Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

ROBIN SWEET
Director and
State Court Administrator

JOHN MCCORMICK
Assistant Court Administrator
Judicial Programs and Services

RICHARD A. STEFANI
Deputy Director
Information Technology

MEETING NOTICE AND AGENDA

Commission on Statewide Rules of Criminal Procedure
Videoconference

Date and Time of Meeting: Monday, February 25, 2019 at Noon
Place of Meeting:

Carson City	Las Vegas	Washoe
Supreme Court Library Room 107 201 S. Carson Street Carson City, Nevada	Nevada Supreme Court Building Conference Room A/B 408 E. Clark Avenue Las Vegas, NV	Second Judicial District Court Room 220B 75 Court Street Reno, NV
Teleconference Access:	Dial-In # 1-408-740-7256	Meeting ID 1110011234

All participants attending via teleconference should mute their lines when not speaking; it is highly recommended that teleconference attendees use a landline and handset in order to reduce background noise.

AGENDA

I. Call to Order
   A. Introduction of New Members
   B. Call of Roll and Determination of a Quorum
   C. Opening Remarks
      i. Clarification of Voting Members on Commission

II. Review and Approval of the January 23, 2019 Meeting Summary **(Tab 1)**

III. January 23, 2019 Meeting Follow-Ups
   A. Life/Death Pretrial Practice Work Group Recommendations **(Tab 2)**
   B. Judicial Training Report **(Tab 3)**

IV. Eighth Judicial District Court's Homicide Case Program Update (**Tab 4)** – *Judge Douglas Herndon*

V. Proposed Statewide Rules: Structure/Outline Discussion
   A. Draft Rules Discussion **(Tab 5)**

i. Arizona Rules of Criminal Procedure
ii. Utah Rules of Criminal Procedure

B. Federal Rules of Criminal Procedure: 2018 Edition available at https://www.federalrulesofcriminalprocedure.org/

VI. Other Items/Discussion

VII. Next Meeting Date and Location

VIII. Adjournment

- Action items are noted by * and typically include review, approval, denial, and/or postponement of specific items. Certain items may be referred to a subcommittee for additional review and action.
- Agenda items may be taken out of order at the discretion of the Chair in order to accommodate persons appearing before the Commission and/or to aid in the time efficiency of the meeting.
- If members of the public participate in the meeting, they must identify themselves when requested. Public comment is welcomed by the Commission but may be limited at the discretion of the Chair.
- The Commission is pleased to provide reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If assistance is required, please notify Commission staff by phone or by email no later than two working days prior to the meeting, as follows: Jamie Gradick, (775) 687-9808 - email: jgradick@nvcourts.nv.gov
- This meeting is exempt from the Nevada Open Meeting Law (NRS 241.030)
- At the discretion of the Chair, topics related to the administration of justice, judicial personnel, and judicial matters that are of a confidential nature may be closed to the public.
- **Notice of this meeting was posted in the following locations**: Nevada Supreme Court website: www.nevadajudiciary.us; Carson City: Supreme Court Building, Administrative Office of the Courts, 201 South Carson Street; Las Vegas: Nevada Supreme Court, 408 East Clark Avenue.

TAB 1

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Commission on Statewide Rules of Criminal Procedure
January 23, 2019
Noon
Summary prepared by: Jamie Gradick

Members Present
Justice James Hardesty, Chair
Justice Abbi Silver, Co-Chair
Justice Lidia Stiglich, Co-Chair
John Arrascada
Chief Judge Scott Freeman
Judge Douglas Herndon
Christopher Hicks
Darin Imlay
Mark Jackson
Lisa Rasmussen
Judge Jim Shirley
JoNell Thomas
Steve Wolfson

Guests Present
Sharon Dickinson
Chris Lalli
Robert O'Brien
Luke Prengaman

AOC Staff Present
Jamie Gradick
John McCormick

I. Call to Order
- Justice Hardesty called the meeting to order at 12:05 pm. A quorum was present.
- Justice Hardesty commented on recent changes to the Commission membership and asked attendees to introduce themselves.
- Attendees discussed new Commission goals.
  - Justice Hardesty informed attendees that the Commission's goal is to submit draft rules to the Nevada Supreme Court by Sept. 1, 2019.

II. Review of October 8, 2018 Meeting Summary
- The summary was included in the meeting material packet for informational purposes; because of the new make-up of the Commission membership, a motion for approval of the summary was not appropriate.

III. Work Group Status Updates and/or Recommendations

- Chief Judge Scott Freeman, as chair of the Jury Instructions Work Group, provided attendees with a brief recap/overview of the work group's progress.
  - The work group continues to move through the pattern instruction book section by section. This is a slow process but necessary in order to achieve the work group's goal.
  - The group meets monthly for 2 hours; Judge Freeman's law clerks aid in editing and maintaining the DropBox where all the instructions are housed.
  - Judge Freeman briefly addressed the evolution of the work group's membership and thanked Luke Prengaman and Deborah Westbrook for their instrumental efforts in the work group.
  - The Nevada Bar has agreed to publish the final pattern instructions.
- Attendees discussed the status of the Discovery Work Group; present work group members informed the Commission that the work group has not been meeting.
  - Justice Hardesty abolished the work group.
- John Arrascada, as chair of the Motions Practice Work Group, provided attendees with a brief overview of the work group's progress.
  - There have been challenges getting a quorum.
  - Justice Hardesty commented that the topics being addressed should be vetted by the entire Commission
  - Justice Hardesty abolished the work group.
- Mr. Steve Wolfson, together with Judge Douglas Herndon, provided an overview/status update on the Life/Death Pretrial Practice Work Group and the Eighth Judicial District Court Homicide Case Pilot Project.
  - Mr. Wolfson provided a brief recap of the work group's creation and efforts and explained that many of the issues the work group worked on are issues unique to Clark County.
  - Judge Herndon provided an overview of the homicide case project's efforts.
    - The administrative order creating the program is open-ended so there is no set end date for the program.
    - 2018 was the first full-calendar year of the program.
    - Between July 2017 and July 2018, the program saved the county approximately $1.5 million in bed space at the jail.
    - In 2018: assigned out 137 new cases, closed 123, and tried 33 homicide cases.
  - Judge Herndon explained that there is a balance to active case management; each case has nuances to consider.
  - Judge Herndon commented that the homicide case program is running successfully and suggested that the Commission now look at other recommendations from the work group's report like Rule 250 changes and settlement conference requirements.
  - Justice Hardesty asked whether the case management recommendations from the work group's report could be applicable to other counties.
    - Mr. Jackson commented that they would not be applicable in Douglas County
    - Judge Shirley commented that they would not be applicable in the 11th Judicial District.
    - Mr. Hicks commented that some of the recommendations would help with resolution efficiency in Washoe County.
    - Judge Freeman commented that Washoe County does not have the same volume as Clark County so some of the recommendations will not apply but he does support

the settlement conference recommendation and suggests that the Commission consider this.

- Attendees discussed case management efforts for homicide cases as well as the death penalty cases. Judge Herndon explained that the homicide case program does this informally and allows the four homicide team judges a degree of flexibility.
- Justice Hardesty commented on the importance of having qualified and trained judges handling death penalty and homicide cases.
  - This is a recommendation that would have a statewide application.
  - Judge Freeman asked for clarification regarding how this type of training would be accomplished.
  - Justice Hardesty informed attendees that not all trainings in this area are helpful or address the correct things. Supreme Court Rule 250 sets out specific training expectations and requirements for attorneys, there should be similar requirements for judges.
  - Attendees agreed to keep this topic on the agenda for further discussion; Justice Hardesty asked Mr. McCormick and Ms. Gradick to research available judicial education on this topic.
- Justice Hardesty suggested that death penalty/homicide qualified judges from other districts could be assigned to try these cases in Clark County.
  - Judge Herndon commented that too many judges in the process impairs productivity and clarified that the homicide team judges are getting the cases trial-ready and are also trying the cases.
  - Mr. Darin Imlay expressed concern with "spreading attorneys too thin" as the Clark County Public Defender office cannot handle any expansion at this point. Ms. Thomas echoed Mr. Imlay's concerns and commented that the system appears to be working well and they are "tweaking" things as necessary.
- Justice Stiglich asked for clarification regarding whether stacks and firm trial dates are issues in the 8th judicial district. Would it be possible to give priority to homicide cases?
  - Judge Herndon commented that trial dates are usually firm. When a continuance occurs, most of the time it is due to an evidentiary or witness issue.
  - Mr. Wolfson explained that the four homicide judges monitor their own calendars to shorten and decrease continuances.
  - Attendees discussed whether the "gentlemen's agreement" to follow stipulated sentencing has helped move the cases long.
- Attendees discussed whether the Commission should consider the mandatory settlement conference recommendation from the report.
  - Judge Herndon clarified that the settlement conference would be presided over by a judge not assigned to the case; this would include senior judges and judges from other districts or departments.
  - Justice Hardesty explained that the ADKT process can change existing jurisprudence; recommending this to the Nevada Supreme Court for consideration could help with possible *Kripps* conflicts.
  - Attendees expressed concern with senior judges handling settlement conferences for these types of cases; there needs to be proper experience and training.
  - Attendees discussed what other case types could benefit from settlement conferences. Concern was expressed regarding mandatory conferences in every criminal case; a suggestion was made that the homicide cases require settlement

conferences but other case types have the option of holding conferences as necessary.
  - Mr. Hicks commented that victims' rights under Marsy's Law would also have to be considered.
  - Judge Herndon suggested the Commission consider putting forth an ADKT; Justice Hardesty asked Judge Herndon to work with other stakeholders as necessary to draft language for settlement conference rules for consideration at the next Commission meeting.
- Justice Hardesty asked attendees for suggestions regarding S.C.R. 250 modifications recommendations; this discussion will be carried over for the next meeting. Attendees were asked to review the work group's recommendations on this topic for further discussion.

IV. SB5: Discussion

- Justice Hardesty asked attendees for input regarding Senate Bill 5, particularly whether this legislation is appropriate or should be withdrawn from legislative consideration.
  - Justice Hardesty informed attendees that he feels the bill should be withdrawn; there is already authority for the Nevada Supreme Court to exercise its inherent powers to adopt criminal procedure rules.
  - Mr. John McCormick explained that he has spoken with the LCB and the bill could be withdrawn easily.
  - Mr. McCormick commented that he believes there is value in the language addressing potential conflicts between statute and the contemplated rules; the rules will control.
    - Justice Hardesty commented that the Commission should avoid getting into a conflict with statute; rules that develop from this Commission's work should conform to statute.
    - Mr. Chris Lalli commented that there is already a good deal of criminal procedure in the NRS but it is not comprehensive; a "patchwork" of rules exists and conflicts are likely to arise.
    - Attendees discussed how best to address potential conflicts and whether the language in question should be kept. It may be most prudent to retain the conflict language portion of the bill and ask the legislature to "step out" and defer to the Court's rules.
    - Discussion was held regarding making adjustments to ambiguities though the administrative docket process rather than legislatively.
    - Mr. Mark Jackson reminded attendees that one of the original goals of this Commission was to address the lack of uniformity and the "hodge-podge" makeup of the current criminal procedure rules. SB5 could decrease the amount of litigation over conflicting rules and which rules will govern.
    - Ms. JoNell Thomas commented that there is ambiguity in terms of what are considered rules of criminal procedure versus what are considered substantive rules.
    - Justice Hardesty commented that the focus is on the procedural rules; there is no intent for this Commission to take us evidentiary rules.
    - Attendees discussed the ability of the Commission to decide which areas are procedural versus substantive and which areas it wants to address.

- Justice Hardesty called for a vote on whether the Commission membership supports retention of the concept as outlined in Section 1(4) of SB5; this would be the sole subject of SB5.
  - The Commission voted to support this motion (7- 4).
  - Justice Hardesty asked Mr. McCormick to amend SB5 accordingly.

V. Proposed Statewide Rules: Discussion

- Judge Shirley provided attendees with a brief overview of the document and the efforts behind its creation.
  - The Motions Practice Work Group reviewed the federal rules and the criminal procedure rules in other states and opted to model this draft after the state rules used in Utah and Arizona.
  - Justice Hardesty asked attendees to review this draft and the federal rules and be ready to discuss both at the next meeting.
    - The goal of that discussion will be to decide on a framework for reviewing and drafting the rules the Commission will ultimately propose.
    - Mr. Jackson explained that the work group had spent quite a bit of time research other rule models and discussing the best process for how to draft these rules.
    - Ms. Gradick has access to this document in Word format; she will distribute it to the Commission members.
    - Ms. Gradick will also find and distribute the links to Utah's and Arizona's criminal procedure rules.

VI. Commission Website

- Justice Hardesty informed attendees that, moving forward, the Commission's efforts would be publically documented on the Commission's website, similar to the way the Committee to Study Evidence-Based Pretrial Release's work has been documented.

VII. Other Items/Discussion

- The district attorney and public defender offices from both Washoe County and Clark County agreed to help with the Commission's research needs.

VIII. Next Meeting

- Justice Hardesty requested that Ms. Gradick, survey the Commission membership for availability and schedule a meeting for next month.

IX. Adjournment

- The meeting was adjourned at 1:45 p.m.

TAB 2

The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations

Nancy J. King* and Ronald F. Wright**

This Article, the most comprehensive study of judicial participation in plea negotiations since the 1970s, reveals a stunning array of new procedures that involve judges routinely in the settlement of criminal cases. Interviewing nearly one hundred judges and attorneys in ten states, we found that what once were informal, disfavored interactions have quietly, without notice, transformed into highly structured best practices for docket management. We learned of grant-funded problem-solving sessions complete with risk assessments and real-time information on treatment options; multicase conferences where other lawyers chime in; settlement courts located at the jail; settlement dockets with retired judges; full-blown felony mediation with defendant and victims; felony-court judges serving as lower court judges; and more. We detail the reasons these innovations in managerial judging have developed so recently on the criminal side, why they thrive, and why some judges have not joined in. Contrary to common assumptions, the potential benefits of regulated involvement of the judge include more informed sentencing by judges, as well as less coercion and uncertainty for defendants facing early plea offers. Our qualitative evidence also raises intriguing hypotheses for future research.

Introduction

In our criminal justice system of negotiated guilty pleas, the job description of the trial judge remains in flux. Should the judge work alongside the negotiating parties in settling criminal cases? The debate has escalated in the past few years. Recently, for example, the Committee that drafts amendments to the Federal Rules of Criminal Procedure narrowly defeated a proposal that would have allowed the limited participation of

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** Needham Yancey Gulley Professor of Criminal Law, Wake Forest University School of Law. Thank you to the dozens and dozens of lawyers and judges who agreed to speak with us for their time and candid conversations. Thanks also to Chris Guthrie, Ganesh Sitaraman, Chris Slobogin, Alistair Newbern, Russell Gold, and Kami Chavis, who read earlier drafts and provided helpful comments.

judges in plea negotiations,[1] while Massachusetts moved in the other direction, adopting a new rule authorizing and regulating the same practice.[2]

Unfortunately for policy makers hoping to make informed decisions, the rhetoric about judicial participation in plea bargaining far outstrips the little empirical information that exists about the practice—and that information mostly dates from the 1970s. Back then, when plea bargaining was just emerging from the shadows, Professor Albert Alschuler revealed in a definitive field study that judges engaged in this back-room horse trading with a wink and a nod, or in secret.[3] Forty years later, the phrase "judicial participation in plea bargaining" still carries with it the same nefarious image—trial judges cajoling and threatening defendants to take the deal rather than pay the consequences of asserting the right to trial.[4] With only a smattering of efforts since the 1970s to document what judges actually do,[5] the assumption that nothing has changed is understandable. But it is wrong.

In this Article we report surprising findings from nearly one hundred detailed interviews about judicial participation in negotiations in felony cases, interviews we conducted with trial judges, prosecutors, and defense attorneys in ten states.[6] We learned that judicial involvement in negotiations is now institutionalized and embedded in the very structure of many court systems in ways never dreamed of in the 1970s. With no fanfare from scholars, "managerial judging," the philosophy that transformed civil litigation in the late twentieth century,[7] has finally taken hold in criminal litigation, more than thirty years later. Along with this shift in philosophy,

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1. Minutes, Advisory Comm. on the Fed. Rules of Criminal Procedure 3–9 (Nov. 4–5, 2014) [hereinafter Minutes, Advisory Comm. on Criminal Rules]. The Federal Rules have prohibited judicial involvement since 1975. Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, 89 Stat. 370–71 (approving a precursor of FED. R. CRIM. P. 11(c)(1)).

2. *See* MASS. R. CRIM. P. 12 (as amended Jan. 29, 2015, effective May 11, 2015). The amendment was adopted "to promote fair and efficient plea bargaining and to establish rules to govern the previously unregulated and widely varying practice of lobby conferences." *Id.* (Reporter's Notes).

3. *See* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1087–99 (1976) [hereinafter Alschuler, *The Trial Judge's Role*] (describing "forthright" off-the-record judicial bargaining as well as "[s]ystems of . . . [i]ndirection and [c]ajolery"). For related studies, see Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975) [hereinafter Alschuler, *The Defense Attorney's Role*] and Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

4. *See, e.g.*, United States v. Davila, 133 S. Ct. 2139, 2149 & n.5 (2013) (discussing a magistrate judge's conduct in encouraging a defendant to plead guilty).

5. *See infra* notes 49–51 and accompanying text.

6. The law in each of these states—California, Florida, Kansas, Maryland, Michigan, Missouri, North Carolina, Ohio, Oregon, and Utah—shares two characteristics: it permits at least some type of judicial participation in plea negotiations, and it includes sentencing rules, such as voluntary or presumptive sentencing guidelines or other limits, that could reduce uncertainty about the sentences that judges will impose. *See infra* subpart I(B) and section III(B)(4).

7. For the classic treatment, see generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

the judge's participation in negotiations has matured into a standard managerial tool. What once were informal, sometimes-illicit interactions between judges and parties in criminal cases have in many courts evolved into highly structured best practices for docket management.

After detailing these developments, we turn to what might explain them.[8] Our interviews uncovered two sets of explanations. First, the revolution in information technology in state courts since the 1990s, together with the budget pressures of the recent Great Recession, have jump-started new forms of managerial judging in criminal cases, including the institutionalization of the judge's involvement in plea negotiations.[9] The technology to track and report the daily progress of a criminal case leaves trial judges exposed: court administrators can now hold individual trial judges accountable for each tiny variation in docket speed and related administrative cost.[10]

In addition, we learned that judges and lawyers value judicial contributions to negotiations for many reasons other than efficiency.[11] Our interviewees turned upside down some of the well-worn objections to judges' involvement. Information deficits and potential coercion of the defendant, for example, raised concerns only for a small portion of our interviewees.[12] Instead, defense attorneys, prosecutors, and judges alike explained to us how the judge's involvement often mitigated the uncertainty and compulsion a prosecutor's early offer can present.[13] Prosecutors accepted the judge's input, sometimes grudgingly, as an additional route to settlement; meanwhile, many defense attorneys felt confident that they could use the judge's presence to benefit their clients, while shielding them from coercion.[14]

The interviews also upended some of our own expectations about this practice. For example, we thought that judicial sentencing guidelines or other structured-sentencing laws might shrink the parties' uncertainty about an expected sentence and, with it, their appetite for judicial input in their negotiations. But structured-sentencing laws generally did not push judges away from negotiations. Where judicial involvement allowed participants to avoid compliance with unwelcome legal requirements, those constraints in sentencing law may have had the opposite effect.[15] We also thought that the advent of victims' rights and impact statements might deter judges from discussing sentences with the parties early on. Instead, a sentence that the parties and the judge hammer out together may include more of the victim's

8. *See infra* Part III.
9. *See infra* subpart III(A).
10. *See infra* section III(A)(2).
11. *See infra* subpart III(B).
12. *See infra* sections III(B)(5)–(7).
13. *See infra* sections III(B)(4)–(6).
14. *See infra* sections III(B)(2)–(3).
15. *See infra* subsection III(B)(4)(a).

input than a stipulated sentence that the parties tender to the judge as a done deal.[16] Some prosecutors told us that victims, too, value the certainty a judge's input provides.[17] The judge's participation provided many other benefits for these participants as well—some of them completely missed in previous scholarship—which for them outweighed any potential costs.

We report here one further feature of the negotiation landscape in these ten states. Although judicial involvement in plea negotiations is now built into the framework of some courts in the states we examined, the practice is not universal, even where the law makes it possible.[18] In two states we studied, rules leave a narrow opening for judges to work with lawyers before a plea is tendered, but judges generally have not grasped that opportunity.[19] In the other states where judges contribute more frequently, some judges jump into negotiations with gusto while others stay on the sidelines.[20] We share several explanations that lawyers and judges in the field offered for this variety in practice. Some interviewees worried that judges in smaller districts, once assigned to settlement duties, would later need to preside over the trial of that same case.[21] Others discussed the political vulnerability or inexperience of some judges, judicial personality, and relationships between the bench and bar.[22]

This unprecedented view of contemporary judicial participation in plea negotiations provides a reality check for outdated assumptions about how judges and lawyers actually negotiate. Our study also raises dozens of intriguing hypotheses for future research—a major advantage of qualitative research. Part I of this Article reviews past empirical portraits of judicial negotiation activity and describes the methodology of our field study. We then catalog in Part II our most important findings: the various institutionalized forms of judicial involvement in plea negotiations. Part III examines why these new features of criminal-case processing have taken root and why courts now treat judicial negotiation—once a covert, ad hoc activity—as a routine best practice. Subpart III(A) discusses how recent trends in court administration and information technology have facilitated these new forms of judicial negotiation: better case-tracking and cost-accounting measures have made judges more committed than ever to clearing their dockets quickly. Subpart III(B) details other reasons why these innovations may be thriving, some of which run contrary to received wisdom: according to our interviewees, the judge's involvement during negotiations

16. *See infra* notes 303–07 and accompanying text.

17. *See infra* note 303.

18. *See infra* Part IV.

19. *See infra* notes 385–88 and accompanying text.

20. *See infra* notes 363–66 and accompanying text.

21. *See infra* notes 373–74 and accompanying text (discussing constraints on rural courts generally).

22. *See infra* notes 367–84 and accompanying text.

gives the judge a chance to add new charging and sentencing ideas and to correct the attorneys' legal errors before the guilty plea hearing; it gives the prosecutor a way to manage police, victims, and public perceptions about the sentence; it often gives the defendant a more lenient sentence; and it gives attorneys, defendants, and victims more certainty about the likely outcome—among other benefits. Part IV describes the flip side—those judges who do not use these managerial techniques, along with their explanations for holding out.

Finally, in Part V, we speculate about the long-term implications for criminal justice when judges involve themselves, openly and as a matter of institutional routine, as negotiators. On balance, we believe routine or selective judicial participation in plea negotiation can add value, particularly in jurisdictions with multiple judges and when carefully limited in scope. In many of the courts that have normalized judicial involvement, the rules regulating the process and the participants involved take steps to prevent known risks such as coercion of the defendant or sentencing decisions based on incomplete information. With its ill effects neutralized, the many benefits of judicial input—a counterweight to intransigent prosecutors, a safeguard against overstretched defense counsel, and a source of more complete information for defendants during negotiations and for judges deciding sentences—can be compelling.

I. Filling the Empirical Void

There is no shortage of scholarship rehashing the *normative* arguments over the judge's appropriate role in plea bargaining. Both in the 1970s and

'80s[23] and more recently,[24] this commentary concentrated on two somewhat competing claims about the effects of judicial participation: that it could

23. *See* Graham Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753, 760 (1981) (characterizing judicial involvement in plea bargaining as an "impermissible pressure[]" on a defendant to plead guilty); Thomas D. Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509, 514–18 (1971) (asserting that judicial involvement leads to "a more informed and meaningful plea" and discounting the coercion concern); Stephen R. Schlesinger & Elizabeth A. Malloy, *Plea Bargaining and the Judiciary: An Argument for Reform*, 30 DRAKE L. REV. 581, 587–93 (1980–1981) (outlining and answering the standard objections in arguing for institutionalized judicial involvement); Michael A. Hiser, Comment, State v. Byrd*: Judicial Participation in Plea Bargaining—Fundamental Fairness?*, 8 OHIO N.U. L. REV. 212, 219–22 (1981) (arguing for a defendant's constitutional right to counsel in plea negotiations with judicial involvement); Daniel Klein, Note, *Judicial Participation in Guilty Pleas—A Search for Standards*, 33 U. PITT. L. REV. 151, 156 (1971) (discussing the coercive potential of judicial involvement); Lowell B. Miller, Comment, *Judicial Discretion to Reject Negotiated Pleas*, 63 GEO. L.J. 241, 254–55, 254 n.93 (1974) (arguing that, while the judge should have discretion to reject a negotiated plea, direct involvement in negotiations should be avoided as "rais[ing] many constitutional and practical difficulties"); Ursula Odiaga, Note, *The Ethics of Judicial Discretion in Plea Bargaining*, 2 GEO. J. LEGAL ETHICS 695, 721–23 (1989) (rearticulating a proposal of mandatory judicial involvement so as to "afford some of the protections derived from trial"); Note, *Plea Bargaining: The Case for Reform*, 6 U. RICH. L. REV. 325, 329–33 (1972) (criticizing the "officially nonexistent" contemporary practice of plea bargaining as failing to protect the constitutional rights of the accused); Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 296–98 (1972) (proposing adoption of a preplea conference managed by judge).

24. *See* RICHARD L. LIPPKE, THE ETHICS OF PLEA BARGAINING 16–28 (2011) (proposing judge-run "settlement hearings," with "waiver rewards" to defendants who settle, and discussing attendant incentive and ethical issues); Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 OHIO ST. L.J. 565, 572–79, 587–96 (2015) (surveying state rules regarding judicial involvement and making normative recommendations); Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1069 (2016) [hereinafter Bibas, *From the Ground Up*] (recommending judicial involvement in part to counterbalance "prosecutors' unilateral offers and threats"); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2542–43 (2004) [hereinafter Bibas, *Outside the Shadow of Trial*] (supporting increased judicial involvement as a corrective of agency cost problems); Isaac Borenstein & Erin J. Anderson, *Judicial Participation in Plea Negotiations: The Elephant in Chambers*, 14 SUFFOLK J. TRIAL & APP. ADVOC. 1, 29–33 (2009) (making specific recommendations "designed to aid in ensuring a fair and just resolution of criminal cases through plea agreements, with the appropriate participation of a judge"); Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1423 (2004) (arguing for a bright-line prohibition on judicial involvement); Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEXAS L. REV. 2023, 2049–53 (2006) (suggesting increased judicial scrutiny of negotiated pleas as a means of curtailing prosecutorial discretion in plea bargaining); Daniel S. McConkie, *Judges as Framers of Plea Bargaining*, 26 STAN. L. & POL'Y REV. 61, 64–66 (2015) (outlining a "thought experiment" for the federal system: "letting defendants request from the court, early in the case, two indicated sentences: one for a guilty plea and another for a post-trial sentence . . . [after engaging] in litigation similar to a sentencing proceeding, with the help of a pre-plea presentence report"); Rachel Broder, Comment, *Fair and Effective Administration of Justice: Amending Rule 11(c)(1) to Allow for Judicial Participation in Plea Negotiations*, 88 TEMP. L. REV. 357, 376–82 (2016) (asserting that judicial involvement would restore integrity to the plea bargaining process); Jennifer Marquis, Casenote, State of Connecticut v. D'Antonio*: An Analysis of Judicial Participation in the Plea Bargain Process*, 25 QUINNIPIAC L. REV. 455, 494 (2006) (arguing for the minimal involvement of judges in plea negotiations).

coerce a defendant into pleading guilty, and that it could moderate prosecutorial excess that would otherwise go unchecked.

Our qualitative study investigates these and other familiar hypotheses, providing a close look at how judicial participation actually works in the twenty-first century in multiple states. But this study goes well beyond reporting information that could help policy makers evaluate these familiar contentions. Unlike any previous discussion of judicial participation, empirical or not, we also investigate how the most significant changes over the last thirty years in the institutional context for judicial negotiations—including developments in information technology, sentencing law, victims' rights, and court administration generally—have affected what judges do.[25]

A. Past Empirical Studies

Considering the amount of commentary on judicial participation in plea negotiation, empirical studies of the practice are surprisingly scarce. The most comprehensive research dates from almost half a century ago, when Al Alschuler ventured out into the criminal courts in ten cities, determined to see for himself the shadowy world of plea bargaining.[26] At the time, accounts of criminal "compromises" or "bargain justice" were based on limited efforts to collect lawyer anecdotes and a handful of appellate opinions,[27] as well as reports of a statistical shift away from trials toward pleas.[28] To find out more,

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25. A few articles, however, have noted the connections between judicial negotiation and the more central role of the judge in an inquisitorial system. *See* Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 560 (1997) (describing various types of bargaining in German criminal proceedings); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 266, 284–85 (2006) (comparing due process standards of adversarial and inquisitorial systems and calling for a stronger role for judges in plea colloquies); Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 720–723 (2014) (citing studies of inquisitorial judging and suggesting improvements to the plea bargaining process).

26. *See supra* note 3 and accompanying text.

27. *See generally* Justin Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1 (1927) (discussing various ways in which criminal cases are resolved through compromise and not taken to jury trial); Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97 (1928) (surveying the increased rate of plea deals against the backdrop of prosecutorial discretion); Donald J. Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 780 (1956) (describing trends in plea bargaining based on interviews with parties involved); Ruth G. Weintraub & Rosalind Tough, *Lesser Pleas Considered*, 32 J. CRIM. L. & CRIMINOLOGY 506 (1942) (reviewing prosecutor statements in New York explaining decisions to endorse guilty pleas to lesser offenses); Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167 (1964) (examining prosecutorial and judicial inducements on defendants to plead guilty, in light of the constitutional requirements of knowing and voluntary waiver). For an exceptional empirical effort to explore typical prosecutorial actions and motives, see Dominick R. Vetri, Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 app. at 896–908 (1964).

28. *See, e.g.*, DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 231 (Frank J. Remington ed., 1966) ("The guilty plea process,

Alschuler talked with a wide range of practicing lawyers and judges about their precise roles in the plea-negotiation process and their motives for avoiding trial.[29] His in-depth interviews uncovered a world where judicial negotiation was largely covert—an unsanctioned coping mechanism judges used on an unsystematic basis to manage a growing volume of cases.[30]

He found that some judges remained on the sidelines, ceding to prosecutors the power to determine sentences.[31] Others included a predictable trial penalty in the sentences of any defendant who failed to reach an agreement, but never directly voiced this expected plea discount to the negotiating parties.[32] Forthright judicial negotiation was a third approach, where the judge, when asked, held a chambers conference with both lawyers, and after hearing what they had to say about the case, announced what sentence he would impose if the defendant pleaded guilty.[33] The most common approach, however, was for judges to bargain through "[h]ints, [i]ndirection and [c]ajolery."[34] Such judges might signal displeasure with the prosecutor's inflexibility, hoping to persuade the prosecutor to make a more favorable offer, or opine about a likely sentence for the defendant if he were to plead guilty.[35]

With one exception,[36] Alschuler found that participating in negotiations was the individual choice of each judge rather than a formalized aspect of case processing.[37] When he asked why individual judges involved themselves in the negotiations, the overriding reason he heard was efficiency—"the need to process large caseloads with seriously inadequate resources."[38] Judges were aware of their caseload statistics, and those who did not move their cases at an acceptable pace faced pressure from the presiding judge and the parties to catch up.[39] Judicial bargaining could also give the prosecutor and judge a forum for deciding who would take political

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frequently occurring and of great administrative significance, has grown without much formal attention . . . .").

29. Alschuler, *The Trial Judge's Role*, *supra* note 3, at 1060–61.

30. *Id.* at 1059–60, 1099.

31. *Id.* at 1061–62.

32. *Id.* at 1076.

33. *Id.* at 1087–88.

34. *Id.* at 1092.

35. *Id.* at 1092–93, 1096.

36. *Id.* at 1090 n.98. In Brooklyn state court at the time, a felony case would be scheduled immediately after indictment for a five-minute session in the court's "conference part," which had a full-time judge. *Id.* Cases that did not resolve by agreement at this stage would be assigned to another judge in the court's "trial part." *Id.*

37. *See id.* at 1099–1103 (describing the factors that influenced judges to participate in plea negotiations).

38. *Id.* at 1099.

39. *Id.* at 1100–02.

responsibility among the voters for a less severe sentence.[40] Alschuler, who generally favored the abolition of plea bargaining, criticized efforts by the organized bar and mainstream legal academy of that era to eradicate the judicial participation they found unseemly.[41] The real effect of formal restraints on negotiation, he maintained, was to create a system of "studied indirection" that left defendants confused and deprived them of a valuable counterweight to the exercise of sentencing authority by prosecutors.[42]

The only empirical study that has rivaled the scale of Alschuler's groundbreaking work arrived right on its heels. Professors John Ryan and James Alfini surveyed felony and misdemeanor trial judges nationwide about their typical methods of involvement in plea negotiations, then supplemented those surveys with interviews and data from fifteen states.[43] Their findings, published in 1979, reinforced one aspect of Alschuler's thesis: judicial bargaining remained exceptional, a tool that a few judges in some places used episodically.[44] More than two-thirds of the judges declared that they were not involved in the negotiations at all and simply ratified the agreement of the parties at a later guilty-plea hearing.[45] Only 7% of responding felony judges stated that they took the most active role of "recommend[ing]" dispositions to the parties, while 20% said that they "review[ed]" proposals from the parties.[46] Judges in urban courts were more likely to get involved in negotiations than judges in rural districts, as were judges with more confidence in their own negotiating skills.[47] The surveys also confirmed that

40. *See id.* at 1096–97 (noting the political pressure on judges not to undercut the prosecutor's recommendation too often).

41. *Id.* at 1153–54 (characterizing these reform efforts as "not only hypocritical but harmful"); *see also* FED. R. CRIM. P. 11(e)(1) advisory committee's note to 1974 amendment (outlining the mainstream position); A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3(1) (AM. LAW INST. 1975) (providing that "the court shall not participate" in plea discussions); STANDARDS RELATING TO PLEAS OF GUILTY § 3.3(a) (AM. BAR ASS'N, Approved Draft 1968) (same); ABA Comm. on Prof'l Ethics, Informal Op. C-779 (1964) ("The judge, of course, should not be a party to any arrangements in advance [of a plea] for the determination of sentence.").

42. Alschuler, *The Trial Judge's Role*, *supra* note 3, at 1153–54.

43. John Paul Ryan & James J. Alfini, *Trial Judges' Participation in Plea Bargaining: An Empirical Perspective*, 13 LAW & SOC'Y REV. 479, 484–85 (1979) (twenty jurisdictions in fifteen states).

44. *See id.* at 485–87 (discussing variations in judicial involvement in the plea bargaining process). Three smaller empirical studies, roughly contemporaneous with Alschuler's work, each focused on only a single jurisdiction. *See* MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 7, 147, 198 n.25 (1978) (noting that some Connecticut trial judges offered to "pre-try" cases to facilitate negotiations); LYNN M. MATHER, PLEA BARGAINING OR TRIAL? THE PROCESS OF CRIMINAL-CASE DISPOSITION 5, 31–33 (1979) (describing Los Angeles judges "chamberizing" cases during negotiations); James Klonoski et al., *Plea Bargaining in Oregon: An Exploratory Study*, 50 OR. L. REV. 114, 117, 129 (1971) (surveying Oregon prosecutors; 59% said that a judge would never discuss sentencing).

45. Ryan & Alfini, *supra* note 43, at 485–86.

46. *Id.* at 486.

47. *Id.* at 493, 497. The factors that might influence the choice of an individual judge to engage in bargaining became clearer in a later study of North Carolina trial courts by Allen Anderson. *See*

procedural rules or appellate decisions that flatly banned judicial involvement were quite effective: reports of judicial involvement in states with such bans were notably less frequent than in other states.[48]

Since these studies of 1970s practice, despite the extraordinary changes in criminal justice over the past four decades, few empirical studies on the topic have appeared.[49] The only recent empirical study of more than one jurisdiction was published a decade ago by Jenia Iontcheva Turner, based on interviews and questionnaires of judges from Germany and two states: Florida and Connecticut.[50] Leading commentaries continue to rely on 1970s sources for accounts of what judges actually do in plea bargaining.[51]

B. Methodology

To help fill the widening gaps in knowledge about what judges do during negotiations and why, we chose to conduct in-depth, semistructured

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Allen F. Anderson, *Judicial Participation in the Plea Negotiation Process: Some Frequencies and Disposing Factors*, 10 HAMLINE J. PUB. L. & POL'Y 39, 43–47 (1989) (describing "informational," "environmental," and "situational" factors affecting judicial involvement). One judge explained his involvement in plea negotiations as an effort "to get more complete information to render a more adequate sentence." *Id.*

48. Ryan & Alfini, *supra* note 43, at 489, 492.

49. From time to time, legal scholars canvassing the law have created updated *legal* inventories of those states with rules, statutes, and appellate opinions that encourage, tolerate, limit, or ban judicial participation in plea negotiations. For recent examples, see generally Batra, *supra* note 24 (surveying state rules regarding judicial involvement), and Borenstein & Anderson, *supra* note 24 (describing rules regarding judicial involvement both nationally and in Massachussetts). Mention should also be made of articles using experimental evidence from psychology to draw inferences about the possible performance by judges under a more expansive role in negotiations. *See* Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 207–10 (2007) (arguing that judicial involvement can "mitigat[e] the distorting effects" of a prosecutor's cognitive biases); Jon P. McClanahan, *Safeguarding the Propriety of the Judiciary*, 91 N.C. L. REV. 1951, 1973–86 (2013) (discussing the implications of empirical findings regarding cognitive bias and procedural justice); Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 54 B.C. L. REV. 1667, 1701–15 (2013) (suggesting that judicial involvement would reduce anchoring-effect distortions); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 461 & n.217–18 (2008) (proposing judicial involvement to overcome fairness-heuristic distortions to the perceived legitimacy of plea-negotiation outcomes).

50. *See* Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 199–200 (2006) (arguing for a greater judicial role in plea negotiations). This well-constructed study stressed differences between the adversarial and inquisitorial traditions. *Id.* at 213–14. Turner concluded that the moderate forms of judicial involvement she found in Florida and Connecticut made positive contributions to the fairness of criminal justice. *Id.* at 243–47, 252–56. Other recent empirical investigations have focused on single jurisdictions. *See, e.g.*, Anderson, *supra* note 47, at 43 (North Carolina); R.L. Gottsfield & Bob James, *Criminal Settlement Conferences On Demand: Worth It?*, ARIZ. ATT'Y, March 2014, at 26, 32 (Maricopa County, Arizona).

51. *See, e.g.*, STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 42 & 189 n.27 (2012) (citing HEUMANN, *supra* note 44); GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 129–33 & 301 n. 74, 302 n.81 (2003) (citing MATHER, *supra* note 44 and Alschuler, *The Trial Judge's Role*, *supra* note 3).

interviews of both judges and lawyers, as Alschuler did, rather than counting responses to formal questionnaires containing preset questions general enough to apply in all jurisdictions. This design permitted us to tailor questions to the idiosyncrasies of each state's system, to ask open-ended questions, and to discover and pursue surprising new topics (which, it turned out, were plentiful).[52] We wanted to learn not only what judges actually do when they participate in deal making in criminal cases but also when that practice started and what judges and attorneys see as the pros and cons of that approach today, given the revolution in sentencing law and other developments in state criminal justice since the 1970s. And we wanted to reach a large number of states, not just one or two.

Anticipating that legal bans succeed to some degree,[53] we focused on states in which the law does not absolutely prohibit judicial involvement in plea negotiations.[54] From among these states, we selected those that use guidelines or other legal constraints on judicial sentencing discretion: California, Florida, Kansas, Maryland, Michigan, Missouri, North Carolina, Ohio, Oregon, and Utah.[55]

We chose states with some form of structured sentencing for at least two reasons. First, of all the trends in state criminal justice since the 1970s, restrictions on the sentencing discretion of judges is one of the most prominent.[56] These limitations increase the predictability of sentencing, so

52. *See* TOM WENGRAF, QUALITATIVE RESEARCH INTERVIEWING: BIOGRAPHIC NARRATIVE AND SEMI-STRUCTURED METHODS 112–13 (2001) (discussing lightly structured, narrative-based interviews).

