



Limited Jurisdiction Bench Book

January 2019

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LIMITED JURISDICTION BENCH BOOK

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CIVIL PRETRIAL CHECKLIST

Note: AZ ST J CT RCP Rule 131 provides both general guidance and significant flexibility in how to conduct pretrial conferences. Some courts set a pretrial conference before any formal mediation occurs. Other courts set every case for mediation in accordance with AZ ST J CT RCP Rule 130. Whatever the local practice, the following items on this checklist should occur prior to trial.

CHECKLIST

- ___ 1. Make sure trial date is still firm and that everyone will be at the trial on time.
- ___ 2. Determine if all discovery and AZ ST J CT RCP Rule 122 issues have been resolved and if parties are ready to proceed to trial.
- ___ 3. Determine if the optional pre-trial statement, in accordance with AZ ST J CT RCP Rule 132(a), has been filed or will be ordered to be filed by a specified date prior to trial.
- ___ 4. Ask for a list of exhibits intended to be used at trial and verify all exhibits have been exchanged or made available.
- ___ 5. Ask for a list of witnesses and make sure all have been properly disclosed. Determine which witnesses are experts.
- ___ 6. If possible, narrow and focus issues of contention for trial.
- ___ 7. Hear and decide all pending motions. Permit amendment of the pleadings.
- ___ 8. Estimate the length of the trial.
- ___ 9. Inform parties when the trial will begin and end each day, when recesses will be taken and for how long, and if there are any court scheduled interruptions.
- ___ 10. Determine who will be at counsel table.
- ___ 11. Establish the order of trial, if multiple parties.
- ___ 12. Ask if any special equipment is needed (e.g. audio visual, headphones for hearing impaired, etc.). Determine whether there are any accommodations required by the Americans with Disabilities Act or whether any party or witness will require an interpreter.

- ___ 13. Remind parties of record requirement for appeal purposes. Make sure recording equipment is available and in working order prior to trial.
- ___ 14. Ascertain if any special problems are anticipated.
- ___ 15. State your preference regarding the following:
 - A. Marking exhibits;
 - B. Making objections;
 - C. Examining witnesses (e.g. - Is re-cross allowed? Should attorneys ask permission to approach a witness?);
 - D. Drawing of diagrams;
 - E. Motions during trial;
 - F. Offers of proof;
 - G. Bench conferences.
- ___ 16. If there is a request for a jury trial, then set a jury status conference to also determine the following:
 - A. Was the request for a jury trial at least 10 days before the start of the trial? AZ ST J CT RCP Rule 133(b). Is the request for an issue for which a right to a jury trial exists? AZ ST J CT RCP Rule 133(b).
 - B. Voir Dire procedures. AZ ST J CT RCP Rule 134(a)(1).
 - C. Jury selection (number of jurors and alternates, peremptory strikes). ARS § 22-223; AZ ST J CT RCP Rule 134(a)(1)
 - D. Preliminary and Final Jury Instructions. AZ ST J CT RCP Rule 34(a)(9).
(Depending on the nature of the claims in a case, specific instructions may be applicable and are available on Wendell.)
 - E. Verdict forms.
 - F. Any objections to evidence.

CIVIL BENCH TRIAL SCRIPT¹

1. (Convene the court.) "Please be seated. Good (morning/afternoon) ladies and gentlemen. The _____ Justice Court is now in session. This is the time set for the trial in the case of _____ v. _____. The Court notes the presence of the Plaintiff(s) and Defendant(s) and their attorneys [if applicable name each attorney and party represented]."

2. Advise parties that their right to appeal my decision in this case is dependent on their request that a record be made of the court proceedings.²

"Your right to appeal is dependent on your requesting that a record be made of the court proceedings. Does either party request the court proceedings be recorded?"

3. "Is the Plaintiff(s) ready to proceed with the trial?"
4. "Is the Defendant(s) ready to proceed?"

(To Pro Pers)

"Are you familiar with the order of proceedings and the burden of proof in a civil case?"

(If either party indicates no:)

"The trial will proceed as follows: The Plaintiff(s) present(s) (his/her/their) case first. The Plaintiff may present witnesses and offer exhibits. After a Plaintiff's witness testifies, the Defendant can ask the witness questions."

"After the Plaintiff finishes, the Defendant may present witnesses and offer exhibits. After a Defendant's witness testifies, the Plaintiff can ask the witness questions."

"After the Defendant's case, the Plaintiff may offer rebuttal evidence. Rebuttal evidence is a term that is given to testimony and evidence that shows that the evidence that was presented by the opposing party is not true."

"After the Plaintiff offers rebuttal evidence, the Court may allow the Defendant to offer surrebuttal testimony."

¹ For order of protection hearing script, refer to section 6. For civil traffic hearing script, refer to section 20.

² A.R.S. §22-261(c) provides that A [a]t the beginning of each proceeding the judge shall advise the parties that their right to appeal is dependent upon their requesting that a record be made of the justice court proceedings." This advisory may seem redundant in light of AZ.R.Super.CT.C.AP. 1(b) & 7 (e), but better practice is to place the advisory on the record.

“Following the presentation of evidence, the Plaintiff may make a closing argument, the Defendant may make a closing argument, and the Plaintiff may make a rebuttal closing argument to what the Defendant said. These closing arguments are a summary of what each party believes the evidence has shown. The arguments are not evidence.”

“The Plaintiff makes the final argument because the Plaintiff has the burden of proving the case. The Plaintiff must do so by a preponderance of the evidence, which means the Plaintiff’s claim is more likely true than not true. If you picture a set of scales, the weight of the evidence must tip in the Plaintiff’s favor for the Plaintiff to win.”³

5. (Exclusion of witnesses.)

"Would all non-party witnesses who are going to testify in this case please come forward. Would each of you, in turn please identify yourself?"

6. (Addressing all witnesses.)

"The rule of exclusion of witnesses has been invoked in this case.⁴ This means you cannot be in the courtroom during the trial except when you are called to testify. Do not discuss your testimony with any other witness until after the trial has been completed. You should avoid being present when others may discuss the case. You are also not to listen to, read, or watch anything revealing what is happening inside the courtroom during trial before you testify. If there is media coverage of this trial, you should also avoid seeing, listening to or watching anything regarding the trial until after the trial has been completed. [In the judge’s discretion, the judge may reference specific forms of traditional media, social media or other forms of technology that the witness must refrain from listening to, reading or watching.] You may, however, discuss your testimony with the [parties/attorneys], so long as no other witness is present. The purpose of the rule is to prevent what occurs in the courtroom from influencing your testimony. Do you understand what is required of you? Does either party have any witnesses whose presence in the courtroom is essential to presenting its case? (If so, then decide if the person is critical to conducting the case and not just to provide testimony.) The remainder of you need to have a seat outside the courtroom.”

³ If there are counterclaims by a defendant this needs to be modified to include the counterclaimant has the burden of proving the counterclaim by a preponderance of the evidence.

⁴ Under AZ.R.EV. 615 the rule must be invoked if a party requests and the Court may invoke on its own motion. Invoking in all cases avoids this as a potential appeal issue and promotes the consistent administration of trials.

7. (Opening Statement.)

An opening statement is used to outline what you intend to prove at trial today. You do not need to make an opening statement.

"____(Plaintiff/Attorney)____, do you wish to make an opening statement?"

"____(Defendant/Attorney)____, do you wish to make an opening statement?"

8. (Presentation of evidence by Plaintiff.)

"The Plaintiff may proceed. Please call your first (next) witness."

9. (Oath to witness.)

"Do you swear (or affirm) that the testimony you will give before this court shall be the truth, the whole truth and nothing but the truth?"

OR

"Do you swear (or affirm) to tell the truth in this case?"

(Direct-examination of each witness.)

(Cross-examination of each witness.)

(Re-direct, if necessary.)

(Re-cross, if necessary.)

(The Plaintiff rests.)

10. (Defendant may move for dismissal of Plaintiff's complaint or a judgment on the pleadings.)⁵

11. (Presentation of evidence by Defendant.)

"The Defense may proceed. Please call your first/next witness."

(Direct-examination of each witness.)

(Cross-examination of each witness.)

(Re-direct, if necessary.)

⁵ Defendant may refer to this as a motion for directed verdict, which is inapplicable in non-jury trials. This is a harmless error and the Court can rule on the motion. Johnson v. Pankratz, 196 Ariz. 621, 2 P. 3rd 1266 (Div.1 2000).

(Re-cross, if necessary.)

(The Defense rests.)

12. (Rebuttal by the Plaintiff.)

"Does the Plaintiff wish to present any evidence in rebuttal?"

13. (Surrebuttal by Defendant. If allowed by Court.)⁶

"Does the defense wish to present any further evidence?"

14. (If there is a counterclaim, then repeat presentation of evidence after interchanging the Defendant for the Plaintiff and vice versa.)

15. (Both parties rest.)

16. (Closing arguments.)

(Plaintiff's initial closing argument.)

(Defendant's closing argument.)

(Plaintiff's rebuttal closing argument.)

(Defendant's surrebuttal argument if allowed, or Defendant's rebuttal if there is a counterclaim.)

17. (Pronouncement of the Judgment.)⁷

a. (if for Plaintiff)

"It is the finding of the Court that the Plaintiff, ____ (Name of Plaintiff) ____ is entitled to recover from the Defendant, ____ (Name of Defendant) ____ the principal amount of _____, court costs of _____, attorney fees (if applicable) of _____, and interest at the rate of ____% per annum from _____ (this date)."

⁶ Whether to allow surrebuttal evidence is in the Court's sound discretion. If allowed it is usually to explain any new evidence presented in rebuttal and not to present evidence that could have been presented in the case in chief. See, State v. Steelman, 120 Ariz. 301, 319, 585 P.2d 1213 (1978).

⁷ AZ ST J CT RCP Rule 139(d) requires party claiming costs to file a written statement after the entry of judgment. AZ ST J CT RCP Rule 139(e) requires attorney's fees be determined on a separate motion unless proven at trial as part of a case. Better practice is to declare a party will recover costs and attorney fees in an amount subsequently determined.

b. (if not for the Plaintiff)

"It is the finding of this Court that the Plaintiff (Name of Plaintiff) is entitled to recover nothing from the Defendant and the Defendant, ____ Name of Defendant)____ is entitled to recover from the Plaintiff, ____ (Name of Plaintiff)____, court costs of _____, attorney fees (if applicable) of _____, and interest at the rate of ____% per annum from ____ (this date)."

c. (if for the Defendant on Counterclaim)

"It is the finding of the court that Defendant, ____ (Name of Defendant)____, is entitled to recover by (his/her/their) counterclaim from Plaintiff, ____ (Name of Plaintiff)____, in the principal amount of _____, court costs of _____, attorney fees (if applicable) of _____, and interest at the rate of ____% per annum from ____ (this date)."

d. (if for the Plaintiff on Counterclaim)

"It is the finding of the court that the Defendant (Name of the Defendant) is entitled to recover nothing from the Plaintiff, ____ (Name of Plaintiff)____, and Plaintiff, ____ (Name of Plaintiff) ____, is entitled to recover from Defendant (Name of Defendant) court costs of ____, attorney fees (if applicable) of ____ and interest at the rate of ____% per annum from ____ (this date).

ADMITTING EXHIBITS DURING TRIAL

18. (Although better practice is to mark exhibits in advance, if not yet marked. "I will mark the exhibit for identification as Plaintiff's/Defendant's exhibit (Number/Letter)." (Mark using exhibit stickers on bench.)

(To opposing party) "Are there any objections to admission of this exhibit?" (If so, hear the arguments and rule.) "Exhibit (Number/Letter) will be/will not be admitted into evidence. Please proceed."

CIVIL JURY TRIAL SCRIPT

[Note: The following script is written as if both parties are represented by counsel. Appropriate adjustments will need to be made if either party appears pro per.]

1. "Please be seated. Good (morning/afternoon) ladies and gentlemen. The _____ Justice Court is now in session. This is the time set for the trial of the case of _____ v. _____. The Court notes the presence of the Plaintiff(s) and Defendant(s) and their attorneys (name each attorney and the party represented.) Is the Plaintiff ready? Is the Defendant ready?"

2. Advise parties that their right to appeal is dependent on their request that a record be made of the court proceedings.¹

"Your right to appeal is dependent on your requesting a record be made of the court proceedings. Does either party request that the court proceedings be recorded?"

3. "Will all the prospective jurors seated in the courtroom please stand and be sworn?"

(Clerk or Judge administers voir dire oath.) "Do you solemnly swear or affirm that you will give true answers to all questions touching upon your qualifications to act as a trial juror in this case?"

4. "Ladies and gentlemen, we are now going to begin the jury selection process in this case. [The clerk/I] will call the names of the prospective jurors. As your name is called, please come forward and take your seat in the jury box and courtroom as the bailiff/clerk directs." (Note, if Court conducts jury selection from the gallery, modify accordingly.)

(While the prospective jurors are being seated in the jury box and courtroom, fill in their names on the seating chart to enable you to address them by name later.)

5. "Ladies and gentlemen, you will now be asked a number of questions. They are not designed to pry unnecessarily into your private lives. They are asked to discover if you have any knowledge about this case, if you have any preconceived opinions which you might find difficult to lay aside, if you have had any personal or family experiences which might cause you to identify yourself with any of the parties, if there is anything going on in your life which might preclude your serving as a juror, and to assure each party that the jury will be fair and impartial."

¹ A.R.S. §22-261(c) provides that "at the beginning of each proceeding the judge shall advise the parties that their right to appeal is dependent upon their requesting that a record be made of the justice court proceedings." This advisory may seem redundant in light of AZ.R.Super.CT.C.AP. 1(b) & 7 (e), but better practice is to place the advisory on the record.

6. "Please do not withhold information in order to be seated on this jury. Be straightforward in your answers rather than answering in the way you feel the [parties/lawyers] or I expect you to answer. If your answer to a question is "yes", please raise your hand so that additional questions may be asked. If your answer to a question is "no", you need do nothing."
7. "By law in order to qualify for jury service you must be 18 years of age or older, a citizen of the United States, a resident of the State of Arizona for at least 50 days, and a resident of (court's jurisdiction). You must not be declared legally incompetent. You cannot have been convicted of a felony in Arizona, or any other state or territory, unless your civil rights have been restored. Is there anyone here who does not meet these requirements? If yes: which category do you fall into?"
8. "The law also allows to be excused if you are a certified police officer, are over 75 years of age, or not able to understand the English language. Does this apply to anyone? If yes: which category do you fall into? Do you want to be excused from jury service in this case?"
9. "Before we go any further, let me introduce the courtroom personnel. The bailiff is__(if applicable)__, the court reporter is __(if applicable)__, and the clerk is __(if applicable)__. Now let me introduce the lawyers and their clients."
10. "The Plaintiff is represented by __(Name of Attorney)__, (who is a member of the firm of _____.) (The alternative method is to have the attorney introduce herself, and her law firm.) Do any of you know __(Name of Attorney)__, or any member of the firm on a social or professional basis"__(Name of Attorney)__, will you please introduce your client."

(Client introduced.)

"Thank you. Do any of you know the Plaintiff?"

11. "The Defendant is represented by __(Name of Attorney)__, (who is a member of the firm of _____.) (The alternative method is to have the attorney introduce herself, and her law firm.)Do any of you know __(Name of Attorney)__, or any member of the firm on a social or professional basis?" __(Name of Attorney)__, will you please introduce your client."

(Client introduced.)

"Thank you. Do any of you know the Defendant?"

12. "The case to be tried today is a civil case, not a criminal case."

(Make a brief statement of the case similar to the following.)

"It involves a collision which occurred on __ (Date) __ at __ (Location) __. According to the Plaintiff, __ (Name of Plaintiff) __, s/he was not negligent (and s/he asserts that the Defendant was negligent)."

"The Defendant denies negligence."

"Have any of you ever seen, heard or read anything about this case, or have any of you ever heard anyone express an opinion about it?"

13. "Have you, any members of your family or close friends ever been involved in a case like this, or any other law suit which might affect your ability to fairly and impartially decide this case?" [*If yes, pursue in individual voir dire.*]

14. "I am going to read a list of witnesses who may be called during this trial. Please raise your hand if you know, or think you might know any of these persons."

(Read list.) (If no hand raised,)

"Apparently none of you know any of the possible witnesses in this case."

(If hand(s) raised,)

"Yes, __ (Name of Juror(s)) __, which witnesses do you think you know? How well do you know _____? Would that affect your ability to be fair and impartial?"

15. "Ladies and gentlemen, I recognize jury service is probably an inconvenience to you, it takes you away from your jobs and families and interrupts your daily routine. However, jury duty is one of the most important duties citizens of this country are called upon to perform. For this reason, I know you will not take this duty lightly."

"This case is expected to take _____ (hours)(days). Our schedule will usually be as follows: _____ (Hours and recesses) __. Would the length of the trial or our daily schedule pose a serious problem for any of you?"²

"Do any of you have a health problem that might make it difficult for you to serve as a juror?"

16. (If easel is used,)

²The Court needs to establish procedures for the submission of statements from prospective jurors who are applying to be excused for undue hardship, health-related reasons or age-related reasons. These are not public documents. A.R.S. §21-202, effective 4-13-2005.

- a. "Ladies and gentlemen, there are some questions on the easel that I am going to ask each of you to answer. One question asks about your jury service in other trials. Please indicate the type of case, civil or criminal. Will you please stand and go first, ___(Juror Number One)___." ³

(If easel is not used, then the Court can ask basically the same questions that would be covered in the easel questions.)

- b. "Ladies and gentlemen, I am going to ask each of you several questions. (Juror Number One) Could you state your name? Without stating your exact address, where is the general area where you live? What is your occupation? What is your marital status? What is your spouse or partner's occupation? Have you served as a juror in other cases? If you have, please tell me the type of case, civil or criminal. (Juror Number One) have you ever served as a juror before?"

17. "Ladies and gentlemen is there anything about the nature of this case that would make it difficult for any of you to serve as a fair and impartial juror? (If yes, pursue on individual voir dire.)

18. "At the beginning of the case I will give you some instructions about the law and at the end of the case before you go to deliberate, I will give you additional instructions about the law. You may feel the law as I read it to you may be too strict or too lenient, or you may feel the law is different than what I read to you. Regardless of any personal opinion you may have about what the law is, or should be, you must follow my instructions about the law as I give them to you."

"Do any of you feel you could not follow my instructions about the law if a particular instruction conflicted with some personal belief you have about what the law is, or should be?" (Follow up on any affirmative response on individual voir dire. If there is no response.) "I take it from your silence that you will all follow my instructions about the law as I give them to you."

19. (Depending on the subject matter of the case) "Have any of you, or any members of your family, ever studied or practiced (law/medicine/other relevant area of expertise)?"

20. "In deciding the facts of the case, the jury has to evaluate the testimony of the witnesses. Is there anyone who could not judge the testimony of each witness by the same standards and not give what one witness says more or less weight based on some factor like the person's occupation?"

³ Suggested easel topics: Name; General location of residence; Occupation- Employer, length of employment, previous occupation if retired; Spouse's Occupation - Employer, length of employment, previous occupation if retired; Prior jury service - when, where, nature of case, verdict (if any). Some judges have decided that asking about the verdict is an improper question. Because of the differences in cases, it is irrelevant to the current case what a full jury did in another case. This question also penalizes previous jury service. Some judges refuse to ask the question and prohibit the lawyers from asking it.

21. "If selected to sit on this case, would any of you be unable, or unwilling, to decide the case solely on the evidence presented at trial?"
22. "Do any of you know the other members of the jury panel?" (Follow up during individual voir dire).
23. "Have any of you ever been a witness in any trial or deposition?"
24. "Ladies and gentlemen, is there anything you think the attorneys or I should know before we select those jurors who will serve in this case? If it is something you don't want to mention in open court, just raise your hand and it can be arranged for you to tell us about it privately."
25. (Ask any additional questions agreed upon, or permit counsel to conduct further voir dire.)

"Counsel, are there any further questions of the panel as a whole?"

(Have counsel approach for a bench conference and determine if there are questions for individual jurors.)

26. "Ladies and gentlemen, we will now take a short recess to complete the process of jury selection. Some of you may be called back individually for additional questions. Whether you are called or not is not a reflection on your ability to serve as a juror. Don't take it personally if you are not chosen to serve as a juror in this case because only _____⁴ of you may be chosen. Please wait outside the courtroom and, while waiting, don't discuss the case or anything connected with it among yourselves or with anyone else. Thank you. We will call you back to the courtroom when we are ready."

(After panel of jurors has left the courtroom, call in and examine individually any jurors who had answers that need clarification, rule on any for cause challenges to individual jurors, then ask counsel if they pass the panel for cause and when passed then allow counsel to exercise their peremptory strikes.)

(After peremptory strikes are used ask counsel.) "Are there any other motions or issues that need to be addressed outside of the jury's presence before we call them in for trial?"

(If answer is yes, then resolve the issues.)

27. (Panel is called back, court reconvenes.)

⁴ Six jurors in a non-record court jury trial. A.R.S. §21-102(D). A greater number may be selected providing for alternates if needed.

"The record will show the presence of all parties, counsel and the prospective jurors. Ladies and gentlemen, the clerk/bailiff will now read the names of the jurors selected to try this case. As your name is read, please come forward and be seated in the jury box as directed by the bailiff/clerk."

(Read names of trial jurors.)

28. "Those of you who were not selected as jurors (are to report back to the Jury Commissioner) (may return home and if you are to return again for jury service, you will be notified). Thank you for assisting us today."

29. "Those of you who have been chosen as jurors will please stand and be sworn."

(Clerk or Judge administers substantially the following oath:)

"Do you swear or affirm you will pay careful attention during the trial, abide by the Court's instructions and when the case is submitted to you, render a verdict according to the law and the evidence presented to you?"

30. (General preliminary jury instructions)⁵

(If not using audiotape instructions) "You have all received a jury instruction packet. This contains instructions of law that you must follow in deciding this case. At the end of the case you may receive modified instructions, but until then this is your guide to the evidence you are about to hear. As I read the instructions please follow along."

Duty of Jurors⁶: "Ladies and Gentlemen: Now that you have been sworn, I will briefly tell you something about your duties as jurors and give you some instructions. At the end of the trial I will give you more detailed instructions, and those instructions will control your deliberations."

"It will be your duty to decide the facts. You must decide the facts only from the evidence produced in court. You must not speculate or guess about any fact. You must not be influenced by sympathy or prejudice."

"You will hear the evidence, decide the facts, and then apply those facts to the law I

⁵ These preliminary instructions are from the Revised Arizona Jury Instructions (Civil) Fourth Edition, published in 2005 ("RAJI"). (Judicial officers may obtain copies of these instructions on disk or in hard copy by contacting the Education Services Division of the Administrative Office of the Courts or online on Wendell.) Depending on the nature of the claims in a case, subject matter specific jury instructions may be applicable.

Preliminary and final jury instructions are to be in written form and copies shall be furnished to the jurors before being read by the court. In limited jurisdiction courts, the court may record jury instructions on audiotape and provide the taped instructions to the jury for their use during deliberations. AZ.R.C.P. 51(b)(3).

⁶ RAJI (Civil) 4th Preliminary 1.

will give to you. That is how you will reach your verdict. In doing so you must follow that law whether you agree with it or not.”

"You must not take anything I may say or do during the trial as indicating any opinion about the facts. You, and you alone, are the judges of the facts.”

Importance of Jury Service⁷ “Jury service is an important part of our system of justice, with a long and distinguished tradition in western civilization. From the beginning, American law has viewed the jury system as an effective means of drawing on the collective wisdom, experience, and fact-finding abilities of persons such as yourselves. While it may be an occasional inconvenience, or worse, jury service is an important responsibility for you, one which, I am sure, you will take seriously.”

Evidence⁸: "You will decide what the facts are from the evidence presented here in court. That evidence will consist of testimony of witnesses, any documents and other things received into evidence as exhibits, and any facts stipulated to by the parties or which you are instructed to accept.”

"You will decide the credibility and weight to be given to any evidence presented in the case, whether it be direct evidence or circumstantial evidence.” [Direct evidence is a physical exhibit or the testimony of a witness who saw, heard, touched, smelled or otherwise actually perceived an event. Circumstantial evidence is the proof of a fact from which the existence of another fact may be inferred. You must determine the weight to be given to all the evidence without regard to whether it is direct or circumstantial.”]

Rulings of the Court⁹: "Admission of evidence in court is governed by rules of law. I will apply those rules and resolve any issues that arise during the trial concerning the admission of evidence.”

"If an objection to a question is sustained, you must disregard the question and you must not guess what the answer to the question might have been. If an exhibit is offered into evidence and an objection to it is sustained, you must not consider that exhibit as evidence. If testimony is ordered stricken from the record, you must not consider that testimony for any purpose.”

"Do not concern yourselves with the reasons for my rulings on the admission of evidence. Do not regard those rulings as any indication from me of the credibility or weight, if any, that you should give to any evidence that has been admitted.”

⁷ RAJI (Civil) 4th Preliminary 2.

⁸ RAJI (Civil) 4th Preliminary 3. The instruction makes reference to direct and circumstantial evidence, but does not define either. Although it is, of course, not error to give the jury a definition of both direct and circumstantial evidence at the beginning of trial, it is not necessary in most cases, and the definitions will be helpful to the jury if given closer to argument at the end of the case, if at all. Suggested definitions of direct and circumstantial evidence are in the brackets.

⁹ RAJI (Civil) 4th Preliminary 4.

Credibility of Witnesses¹⁰: "In deciding the facts of this case, you should consider what testimony to accept, and what to reject. You may accept everything a witness says, or part of it, or none of it."

"In evaluating testimony, you should use the tests for accuracy and truthfulness that people use in determining matters of importance in everyday life, including such factors as: the witness' ability to see or hear or know the things the witness testified to; the quality of the witness' memory; the witness' manner while testifying; whether the witness has any motive, bias, or prejudice; whether the witness is contradicted by anything the witness said or wrote before trial, or by other evidence; and the reasonableness of the witness' testimony when considered in the light of the other evidence."

"Consider all of the evidence in light of reason, common sense, and experience."

Expert Witness¹¹: [Give the expert witness instruction only if it is known at the start of the trial that the jury will be hearing expert opinion testimony during the trial.]

"A witness qualified as an expert by education or experience may state opinions on matters in that witness' field of expertise, and may also state reasons for those opinions."

"Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept it or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness' qualifications and experience, the reasons given for the opinions, and all the other evidence in the case."

Evidence, Statements of Lawyers and Rulings¹² As I mentioned earlier it is your job to decide what the facts are from the evidence presented. To help you make that decision, here are six rules on what is and what is not, evidence.

1. **Evidence to be considered.** You are to determine the facts only from the testimony of witnesses and from exhibits received into evidence.
2. **Lawyers' statements.** Ordinarily statements or arguments made by lawyers are not evidence. Their purpose is to help you understand the evidence and the law. However, if the lawyers for both/all of the parties agree or stipulate that some particular fact is true you should accept it as true.
3. **Questions to a witness.** A question, by itself, is not evidence. A question can only be used to give meaning to a witness's answer.
4. **Objections to a question.** If a lawyer objects to a question and I do not allow the witness to answer, you must not try to guess what the answer might

¹⁰ RAJI (Civil) 4th Preliminary 5.

¹¹ RAJI (Civil) 4th Preliminary 5.

¹² Based on RAJI (Civil) 4th Preliminary 7.

have been. You must not treat the objection as evidence or guess the reason why the lawyer objected in the first place.

5. **Rejected evidence.** During the trial if testimony or exhibits are offered as evidence that I do not allow to become evidence you must not consider them.
6. **Stricken evidence.** If I order some evidence to stricken, or thrown out, it is no longer evidence and you must not consider it.

No Transcript Available To Jury; Taking Notes¹³: "At the end of the trial you will have to make your decision based on what you recall of the evidence. You will not be given a written transcript of any testimony; you should pay close attention to the testimony as it is given."

"You have been provided with note pads and pencils. The court encourages you to take notes during the trial if you wish to do so. But do not let note taking distract you so that you miss hearing or seeing any testimony. You may take your notes [and notebooks¹⁴] with you when you leave the courtroom for recesses and may use them during [discussions with other jurors in the jury room during the trial and during¹⁵] your deliberations at the end of the trial. Until then, keep your notes to yourself. If you do not want to take notes [and notebooks] with you during the trial, you should leave them on your seat. Whether you take notes or not, you should rely upon your own memory of what was said and not be overly influenced by the notes of other jurors. After you have rendered your verdict, the bailiff/clerk will collect your notes and destroy them without reading them."

"Do not be influenced by my taking notes at times. What I write down most likely has nothing to do with your job of determining the facts of the case."

Questions by Jurors¹⁶: "If at any time during the trial you have difficulty hearing or seeing something that you should be hearing or seeing, or if you get into personal distress for any reason, raise your hand and let me know."

"If you have any questions about parking, restaurants, or other personal matters relating to jury service, feel free to ask one of the court staff, but remember that the Admonition, which I will explain in a couple of minutes, applies to court staff, as it does to everybody else, so do not try to discuss the case with court staff."

"If you have a question you would like to ask a witness or me during the trial, write your question down, but do not sign it. Pass the question down to the end of the row and forward to the container at the end of the jury box. If I have not seen there is a question for a witness who is about to leave the witness stand, signal the bailiff/clerk

¹³ Based on RAJI (Civil) 4th Preliminary 8.

¹⁴ The bracketed language regarding the use of notebooks should be used if the court, in its discretion, has authorized their use pursuant to AZ ST J CT RCP Rule 134 a (1).

¹⁵ The bracketed language regarding juror discussions should be used unless the court has limited or prohibited juror discussions during recesses pursuant to AZ.R.C.P. 39(f).

¹⁶ RAJI (Civil) 4th Preliminary 11.

or me before the witness leaves the stand.” (This system is based on there being a container at the end of the jury box for collections of questions.)

"The lawyers and I will discuss the question. If I decide the question is proper, it will be asked in the same manner as a question by an attorney. Keep in mind, however, that the rules of evidence, or other rules of law, may prevent some questions from being asked. I will apply the same legal standards to your questions as I do to the questions asked by the lawyers.

["If a particular question is not asked, do not guess why or wonder what the answer might have been. The failure to ask a question is not a reflection on the person asking it, and does not have any significance to the trial or your decision on the facts."] ¹⁷

Order of the Trial¹⁸: "The trial will proceed in this order. First, each side may make an opening statement. An opening statement is not evidence. It is an outline of the expected evidence, offered to help you understand and follow the evidence that will be presented during trial."

"Next, Plaintiff will present witnesses and Defendant may cross-examine them. Then Defendant may present witnesses and Plaintiff may cross-examine. Plaintiff may then present further evidence." (If sur-rebuttal evidence will be allowed this should be mentioned here. If there are counter or cross claims this should be modified to show them as well.)

"After the evidence has been presented, the attorneys may make their closing arguments. Then I will give you final instructions on the law that you are to apply in deciding the case."

"You will then go to the jury room to deliberate and decide the case."

"The final instructions I give you at the end of the trial may differ from these preliminary instructions based upon the evidence presented at the trial. The preliminary jury instructions will be replaced by the final jury instructions I will give you at the end of the trial. The final instructions will govern your deliberations."

31. "Members of the jury, I am now going to give you what is known as the Admonition." ¹⁹

"This is a list of do's and don'ts, mostly don'ts, which govern your conduct as jurors. This Admonition is designed to prevent any tampering and any appearance of jury

¹⁷ In accordance with AZ.R.C.P. 39(b) (10) the bracketed language should be used unless for good cause the court has prohibited or limited the submission of questions to witnesses.

¹⁸RAJI (Civil) 4th Preliminary 16.

¹⁹This Admonition is based on RAJI (Civil) 4th Preliminary 9, the Model Federal Jury Instructions and the admonition for the Superior Courts of Washington DC.

tampering, something that cannot be tolerated in our system of justice”

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

"Do not do any research or make any investigation about the case on your own. Do not view or visit the locations where the events of the case took place. "Research" includes doing things such as looking up words in a dictionary or encyclopedia, or using legal publications or similar sources with respect to any of the issues involved in the case. Research also includes searching on the internet or using other electronic devices to obtain information. The reason for this is that you have to base any decision on the evidence that is produced here in the courtroom. "

Until the trial has ended and you have been discharged as jurors do not talk to anyone about the case, or about anyone who has anything to do with it, and do not let anyone talk to you about these matters. Do not communicate with anyone about the case on your cell phone, through e-mail, through any communication device, do not text message with anyone about the case, mention it on Twitter or any blog, website or any social networking website, including Facebook, MySpace, LinkedIn and YouTube. You may tell people you are on a jury, and you may tell them the estimated schedule for the trial, but do not tell them anything else except to say that you cannot talk about the trial until it is over."

"It is your duty not to speak with or permit yourselves to be addressed by any person on any subject connected with the trial. If someone tries to talk to you about the case, stop them or walk away. If you should overhear others talking about the case, stop them or walk away. If anything like this does happen, immediately report it to me or any member of my staff as soon as you can."

"To avoid even the appearance of improper conduct, do not talk to any of the parties, the lawyers, or witnesses about anything until the case is over, even if your conversation with them has nothing to do with the case. For example, you might pass a lawyer in the hall and ask what good restaurants are in the area, and somebody from a distance may think you are talking about the case. So, again, please avoid even the appearance of improper conduct."

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

["There is one and only one limited exception to the foregoing rules. During recesses from the trial, you may discuss the evidence presented at the trial, but:

(1) only among yourselves; (2) only when you are all together; and (3) only behind closed doors in the jury room.]"²⁰

"[Even though you may discuss the case under the conditions I have described,] do not form final opinions about any fact or about the outcome of the case until you have heard and considered all of the evidence, the closing arguments, and the rest of the instructions I will give you on the law. Both sides have the right to have the case fully presented and argued before you decide any of the issues in the case. Keep an open mind during the trial. Form your final opinions only after you have had an opportunity to discuss the case with your fellow jurors in the jury room at the end of the trial."]

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

Arguments of Counsel²¹: "At this time, the lawyers may make opening statements. What the lawyers say in their opening statements is not evidence. It is simply their outline of what the lawyer thinks the evidence will be, and is offered to help you understand and follow the evidence during the trial. If a lawyer decides not to make an opening statement this has no significance to your determination on the facts."

32. (Presentation of evidence.)

"The Plaintiff may proceed. Please call your [first/next] witness."

(Oath to witness.)

"Do you swear (or affirm) that the testimony you will give before this court shall be the truth, the whole truth and nothing but the truth?"

