reference to "regular jurors"—a phrase that lacks a self-evident meaning—with the phrase "trial jurors." The Task Force's other proposed changes to this rule are stylistic.

Rule 18.3. Jurors' Information

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) To enhance the rule's clarity, the Task Force proposes replace the current rule's reference to "felony conviction status" with the phrase "prior felony conviction."

(b) The Task Force also proposes replacing the current rule's reference to "jury commissioner" with "court" so it encompasses similar functions performed by other designated staff in courts that do not have a dedicated jury commissioner.

Rule 18.4. Challenges

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) Currently, a comment to Rule 18.4(a) says that a challenge to the panel must include a showing of prejudice. The Task Force proposes including this requirement in the body of proposed Rule 18.4(a).

(b) To clarify that a party may challenge multiple jurors for cause under Rule 18.4(b) and not just single jurors, the Task Force proposes adding the phrase "or jurors" to the proposed rule.

Rule 18.5. Procedure for Jury Selection

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) The Task Force proposes replacing the current rule's reference to "court or clerk" with "court," which would allow the jury commissioner to perform the function of calling jurors.

(b) The Task Force proposes retaining and slightly modifying a comment to current Rule 18.5(b), which distinguishes the "strike and replace" and "struck" methods of jury selection.

(c) Like the current rule, proposed Rule 18.5(c) provides that the court may allow the parties to present brief opening statements to the jury panel. The current rule, however, also provides that "the court may require the parties to do so." The Task Force proposes deleting that clause because a court cannot compel the defendant to make an opening statement or a "mini-opening statement."

(d) In proposed Rule 18.5(h)(2), which deals with the selection of alternates, the Task Force proposes adding the words "or court official" after the word "clerk," and the words "or stipulation" after the words "by lot." These revisions would give the court more flexibility in determining who the alternate jurors will be.

(e) Proposed Rule 18.5(i)(1), governing juror alternates, adds a new sentence that is implied in the current rule: "this rule governs their continued participation in the case."

(f) The Task Force proposes combining two of the current comments to the rule and modifying them.

In response to comments submitted after the filing of the Task Force's initial petition, the Task Force modified proposed amended Rule 18.5 to provide that a court "must"—and not just "may"—allow the parties to conduct voir dire. The change is consistent with existing case law. *See State v. Anderson*, 197 Ariz. 314, 320-21, 4 P.3d 369, 375-76 (2000) ("Under existing Arizona law, the judge lacks discretion to deny defense counsel's request [to conduct voir dire] under Rule 18.5.").

Rule 18.6. Jurors' Conduct

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) Currently, Rule 18.6(a) contains a reference to a juror's handbook approved by the Supreme Court. Because such a handbook is no longer in common use,

the Task Force proposes changing this provision to provide that "the court may provide prospective jurors with orientation information about jury service."

(b) Currently, in the oath set forth in Rule 18.6(b), the words "or affirm" are in parentheses, indicating that the words "or affirm" may be used if a juror declines to "swear" an oath on religious grounds. The current rule, however, does not include parenthesis around the phrase "so help you God," which suggests that the invocation of the phrase is mandatory even if a juror does not believe in the existence of God. Because of concerns that this might be unconstitutional, the Task Force proposes placing corresponding parentheses around the phrase, and leaving it the judges determine the manner of administration, i.e., whether to administer it as an oath or as an affirmation, and whether to include the phrase "so help you God."

(c) To reflect existing practice, proposed Rule 18.6(c) replaces the current rule's initial phrase "immediately after the jury is sworn" with "after the jury is sworn."

Rule 19. Trial

Rule 19.1. Conduct of Trial

The Task Force proposes a new Rule 19.1(a) to clarify that the rules applicable to trials may be modified with the court's permission and that portions of Rule 19 may not apply in bench trials. The Task Force's other proposed changes to this rule are stylistic.

Rule 19.2. Presence of the Defendant at Trial

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Current Rule 19.3. Evidence

Currently, Rule 19.3(a) says that the "law of evidence relating to civil actions shall apply to criminal proceedings except as otherwise provided." The rule goes on in Rules 1.9(b) and (c) to set forth rules governing the admissibility of prior inconsistent statements and prior recorded testimony.

The Task Force proposes eliminating Rule 19.3 altogether. Rule 1.9(a) is outdated and unnecessary because the Arizona Rules of Evidence governs the admissibility of evidence in criminal proceedings and it is unnecessary for the criminal rules to incorporate those evidentiary rules by saying that they to apply to criminal proceedings. Rules 19.3(b) and (c) also are unnecessary because there is nothing in them that is not already set forth in Rules 801(d)(A) and 804(d)(1) of the Arizona Rules of Evidence.

Rule 19.3. Admonition

To reflect the proposed deletion of current Rule 19.3, the Task Force proposes renumbering current Rule 19.4 as Rule 19.3. It also proposes relocating the current rule's provisions regarding sequestration from this rule to proposed new Rule 19.6, and changing this rule's title from "Separation and Detention of Jurors" to "Admonition." The Task Force's other proposed changes to this rule are stylistic.

Rule 19.4. A Judge's Death, Illness, or Other Incapacity

To reflect the proposed deletion of current Rule 19.3, the Task Force proposes renumbering current Rule 19.5 as Rule 19.4. Additionally, the Task Force proposes revising the current rule to clarify that if a judge is replaced because he or she becomes ill, incapacitated, or unavailable, the new judge must order a new trial if continuing the proceeding would be "unduly prejudicial," and, in making that determination, the new judge "should consider the manifest necessity of declaring a mistrial over the defendant's objection." The Task Force's other proposed changes to this rule are stylistic.

Rule 19.5. Presence of a Representative of a Minor or Incapacitated Victim

To reflect the proposed deletion of current Rule 19.3, the Task Force proposes renumbering current Rule 19.6 as Rule 19.5. The Task Force's other proposed changes to this rule are stylistic.

Rule 19.6. Sequestration

Proposed new Rule 19.7 extracts concepts of sequestration from the current Rule 19.4 and proposes various stylistic changes to the extracted provisions. No substantive changes are intended.

Rule 20. Judgment of Acquittal or Unproven Aggravator

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) The Task Force proposes adding a sentence to Rule 20(a)(3) to clarify that the defendant is not required to proceed with his or her case until the court rules on a Rule 20(a) motion. This addition comes from a comment following the current rule.

(b) The Task Force proposes adding a new Rule 20(b)(2) to recognize explicitly that the court has the inherent authority, on its own initiative, to order a judgment of acquittal or find an aggravator or other sentence enhancement not proven if there is no substantial evidence to support the verdict. This authority is not delineated in the current rule, but the Task Force believes that this addition is necessary and consistent with due process.

(c) Currently, Rule 20(b) provides that after a verdict, a defendant may "renew[]" a motion for acquittal, indicating that such a motion may be brought only if a similar motion was made at or before the close of evidence. The Task Force proposes revising the rule in proposed Rule 20(b)(1) to provide that a defendant "may make or renew" a Rule 20 motion after a verdict, which would permit a defendant to make a post-verdict motion for acquittal even if no such motion was made at or before the close of the evidence. The Task Force believes this addition is needed for two reasons:

(1) First, a verdict based on insufficient evidence would be reversed on appeal as fundamental error. Thus, the court should have the ability to make this finding even if the motion is made for the first time post-verdict.

(2) Second, because a court is required to grant a motion for judgment of acquittal on its own initiative if it determines that there is no substantial evidence to support the verdict, no reason exists not to allow a defendant to raise that issue in a post-verdict motion even if he or she failed to raise it earlier during trial.

Rule 21. Jury Instructions and Verdict Forms

Rule 21.1 Applicable Law

Currently, Rule 21.1 provides that "[t]he law relating to instructions to the jury in civil actions" generally apply to criminal actions. The Task Force proposes making the rule more specific by replacing the quoted phrase with "Arizona Rule of Civil Procedure 51," which is the civil procedure rule governing jury instructions. The Task Force's other proposed changes to this rule are stylistic.

Rule 21.2 Requests for Instructions and Verdict Forms

Proposed Rule 21.2 replaces the current rule's reference to "counsel for each party" with "parties" as some cases involve self-represented defendants. Currently, the rule requires a party to furnish proposed instructions to "the other parties." To enhance the rule's clarity, the Task Force proposes adding the phrase, "including co-defendants." The Task Force's other proposed changes to this rule are stylistic.

Rule 21.3. Rulings on Instructions and Verdict Forms

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) To enhance the rule's clarity, the proposed rule replaces the current rule's reference to "proposed action" to require the court to inform the parties of "its proposed jury instructions and verdict forms."

(b) The Task Force proposes relocating current Rule 21.3(c), relating to objections and waiver, to proposed Rule 21.3(b), so it follows immediately after the requirement in proposed Rule 21.3(a) that the court disclose its proposed instructions and verdict forms to the parties.

(c) ~~Proposed Rule 21.3(b) also adds a new sentence acknowledging, consistent with long-standing case law, that even if a party fails to make an objection, an appellate court may nonetheless review the instruction for "fundamental error."~~ Currently, Rule 21.3(c) says that a party may not "assign error" on appeal for an erroneous instruction or the failure to give an instruction unless the party has made an objection. That is not an accurate restatement of the law because limited appellate review may still be available even when no objection is made. To clarify the rule, a last sentence has been added saying "If a party does not make a proper objection, appellate review may be limited."

(d) Currently, Rule 21.3(d) permits limited jurisdiction courts to provide juries with prerecorded audio instructions rather than paper copies of instructions. In the Task Force's opinion, this is not a good practice because it discourages judges from customizing instructions to fit the needs of particular cases. Because of this, the Task Force proposes to eliminate this rule and to replace it with a provision in proposed Rule 21.3(d) stating that "[t]he court's preliminary and final instructions must be in writing, and the court must furnish a copy of the instructions to each juror before the court reads them."