53. *See supra* note 48 and accompanying text (showing that such bans were effective in the 1970s).

54. Although Batra, *supra* note 24, at 573–75, categorizes Kansas and Utah as states that prohibit judicial participation in negotiation, and Broder, *supra* note 24, at 370, categorizes Utah as such, we read the law in those states to leave room for the practice. UTAH R. CRIM. P. 11(i)(1) sets a general rule against judicial participation, but Rule 11(i)(2) creates an exception for stipulated sentence agreements, allowing the judge to "indicate to the prosecuting attorney and defense counsel whether the proposed disposition will be approved." In Kansas, the statute neither prohibits nor condones judicial participation. *See* KAN. STAT. ANN. 22-3210 (2007). Appellate opinions recognize that the practice sometimes occurs, but caution against a judge remaining involved in a case after participating in the negotiations. *See, e.g.*, State v. McCray, 87 P.3d 369, 372–73 (Kan. Ct. App. 2004) (describing it to be "better practice" for judges to avoid plea discussions, but affirming a conviction in a case where a judge was involved).

55. *See, e.g.*, CAL. PENAL CODE § 1170 (West 2016); FLA. R. CRIM. P. 3.704; FLA. R. CRIM. P. 3.992; KAN. STAT. ANN. § 21-6804 (West 2015); MD. CODE ANN., CRIM. PROC. § 6-208 (LexisNexis 2008); MICH. COMP. LAWS ANN. § 777.21 (West 2016); MO. ANN. STAT. § 557.011(West 2016); N.C. GEN. STAT. ANN. § 15A-1340.13 (LexisNexis 2015); OHIO REV. CODE ANN. § 2929.12 (West 2016); OR. REV. STAT. ANN. § 137.700 (2015); UTAH CODE ANN. § 77-18-4 (LexisNexis 2012). For additional details about our selection of these jurisdictions, see the Methodology Appendix for this Article, available upon request from the authors.

56. *See generally* LAFAVE, ISRAEL, KING & KERR, 6 CRIMINAL PROCEDURE § 26.3 (4th ed. 2015).

they might reduce the demand for the judicial input during negotiations.[57] If judicial negotiation thrives even in these dry conditions, we imagine that it would flower in any jurisdiction that authorizes the practice. Second, information about judicial participation in guidelines states could inform the ongoing debate about amending the Federal Rules of Criminal Procedure to allow the practice in the federal courts.[58]

In order to obtain a broader view of state practice, as well as to explore whether the differences between urban and rural jurisdictions reported in the 1970s persisted today, we sought interviewees within each state from a mix of urban, suburban, and rural counties. We completed a total of ninety-seven interviews, with a minimum of three judges, three prosecutors, and three defense attorneys from each state.[59] We also spoke with court administrators and others knowledgeable about criminal dockets and plea-negotiation practices generally. The interviews took place by telephone. We promised anonymity to each interviewee: identifications would include only state, position (i.e., prosecutor, defense attorney, trial judge), and, on occasion, the type of jurisdiction (i.e., large urban, smaller).[60]

We formulated initial hypotheses to pursue in our interviews based upon earlier research and commentary. For example, we were interested in learning whether judges get involved in negotiations to improve their docket control, and whether defense attorneys favor it (and prosecutors disfavor it) as a counterweight to prosecutorial power. We also wanted to learn why some judges decline to participate or defer more often to the parties on sentencing deals. Potential concerns keeping them out, we thought, could include political vulnerability, a lack of information needed for sentencing, or the potentially coercive effects on defendants.

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57. *See, e.g.*, *Item #2 – 2006-16 – Proposed Adoption of the Amendment of Rules 6.302 and 6.310 of the Michigan Court Rules: Hearing Before the Mich. Sup. Ct.* (2008) (statement of Timothy Baughman, Chief of Research, Training, and Appeals for the Wayne County Prosecutor's Office) [hereinafter Statement of Timothy Baughman] (testifying in favor of an amendment that would bar judicial participation in plea bargaining in Michigan: "With sentence guidelines that are now mandatory . . . that's enough information for the parties without the judge's involvement to make an intelligent decision about a plea."); *see also* Bibas, *Outside the Shadow of Trial*, *supra* note 24, at 2533 (suggesting that guidelines benefit defendants by reducing uncertainty).

58. *See* Minutes, Advisory Comm. on Criminal Rules, *supra* note 1, at 3–9 (discussing and rejecting a rules amendment that would have allowed trial judges to participate, on a limited basis, in plea negotiations); Broder, *supra* note 24, at 358 (proposing a similar amendment); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ [https://perma.cc/656C-65HE] (advocating that federal courts follow Florida and Connecticut in allowing judicial involvement).

59. *See* Methodology Appendix tbl.1 (on file with authors) (summarizing the number of interviews in each state).

60. The anonymity extends to our citation form. In this Article, interviews are coded by state abbreviation, a letter indicating the interviewee's position (P, D, or J), and an interview number. For example, "CA-J-1" indicates a judge from California. In addition, if an unidentified interviewee is referenced by a pronoun, we use "he" and not "she" in order to preserve anonymity.

Each interview covered the interviewee's professional experience, the structure of the local courts, the sentencing options normally available to the judge, the charge bargains or sentence bargains that the parties typically discussed during their negotiations, the timing and location of plea discussions, who was present, the statements and actions of judges and lawyers during these discussions, and the typical sequence of events. We discussed the information normally available to the parties and the judge at that stage and how the parties selected cases in which to solicit the judge's opinion. We talked to our interviewees about the objectives that prosecutors, defense attorneys, and judges hoped to achieve by involving the judge in plea negotiations, as well as their concerns about the practice.[61]

Although this is the most comprehensive study of state judicial participation in plea negotiation since the 1970s, it is subject to the same limitations that affect any research based on interviews. We should remain cautious when drawing inferences. Interviewees might have consciously or unconsciously distorted actual events, the sample is small, and practices and participants change over time. Moreover, because practices are so idiosyncratic and varied, it is likely that very different practices could be discovered in other localities within a state and in states not included in this study. Finally, interviewees may consciously or unconsciously respond in ways that tend to justify rather than question what they do, or to overlook the downsides of a familiar practice.[62] Despite these caveats, what we uncovered is new—and essential to informed policy making. The extent of these practices within each state, a point on which our study provides only sketchy information, is not as important as the fact that these practices exist, and that we now better understand the experiences and motivations of those who engage in them.

II. Institutionalized Judicial Involvement: Judges as Caseflow Managers, Criminal Style

Civil procedure scholar Judith Resnik long ago noted the sea change in the work of judges in civil cases: a fundamental shift from the passive umpire, adjudicating facts and law only when asked, to the proactive, even aggressive, manager of a growing caseload.[63] Our study revealed that the same shift is taking place in criminal cases; it is just taking longer. And just as courts that embrace proactive management of civil dockets have not

61. The interview guide is available from the authors upon request. Additional interview quotations supporting the footnotes throughout this Article appear in the Supplemental Interview Material Appendix, also available upon request from the authors.

62. On insider incentives to "plead cases out quickly," see BIBAS, *supra* note 51, at 30–34 & 182–84 nn.1–7, 53–54 & 196–98 nn.52–55 and Bibas, *Outside the Shadow of Trial*, *supra* note 24, at 2470–86.

63. *See* Resnik, *supra* note 7, at 376–78.

returned to their former, more passive approach, criminal courts are unlikely to abandon the new techniques we describe here.[64]

In this Part we detail the surprising variety of new, more aggressive approaches to managing criminal cases in the ten states we examined, many of which include the judge in plea negotiations. All of these novel procedures share a goal: to resolve the cases that will not be tried as early in the process as possible.

A. Mandatory Early Meetings with the Judge

Among the many policies we encountered, one of the more modest was mandating judicial conversations with parties about the status of settlement early in the process, in every case. As one attorney put it, "[s]ettlement conferences are part of the machinery."[65] Scheduling the conference accelerates disposition by forcing the prosecutor to decide what, if anything, to offer on the case, and by forcing both parties to articulate their positions earlier than they otherwise might.[66] Routine, early conferences are incorporated into normal case processing in at least some counties in eight of the ten states we examined.[67]

For example, several counties in California conduct "pre-preliminary hearings" at which the judge discusses possible early disposition and probable sentence, based on the facts represented to the court by the parties.[68]

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64. *See generally* David Steelman, *Caseflow Management*, *in* NAT'L CTR. FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 2008, at 8 (Carol L. Flango et al. eds., 2008) (discussing the evolution and continued importance of proactive caseflow management).

65. OR-D-2; *see also* Interview with William Raftery, Knowledge & Info. Servs. Analyst, Nat'l Ctr. for State Courts (Nov. 11, 2015) ("Everybody gets pretrial conference no matter what.").

66. *See, e.g.*, CA-P-2 ("[Scheduled conferences] force the sides to speak to another . . . .").

67. For example, one Florida prosecutor noted that the court "sets arraignment automatically to move things along," and that the arraignment sees "negotiations happen in open court with the judge involved." FL-P-1. "We make a plea offer at arraignments in roughly seventy-five percent of cases with lower penalties." *Id.* This prosecutor also described another "status calendar" called a "sounding": "It is kind of like a pretrial conference but it happens earlier with more emphasis on the plea negotiations so far." *Id.*; *see also* OHIO COURT OF COMMON PLEAS, STARK COUNTY, R. 17.10(B) ("A date certain will be assigned for pre-trial at the arraignment . . . ."). Even where an early conference is mandated, the attorneys might request to meet with the judge beforehand. *See* OH-J-2 (describing a process of "immediately mark[ing] on the file what I'm going to do, or am willing to do," with the bailiff communicating these "first impression[s]" to counsel, who can request a conference). Other states that authorize judicial participation in plea negotiations, not included in our study, have also shifted to mandatory conferences. *See, e.g.*, MASS. R. CRIM. P. 11. Just as the early articulation of negotiating positions changes the pretrial dynamic between the parties, the debiasing effects of articulating a position are useful in the search-warrant context. *See* Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1614 (2012) (recommending "a real warrant requirement" to force police to "stop and think").

68. *See* CAL. SUPER. COURT, ALPINE COUNTY, R. 6.3.7 (mandating a "Pre Preliminary Conference (PPX)," to be set "generally two weeks after arraignment on complaint"); CAL. SUPER. COURT, KERN COUNTY, R. 5.2.1.2 ("At the pre-preliminary, and later at the readiness conference, the court will attempt to resolve the cases pending . . . ."); People v. Silva, 42 Cal. Rptr. 2d 120, 121 & n.1 (Cal. Ct. App. 1995) (describing the pre-preliminary hearing process in Contra Costa County);

We learned that at least one county schedules judicial "interventions" for every case that has not settled in a timely way.[69]

In Michigan, mandated status conferences in felony cases began about ten years ago in some counties.[70] By 2014, the state had adopted a new court rule that required, within two weeks of arraignment, a conference including "discussions regarding a possible plea agreement."[71]

While the details vary from place to place, these meetings, whether mandatory or based on a party request, all share some common features. Typically the only people present are the judge and the attorneys, although in a few jurisdictions a staff member who tracks cases for the judge,[72] or a probation officer to discuss available programming, will be on hand.[73] The defendant and the victim are generally not present.[74]

JOHN GREACEN & FREDERICK MILLER, CAL. ADMIN. OFFICE OF THE COURTS, FELONY HEARING AND TRIAL DATE CERTAINTY STUDY 19 (2011) (reporting that all but two courts in the study dispose of most felony cases at the pre-preliminary hearing, with some courts disposing of up to 75% of felonies at that stage).

69. One prosecutor described the process:

> It was a way to force the sides to speak to another and talk before the intervention. . . . [The workload d]oesn't leave a lot of time during business hours to sit and talk about cases, so generally these conversations [between lawyers] would be in the hallway, or a phone call, sometimes an email. By creating [an] intervention hearing, that hearing coming up would force that communication to occur. And [the prosecutor] would have to justify the offer to the judge. If someone's position is unreasonable, the judge's role was to raise an eyebrow to that. CA-P-2.

70. MI-D-1.

71. MICH. CT. R. CRIM. P. 6.108(C); An Act to Amend 1927 PA 175, 2014 Mich. Pub. Acts 63, 64; *see also* MICH. STATE COURT ADMIN. OFFICE, CASEFLOW MANAGEMENT GUIDE 21 (2013) [hereinafter MICH. CASEFLOW MGMT.] (stating that screening conferences "would be appropriate for circuit court civil or criminal felony matters and some special proceeding cases"); MI-P-3 ("Felony settlement conferences are now set within a month of the preliminary hearing, because the State Court Administrator's Office is putting . . . pressure on judges . . . to move these cases more quickly.").

72. *See* OH-P-2 ("The only people present during the pre-trial conference are the judge, the defense attorney, the prosecutor, and the bailiff. The bailiff tracks all of the criminal cases for the judge . . . .").

73. *See* Philip H. Pennypacker & Alyssa Thompson, *Realignment: A View from the Trenches*, 53 SANTA CLARA L. REV. 991, 1025 (2013) (reporting that, in some jurisdictions, probation officers regularly sit in on plea discussions); *see also* Joan Petersilia et al., *Voices from the Field: How California Stakeholders View Public Safety Realignment* 145 (Nat'l Inst. of Justice, U.S. Dep't of Justice, Award No. 2012-IJ-CX-0002, 2014) ("[J]udges have to know much more, often on a daily basis, about the capacity constraints in their local jails and the programs offered by probation.").

74. *See, e.g.*, MD-P-2 ("I would be uncomfortable having the defendant present. He will be in shackles, need security. There is a level of intimacy in these conversations, they don't lend themselves to having the defendant present. He could blurt something out. The defense attorney would hate that."). *But see* OR-D-3 ("It is rare that I've had [a] client blurt out something harmful. Maybe once or twice, not that big of a deal. I'll prep them before, I'll say, 'You can't blame this on the victim,' advice like that."). Variations on who was in attendance were reported in Ohio. *See* OH-J-1 ("Sometimes the police officer is present at the conference. . . . The client is present in the hallway—the sheriff brings them over for the day—for consultation. . . . A Victim Advocate employee is also present in the meeting."). These mandatory routine meetings for every case are

Client involvement in these conferences, however, is the norm in Oregon, and is also reported in some places in Missouri and North Carolina, at least where these discussions take place in open court.[75] The defendant's presence appears to serve two goals: it allows the defendant to hear directly from the judge,[76] and it "humanizes" the defendant for both the prosecutor and the judge.[77] Defendants who participate are protected from use of their statements later.[78]

At the meeting, if the parties have not yet agreed on a possible resolution, they usually present a short summary to the judge of important evidence, the defendant's criminal history, and the likely scoring under sentencing guidelines, if any, for the charges.[79] After listening to these summaries, the judge responds with language along the lines of, "Based on the information I have now, this is what I would give him if he decides to plead guilty."[80] When the parties float a proposed sentence deal, the judge indicates whether it is acceptable.[81] The conferences are generally short, but

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different than the more selective mediations described in subpart II(D), *infra*, which often do involve the defendant and the victim.

75. See MO-D-1, NC-P-1, and OR-D-3, discussing client involvement.

76. *See* MO-D-1 ("I think the preference of the client is that it all happen in open court, because they want to hear what the judge has to say. . . . [They] feel more invested in the process if they are there for that.").

77. *See* OR-D-3 ("I want him to hear from the judge. And I want the prosecutor to lay eyes on my client, and see that he's a real human being. If my client is smart or likable, it will help.").

78. *See* OR-P-3 ("What the defendant says is not usable by state except or unless he said in [the conference], for example, 'I did this and I'm sorry,' then took the stand later and said 'I didn't do it.' If that happened, we can use it to impeach."); OR-D-3 ("I can't think of a time that something the client said at a conference undermined the defense. And the judge will say to him that the state can't use what you say at trial unless you were to take the stand and testify to something that [was] inconsistent."). For further discussion of the benefits of involving the defendant, see Batra, *supra* note 24, at 595–96 (citing Alschuler, *The Trial Judge's Role*, *supra* note 3, and Turner, *supra* note 50) and Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 426–32 (2008) (recommending plea negotiation process norms).

79. *See, e.g.*, CA-P-2 (explaining how the prosecutor presents the facts and the offer, the defense responds, and the judge then "put[s] a finger on the scale"); NC-P-1 (describing a similar process).

80. *See* MI-P-5 ("[I]t is not a promise, but a suggestion, that if the information stays the same and the guidelines score is as represented to me, I would impose a sentence of *X*, or a cap, or a range."); FL-J-1 ("I need some legally recognized enumerated reasons to go below that minimum, and I have to articulate that reason in the sentence order."). One prosecutor described alternating scenarios. On the one hand, if the attorneys agree: "After explaining the background and the evidence problems to the judge, we all concluded that the judge would accept the plea at the hearing, assuming nothing new appeared in the case—although the judge didn't say this in so many words." NC-P-1. On the other hand, "a griping session for the defense lawyer": "Then the judge gives a reaction, saying which parts of the evidence seem to carry the most weight. . . . We're both spit-balling our case, trying to understand how a newcomer might see the case with fresh eyes." *Id.* For a description of a conference in California that mirrors the descriptions we heard from the field, see Pennypacker & Thompson, *supra* note 73, at 1020–22.

81. This indication may be more or less explicit depending on the judge. *See* NC-P-1. One interviewee reported a different negotiating dynamic in victimless or institutional-victim cases. *See* FL-P-2 ("[T]he conversation does not take the form of a real negotiation. The judge asks the

they could take anywhere from thirty seconds to an hour or more.[82] Some judges actively mediate through shuttle diplomacy, extending the negotiations for a longer time, while others take a much more passive approach.[83]

Some judges continue to do this off the record in chambers, at least some of the time, as was the practice fifty years ago.[84] But the discussion in many of these states is now on the record, whether it be in a courtroom, at the bench, or recorded in chambers.[85] The location of the conference appears to be a judicial preference, not a set practice.[86] Some interviewees noted that bench conferences are quicker,[87] or that the public and victims can be suspicious of the less transparent meetings in chambers.[88] Others favored chambers or

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defendant, 'Have you considered pleading to the bench?' Then if the defense does ask, the judges say that they will beat the state's offer.").

82. OR-D-2.

83. OR-D-2; *see also* OR-D-3 ("Oftentimes the judge will ask the prosecutor to step out of the room. I'll say, 'This case deserves probation and here's why,' and I'll have a foot of documents about my client's brain injury and why incarceration would be wrong, and the judge would say, 'That's great, nice meeting you,' then he'll meet with the prosecutor separately in chambers."). This approach, with its emphasis on information management and confidentiality, is sometimes known in negotiation literature as the "caucus" method. *See generally* Christopher W. Moore, *The Caucus: Private Meetings That Promote Settlement*, 16 MEDIATION Q., Summer 1987, at 87.

84. *See* NC-P-1 (reporting chambers conferences when both parties want to give the judge a heads-up and when the defense seeks to get a better deal, but not when the defense lawyer has requested help with a difficult client); OH-J-1 ("It happens in chambers and is not transcribed. . . . If an agreement [is] reached, everyone moves right away into the courtroom for the plea hearing."); OR-D-3 (stating that settlement conferences are not on the record); *see also* People v. Hambek, No. C078974, 2016 WL 6518906, at *4 n.3 (Cal. Ct. App. Nov. 3, 2016) ("[U]nreported chambers conferences, if held at all, should be immediately put on the record when the parties return to the courtroom to avoid faded recollections . . . and misunderstandings . . . .").

85. *See, e.g.*, CA-D-1; FL-D-1 ("You can specifically request a conference in chambers and still put the discussion on the record.").

86. *See* MI-P-1 ("Some do it at [the] bench, some in chambers."); NC-P-1 (reporting that a judge might indicate in open court, on the record or off, but no longer in chambers); OR-D-3 ("Depends on the judge's preference."); *see also* Bryce v. Superior Court, 252 Cal. Rptr. 443, 448 (Cal. Ct. App. 1988) (holding, when a judge bowed to a prosecutor's threat not to attend settlement conferences unless they were held in open court, that the judge must make his own conference policy, and that, regardless of where the judge holds such conferences, "[a]ny litigant who willfully disobeys an order to attend a settlement conference is subject to appropriate sanctions"). More than one North Carolina defense attorney related that the proximity of judicial chambers to the courtroom made a difference. As one described it, in one building, "judicial negotiations were supported by the architecture"; in another, where judges reached their chambers by private elevators, there was "lots less day-to-day conversation. . . . That creates less opportunity to engage the judges." NC-D-2. As another put it, "[t]he judges in small counties are a little more involved when the attorneys have more access to them, just walking in the back halls of the courtroom." NC-D-3.

87. *See* MO-P-3 ("[N]o time to do this in chambers in advance."); MI-D-4 ("Ninety-five percent of the time the defense attorney will say, 'Judge, may we approach?,' then there will be discussions on the record at the bench.").

88. *See* MI-D-4 ("Now we never go into chambers, we used to all the time. This county has made a commitment to transparency. We have these private quasi-conversations at the bench with the defense attorney, sometimes . . . off the record, . . . but not common. . . . If everybody agrees, we immediately go back and put it on the record what we just discussed at the bench."); FL-D-1

more private meetings, which allow attorneys to avoid surprising the judge with an unusual deal ("[t]hey don't want you to drop it on 'em in court")[89] and permit candid discussion of sensitive issues such as mental health conditions that could be an embarrassment to the defendant's family,[90] information that the defendant is cooperating in another case,[91] or evidentiary problems.[92] Some judges who said they included defendants in these discussions also said they would never speak with a defendant off the record; even if they meet with counsel in chambers, they go into the courtroom to speak with the defendant.[93]

It surprised us to learn that in several states, some judges hold these conferences in a group setting.[94] These judges meet with the attorneys for all of the cases on the day's docket all at once: both retained and appointed counsel, as well as the public defender and the prosecutor.[95] The lawyers will crowd into chambers, or sometimes the jury room.[96] As each attorney works through her case with the prosecutor and the judge, the other attorneys listen, now and then chiming in.[97] Because there is no shuffling back and forth to

("Experienced judges usually resort to the informal conferences in chambers more often than the younger judges . . . . A new judge comes into the division, and she wants everything on the record—'Let's talk out in the courtroom, not back in chambers.'").

89. MO-D-1; *see also* MD-D-3 (stating that conferences are held in open court on the record with the defendant there, but that it is "not uncommon that the defendant and prosecutor would go back into chambers . . . ahead of time so that when they are on the record there are no surprises").

90. *See* MO-J-1 (stating normally he talks in open court, but sometimes discusses cases in chambers with the lawyers in cases "with mental health issues," and puts it on the record when it "could be an embarrassment to the family, could be that the person is uncontrollable in the court room. Or it could be someone who has snitched.").

91. *See id.*; MD-J-2 (noting that although most conferences are on the record in the courtroom, sometimes an attorney will request to talk to the judge in advance in chambers if the defendant cooperated or if the agreement is for a below-guidelines sentence).

92. *See* MD-P-1 ("We can subtly convey this case is not great, and the judge gets it. Couldn't do that in open court. . . . The defense attorney knows—he's got discovery. I'm not fooling him."); NC-D-1 ("We might have an offer of proof area, some touchy area where we want to prevent touchy testimony from coming into evidence."). Several interviewees indicated that conferences in serious cases are held in chambers, while less serious cases proceed in open court. *See* NC-P-2 ("If the case is more complex, it is more likely that this consultation will happen in chambers so that we can have an easier and fuller discussion. Certainly if we have a big case, like a murder . . . we'll take our discussion back into chambers."); FL-P-1 ("For the less serious cases, the judge might address possible changes to the charges or the sentence in open court.").

93. OR-J-3; *see also* OH-D-2 ("Victims might talk to the judge, but only rarely and always in open court.").

94. *See, e.g.*, FL-D-1 ("In [one county], judges will sometimes invite back to chambers multiple attorneys in multiple cases and discuss them all at the same time in chambers.").

95. *See* CA-D-4 ("Typically all attorneys are in chambers sitting around, they talk about one case at a time. People from other cases will chime in.").

96. *Id.*; MI-J-3.

97. One California judge described the scene:

> It is one case at a time with everybody listening. . . . The front benchers are right in front of my desk, I'm listening to them, the other people are in the back. . . . [Interruptions] usually come[] up in a good-natured way . . . the defense lawyers will

the bench or in and out of chambers, this process enables the judge to deal with one case right after another, which could save time. But judges who do this reported liking it for other reasons: "There was hydraulic pressure to be reasonable when everyone is sitting there listening."[98] Also, it helps the inexperienced attorneys (and, presumably, their clients). As one judge explained, "Someone'll come in and say, 'Guidelines? What Guidelines?' At that moment, I'll say to someone experienced in the room, 'Could you please talk to 'em?' And the experienced attorney will get out the book and walk 'em through it. It is a collective endeavor."[99]

Some interviewees reported that during the settlement conference the defendant is easily accessible nearby, or that defense attorneys secure the client's approval of terms or a sentence range in advance, so that the plea can be accepted and sentence entered immediately after the consultation with the judge.[100] Others indicated that the plea is usually postponed so that the defense attorney can speak again with the client before the plea was entered.[101]

Of course, judges can confer with counsel early in a case without participating in plea negotiations. Some states that prohibit judicial participation in negotiations have adopted early settlement conferences to provide the parties an incentive to negotiate earlier.[102]

B. Differentiated Case Management: "Early Disposition" or "Settlement" Dockets

In some counties with multiple judges, early conferences happen as part of a more formal process called Differentiated Case Management (DCM), which tracks cases that are more likely to settle to specialized dockets or to

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> say to the prosecutor, "Come on!," or they'll say, "Gee, Judge, you gotta do something." And I'll say, "I'm not looking to take a vote here!"

CA-J-3.

98. MI-J-3; *see also* Marc L. Miller & Samantha Caplinger, *Prosecution in Arizona: Practical Problems, Prosecutorial Accountability, and Local Solutions*, 41 CRIME & JUST. 265, 280–82 (2012) (commenting on the group dynamics of Yavapai County's "Case Resolution Conference," or "Sharkfest").

99. MI-J-3. "Sometimes, when either side is being unreasonable, the attorneys would chime in and say, 'Come on now, nobody ever gets that!' . . . [The] public defender goes last. He'd have more cases . . . . And of course he has the most experience . . . ." *Id.*; *see also* CA-D-4 ("You have a mini trial in two minutes. Both sides in an adversarial process. . . . [J]udges do comment on the evidence. They'll say, 'This is serious,' or, 'This is not really serious.'").

100. *See* CA-J-3; OH-J-1 (describing a practice of immediate sentencing once an agreement is reached).

101. *See* CA-P-1; CA-P-2 ("[T]here is another conversation between defense attorney and client, then if it's going to resolve [it] would happen at the next meeting.").

102. *See, e.g.*, WASH. REV. CODE § 9.94A.421 ("The court shall not participate in any [plea agreement] discussions."); WASH. SUPER. COURT CRIM. R. 4.5 (mandating omnibus hearings and accelerated disclosure to encourage early disposition of cases through settlement).

judges other than those who handle cases headed for trial.[103] DCM has long been an approved method for improving docket efficiency in civil cases, but has taken longer to gain a foothold in criminal cases.[104] Early experiments with DCM in criminal cases began in the late 1980s as part of a federally funded study in four states, one of which, Michigan, was included in our study.[105] Free technical assistance for creating DCM programs in criminal courts became available in 2010.[106]

Most of the states we studied included counties that had adopted separate dockets for "settlement" cases, or had set timelines for resolving most cases by plea that were different from the timelines set for cases that went to trial.[107] In Oregon, for example, early disposition programs were authorized by statute in 2001.[108] In our study we found one county where an estimated 30 to 50% of cases are resolved at arraignment or shortly thereafter as part of Early Case Resolution (ECR).[109]

In other Oregon counties, thirty-five days after arraignment the attorneys must appear in court and declare the status of their negotiations.[110] On this "call" day the presiding judge assigns cases headed for trial to a trial judge, cases in which the parties request a conference to one of the judges

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103. *See* VICTOR E. FLANGO & THOMAS M. CLARKE, REIMAGINING COURTS: A DESIGN FOR THE TWENTY-FIRST CENTURY 52–53 (2015) (defining DCM and demonstrating both the benefits and fallbacks of the process). For a collection of DCM resources, see *Caseflow Management Resource Guide*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/Topics/Court-Management/Caseflow-Management/Resource-Guide.aspx [https://perma.cc/UP4H-FP8K].

104. *See* FLANGO & CLARKE, *supra* note 103, at 52–53 (praising DCM for efficiently resolving cases, but cabining that praise to the civil-case context).

105. *See* THOMAS A. HENDERSON ET AL., DIFFERENTIATED CASE MANAGEMENT 1 (1990) (describing Detroit's application of DCM in this early test, "treat[ing] cases generically for management purposes and us[ing] DCM simply to accelerate the identification of cases which could be settled by plea"). For a more recent study of DCM practice, see MAUREEN SOLOMON, IMPROVING CRIMINAL CASEFLOW 7 (2008) ("[J]udges who conduct a case management conference within about 21–28 days after superior court arraignment have concluded that they obtain earlier dispositions, with better overall use of their and the lawyers' time. . . . [It] should be clear that *effective, early identification of cases least likely to require a trial can result in earlier disposition of most of the caseload*.").

106. *See generally* Special Caseflow Management Improvement Initiative, BUREAU JUST. ASSISTANCE (2010), https://nacmnet.org/sites/default/files/CCTAP%20Project%20Announcement%20%20Logos%20YD%20CFL%20MGT%201%2025%2010.pdf [https://perma.cc/MH27-WCKB].

107. *See* MO-J-4 (reporting that it is not uncommon for lawyers to say at arraignment, "Judge, put this on the settlement docket [before the administrative judge] instead of the trial division"; that about a third of the cases stay in the criminal division for settlement while the rest go to the trial division; and that, in addition to the settlement docket before the administrative judge there is an early disposition docket).

108. OR. REV. STAT. § 135.941 (2015).

109. As one attorney described the process in this county, a judge with specialized administrative duties arraigns everybody; if a case is not settled at arraignment, it is assigned to one of several judges who hear pretrial conferences, and if not settled there it is assigned to a trial judge. OR-D-1. For a similar process, see OR. CIR. CT., CLATSOP COUNTY, R. 7.007.

110. *See, e.g.*, OR-J-1.

available to discuss a negotiated settlement that day, and cases with defendants ready to plead guilty without a conference to the judges ready to take pleas and sentence immediately.[111] If the settlement conference successfully resolves a case, the settlement judge will generally take the plea and sentence the defendant that same day.[112] If the case is not resolved, it is set for trial and assigned a trial judge.[113] By delaying the assignment of the trial judge until after the settlement conference, these mechanisms avoid the statutory requirement to obtain written consent from both parties before the judge assigned to try the case can do anything in negotiations other than concur with a proposed disposition.[114] With this system, the vast majority of felony defendants—80 to 90%—plead guilty and are sentenced on this call date.[115]

Local rules authorizing early disposition for felonies appeared in some California counties as early as 1999.[116] Explained one prosecutor, on plea days, for each of the approximately fifty cases up, the parties "ask the judge to continue the case, or to settle the case, or will say, 'We need

111. *Id.* The presiding judge determines which case goes to which judge, but the parties can pick their own judge and contact the judge for a meeting before the thirty-five-day call if they prefer. *Id.* For a description of the system in one Oregon county, see generally LANE CTY. CIRCUIT COURT, PRELIMINARY REPORT ON ENHANCEMENTS TO CRIMINAL CASEFLOW MANAGEMENT (2006) (describing a 2006 pilot project on case management in which the county was one of six judicial districts to participate); *see also* OR. UNIF. TRIAL CT. R. 7.010 (outlining the early disposition process for Oregon circuit courts).

112. OR-D-1.

113. *Id.* In at least one county, parties cannot get a trial date unless they have first completed a settlement conference with a judge. *See* OR-D-2 ("Six or seven years ago the presiding judge decided to make this mandatory, the lawyers complained and griped, and as it turns out mandating settlement conferences was a good idea because some judges have skills that help cases settle that didn't look like they would settle.").

114. OR. REV. STAT. § 135.432 (2015); *see also* OR-J-3 (noting that before judicial settlement conferences were mandatory, the judges had to get waivers, but when mandatory conferences were adopted, trial judges were no longer assigned until much later in the process); OR-D-3 ("There would always be a different judge for trial."). For more on the assignment of a different judge for trial, see *infra* note 354 and accompanying text.

115. *See* OR-J-1 ("So a huge bulk of cases settles on the day of that thirty-five-day call and the ones that don't will go to trial."); OR-D-2 (reporting that "[a]bout eighty to ninety percent [of] felonies are settled before thirty-five-day call, between the lawyers," without the judge's help, in order to get the case on the morning docket and avoid waiting for a settlement conference later). To assure that this is possible, court rules may require the defendant's presence. *See, e.g.*, OR. CIR. COURT, MULTNOMAH COUNTY, R. 7.055(10) ("All out-of-custody felony defendants shall appear on all Call dates, unless the Presiding Judge directs otherwise.").

116. *See* CAL. SUPER. COURT, KINGS COUNTY, R. 520(A) (allowing the defendant to ask for an early-disposition hearing); CAL. SUPER. COURT, IMPERIAL COUNTY, R. 4.1.4 (requiring counsel to "be prepared to discuss the offer or other possible disposition with the Court" at the first pretrial conference, and mandating a second formal attempt at early disposition "following compliance by all parties with discovery rules"); *see also* EDWARD A. RUCKER & MARK E. OVERLAND, 1 CAL. CRIM. PRACTICE: MOTIONS, JURY INSTR. & SENT. § 14:4 (4th ed. 2016) ("Most courts, at the urging of the Judicial Council, have created 'Early Disposition Courts.'").

intervention.'"[117] Clerks in other counties assign each case to a "home court" judge who meets with the parties shortly after arraignment to settle the case prior to preliminary hearing, before a trial judge is assigned, in a courtroom located at the jail.[118] In still other counties, lower grade felonies are referred to retired judges for settlement before preliminary hearing.[119]

Similar arrangements turned up in Maryland, Missouri, North Carolina, and Florida.[120] In addition to separating the judges who take pleas, some Maryland courts have created "preliminary disposition dockets,"[121] or "resolution conferences" staffed by retired judges whose sentencing practices are generally acceptable to both sides.[122] Some counties in Missouri have adopted "Early Disposition Dockets,"[123] while urban counties in North Carolina alternate an "Administrative Term" with a "Trial Term" to sort out

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117. CA-P-3.

118. CA-J-3; *see also* CA-J-2 ("[I]f it can't be resolved [in home court, it will be] shipped to a trial court judge. . . . The judges in the home court . . . , they get down to what a case is worth and how to value it."). Elsewhere, low-level felonies are sent to the "master calendar," where a case is either settled after the judge indicates the sentence that would be imposed if the defendant pleads guilty as charged, or assigned out to another judge for a preliminary hearing. CA-D-2.

119. *See* CA-D-4 (describing a settlement court at the pretrial facility where a retired judge oversees an early settlement process for "first-, second-, third-time offenders doing less serious things . . . . [T]he idea was you pair a reasonable defense attorney with a reasonable prosecutor and a reasonable, settlement-oriented judge, and try [to] get a case settled," also noting settlement court is not for cases that would be strikes or are serious felonies).

120. Other judicial-participation states not in our study have also adopted early disposition practices. *See* ARIZ. R. CRIM. P. 17.4(a) ("[T]he court may, in its sole discretion, participate in settlement discussions by directing counsel . . . to participate in a good faith discussion with the court regarding a non-trial or non-jury trial resolution which conforms to the interests of justice."); MASS. SUPER. COURT STANDING ORDER No. 2-86 (2009) ("At anytime within 45 days of the pre-trial conference, counsel may advance the case for an early disposition . . . ."); MASS. R. CRIM. P. 11(a) ("[T]he court shall order the prosecuting attorney and defense counsel to attend a pretrial conference on a date certain to consider such matters as will promote a fair and expeditious disposition of the case."); N.M. 2D JUD. DIST. COURT R. LR2-400 (detailing the local process for assigning cases to case-management calendars); LOC. ADMIN. R. OF LUBBOCK COUNTY, TEX. 5.15 (outlining policy goals, including the establishment of "effective and fair procedure for the timely disposition of criminal cases"); LOC. R. CRIM. PROCEEDINGS, TARRANT COUNTY, TEX. 5.27 ("The last case setting before trial is the Status Conference (SC). Meaningful plea negotiations are encouraged.").

121. MD-J-2.

122. MD-J-3; *see also* MD-P-1 ("That's why we use retired judges. . . . They can hear what they want to hear, if the plea breaks down . . . they won't be trying the case."); MD-J-2 (describing how the court started "a criminal settlement docket" with "two judges with expertise" in settling cases sitting "at least a day a week" to "dispose of cases that were going to plead as early as possible," noting that most courts "use retired judges for settlement conferences because if it doesn't work out, another judge can try the case," and relating that settlement conferences help avoid day-of-trial settlements: "That costs a lot; the jurors are already there.").

123. *See* MO-J-4 (reporting that defendants for "EDD" are selected by a department of corrections employee who identifies those charged with low-level crimes, like "petty theft, tampering, anything victimless," who can't make bond). *But see* MO-D-4 (reporting that switching out judges from phase to phase was tried and abandoned in his jurisdiction, because there was more accountability, presumably for case disposition efficiency, when one judge had the case the entire time).

cases for settlement as early as possible.[124] And in Florida, various circuits have adopted formal early disposition tracks for felony cases by court rule.[125]

Tracking permits courts to allocate judicial resources efficiently and strategically, assigning to settlement duty those judges who are the most effective at helping parties reach agreement early. In one county in Michigan, for example, the judges assigned to handle arraignments on the less serious felonies are "the most lenient sentencers."[126] Attorneys have "an incentive to deal in front of them" because waiting to negotiate at a later stage means that "you might get Darth Vader as your judge."[127] An Oregon defense attorney reported that if the parties on the "call" date request "active assistance" from the presiding judge, the presiding judge would avoid assigning a judge for settlement who would be a "bump on a log" and assign instead a judge who would work to resolve the case.[128] Or the parties might ask for "a judge who would be bound" if they want assurance that the judge will agree to impose a stipulated sentence that is more lenient than usual.[129]

Granted, these tracking practices are not restricted to judicial-participation states.[130] But states that do institutionalize distinct tracks—with separate judges for settlement and for trial—can make judicial participation in negotiations easier and less risky. Tracking not only permits presiding judges to match each judge's duties to that judge's strengths, but it also reduces concerns that the judge who discusses settlement could retaliate later or improperly use information learned during the settlement process should negotiations fall through.

C. Regulation of the Settlement Discussion and Its Consequences

In addition to mandatory meetings and case tracking, the increasingly institutionalized nature of judicial participation also finds expression in the

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124. NC-P-2; *see also* NC-J-2 (stating that "all but one or two" of the division's judges preside over "Administrative Settings," while a nearby urban jurisdiction assigns the Administrative Terms to "specialists" on account of the volume of cases).

125. *See* FLA. 20TH JUD. CIR. ADMIN. ORDER NO. 3.25 (2007) (adopting separate case tracks for "Expedited," "Standard," and "Complex" cases, with the presumptive track for a case "primarily based upon the lead charge in the charging document"); FLA. 9TH JUD. CIR. ADMIN. ORDER NO. 2009-05 (2009) ("The Criminal Intake Bureau of the Office of the State Attorney, shall screen and designate the cases that meet the criteria for the Special Felony Case Management Program. . . . The State Attorney shall prepare a guideline scoresheet for the case management conference.").

126. MI-J-1.

127. *Id.* Similarly, we heard from California practitioners that early disposition courts are staffed with experienced judges who were "reasonable"—that is, willing to agree to lower sentences and not opposed to going below the prosecutor's offer. CA-D-1; CA-D-4.

128. OR-D-2.

129. *Id.*

130. For a state-by-state guide to the use of DCM technology in state trial courts, see *State Court Organization*, NAT'L CTR. FOR ST. CTS., tbl.60a, http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document%255CBM223 [https://perma.cc/7WX2-NNUQ].

case law, statutes, and court rules, which spell out what can and cannot take place during these discussions with parties. Years of experience with the practice have provided lawmakers and courts with rich information about how to protect against abuses while maintaining the advantages that judges and parties seek. Statewide regulation signals statewide acceptance as well, unifying and disseminating a practice that would otherwise be restricted to a subset of counties.