OR

"Do you swear (or affirm) to tell the truth in this case?"

(Direct-examination of each witness.)

(Cross-examination of each witness.)

(Re-direct, if necessary.)

²⁰ The bracketed language regarding juror discussions should be used unless the court has limited or prohibited juror discussions during recesses pursuant to AZ.R.C.P. 39(f).

²¹ There is not equivalent separate instruction in RAJI (Civil) 4th Edition. This is based on RAJI (Civil) 4th Standard 4. This was separated and included to emphasize the importance to the jury.

(Re-cross, if allowed.)

(Juror questions of each witness, if any, and if allowed.)

(Plaintiff rests.)

33. (Defendant may move for a directed verdict of dismissal of Plaintiff's complaint. This is done outside of the presence of the jury. Before this is done the jury should be sent to the jury deliberation room. Better practice is to take a short recess to allow for any motions before the Defense case is presented.)

34. (Presentation of evidence by the Defendant.)

"The Defense may proceed. Please call your first/next witness."

(Oath to witness.)

"Do you swear (or affirm) that the testimony you will give before this court shall be the truth, the whole truth and nothing but the truth?"

OR

"Do you swear (or affirm) to tell the truth in this case?"

(Direct-examination of each witness.)

(Cross-examination of each witness.)

(Re-direct, if necessary.)

(Re-cross, if allowed.)

(Juror questions of each witness, if any and if allowed.)

(Defense rests.)

35. (Rebuttal by Plaintiff.)

"Does the Plaintiff wish to present any rebuttal evidence?"

36. (Surrebuttal by Defendant, if allowed.)²²

"Does the defense wish to present any surrebuttal evidence?"

²²Whether to allow surrebuttal evidence is in the Court's sound discretion. If allowed it is usually to explain any new evidence presented in rebuttal and not to present evidence that could have been presented in case in chief. See, State v. Steelman, 120 Ariz. 301, 319, 585 P.2d 1213 (1978).

(If there is a counterclaim, then repeat the presentation of evidence after interchanging the Defendant for the Plaintiff.)

37. (Recess Admonition)

"Members of the jury, we will now take our (morning/noon/afternoon) recess. Please remember the Admonition I gave you about not discussing this case or forming any conclusions about it until all the evidence is in and you begin your deliberations. Please be back in the jury room at __ (time) __."

38. (After each recess.)

"The record will reflect the presence of all parties, counsel and the jury."

39. (Parties rest) (Closing arguments)

"It is now time for closing arguments in this case. Does the Plaintiff want to give a closing argument?"

(Plaintiff's initial closing.)

(Defendant's closing.) "Does the Defendant want to give a closing argument?"

(Plaintiff's final closing.) "Does the Plaintiff want to reply?"

(If there are counterclaims continue with the parties being identified appropriately.)

40. (Final instructions.) (These may be delivered either before or after closing arguments.)

[Jury instructions on matters of law, legal principles, and issues shall be given by a justice of the peace. A.R.S. §22-220(D). Attorneys may confer and stipulate as to what each of them will say in closing arguments concerning matters of law, unless otherwise provided by law. While this is better done before this point, outside the presence of the jury, if it has not been done have counsel at a side bar conference to see if there are any proposed changes to the jury instructions. If there are take a recess to determine if changes are needed and if they are to have the changes made and copies distributed.]

"The instruction packet you have contains the final jury instructions that you must apply in deciding this case. There have/have not been changes made to your original packet."

(Read instructions.)

41. (The court explains the verdict forms to jury. Dismiss and thank any alternate jurors. Bailiff/clerk is sworn in by judge. Jury retires to deliberate.)

42. (Taking jury verdict.)

"The record will reflect the presence of counsel, (the parties if applicable) and the jury. Has the jury reached a verdict?"

(Presiding Juror responds.)

(If YES,)

"Would you please hand all forms of verdict to the bailiff/clerk."

(Bailiff/clerk then hands the verdict forms to the judge who reviews them silently and hands them to the clerk (or reads the verdict, depending on court practice.)

"The clerk will please read and record the verdict, omitting the formal caption."

(Clerk reads verdict.)

"Does either counsel wish to poll the jury?"

(If YES, Clerk or Judge asks each juror)²³

"Is this your true verdict?"

(If five out of six jurors answer yes²⁴, proceed to paragraph 33 and discharge the jury.)

(If a sufficient number of jurors answer no, the court shall direct them to retire for further deliberations. AZ.R.C.P. 49(f))

43. "Members of the jury, on behalf of all the participants in the trial, I want to thank you for your service to the community. Since the verdict has been returned, you are now free to discuss the case with the [attorneys/parties] if you wish. Having such an opportunity is an educational experience for them. Should you choose not to discuss the case with them, simply tell them so and they will honor your request. Hand any notes you may have taken to the bailiff to be destroyed. You may also take your

²³When polling the Court cannot use a juror's name, but must use a system which preserves an accurate record, such as identifying persons by their juror numbers.

²⁴ A.R.S. §21-102(D). requires, "In a court not of record, a jury for trial of any case shall consist of six persons. The concurrence of all but one in a civil case shall be necessary to render a verdict." AZ.R.C.P. 48 allows parties to "stipulate that...a verdict or a finding of the stated majority of the jurors shall be taken as the verdict or finding of the jury." The ability to stipulate lower than five is limited by the general rule that a minimum of three fourths of the jurors is required. Ariz. Const. Art. 2, §23, A.R.S. §21-102(D) and A.R.S. §21-102(E).

notes with you if you would like.”

"Thank you, and you are now excused."

EXCLUSION OF WITNESSES SCRIPT

"Would all non-party witnesses who are going to testify in this case please come forward? Would each of you, in turn please identify yourself?"

(Addressing all witnesses,)

"The rule of exclusion of witnesses has been invoked in this case²⁵. This means you cannot be in the courtroom during the trial except when you are called to testify. Do not discuss your testimony with any other witness until after the trial has been completed. You should also avoid being present when others may discuss the case. You are also not to listen to, read, or watch anything revealing what is happening inside the courtroom during trial before you testify. If there is media coverage of this trial, you should also avoid seeing, listening to or watching anything regarding the trial until after the trial has been completed [In the judge's discretion, the judge may reference specific forms of traditional media, social media or other forms of technology that the witness must refrain from listening to, reading or watching.] You may, however, discuss your testimony with the [parties/attorneys], so long as no other witness is present. The purpose of the rule is to prevent what occurs in the courtroom from influencing your testimony. Do you understand what is required of you? Does either party have any witnesses whose presence in the courtroom is essential to presenting its case? (If so then decide if the person is critical to conducting the case and not just to provide testimony.) The remainder of you need to have a seat outside the courtroom."

BENCH CONFERENCES SCRIPT

"Members of the jury, sometimes it is necessary for the Court and the lawyers to confer privately regarding a matter of law. Please understand we are not trying to hide anything from you. But these conferences are an important part of the trial and help us present this case to you in a proper and legal manner."

DEPOSITIONS AND INTERROGATORIES SCRIPT

(Depositions)

"Members of the jury, during the trial you may hear the attorneys refer to a deposition or read testimony from a deposition. A deposition is out-of-court testimony which, like the testimony here in court, is given under oath with the attorneys present and is recorded by a court reporter."

²⁵ Under AZ.R.EV. 615 the rule must be invoked if a party requests and the Court may invoke on its own motion. Invoking in all cases avoids this as a potential appeal issue and promotes the consistent administration of trials.

(Interrogatories)

"During the trial, you may (also) hear the attorneys refer to interrogatories. Interrogatories are written questions answered by a person in writing and under oath."

PRIOR PROCEEDINGS SCRIPT

"Members of the jury, you may hear the attorneys or witnesses mention other proceedings involving this case. Do not speculate or guess about those other proceedings. Your responsibility is to consider the evidence presented during this trial and determine the facts from that evidence alone."

ALTERNATE JUROR SCRIPT

"Members of the jury, in any case lasting more than one day, an alternate juror is usually chosen in case a juror becomes ill or has a personal emergency. Just because you aren't one of the first six jurors doesn't mean you are necessarily going to be an alternate. The alternate will be chosen by lot and excused at the end of the case. Until then, each of you must consider yourself a juror, and pay close attention to the evidence."

PHYSICALLY EXCUSING ALTERNATE JURORS²⁶ SCRIPT

"[Name of Alternate Juror], your name has been drawn by lot as an alternate juror. While you are physically excused from your service as a juror at this time, there remains a possibility you may be called back to court to deliberate should one of the other jurors be unable to do so. The bailiff/clerk will retain your notes [and notebook] for your use if you are called back. The Admonition continues to apply to you. Please do not discuss this case with anyone or let anyone talk to you about it until someone from my office notifies you a verdict has been reached."

"The Clerk will swear in the Bailiff." (Bailiff is sworn, if the Court has a bailiff, otherwise the clerk or other official is sworn.) "Ladies and Gentlemen, you may now go to the jury room and deliberate. Take your notebooks with you."

EVENING RECESS SCRIPT

(If jury is not deliberating,)

"You are reminded of the court's Admonition not to discuss the case with others, which includes family members and friends. This means you are not to discuss the evidence. When the trial is over and you have been excused as a juror, you will then be free to discuss the case and your experience as a juror."

²⁶RAJI (Civil) 4th Standard 14; AZ.R.C.P. 47(f). This instruction should not be given in cases where the parties have stipulated that alternates may deliberate. The bracketed language regarding the retention of a notebook should be used if the court, in its discretion, has authorized their use pursuant to AZ ST J CT RCP Rule 134 a(1).

"We stand in recess."

ADVANCE ANNOUNCEMENT OF EVENING RECESS

(Jury deliberating.)

"Members of the jury, if you do not have a verdict at or near ____ p.m., you may recess at that time and return at ____ a.m. on (next trial day)."

"When you return, do not begin deliberating until all jurors are present. When all jurors are present in the jury room, please notify the Bailiff/clerk."

"Please remember the Admonition. Don't talk to anyone about the case; don't let anyone talk to you about it. Keep an open mind about the case."

REGULAR ANNOUNCEMENT OF EVENING RECESS

(Jury deliberating.)

[Jury is called back into court. Counsel and parties are either present or have waived presence. Court announces evening recess and gives jury directions on when to return, as in "Advance Announcement", above.]

HUNG JURY SCRIPT

"Members of the jury, you have been called back into the courtroom to discuss whether you can reach a verdict. Have you chosen a presiding juror?"

" _____ (Name of Presiding Juror), is there a reasonable probability the jury will reach a verdict within a reasonable time? Please answer simply 'Yes' or 'No', nothing else, and don't tell me how many are voting one way or the other."

(Presiding Juror answers.)

(To entire panel,)

"Do any of you disagree with what the presiding juror has said? If so please raise your hand."

(If no hands are raised, either declare a mistrial or have the jury continue their deliberations, as dictated by the presiding juror's response.)

(If one or more hands are raised, confer with counsel and exercise your discretion accordingly.)

ADMITTING EXHIBITS DURING TRIAL SCRIPT

(Although better practice is to mark exhibits in advance, if not yet marked. “I will mark the exhibit for identification as Plaintiff’s/Defendant’s exhibit (Number/Letter).” (Mark using exhibit stickers on bench.)

(To opposing party) “Are there any objections to admission of this exhibit?” (If so, hear the arguments at a sidebar conference and rule.)

“Exhibit (Number/Letter) will be/will not be admitted into evidence.” (If not admitted, then to jury: “The exhibit will not be admitted into evidence. You are not to guess about the reason for my decision and the exhibit is not to be considered in reaching your decision. Counsel please proceed.”)

SMALL CLAIMS

There is a Small Claims Division in the Justice Court. Parties can have the case transferred to the Civil Division of the Justice Court if request is made no less than 10 days prior to the trial/hearing. The party requesting the transfer pays the civil fee amount.

CHECKLIST

1. Plaintiff files complaint. No more than \$3,500. (Jurisdiction A.R.S. §22-503)

Must pay filing fee. (*if no filing fee is paid-considered as no answer filed.*)

See A.R.S. §22-281.

Make sure parties are named properly. For example, a person or persons must be named and served, not just a business name.

2. Plaintiff sends complaint by certified mail, return receipt requested, to Defendant.

Each person named in suit must be served.

If Defendant cannot be served by mail, then Plaintiff can attempt service by constable or process server.

3. Once served, the Defendant(s) (has/have) 20 calendar days to answer.

4. Defendant(s) (files/file) answer. No fee paid – no answer filed.

Must pay answer fee. See A.R.S. §22-281.

5. Defendant(s) can file counterclaim. No more than \$3,500.00.

The Plaintiff can file an answer to the counterclaim or the Plaintiff can answer at the time of the hearing.

6. When the Defense answers and counterclaims, if any, are received, the Court sets a hearing within 60 days. The Court notifies both parties of the hearing date.

The Plaintiff's complaint and Defendant's counterclaim can be heard at the same time.

7. Either party can request transfer to Justice Court. Request must be made no less than 10 days prior to trial. (A.R.S. §22-504)

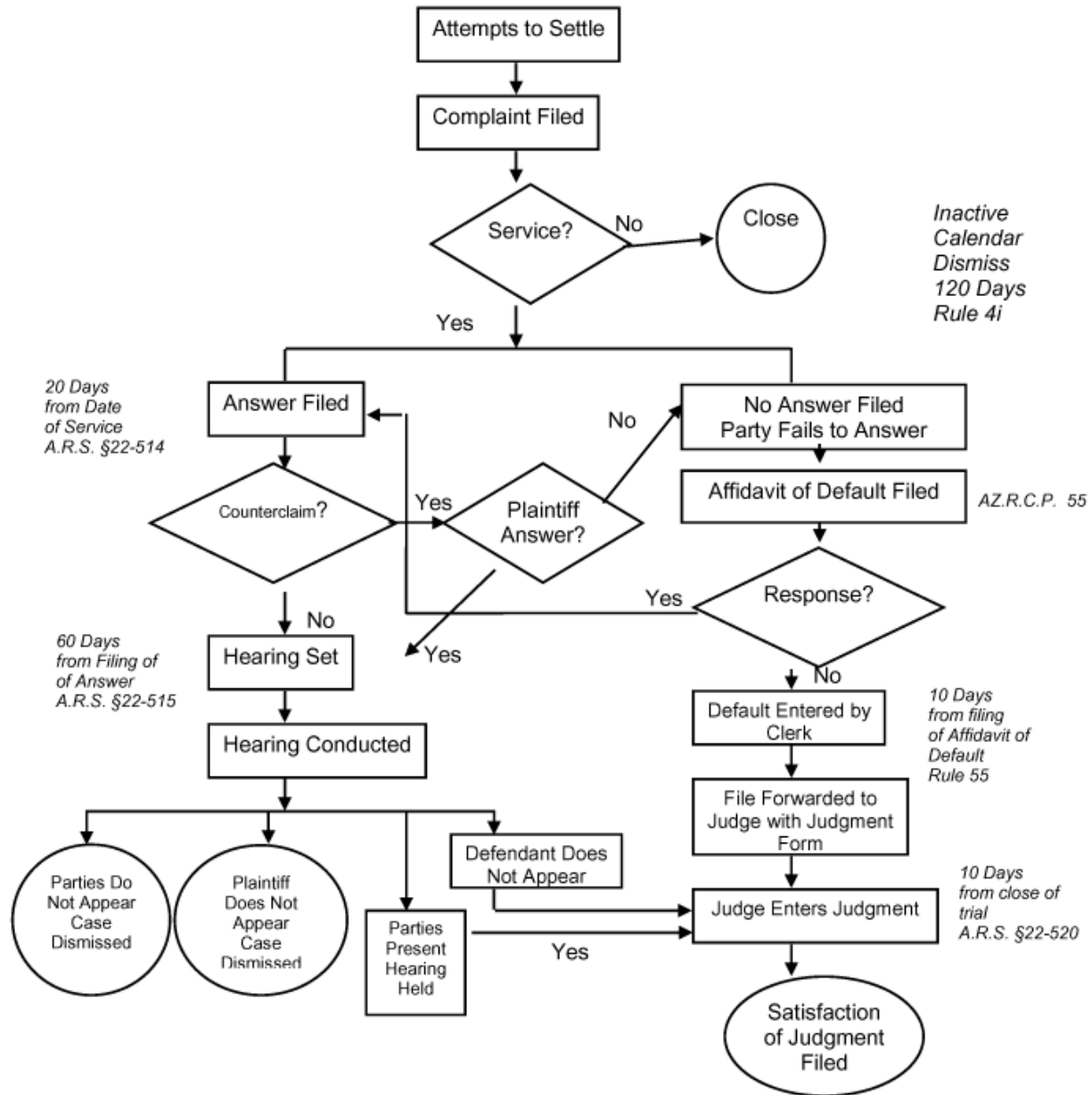
8. A motion for change of venue and a motion to vacate a judgment are the only motions allowed in a small claims action. These motions shall be heard only by a justice of the peace. A.R.S. §22-505.
9. If Defendant does not answer the original complaint, then Plaintiff can file an Affidavit of Default. A copy must be sent to Defendant's last known address. The Rules for Default in a Small Claims follow AZ ST J CT RCP Rule 140.

After the Default has been entered and goes into effect (usually 10 days after filing the affidavit), then Plaintiff can request a Default Judgment.

If the Defendant answers within the 10 days (the Defendant has "opted in"), set for hearing.

Default Judgment can be entered with or without a hearing. The Defendant should be notified if a Default Hearing is scheduled. If a hearing is held, Plaintiff can present evidence. Defendant must be notified at last address when the Default Judgment is entered.

SMALL CLAIMS CASE FLOW CHART



TRIAL CHECKLIST

- ____ 1. Identify Plaintiff: "What is your name, please?"
- ____ 2. Identify Defendant: "What is your name, please?"
- ____ 3. Identify yourself as Judge/Hearing Officer. If you are a Hearing Officer then give name and date of appointment by presiding judge.
- ____ 4. Give brief summary of trial procedures. Remind parties that small claims division decisions cannot be appealed.
- ____ 5. Trial proceeds: Plaintiff is sworn and gives testimony.
- ____ 6. Judge/Hearing Officer asks questions, if any.
- ____ 7. *Judge/Hearing Officer asks if Defendant has any questions.
- ____ 8. If Defendant has questions, Judge/Hearing Officer refines and restates them, as necessary.
- ____ 9. Plaintiff witness(es) called.
- ____ 10. Plaintiff and Judge/Hearing Officer ask questions of witness.
- ____ 11. *Ask if Defendant has any questions of the witness(es).
- ____ 12. If Defendant has questions, Judge/Hearing Officer refines and restates questions, as necessary.
- ____ 13. Defendant is sworn and gives testimony.
- ____ 14. Judge/Hearing Officer asks questions of Defendant.
- ____ 15. *Judge/Hearing Officer asks if Plaintiff has more questions.
- ____ 16. If Plaintiff has additional questions, Judge/Hearing Officer refines or restates questions as necessary.
- ____ 17. Defendant witness(es) called.
- ____ 18. Defendant and Judge/Hearing officer ask questions of witness(es).
- ____ 19. *Judge/Hearing Officer asks if Plaintiff has more questions.
- ____ 20. If Plaintiff has additional questions, Judge/Hearing Officer refines and restates questions as necessary.

- _____ 21. Judge/Hearing Officer asks each party if they have given their full side of the story. If not, additional testimony is heard, but not a repeat of earlier testimony.
- _____ 22. Judge/Hearing Officer either gives judgment immediately or takes the matter under advisement. If taken under advisement decision must be within 10 days after close of trial (A.R.S. §22-520).

* Some judges prefer to ask the questions themselves, rather than have the parties question each other.

TRIAL SCRIPT

"Good morning/afternoon. I am Judge/Hearing Officer _____ and this is the _____ Justice Court. It is _____ (Date & Time) _____."

(Optional) "This matter is being recorded."

"This is the time and date set for Small Claims Hearing in Cause No. _____, entitled (Plaintiff's Name) vs. (Defendant's Name)."

"It appears that both parties are present."

"The Plaintiff is suing the Defendant for the amount of \$_____ for the following reason: (Read Complaint)."

"The Defendant has answered that no money is due to the Plaintiff for the following reason: (Read Answer)."

[IF THERE IS A COUNTERCLAIM:] "The Defendant has filed a counterclaim in the amount of \$_____ for the following reason:" [Read Counterclaim].

[READ REPLY TO COUNTERCLAIM IF ONE HAS BEEN FILED.]

[COMPLAINT AND COUNTERCLAIM CAN BE HEARD AT THE SAME HEARING.]

"Because this is a Small Claims matter, it is an informal proceeding and the Rules of Evidence and Procedure do not apply. Any evidence that is relevant to the proceeding may be admitted."

"The Plaintiff and any witnesses for the Plaintiff will be allowed to testify first."

"The Defendant and any witnesses for Defendant may then testify."

"The Plaintiff will be allowed rebuttal testimony and then I will ask for a final summary of the case from each side."

"I may allow the parties to cross-examine the witnesses or I may ask some questions myself."

"The Plaintiff must prove the case with a preponderance of the evidence. To illustrate this, if you picture a set of scales, the Plaintiff must present sufficient evidence to tip the balance of the scales in his or her favor, however slightly."

"There is no appeal from a Small Claims case. The decision of the court is final and binding on both parties."

"Before we begin, would you like to have five or ten minutes to yourselves to discuss a possible settlement of the case or to see if there are some issues that you can clear up between yourselves?"

[IF YES, DIRECT THE PARTIES TO A ROOM WHERE THEY CAN SPEAK PRIVATELY OR LEAVE THEM ALONE IN THE COURTROOM.]

[IF NO, OR IF THE PARTIES CANNOT REACH A SETTLEMENT, THEN PROCEED WITH THE HEARING.]

"Would each person who may testify in this case please raise your right hand and I will swear you in."

"Do you solemnly swear or affirm that the testimony you will give in the cause now before this court will be the truth, the whole truth, and nothing but the truth?"

[GET THE NAME OF EACH WITNESS PRIOR TO TESTIMONY.]

[AFTER ALL EVIDENCE HAS BEEN PRESENTED ASK:]

"Have each of you told me everything you want the court to know regarding this case? You do not need to repeat any earlier testimony."

Some Judges ask the parties at this time if they would like to discuss a settlement. Sometimes after they have heard all the evidence and testimony in court, they are more willing to settle.

[RENDER JUDGMENT.]

"My judgment in this case is as follows:

As to the original claim, I find in favor of the Plaintiff in the amount of \$_____.

As to the original complaint, I find in favor of the Defendant and the claim is dismissed."

[IF A COUNTERCLAIM WAS HEARD:]

"As to the counterclaim, I find in favor of the Defendant in the amount of \$_____.

As to the counterclaim, I find in favor of the Plaintiff and the counterclaim is dismissed."

"The court awards the [prevailing party] court costs in the amount of \$_____.¹

[IF YOU NEED TO TAKE THE CASE UNDER ADVISEMENT:]

"I am going to take this matter under advisement so that I can review the testimony on the audiotape. You will receive my judgment in writing within ten working days."

CONFIRM ADDRESSES OF EACH PARTY.]

² Cost information should be in file. The costs are usually filing fee and service costs.

EVICTIION ACTIONS

Bench Script for Eviction Actions, based on the Arizona Rules of Procedure for Eviction Actions (RPEA)

1. Turn Record on and announce the name of the plaintiff and defendant(s). (RPEA 11(a))
2. Identify who is present: attorneys, parties; authorized representatives. (RPEA 11(b))
3. If either party is not represented by counsel, determine who the party appearing to be the plaintiff or defendant actually is. Not infrequently, a property manager or other “agent” may attempt to represent the plaintiff; less frequently, a friend or relative may attempt to represent either the plaintiff or the defendant.
4. If the plaintiff is a corporation or an LLC, a member of that entity who is properly authorized as provided for in Ariz.S.Ct. R 31(d)(3) may represent the corporation.¹ Best practice is to have that authorization filed with the complaint.
 - a. Partners may not represent a partnership, but a solo proprietor is the proper plaintiff.
 - b. Trustees may not represent the trust.
5. If there is an unauthorized agent for the plaintiff, advise them that they must hire an attorney, or that the actual owner must appear; if a defendant appears and opposes a continuance for that purpose, you must decide if a continuance is warranted or dismiss the case.
6. If a friend or relative wants to appear on behalf of either party, advise them that this is not permitted.
7. After determining that the proper party or parties are present, review the Declaration of Service to determine whether service of the Summons, Complaint, and termination notice was proper. (RPEA 13(a)(1))
 - a. Alternative (post and mail) service is permitted for Special Detainers (Arizona Residential Landlord and Tenant Act or ARTLA) and for terminations under the Residential Mobile Home Act arising out of an irreparable breach only.
 - b. No other type of eviction action may utilize post and mail service unless an attempt at personal service has been made and validated, and the

¹ LLC and corporation information may be found at: <https://apps.azsos.gov/apps/tntp/se.html>

plaintiff then moves for alternative service. Review Declaration of Service to verify the failure, and if a motion is made, note that you are granting motion for alternative service, specifying how that is to occur (post and mail).

8. Check the dates of service. Service must be completed two days before the hearing. If service was accomplished by posting and mailing, service is complete 3 days after mailing certified mail.

- a. A hearing held less than three (3) days after service by posting and mailing is too early, and the hearing must be postponed.
- b. If Plaintiff objects to postponing when no defendant is present, advise plaintiff that a judgment is void if the service is not proper.
- c. If a defendant is present and consents to proceed, you may do so.

9. Review the termination notice to verify that it complies with the provisions of the relevant act. This is especially important with new, pro se Plaintiffs. An invalid notice does not terminate a tenancy; if there is no termination, there is no ground for filing a forcible detainer.

10. Review the Complaint to determine whether the facts alleged are sufficient to entitle the plaintiff to possession of the premises due to a material breach of the lease. (RPEA 13(a)(3))

- a. Verify that the amounts sought in the Complaint correspond to the amounts stated in the termination notice, if the action is for non-payment of rent. Any discrepancies should be clarified before a default judgment is entered.
- b. If the amount sought in the Complaint is less than the amount asked for in the late rent notice, query whether the defendant made a partial payment.
- c. Verify that the amount sought in a non-payment case is within the jurisdictional limits of Justice Court.
- d. Verify that the complaint states that the case involves a subsidized rental (RPEA 5(b)(8)), and if so, that it states the total amount of rent as well as the defendant's portion and what defendant owes (RPEA 5(c)(8)).

Note: If the complaint is silent, but the amount of rent seems low, you should still inquire if it is a Section 8 rental and proceed accordingly.

11. If a partial payment was made and this is an ARLTA case, then inquire as to whether the plaintiff has a written and signed partial payment agreement made contemporaneously with the payment, as required by law. (A.R.S. § 33-1371)

- a. A plaintiff who accepts a partial payment and then gives a new 5-day notice has not complied with the partial payment agreement requirement.
- b. Whether or not the defendant is present, if the plaintiff accepted a partial payment and failed to obtain a partial payment agreement (commonly known as non-waiver agreement), you must dismiss the case. (RPEA 13(a)(4)).
- c. There is no prohibition against accepting partial payments in Acts other than the Residential Act.

12. If the action is based on an immediate termination for a material and irreparable breach, the plaintiff must present actual evidence establishing the breach:

- a. An attorney presenting a police report is not admissible evidence.
- b. A property manager reporting hearsay is not admissible evidence.
- c. Best practice is to have law enforcement testify, if involved, and/or the parties who were harmed by the breach and have knowledge of it.
- d. No writ can issue if no evidence is presented to support the claim. (RPEA 13(a)(3)).

13. If the action is based on non-payment of rent, and the defendant is not present, this is handled as a default judgment.

- a. Query whether the defendant was in possession when the case was filed. If the defendant surrendered possession prior to the filing of the complaint, there is no forcible detainer and the case must be dismissed. Any claim for unpaid rent can be pursued as a civil case.
- b. If you have verified service and notice, and reviewed the Complaint, then a default judgment is entered based on the complaint, with updated figures for current rent, late fees, court costs, attorney's fees, utilities and other charges. (RPEA 13(b)(3)(A)).
- c. If the plaintiff is requesting money damages, he is required to provide a copy of the rental agreement. (RPEA 13(c)(2)). If no written agreement exists, testimony is required to support the plaintiff's claim. You can only award damages and rent concessions that were properly pled in the

complaint. (Remember that evictions are a summary, expedited procedure that allows post and mail service. It should not be used to circumvent the rules of civil procedure for substantial claims that would otherwise require personal service or to cover future damages).

14. If the defendant is present, state or summarize the material allegations alleged by the plaintiff. For example, “the plaintiff claims that you were given a non-payment of rent notice and that you have not paid rent for March, and now April.” Or, “the plaintiff claims you, after notice, have failed to repair windows broken by your children.”

15. After you have stated the allegations, ask the defendant(s) whether they contest them.

a. If the defendant admits the allegations, explain that you will be entering a judgment against the defendant terminating the lease and awarding the sums sought in the complaint, including any currently owed rent and fees.

b. If the termination is for reasons other than non-payment and the defendant appears, it is unlikely the defendant will admit the allegations. If the defendant does, explain as above.

16. If the defendant contests the allegations or wants to explain and has not filed an answer, question the defendant.

a. Frequently the defendant just wants to explain why the rent was not paid due to personal circumstances. Best practice is to allow defendant to speak and then explain that this is not a legal defense, inquire as above as to whether defendant agrees that the rent is unpaid, explain the process, and allow defendant to ask you questions when the information has been presented.²

b. The defendant may offer other defenses such as lack of written notice, insufficient notice times, cure of the noticed event, improper parties, retaliation, partial payment, tender of payment and refusal.

17. If you determine that there is a basis for a legal defense, you must order a trial on the merits (RPEA 11(b)(1)). You must determine whether you have time to hear it, given your calendar. Issues such as notice, cure, improper parties, partial payment and tender may frequently be heard expeditiously.

a. Explain the trial procedure to the parties, and conduct the trial. The trial must have sufficient formality so the parties understand it is a trial. All

² The ARTLA uses the terminology of guilty and not guilty (A.R.S. § 33-1377 F & G). If the defendant admits to owing rent or committing the violation, the judge would enter a judgment for plaintiff based on this admission of guilt.

parties and witnesses should be sworn in, the parties should have an opportunity to testify and explain what they want you to know and to question and cross-examine all witnesses. The best practice is to have the parties seated at the tables and not hold the trial at the bench.

b. If the defense raises issues that will require a longer trial, then the matter is continued. Continuances are limited to 3 days unless the parties agree.

c. If you continue the matter, you may require the defendant to file a written answer and serve it on the plaintiff. Explain that a fee waiver may be available.

d. Actions based on irreparable breach should not be continued, even if contested and likely to take time.

e. If the plaintiff is not prepared to present its case and the defendant contests the allegations, the matter should not be continued unless the parties agree or the moving party provides sufficient reason.

18. If the defendant is asserting a counterclaim and has not filed it, or not filed an answer, determine whether it is a valid counterclaim.

a. There are no counterclaims in cases other than the ARLTA.

b. Counterclaims must arise out of the statute or the rental agreement.

19. If the oral answer/counterclaim appears to be one permitted by the ARLTA, then either:

a. Proceed with the trial as scheduled, if the plaintiff is aware of the defendant's claims and prepared to defend them; or

b. Continue the matter for no more than 3 days (more if the parties agree) and require a written counterclaim to be filed and served prior to the new trial date, with copies of relevant documents to be relied on.

20. Stipulated Judgments may be presented either by a written document, or by oral presentation to the Court after negotiation. A written stipulation must contain the following warning: (RPEA 13(b)(4)).

WARNING!

1. The plaintiff's representative is not a court employee.

2. By signing below, you are consenting to the terms of a judgment against you and the plaintiff will now be able to evict you.

3. You may have your wages garnished and the judgment may appear on your credit report.

4. You may lose your right to subsidized housing.

5. You may NOT stay at the property, even if the amount of the judgment is paid in full, unless you get the agreement in writing or get a new written rental agreement.

a. You can only accept the stipulation if:

1. Both parties or their attorneys appear personally. In that case, explain to the defendant that once a judgment is entered, the plaintiff has the right both to collect on the money judgment and to evict the defendant, that if the agreement is for the defendant to “pay and stay”, this has to be explicitly agreed; or
2. The plaintiff’s attorney asserts to you that the defendant was informed of the right to appear and declined. You should ascertain defendant has signed the warning language; or
3. You determine that because of distance or other circumstances the defendant cannot personally appear; or
4. An attorney for defendant has signed the stipulation.

b. If the stipulation is an oral agreement negotiated by the parties, ask who is to present the agreement. If the speaker is the plaintiff or plaintiff’s attorney, advise the defendant to indicate any disagreement with any aspect of what is said. Write the stipulation on your form of judgment.

21. Judgments are based either on the trial, a plea of guilty, a stipulation or a default.

a. Judgments for the plaintiff may include rent, late fees, costs, attorney’s fees, utilities, notice fees and rent concession, assuming these are properly pled.

b. Damages other than rent and the above fees must be pled and must have been incurred by the plaintiff, and the defendant must have notice of these. Plaintiffs may not use this action to claim future damages (property damages, future rent).

c. Judgments include the right to obtain a writ of restitution, with the appropriate timetable (immediate writ for irreparable breach).

- d. Note the difference in the late fee provision between the Mobile Home Act and the ARLTA; the latter limits late fees to “reasonable” and only if provided for in the lease.
- e. Reasonable attorney’s fees are awarded to the prevailing party, if provided for in the lease or if there is a contested action.

ORDER OF PROTECTION

Please note: Information on Orders of Protection, including rules of evidence, procedure, and motions pertaining to them, may be found in the Domestic Violence and Protective Order Bench Book.

SEARCH WARRANT AFFIDAVIT CHECKLIST

INTRODUCTION:

Pursuant A.R.S. § 13-3911 a search warrant is an order in writing issued in the name of the State of Arizona, signed by a magistrate, directed to a peace officer, commanding him/her to search for personal property, persons or items.

AFFIANT

__1. Is the name of the affiant stated?

COMMENTS: The affiant may be either a peace officer or a private citizen. The affidavit must be made in the affiant's true identity.

CRIMINAL ACTIVITY

__2. Does the affidavit specify the suspected criminal activity?

DESCRIPTION OF THE PERSON TO BE SEARCHED

__3. Does the affidavit name the person to be searched or describe him or her with sufficient detail so that he or she can be identified with reasonable certainty?

COMMENTS: If a description is used rather than a name, the description should identify the person in such a manner as to leave the officer no doubt and no discretion as to the person to be searched. A warrant for the search of premises only, and not for the search of a person, need not name the owner or occupant of the premises.