Rule 21.4. Verdict Forms for Necessarily Included Offenses or Attempts

Currently, Rule 23.3 includes a provision for submitting forms of verdict to the jury on necessarily included offenses. In the Task Force's opinion, it would be more logical to include this provision in Rule 21, which deals more generally with instructions and verdict forms. Consequently, the Task Force proposes relocating the rule to proposed new Rule 21.4. In the text of the proposed rule, the Task Force proposes the addition of a prefatory phrase requiring the court to submit the verdict form to the jury "on request by any party and if supported by the evidence." The Task Force's other proposed changes to this rule are stylistic.

Rule 22. Deliberations

Rule 22.1. Instructions and Retirement

To better reflect the rule's contents, the Task Force proposes changing the current rule's title from "retirement of jurors" to "Instructions and Retirement." The Task Force's other proposed changes to this rule are stylistic.

Rule 22.2. Materials Used During Deliberations

Currently, Rule 22.2(a) does not allow a verdict form to indicate whether the charged offense is a felony or misdemeanor "unless the statute upon which the charge is

based directs that the jury make this determination." The Task Force believes this quoted language is unnecessary and proposes deleting it in proposed Rule 22.2(b). The Task Force's other proposed changes to this rule are stylistic.

Rule 22.3. Repeating Testimony and Additional Instructions

The Task Force proposes adding a provision that testimony can be "replayed" in addition to being "read." The Task Force's other proposed changes to this rule are stylistic.

Rule 22.4. Assisting Jurors at Impasse

The Task Force proposes revising the comment to the rule to include the updated impasse instruction in RAJI (CRIMINAL) 3D, Standard Criminal 42 (Supp. 2010). The Task Force's other proposed changes to this rule are stylistic.

Rule 22.5. Discharging a Jury

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 23. Verdict

Rule 23.1. Form of Verdict; Sealed Verdict

The Task Force proposes amending the current rule to follow an analogous recent amendment to Rule 24 of the Arizona Rules of Civil Procedure, which permits a foreperson to affix initials and a juror number to a verdict form in lieu of a signature. The intention is to protect the foreperson from having his or her identity disclosed publicly in the court file, which may invite harassment or possible identity theft. The Task Force's other proposed changes to this rule are stylistic.

Rule 23.2. Types of Verdicts

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) The Task Force proposes amending current Rule 23.2(e), which presently applies only to aggravation verdicts in capital cases, to also apply to aggravation verdicts in noncapital cases. Because the jury is not required to reach a separate aggravation verdict for an element that is inherent in an offense (e.g., dangerousness, prior conviction), the Task Force proposes amending the rule to state in proposed Rule 23.2(e) that the jury must render a verdict determining whether "the State proved each of the alleged aggravating circumstances submitted to the jury."

(b) The Task Force proposes changing the term "penalty hearing" in current Rule 23.2(f) to "penalty phase," consistent with the nomenclature used in practice.

Rule 23.3. Polling the Jury

As discussed earlier, the Task Force proposes relocating current Rule 23.3, dealing with forms of verdict for necessarily included offenses, to proposed new Rule 21.4. To accommodate that change, the Task Force proposes renumbering current Rule 23.4 as Rule 23.3. The Task Force's other proposed changes to current Rule 23.4 are stylistic.

Rule 24. Post-Trial Motions

Rule 24.1. Motion for New Trial

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) Throughout Rule 24, the Task Force proposes replacing references to "perfection of an appeal" to reflect that, consistent with the 2015 amendments to the Arizona Rules of Civil Appellate Procedure, the Task Force proposes replacing the vague metaphysical concept of "appeal perfection" with the distribution of a notice by the appellate clerk under proposed Rule 31.9(e) that the record on appeal has been filed.

(b) The Task Force proposes adding a sentence in Rule 24.1(b) to clarify that the deadline for filing a motion for a new trial is jurisdictional and the court may not extend it. This provision comes from a comment following the current Rule 24.1(b).

Rule 24.2. Motion to Vacate Judgment

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) Current Rule 24.2(b) provides that a court may deny a motion to vacate a judgment "on the grounds that the matter has already been decided." The Task Force proposes to delete this rule because it is unnecessary; no one doubts that a court has the authority to deny a motion on that basis.

(b) The Task Force proposes a new Rule 24.2(b), which incorporates the timing requirements currently in Rule 24.2(a) and replaces the references to "perfection" with receipt of notification under proposed Rule 31.9(e).

Rule 24.3. Modification of Sentence

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 24.4. Clerical Error

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 25. Procedure After a Verdict or Finding of Guilty Except Insane

To conform to changes in A.R.S. § 13-502, the Task Force proposes changing the title of current Rule 25 from "Procedure After Verdict or Finding of *Not Guilty by Reason of Insanity*" to "Procedure After a Verdict or Finding of *Guilty Except Insane*." The Task Force's other proposed changes to this rule are stylistic.

Rule 26. Sentencing

Rule 26.1. Definitions; Scope.

The Task Force proposes to revise the definitions of "determination of guilt" and "judgment" to acknowledge that a judge who sits as finder of fact in a bench trial returns a "verdict," even if not on a verdict form in the manner followed by a jury. The Task Force's other proposed changes to this rule are stylistic.

Rule 26.2. Time to Render Judgment

Currently, Rule 26.2(d) permits a court to make a finding of factual basis for a plea just before the entry of the judgment of guilt if "the court did not affirmatively make a finding of a factual basis for a plea under Rule 17.3." The Task Force could not envision a situation in which this could occur, but decided to retain it in the unlikely event it is needed. The Task Force, however, proposes relocating the provision to Rule 17.3(b), which deals more generally with determining a factual basis for a plea. The Task Force's other proposed changes to this rule are stylistic.

Rule 26.3. Sentencing Date and Time Extensions

The Task Force proposes to insert the word "trial" into proposed Rule 26.3(a)(1)(C) so that the last clause of the last sentence reads that the defendant may "lose the right to have an appellate court review the *trial* proceedings by direct appeal." Although a substantive change, the Task Force believes the addition of the word "trial" is necessary to conform to the subject matter jurisdiction limitations in A.R.S. § 13-4033(C). The Task Force's other proposed changes to this rule are stylistic.

Rule 26.4. Presentence Report

The Task Force proposes relocating the inadmissibility provision from current Rule 26.6(d)(2) to proposed new Rule 26.4(d). The Task Force's other proposed changes to this rule are stylistic.

Rule 26.5. Diagnostic Evaluation and Mental Health Examination

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 26.6. Court Disclosure of Reports Before Sentencing

As discussed above, the Task Force proposes relocating the inadmissibility provision from current Rule 26.6(d)(2) to proposed new Rule 26.4(d). The Task Force's other proposed changes to this rule are stylistic.

Rule 26.7. Presentencing Hearing; Prehearing Conference

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 26.8. The State's Disclosure Duty; Objections and Corrections to a Presentence Report

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended. As part of the stylistic changes, the heading of current Rule 26.8(b)—"Special Duty of the Prosecutor"—was changed to "The State's Disclosure Duty" in proposed Rule 26.8(a) to highlight that disclosure obligation is owed by the State, and not just the individual prosecutor responsible for a case.

Rule 26.9. The Defendant's Presence

Currently, Rule 26.9 includes a provision stating that "[i]n a capital case, the defendant is entitled to be present at both the aggravation and penalty hearings, and the return of any verdict." The Task Force proposes deleting that provision because capital aggravation and sentencing are now part of trial, *see* A.R.S. § 13-752, and the right to be present is already set forth in proposed Rule 19.2. The Task Force's other proposed changes to this rule are stylistic.

Rule 26.10. Pronouncing Judgment and Sentence

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 26.11. A Court's Duty After Pronouncing Sentence

The Task Force proposes adding a provision in proposed Rule 26.11(a)(1)(B) stating explicitly that the sentencing court must inform the defendant of the right to seek post-conviction relief. The Task Force's other proposed changes to this rule are stylistic.

Rule 26.12. Defendant's Compliance with Monetary Terms of a Sentence

Currently, Rule 26.12(c)(3) ("Time limits–Restitution and Non-Monetary Obligations") begins with the conditional clause "if the payment or performance of an obligation does not involve the court." The Task Force could envision no circumstance where this would apply (i.e., where the court would *not* be involved), and therefore proposes deleting the rule and renumbering current Rule 26.12(c)(4) as Rule 26.12(c)(3). The Task Force's other proposed changes to this rule are stylistic.

Rule 26.13. Consecutive Sentences

The Task Force proposes the addition of a final sentence to the current rule: "There is no presumption for consecutive sentences rather than concurrent sentences." The Task Force believes this addition is needed because members were aware of several instances where sentencing courts misinterpreted this rule as creating such a presumption. The Task Force's other proposed changes to this rule are stylistic.

Rule 26.14. Resentencing

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 26.15. Special Procedures upon Imposing a Death Sentence

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 26.16. Warrant of Authority

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 27. Probation and Probation Revocation

Rule 27.1. Conditions and Regulations of Probation

In response to comments submitted after the filing of the Task Force's initial petition, the Task Force proposes adding the phrase "and protect any victim" at the end of the first sentence so it reads "[t]he sentencing court may impose conditions on a probationer that promote rehabilitation and protect any victim." The Task Force also proposes adding a sentence to the end of current Rule 27.1 to indicate that the provisions regarding probation do not apply in limited jurisdiction courts unless an intergovernmental agreement exists. The Task Force's other proposed changes to this rule are stylistic.