1. Authorized Scripts.—Case law in several states now details what judges can and cannot say in their conversations with the parties. In 1993, the Supreme Court of Michigan, in *People v. Cobbs*,[131] held that a trial judge, upon the request of a party, may state on the record the sentence the court believes would be appropriate if the defendant was convicted as charged, based on the information then available to the court.[132] The defendant may then agree to plead guilty in reliance upon that sentence preview and has the right to withdraw the plea if the judge later decides the sentence must exceed the earlier valuation. The rules for "*Cobbs* evaluations" have been refined over the years,[133] codified into a state court rule,[134] and standardized with a form for judges to use.[135] Similarly, the Florida Supreme Court in 2000 interpreted its rules of criminal procedure to allow a trial judge to state on the record "the length of sentence which, on the basis of information then available to the judge, appears to be appropriate for the charged offense."[136] In 2013, the California Supreme Court, in *People v. Clancey*,[137] instructed judges to wait until the parties negotiate a potential bargain, to consider

131. 505 N.W.2d 208 (Mich. 1993) (per curiam).

132. *Id.* at 212.

133. *See* People v. Williams, 626 N.W.2d 899, 902 (Mich. 2001) (per curiam) (defining the procedure to be followed when the court determines that it cannot impose the sentence contemplated under a preliminary *Cobbs* evaluation).

134. *See* MICH. CT. R. CRIM. P. 6.310(B)(2)(b) (indicating that the defendant is entitled to withdraw his plea if "the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose"). The rule was amended in 2014 to require that the agreement be on the record or in writing, and to explain that a defendant's misconduct that occurs between the time the plea is accepted and the defendant's sentencing may result in a forfeiture of the defendant's right to withdraw a plea. *Id.* at 6.302(C)(1), 6.310(B)(3).

135. *See* 2 MICH. JUDICIAL INST., CRIMINAL PROCEEDINGS BENCHBOOK app. at 14 (2016), https://mjieducation.mi.gov/documents/benchbooks/20-crimv2/file [https://perma.cc/Y6AZ-MTND] (containing a sample form). Individual judges have created their own forms, and defendants will sometimes use forms to request a *Cobbs* evaluation. MI-P-4.

136. State v. Warner, 762 So. 2d 507, 514 (Fla. 2000). Reports from the field were consistent. For example, as one prosecutor described chambers conferences on more serious cases: "The judge asks, 'What is the holdup?' Then we hash out the state's position and the defense position. The judge will offer views on the predicted outcome at trial and the likely sentence based on the facts visible at that point." FL-P-1.

137. 299 P.3d 131 (Cal. 2013).

whether there is sufficient information to make the sentencing decision, and to avoid any mention of a different sentence after trial.[138] The judges we interviewed knew what they could and could not say and welcomed the clear direction.[139]

2. Prerequisites for Conference.—Local regulations in some jurisdictions standardize preparation for and conduct of the conference with the judge, requiring the parties to make a good faith attempt to reach an agreement in advance,[140] prepare the guidelines scoring or other information for the judge to consider,[141] or provide discovery to the other party.[142] The rules may specify that a prosecutor with authority to negotiate must be present, or that the defendant must be standing by.[143] Courts without mandatory conferences often provide that the judge can only enter the negotiations at the invitation of one or both parties, or after the parties have

138. *Id.* at 138–39. The court also noted that, when announcing an indicated sentence, the trial court should state that it represents the court's best judgment, given the information then available about the appropriate punishment, regardless of whether guilt is established by plea or at trial. *Id.* at 139. Subsequent case law continues to refine the court's instructions. *See* People v. Gray, No. F068375, 2015 WL 4396211, at *6 (Cal. Ct. App. July 17, 2015) (holding that "a trial court has discretion under section 1018 [of the California Penal Code] to decide whether to permit a defendant to withdraw a plea entered in response to an indicated sentence when the court decides not to impose the indicated sentence").

139. As one judge described it, "Under the *Clancey* case, you can indicate the sentence you would give, you are allowed to say, 'Based on what I know about the case and the defendant now, this would be an appropriate sentence.' *Clancey* says that . . . can't be a pre-trial, post-trial comparison." CA-J-1. The judge added that "*Clancey* is helpful in that it told judges you can't make the sentence turn on when they plead guilty. The coercive part of judicial participation is telling the defendant he would get five years today if he pleads guilty, and ten years after that. Can't do it that way." *Id.*

140. *See, e.g.*, N.C. SUPER. COURT, MECKLENBURG COUNTY, CRIM. R. 7.4 (judicial involvement is "reserved for cases in which all independent efforts to agree on a plea arrangement have been exhausted without an agreement").

141. *See infra* section III(B)(5) (discussing information provided to judges).

142. *See* OR. CIR. COURT, CROOK & JEFFERSON COUNTIES, R. 7.016 (requiring the prosecutor to submit, "in writing to the court, a detailed settlement offer" and the defense to submit "in writing a certificate that counsel has informed and discussed the offer with his or her client and the District Attorney").

143. *See, e.g.*, OR-P-1 (explaining that by the time of the conference, the prosecutor must have made a plea offer to the defendant, and the defendant must be on hand, prepared to resolve the case).

reached a tentative agreement.[144] Some states now require that these discussions take place, or be placed, on the record.[145]

3. Plea Withdrawal, Trial.—States have also adopted specific rules regarding the defendant's right to withdraw his plea if a judge who once indicated she would accept a certain sentence changes her mind.[146] A Michigan judge who concludes at sentencing that the sentence indicated earlier is too low must allow the defendant to withdraw the plea but may not indicate the new sentence.[147] Also common are rules governing when a judge

144. State v. McMahon, 94 So. 3d 468, 474 (Fla. 2012) (quoting *State v. Warner*, 762 So. 2d 507, 513 (Fla. 2000)); Lebron v. State, 127 So. 3d 597, 606 (Fla. Dist. Ct. App. 2012) (quoting same); FL-J-1 ("Our rule is that the judge cannot initiate negotiations. He has to be invited in by a party. I can't just say from the bench, 'Can't you work a deal? State, can't you drop this part?'"). In Missouri, a court rule bars the court from participating in any plea negotiations but authorizes the court, after a plea agreement has been reached, to discuss the agreement with the attorneys and to suggest alternatives that would be acceptable. Harris v. State, 766 S.W.2d 460, 461 (Mo. Ct. App. 1989) (citing MO. R. CRIM. P. 24.02). In Maryland, too, parties can tender a proposed plea agreement to the judge for consideration. MD. R. 4–243(a)(1)(F); *see also* Smith v. State, 825 A.2d 1055, 1077 (Md. 2003) (holding that a trial judge should refrain from participating in plea negotiations until she receives an agreement for approval); Barnes v. State, 523 A.2d 635, 641 (Md. Ct. Spec. App. 1987) (holding that a trial court judge "exceeded the permissible bounds of judicial participation in plea bargaining contemplated by Rule 4–243" by "interject[ing] himself into the plea bargaining process as an active negotiator"). In Ohio, judges are "supposed to wait until the parties ask, but word gets around about which judges are open" to discussing potential plea agreements. OH-D-1.

145. *See* State v. Poole, 583 A.2d 265, 273 (Md. 1991) (encouraging lower courts to make a record of plea discussions and to grant party requests that an agreement be placed on the record). States not in our study have adopted similar regulations. *See* VT. R. CRIM. P. 11(e)(1) ("The court shall not participate in any such discussions, unless the proceedings are taken down by a court reporter or recording equipment."); *see also supra* note 2 and accompanying text (discussing a recent Massachusetts rules amendment that allowed judicial involvement in plea negotiations provided that participation be at the request of one or both parties and that these discussions be recorded and made a part of the record).

146. In California, *Clancey* left this open, but intermediate courts have concluded there is no right to withdraw, as there would be if the judge's indication was itself a promise or bargain. People v. Gray, No. F068375, 2015 WL 4396211, at *6 (Cal. Ct. App. July 17, 2015). Examples of similar restraints appear in other judicial-participation states not in our study. *See, e.g.*, MASS. R. CRIM. P. 12 (detailing the process of making and withdrawing a plea agreement); State v. Milinovich, 887 P.2d 214, 217 (Mont. 1994) (outlining factors that a trial court may use to determine whether a defendant may withdraw a guilty plea).

147. *See* People v. Williams, 626 N.W.2d 899, 902 (Mich. 2001) ("[W]hen the judge makes the determination that the sentence will not be in accord with the earlier assessment, to have the judge then specify a new sentence, which the defendant may accept or not, goes too far in involving the judge in the bargaining process.").

other than the settlement judge must preside at trial, should the defendant end up going to trial.[148]

Compliance with these various new rules is reportedly not perfect.[149] Nevertheless, the preplea judicial conferences described to us look very different than the clandestine sessions of decades past. They have matured from an entirely ad hoc, unregulated process of questionable propriety into an approved, increasingly uniform, and institutionalized procedure, complete with protections responsive to each state's experience.

D. Mediation Programs

One of the most surprising new policies we encountered was full-fledged mediation, practiced in two of our ten states: Oregon and Kansas. Motivated by fiscal concerns, and arising only in the past several years, this development has been entirely missed by legal scholars.

In Oregon, mediation in criminal cases was prompted by a federally supported program called Justice Reinvestment, known by the acronym "JRI."[150] Since 2014, Oregon has allocated funds to several participating counties based in part on the reduction in the number of defendants going to prison.[151] In one participating county, for example, a "Judicial Settlement Conference Standards of Excellence Task Force" has drafted four separate "Best Practice" guides for judicial settlement conferences: one each for judges, prosecutors, defense attorneys, and probation officers.[152] Each guide

148. *See* MD. R. 4–243(c)(5) (providing for a change of judge on motion of either the defendant or the state following a plea withdrawal); Addison v. State 990 A.2d 614, 623 (Md. Ct. Spec. App. 2010) (holding that Rule 4–243 "requires recusal only upon the objection or request of a party"); *see also infra* section III(B)(7) (discussing the judicial-coercion concern).

149. *See* FL-D-1 ("I can think of only one judge who gets involved only after an invitation from an attorney. Others aren't such sticklers about the invitation. They might propose a plea conference from time to time, although it is normal for the parties to make the proposal. There's a judge who . . . will put on the record anything that was concluded in conference. Others don't put everything on the record.").

150. OR-D-2. The JRI program helps states to reallocate criminal justice dollars in ways that reduce recidivism and incarceration rates. *What is JRI?*, BUREAU JUST. ASSISTANCE, https://www.bja.gov/programs/justicereinvestment/what_is_jri.html [https://perma.cc/W98G-BVTB].

151. *See* OR-J-1; OR-P-1 ("[T]hose counties with lower length of stays will essentially be rewarded by taking the money that would have gone to incarceration. Instead, a portion of that money will be returned to county to use for innovative programs to divert people from prisons. I call it, 'If you don't send people to prison we'll send you a quarter million bucks.'").

152. *See generally* STEPHEN K. BUSHONG ET AL., MULTNOMAH CTY. JUSTICE REINVESTMENT PROGRAM, BEST PRACTICES FOR JUDGES (2016) [hereinafter BEST PRACTICES FOR JUDGES] https://multco.us/file/52352/download [https://perma.cc/S4E4-FBL7]; STEPHEN K. BUSHONG ET AL., MULTNOMAH CTY. JUSTICE REINVESTMENT PROGRAM, BEST PRACTICES FOR DISTRICT ATTORNEYS (2016), https://multco.us/file/52474/download [https://perma.cc/BN86-9YSD]; STEPHEN K. BUSHONG ET AL., MULTNOMAH CTY. JUSTICE REINVESTMENT PROGRAM, BEST PRACTICES FOR DEFENSE ATTORNEYS (2016), https://multco.us/file/52476/download [https://perma.cc/76ZH-3QJZ]; STEPHEN K. BUSHONG ET AL., MULTNOMAH CTY. JUSTICE

contains detailed suggestions for questions and statements when communicating with different participants at different stages of the process and detailed checklists for each participant's preparation.[153]

In one county that embraced the program, probation officers now provide risk-and-needs assessments for each defendant charged with an eligible offense.[154] JRI-eligible cases include serious felony cases with presumptive prison terms, other than domestic violence, sexual assault, and homicide.[155] A judicial-settlement conference is mandatory within a certain period after arraignment for any JRI case.[156] The mediators in these JRI cases are a subset of the county's judges, selected by a committee with representation from both prosecution and defense.[157] Each judge devotes at least one afternoon a week to these conferences, which are held off the record, in the courtroom, "about forty-five days out" from first appearance.[158] At the conference, the judge might meet with the prosecution separately from meeting with defense counsel and the defendant.[159] Those separate meetings make it easier for the mediator to "unstick"[160] the parties from their initial negotiating positions by allowing them to "save face."[161] As one defense attorney observed in a county where the judges met with parties separately during settlement conferences, "Those harder discussions, when a judge is trying to move the DA's position, those take place without everybody in the room, so the prosecutor won't be disrespected by the judge in front of everybody."[162]

If a mandatory minimum sentence follows from an enhancement or charge, the conference would be about dropping that enhancement or

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REINVESTMENT PROGRAM, BEST PRACTICES FOR PROBATION OFFICERS (2016), https://multco.us/file/52478/download [https://perma.cc/CRG5-4RGU].

153. *E.g.*, BEST PRACTICES FOR JUDGES, *supra* note 152, at 3–4 (outlining preliminary steps to take at conference).

154. *See* OR-J-2.

155. *Id.*

156. *See id.* (describing the program and reporting that all presumptive-prison-sentence cases must go to settlement unless the defendant opts to go to trial, but that reportedly "[d]oes not happen very often"); OR-P-3 (describing a program "designed to look at resolving a case short of trial that allows us to have confidence in local public safety, in the form of probation that can also save state prison resources"); *see also* OR-D-4 (stating "I'm seeing more probation offers on cases that used to go to prison").

157. *See* OR-D-3 (noting that judges were selected "[b]ecause they have a good handle on sentencing options"); OR-J-2.

158. OR-J-2.

159. *Id.*

160. OR-D-2.

161. *Id.*

162. *Id.*; *see also* OR-J-2 (stating that often a defendant will stop insisting on trial once he "finds out that instead of presumptive prison the state would be on board with something less").

substituting a charge that would permit the desired disposition.[163] Prior to JRI, the prosecutor might have been willing to negotiate a nonincarceration sentence but could not be sure that the treatment, housing, or other support that the defendant needed to succeed was available.[164] With the new program, not only do judges and lawyers receive a report of the risks and needs of each defendant before settling on a negotiated resolution, but probation officers also attend settlement conferences, so that everyone has access to the latest information on the immediate availability of programming for a particular defendant.[165]

In addition to the JRI conferences and the shorter routine settlement conferences described earlier, some Oregon counties conduct special settlement conferences for the biggest, most expensive cases.[166] Both parties will approve a settlement judge, other than the one assigned to try the case—often a judge from another jurisdiction—particularly when the case is being prosecuted in a small county.[167] The judge will use "shuttle diplomacy," meeting with one side then the next.[168] Victims and defendants, sometimes

163. *See* OR-J-2 (noting that a second degree assault charge carrying a mandatory sentence of seventy months might "resolve as attempt, or . . . with a completely different crime, to get the sentence goal they've determined based on that particular case").

164. OR-P-3 ("Say there is a charge for a burglar who is presumptive prison. But the reason he's burglarizing, everybody agrees, is his heroin addiction. So a risk and needs assessment will reveal he needs high level inpatient treatment. Five years ago, me and [the defense] attorney would resolve this case, the judge will say, '[T]here's my order: he gets treatment'—but when he gets to parole and probation, they might say, '[W]e don't have a bed, so he will wait in line.' And if there's no bed, they've reoffended. So we now have a more informed judicial settlement conference. We have to know what will actually happen with this guy. Will the programs be there? We need to know that. So if we will use that, I need a high degree of certainty. It is increasing system awareness, informed awareness, helps us support one another").

165. *Id.* ("We do the LSCMI for each of these. Eighty percent of those eligible for the JRI program score high or very high risk of recidivism. So I want judicial involvement, so that if we're giving probation the judge is aware of how risky that is and how we need judicial support if there is a misstep. . . . We've added parole and probation to judicial settlement conferences, too, so we have all the information about resources and programs right there at the table.").

166. *See* OR-P-1 (noting settlement conferences for "homicides and serious cases"—the "high-end cases where a lot of resources are going to be used"); OR-P-2 (noting success of settlement "in a number of big cases, murders, aggravated murder, child abuse cases, and other statutory theories of homicide").

167. *See* OR-P-1 (explaining that "someone from the outside will have no personal relationship with the parties, [and is] not going to try the case or experience fallout from it, so they'll presumably do a fair job of really trying to force the litigants to resolve the case," reporting that smaller counties do this only "on an occasional basis"); OR-P-2.

168. *See* OR-P-1 (indicating that "sometimes this is a lengthy process"); OR-P-2 ("The judge is an intermediator, he or she shuttles back and forth. And in a victim case, meeting with DA in the morning, and we'd tell 'em where we're at, reveal everything they know. Then might meet with the victim. Then later in the morning the judge would meet with the defendant and the defense attorney, maybe some of the defendant's family, and get the two sides, and then shuttle back and forth trying to hammer out an acceptable deal.").

even the defendant's family, participate, all trusting the judge not to pass along confidential information to the other side.[169]

In Kansas, a state where most of those interviewed reported little if any judicial participation in negotiations, a small number of counties have quietly started, without any rule or statutory change, to conduct mediation in criminal cases similar to the process described in Oregon.[170] Reportedly beginning in one county more than ten years ago, mediation is now practiced in at least two others for more serious or complex crimes as well as for cases with unpredictable sentences.[171] Counties that do not mediate cases may send some cases to judges in counties that will.[172] If one of the parties does not request mediation, the judge might do so;[173] although one party could refuse after the other party or the judge requests it, that "never" happens.[174] The judge assigned to try the case selects a mediator for the case, often another sitting or retired judge who has volunteered to take mediations.[175] The volunteers are often criminal court judges with experience in both prosecution and defense,[176] but the mediation judge can have no contact at all with the trial judge—before, during, or after the mediation.[177] The probation department prepares a preliminary presentence investigation report (PSI), and the mediation is conducted by meeting with one side, then the other, off the record: it might take less than an hour, or several short sessions over several days.[178] The judge, without revealing specific confidential information, might signal to the attorneys that there will be serious challenges for them at trial, and will propose a specific outcome for the parties to consider.[179] If the parties agree, and between 30% and 90% of the time they do, then the trial judge will implement the mediation result.[180] Estimates of

169. OR-P-2 ("Everybody spills all the beans about strengths and weaknesses and the judge gets them to agree, often persuading the parties to genuinely appreciate a different perspective."). The discussions are not on the record, and nothing can be admitted or used later. *Id.*

170. *See* KS-J-1 (stating that mediation takes place in one or two Kansas counties); KS-D-2 (explaining that, while at least one county had recently started criminal-case mediation, the practice "is not established by formal rules of procedure").

171. *See* KS-D-2 (mentioning counties that use mediation); KS-D-3 (stating that felony mediation began in one county approximately ten years ago); KS-J-2 ("Mediation, in my mind, is designed for the trickier cases."); KS-P-2 (stating that cases involving more serious sentences or witnesses that might prove unreliable at trial are more likely to be sent to mediation).

172. *See* KS-J-3 ("[T]hose judges will send them to me for mediation.").

173. KS-J-2.

174. *See* KS-D-3 ("I've never had a refusal.").

175. KS-D-2.

176. *See* KS-J-3 (describing one judge's extensive criminal justice background); KS-P-2 (same).

177. *See* KS-D-2 ("The mediation rules are not written, but . . . that practice holds true.").

178. KS-D-2; KS-D-3; KS-J-2.

179. KS-D-2; KS-J-3.

180. *See* KS-D-3 ("The process is successful, produces an agreement, about a third of the time."); KS-J-3 ("As for success rates, mine is well over ninety percent. That's how often the parties

the proportion of felonies resolved with mediation in these Kansas counties ranged from 5% to 20%.[181]

E. Placing Judges with Felony Sentencing Authority Before Bindover

As a final example of the formalization of judicial involvement in settlements, courts in at least two states have modified the traditional division of authority between felony- and lower court judges precisely to encourage settlement of felonies before the preliminary hearing. Such changes would not be necessary in a state with a unified criminal bench, where the judges who preside over the earliest phases of a felony case are the same judges who impose the sentence. But in states where felony-court judges, not lower court judges, select the sentence, parties have little incentive to ask a lower court judge to weigh in on disposition.[182] Some counties in Michigan have encouraged earlier settlement conferences by authorizing their circuit judges to function as district judges so that they may talk to the parties about sentencing before the preliminary hearing.[183] In California, too, trial courts with more than three judges are required by court rule to adopt procedures to facilitate dispositions before the preliminary hearing, which may include "[t]he use of superior court judges as magistrates to conduct readiness conferences before the preliminary hearing and to assist, where not inconsistent with law, in the early disposition of cases."[184]

The surprising array of formalized intervention techniques described above is one of our most important findings. In the 1970s, researchers thought a single judge's decision to "announce from the bench that [he] will be available during a specific time to 'pre-try' cases," was "institutionalizing judicial participation in plea bargaining."[185] Scholars back then could not

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reach an agreement in mediation."). None of those interviewed could remember a trial judge rejecting a mediated settlement.

181. KS-D-2 (estimating five percent); KS-P-2 (same); KS-J-3 (estimating ten to fifteen percent); KS-J-2 (estimating twenty percent).

182. *See* MI-J-2 ("*Cobbs* doesn't come up in the district court; they can't make representations about sentencing."). In Missouri, judges reportedly do not get involved before preliminary hearing because they can't take the plea; judicial involvement must await bindover. *See* MO-D-4.

183. *See* MI-J-1 ("[W]e have identified cases we send to one circuit court, designated as a district court judge—low-end cases that carry four to five years max . . . . [L]ast year, we probably got rid of . . . maybe twenty percent of felony caseload [that way]."). For a list of plans allowing for circuit and district judges to exercise one another's jurisdiction, see generally MICHIGAN STATE COURT ADMINISTRATIVE OFFICE, CONCURRENT JURISDICTION PLANS (2011), http://courts.mi.gov/Administration/SCAO/Resources/Documents/other/concurrentjurisdictionwithcj.pdf [https://perma.cc/9QBW-Y2VF].

184. CAL. R. CT. 10.953; *see* EDWARD A. RUCKER & MARK E. OVERLAND, CALIFORNIA CRIMINAL PRACTICE: MOTIONS, JURY INSTRUCTIONS AND SENTENCING § 14:4 (4th ed.), Westlaw (database updated Oct. 2016) ("Superior court judges sit as magistrates to encourage the early disposition of cases. A defendant who pleads guilty or nolo contendere in these courts is sentenced before the judge taking the plea.").

185. HEUMANN, *supra* note 44, at 147; *see also id.* at 198–99 n.25 (emphasizing that "[t]here are no administrative rules or directives about this process; it is simply something instituted by

imagine the level of institutional support and momentum for judicial participation that now exists in some of these state courts.[186] Even today, it remains almost invisible in legal scholarship.

III. Why Judicial Participation Thrives

The institutionalization of the judge's role in plea negotiation is not accidental. In this Part, we explore the larger forces that are driving this trend. We divide these explanations into two sets. First, in subpart A, we address a pair of recent developments in state criminal justice that promote this portfolio of new judicial practices—the rise of criminal docket management and an explosion in information technology—and summarize what judges and lawyers told us about how these management tools have changed practices in their own courts. The second set of explanations, discussed in subpart B, includes a long list of other benefits from judicial involvement, beyond the efficient resolution of cases. The interviewees' comments challenge not only some of our hypotheses, but also some of the most common criticisms of judicial participation.

A. Judges as Cost-Conscious Docket Managers

The procedures outlined in Part II are part of a fundamental shift in the way that state courts process criminal cases, a shift toward more aggressive management of criminal caseflow. Accelerating over only the past two or three decades, this shift has gone unnoticed in scholarly literature. Few scholars have noticed the transformation in the way state courts handle cases on the criminal side,[187] perhaps because it has been overshadowed by other attention-grabbing developments such as drug courts, sentencing reforms, mass incarceration, and the crisis in indigent defense.[188] In any event, the

individual judges concerned about facilitating negotiations," and noting judges' conflicting views about the propriety of this sort of involvement).

186. *See, e.g.*, *id.* at 137 (predicting that, "though the judge may not necessarily participate in plea bargaining, the requirement that he sanction the deals suggests that over time he will have to come to grips (in a normative sense) with the notion of negotiated dispositions").

187. Exceptions include Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 613–14 (2014) (discussing the processing of misdemeanors in New York City); Turner, *supra* note 50, at 203 (referencing managerial-judging models in a study of judicial bargaining in Florida, Connecticut, and Germany, citing Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004) and Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835 (2005) for Langer's observation of this phenomenon in Germany and at the International Criminal Tribunal for the former Yugoslavia). In an article published while our interviews were underway, one scholar speculated briefly that adopting the more "modern" model of managerial judging in the criminal context would allow for judicial participation—predicting, but apparently unaware of, the entrenched practices revealed for the first time by our study. Batra, *supra* note 24, at 571–72.

188. Federal courts are just now joining this movement in earnest on the civil side from top to bottom. *See* JOHN ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2015)

managerial ethos among judges in criminal cases has emerged right under our noses; alongside this managerial ethos, a controversial practice from an earlier generation—judicial participation in plea negotiations—has matured into an institution in its own right. Differentiated case-management structures, early disposition programs, and other policies designed to minimize delay and achieve quicker dispositions are now structural features of criminal courts in many states. Organizations such as the National Center for State Courts (NCSC) and the Conference of State Court Administrators (CSCA) offer training, tools, and resources to help state trial courts speed up criminal-case disposition.[189] Of the many factors contributing to these developments, two stand out: budget stresses, sometimes linked to increasing caseloads, and new capabilities in information technology.

1. Time Is Money: Earlier Disposition and Budget Concerns.—As state courts struggled with the budget stresses of the recent recession, case-management techniques that streamline disposition emerged as popular cost-cutting measures. The focus of these efforts has not been to convert more trials into guilty pleas but instead to help cases that are already headed for a guilty plea to get there *sooner*.

The push to shrink disposition time has been based, at least in part, on research confirming that slower cases cost more money. Earlier disposition reduces the number of conferences and hearings for each case, freeing up the time of attorneys, judges, court staff, and sheriff's personnel.[190] For example, one report noted two protracted cases in a mid-sized urban jurisdiction that included over seventy scheduled events apiece and estimated that those two cases alone may have cost the jurisdiction the full-time equivalent of an extra prosecutor or public defender.[191] A 2011 study from California concluded

(noting the "crucial role of federal judges in engaging in early and effective case management"). *See generally* Bert I. Huang, *Trial by Preview*, 113 COLUM. L. REV. 1323 (2013) (discussing previews of the judge's assessment in civil cases).

189. *See, e.g.*, *Caseflow Management Resource Guide*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/Topics/Court-Management/Caseflow-Management/Resource-Guide.aspx [https://perma.cc/UP4H-FP8K] (collecting caseflow-management resources); *see also ICM Fellows Papers*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/Education-and-Careers/ICM-Fellows/ICM-Fellows-Papers.aspx [https://perma.cc/7H3F-2JKE] (compiling additional research regarding DCM in individual jurisdictions).

190. NAT'L CTR. FOR STATE COURTS, MODEL TIME STANDARDS FOR STATE TRIAL COURTS 35 (2011) [hereinafter MODEL TIME STANDARDS]; *see* BRIAN J. OSTROM & ROGER A. HANSON, NAT'L CTR. FOR STATE COURTS, EFFICIENCY, TIMELINESS, AND QUALITY: A NEW PERSPECTIVE FROM NINE STATE CRIMINAL TRIAL COURTS 104–06 (1999), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.173.4163&rep=rep1&type=pdf [https://perma.cc/H5SX-CZYQ] (summarizing research on the relationship between local legal culture and efficient case disposition); DAVID C. STEELMAN & JONATHAN L. MEADOWS, NAT'L CTR. FOR STATE COURTS, TEN STEPS TO ACHIEVE MORE MEANINGFUL CRIMINAL PRETRIAL CONFERENCES IN THE NINTH JUDICIAL CIRCUIT OF FLORIDA, at ix–xi (2010) (illustrating time and personnel costs of nonmeaningful pretrial conferences and trial dates).

191. *See* MODEL TIME STANDARDS, *supra* note 193, at 43 (discussing this finding).

that "[i]f all California trial courts . . . were able to reduce by one the number of hearings required to dispose of their felony cases, the courts would realize cost efficiencies of over $60 million dollars."[192] Earlier pleas also reduce the cost of summoning, orienting, feeding, and paying potential jurors whose services are never needed, in courts where plea agreements are too often reached on the first day of trial.[193] And earlier pleas reduce the cost of jailing pretrial detainees who would be released upon entering their plea.[194]

Although the monetary savings[195] of earlier dispositions have been recognized since the late 1980s,[196] it wasn't until the 1990s that criminal-case management moved out to the leading edge of policy change, prompting targeted federal funding for state courts to experiment with some of the early disposition programs mentioned above.[197] And it was the budget trimming required by the recession of 2008,[198] combined in some places with rising caseloads, that prompted even more court administrators seriously to consider adopting new case-management techniques in criminal cases.[199]

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192. *See* GREACEN & MILLER, *supra* note 68, at 2.

193. *See infra* note 228.

194. MODEL TIME STANDARDS, *supra* note 193, at 43 ("A 2011 study to improve the efficiency of the trial court process concluded that early and continuous court control of criminal case progress would reduce the average monthly population of the jai[l] by almost 10% . . . .").

195. Monetary savings to the county and state are not the only benefits of earlier dispositions. Moving the time of disposition forward may reduce the toll that unnecessary pretrial detention takes on defendants and their families, the risks associated with transporting the defendant back and forth to court repeatedly, the frustration of jurors and witnesses who must show up and wait around, and the delay before a defendant receives treatment or a victim receives restitution.

196. *See* MICH. CASEFLOW MGMT., *supra* note 71, at 4 ("The National Center for State Courts and the Bureau of Justice Assistance of the U.S. Department of Justice initiated a Trial Court Performance Standards project in August 1987 to develop measurable performance standards for trial courts.").

197. *See* HENDERSON ET AL., *supra* note 105, at 1 (studying the application of DCM to criminal-case processing at four demonstration sites).

198. *See, e.g.*, OREGON JUDICIAL BRANCH, 2011–2014: A FOUR YEAR REPORT 15–17, http://courts.oregon.gov/OJD/docs/OSCA/2011-2014OJDFourYearReportR.pdf [https://perma.cc/4TWY-8D9S] (describing state budget cuts between 2008 and 2013 that forced layoffs, weeks of unpaid furlough days, pay freezes, and courthouse closures; and explaining how, as the budget crisis persisted, the Oregon Judicial Department "undertook an urgent effort to 'do more with less' . . . by 'doing things differently' in developing permanent OJD-wide efficiencies [and] innovations"); *see also* FLANGO & CLARKE, *supra* note 103, at 24–25 ("[T]he financial crisis provides an opportunity to examine court activities, define those that are most essential, streamline or even eliminate services that are not of the highest priority, and reengineer those court processes that remain.").

199. One expert described the transformation this way:

> [T]here have been two big changes in the past five to ten years. One is technology . . . . The other is a change in culture, a shift in priorities that came about because of the recession. Courts have decided they need to be able to measure these things because they just can't be at the mercy of the parties anymore. They need to know what is happening in order to budget for it, manage judicial resources.

See Interview with William Raftery, *supra* note 65; *see also* ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 34–35 (2009) (describing early disposition

2. Data and the New Performance Measures: Measuring Speed and Savings.—Another catalyst for these new ways of managing criminal cases has been the revolution in information technology.[200] Before the 1990s, statistical information about caseflow in state courts was very limited; what did exist was expensive to collect and evaluate.[201] Since then, a large number of state courts have launched new case-management information systems.[202] In just the last decade, many presiding judges and state-court administrators for the first time gained the power to track (and to publish) how long it takes criminal charges to move through the system.[203] Advances in court information systems have also allowed courts to calculate how much money they can save through more aggressive case-management techniques, making experimentation with judicial settlement practices less risky to attempt and more attractive to cost-conscious judges, legislators, and commissioners.[204]

Part of the "new notion" of court management of the criminal docket, as explained by William Raftery, an expert in court management and court technology at the NCSC, is the adoption of court-performance measures.[205] Lower criminal courts track and report how quickly they move criminal cases from charge to disposition or bindover, while felony courts detail how quickly they move cases from arraignment to plea or sentence.[206] In 2011,

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projects, created as a response to overwhelming caseloads, including the Allegheny County Early Disposition Project, which promotes "coordination between the courts and social service agencies to help clients get out of jail and resolve their cases earlier. . . . [W]ithin a week, as opposed to four or five months.").

200. *See* NANCY LAVIGNE ET AL., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT 5 (2014) (attributing the new emphasis on justice-system innovation and "increased efforts to assess the impact and cost-effectiveness of criminal justice policies and practices" to "[a]dvances in information technology" that support data analysis and "infrastructure for data-driven decision-making.").

201. *See* Interview with William Raftery, *supra* note 65.

202. *See id.*

203. See Interview with William Raftery, *supra* note 65, noting that:

> [T]echnology . . . allows courts to track how badly they are wasting resources, to track how long cases are taking, etc. Particularly in the last decade, courts have for the first time become able to track this and there is greater willingness to do it. They can see the time these are taking and whether there are continuances.

204. *See* OR-J-1 (describing how the adoption of a thirty-five-day call case management "dramatically cut the number of jurors we had to summon, and generated more savings too"); Interview with William Raftery, *supra* note 65 ("Juror utilization alone is substantial savings. . . . In a state where prior to [case management] it was one continuance after another, it is a big savings, trial date certainty reports show this.").

205. Interview with William Raftery, *supra* note 65; *see also* MODEL TIME STANDARDS, *supra* note 190, at 35 ("[T]ime standards can play an important role in achieving the purposes of courts in society.").

206. Other popular measures include the number of trial postponements and the number of jurors summoned but not used. *See, e.g.*, Memorandum from John A. Hohman, Jr., State Court Adm'r, Mich. State Court Admin. Office, to Judges (Apr. 3, 2014), http://courts.mi.gov/administration/admin/op/performance/documents/pmstatus04-03-14.pdf [https://perma.cc/NFB6-2GW5] (discussing implementation of these measures); *see also* GREACEN

the NCSC published model time standards for case disposition, approved by the Conference of State Court Administrators, the Conference of Chief Justices, the American Bar Association House of Delegates, and the National Association for Court Management.[207] At least thirty-nine states and the District of Columbia have adopted time-to-disposition standards for felony cases.[208] In the fall of 2015, the NCSC launched a new "Effective Criminal Case Management Project" that will "collect the most broadly based case-level data ever assembled on case processing of felony and misdemeanor cases," and select "[e]ight courts that have demonstrated the ability to achieve timely criminal case processing . . . to document the specific best practices that underlie their success."[209]

The new measures allow comparison of the relative speed of each court within a state, and, when judge-specific information is available, of each particular judge.[210] Some states provide the information from local courts only to those courts or their presiding judges to use as they see fit; others post it online for all to see.[211] "If an individual judge is going to be accountable to time performance standards, the burden [to move the case] is on the court," Raftery noted.[212] "[T]he judge has the attitude toward the parties: 'you're not tanking my numbers.'"[213]

& MILLER, *supra* note 68, at 7 (noting that the "study is the outgrowth of seven years of effort by the California judicial branch to improve criminal case processing in its 58 counties").

207. MODEL TIME STANDARDS, *supra* note 190, at 3 (recommending the resolution of 75% of felonies within 90 days, 90% within 180 days, and 98% within 365 days).

208. *Id.* at 5. For a sampling of standards from the states in our study, see CAL. SUPER. COURT, ALPINE COUNTY, R. 6.1(B) (calling for 90% of felony preliminary examinations to be concluded within 30 days after arraignment, 98% within 45 days, and 100% within 90 days); 9TH JUD. CIR. FLA. ADMIN. ORDER NO. 2004-04-3 (2007) (adopting time standards and differential case management); MICH. CT. R. 8.110 (requiring chief judges to file quarterly reports including a list of felony cases with delays of more than 301 days between bindover and adjudication); N.C. SUPER. CT., CUMBERLAND COUNTY, R. 2 (establishing a case-tracking system); *see also Case Processing Time Standards*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/cpts [https://perma.cc/49U4-HK9C] (collecting time standards by state); *Trial Court Performance Measures*, COURTOOLS, http://www.courtools.org/Trial-Court-Performance-Measures.aspx [https://perma.cc/3EFJ-9F7K] (recommending particular performance measures).

209. *Effective Criminal Case Management Project*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/services-and-experts/areas-of-expertise/caseflow-and-workflow-management/effective-criminal-case-management.aspx [https://perma.cc/8M8Q-94H3].

210. *See* MICH. CASEFLOW MGMT., *supra* note 71, at 30 (describing data uses); Hohman, *supra* note 206 (noting the schedule for publication of individual judge's disposition rates).

211. *See generally* MICH. STATE COURT ADMIN. OFFICE, CIRCUIT CASE AGE RATES (2013), http://courts.mi.gov/education/stats/performance-measures/Documents/Timeliness/caseagelargecircuit.pdf [https://perma.cc/6M6R-7QJ5] (providing average disposition rates by case type).

212. Interview with William Raftery, *supra* note 65.

213. *Id.*; *cf.* Resnik, *supra* note 7, at 397–99 (noting the role of "[n]ew recordkeeping systems coupled with computer technology" in the rise of managerial judging in the civil system as a response to workload pressure and case backlogs).

3. Reports from the Field Linking Judicial Negotiation to Management Goals.—Some of the new approaches described in Part II do not require judicial participation in the negotiation process.[214] But in many of the states we examined, where the law does not prohibit judicial participation, this new, data-driven regulatory regime for the administration of criminal cases creates an environment that welcomes judicial involvement to help parties reach agreement faster. The overwhelming attention to efficiency sends a clear message to trial judges: Do what you can to resolve these cases earlier in the process. As the saying goes, "What gets measured, gets managed." And experts on court management sometimes suggest that the best way to manage disposition time is for judges to get in there and settle criminal cases earlier.[215]

This shift to statistics-driven case management clearly made an impact in the states in our study. Nine of the ten states we examined had adopted time-to-disposition performance standards for felony cases.[216] The tenth, Utah, actively collects and publishes time-to-disposition information and conducts training for courts to improve their numbers.[217] The trial judges we interviewed knew their efficiency was being tracked.[218] Even though public access to these statistics, if any, is limited to court-level rather than judge-level data, interviewees stated that presiding judges use the individual judge numbers internally to encourage speedy disposition[219] and manage judicial

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214. Indeed, although the NCSC recommends early conferences in every case to encourage early settlement, it recognizes that what judges do and say during those conferences is regulated by local law. *See* Interview with William Raftery, *supra* note 65 ("Our obligation is with court management. The court's responsibility is to schedule the meeting and get those parties staring at each other; what they talk about is up to the law of the jurisdiction. Court management gets people in the room, then lets them do the law.").

215. *See* SOLOMON, *supra* note 105, at 11 ("An early disposition climate is created by requiring counsel to meet with the client as soon as possible, creating a structured opportunity for serious negotiations between the lawyers directly responsible for the case and meaningful judicial participation in the process, where appropriate."); *see also* DAVID C. STEELMAN ET AL., NAT'L CTR. FOR STATE COURTS, FELONY CASEFLOW MANAGEMENT IN BERNALILLO COUNTY, NEW MEXICO app. at 50–53 (2009).

216. Maryland's counties are adopting CourTools individually. *See, e.g.*, *Performance Measures (CourTools)*, MONTGOMERY COUNTY CIR. CT., https://www.montgomerycountymd.gov/circuitCourt/Court/Publications/CourTools.html [https://perma.cc/ERU2-SU3L] (explaining the measures).

217. *Time to Disposition: District Courts*, UTAH ST. CTS. (2016), https://www.utcourts.gov/courtools/reports.asp?measure=disposition&court=dist&detail=all [https://perma.cc/BAQ6-SXSE].

