

Hon. Joseph Welty, Chair
Task Force on the Arizona Rules of Criminal Procedure, Petitioner
1501 W. Washington St., Ste. 410
Phoenix, AZ 85007

SUPREME COURT OF ARIZONA

PETITION TO AMEND THE ARIZONA	)	Supreme Court No. R-17-0002
RULES OF CRIMINAL PROCEDURE	)	
	)	Petitioner's Reply
	)	
_____	)	

Consistent with Rule 28 of the Rules of the Arizona Supreme Court and the Court's scheduling order in this matter, the Task Force on the Arizona Rules of Criminal Procedure ("Task Force") submits this Reply. Attached are three appendices:

(a) Reply Appendix A contains the full set of rules proposed last January, as revised following the first and second comment periods. This appendix is a "clean" and "final" version of the proposed criminal procedure rules.

(b) Reply Appendix B incorporates the "rule-by-rule" explanations set forth in Appendix B of the January petition, with "redlines" explaining changes following the first and second comment periods.

(c) A new Appendix C shows “redline” changes the Task Force made to the proposed rule amendments after the filing of its supplemental petition last April. The affected rules are Rules 1, 7, 11, 12, 15, 17, 23, 26, 29, 31, 32, and 39.

Part I: Background. When this Court opened this petition for public comment, it provided two sequential comment periods. The first comment period ended on March 14, 2017, and produced nineteen comments. The four Task Force workgroups reconvened to study those comments and make recommendations on possible changes to the Task Force’s proposed rule amendments. The Task Force then met as a whole twice in April, and filed a supplemental petition on April 25 discussing the comments and recommending a number of modifications to its originally proposed rule amendments.

The second comment period ended on May 31, 2017, and yielded six comments. The Task Force workgroups met to discuss those additional comments, and the full Task Force met on June 27 to discuss them and the workgroup recommendations. The Task Force also discussed recent Arizona legislation affecting the criminal rules, as well as other pending rule petitions proposing changes in the Arizona Rules of Criminal Procedure. What follows in this Reply is the Task Force’s views on these items, along with a discussion of its final set of recommended rule changes.

Part II: Arizona Voice for Crime Victims Comment. After the first comment period, the Task Force considered a comment and presentation from the Arizona Voice for Crime Victims (“AVCV”). The AVCV’s comment included a 54-page appendix proposing rule changes in virtually every one of the Arizona Rules of Criminal Procedure. The comment raised an important issue regarding how victims’ rights should be incorporated into the rules: should the rules concerning victims be centrally located in Rule 39, as they are now? Or should provisions regarding victims be interspersed throughout the rules, as the AVCV proposed? After a substantial amount of discussion, the Task Force was almost unanimous in favoring the former approach. Accordingly, although it adopted a few of the AVCV’s proposed changes, it declined to adopt the majority of the AVCV’s suggested changes.

During the second comment period, the AVCV submitted a 36-page comment that essentially reiterated its previously proposed changes. The AVCV’s comment concerned Rules 1, 4, 5, 6, 7, 8, 9, 10, 15, 16, 17, 26, 27, 31, and 32. Each of the workgroups, as well as the Task Force as a whole, discussed the AVCV’s second comment, and the AVCV’s counsel addressed the Task Force a second time. Although the Task Force again declined the majority of the AVCV’s suggested revisions, it adopted a few more of its proposed changes including the following revisions to Rules 7, 31, and 32.

Rule 7 (“Release”): As originally proposed by the Task Force and reflecting recent rule changes approved by the Supreme Court, Rule 7 required the court when setting conditions of release to consider the safety of “others” and “the community” from any risk of harm by the defendant. The AVCV re-urged that the Rule 7 provisions specifically include “the victim” and not merely include them among the “others.” The Task Force reconsidered the matter and concluded that when it comes to release conditions, the victim has a special and unique relationship to a criminal case that merits having the rule specifically identify the victim’s safety as a major concern. The Task Force accordingly decided to add specific references to “the victim” in selected provision of Rule 7.2 (“Right to Release”), along with “any other person or the community.”