Rule 27.2. Intercounty Transfers

The Task Force proposes adding definitions of "courtesy transfer of probation supervision" and "transfer of probation jurisdiction" in proposed Rule 27.2(a). The Task Force's other proposed changes to this rule are stylistic.

Rule 27.3. Modification of Conditions or Regulations

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) The Task Force proposes adding definitions of "condition" and "regulation" in proposed Rule 27.3(a).

(b) The Task Force also proposes adding a sentence to the rule, appearing in proposed Rule 27.3(c)(1), to clarify that a court's authority to modify probation terms must comply with due process requirements, statutory limitations, and the parties' agreement.

Rule 27.4. Early Termination of Probation

In response to comments submitted after the filing of the Task Force's initial petition, the Task Force proposes modifying the second sentence to provide that a motion to terminate probation may be made not only by the probation officer and the court, but also by the probationer. It also proposes modifying that sentence to provide that the court may take action only after giving the victim and the State the opportunity to be heard. The Task Force also proposes various stylistic changes to this rule, but no other substantive changes are intended.

Rule 27.5. Order and Notice of Discharge

The Task Force proposes deleting the word "absolutely" that now appears in current Rule 27.5(a) and (b). In the Task Force's opinion, the term is misleading because even if a probationer may be discharged from probation; he or she may still remain responsible for restitution payments. In such a situation, the probationer would not be "absolutely discharged." The Task Force's other proposed changes to this rule are stylistic.

Rule 26.6. Petition to Revoke Probation and Securing the Probationer's Presence

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 27.7. Initial Appearance After Arrest

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) In proposed Rule 27.7(a), the Task Force proposes adding a reference to A.R.S. § 13-901(D) to address situations in which a probationer is arrested by the individual's probation officer.

(b) Also, in proposed Rule 27.7(b), the Task Force proposes to clarify that after a probationer is arrested on a warrant issued under Rule 27.6, the court is responsible for notifying the individual's probation officer of the initial appearance date.

Rule 27.8. Probation Revocation

The Task Force proposes a change to current Rule 27.8(b)(2), reflected in proposed Rule 27.8(b)(2), to clarify that although a probationer has a right to be present for a violation hearing, the violation hearing may proceed in the probationer's absence under Rule 9.1 if the probationer was previously arraigned under Rule 27.8. The Task Force's other proposed changes to this rule are stylistic.

Rule 27.9. Admissions by the Probationer

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 27.10. Victims' Rights in Probation Proceedings

The Task Force proposes deleting current Rule 27.10, dealing with probation revocation proceeding that are conducted *in absentia*. Task Force members are not aware of any courts using this rule, and the procedure raises serious due process concerns.

To accommodate deleting Rule 27.10, the Task Force proposes renumbering Rule 27.11 as Rule 27.10. The Task Force's other proposed changes to this rule are stylistic.

Rule 27.11. Probation Review Hearing Regarding Sex Offender Registration

To accommodate deleting current Rule 27.10, the Task Force proposes renumbering Rule 27.12 as Rule 27.11. It also proposes modifying the title of the rule to better reflect its contents. The Task Force's other proposed changes to this rule are stylistic.

Rule 28. Retention and Destruction of Records and Evidence

Rule 28.1. Duties of the Clerk

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) The Task Force proposes eliminating the majority of current Rule 28(b)(1) and (2) relating to the destruction of certain court records. The rule's content already appears in Supreme Court Rule 94 and other supplemental Supreme Court authority. In their place, proposed Rule 28(b)(1) directs the reader to the Supreme Court's retention and destruction schedules for guidance on destroying records.

(b) Proposed Rule 28(b)(2) retains the definition of "subject to modification" contained in the current rule, which triggers a clerk's obligation to return evidence to the party who submitted it.

(c) The Task Force proposes amending current Rule 28.1(c) to clarify that the "original verbatim records" referenced in the title of the rule means court reporter notes, as stated in the present rule. Although the Arizona Code of Judicial Administration includes provisions for the retention of court reporter notes, the Task Force is concerned that deleting Rule 28.1(c) might give the false impression that court reporters no longer need to retain their notes.

(d) The Task Force proposes deleting Rule 28.1(d), dealing with appellate court records. In the Task Force's opinion, the current rule is unnecessary because the appellate clerks already are subject to mandated records retention and destruction schedules independent of this rule.

Rule 28.2 Disposition of Evidence

The Task Force's proposed changes to this rule are stylistic except for the following organizational and substantive changes:

(a) Proposed Rule 28.2(a) sets forth a general rule that once a case is no longer "subject to modification," the clerk must return evidence to the party who submitted it. This proposed rule reflects current practice, but it is nowhere to be found in the current rule.

(b) Proposed Rule 28.2(b) sets forth for the rules that govern a law enforcement agency's disposal of evidence. It is intended to replace current Rules 28.2(a) through (e).

(c) Proposed Rule 28.2(b)(1) clarifies that the rule only applies to evidence a law enforcement agency possesses or acquires in a filed case that is either

pending or concluded. The proposed rule does not address evidence in the custody of prosecutors or law enforcement in matters still under review but not filed. The current rule is ambiguous about whether it applies to such evidence.

(d) Proposed Rule 28.2(b)(1) also incorporates the provisions in current Rule 28.2(d), requiring the law enforcement agency to notify the relevant prosecuting agency and the Attorney General of an intention to dispose of evidence, and permitting them to document the evidence.

(e) Proposed Rule 28.2(b)(2) incorporates the provisions now found in current Rule 28.2(e), requiring the prosecuting agency or law enforcement agency to notify any person against whom the State has used or may use the evidence, of the intent to dispose of the evidence. The current rule provides that the agency must serve written notice at least ten days before disposing of the evidence; the proposed rule would require at least twenty days' notice. Like the current rule, the agency also would be required to serve any record of disposal prepared by the law enforcement agency, the prosecuting agency, or the Attorney General.

(f) Similar to a provision in current Rule 28.1(e), proposed Rule 28.2(b)(3) would give a person receiving notice ten days in which to request a stay of disposal until after trial or to request permission to examine the item. Proposed Rule 28.2(b)(4) clarifies that if a request for examination is made, the State must permit it, which is implied but not required in current Rule 28.1(e). Like current Rule 28.1(e), proposed Rule 28.2(b)(4) also provides that the State may impose reasonable conditions on any examination, testing, or analysis.

Rule 29. Restoring Civil Rights or Vacating a Conviction

Rule 29.1. Grounds; Notice

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) The Task Force proposes changing the heading to current Rule 29.1(a) from "Probationers" to "Generally" to clarify that the rule applies not just to probationary cases, but to cases from *all* courts, including limited jurisdiction courts. This is currently stated in a 1993 comment to current Rule 29.2.

(b) Consistent with the language used in A.R.S. § 13-907, the current Rule 29.1(a)'s reference to "vacat[ing] a conviction" would be changed to "set[ting] aside a conviction." This change also clarifies that the rule does not apply to a plea in a diversion case that ultimately resulted in a dismissal and not a conviction.

(c) The Task Force proposes retaining the comment to this rule, but proposes a number of changes to update the statutory citations.

Rule 29.2. Application

The Task Force proposes replacing the reference to "prosecutor" with "prosecuting agency" to clarify that the rule refers to the agency and not the individual prosecutor originally responsible for the case. The Task Force's other proposed changes to this rule are stylistic.

Rule 29.3. Hearing Date

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 29.4. State's Response

The Task Force proposes modifying current Rule 29.4's requirement that the State send its response "to the applicant and his or her attorney." In the Task Force's opinion, no need exists to send the response directly to the applicant if he or she is represented by counsel. Consequently, proposed Rule 29.4 provides that the State must send the response to "the applicant's attorney or the applicant if self-represented." The Task Force's other proposed changes to this rule are stylistic.

Rule 29.5. Disposition

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 29.6. Special Provisions for Sex Trafficking Victims

Because current Rules 29.6 and 29.7 pertain to the same subject matter, the Task Force proposes combining the two rules under a new heading "Special Provision for Sex Trafficking Victims." Proposed Rule 26.7(b) also provides that the clerk must transmit a copy of an order vacating a conviction to the victim, a requirement not currently in Rule 29.7. The Task Force's other proposed changes to the contents of the combined rule are stylistic.

Rule 30. [Reserved] (Currently, "Appeals from Limited Jurisdiction Courts")

The Task Force proposes eliminating current Rule 30 because the Superior Court Rules of Appellate Procedure–Criminal ("SCRAP–Criminal") adequately address the topics covered in current Rule 30. The Task Force proposes adding a new Rule 31(a)(1) providing that appeals from limited jurisdiction courts are governed by the SCRAP–Criminal provisions. Rule 30 would be reserved as as a placeholder for a future rule.

Rule 31. Appeals

Rule 31.1. Scope of Rule; Precedence; Definitions

The Task Force's proposed changes to this rule are stylistic except for the following organizational and substantive changes:

(a) As discussed above, the Task Force proposes adding a new Rule 31(a)(1) providing that appeals from limited jurisdiction courts are governed by the SCRAP–Criminal provisions.

(b) The Task Force proposes relocating current Rule 31.14(b) ("Precedence of Criminal Appeals") to proposed Rule 31.1(b) because it is a rule of general application.

(c) The Task Force also proposes a new Rule 31.1(c) providing definitions for common terms used in Rule 31. Of particular significance is the definition of "entry" in proposed Rule 31.1(c)(6), a term that is used (among other places) in proposed Rule 31.2(a)(2), governing the deadlines for filing a notice of appeal.