218. *See* MO-J-1 ("Historically our circuit had been way up at the top on these stats, but now we are falling behind. We are thinking about imposing time limits on associate judges."); MI-J-1 (reporting that the court had been tracking the timing of pleas for the past seven or eight months as part of the budget process).

219. *See* MI-J-2 (reporting that the chief judge "would distribute all the judges' numbers to all the judges"; asked if this operated as peer shaming, the judge answered, "Now, I didn't say that. But it worked."); FL-J-2 ("If there is a large number of cases over 180 days old—the standard

assignments.[220] "[T]he reports create this gentle pressure not to be the low boy," explained one judge.[221] "Everyone sees the reports."[222] Judges seemed proud when their court's statistics were good compared to the rest of the state.[223] A number of the judges we interviewed specifically linked local judicial-involvement practices to encouragement from the state supreme court, court administrators, or the presiding judge to secure pleas earlier in the process. Said one judge, "We have numbers through the State Court Administrative Office that show the percentage of cases closed on time—there are deadlines established. The judges actively involved in the process have the best numbers."[224]

Lawyers, too, perceived courts as driven by disposition speed and performance measures,[225] and some tied judicial-participation practices to this pressure. A California prosecutor explained that the court split up the pretrial department in hopes of earlier settlements after the county "got poor marks for how long cases were taking to resolve prior to prelim. . . . The push came from the court."[226] Said an Oregon prosecutor, "The reason they use settlement judges is . . . because of how the performance measure is for the court. . . . Almost always it is the presiding judge of the county that says, 'Let's go to a settlement judge.'"[227]

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declared by the Florida Supreme Court—I would address that with the judge. I would just inquire, 'What's happening?'").

220. *See* CA-J-2 ("[Y]ou have to do what the presiding judge says. Everyone goes along, or you'll get shipped to some worse court where you don't want to be."). Another judge elaborated:

> The judges can see who is efficient, who is keeping their heads above water. . . . [The Chief Judge wants] everyone to see what everyone else is doing, so they won't complain about a workload that they only imagine. "Judge Smith, your numbers are growing. But I see that all of your colleagues are doing the same." Versus, "Judge Smith, you alone are going up. So how can I help you speed up?"

FL-J-1.

221. FL-J-1.

222. *Id.*

223. CA-J-3 ("I had the highest resolution statistics. . . . [The spreadsheet] would have median resolution rate, then where you were up against that rate. . . . I didn't live by the numbers, but I would look.").

224. MI-J-3.

225. *See* CA-D-1 ("[T]hey'll get pressure from the supervising judge—that their numbers are too high, have to get the lawyers to move more quickly. . . . If the numbers are too high, the judges don't look good in front of their colleagues."); FL-D-1 ("Case backlog numbers for all judges go out in a monthly report. It's like a competition to see who has the lowest numbers. . . . If you're backed up in your criminal docket, you might get moved elsewhere, someplace where fast dispositions are not so important."); OR-D-1 ("In this county, the judges are interested in trying to reduce the trial rate. They are . . . always working on how we can reinvent our docket system: more smooth, fewer trials, fewer cases . . . .").

226. CA-P-3.

227. OR-P-1; *see also* FL-P-2 ("They are highly conscious of their numbers. They carry on friendly competitions with each other, and some judges are known for having the lowest numbers on their dockets. . . . Judges probably think of their own plea negotiations as a docket management technique.").

Several interviewees also connected judicial participation to reduced juror costs[228] or to lowering the duration or expense of pretrial detention.[229] And in Oregon, where judicial settlement conferences are supported by grant funding, early anecdotal reports point to significant savings already.[230]

Not surprisingly given the range of disparate practices, interviewees varied in their perceptions of how effectively judicial participation improved efficiency. There were some who thought having the judge involved didn't make much of a difference in efficiency.[231] Several believed that having the judge's input helps settle cases that would otherwise go to trial.[232] But the majority of our interviewees doubted that judicial participation affected *how many* cases settled; instead, they were convinced that judicial participation facilitates *earlier* settlement.[233] An Oregon judge, for example, explained that an attempt to force parties to negotiate their cases earlier on their own, without the judge, failed to reduce the number of cases that were settling at the last minute, and that only by requiring the parties to present their positions to the judge in a settlement conference was the court able to get its trial docket under control.[234]

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228. *See* MD-J-2 (noting juror costs); MI-J-1 (noting, "[W]e were spending a considerable amount of money to summon jurors, they were sitting and never being sent to courtroom. . . . [O]n any particular day thirty-five percent never get out of the assembly room," and that permitting *Cobbs* evaluations moves the plea earlier, reducing this expense).

229. MI-J-2 ("[W]hat it did was move things forward, to shorten the pretrial confinement."); *see* MO-J-4 ("We have a lot of cases and a small county jail, so those two issues drive the train. It forces the prosecutor to negotiate a resolution faster.").

230. One attorney reported that the county prosecutor has said the program has saved "millions." "I'm seeing more probation offers on cases that used to go to prison. . . . Some Measure 11 cases, it is making a difference." OR-D-4; *see also* OR-J-2 ("We are seeing a lot of cases that before JRI would have been prison sentences.").

231. *See* MI-P-5 ("You don't need conferences to move pleas up from the first day of trial."); *see also* MI-J-4 (stating *Cobbs* evaluations "slow down the process, because defendants wanting to talk to the judge are waiting longer to plead").

232. *See* CA-P-1 (predicting that defendants would go to trial more often if they didn't have any input from the judge, because "[t]he defendant doesn't have a clue"); CA-P-3 ("Of the cases that settle, I would say twenty percent of those cases would not settle without judicial intervention."); MI-D-4 ("Nothing was ever created that reduced the amount of trials better than *People v. Cobbs*. . . . The decrease in jury trial is exponential, and the reason is being able to do preliminary evaluations with the judge at the pretrial.").

233. *See* CA-J-3 (answering whether cases would resolve without judicial involvement: "Not in as timely a fashion and maybe not as fair."); MI-J-2 ("It increased the number of pleas, but dramatically affected the timing of the pleas. A lot of pleas happened on the first day of trial; with *Cobbs* that tends to not be the case. . . . [W]hat it did was move things forward . . . ."); MI-J-3 (noting that "[c]ases get resolved earlier in the process" with judicial intervention); *see also* MATTHEW KLEIMAN & CYNTHIA G. LEE, NAT'L CTR. FOR STATE COURTS, MICHIGAN JUDICIAL WORKLOAD ASSESSMENT: FINAL REPORT 14 (2011) ("Judges also cite . . . [*Cobbs*] agreements as time-savers in criminal cases.").

234. "Before we had this process . . . we'd have [dozens of] cases on for trial, and we have all these people at call for all those cases . . . and the poor lawyers were having to prepare for trial, but they didn't know if it would go." OR-J-3. "We tried setting conferences without the judge, but they just didn't do it. Or the DA would send somebody with no authority to negotiate the case." *Id.*

Like judges, many prosecutors and defense attorneys also appreciated judicial input on sentences as a means of improving efficiency for their staffing.[235] The earlier in the process that routine cases settle, the more time staffers have for the most serious cases.[236] One Florida prosecutor explained: "Some prosecutors, especially drug prosecutors, love it when the judge resolves all of the possession cases through routine pleas to the bench: 'Then I can spend all my time going after the bad guy traffickers and will put less work into the possession cases.'"[237] And in those counties using mediation, prosecutors also prized a judge's ability to smooth the way to an agreement in serious cases that would otherwise be particularly time consuming to litigate.[238]

All of these comments leave a strong impression that the structured and formalized judicial involvement that these participants describe is part of a larger transformation in criminal-case management generally, encouraged by budget pressures and new court-statistics capabilities. And this change in the way state courts adjudicate criminal cases is likely here to stay: like race car drivers, once they experience greater speed, courts may never be satisfied with less.

B. Beyond Efficiency: Other (Often Surprising) Reasons Participants Favored Judicial Involvement

Judges, prosecutors, and defense attorneys did not always attribute judicial involvement to the judge's desire to control caseflow, nor did they cite efficiency as its only advantage. In addition to speeding up the process, interviewees from all three groups reported that judicial involvement advanced their interests in other ways. This subpart collects these reports,

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235. *See* MI-P-4 ("I like em a lot . . . . [I]t's a no brainer for me. By the time I go down to the hearing, the defense lawyer had already submitted a form requesting *Cobbs*, had put in there the preliminary evaluation of guidelines. When the hearing date comes, I go down there and it's all set."); OR-D-1 ("[T]he DA doesn't want to try the case either. Maybe the victim will mess up, or . . . he needs to indict ten other people instead of sitting in the trial for this guy.").

236. *See* NC-P-1 ("[I]t's good to know where things stand. At bottom, that's what the judge's involvement gives us. The judge's input can lead to a more efficient use of judicial resources. It can prevent some wasted efforts by us to collect witnesses and victims at the courthouse."); OR-D-2 ("[F]or every one that is settled earlier, my lawyers can invest their time on other cases and preparing the ones that actually do go to trial . . . .").

237. FL-P-2.

238. As one prosecutor explained,

> You get to the truth and facts of a case, and you get through some of the emotional challenges . . . . You are getting a judge who has no role in deciding pretrial motions or a stake in the trial, working through those issues that sometimes get in the way. . . . Having done this quite a while, seeing serious cases resolved in an appropriate fashion, in a way that satisfies everyone, other counties are taking notice.

OR-P-2. Further, "[i]t's all about meeting the defendant as opposed to meeting the prosecutor. Sometimes it's not even about the sentence, but about the discussion." *Id.*

comparing each claimed advantage to our initial predictions and the conventional critique.

Section 1 addresses a theme we heard from many judges when we asked why they appreciate their opportunity to participate in negotiations. They told us that early involvement improves case outcomes because it provides the opportunity to suggest options for sentencing that the parties had not presented and to remedy clear errors by the attorneys.

Section 2 turns to a common observation from prosecutors, who find the judge's input strategically useful in managing their relationships with police, victims, and the public.

Section 3 addresses an observation that defense attorneys stressed, one of the two dominant drivers here other than efficiency: the expectation that getting the judge involved tends to produce a sentence more lenient than the deal offered by the prosecutor. Reports of the moderating influence of judicial participation on sentences were quite consistent across different courts and interviewees—a finding that is not surprising when one considers the participants' explanations.

Section 4 tackles the other explanation for the practice of judicial involvement that we heard over and over again: the desire of both parties for information about the likely sentence—a preview that only the judge can supply. We note in this part that our interviews appeared to refute our initial hypothesis that the added predictability provided by laws restricting sentencing discretion would reduce the parties' incentives to seek a preview of the likely sentence from the judge before agreeing to a deal. Rather, such laws merely shifted the parties' uncertainty to other aspects of sentencing, such as guideline scoring. When a state's sentencing restrictions included a provision insulating from review any deal with advance judicial approval, those restrictions may have increased the incentives for prosecutors to nail down the judge's views in advance.

The remaining sections suggest that three of the more common criticisms of judicial participation may have it backwards. In section 5, we relate how interviewees dismissed worries that judges would be reluctant to talk about the sentence before receiving a presentence report complete with guidelines facts and a victim's statement. They shrugged off concerns that judges lacked this information at the negotiation stage or that adding the judge to the negotiating mix would produce less informed sentences, inviting trouble should more complete information surface later. The processes our interviewees described suggested just the opposite: the judge's involvement created a higher likelihood that a victim's views would be considered in the sentence, as compared to a deal with a sentence recommendation hammered out between the parties alone before tendering a plea to the judge. And as for missing information from presentence reports, many related either that presentence reports had recently faded from use in guilty-plea cases generally, or that the judge had access to other, novel sources of information

at the negotiation stage that replicated the type of information typically found in such reports.

In section 6, we note that those who spoke with us showed little fear that the judge's participation in negotiations would force defendants to settle their cases before they received the information they needed. Rather, interviewees reported that prosecutors typically turned over discovery to the defendant well before such conferences took place, often at the urging of the judge. Moreover, the judge's involvement put the defense attorney in a position to hear the prosecution's answers to questions from the judge, questions that the prosecutor might never address in negotiations with defense counsel alone.

Finally, in section 7, we address the potential for a judge's involvement to influence a defendant's decision about pleading guilty. Despite the concern of a few that judicial involvement creates the risk of coercing the defendant into pleading guilty, this view was not widely shared. Most of the participants who spoke to us seemed unconcerned about a risk that judicial input into the negotiations added to the coercion defendants already face in plea bargaining. Instead, attorneys often prized judicial involvement for just the opposite reason: that it made the negotiation *less* coercive. As section 6 relates, interviewees suggested that by increasing the information available to a defendant and creating a sentencing option that is often more moderate than the prosecutor's offer, judicial participation can make an already coercive situation a little less so.

1. Better (Not Just Faster) Outcomes.—Judges reported that participating in discussions about potential sentences allowed them to educate prosecutors about why the sentence terms they had offered were excessive. In these conferences, said one, "I'll say that a lot, 'Why should the public have to pay to house him for three or four years when you and I know this guy is no danger?'"[239] Explained another, "We get some [state's] assistants that aren't too smart; they don't realize they won't get anything better."[240] The judge continued, "If I had to wait until the plea colloquy, I can't talk to them then. . . . I say to the state, 'You really think you are going to win this case?'"[241] Some considered their participation to be an essential source of impartial information for an assistant prosecutor who is bound by office policy and may have less experience: "The judge has the neutral role and is not an advocate for one side. . . . [S]omeone not beholden to the prosecutor's office or food chain politics, who is able to look at a case and provide some balance . . . ."[242]

239. OR-J-1.

240. MD-J-1.

241. *Id.*

242. CA-J-3; *see also* OR-J-3 ("Sometimes it's the DA. [After hearing the offer in one case] I said, 'No way, . . . that's ridiculous.' So they get a little more reasonable after hearing that.").

Prosecutors with management responsibility also remarked that judicial participation in plea discussions is helpful when the attorneys involved are inexperienced or overzealous. Explained one:

> As a manager, I am aware that lawyers on both sides fall in love with their cases. They become too committed. The defense attorney decides to right a terrible injustice; and from the prosecutor's side, the prosecutors can't see the holes in their cases. Lawyers are human beings, but the more passionate they are sometimes creates problems. A rational, reasonable, respectful person can come in and tell the prosecutor, "Let me tell you what the problems are with this case." [The judge] can tell your assistant, "Look, your victim has a drug problem—she won't come across that well. These are bizarre text messages she sent. Have you considered [a lesser charge]? Instead of a hundred months, just sixty . . . ?[243]

The prosecutor continued, "Having someone outside who is respected, and here judges are respected by everyone, is giving the defendant, defense attorney, or prosecutor—giving them a reality check and—I appreciate that greatly."[244]

Judges also noted that their involvement can help to reach a more just resolution when they are concerned that inexperienced defense attorneys are going astray, against the best interests of their clients. Judges who conduct these discussions in a group setting reported that it allows the more experienced defense counsel to teach the rookie attorneys about law and strategy.[245] A number of judges also suggested that a defense attorney might occasionally need education from the judge, as when the attorney is out to prove a point at the expense of her client, has overlooked a problem, or has an unrealistic view of the case. Stated one judge, "[I]f there is an unreasonable defense practitioner who is looking to jam up the system, wanting to have as many cases set for trial or push things as far as they can to gum up the works, the judge is able to impact things then."[246] One judge recalled a colleague who was known to have said to defense attorneys: "Are you kidding? This deal is so good, if he doesn't take it I will!"[247] One prosecutor said he would ask a judge to participate only if an inexperienced defense attorney "is unrealistic in terms of how much time the case is worth. So I'll say, 'Why don't you ask the judge, and you'll see what I'm saying is

243. OR-P-1.

244. OR-P-1; *see also* CA-P-3 ("There are a lot of DAs, less experienced, who might want input a bit because they are not as comfortable with the likely sentences.").

245. *See supra* notes 94–99 and accompanying text; *see also* MI-D-1 (reporting that "there will be private attorneys and other attorneys sitting around the table, and they hear all the cases," and that the younger attorneys do learn a lot by "watch[ing] and listen[ing] to the older attorneys").

246. CA-J-3.

247. MI-J-3.

accurate?'"[248] A defense attorney remarked, "[As] advocates, we get tunnel vision. We are like little children; it is helpful to have a mediator-type figure to shed light on it."[249]

Finally, several judges noted that, in talking with the parties, they would suggest dispositions or conditions of probation that neither party had thought about, but that they believed were appropriate for the particular case.[250] "Occasionally I'd see a situation where the parties are missing what the key issue is or not focusing on the appropriate conditions," said one.[251] "So I'll bring those up."[252] Said a California judge:

> We're really talking about different options: how best to rehabilitate the defendant, how do we protect the public, what should we do to accommodate the particular defendant. We're talking about a menu of options. When I sit down with them I really want a conversation about what kinds of options they are looking at, how best to resolve this case.[253]

2. The Strategic Utility of Judicial Participation to Prosecutors.—In past years, some prosecutors have voiced opposition to proposals to authorize

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248. CA-P-3.

249. CA-D-4; *see also* OR-D-3 ("It's one thing to read the dry police report; it's another to watch the DA give a mini opening statement to the judge . . . . And often the Judge can help the parties come to agreement. I might have a blind spot, and the judge can point that out."). These comments are consistent with law-and-economics analyses of settlement behavior: judicial participation would make settlement more likely if it helped the parties replace differing, irrational expectations of trial outcome with more rational, converging expectations. *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (presenting a model of litigation in which parties select for settlement and trial according to expected outcomes and associated costs); George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes*, 14 J. LEGAL STUD. 215 (1985) (responding to criticism of the 1984 article). The judge can also help the parties overcome the psychological barrier known as "reactive devaluation." *See* Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, *in* BARRIERS TO CONFLICT RESOLUTION 26, 28 (Kenneth Arrow et al. eds., 1995) ("[Reactive devaluation] refers to the fact that the very offer of a particular proposal or concession—especially if the offer comes from an *adversary*—may diminish its apparent value or attractiveness in the eyes of the recipient."); Bibas, *Outside the Shadow of Trial*, *supra* note 24, at 2532–34, 2542–43 (suggesting that more information about the probable sentence would de-bias bargaining, and that judicial oversight could help correct for agency costs of representation).

250. *See, e.g.*, OR-J-1 ("I might suggest there is a treatment program that would be beneficial"—also noting he would sometimes even volunteer to do the supervision, meeting with the defendant once a week, because the probation officers' caseloads were too high to provide adequate supervision).

251. OR-J-2.

252. *Id.*; *see also* FL-D-1 ("The judge does more than react to party proposals. The judge, for instance, might talk about referral to Drug Court . . . . A lot of the discussion in the plea conference involves potential grounds for a departure.").

253. CA-J-1. Also, "It is not a total one-way ratchet. Not at all. If judges refused to get involved, that should be a win for the prosecutor. But that is a narrow way to look at it." *Id.*; *see also* OR-D-4 ("I like working the judge in because they can involve the DA and change the posture, from adversarial to, 'Alright, let's get behind this and get this done.' It fosters a spirit of teamwork.").

judicial participation;[254] several of the prosecutors we interviewed were not fans of it, either. We were somewhat surprised, then, to hear from many prosecutors that judicial participation held several advantages for them. Most even said they prefer it over a system in which judicial input was not available before the plea. We have already seen that prosecutors value judicial participation for its efficiency effects and that they appreciate how judges train and moderate assistants who are inexperienced or overzealous.[255] When judges can proffer a sentence, prosecutors said, in some cases it also helps them manage relationships with victims, police, press, and the public. One former prosecutor put it this way:

> [I]t is unusual, but in politically sensitive cases—sex crimes, domestic violence cases—there are times when the DA has to take a really hard position politically, but maybe they have a weak case . . . . They'll want to do what I call, "pass the poop." They want the judge to offer on the deal, so, if the guy goes out and sexually assaults somebody else, the judge would have been the one who let him out early. . . . [Prosecutors] are elected. If the cops think the DA is going too lenient, the cops can go AWOL. . . . The media won't know who the line deputy was. . . . It would be the *elected* district attorney who would get the flak if the police got mad.[256]

Another California prosecutor emphasized the utility of a judge's indication of sentence when dealing with victims: "It is hard to tell someone that we couldn't get any more time for you, or that something has to be punished as a misdemeanor, not a felony."[257] He continued, "Victims call and voice their displeasure. You say, 'I'm sorry this wasn't our offer, it was the court's offer. We encourage you to come to sentencing and let him know your views.'"[258] A Michigan prosecutor explained that some prosecutors might "actually [be] glad the judge does this—keeps the pleas moving—it allows the prosecutors to look like they are tough on crime."[259]

Judges mentioned this dynamic as well. "The DA would look at me [and say], 'You gotta help me out.' So I'd say to the defense attorney, 'Okay

254. *See supra* note 57.

255. *See supra* notes 235–38 and accompanying text.

256. CA-D-2; *see also* CA-D-1 ("[T]he judge takes the heat. The judge is [retired], it won't affect his career.").

257. CA-P-3.

258. *Id.*

259. MI-P-5. A Florida prosecutor also noted this tendency, finding it "disturbing." FL-P-2. "Among prosecutors, the higher-ups say, 'I don't want the State's Attorney depending on the judge to do something to avoid taking a difficult but correct stand.'" *Id.* Even in Utah, where judges reportedly did not participate as often, one prosecutor related, "Judicial signals allow the prosecutor to blame the judge for the bad news when dealing with the victim." UT-P-1.

you plead the sheet, plead guilty to everything, and here's my promise.'"[260] "If the prosecutor says, 'I can't agree to a jail cap,' [then I know] they have victim issues," explained another judge.[261] This judge continued, "If it's a high-profile case, where press come in, oftentimes the prosecutor doesn't want to make a generous offer, even if all agree the case doesn't cry out for a long sentence. I would say, 'Don't worry, I'll do it. . . . [L]et the victim blame me.'"[262]

Assistant prosecutors had another reason to appreciate judicial input: it allowed them to avoid having to enforce a boss's rigid office policy in particular cases. "If I had an unreasonable boss that was gung ho on a case that was hopeless," explained one former assistant DA, "[and] my supervisor said I can't dump this, so I said, 'If the court does this I won't object, but I'm constrained.'"[263]

Judges and defense attorneys mentioned this as well. As one defense attorney described it, when the line prosecutor "doesn't want to get in trouble with the boss, but wouldn't mind if the outcome were lower than office policy allows. . . . [He'll] just signal to me, saying something like, 'Let's ask for a conference on this one.' Wink, wink."[264] A Florida judge agreed:

> Sometimes the defense appreciates that the Assistant State's Attorney is in a pickle. The ASA knows that something lower is acceptable, but couldn't be seen by the boss to go with something less the current offer. The defense and prosecution are holding hands, so the State leaves no fingerprints on the case. . . . Some judges might say, "Eh, State, do you have any objection if the defendant pleads straight up and I sentence to *X*?" Sometimes the State says, "We have a big problem with that." Others say, "Judge, that would be a plea to the court." That's a wink and a nod, meaning, "Yes, go ahead. I just don't want to agree to that on the record." Using this technique, the prosecutor can pass the heat off to the judge for the victims and their

260. CA-J-2; *see also* NC-J-2 ("At least fifty percent of the time, it is somewhat political. The elected DA doesn't want to say in open court that he agrees with the proposal, but doesn't really oppose it, either.").

261. MI-J-3.

262. *Id.* Indeed, this very rationale for authorizing judges to make a sentencing offer to a defendant was mentioned expressly by one of the justices in the *Cobbs* case itself:

> A judge who chooses not to become involved has no political responsibility for a bargained sentence and that is a wholly appropriate position to take. Where, however, a judge is willing to assume that responsibility, I can think of no reason why that truth should not be communicated to the representatives of the people and the defendant.

People v. Cobbs, 505 N.W.2d 208, 214 (Mich. 1993) (per curiam) (Boyle, J., concurring).

263. CA-D-2.

264. FL-D-1; *see also* NC-P-3 ("Some places around the state have rules in the prosecutor's office about what you can offer or can't offer in certain types of cases. The judge could give the ADA a reason for departing from office policy.").

> boss. They say to the boss and the victims, "I was holding out for five, but he got three."[265]

A California defense attorney explained the consequences for a line prosecutor who acts against office policy without political cover from the judge: "Their bosses will make their life miserable. They'll get 'freeway therapy.' . . . [T]hey'll give you a job fifty miles from home."[266]

3. For the Defense: Better Sentences.—In describing judicial participation and why they favor it, most interviewees told us that judicial input usually leads to sentences that are more lenient than the sentences defense attorneys would obtain for their clients if they had to deal with the prosecutor alone.[267] Said one attorney who practiced in a county where defendants attend the preplea conference, "[T]hey can be helpful to hear the defendant up close; the judge and the DA can size him up and see that he is not a monster."[268] Said another, "If you do have a prosecutor who won't deal, you still have an avenue to seek leniency for the client."[269] And, we heard, when the prosecutor does offer a deal, the judge's view of the appropriate sentence is often more lenient than the prosecutor's offer.[270] The judge's input offered a "face-saving" way for "gung ho" prosecutors to acknowledge

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265. FL-J-1. A California judge similarly described when assistant prosecutors appreciate judicial participation:

> Most often, when you would have a straight-jacket DA policy. . . . I'd have to read [the prosecutor to learn whether] this is an opposition on the record, or is it a pound-your-fist-this-is-an-outrage kind of opposition. . . . So I'd check to see the degree to which the prosecutor was offended you were doing this. Really a body language thing.

CA-J-3.

266. CA-D-1.

267. As to the exceptions, one defense attorney noted that a particular judge in his jurisdiction was "notorious for giving us a worse deal than what we negotiated . . . . [But] with other judges we do better than what we're going to get out of the prosecutor." MO-D-1; *see also* NC-D-1 ("At times [when parties ask for input], the judge says, 'I don't mind that, but you'll have to add this.' For instance, a judge might allow a split sentence, but will add confinement on the date of the collision every year for a certain number of years."); OR-J-3 ("I probably concur with the DA more often than the defense."); UT-P-1 ("Heavier judicial involvement brings in all the outliers. Our higher charges are being brought down. Defense's generous proposals are rejected and the judge reinforces that. Overall, the judge makes party expectations more realistic.").

268. OR-D-4 ("I'm hoping the judge will help me push the DA to be more reasonable. Some judges will, some won't.").

269. MI-D-1; *see also* OR-D-3 ("Or sometimes the DA is being stubborn or unreasonable. It is very powerful for that judge to say to the DA, 'You are being unrealistic about your chances here.'").

270. *See* FL-D-1 ("Of the cases that go to conference, I would say that about half end up more favorable to defense than they would have if the prosecutor and I just negotiated on our own. In the other half of the cases, there is simply no movement from the prosecutor's offer."); MI-D-2 ("If the prosecutor is offering something the defendant doesn't feel is enough, then he can get the judge and the judge can narrow the exposure."); UT-D-2 ("In these, maybe a third or half the time, the judge makes some little comment about really going to trial—'Can't you come up with something?' These comments are mostly meant for the prosecutor.").

weaknesses in their case: "[T]hey [hear] the judge say the same words that the defense lawyer was telling them about the problems with the case."[271] Another said, "The judge backs them down, and the prosecutor will then bow to reality."[272] In sum, defense attorneys agreed that judicial participation systematically helped their clients to receive lower sentences, not just in a few unusual cases.[273] Judges acknowledged that they regularly try to persuade the prosecutors to take a more lenient stance.[274]

It is easy to see why a judge might put more pressure on the prosecutor than the defense attorney in these discussions. The prosecutor generally has the authority to accede to a particular sentence arrangement on the spot, while the defense attorney may have to first consult the client.[275] Also, some prosecutors believe they have more to lose by irritating the judge than private defense attorneys do. Asked for his reaction to the suggestion that the judge's involvement might seem coercive to a defendant, one prosecutor laughed, and said:

> All the pressure [is] on the *prosecutor* to give them a better deal! . . . The lawyer that the judge can pressure is the lawyer that has to appear before the judge every day. Dozens of ways a judge can make a prosecutor's life difficult. Do you want to tick off the judge? No, no matter what there is always something. Think about discretionary evidence rulings. There are a lot of ways you can pay for being obstinate. If there is a public defender the same rationale could apply there.[276]

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271. OH-D-1 (adding, "I involve the judge for prosecutor management"); *see also* OR-D-2 (mentioning that judges can help with "intransigent" or "stubborn" DAs, and that if judges did not participate, "[i]t would mean more clients went to prison for longer periods of time").

272. FL-D-1 (adding, "The judge never takes the sentence or the charges in the case higher than the prosecutor's negotiating position").

273. *E.g.*, MD-D-2 ("Never happens that it works to the disadvantage of the client. Has not ever been anything other than what is good for the client."); *see also* CA-D-4 ("Perhaps the judges in our county have overextended themselves to participate and give indicateds because our prosecutor has been so unreasonable."). Prosecutors generally shared this view. *See, e.g.*, CA-P-2 (remarking that judges "probably lean more on the prosecutor," but "it depended on the judge"); CA-P-3 ("The judge will typically go with or undercut my offer."); NC-P-1 ("Sometimes we change our recommendation after we hear the judge's view about the evidence. Or sometimes our recommended sentence changes after we hear the judge's reaction to a possible open plea situation."); OH-P-1 ("I could live with less involvement, maybe. . . . If I were answering this question from the defense side, I would probably see it differently.").

274. *See* FL-J-1 ("Usually the defense asks. The defense attorney goes shopping to the judge to undercut the state. I will do this sometimes in my courtroom, and have had good luck with it."); MD-J-1 ("The State's Attorney's office is my problem."); MI-J-1 ("I can see why a prosecutor might think, 'The judge is really leaning on me.' The judge . . . may say, 'Your facts are bad, you won't get that from a jury.' Or the judge may say, 'You'll be pushing for serious time, but I'm not seeing it.'").

275. *See* MD-D-3 ("For me, the decision maker is the defendant; I have to go back to the client . . . . If the judge waits for you to go to the client, they have to wait. . . . But the prosecutor can make the decision right there.").

276. MI-P-5.

4. Increased Certainty for All.—The most important thing, many interviewees told us, was that hearing from the judge on the sentence provided certainty—for defendants, victims, and attorneys.

a. The Need for Certainty Despite the Predictability of Sentencing Limits.—Despite guidelines, mandatory minimums, appellate review, and other restrictions on a judge's sentencing discretion in the states we examined, a judge's indication of sentence before the plea provides certainty that defendants continue to crave. We began this project with the hypothesis that structured judicial discretion in sentencing should give parties more certainty about sentence and thus reduce their incentive to seek judicial input. We also doubted that judicial participation would thrive in states where sentences were based on various sentencing facts ordinarily developed as part of the presentence investigation long after negotiations were complete. We selected our states accordingly, choosing states that have adopted restrictions on judicial sentencing in the form of guidelines or other structured-sentencing laws. We learned that judicial involvement in plea negotiations was alive and well even in states with binding sentencing guidelines, in part because judges retained considerable discretion.[277]

The various constraints on judicial discretion in these states did not satisfy the parties' appetite for a more certain sentence. For example, at the time we conducted the interviews, Michigan's sentencing guidelines were binding, but judges could depart for substantial and compelling reasons,[278] "straddle cells" permitted either incarceration or probation, and ranges were very broad for serious crimes.[279] In California, where for many felonies the judge can only choose among a mitigated, middle, or aggravated term of years, defendants wanted to know which the judge would choose, how much of the term they would spend in prison,[280] whether the judge would "strike a strike," and whether a "wobbler" would be a felony or misdemeanor.[281] In

277. *See, e.g.*, OH-P-2 ("Guidelines didn't change their involvement. Not at all.").

278. Some reported that an agreement with the judge trumps the guidelines. *See* MI-D-1 (explaining that the parties score the guidelines before the conference, and the agreement "eliminates the dispute at sentencing; if it comes back higher at sentencing, plea bargain controls").

279. *See* MI-J-1 ("Straddle cell sentencing cases—where guidelines allow the judge to give probation, jail, or prison—those cases in particular, defendants want to find out with what the sentence will be with a *Cobbs* evaluation: If I plea, what am I going to get?"). The same is true for Ohio sentencing guidelines. *See* OH-P-1 ("As far as felonies, the parties want feedback from the judge more often on mid-range to high-level felonies. In those cases, the judge has more discretion under the guidelines.").

280. *See* CA-D-1 ("The sentencing range is three terms, so they can say, 'I can find this to be very aggravating'—that is a sign.").

281. California judges have the authority to "strike a strike," that is, to ignore an earlier felony conviction for purposes of a current habitual-felon sentence. People v. Superior Court (*Romero*), 917 P.2d 628, 629–30 (Cal. 1996); People v. Williams, 948 P.2d 429, 435 (Cal. 1998); *see* CA-D-1 ("There are some [enhancements] they can strike. . . . [I]f your client has five priors, could get up to fifteen years of enhancement, but judge can say, 'If you admit all those, I'll give him one or

Florida, too, many ranges were broad, and judges could depart.[282] And interviewees from several states mentioned that parties wanted to know if the judge would impose consecutive or concurrent sentences for multiple counts.[283]

In Oregon and Maryland, the guidelines predicted even less. Oregon interviewees reported that they would agree on a sentence and then manipulate the state's binding guidelines by stipulating to whatever criminal history, grid blocks, sentencing facts, and departures would produce the sentence they wanted—and that the judge would willingly go along.[284] In Maryland the law includes a convenient fiction: once the judge is on board with a stipulated sentence and agrees to a "binding" plea, that sentence automatically complies with the guidelines.[285]

Sentencing guidelines in these states clearly do not sate the parties' appetites for greater certainty about what sentence the judge will impose.

b. The Certainty that Judicial Input Brings.—For the parties, the judge's advance views on sentencing provided welcome assurance that, if they proposed a sentence, the judge would probably accept their proposal.[286] The

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two.'"). The California Code also gives the sentencing judge authority to treat certain crimes as either a felony or a misdemeanor—the crime "wobbles" between the two statuses. *See* CA-J-3 ("For predictability, for the defendant there is still quite a range—say probation to six years—want to know sooner rather than later."); CA-P-3 (noting that sentencing uncertainty includes whether a strike will be struck and whether a charge will be a misdemeanor or felony).

282. *See* FL-J-1 (noting that cases produce requests for judicial input where "judges have a wide range of discretion"). Some Florida judges reportedly defied the need to justify departures from the guidelines. *See* FL-P-1 ("In [one county], if you pointed out to the judge that there was no statutory basis for a contemplated downward departure, they would stop. But here, because of the volume, the judges don't care.").

283. *E.g.*, CA-D-4 ("Our laws are so open-ended. Your client could get up to three years in prison, . . . there could be consecutive-sentencing possibility . . . .").

284. *See* OR-D-2 ("Guidelines don't ever get in the way of settling the case. So in that sense they don't matter. I have always said to the DA, 'If we can agree on a number, I can figure out a way to get us there.' . . . [There are] enough ways to wiggle around them."); OR-D-3 ("We pick the correct sentence and engineer backwards.").

285. MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, 2014 ANNUAL REPORT 39 (2014); *see also* MD-D-3 ("Q: Did the Guidelines bring more certainty, make it less necessary to use [binding pleas with judicial involvement]? A: No, to the contrary, the Commission said any binding plea would be a guidelines plea. The judge doesn't have to justify going outside the guidelines."). Even though fewer than half of all Maryland cases in 2014 that departed from guidelines included a reason for the departure, about half of those that did include a reason listed, "the parties reached a plea agreement that called for a reduced sentence." MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, *supra*, at 44–47. Asked whether such manipulation of their state's sentencing guidelines raised concerns about consistent sentencing, interviewees in both states responded, essentially, "Why should it, if both parties agree?" *E.g.*, MD-J-2 ("There is a recognition that if every single case went to trial, we couldn't handle it. . . . Judges realize that binding to a plea is sometimes helpful to get a case resolved."); OR-J-3 ("It doesn't bother me, because if the defense and the prosecution are ok with it, it is ok with me.").

286. *See* CA-P-3 ("The judge isn't making a promise, but in the . . . years I've done this, I've never seen a judge change his mind."); FL-D-1 ("There are times when the judge rejects the plea offer that the parties propose at the guilty plea hearing. But I don't remember that ever happening

sentence preview was especially important, said a North Carolina attorney, in "serious, victim" cases, which "all attract media attention."[287] In those cases, "if I'm dealing with an open plea, I'm not doing my job. A charge bargain without a sentence recommendation is just way too much leeway to allow the judge, even with structured sentencing."[288] Summed up by a Maryland attorney, it is "a big deal to be able to tell a client with confidence that a certain disposition will follow from a guilty plea."[289] California attorneys echoed that, when a defendant was considering pleading guilty as charged ("eating the sheet") instead of taking the prosecutor's offer, knowing what sentence the judge would impose was crucial.[290] "It would be like standing there naked," said one; "pleading guilty without an indicated is crazy."[291] "You don't *need* it, but it is sure nice to have. Like a tightrope walker, I like the net." [292]

Judges agreed: increased certainty about the sentence is the key advantage of judicial involvement before the plea for defendants. Explained one Michigan judge, pleading guilty without knowing what the sentence will be is "a white-knuckle ride."[293] Another said that, decades ago, when Michigan law prohibited discussing a potential sentence or deal with the judge during a pretrial conference, the "[j]udges did it anyway."[294] He told this story to illustrate:

> There was another judge, . . . during the winter, [the] window between his chambers and the hallway would steam up. After pretrial

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if the parties went through a plea conference."); UT-D-3 ("[T]he defense wants a commitment that you won't send him to jail.").

287. NC-D-1.

288. *Id.*; *see also* OH-J-1 ("Even under sentencing guidelines, discretionary sentences still happen. Parties find judicial guidance less valuable where the rules restrict more. But the guidance still helps them and they still ask.").

289. MD-D-3.

290. *See* CA-P-1 (noting that judicial participation is more likely "[i]n cases where the judge has more discretion—nonviolent, non-serious offenses"). A Michigan attorney described this uncertainty:

> I tell my client, "You have three choices: you can fight, or we can approach the prosecutor to see if we can reduce the charge or counts, or we can go to the judge and look at what you are looking at in terms of sentence." And the clients want to go to the judge. They don't care about the crime; they care about the sentence—Call it Murder 2 so long as I know I'm getting probation. . . . It's like the devil you know.

MI-D-4.

291. CA-D-4.

292. *Id.*

293. MI-J-3; *see also id.* ("Defendant is always better off having certainty."); OH-J-2 ("The defense counsel motive is to move the scary unknown parts of a bargain into more certainty."); *cf.* Bibas, *From the Ground Up*, *supra* note 24, at 1075 ("At bottom, what defendants really need is an informed forecast of the expected conviction and sentence (including collateral consequences), how they compare to those received by other defendants, and the risks and benefits of holding out or walking away.").

294. MI-J-2.

> conferences with the lawyers, they'd walk out, and he'd write with his finger on the steamy window, "5–10." Then they would know what it would be.[295]

Knowing the probable outcome of a potential plea reduces uncertainty for prosecutors, as well as for victims and defendants.[296] When the prosecutor wants a sentence or plea bargain that would look unusual to the judge, speaking with the judge in advance of the plea can reduce the risk that the judge will balk. Said one, "[I]t is usually the prosecutor who wants to check with the judge [because the prosecutor] is the one who would be questioned by the judge about the deal in open court."[297] One prosecutor from North Carolina called this reason for requesting input from the judge the "heads-up plan," to "prevent the judge from rejecting the plea agreement."[298] The judge's agreement to be bound by the parties' proposed sentence in Maryland also carried assurance that the sentence would not be subject to later modification without the agreement of the prosecution.[299]

In sum, restrictions on judicial sentencing discretion did not dissuade parties from seeking sentencing information from the judge before settling on a deal. Instead, judicial input in these jurisdictions was valued for the certainty it provided about those aspects of punishment that the law left to the judge's discretion. And where the judge's approval offered a way around sentencing restrictions or postsentence review, judicial participation became even more attractive.

5. Filling Gaps in Information for the Judge.—Critics have been skeptical about whether judges should talk about the sentence before receiving a presentence report, complete with guidelines facts and a victim's statement, concerned that sentences estimated under such conditions would be inaccurate or require adjustment later.[300] Our interviewees described a

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295. *Id.*

296. *See* NC-P-1 ("It prevents unhappy surprises for the victims.").