Rule 31 (“Appeals”): The AVCV also requested that Rule 31 specifically mention the victim’s right to a timely disposition of an appeal. The Task Force agreed that victims have a special interest in the finality of a post-sentencing proceeding, and they added references to “considering the rights of the victim” in Rule 31.3(e) (“Modifying a Deadline”) and in Rule 31.9(c)(2) (“Extension and Reduction of Time”).

Rule 32 (“Post-Conviction Relief”): In response to the AVCV’s concerns about recognizing the victim’s right to the timely disposition of a post-conviction petition, the Task Force added two references in Rule 32.4(c) (“Time for Filing a

Petition for Post-Conviction Relief”) that require the court to consider the victim’s rights in extending time. The Task Force made a similar addition to Rule 32.6 (“Response and Reply; Amendments; Review”), which governs granting the State time extensions.

Although the Task Force thought these changes were appropriate, it rejected the AVCV’s other proposed changes, leaving Rule 39 largely intact as the primary source of victims’ rights. Reflecting the virtually unanimous views of the prosecutors, defense counsel, and judges on the Task Force, the Task Force believes that putting those rights in a single rule makes them easier to find and highlights their importance. It also is worth noting that although the AVCV requested amendments to most of the existing rules, it had not proposed any corresponding deletions to Rule 39. Consequently, adopting all of the AVCV’s proposed changes would have significantly overlapped what is already in Rule 39.

Part III: Arizona Bail Bondsman Association Comment. Like the AVCV, the Arizona Bail Bondsman Association (“ABBA”) submitted comments during the first as well as the second comment period, and counsel for ABBA made presentations during two Task Force meetings. The Task Force declined to adopt most of ABBA’s suggested changes because they mostly involved major substantive changes to recent amendments to Rule 7 that were adopted by the

Court last December. After studying its second comment, however, the Task Force reconsidered and adopted one of its suggestions.

Rule 7 (“Release”): The Fair Justice for All Task Force recommended, and this Court in December 2016 adopted, a number of changes to Rule 7 proposed in Rule Petition R-16-0041. Because of their recency, the Task Force was reluctant to recommend any substantive changes in the amendments. Nonetheless, the Task Force agreed with the ABBA’s recommended change to the newly adopted definition of a “cash bond.”

Restyled Rule 7.1(c), following the language adopted in R-16-0041, defined a cash bond as “actual cash deposited by the defendant or someone acting on the defendant’s behalf *other than a professional bondsman.*” (Emphasis added.) ABBA noted that there are circumstances where an incarcerated defendant or the defendant’s family have little cash, but they have credit card limits sufficient to meet the “actual cash” requirement. Many jails, however, do not accept credit cards. In those situations, the Task Force did not find any reason why a defendant should not be able to request a professional bondsman to post the “actual cash” in exchange for a credit card charge equal to the cash amount plus the bondsman’s premium.

Accordingly, the Task Force now proposes to strike the words “other than a professional bondsman” from the definition of cash bond. The Task Force

considered striking, but declined to strike, those same words from the definition of “deposit bond” in Rule 7.1(d) because of uncertainty about whether Department of Insurance regulations would permit a professional bondsman to post a deposit bond.

Part IV: Individual Rules. Following is a brief review of other rule changes proposed by this Reply.

Rule 1 (“Scope, Purpose and Construction, etcetera”): Proposed Rule 1.6(b)(1)(B) requires that “every typed document must use at least at 13-point type size.” A similar provision is in restyled Civil Rule 5.2(b)(1)(B), which became effective on January 1, 2017. Several lawyers and judges have recently pointed out that this rule conflicts with Maricopa County Local Rule 2.16 (“size of print”), which requires typeface “no smaller than twelve (12) point” in all filings in that court. Although it would seem evident that a state rule supersedes a local rule, some practitioners and judges are confused about which rule governs. To avoid similar confusion in criminal cases, the Task Force proposes to add the introductory clause “notwithstanding any local rule” to Rule 1.6(b)(1)(B)’s type size provision. Doing so would clarify that the statewide rule on type size prevails.