Rule 31.2. Notice of Appeal or Notice of Cross-Appeal

The Task Force proposes relocating current Rule 31.3, concerning the time for taking an appeal, to proposed Rule 31.2(a)(2), The Task Force's other proposed changes to this rule are stylistic except for the following organizational or substantive changes:

(a) The Task Force proposes relocating the deadlines for filing a notice of appeal or notice of cross-appeal from current Rule 31.3 to proposed Rule 31.2(a)(2).

(b) Proposed Rule 31.2(a)(2)(A) and (B) clarify that a notice of appeal taken from a judgment of conviction and imposition of sentence must be filed no later than twenty days after oral pronouncement of sentence, but a notice of appeal taken from any other judgment or order must be filed no later than twenty days after entry of the judgment or order. In similar fashion, proposed Rule 31.2(a)(3) requires a notice of delayed appeal to be filed no later than twenty days of entry of the order granting a delayed appeal, rather than within twenty days of service of the order granting a delayed appeal. These deadlines are no different than those currently set forth in Rule 31.3.

(c) The Task Force proposes deleting a portion of current Rule 31.2(c), concerning joining appeals following the filing of separate notices of appeal, because proposed Rule 31.4(a), governing consolidation of appeals, covers that subject.

(d) Proposed Rule 31.2(d) permits two or more defendants to file a joint notice of appeal or cross-appeal if they have "common issues of law and fact," which is more specific and easier to understand than the current language used in Rule 31.2(c),

which permits a joint notice of appeal if "their interests are such as to make joinder practicable."

(e) The Task Force proposes relocating current Rule 31.7, governing "docketing in the appellate court" and "designation of the parties," to proposed Rule 31.2(g), which explains the actions that an appellate clerk must take no later than ten days after receiving a notice of appeal. The vague term "docketing" would no longer be used. Proposed Rule 31.2(i) also adds that the appellate clerk must assign an appellate case number to the appeal, which reflects current practice but is not currently required in the rule.

(f) The Task Force proposes adding proposed Rule 31.2(h) to explain that if a party seeks review of an order that grants or denies relief under Rule 24 but was issued after a notice of appeal or cross-appeal is filed, the party must file an amended notice of appeal within twenty days of entry of the order. That proposed requirement would clarify that the party should not file a separate notice of appeal, which would require the court to later consolidate the two appeals.

Rule 31.3. Suspension of These Rules; Suspension of an Appeal; Computation of Time; Modifying a Deadline

As discussed above, the Task Force proposes relocating current Rule 31.3 to proposed Rule 31.2. The Task Force proposes consolidating three other current rules into proposed new Rule 31.3—current Rule 31.4 ("Motion to stay appeal; notice of reinstatement of appeal"); Rule 31.20 ("Suspension of these rules"); and Rule 31.11 ("Perfection of the appeal"). Proposed Rule 31.4 addresses "Consolidation of Appeals."

The Task Force's proposed changes to the combined rules are stylistic except for the following organizational and substantive changes:

(a) Currently, Rule 31.20 allows an appellate court to suspend any provision in Rule 31 "in exceptional circumstances." In proposed Rule 31.3(a), the Task Force proposes changing that standard to provide that an appellate court may suspend any provision "for good cause." This proposed terminology is consistent with the Rule 3(a) of the Arizona Rules of Civil Appellate Procedure.

(b) Proposed Rule 31.3(b)(1) provides that an appellate court may "suspend" an appeal rather than "stay" it, which is the term currently used in Rule 31.4(a). This proposed terminology is consistent with the terminology used in Rule 3(b) of the Arizona Rules of Civil Appellate Procedure.

(c) Currently, Rule 31.11 provides that a party may not file a new matter in the trial court later than fifteen days after the record on appeal has been filed, which the title of the rule describes as the "[p]erfection of the appeal." The Task Force proposes

relocating this provision to proposed Rule 31.3(c). It also proposes eliminating the phrase "perfection of the appeal" because it adds nothing to an understanding of the rule. Last, because the parties will not know when the appellate court has received and filed all of the record on appeal, the Task Force proposes that the fifteen-day period begin when the appellate court distributes a notice under proposed Rule 31.9(e) that the record on appeal has been filed.

(d) The Task Force proposes a new Rule 31.3(d), which sets forth the time computation rules. It incorporates by reference the time computation rules in proposed Rule 1.3(a), which are generally applicable to trial courts. It includes one exception—five calendar days would not be added to the time for responding to an electronically served document. This change is necessary because as of January 1, 2017, an amendment to Rule 5(a) of the Arizona Rules of Civil Appellate Procedure eliminates the additional five-day period for responding to electronically served documents in civil appeals. *See* Order, R-16-0034 (Ariz. Sup. Ct. filed Sept. 2, 2016). Including this exception here would ensure that the time computation rules of time are the same in both criminal and civil appeals.

(e) The Task Force proposes adding a new Rule 31.3(e), governing the modification of deadlines. It is modeled on Rule 5(b) of the Arizona Rules of Civil Appellate Procedure. The Task Force proposes this rule to promote consistency with the civil appellate rules.

Rule 31.4. Consolidation of Appeals

This proposed rule derives from current Rule 31.4(b). The Task Force proposes various stylistic changes to the rule, but no substantive changes are intended.

Rule 31.5. Appointment of Counsel on Appeal; Waiver of the Right to Appellate Counsel

The Task Force's proposed amendments to current Rules 31.5(a) through (d) are stylistic and no substantive changes are intended. Proposed Rules 31.5(e) and (f) address a defendant's right to self-representation on appeal, and are consistent with the Arizona Supreme Court's January 2016 amendments to Rule 31.5. *See* Order, R-15-0028 (Ariz. Sup. Ct. filed Dec. 16, 2015).

Rule 31.6. Filing Documents with an Appellate Court; Document Format; Service and Proof of Service

Proposed Rule 31.6 governs the filing, formatting, and service of documents, and is derived mostly from current Rules 31.12 and 31.21. The Task Force proposed changes are stylistic except for the following organizational and substantive changes:

(a) Proposed Rule 31.6(a) is derived from current Rule 31.21(a), but it also incorporates the definition of "filing" set forth in proposed Rule 1.7(a).

(b) Proposed Rule 31.6(b) replaces current Rule 31.12, governing the form of motions, and also applies to other documents filed with an appellate court besides appellate briefs, which are separately governed by proposed Rule 31.12(b). The proposed rule incorporates by reference formatting requirements set forth in proposed Rule 1.6(a) through (c), except that the text in every typed document and footnote must use at least a 14-point typeface.

(c) Proposed Rule 31.6(c) is derived from current Rule 31.21(b), but omits a provision allowing a party to file, in lieu of a proof of service, an "acknowledgment of service" signed by the person served. To best of the Task Force's knowledge, this alternative is never used. Additionally, the proposed rule incorporates by reference the service provisions set forth in proposed Rule 1.7(c), with the service requirements for appellate briefs separately set forth in proposed Rule 31.13(d).

(c) Proposed Rule 31.6(d), regarding word limits, derives from current Rule 31.13(b)(2). It also clarifies which parts of a document a party must include when calculating the word limits specified in other cross-referenced rules, and is consistent with Rule 4(b)(9) of the Arizona Rules of Civil Appellate Procedure.

Rule 31.7. Stay of Proceedings

The Task Force proposes consolidating current Rule 31.6 ("Stay of execution of sentence and credit pending appeal") with current Rule 31.16 ("Appeal by state is inoperative to stay order in favor of defendant") because both rules concern stays of proceedings. The Task Force's proposed changes to the contents of the combined rules are stylistic.

Rule 31.8. The Record on Appeal; Briefs and Argument

Proposed Rule 31.8 is derived from current Rule 31.8 and is revised to incorporate various provisions of Rule 11 of the Arizona Rules of Civil Appellate Procedure. The Task Force proposed changes to the current rule are stylistic with the following exceptions:

(a) The first exception deals with additions and deletions to the record on appeal.

(1) Proposed Rules 31.8(a)(2) and 31.8(b)(2) extend the time for parties to request that the record on appeal be supplemented with additional record items and transcripts, as well as the time for an appellant to request that such items or transcripts be deleted if deemed unnecessary. The proposed rule provides that an appellant has thirty days after filing a notice of appeal to make such requests, and that an appellee has thirty days after an opening brief is filed to make its requests.

(2) In proposing these extended deadlines, the Task Force notes that the current time limits—requiring an appellant to make the request within five days

after filing a notice of appeal, and requiring an appellee to make the request within twelve days after the filing of a notice of appeal—are impractical and are not followed in practice. An appellee often does not review the record to determine appropriate designations until receiving the opening brief. If an appellant files an *Anders* brief, the appellee likely does not need to designate additional items or transcripts to be included in the record on appeal. Occasionally, however, an appellee may conclude that an item or transcript that has not been designated is necessary to resolve the issues raised on appeal.

(b) Proposed Rule 31.8(b)(1)(B)(ii) modifies current Rule 31.8(b)(2)(ii) and expands the definition of "the record on appeal" to automatically include transcripts of opening statements and closing arguments of counsel. The Task Force notes that opening statements and closing arguments are generally relevant and important in addressing issues raised on appeal, and in practice, the parties invariably request that the proceedings be transcribed.

(c) Proposed Rule 31.8(b)(2)(C) adds a provision permitting a party, for good cause shown, to make an untimely request to supplement the record on appeal with a certified transcript. This proposal is consistent with current practice.

(d) Proposed Rules 31.8(c)(1) through (c)(3) describe what an authorized transcriber is and explain the procedures a party must follow to order certified transcripts from audio or video recordings. These additions to the current rule are modeled on Rule 11(b) of the Arizona Rules of Civil Appellate Procedure.