DESCRIPTION OF THE PLACE TO BE SEARCHED

__4. Does the description of the place to be searched contain sufficient detail so that the place can be identified with reasonable certainty?

COMMENTS: The description of the place to be searched must be identified and exclude all other places. However, a technical or legal description is not required.

GROUND

__5. Are the grounds for the issuance of the search warrant specified?

COMMENTS: One or more of the following grounds set forth in A.R.S. §13-3912 must be specified:

- a) The property to be seized was stolen or embezzled;
- b) The property or things to be seized were used as a means of committing a public offense;
- c) The property or things to be seized are in possession of a person having intent to use them as a means of committing a public offense or in possession of another to whom he may have delivered it for the purpose of concealing it or preventing it from being discovered;
- d) The property or things to be seized consist of any item or constitute any evidence which tends to show that a particular public offense has been committed, or tends to show that a particular person has committed a public offense;
- e) The property is to be searched and inspected by an appropriate official in the interest of the public health, safety or welfare as part of an inspection program authorized by law;
- f) The person sought is the subject of an outstanding arrest warrant.

DESCRIPTION OF THE ITEMS TO BE SEIZED

- ___6. Are the items to be seized described with sufficient particularity that the officer executing the search warrant can identify the items with reasonable certainty and is left with no discretion as to which items are to be seized?

COMMENTS: The description must not be so general that the officer is left with discretion in what is to be seized. The use of general descriptions such as “written documents” or “stolen property” should be avoided. However, the specificity required depends on the nature of the items to be seized. If the item cannot be described with specificity, a more general description will be acceptable.

FACTUAL NATURE OF THE ALLEGATIONS

- ___7. Does the affidavit allege facts, rather than mere conclusions, statements of belief or opinion?

COMMENTS: An allegation in the affidavit that the informant stated that “John Doe is in possession of heroin” is a mere conclusion because it does not indicate the source of the information. An allegation that “the informant saw John Doe in possession of heroin” is a factual allegation. Enough details and underlying circumstances must be given so that the magistrate knows something more substantial than casual rumor or general reputation is involved.

RULE OF STALENESS

- ___8. Do the facts alleged provide reason to believe that the criminal activity is presently occurring or that the evidence is presently at the location?

COMMENTS: Whether the information is stale depends on the nature of the activity and not on the mere lapse of time. Where the criminal activity involved is of a continuous nature or course of conduct, passage of time becomes less important. The affidavit should state the date the information was received by the officer and the date it was obtained by the informant. However, it is permissible instead to allege that the informant observed the conduct within a certain specified period of time, such as “within the past 72 hours.” If the affidavit specifies too broad a time period it may be subject to an objection on the grounds of staleness.

PROBABLE CAUSE

- ___9. Do the facts set forth in the affidavit indicate that there is a fair probability that contraband or evidence of a crime will be found in a particular place?

COMMENTS: The test for probable cause for the issuance of a search warrant is whether the facts presented to the magistrate, based either on personal knowledge or trustworthy information, are sufficient to warrant a person of reasonable caution to believe that items to be seized are located on the premises or persons sought to be searched. Whether probable cause exists is tested by an objective standard; that is, by the outward facts and circumstances as they are seen by a reasonable person. The facts upon which the probable cause is based may be obtained through the affiant’s own senses or from reliable informants.

There must be some basis for believing the information or the source of the information. Probable cause may be based on hearsay. A police officer is entitled to use his past experience as a police officer in interpreting the facts. The United States Supreme Court has abandoned the so-called “two-pronged” test for determining whether the information supplied by an informant is sufficient to establish probable cause, and in its place has promulgated a “totality of the circumstances” test. Inquiry into the informant’s veracity and reliability and the basis of the informant’s knowledge is still highly relevant, but they are not entirely separate and independent factors to be rigidly required in every case. Probable cause is a common sense, practical and non-technical concept. Courts should not review an affidavit for a search warrant in a hyper-technical manner, but should do so in a common sense manner. The test is whether, after reviewing all the facts set forth in the affidavit, the magistrate had substantial basis for concluding that a search would uncover evidence of wrongdoing.

RELIABILITY OF INFORMANT

- ___10. Are sufficient facts set forth in the affidavit to demonstrate that the informant is credible or that the information he gives is reliable?

COMMENTS: An informant is someone who informs; that is, gives information. The term may include police informants, paid informants, victims of crimes or witnesses to a crime. The underlying rule is that there must be facts and circumstances set forth in the affidavit to give a reasonable basis for believing the information. There are no set formulas but there are some general guidelines:

- a) Information given by an anonymous “crime stop” caller is generally considered to be reliable, provided there is no reason to believe a corrupt motive exists;
- b) A victim or citizen eye-witness is usually considered to be reliable unless there is some reason to disbelieve the statement;
- c) Information received from fellow police officers or through official police channels may be considered reliable if it is accompanied by some fact or circumstance which attests to its reliability;
- d) Information received from a police informant may be considered reliable if the police have had past dealings with the informant and the information received in the past has proved to be true;
- e) Consistent information received from two independent sources may be considered reliable;
- f) Information may be rendered reliable by independent investigation that corroborates the incriminating details of the information;
- g) The fact that events of a criminal nature occur as the informant said they would may establish reliability of the information;
- h) Information obtained by an informant while being directly supervised by police officers may be considered reliable
- i) If the information is against the penal interest of the informant, it may be considered reliable;

Even though no other basis for reliability exists, the reliability of the informant may be established by corroborating some of the details of the informant’s statement. The court may conclude that because the informant is right about some things, he is probably right about other things.

INFORMANT'S BASIS OF INFORMATION

- ___11. Are sufficient facts set forth in the affidavit to demonstrate that the informant has a basis for his or her knowledge; that is, does the affidavit state how the informant gained the information?

COMMENTS: The affidavit should state how, when and where the informant obtained the information. There must be facts and circumstances set forth to satisfy the magistrate that the informant’s information was not the result of mere rumor or suspicion. The affidavit must set forth facts enabling the magistrate to independently evaluate the accuracy of the informant’s conclusion.

NIGHTTIME SEARCH WARRANT

- ___12. If a nighttime search warrant is being requested, did the affidavit state facts which show good cause for the issuance of a nighttime search warrant?

COMMENTS: The good cause for issuance for a nighttime search warrant under A.R.S. § 13-3917, means that the affidavit upon which the magistrate issues the warrant must set forth specific facts which show a necessity for service of the warrant at night, such as: facts that indicate that the contraband or evidence to be seized will not be in the place to be searched during the daytime hours or in the case of a DUI, the evidence is perishable and would be rendered useless. Nighttime hours are 10:00 p.m. to 6:30 a.m.

NO-KNOCK WARRANT

- ___13. So called “no-knock” search warrants where the notice of authority and purpose requirement of A.R.S. § 13-3916 are dispensed with are authorized by A.R.S. § 13-3915 (B). There should be a showing that the “knock and announce” required by A.R.S. § 13-3916 would “endanger the safety of any person or would result in the destruction of any of the items described in the warrant.”

ANTICIPATORY SEARCH WARRANT

- ___14. An anticipatory search warrant describes acts which have not yet occurred, but the officer has probable cause to believe they will occur. In evaluating probable cause, the reviewing magistrate should assume that the acts will occur EXACTLY as described by the affiant. If the acts that are anticipated to occur, coupled with that which has already occurred, set out probable cause, then the warrant should be signed. The affidavit should recite that if the “anticipatory acts” do not occur exactly as described, then the warrant will not be executed.

REVIEW BY MAGISTRATE

- ___15. Did the magistrate read the entire affidavit and exercise independent judgment in ruling on its sufficiency?

COMMENTS: The magistrate may examine the affiant and other witnesses under oath (A.R.S. § 13-3914). Any oral testimony thus given should be recorded, transcribed and subscribed and sworn to by the person giving the testimony. An affidavit need not be drafted with legal precision and should not be interpreted in a hyper-technical manner. The magistrate must be neutral and detached and must not be a mere rubber stamp for police. The review should not be mechanical or perfunctory.

ADMINISTRATION OF THE OATH

__16. Was the affidavit received upon a properly administered oath?

COMMENTS: The affiant should raise his/her right hand. The magistrate should also raise his/her right hand. The magistrate then administers the oath:

"Do you solemnly swear (or affirm) that the facts stated in the affidavit for the search warrant in this matter are true to the best of your information and belief (knowledge)?"

SIGNATURE

__17. Did the magistrate sign the oath on the affidavit?

ISSUANCE OF SEARCH WARRANT

__18. Did the magistrate read and sign the search warrant and endorse thereon the date and time of issuance?

COMMENTS: The warrant should be in substantial compliance with the form set forth in A.R.S. § 13-3915 (C).

TELEPHONIC SEARCH WARRANT SCRIPT

1. Initiation of Procedure

A police officer telephones the magistrate and requests the issuance of a telephonic search warrant. The [police officer/magistrate] sets up the recording device, tests it for operability and begins recording the conversation.

2. Administration of the Oath

[Magistrate]: "Do you solemnly swear (or affirm) that all statements you will make during your application for the search warrant and all statements you will make in connection with the issuance of the search warrant will be true to the best of your knowledge (information and belief)?"¹

3. Affidavit

¹ In lieu of, or in addition to a written affidavit, or affidavits, as provided in subsection A, the magistrate may take an oral statement under oath that shall be recorded on tape, wire or other comparable method. This statement may be given in person to the magistrate or by telephone, radio or other means of electronic communication. This statement is deemed to be an affidavit for the purposes of issuance of a search warrant. If a recording of the sworn statement is made, the statement shall be transcribed at the request of the court or either party and certified by the magistrate and filed with the court. [A.R.S. § 13-3914\(C\)](#).

a. Written Affidavit Prepared

"Do you already have the affidavit written?"

(If yes) "Please read me the affidavit."

b. Written Affidavit Not Prepared

"Do you already have the written affidavit?"

(If no, pose the following questions to the officer and evaluate the answers.)

"State your name."

"What is your badge number?"

"By whom are you employed?"

"Are you a certified and sworn peace officer in the state of Arizona?"

"What is the kind of criminal activity you believe is taking place?"

"Do you believe it is currently taking place?"

"(If not) when do you believe it took place?"

"What is the name of the person you believe has engaged in this criminal activity (or who possesses the evidence for which you wish to search?)"

"Do you wish to search the person of that individual?"

"What is the address (description) of the premises where the criminal activity is taking (has taken) place (or where you believe the evidence for which you are searching is located?)"

"What is the description of the vehicle involved in the criminal activity (or where you believe the evidence of the crime is located?)"

"What legal grounds do you allege exist for searching the person (premises, vehicle?)² Describe the items you believe you will discover

² Grounds for issuance: A search warrant may be issued upon any of the following grounds:

a. When the property to be seized was stolen or embezzled.

b. When the property or things to be seized were used as a means of committing a public offense.

upon a search of the person (premises, vehicle) and which are to be seized if found?"

"Why do you believe that these items are presently on the person (premises, vehicle?)"

"When (or between what dates) did you obtain the facts you are relying upon for this affidavit?"

"Do you wish to disclose the name of your informant?"

"(If yes) What is the name of your informant?"

"Why do you believe the informant is reliable?"

"Why do you believe the information the informant gave you is reliable?"

"What are the facts that indicate to you that the criminal activity is taking (has taken) place (or indicate to you that you will find evidence of the crime?)"

"How did you obtain this information?"

"How did your informant obtain this information?"

"What are the facts that indicate to you that the person you named (described) is engaged in this criminal activity?"

"How did you obtain this information?"

"How did your informant obtain this information?"

"Are you requesting a nighttime search warrant?"

(If yes) "What are the reasons for your request?"

4. Issuance of the Search Warrant

c. When the property or things to be seized are in the possession of a person having the intent to use them as a means of committing a public offense or in possession of another to whom he may have delivered it for the purpose of concealing it or preventing it from being discovered.

d. When property or things to be seized consist of any item or constitute evidence that tends to show that a particular public offense has been committed or tends to show that a particular person committed the offense.

e. When the property is to be searched and inspected by an appropriate official in the interest of public health, safety or welfare as part of an inspection program authorized by law.

f. When the person sought is the subject of an outstanding arrest warrant. [A.R.S. §13-3912](#).

(If probable cause has been found)

"Officer _____, I find from your sworn statement that probable cause exists for the issuance of the search warrant. Please read me the search warrant as you have completed it." (The officer must have already completed form or must do so at this time. The information in the search warrant must conform to the information in the telephonic search warrant affidavit as it was delivered to the magistrate.)

5. (If night-time service is requested):

"I find that there is good cause for the warrant to be served in the night-time."

6. (If "no-knock" service is requested):

"a reasonable showing having been made pursuant to A.R.S. § 13-3915(B), I hereby authorize an unannounced entry."

7. (If the search warrant conforms to the information in the affidavit)

"Officer _____, you may sign my name to the search warrant in your possession."³

(If probable cause not found)

"Officer _____, I do not find from your sworn statement that probable cause exists for the issuance of the search warrant."

[Complete the Record.⁴]

³ The magistrate may orally authorize a peace officer to sign the magistrate's name on a search warrant if the peace officer applying for the warrant is not in the actual physical presence of the magistrate. This warrant shall be called a duplicate original search warrant and shall be deemed a search warrant for the purposes of this chapter. In such cases, the magistrate shall cause to be made an original warrant and shall enter the exact time of issuance of the duplicate original warrant on the face of the original warrant. Upon the return of the duplicate original warrant, the magistrate shall file the original warrant and the duplicate original warrant as provided in [A.R.S. §13-3923](#). [A.R.S. §13-3915\(D\)](#).

A magistrate may affix the magistrate's signature on a telefacsimile of an original warrant. The telefacsimile of the original warrant is deemed to be a search warrant for the purposes of this chapter. On return of the telefacsimile of the original warrant, the magistrate shall file the original warrant and the telefacsimile of the original warrant as provided in [A.R.S. §13-3923](#). [A.R.S. §13-3915\(E\)](#).

⁴ Completing the Record: The magistrate:

- may direct that the statement be transcribed [A.R.S. §13-3914\(C\)](#);
- certifies the transcript, if the statement is transcribed [A.R.S. §13-3914\(C\)](#);
- files the transcript in court [A.R.S. §13-3914\(C\)](#);
- causes an original warrant to be prepared and enters the exact time of the issuance of the duplicate original warrant on the face of the original affidavit. [A.R.S. §13-3915\(D\)](#);
- upon return of the duplicate original warrant, causes the original warrant and the duplicate original warrant to be filed as provided for in [A.R.S. §13-3923](#) [A.R.S. §13-3915\(D\)](#)

A.R.S. § 13-3915. Issuance; form of warrant; duplicate original warrant; telefacsimile

A. If the magistrate is satisfied that probable cause for the issuance of the warrant exists, the magistrate shall issue a search warrant commanding a search by any peace officer of the person or place specified, for the items described.

B. On a reasonable showing that an announced entry to execute the warrant would endanger the safety of any person or would result in the destruction of any of the items described in the warrant, the magistrate shall authorize an unannounced entry.

C. The warrant shall be in substantially the following form:

County of _____, state of Arizona.

To any peace officer in the state of Arizona:

Proof by affidavit having been this day made before me by (naming every person whose affidavit has been taken) there is probable cause for believing that (stating the grounds of the application) according to section 13-3912, you are therefore commanded in the daytime (or in the night, as the case may be, according to section 13-3917) to make a search of (naming persons, buildings, premises or vehicles, describing each with reasonable particularity) for the following property, persons or things: (describing such with reasonable particularity), and if you find such or any part thereof, to retain such in your custody subject to section 13-3920 .

Given under my hand or direction and dated _____ (judge, justice of the peace or magistrate.)

D. The magistrate may orally authorize a peace officer to sign the magistrate's name on a search warrant if the peace officer applying for the warrant is not in the actual physical presence of the magistrate. This warrant shall be called a duplicate original search warrant and shall be deemed a search warrant for the purposes of this chapter. In such cases, the magistrate shall cause to be made an original warrant and shall enter the exact time of issuance of the duplicate original warrant on the face of the original warrant. Upon the return of the duplicate original warrant, the magistrate shall file the original warrant and the duplicate original warrant as provided in section 13-3923.

E. A magistrate may affix the magistrate's signature on a telefacsimile of an original warrant. The telefacsimile of the original warrant is deemed to be a search warrant for the purposes of this chapter. On return of the telefacsimile of the original warrant, the magistrate shall file the original warrant and the telefacsimile of the original warrant as provided in section 13-3923.

INITIAL APPEARANCE

The Initial Appearance is the Defendant's first meeting with the Court regarding the alleged charges against the Defendant. The purpose of the Initial Appearance is to inform the Defendant, gather information and determine if probable cause exist for determining conditions of release.

No plea is taken at the Initial Appearance unless the Initial Appearance is combined with the Arraignment.

Time Constraints:

AZ.R.CR.P 4.1

A person, who is arrested and not brought before a magistrate within 24 hours after arrest, shall be released. AZ.R.CR.P 4.1(a).

The Court may conduct an Initial Appearance before a complaint is filed. However, the state must file a complaint within 48 hours of the Initial Appearance or the Defendant shall be released from custody and any future dates vacated. AZ.R.CR.P 4.1(b).

Procedure for an Initial Appearance pursuant to

AZ.R.CR.P 4.2

AZ.R.CR.P 4.2(a) (1)

Call the Defendant to the bench. State the Defendant's name and address as it appears in the Court file and ask the Defendant if that is correct. [If necessary and with adequate proof, amend the name or address.] Advise Defendant to promptly notify the Court of any change of address.

AZ.R.CR.P 4.2(a) (2)

Inform the Defendant of the charges listed in the complaint. If no complaint has been prepared, the Release Questionnaire Part A (Form IV), police report, booking sheet or testimony of the arresting officer may be used to advise the Defendant of the charges.

AZ.R.CR.P 4.2(a) (3)

Advise the Defendant of the right to remain silent and of the right to legal counsel at Defendant's own expense.

AZ.R.CR.P 4.2(a) (4)

Determine whether probable cause exists (evidence that a crime was committed, and the Defendant committed it) for the purpose of release from custody. If no probable cause is found, Defendant must be released from custody immediately. AZ.R.CR.P 4.2(a) (4); Riverside County, California v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991).

AZ.R.CR.P 4.2(a) (5)

Appoint counsel, if the Defendant is eligible for and request appointed counsel under AZ.R.CR.P 6.

If the Defendant is going to be held in custody at or following the initial appearance on misdemeanor criminal charges they are entitled to Court-Appointed Counsel for the limited purpose of assisting with a hearing to review the release conditions. 6.1b(1)(B) No later than 10 days after the arraignment the court must determine whether to amend the conditions of release for any Defendant held on bond for a misdemeanor. 7.4(d) If a conviction for an offense will result in a jail term, probation or if the interests of justice so requires, advise the Defendant they may have a right to a Court-Appointed Counsel/Public Defender. AZ.R.CR.P 6.1(b)

If the Defendant requests Court-Appointed Counsel/Public Defender:

- (1) Have the Defendant complete a Financial Statement.
- (2) Examine the Defendant under oath regarding financial resources.
AZ.R.CR.P 6.4(a).
- (3) Make a determination as to; whether the Defendant is financially unable to employ counsel and if so, whether the Defendant should be ordered to make partial reimbursement for the cost of the Court-Appointed Counsel/Public Defender.
 - (a) If the Defendant is found to be indigent, enter the appropriate order. Advise, the Defendant that they may be required to pay an Indigent Administrative Assessment fee of not more than \$25.00, A.R.S. § 11-584(C)(1), and may be required to repay to the City/County a reasonable amount to reimburse the City/County for the cost of the Defendant's legal defense A.R.S. § 11-584(C)(3).
 - (b) If the Defendant is not indigent, enter the appropriate order and advise the Defendant that:
 - i. The Court has ruled that the Defendant is not indigent and, therefore, a Court-Appointed Counsel/Public Defender will not be appointed;
 - ii. If the Defendant desires to be represented by counsel, then the Defendant must retain counsel;
 - iii. If the Defendant appears at any proceeding without an attorney, it may constitute a waiver of counsel for that proceeding. AZ.R.CR.P 6.1(d).

AZ.R.CR.P 4.2(a) (6)

Consider comments offered by the victim concerning the conditions of release. The magistrate shall permit the victim to comment orally or in writing, on the issue of the Defendant's release.

If the victim is not present and no information is provided to indicate the victim(s) wishes to have continued contact (e.g. from Form 4), the victim(s) should be included in the "no contact" provision on the release order. This can be amended to allow contact at a later date and upon request of the victim.

AZ.R.CR.P 4.2(a) (7)

Determine the conditions of release in accordance with AZ.R.CR.P 7.2(a) unless the Court determines under 4.2(a)(8) that release on bail is prohibited.

The Defendant must be released on their own recognizance (O.R.) with only the conditions of release required by 7.3 (a)(1) – (4). However, if the Court determines, in its discretion, that an O.R. release will not reasonably assure the Defendant's appearance or protect other persons or the community from risk posed by the person the Court may impose the least onerous condition(s) contained in 7.3(b).

Advise the Defendant that any party may move to have the release conditions modified. If the motion involves whether the person shall be held without bail, a hearing on the motion shall be held within 7 days after filing of the motion. AZ.R.CR.P 7.4(b)(3).

Note:

(1) Determination of appropriate release conditions:

(a) **Mandatory release conditions** are as follows:

AZ.R.CR.P 7.3(a) (1) – (4).

- i. That the person appear to answer and submit to the orders and processes of the Court;
- ii. That the person refrain from committing any criminal offense;
- iii. That the person not depart the state without leave of the Court;
- iv. If released after judgment, the person diligently prosecute their appeal;

(b) If the person is charged with an offense in ARS 13-610(O)(3) and has been summoned to appear in Court, the Court shall order the person to report within 5 days after release to the arresting law enforcement agency to submit a DNA sample. A willful failure to do so shall result in revocation of the person's release.

- (c) Discretionary conditions that may be included: The court must order the defendant not to contact a victim if such an order is reasonable and necessary to protect a victim from physical harm, harassment, intimidation, or abuse. The Court may impose one or more of the following conditions if the court finds the condition is reasonable and necessary to protect other persons or the community from risk posed by the Defendant or to secure the Defendants' appearance. In making this determination the Court must consider the results of **a risk assessment** approved by the Supreme Court or **a lethality assessment by law enforcement** if provided. AZ.R.CR.P 7.3 (c) (1) -(2) (emphasis added).

(I) Non-monetary conditions:

- i. Place the person in the custody of a designated person or organization agreeing to provide supervision;
- ii. Restrict the person's travel, associations, or residence;
- iii. Prohibit the person from possessing any dangerous weapon;
- iv. Engaging in certain described activities or consuming intoxicating liquors or any controlled substance not validly prescribed;
- v. Require the person to report regularly to and remain under the supervision of an officer of the court;
- vi. Return the person to custody after specified hours; or
- vii. Any other non-monetary condition that has a reasonable relationship to assuring the safety of other persons or the community from risk posed by the person or securing the person's appearance.

(II) Monetary conditions: In deciding whether to impose a monetary condition of release and what amount to impose, the court must make an individualized determination of the person's risk of non-appearance, risk to the community, and financial circumstances **rather than rely on a schedule of charge-based bond amounts**. The court must not impose a monetary condition that results in unnecessary pretrial incarceration solely because the person is unable to pay the bond. If the court determines a monetary condition is necessary, the court must impose the least onerous of the types of bonds listed below in the lowest amount necessary to protect other persons or the community from risk posed by the person or to secure the person's appearance. Monetary conditions include: (emphasis added)

- i. Unsecured appearance bond;
- ii. Deposit bond;
- iii. Other type of secured appearance bond; or
- iv. Cash bond

Note:

(d) The Court may also consider the following:

- i. Nature and gravity of the offense charged;
- ii. Any views and comments offered by a victim concerning the issue of release [can be written or oral AZ.R.CR.P 4.2(a)(6)];
- iii. Any previous criminal record;
- iv. The measure of punishment that may be inflicted;
- v. Defendant's financial resources and mental condition;
- vi. Previous failures to appear, if any;
- vii. Defendant's ties to the community such as employment, family, dependents, length of residence, etc.;
- viii. Any concern for the safety of a person or the community;
- ix. Whether threats were made;
- x. Whether a weapon was used;
- xi. Whether the complaint involved violence.

(2) Release Order: Complete (or have the Clerk complete) the release order ("Determination of Release Conditions and Release Order"), with the following:

- (a) Defendant's name and case number;
- (b) Date, time and location of the Arraignment (for misdemeanors) or the Preliminary Hearing (for felonies); or, if Initial Appearance was held in conjunction with Arraignment, a Pretrial Conference and/or Trial as local procedure provides;

- (c) Conditions of release;
- (d) Defendant's signature;
- (e) Judge's signature;
- (f) Give a copy of the release order to the Defendant;
- (g) Register Release Order with local law enforcement, if a victim is named in the "no contact provision". AZ.R.CR.P 39.
- (h) Inform the Defendant of the conditions of release and the possible consequences of their violation. AZ.R.CR.P 7.4(a).
 - i. Send copy to victim witness agency and jail, if necessary;
 - ii. Ask if the Defendant has any questions and, if so, answer them.

NOTE: At an initial appearance, the court must determine bail eligibility and the conditions for release. If the court decides that the defendant is eligible for release, the court must issue an order containing the conditions of release. The order must inform the defendant of the conditions and possible consequences for violating a condition, and that the court may immediately issue a warrant for the defendant's arrest if there is a violation. AZ.R.CR.P 7.4(a).

AZ.R.CR.P 4.2(a) (8)

Determine whether probable cause exists to believe:

- (1) The defendant committed a capital offense, or any felony offense committed while the person was on pretrial release for a separate felony charge; or
- (2) The defendant committed a felony for which release on bail is prohibited because the defendant poses a substantial danger and no conditions of release will reasonably assure the safety of the victim, any other person, or the community based on the considerations provided in AZ.R.CR.P 7.2(b)(3).

Bail Eligibility Considerations, AZ.R.CR.P 7.2(b)(3):

- (a) the nature and circumstances of the offense charged, including whether the offense is a "dangerous offense" as defined in A.R.S. § 13-105;
- (b) the weight of the evidence against the defendant;

- (c) the history and characteristics of the defendant, including the defendant's character, physical and mental condition, past conduct including membership in a criminal street gang, history relating to drug or alcohol abuse, and criminal history;
- (d) the nature and seriousness of the danger to the victim, any other person, or the community that would be posed by releasing the defendant on bail, including any threat to a victim or other participants in the judicial process;
- (e) the recommendation of the pretrial services program based on an appropriate risk assessment instrument;
- (f) any victim statement about the offense and release on bail; and
- (g) any other factor relevant to the determination required under 7.2 (b)(2)(B) and 7.2 (b)(2)(C).

Note: Arizona Supreme Court Order No. R-18-0031 amending AZ.R.CR.P 4.2 (a)(8)(1) and AZ.R.CR.P 7.2(b)(1)(A) is currently pending.

AZ.R.CR.P 4.2(a) (9)

If the court determines that the defendant is not eligible for bail based on a determination under 4.2 (a)(8) (A) or (B), schedule a bail eligibility hearing in Superior Court as required under AZ.R.CR.P 7.2(b)(4).

Note: The procedures for Bail Eligibility Hearing are located at AZ.R.CR.P 7.4(b).

AZ.R.CR.P 4.2(a) (10)

If Defendant was charged with a felony, a sex offense, Custodial Interference, Access Interference, DUI, or Domestic Violence, the Court shall order that the Defendant be fingerprinted if the Court has not received the process control number or the Defendant is not able to present a completed mandatory fingerprint compliance form. AZ.R.CR.P 4.2 10 (A) (B). The Court must order the ten-print be completed within twenty calendar days. The Court may remand non-compliant Defendants into custody for ten-print fingerprinting. See, Amended AZ.R.CR.P 3.2 (c), 7.5 (e) 14.3 (i).

Note:

AZ.R.CR.P 4.2(a) (11)

For an in-custody Defendant who was arrested for an offense listed in A.R.S. § 13-610 (O)(3), if the Court has not received proof of compliance with A.R.S. § 13-610 (K), the Court shall order the arresting agency to secure a buccal cells or other bodily substances for DNA testing.

NOTE: A.R.S. § 13-610(O)(3) requires DNA testing for a person arrested for a violation

of any offense in chapter 11 of Title 13, a violation of section §13-1402, §13-1403, §13-1404, §13-1405, §13-1406, §13-1410, §13-1411, §13-1417, §13-1507, §13-1508, §13-3208, §13-3214, §13-3555 or §13-3608 or a violation of any serious offense pursuant to section A.R.S. §13-706 involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury. A judicial officer who releases a person charged with certain enumerated offenses on bail or on the person's own recognizance must order the person to report for DNA testing within 5 days. Courts must revoke the release of a person who does not comply. §13-3967(F)(4)

NOTE: Initial Appearances (and certain other proceedings) may be conducted via videoconferencing. See, AZ.R.CR.P 1.6. See also, Arizona Code of Judicial Administration Part 5, Chapter 2, § 5-208 Operational Standards for Interactive Audiovisual Proceedings in Criminal Cases.

MISDEMEANOR ONLY

Scheduling the Arraignment: AZ.R.CR.P 14.2 (a)

Those in custody: Within 10 days after filing of the indictment, information or complaint.

Those not in custody: Within 30 days after the filing of the indictment, information or complaint.

If an Arraignment cannot be held within the required time frame, or is not required to be held, or it was held in conjunction with the Initial Appearance, set the date for the pretrial conference and/or trial pursuant to local procedure. See, AZ.R.CR.P 14.2 (b), (c) and (e)

INITIAL APPEARANCE SCRIPT

(1) Ascertain Defendant's True Name and Address:

"Is _____ your true name? Is _____ your correct address?"

If the name is unusual, have the Defendant spell it; when necessary, the complaint should be amended to correctly name the Defendant.

(2) Notification of Change of Address:

"If you should move at any time prior to the final disposition of this matter, please promptly advise this court of your new address."

(3) State the Charge:

"You are charged with the criminal offense of _____. Have you received a copy of the complaint against you?" (If not, one should be furnished, if it is available.)

(4) Right to Remain Silent:

"Under the law you have the right to remain silent. Anything you say can be used against you."

(5) Right to Counsel:

"You have the right to be represented by an attorney at your own expense at all stages of this case."

(6) Appointment of Attorney, if applicable:

"If you are unable to hire an attorney, a procedure is available to have an attorney appointed to represent you; the public will pay part or all of the cost depending upon your financial circumstances. Can you afford to hire an attorney? If not, do you wish to request the appointment of a Court Appointed Counsel/ Public Defender?"

If yes, have Defendant complete financial statement.

(7) Conditions of Release:

"Based upon the information before this court concerning you and the offense, I find there is probable cause for the charge(s) and it is my determination:

a. (Release Without Bail)

...that you be released on your own recognizance. This means that your word

is your bond and that you must comply with the conditions of the release order."

OR

b. (Release Upon Appearance Bond)
..."that you be released pursuant to a(n)

Unsecured appearance bond;

Deposit bond;

Other type of secured appearance bond; or

Cash bond."

This means that you will remain in custody until you meet the requirements of the Bond and that when released, you must comply with the conditions of the release order. If held on a secured bond you are eligible for appointment of an attorney for a hearing on reviewing your release conditions. Would you like to request the court appoint you counsel for this hearing?

OR

c. (No Bond Hold)

...that you be held without bond pending your next court appearance"

(8) Execution of the Release Order:

"These are the conditions of your release:"

(9) Read each condition

"This is the original release order and your copy. Please read it and if you understand it, sign the original and your copy."

(10) Consequences of Violation

"If you violate any condition of your release, a warrant may be issued for your arrest and you may be jailed or more serious release conditions may be imposed.

(11) Finger print and DNA requirement:

Determine if the charged offense requires the Defendant to complete the Finger Print /DNA requirements and issue the appropriate order.

(12) **Set next court date:**

"Your next court date will be (date, time and location). The next proceeding will be your (Preliminary Hearing/Arraignment/etc.) You must appear at your next court proceeding. If you fail to appear you will be charged with a new offense for failing to appear and a warrant will be issued for your arrest."

ARRAIGNMENT

The Arraignment is the Defendant's opportunity to state their plea for the record. Further, during the Arraignment the Court should notify the Defendant of certain rights and set a date for the Defendant's next proceeding.

Most Limited Jurisdiction Courts combine the Initial Appearance (IA) with the Arraignment. It is also possible for the Court to conduct an Arraignment, Initial Appearance and a Change of Plea in the same proceeding. For purposes of the section, the procedures for Arraignments and the combined Arraignment/ Initial Appearance will be discussed separately.

An Arraignment does not need to be held in cases where defense counsel has appeared and entered a plea of not guilty or where the Court permits the Defendant to enter a plea of not guilty by mail. AZ.R.CR.P 14.2(C)(1)(2).

Time Constraints

Except as provided in sections (b), (c), and (d)... an Arraignment shall be held within 10 days after filing an indictment, information or complaint, if the Defendant is in custody. If the Defendant is not in custody an Arraignment shall be held within 30 days after filing an indictment, information or complaint. AZ.R.CR.P 14.2(a)(1)(2).

Arraignments

The following discussion includes the statutory requirements and general procedures that need to be completed when conducting an Arraignment separate from the IA. The presentation of the material essentially follows the order of the statute related to conducting an Arraignment. You do not need to follow the specific order of the presentation of this material when conducting an Arraignment.

- I. Procedure for Arraignments where IA has already been completed.
AZ.R.CR.P 14.4.
 - (1) Call the Defendant to the bench.
 - (2) State the Defendant's name and address as it appears in the Court file and ask the Defendant if that is correct. [If necessary and with adequate proof, amend the name or address.] Advise Defendant to promptly notify the Court of any change of address.
 - (3) Explain the specific charges to the Defendant and what class of misdemeanor is being charged.
 - (4) Advise the Defendant that they have the right to remain silent.

- (5) Ascertain the Defendant's plea of not guilty, guilty or no contest. AZ.R.CR.P 14.4(a).
 - (a) If the Defendant refuses to plead, enter a plea of not guilty. AZ.R.CR.P. 14.4(a).
 - (b) If Defendant wants to enter a plea of guilty or no contest, reference Chapter 17 of the Bench Book for the procedure related to accepting a plea.

NOTE: Many judges enter a plea of not guilty on behalf of the Defendant.