Rule 11 (“Incompetence and Mental Examinations”): Two pieces of recent legislation—Laws 2017, Chapter 14, SB 1157; and Laws 2017, Chapter 59, HB 2239—affect Criminal Procedure Rule 11. HB 1157 allows the presiding

judge in a county to authorize a limited jurisdiction court to preside over a competency hearing in a misdemeanor case. HB 2239 made changes to the examiner's qualifications, and the entity to which the court remands an incompetent and non-restorable defendant. It also allows the trial court to temporally extend its jurisdiction over an incompetent defendant, and to conduct further proceedings and enter additional orders concerning sexually violent persons. HB 2239 adds an exception to the privileged statements of a defendant made in the course of a competence matter.

This legislation becomes effective August 9, 2017. Accordingly, the Administrative Office of the Courts ("A.O.C.") has filed Rule Petition R-17-0041, which requests the Court to adopt on an emergency basis conforming amendments to the current provisions of Rule 11. The Task Force has incorporated some but not all corresponding provisions of R-17-0041 in its final version of proposed rules.

What it did incorporate: The Task Force added a conforming revision to proposed Rule 11.3(a)(5)(A) regarding expert qualifications (i.e., that the expert be "familiar with Arizona's standards and statutes for competence and criminal and involuntary commitment statutes"). It also agreed to conforming revisions to proposed Rule 11.5(b)(4) pertaining to additional actions the court may take if the defendant is incompetent and non-restorable ("it may retain jurisdiction and enter

further orders as specified in A.R.S. §§ 13-4517 and 13-4518”). Additionally, consistent with the statute, it modified Rule 11.3(b)(3)(A) to provide that the court may remand the defendant to “an evaluating agency approved and licensed under Title 36,” rather than to the Department of Health Services, as the current rule provides.

What it did not incorporate: SB 1157 would permit a limited jurisdiction court judge to conduct a competence hearing in a misdemeanor case if authorized by the presiding judge. The workgroup responsible for Rule 11 initially made consistent “restyled” revisions to draft Rules 11.2 and 11.5. The Task Force, however, was informed that implementation issues for these provisions—such as training for limited jurisdiction court clerks and access to the superior court’s case management system—apparently remain unresolved. After discussion, the Task Force agreed not to include the workgroup’s proposed revisions in the final set of proposed rule amendments.

Additionally, HB 2239 included a provision that would allow for the admission of statements a defendant makes in a Rule 11 proceeding in a later Title 36 proceeding. Because some Task Force members had concerns about the constitutionality of this statutory provision, the Task Force declined to make a conforming “restyled” change to the privileges enumerated in proposed Rule 11.7.

Rule 12 (“The Grand Jury”): Laws 2017, Chapter 35, HB 2240, added provisions that permit the court to empanel alternate grand jurors. The Task Force considered adding to its proposed Rule 12.1 (“Selecting and Preparing Grand Jurors”), a new section (e) concerning “alternate grand jurors.” Ultimately, however, the Task Force decided that the addition was unnecessary because the statutory provision is already subsumed in proposed Rule 12.1(a), which provides that “grand jurors are summoned and empaneled as provided by law.”

A deputy Maricopa County Public Defender submitted a comment asking the Task Force to consider expanding the time for filing a Rule 12.9 motion from 25 days, which is the deadline in the current rule, to 45 days. Although defense counsel routinely ask now for more time when necessary, it can be a disaster if a judge fails to rule on the request before the 25-day deadline expires. If that occurs, a Rule 12.9 motion is jurisdictionally barred even if the judge would have been inclined to grant the extension. Because of that risk and because 25 days provides a very small window in which to obtain and review the State’s discovery, interview witnesses, and file a Rule 12.9 motion, the Task Force agreed to propose modifying the rule by extending to 45 days the time for filing a Rule 12.9 motion.