(e) The Task Force proposes relocating current Rule 31.8(e), which explains that non-indigent defendants bear the responsibility for payment of record items and certified transcripts they have requested, to the second sentence of proposed Rule 31.8(c)(6). This proposed change requires renumbering the remaining provisions in the rule.

(f) Current Rule 31.8(d)(3) provides that transcripts are filed with the appellate clerk. Proposed Rule 31.8(d)(1) carried over this requirement. In response to a comment submitted after the filing of the Task Force's initial petition, the Task Force modified the provision to say that electronic transcripts also must be transmitted to the trial court.

(~~f~~g) Proposed Rule 31.8(d)(3) omits an outdated provision in current Rule 31.8(d)(3)(i) referring to the transcriber's preparation of "non-electronically filed transcripts," *i.e.*, paper transcripts. Instead, the proposed rule requires transcribers to provide paper copies of transcripts if requested by defense counsel or a self-represented defendant, but otherwise to deliver electronic copies to the parties. Additionally, proposed Rule 31.8(d) does not require, as the current rule does, that the authorized transcriber file an "original" electronic transcript, which would be indistinguishable from a certified electronic copy.

(~~g~~h) The proposed rule omits the provision currently in Rule 31.8(d)(3)(iii), which requires that "[c]opies of transcripts retained under this rule shall be retained for 90 days."

(~~h~~i) The Task Force proposes revising current Rule 31.8(f) through (h) to promote consistency with the Arizona Rules of Civil Appellate Procedure. Proposed Rule 31.8(e) through (g) derives from corresponding provisions in Rule 11 of the Arizona Rules of Civil Appellate Procedure.

Rule 31.9. Transmission of the Record to the Appellate Court

Proposed Rule 31.9 derives from Rule 11.1 of the Arizona Rule of Civil Appellate Procedure, governing transmission of the record to the appellate court. Additionally, the Task Force proposes relocating current Rule 31.10 ("Filing of the record") to proposed Rule 31.9(e) because this provision explains that the appellate clerk must promptly give all parties notice upon receiving the record on appeal. This notice, in turn, is used in proposed Rule 31.3(c) to start the fifteen-day period after which no new matter may be filed in the trial court.

In response to comments submitted after the filing of the Task Force's initial petition, the Task Force modified proposed amended Rule 31.9(c)(1) to provide that the clerk must make the documents submitted to the Court of Appeals available to the parties, but that they do not need to be made available electronically.

Rule 31.10. Content of Briefs

The Task Force proposes changing the requirements currently in Rule 31.13 to promote consistency with Rule 13 of the Arizona Rules of Civil Appellate Procedure. Among other things, proposed Rule 31.10(a)(1) and (b) would require for the first time that in criminal appeals, electronically-filed opening briefs and answering briefs include bookmarks to sections of the brief "if feasible."

Additionally, consistent with the Arizona Rules of Civil Appellate Procedure, the Task Force proposes amending a provision in current Rule 31.13(c)(1)(vi), which requires parties to cite "the volume and page number of the official reports and also when possible to the unofficial reports." Proposed Rule 31.10(g) provides instead that if the party is citing to Arizona case law, the party must cite "the volume, page number and, if available, the paragraph number, of the official Arizona reporter," and to the volume and page number of the applicable regional or federal reporter when citing non-Arizona case law.

In reviewing comments submitted after the filing of the Task Force's initial petition, the Task Force learned that it inadvertently omitted current Rule 31.13(e), which governs the consequences if a party does not comply with the rule. To correct this oversight, the Task Force proposes adding a new subsection (k) incorporating the substance of the current

rule: "The appellate court may strike a brief or other filing that does not substantially conform to the requirements of these rules."

Rule 31.11. Appendix

Proposed Rule 31.11 describes the requirements for filing an appendix with more specificity than current Rule 31.13(c)(4). The proposed rule is modeled on Rule 13.1 of the Arizona Rules of Civil Appellate Procedure.

Rule 31.12. Length and Form of Briefs

Proposed Rule 31.12 attempts to make current Rule 31.13(b), which prescribes the permitted length and form of briefs, more readable and reflective of current practice. For example, the proposed rule no longer requires covers of briefs to be on colored paper and clarifies that both paper and electronic briefs must comply with the formatting requirements of proposed Rule 1.6(a) through (c), except for the use of a 14-point typeface instead of a 13-point typeface. The Task Force also proposes to relocate the length and form requirements for amicus curiae briefs to proposed Rule 31.12(a)(4), which is derived from current Rule 31.25(a).

Rule 31.13. Due Dates; Filing and Service of Briefs

Proposed Rule 31.13 is derived from current Rule 31.13(a) ("Time for Filing; Manner of Filing") and current Rule 31.21 ("Manner of filing and service; copies"). The Task Force attempted to make the rules more readable and to reflect current practice regarding the filing and service of electronic and paper briefs.

Among other things, proposed Rules 31.13(a)(6) and (7) place deadlines for filing and responding to an amicus curiae brief, and are derived from current Rule 31.25. Additionally, proposed Rule 31.13(e) ("Extension of Time to File a Brief") clarifies what a party must include in its motion to extend time for filing a brief based on a transcript's unavailability.

Rule 31.14. Provisions Applicable Only to Briefs in Capital Case Appeals

Proposed Rules 31.14(a) ("Length of Briefs") and (b) ("Time for Filing") derive from current Rule 31.13(f), governing briefs filed in capital case appeals. Additionally, proposed Rule 31.14(c) ("Request for Extension of Time to File a Brief") derives from current Rule 31.27 ("Extensions of time; notification of victims"). The proposed rule makes only stylistic changes to those current rules' contents.

Rule 31.15. Amicus Curiae

Proposed Rule 31.15 clarifies the role of amicus curiae and describes with specificity the requirements applicable to briefs filed by amicus curiae and participation in

oral argument. The proposed rules derives from current Rule 31.25 and makes only stylistic changes to that rule's contents.

Rule 31.16 Supplemental Citation of Legal Authority

Proposed Rule 31.16 derives from current Rule 31.22 and makes only stylistic changes to that rule's contents.

Rule 31.17. Oral Argument in the Court of Appeals

Proposed Rule 31.17 derives from current Rule 31.14(a) and makes only stylistic changes to that rule's contents.

Rule 31.18. Petition for Transfer

Proposed Rule 31.18 is a new provision governing the transfer of an appeal pending in the Court of Appeals to the Arizona Supreme Court. It is modeled on Rule 19 of the Arizona Rules of Civil Appellate Procedure.

Rule 31.19. An Appellate Court's Orders and Decisions

Proposed Rule 31.19(a) ("Notice of an Order or a Decision") is modeled on Rule 20 of the Arizona Rules of Civil Appellate Procedure, and is proposed to clarify, consistent with current practice, that an appellate clerk must promptly notify the parties to an appeal when an appellate court enters an order or decision.

Proposed Rule 31.19(b) through (f) derive from current Rules 31.17(a), (b), and (d), Rule 31.24, and Rule 31.26, and make only stylistic changes to the content of those rules.

Rule 31.20. Motion for Reconsideration

Proposed Rule 31.20 is modeled on Rule 22 of the Arizona Rules of Civil Appellate Procedure 22 and is intended to replace current Rule 31.18 ("Motions for reconsideration").

Rule 31.21. Petition for Review

Proposed Rule 31.21 is modeled on Rule 23 of the Arizona Rules of Civil Appellate Procedure and is intended to replace current Rule 31.19 ("Petitions for review").

Rule 31.22. Appellate Court Mandates

Proposed Rule 31.22 is derived from current Rule 31.23 ("Issuance of mandates by appellate courts and mandates from United States Supreme Court") and makes only stylistic changes to the contents of that rule.

Rule 31.23. Warrant of Execution

Proposed Rule 31.23 is derived from current Rule 31.17(c) ("Warrant of Execution") and makes only stylistic changes to the contents of that rule. The Task Force made two minor changes in the rule in response to comments submitted after the filing of the Task Force's initial petition. First, in proposed amended Rule 31.23(a)(3), the Task Force deleted the reference to filing a petition for review with "the Court of Appeals" because a capital defendant would not be filing a petition for review in that court. Second, in proposed amended Rule 31.23(d), the Task Force replaced the archaic reference to the "superintendent of the state prison" with the "director of the Arizona Department of Corrections."

Rule 31.24. Voluntary Dismissal

Proposed Rule 31.24 is derived partly from current Rule 31.15 ("Motion to dismiss") and includes changes modeled on Rule 26 of the Arizona Rules of Civil Appellate Procedure.

Rule 32. Post-Conviction Relief

In a separate written submission to the Chief Justice, the Task Force will be proposing that a committee be established to consider a comprehensive substantive redrafting of this rule. Task Force members believe that the current rule suffers from serious substantive deficiencies, but they also agree that an attempt to rewrite the rule to address those deficiencies would go far beyond the Task Force's mission to restyle and clarify the current rule. Nonetheless, the Task Force is proposing some substantive changes to the rule, but they are supported by a consensus of the Task Force members and are not likely to be controversial.

Rule 32.1. Scope of Remedy

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended. The Task Force has deviated from its conventions in restyling this rule—especially the use of lettered subheadings—to avoid having to renumber the subparts in the current rule that are frequently cited in court filings and in Arizona and federal case law. Also, the proposed rule clarifies the phrase "of-right petition" and specifies the procedural matters that are subject to "of-right" relief as that term is used throughout Rule 32.