- (6) Hear and decide all motions concerning conditions of release if: AZ.R.CR.P 14.4(b).
 - (a) The arraignment is held with the defendant's initial appearance under AZ.R.CR.P 4.2;
 - (b) A 5-day notice is required, if a motion for release is contested, unless such time is waived by all the parties.
 - (c) Consider comments offered by the victim concerning the conditions of release.
 - (d) **Reference AZ.R.CR.P. 7.2, 7.3 as amended and/or Chapter 8 of the Limited Jurisdiction Bench Book for additional information on conditions of release.**

Note:

- (7) Set the date for a Pretrial Conference or Trial date. AZ.R.CR.P 14.4(c)
- (8) Advise the parties in writing of future Court dates and important deadlines. AZ.R.CR.P 14.4(d).
- (9) Advise the Defendant of the right to Counsel/Court Appointed Counsel, if eligible. Appoint counsel, if appropriate. AZ.R.CR.P 14.4(e) - (f).
 - (a) If the Defendant is found to be indigent, enter the appropriate order. Advise, the Defendant that they may be required to pay an Indigent Administrative Assessment of not more than \$25.00, A.R.S. §11-584(C)(1), and may be required to repay to the City/ County a reasonable amount to reimburse the City/County for the cost of the

Defendant's legal defense A.R.S. §11-584(C)(3).

- (b) If the Defendant is indigent and will be held in custody, the defendant is entitled to be appointed counsel for the limited purpose of determining conditions of release. AZ.R.CR.P 6.1(b)(1)(b).

Note:

- (a) If the Defendant is not indigent, enter the appropriate order and advise the Defendant that:
- i. The Court has ruled that the Defendant is not indigent and, therefore, a Court appointed Counsel /Public Defender will not be appointed;
 - ii. If the Defendant desires to be represented by counsel, then the Defendant must retain counsel;
 - iii. If the Defendant appears at any proceeding without an attorney, it may constitute a waiver of counsel for that proceeding. AZ.R.CR.P. 6.1(d).
- (10) Advise the Defendant of the right to a jury trial, if applicable. AZ.R.CR.P 14.4(e).

The following misdemeanor cases are eligible for a jury trial:

- i. DUI
 - ii. Indecent exposure and public sexual indecency
 - iii. Shoplifting
 - iv. Reckless driving
 - v. Theft
 - vi. Any criminal charge that also has an allegation of sexual motivation pursuant to A.R.S. §13-118
 - vii. Resisting Arrest
- (11) Advise the Defendant of the following:
- i. Right to be present at all future proceedings;

- ii. That all proceedings other than sentencing may be held in the Defendant's absence and that if the Defendant fails to appear, the Defendant may be charged with an offense and a warrant issued for Defendant's arrest without further notice;
 - iii. Advise the Defendant that if the Defendant's absence prevents sentencing from occurring within 90 days following a conviction, the Defendant may lose the right to have an appellate court review the proceedings by way of a direct appeal. AZ.R.CR.P 14.4(e).
- (12) If Defendant was summoned in on a felony, a sex offense, Custodial Interference, Access Interference, DUI, or Domestic Violence offense, the Court shall order that the Defendant be fingerprinted if not previously fingerprinted. The Court must order the ten-print be completed within twenty calendar days. order a summoned defendant to be 10-print fingerprinted no later than 20 calendar days. AZ.R.CR.P. 14.4 (g). The Court may remand non-compliant Defendants into custody for ten-print fingerprinting. See, AZ.R.CR.P 3.2(c), 7.5(e), 14.3(i).

Combined Initial Appearance and Arraignment

Determine if this is a combined Initial Appearance and Arraignment under AZ.R.CR.P 14.2(e). The Arraignment may be held with the Initial Appearance if: it is held in the Trial Court; this is the Defendants first appearance after charges have been filed and the Defendant waives the right to counsel or counsel is present. AZ.R.CR.P 4.2(c), 14.2(e).

II. Procedure for combined IA & Arraignments for Limited Jurisdiction Courts. AZ.R.CR.P 14.2(e).

- (1) Call the Defendant to the bench.
- (2) Advise Defendant that the purpose of the IA & Arraignment is to explain the charges and to inform them of their rights, options and to ascertain their plea.
- (3) Ascertain the Defendant's true name and address. Instruct the Defendant to notify the Court promptly of any change of address.
- (4) Explain the specific charges to the Defendant and what class of misdemeanor is being charged.
- (5) Inform the Defendant of the following rights:

- (a) The right to counsel;
- (b) The right to court-appointed counsel (if eligible);
- (c) The right to remain silent;
- (d) If the case is eligible for a jury trial, advise the Defendant of that right. If a jury trial is requested, note the record;

NOTE: The following misdemeanor cases are eligible for a jury trial:

- i. DUI
- ii. Indecent exposure and public sexual indecency
- iii. Shoplifting
- iv. Reckless driving
- v. Theft
- vi. Any criminal charge that also has an allegation of sexual motivation pursuant to A.R.S. §13-118
- vii. Resisting Arrest

(6) Ascertain Defendant's plea of not guilty, guilty or no contest.

- (a) If the Defendant refuses to plead, enter a plea of not guilty. AZ.R.CR.P. 14.4(a).
- (b) If Defendant wants to enter a plea of guilty or no contest reference Chapter 17 of the Bench Book for the procedure related to accepting a plea.

NOTE: Many judges enter a plea of not guilty on behalf of the Defendant.

(7) Address release conditions.

- (a) If Defendant is in custody, determine if probable cause exists to retain Defendant in custody.
- (b) If the Defendant is indigent and will be held in custody, the defendant is entitled to be appointed counsel for the limited purpose of determining conditions of release. AZ.R.CR.P 6.1(b)(1)(b).

- (c) Determine release conditions under AZ.R.CR.P. 7. Consider any comments offered by the victim concerning release conditions.

Reference AZ.R.CR. P. 7.2, 7.3 as amended and/or Chapter 8 of the Limited Jurisdiction Bench Book for additional information on conditions of release.

- (d) Set bail amount.

The Defendant must be released on their own recognizance (O.R.) with only the conditions of release required by AZ.R.CR.P 7.3 (a)(1)-(4) unless the Court determines, in its discretion, that an O.R. release will not reasonably assure the Defendant's appearance or protect other persons or the community from risk posed by the person.

Reference AZ.R.CR.P. 4.2(a)(7), 4.2(a)(8) as amended and/or Chapter 8 of the Limited Jurisdiction Bench Book for additional information on setting bail.

- (8) Advise Defendant of the following:

- i. Right to be present at all future proceedings;
- ii. That all proceedings other than sentencing may be held in the Defendant's absence and that if the Defendant fails to appear, the Defendant may be charged with an offense and a warrant issued for Defendant's arrest without further notice.
- iii. Advise the Defendant that if the Defendant's absence prevents sentencing from occurring within 90 days following a conviction, the Defendant may lose the right to have an appellate court review the proceedings by way of a direct appeal. AZ.R.CR.P 14.4(e).

- (9) Set the date for the pretrial conference or trial.

- (a) Advise the Defendant in writing of the next court date(s).
- (b) Provide notice of the next court dates to any victims.

- (10) If Defendant was summoned in on a felony, a sex offense, Custodial Interference, Access Interference, DUI, or Domestic Violence offense, the Court shall order that the Defendant be fingerprinted if not previously fingerprinted. The Court must order the ten-print be completed within twenty calendar days. order a summoned defendant to be 10-print fingerprinted no later than 20 calendar days. AZ.R.CR.P. 14.4(g). The Court may remand non-compliant Defendants into custody for ten-print fingerprinting. See, AZ.R.CR.P 3.2(c), ,7.5(e), 14.3(i).
- (11) Pursuant to A.R.S. §13-610(L), DNA testing is required for any person arrested for a violation of any offense in chapter 11 of Title 13, a violation of section §13-1402, §13-1403, §13-1404, §13-1405, §13-1406, §13-1410, §13-1411, §13-1417, §13-1507, §13-1508, §13-3208, §13-3214, §13-3555 or §13-3608 or a violation of any serious offense pursuant to section A.R.S. §13-706 involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury. A judicial officer who releases a person charged with certain enumerated offenses on bail or on the person's own recognizance must order the person to report for DNA testing within 5 days. Courts must revoke the release of a person who does not comply. A.R.S. §13-3967(F)(4)

SCRIPTS

Arraignment

(1) **Call the defendant to the bench:**

"This is case # _____ State of Arizona Vs. _____, Mr. / Mrs. would you please approach the bench."

(2) **Ascertain Defendant's True Name and Address:**

"Is _____ your true name? Is _____ your correct address?"

If the name is unusual, have the Defendant spell it; when necessary, the complaint should be amended to correctly name the Defendant.

(3) **Notification of Change of Address:**

"If you should move at any time prior to the final disposition of this matter, please promptly advise this Court of your new address."

(4) **State the Charge:**

"You are charged with the criminal offense of _____. This is a class_____ misdemeanor punishable by a fine of up to_____ plus surcharges, _____ months in jail and up to _____ years of probation."

(5) **Right to Remain Silent:**

"Under the law you have the right to remain silent. Anything you say can be used against you."

(6) **Right to jury trial, if applicable:**

"You have the right to a jury trial."

(7) **Right to Counsel:**

"You have the right to be represented by an attorney at your own expense at all stages of this case."

(8) **Appointment of Attorney, if applicable:**

"If you are unable to hire an attorney, a procedure is available to have an attorney appointed to represent you; the public will pay part or all of the cost depending upon your financial circumstances. Can you afford to hire an attorney? If not, do you wish to request the appointment of a Court Appointed Counsel/ Public Defender?"

If yes, have Defendant complete financial statement.

(9) Ascertain the Defendants plea:

"This is the time set to enter your plea, you may plead not guilty, guilty or No contest." How would you like to plead?"

Or

"The Court is going to be entering plea of not guilty on your behalf and this matter is going to be set to a _____."

(10) Set next court date:

"Your next court date will be (date, time and location)."

Have Defendant sign all relevant orders.

(11) Right to present:

"You have the right to be present at all future proceedings. If you fail to appear at any proceeding, except sentencing, the proceeding may be held in your absence. Additionally, you may be charged with a new offense for failing to appear and a warrant will issue for your arrest. Further, if your absence prevents sentencing from occurring within 90 days following a conviction, you may lose the right to have an appellate court review your case by way of a direct appeal."

(12) Conditions of Release:

Ensure victims' rights have been complied with and all notice requirements have been met before addressing motions regarding conditions of release.

"Based upon the information before this Court concerning you and the offense, the Court is going to set the following release conditions."

a. (Release Without Bail)

...that you be released on your own recognizance. This means that your word is your bond and that you must comply with the conditions of the release order."

OR

b. (Release Upon Appearance Bond)
...that you be released pursuant to a(n)

Unsecured appearance bond;

Deposit bond;

Other type of secured appearance bond;

or Cash bond.”

This means that you will remain in custody until you meet the requirements of the Bond and that when released, you must comply with the conditions of the release order. If held on a secured bond you are eligible for appointment of an attorney for a hearing on reviewing your release conditions. Would you like to request the court appoint you counsel for this hearing?

OR

c. (No Bond Hold)

...that you be held without bond pending your next court appearance.”

(13) Finger print and DNA requirement:

Determine if the charged offense requires the Defendant to complete the Finger Print /DNA requirements and issue the appropriate order.

Group Advisory

[NOTE: The statement of rights that follows is an example of a statement that might be given by the judge to the entire group of Defendants to be arraigned. It is not offered as an ideal statement of rights, but rather as an example of what such a statement might contain.]

"This is the time set for arraignments. An arraignment is the time in a criminal proceeding when the charges are read and you have an opportunity to enter a plea of not guilty, guilty or no contest. Before I actually begin calling you up here to inform you of the charges, let me briefly go over a few matters such as your rights, what type of charges we are talking about here today, and procedurally how things work.

When you are charged with a criminal offense, you have the right to remain silent and to be presumed not guilty. You have the right to plead not guilty and proceed to trial. If your matter is eligible for a jury trial, I will inform you of that when I call you forward. At the trial you would have the right to confront and cross examine all of the State's witnesses. You have the ability to subpoena and call your own witnesses and to testify in your own behalf.

Additionally, you have the right to be represented at all proceedings by an attorney. If you cannot afford an attorney, you can fill out a request for a public defender. That request would be reviewed and a determination made by the Court whether or not you qualify for a public defender. A public defender is an attorney appointed by the Court to represent you when you are unable to afford to hire your own attorney. A public defender would be appointed at little or no cost to yourself. Even if you are indigent, in certain cases, you may not be allowed to have a public defender if the charge has no mandatory jail time upon conviction.

The law requires that I advise you as follows of the immigration consequences of entering a guilty or no contest plea: "If you are not a citizen of the United States, pleading guilty or no contest to a crime may affect your immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. Your plea or admission of guilt could result in your deportation or removal, could prevent you from ever being able to get legal status in the United States, or could prevent you from becoming a United States citizen." AZ.R.CR. P.17.2(f).

The matters before the Court today are misdemeanors and they come in three (3) categories; class one, class two, and class three. The class one misdemeanor carries a maximum penalty of \$2,500, six (6) months in jail, and three (3) years' probation. Driving under the influence has a maximum probation of (5) five years. All fines have a eighty-four percent (84%) surcharge added on plus a probation surcharge (\$20 in Maricopa County) on all fines. A class two misdemeanor has a maximum penalty of \$750, four (4) months in jail, and (2) years' probation. And a class three misdemeanor has a maximum penalty of \$500, thirty (30) days in jail, and one (1) year probation. In most cases, no matter what class of misdemeanor we are dealing with, the minimum penalty is a

suspended sentence.

When I call you up here, I will read the charges and explain what the charge means. I will also, at that time, inform you as to what class misdemeanor it is. Certain charges have what are known as mandatory minimum penalties. That means if you plead guilty or no contest or are found guilty, there is a minimum penalty described in the statute. For example, if you are convicted of contracting without a license, there is a mandatory/minimum fine of \$1,000.00. If your particular case does have a mandatory/minimum penalty, I will tell you that when you come up here.

Procedurally, when a plea of not guilty is entered, you will get a pre-trial conference date. That is a date where you meet with a prosecutor to exchange discovery and see if the matter can be settled without going to trial. Be advised, however, that the person you are dealing with is an attorney that represents the State of Arizona. If you are representing yourself, the prosecutor is not there to give you advice or tell you what is in your best interest; you have to make that determination on your own.

Also be advised that you must appear at all court proceedings. Failure to appear would result in a number of things. There would be a warrant for your arrest and a new charge of failure to appear would be filed, which is a misdemeanor. And finally, if any of the matters are traffic related, the Department of Motor Vehicles will be notified and your license may be suspended.

When you enter a plea of not guilty, I will have you see my bailiff who will give you your court date in writing. As I indicated, you must appear on that date and time. If you plead guilty or no contest you will be giving up the constitutional rights I described earlier, including the right to be represented by an attorney. In most cases, if you plead guilty or no contest today and the Court accepts the plea, you will be sentenced and that will conclude the matter.

In certain cases, however, where there is a victim or possible restitution, the entry of your plea would be deferred and you would need to come back for the entry of judgment and sentencing. State law provides that a victim has a right to be heard at all court proceedings. State law also provides that individuals who have sustained economic damage as a result of criminal activity have a right to compensation. You would be given the date of entry of judgment and sentencing in writing and would need to appear on that day.

I will now call the cases set for arraignment this morning. If you are present, please come forward when I call your name."

PRELIMINARY HEARING SCRIPT

Convening the Court

Ensure the proceeding is recorded electronically or by a court reporter. (AZ.R.Cr.P. 5.2.)

"This Court is now convened for the preliminary hearing in the case of the State of Arizona v. _____, case number _____."

"For the record, the Court notes the presence of the Defendant, defense counsel and the prosecutor."

"Is the State ready to proceed?"

"Is the defense ready to proceed?"

"The Defendant is charged by criminal complaint with the felony offense(s) of _____."

To Defendant or defense counsel:

"Have you received a copy of the complaint? Do you waive a reading of the complaint?"

Exclusion of Witnesses

If the rule of exclusion of witnesses is invoked (AZ.R.Ev. 615), call all of the prospective witnesses forward and state:

"The rule of exclusion of witnesses has been invoked in this case. This means that you are not to be in the courtroom during this hearing except when you are called to testify. Do not discuss your testimony with any other witness or with the Defendant. You should also avoid being present when others may discuss the case. You may, however, discuss your testimony with the attorneys, so long as no other witness is present. Do you understand what is required of you?"

Administer the oath to the witnesses

"Do you solemnly swear (or affirm) that the testimony you will give in this hearing will be the truth, the whole truth and nothing but the truth?"

Exclude those witnesses to be excluded and indicate which witnesses are to remain.

State's Prima Facie Case

"The State may proceed. Please call your first witness."

(If the oath has not already been administered to the witness, do so at this time.)

To witness:

"Please take the witness stand."

If the defense asks to exclude evidence on the ground that it was obtained illegally, deny the motion. (AZ.R.Cr.P. 5.3(b).)

At the close of the State's evidence and arguments of counsel (if any), if no probable cause is found, say:

"The Court finds that the State has failed to prove that probable cause exists to believe that the crime(s) charged occurred [and/or] that the Defendant committed the crime(s). The case is dismissed without prejudice."

(AZ.R.Cr.P. 5.4(d).)

If probable cause is found, say:

"The Court finds that probable cause exists to believe that the crime(s) charged occurred and the court further finds that probable cause exists to believe that the Defendant committed the crime(s)."

Note: Under the 2017 rule amendments, the rule's requirement is satisfied if a probable cause finding was made at a bail eligibility hearing under Rule 7.

To defense counsel:

"Does the Defense wish to make an offer of proof?"

(AZ.R.Cr.P. 5.3(a).)

If answer is YES:

"Please state what the Defendant intends to prove and what witnesses and evidence will be offered to establish that proof."

If the Magistrate determines that the evidence offered would be insufficient to rebut the finding of probable cause, state:

"I find that the evidence offered by the defense is insufficient to rebut the finding of probable cause, and the offer is, therefore, disallowed."

(AZ.R.Cr.P. 5.3(a).)

If the Magistrate concludes that the Defendant is entitled to present evidence, state:

"The defense may provide evidence."

If the Defendant declines to make an offer of proof, or the offer of proof has been disallowed, or the defense has presented evidence, but it has been found to be insufficient to rebut the finding of probable cause, state:

"It is ordered that the Defendant _____ be held to answer before the Superior Court for the offense(s) of _____ and is bound over to the Superior Court for trial."

(AZ.R.Cr.P. 5.4(a).)

If the Defendant has been bound over for trial, the Magistrate should determine whether any AZ.R.Cr.P. 39 Victims' Rights issues exist. If Rule 39 issues exist, the Magistrate should state:

"The initial appearance was conducted on -----, at which time bond was set at \$-----,(or, Defendant was released to Pre-Trial Services), (or, Defendant was released on his own recognizance). Defendant was further ordered to have no contact of any type with the victim(s), (or with the Victim's residence) Would the Prosecutor, the Victim or the Defendant like to be heard on these conditions?"

If the finding of probable cause has been rebutted by the Defendant, state:

"The Defendant has rebutted the probable cause evidence introduced by the State. The case is dismissed without prejudice."

(AZ.R.Cr.P. 5.4(d).)

CRIMINAL MOTION HEARINGS

GENERAL CHECKLIST

PRIOR TO HEARING

- ___ 1. Upon receipt of a motion, determine if it is timely. AZ.R.CR.P. 16.1(b) provides that all motions shall be made no later than 20 days prior to trial or at such other time as the Court may direct (except that lack of jurisdiction may be raised at any time). A motion not timely received may be precluded by the court, absent special circumstances (See AZ.R.CR.P. 16.1(c). In addition, motions that raise issues previously decided in the case are generally not subject to reconsideration (See AZ.R.CR.P. 16.1(d). Note that all motions are subject to the requirements of AZ.R.CR.P. 1.6 (form of documents) and AZ.R.CR.P. 1.7 (Motions, oral argument and proposed orders and are to be served as provided in AZ.R.CR.P. 1.7 (filing and service of documents). AZ.R.CR.P. 16.1(b).
- ___ 2. Calendar for review following the response and reply time of the parties. (The opposing party has 10 calendar days to respond and the moving party has three 3 days - excluding weekends and holidays - to reply. AZ.R.CR.P. 1.3 (Computation of time), and AZ.R.CR.P. 1.9 (Motions, oral arguments and proposed rules). These times will be extended by 5 days if the filing or service is by mail or by electronic means when electronic service is completed after written consent of the recipient or upon order of the court. AZ.R.CR.P. 1.3(a).
- ___ 3. Decide whether the motion should be set for oral argument, and/or evidentiary hearing, or can be ruled on by consideration of the pleadings. (Upon request of any party or on its own initiative, the Court may set any motion for hearing and may limit or deny oral argument on any motion. AZ.R.CR.P. 1.9(e)).
- ___ 4. If oral argument or an evidentiary hearing is scheduled, review pleadings prior to the hearing or argument.

AT THE HEARING

- ___ 1. Record the proceeding.
- ___ 2. Have counsel state their appearances for the record.
- ___ 3. If you have reviewed the pleadings, advise counsel they need not repeat what appears in the pleadings.

- ___ 4. The Prosecutor has the burden of proving, by a preponderance of the evidence, the lawfulness of the acquisition of all evidence that will be used at trial. AZ.R.CR.P. 16.2(b)(1).

If, however, evidence is obtained under any of the following circumstances:

- (a) the evidence involves a confession, identification, search, or seizure, and the defendant is entitled under Rule 15 of the Arizona Rules of Criminal Procedure to discover how the evidence was obtained; or
- (b) defense counsel was present when the evidence was taken; or
- (c) the evidence was obtained under a warrant,

then the State's burden of proof under AZ.R.CR.P. 16.2(b)(1) arises only after the defendant alleges specific circumstances and establishes a prima facie case supporting the suppression of such evidence.

Questions regarding the admissibility of evidence shall be determined by the court and in making its determination, the Court is not bound by the rules of evidences except those with respect to privileges. (AZ.R.Ev. 104(a)).

- ___ 5. If the Defense raises the issues of No Reasonable Suspicion for the stop and/or No Probable Cause for the arrest, the burden of going forward first with its evidence shifts to the Prosecutor. The evidence presented will usually take the form of testimony from the law enforcement officers involved and possibly from civilian witnesses.
- ___ 6. Following the argument and/or presentation of evidence, either rule from the bench or take the matter under advisement for further study. If you take the case under advisement, inform the parties when they can expect your ruling.
- ___ 7. Set or affirm a future court date in the case.

MIRANDA HEARING FINDING¹

1. MIRANDA COMPLIANCE:

The Court finds that Defendant's statement to [Name] was taken in full compliance with Miranda.

(Provide some brief specifics; e.g., the statement was made while Defendant was in custody but was "volunteered"; the statement was made in response to an officer's question, but is admissible because of the "general, on the scene" nature of the questioning, etc.)

2. MIRANDA VIOLATION:

The Court finds that Defendant's statement to [Name] was taken in violation of Miranda. [Specifics.]

3. To determine the admissibility of Defendant's statements for impeachment if the Defendant testifies, consider Voluntariness issue, next page.

¹ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

VOLUNTARINESS HEARING FINDING²

1. STATEMENT VOLUNTARY, No Voluntariness/Miranda Violation:
Having considered all the circumstances set forth in A.R.S. §13-3988(B), the Court finds that Defendant's statement to [Name] was made voluntarily. Therefore, that statement is admissible during the State's case-in-chief. [It is good practice to state brief specific findings regarding any particular factor at issue in the hearing.]
2. STATEMENT VOLUNTARY, Voluntariness/Miranda Violation:
The totality of the circumstances establishes that the statement was made voluntarily, but was made after the Defendant asserted the Fifth Amendment right to counsel. The statement is therefore inadmissible during the State's case-in-chief. However, because the statement appears trustworthy, it is admissible for the purpose of impeaching Defendant, if the Defendant testifies.³ [Specifics.]
3. STATEMENT NOT VOLUNTARY:
The Court finds that Defendant's statement to [Name] is involuntary because: [Specifics.]

Therefore, that statement is not admissible at trial for any purpose.

² To warrant a pre-trial hearing on voluntariness, Defendant's motion must provide some factual basis for suppression of the evidence. "The Defendant is responsible for properly raising issues such as voluntariness and Miranda compliance." State v. Alvarado, 121 Ariz. 485, 487, 591 P.2d 973, 975 (1979); State v. Anaya, 170 Ariz. 436, 443, 825 P.2d 961, 968 (App. 1991).

³ Harris v. New York, 401 U.S. 222 (1971); State v. Routhier, 137 Ariz. 90, 98, 669 P.2d 68, 76 (1983), cert. denied, 464 U.S. 1073 (1984); State v. Williams, 169 Ariz. 376, 379, 819 P.2d 962, 965 (App. 1991). The statement is only admissible for impeachment and not as substantive evidence. A special instruction must be given telling the jurors the statement can only be used to weigh credibility and cannot be used as evidence of guilt. State v. Routhier, 137 Ariz. at 98, 669 P.2d at 76.

IDENTIFICATION HEARING FINDING⁴

ISSUE: Were the pretrial identification procedures unduly suggestive?

1. PRETRIAL IDENTIFICATION OK:

The State has proved by clear and convincing evidence that the pretrial identification procedures were not unduly suggestive.

[Go to 3A]

2. PRETRIAL IDENTIFICATION NOT OK:

The pretrial identification procedures were unduly suggestive.

[Nevertheless, is there an independent basis for the in-court identification? If "Yes", go to 3; if "No", go to 4.]

3. IN-COURT IDENTIFICATION OK:

The State has proved by clear and convincing evidence that the proposed in-court identification is not tainted by the prior identification. [Specifics.]

A. IT IS ORDERED that [Name of Witness] may make an in-court identification of Defendant.

4. IN-COURT IDENTIFICATION NOT OK:

Any in-court identification is tainted by the prior identification. [Specifics.]

A. IT IS ORDERED that [Name of Witness] may not make an in-court identification of Defendant.

⁴ State v. Dessureault, 104 Ariz. 380, 453 P.2d 951 (1969). Note that the case also holds that: "[I]f requested, the Court must instruct the jury that before returning a verdict of guilty it must be satisfied beyond a reasonable doubt that the in-court identification was independent of the previous pretrial identification or if not derived from an independent source, it must find from other evidence in the case that the Defendant is the guilty person beyond a reasonable doubt." However, this instruction need not be given if the Court has found that the pretrial identification was not unduly suggestive. State v. Harris, 23 Ariz. App. 358, 533 P.2d 569 (1975). See also State v. Nottingham, 231 Ariz. 21, 26, 289 P.3d 949, 954 (Ct. App. 2012) (Perry v. New Hampshire suggests that, at minimum, a cautionary jury instruction is required when a defendant has presented evidence that a pretrial identification has been made under suggestive circumstances that might cause the later "eyewitness testimony [to be] of questionable reliability." 132 S.Ct. at 728.)

IMPEACHMENT WITH PRIOR CONVICTION FINDING⁵

Applies to felony convictions and misdemeanors involving dishonesty or false statement.⁶

1. PRIOR NOT ALLOWED:

I find that the prior conviction:

- A. Has not been proved; OR
- B. Was not punishable by death or imprisonment for more than a year; OR
Did not involve dishonesty or false statement; OR
- C. The probative value of admitting the conviction does not outweigh the
prejudicial effect of its admission; OR
- D. [If prior is more than ten (10) years old:] The adverse party did not give
sufficient advance notice of intent to use this evidence.

2. PRIOR ALLOWED; Conviction under ten (10) years old:

I find that the witness/Defendant was previously convicted of _____, and
that this offense:

- i. Was punishable by death or imprisonment for more than one year;
OR Involved dishonesty or false statement; AND,
 - ii. I further find that the probative value of admitting the prior
conviction outweighs any prejudicial effect of the admission.
3. PRIOR ALLOWED; Conviction OLDER than ten (10) years:

I find that the witness/Defendant was previously convicted of _____
and that this offense:

- i. Was punishable by death or imprisonment for more than one year;
OR Involved dishonesty or false statement; AND
- ii. I further find that the adverse party gave sufficient advance written
notice of the intent to use this evidence; AND

⁵ For discussion of procedure for the AZ.R.EV. 609 Hearing and for a non-exclusive listing of factors that might be taken into account when weighing probative value and prejudicial effect of a prior conviction, see State v. Williams, 144 Ariz. 433, 438-439, 698 P.2d 678, 683-684 (1985).

⁶ The Arizona Supreme Court has stated that the phrase "dishonesty or false statement" "should be construed narrowly to include only those crimes involving some element of deceit, untruthfulness, or falsification". State v. Malloy, 131 Ariz. 125, 127, 639 P. 2d 315, 317 (1981). Crimes involving dishonesty or false statement, fraud, embezzlement and tax evasion. *Id.* at 127, 639 P. 2d at 317; Blankenship v. Duarte, 137 Ariz. 217, 669 P.2d 708 (App. 1981). They do not include attempted burglary or conspiracy to commit burglary. State v. Malloy, 131 Ariz. at 127, 639 P.2d at 317; State v. Johnson, 132 Ariz. 5, 643 P.2d 708 (App. 1981).

- iii. That the probative value of admitting the prior conviction substantially outweighs any prejudicial effect.

4. IT IS ORDERED that the evidence of the prior conviction [is/is not] admissible as impeachment if the [witness/Defendant] testifies.

- A. If impeachment is allowed, specify what testimony and exhibits are admissible.

Is the prior to be a "No Name" felony? If not, allow only: Name and Classification of Offense; Court, Cause Number, and Date of Conviction; and whether the person was represented by counsel.

- B. Limiting Instruction? See next page.

IMPEACHMENT WITH PRIOR CONVICTION INSTRUCTION

WITNESS (PRIOR CONVICTION)

You have heard evidence that a witness has previously been convicted of a criminal offense. You may consider this evidence only as it may affect the witness' believability.

DEFENDANT WITNESS (PRIOR CONVICTION)⁷

You have heard evidence that defendant has previously been convicted of a criminal offense. You may consider that evidence only as it may affect defendant's believability as a witness. You must not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial.

⁷ Source: RAJI (Criminal) 4th Standard 19, 20; AZ.R.EV. 609; State v. Canedo, 125 Ariz. 197, 608 P.2d 774 (1980); State v. Cruz, 127 Ariz. 33, 617 P.2d 1149 (1980); State v. Turner, 141 Ariz. 470, 687 P.2d 1225 (1984).

Comment: A felony conviction is admissible for impeachment purposes if the Court, following a hearing, makes the findings required by AZ.R.EV. 609; Wilson v. Riley Whittle, Inc., 145 Ariz. 317, 324, 701 P.2d 575, 582 (App. 1984).

WAIVER OF JURY; SUBMISSION OF CASE

1. "Is your true name _____?"
2. "What is your date of birth?"
3. "Do you read and understand English?"
4. "Have you had any drugs, alcohol or medication in the last 24 hours?"

[If yes...]

"What did you have?"

"When did you have it?"

"Is the substance that you took in the last 24 hours affecting your ability to understand today's proceedings?"

WAIVER OF JURY

5. "Is it your intention to waive your right to trial by jury?"
6. **Waiver Form:** "Look at the Waiver of Trial by Jury Form¹. Have you read the entire form?"

"Have you discussed it with your lawyer?"

"Is there anything about it you do not understand?"

"Is this your signature on the Form?"
7. **Rights:** "By waiving a jury trial, you give up certain constitutional rights. Let me explain those rights:
 - A. You have the right to keep your plea of not guilty, to have a trial by jury on the charge(s), and to be represented by counsel at a jury trial;
 - B. You are presumed innocent; you could not be found guilty at trial unless the State proved to a jury, beyond reasonable doubt, that you are guilty;
 - C. Your trial rights include the right to confront and cross-examine the witnesses called by the State, and the right to present evidence and to subpoena witnesses to testify in your defense;

¹ See AZ.R.CR.P. Form 20.

- D. You have the right to testify at trial if you wish; you also have the right to remain silent and decline to testify. Your silence could not be used against you."
8. "Do you understand these rights?" "Do you understand that once you waive your right to a jury trial, you may change your decision only with the permission of the court, and may not change it at all once the trial has actually begun?" Do you wish to waive your right to a jury trial?"

Voluntariness: "The Court finds that defendant's waiver of jury trial is knowingly, intelligently, and voluntarily made." The waiver of jury trial is entered.

SUBMISSION OF CASE

9. By submitting the case to me for decision you give up certain constitutional rights.²

Let me explain these rights:

- A. You have the right to keep your plea of not guilty, to have a trial on the charges, and to be represented by counsel at the trial.
- B. You have the right to have the issue of guilt or innocence decided by a judge based solely on the record submitted. [Note: the rule requires the Court to say "innocence," even though judges and juries do not decide innocence, but instead render a verdict of "not guilty" if appropriate.]
- C. Your trial rights include the right to confront and cross examine the witnesses called by the State and the right to present evidence and to subpoena witnesses to testify in your defense.
- D. You have the right to testify at trial if you wish; you also have the right to remain silent and decline to testify. Your silence could not be used against you.
- E. You are presumed innocent; you could not be found guilty at trial unless the State proved beyond a reasonable doubt, that you are guilty.
- F. [To Defendant] "Do you wish to submit the case to me for decision?" "Counsel, what evidence will be submitted?"
- G. [To Defendant] "Do you understand that the things just mentioned will be the only evidence I will consider in deciding whether you are guilty or not guilty?"

² State v. Avila, 127 Ariz. 21, 617 P.2d 1137 (Ariz. 1980)

- H. "Do you wish to submit the case to me for a decision based only on the evidence that has been presented to me?"
10. "I will now explain some of the sentencing possibilities and consequences if you are found guilty (they are the same whether you are found guilty by a jury or by the court)."
- [Misdemeanor]:** "You could receive up to _____ [days/months] in jail, a fine of \$_____ plus a surcharges and probation for up to _____ year(s)."
- Restitution:** "If there has been economic loss to a victim you will have to pay for the loss."
11. "Were you on probation or parole on _____(date of violation)?"
- [If "Yes":] "Do you understand that if you are found guilty in this case, your [probation/parole] could be revoked and any sentence on this case could be in addition to any sentence you may receive on the [probation/parole] matter?"
12. "Do you have any questions?"
13. "Counsel, any additions or corrections to anything?"
14. [To Defendant:] "Do you wish to submit the case for my decision?"
15. **Voluntariness:** "The Court finds that defendant's submission of the matter to the Court is knowingly, intelligently, and voluntarily made."
16. "The matter is deemed submitted on the evidence presented."
- [Evidence is identified, marked, and admitted.]
17. "Do counsel wish to make closing arguments?"
18. [Review the submitted evidence, then either return a verdict or take the matter under advisement.]