297. MO-P-1.

298. NC-P-1 (noting that this is "the most common scenario that involves the judge in plea negotiations"); *see also* FL-P-3 ("[J]udges appreciate hearing ahead of time about something that doesn't follow a typical pattern."); OH-D-3 ("We know if there is a potential problem with a deal because of its unusual terms, and for those cases we will approach the judge."). A Maryland judge noted that, in the rare case where the judge would reject a negotiated sentence as too low, a preplea session permits the judge to tell defense counsel what sentence the judge would consider. MD-J-2.

299. *See* MD-J-2 ("If it is a binding plea, it cannot be modified later if the state doesn't agree."); MD-P-1 ("[I]f it is an agreed-upon sentence, and the judge has bound himself, the judge will say, 'This cannot be modified unless state agrees to the modification.'"); MD-P-2.

300. *See, e.g.*, Minutes, Advisory Comm. on Criminal Rules, *supra* note 1, at 5–6; UT-D-2 (recounting that one county's experiment with an Early Case Resolution Court was abandoned because "judges felt like they needed more information before they could impose a proper sentence, but in the ECR they had little or no information about the defendant or the crime").

very different picture: judges with as much or more information during negotiations as they would have if the parties had settled on their own.

Some critics of judicial participation argue that it can cut victims out of the sentencing process.[301] The sidelining of victims is one of the oldest complaints about plea bargaining generally.[302] Yet, if prosecutors lack the time or resources to consult with victims before making a deal directly with the defense attorney, it is not clear that adding the judge's input to negotiations would aggravate that problem. Rather, as interviewees told us, because judges at these conferences often ask the prosecutor for the victim's views, the judge's involvement can push prosecutors to try harder to obtain victim input before settling a case.[303] Although there were some interviewees, particularly those from California, who did report that victims typically were not consulted before conferences,[304] most said that prosecutors regularly solicited victim views before meetings with the judge about settlement.[305]

In addition, all but a few interviewees[306] treated the absence of presentence reports at the discussion of sentence with the judge as no big deal. We gathered that the sentencing information the judge received at a settlement conference was as good as, and sometimes even better than, what the judge would see in guilty-plea cases without speaking with the parties before the plea. Many interviewees reported they seldom used presentence reports regardless of whether the judge was involved. In several states

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301. *See* Statement of Timothy Baughman, *supra* note 57 ("[Y]ou may have an impact statement coming in later and you may have a victim standing up at the lectern speaking, but the judge has already told the defendant what sentence he's getting.").

302. *See generally* Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. VA. L. REV. 97 (2014) (assessing the victims' rights agenda in three recent United States Supreme Court opinions); Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.Q. 301 (1987) (arguing that victims have a right to participate in the plea-bargain stage of the prosecution).

303. *See* FL-P-1 ("[T]he prosecutor has met with victim very early, so the victim information is not just based on a sworn statement. The judges know this. They're very interested in hearing from us whether the victim is cooperative."); MD-J-2 ("Often these [conferences] are during the regular criminal docket. I will always ask if the victim is aware of the plea agreement if the victim is not there."); OH-D-3 (stating that, "[n]ine out of ten times—or more—the victim already knows about the offer" by the time the parties speak to the judge).

304. *See* CA-J-3 (stating that prosecutors rarely talk to the victim before making an offer, but that "there's a better chance they have spoken" if it is a more serious case). Defense attorneys had strategies for dealing with the possibility that victim input later, at sentencing, could derail a settlement. For example, one reported that, if he was worried about the victim's input at sentencing, he'd agree "to the high part of the guidelines. Many judges will explain on the record [at sentencing], 'I have to stay within the guidelines.'" MI-D-1.

305. *See* MO-P-3 (reporting that they've "always talked to the victim by that point"); *see also* MI-D-4 ("This office is great—maybe too great—at contacting victims.").

306. *See* MI-P-3 ("[Judges will] say, 'I don't know anything about this case. I don't know the facts, I don't know the guy. You people know much more about it than I do.' They don't want to weigh in."); OR-J-1 (describing the settlement judge "making decisions totally on what the lawyers say," and stating that "[t]he fact that we don't have a PSR is a real problem for the system").

presentence reports seem to be vanishing from routine use. A decade or more ago, as one Oregon attorney told us, probation office staff in his county routinely prepared presentence reports for most cases resolved by plea, but funding for the preparation of presentence reports has now been drastically reduced and probation office resources shifted to supervision and pretrial.[307] For example, despite the heralded embrace of risk–needs assessments at sentencing in California,[308] judges in some counties obtained full presentence reports in very few cases, making do with information about custody credits, criminal history, and whatever other information the attorneys supplied.[309] Judges don't often order presentence reports in some counties in Oregon,[310] Maryland,[311] or Florida[312] either, and use them in only about half or fewer of felony cases in Missouri.[313] Without presentence reports at the conference, judges relied on the parties for information.[314] Criminal history was always available from either the prosecutor or an online resource,[315] and defense attorneys presented employment, health, and other information about their

307. *See* OR-D-4 ("We used to have [more] people in the probation office writing PSIs, now we have one half-time person,"—and noting JRI grant now funds risk–needs assessments in program-eligible cases only).

308. *See* Petersilia et al., *supra* note 73, at 35 (detailing California's evidence-based presentencing programs, designed to target interventions to offenders at greater risk of recidivism as well those with "criminogenic" needs that might lead to criminal conduct).

309. *See* CA-J-3 ("[S]ince the probation office budget was slashed . . . we would waive any referral to the probation department. . . . So basically, [at sentencing] I'm fat, dumb, and happy; I don't know anything more than what I learned in the chambers discussion.").

310. Oregon interviewees reported that the state's mandatory minimum laws have displaced the guidelines in affected cases, making presentence reports useless, and that there are no resources to prepare them. *See* OR-D-2 (reporting that, after the legislature passed a mandatory sentencing scheme in 1995, presentence reports stopped: "I haven't seen a PSI since.").

311. *See* MD-D-2 ("Q: What would the judge have later that he doesn't have at the conference? A: That's just it—nothing."); MD-J-1 (stating that he will request PSR only for low-level cases where the defendant will be released—"[y]ounger defendants with no record, . . . cases where I am concerned whether or not a person who is homeless will carry through"—and that it "doesn't happen very often that I want to see presentence to back up what the parties tell me"); MD-J-3 (noting that a presentence report "takes a while to get, and it's expensive. Parole and probation figured out it's about $750 of time and materials to get each one. So we don't generally get presentence reports. Only in a murder case, real serious stuff, we'll do that.").

312. *See* FL-D-1 ("The PSI report is not done routinely, not even in time for sentencing.").

313. Missouri judges routinely dispense with presentence reports (or "Sentencing Assessment Reports"), unless the defendant pleads "open" or "blind" (that is, without a recommendation or agreement on sentence) or is convicted by a jury. *See* MO-D-2 (reporting that "most pleas never have a SAR"); MO-J-1 ("Our statistics on SAR show they are used in about 55% of the felonies.").

314. *See* FL-P-2 ("If the judge is going to undercut me, the judge will give me a chance to talk him out of it. He'll ask, 'How serious was the injury? Do you have the photographs?'"); NC-D-2 ("The judge has nothing. He might have looked at the clerk's file. That file contains the indictment, witness subpoenas . . . . The judge offers feedback based just on a quick view of the clerk's file and whatever the attorneys say in chambers about the case.").

315. *See* MD-J-2 ("We always get the criminal history of the defendant from the prosecutor."). Online resources are available in Missouri and California. *See* MO-D-2 ("Casenet is open to anyone . . . ."); CA-J-1 ("[O]n criminal history, this is a huge state, our data base about their offenses is pretty good.").

clients.[316] Parties calculated guidelines scores and grids for the judge using simple forms or online tools.[317]

Interviewees also reported that, even when a presentence report was prepared between a settlement conference and sentencing, it was unusual to encounter information that differed from what the judge knew at settlement.[318] Occasionally there would be a missed prior conviction, or a new victim's statement, but this happened rarely and, when it did, it rarely affected the judge's earlier view of the appropriate sentence.[319] Even in those highly unusual cases, we were told, in which a judge encountered a new fact at sentencing that compelled a higher sentence, it was quite uncommon for a defendant to withdraw from a bargain.[320]

Some responses suggested that, judges may receive *more* information about the case in a settlement conference than they could if a stipulated deal was simply presented to them for an up-or-down decision at a plea hearing. At the conference, we were told, the judge can explore options and issues with the attorneys.[321] When counsel appear at a plea hearing with a stipulated disposition in hand, however, a judge may be less inclined to have these exploratory conversations.

In addition, a few of those we interviewed reported another source of information that surprised us: judges at the settlement stage had access to evidence-based risk reports, sometimes called "bail reviews," prepared in connection with the pretrial release decision.[322] These reports, like presentence reports, provide information about a defendant's employment,

316. *See* NC-D-1 ("Basically, you describe for the judge in this conference everything you would give him at sentencing. . . . I'll jump back to anything that I can find in my mitigation notebook, anything that relates to a topic that the judge mentioned."); OH-D-1 ("[Defense] might provide the judge with proof of counseling or treatment."). In at least one county, the defense attorneys did extensive investigation preparing for the settlement, for example, setting up psychological evaluations in all sex offense cases. OR-D-4.

317. *See* FL-D-2 ("All of the calculations for a single defendant appear on one sheet unless there's a lot of criminal history."); OR-D-3 ("One of the first questions the judge will ask is, 'What's his grid?'"). Maryland has an online tool called "MAGS" that calculates guidelines scores automatically. *See Maryland Automated Guidelines System*, MD. ST. COMM'N ON CRIM. SENT'G POL'Y, http://www.msccsp.org/MAGS/ [https://perma.cc/MNB2-56KL].

318. *See* CA-J-1 ("Can't think of any cases where the criminal history I received earlier turned out to be incomplete."); CA-P-3 ("The biggest surprise at sentencing is if someone picks up a new case or they don't show up to court. Those are changed circumstances. It is very, very rare for a disposition to be overturned because of anything else.").

319. *See* CA-D-4 (noting that "the info has to be really bad" for the judge to withdraw an indicated sentence; estimating that this occurs in "maybe one percent" of cases, and "[u]sually it's the prior record that upsets the apple cart" after "they do the background and all the aliases come in"); MI-P-1 ("The prosecutor will say, 'Judge, we see that the guidelines came in a year higher, but we'll overlook that and stick with the *Cobbs* [evaluation].'").

320. *See* MI-J-1 ("I try very hard with *Cobbs*, that I know as much as I can so that I can follow through with it. Doesn't serve your reputation with defense bar if you don't.").

321. *See supra* notes 79–83, 94–99.

322. OR-P-3; CA-D-2.

educational, and family situation.[323] Judges in some courts also included probation staff in the conferences, consulted the probation officer before the conference, or were able to access for settlement discussions real-time information on the availability of treatment programs and jail beds, information the parties would not see if they were negotiating a sentence on their own.[324]

With alternative sources of information providing the same information as a traditional presentence report, if not better, at an earlier stage, it is no wonder that so many of our interviewees shrugged off the absence of presentence reports at settlement.

6. Accommodating Early Discovery for the Defense.—Another criticism leveled against any early plea negotiations—not limited to negotiations that involve judicial input—is that defendants are compelled to consider offers before they have had time to investigate the case or receive discovery materials. A few attorneys in two states complained about this,[325] but we found little of this concern in the other states included in our study. Instead, in these states, the practice of judicial involvement may actually prompt prosecutors to reveal more to defense counsel, and to reveal it earlier. Defendants generally receive the discovery they need in time, well before a

323. *See* OR-J-1 (describing plans for expanding a system of pretrial, risk-based investigations, available to judges for use in evaluating sentences—"Judges would have access to that early on, so they will know more about the case and the defendant"—and noting that "that system is beginning to be accepted"); OR-P-3 (reporting that judges have access at settlement to bail reviews that "include some important release consideration factors . . . gathered by the court's staff"; these are available "[o]nline, hard copies in the court file—both parties will have a file. . . . You have info on criminal history, [failures to appear], mental health issues, residence, drugs," but this prosecutor cautioned that, "in a settlement conference, judges must be careful in consulting these risk tools which are created for a different context"); *cf.* OH-J-1 (describing one judge who "looks at police reports, witness statements, the defendant's prior record, [and] the defendant's conduct on bond"). Judicial access at settlement conference to risk-and-needs assessments originally created for setting bail was reported as well in California and Missouri. *See* CA-D-2 (commenting that they will get a probation report "for bail, at the time of arraignment"); MO-J-1 (describing the risk-assessment report and score available to the judge from first appearance on in some courts).

324. *See* MI-P-4 (reporting that the judge, after granting a written request for a sentence evaluation, "meets with probation, comes up with his own range, then meets on the record" with the parties); *see also* Pennypacker & Thompson, *supra* note 73, at 1025 (noting the presence of probation officers at settlement conferences); NAT'L CTR. FOR ST. CTS., *supra* note 130, at tbl.53(b), http://data.ncsc.org/QvAJAXZfc/opendoc.htm?document=Public%20App/SCO.qvw&host=QVS@qlikviewisa&anonymous=true&bookmark=Document\BM193 [https://perma.cc/7Q7S-EJRQ] (listing jurisdictions with real-time electronic exchange of information between courts and jails). By far the most informed settlement discussions reported to us were those supported by grant funding in Oregon, where full risk-and-needs assessment reports were prepared with the aim of exploring nonincarceration options. *See* OR-D-4 (stating that risk assessments are received by "secure email," and that the report "does give you some of what you need for mitigation, life history about trauma, to show—not just a criminal—he has needs that can be addressed").

325. *See* MI-D-1 (explaining that sometimes they don't have "full discovery" needed before status conference); OR-D-3 (noting that in some JRI cases it has been a challenge to complete the defense investigation—particularly securing psychological tests—before the settlement conference deadline).

settlement conference,[326] or can request early discovery if a client wishes to settle before a preliminary hearing.[327] Some interviewees reported that the settlement conference itself serves as a discovery device for the defense because prosecutors had to relate some information to the judge that they may not have disclosed in negotiations with defense counsel alone.[328] Just as judicial involvement in bargaining may, depending on the practice, generate more information for the judge than the judge would have in a case without judicial involvement, it could also generate more information for defense counsel.

7. Informing Clients Who Won't Believe Their Lawyers.—In addition to the information benefits of judicial participation noted above, defense attorneys also perceived judicial participation as particularly helpful when clients are stubborn or do not listen to their advice. We heard this from practitioners in places where judges sometimes talked directly with defendants, as they do in some counties in Oregon, Kansas, and California.[329] The same point came from practitioners in other states where judges met only with the attorneys, and defense counsel relayed to clients what the judge had said.[330]

In states where judges sometimes speak directly to defendants, defense attorneys viewed enlisting the judge as a strategic option to help a client obtain a better sentence than he would get if he held out. "It helps to have someone else, someone in the robe, explaining the facts of life," stated one

326. *See, e.g.*, MD-P-1 ("Discovery is done before you talk about pleas. How can you ethically discuss a plea if you don't have discovery?"); MI-D-4. In California and Oregon, the prosecutor provides discovery at arraignment or soon afterward. *See* CA-P-1 ("Defense will get the police report, and any supplement reports, and a printout of the client's criminal history [at arraignment]."); OR-J-1 (stating that discovery is provided at arraignment in eighty percent of cases, otherwise within three to four days after); OR-J-3 (noting that discovery is required well in advance of the Early Resolution Conference); *see also* FLA. 20TH JUD. CIR., *supra* note 125 ("Initial discovery . . . shall be provided at arraignment or at the earliest time possible . . . in order to permit the State and the Defendant sufficient time, in advance of the case management conference, to evaluate the case and meaningfully participate in the [conference].").

327. MO-P-1.

328. Federal Judge Thomas Lambros claimed more than forty years ago that "[j]udicial participation in plea discussions inevitably causes the prosecutor to open his file and to freely discuss the strength of his case," providing information to the defense that would not be discoverable. *See* Lambros, *supra* note 23, at 515. Based on the reports from our interviewees, it appears that he was right about that. *See* OR-D-3 ("In my experience, that process is helpful. I always learn something. It's one thing to read the dry police report; it's another to watch the DA give a mini opening statement to the judge—gives it that personal spin. It's always informative.").

329. *See, e.g.*, CA-D-4; KS-D-2; OR-D-2; OR-D-4.

330. *See* MD-P-1 ("It gave the defense attorney something to go out to his client and say, 'Look, I talked to the judge . . . [he is] saying this is a serious case and that you are looking at serious jail time.'").

Oregon defense attorney.[331] As one California attorney explained, the client may treat the judge as more authoritative and therefore more believable:

> [B]ecause I'm appointed they call us "public pretenders." They don't think we're real lawyers. They don't trust what I'm saying. They want to hear it from the judge. . . . So I'll go back—judges are very good at this—and I'll say, "Judge, the client wants to hear from you," and the judge will give 'em a real rundown: "This is why it is serious—have you considered the victim?" . . . [T]here are some clients who are so used to getting away, particularly abusers. They are bullies; they are used to strong-arming their way. They need someone stronger than they are to boom down on them with a strong voice. . . . They used to stuff people like me in lockers. I'm saving them from themselves.[332]

One female attorney said that she uses mediation with the judge (an older white male) to great effect with older male clients who have "a problem with me."[333] When the judge tells the client "that the offer [is] excellent," the client is more likely to accept this advice from somebody who is "more authoritative by his lights."[334]

Prosecutors and judges also mentioned this. A California judge explained how, upon the request of a defense attorney, he reviews the DA's offer with the defendant and then comments along these lines:

> I'm not here to choose for you—it is entirely your decision and it doesn't matter to me—but at the same time, to the extent your lawyer is saying that is a good offer and to give it some thought, I would echo that's probably right. But it's your call.[335]

One North Carolina prosecutor estimated that the judge's advice to "hardheaded" defendants, delivered in open court, makes a difference: "Maybe twenty percent of time the defendant will accept the deal after

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331. OR-D-2; *see also* OR-D-4 ("Another reason people have settlement conferences is to browbeat—or help—their clients. You have someone who is a difficult client, very criminal and antisocial, doesn't trust you. [I say,] 'So you don't believe me? You can hear it from the judge.' That is a very common practice.").

332. CA-D-4; *see also* UT-D-2 (noting how, for defendants, judicial input about a sentence "confirms that they're going to go to prison and the defense lawyer has been giving them good advice").

333. KS-D-2.

334. *Id.*

335. CA-J-3. An Oregon prosecutor, recalling his work as a defense attorney, also mentioned that a settlement judge can be helpful when the defendant is saying, "[W]ell, my friend in Cell Block D told me he thinks he can get a better deal." OR-P-1. Alternatively, he explained, a settlement judge is also helpful with:

> a client who is a pedophile, looking at 120 years in prison, and he doesn't want to tell his mommy, so he says he's innocent. He needs someone other than the defense attorney to say it clearly, [so the settlement judge will] come in a room and say, "Son, you're screwed. If you don't do this you're looking at thirty-eight years in prison."

Id.

hearing from the judge, even though the defendant had rejected the same advice earlier from defense counsel."[336]

These conversations between the judge and the defendant raise the specter of coercion. Indeed, one of the perennial risks of judicial involvement in negotiations is the prospect that the judge might create too much pressure to plead guilty for defendants who believe they are innocent or would rather go to trial.[337] We pursued this topic with our interviewees. Several defense attorneys, judges, and even prosecutors acknowledged some risk that a judge might cross the line while speaking with a defendant. But they also believed that standard limits on the judge's involvement kept that risk low, and that the benefits to the defense far outweighed that risk.[338] In their view, judicial involvement made an already coercive situation a little less so. Like the other self-serving claims about defendant perceptions we report here, our interviewees' assertions deserve testing that this study cannot provide. Yet the consistency with which participants held this view was striking.

First, interviewees in jurisdictions where judges met only with the attorneys were puzzled by the idea that judicial participation could be coercive when the judge did not speak directly to the defendant, and the defendant heard only from her own lawyer. All interviewees from Michigan and Maryland—and most of those we contacted from Missouri, North Carolina, Ohio, Florida, and California—reported that judges did not speak directly to the defendants in these conferences: defendants heard what the judge said in conference only from their own lawyers. In these courts, the judge adds no additional incentive to plea and only confirms for the defendant that the defense attorney's assessment of the choice provided by the

336. NC-P-1 (adding, "[T]here are plenty of other cases where everyone in the courtroom shakes their head, thinking to themselves, 'Does this guy understand what he just turned down?'"); *see also* FL-P-2 ("The defense attorney sets a plea conference with expectations that the prosecutor will give a little speech about the strength of the case, and then the judge will describe the legal minimum and maximum sentences based on the current charges. . . . The defendant hears the bad news from the court and from the state, in equal amounts.").

337. *See, e.g.*, Hiser, *supra* note 23, at 213 (acknowledging the potential problems with judicial participation in the plea bargaining process); Hughes, *supra* note 23, at 760 (arguing that the practice of judicial participation in the plea bargaining process "is so fraught with danger that it should be generally abandoned").

338. *See* MI-J-2 (noting that the risk of coercing defendant to plead when he'd rather not "[m]ay be true in some cases. In most cases, though, the defendant sees it as a real advantage to know what the sentence is going to be. . . . You have to be aware of that [risk], and can't do it as a pressure [thing] when dealing with the defendant."). But as noted in Part IV, some defense attorneys in Utah and Kansas praised judges for staying out of negotiations. *See, e.g.*, UT-D-1 ("Most judges are very good about staying away from that sort of thing."); KS-D-1 ("[J]udicial involvement . . . [is] just never done and I hope it stays that way.").

prosecutor was accurate.[339] "So, as far as pressure goes, the only pressure is from the defendant's lawyer . . . ."[340]

Another safeguard mentioned frequently was that judges did not participate in plea discussions until defense counsel confirmed that the client was interested in exploring a plea and requested judicial participation, or until the parties had already reached a tentative agreement.[341] Judicial consultation, most reported, only happened when the parties wanted to make sure that the judge would accept the deal that the parties had discussed, or when the defendant wanted a better deal than what the prosecutor had offered.[342]

Even where settlement conferences were reportedly mandatory, a defendant could opt out if he was intent on going to trial.[343] Judges, for their part, told us that they had no time to get involved if the defendant had not already decided to plead guilty. "I don't have *time* to work on you," said one.[344] "I've got too many cases. [I]t's like Lucy and Ethyl in there; we *have* to keep it moving, to preserve resources to be able to fully litigate the cases that need to be fully litigated."[345] Some noted that some judges would try to

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339. *See* MI-D-1:

> I have no problem with [the judge's involvement], because I've told my client the exact same thing. The history of public defenders is that we are not trusted by many clients, and sometimes our clients don't think we are truthful. And when they hear it again from the bench, by the person in the black robe, many times they'll say, 'Hmm, that's what my lawyer said.' They'll think it over. . . . But if the judge says, 'You better take this plea; you're stupid not to take it'—that's something else. We don't get that. Never seen it happen.

340. MI-J-3; *see also* CA-D-2 ("Your client isn't there, so that doesn't happen.").

341. *See* MD-P-2 (noting that the judge "wouldn't bother with it" if the defendant had not already agreed to plead guilty). In many states, court rule or case law forbids judges from participating without a request from the parties or a tentative agreement. *See supra* note 140.

342. *See* MI-D-2 ("Normally you are not asking for *Cobbs* unless the defense is thinking about pleading."); CA-P-1 ("A majority of them are situations in which defense are not happy with the prosecution's offer. They are interested in what better deal they may be able to get from the prosecutor or the judge.").

343. *See, e.g.*, OR-D-4 ("Q: What if your client insists on innocence, do you go to settlement anyway? A: You can opt out if you want to go to trial.").

344. CA-J-3.

345. *Id.* The judge continued:

> If they are not ready to have any meaningful discussion I would not force it. . . . I'm not going to lose sleep if attorneys say that there is no way the case can get resolved—either because so many counts, because so much past history, because they are filing an amendment. Or the defense says this case is a go—there is a legitimate suppression motion, or we think we can get the confession thrown out, or the guy's exposure is just too big. If that happens, I'm not going to spend a lot of time asking, 'Why is that?' . . . The defendant may have those concerns [about coercion], but all the benefits inure to the accused by having a resolution system. You are ultimately harming the accused by not having judges have a chance to weigh in.

Id.; *see also* OR-D-2 ("[I]f we're firm that we're going to trial . . . the court may not want to waste its time trying to make settlement happen. . . . [I]f the judge thinks the attorneys are rookies . . . the

get the parties to settle even when the defendant had not asked for it, but these attorneys did not perceive this as a problem.[346]

As we noted earlier, states such as Michigan and California have barred judges from contrasting the sentence likely upon plea with the usual trial sentence, reasoning that this is one potentially coercive aspect of judicial participation that judges must strictly avoid.[347] A few interviewees from other states, however, mentioned that judges do tell defense counsel what sentence is likely if the defendant chooses not to plead and is instead sentenced after trial.[348] Some also observed that this contrasting information was now inevitable, even without judicial participation in negotiations. The United States Supreme Court in *Missouri v. Frye*[349] and *Lafler v. Cooper*[350] recommended that attorneys and judges create a record to show that a defendant considered and rejected an offer to settle the case.[351] Both where judicial participation in settlement is allowed as well as where it is not, judges and prosecutors frequently elicit—on the record at a hearing before trial—proof that the defendant learned of the offer, what that offer was, and that the defendant turned it down knowing the sentence range he would face if convicted at trial.[352] If judges who do not participate in negotiations are

judge might take a stab at it anyway; if he respects the lawyers, the judge will say, 'Okay,' and move on.").

346. *See* FL-P-2 ("Some judges do talk about the possible coercion. That's one of their leading justifications for staying out of it, never negotiating. Other judges who do get involved still worry aloud about this. But I don't think it's a real problem. The vast majority of the time, the judge is offering something better than the state."); NC-D-3 ("Q: Do you worry about the coercive effect on your client when a judge gets into the negotiating mix? A: No, that's your job as a defense attorney. . . . [T]he statute allows me just to say no to the plea deal.").

347. *See supra* section II(C)(1).

348. *See supra* note 136 and accompanying text; *see also* NC-P-1:

> In the conference in chambers, the judge said to the defense attorney, 'I just want you to know that if the jury finds your client guilty, this will be the sentence I plan to impose, assuming no surprises in the proof at trial or the further evidence you might present to me at sentencing.' The judge indicated a sentence that was higher than the sentence that would have resulted from our proposed plea deal. This case went ahead to trial. But it was a comfort during the prep and the trial itself to know what the judge would do at sentencing after a guilty verdict. It was a confidence boost to know that our offer was not out of line.

349. 132 S. Ct. 1399 (2012).

350. 132 S. Ct. 1376 (2012).

351. *Frye*, 132 S. Ct. at 1408–09; *Lafler*, 132 S. Ct. at 1390.

352. *See* FL-J-1 ("That exchange on the record takes away a later [FLA. R. CRIM. P.] 3.850 argument regarding ineffective assistance of counsel. That colloquy in the court just before trial sometimes sparks a discussion between the parties and it settles at the last minute."); MD-P-2 (describing a plea-rejection hearing as an opportunity for the judge to read the plea offer into the record and to ensure the defendant understands the offer and the consequences of rejecting it); *see also* Noland v. State, 413 S.W.3d 684, 686 (Mo. Ct. App. 2013) (quoting a trial-court record of a plea-rejection hearing); State v. Jabbaar, 991 N.E.2d 290, 295 (Ohio Ct. App. 2013) ("[I]t is important for a record to be established that a defendant is aware of a plea deal if one is presented to the defendant—something that may necessarily involve the participation of the trial judge by

already ensuring on the record before trial that the defendant understands the higher sentence he is risking by declining the prosecutor's formal plea offer, it is difficult to see why permitting a judge to give the defendant earlier notice of the likely trial sentence adds to the coercive effect of a prosecutor's plea offer.

One Florida judge recognized the risk that a defendant might claim vindictiveness after receiving a trial sentence higher than an earlier, rejected offer, but dismissed the concern: "If you get more bad facts at trial, that could justify a higher sentence. . . . Only the weak, lazy, feeble judge will hammer anybody who goes to trial. That is an immature and inappropriate way to handle your docket. And it's ineffective. Those judges don't clear their dockets any quicker."[353]

Other interviewees made additional points about why the risk of a vindictive sentence was not a concern. First, as noted in Part II, many of these courts already separate the judges who participate in settlements from the judges presiding at trial; even in places that did not designate a new trial judge automatically, several interviewees noted that, if a case ended up at trial, defendants were entitled to a judge other than the settlement judge.[354] Second, one judge viewed judicial involvement as raising no more incentive for retaliation than otherwise exists, where the judge is never involved in negotiations.[355]

A few interviewees noted that some judges would occasionally cross the line and try to pressure defendants to accept a plea resolution. One defense attorney explained that one former judge would say, "Make sure your client knows that, if you lose, your client is going to jail. Admitting responsibility weighs heavily for me."[356] In those exceptional cases when judges pressed a defendant to accept a deal that the defense attorney did not believe was in the client's best interest, attorneys treated it as their responsibility to protect their clients. The attorneys felt that they were up to the task. One Oregon defense attorney explained that if the judge is too heavy-handed, he intercedes:

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placing the plea deal on the record."); McConkie, *supra* note 24, at 74–75 (referring to such a hearing as a "no-plea colloquy").

353. FL-J-1; *see also* CA-J-1 (commenting on having the settlement judge as a trial judge: "Don't think it is a big issue; trial is so much more detailed").

354. *E.g.*, OR-J-2 (reporting that if no settlement is reached it is "never" the same judge for trial); MO-P-3 (noting that, in the "rare" case that a judge rejects a plea as too low, the defendant may ask for another judge for trial). For more on the benefits of requiring a different judge for trial if settlement talks fall through, see Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1292–93, 1326–27 (2005) (recommending "divided decision making" in order to avoid the inadvertent influence of inadmissible information on a judge who both participates at settlement and presides at trial); Batra, *supra* note 24, at 588–89 (recommending the same, and noting, in addition to evidentiary concerns, that the defendant may be improperly "incentivized to follow the instructions of the judge" at settlement knowing that the same judge is to preside at trial).

355. MI-J-1.

356. NC-D-2.

> I pipe in and say, "We've already talked about this." I'd say, "He's been clear, that's not acceptable to him." . . . [I]t wouldn't take any more than that to get the judge to back off. . . . I have never seen a client get beat up into taking a deal that the defense lawyer didn't agree with the judge was the best resolution of the case.[357]

Everywhere, we heard a common refrain, that judicial settlement conferences provided *better* options for defendants, not worse.[358] It was not coercive, as one attorney explained, when a defendant pleads guilty to obtain a judge's certain, indicated sentence to avoid the risk of a much longer sentence post-trial under a higher guideline range.[359] These stories suggest that defense attorneys, as well as prosecutors and judges themselves, regard the risk of coercion as negligible in context. In jurisdictions where the judge typically provides a better offer than the prosecutor does, they believe that the judge's participation, on balance, assists, and does not coerce, the defendant. If they are right about that—and judicial participation really does provide a more lenient sentence, along with the extra benefits of greater certainty and potentially more information, more effective sentencing options, and a safeguard for inexperienced attorneys—then the image of overbearing judges threatening defendants to plead guilty—or else—seems to be overblown and outdated.

Overall, the new and varied forms of judicial participation in negotiation that judges and lawyers described to us looked quite unlike the landscape that Alschuler's subjects painted decades ago. Based on reports from the field, efficiency remains a key motivator, but there is much more going on here than courtroom actors responding to the need for speed.

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357. OR-D-2.

358. Discussing the contrast, a Florida prosecutor related one way that judges, without ever participating in negotiations, would pressure defendants to settle:

> Judges who are tougher at sentencing after trial are far more likely to get pleas to the bench. And everyone knows what they do at sentencing. The judges will intentionally set their sentencing hearings after a guilty verdict at trial for the first day of the next session. Defendants are sitting there still trying to decide whether to accept an offer. Then they'll see a guy who just lost a trial sentenced to twenty years. The next two guys whose cases are called start asking with real interest about that five-year deal that the prosecutor mentioned.

FL-P-2.

359. MI-D-4, describing a murder case:

> Even though his attorney was browbeating him, trying to get him to go to trial, there was also a risk of conviction with much, much higher guidelines. He knew the judge would stay within the guidelines [if he pleaded guilty to manslaughter]. That wasn't coercive. He could have said, "I'm not guilty," yet he took the plea knowing that, "I'm probably going to get seven to eight as opposed to dying in prison."

See also CA-J-1 ("The concern about coercion is really academic, since this is a way for a defendant to get a better offer than the prosecutor is offering. It is not a disadvantage for defendants.").

IV. When and Why Judges Choose Not to Get Involved

The many reported upsides of judicial participation naturally raise a question: "If this is so great, why isn't everyone doing it?" State criminal justice is notorious for inertia as well as independence, and, in jurisdictions that have prohibited the practice for decades, change would be an uphill battle.[360] But the law in all ten of the states we examined already allows judges to indicate before the entry of the plea whether a proposed sentence would be acceptable.[361] And even though this involvement appears to carry several benefits in other states where it is commonplace, we found that judges rarely get involved in Kansas and Utah.[362] Even in the states where judicial participation is routine,[363] interviewees reported that some judges flatly refuse to participate,[364] or participate only in certain categories of cases, such as "when you wanted to sell something that was beyond the norm, unusual, and you didn't think [the judge] was going to go for it."[365] Although our study was not designed to produce information about the frequency of judicial involvement, our conversations often touched on this. Estimates of the percentage of felony cases that included a discussion with the judge about the sentence were all over the map, ranging from less than 10% to 100%.[366]

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360. There are many analogous areas in criminal practice where legal authorization is a precondition to the development of more refined choices. For example, innocence claims have evolved in some places, and haven't even been recognized in others. *E.g.*, Nancy J. King, *Judicial Review: Appeals and Postconviction Proceedings*, *in* EXAMINING WRONGFUL CONVICTIONS 217, 228 (Allison D. Redlich et al. eds., 2014). The same is true for the choice between direct filing, grand jury, and preliminary hearing. *See* 1, 4 LAFAVE, ISRAEL, KING & KERR, *supra* note 56 §§ 1.3(b), 14.2(d), 15.1(c).

361. *See supra* section III(B)(4).

362. *See* KS-D-1 ("I did that once years ago. But it is rare. It is just not done."); UT-D-1 ("Judges are virtually never involved in plea negotiations.").

363. *See, e.g.*, CA-J-2 (noting that judicial participation was "the culture of the court"); MD-D-3 (reporting that judges are "used routinely" in plea negotiations); MI-D-4 ("The vast majority of cases are *Cobbs*.").

364. *See* MD-D-3 ("In some counties, judges won't bind themselves."); MI-J-1 ("A few will refuse [to use *Cobbs*]. . . . They believe it is inappropriate for a judge to get actively engaged in that kind of activity."); NC-P-1 (reporting that conferences where the defense is seeking a better offer happen frequently with one judge, who "kind of befriends the defense bar," but that, "[i]n other counties in our district, it doesn't happen often because defense attorneys know it won't do any good and therefore don't even ask").

365. MO-D-1 (explaining that this was "the only time you'd go back into the judge's office before the plea" in his county, but that, in other counties, the attorneys checked with the judge in every case); *see also* CA-D-2 (estimating that 40%–50% of cases settle before the preliminary hearing with no help from the judge, and asserting that "court offers" are only viable where the district attorney wants a high sentence on a low-level felony).

366. *See* MD. STATE COMM'N ON CRIMINAL SENTENCING POLICY, *supra* note 285, at 34, 39, 58 (reporting that, in 2014, 38% of cases were resolved by agreement in which the judge, prosecutor, and defense attorney agreed to sentencing terms before the hearing); CA-J-1 (noting one county where parties attempt to discuss settlement with the judge in every case); MO-J-3 (reporting that the judge makes a suggestion regarding settlement terms in 5%–10% of cases); OR-D-1 (estimating that about half of all cases are resolved at Early Case Resolution); UT-D-1 (suggesting that judges get involved in less than 10% of cases).

In this Part, we examine why some judges stayed away from plea negotiations. When we asked about this, several themes appeared over and over, in addition to the unsurprising mention of the judge's individual personality or philosophy.[367] First, we heard that judges in rural jurisdictions with smaller benches and caseloads are less involved than judges in busier urban courts. Second, we were told that newer judges or those who are more politically vulnerable tend to be less eager to wade into plea negotiations. Third, several interviewees explained that a judge's involvement with the parties' negotiations in a criminal case would violate the traditional practices and roles of trial judges.

Our interviewees reported that structured or routine participation of judges was more common in urban jurisdictions than in smaller jurisdictions.[368] Some based this observation on their own legal practice in different counties, while others drew this conclusion based on conversations with peers from other counties. Data was not available to test this hypothesis, but it makes sense for several reasons. Less volume, suggested some, means less pressure to speed up case disposition.[369] In that setting, judges who enjoy trials can allow more of them to happen without paying too great a price.[370] A smaller bench also means that attorneys know more about what any given judge will do, reducing their need for the added certainty that judicial previews offer.[371] Prosecutors' offices in larger jurisdictions are also more likely to keep tighter controls on line prosecutors, making judicial

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367. *See* FL-J-1 ("It does happen. It greatly depends on each judge's style, philosophy, and comfort level with the parties who come before them."); MD-D-3 ("Maybe the egos of the judges; who knows."). Only two interviewees noted that concerns about the potential coercion of the defendant might motivate judges to avoid getting involved. *See* FL-P-2 ("Some judges do talk about the possible coercion. That's one of their leading justifications for staying out of it, never negotiating. Other judges who do get involved still worry aloud about this."); NC-J-3 ("Some judges will say to a defendant, 'Look, if you plead guilty now, this is what the sentence would be.' I think this is too much like trying to strong-arm a plea. I stay away from statements like that.").

368. *See* FL-D-3 (explaining that, in the city where the attorney practices, "those days of informal meetings are over," but that "[i]t still happens out in the countryside"); OH-D-1 ("Especially in smaller counties, judges will not discuss negotiations at all. They won't discuss sentences at all. I have other judges in more urban counties that will be completely involved in the process.").

369. FL-D-1 ("[Smaller counties] have less volume. That means fewer departures and less judicial involvement through plea conferences."); OH-J-1 ("[I]t is more likely in urban districts for judges to get involved with the plea negotiations. They have more of a docket management need."); OR-D-4 ("It's unusual in a lot of the courts. We adopted here them [sic] as a way to dispose of cases prior to trial. Big docket here.").

370. *See* OH-J-1 ("One reason for my position of non-involvement is, I like trials. So if I get involved, I'm betting against myself.").

371. *See* CA-J-1 ("[T]hey don't know me [here yet], so it seems that I am having to give more indicateds here. There has to be a level of trust between the lawyers and between the lawyers and the judge before they know what sentences you'll be giving."); MO-J-3 ("We know so many [of the defendants]. Their parents were here . . . . It's a very local area."); UT-P-1 ("In rural Utah . . . the prosecutors and judges know each other so well that they don't even have to hear any explicit hints about acceptable outcomes.").

involvement a welcome escape hatch, that may not be needed in smaller jurisdictions, for assistant prosecutors seeking to avoid a rigid office policy.[372]

There are further practical reasons explaining why judges in rural counties participate less than their urban counterparts. Where a single judge is shared between counties, it may be more difficult to find a time to meet with the judge simply because the judge isn't in the building very often.[373] And it is more difficult to assign settlement conferences to judges other than those trying the cases in smaller communities, or to find a capable retired judge nearby who is willing to conduct settlement conferences.[374] An Oregon judge offered another explanation: larger counties are more likely than smaller counties to have multiple judges who are really good at settlement conferences and have more opportunity to refine those skills.[375]

Many interviewees saw a connection between judicial involvement in plea negotiations and the fact that judges must campaign for re-election. They told us that the judges who were most politically vulnerable—especially newer judges or those who faced an election campaign in the near future—tended to remain on the sidelines during plea negotiations.[376] According to one Florida prosecutor, "[J]udges differ in how secure they are in themselves, how willing they are to rock the boat."[377] Judges who are "newer to the bench and less sure of themselves" defer more to the parties.[378] Judges who merely endorse deals that the parties crafted for themselves can avoid political blowback if the sentence later proves unpopular.[379] It requires

372. *See* OH-D-2 ("[I]n larger districts, the judge helps the line prosecutor move his boss off of the original offer to something more favorable for the defendant.").