Rule 32.2. Preclusion of Remedy

Current Rule 32.2 requires a notice of post-conviction relief to specify the exception to the preclusion rule that is being relied on and to explain why the claim was not raised in a previous petition or in a timely manner. The rule goes on to say that the notice fails to comply with this requirement, it "shall" be summarily dismissed. The Task Force proposes

replacing the word "shall" in proposed Rule 32.2(b) with the word "may." In the Task Force's opinion, this rule is intended to give a court discretion to permit a notice to be amended or clarified (rather than requiring its dismissal) if a petitioner fails to fully comply with the rule. The Task Force's other proposed changes to this rule are stylistic.

Rule 32.3. Nature of a Post-Conviction Proceeding and Relation to Other Remedies

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 32.4. Filing of Notice and Petition, and Other Initial Proceedings

The Task Force proposes reorganizing and renumbering the subparts of this rule. The Task Force's other proposed changes are stylistic with the following exceptions:

(a) Proposed Rule 32.4(b)(1), which is mostly a restyled version of current Rule 32.4(c), more particularly specifies the requirements of appointed capital counsel as those who meet the standards of Rules 6.5 and 6.8 and A.R.S. § 13-4041.

(b) Proposed Rule 32.4(d)(2), which is mostly a restyled version of the fifth paragraph of current Rule 32.4(c), addresses counsel's duty in an of-right proceeding where no colorable claims are found. The Task Force proposes adding a requirement that counsel's "notice of no colorable claim" include a summary of the facts and the procedural history of the case. This is comparable to what is required of counsel in an *Anders* appeal and will help ensure that counsel has complied with the duty to thoroughly review the matter.

In response to comments submitted after the filing of the Task Force's initial petition, the Task Force modified proposed amended Rule 32.4(a)(4)(A) to add the phrase "or the Supreme Court" to the rule's first sentence to reflect the fact that in a capital case, a notice of a post-conviction relief is filed by the Supreme Court clerk rather than the defendant.

Also in response to a comment, the Task Force modified proposed amended Rule 32.4(b)(2), which governs the appointment of counsel in noncapital cases. As initially drafted, the proposed rule provided for the appointment to be made "[n]o later than 15 days after the timely filing of a notice of a defendant's first Rule 32 proceeding or in any of-right proceeding. In contrast, current Rule 32.4(c)(2) provides that counsel is appoint within 15 days of the filing of a "timely or first notice in a Rule 32 proceeding." Because this change may have unintended consequences and because the "timely or first" provision has been the subject of appellate decisions, the Task Force decided to go back to language closer to the current rule. As revised, it says "[n]o later than 15 days after the ~~timely~~ filing of a notice of a defendant's *timely or* first Rule 32 proceeding~~ or in any of right proceeding~~."

Rule 32.5. Contents of a Petition for Post-Conviction Relief

The Task Force's proposed changes to this rule are stylistic with ~~two~~ three exceptions:

(a) Proposed Rule 32.5(b) slightly increases the page limitation for a petition and response to twenty-eight pages, and for a reply to eleven pages, to account for the proposed increase from 12-point typeface for text, which is currently permitted under the local rules of Maricopa and Pima counties, to 13-point typeface as required in proposed Rule 1.6(b)(1)(B). A similar adjustment is made to the length of petitions involving the death penalty—under the proposed rule, the petition and response would be limited to forty-four pages, and the reply to twenty-two pages.

(b) Currently, Rule 32.5 requires a petition to be accompanied by a declaration by the defendant attesting that under penalty of perjury, the information in the petition is true to the best of the defendant's knowledge and belief. Proposed Rule 32.5(c) would modify this by requiring such a declaration only if the defendant is self-represented. In the Task Force's opinion, the declaration serves no purpose if a defendant is represented by counsel.

(c) The Task Force proposes one additional change in response to comments submitted after the filing of the Task Force's initial petition. Currently, Rule 32.5 provides that if a petitioner files a non-complying petition, it must be returned to the defendant with an order specifying how the petition fails to comply with the rules. The current rule then goes on to say that the defendant has 30 days "after defendant's *receipt* of the non-conforming petition" to file a petition that complies with the rules. (Emphasis added.) Because there is no way for the court to know when the defendant receives the non-conforming petition, proposed amended Rule 32.5(e) measures the time for compliance from the date the order is "*entered*," i.e., filed. But in response to concerns that this change shortens the compliance time conferred by the current rule, the Task Force also proposes increasing the time for compliance from 30 days to 40 days.

Rule 32.6. Response and Reply; Amendments; Review

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) The first exception relates to the deadline by which a court must dispose of a fully briefed petition for post-conviction relief:

(1) Currently, Rule 32.6(c) requires the court to "review the petition within twenty days after the defendant's reply was due" and determine which claims are procedurally precluded. If no remaining claim "presents a material issue of fact or law which would entitle the defendant to relief," the court "shall dismiss the petition."

If the court does not dismiss the petition, it "shall set a hearing within thirty days on those claims that present a material issue of fact or law."

(2) The majority of the Task Force members interprets this rule as requiring that a court rule on whether the post-conviction petition must be summarily dismissed within twenty days after the due date of the defendant's reply. A majority of the Task Force was deeply concerned that the twenty-day deadline is unrealistic in complex fact-intensive noncapital cases and in all capital cases.

(3) To address this issue, the Task Force's proposes in proposed Rule 32.6(d)(1) that a court may exceed the twenty-day deadline in a noncapital matter if there is good cause to do so. It also increases the time period for the summary dismissal of a capital matter to sixty days, and permits the court to extend that deadline if good cause exists to do so.

(4) The Task Force recognizes that its proposed changes in the deadline, as well as its proposed "good cause" time extensions, are inconsistent with the statutory deadlines set forth in A.R.S. § 13-4236(C). But the Task Force believes that these timing provisions are procedural in nature and that the Supreme Court has the authority to establish such rules even if they are inconsistent with statutory deadlines. Should these amendments be approved, the Task Force recommends that the legislature be encouraged to amend the corresponding statutes.

(b) The second exception relates to what kind of hearing must be scheduled if a petition is not summarily dismissed and when it must be held:

(1) Currently, the rule says merely that the court "shall set a hearing within thirty days on those claims present a material issue of fact or law." It is unclear, however, whether that hearing must address the merits of those claims or instead may be a status conference to determine how case should proceed to resolve those claims.

(2) Proposed Rule 32.6(d)(2) clarifies the rule by explicitly providing that the court may set either a hearing on the merits or a status conference to discuss how to proceed. The proposal reflects current practice—courts typically hold a status conference before holding an evidentiary hearing to identify the issues that must be addressed, resolve discovery disputes, and to work out logistics.

Rule 32.7. Informal Conference

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 32.8. Evidentiary Hearing

Currently, if a court conducts an evidentiary hearing, Rule 32.8(d) requires the court to rule no later than ten days after the hearing's end "except in extraordinary circumstances where the volume of the evidence or the complexity of the issues require additional time." The Task Force proposes removing the words "in extraordinary circumstances" because the text of the rule itself clearly identifies the circumstances that would permit a court to exceed the ten-day deadline. As revised, proposed Rule 32.8(d)(1) provides that a court must adhere to the ten-day deadline "except if the volume of the evidence or the complexity of the issues require additional time." The Task Force's other proposed changes to this rule are stylistic.

Rule 32.9. Review

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) Proposed Rule 32.9(c) incorporates by reference many of the formatting and time computation rules set forth in Rule 31 and, because petitions for review and related briefs are either filed or scanned electronically, it also dispenses with requiring the filing of multiple copies of a brief.

(b) Currently, Rule 32.9(c) imposes page limitations on the length of petitions, responses, and replies. Proposed Rules 32.9(c)(4)(A) and (c)(6)(B) retain page limitations if a brief is handwritten, but imposes word limitations if a brief is typed—6000 words for a petition or response, and 3000 words for a reply.

(c) Currently, Rule 32.9 is silent on whether an amicus curiae brief may be filed, and, if so, the procedures that must be followed to file one. Proposed Rule 32.9(c)(7) addresses this issue, incorporating by reference the provisions in proposed Rule 31 governing filing and responding to amicus curiae briefs. The proposed rule reflects current practice.

(d) Currently, the last sentence of Rule 32.9(f) provides that the State must notify the victim of an appellate court's disposition. The Task Force proposes placing the requirement in its own separate subsection—proposed Rule 32.9(i)—so the requirement stands out in the rule, making compliance more likely.

In response to comments submitted after the filing of the Task Force's initial petition, the Task Force modified Rule 32.9(c)(3) to provide that if a motion for an extension of time is filed, the court must decide the motion "promptly."

Rule 32.10. Review of an Intellectual Disability Determination in Capital Cases

The Task Force proposes revising the title of the current rule to clarify that it applies only to capital cases. The Task Force's other proposed changes to this rule are stylistic.

Rule 32.11. Extensions of Time; Victim Notice and Service

Currently, in a capital case, Rule 32.11 requires that a party seeking a time extension must provide notice to the victim. The rule, however, does not explicitly allow the victim to file a response to the request. Proposed Rule 32.11(c) corrects this oversight, providing that "[a] victim may file a response to the request no later than 10 days after it is served." This proposed amendment is derived from A.R.S. § 13-4234.01(A). The Task Force's other proposed changes to this rule are stylistic.

Rule 32.12. Post-Conviction Deoxyribonucleic Acid Testing

The Task Force's proposed changes to this rule are stylistic with the following exceptions:

(a) The Task Force proposes amending current Rule 32.12(d)(1)(B) to remove the requirement that before ordering testing, a court must find that the evidence to be tested is in a condition that allows DNA testing to be conducted. Significant recent advances in the science of DNA testing make it possible to subject very small samples of biological material to testing. As such, it is often difficult to know whether an evidence sample is in a condition that allows testing, without first conducting such testing. Thus, in the Task Force's opinion, the requirement to determine the condition of the evidence makes little sense, and it proposes eliminating the requirement in proposed Rule 32.12(d)(1).