Rule 15.3(c)(3) (“Motion for Taking Deposition/Notice and Subpoena”): As originally proposed by the Task Force, proposed amended Rule 15.3(c)(3) would allow a party to serve a deposition subpoena “in the manner allowed by

A.R.S. § 13-4072.” Section (F) of this statute requires a peace officer to serve subpoenas “either on behalf of this state or the defendant.” A comment from law enforcement officers objected to this proposed rule because it would add to their workload, and because serving subpoenas on behalf of a defendant might create a conflict of interest for the officers. The Task Force questions both contentions—the likely added workload would be minimal because the volume of subpoenas served under (F) is probably low, and serving a subpoena for a defendant does not create a conflict of interest because the mission of law enforcement officers is not to secure convictions but to do justice. Moreover, law enforcement officers might occasionally be needed to serve deposition subpoenas because they have greater resources than individual counsel, and because service in some instances might jeopardize the safety of the person serving a deposition subpoena. Nonetheless, the Task Force decided to go along with the suggestion and revise the statutory reference to refer only to A.R.S. § 13-4072(A) through (E), which would eliminate the application of (F). But it further added the words “or as otherwise ordered by court” to allow the court to order law enforcement officers to serve a deposition subpoena if the situation warrants.

Rule 17.1(f)(2)(C) (“Plea by Mail/Procedure”): In April 2017, the Court adopted the rule change proposed in Rule Petition R-16-0036 and deleted the provision in Rule 17.1(a)(4) requiring a defendant to notarize his or her signature

on a limited jurisdiction court's plea by mail form. Because this change is now embodied as a court rule, the Task Force made a corresponding change by deleting the notary requirement in its restyled Rule 17.1(f)(2)(C). It further agreed that this reply did not need to include a change to Form 28(a), the plea by mail form, because the Court already made that revision in R-16-0036.

Rule 23.1 (“Form of Verdict”): Another pending rule petition, Rule Petition R-17-0014, requests an amendment to Rule 23.1 that would permit a jury foreperson to sign the verdict or alternatively, to write a juror number and initials on the verdict form. This change would conform the criminal rule to a parallel change recently made to Civil Procedure Rule 49(d)(2). The Task Force integrated this proposed change into the version of Rule 23.1 it filed with its original petition. However, a later comment to Rule Petition R-17-0014 refers to studies showing that procedures protecting jurors' identity may result in harsher criminal verdicts. The comment also argues that the proposed rule change could suggest that a defendant poses a risk to jurors that is increased by writing a full name and mitigated by allowing a juror number and initials on the verdict form. A signature on a verdict in a criminal case also may be appropriate to show its solemnity. Accordingly, rather than prejudge the merits of Rule Petition R-17-0014, the Task Force agreed to delete the second sentence of proposed amended Rule 23.1(a) that permits the “initial and number” practice.

Rule 26.10 (“Pronouncing Judgment and Sentence”): Laws 2017, Chapter 27, HB 2085, contained an amendment to the “judgment of guilt and sentence document” provisions of A.R.S. § 13-607. After discussion, members agreed to the following conforming change to proposed Rule 26.10(b)(5) to require that the court to, ~~“for any felony offense or a violation of A.R.S. §§ 13-1802, 13-1805, 28-1381, or 28-1382,~~ permanently affix the defendant’s right index fingerprint to the sentencing document or order in accordance with A.R.S. § 13-607(A);....”

Rule 29.1(b) (“Grounds; Notice/Sex Trafficking Victims”): Members considered revisions to this rule occasioned by Laws 2017, Chapter 87, SB 1422. These legislative changes to A.R.S. § 13-907.01 would treat convictions based on local ordinances in the same manner as convictions based on state law. The A.O.C. filed a rule petition earlier this month, Rule Petition R-17-0039, requesting conforming changes to the current criminal procedure rule and Form 21(a). The Task Force made a parallel change to its restyled version of Rule 29.1. Because R-17-0039 requested emergency consideration, i.e., that the Court consider the petition before August 9, the Task Force did not believe it was necessary to include a revision to Form 21(a) in this Reply because it is likely to be an existing form when the Task Force’s proposed rule would become effective.