373. *See* MO-D-1 (noting that a judge may devote one day a month to all felony arraignments, pleas, probation violations, and motions, so that any conversation would have to take place on one of those days, and that, in "five or six counties, there are only two judges, . . . [so] the likelihood the judge will be in county is low—hard to catch them").

374. *See* OR-D-2 (noting that judicial participation works in larger counties where "trial judges are not assigned until the morning of trial").

375. OR-J-3 ("In large counties there are more judges, who have more time to spend on these. And in some counties they have judges that are really skilled at this, they like to get in there and work out resolutions. It is a matter of preference and skill.").

376. *See* OH-D-2 ("Over the years, judicial involvement has diminished due to heavier media coverage of criminal proceedings and public disapproval of any reductions in charges or proposed penalties. . . . So, they will lean on the prosecutor only when they believe the media will not notice.").

377. FL-P-1.

378. *Id.* ("The judges who are closer in time to their election date are also more vulnerable to this."); *see also* OH-P-2 ("Newer judges tend to look to us as prosecutors for a lot of guidance."); UT-D-2 (explaining that newer judges want "that separation . . . between themselves and the lawyers; they want to stand apart").

379. *See* MI-J-1 ("That is not a particularly courageous position—you are supposed to make tough calls—having as a judicial philosophy the notion that, if something goes wrong, I'll say, 'The prosecutor and defendant said it was okay.'"). A Maryland judge explained that some judges refuse to accept a plea that includes a binding sentence agreement, for similar reasons:

a secure judge to take responsibility for a punishment different from what the parties worked out on their own.

The interviewees disagreed, however, about which party benefits most from an insecure or vulnerable judge. Some worried that vulnerable judges would tilt toward the prosecution.[380] In an effort to appear tough on crime for election purposes, the judge might defer even to excessive proposals from the prosecution.[381] Some prosecutors, on the other hand, worried that apprehension about elections pushed judges in the direction of the defense because judges depend on political contributions from prominent defense attorneys.[382]

Many interviewees also mentioned that older judges are more likely to participate than younger judges.[383] More experienced judges may feel less politically vulnerable, or they may simply be more confident, sure that they know better than the parties what the appropriate sentence should be. As one Florida prosecutor put it, older judges "don't want some pipsqueak prosecutor telling them about justice."[384]

In two of the states we examined, Utah and Kansas, judges by and large stay out of the action, even though procedural rules and appellate opinions in

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> [T]hey have strict sentencing philosophy and don't want their discretion fettered in any way. . . . They don't want to be perceived as anything other than tough on crime. Judges do have to run for election. We've had nasty contested elections. . . . [T]hey may not want to take the chance of something not making a good sound bite.

MD-J-3.

380. *See* MI-J-2 ("I think there is a pro prosecution bias on the part of state criminal judges, in part because of elections. It is a combination of factors: that they are elected; and that many came up through prosecutorial ranks; and the third factor is that there is, not exactly a burn out, but an attitude that comes about when ninety-eight percent are going to plead guilty to something. This attitude that everybody is guilty.").

381. Judges mentioned this as a risk but then denied that a judge's choice to defer, or not, to stipulated sentences actually influenced elections. *See, e.g.*, *id.* ("Almost never comes up at election. But most judges don't understand that."); FL-J-1 ("Hopefully most of us have the courage to impose the proper sentence without regard to popularity. I've never seen a judge voted out of office because the judge was perceived as too weak or too strong. . . . The elections are never focused around sentencing habits.").

382. *See* FL-P-1 ("Some are willing to do what's right regardless of the guidelines. Others will cater to the private defense bar because the defense attorneys are so important to their election campaigns. In that situation, the judge won't push back so much on defense ideas."). This prosecutor reported that sometimes a judge will grant a motion to suppress filed by a campaign contributor, even knowing it will be reversed later, and tell the prosecutor to "go back to your people and make a better offer." *Id.* But these concerns were atypical among our interviewees.

383. *See* FL-D-1 ("The experienced judges are more confident about what will produce trouble on appeal, and they want to resolve more cases without a trial. The newer judges don't want the conferences in chambers as often."); NC-P-2 ("A lot of our judges in our division are newer, with less than fifteen years on the bench. The older judges have the self-assurance it takes to be more active. They have a firmer idea about the proper outcomes for different categories of cases.").

384. FL-P-1. It could also be that judges put more emphasis on docket control the longer they stay on the bench, and conclude that they can control their dockets best by stepping into the negotiations with the parties. FL-D-1.

those states allow some level of involvement in negotiations.[385] Judges in these states respect a strong, reportedly statewide norm against judicial negotiation and are willing only to send subtle signals that the parties should try harder to settle a case that is heading for trial.[386] Interviewees invoked traditional ideas of the judicial role in an adversarial system.[387] A Utah prosecutor explained the statewide practice in terms of classic judicial independence: "We don't want to make a practice of involving the court in the negotiation process. That really changes the way the judge does business. We prefer the judiciary to be more independent, passively to receive recommendations and then to make their own call."[388] As with the other views reported here, we cannot know if this viewpoint produces, or is produced by, a jurisdiction's norms.

V. How Judicial Involvement Can Contribute to Healthier Criminal Justice

We turn now to the lessons this project holds for policy. The methodology requires caution in drawing conclusions. Our sample of interviewees, while larger than any study since Alschuler's, was too small to show the frequency or variety of practices in each of these states, and says nothing about what happens in other states. The observations we did collect may be skewed by self-interest and cognitive biases.[389] Quantitative analyses refuting or confirming interviewees' claims, based on court data, would be useful. Our interviewees' claims about the perceptions of defendants, victims, and the voting public also deserve further study. In the meantime, assuming that those themes we heard most consistently are true, we offer several tentative, educated guesses about the potential effects of judicial involvement in plea negotiations.

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385. *See supra* note 54. For a discussion of the exceptional use of mediation in a few Kansas counties, see *supra* subpart II(D).

386. *See* UT-D-2 ("With older, more experienced judges, they might drop hints at the close of the preliminary hearing. They'll say something like, 'That was a close call. I'm not sure this will survive a jury trial.' In other words: 'Prosecutor, your case is shit.'").

387. Sometimes they made the point in conclusory terms. *See* KS-D-1 ("It's just not proper."); UT-D-1 ("That's just not what judges should do."). For a discussion of the historical and comparative background to this claim about traditional judicial reluctance to regulate plea negotiations, see generally Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225 (2016) (analyzing the history of plea bargaining in the United States and critiquing common rationales of minimal judicial involvement in the process).

388. UT-P-1. This concern surfaced in a few other states as well. For example, as one Oregon attorney described the reasoning of judges who do not participate in settlement conferences: "They don't think it is appropriate, I guess. . . . Some judges don't think it's his role. He'd rather say, 'Just have a trial if you can't settle.'" OR-D-4. This attorney went on to describe one particularly unenthusiastic judge: "One is very by the book: doesn't come down from the bench, doesn't tell the DA what to do, feels ethically restricted, figures he's not a party so he shouldn't be involved." *Id.*

389. *See supra* note 62 and accompanying text.

A. Faster, Cheaper Dispositions

First, judicial participation accelerates pleas, shifting deals away from the eve of trial to earlier in the process. By reducing uncertainty for both sides and forcing lawyers to evaluate their cases sooner so as to prepare for presentations to the judge, judicial involvement helps defendants decide earlier in the process whether or not to plead guilty without an agreement and helps parties reach agreements earlier than they would without the judge's input.[390] And when the parties have settled on an unusually low sentence, the opportunity to answer the judge's questions in advance helps prevent delays.[391] Quicker pleas can carry significant savings from the more efficient use of courtrooms, judges, jurors, and court and corrections staff.[392] Savings can extend to more efficient use of staff and resources in prosecutor and public defender offices and shorter preconviction stays in jail.[393] Together, these savings could far exceed the cost of building a settlement talk with the judge into existing pretrial proceedings.

Of course, faster and cheaper processing of cases does not necessarily make a criminal justice system better. It could make case outcomes significantly worse. As the Framers recognized, time-consuming procedures—and adversarial trials in particular—protect defendants and carry independent benefits for the public, jurors, victims, and other participants.[394] Today, only a small percentage of defendants exercise their right to trial, in face of the powerful incentives to admit guilt created by the combination of delay, limits on pretrial release, prosecutors' charging practices, judicial-sentencing practices, and legislative punishment choices.[395] If new judicial involvement in negotiations diminishes the trial rate even further, then in our view the innovation is not justified by any monetary benefits.[396] And if the savings from a faster system simply

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390. *See supra* notes 66, 233–34 and accompanying text.

391. *See supra* notes 284–86 and accompanying text.

392. *See supra* section III(A)(1).

393. *See supra* notes 190–91, 194 and accompanying text.

394. *See* THE FEDERALIST No. 83, at 498 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; . . . the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.").

395. *See* Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84, 102, 125 (2005) (stating that the federal acquittal rate fell to one percent in 2002, marking the lowest level since the inception of the federal criminal justice system; blaming the decrease in part on prosecution-friendly sentencing and trial practices, pretrial detention, and delay).

396. *See, e.g.*, BIBAS, *supra* note 51, at 115 ("The machinery's relentless efficiency undermines the criminal law's broader moral goals. Efficient case processing and crime reduction are important goods, but not the only ones that matter. . . . Quantity automatically trumps quality, without much discussion or thought about the appropriate tradeoff between the two."); ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL 2, 113 (2009) (lamenting that "[t]he institution of the trial seems to be disappearing in one context after another" and explaining the trial's function of "soften[ing]"

facilitate an even greater volume of prosecutions, that would not be an accomplishment worth celebrating.[397] Our findings suggest, however, that more cost-effective case disposition could actually contribute to the quality of case outcomes, at least where the process amplifies the judge's input. Under certain conditions, the judge's input ends up moderating, not exacerbating, several troubling aspects of early plea bargaining.[398]

B. Innovative and More Lenient Dispositions

When judges are invited to help resolve a criminal case, they sometimes propose alternative ideas for sentencing that the parties had overlooked, ideas that the parties welcome as better resolutions.[399] Even when judges merely indicate the likely sentence, they tend to provide a counterweight to the prosecutor's sentencing offer.[400] In a case where the judge can assure the defendant that a guilty plea as charged, if the facts don't change, would probably produce a sentence lower than the prosecutor's offer, judges are able to defuse prosecutors' threats about sentence.[401] Additionally, by pointing out evidentiary weaknesses, pushing back on draconian applications of rigid prosecutorial policy, and moderating inexperienced or overzealous assistants, judges can exert downward pressure on negotiated sentences, persuading prosecutors to accept more lenient sentence terms.[402] Hypothetically, judges could school the defense in similar ways, pitching a deal even less favorable than the prosecutor's, but generally they don't. The prosecutor's initial offer appears to mark an upper bound.[403] Participation also allows judges to correct misunderstandings of sentencing law that in a negotiation between the parties alone could have gone unnoticed.[404]

This judicial counterweight is a healthy antidote to the metastasis of prosecutor influence. While others have made this particular assertion

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rigid or harsh laws and serving as a place where "a citizen can effectively tell his own story publicly in a forum of power"); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 302 (2011) (arguing that the high rate of plea bargaining is decreasing transparency in case outcomes and creating a one-sided bargaining dynamic in favor of the prosecutor, thus further disadvantaging indigent defendants).

397. *See* Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 200 (2014) (raising the concern that increased efficiency in case processing "makes it less costly for legislatures to create new offenses, and more tempting to choose criminal enforcement over other public policy strategies to address social problems or regulatory agendas").

398. *See supra* section III(B)(1).

399. *See supra* notes 250–53 and accompanying text.

400. *See supra* note 272.

401. *See supra* note 80.

402. *See supra* notes 234, 250–53, and accompanying text; section III(B)(3).

403. *See supra* note 272 and accompanying text.

404. *See supra* note 99 and accompanying text.

before,[405] the interviews reported here provide new information about exactly how, when, and why today's state judges choose to do this, and the surprising reasons why many prosecutors don't mind.

C. Promoting Acceptance of Dispositions and Advocates

The judge's participation also appears to help attorneys retain the confidence of clients, victims, and other constituencies. Without judicial participation, outsiders to the courtroom often assume that the attorneys pick the punishment in a negotiated case, and that the judge simply agrees to go along.[406] Defendants hold their own attorneys responsible for failing to negotiate better offers; victims and others blame the prosecutor for not insisting upon more severe punishment. With judicial involvement before the deal is done, the story can change. The attorneys can maintain that it was the judge who suggested or approved the sentence—that it was the judge's sentence, not theirs.[407] When judicial participation involves mediation, it can help defendants, victims, and observers to see the outcome, more accurately, as the product of a consensus.[408]

The judge's participation potentially reduces the second-guessing of attorneys in other ways. Without it, a defendant hears only his lawyer's own prediction of what the judge might do; if that prediction doesn't pan out, it is only natural to conclude that his lawyer was either dishonest or incompetent. Judicial participation certifies the lawyer's claims for the defendant and reduces the number of cases in which counsel's sentence predictions miss the mark.[409] Finally, advance information from the judge can prevent an unpleasant surprise, moderating the disappointment or anger that criminal dispositions can generate and making them easier to accept as legitimate.[410]

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405. *See* Bibas, *From the Ground Up*, *supra* note 24, at 1069 (noting previous proposals to allow judicial involvement in plea bargaining as a counterbalance to prosecutorial power); Rakoff, *supra* note 58 (advancing a similar proposal).

406. *Cf.* Freeman v. United States, 564 U.S. 522, 535–36 (2011) (Sotomayor, J., concurring) (arguing in her controlling concurrence that it is the parties' agreement, and not the guidelines, that is the basis for the sentence in a plea under Rule 11(c)(1)(C)).

407. *See supra* notes 331–35 and accompanying text.

408. Although the felony mediations described by our interviewees were not adopted as part of the restorative-justice movement, but instead to save resources and reduce recidivism, the involvement of victims and defendants may nevertheless produce some of the benefits restorative-justice proponents claim. *See generally* BIBAS, *supra* note 51, at 94–96, 151 (rejecting retributive criminal justice theory; praising mediations between offender and victim as a means to reconcile offender, victim, and state); Clynton Namuo, *Victim Offender Mediation: When Divergent Paths and Destroyed Lives Come Together for Healing*, 32 GA. ST. U. L. REV. 577, 578, 588 (2016) (describing the successes of statutory mediation programs in Texas and Tennessee); Lawrence W. Sherman & Heather Strang, *Restorative Justice as Evidence-Based Sentencing*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 215, 215–16 (Joan Petersilia & Kevin R. Reitz eds., 2012) (espousing the benefits of a reconciliatory approach to criminal justice, including reduced rates of recidivism and lowered costs to society).

409. *See supra* notes 336, 339 and accompanying text.

410. *See supra* note 335 and accompanying text.

D. Better Informed Participants

Any early negotiated plea, with or without the participation of the judge in negotiations, shifts the need for sentencing information about the offense and offender to an earlier point in the process. But adding judges to early negotiations may actually lead to more informed sentences, not less. The states we examined have adopted various ways to shorten the wait to receive discovery from the prosecution or the information that would otherwise appear in the report of a presentence investigation.[411] Some judges refuse to participate, for example, until the defendant has received discovery, and in several states the defendant routinely receives discovery before talking with the judge.[412]

Judicial participation can increase, rather than decrease, the amount of information available to the defense at the negotiation stage for another reason as well: at or before these discussions, a judge may be more willing or able to demand and receive more information from the government than a defense attorney could negotiating alone.[413] More information about sentencing, too, may be available to negotiators when judges participate, as compared to deals made with no judicial input. Judges in many counties brought to the table more information about sentencing options than the parties possessed.[414]

Conclusion

As courts turn in earnest to the project of regulating plea negotiations, the debate over the appropriate role of the judge in negotiations is intensifying. Federal and state judges who wonder how best to involve their colleagues in the negotiation process labor in the dark about what actually happens in the courtrooms of other judges. Using the words of nearly one hundred judges and attorneys across ten states, this Article sheds some light on a varied set of new practices that look quite unlike the judicial role as commonly imagined.

The breadth of innovation in just these ten states is mind-boggling: grant-funded problem-solving sessions complete with risk assessments and real-time information on treatment options; multicase conferences where other lawyers chime in; special settlement courts set up at the jail; settlement dockets using retired judges; full-blown mediation with families of victims and defendants; felony-court judges serving as lower court judges; and more. Whether the discussion with the judge takes place in a "home court," at a docket "call," in "early case resolution" or "early disposition docket," or at

411. *See supra* sections III(B)(5)–(6).
412. *See supra* section III(B)(6).
413. *See supra* note 328 and accompanying text.
414. *See supra* subsection III(B)(4)(b).

an "administrative term," these courts have built the judge's discussion with the parties into the very framework of the court system. Varied approaches have grown from ad hoc experimentation into system-wide best practices.

Severe budget pressures combined with new data about case processing and its costs have pushed many state trial courts in just the past ten years to abandon their traditional, passive approach to managing criminal cases. Judicial participation in plea negotiations is riding that wave. As practiced in the states we examined, it is fulfilling many other goals of judges, defendants, and prosecutors at the same time. This qualitative study of judicial participation in criminal-case settlement in ten states reveals, in unprecedented detail, just why the carefully tailored involvement of judges in plea negotiations has the potential to contribute far more than increased efficiency to contemporary criminal justice.

TAB 3

Homicide/Life Sentences/Death Penalty Education

State	Answer	Notes
	A comprehensive course required of all judges sitting on capital cases	Four-Day Curriculum
Florida (David Denkin)	Annual course for judges on capital death penalty cases. Judge must attend before handling such cases.	Four-Day Curriculum
Arizona (Jeff Schrade)	Capital case training provided every 18 to 24 months. No differentiation between new and experienced judges, but experienced judges serve as faculty and mentors. The Supreme Court maintains a capital case oversight committee that makes training recommendations.	Training is provided specifically to judges actively hearing cases as many counties don't have active capital cases
Utah (Tom Langhorne)	Classes at regular conferences about every three years. The Judicial Education unit has a dedicated FTE that travels to assist any judge assigned a capital case. That staff attorney serves as a special law clerk during the course of the case.	
North Carolina (Elizabeth Price)	"Capital Case Management," offered every five years. The course is designed to help superior court judges handle capital cases efficiently and correctly. Addressing such issues as case management, jury selection, experts and discovery, and capital sentencing hearings.	
Wisconsin (Charlie Shudson)	Chapter 9 of my new book *Independence Corrupted/How America's Judges Make Their Decisions* addresses murder trials, insanity defense, life sentencing	
Idaho (Ileen Gerstenberger)	A course has been developed and offered in state. It is a three-hour session, offered only once, including high-profile cases	
Pennsylvania (Stephen Feiler)	Offers a course every few years. Course originally developed through a NJC initiative, and has been revised several times. Mixed audience of judges, prosecutors, defense attorneys. Planning a judge-only course for 2020. Pennsylvania also offers courses on juvenile-lifers and conviction integrity (generally homicide).	
New Mexico	No courses specific to New Mexico. Judges can attend NJC offerings	

Ohio	Annual capital case course based on NJC course. Mandatory for new common pleas court judges	Two-day curriculum
Maryland	No offerings and no plans.	
Arkansas	No set program	
The National Judicial College (NJC)	Handling Capital Cases Course Objectives: Manage a capital case more effectively; Summarize the trends in recent U.S. Supreme Court capital cases; Manage pretrial and trial issues in a capital case; Ensure that a jury has been properly "death qualified" through voir dire; Properly manage and define the role of the media to ensure accurate and fair information is given to the public; Apply practical techniques to effectively communicate and manage mentally ill defendants in court proceedings; Conduct the penalty phase of a capital case; and Effectively handle post-conviction claims.	The NJL offers a four-day course and a bench book at: https://www.judges.org/capitalcasesresources/book.html
National Center for State Courts (NCSC)	Over four dozen resources (vice courses) available covering areas such as •General and Background •Costs •Information Clearinghouses •Legal Defense agencies •Case Law	

TAB 4

Homicide Project Update 2-15-19

Trial Overview

2016 – 10 trials conducted
2017 – 13 trials conducted (11 after creation of Homicide Team on 7-1-17)
2018 – 30 trials conducted
2019 – 3 trials conducted

Assignment / Resolution Overview

2017 (7-1-17 through 12-31-17)

- 216 cases assigned
  (number is inflated due to having to assign out all the pre-existing Homicide cases when the Homicide Team was formed 7-1-17, in addition to new cases coming in from 7-1-17 forward)
- 66 cases resolved

2018
- 132 cases assigned
- 188 cases resolved

2019
- 20 cases assigned
- 14 cases resolved

Active Case Overview

(these are cases pending trial or other hearing but excluding resolved cases pending sentencing)

	Pending non-capital trials	Pending capital trials	Cases pending other hearing (i.e. trial setting, negotiations, Lakes Crossing, competency court, death review, etc)	Total unresolved cases
DC3	42	17	13	72
DC12	49	13	16	78
DC17	45	14	12	71
DC21	47	9	5	61
	183	53	46	282

TAB 5

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Incorporation of Statutory Provisions Into Rules With Footnotes

MARCH 8, 2018

ELEVENTH JUDICIAL DISTRICT COURT
P.O. Box H, Lovelock, NV 89419

Table of Contents

Contents

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

TITLE I. APPLICABILITY

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 1 General Provisions and Scope

(a) **General Provisions.**

1. *Title.* This chapter shall be known and may be cited as the "Nevada Rules of Criminal Procedure" and may referenced as "Nev. Rules of Crim. Pro." and cited to as "NRCRP".
2. *Intended Purpose.* These rules shall govern the procedure in all criminal cases in the courts of this state except juvenile court cases. These rules are intended and shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unnecessary expense and delay.
3. *Effective.* These rules shall take effect on July 1, 2019. Thereafter, they shall govern all criminal proceedings commenced and, so far as just and practicable, all proceedings then pending. All statutes and rules in conflict therewith are repealed.

(b) **Scope.**

1. *In General.* These rules govern the procedure in all criminal proceedings in the Municipal Courts, Justice Courts, District Courts, Court of Appeals, and Supreme Court of the State of Nevada.
2. *Excluded Proceedings:* Proceedings not governed by these rules include:
    i. The extradition and rendition of a fugitive (governed by NRS);
    ii. Civil property forfeiture for violating a state or local law;
    iii. Juvenile delinquency and dependency proceedings; and
    iv. Other civil proceedings.

Rule 2 Interpretation

These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

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Rule 3 Preliminary Provisions

(a) **"Bonds and undertakings in criminal actions."**[1] In all criminal actions or proceedings, the following provisions apply:

1. Where a bond or other undertaking is required by the provisions of the Nevada Revised Statutes or by the Nevada Rules of Civil Procedure or the Nevada Rules of Appellate Procedure, the bond or undertaking shall be presented to the clerk, of the court in which the action or proceeding is pending, for the clerk's approval before being filed or deposited.
2. The clerk of the court may refuse approval of a surety for any bond or other undertaking if a power of attorney-in-fact, which covers the agent whose signature appears on the bond or other undertaking, is not on file with the clerk of the court.

(b) **"Jurisdiction over criminal offenses."** These rules do not attempt to define jurisdiction of criminal offenses. Jurisdictional requirements are governed by the Nevada Revised Statutes.[2]

(c) **"Signature by mark."** When a signature of a person is required by this title, the mark of a person, if the person cannot write, shall be deemed sufficient, the name of the person making the mark being written near it, and the mark being witnessed by a person who writes his or her own name as a witness.[3]

(d) **"Statutes of Limitation."** These rules do not govern the Statutes of Limitations for bringing a criminal action. Statutes of Limitation are governed by the Nevada Revised Statutes.[4]

(e) **"Statutory Revisions."** Superseding of criminal law is not a bar to punishment unless specifically expressed. The superseding of any law creating a criminal offense shall not be held to constitute a bar to the prosecution and punishment of a crime already committed, or to bar the trial and punishment of a crime where a prosecution has been already begun, for a violation of the law so superseded, unless the intention to bar such prosecution and punishment, or trial and punishment where a prosecution has been already begun is expressly declared in the superseding act.[5]

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[1] NRS 169.245
[2] *E.g., see* NRS 171.010-171.020
[3] NRS 169.225
[4] *E.g., see* NRS 171.080-171.100
[5] NRS 169.235

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 4 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 5 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

TITLE II. PRELIMINARY PROCEEDINGS

Rule 6 Prosecution Upon Citation

(a) **Filing of Citation.**[6] The filing of a citation in the justice's court or municipal court initiates a criminal action for only misdemeanor offense(s). The citation shall be issued and served in conformance with the requirements of NRS 171.1771 *et. seq.*

(b) **Citation filed with court deemed complaint for purpose of prosecution.**[7] If the form of citation:

1. Includes information whose truthfulness is attested as required for a complaint charging commission of the offense alleged in the citation to have been committed; or
2. Is prepared electronically, then the citation when filed with a court of competent jurisdiction shall be deemed to be a lawful complaint for the purpose of prosecution.

(c) **Electronic Filing.**[8] A court clerk may accept a citation filed pursuant to this chapter that is filed electronically. The following governs the filing of an electronic Complaint in a criminal proceeding:

1. A citation that is filed electronically must contain an image of the signature of the law enforcement officer who issued the citation.
2. If a court clerk accepts a citation that is filed electronically pursuant to subsection 1, the court clerk shall acknowledge receipt of the citation by an electronic time stamp and shall electronically return the citation with the electronic time stamp to the prosecuting attorney.
3. A citation that is filed and time-stamped electronically pursuant to this section may be converted into a printed document and shall be treated in the same manner as a citation that is not filed electronically.

[6] The issuance of a citation is governed by NRS 171.177
[7] NRS 171.1778.
[8] NRS 171.103.

Rule 7 Prosecution By Complaint

(a) **Filing of Complaint.**[9] The filing of a Complaint in the Justice's Court or Municipal Court initiates a criminal action for a misdemeanor, gross misdemeanor, and/or felony offense(s). The Complaint shall:

1. Be signed by a prosecuting attorney;
2. Be made upon: Oath before a magistrate or a notary public; or By Declaration which is made subject to the penalty for perjury;
3. Set forth facts that establish that probable cause exists to believe that an act was committed by the defendant which is a public offense under the laws of the State of Nevada.

(b) **Electronic Filing.**[10] A court clerk may accept a complaint filed pursuant to this chapter that is filed electronically. The following governs the filing of an electronic Complaint in a criminal proceeding:

1. A complaint that is filed electronically must contain an image of the signature of the prosecuting attorney.
2. If a court clerk accepts a complaint that is filed electronically pursuant to subsection 1, the court clerk shall acknowledge receipt of the complaint by an electronic time stamp and shall electronically return the complaint with the electronic time stamp to the prosecuting attorney.
3. A complaint that is filed and time-stamped electronically pursuant to this section may be converted into a printed document and served upon a defendant in the same manner as a complaint that is not filed electronically.

[9] NRS 171.102.
[10] NRS 171.103.

Rule 8 Charged Multiple Offenses - To Be Filed In Single Court

(a) **Filed in Single Court.** Unless otherwise provided by law, complaints, citations, or informations charging multiple offenses, which may include violations of state laws, county ordinances, or municipal ordinances and arising from a single criminal episode, shall be filed in a single court that has jurisdiction of the charged offense with the highest possible penalty of all the offenses charged.

(b) **When separation may occur.** The offenses within the filed complaint, citation, or information may not be separated except by order of the court and for good cause shown.

(c) **Jurisdiction.** For purposes of this section, the court that is adjudicating the complaint, citation, or information has jurisdiction over all the offenses charged, and a single prosecutorial entity shall prosecute the offenses.

Rule 9 Warrants, Summons & Arrest

(a) **Issuance of Warrant or Summons.**[11] If it appears from the complaint or a citation issued pursuant to NRS 484A.730, 488.920 or 501.386, or from an affidavit or affidavits filed with the complaint or citation that there is probable cause to believe that an offense, triable within the county, has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall be issued by the magistrate to any peace officer. Upon the request of the district attorney a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint or citation. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) **Content of Warrant:**[12] The warrant of arrest is an order in writing in the name of the State of Nevada which shall:

1. Be signed by the magistrate with the magistrate's name of office;
2. Contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty;
3. State the date of its issuance, and the county, city or town where it was issued;
4. Describe the offense charged in the complaint; and
5. Command that the defendant be arrested and brought before the nearest available magistrate.

(c) **Content of Summons:**[13] The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place. Upon a complaint against a corporation, the magistrate must issue a summons, signed by the magistrate, with the magistrate's name of office, requiring the corporation to appear before the magistrate at a specified time and place to answer the charge, the time to be not less than 10 days after the issuing of the summons.

(d) **Execution and Service of Warrant or Summons.** The execution and service of a warrant is governed by NRS 171.114 *et. seq.*

(e) **Magistrate may order arrest for committing or attempting to commit offense in magistrate's presence.**[14] A magistrate may orally order a peace officer or private person to arrest anyone committing or attempting to commit a public offense in the presence of the magistrate, and may thereupon proceed as if the offender had been brought before the magistrate on a warrant of arrest.

(f) **Warrant of arrest by telegram authorized.**[15]

1. A warrant of arrest may be transmitted by telegram. A copy of a warrant transmitted by telegram may be sent to one or more peace officers, and the copy is as effectual in the

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[11] NRS 171.106
[12] NRS 171.108
[13] NRS 171.112
[14] NRS 171.128
[15] NRS 171.148

hands of any officer, and the officer must proceed in the same manner under it, as though the officer held an original warrant issued by the magistrate before whom the original complaint in the case was laid.

2. Every officer causing a warrant to be transmitted by telegram pursuant to subsection 1 must certify as correct a copy of the warrant and endorsement thereon, and must return the original with a statement of the officer's action thereunder.
3. As used in this section, "telegram" includes every method of electric or electronic communication by which a written as distinct from an oral message is transmitted.

(g) **Return of warrant after execution by arrest or issuance of citation; return of summons after service; cancellation by district attorney before execution or service; reissuance.**

1. The peace officer executing a warrant by arrest shall make return thereof to the magistrate before whom the defendant is brought pursuant to NRS 171.178 and 171.184. At the request of the district attorney any unexecuted warrant must be returned to the magistrate by whom it was issued and must be cancelled.
2. The peace officer executing a warrant by issuance of a citation pursuant to subsection 2 of NRS 171.122 shall:
    i. Record on the warrant the number assigned to the citation issued thereon;
    ii. Attach the warrant to the citation issued thereon; and
    iii. Return the warrant and citation to the magistrate before whom the defendant is scheduled to appear.
3. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate before whom the summons is returnable.
4. At the request of the district attorney made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the magistrate to a peace officer for execution or service.

Rule 10 Appearance Before Magistrate Following Arrest

(a) **Appearance before magistrate.**[16]

1. An arrested person shall be brought before the magistrate who issued the warrant or the nearest available magistrate empowered to commit persons charged with offenses against the laws of the State of Nevada. The magistrate must make a probable cause determination within 48 hours of arrest based upon a probable cause statement prepared by the arresting officer. If the magistrate determines that probable cause for the arrest existed, the magistrate may hold the individual for further proceedings after determining if the bail set in the matter is appropriate. If the magistrate determines that probable cause for the arrest did not exist, the magistrate shall release the individual.
2. If the magistrate determines that probable cause existed to justify the arrest, within 72 hours, excluding nonjudicial days, of that determination, the following shall occur: (1) The prosecuting agency, unless excused by the following subsection, must file a complaint before the magistrate setting forth the crime or crimes with which the person is charged; and (2) The person must be brought before the magistrate for an advisement hearing in which the person is advised of the person's right to counsel and the nature of the charges contained in the Complaint.
3. If the complaint is not filed within the 72 hours after arrest, excluding nonjudicial days, the magistrate:
    i. Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay and may allow additional time to file a Complaint; and
    ii. May release the arrested person if the magistrate determines that the person was not brought before a magistrate without unnecessary delay.
4. When a person arrested under the terms of a warrant for arrest is brought before a magistrate, a complaint must be filed forthwith.
5. Except as otherwise provided in NRS 178.484 and 178.487, where the defendant can be admitted to bail without appearing personally before a magistrate, the defendant must be so admitted with the least possible delay, and required to appear before a magistrate at the earliest convenient time thereafter.
6. When a summons is issued in lieu of a warrant of arrest, the defendant shall appear before the court as directed in the summons.

(b) **Proceedings before another magistrate.**[17] If the defendant is brought before a magistrate in the same county, other than the one who issued the warrant, the affidavits and depositions on which the warrant was granted, if the defendant insists upon an examination, must be sent to that magistrate, or, if they cannot be procured, the prosecutor and the prosecutor's witnesses must be summoned to give their testimony anew.

(c) **Proceedings upon complaint for offenses triable in another county.**[18]

1. When a complaint is laid before a magistrate of the commission of a public offense triable in another county of the State, but showing that the defendant is in the county where the complaint is laid, the same proceedings must be had as prescribed in these

[16] NRS 171.178.
[17] NRS 171.182.
[18] Mirrors the language in NRS 171.184.

Rules except that the warrant must require the defendant to be taken before the nearest or most accessible magistrate of the county in which the offense is triable, and the depositions of the complainant or prosecutor, and of the witnesses who may have been produced, must be delivered by the magistrate to the officer to whom the warrant is delivered.

2. The officer who executed the warrant must take the defendant before the nearest or most accessible magistrate of the county in which the offense is triable, and must deliver the depositions and the warrant, with the officer's return endorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by the magistrate.
3. If the offense charged in the warrant issued pursuant to subsection 1 is a misdemeanor, the officer must, upon being required by the defendant, take the defendant before a magistrate of the county in which the warrant was issued, who must admit the defendant to bail, and immediately transmit the warrant, depositions and undertaking to the justice of the peace or clerk of the court in which the defendant is required to appear.

(d) **Proceedings upon discovery of another arrest warrant outstanding in another county.**[19]

1. If a person is brought before a magistrate under the provisions of NRS 171.178 or 171.184, and it is discovered that there is a warrant for the person's arrest outstanding in another county of this State, the magistrate may release the person in accordance with the provisions of NRS 178.484 or 178.4851 if:
    i. The warrant arises out of a public offense which constitutes a misdemeanor; and
    ii. The person provides a suitable address where the magistrate who issued the warrant in the other county can notify the person of a time and place to appear.
2. If a person is released under the provisions of this section, the magistrate who releases the person shall transmit the cash, bond, notes or agreement submitted under the provisions of NRS 178.502 or 178.4851, together with the person's address, to the magistrate who issued the warrant. Upon receipt of the cash, bonds, notes or agreement and address, the magistrate who issued the warrant shall notify the person of a time and place to appear.
3. Any bail set under the provisions of this section must be in addition to and apart from any bail set for any public offense with which a person is charged in the county in which a magistrate is setting bail. In setting bail under the provisions of this section, a magistrate shall set the bail in an amount which is sufficient to induce a reasonable person to travel to the county in which the warrant for the arrest is outstanding.
4. A person who fails to appear in the other county as ordered is guilty of failing to appear and shall be punished as provided in NRS 199.335. A sentence of imprisonment imposed for failing to appear in violation of this section must be imposed consecutively to a sentence of imprisonment for the offense out of which the warrant arises.

Commented [TW1]: Need to check all of these references to ensure that they align with provisions that will still be in place.

[19] NRS 171.1845.

Rule 11 Proceedings Before Justice of the Peace or Municipal Court Judge

(a) **Rights of defendant at the advisement hearing.**[20] The magistrate or master shall inform the defendant of the complaint and of any affidavit filed therewith, of the right to retain counsel, of the right to request the assignment of counsel if the defendant is unable to obtain counsel, and of the right to have a preliminary examination if any charge alleges a gross misdemeanor or felony crime or of the right to an arraignment if the charge or charges involve any misdemeanor crime. The magistrate shall also inform the defendant that the defendant is not required to make a statement and that any statement made may be used against him or her. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel, and shall admit the defendant to bail as provided in these rules.

(b) **Procedure for appointment of attorney for indigent defendant.**[21]

1. Any defendant charged with a public offense who is an indigent may, by oral statement to the district judge, justice of the peace, municipal judge or master, request the appointment of an attorney to represent the defendant.
2. The request must be accompanied by the defendant's affidavit, which must state:
    i. That the defendant is without means of employing an attorney; and
    ii. Facts with some particularity, definiteness and certainty concerning the defendant's financial disability.
3. The district judge, justice of the peace, municipal judge or master shall forthwith consider the application and shall make such further inquiry as he or she considers necessary. If the district judge, justice of the peace, municipal judge or master:
    i. Finds that the defendant is without means of employing an attorney; and
    ii. Otherwise determines that representation is required, the judge, justice or master shall designate the public defender of the county or the State Public Defender, as appropriate, to represent the defendant. If the appropriate public defender is unable to represent the defendant, or other good cause appears, another attorney must be appointed.
4. The county or State Public Defender must be reimbursed by the city for costs incurred in appearing in municipal court. If a private attorney is appointed as provided in this section, the private attorney must be reimbursed by the county for appearance in Justice Court or the city for appearance in municipal court in an amount not to exceed $75 per case.

(c) **Certification of bail; discharge of defendant.**[22] On admitting the defendant to bail, the magistrate shall certify on the warrant the fact of having done so, and deliver the warrant and recognizance to the officer having charge of the defendant.

(d) **Preliminary examination: Waiver; time for conducting; postponement; burden of proof, introduction of evidence and cross-examination of witnesses by defendant; admissibility of hearsay evidence.**[23]

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[20] NRS 171.186.
[21] NRS 171.188.
[22] NRS 171.192.
[23] Taken primarily from NRS 171.196.

1. If an offense is not triable in the Justice Court, the defendant must not be called upon to plead. If the defendant waives preliminary examination, the magistrate shall immediately hold the defendant to answer in the district court.
2. The magistrate may require the appearance of the defendant at the preliminary hearing.
3. If the defendant does not waive examination, the magistrate shall hear the evidence within 15 days of the advisement hearing, unless for good cause shown the magistrate extends such time.
4. Unless the defendant waives counsel, reasonable time must be allowed for counsel to appear.
5. Except as otherwise provided in this rule, if the magistrate postpones the examination at the request of a party, the magistrate may order that party to pay all or part of the costs and fees expended to have a witness attend the examination. The magistrate shall not require a party who requested the postponement of the examination to pay for the costs and fees of a witness if:
    i. It was not reasonably necessary for the witness to attend the examination; or
    ii. The magistrate ordered the extension pursuant to subsection 4.
6. If application is made for the appointment of counsel for an indigent defendant, the magistrate shall postpone the examination until:
    i. The application has been granted or denied; and
    ii. If the application is granted, the attorney appointed or the public defender has had reasonable time to appear.
7. Unless otherwise provided, a preliminary examination shall be held under the rules and laws applicable to criminal cases tried before a court. The state has the burden of proof and shall proceed first with its case. The preliminary examination is confined to the issues relevant to the determination as to whether there is probable cause to believe that a crime was committed and that the defendant committed said crime. These rules do not abrogate the established case law of the appellate courts of this state regarding preliminary hearings.
8. The defendant may cross-examine witnesses against him or her and may introduce evidence in his or her own behalf.
9. Hearsay evidence consisting of an out of court statement made by the alleged victim of the offense is admissible at a preliminary examination conducted pursuant to this section only if the defendant is charged with one or more of the following offenses:
    i. A sexual offense committed against a child who is under the age of 16 years if the offense is punishable as a felony. As used in this paragraph, "sexual offense" has the meaning ascribed to it in NRS 179D.097;
    ii. Abuse of a child pursuant to NRS 200.508 if the offense is committed against a child who is under the age of 16 years and the offense is punishable as a felony; and
    iii. An act which constitutes domestic violence pursuant to NRS 33.018, which is punishable as a felony and which resulted in substantial bodily harm to the alleged victim.