CRIMINAL PRETRIAL CHECKLIST

- ___ 1. Find out estimated length of trial.
- ___ 2. Inform counsel of trial schedule:
 - A. Days of the week on which trial will be held.
 - B. Time when trial will begin and end each day.
 - C. Recess timing and duration, etc.
 - D. Discuss imposition of reasonable time limits on trial proceedings or portions thereof.
- ___ 3. If jury trial, decide jury selection issues:
 - A. Number of jurors (mandated by statute)¹ and alternates (discretionary).
 - B. Number of peremptory strikes per side (mandated by statute).²
 - C. Procedure for selecting the jury; how jurors will be seated, how many will be called for questioning.
 - D. Procedure for designating alternates.³
 - E. Status of law re: Batson issues.⁴
- ___ 4. Review with counsel:
 - A. Full names of defendant(s) and counsel.
 - B. Charges at issue in the trial. How to handle civil traffic charges if applicable.
 - C. List of witnesses.
 - D. List of exhibits.⁵ Procedure for handling disputes.

¹ Six jurors for criminal matters in limited jurisdiction courts. A.R.S. §21-102(D).

² Two strikes in all cases tried in limited jurisdiction courts. AZ.R.CR.P. 18.4(c)(1)(iii)

³ By lot drawn by clerk. AZ.R.CR.P. 18.5(h)

⁴ The United States Supreme Court has determined that peremptory challenges by either party based on race or gender violate the United States Constitution. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed. 2d 69 (1986), Holland v. Illinois, 493 U.S. 474, 110 S.Ct. 803, 107 L.Ed. 2d 905 (1990) (race-based peremptories prohibited); J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed. 2d 89 (1994) (gender-based peremptories prohibited); Edmonson v. Leesville Concrete Company, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) (applies to parties in civil litigation); Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed. 33 (1992) (applies to criminal defendants' peremptory challenges as well as prosecutors' peremptory challenges); Purkett v. Elem, 514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed.2d 834 (1995) (three-step analysis: 1)prima facie showing of discrimination; 2) race-neutral reason by the striking party; 3) challenger has burden of proving purposeful racial discrimination). See also, State v. Canez, 367 Ariz. Adv. Rep. 37, 42 P.3d 564 (2002) (specifically adopting the Purkett analysis); State v. Harris, 157 Ariz. 35, 754 P.2d 1139 (1988) (a Batson challenge is untimely unless it is made before the trial jury is empanelled); State v. Lucas, 199 Ariz. 366, 18 P.3d 160 (Ct. App. 2001) (if striking party provides both a neutral and non-neutral reason for the strike, the strike is not neutral – citing Payton v. Kears, 329 S.C. 51, 495 S.E.2d. 205 (1998).) A defendant satisfies Batson's first step requirements by producing evidence sufficient to permit trial judge to draw an inference that discrimination occurred. Johnson v. California, 545 U.S. 162, 125 S.Ct. 2410, 162 L. Ed. 2d 129 (2005).

⁵ The trial court should control the number of exhibits, have relevant portions of admitted documents highlighted and provide copies of key documents to jurors.

- E. Deadline for submitting instructions and verdicts.
- F. Order of trial, if multiple defendants.
- G. Need for use of juror notebooks containing basic trial documents and instructions.

___ 5. If jury trial, review Voir Dire procedures.

- A. Preliminary voir dire by the Court.
- B. Whether counsel to give Mini-Opening Statements (pre-voir dire, brief, non-argumentative factual statements regarding case.)
- C. Additional voir dire requested by counsel.
- D. Set reasonable limits on counsels' voir dire.
- E. Does defense counsel want the jury to be advised during voir dire of defendant's right to not testify?
- F. If defense counsel is a Deputy Public Defender, does counsel prefer to be introduced as such, or without mention of that office.

___ 6. Motions and Preliminary Instructions:

- A. Hear and resolve pending motions.
- B. Find out about any other issues that might require a hearing, including Motions in Limine.⁶
- C. Settle preliminary instructions, if giving instructions in addition to those in the Benchbook.⁷

___ 7. Advise counsel of courtroom protocol re:

- A. Marking exhibits ahead of time
- B. Bench conferences
- C. Mid-trial motions
- D. Offers of proof
- E. Examination (Re-cross?⁸)
- F. Making objections
- G. Juror questions
- H. Using easels, blow-ups, etc
- I. Approaching witnesses
- J. Handling exhibits
- K. Using lectern
- L. Other matters

___ 8. Any special equipment needs?
Computers, projectors, etc.

⁶ "The primary purpose of a motion in limine is to avoid disclosing to the jury prejudicial matters which may compel a mistrial. It should not, except upon a clear showing of non-admissibility, be used to reject evidence." State v. Superior Court, 108 Ariz. 396, 397, 499 P.2d 152, 153 (1972).

⁷ The Committee on More Effective Use of Juries recommended, and the Arizona Supreme Court adopted, the recommendation that juries should also be instructed at the outset of the trial on the elementary legal principles that will govern the proceedings.

⁸ Re-cross is not favored, and should only be granted in the rarest of circumstances.

___ 9. Any special problems anticipated?
Security, prisoner dress, method of bringing prisoner into court, interpreter issues, media coverage, etc.

___ 10. Is there an alleged victim?

Has the State complied with the Victims' Rights Act⁹ regarding notification?

If the victim is present ask if he/she/they have been advised of their rights.

Provide the victim with a written list of rights.¹⁰

Is the victim likely to be in attendance during trial?¹¹

Are there any issues pertaining to victims' rights requiring special attention by court or counsel, i.e., presence of support person, security issues, interpreter issues, etc.?

___ 11. Is the Rule of Exclusion of Witnesses¹² invoked?

If so, tell counsel what it means, and advise counsel of the provisions of the Notice that will be posted. Have staff post a Notice re: Exclusion of Witnesses.

⁹ See AZ.R.CR.P. 39; A.R.S. §13-4401, et seq. See A.R.S. §13-4436

¹⁰ See AZ.R.CR.P. 39

¹¹ A.R.S. §13-4420: "The victim has the right to be present throughout all criminal proceedings in which the defendant has the right to be present."

¹² See AZ.R.CR.P. 9.3; AZ.R.EV. 615; AZ.R.CR.P. 39, (Note: the Rule of Exclusion does not apply to victims. A.R.S. §13-4420.)

STATE OF ARIZONA
_____**COUNTY**
_____**JUSTICE/CITY COURT**

NOTICE
TO
ALL WITNESSES AND OBSERVERS

V.

The rule of exclusion of witnesses has been invoked.

IT IS ORDERED:

1. WITNESSES ARE NOT PERMITTED IN THE COURTROOM UNTIL CALLED IN TO TESTIFY. (ON ARRIVAL, WITNESSES SHOULD CHECK IN AT THE OFFICE OF THIS DIVISION.)
2. WITNESSES IN THE CASE ARE NOT PERMITTED TO DISCUSS THE CASE OR THEIR TESTIMONY WITH ANYONE (EXCEPT LAWYERS) UNTIL AFTER THE TRIAL HAS BEEN COMPLETED.
3. ALL PERSONS: DO NOT TALK ABOUT THE CASE, OR ANYTHING RELATED TO IT, IN THE PRESENCE OR HEARING OF WITNESSES OR JURORS.
4. ALL PERSONS: PLEASE ENTER AND EXIT THE COURTROOM QUIETLY. DO NOT SMOKE, CHEW, DRINK OR TALK IN THE COURTROOM. TURN OFF OR TURN TO SILENT ALL ELECTRONIC DEVICES. DO NOT DISTURB THE PARTICIPANTS OR THE PROCEEDINGS IN ANY WAY.

DATED: _____
JUDGE

CRIMINAL BENCH TRIAL

1. Convening the Court

By the Bailiff:

"All rise. The City/Municipal Court of the City of _____ is now in session (the _____ Justice Court is now in session.)"

The Honorable _____ now presiding.

By the Judge:

"Please be seated. We are now on the record. Good morning/afternoon ladies and gentlemen.

"This is the time set for the trial of the case of State v. _____, Case Number: xxxxxxxx"

"The court notes the presence of the Defendant, defense counsel and counsel for the State."

2. If Defendant is not represented by legal counsel:

(Prior to the start of the trial, the court needs to make sure that the defendant has signed a waiver of counsel and that it is in the file. If that has not been done, the court needs to make sure that the defendant is willing to waive a public defender, does not qualify for a public defender, wishes to voluntarily enforce his/her constitutional right to represent themselves at trial, and/or has voluntarily waived private counsel by being able to hire counsel and not doing so. If they do not wish to waive an attorney, the judge needs to decide if they qualify for a public defender. Have the Defendant fill out the financial form and then decide if you will appoint one. If one is appointed, reset the court proceeding. If one is not appointed, make a record as to why one was not appointed and proceed with the trial.)

"The Court notes for the record that the Defendant desires to or/has previously waived the right to an attorney. Do you understand that you have the right to be represented by an attorney?"

"You are charged with _____, a class ____ misdemeanor under the laws of Arizona, and if you are found guilty you can be given a severe punishment, including incarceration in the county jail, a fine, probation and other penalties."

(If Defendant has not signed a waiver of counsel) "Do you understand that an

attorney could assist you in dealing with the Rules of Evidence and the Rules of Criminal Procedure and assist you in questioning the state's witnesses, challenging the state's evidence, and presenting your evidence?"

"You understood by appearing here today without an attorney, you were giving up your right to counsel, is that correct?"

"Has anyone forced, threatened, or made any promises to you to have you waive your right to an attorney?"

"Have you had any drugs, alcohol or medication in the last 24 hours? If no, proceed, if yes – "Are the drugs, alcohol or medication you took in the last 24 hours affecting your ability to understand today's proceedings?"

"I find that your waiver of counsel is voluntarily, intelligently and knowingly made and not the result of force, threats or promises and that you have waived your right to an attorney."

3. If Defendant is entitled to jury trial:

"Have Defendant and Prosecutor executed a jury waiver form and previously reviewed the same on the record?"

(If yes, proceed to 4. If no, have the parties review and sign a jury waiver form before proceeding.)

"Is your true name _____?"

"What is your date of birth?"

"Do you read and understand English?"

"Have you had any drugs, alcohol or medication in the last 24 hours?"

If no, proceed, if yes – "Are the drugs, alcohol or medication you took in the last 24 hours affecting your ability to understand today's proceedings?"

"Is it your intention to waive your right to trial by jury?"

Waiver Form: "Look at the" Waiver of Trial by Jury Form¹. Have you read the entire form?"

"Have you discussed it with your lawyer?" (If Defendant has not previously waived counsel)

¹ See AZ.R.CR.P. Form 20

"Is there anything about it you do not understand?"

"Do you have any questions about the Form?"

"Is this your signature on the Form?"

Rights: "By waiving a jury trial, you give up certain constitutional rights. Let me explain those rights:

- A. You have the right to keep your plea of not guilty, to have a trial by jury on the charge(s), and to be represented by counsel at a jury trial;
- B. You are presumed innocent; you could not be found guilty at trial unless the State proved to a jury, beyond reasonable doubt, that you are guilty;
- C. Your trial rights include the right to confront and cross-examine the witnesses called by the State, and the right to present evidence and to subpoena witnesses to testify in your defense;
- D. You have the right to testify at trial if you wish; you also have the right to remain silent and decline to testify. Your silence could not be used against you."

"Do you understand these rights?" "Do you understand that once you waive your right to a jury trial, you may change your decision only with the permission of the court, and may not change it at all once the trial has actually begun?" Do you wish to waive your right to a jury trial and consent to have your guilt or innocence determined by a judge?"

"Has anyone forced, threatened, or made any promises to you to have you waive your right to a jury trial?"

Voluntariness: "The Court finds that defendant's waiver of jury trial is knowingly, intelligently, and voluntarily made and not the result of force, threats, or promises." The waiver of jury trial is entered on the record.

4. Proceeding with the trial

"Is the State ready to proceed with the trial?"

"Is the Defendant ready to proceed?"

Exclusion of Witnesses (if requested by either party)

"Would all witnesses who are going to testify in this case please come forward (not including the Defendant). Would each of you, in turn, identify yourself. Please raise your right hand."

Administer oath

"Do you swear (or affirm) that the testimony you will give in this trial will be the truth, the whole truth and nothing but the truth?"

Addressing all witnesses

"The rule of exclusion of witnesses has been invoked in this case. This means that witnesses other than the Defendant, the victim(s) and any designated investigators are not to be in the courtroom during the trial except when you are called to testify. Do not discuss your testimony with any other witness until after the trial has been completed. You should also avoid being present when others may discuss the case. You are also not to listen to, read, or watch anything revealing what is happening inside the courtroom during trial before you testify. If there is media coverage of this trial, you should also avoid seeing, listening to or watching anything regarding the trial until after the trial has been completed [In the judge's discretion, the judge may reference specific forms of traditional media, social media or other forms of technology that the witness must refrain from listening to, reading or watching.]. You may, however, discuss your testimony with the attorneys, so long as no other witness is present. The purpose of the rule is that you not know or hear what has occurred in the courtroom. Do you understand what is required of you? Does either side wish to designate an investigator? The investigating officer and any victims are allowed to remain in the court room during the trial. The remainder of you need to have a seat outside the courtroom."

Reading the Complaint

"The Complaint alleges that _____."

"The Defendant has pled not guilty to (the/all) charge(s)."

[To Pro Per Defendant] [If Defendant is represented proceed to Opening Statements]

"Are you familiar with the order of proceedings and the burden of proof in a criminal case?"

[If Defendant indicates no:]

"The trial will normally proceed in the following order:

First, the Prosecutor and the Defendant will have an opportunity to present opening statements. What is said in opening statements is not evidence. It is simply an outline of what each side thinks the evidence will be. The State may present an opening statement or waive it. You may present an opening statement, waive it, or reserve it until after the State's case.

"Next, the Prosecutor must introduce evidence in support of the charges made in the complaint. The Prosecutor questions the witness first, the defense then has the right to cross-examine the witness. When the Prosecutor has no further evidence to present, the State will rest."

"After the State's case, you may call witnesses to testify and offer exhibits but you are not obligated to do so. You are not required to testify or present any evidence. It is the State's burden to prove you guilty beyond a reasonable doubt. If you do testify, the Prosecutor can ask you questions. If you call a witness to testify, you question the witness first, and the Prosecutor has the right to cross examine the witness. After the Defendant's case, the State may offer rebuttal evidence."

"Following the presentation of evidence, the Prosecutor may make a closing argument, you may make a closing argument, and the Prosecutor may make a rebuttal closing argument." What is said in closing argument is not evidence.

"The reason that the Prosecutor makes the final argument is that the State has the burden of proving the case beyond a reasonable doubt."

Opening Statements

"(Prosecutor), do you wish to make an Opening Statement?"

[The State may present an opening statement or waive it]

"(Defendant/Defense Attorney), do you wish to make an Opening Statement?"

[The Defense may present an opening statement, waive it, or reserve it until after the state's case]

Presentation of Evidence by the State

"The State may proceed. Please call your first witness/next witness."

Oath to witness: (If not previously sworn in)

"Do you swear (or affirm) that the testimony you will give in this trial will be the truth, the whole truth and nothing but the truth?"

Direct examination of each witness.

Cross-examination of each witness.

Re-direct examination of witness.

Re-cross examination of witness (is almost never allowed).

State rests.

[If defense makes motion for directed verdict/Rule 20 motion, determine whether the State has presented "substantial evidence to warrant a conviction" of the Defendant. If yes, deny motion for directed verdict and continue with Defendant's case, if no, dismiss the case.]

[Statement to Defendant at end of State's case if Defendant is unrepresented:]

"The State has the burden of proving you guilty beyond a reasonable doubt. You are not required to testify or present any evidence. You have the right to remain silent and if you testify, the State can ask you questions. Do you wish to present any evidence?"

Presentation of Evidence by the Defendant

"The defense may proceed. Defense may present opening statement if it was reserved. Please call your (first/next) witness."

Oath to Defendant if he/she is to testify.

Direct examination of each witness.

Cross-examination of each witness.

Re-direct examination of each witness.

Re-cross examination of each witness (is almost never allowed).

Defense rests.

Rebuttal by the State

"Does the State wish to present any evidence in rebuttal?"

Surrebuttal by Defendant (only if rebuttal presented)

"Does the Defense wish to present any further evidence?"

Both parties rest.

Closing Arguments

State opens.

Defendant argues.

State replies.

Pronouncement of the Judgment/Verdict

"It is the finding of the Court that the Defendant, (Name of Defendant), is guilty/not guilty of A.R.S. §_____. " (name of offense)

If the judgment/verdict is guilty:

Sentencing should occur immediately upon determination of guilt unless the court orders otherwise pursuant to AZ.R.CR.P. 26.3(2).

Explain the minimum and maximum sentence for each charge where the finding was guilty. Advise the Defendant of the right to address the court before sentence is imposed.

Hear State's position, the victim's position, if any, the Defendant's counsel and Defendant's position regarding sentence.

Impose sentence.

Ensure that Defendant is informed of appeal rights.

If the Court does not impose sentence immediately:

"It is ORDERED setting this matter for sentencing on the (no later than 30 days from now) day of _____."

"It is further ORDERED reaffirming the release conditions in this matter. (It is further ORDERED imposing the following release conditions:)"

If the judgment/verdict is not guilty:

"It is ORDERED exonerating the bond. It is further ORDERED returning any security deposit in this matter."
By the Judge:

"We are now off the record."

JURY TRIAL

CRIMINAL IMPANELMENT AND VOIR DIRE SCRIPT

THE ARIZONA LENGTHY TRIAL FUND

Jury trials in limited jurisdiction courts rarely last more than five days. If you have a jury trial that may go into a sixth day, or beyond, please see ARS § 21-222.

PRELIMINARY CONSIDERATION OF VOIR DIRE OPTIONS¹

AZ.R.CR.P. 18.5 Procedure for Selecting a Jury

The preferred procedure for questioning the entire panel at once is as follows: The jurors are seated in the courtroom, as directed by the court, in the order in which they appear on the jury panel list. [The jurors can be seated before or after the Judge enters the courtroom.] The Judge administers the oath to all prospective jurors. The entire panel is then questioned in voir dire. The panel is excused from the courtroom, but individual jurors may be questioned in individual voir dire, if necessary.

After voir dire is completed, the entire panel is excused for a recess. The Judge advises counsel which jurors it is excusing for the hardship reasons expressed by the jurors during voir dire. The Judge hears and resolves Motions to Strike for Cause. When all counsel pass the panel for cause, the Clerk is told to strike all but "X" names from the jury list. ("X" is the number of jurors to serve, plus the number of alternates plus the number of peremptory strikes allowed.) Counsel then exercises peremptory strikes. After all peremptory strikes are made, the jury panel is called back into court. The Judge reads the names of the jurors. The rest of the panelists are thanked and released, or directed to return to the Jury Commissioner.

Optional Strike and Replace Procedure:

AZ.R.CR.P. 18.5(b) provides for the optional procedure of only calling the necessary number of jurors for questioning equal to the number of jurors plus alternates and peremptory challenges allowed the parties. As the jurors are called, chart their names and seating location so you can later address them by name. Only these prospective jurors are questioned and, if they are struck, they are replaced by other jurors waiting in the courtroom.

¹ See comment to AZ.R.CR.P. 18.5 for discussion of the "struck" method and "strike and replace" method of empanelment.

JURY TRIAL SCRIPT

Pre-Trial Matters

Confirm whether any pretrial motions or motions in limine remain unresolved and resolve them. Conduct evidentiary hearing if necessary.

Determine which witnesses may be called and whether either side will call expert witnesses.

Determine how long the trial is expected to last and whether there are any scheduling issues to work around.

Determine whether any other pre-trial issues need to be resolved and resolve them.

Complete the Preliminary Jury Instructions and resolve any issues before seating the jury. Confirm on the record that the attorneys for both parties approve the preliminary instructions. Make certain that Preliminary Jury Instructions books are completed and ready for the jurors, attorneys and judge. (If the case involves the use of an interpreter, provide a copy of the Preliminary Jury Instructions to the interpreter as well.)

Initiating the Jury Trial

1. Announce: "Good (morning/afternoon), ladies and gentlemen. This is the time set for the trial of Case Number _____, State of Arizona vs. _____."

"Is the State ready?" "Is Defendant ready?"

2. After the panel is seated in order, ask them to stand to be sworn:

"Will all prospective jurors please stand and be sworn."

[Judge or clerk administers Voir Dire oath.] "Do you (swear/affirm) that you will give true answers to all questions touching upon your qualifications to act as trial jurors in the case of the State of Arizona vs. _____?"

3. "Please be seated. Ladies and gentlemen, we are now going to begin the jury selection process in the case."
4. "You will now be asked a number of questions about yourselves. These questions are not designed to pry unnecessarily into your personal lives or affairs, nor are they intended to embarrass you, and I hope they do not

do that.”

“It is necessary for me to ask you questions to find out if you have any knowledge about this case or about any of the people who might be involved in it; to find out if you have any preconceived opinions about the case which you might find difficult to lay aside; and to find out if you have had any personal or family experiences that might cause you to identify yourself with any of the parties.”

“In other words, we need to ask these questions to do all we can to assure each party that the jurors who will be selected to decide the case are able to be fair and impartial.”

“Please do not withhold information in order to be seated on the jury. Do not be concerned with whether your answers are “right” or “wrong”; this is not any sort of test. Just be honest and candid in your answers and do not be concerned with what you feel the lawyers or I might want to hear from you.”

“If your answer involves a confidential or sensitive matter, you may tell that answer to me, the attorneys and defendant in private. Just let me know that you wish to answer in private when I ask the question.”

“You must have the following qualifications to serve on the jury for this case:

- a. 18 years of age or over;
- b. a citizen of the United States;
- c. a resident of this (city/ town/precinct);
- d. mentally competent;
- e. not convicted of a felony unless your civil rights have been restored.”

“If any person does not have all of these qualifications, please raise your hand.”

[If no hands are raised] “The Court notes for the record that no one on the jury panel raised their hand as lacking any qualification.”

5. “Ladies and gentlemen, we know that jury service is an inconvenience to all of you to one extent or another. And you know how important it is to this community that persons such as yourselves be willing to serve on juries to decide cases like this one.”

“Jury duty is one of the most important civic duties that citizens of this country are called upon to perform. I know that you will not take this duty lightly.”

"I will ask a series of questions. If your answer to a question asked of the whole panel is "No", you need do nothing. If your answer to a question is "Yes", please raise your hand. When I call on you, please state your name. I may ask additional questions of you at that time or during individual voir dire."

If at any time you do not understand a question or if you do not hear it clearly, please raise your hand. When I call on you, please ask for clarification. I will try to speak louder or more clearly or I will reword the question so that you will understand. If you do not know whether your answer is yes or no, raise your hand and I will attempt to clarify it for you.

6. "The complaint in this case, in summary form, reads as follows: The State has alleged that, on _____ (date) at _____ (location) the defendant _____ (list or describe charge or charges). (Omit anything that is irrelevant or unfairly prejudicial such as, allegations of prior convictions and designation of offense (e.g., "a Class 1 Misdemeanor" etc.).
7. "Defendant has plead "Not Guilty" to this/these charge(s)."
8. Please understand that the law provides that a juror can be excused only if:²
 - a. The prospective juror has a mental or physical condition that causes the juror to be incapable of performing jury service; or
 - b. Service as a juror would substantially and materially affect the public interest or welfare in an adverse manner; or
 - c. The prospective juror is not currently capable of understanding the English language; or
 - d. Jury service would cause an undue or extreme physical or financial hardship for the juror or a person under the prospective juror's care or supervision; or
 - e. The prospective juror is a certified peace officer who is employed in that capacity in this state; or
 - f. The prospective juror was on a grand jury within the last four years; or
 - g. The prospective juror is at least 75 years of age.

² A.R.S. § 21-202.

9. "Let me tell you a bit about the schedule for the trial. This case is expected to take_____ (days). Daily schedule will be: [Trial days, hours, recesses]."

[If you see any hands, note the juror's name and pursue in individual voir dire.]

10. "I am going to ask three more questions. Again, if your answer to any question is affirmative, please raise your hand. You may request permission to communicate any matter of a sensitive nature in private."
- a. "Is there any juror who has a physical condition or illness that would make it difficult or impossible to sit through a trial of this length?"
 - b. "Is there any juror who does not have sufficient knowledge of the English language to understand a court trial?"
 - c. "Is there any juror who has a hearing or any other impairment or disability that would affect his/her ability to participate?"
 - d. "Is there anything about the trial schedule, your physical condition, or your financial condition that would cause you an undue or extreme hardship so that you would be unable to serve on this jury and be rescheduled for you to do your civic duty on another jury."

[If yes, pursue in individual voir dire.]

11. "On the easel are a series of questions I will ask each of you in turn to answer. Please stand and give us your name before you answer the questions." [Board should contain the following:]

- a. Name
- b. General area where you reside
- c. Occupation
- d. Marital Status
- e. Spouse or Partner's occupation
- f. Any prior jury service

"You do not have to give us your residential address. A general area where you reside is sufficient, for example, Northwest (name of city), or major cross streets near your home. Give us your occupation, and if you are retired or unemployed, tell us what you did while you were working. If you are a teacher or a student, please tell us what subject you teach or are studying. Tell us your marital status. Let us know your spouse or partner's occupation, and if retired or unemployed, tell us what he or she

did while working. If your spouse or partner is a teacher or a student, please tell us what subject he or she teaches or is studying. If you have served as a juror before tell us the type of case, criminal or civil, [the verdict in the case or the result³], if you recall.”

[Ask each juror in turn to answer the questions. If an easel is not used, use a checklist (or a handout) and find out from each juror basic background information, as deemed sufficient for the case. Have the easel put away.]

12. "The State is represented by _____, (Assistant City Prosecutor / Deputy County Attorney). Do any of you know (Name of Prosecutor), or any member of (his/her) office?"
[If yes, pursue in individual voir dire.]

"(Name of Prosecutor), will you please introduce the person seated with you."

"Thank you. Do any of you know (Officer) or any member of (Officer's agency)?"

[If yes, pursue in individual voir dire.] "Yes, (Name of Juror), which person do you think you know? How well do you know (him/her)? Would that affect your ability to be fair and impartial?"

"The Defendant is represented by _____, (a member of the firm of _____)."

[Find out before trial whether a Deputy Public Defender wants to be introduced as such.]⁴

"Do any of you know (Defense Counsel or any member of his/her office)?"

[If yes, pursue in individual voir dire.]

"(Name of Defense Counsel), will you please introduce your client.

[Defendant introduced.] Thank you. Do any of you know (Defendant) or anyone in (his/her) family?" [If yes, pursue in individual voir dire.]

³ Some judges have decided that asking the juror about the verdict is an improper question. Because of the differences in cases, it is irrelevant to the current case what a full jury did in another case. This question also penalizes previous jury service. Some judges are refusing to ask the question and prohibiting the lawyers from asking it.

⁴ If a Deputy Public Defender so requests, he or she can be introduced without mention of employment. Later in the voir dire, at Question 15, jurors can be asked whether they have any family or friends who are lawyers working for any governmental agency, including a Public Defender's office.

13. "I am now going to read a list of witnesses who may be called to testify during the trial. Some or all of these individuals may be called as witnesses. Please raise your hand if you know, or think you might know, any of these people."

[If hand raised:] "Yes, (Name of Juror), [pursue in individual voir dire] which witness do you think you know? How well do you know (him/her)? Would that affect your ability to be fair and impartial?"

14. "This may be an appropriate time for Mini-Opening Statements or for reading the approved statement of the case to the jury, if requested.

15. This is a criminal case. There are differences between criminal and civil cases.

- A civil case generally involves a dispute between private individuals, businesses and/or governmental entities. A criminal case always involves a charge that the defendant committed a criminal violation.
- In a civil case the plaintiff need only prove the case by a preponderance of the evidence. This is like weighing the evidence on a balance scale - there may be some evidence on both sides, but the "heavier" side wins, even if it is only slightly heavier.
- In a criminal case, the State must prove the defendant guilty **BEYOND A REASONABLE DOUBT** before the defendant may be convicted of the offense charged. This is a much heavier burden of proof. The term "beyond a reasonable doubt" will be explained more in detail to those of you who actually sit on the jury in the trial of the case.

Is there anyone who does not understand the difference between a criminal and civil case?

16. "At the beginning of the case I will give you some instructions as to the law, and at the end of the case before you go to deliberate, I will give you additional instructions as to the law. You may feel that the law as I read it to you may be too strict or too lenient, or you may feel that the law may be something other than what I read to you. Regardless of any personal opinion you may have as to what the law is, or what the law should be, you must follow my instructions as to the law as I give them to you."

"Do any of you feel that you could not follow my instructions as to the law if any particular instruction conflicted with some personal belief that you may have about what the law is, or what the law should be? I take it from your silence that all of you would follow my instructions as to the law as I would give them to you."

17. "The law requires the State to prove the Defendant guilty beyond a reasonable doubt. The Defendant is presumed by law to be innocent; this means that the Defendant is not required to prove innocence or to produce any evidence."

"Are there any of you who do not understand this principle of law, or who disagree with it?"

18. "Have any of you ever seen, heard or read anything about this case, any of the people involved or have any of you ever heard anyone express an opinion about it?" [If yes, pursue on individual voir dire].

19. "Is there anything about the nature of this case that would make it difficult for any of you to serve as a fair and impartial juror?" [If yes, pursue on individual voir dire].

19. "Have any of you, or any members of your family or close friends, ever served as a law enforcement officer?"

20. "Have any of you, or any members of your family, ever studied or practiced (law/medicine/other relevant area of expertise)?"

21. [Read this next sentence only if Defendant request it] "A Defendant in a criminal case has a right to not testify at trial, or produce evidence. If the Defendant exercises this right, it may not affect your deliberation in any way whatsoever."

"Are there any of you who do not understand this principle of law, or who disagree with it?"

22. "The fact a Defendant has been charged with an offense and is on trial today is not evidence of guilt. In fact, it is not evidence of any kind whatsoever."

"Do any of you disagree with this principle of our law?"

23. "In deciding the facts of the case, the jury will have to evaluate the testimony of the witnesses. Is there anyone who could not judge the testimony of each witness by the same standards? For example, is there anyone who is likely to give more or less weight to the testimony of a (law enforcement officer) than to the testimony of another witness, simply because one is employed as a (law enforcement officer) and one is not?"

24. [Read this next sentence only if requested] "One or more of the parties is (particular national or ethnic group). Will the race or heritage of a person affect you in any way evaluating the testimony of that person?"
25. "Have any of you ever been called to testify as a witness in a criminal case? In any case?" [If yes, pursue in individual voir dire.]
26. "Have you, or any members of your family or a close friend ever been the victim of a crime alleged here or any other crime?" [If yes, pursue in individual voir dire.]
27. "Have you, or any members of your family or close friends ever been investigated for, arrested, charged with, or convicted of any similar crime?" [If yes, pursue in individual voir dire.]
28. Do any of you know of any reason at all why you could not serve as a fair and impartial juror and decide this case without sympathy or prejudice to either side? [If yes, pursue in individual voir dire.]
29. Is there any incident that has occurred in your life that you feel the court and parties should know about, even though you feel it would not influence your judgment in this case? [If yes, pursue in individual voir dire.]

[At this point, ask specific questions about juror experience and background relevant to the case; i.e., alcohol use in a DUI-type case, etc.]
23. "If selected to sit on this case, would any of you be unable or unwilling to render a verdict solely on the evidence presented at trial?"
31. "Do any of you know other members of the jury panel?"

Jury Trial - Additional Voir Dire for D.U.I. Charges

1. "Is there anyone on the panel who does not drive an automobile?"
2. "Is there anyone on the panel who belongs to any organization whose purpose is to prohibit the sale or use of alcoholic beverages?" [If yes, pursue in individual voir dire.]
3. "Are you, any family member or a close friend a member or a contributor to the organizations known as M.A.D.D. or S.A.D.D.?" [If yes, pursue in individual voir dire.]

4. "It is not against the law of this State for a person to have a drink or drinks of an alcoholic beverage and then drive an automobile. Those two factors, standing alone, do not constitute a violation of the law. A driver is in violation of the law only if the alcohol consumed impairs the person to the slightest degree or exceeds certain levels. Do any of you believe that any person who drinks an alcoholic beverage and then drives an automobile has violated the law regardless of the effect on the driver or the quantity consumed?" [If yes, give standard explanation for DUI violation and ask if they can follow the law.]
5. "Do any of you have a strong moral objection to the use of alcoholic beverages, to the extent that you feel that you could not be fair and impartial in the trial of this case?" [If yes, pursue in individual voir dire.]
6. "Are there any of you who do not drink alcoholic beverages of any kind at any time?" [If yes, pursue in individual voir dire.]
7. "Do any of you consider yourselves, any member of your family or close friends to be an alcoholic or an alcoholic in recovery?" [If yes, pursue in individual voir dire.]
8. "Have any of you ever been employed to sell or serve alcoholic beverages?" [If yes, pursue in individual voir dire.]
9. "Do any of you have personal feelings about the charge of driving under the influence that might make it difficult for you to be completely fair and objective if you were to serve on the jury in this case?" [If yes, pursue in individual voir dire.]

Jury Trial – Conclusion of Voir Dire

1. "Ladies and gentlemen, sometimes I find that we get to the end of the questioning and jurors have thought about additional answers they might have to questions that were asked earlier in the voir dire. They then wonder if they should give the answers or not."

"If you have anything in mind now that you are wondering if you should tell me about, or you wish you had said something about earlier, please tell me now. There is no better time to do it than now." [If yes, pursue in individual voir dire.]
2. "Let me ask a last, very broad question: Is there anything else you think the attorneys or I should know about you before selecting those jurors who will serve in this case?" [If yes, pursue in individual voir dire.]

3. "Counsel, are there any further questions of the panel?"

[If "Yes":] "Counsel, please approach the bench."

[Hear and resolve any requests for additional questions or individual voir dire.]

4. "Ladies and gentlemen, we will now take a short recess to complete the process of jury selection. Each of you may be asked additional questions during individual voir dire."

"Please wait outside the courtroom during this recess and do not discuss or communicate about the case or anything connected with it among yourselves or with anyone else either directly or by any electronic means.

[Stay on bench while jurors leave courtroom. This preserves formality and it also gives counsel the opportunity to make any necessary record.]