(b) Currently, if a court determines that a DNA sample should be tested, Rule 32.12(d) requires the court to select "a laboratory that meets the standards of the DNA advisory board." The phrase "DNA advisory board" does not accurately describe the entities that accredit testing laboratories. Instead, in proposed Rule 32.12(d)(3), the Task Force proposes providing simply that the court designate an "accredited laboratory" to conduct the testing, which more accurately reflects the certification requirement for testing laboratories.

V. MISCELLANEOUS

Rule 33. Criminal Contempt

Rule 33.1. Definition

Proposed Rule 33.1(b) replaces the current rule's reference to "contumacious conduct" with the phrase "unreasonable conduct," which conveys the same meaning but is less archaic. The Task Force's other proposed changes to this rule are stylistic.

Rule 33.2. Summary Disposition of Contempt

The Task Force proposes adding a new Rule 33.2(c) that specifies the punishment for criminal contempt—reflecting the limits in current Rule 33.4, a court may imprison a defendant for no longer than six months, impose a fine of up to $300, or both, unless the person either has been found guilty of contempt by a jury or has waived the right to a jury trial. The Task Force's other proposed changes to this rule are stylistic.

Rule 33.3. Disposition of Contempt by Notice and Hearing

The Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

Rule 33.4. Jury Trial; Disqualification of the Citing Judge

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) Like the change in proposed Rule 33.1, proposed Rule 33.4(b) replaces the current rule's reference to "contumacious conduct" with the phrase "unreasonable conduct."

(b) Proposed Rule 33.4(b) also adds an additional clause to the current rule's provision that clarifies that if a contempt matter is assigned to a new judge, "any prior adjudication of guilt is void."

Rule 34. Subpoenas

The Task Force's proposed changes to this rule are stylistic except for the following organizational and substantive changes:

(a) The Task Force proposes adding a new Rule 34(a) that explains that a subpoena is used to compel the attendance of witness before a court or magistrate, and requires that it be substantially in the form shown in Rule 41, Form 27(a).

(b) To accommodate adding proposed new Rule 34(a), the Task Force proposes renumbering current Rule 34(a) as Rule 34(b). It also propose adding a requirement that the alternative form of subpoena be substantially in the form shown in Rule 41, Form 27(b).

(c) To accommodate adding proposed new Rule 34(a), the Task Force proposes renumbering current Rule 34(b) as Rule 34(c). The Task Force also proposes replacing the current rule's outdated reference to "City Magistrate Court" with the phrase "Municipal Court."

(d) To accommodate adding proposed new Rule 34(a), the Task Force proposes renumbering current Rule 34(c) as Rule 34(d).

Rule 35. [Reserved] (Currently, "Form, Content and Service of Motions and Requests")

Currently, Rule 35 governs the form, content, and service of motions. The Task Force proposes relocating the substance of the rule (with a few modifications) to proposed Rule 1. Rule 35 would be reserved as as a placeholder for a future rule.

Rule 36. [Reserved]

The Arizona Supreme Court abrogated this rule, which formerly governed the adoption of local rules, effective January 1, 2017. Supreme Court Rule 28.1, which became effective on the same day, now governs the adoption of local rules. *See* Order, R-16-0033 (Ariz. Sup. Ct. filed Sept. 2, 2016). The Task Force proposes reserving Rule 36 as a placeholder for a future rule.

Rule 37. Report of Court Dispositions

The Task Force's proposed changes to this rule are stylistic with two exceptions:

(a) The Task Force proposes adding a new provision, which appears in proposed Rule 37.1(a) that would allow final disposition reports to be created and transmitted electronically.

(b) Proposed Rule 37.1 reorganizes the current rule and includes new subparts pertaining to the filing of a complaint and also a subpart that applies when filing an indictment or information. No additional significant changes were recommended.

The Task Force was reluctant to make any substantive changes to the rule because there is currently a group of stakeholders working on proposals for alterations in the process of submitting disposition reports to the Department of Public Safety to comply with statutory changes that will take effect on January 1, 2017.

Rule 38. Suspension of Prosecution for a Deferred Prosecution Program

For clarity and simplicity, the Task Force proposes amending current Rule 38.2, which sets the time for trial, to include a cross-reference to the speedy trial provisions in Rule 8.4. The Task Force's other proposed changes to this rule are stylistic.

Rule 39. Victim's Rights

Rule 39(a). Definitions

The Task Force's proposed changes to Rule 39(a) are stylistic but three sets of changes are noteworthy:

(a) ~~The Task Force proposes to modify the current definition of "victim" in proposed Rule 39(a)(1) by simply referring to the applicable definitions in the underlying statutory source instead of repeating those definitions in the rule.~~ The Task Force proposes relocating the current rule's provisions in Rule 39(a)(1) about how a victim in or out of custody can exercise the right to be heard to proposed new Rule 39(c), which provides more detailed information regarding the right to be heard.

(b) The definition of "victim" in current Rule 39(a)(1) has been moved to proposed amended Rule 1.4(h) so it appears along with all the other terms that are commonly used throughout the rules. The Task Force also moved provisions for "Cessation of Victim Status" and "Legal Entities," which appeared in the initially proposed draft as proposed Rule 39(a)(B) and (C), to a new proposed Rule 39(a)(3)(A) and (B), under the heading of "Limitations." The Task Force also modified the title of subpart (a) to add "and Limitations" to "Definitions." Last, the Task Force renumbered the subparts "Criminal Proceeding" and "Identifying and Locating Information" to be proposed Rule 39(a)(1) and (2).

(~~b~~c) Proposed Rule 39(a)(~~2~~1) streamlines the current definition of "criminal proceeding" by eliminating the references to specific types of hearings because they are redundant. The elimination of those specific hearings from the definition is not intended to be a substantive change. The proposed rule retains the specific reference to post-conviction hearings, however, to be clear that a victim's rights do not end at sentencing.

(d) The Task Force slightly modified the definition of "criminal proceeding" in newly renumbered proposed Rule 39(a)(1) to include "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." (Addition shown in italics.) The change clarifies that when proposed Rule 39(b)(4) gives a victim "the right to be present at all criminal proceedings," it includes telephonic hearings. The Task Force made the change based on anecdotal reports that victims are sometimes denied the right to join telephonic hearings.

(~~c~~e) Finally, to make later rules easier to read, the Task Force proposes adding a definition of "identifying and locating information," which is taken from the underlying statute and the language in current Rule 39(b)(10).

Rule 39(b). Victims' Rights

Rule 39(b) lists a victim's specific rights. This section was significantly restyled to use lists instead of large paragraphs when possible to make it easier to read and to locate specific rights. The Task Force's proposed changes to the rule are stylistic with the following exceptions:

(a) The Task Force proposes eliminating current Rule 39(b)(5), which gives a victim the right to be notified if a defendant escapes. Because that right is enforced only by law enforcement agencies and not by the courts or prosecutors, the Task Force felt that a reference to that particular right did not belong in these procedural rules.

(b) Proposed Rule 39(b)(2) makes two changes to the current rule:

(1) First, the Task Force proposes modifying current Rule 39(b)(2) by removing the requirement that the victim be provided with a written list of his or her rights. This requirement is not one of the rights set forth in the Arizona Constitution or the underlying statute. Moreover, courts are not currently providing victims with a written list of rights, and it is unnecessary to do so. Although a victim has the right to notice of the various rights, notice is accomplished in practice in a variety of ways, including orally.

(2) The definition in the proposed rule also adds a reference to A.R.S. § 13-4438 to emphasize the court's obligation to provide and, in superior court, to read aloud the statement of rights set forth in the statute.

(c) Proposed Rule 39(b)(3) modifies current Rule 39(b)(3) by adding a reference to A.R.S. § 13-4409. The reference would be helpful because the statute provides specific instructions to courts about setting criminal proceedings to ensure that victims have time to receive proper notification. In the Task Force's opinion, referring to the statute is better (and simpler) than repeating all the statutory specifics in the rule.

(d) Proposed Rules 39(b)(6) and (7) divide the current Rule 39(b)(7) into two separate sections—proposed Rule 39(b)(6) addresses the specific rights to confer with the prosecutor and proposed Rule 39(b)(7) addresses the right to receive notice and be heard by the court. Proposed Rule 39(b)(6) reorganizes and simplifies the rights listed in the current rule but no substantive changes are intended. Proposed Rule 39(b)(7) lists the specific types of court proceedings in which a victim has a right to be heard, and is based on A.R.S. §§ 13-4412, 13-4422 to -4423, 13-4426 to -4427. The proposed rule adds the right to be heard at: (1) a probation modification, early termination of probation, and disposition hearings; (2) and the right to be heard in any post-conviction release proceeding; and (3) a hearing regarding a suspension of Rule 8 or a continuance of a trial date. Neither right is included in tThe current rule does not refer to any of these proceedings.

(e) Proposed Rule 39(b)(8) combines a victim's right to be accompanied to specific events and the right to choose who will accompany them, which are currently divided into Rule 39(b)(8) and (9). Because the two rules relate to the same events, the Task Force believes it is better to combine the rules into one rule.

(f) Although the Task Force is divided over the issue, a majority favors adding proposed new Rule 39(b)(9):

(1) The proposed rule would provide for the right to the assistance of a facility dog as described in A.R.S. § 13-4442, which was enacted in 2016. The statute contains very specific rules describing how to provide notice that a facility dog will be used, the court's duty to instruct the jury on the presence of the dog, and the definition of "facility dog." Again, the Task Force believes that referring to the statute is a better way to alert the court and parties to this right than repeating all the statutory provisions in the rule.