Commented [TW2]: I added this paragraph

(e) **Discovery by defendant before preliminary examination; material subject to discovery; effect of failure to permit discovery.**[24]

1. At the time a person is brought before a magistrate pursuant to NRS 171.178, or as soon as practicable thereafter, but not less than 5 judicial days before a preliminary examination, the prosecuting attorney shall provide a defendant charged with a felony or a gross misdemeanor with copies of any:
    i. Written or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness or witnesses, or any reports of statements or confessions, or copies thereof, within the possession or custody of the prosecuting attorney;
    ii. Results or reports of physical or mental examinations, scientific tests or scientific experiments made in connection with the particular case, or copies thereof, within the possession or custody of the prosecuting attorney; and
    iii. Books, papers, documents or tangible objects that the prosecuting attorney intends to introduce in evidence during the case in chief of the State, or copies thereof, within the possession or custody of the prosecuting attorney.
2. The defendant is not entitled, pursuant to the provisions of this section, to the discovery or inspection of:
    i. An internal report, document or memorandum that is prepared by or on behalf of the prosecuting attorney in connection with the investigation or prosecution of the case; and
    ii. A statement, report, book, paper, document, tangible object or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this State or the Constitution of the United States.
3. The provisions of this section are not intended to affect any obligation placed upon the prosecuting attorney by the Constitution of this State or the Constitution of the United States to disclose exculpatory evidence to the defendant.
4. The magistrate shall not postpone a preliminary examination at the request of a party based solely on the failure of the prosecuting attorney to permit the defendant to inspect, copy or photograph material as required in this section, unless the court finds that the defendant has been prejudiced by such failure.

(f) **Use of affidavit at preliminary examination: When permitted; notice by district attorney; circumstances under which district attorney must produce person who signed affidavit; continuances.**[25]

1. If a witness resides outside this State or more than 100 miles from the place of a preliminary examination, the witness's affidavit may be used at the preliminary examination if it is necessary for the district attorney to establish as an element of any offense that:

[24] NRS 171.1965.
[25] NRS 171.197.

i. The witness was the owner, possessor or occupant of real or personal property; and
ii. The defendant did not have the permission of the witness to enter, occupy, possess or control the real or personal property of the witness.

2. If a financial institution does not maintain any principal or branch office within this State or if a financial institution that maintains a principal or branch office within this State does not maintain any such office within 100 miles of the place of a preliminary examination, the affidavit of a custodian of the records of the financial institution or the affidavit of any other qualified person of the financial institution may be used at the preliminary examination if it is necessary for the district attorney to establish as an element of any offense that:
   i. When a check or draft naming the financial institution as drawee was drawn or passed, the account or purported account upon which the check or draft was drawn did not exist, was closed or held insufficient money, property or credit to pay the check or draft in full upon its presentation; or
   ii. When a check or draft naming the financial institution as drawee was presented for payment to the financial institution, the account or purported account upon which the check or draft was drawn did not exist, was closed or held insufficient money, property or credit to pay the check or draft in full.
3. If a specific rule or statute allows for the use of an affidavit, the prosecutor may use the affidavit in accordance with the specific rule or statute.
4. The district attorney shall provide either written or oral notice to the defendant's attorney, not less than 10 days before the scheduled preliminary examination, that the district attorney intends to use an affidavit described in this section at the preliminary examination.
5. If, at or before the time of the preliminary examination, the defendant establishes that:
   i. There is a substantial and bona fide dispute as to the facts in an affidavit described in this section; and
   ii. It is in the best interests of justice that the person who signed the affidavit be cross-examined,

   the magistrate may order the district attorney to produce the person who signed the affidavit and may continue the examination for any time it deems reasonably necessary in order to receive such testimony.

(g) **Use of audiovisual technology to present live testimony at preliminary examination: Requirements.**[26]

1. If a witness resides more than 100 miles from the place of a preliminary examination or is unable to attend the preliminary examination because of a medical condition, or if good cause otherwise exists, the magistrate must allow the witness to testify at the preliminary examination through the use of audiovisual technology.
2. If a witness testifies at the preliminary examination through the use of audiovisual technology:

[26] NRS 171.1975.

i. The testimony of the witness must be transcribed by a certified court reporter; and

ii. Before giving testimony, the witness must be sworn and must sign a written declaration, on a form provided by the magistrate, which acknowledges that the witness understands that he or she is subject to the jurisdiction of the courts of this state and may be subject to criminal prosecution for the commission of any crime in connection with his or her testimony, including, without limitation, perjury, and that the witness consents to such jurisdiction.

3. Audiovisual technology used pursuant to this section must ensure that the witness may be:
   i. Clearly heard and seen; and
   ii. Examined and cross-examined.
4. As used in this section, "audiovisual technology" includes, without limitation, closed-circuit video and videoconferencing.

(h) **Reporting testimony of witnesses.**[27]

1. Except as otherwise provided in subsection 2, a magistrate shall employ a certified court reporter to take down all the testimony and the proceedings on the preliminary hearing or examination and, within such time as the court may designate, have such testimony and proceedings transcribed into typewritten transcript.
2. A magistrate who presides over a preliminary hearing in a justice court, in any case other than in a case in which the death penalty is sought, may employ a certified court reporter to take down all the testimony and the proceedings on the hearing or appoint a person to use sound recording equipment to record all the testimony and the proceedings on the hearing. If the magistrate appoints a person to use sound recording equipment to record the testimony and proceedings on the hearing, the testimony and proceedings must be recorded and transcribed in the same manner as set forth in NRS 4.390 to 4.420, inclusive. Any transcript of the testimony and proceedings produced from a recording conducted pursuant to this subsection is subject to the provisions of this section in the same manner as a transcript produced by a certified court reporter.
3. When the testimony of each witness is all taken and transcribed by the reporter, the reporter shall certify to the transcript in the same manner as for a transcript of testimony in the district court, which certificate authenticates the transcript for all purposes of this title.
4. Before the date set for trial, either party may move the court before which the case is pending to add to, delete from or otherwise correct the transcript to conform with the testimony as given and to settle the transcript so altered.
5. The compensation for the services of a reporter employed as provided in this section are the same as provided in NRS 3.370, to be paid out of the county treasury as other claims against the county are allowed and paid.
6. Testimony reduced to writing and authenticated according to the provisions of this section must be filed by the examining magistrate with the clerk of the district court of

[27] NRS 171.198.

the magistrate's county, and if the prisoner is subsequently examined upon a writ of habeas corpus, such testimony must be considered as given before such judge or court. A copy of the transcript must be furnished to the defendant and to the district attorney.

7. The testimony so taken may be used:
    i. By the defendant; or
    ii. By the State if the defendant was represented by counsel or affirmatively waived his or her right to counsel,

upon the trial of the cause, and in all proceedings therein, when the witness is sick, out of the State, dead, or persistent in refusing to testify despite an order of the judge to do so, or when the witness's personal attendance cannot be had in court.

(i) **District attorney to prosecute at preliminary examination where felony or gross misdemeanor charged.** The district attorney of the proper county shall be present at and conduct the prosecution in all preliminary examinations where a felony or gross misdemeanor is charged.

(j) **Exclusion of persons; exceptions.**[28]

1. Except as otherwise provided in subsection 2, the magistrate may, if good cause is shown and upon the request of any party or on the magistrate's own motion, exclude from the examination every person except:
    i. The magistrate's clerk;
    ii. The Attorney General;
    iii. The prosecuting attorney;
    iv. An investigating officer, after the investigating officer has testified as a prosecuting witness and the investigating officer's cross-examination has been completed;
    v. Any counsel for the victim;
    vi. The victim, after the victim has testified as a prosecuting witness and the victim's cross-examination has been completed;
    vii. The defendant and the defendant's counsel;
    viii. The witness who is testifying;
    ix. The officer having the defendant or a witness in the officer's custody;
    x. An attendant to a witness designated pursuant to NRS 178.571; and
    xi. Any other person whose presence is found by the magistrate to be necessary for the proper conduct of the examination.
2. A person who is called as a witness primarily for the purpose of identifying the victim may not be excluded from the examination except in the discretion of the magistrate.
3. As used in this section, "victim" includes any person described in NRS 178.569.

(k) **Procedure following preliminary examination.**[29] If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall forthwith hold the defendant to answer in the district court; otherwise the magistrate shall discharge the defendant. The magistrate shall admit the

[28] NRS 171.204.
[29] NRS 171.206.

defendant to bail as provided in this title. After concluding the proceeding the magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail.

Rule 12 Appointment of Counsel

(a) **Right to Counsel.**[30] A defendant charged with a public offense has the right to self-representation, and if indigent, has the right to court-appointed counsel if the defendant faces a substantial probability of deprivation of liberty.

(b) **Appointment of attorney other than public defender prohibited unless public defender disqualified.**[31] A magistrate, master or a district court shall not appoint an attorney other than a public defender to represent a person charged with any offense or delinquent act by petition, indictment or information unless the magistrate, master or district court makes a finding, entered into the record of the case, that the public defender is disqualified from furnishing the representation and sets forth the reason or reasons for the disqualification.

(c) **Counsel in Capital Case.**[32] In all cases in which counsel is appointed to represent an indigent defendant who is charged with an offense for which the punishment may be death, the court shall appoint two or more attorneys to represent such defendant and shall make a finding on the record based on the requirements set forth below that appointed counsel is proficient in the trial of capital cases. In making its determination, the court shall ensure that the experience of counsel who are under consideration for appointment have met the minimum requirements under SCR 250.

(d) **Attorney Selection in Capital Case.**[33] In making its selection of attorneys for appointment in a capital case, the court should also consider at least the following factors:

1. whether one or more of the attorneys under consideration have previously appeared as counsel or co-counsel in a capital case;
2. the extent to which the attorneys under consideration have sufficient time and support and can dedicate those resources to the representation of the defendant in the capital case now pending before the court with undivided loyalty to the defendant;
3. the extent to which the attorneys under consideration have engaged in the active practice of criminal law in the past five years;
4. the diligence, competency and ability of the attorneys being considered; and
5. any other factor which may be relevant to a determination that counsel to be appointed will fairly, efficiently and effectively provide representation to the defendant.

(e) **Counsel for Capital Case Appeal.**[34] In all cases where an indigent defendant is sentenced to death, the court shall appoint one or more attorneys to represent such defendant on appeal and shall make a finding that counsel is proficient in the appeal of capital cases. To be found proficient to represent on appeal persons sentenced to death, the combined experience of the appointed attorneys must meet the following requirements:

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31 NRS 7.115, NRS 260.065.

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1. at least one attorney must have served as counsel in at least three felony appeals; and
2. at least one attorney must have attended and completed within the past five years an approved continuing legal education course which deals, in substantial part, with the trial or appeal of death penalty cases.

(f) **Counsel for Post-Conviction.**[35] In all cases in which counsel is appointed to represent an indigent petitioner, the court shall appoint one or more attorneys to represent such petitioner at post-conviction trial and on post-conviction appeal and shall make a finding that counsel is qualified to represent persons sentenced to death in post-conviction cases. To be found qualified, the combined experience of the appointed attorneys must meet the following requirements:

1. at least one of the appointed attorneys must have served as counsel in at least three felony or post-conviction appeals;
2. at least one of the appointed attorneys must have appeared as counsel or co-counsel in a post-conviction case at the evidentiary hearing, on appeal, or otherwise demonstrated proficiency in the area of post-conviction litigation;
3. at least one of the appointed attorneys must have attended and completed or taught within the past five years an approved continuing legal education course which dealt, in substantial part, with the trial and appeal of death penalty cases or with the prosecution or defense of post-conviction proceedings in death penalty cases;
4. at least one of the appointed attorneys must have tried to judgment or verdict three civil jury or felony cases within the past four years or ten cases total; and
5. the experience of at least one of the appointed attorneys must total not less than five years in the active practice of law.

(g) **Grounds not Created by Rule.**[36] Mere noncompliance with this rule or failure to follow the guidelines set forth in this rule shall not of itself be grounds for establishing that appointed counsel ineffectively represented the defendant at trial or on appeal.

(h) **Fees of appointed attorney other than public defender.**[37]

1. Except as limited by subsections 2, 3 and 4, an attorney, other than a public defender, who is appointed by a magistrate or a district court to represent or defend a defendant at any stage of the criminal proceedings from the defendant's initial appearance before the magistrate or the district court through the appeal, if any, is entitled to receive a fee for court appearances and other time reasonably spent on the matter to which the appointment is made of $125 per hour in cases in which the death penalty is sought and $100 per hour in all other cases. Except for cases in which the most serious crime is a felony punishable by death or by imprisonment for life with or without possibility of parole, this subsection does not preclude a governmental entity from contracting with a private attorney who agrees to provide such services for a lesser rate of compensation.
2. Except as otherwise provided in subsection 4, the total fee for each attorney in any matter regardless of the number of offenses charged or ancillary matters pursued must not exceed:

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37 NRS 7.125.

i. If the most serious crime is a felony punishable by death or by imprisonment for life with or without possibility of parole, $20,000;
ii. If the most serious crime is a felony other than a felony included in paragraph (a) or is a gross misdemeanor, $2,500;
iii. If the most serious crime is a misdemeanor, $750;
iv. For an appeal of one or more misdemeanor convictions, $750; or
v. For an appeal of one or more gross misdemeanor or felony convictions, $2,500.

3. Except as otherwise provided in subsection 4, an attorney appointed by a district court to represent an indigent petitioner for a writ of habeas corpus or other postconviction relief, if the petitioner is imprisoned pursuant to a judgment of conviction of a gross misdemeanor or felony, is entitled to be paid a fee not to exceed $750.
4. If the appointing court because of:
   i. The complexity of a case or the number of its factual or legal issues;
   ii. The severity of the offense;
   iii. The time necessary to provide an adequate defense; or
   iv. Other special circumstances,

   deems it appropriate to grant a fee in excess of the applicable maximum, the payment must be made, but only if the court in which the representation was rendered certifies that the amount of the excess payment is both reasonable and necessary and the payment is approved by the presiding judge of the judicial district in which the attorney was appointed, or if there is no such presiding judge or if he or she presided over the court in which the representation was rendered, then by the district judge who holds seniority in years of service in office.
5. The magistrate, the district court, the Court of Appeals or the Supreme Court may, in the interests of justice, substitute one appointed attorney for another at any stage of the proceedings, but the total amount of fees granted to all appointed attorneys must not exceed those allowable if but one attorney represented or defended the defendant at all stages of the criminal proceeding.

(i) **Reimbursement for expenses; employment of investigative, expert or other services.**[38] The attorney appointed by a magistrate or district court to represent a defendant is entitled, in addition to the fee provided by NRS 7.125 for the attorney's services, to be reimbursed for expenses reasonably incurred by the attorney in representing the defendant and may employ, subject to the prior approval of the magistrate or the district court in an ex parte application, such investigative, expert or other services as may be necessary for an adequate defense. Compensation to any person furnishing such investigative, expert or other services must not exceed $500, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is:

1. Certified by the trial judge of the court, or by the magistrate if the services were rendered in connection with a case disposed of entirely before the magistrate, as necessary to provide fair compensation for services of an unusual character or duration; and
2. Approved by the presiding judge of the judicial district in which the attorney was appointed or, if there is no presiding judge, by the district judge who holds seniority in years of service in office.

[38] NRS 7.135.

(j) **Claim for compensation and expenses.**[39]

1. A claim for compensation and expenses made pursuant to NRS 7.125 or 7.135 must not be paid unless it is submitted within 60 days after the appointment is terminated to:
    i. The magistrate in cases in which the representation was rendered exclusively before the magistrate; and
    ii. The district court in all other cases.
2. Each claim must be supported by a sworn statement specifying the time expended in court, the services rendered out of court and the time expended therein, the expenses incurred while the case was pending and the compensation and reimbursement applied for or received in the same case from any other source. Except as otherwise provided for the approval of payments in excess of the statutory limit, the magistrate or the court to which the claim is submitted shall fix and certify the compensation and expenses to be paid, and the amounts so certified must be paid in accordance with NRS 7.155.

(k) **Payment of compensation and expenses from county treasury or money appropriated to State Public Defender.**[40] The compensation and expenses of an attorney appointed to represent a defendant must be paid from the county treasury unless the proceedings are based upon a postconviction petition for habeas corpus, in which case the compensation and expenses must be paid from money appropriated to the Office of State Public Defender, but after the appropriation for such expenses is exhausted, money must be allocated to the Office of State Public Defender from the reserve for statutory contingency account for the payment of such compensation and expenses.

(l) **Payment of compensation and expenses by defendant.**[41] If at any time after the appointment of an attorney or attorneys the magistrate or the district court finds that money is available for payment from or on behalf of the defendant so that the defendant is financially able to obtain private counsel or to make partial payment for such representation, the magistrate or the district court may:

1. Terminate the appointment of such attorney or attorneys; or
2. Direct that such money be paid to:
    i. The appointed attorney or attorneys, in which event any compensation provided for in NRS 7.125 shall be reduced by the amount of the money so paid, and no such attorney may otherwise request or accept any payment or promise of payment for representing such defendant; or
    ii. The clerk of the district court for deposit in the county treasury, if all of the compensation and expenses in connection with the representation of such defendant were paid from the county treasury, and remittance to the Office of State Public Defender, if such compensation and expenses were paid partly from moneys appropriated to the Office of State Public Defender and the money received exceeds the amount of compensation and expenses paid from the county treasury.

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[39] NRS 7.145.
[40] NRS 7.155.
[41] NRS 7.165.

(m) **Compensation and expenses on new trial.**[42] For the purposes of compensation and other payments authorized by NRS 7.125 to 7.165, inclusive, an order by a court granting a new trial shall be deemed to initiate a new case.

[42] NRS 7.175.

Rule 13 Hearings With Contemporaneous Transmission From A Different Location.[43]

(a) The court, in its discretion, may conduct the arraignment, bail hearing, and/or initial appearance with a defendant attending by contemporaneous transmission from a different location without the agreement of the parties or waiver of the defendant's attendance in person.

(b) For any other type of hearing, the court may conduct the hearing with a defendant attending by contemporaneous transmission from a different location only if the parties agree and the defendant knowingly and voluntarily waives attendance in person.

(c) For good cause and with appropriate safeguards the court may permit testimony in open court by contemporaneous transmission from a different location if the party not calling the witness waives the right to confront the witness in person.

(d) Nothing in this rule precludes or affects the procedures in rule ***.

[43] .

Rule 14 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 15 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

TITLE IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 16 Arraignment

(a) **Remand for preliminary examination.**[44] If the case involves any felony or gross misdemeanor, a preliminary examination has not been had, and the defendant has not unconditionally waived the examination, the district court may for good cause shown at any time before a plea has been entered or an indictment found remand the defendant for preliminary examination to the appropriate justice of the peace or other magistrate, and the justice or other magistrate shall then proceed with the preliminary examination as provided in this chapter.

(b) **Representation by Counsel, Additional time.** Upon arraignment, unless the defendant makes knowing and voluntary waiver in open court, the following applies: (1) A defendant may be represented by counsel on all misdemeanors; (2) A defendant shall be represented by counsel in all misdemeanor cases in which jail time is mandatory or likely to be imposed; and (3) The defendant shall be represented by counsel in all gross misdemeanor or felony cases. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(c) **Conduct of arraignment.**[45] ***District Court:*** Upon the return of an indictment or upon receipt of the records from the magistrate following a bind-over, the defendant shall be arraigned in the district court in the following manner:

1. Except as otherwise provided in subsection 3, arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating the substance of the charge and calling on the defendant to plead thereto. The defendant may waive the formal reading after being advised of the right.
2. The Court will take the plea to the charge or charges contained in the Information and enter the pleas upon the records of the Court;
3. The Court shall canvass the Defendant to ensure the Defendant understands the rights associate with trial, to wit: (1) The speedy trial right; (2) The right to use the subpoena power of the court to compel witnesses to appear; (3) The right of confrontation; (4) The right to remain silent; and (5) The right to waive the right to remain silent and to give testimony;

Justice/Municipal Court: In the justice court or municipal court, an arraignment on all complaints alleging misdemeanor offenses must be held within 30 days of the advisement hearing. At the arraignment, the magistrate shall conduct the arraignment in open court and shall provide the Defendant an opportunity to have the complaint read in open court and shall call on the Defendant to enter a plea to each offense of the complaint. The defendant may waive the formal reading after being advised of the right. The Court shall also

1. The Court will take the plea to the charge or charges contained in the Complaint and enter the pleas upon the records of the Court; and

[44] NRS 171.208.
[45] NRS 174.015.

2. The Court shall canvass the Defendant to ensure the Defendant understands the rights associate with trial, to wit: (1) The speedy trial right; (2) The right to use the subpoena power of the court to compel witnesses to appear; (3) The right of confrontation; (4) The right to remain silent; and (5) The right to waive the right to remain silent and to give testimony;
3. Before the defendant is called upon to plead, the court shall determine whether the defendant is eligible for assignment to a preprosecution diversion program pursuant to NRS 174.031.

(d) **Proceedings respecting name of defendant; entry of true name in minutes; subsequent proceedings in true name.**[46] When the defendant is arraigned, the defendant must be informed that if the name by which the defendant is prosecuted is not his or her true name the defendant must then declare his or her true name, or be proceeded against by the name in the indictment, information or complaint. If the defendant gives no other name, the court may proceed accordingly; but, if the defendant alleges that another name is his or her true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the information, indictment or complaint may be had against the defendant by that name, referring also to the name by which the defendant was first charged therein.

(e) **Additional Time.** If upon arraignment the defendant requests additional time in which to plead or otherwise respond, a reasonable time may be granted.

(f) **Failure to Appear.** If a defendant has been released on bail, or on his own recognizance, prior to arraignment and thereafter fails to appear for arraignment or trial when required to do so, a warrant of arrest may issue and bail may be forfeited.

[46] NRS 174.025.

Rule 17 Assignment to Preprosecution Diversion Program

(a) **Determination of eligibility; court may order defendant to complete program.**[47]

1. At the arraignment of a defendant in justice court or municipal court, but before the entry of a plea, the court shall determine whether the defendant is eligible for assignment to a preprosecution diversion program established pursuant to NRS 174.032. The court shall receive input from the prosecuting attorney and the attorney for the defendant, if any, whether the defendant would benefit from and is eligible for assignment to the program.
2. A defendant may be determined to be eligible by the court for assignment to a preprosecution diversion program if the defendant:
    i. Is charged with a misdemeanor other than:
        A. A crime of violence as defined in NRS 200.408;
        B. Vehicular manslaughter as described in NRS 484B.657;
        C. Driving under the influence of intoxicating liquor or a controlled substance in violation of NRS 484C.110, 484C.120 or 484C.130; or
        D. A minor traffic offense; and
    ii. Has not previously been:
        A. Convicted of violating any criminal law other than a minor traffic offense; or
        B. Ordered by a court to complete a preprosecution diversion program in this State.
3. If a defendant is determined to be eligible for assignment to a preprosecution diversion program pursuant to subsection 2, the justice court or municipal court may order the defendant to complete the program pursuant to subsection 5 of NRS 174.032.
4. A defendant has no right to complete a preprosecution diversion program or to appeal the decision of the justice court or municipal court relating to the participation of the defendant in such a program.

(b) **Establishment of program; terms and conditions.**[48]

1. A justice court or municipal court may establish a preprosecution diversion program to which it may assign a defendant if he or she is determined to be eligible pursuant to NRS 174.031.
2. If a defendant is determined to be eligible for assignment to a preprosecution diversion program pursuant to NRS 174.031, the justice or municipal court must receive input from the prosecuting attorney, the attorney for the defendant, if any, and the defendant relating to the terms and conditions for the defendant's participation in the program.
3. A preprosecution diversion program established by a justice court or municipal court pursuant to this section may include, without limitation:
    i. A program of treatment which may rehabilitate a defendant, including, without limitation, educational programs, participation in a support group, anger management therapy, counseling or a program of treatment for veterans and members of the military, mental illness or intellectual disabilities or the abuse of alcohol or drugs;

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[47] NRS 174.031.
[48] NRS 174.032.

ii. Any appropriate sanctions to impose on a defendant, which may include, without limitation, community service, restitution, prohibiting contact with certain persons or the imposition of a curfew; and

iii. Any other factor which may be relevant to determining an appropriate program of treatment or sanctions to require for participation of a defendant in the preprosecution diversion program.

4. If the justice court or municipal court determines that a defendant may be rehabilitated by a program of treatment for veterans and members of the military, persons with mental illness or intellectual disabilities or the abuse of alcohol or drugs, the court may refer the defendant to an appropriate program of treatment established pursuant to NRS 176A.250, 176A.280 or 453.580. The court shall retain jurisdiction over the defendant while the defendant completes such a program of treatment.

5. The justice court or municipal court shall, when assigning a defendant to a preprosecution diversion program, issue an order setting forth the terms and conditions for successful completion of the preprosecution diversion program, which may include, without limitation:

i. Any program of treatment the defendant is required to complete;

ii. Any sanctions and the manner in which they must be carried out by the defendant;

iii. The date by which the terms and conditions must be completed by the defendant, which must not be more than 18 months after the date of the order;

iv. A requirement that the defendant appear before the court at least one time every 3 months for a status hearing on the progress of the defendant toward completion of the terms and conditions set forth in the order; and

v. A notice relating to the provisions of subsection 3 of NRS 174.033.

6. A defendant assigned to a preprosecution diversion program shall pay the cost of any program of treatment required by this section to the extent of his or her financial resources. The court shall not refuse to place a defendant in a program of treatment if the defendant does not have the financial resources to pay any or all of the costs of such program.

7. If restitution is ordered to be paid pursuant to subsection 5, the defendant must make a good faith effort to pay the required amount of restitution in full. If the justice court or municipal court determines that a defendant is unable to pay such restitution, the court must require the defendant to enter into a judgment by confession for the amount of restitution.

(c) **Discharge of defendant upon fulfillment of terms and conditions; termination of participation of defendant and order to appear for arraignment.**[49]

1. If the justice court or municipal court determines that a defendant has successfully completed the terms and conditions of a preprosecution diversion program ordered pursuant to subsection 5 of NRS 174.032, the court must discharge the defendant and dismiss the indictment, information, complaint or citation.

2. Discharge and dismissal pursuant to subsection 1 is without adjudication of guilt and is not a conviction for purposes of employment, civil rights or any statute or regulation or license or questionnaire or for any other public or private purpose. Discharge and

[49] NRS 174.033.

dismissal restores the defendant, in the contemplation of the law, to the status occupied before the indictment, information, complaint or citation. The defendant may not be held thereafter under any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge the indictment, information, complaint or citation in response to an inquiry made of the defendant for any purpose.

3. If the justice court or municipal court determines that a defendant has not successfully completed the terms or conditions of a preprosecution diversion program ordered pursuant to subsection 5 of NRS 174.032, the court must issue an order terminating the participation of the defendant in the preprosecution diversion program and order the defendant to appear for an arraignment to enter a plea based on the original indictment, information, complaint or citation pursuant to NRS 174.015.

(d) **Sealing of records after discharge.**[50]

1. If the defendant is discharged and the indictment, information, complaint or citation is dismissed pursuant to NRS 174.033, the justice court or municipal court must order sealed all documents, papers and exhibits in the record of the defendant, minute book entries and entries on dockets, and other documents relating to the case in the custody of such other agencies and officers as are named in the order of the court. The court shall order those records sealed without a hearing unless the district attorney petitions the court, for good cause shown, not to seal the records and requests a hearing thereon.
2. If the justice court or municipal court orders the record of a defendant sealed, the defendant must send a copy of the order to each agency or officer named in the order. Each such agency or officer shall notify the court in writing of its compliance with the order.

[50] NRS 174.034.

Rule 18 Pleas

(a) **Types of pleas; procedure for entering plea.**[51]

1. A defendant may plead not guilty, guilty, guilty but mentally ill or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of nolo contendere, guilty or guilty but mentally ill. In all cases involving a misdemeanor, the prosecution and defense may also agree to a plea in abeyance, wherein the defendant pleads guilty to the offense or offenses in the Complaint.
2. A plea in abeyance means that an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement. In accordance with the order, the proceedings are suspended allowing the defendant to comply with terms and conditions set forth in the plea and abeyance agreement. Any such agreement requires that the defendant waive the right to a speedy trial while the agreement is in place. If at the end of the agreement, the defendant has completed the terms and conditions of the agreement, the agreement shall bind the parties to the terms of the agreement. If the defendant fails to successfully complete the agreement within the timeframe agreed to by the parties, the prosecuting attorney may request that the plea be entered and sentencing proceed. The Court shall require the prosecutor to put on evidence of a violation of the agreement or non-completion of the agreement by the defendant before proceeding to sentencing and shall allow the defendant to contest the prosecutors evidence. In such a hearing, the rules of evidence applicable to a sentencing hearing are applicable.
3. If a plea of guilty or guilty but mentally ill is made in a written plea agreement, the agreement must be in substantially the form prescribed in NRS 174.063. If a plea of guilty or guilty but mentally ill is made orally, the court shall not accept such a plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and consequences of the plea.
4. With the consent of the court and the district attorney, a defendant may enter a conditional plea of guilty, guilty but mentally ill or nolo contendere, reserving in writing the right, on appeal from the judgment, to a review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal must be allowed to withdraw the plea.
5. Upon an unconditional waiver of a preliminary hearing, a defendant and the district attorney may enter into a written conditional plea agreement, subject to the court accepting the recommended sentence pursuant to the agreement.
6. A plea of guilty but mentally ill must be entered not less than 21 days before the date set for trial. A defendant who has entered a plea of guilty but mentally ill has the burden of establishing the defendant's mental illness by a preponderance of the evidence. Except as otherwise provided by specific statute, a defendant who enters such a plea is subject to the same criminal, civil and administrative penalties and procedures as a defendant who pleads guilty.

[51] NRS 174.035.

7. The defendant may, in the alternative or in addition to any one of the pleas permitted by subsection 1, plead not guilty by reason of insanity. A plea of not guilty by reason of insanity must be entered not less than 21 days before the date set for trial. A defendant who has not so pleaded may offer the defense of insanity during trial upon good cause shown. Under such a plea or defense, the burden of proof is upon the defendant to establish by a preponderance of the evidence that:
    i. Due to a disease or defect of the mind, the defendant was in a delusional state at the time of the alleged offense; and
    ii. Due to the delusional state, the defendant either did not:
        A. Know or understand the nature and capacity of his or her act; or
        B. Appreciate that his or her conduct was wrong, meaning not authorized by law.
8. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or guilty but mentally ill or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.
9. A defendant may not enter a plea of guilty or guilty but mentally ill pursuant to a plea bargain for an offense punishable as a felony for which:
    i. Probation is not allowed; or
    ii. The maximum prison sentence is more than 10 years,

    unless the plea bargain is set forth in writing and signed by the defendant, the defendant's attorney, if the defendant is represented by counsel, and the prosecuting attorney.
10. If the court accepts a plea of guilty but mentally ill pursuant to this section, the court shall cause, within 5 business days after acceptance of the plea, on a form prescribed by the Department of Public Safety, a record of that plea to be transmitted to the Central Repository for Nevada Records of Criminal History along with a statement indicating that the record is being transmitted for inclusion in each appropriate database of the National Instant Criminal Background Check System.
11. As used in this section:
    i. "Disease or defect of the mind" does not include a disease or defect which is caused solely by voluntary intoxication.
    ii. "National Instant Criminal Background Check System" has the meaning ascribed to it in NRS 179A.062.

(b) **Proceedings on plea of guilty or guilty but mentally ill in justice court or municipal court.**[52] In a justice court or municipal court, if the defendant pleads guilty or guilty but mentally ill, the court may, before entering such a plea or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed. If it appears to the court that a higher offense has been committed than the offense charged in the complaint, the court may order the defendant to be committed or admitted to bail or to answer any indictment that may be found against the defendant or any information which may be filed by the district attorney.

(c) **Plea bargaining: General requirements; prohibited agreements.**[53]

1. If a prosecuting attorney enters into an agreement with a defendant in which the defendant agrees to testify against another defendant in exchange for a plea of guilty,

[52] NRS 174.055.
[53] NRS 174.061.

guilty but mentally ill or nolo contendere to a lesser charge or for a recommendation of a reduced sentence, the agreement:

i. Is void if the defendant's testimony is false.

ii. Must be in writing and include a statement that the agreement is void if the defendant's testimony is false.

2. A prosecuting attorney shall not enter into an agreement with a defendant which:

i. Limits the testimony of the defendant to a predetermined formula.

ii. Is contingent on the testimony of the defendant contributing to a specified conclusion.

(d) **Written plea agreement for plea of guilty or guilty but mentally ill: Form; contents.**[54]

1. If a plea of guilty or guilty but mentally ill is made in a written plea agreement, the agreement must be substantially in the following form:

Case No. .....
Dept. No. .....

IN THE ..... JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF.....,

The State of Nevada,
PLAINTIFF,

v.

(Name of defendant),
DEFENDANT.

GUILTY OR GUILTY BUT MENTALLY ILL PLEA AGREEMENT

I hereby agree to plead guilty or guilty but mentally ill to: (List charges to which defendant is pleading guilty or guilty but mentally ill), as more fully alleged in the charging document attached hereto as Exhibit 1.

My decision to plead guilty or guilty but mentally ill is based upon the plea agreement in this case which is as follows:

(State the terms of the agreement.)

CONSEQUENCES OF THE PLEA

I understand that by pleading guilty or guilty but mentally ill I admit the facts which support all the elements of the offenses to which I now plead as set forth in Exhibit 1.

I understand that as a consequence of my plea of guilty or guilty but mentally ill I may be imprisoned for a period of not more than (maximum term of imprisonment) and that I (may

[54] NRS 174.063.

or will) be fined up to (maximum amount of fine). I understand that the law requires me to pay an administrative assessment fee.

I understand that, if appropriate, I will be ordered to make restitution to the victim of the offenses to which I am pleading guilty or guilty but mentally ill and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the State of Nevada for expenses relating to my extradition, if any.

I understand that I (am or am not) eligible for probation for the offense to which I am pleading guilty or guilty but mentally ill. (I understand that, except as otherwise provided by statute, the question of whether I receive probation is in the discretion of the sentencing judge, or I understand that I must serve a mandatory minimum term of (term of imprisonment) or pay a minimum mandatory fine of (amount of fine) or serve a mandatory minimum term (term of imprisonment) and pay a minimum mandatory fine of (amount of fine).)

I understand that if more than one sentence of imprisonment is imposed and I am eligible to serve the sentences concurrently, the sentencing judge has the discretion to order the sentences served concurrently or consecutively.

I understand that information regarding charges not filed, dismissed charges or charges to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the court within the limits prescribed by statute. I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the court, the court is not obligated to accept the recommendation.

I understand that the Division of Parole and Probation of the Department of Public Safety may or will prepare a report for the sentencing judge before sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. I understand that this report may contain hearsay information regarding my background and criminal history. My attorney (if represented by counsel) and I will each have the opportunity to comment on the information contained in the report at the time of sentencing.

WAIVER OF RIGHTS

By entering my plea of guilty or guilty but mentally ill, I understand that I have waived the following rights and privileges:

1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.

2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial, the State would bear the burden of proving beyond a reasonable doubt each element of the offense charged.

3. The constitutional right to confront and cross-examine any witnesses who would testify against me.

4. The constitutional right to subpoena witnesses to testify on my behalf.

5. The constitutional right to testify in my own defense.

6. The right to appeal the conviction, with the assistance of an attorney, either appointed or retained, unless the appeal is based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035.

VOLUNTARINESS OF PLEA

I have discussed the elements of all the original charges against me with my attorney (if represented by counsel) and I understand the nature of these charges against me.

I understand that the State would have to prove each element of the charge against me at trial.

I have discussed with my attorney (if represented by counsel) any possible defenses and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights and waiver of rights have been thoroughly explained to me by my attorney (if represented by counsel).

I believe that pleading guilty or guilty but mentally ill and accepting this plea bargain is in my best interest and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney (if represented by counsel) and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

My attorney (if represented by counsel) has answered all my questions regarding this guilty or guilty but mentally ill plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

Dated: This ..... day of the month of ..... of the year .....

.....
Defendant.

Agreed to on this ..... day of the month of ..... of the year .....

.....
Deputy District Attorney.

2. If the defendant is represented by counsel, the written plea agreement must also include a certificate of counsel that is substantially in the following form:

CERTIFICATE OF COUNSEL

I, the undersigned, as the attorney for the defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the defendant the allegations contained in the charges to which guilty or guilty but mentally ill pleas are being entered.

2. I have advised the defendant of the penalties for each charge and the restitution that the defendant may be ordered to pay.

3. All pleas of guilty or guilty but mentally ill offered by the defendant pursuant to this agreement are consistent with all the facts known to me and are made with my advice to the defendant and are in the best interest of the defendant.

4. To the best of my knowledge and belief, the defendant:

(a) Is competent and understands the charges and the consequences of pleading guilty or guilty but mentally ill as provided in this agreement.

(b) Executed this agreement and will enter all guilty or guilty but mentally ill pleas pursuant hereto voluntarily.

(c) Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time of the execution of this agreement.

Dated: This ..... day of the month of ..... of the year .....

.....
Attorney for defendant.

(e) **When plea may specify degree of crime or punishment.**[55] Except as otherwise provided in NRS 174.061:

1. On a plea of guilty or guilty but mentally ill to an information or indictment accusing a defendant of a crime divided into degrees, when consented to by the prosecuting attorney in open court and approved by the court, the plea may specify the degree, and in such event the defendant shall not be punished for a higher degree than that specified in the plea.
2. On a plea of guilty or guilty but mentally ill to an indictment or information for murder of the first degree, when consented to by the prosecuting attorney in open court and approved by the court, the plea may specify a punishment less than death. The specified punishment, or any lesser punishment, may be imposed by a single judge.

[55] NRS 174.065.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 19 Pleadings before Trial

(a) **Pleadings and motions.**[56]

1. Pleadings in criminal proceedings are the indictment, the information and, in justice court, the complaint, and the pleas of guilty, guilty but mentally ill, not guilty, not guilty by reason of insanity and nolo contendere.
2. All other pleas, demurrers and motions to quash are abolished, and defenses and objections raised before trial which could have been raised by one or more of them may be raised only by motion to dismiss or to grant appropriate relief, as provided in Rule **.

(b) **Proceedings not constituting acquittal; effect of acquittal on merits; proceedings constituting bar to another prosecution; retrial after discharge of jury; effect of voluntary dismissal.**[57]

1. If a defendant was formerly acquitted on the ground of a variance between the indictment, information or complaint and proof, or the indictment, information, or complaint was dismissed upon an objection to its form or substance, or in order to hold a defendant for a higher offense without a judgment of acquittal, it is not an acquittal of the same offense.
2. If a defendant is acquitted on the merits, the defendant is acquitted of the same offense, notwithstanding a defect in the form or substance in the indictment, information, or complaint on which the trial was had.
3. When a defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment, information or complaint, except as otherwise provided in subsections 5 and 6, the conviction, acquittal or jeopardy is a bar to another indictment, information or complaint for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which the defendant might have been convicted under that indictment, information or complaint.
4. In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial or after the cause is submitted to them, the cause may be again tried.
5. The prosecuting attorney, in a case that the prosecuting attorney has initiated, may voluntarily dismiss a complaint:
    i. Before a preliminary hearing if the crime with which the defendant is charged is a felony or gross misdemeanor; or
    ii. Before trial if the crime with which the defendant is charged is a misdemeanor,

   without prejudice to the right to file another complaint, unless the State of Nevada has previously filed a complaint against the defendant which was dismissed at the request of the prosecuting attorney. After the dismissal, the court shall order the defendant released from custody or, if the defendant is released on bail, exonerate the obligors and release any bail.
6. If a prosecuting attorney files a subsequent complaint after a complaint concerning the same matter has been filed and dismissed against the defendant:

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[56] NRS 174.075

[57] NRS 174.085.

i. The case must be assigned to the same judge to whom the initial complaint was assigned; and
ii. A court shall not issue a warrant for the arrest of a defendant who was released from custody pursuant to subsection 5 or require a defendant whose bail has been exonerated pursuant to subsection 5 to give bail unless the defendant does not appear in court in response to a properly issued summons in connection with the complaint.