5. [Examine individually any jurors who had answers that need clarification. Ask any follow up questions you deem necessary based on the individual juror's previous answers. Then give the prosecutor and defense attorney an opportunity to ask related follow up questions.]
6. [Resolve any challenges for cause regarding individual jurors. Confirm on the record that the attorneys for both parties pass the panel for cause.]
7. [Provide counsel with the jury list after striking through any jurors that have been excused or struck for any reason. Mark a line under the last qualified juror and allow the attorneys to exercise their strikes.]
8. After counsel has exercised peremptory strikes, make any Batson or other record outside the presence of the jurors.⁵ Then have the jurors brought back in to court.]

SEATING THE JURY AN PROCEEDING WITH THE TRIAL

⁵ The procedure below should be satisfactory for most Batson inquiries:

A) Party A makes a prima facie showing of purposeful discrimination by Party B in the exercise of a peremptory strike on a minority juror. A defendant satisfies Batson's first step requirements by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. (Any relevant circumstances can be alleged and considered.);

B) If the Court finds a prima facie showing has been made, it then requires Party B to articulate an explanation for the strike;

C) The Court then states an on-the-record finding. The finding is either a) that the explanation given by Party B is race-neutral and the strike is allowed; or, b) that Party A we has shown purposeful discrimination and the strike is disallowed.

- 1 [When taking the bench] "The record will reflect the presence of Defendant, counsel for both parties, and the members of the jury panel."

"Ladies and gentlemen, I will now read the names of those selected to serve as jurors for this case. As your name is called, please come forward and take the seat in the jury box that you are directed to."

[Judge reads names of trial jurors.]

- 2 [Directing attention to the jury] "The jury will please stand and be sworn."
[Judge administers the oath.]

Justice court: "Do you swear (or affirm) that you will give careful attention to the proceedings, abide by the Court's instructions, and render a verdict in accordance with the law and evidence presented to you, so help you God?"⁶

City/municipal court: "Do you swear (or affirm) that you will give careful attention to the proceedings, follow the court's instruction, including the admonition, and render a verdict in accordance with the law and evidence presented to you, so help you God?"⁷

"Thank you. Please be seated."

- 3 "For those of you who were not selected as jurors in this case, I want to thank you very much for your participation here today and for your willingness to serve on this jury. Thank you also for your time, attention and patience as we worked through the jury selection process. [Direct those not selected to return to the Jury Commissioner or Jury Room or dismiss them as needed, after consulting with the Jury Commissioner.]
- 4 Make sure that each juror has a packet of the Preliminary Jury Instructions, a notepad and a pen or pencil to take notes. Proceed by reading the preliminary instructions, including appropriate instructions on substantive law that apply to the offenses charged.

⁶ A.R.S. § 22-323

⁷ AZ.R.CR.P. 18.6

PRELIMINARY INSTRUCTIONS⁸

Importance of Jury Service⁹

Jury service is an important part of our system of justice, with a long and distinguished tradition in American law. From the beginning, American law has viewed the jury system as an effective means of drawing on the collective wisdom, experience, and fact-finding abilities of persons such as yourselves. While it may be an occasional inconvenience, or worse, jury service is an important responsibility for you, one, which I am sure, you will take seriously.

Duty of Jurors¹⁰

Ladies and Gentlemen:

Now that you have been sworn, I will briefly tell you something about your duties as jurors and give you some instructions. At the end of the trial I will give you more detailed instructions, and those instructions will control your deliberations.

It will be your duty to decide the facts. You must decide the facts only from the evidence produced in court. You must not speculate or guess about any fact. In deciding this case, you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. Race, color, religion, national ancestry, gender or sexual orientation should not influence you.

You will hear the evidence, decide the facts, and then apply the law I will give to you to those facts. That is how you will reach your verdict. In doing so you must follow that law whether you agree with it or not.

You must not take anything I may say or do during the trial as indicating any opinion about the facts. You, and you alone, are the judges of the facts.

Evidence¹¹

You will decide what the facts are from the evidence presented here in court. That evidence will consist of testimony of witnesses, any documents and other things received into evidence as exhibits, and any evidence stipulated to by the parties or that you are instructed to consider.

⁸ 2016 Preliminary Criminal Jury Instructions. Cite as RAJI (CRIMINAL) 4th

⁹ Preliminary Criminal 1

¹⁰ Preliminary Criminal 2

¹¹ Preliminary Criminal 3

[You may hear reference to exhibits that are not admitted and are not asked to be admitted. These exhibits are not admitted as evidence, but the information from them that is testified to by witnesses is evidence that you may consider.]

You will decide the credibility of the witnesses and weight to be given to any evidence presented in the case, whether it is direct evidence or circumstantial evidence.

Direct and Circumstantial Evidence¹²

Evidence may be direct or circumstantial. Direct evidence is a physical exhibit or the testimony of a witness who saw, heard, touched, smelled or otherwise actually perceived an event. Circumstantial evidence is the proof of a fact or facts from which the existence of another fact may be determined. The law makes no distinction between direct and circumstantial evidence. You must determine the weight to be given to all the evidence without regard to whether it is direct or circumstantial.

Stipulations¹³

During the trial, the lawyers are permitted to stipulate that certain evidence exists. This means both sides agree that evidence exists and is to be considered by you during your deliberations at the conclusion of the trial.

Evidence, Statements of Lawyers and Rulings¹⁴

As I mentioned earlier, it is your job to decide from the evidence what the facts are. Here are six rules on what is and what is not evidence:

1. Evidence to be considered: You must determine the facts only from the testimony of witnesses and from exhibits admitted in evidence. Anything you may see or hear when the court is not in session, even if what you see or hear is done or said by one of the parties or by one of the witnesses, is not evidence and must not be considered by you. If you should hear or see anything pertaining to the case outside the courtroom or if anyone should attempt to speak to you about this case outside the courtroom, please report to me as soon as you can.

2. Lawyers' statements: Statements or arguments made by the lawyers in the case are not evidence. Their purpose is to help you understand the evidence and law.

¹² Preliminary Criminal 4

¹³ Preliminary Criminal 5

¹⁴ Preliminary Criminal 6

3. Questions to a witness: A question is not evidence. A question can only be used to give meaning to a witness' answer.

4. Objections to questions: If a lawyer objects to a question and I do not allow the witness to answer, you must not try to guess what the answer might have been. You must also not try to guess the reason why the lawyer objected in the first place.

5. Rejected evidence: At times during the trial, evidence may be offered that I do not admit as evidence. When evidence is not admitted, you must not consider it for any purpose.

6. Stricken evidence: At times I may order some evidence to be stricken from the record. Then it is no longer evidence and you must not consider it for any purpose.

Rulings of the Court¹⁵

Admission of evidence in court is governed by rules of law. I will apply those rules and resolve any issues that arise during the trial concerning the admission of evidence.

If an objection to a question is sustained, you must disregard the question and you must not guess what the answer to the question might have been. If an exhibit is offered into evidence and an objection to it is sustained, you must not consider that exhibit as evidence. If testimony is ordered stricken from the record, you must not consider that testimony for any purpose.

Do not concern yourselves with the reasons for my rulings on the admission of evidence. Do not regard those rulings as any indication from me of the credibility of the witnesses or the weight you should give to any evidence that has been admitted.

Exclusion of Witnesses¹⁶ [IF the Exclusionary Rule is invoked]

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

The lawyers are directed to inform all their witnesses of these rules and to remind them of their obligations from time to time, as may be necessary. The

¹⁵ Preliminary Criminal 7

¹⁶ Preliminary Criminal 8

parties and their lawyers should keep a careful lookout to prevent any potential witness from remaining in the courtroom if they accidentally enter.

Bench Conferences and Recesses¹⁷

From time to time during the trial, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error. We will, of course, do what we can to keep the number and length of these conferences to a minimum. I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be. Please do not be concerned with what we are discussing at any bench conference we may have. Please respect the privacy of those participating in the bench conference in order to maintain the fairness of the trial.

Credibility of Witnesses¹⁸

In deciding the facts of this case, you should consider what testimony to accept, and what to reject. You may accept everything a witness says, or part of it, or none of it.

In evaluating testimony, you should use the tests for accuracy and truthfulness that people use in determining matters of importance in everyday life, including such factors as: the witness's ability to see or hear or know the things the witness testified to; the quality of the witness's memory; the witness's manner while testifying; whether the witness has any motive, bias, or prejudice; whether the witness is contradicted by anything the witness said or wrote before trial, or by other evidence; and the reasonableness of the witness's testimony when considered in the light of the other evidence.

Consider all of the evidence in light of reason, common sense, and experience.

Expert Witness¹⁹

A witness qualified as an expert by education or experience may state opinions on matters in that witness's field of expertise, and may also state reasons for those opinions.

Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept it or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness's qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.

¹⁷ Preliminary Criminal 9

¹⁸ Preliminary Criminal 10

¹⁹ Preliminary Criminal 11

Constitutional Right Not to Testify²⁰

A defendant in a criminal case has a constitutional right to not testify at trial, and the exercise of that right cannot be considered by the jury in determining whether a defendant is guilty or not guilty.

Presumption of Innocence and Burden of Proof²¹

The State has charged the defendant with a crime. The charge is not evidence against the defendant. You must not think the defendant is guilty just because the defendant has been charged with a crime. The defendant has pled “not guilty.” The defendant’s plea of “not guilty” means that the State must prove every part of the charge beyond a reasonable doubt.

The law does not require a defendant to prove innocence. Every defendant is presumed by law to be innocent.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the State’s proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you must give him/her the benefit of the doubt and find him/her not guilty.

In deciding whether the defendant is guilty or not guilty, do not consider the possible punishment.

The Charged Offense²²

To assist you in considering the evidence that will be presented during the trial, I will now tell you about the crime[s] with which the defendant is charged. The defendant is charged with [“insert name of crime[s]”], which crime[s] require[s] proof of the following:

[Set out the elements of the charged crime or crimes along with any definitions that may prove useful to the jury during presentation of the evidence.]

The defendant has pled “not guilty” to [this charge] [these charges]. The State must prove each element of the charged crime beyond a reasonable doubt. I will give you more details and definitions about the alleged crime in the final jury instructions.

Order of Trial²³

²⁰ Preliminary Criminal 18

²¹ Preliminary Criminal 20

²² Preliminary Criminal 22

²³ Preliminary Criminal 24

Criminal trials generally proceed in the following order:

First, the prosecuting attorney will make an opening statement giving a preview of the case. The defendant's attorney may make an opening statement outlining the defense case immediately after the prosecutor's statement, or it may be postponed until after the State's case has been presented. What is said in opening statements is not evidence. Nor is it an argument. The purpose of an opening statement is to help you prepare for anticipated evidence.

Second, the State will present its evidence. After the State finishes the presentation of its evidence, the defendant may present evidence. If the defendant does produce evidence, the State may present additional, or rebuttal, evidence. With each witness, there is a direct examination, a cross-examination by the opposing side, and, finally, redirect examination. This usually ends the testimony of that witness.

Third, after all the evidence is in, I will read and give you copies of the final instructions, the rules of law you must follow in reaching your verdict.

[Fourth, the attorneys will make closing arguments to tell you what they think the evidence shows and how they think you should decide the case. The State has the right to open and close the argument since the State has the burden of proof. Just as in opening statements, what is said in closing arguments is not evidence.]

[Fourth, the attorneys will make closing arguments to tell you what they think the evidence shows and how they think you should decide the case. The State has the right to open the argument, but if the defendant presents an affirmative defense, the defendant may be allowed to close the argument because the defendant has the burden of proof on the affirmative defense. If no affirmative defense is presented, the State has the right to close the argument. Just as in opening statements, what is said in closing arguments is not evidence.]

Fifth, you will deliberate in the jury room about the evidence and rules of law in an effort to reach the verdict[s]. If you unanimously agree upon the verdict[s], [it] [they] will be read in court with you and the parties present.

Finally, you will be discharged and released from the Admonition. The rules of law I have shared with you in the past few minutes are preliminary only. At the end of the case I will read to you and give you a copy of the final instructions of law. In deciding the case you must be guided by the final instructions.

Scheduling During Trial²⁴

The trial is expected to last through _____. We will all do our best to move the case along, but delays frequently occur. These won't be anyone's fault, so don't hold them against the parties. Delays usually occur because the attorneys

²⁴ Preliminary Criminal 23

and I often need to resolve certain legal matters before these matters may be presented to you in court or because I am busy with matters in other cases.

The usual hours of trial will be from _____ to _____. We will take short recesses about every mid-morning and mid-afternoon and occasionally stretch breaks in place. We will recess at _____ and begin again at _____. Unless a different starting time is announced prior to recessing for the evening, you may assume a starting time of _____ for the next day. At the beginning of the day, please assemble in the jury room for this division. Please do not come back into the courtroom until you are called by the bailiff.

No Transcript Available to Jury; Taking Notes²⁵

At the end of the trial you will have to make your decision based on what you recall of the evidence. You will not be given a written transcript of any testimony; you should pay close attention to the testimony as it is given.

You have been provided with note pads and pens. The court encourages you to take notes during the trial if you wish to do so. Do not let note taking distract you so that you miss hearing or seeing other testimony. You may use your notes during your deliberations at the end of the trial. Until then, keep your notes to yourself. During recesses in the trial, you may leave your notes on your seat. Your notes are confidential and my bailiff will guard them. No one will be allowed to read your notes. Whether you take notes or not, you should rely upon your own memory of what was said and not be overly influenced by the notes of other jurors. After you have rendered your verdict, the bailiff will collect your notes and destroy them.

Do not be influenced at all by my taking notes at times. What I write down may have nothing to do with what you will be concerned with at this trial.

Questions by Jurors²⁶

If at any time during the trial you have difficulty hearing or seeing something that you should be hearing or seeing, or if you get into personal distress for any reason, raise your hand and let me know.

If you have any questions about parking, restaurants, or other matters relating to jury service, feel free to ask one of the court staff. But remember that the Admonition applies to court staff, as it does to everyone else, so do not try to discuss the case with court staff.

If you have a question about the case for a witness or for me, write it down, but do not sign it. Hand the question to the bailiff. If your question is for a witness who is about to leave the witness stand, please signal the bailiff or me before the witness leaves the stand.

The lawyers and I will discuss the question. The rules of evidence or other rules of law may prevent some questions from being asked. If the rules permit the question and the answer is available, an answer will be given at the earliest opportunity. When we do not ask a question, it is no reflection on the person submitting it. You should attach no significance to the failure to ask a question. I will

²⁵Preliminary Criminal 12

²⁶ Preliminary Criminal 16

apply the same legal standards to your questions as I do to the questions asked by the lawyers. If a particular question is not asked, please do not guess why or what the answer might have been.

Admonition²⁷

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

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

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

Do not talk to anyone about the case, or about anyone who has anything to do with it, and do not let anyone talk to you about those matters, until the trial has ended, and you have been discharged as jurors. This prohibition about not discussing the case includes using email, Facebook, Twitter, instant messaging, iPhones, Google, Yahoo, or any internet search engine, or any other form of electronic communication for any purpose whatsoever, if it relates in any way to this case. This includes, but is not limited to, blogging about the case or your experience as a juror on this case, discussing the evidence, the lawyers, the parties, the court, your deliberations, your reactions to testimony or exhibits or any aspect of the case or your courtroom experience with anyone whatsoever, until the trial has ended, and you have been discharged as jurors. Until then, you may tell people you are on a jury, and you may tell them the estimated schedule for the trial, but do not tell them anything else except to say that you cannot talk about the trial until it is over.

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

If you have cell phones, laptops or other communication devices, please turn them off and do not turn them on while in the courtroom. You may use them only during breaks, so long as you do not use them to communicate about any matter having to do with the case. You are not permitted to take notes with laptops, tape recorders or any other electronic device. You are only permitted to take notes on

²⁷ Preliminary Criminal 13

the notepad provided by the court. Devices that can take pictures are prohibited and may not be used for any purpose.

It is your duty not to speak with or permit yourselves to be addressed by any person on any subject connected with the trial. If someone should try to talk to you about the case, stop him or her or walk away. If you should overhear others talking about the case, stop them or walk away. If anything like this does happen, report it to me or any member of my staff [insert phone number] as soon as you can. To avoid even the appearance of improper conduct, do not talk to any of the parties, the lawyers, the witnesses or media representatives about anything until the case is over, even if your conversation with them has nothing to do with the case. For example, you might pass an attorney in the hall, and ask what good restaurants there are downtown, and somebody from a distance may think you are talking about the case. So, again, please avoid even the appearance of improper conduct.

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

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

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

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

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

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

Special Instructions²⁸: [If there are any special Preliminary Instructions that will be given in the case, you will have to determine where, in the course of preliminary instructions, is the most appropriate place to insert them.]

Conclusion to Preliminary Instructions:

"The rules of law I have shared with you in the past few minutes are preliminary only. At the end of the case I will read to you and give you a copy of the final instructions of law. In deciding the case you must be guided by the final instructions."

First Evening Recess Admonition:

"Members of the jury, you are reminded of the Admonition not to talk about the case with anyone and not to let anyone talk to you about the case; this includes family members and friends."

"You may certainly advise people at home and at work that you are on a jury. You can tell them about the expected length and schedule for the trial. But beyond those scheduling matters tell people that you cannot say anything more about the case or your jury service until after the trial. When the trial is over and you have been excused as a juror, you will then be free to discuss the case and your experiences as a juror."

"Please be back in/at the jury room at _____ time on -----day."

[You will have to decide whether you want the jurors to come into the courtroom on their own or to assemble at some other location (e.g., jury room, hallway outside courtroom). Give the jurors specific instructions about where they should gather.

Other Recess Admonition:

"We will now take the (morning/noon/afternoon) recess."

"Please remember the Admonition. Don't talk to anyone about the case; don't let anyone talk to you about it. Keep an open mind about the case."

"Please be back [designated location] at _____."

After each Recess:

²⁸ There are additional Preliminary Criminal Revised Arizona Jury Instructions That apply to specific circumstances. They are: Preliminary Criminal Instruction 14, Media Coverage; Preliminary Criminal Instruction 15, Presence of a Deputy; Preliminary Criminal Instruction 17, Alternate Jurors Preliminary Criminal Instruction 19, Statements of Defendant; Preliminary Criminal Instruction 21 [Short Version] Jury to be Guided by Official English Translation/Interpretation; Criminal Instruction 21 [Long Version] Jury to be Guided by Official English Translation/Interpretation; Criminal Instruction 21.1 Interpreter for Defendant; Criminal Instruction 21.2 Citizenship/Nationality Instruction.

"The record will show the presence of Defendant, counsel for both parties and the jury."

OPENING STATEMENTS

At this time, the lawyers will be permitted to make their Opening Statement. Again, what the lawyers say in their Opening Statements is not evidence. It is simply an outline of what the lawyer thinks the evidence will be, and is offered to help you understand and follow the evidence during the trial.

"(Name of Prosecutor), are you ready to proceed?"

"(Name of Defense Counsel), are you ready to proceed?"

"Does the State wish to make an opening statement?"

"Does the defense wish to make an opening statement now or reserve that statement until the close of the State's case?"

"The State may proceed."

Witness oath: Do you swear or affirm to tell the truth and nothing but the truth so help you God?

The State puts on its case.

RULE 20 Motion

AZ.R.CR. P. 20(a)(1) **Before Verdict.** "After the close of evidence on either side, and on motion or on its own, the court must enter a judgment of acquittal on any offense charged in an indictment, information, or complaint if there is no substantial evidence to support a conviction." See also AZ.R.CR. P. 20(a)(3), "The court must rule on a defendant's motion with all possible speed. Until the motion is decided, the defense is not required to proceed." [The motion, argument and ruling should all be done outside the presence of the jury.]

"The Defense may proceed."

After the Defense rests "Does the State have anything in rebuttal?"

After the Defense rests, or rebuttal if any is presented, take a recess to settle jury instructions and forms of verdict. Allow counsel to make record concerning jury instructions or forms of verdict.

1. [If, in the judge's discretion, instructions are to be given **before final argument**, read the final instructions to the jury at this point.]²⁹ "Do counsel have any additions or corrections to the instructions as read?"

[if "Yes":] "Will counsel approach the bench, please."

[Closing Arguments]

"This is time for final arguments. The State may proceed"

"Defense, you may proceed with your closing argument."

"State, your final argument."

[NOTE – if the defendant presented an affirmative defense, the defense gets the final word.

2. If instructions are given **after closing argument** read the final instructions to the jury at this point and after instructing the jury:] "Do counsel have any additions or corrections to the instructions as read?"
3. [After instructing the jury.] "Do counsel have any additions or corrections to the instructions as read?"

[if "Yes":] "Will counsel approach the bench, please."

FORMS OF VERDICT

"Excluding the formal portions of the verdict forms, they read as follows:

[Read each verdict form.]

EXCUSING ALTERNATE JURORS³⁰

If an alternate has been included on the jury, conduct a drawing to determine which juror is alternate. Once the alternate is selected, address the juror by name or juror number and instruct the alternate.

"(Name of Alternate Juror), you have been drawn by lot as an alternate juror. While you are physically excused from your service as a juror at this time, there remains a possibility you may be called back to court to deliberate should one of the other jurors be unable to do so. The bailiff will retain your notes [and notebooks] for your use if you are called back. The Admonition continues to apply to you. Please do not discuss this case with anyone or let anyone talk to you about it until someone from my office notifies you a verdict has been reached."

²⁹ "The court, at its election, may instruct the jury before or after argument, or both. . . ." AZ.R.C.P. 51(a), AZ.R.CR.P. 19.1(a). The judge may choose to give the substantive instructions prior to closing argument and the 'housekeeping' instructions after closing argument, to lessen the impact of having final closing argument.

³⁰ See AZ.R.CR.P. 18.5(h).

SWEARING THE BAILIFF

"The Judge will now swear in the Bailiff." [Bailiff is sworn.]

"Do you (affirm/swear) that you will take charge of this jury and direct them to a private room to deliberate and that you will not allow anyone to communicate with them concerning this case nor will you communicate with them except to ask if they have agreed upon a verdict?"

"Members of the jury, you may now go to the jury room and deliberate. Take your notes [and notebooks] as well as your Final Jury Instructions with you. You will also have any exhibits that were admitted into evidence in the deliberation room with you."

ANNOUNCEMENTS OF EVENING RECESS DURING DELIBERATIONS

Advance Announcement

"Members of the jury, if you do not have a verdict at or near ____ p.m. today, you may recess at that time and return at a.m. on ____ (next trial day)."

"When you return, do not begin deliberating until all jurors are present. and you are in the jury deliberation room together."

"Please remember the Admonition during the recess. Don't talk to anyone about the case; don't let anyone talk to you about it. Keep an open mind about the case."

Regular Announcement

[Jury is called back into court. Counsel and Defendant are either present or have waived presence. Court announces evening recess and gives jury directions on when to return, as in "Advance Announcement", above.]

QUESTIONS FROM THE JURY DURING DELIBERATIONS

All questions from jurors should be in writing. All responses should also be in writing. No response should be given without consulting with counsel for both parties and a record being made. The most common response is "You must base your decision on the evidence and instructions presented to you." Keep all notes from the jury in the court file.

IMPASSE IN JURY DELIBERATIONS³¹

"My bailiff tells me you are at a deadlock in your deliberations. I have some suggestions to help your deliberations, not to force you to reach a verdict. I am merely trying to be responsive to your apparent need for help. I do not wish nor intend to force a verdict. Each juror has a duty to consult with one another, to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment. No juror should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors or for the purpose of reaching a verdict."

"However, you may want to identify areas of agreement and disagreement and discuss the law and the evidence as they relate to the areas of disagreement."

"If you still disagree, you may wish to tell the attorneys and me which issues, questions, law or facts you would like us to assist you with. If you decide to follow this suggestion, please write down the issues, questions, law or facts on which we can possibly help. Please give your note to the bailiff. We will then discuss your note and try to help."

[If it appears that the jurors are at an impasse, declare a mistrial - or have the jury continue to deliberate - depending on the response received and demeanor of the Presiding Juror (and other jurors) and your own evaluation of the situation.]

DISCHARGE OF HUNG JURY

"Members of the jury, I'm sure you are disappointed that you were unable to reach a verdict, but don't feel badly about it. In some cases, the issues are more difficult to decide than others. It is not altogether surprising, therefore, that some jurors had an honest difference of opinion regarding the verdict in this case."

"On behalf of all the participants in the trial I want to thank you for your service to the parties and to the community."

[Add other comments, as appropriate for the case.]

"The Admonition is now lifted. You are free to talk about the case with anyone or not talk about it, as you wish. If someone asks you about the case and you don't want to talk about it, just advise them of that fact and they will honor your request."

³¹ RAJI (Civil) 3d Standard 15; AZ.R.CR.P. 39(h); also AZ.R.CR.P. 22.4 comment. This instruction should not be routinely given but should only be used if the jury indicates it is at an impasse. See also State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (App. 1996).

The options for helping the jury identified in the Comment to AZ.R.CR.P. 22.4 include giving additional instruction, clarifying earlier instructions, directing the attorneys to give additional closing argument, reopening the evidence for limited purposes, or a combination of these measures. The list is not exclusive.

"Please leave with us your juror badges and your notebooks. The Bailiff will destroy your notes, but the badges and the books will be used in other cases."

"Thank you once again. Your jury service is now completed and you are excused."

VERDICT

1. All parties and counsel should be in the courtroom unless presence has been waived on the record.
2. "The record may show the presence of Defendant, counsel for both parties and the jury.

"Who is the foreperson? Has the jury reached a verdict, (Name of Presiding Juror)?"

[if "Yes":] "Please hand all verdict forms to the Bailiff."

[Bailiff hands all verdict forms to Judge. Judge reviews the forms silently.]

The Judge will read and record the verdict or ask the bailiff to do so.
[This should be determined between judge and bailiff in advance.]

[Judge or bailiff reads verdict.]

3. POLL OF JURY: "Does counsel wish to poll the jury?"³²

[If "Yes":] "Members of the jury, you will each be asked a question. Please answer it "Yes" or "No"."

[Judge asks each juror, for each count:] "(Juror # ____), is this your true verdict?" Do not use Juror's name when polling jury.

[If all jurors answer yes, proceed to discharge the jury.]

[If any juror answers no, the court may direct them to retire for further deliberations or the jury may be discharged. AZ.R.CR.P. 23.4

DISCHARGE OF JURY

(To be given at conclusion of all proceedings.)

"Members of the jury, on behalf of all the participants in the trial I want to thank you for your service to our community." [Add other comments, as appropriate for the case.]

³² The jury " the court must poll the jury at the request of any party or on the court's own initiative." AZ.R.CR.P. 23.3

"The Admonition is now lifted. You are free to talk about the case with anyone or not talk about it, as you wish. If someone asks you about the case and you don't want to talk about it, just advise them of that fact and they will honor your request. Please leave with us your juror badges (if reusable) and your notebooks. The bailiff will destroy your notes, but the badges and the books will be used in other cases. Thank you once again. Your jury service is now completed and you are excused."

Guilty: "Ask the parties if they are ready to proceed with sentencing and if they are proceed with the sentence, OR, If the court is not ready to proceed with the sentencing, or either parties requests a sentencing date, then set a sentencing date within 30 days and affirm release conditions."

"Sentencing is set for _____ at ____ o'clock __am/pm."

Release conditions are affirmed.

[or]

[Proceed with sentencing.]³³

Not Guilty: "Judgment of Acquittal is entered."

[If applicable,] Defendant is released from custody on this case.

Any bond is exonerated.

Don't forget to rule on any outstanding civil charges or charges for which the defendant is not entitled to a jury trial.

If the Defendant is found guilty and/or responsible – ADVISE DEFENDANT OF APPEAL RIGHTS.

TRIAL OF PRIOR CONVICTION

Trial of a prior conviction shall be heard by the court.

[Allegation read and Denial stated]

[Opening Statement, Evidence, Argument]

To prove the allegation of prior conviction, the State must prove that:

³³ In limited jurisdiction courts, sentence may be pronounced immediately or set within 30 days on court motion or request of either party. AZ.R.CR.P. 26.3(a)(2)

1. The prior conviction exists;
2. Defendant is the person who was convicted; and,
3. Defendant was represented by counsel [or waived representation by counsel] at the time of receiving the prior conviction.

The State has the burden of proving each of these three elements by clear and convincing evidence³⁴

If the State proves each of the elements by clear and convincing evidence then enter a finding that the allegation of prior conviction is true.

³⁴ State v. Cons, 208 Ariz. 409, 94 P3d 609 (App, 2004).

STANDARD CRIMINAL JURY INSTRUCTIONS

There are 54 numbered Standard Jury Instructions, along with three subsections, in the 2016 Revised Arizona Jury Instructions – Standard Criminal Instructions. (Cited as RAJI (CRIMINAL) 4th, 2018 Updates). The following instructions are those most commonly used in criminal cases. The less commonly used Standard Criminal Jury Instructions are fact specific.¹ They are available in their entirety at the Arizona State Bar webpage.

Duty of Jury²

It is your duty as a juror to decide this case by applying these jury instructions to the facts as you determine them. You must follow these jury instructions. They are the rules you should use to decide this case.

It is your duty to determine what the facts are in the case by determining what actually happened. Determine the facts only from the evidence produced in court. When I say “evidence,” I mean the testimony of witnesses and the exhibits introduced in court. You should not guess about any fact. You must not be influenced by sympathy or prejudice. You must not be concerned with any opinion that you feel I have about the facts. You, as jurors, are the sole judges of what happened.

You must consider all these instructions. Do not pick out one instruction, or part of one, and ignore the others. As you determine the facts, however, you may find that some instructions no longer apply. You must then consider the instructions that do apply, together with the facts as you have determined them.

¹ Standard Criminal 5b(2) -Standards for the Burden of Proof (three standards); Standard Criminal 6 - Voluntariness of Defendant's Statements; Standard Criminal 8 - Character and Reputation of the Defendant; Standard Criminal 9 - Flight or Concealment; Standard Criminal 10 - Lost, Destroyed, or Unpreserved Evidence; Standard Criminal 11 - Multiple Acts; Standard Criminal 12 - Absence of Other Participant; Standard Criminal 13 - Entrapment (Deleted; Replaced by Statutory Criminal 2.026); Standard Criminal 14 - Threats by Defendant; Standard Criminal 17 - Voluntary Act; Standard Criminal 19 - Defendant Witness (Prior Conviction) Standard Criminal 20 - Witness (Prior Conviction); Standard Criminal 22 - Lesser-Included Offense; Standard Criminal 26A - Other Acts; Standard Criminal 26B - Character Evidence in Sexual Misconduct Cases; Standard Criminal 31 - Mere Presence; Standard Criminal 32 - Consider Evidence Separately; Standard Criminal 33 - Defendant Absent at Trial; Standard Criminal 37 - Possession Defined; Standard Criminal 38 – Motive; Standard Criminal 39 – Identification; Standard Criminal 40 - Deliberate Ignorance; Standard Criminal 41 - Involuntary Intoxication; Standard Criminal 42 - Impasse Instruction; Standard Criminal 43 - Alibi or Non-Presence of the Defendant; Standard Criminal 44- Defendant's Right to Represent Himself/Herself; Standard Criminal 45 - Reconstituting the Jury; Standard Criminal 47 - Evidence for Limited Purpose; Standard Criminal 48 - Dismissal/Severance of Some Charges Against Defendant; Standard Criminal 49 - Disposition of Charge Against Defendant; Standard Criminal 50 - Reduced Exhibits; Standard Criminal 51 - Judicial Notice of Adjudicative Facts; Standard Criminal 53 - Jury Polling.

² Standard Criminal 1

Lawyers' Comments Are Not Evidence³

In their opening statements and closing arguments, the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence, but it may help you to understand the law and the evidence.

Stipulations⁴

The lawyers are permitted to stipulate that certain facts exist. This means that both sides agree those facts do exist and are part of the evidence. You are to treat a stipulation as any other evidence. You are free to accept it or reject it, in whole or in part, just as any other evidence.

Evidence to Be Considered⁵

You are to determine what the facts in the case are from the evidence produced in court. If an objection to a question was sustained, you must disregard the question and you must not guess what the answer to the question might have been. If an exhibit was offered into evidence and an objection to it was sustained, you must not consider that exhibit as evidence. If testimony was ordered stricken from the record, you must not consider that testimony for any purpose.”

Presumption of Innocence⁶

The law does not require a defendant to prove innocence. Every defendant is presumed by law to be innocent. You must start with the presumption that the defendant is innocent.

Burden of Proof⁷

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This means the State must prove each element of each charge beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute

³ Standard Criminal 2

⁴ Standard Criminal 3

⁵ Standard Criminal 4

⁶ Standard Criminal 5a

⁷ Standard Criminal 5b(1)

certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find [him][her] guilty. If, on the other hand, you think there is a real possibility that [he][she] is not guilty, you must give [him][her] the benefit of the doubt and find [him][her] not guilty.

[Standard Criminal Instruction 5b(2) defines these other standards for the jurors.]

Jury Not to Consider Penalty⁸

You must decide whether the defendant is guilty or not guilty by determining what the facts in the case are and applying these jury instructions.

You must not consider the possible punishment when deciding on guilt; punishment is left to the judge.

Defendant Need Not Testify⁹

The State must prove guilt beyond a reasonable doubt based on the evidence. You must not conclude that the defendant is likely to be guilty because the defendant did not testify. The defendant is not required to testify. The decision on whether or not to testify is left to the defendant acting with the advice of an attorney. You must not let this choice affect your deliberations in any way.

Evidence of Any Kind¹⁰

The State must prove guilt beyond a reasonable doubt based on the evidence. The defendant is not required to produce evidence of any kind. The defendant's decision not to produce any evidence is not evidence of guilt.

Credibility [Believability] of Witnesses¹¹

In deciding the facts of this case, you should consider what testimony to accept, and what to reject. You may accept everything a witness says, or part of it, or none of it.

In evaluating testimony, you should use the tests for truthfulness that people use in determining matters of importance in everyday life, including such factors as: the witness's ability to see or hear or know the things the witness testified to; the quality of the witness's memory; the witness's manner while testifying; whether the witness had any motive, bias, or prejudice; whether the witness was contradicted by anything the

⁸ Standard Criminal 7

⁹ Standard Criminal 15

¹⁰ Standard Criminal 16

¹¹ Standard Criminal 18

witness said or wrote before trial, or by other evidence; and the reasonableness of the witness's testimony when considered in the light of the other evidence.

Consider all of the evidence in the light of reason, common sense, and experience.