Rule 39(d)(3) (“Assistance and Representation/Conflicts”): After the April 21 Task Force meeting, a prosecutor on the Task Force discussed the content of then-proposed Rule 39(d)(3) (“conflicts”) with his colleagues. The provision says that if a conflict arises between the prosecutor and a victim, the prosecutor must provide the victim with contact information “for the appropriate state or local bar association or the Attorney General’s Victims’ Rights Program.” At the June 27 meeting, the prosecutor moved to delete the reference to the Attorney General’s Victims’ Rights Program because the reference has been criticized by both victims’ advocates and by prosecutors. After discussion, the Task Force unanimously approved the motion.

Rule 41 (“Forms”): The A.O.C.’s Administrative Director filed a comment requesting a modification to Rule 41, Form 7. Form 7 concerns the appearance bond. The second page of the form includes a requirement that defendant’s signature be notarized. The Director noted that notarization is unnecessary because the incarcerated defendant’s identity is already known. Moreover, a notary is not always available when the form is executed. The Director requested that the notary block on the form be replaced with an oath or affirmation under penalty of perjury. The Task Force agreed with this request.

Part V: Other Issues: rule titles, conforming changes, implementation.

At its June 27 meeting, the Task Force discussed and approved changes to the titles

of Rules 1, 4, 6, 13, and 17. These various changes, which are shown in Appendix C, make the titles clearer, conforming, and more concise.

The Task Force also considered whether any conforming changes were appropriate for the Rules of Procedure for the Juvenile Court, which includes cross-references to the Criminal Rules in Juvenile Rules 17, 23, 28, and 34. The Task Force concluded that no conforming changes were necessary because the restyled rules retain the same numbering as the referenced rules.

Last, the Task Force discussed whether any special provisions need to be included in this Court's implementation order. It reviewed the implementation Order the Court entered in adopting the rules proposed in Rule Petition R-16-0010. That Order abrogated the Arizona Rules of Civil Procedure and all associated forms and comments and adopted the proposed amended Arizona Rules of Civil Procedure and associated forms and comments. The Order further provided that the newly adopted rules would apply in all cases filed after January 1, 2017, as well as all cases that were pending on that date unless doing so "would be infeasible or work an injustice, in which event the former rule or procedure applies."

The Task Force foresees no issues if the Court enters a similar implementation order for adopting the rules proposed in this petition. However, with respect to Rule 41's forms, the Task Force believes it might be appropriate if

the Court's order here, unlike its order in Rule Petition R-16-0010, abrogates only specified current forms, i.e., those modified or created by the Task Force (Forms 7 and 30), rather than all current forms. The Task Force recommends that the Court continue the use of the great majority of the current forms.

The Task Force also agrees that there is no reason to delay the effective date of the newly adopted rules beyond January 1, 2018. For the most part, the proposed rule amendments merely restyle the current rules, and do not change them. Moreover, the proposed rules have been widely circulated to the legal community during the rule petition process. Based on the number of comments the Task Force has received, it appears that the Bar and the courts have at least some familiarity with the proposed rules' substantive changes.

Part VI: Conclusion. The Task Force appreciates the comments stakeholders submitted during both comment periods. Although the Task Force did not adopt all of the comments' suggestions, each comment was discussed and considered. These comments—from prosecutors, defense counsel, court clerks, and various stakeholder organizations—greatly improved the Task Force work product.

The Task Force requests the Court to abrogate the current rules and adopt the proposed rules shown in Appendix A to this Reply.

RESPECTFULLY SUBMITTED this 7th day of July, 2017

By /s/ Judge Joseph Welty

Hon. Joseph Welty, Chair