(2) The Task Force questions the constitutionality of this statute because it appears to infringe on Supreme Court's constitutional rulemaking function. Some Task Force members believe that this reference to the statute should not be included in the rules to allow parties to litigate the constitutionality of the statute.

(g) The Task Force proposes adding a new Rule 39(b)(10) to incorporate the provisions of A.R.S. § 13-4434(A), which gives a victim the right to refuse to testify about any identifying or locating information unless the court orders disclosure. Because this statute deals with limitations on a victim's testimony and the court's procedures for handling challenges to those limitations in individual cases, the Task Force believes the statutory provisions should be part of these procedural rules.

(h) To accommodate adding proposed new Rule 39(b)(10), the Task Force proposes renumbering current Rule 39(b)(10) as Rule 39(b)(11). The only change the Task Force proposes is the separating the right and the exceptions, but no substantive changes are intended.

(i) To accommodate adding proposed new Rule 39(b)(10), the Task Force proposes renumbering current Rule 39(b)(11) as Rule 39(b)(12). The Task Force proposes modifying the current rule's provision that limits the application of the right to "after charges are filed." The proposed rule eliminates that phrase because a victim's rights attach upon arrest or formal charging under A.R.S. § 13-4402. Consequently, to the extent the current rule can be read to limit the right to situations where charges have been filed, it is inconsistent with the statutory right.

(j) Proposed Rule 39(b)(13), which deals with a victim's right to set reasonable conditions on any interview, is derived from current Rule 39(b)(12)(i). The

Task Force proposes various stylistic changes to this rule, but no substantive changes are intended.

(k) Proposed Rule 39(b)(14), which concerns a victim's right to terminate an interview, is derived, with some modifications, from current Rule 39(12)(ii).

(1) The current rule states that a victim has the right to terminate "the interview or deposition if it is not conducted in a dignified and professional manner." The Task Force proposes deleting the qualifying language "if it is not conducted in a dignified and professional manner." Under A.R.S. § 13-4433(D), a victim has a right to terminate a defense interview at any time and for any reason. To the extent the qualifying language is interpreted to restrict when a victim may terminate an interview, it imposes a restriction not found in the statute.

(2) The Task Force also believes that the current rule's inclusion of depositions is confusing and inaccurate. A deposition is a court-ordered event under Rule 15.3 and the applicable civil rules. If the deposition was lawfully ordered, a victim would not have the right to terminate that proceeding beyond what any deponent would have under the rules. The victims' rights statutes do not address depositions and it would be rare for a court to order a victim to be deposed. Thus, the Task Force proposes to remove the rule's reference to depositions.

Rule 39(c). Exercising the Right to Be Heard

The Task Force's proposes adding a new Rule 39(c) to specifically address how a victim may exercise the right to be heard and the nature of that right.

Proposed Rule 39(c)(1) is taken from A.R.S. § 13-4426.01 which specifies that victims do not exercise their right to be heard by the court by being a witness, they are not subject to cross-examination, and they are not required to disclose their statements to the parties. The statute and this rule apply to situations where a victim is addressing the court in the court proceedings described in proposed Rule 39(b)(7). Neither this rule, nor the corresponding statute, describes the procedures that must be followed when a victim presents a victim impact statement to a jury during a capital penalty trial. The last sentence of the proposed rule is intended to specify that limitation to avoid any confusion.

Proposed Rules 39(c)(2) and (3) are taken from information currently included in the definitions in Rule 39(a)(1). The Task Force proposes modifying the current provision slightly to make it clear that an in-custody victim's right to be heard is satisfied by giving the victim the opportunity to submit a written statement. For victims who are not in custody, proposed Rule 39(c)(3) modifies the current rule to the extent that the current rule gives the court discretion over the way a victim chooses to exercise the right. A.R.S. § 13-4428(B) gives victims the discretion to decide how they want to be heard. The proposed rule clarifies that out-of-custody victims may exercise the right to be heard by giving oral

statements in person to the court or by providing the court with a written or recorded statement.

Proposed Rule 39(c)(4) provides specifics regarding what a victim may do when exercising the right to be heard at sentencing. This proposed rule is an addition to the current rules and is based on A.R.S. §§ 13-4424 and 13-4426.

Rule 39(d). Assistance and Representation

To accommodate adding proposed new Rule 39(c), the Task Force proposes renumbering current Rule 39(c) as Rule 39(d). The Task Force's other proposed changes to the rule are stylistic with the following exceptions:

(a) Proposed Rule 39(d)(3) slightly modifies the content of the current Rule 39(c)(3):

(1) The current rule refers to "conflict of interests" between the prosecutor and the victim. The Task Force is concerned about using that phrase because it is a term of art referring to a lawyer's ethical obligations under Arizona Ethical Rules 1.7, 1.9, and 1.18. None of those rules appears to apply to the type of "conflict" to which the current rule seems to be referring. If there is an ethical conflict of interest between a prosecutor and a victim, the prosecutor likely would have to withdraw and have the case reassigned to another prosecutor or another prosecuting agency. The remedy provided in the current rule—directing the victim "to the appropriate legal referral, legal assistance, or legal aid agency"—would not resolve an ethical conflict of interest between the prosecutor and the victim.

(2) The Task Force believes that in the context of this rule, which mainly describes how a prosecutor can assert rights on behalf of a victim notwithstanding the fact that the prosecutor does not represent the victim, the phrase "conflict of interest" must refer to disagreements between the prosecutor and the victim about how to assert certain rights. In that context, it makes sense for the prosecutor to refer the victim to other sources that might provide representation specifically to assert the victim's rights.

(3) To clear up this confusion, the Task Force proposes to eliminate the phrase "conflict of interest" and instead use "[i]f any conflict arises between the prosecutor and a victim in asserting the victim's rights."

(b) The Task Force also is concerned with the current rule's specific reference in Rule 39(c)(3) to "legal assistance or legal aid agency." The Task Force believes the rule was intended to require the prosecutor to do more than simply tell the victim that he or she has the right to hire his or her own lawyer. On the other hand, if a prosecutor and a victim seriously disagree on an issue, a prosecutor should not make a referral to a particular lawyer or agency because it could create an ethical conflict of

interest. Ultimately, the Task Force decided to propose in Rule 39(d)(3) that the rule should direct the prosecutor to refer the victim to a state bar or local bar association, or the Attorney General's Victim's Rights Program, for an appropriate referral, which may include pro bono or reduced cost services.

(c) Consistent with a recently adopted statute, the Task Force added two sentences following the first sentence: "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."

(~~c~~d) The last sentence of proposed Rule 39(d)(4) is not part of current Rule 39(c)(4). That sentence was added to reflect a 2016 statutory change in A.R.S. § 13-4437(E), which specifically authorizes a victim's attorney to present evidence and make arguments in restitution hearings.

Rule 39(e). Victim's Duties

To accommodate adding proposed new Rule 39(c), the Task Force proposes renumbering current Rule 39(d) as Rule 39(e).

In addition to restyling the rule, the Task Force's proposes to add a notice requirement under proposed Rule 39(e)(2)(D) to correct an oversight in the current rule. The current rule requires the prosecutor to notify the defense and the court when a legal entity designates a representative to assert victim's rights, and also provides a method for a legal entity to change the representative. The rule, however, does not specifically require the prosecutor to provide notice to the defense and the court if the legal entity changes its representative. Proposed Rule 39(e)(2)(D) adds that requirement.

The Task Force's other proposed changes to the rule are stylistic.

Rule 39(f). Waiver

To accommodate adding proposed new Rule 39(c), the Task Force proposes renumbering current Rule 39(e) as Rule 39(f). The Task Force's other proposed changes to the rule are stylistic.

Rule 39(g). Court Enforcement of Victim Notice Requirements

To accommodate adding proposed new Rule 39(c), the Task Force proposes renumbering current Rule 39(f) as Rule 39(g). Consistent with the discussion above regarding Rule 39(b)(2), the Task Force proposes removing the requirement that the victim be provided with a written list of his or her rights. The Task Force's other proposed changes to the rule are stylistic.

Rule 39(h). Appointment of Victim's Representative

To accommodate adding proposed new Rule 39(c), the Task Force proposes renumbering current Rule 39(g) as Rule 39(h). The Task Force's other proposed changes to the rule are stylistic.

Rule 40. Transfer for Juvenile Prosecution

The Task Force's proposed changes to this rule are stylistic with three exceptions:

(a) In proposed Rule 40(b), the Task Force proposes using the word "must" instead of the current rule's use of the word "shall." The intent is to make it clear that a court is required to hold a transfer hearing if the defendant asks for a hearing or if a court orders it on its own initiative because the court decides it is appropriate or because it is required by law.

(b) The Task Force proposes adding a statutory reference to proposed Rule 40(h) that identifies the factors a court should consider in making a transfer decision.

(c) The Task Force proposes adding a provision in proposed Rule 40(j) stating that a court determination regarding transfer must occur "with all possible speed." Currently, the rule says that the determination must be made "at the conclusion of the hearing," which seems to say (perhaps inadvertently) that a court must rule from the bench. The proposed amendment would give the court the option of considering the matter further after a hearing, but it also conveys that a court should make the decision as soon as possible.

Rule 41. Forms

Currently, Rule 41 provides that all court forms must "comply with the formatting requirements of Rule 10, Rules of Civil Procedure." The Task Force proposes deleting this provision because proposed Rule 1.6(b)(1)(J) provides that none of the criminal rules' formatting requirements apply to printed court forms. The Task Force's other proposed changes to the rule are stylistic.