Indictment/Information [Charge] Is Not Evidence¹²

The State has charged the defendant with [a crime] [certain crimes]. A charge is not evidence against the defendant. You must not think that the defendant is guilty just because of a charge. The defendant has pled "not guilty."

This plea of "not guilty" means that the State must prove each element of the charge[s] beyond a reasonable doubt.

Direct and Circumstantial Evidence¹³

Evidence may be direct or circumstantial. Direct evidence is the testimony of a witness who saw, heard, or otherwise sensed an event. Circumstantial evidence is the proof of a fact or facts from which you may find another fact. The law makes no distinction between direct and circumstantial evidence. It is for you to determine the importance to be given to the evidence, regardless of whether it is direct or circumstantial.

Expert Witness¹⁴

A witness qualified as an expert by education or experience may state opinions on matters in that witness's field of expertise, and may also state reasons for those opinions.

Expert opinion testimony should be judged just as any other testimony. You are not bound by it. You may accept it or reject it, in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness's qualifications and experience, the reasons given for the opinions, and all the other evidence in the case.

Testimony of Law Enforcement Officers¹⁵

The testimony of a law enforcement officer is not entitled to any greater or lesser importance or believability merely because of the fact that the witness is a law

¹² Standard Criminal 21

¹³ Standard Criminal 24

¹⁴ Standard Criminal 25

¹⁵ Standard Criminal 34

enforcement officer. You are to consider the testimony of a police officer just as you would the testimony of any other witness.

Separate Counts¹⁶

Each count charges a separate and distinct offense. You must decide each count separately on the evidence with the law applicable to it, uninfluenced by your decision on any other count. You may find that the State has proved beyond a reasonable doubt, all, some, or none of the charged offenses. Your finding for each count must be stated in a separate verdict.

Defendant's Testimony¹⁷

You must evaluate the defendant's testimony the same as any witness' testimony.

Closing Instruction¹⁸

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

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

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

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

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

¹⁶ Standard Criminal 35

¹⁷ Standard Criminal 36

¹⁸ Standard Criminal 46

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

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

All [six]¹⁹ of you must agree on [the] [each] verdict. You must be unanimous. Once all [six] agree on a verdict, only the Foreperson need sign the verdict form on the line marked "Foreperson."

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

Jury Foreperson²⁰

The case is now submitted to you for decision. When you go to the jury room you will choose a foreperson.

The role of jury foreperson is important, but please remember that the foreperson's opinion about the case is not more important than that of the other jurors. The opinions of each juror count equally.

The jury foreperson's responsibilities include the following:

1. Make sure every member of the jury is present during all discussions and deliberations.
2. Make sure that the deliberations are conducted respectfully and that all issues are fully discussed. The discussions should be open and free so that every juror may participate.
3. All jurors should be allowed to state their views about the case and what they think the verdict should be and why.
4. All members must agree unanimously on any verdict. Therefore, the foreperson should count the votes to ensure that every juror has voted.
5. If you reach a verdict [verdicts], fill out the verdict form[s] and then sign the form on behalf of the jury.

¹⁹ NOTE – For misdemeanor charges, SIX jurors are required to deliberate.

²⁰ Standard Criminal 52

6. If the jury reaches a verdict, the foreperson will inform the bailiff. When the jury returns to the courtroom, the foreperson will bring the signed or unsigned verdict form[s] as well as any question forms that may have been used.

7. When you return to the courtroom, the court will ask the foreperson whether the jury has reached any verdict. The foreperson will respond “yes” or “no.” The foreperson is not expected to read any verdict to the court; that will be done by the clerk [or judge].

PRO PER DEFENDANT PLEA PROCEEDING

In Limited Jurisdiction Courts the defendant may enter a guilty plea to the court at the time of arraignment or may enter a plea agreement after conferring with a prosecutor.

The Arraignment proceeding is covered in Chapter 9.

CHECKLIST

Make sure to record the proceedings. AZ.R.CR.P. 17.1(d).

Give a “General Advisement” when all defendants are present at the start of the proceedings, so that you can reference it with each defendant. As part of the General Advisement, read the A.R.S. §13-4438 Victim Advisement.

Read the AZ.R.CR.P. 17.2(f) Immigration Advisement. The Defendant is **not** required to disclose his or her legal status in the United States to the court. AZ.R.CR.P. 17.2(f). You must read the immigration advisement to every defendant.

Advise Defendants of the constitutional rights they would give up by pleading guilty or no contest.

It is not mandated, but consider reading the waiver of counsel form so that defendants will understand how important it may be to have an attorney in their case.¹

The State has a right to be present at all changes of plea. But in many Limited Jurisdiction Courts, the State waives their right to be present at arraignments. The judge may accept a plea to the court at arraignment. But if Defendant is entering a plea to the court at the PTC setting, it would be appropriate to allow the State should be heard as to sentencing.

The State should be involved in any change of plea proceeding to a crime that involves a victim to assure that victim rights have been complied with.

NOTE: Address the Defendant personally – AZ.R.CR.P. 17.2

- ____ 1. Have the Defendant state full, true name and match the name given to the name given at initial appearance. – AZ.R.CR.P. 4.2(a)(1)
 - a) If there is a match – Proceed to 2. below.
 - b) If there is not a match – Do whatever is necessary to match the correct Defendant to the case.

¹ A general advisement should explain what happens at arraignment and would be a good opportunity to explain the difference between civil and criminal traffic violations, the consequences of not paying court fines, as well as the consequences for not appearing at future hearings that may be set.

- ____ 2. Determine the capacity and competency of the Defendant by asking if Defendant understands spoken and written English language.
- a) If YES - Proceed to c. below.
 - b) If NO - Make sure the Defendant has a proper interpreter either in person or through Language Line Services (www.languageLine.com) or similar interpretation service, and ask if they had the services of an interpreter at all relevant times in the case?
 - 1) If YES - Proceed to c. below.
 - 2) If NO - Proceed to c. below after making sure the Defendant has received all relevant interpreted advisements.
- ____ c. Ask if Defendant has taken or failed to take any substance or if they have any illness that would cause them to not understand what is going on.
- 1) If NO – Proceed to d. below.
 - 2) If YES - Continue the case until Defendant is able to understand.
- ____ d. Inquire as to Defendant's education.
- 1) If it appears that the Defendant is educated enough to make a knowing, intelligent plea, proceed to 3. below.
 - 2) If it appears that the Defendant is not educated enough to make a knowing, intelligent plea, enter a not guilty plea for the Defendant and proceed with not guilty case processing, including determination whether counsel should be appointed to represent Defendant.
- ____ 3. Have the Defendant execute a written waiver of counsel and verify that Defendant understands the right to counsel and the consequences of waiving that right. AZ.R.Cr.P. Form 8.
- ____ 4. If a plea agreement has been filed, ascertain the following:²
- ____ a. That the Defendant has read it, or it has been translated to Defendant or Defendant has had it explained.
 - ____ b. That the Defendant understands the terms of the plea agreement. (Recite the terms of the plea agreement and ask the Defendant if that is what the Defendant understands the terms to be.)

² There is no legal requirement that there be a written plea agreement if the defendant is pleading guilty to the charged offenses without any agreements, i.e. pleading straight up to the charges. State v. Rose, 231 Ariz. 500, 505-06, 297 P3d 906, 911-12 (App. 2013) On the other hand if there is a negotiated plea agreement it must be in writing. AZ.R.Cr.P. 17.4(b).

- _____ c. That the Defendant agrees to the terms of the plea agreement.
- _____ d. That all promises made to the Defendant are contained in the plea agreement.
- _____ 5. Using the plea proceeding form ("Guilty/No Contest Plea Proceeding"), conduct the plea proceeding:

NOTE: The record itself must demonstrate that the waiver of constitutional rights was knowing, intelligent and voluntary and that the Court complied with all applicable procedures. A written plea proceeding form, if properly used and completed, will serve as an adequate record of the plea.

- _____ a. Advise the Defendant of the charge(s).
- _____ b. Advise the Defendant of the range of possible sentences and the consequences of pleading guilty (or no contest):
 - _____ 1) The maximum jail term, maximum probation term, and maximum fine that can be imposed.
 - _____ 2) Any mandatory minimum jail terms, fines, or other conditions.
 - _____ 3) If applicable, that restitution may be imposed in the full amount of the economic loss to the victim (must advise Defendant of a "not to exceed" amount on restitution or the plea can be withdrawn).³
 - _____ 4) The possible or probable loss of driver's license. (Optional if a collateral consequence of the plea.) (see note below 7) as to all collateral consequences)
 - _____ 5) The possibility of increased punishment upon a subsequent conviction.
 - _____ 6) Ascertain if the Defendant is on probation, parole or community supervision?
 - i. If NO – Proceed
 - ii. If YES – Advise the Defendant that a plea of (guilty/no contest) will be a violation of that status

³ A plea to a crime with a victim should always address restitution. A.R.S. § 13-603(C).

and could expose the defendant to consequences in that other case. After ascertaining that defendant understands that possibility inquire if they still wish to proceed with their change of plea?

iii. If NO – Enter a not guilty plea for the Defendant and proceed with not guilty case processing including determination whether counsel should be appointed to represent Defendant.

iv. If YES -- Proceed

____ 6. Any other direct consequence of the plea.

NOTE: It is not necessary to advise the Defendant of: 1) the collateral (indirect) consequences of the plea; 2) all potential conditions of probation, unless a jail term is going to be imposed as a condition of probation; or 3) possible defenses to the charge(s).

Collateral consequences of criminal convictions are restrictions, penalties, and sanctions generally not included in penal codes or sentencing guidelines, but resulting from criminal convictions under U.S. state and federal law. These may range from driver license suspensions, requirements to the need to have an SR22 insurance, to firearm restrictions or access to federal housing. Criminal convictions in Arizona have consequences for anyone who holds a professional license from a state agency (i.e. teachers, health professionals)

The case law establishes that Judges must advise Defendants of direct consequences of the plea. Failure to inform a Defendant of a collateral consequence of a plea does not render it invalid. State v. City Court of Tucson, 131 Ariz. 256, 257, 640 P.2d 187, 188 (App. 1981). Suspension of a driver's license is a collateral, not direct, consequence of a guilty plea and the judge does not have to inform the Defendant of the consequences. Id.

Some judges may choose to advise the Defendant that Motor Vehicle Department may take action against their driver's license or other consequences.

In Padilla v. Kentucky, 559 U.S. 356 130 S. Ct. 1473; 176 L. Ed. 2d 284 (2010), the US Supreme Court held that because of the seriousness of the consequences, attorneys and judges must inform defendants of the immigration consequences of a guilty plea. AZ.R.Cr.P 17.2(b).

_____ a. Ascertain the Defendant understands the constitutional rights that defendant would waive by pleading guilty or no contest?
1) If YES – Proceed.
2) If NO – Explain until there is an understanding and then proceed.

_____ b. Ascertain Defendant wished to give up these rights and enter a plea.
1) If YES – Proceed.
2) If NO – Enter a plea of not guilty for the Defendant and proceed with not guilty case processing including determination whether counsel should be appointed to represent Defendant.

_____ c. Take a plea as to each count). [state the number, description, and class of each charge]

NOTE: The Defendant may enter an "Alford" plea, where the Defendant does not admit guilt. A Defendant may plead guilty (or no contest) by way of Alford without admitting guilt, or while even asserting innocence, if the Defendant believes that the plea is in their best interest and the record strongly evidences guilt. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970). But see Duran v. Superior Court for Maricopa County, 162 Ariz. 206, 207 782 P.2d 324,325 (App. 1984) ("While an Alford plea is constitutionally permissible, we do not favor its use.") The Court should advise the defendant that the Alford plea will have the same consequences on his/her record and sentencing as a straight guilty plea does.

_____ d. Ascertain Defendant's plea is not a result of any force, threats or promises (other than the promises contained in the plea agreement).

_____ e. If there is no written plea agreement or if the sentence is not specified in the plea agreement, advise the Defendant that the judge determines what the sentence will be and that no promises by the defense attorney or prosecutor are binding on the judge.

_____ 7. Determine the factual basis for the plea:
A factual basis may be obtained from: 1) a review of the offense report prepared by the police (must state these facts on the record or admit report); 2) evidence offered at trial; 3) an avowal of facts by the prosecuting attorney; or 4) the Defendant's statement.

_____ 8. Make sure the Defendant has understood everything that has been said.

- ____ 9. Make the following specific findings:
- ____ a. That the Defendant knowingly, voluntarily and intelligently waived constitutional rights and entered into the plea.
 - ____ b. That there is a factual basis for the plea.
 - ____ c. That the plea is accepted and entered of record.
- ____ 10. Sign and initial the plea proceeding form in the appropriate spaces.⁴
- ____ 11. Have the Defendant sign the plea proceeding form.
- ____ 12. Make sure the Defendant receives a copy of the plea proceeding form.
- ____ 13. Proceed to sentencing (Sentencing should occur immediately after determination of guilt unless the court on its own motion or upon request of the victim or either party orders that sentencing occur at a later date, not exceeding 30 days. AZ.R.CR.P. 26.3(a)(2).
- Ask the defendant if there anything Defendant wants to say before imposing sentence.
- 1. If Yes – Listen and then pronounce sentence.
 - 2. If No – Ask questions if you wish and then pronounce sentence.
- ____ 14. Officially dismiss any charges agreed to be dismissed as part of the plea.
- ____ 15. Enter an order exonerating a posted bond, if appropriate.
- ____ 16. Assess fees for recoupment of public defender costs, jail costs or any other court costs in an appropriate amount.
- ____ 17. Complete other necessary paperwork such as judgment form, A.R.S. §13-607, M.V.D. Abstract, etc.

⁴ It is good practice to initial the form as the guilty plea proceeding progresses to ensure that every point is covered.

SCRIPT

1. "State of Arizona v. _____, case number_____."

"Do you understand that you have the right to have an attorney? If you cannot afford an attorney, one will be appointed for you if jail time is a part of the sentence.⁵⁶

"Did you read and understand the waiver of counsel form?" (Or – "Did you hear me read the Waiver of Counsel form at the start of the proceedings and did you understand what I read?" Or – "Did you hear the interpretation of my reading of the waiver of counsel at the start of the proceedings and did you understand the interpretation?") When the Defendant acknowledges understanding: "The court finds that the Defendant knowingly, intelligently and voluntarily waives the right to an attorney." [Have Defendant execute Waiver of Counsel form.]

2. "State your full, true name and date of birth."

3. "Do you read and understand English?" [Have you had the services of an interpreter to go over the plea agreement?"

4. "Have you taken any drugs or medication that might affect you here today? Or should you have taken a medication that you did not take?"

5. "If you don't understand something I say, please tell me."

6. [Read the A.R.S. §13-4438 Victim Advisement. See Checklist for details.]

5. [When a written plea agreement is filed with the court:]⁷

a. You were originally charged with but it looks like you have reached an agreement to resolve your case. Is this your plea agreement? Are these your initials and your signature? "The plea agreement states that you are pleading guilty/no contest to _____, correct?"

b. "It also provides that the sentence will be _____ (that you will be placed on probation for _____ on the condition that you _____), correct?"

⁵ Some judges' standard for public defender include probation (summary or supervised), or Domestic Violence charges

⁶ The Waiver of Counsel would have been executed as part of the Arraignment procedure if Defendant is pleading guilty at an Arraignment Hearing.

⁷ There is no legal requirement that there be a written plea agreement if the defendant is pleading guilty to the charged offenses without any agreements, i.e. pleading straight up to the charges. *State v. Rose*, 231 Ariz. 500, 505-06, 297 P3d 906, 911-12 (App. 2013). On the other hand, if there is a negotiated pleas agreement it shall be in writing. AZ.R.CR.P. 17.4(b).

- c. If relevant – "It further provides that the remaining charges will be dismissed (or not filed, etc.), correct?"
- d. "Does it contain everything that you agreed to?" [Or, "Is this your understanding of the terms of the plea agreement?"]
- e. "Did you read the agreement, understand it, initial the paragraphs and sign it?" (Or – "Was the agreement translated to you, you understood the translation, initialed the paragraphs and signed it?") "Any questions about the agreement?"

[When there is a plea to the court without a written plea:]

"I understand you wish to plead guilty. Is that correct?"

- 6. Explain the range of punishment (maximum and minimum) to the Defendant.
- 7. "Are you currently on probation, parole, or community supervision?" [If YES: see Checklist.]
 - a. "If placement was after date of incident in this case, it will not be affected by this/these new charge(s). When were you placed on probation/parole/community supervision?"
 - 1) If placement was after the date of the incident in this case proceed to 8. below.
 - 2) If placement was before the date of the incident in this case:
 - a) "You need to know that your plea in this case could result in revocation of your probation/parole/community supervision, if appropriate. Does that change your mind about your plea?"
If YES – Enter a plea of not guilty for the Defendant and proceed with not guilty case processing including determination whether counsel should be appointed to represent Defendant.
If NO – Proceed to b) below.
 - b) "If you are revoked because of this plea, you can be given a maximum sentence in the case on which you are on probation/parole/community supervision. Does that change your mind about your plea?"
If YES – Enter a plea of not guilty for the Defendant and proceed with not guilty case processing including

determination whether counsel should be appointed to represent Defendant.
If NO – Proceed to c) below.

- c) "Have you discussed your probation/parole/community supervision status with your probation officer?"
If NO - Continue the case so that the defendant can review with the probation/parole officer, or appoint an attorney if the defendant is not represented.
If YES – “Do you still wish to plead guilty/no contest and take the risk that there may be consequences if you are considered to have violated your probation/parole/community supervision status?”
If YES – Proceed to 8) below.
If NO – Enter a plea of not guilty for the Defendant and proceed with not guilty case processing including determination whether counsel should be appointed to represent Defendant.

- 8. "By entering a plea of guilty/no contest you would be giving up the constitutional rights I read at the start of the proceedings." (Or, if you did not give a General Advisement – “By entering a plea of guilty/no contest you would be giving up the following constitutional rights.”
 - a. To plead not guilty;
 - b. To a trial (to the court/by a jury);
 - c. To the assistance of an attorney at all stages of the proceedings, including an appeal if that became necessary. If you cannot afford to hire an attorney, the Court could appoint an attorney to represent you at all stages of the proceedings, if jail time is part of the sentence;
 - d. To confront the witnesses against you, which means your right to see and hear the witnesses at trial and to cross-examine them, that is to ask them questions;
 - e. To present evidence on your own behalf;
 - f. To compel the attendance of witnesses of your choosing to appear and testify, that is, the Court will issue subpoenas for you. A subpoena is an enforceable court order directing your witnesses to be in court for trial;

- g. To remain silent and not be forced to incriminate yourself. That means that you are never required to testify, and if you remain silent the prosecutor could not make any comment about that fact to the Court or jury and the Court and the jury could not take that into account in deciding the various issues in the case;
 - h. To be presumed innocent;
 - i. To have the State bear the burden of attempting to prove you guilty beyond a reasonable doubt. You are not required to prove anything. The State must prove the charge and must do so beyond a reasonable doubt if the matter goes to trial;
 - j. To a direct appeal, that is to appeal to the Superior Court if you thought something wrong happened at trial. After entering a plea, you could only apply for post-conviction relief.
9. "Do you understand these rights?" (Did you hear and understand the rights I explained earlier?)
10. "Do you wish to give up these rights and enter the (guilty/no contest) plea?"

On A Plea of No Contest:

- a. "Do you understand that a plea of no contest means that while you are not admitting that you committed the crime, you are not contesting the matter by taking it to trial and the Court will be entering a finding of guilty if a factual basis is shown?"
- b. "Does counsel avow that you have given due consideration to the views of the parties and to the interest of the public in the effective administration of justice and that you feel the Court should accept the plea of no contest?"

A no contest plea requires approval of the Court. The Court may accept a plea of no contest only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.
AZ.R.CR.P. 17.1(c).

11. "I do not know if it applies or not, but I am required to give every defendant the following immigration advisement:
- "If you are not a citizen of the United States, pleading guilty or no contest to a crime may affect your immigration status. Admitting guilt may result in deportaion even if the charge is later dismissed. Your plea or admission of guilt could result in your deportation or removal, could prevent you from ever being able to get legal status in the United States or could prevent you from

becoming a United States citizen." [Do not require the defendant to disclose his immigration status in the U.S.]⁸

12. "How do you plead to the charge(s) of _____?" See Checklist.
13. "Was there any force, threats, or promises (other than in the plea agreement), made to get you to plead guilty/no contest?"
14. [If the entire sentence is not specified in a plea agreement, i.e., if sentence is left to the court,]
 - a. "Has anyone made any promises to you as to what the sentence will be in this case?"
15. Obtain a factual basis from some source—prosecutor, Defendant, police reports, etc.⁹
16. "The Court finds the Defendant knowingly, voluntarily, and intelligently entered a plea of guilty/no contest to the charge(s) (as set forth in the plea agreement) and that there is a factual basis for the plea."
17. "The plea of guilty/no contest is accepted and entered of record." (Or, "The acceptance or rejection of the plea is set for _____.")
18. Obtain signatures on plea proceeding forms, waiver forms, etc., if appropriate.
19. Proceed with sentencing immediately unless you decide to schedule sentencing for a later date, not more than 30 days after judgment.

Impose sentence after considering any evidence and arguments in mitigation and aggravation and after giving the Defendant right of allocution (opportunity to address the court).
20. Officially dismiss any charges agreed to be dismissed as part of the plea arrangement.
21. Enter an order exonerating a posted bond, if appropriate.
22. Assess fees for recoupment of public defender costs, jail costs or any other court costs, in an appropriate amount.
23. Complete other necessary paperwork such as judgment form, A.R.S. §13-607, M.V.D. Abstract, etc.

⁸ The court should not ask if it is necessary to read the Immigration Advisement or if defendant or counsel waive the reading of the advisement. It should be read in its entirety.

⁹ Defendants are sometimes reluctant to admit guilt. They may need help to establish the factual basis.

DUI GUILTY PLEA SCRIPT

1. "State of Arizona v. _____, case number _____."
2. [Should be same as Standard Plea with the specifics below:]

Your plea agreement indicates you are pleading guilty to _____
All DUIs are class 1 misdemeanors. The maximum penalty for a class 1 misdemeanor is a \$2,500 fine plus surcharge, six (6) months in jail and probation for a DUI can be up to five (5) years.

But DUIs also have mandatory minimum penalties that are required by law. The judge must impose at least these minimum penalties to anyone who pleads or is found guilty of a DUI. For this type of DUI, the minimum penalty is (for a first time 28-1381A1 or A2)¹⁰ a \$250 fine plus surcharge, a \$500 assessment to the prison construction fund and a \$250 assessment to the public safety equipment fund. It also carries 10 days in jail but if you complete a court ordered substance abuse screening and counseling program all but one (1) day may be suspended. You must reimburse jail costs.¹¹ The law also requires that you must equip any motor vehicle you drive with a certified ignition interlock device at your cost for a minimum of 12 months.¹² You may also be ordered to perform community service. Do you understand these penalties?

And in your plea, you have agreed you will be imposed those minimum penalties¹³. Is that correct?

All of these sentences that I have just explained to you, are for a first time DUI. If you were to get a second conviction for DUI within the next 84 months (7 years) the next time you would be sentenced as a second-time offender. The penalty for a second DUI of this nature carries a minimum \$500 fine plus surcharge, a \$1,250 assessment to the prison construction fund and a \$1,250 assessment to the public safety equipment fund. The jail time for a second DUI is a minimum of 90 days. 60 days could be suspended upon completion of a counseling program, but 30 days shall be served consecutively. A second DUI also carries 30 hours of community restitution and the person's driver's license would be revoked for one year.

If the second DUI were an extreme or super-extreme DUI, the minimum jail time would be 4 or 6 months with no suspension of time.

¹⁰ Mandatory minimum sentence for first offense DUI is contained in A.R.S. §28-1381(I); mandatory minimum sentence for second offense DUI is contained in A.R.S. §28-1381(K); mandatory minimum sentence for extreme DUI is contained in A.R.S. §28-1382(D); mandatory minimum sentence for second offense extreme DUI is contained in A.R.S. §28-1382(E).

¹¹ Required under A.R.S. §28-1444. But may be waived by the judge at the time of sentencing.

¹² Interlock is not required for convictions for DUI drugs §28-1381(A)(3).

¹³ Or go over any additional penalties contained in the plea.

A third conviction for DUI could be charged as a class 4 felony and carry a minimum of six (6) months up to five (5) years in prison.

3. (Follow plea proceeding above)
4. [Determine factual basis by asking Defendant:] "Do you feel you were impaired, while driving, to the slightest degree by the alcohol you had consumed?" [Or if no contest:] "Do you think that the evidence would show that you were impaired to the slightest degree by the alcohol you had consumed?" [Or you can obtain the factual basis from the prosecutor.¹⁴] Then state, "I find that there is a factual basis for accepting your plea to the charge of DUI."
5. [Follow the local practice of your court in sentencing, You must impose the minimum penalties required by law. You should obtain the necessary fingerprints. Out of custody defendants should be given a confinement order to fulfill their jail term. Restitution should be addressed in all DUI cases where an accident occurred.

¹⁴ The court should not have a departmental report unless referred to in plea agreement.

SENTENCING SCRIPT

1. "This is the ____ (date) and ____ (time) set for sentencing in State v. _____, Case Number _____."
2. "The Court notes for the record the presence of the Defendant (defense counsel, prosecutor)."
3. "Are the parties ready to proceed?"
4. "There having been a determination of guilt by (a jury/the Court/the Defendant's plea of guilty/the Defendant's plea of no contest)."

In the case of no contest plea, if not previously done, also state: "It is the judgment of the Court that the Defendant is guilty of _____, committed on or about _____."

(Enter a judgment on each count.)

5. "(Prosecutor), do you want to add anything on behalf of the State?"
6. (If applicable, inquire if a victim is present and wishes to speak and if not whether the victim was notified and given the opportunity to be present.)
7. "(Defense Counsel), do you wish to say anything on behalf of your client?"
8. "(Defendant), is there anything you wish to add on your behalf before the Court imposes sentence?"
9. If the Interstate Compact for Adult Supervision applies to a qualifying misdemeanor or felony, the court must consider interstate movement of certain adult offenders.¹

¹ This case may trigger the Interstate Compact for Adult Offender Supervision (Compact), so please review the following information. The Compact is governed in Arizona by ARS §31-467 and is a formal agreement between member states that seeks to promote public safety by systematically controlling the interstate movement of certain adult offenders. These offenders include all convicted felons and *certain misdemeanants* who are required to complete certain conditions or requirements imposed on them at the time of sentencing. When applicable the compact is the sole legal mechanism for the interstate movement of these offenders. Currently there is no alternative legal avenue for lower courts to allow a compact eligible offender to move out of state, therefore, defendants whose limited jurisdiction sentence and conviction triggers compact eligibility must reside in Arizona to complete their supervision requirements to the lower court(s).

Compact Eligibility: The compact relates to misdemeanor cases sentenced out of limited jurisdiction courts where a defendant is placed on any sort of probation, unsupervised probation or monitoring by a court (to include the offender mailing proof of completion of anger management counseling, alcohol classes, etc.), for a period of *one year or more* for crimes involving:

10. (Follow the practice of the court on sentencing. These are examples of various sentencing options.)

JAIL

"It is the judgment and sentence of the Court that the Defendant be incarcerated in the _____ County Jail for a term of _____ days/months, commencing _____ and ending _____. (Defendant shall/shall not serve straight time, with no two for one credit.)"

"The Court has considered the time the Defendant has spent in custody on the present charge(s) and has credited the Defendant with _____ days time served."

(Then, say either:)

"The Defendant is committed to the custody of the _____ County Sheriff."

(OR)

"The Defendant shall report to the _____ (City/County) Jail at (address) on _____(date) _____at _____ (time) to serve said sentence."

(OR)

"The Defendant shall report to the _____ (City/County) Jail at _____(address) at _____ (time) on each Friday for _____consecutive weeks commencing _____ (date) and shall be released at _____ (time) on the following Sunday each weekend until the full term of incarceration is served."

(OR)

"The Defendant shall report to the _____ (City/County) Jail at _____ (address) at _____ (time) on _____ (date) and serve _____ (number) consecutive days/hours, and then commencing on _____ (date) from _____ (time a.m./p.m.) until _____ (time a.m./p.m.) on the following days: _____(days of the week) and twenty four hours a day on the remaining days of the week, until the sentence is served in full. Defendant shall be entitled to be released from

-
- domestic violence or violence in general; or
 - 2nd or subsequent DUI convictions; or
 - offenses involving the use or possession of a firearm; or
 - any misdemeanor conviction for a sex offense requiring registration for such an offense in Arizona.
- To summarize: Defendants convicted of misdemeanors described above whose sentence is one year or more must reside in Arizona. An alternative practice is to place the Defendant on probation for Eleven (11) months. The Court should inquire if the State contacted the Victim for a position on the shorter probation term.

custody between the hours of _____ and _____ on the stated days: _____ for the purpose of his/her employment."

(OR)

(If Court has a home detention program).

"The Defendant shall serve _____ (number) days of home detention at _____ (address) to be monitored by the _____ (probation department or other appropriate agency.)"

JAIL FEES

(Follow the practice of the court, waiver of jail fees, in whole or in part is within the Court's discretion.)

"The Defendant shall pay _____ (number) dollars as jail fees to reimburse the _____ (City/County), of which _____ (number) dollars are suspended (if the Court determines appropriate)." [When will the Court determine? Do it then.]

If jail recovery fees are waived, "The Court finds the interests of justice are served by waiving recovery of jail fees in this case."

FINE

(Follow the practice of the court in setting the fine and payment. For example,)

"It is the (further) judgment and sentence of this Court that the Defendant pay a fine in the amount of \$_____, said amount payable (forthwith) (on/before) _____ (date) in installment payments of \$_____ each _____ (week/month/etc.) commencing _____ (date), until the full amount is paid."

(OR)

"It is the (further) judgment and sentence of this Court that the Defendant pay a fine in the amount of \$_____. The Defendant shall report to (financial services or the other appropriate office) to establish a payment plan and abide by the plan until the full amount is paid."

(These examples are based on all applicable surcharges and court fees being included in the fine. If individual court practice is to impose the fine amount and then add the surcharges and fees, the language should be changed to read either, "a fine in the amount of \$_____, plus surcharges of (dollars or percent) and court costs of (dollars)" or a fine the amount of \$_____, plus surcharges and court costs".

(On mandatory fines, except for DUI fines, the Court may suspend some surcharges and assessments in the interest of justice. Which amounts can be suspended is currently under review.)

"It is the (further) judgment and sentence of this Court that the Defendant pay a fine in the amount of \$_____. In the interests of justice the Court waives the surcharges on this fine."

RESTITUTION

"It is the (further) judgment and sentence of this Court that the Defendant pay to the Court as restitution the total sum of \$_____, to the following persons/firms: To _____ (Name of Payee(s)), the sum of \$_____ payable (forthwith) (on or before _____) in installment payments of \$_____ each _____ week/month _____ commencing _____, until the full amount is paid."

(Best practice is to have all restitution payments made to the Court, and the Court will then forward the payment to the victim. Otherwise, the victim's contact information is available to the Defendant.)

(Often the amount of restitution is not determined by the time of sentencing and a separate restitution hearing is scheduled for a later date.)

COMMUNITY RESTITUTION HOURS

Community restitution was formerly known as community service. Community restitution can be ordered as part of probation, as a straight sentence or to satisfy all or part of a fine, fee, assessment or incarceration cost, but not a surcharge, if the Court finds a defendant unable to pay. Community restitution is credited at Ten Dollars (\$10.00) an hour. ² Follow individual court policy when ordering where the services will be performed and under what circumstances.)

"It is the (further) judgment and sentence of this Court that the Defendant perform _____ hours of community restitution. This shall be performed at (charity, government agency or other agency per court policy). The defendant shall return to Court on _____ with written proof of completion of the hours of service."

PROBATION

"The Court finds that the following reasons warrant probation: _____."

(If probation is being used in lieu of jail or other sentence conditions.)

² Effective January 1, 2016. A.R.S §13-824.

If the Interstate Compact for Adult Supervision applies to a qualifying misdemeanor or felony, the court must consider interstate movement of certain adult offenders.³

"It is the judgment of this Court that the (execution/imposition) of the sentence be suspended and the Defendant be placed on (supervised/unsupervised) probation for a period of _____ (years/months) from _____ (this date) to _____ (date) on the following terms and conditions _____: (Cover all the terms with the Defendant.)" If the Interstate Compact for Adult Supervision applies to a qualifying misdemeanor or felony, the court must consider interstate movement of certain adult offenders.

(OR)

(If sentence is straight probation.)

"It is the judgment of this Court that the Defendant be placed on (supervised/unsupervised) probation for a period of _____ (years/months) from _____ (this date) to _____ (date) on the following terms and conditions _____: (cover all the terms with the Defendant.)" If the Interstate Compact for Adult Supervision applies to a qualifying misdemeanor or felony, the court must consider interstate movement of certain adult offenders.

In either case have the Defendant sign the written document imposing the terms of probation.

³This case may trigger the Interstate Compact for Adult Offender Supervision (Compact), so please review the following information. The Compact is governed in Arizona by ARS §31-467 and is a formal agreement between member states that seeks to promote public safety by systematically controlling the interstate movement of certain adult offenders. These offenders include all convicted felons and *certain misdemeanants* who are required to complete certain conditions or requirements imposed on them at the time of sentencing. When applicable the compact is the sole legal mechanism for the interstate movement of these offenders. Currently there is no alternative legal avenue for lower courts to allow a compact eligible offender to move out of state, therefore, defendants whose limited jurisdiction sentence and conviction triggers compact eligibility must reside in Arizona to complete their supervision requirements to the lower court(s).

Compact Eligibility: The compact relates to misdemeanor cases sentenced out of limited jurisdiction courts where a defendant is placed on any sort of probation, unsupervised probation or monitoring by a court (to include the offender mailing proof of completion of anger management counseling, alcohol classes, etc.), for a period of *one year or more* for crimes involving:

- domestic violence or violence in general; or
 - 2nd or subsequent DUI convictions; or
 - offenses involving the use or possession of a firearm; or
 - any misdemeanor conviction for a sex offense requiring registration for such an offense in Arizona.
- To summarize: Defendants convicted of misdemeanors described above whose sentence is one year or more must reside in Arizona. An alternative practice is to place the Defendant on probation for Eleven (11) months. The Court should inquire if the State contacted the Victim for a position on the shorter probation term.

SET ASIDE

“After you have fulfilled all conditions of your sentence/probation, you may apply to the court to have your judgment of guilt set aside.”

APPEAL NOTICE

If Defendant is being sentenced following determination of guilt after a jury or bench trial, the Defendant must be advised of the right to appeal and be provided written notice of those rights. The better practice is to have Defendant sign the notice of appeal rights form.

(Sample script)

“Having been found guilty and sentenced, you have the right to appeal either the judgment of guilt, the sentence or both. If you decide to appeal it will not be held against you. If you are going to appeal you must do so within fourteen (14) calendar days from today. If you do not file your notice of appeal within this time you lose your right to appeal, however, a judge can grant a delayed appeal.”

(If appropriate, advise of right to appointed counsel and waiver of transcript fees.)

“The bailiff/clerk will give you a written version of your rights on appeal. Please sign, acknowledging receipt of those rights”

PROBATION REVOCATION

INITIAL APPEARANCE

1. "Is your true name _____?"
2. "You have the right to remain silent about the Petition. Anything you say could be used against you. You have the right to be represented by an attorney. If you cannot afford an attorney, one may be appointed for you."
3. [Determine if Defendant has or is entitled to court-appointed counsel.]

ARRAIGNMENT

1. "Is your true name _____?"
2. "Did you receive a copy of the Petition to Revoke Probation? "
3. "Do you admit or deny that you violated probation as alleged in the Petition?"
4. [If DENIAL:] "A denial is entered. Violation hearing is _____ (day and date) at _____ (hour) in Division _____."

Prior custody/release conditions are affirmed.

[If Admission, turn to page 19-2 for Admission of Probation Violation Script.]

PROBATION VIOLATION HEARING

1. Opening Statement, Evidence, Final Argument.
 - a. VIOLATION PROVED: "The Court finds by a preponderance of the evidence that Defendant violated probation as follows:

[State each term violated and state (brief) findings of facts that establish the violation.]

IT IS ORDERED:

- Disposition hearing is set for _____ (day and date) at _____ (hour) in Division _____.
- Release conditions are (affirmed/revoked).
- A supplemental Presentence Report is Ordered."

- b. VIOLATION NOT PROVED: "The Court finds that a violation has not been proved.

IT IS ORDERED:

- The Petition is dismissed;
- Defendant is reinstated on existing terms and conditions of probation;
- Report to the Probation Office today.
- Defendant is released from custody on this Petition."

ADMISSION OF PROBATION VIOLATION

1. "Is your true name _____?"
2. "What is your date of birth?"
3. "Do you read and understand English?"
4. "Have you had any drugs, alcohol or medication in the last 24 hours?"
5. "Counsel, what terms are going to be admitted?"
6. "You are on probation for a Misdemeanor. If you admit any violation of probation, your probation could be revoked and you could be sentenced to a maximum penalty of
 - a. Class 1 misdemeanor - 6 months jail, \$2,500 fine plus surcharges¹, 3 years probation (DUI - 5 years probation).
 - b. Class 2 misdemeanor - 4 months jail, \$750 fine plus surcharges, 2 years probation.
 - c. Class 3 misdemeanor - 30 days jail, \$500 fine plus surcharges, 1-year probation."
7. New Crime Violation: "What you say here about any new crime can be used against you. You could be prosecuted for that new crime. Any sentence for that new crime could be in addition to whatever penalty you receive here."
8. Waiver of Rights: "By admitting a violation of probation you give up certain constitutional rights. Let me explain those rights to you:

¹ Pursuant to A.R.S. §12-116.01 - Surcharges are applied to the base fine, civil penalty or forfeiture and not to other surcharges. Applicable to violations committed on or after January 1, 2012. 61% is applicable to violations committed from September 19, 2007 – December 31, 2011, 57% is applicable to violations committed from August 22, 2002 – September 18, 2007. Pursuant to A.R.S. §12-114.01 - \$5 surcharge applicable to violations committed on or after August 22, 2002. \$10 surcharge applicable to violations committed statewide on or after September 21, 2006. \$20 surcharge applicable to violations committed in statewide on or after November 24, 2009.

- d. You have the right to keep your denial of the allegations, to have a hearing on those allegations, and to be represented by counsel at the hearing;
 - e. You are presumed innocent. You could not be found in violation of probation unless the State proved the allegations at the hearing;
 - f. Your rights at the hearing include the right to confront and cross-examine the witnesses called by the State, and the right to present evidence and to subpoena witnesses to testify in your defense;
 - g. You have the right to testify at the hearing; you also have the right to remain silent and refuse to testify. Your silence could not be used against you;
 - h. You have a right to appeal."
9. "Do you understand these rights? Do you want to give them up and admit you violated probation?"
- "Your only right of review from these proceedings is to file a petition for post conviction relief with this court. If that is denied, you may petition the appellate courts of this State for review of such denial, but such review may or may not be granted. Do you understand this?"
10. Allegations: "The probation violation allegation is:" [read it]."
11. Admission: "Do you admit or deny that allegation?"
12. Promises or Agreements: "Are you admitting the violation because of any promises or agreements of any kind or because of anything the probation officer or prosecutor has agreed to recommend?" [If "Yes", find out details, then advise:]
- "Do you understand that if I conclude that the agreement is inappropriate, I can reject it? If I reject the agreement, I will give both you and the State of Arizona an opportunity to withdraw from the agreement."
13. Threats or Force: "Were any threats made or was any force used to get you to make this admission today?"
14. Factual Basis: [Establish knowledge of the term, ability to comply, and failure to comply.]
15. "Counsel, any additions or corrections to anything?"

16. Voluntariness; Factual Basis: "Defendant's admission is knowingly, intelligently, and voluntarily made. There is a factual basis for it. The admission is accepted. The Court finds Defendant in violation of probation."
17. "Disposition is _____ (day and date) at _____ (hour)."²

DISPOSITION OF PROBATION VIOLATION

1. "Is your true name _____? "
2. "What is your date of birth?"
3. "Based on the prior finding by the Court, it is the JUDGMENT of the Court that Defendant has violated the terms of the ____ year probation imposed on _____ (date of Sentence) for the crime of _____, a Class _____ Misdemeanor."
4. "I have read and considered [the original and supplemental presentence report and its recommendation].
[The letters received from .]
[The evidence at violation/predisposition hearing.]
[The Victim Impact Statement.]
5. (To Prosecutor) "Anything to say on behalf of the State concerning Disposition?"³
6. (To Prosecutor, unless it's a case with no victim:)⁴ "Are there any victims present?" [If "Yes", give an opportunity to address the Court.]

[If "No", ask prosecutor questions sufficient to establish State's compliance with Victims' Rights, e.g.,
 - a. Has your office contacted the victim?
 - b. What efforts have been made to do so?
 - c. Do you have any statement or disposition recommendation on behalf of the victim?
 - d. Does the victim have notice of this hearing?
 - e. What efforts were made to give notice?]
7. (To Defense Counsel) "Anything to say on behalf of your client?"
8. (To Defendant) "Anything you wish to say concerning sentence?"

² A disposition hearing shall be held no less than 7 and no more than 20 days after a determination that a probationer has violated probation. AZ.R.CR.P. 27.7(c) The probationer may waive a disposition hearing and disposition may proceed immediately. AZ.R.CR.P. 27.7(d).

³ The Court can hear from counsel, victim, and Defendant in any order.

⁴ The Victim Rights Act applies in misdemeanor cases involving physical injury, the threat of physical injury or a sexual offense. A.R.S. §13-4402(A).

[For REINSTATEMENT ON PROBATION, turn to page 19-6.]

[For REVOCATION AND JAIL/OTHER SENTENCE, go to Page 19-7.]

REINSTATEMENT ON PROBATION

1. PROBATION: "Reinstatement is warranted [Reasons]."
2. "It is the Judgment of the Court that imposition of sentence is suspended and Defendant is reinstated on probation for _____ (months/years) to date from _____."
3. Jail; Financial Terms; Special Terms: [Be sure all details are properly included on the Judgment or Conditions of Probation; advise Defendant of any necessary details.]
4. General Terms: "The terms and conditions of your probation outline the expectations for your behavior while under supervision. You will receive a copy. Probation provides you with an opportunity to make changes to be a successful person, if you choose to take advantage of the opportunities that are available to you. I am confident that you have the ability to be successful- which is the reason that I am reinstating your probation grant. What do you think that you can do differently in the future to avoid legal problems like this from occurring again? It is my sincere hope that you take this opportunity to utilize any available programming or services that may assist with your success while on probation."
5. Right to Review:

[If hearing]

"If you want to appeal, you must do so within 10 days from today or you will lose your right to appeal. You must sign a copy of the appeal rights and also your conditions of probation. "

[If admission]

"If you want to petition for post-conviction relief, you must do so within 90 days from today or you will lose your right to petition for post-conviction relief. You must sign a copy of the post-conviction relief rights and also your Conditions of Probation."
6. If the Interstate Compact for Adult Supervision applies to a qualifying misdemeanor or felony, the court must consider interstate movement of certain adult offenders.⁵

⁵ This case may trigger the Interstate Compact for Adult Offender Supervision (Compact), so please review the following information. The Compact is governed in Arizona by A.R.S. §31-467 and is a formal agreement between member states that seeks to promote public safety by systematically controlling the interstate movement of certain adult offenders. These offenders include all convicted felons and *certain misdemeanants* who are required to complete certain conditions or requirements imposed on them at the time of sentencing. The compact is the sole legal mechanism for the interstate movement of these

REVOCATION AND JAIL/OTHER SENTENCE

1. JAIL: Probation is not appropriate.
2. Sentence: "It is the Judgment and Sentence of the Court that probation be revoked and Defendant be jailed for _____ (days/months)."

"The sentence is to date from ."

Although you are receiving a jail sentence, it is my sincere hope that you take this opportunity to utilize any available programming or services that may assist with your success upon your release. You may wish to take this time to reflect upon the issues in your life that have brought you to this situation and seek some potential solutions. What do you think that you can do differently in the future to avoid legal problems like this from occurring again?

3. Fine: "You are fined \$ _____, plus a surcharge⁶ of _____%. [Specify payee, unless it is the County general fund.]
4. "Restitution is Ordered in the amount of \$ _____."
5. Payment: [Set per practice of the court. For example] "Pay each of these sums at the rate of not less than \$25 per month, beginning the first day of the fourth month following your release from jail."

"You are given credit for any monies previously paid."

[Include any time payment fee required by statute.]

offenders. Currently there is no alternative legal avenue for lower courts to allow a compact eligible offender to move out of state, therefore, defendants whose limited jurisdiction sentence and conviction triggers compact eligibility must reside in Arizona to complete their supervision requirements to the lower court(s).

Compact Eligibility: The compact relates to misdemeanor cases sentenced out of limited jurisdiction courts where a defendant is placed on any sort of probation, unsupervised probation or monitoring by a court (to include the offender mailing proof of completion of anger management counseling, alcohol classes, etc.), for a period of *one year or more* for crimes involving:

- domestic violence or violence in general; or
 - 2nd or subsequent DUI convictions; or
 - offenses involving the use or possession of a firearm; or
 - any misdemeanor conviction for a sex offense requiring registration for such an offense in Arizona.
- To summarize: Defendants convicted of misdemeanors described above whose sentence is one year or more must reside in Arizona.

⁶ Pursuant to A.R. S. §12-116.01 - Surcharges are applied to the base fine, civil penalty or forfeiture and not to other surcharges. Applicable to violations committed on or after January 1, 2012. 61% is applicable to violations committed from September 19, 2007 – December 31, 2011, 57% is applicable to violations committed from August 22, 2002 – September 18, 2007. Pursuant to A.R. S. §12-114.01 - \$5 surcharge applicable to violations committed on or after August 22, 2002. \$10 surcharge applicable to violations committed statewide on or after September 21, 2006. \$20 surcharge applicable to violations committed in statewide on or after November 24, 2009.

6. Review Rights:

[If hearing]

"If you want to appeal, you must file a notice of appeal within 10 days from today or you lose the right to appeal."

"You must sign for a copy of those appeal rights."

[If admission]

"If you want to petition for post-conviction relief, you must file the petition within 90 days from today or you lose the right to post-conviction relief."

"You must sign for a copy of those post-conviction relief rights."

CIVIL TRAFFIC HEARING CHECKLIST

CHECKLIST

- ___ 1. If no witness for the State appears and the Defendant appears, dismiss the complaint. However, if good cause for the absence of the State's witness is shown, continue the case.
- ___ 2. If the Defendant fails to appear and the State is present and ready to proceed, enter default judgment. If it appears Defendant at a later date and did not receive proper notice of hearing, re-set hearing.
- ___ 3. If no one appears for the hearing, dismiss the complaint. The State has the burden to prove the case.
- ___ 4. If both sides are present, call the parties forward and invite them to sit in their places.
- ___ 5. Make sure the recording device is recording.
- ___ 6. Announce the case:

"On the record. This is the time for the civil traffic hearing in the case of the State v. _____, case number _____."
Read the charges as listed on the complaint.
- ___ 7. Ask if the State is ready to proceed. If State is represented by an attorney, have attorney announce his/her name for the record.
- ___ 8. Ask if the Defendant is ready to proceed. If the Defendant is represented by counsel, have the attorney announce his/her name for the record. [If the Defendant requires the assistance of an interpreter, have the interpreter announce his/her name for the record and what language is being translated. Some judges will place the interpreter under oath.]
- ___ 9. Ask each party if they will be offering in evidence any photographs, diagrams, exhibits or recordings. If so, ask them to show the items to the other party. Have the exhibits marked for the record.
- ___ 10. Advise the parties of the procedure to be followed:
 - a. The hearing will be informal.
 - b. The parties should feel free to tell the Court what they feel is important.

- c. The burden of proof the State carries is to convince the Court by a preponderance of the evidence (more likely than not).
- d. Rules of evidence do not apply except for the rules of relevancy and privilege.
- e. Explain the order to be followed in the proceeding.

___ 11. Place the witnesses under oath.

- a. Make sure the witness states their name for the record and spells the last name. Officers should state their badge/serial numbers as well.
- b. If any witnesses require the assistance of an interpreter, have the interpreter announce his/her name for the record and what language is being translated, if they have not already done so in the proceeding.
- c. The judge may question witnesses, but it should be in a neutral and impartial manner and for the sole purpose of finding the facts.

___ 12. Examination of the State's witnesses:

- a. If the State is represented by counsel, invite counsel to present the State's case. If the State is not represented by counsel, the judge may conduct the examination of the witness or may allow the witness to testify in a narrative form.
- b. After each witness testifies, permit the Defendant (or defense counsel) to cross-examine the witness.
- c. In every case, it is necessary to establish:
 - 1) Date and Time
 - 2) Location
 - 3) Jurisdiction
 - 4) Identity

___ 13. Examination of defense witnesses:

- a. If the Defendant is represented by counsel, invite counsel to present the defense. If the Defendant is not represented by counsel, ask if the Defendant wishes to testify. The State may cross-examine the Defendant only if the State is represented by an attorney.
- b. If there are witnesses present for the defense, ask the Defendant if he/she would like to question the witnesses or wishes to have the witness simply tell what the witness knows about the event.

- c. If the State is represented by counsel, permit the attorney to cross-examine each defense witness. If the State is not represented by counsel, there will be no cross-examination of the defense witnesses. The judge may ask questions as necessary to clarify the testimony.
- ___ 14. Ask if the officer (or counsel for State) wishes to present testimony in rebuttal. If so, permit the testimony.
- ___ 15. The Court has discretion to allow the Defendant to present sur-rebuttal.
- ___ 16. If you wish to, invite the State (only if represented by an attorney) and then Defendant to make a final argument. Better practice is not to allow final, or closing, argument unless the parties are represented by legal counsel.
- ___ 17. Make a finding of "Responsible" or "Not Responsible." State your findings of fact and conclusions of law for the record.
- ___ 18. Enter judgment:
 - a. Upon a finding of responsible: A civil sanction of up to \$250.00 may be assessed (unless a mandatory fine is required by statute), plus surcharges of 78% beginning Jan 1, 2019, (A.R.S. §12-116.01-02), additional fees required by statute (the \$9 required by HB 2169 beginning Jan 1, 2019 and the \$4 Peace Officer Training required by HB 2527, beginning Jan 1, 2019) and any other approved court fees. The Defendant has 30 days to pay the civil sanction, or the Court may extend the time for payment, or permit installment payments. (A.R.S. §28-1601). Inform the Defendant that an additional \$20.00 time payment fee must be added to a sanction not paid in full on the date the sanction is imposed.
 - b. Upon a finding of not responsible: The court enters judgment for defendant and returns any deposit. AZ ST CIV TRAF Rule 24.
- ___ 20. If the Defendant has been found to be responsible, advise the Defendant of the right to appeal and provide a written notice.
- ___ 21. Adjourn the hearing. Go off the record.

CIVIL TRAFFIC HEARING SCRIPT

(This is a formal script to show the essential elements. Judges will modify to fit their own style and that of their court.)

1. Ask the Defendant and defense counsel, if any, to sit at the table used by the defense in the courtroom.

Ask the police officer and the attorney representing the state, if any, to sit at the table that is used by the state in the courtroom. [Since this is a civil case, do not use the term "prosecutor." You may use the word "counsel".]

2. Start the recording system for the courtroom, and begin recording.
3. Call the case. "State of Arizona vs. (Defendant's name), this is the time set for the civil traffic hearing in case number (insert number) on the charge(s) of (list charges.)"
4. If counsel is present for the State, ask counsel to announce his/her name for the record and also ask if the State is ready to proceed. If only the police officer is present, ask if the officer is ready to proceed.
5. If Defendant is represented by counsel, ask counsel to announce his/her name for the record and ask if the defense is ready to proceed.
6. If the Defendant or any witnesses require the assistance of an interpreter, have the interpreter identify him/herself for the record by stating his/her name, spelling the last name, and indicating what language is being interpreted. Some judges prefer to place the interpreter under oath, as follows: "Do you solemnly swear or affirm that you will give a true and accurate interpretation of all words spoken in this proceeding to the best of your training and ability?"
7. "Does either side have any exhibits, photographs, diagrams or written or recorded statements of witnesses that may be offered in evidence at the hearing? If so, please bring them forward to be marked, and allow the other side to inspect them." Mark the exhibits. If the officer is going to prepare a diagram, have it done at this time.
- 8A. (DEFENDANT NOT REPRESENTED BY COUNSEL)
 - a. "This is an informal hearing. The purpose is to give both sides a chance to tell me what happened and I will make a decision based on the evidence presented. The rules of evidence do not apply so the court will hear evidence that is not admissible in other trials. However, all the

evidence presented must be relevant to the case. The State has the burden of proving the charge(s), so it must go first. The burden on the State is proof by a preponderance of the evidence, which means it is more likely than not that the violation(s) occurred. You will have a chance to cross-examine, or question, the State's witnesses. After the State is finished you will be able to present your defense case. You may testify, call witnesses and submit evidence. After you are finished the State may offer rebuttal testimony. If it does you again have the right to ask questions." (Then depending on court practice on sur-rebuttal, "Then you will be given the final opportunity to present any responsive evidence to the rebuttal testimony.")

- b. "(Officer/accident investigator), would you please stand and be sworn?"

[Swear in the officer as a witness.]

- c. "Please raise your right hand."

[The judge or hearing officer also raises their right hand.]

- d. "Do you swear or affirm that the testimony you will give in this hearing will be the truth, the whole truth and nothing but the truth?"

(The witness should say "Yes" or "I do" or an equivalent response.)

- e. (To the witness) "Please take the witness chair (or depending on court practice, if officer testifies from the state's table, "take your seat".) Please state your full name, spell your last name, and state your serial or badge number."

- f. "Please proceed with your testimony regarding this case." *[The witness then gives a narration of the events leading up to the citation or the events witnessed. After the witness has finished, the judge or hearing officer may ask questions for the purpose of clarifying the testimony of the witness. The questions should be neutral and should not be asked in the manner of cross-examination. If any exhibits were used during the testimony, the court should ask the Defendant if there is any objection to the court admitting the exhibit(s). Since this is an informal hearing there should not be any persuasive objections, but better practice is to ask. If the exhibit(s) are admitted, state on the record, "State's exhibit(s) are admitted as part of the record in this case."]*

- g. (To the Defendant) "Do you have any questions for this witness?"

- h. *[It is a common experience at this point for the Defendant to begin making a statement, rather than asking questions on cross-examination.]*

If this occurs, say:]

"Excuse me for interrupting, but you are crossing the line between asking questions and testifying. You will have an opportunity to fully explain what happened during the defense case. Now is the time for cross examination. Do you have any questions for this witness?"

- i. (When the Defendant has no additional questions for the witness, excuse the witness.)

"(Witness), you may step down (or, depending on court practice, skip the "step down" if testifying from the state's table.)

- j. (Call each witness for the State in turn and follow the procedure in the above steps.)
- k. "Now is your chance to present a defense case. How do you wish to proceed? Will you be testifying, or would you like to call your witness(s) first?"
- l. (Call any witness for the Defendant in turn, and follow the procedure in the above steps. The Defendant should be given an opportunity to ask the defense witnesses questions, but the court should also allow the witnesses to testify in the narrative, if that is more appropriate. A police officer does not have the right to cross-examine defense witnesses.)
- m. If the defendant chooses to testify follow the procedure in the steps above. A police officer does not have the right to cross-examine the defendant.
- n. (After all the defense witnesses have testified, admit any defense exhibits.) "The defense rests."
- o. Does the State wish to offer any rebuttal testimony?" (If there is testimony, follow the procedure in the above steps.)
- p. (When the State finishes rebuttal testimony, if sur-rebuttal is allowed, proceed.) "Now is the final chance to present evidence in the hearing. Is there anything you would like to add in response to the state's rebuttal testimony?"

9B. (DEFENDANT REPRESENTED BY COUNSEL)

- a. "Does either side wish to make an opening statement?"
 - b. "The State may proceed."
 - c. (Administer the oath to each of the State's witnesses.)
 - d. (The counsel for the State examines each witness and defense counsel cross-examines the witnesses.)
 - e. (When the State rests)

"(Defense Counsel), do you wish to present any witnesses?"
 - f. (If so, administer the oath to each defense witness before their testimony and allow the prosecutor to cross-examine each witness.)
 - g. (When Defense rests)

"Does the State want to offer any rebuttal evidence?"
 - h. (If so, swear in the witnesses, if not previously sworn, and permit examination and cross-examination of the witnesses.)
 - i. (When examination of the rebuttal witnesses has been completed)
"(Defense Counsel), do you have any sur-rebuttal witnesses?"

(If so, swear in the witnesses, if not previously sworn, and permit examination and cross-examination of the witnesses.)
10. "Would either side like to present a closing argument?" Remember, the State may only present a closing argument if represented by an attorney.
11. After all evidence and exhibits have been presented and all arguments have been offered, the judge or hearing officer states finding of responsible or not responsible. The judge or hearing officer should summarize the evidence and may want to read the statutes, noting the relevant elements of the violation(s).)

12A. (FINDING OF RESPONSIBLE)

a. "Based upon the evidence presented, I find (Defendant) responsible for the violation(s)."

b. "The civil sanction(s) will be \$_____."

(Enter your findings on the traffic citation in the appropriate place.)

c. "You have the right to appeal this decision. A notice of appeal must be filed with this court in writing within fourteen (14) calendar days from today. If you fail to file a notice, you will lose your right to appeal."

(The Defendant signs the original notice of the right to appeal and is given a copy of the notice of the right to appeal either by judge or clerk.)

d. *[If a bond has been previously posted that will pay for the civil sanction:]*

"The bond you posted will be applied to the judgment. (If there is a balance owing, explain how to pay that amount and if there is bond money to be refunded explain the refund process in your court.)"

e. *[If a bond has not been previously posted, follow the practice for your court. For example:]*

"Are you paying the judgment in full today?"

(If YES), direct the Defendant to make the payment.

(If NO), direct the Defendant to your court's financial services section to make payment arrangements.

12B. (FINDING OF NOT RESPONSIBLE)

a. "Based upon the evidence presented, I find the State did not meet its burden of proof and find the Defendant not responsible on the charged civil traffic violation(s)."

b. *If you desire to do so, explain the reasons for the ruling. This is helpful for police officers and defendants. Often times a defendant is found not responsible due to a wrongly charged violation or some other technical error.*

c. *If a bond has been previously posted, follow the practice for your court. For example:*

"The clerk will explain about any refund of your bond."

13. "This hearing is adjourned. We are off the record."

CONTEMPT

CHECKLIST

Contempt is an act of disrespect or disobedience calculated to hinder or obstruct a court in the administration of justice or which lessens the dignity or authority of the Court. Limited jurisdiction courts have the authority to hear, decide and find contempt.¹

CLASSIFICATION OF CONTEMPT

There are two classifications of contempt:

1. Criminal
2. Civil

Test for civil or criminal contempt with the following question.

Is the purpose of the contempt finding punishment or remedial and coercive?

If the answer is PUNISHMENT, it is criminal contempt.

If the answer is REMEDIAL and COERCIVE, it is civil contempt.

TYPE OF CONTEMPT

Within each classification there are two types of contempt:

1. Direct
2. Indirect

To test for direct vs. indirect contempt, ask did the conduct occur in the presence of the court or so near as to obstruct the administration of justice?²

If the answer is YES, it is direct contempt.

If the answer is NO, it is indirect contempt.

TYPE AND NATURE OF CONTEMPT

Direct Criminal Contempt

Direct criminal contempt may be dealt with in a summary proceeding.³

¹ See AZ.R.CR.P. 33; A.R.S. §12-864, and the court's inherent power. Owen v. City Court of the City of Tucson, 123 Ariz. 267, 599 P.2d 223 (1979).

² In extreme cases this may be conduct directed toward other people at the courthouse. Hirschfeld v. Superior Court In and for County of Maricopa, 184 Ariz. 208, 908 P.2d 22 (App. 1995).

³ See AZ.R.CR.P. 33.2

1. If possible, warn the potential contemnor of the impending contempt.
2. (Optional) Permit brief response from contemnor.
3. Prepare and file a written order stating the basis for the contempt finding, including what the judge saw and/or heard.
4. Punishment –Give the contemnor a brief opportunity to present evidence or argument relating to the punishment. Do not make a decision on punishment during the proceeding where contempt occurred, unless prompt punishment is imperative.⁴
5. NOTE: If judge's objectivity is in doubt because of the nature of the contempt or the judge's reaction, it is better practice to have another judge adjudicate the contempt, whether at hearing or trial, especially if punishment is not imposed at the time of the conduct which is the basis for contempt.
6. NOTE: In criminal contempt, the Defendant is entitled to a jury trial if the incarceration is longer than six (6) months, the fine is more than Three Hundred Dollars (\$300), or both. Additionally, in this situation if the Defendant is indigent, the Defendant is entitled to appointed counsel.

Indirect Criminal Contempt

Indirect criminal contempt requires a hearing.⁵

1. Committed outside the Court's presence but interfering with proceedings, process, jurors, witnesses, etc.
2. Set hearing with notice of specifics of charge, etc, allowing Defendant sufficient time to prepare a defense. Defendant may call witnesses.
3. Observe constitutional safeguards at the trial/hearing. If more than six (6) months jail time, a fine of more than three hundred dollars (\$300) or both, the safeguards would include appointment of counsel if jail time is likely and the Defendant is indigent and a jury trial.

In criminal contempt proceedings, the burden of persuasion is proof beyond a reasonable doubt.

⁴ See AZ.R.CR.P. 33.2(b)

⁵ See AZ.R.CR.P. 33.3

Indirect Civil Contempt

Indirect civil contempt requires a hearing.

1. Committed outside the Court's presence.
2. Notice and hearing required.
3. Often brought by aggrieved party, i.e. judgment holder, wanting to secure compliance with a court order that has been disobeyed.
4. Contemnor "holds the key to the jail cell" by compliance with the court order. If the contemnor complies with the court order, the term of incarceration terminates. This is what is meant by "holding the keys to the cell." The court, after a hearing, may order that the defendant receive credit toward payment of the fine for jail time served in an amount that is determined by the judge for each one day of imprisonment. The sentence shall not extend beyond the term of imprisonment for which the defendant might be sentenced for the offense of which the defendant has been found guilty. A.R. S. § 22-352(B). There is a division of opinion on whether Limited Jurisdiction Courts are limited to allowing \$50.00 per day under A.R.S. §31-145 on "days for dollars". This writer does not believe the limitation applies because the section refers to "imprisonment" and "hard labor," not jail time.
5. There may be no right to appointed counsel or a jury trial for civil contempt. In Turner v. Rogers, 564 U.S. 431, 131 S. Ct. 2507 (2011) the Supreme Court stopped short of absolutely requiring appointed counsel in civil contempt cases, instead emphasizing the need to ensure a fair determination of the questions before the court. Arizona has not ruled on this issue.
6. Findings are required and the contempt order must contain a purge clause.

Direct Civil Contempt

Direct civil contempt is the least common of the contempt proceedings for limited jurisdiction courts. It could arise where a witness refuses to answer a question without a justifiable constitutional reason. If applicable there could be a summary proceeding or the court could set a hearing. As with indirect civil contempt, there are no set constitutional rights on legal representation and jury trial. Any contempt order must contain a purge clause that clearly states what the contemnor must do to clear the contempt.

In civil contempt proceedings, the burden of persuasion is proof by a preponderance of the evidence.

CONTEMPT

The classification of the contempt directs the procedures to be followed.

1. Determine type of contempt

- Direct

Direct contempt is an act committed in the presence of the court or so near thereto as to obstruct the administration of justice.

- Indirect

Constructive or indirect contempt is an act committed outside the presence of the court.

Sanctions

Sanctions are different depending on the nature of the classification of contempt.

2. Determine the classification of contempt

- Criminal

Purpose of Criminal Contempt – A criminal contempt is found solely for punishment purposes, and nothing the contemnor can do will free him or her before the term of confinement imposed has run out. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442, 31 S.Ct. 492, 498, 55 L.Ed. 797, 806 (1911), Ong Hing v. Thurston, 101 Ariz. 92, 416 P.2d 416 (1966).

Punishment Only Criminal Contempt – A contempt finding intended solely for the purpose of imposing punishment must, by definition, involve a finding of criminal contempt.

- Civil

Definition – Civil contempt is the disobedience of a court order directing an act for the benefit or advantage of the opposing party to the litigation.

Purpose of Civil Contempt – To coerce a person to do or refrain from doing some act.

To effectuate this coercion, there must be a meaningful purge clause.

Purge Clause in Civil Contempt

Purge: Imprisonment for civil contempt may be ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form, or substance, was mandatory in its character.

1. Imprisonment in civil contempt is inflicted not for punishment. It is intended to be remedial and coerces defendants to do what they have refused to do. The decree in such cases is that the defendant stands committed unless and until performance of the affirmative act required by the court's order.

Contemnors may end the sentence and secure discharge at any moment by doing what they previously refused to do.

2. There must be a purge clause. Contemnors carry the keys of incarceration in their own pocket. If the contemnor completes the mandate of the purge clause, the contempt is purged.

Continued incarceration after purge payment – If a contemnor has satisfied a purge, but the court declines to release the defendant from incarceration, a continued sentence under such circumstances would be a criminal contempt because such incarceration becomes, by its nature, punitive only. The defendant must have been given all rights, including an attorney as set forth under criminal contempt. Korman v. Strick, 133 Ariz. 471, 652 P.2d 544 (1982).

ATTORNEY'S FEES

A failure to pay attorney's fees owed as a result of a court order to the opposing party is a constructive contempt. In re Quan, 39 Ariz. 13, 3 P.2d 522 (1931).

INDIRECT CRIMINAL CONTEMPT

Indirect criminal contempt – In an indirect criminal contempt case alleged contemnors would have additional rights, e.g., the right to notice that they face a criminal rather than a civil charge, the potential right to a jury trial, court appointed counsel and the right to require proof against them to be beyond a reasonable doubt.

A criminal contempt prosecution may be an option under AZ.R.CR.P. 33.

INDIRECT CIVIL CONTEMPT

Findings are required for indirect civil contempt.

CONTEMPT FINDINGS FOR INDIRECT CIVIL CONTEMPT

SAMPLE FINDINGS

1. There is a valid order of _____ which was signed by a Court of competent jurisdiction on _____.
2. OBLIGOR had knowledge of the obligation to pay the foregoing, _____, had the ability to pay the amount in full or in part and willfully failed and refused to pay.
3. THE COURT FINDS OBLIGOR to be arrears in the sum of \$_____ for _____ for the period commencing _____ through _____.
4. Obligor is in indirect civil contempt of court.

SAMPLE ORDERS

It is therefore ordered as follows:

Contempt

1. It is ordered obligor is found in indirect civil contempt of court for failure to _____.
2. It is ordered granting judgment for the arrearage against obligor in the sum of \$_____ together with interest thereon as provided by law.
3. Obligor shall pay the arrearage/judgment in installments of \$_____ per month commencing _____.
4. Payments to the _____ shall be made through the _____ Clerk of the Court, until all of the judgment/arrearage is satisfied.
5. A lien may be granted against the property owned by Obligor upon filing of the judgment.

Review Hearing

A review hearing is recommended for the following reasons:

1. To ensure compliance;
2. To ensure that a contemnor does not remain incarcerated when he/she has complied or is able to comply, and;
3. A review hearing may be set to enable a contemnor to comply before incarceration. Incarceration may be set on the date for review hearing. If the contemnor brings proof of compliance, incarceration will not be necessary.

SAMPLE REVIEW HEARING ORDER

1. It is further ordered setting this matter for Review Hearing on _____ at _____ (Time Allotted: 20 Minutes) in this division in Courtroom # _____ [Give written notice.]
2. At the Review Hearing, it shall be the responsibility of the Obligor to provide a detailed calculation of the amount paid and the amount owed for _____. Obligor shall support his/her arguments with documentation and paperwork in addition to information regarding ability to pay.
3. It shall be the responsibility of the Obligor to provide this information to the _____ five days prior to the Review Hearing.
4. Failure to appear for the review hearing may result in the issuance of a civil arrest warrant.

PURGE ORDERS

1. Obligor may purge the contempt by paying the purge amount of \$_____ and remaining current on obligor's support monthly arrearage installment of _____ for _____ months.
2. The purge amount may be paid in cashier's check or cash currency or _____.

INCARCERATION ORDERS

1. It is further ordered obligor shall be incarcerated in the _____ Jail for an indefinite period of time, not to exceed six months. Obligor shall be released from jail if Obligor either satisfies the purge or if Obligor has been incarcerated for six months, whichever comes first.