7. The prosecuting attorney, in a case that the prosecuting attorney has initiated, may voluntarily dismiss an indictment or information before the actual arrest or incarceration of the defendant without prejudice to the right to bring another indictment or information. After the arrest or incarceration of the defendant, the prosecuting attorney may voluntarily dismiss an indictment or information without prejudice to the right to bring another indictment or information only upon good cause shown to the court and upon written findings and a court order to that effect.

Rule 20 Motions

(a) **In General**

1. *Requirement of writing and signature.* A pretrial motion shall be in writing and signed by the party making the motion or the attorney for that party. Pretrial motions shall be filed within the time set forth in subdivision (d) of this rule. The writing and signature requirements may be waived by: (1) The opposing party; or (2) by Order of the Court after the moving party has demonstrated good cause as to why the Motion could not have been made in writing with the required notice to the opposing party[58].
2. *Grounds and Affidavit.* A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached.
3. *Service and Notice:* A copy of any pretrial motion and supporting affidavits shall be served on all parties or their attorneys pursuant to Rule 32 at the time the originals are filed. Opposing affidavits shall be served not later than one day before the hearing. For cause shown the requirements of this subdivision may be waived by the court and the time for notice may be shortened.[59]
4. *Memoranda of Law:* The court may require the filing of a memorandum of law, in such form and within such time as the court may direct, as a condition precedent to a hearing on a motion or interlocutory matter. A dispositive motion may not be filed unless accompanied by a memorandum of law, except when otherwise ordered by the court.
5. *Renewal:* Upon a showing that substantial justice requires and good cause similar to the require showing for a Rule 60(b) Motion under the Nevada Rules of Civil Procedure, the court may permit a pretrial motion which has been heard and denied to be renewed.
6. *Certificate of Good Faith:* A certificate of good faith ("certificate") must be filed with any motion, any opposition to a motion, or any reply to an opposition. The certificate shall be signed by the attorney representing the party. If the party is self-represented, the self-represented party must personally sign the certificate. The certificate must indicate that the pleading is filed in good faith and, to the best of the signer's

[58] Based upon NRS 174.125
[59] Based upon NRS 174.125

knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that:

i. The Motion is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
ii. The claims asserted within the Motion are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and
iii. The allegations and other factual contentions within the Motion have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

In the event that the Court or a party believes that the party/attorney has violated the representations in the certificate, the court may follow the procedure under Rule 11(c) of the Nevada Rules of Civil Procedure ("NRCP") in relation to sanctions and may impose such sanctions identified in NRCP Rule 11(c) against the party who violated the representations set forth in the certificate in filing a Motion, Opposition, or Reply.

(b) **Procedure for Submission Of Motions**

1. *Response/Opposition to Motion*: Unless otherwise ordered by the court, any response to a motion filed under NRS 174.105 shall be filed on or before the first business day which falls 10 calendar days, excluding holidays, after service of the motion.
2. *Reply*: Unless otherwise ordered by the court, any reply shall be filed on or before the judicial day which falls 5 calendar days after service of the response.
3. *Request for Submission*: If neither party has advised the court of the filing nor requested a hearing, when the time for filing a response to a motion and the reply has passed, either party may file a request that the motion be submitted for decision ("Request to Submit for Decision"). If a Request to Submit for Decision is filed, the pleading shall be a separate pleading so captioned. The Request to Submit for Decision shall state the date on which the motion was filed, the date on which any response was filed and the date on which any reply was filed. If no party files a written Request to Submit, or the motion has not otherwise been brought to the attention of the court, the motion will not be considered submitted for decision.

(c) **Timing of Motions.**

1. *Thirty Days Rule:* Unless otherwise ordered by the Court or set forth in these rules, all motions in a criminal prosecution that if granted will delay or postpone the time of trial, must be made at least 30 days before trial or prior to the pre-trial conference whichever occurs earlier, or at such time as otherwise order by the court, unless an opportunity to make such a motion before trial did not exist or the moving party was not aware of the grounds for the motion at least 45 days prior to the first day of trial.[60]
2. *Motion for Leave to file Untimely Motion:* In the event that an opportunity to make such a motion before trial did not exist or the moving party was not aware of the grounds for the motion at least 45 days prior to the first day of trial:

[60] Based upon NRS 174.095 and replaces the distinction between single and multiple judge districts in NRS 174.125.

i. If the basis or grounds for such a Motion are discovered prior to trial, a written Motion seeking leave to file the Untimely Motion, which complies with Rule 16, must be filed setting forth the justification for not raising the issue at an earlier date, together with the Motion; or

ii. If the basis or grounds for such a Motion are discovered at trial, a verbal motion for leave may be made, which shall be supported by a statement made under oath, setting forth the justification for not filing a written Motion prior to trial.

3. *Ruling on Motion for Leave to file Untimely Motion:* In ruling on a Motion for Leave, the Court shall determine if the grounds exist to allow the untimely Motion by determining: (1) If the moving party exercised reasonable due diligence prior to seeking leave to file the motion[61]; and (2) Good cause exists which justifies the proposed Motion being brought in an untimely manner. In analyzing the good cause grounds, the Court shall examine the adequacy of the moving party's reasons for failure to comply with applicable rules of procedure and whether the opposing party will be unfairly or unduly prejudiced by the untimely motion.

(d) **Pre-Trial Motions For Self-Represented Defendants.** Whenever an issue concerning the constitutionality of the use of specific evidence against the defendant raises before trial, and the defendant is not represented by counsel, the court shall inform the defendant that:

1. The defendant may, but need not, testify at a pretrial hearing regarding the circumstances surrounding the acquisition of the evidence;
2. If the defendant testifies at the hearing, he or she will be subject to cross-examination by the opposing party;
3. If the defendant does testify at the hearing, he or she does not waive his or her right to remain silent by so testifying; and
4. If the defendant does testify at the hearing, neither this fact nor his or her testimony at the hearing shall be mentioned to the jury unless he or she testifies at trial concerning the same matter.

(e) **Defense Motions[62].**

1. All defenses available to a defendant by plea, other than not guilty, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief.
2. Any defenses and objections based on defects in the institution of the prosecution or in the indictment, information, or complaint must be raised by motion before entry of

[61] The good cause justification required by the rule are soundly based. A defendant waives the right to make certain motions (i.e. Motions to Suppress) if the Motion is not brought before trial commences. The purpose behind such a rule is centered on due process for the State and Defendant to have the issue properly before the Court and considered on its merits. For example, if the court grants a suppression motion and excludes evidence, the rule avoids having the prosecution's appeal rights inadvertently extinguished by double jeopardy protections. Trial courts must adjudicate any suppression issues prior to trial, absent good cause for delaying such rulings until trial. Cf. *Jones v. State*, 395 Md. 97, 909 A.2d 650, 659 (2006) (noting the Maryland procedural rule providing that suppression motions "shall be determined before trial" (citation omitted)). See also *Hill v. State*, 67862, 2016 WL 1616577, at *2 (Nev. App. Apr. 20, 2016) discussing that due diligence must be exercised.

[62] Based upon NRS 174.105.

plea, unless the Court permits the defendant to make file a written motion within a reasonable time thereafter.[63] This provision is subject to the following[64]:

i. If a motion is determined adversely to the defendant, the defendant shall be permitted to plead if the defendant had not previously pleaded. A plea previously entered shall stand.
ii. If the court grants such a motion, the court may also order that bail be continued for a reasonable and specified time pending the filing of a new indictment, information, or complaint.
iii. Nothing in this provision shall be deemed to permit the relating back of a newly filed indictment, information, or complaint to the original filing date of the indictment, information, or complaint for purposes of a statute of limitations.

3. Any other defenses, objections or motions that are capable of determination without trial of the general issue must be raised by motion at least 30 days prior to the commencement of the trial, unless the moving party can demonstrate good cause in that either: (1) An opportunity to make such a motion before trial did not exist; or (2) The moving party was not aware of the grounds for the motion prior to trial.
4. Failure to present any such defense or objection as herein provided constitutes waiver thereof, but the court may, for good cause shown, grant relief from the waiver and permit them to be raised within a reasonable time thereafter.
5. Lack of jurisdiction or the failure of the indictment, information or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.
6. **TBD

(f) **Amendment of Charging Document.** If prior to the close of the State's Case In Chief, the prosecution discovers that the Information or Complaint needs to be amended because there exists a material variance between the evidence and the allegations of the pleading, the prosecutor may move to amend the pleadings to conform to the evidence. The Court may order that the Complaint or Information be amended to conform to the evidence or grant such other relief as justice requires.

(g) **Dispositive Motions.**

1. The following are considered Dispositive Motions and shall be raised by motion at least 30 days prior to trial, or at such time as otherwise ordered by the court if good cause exists to allow the Motion to be raised later:
   i. Motions to suppress evidence on the grounds that the evidence was illegally obtained;
   ii. Requests for a severance of charges or defendants;
   iii. Matters which go to legality of arrest;
   iv. All motions in limine to exclude or admit evidence;
   v. Motions to dismiss based on former jeopardy;

[63] NRS 174.105 and NRS 174.115.
[64] NRS 174.145 *Effect of Determination.*

vi. Motion for the withdrawal of counsel;
vii. Motions to admit other act evidence under NRS 48.035 or 48.045;
viii. Motion to declare that Defendant is intellectually disabled; or
ix. Motions which by their nature, if granted, delay or postpone the time of trial.

2. *Motion to Suppress Evidence:* A motion to suppress evidence under shall:
   i. Describe with particularity the evidence and/or testimony sought to be suppressed;
   ii. Set forth the standing of the movant to make the motion; and
   iii. Provide specific sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of the issues and enable the court to determine what proceedings are appropriate to address the issues and grounds so raised.
3. *Motions to admit other act evidence under NRS 48.035 or 48.045.* A Motion seeking to have a defendant declared intellectually disabled shall:
   i. The party seeking to introduce the evidence must file a Motion which states with particularity the evidence and/or testimony sought to be introduced;
   ii. The motion must state why the evidence is relevant to the crime charged and the particular portion of the statute that would allow its admission;
   iii. At the hearing on the Motion, the party seeking to introduce the evidence must prove by clear and convincing evidence the particular act(s); and
   iv. The motion and evidence must establish that the probative value is not substantially outweighed by the danger of unfair prejudice.
4. *Motion to declare that Defendant is intellectually disabled.*[65] A Motion seeking to have a defendant, who is charged with murder in the first degree and the State is seeking to impose the death penalty, declared intellectually disabled shall be subject to the following:
   i. Be filed not less than 60[66] days prior the date set for the pre-trial conference[67], file a motion to declare that the defendant is intellectually disabled.
   ii. If a defendant files a motion pursuant to this section, the court shall:
      A. Stay the proceedings pending a decision on the issue of intellectual disability; and
      B. Hold a hearing within a reasonable time before the trial to determine whether the defendant is intellectually disabled.
   iii. The court shall order the defendant to:
      A. Provide evidence which demonstrates that the defendant is intellectually disabled not less than 30 days before the date set for a hearing conducted pursuant to subsection (d)(ii); and

[65] NRS 174.098. ***This portion of the rule should be decided by the committee that is analyzing these issues and maybe a section of special death penalty case provisions should be created by a separate rule.***

[66] This was originally set for ten days. Given the reality of death penalty cases and the time it takes to get to a trial, it would seem that this issue could and should be resolved at a much earlier stage than in the last days before a trial.

[67] Statute provides trial. One of the goals of the Motion committee was to have these issues addressed at earlier dates.

B. Undergo an examination by an expert selected by the prosecution on the issue of whether the defendant is intellectually disabled at least 15 days before the date set for a hearing pursuant to subsection (d)(ii).

iv. For the purpose of the hearing conducted pursuant to subsection (d)(ii), there is no privilege for any information or evidence provided to the prosecution or obtained by the prosecution pursuant to subsection (d)(iii).

v. At a hearing conducted pursuant to subsection (d)(ii):

A. The court must allow the defendant and the prosecution to present evidence and conduct a cross-examination of any witness concerning whether the defendant is intellectually disabled; and

B. The defendant has the burden of proving by a preponderance of the evidence that the defendant is intellectually disabled.

vi. If the court determines based on the evidence presented at a hearing conducted pursuant to subsection 2 that the defendant is intellectually disabled, the court must make such a finding in the record and strike the notice of intent to seek the death penalty. Such a finding may be appealed pursuant to NRS 177.015.

vii. For the purposes of this section of the Rule, "intellectually disabled" means significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period.

Rule 21 Joinder/Consolidation of Cases and Relief Therefrom

(a) **Trial together of indictments or informations.**[68] The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

(b) **A motion to consolidate cases.**[69] A motion to consolidate cases shall be heard by the judge assigned to the first case filed. Notice of a motion to consolidate cases shall be given to all parties in each case. The order denying or granting the motion shall be filed in each case.

(c) **Case number.**[70] If a motion to consolidate is granted, the case number of the first case filed shall be used for all subsequent papers and the case shall be heard by the judge assigned to the first case. The presiding judge may assign the case to another judge for good cause.

(d) **Relief from prejudicial joinder.**[71]

1. If it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.
2. In ruling on a motion by a defendant for severance the court may order the district attorney to deliver to the court for inspection in chambers any statements or confessions made by the defendants which the State intends to introduce in evidence at the trial.

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[68] NRS 174.155.

[69]

[70] .

[71] NRS 174.165.

Rule 22 Depositions

(a) **Applicability.**[72] The provisions of NRS 174.171 to 174.225, inclusive, do not apply to a deposition taken pursuant to NRS 174.227 or used pursuant to NRS 174.228, or both.

(b) **When taken.**[73]

1. If it appears that a prospective witness is an older person or a vulnerable person or may be unable to attend or prevented from attending a trial or hearing, that the witness's testimony is material and that it is necessary to take the witness's deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment, information or complaint may, upon motion of a defendant or of the State and notice to the parties, order that the witness's testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If the motion is for the deposition of an older person or a vulnerable person, the court may enter an order to take the deposition only upon good cause shown to the court. If the deposition is taken upon motion of the State, the court shall order that it be taken under such conditions as will afford to each defendant the opportunity to confront the witnesses against him or her.
2. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court, on written motion of the witness and upon notice to the parties, may direct that the witness's deposition be taken. After the deposition has been subscribed, the court may discharge the witness.
3. This section does not apply to the prosecutor, or to an accomplice in the commission of the offense charged.
4. As used in this section:
   (a) "Older person" means a person who is 70 years of age or older.
   (b) "Vulnerable person" has the meaning ascribed to it in NRS 200.5092.

(c) **Notice of taking.**[74] The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(d) **Defendant's counsel and payment of expenses.**[75] If a defendant is without counsel the court shall advise the defendant of his or her right and assign counsel to represent the defendant unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of the court reporter and of travel and subsistence of the defendant's attorney for attendance at the examination must be paid as provided in NRS 7.135.

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[72] NRS 174.171.
[73] NRS 174.175.
[74] NRS 174.185.
[75] NRS 174.195.

(e) **How taken.**[76] A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(f) **Use of deposition.**[77]

1. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears:
    i. That the witness is dead;
    ii. That the witness is out of the State of Nevada, unless it appears that the absence of the witness was procured by the party offering the deposition;
    iii. That the witness cannot attend or testify because of sickness or infirmity;
    iv. That the witness has become of unsound mind; or
    v. That the party offering the deposition could not procure the attendance of the witness by subpoena.
2. Any deposition may also be used by any party to contradict or impeach the testimony of the deponent as a witness.
3. If only a part of a deposition is offered in evidence by a party, an adverse party may require the party to offer all of it which is relevant to the part offered and any party may offer other parts.

(g) **Objections to admissibility.**[78] Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

(h) **Videotaped depositions: Order of court; notice to parties; cross-examination; use.**[79]

1. A court on its own motion or on the motion of the district attorney may, for good cause shown, order the taking of a videotaped deposition of:
    i. A victim of sexual abuse as that term is defined in NRS 432B.100;
    ii. A prospective witness in any criminal prosecution if the witness is less than 14 years of age; or
    iii. A victim of sex trafficking as that term is defined in subsection 2 of NRS 201.300. There is a rebuttable presumption that good cause exists where the district attorney seeks to take the deposition of a person alleged to be the victim of sex trafficking.

   The court may specify the time and place for taking the deposition and the persons who may be present when it is taken.
2. The district attorney shall give every other party reasonable written notice of the time and place for taking the deposition. The notice must include the name of the person to be examined. On the motion of a party upon whom the notice is served, the court:
   (a) For good cause shown may release the address of the person to be examined; and
   (b) For cause shown may extend or shorten the time.
3. If at the time such a deposition is taken, the district attorney anticipates using the deposition at trial, the court shall so state in the order for the deposition and the accused

[76] NRS 174.205.
[77] NRS 174.215.
[78] NRS 174.225.
[79] NRS 174.227.

must be given the opportunity to cross-examine the deponent in the same manner as permitted at trial.

4. Except as limited by NRS 174.228, the court may allow the videotaped deposition to be used at any proceeding in addition to or in lieu of the direct testimony of the deponent. It may also be used by any party to contradict or impeach the testimony of the deponent as a witness. If only a part of the deposition is offered in evidence by a party, an adverse party may require the party to offer all of it which is relevant to the part offered and any party may offer other parts.

(i) **Videotaped depositions: Use.**[80] A court may allow a videotaped deposition to be used instead of the deponent's testimony at trial only if:

1. In the case of a victim of sexual abuse, as that term is defined in NRS 432B.100:
    i. Before the deposition is taken, a hearing is held by a justice of the peace or district judge who finds that:
        A. The use of the videotaped deposition in lieu of testimony at trial is necessary to protect the welfare of the victim; and
        B. The presence of the accused at trial would inflict trauma, more than minimal in degree, upon the victim; and
    ii. At the time a party seeks to use the deposition, the court determines that the conditions set forth in subparagraphs (1) and (2) of paragraph (a) continue to exist. The court may hold a hearing before the use of the deposition to make its determination.
2. In the case of a victim of sex trafficking as that term is defined in subsection 2 of NRS 201.300:
    i. Before the deposition is taken, a hearing is held by a justice of the peace or district judge and the justice or judge finds that cause exists pursuant to paragraph (c) of subsection 1 of NRS 174.227; and
    ii. Before allowing the videotaped deposition to be used at trial, the court finds that the victim is unavailable as a witness.
3. In all cases:
    i. A justice of the peace or district judge presides over the taking of the deposition;
    ii. The accused is able to hear and see the proceedings;
    iii. The accused is represented by counsel who, if physically separated from the accused, is able to communicate orally with the accused by electronic means.
    iv. The accused is given an adequate opportunity to cross-examine the deponent subject to the protection of the deponent deemed necessary by the court; and
    v. The deponent testifies under oath.

(j) **Videotaped testimony.**[81] If a prospective witness who is scheduled to testify before a grand jury or at a preliminary hearing is less than 14 years of age, the court shall, upon the motion of the district attorney, and may, upon its own motion, order the child's testimony to be videotaped at the time it is given.

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[80] NRS 174.228.
[81] NRS 174.229.

(k) **Effect of NRS 174.227, 174.228 and 174.229.**[82] The provisions of NRS 174.227, 174.228 and 174.229 do not preclude:

1. The submission of videotaped depositions or testimony which are otherwise admissible as evidence in court.
2. A victim or prospective witness from testifying at a proceeding without the use of his or her videotaped deposition or testimony.

[82] NRS 174.231.

Rule 23 Discovery

(a) **Disclosure by defendant of intent to claim alibi; defendant to disclose list of alibi witnesses; prosecuting attorney to disclose list of rebuttal witnesses; continuing duty to disclose; sanctions.**[83]

1. In addition to the written notice required by NRS 174.234, a defendant in a criminal case who intends to offer evidence of an alibi in his or her defense shall, not less than 10 days before trial or at such other time as the court may direct, file and serve upon the prosecuting attorney a written notice of the defendant's intention to claim the alibi. The notice must contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as are known to defendant or the defendant's attorney, the names and last known addresses of the witnesses by whom the defendant proposes to establish the alibi.
2. Not less than 10 days after receipt of the defendant's list of witnesses, or at such other time as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and last known addresses, as particularly as are known to the prosecuting attorney, of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause.
3. Both the defendant and the prosecuting attorney have a continuing duty to disclose promptly the names and last known addresses of additional witnesses which come to the attention of either party after filing their respective lists.
4. If a defendant fails to file and serve a copy of the notice required by this section, the court may exclude evidence offered by the defendant to prove an alibi, except the testimony of the defendant. If the notice is given by a defendant, the court may exclude the testimony of any witness offered by the defendant to prove an alibi if the name and last known address of the witness, as particularly as are known to the defendant or the defendant's attorney, are not stated in the notice.
5. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as required by this section, the court may exclude evidence offered by the State in rebuttal to the defendant's evidence of alibi. If the list is filed and served by the prosecuting attorney, the court may exclude the testimony of any witness offered by the prosecuting attorney for the purpose of rebutting the evidence of alibi if the name and last known address of the witness, as particularly as are known to the prosecuting attorney, are not stated in the notice. For good cause shown the court may waive the requirements of this section.

(b) **Reciprocal disclosure of lists of witnesses and information relating to expert testimony; continuing duty to disclose; protective orders; sanctions.**[84]

1. Except as otherwise provided in this section, not less than 5 judicial days before trial or at such other time as the court directs:
    i. If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony:
        A. The defendant shall file and serve upon the prosecuting attorney a written notice containing the names and last known addresses of all witnesses the defendant intends to call during the case in chief of the defendant; and

[83] NRS 174.233.
[84] NRS 174.234.

B. The prosecuting attorney shall file and serve upon the defendant a written notice containing the names and last known addresses of all witnesses the prosecuting attorney intends to call during the case in chief of the State.

ii. If the defendant will not be tried for any offenses that are punishable as a gross misdemeanor or felony:

A. The defendant shall file and serve upon the prosecuting attorney a written notice containing the name and last known address of any witness the defendant intends to call during the case in chief of the defendant whose name and last known address have not otherwise been provided to the prosecuting attorney pursuant to NRS 174.245; and

B. The prosecuting attorney shall file and serve upon the defendant a written notice containing the name and last known address or place of employment of any witness the prosecuting attorney intends to call during the case in chief of the State whose name and last known address or place of employment have not otherwise been provided to the defendant pursuant to NRS 171.1965 or 174.235.

2. If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the State or during the case in chief of the defendant is expected to offer testimony as an expert witness, the party who intends to call that witness shall file and serve upon the opposing party, not less than 21 days before trial or at such other time as the court directs, a written notice containing:
   i. A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony;
   ii. A copy of the curriculum vitae of the expert witness; and
   iii. A copy of all reports made by or at the direction of the expert witness.
3. After complying with the provisions of subsections 1 and 2, each party has a continuing duty to file and serve upon the opposing party:
   i. Written notice of the names and last known addresses of any additional witnesses that the party intends to call during the case in chief of the State or during the case in chief of the defendant. A party shall file and serve written notice pursuant to this paragraph as soon as practicable after the party determines that the party intends to call an additional witness during the case in chief of the State or during the case in chief of the defendant. The court shall prohibit an additional witness from testifying if the court determines that the party acted in bad faith by not including the witness on the written notice required pursuant to subsection 1.
   ii. Any information relating to an expert witness that is required to be disclosed pursuant to subsection 2. A party shall provide information pursuant to this paragraph as soon as practicable after the party obtains that information. The court shall prohibit the party from introducing that information in evidence or shall prohibit the expert witness from testifying if the court determines that the party acted in bad faith by not timely disclosing that information pursuant to subsection 2.
4. Each party has a continuing duty to file and serve upon the opposing party any change in the last known address, or, if applicable, last known place of employment, of any witness

that the party intends to call during the case in chief of the State or during the case in chief of the defendant as soon as practicable after the party obtains that information.

5. Upon a motion by either party or the witness, the court shall prohibit disclosure to the other party of the address of the witness if the court determines that disclosure of the address would create a substantial threat to the witness of bodily harm, intimidation, coercion or harassment. If the court prohibits disclosure of an address pursuant to this subsection, the court shall, upon the request of a party, provide the party or the party's attorney or agent with an opportunity to interview the witness in an environment that provides for protection of the witness.
6. In addition to the sanctions and protective orders otherwise provided in subsections 3 and 5, the court may upon the request of a party:
    i. Order that disclosure pursuant to this section be denied, restricted or deferred pursuant to the provisions of NRS 174.275; or
    ii. Impose sanctions pursuant to subsection 2 of NRS 174.295 for the failure to comply with the provisions of this section.
7. A party is not entitled, pursuant to the provisions of this section, to the disclosure of the name or address of a witness or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this state or the Constitution of the United States.

(c) **Disclosure by prosecuting attorney of evidence relating to prosecution; limitations.**[85]

1. Except as otherwise provided in NRS 174.233 to 174.295, inclusive, at the request of a defendant, the prosecuting attorney shall permit the defendant to inspect and to copy or photograph any:
    i. Written or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the State, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney;
    ii. Results or reports of physical or mental examinations, scientific tests or scientific experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; and
    iii. Books, papers, documents, tangible objects, or copies thereof, which the prosecuting attorney intends to introduce during the case in chief of the State and which are within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney.
2. The defendant is not entitled, pursuant to the provisions of this section, to the discovery or inspection of:
    i. An internal report, document or memorandum that is prepared by or on behalf of the prosecuting attorney in connection with the investigation or prosecution of the case.

[85] NRS 174.235.

ii. A statement, report, book, paper, document, tangible object or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this state or the Constitution of the United States.

3. The provisions of this section are not intended to affect any obligation placed upon the prosecuting attorney by the Constitution of this state or the Constitution of the United States to disclose exculpatory evidence to the defendant.

(d) **Disclosure by defendant of evidence relating to defense; limitations.**[86]

1. Except as otherwise provided in NRS 174.233 to 174.295, inclusive, at the request of the prosecuting attorney, the defendant shall permit the prosecuting attorney to inspect and to copy or photograph any:
   i. Written or recorded statements made by a witness the defendant intends to call during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant;
   ii. Results or reports of physical or mental examinations, scientific tests or scientific experiments that the defendant intends to introduce in evidence during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant; and
   iii. Books, papers, documents or tangible objects that the defendant intends to introduce in evidence during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant.
2. The prosecuting attorney is not entitled, pursuant to the provisions of this section, to the discovery or inspection of:
   i. An internal report, document or memorandum that is prepared by or on behalf of the defendant or the defendant's attorney in connection with the investigation or defense of the case.
   ii. A statement, report, book, paper, document, tangible object or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this state or the Constitution of the United States.

(e) **Protective orders.**[87] Upon a sufficient showing, the court may at any time order that discovery or inspection pursuant to NRS 174.234 to 174.295, inclusive, be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the defendant or prosecuting attorney, the court may permit the defendant or prosecuting attorney to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in chambers. If the court enters an order granting relief following a showing in chambers, the entire text of the written statement must be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

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[86] NRS 174.245.
[87] NRS 174.275.

(f) **Time limits.**[88]

1. A request made pursuant to NRS 174.235 or 174.245 may be made only within 30 days after arraignment or at such reasonable later time as the court may permit. A subsequent request may be made only upon a showing of cause why the request would be in the interest of justice.
2. A party shall comply with a request made pursuant to NRS 174.235 or 174.245 not less than 30 days before trial or at such reasonable later time as the court may permit.

(g) **Continuing duty to disclose; failure to comply; sanctions.**[89]

1. If, after complying with the provisions of NRS 174.235 to 174.295, inclusive, and before or during trial, a party discovers additional material previously requested which is subject to discovery or inspection under those sections, the party shall promptly notify the other party or the other party's attorney or the court of the existence of the additional material.
2. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with the provisions of NRS 174.234 to 174.295, inclusive, the court may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

[88] NRS 174.285.
[89] NRS 174.295.

Rule 24 Subpoena

(a) **Subpoena for attendance of witnesses; form; issuance.**[90] Except as provided in NRS 172.195 and 174.315:

1. A subpoena must be issued by the clerk under the seal of the court. It must state the name of the court and the title, if any, of the proceeding, and must command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank, to a party requesting it, who shall fill in the blanks before it is served.
2. A subpoena must be issued by a justice of the peace in a proceeding before the justice of the peace under the seal of the court.

(b) **Issuance of subpoena by prosecuting attorney or attorney for defendant; promise to appear; informing witness of general nature of grand jury's inquiry; calendaring of certain subpoenas.**[91]

1. A prosecuting attorney may issue subpoenas subscribed by the prosecuting attorney for witnesses within the State, in support of the prosecution or whom a grand jury may direct to appear before it, upon any investigation pending before the grand jury.
2. A prosecuting attorney or an attorney for a defendant may issue subpoenas subscribed by the issuer for:
    i. Witnesses within the State to appear before the court at which a preliminary hearing is to be held or an indictment, information or criminal complaint is to be tried.
    ii. Witnesses already subpoenaed who are required to reappear in any Justice Court at any time the court is to reconvene in the same case within 60 days, and the time may be extended beyond 60 days upon good cause being shown for its extension.
3. Witnesses, whether within or outside of the State, may accept delivery of a subpoena in lieu of service, by a written or oral promise to appear given by the witness. Any person who accepts an oral promise to appear shall:
    i. Identify himself or herself to the witness by name and occupation;
    ii. Make a written notation of the date when the oral promise to appear was given and the information given by the person making the oral promise to appear identifying the person as the witness subpoenaed; and
    iii. Execute a certificate of service containing the information set forth in paragraphs (a) and (b).
4. A peace officer may accept delivery of a subpoena in lieu of service, via electronic means, by providing a written promise to appear that is transmitted electronically by any appropriate means, including, without limitation, by electronic mail transmitted through the official electronic mail system of the law enforcement agency which employs the peace officer.
5. A prosecuting attorney shall orally inform any witness subpoenaed as provided in subsection 1 of the general nature of the grand jury's inquiry before the witness testifies. Such a statement must be included in the transcript of the proceedings.

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[90] NRS 174.305.
[91] NRS 174.315.

6. Any subpoena issued by an attorney for a defendant for a witness to appear before the court at which a preliminary hearing is to be held must be calendared by filing a motion that includes a notice of hearing setting the matter for hearing not less than 2 full judicial days after the date on which the motion is filed. A prosecuting attorney may oppose the motion orally in open court. A subpoena that is properly calendared pursuant to this subsection may be served on the witness unless the court quashes the subpoena.

(c) **Production of prisoner as witness.**[92]

1. When it is necessary to have a person imprisoned in the state prison brought before any district court, or a person imprisoned in the county jail brought before a district court sitting in another county, an order for that purpose may be made by the district court or district judge, at chambers, and executed by the sheriff of the county when it is made. The order can only be made upon motion of a party upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.
2. When a person required as a witness before a district court is imprisoned, the judge thereof may order the sheriff to bring the prisoner before the court at the expense of the State or, in the judge's discretion, at the expense of the defendant.

(d) **Subpoena for production of documentary evidence and of objects.**[93]

1. Except as otherwise provided in NRS 172.139, a subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein.
2. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.
3. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time before the trial or before the time when they are to be offered in evidence and may, upon their production, permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(e) **Service of subpoena.**[94]

1. Except as otherwise provided in NRS 174.315 and subsection 2, a subpoena may be served by a peace officer or by any other person who is not a party and who is not less than 18 years of age. Except as otherwise provided in NRS 289.027, service of a subpoena must be made by delivering a copy thereof to the person named.
2. Except as otherwise provided in NRS 174.315, a subpoena to attend a misdemeanor trial may be served by mailing the subpoena to the person to be served by registered or certified mail, return receipt requested from that person, in a sealed postpaid envelope, addressed to the person's last known address, not less than 10 days before the trial which the subpoena commands the person to attend.
3. If a subpoena is served by mail, a certificate of the mailing must be filed with the court within 2 days after the subpoena is mailed.

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92 NRS 174.325.
93 NRS 174.335.
94 NRS 174.345.

(f) **Place of service.**[95] A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the State of Nevada.

(g) **Subpoena for taking depositions; place of examination.**[96]

1. An order to take a deposition authorizes the issuance by the clerk of the court for the county in which the deposition is to be taken of subpoenas for the persons named or described therein.
2. A resident of this state may be required to attend an examination only in the county wherein the resident resides or is employed or transacts business in person. A nonresident of this state may be required to attend only in the county where the nonresident is served with a subpoena or within 40 miles from the place of service or at such other place as is fixed by the court.

(h) **Contempt.**[97] Failure by any person without an adequate excuse to obey a subpoena of a court, a prosecuting attorney or an attorney for a defendant served upon the person or, in the case of a subpoena issued by a prosecuting attorney or an attorney for a defendant, delivered to the person and accepted, shall be deemed a contempt of the court from which the subpoena issued or, in the case of a subpoena issued by a prosecuting attorney or an attorney for a defendant, of the court in which a preliminary hearing is to be held, an investigation is pending or an indictment, information or complaint is to be tried.

[95] NRS 174.365.
[96] NRS 174.375
[97] NRS 174.385

Rule 25 Attendance of Witness Outside State

(a) **Definitions.**[98] As used in NRS 174.395 to 174.445, inclusive:

1. "State" shall include any territory of the United States and the District of Columbia.
2. "Summons" shall include a subpoena, order or other notice requiring the appearance of a witness.
3. "Witness" shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

(b) **Summoning witness in this State to testify in another state.**[99]

1. If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this State certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this State is a material witness in such prosecution, or grand jury investigation, and that the person's presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.
2. If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence (and of any other state through which the witness may be required to pass by ordinary course of travel), will give the witness protection from arrest and the service of civil and criminal process, the judge shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.
3. If the certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure the witness's attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before the judge for hearings; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability, may, in lieu of issuing subpoena or summons, order that the witness be forthwith taken into custody and delivered to an officer of the requesting state.
4. If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the amount required by NRS 50.225 for subsistence and travel expenses, fails without good cause to attend and testify as directed in the

[98] NRS 174.405.
[99] NRS 174.415.

summons, the witness shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State.

(c) **Witness from another state summoned to testify in this State.**[100]

1. If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this State, is a material witness in a prosecution pending in a court of record in this State, or in a grand jury investigation which has commenced or is about to commence, a judge of such a court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this State to ensure the witness's attendance in this State. This certificate must be presented to a judge of a court of record in the county in which the witness is found.
2. If the witness is summoned to attend and testify in this State the witness is entitled to receive the amount required by NRS 50.225 for subsistence and travel expenses. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this State a longer period of time than the period mentioned in the certificate unless otherwise ordered by the court. If such witness, after coming into this State, fails without good cause to attend and testify as directed in the summons, the witness shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State.

(d) **Exemption from arrest and service of process.**[101]

1. If a person comes into this state in obedience to a summons directing the person to attend and testify in this state the person shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before the person's entrance into this state under the summons.
2. If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, the person shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before the person's entrance into this state under the summons.

(e) **Uniformity of interpretation.**[102] NRS 174.395 to 174.445, inclusive, shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of the states which enact them.

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100 NRS 174.425.
101 NRS 174.435.
102 NRS 174.445.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 26 Pre-trial Conference[103]

(a) **Pre-trial Conference.** Unless otherwise ordered by the trial court, the trial court shall hold a scheduled mandatory pre-trial conference with trial counsel present at least 30 days prior to a trial to consider such matters as will promote a fair and expeditious trial. The defendant shall be present unless he waives his right to appear and the Court orders that the Defendant not be required to appear.

(b) **Dispositive Motions.** Any motion, defense or objection not previously raised by motion prior to the pre-trial conference as required under the Nevada Rules of Criminal Procedure shall be precluded, unless the basis thereof was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises the issue promptly upon learning of it.

(c) **Issues, Jury Instructions.** The parties shall identify the issues of fact which must be determined at trial by the trier of fact and, if a jury trial is to be held, provide the Court with written jury instructions for consideration.

(d) **Pretrial Order.** At the conclusion of the conference, a pretrial order shall set out the matters ruled upon. Any stipulations made shall be signed by counsel, approved by the court and filed, and shall be binding upon the parties at trial, on appeal, and in postconviction proceedings unless set aside or modified by the court.

[103] Partly replaces NRS 174.135.

Rule 27 [Reserved]

Rule 28 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

TITLE V. VENUE

Rule 29 Disability/Disqualification Of A Judge

(a) **Disability After Start Of Trial.** If, by reason of death, sickness, or other disability, the judge before whom a trial has begun is unable to continue with the trial, any other judge of that court or any judge assigned by the Administrative Office of the Courts, upon certifying that the judge is familiar with the record of the trial, may, unless otherwise disqualified, proceed with and finish the trial, but if the assigned judge is satisfied that neither he nor another substitute judge can proceed with the trial, the judge may, in his discretion, grant a new trial.

(b) **Disability After Trial Completed, Prior To Sentencing.** If, by reason of death, sickness, or other disability, the judge before whom a defendant has been tried is unable to perform the duties required of the court after a verdict of guilty, any other judge of that district or township or any other judge assigned by the Administrative Office of the Courts may perform those duties.

(c) **Disqualification of Judge:**

1. Disqualification of a Judge is governed by NRS 1.230 *et. seq.* and the Nevada Code of Judicial Conduct ("NCJC"). The party seeking disqualification must file a Motion to Disqualify and shall comply with the provisions in Rule ** pertaining to Motions.
2. If a Motion to Disqualify is filed, the other parties to the action may not file an opposition to the motion and if any response is filed it will not be considered. The moving party need not file a Request to Submit for Decision. The motion will be submitted for decision upon filing in accordance with the NRS 1.235 and may be decided under the statutory provision in chapter 1 of the NRS or under NCJC.
3. Should the assigned judge file an answer in response to the Motion for Disqualification in accordance with NRS 1.235(6), no party is allowed to file a responsive pleading to the Answer filed by the judge.

Rule 30 Change of Judge As A Matter of Right[104]

(a) **Notice of change.** In any criminal action commenced after July 1, 2019 in any district or justice court, all parties joined in the action may, by unanimous agreement and without cause, change the judge assigned to the action by filing a written notice of a peremptory challenge and request for change of judge.

(b) **Contents of Notice.** The parties shall send a copy of the notice to the assigned judge, and, in districts with more than one judge, to the presiding judge. The notice shall be signed by: The district attorney or assigned deputy district attorney; The Defendant(s) personally; and By each attorney appearing in the action as a representative of a defendant to the action. The notice shall state in separate clearly identified sections:

1. The name of the assigned judge;
2. The date on which the action was commenced through the filing of a complaint in the justice's court;
3. That all parties joined in the action have agreed to the change;
4. That no other persons are expected to be named as parties;
5. Either:
    i. The date of the advisement/arraignment of the charges on a misdemeanor in justice's court;
    ii. The date of the bindover/indictment on a felony or gross misdemeanor charge in a single judge district; or
    iii. The date of arraignment in a multiple judge district; and

That a good faith effort has been made to serve all parties named in the pleadings.

Failure to follow the exact requirements of this subsection renders the notice invalid and precludes any change of judge under this rule.

(c) **Restrictions.** The notice shall not specify any reason for the change of judge. Under no circumstances shall more than one change of judge be allowed under this rule in any action. A change of judge under this rule is available only after a judge has been assigned to the case for arraignment or for preliminary hearing. A notice of change may not be filed during a preliminary examination.

(d) **Time.** The notice shall be filed: (1) To remove the assigned justice of the peace: (i) Ten days after the filing in the Justice's Court of a complaint alleging a felony or gross misdemeanor charge; or (ii) Within ten calendar days after the arraignment on a misdemeanor in the justice's court; and (2) To remove the assigned district judge: (i) No later than fourteen (14) days after bind-over from justice's court to the district court, or the indictment, in a single judge district; and (ii) No later than ten (10) days after arraignment in a district with more than one judge. Failure to file a timely notice renders the notice invalid and precludes any change of judge under this rule.

[104]

(e) **Assignment of Action.** Upon the filing of a timely, valid, and complete notice of change, the assigned judge shall take no further action in the case and shall transfer the case accordingly. If the assigned judge determines that the notice is invalid, the judge shall make specific findings as to the assigned judge's determination as to why the notice is invalid. The judge shall refer the matter for ruling as to whether the notice is invalid to another judge. In a single judge district court, the referral shall be to a consenting judge in another district. In multi-judge district court or justice's court, the matter shall be referred to another judge in either the district or township. In a single judge justice's court, the referral shall either be referred to the district judge or to a justice of the peace in another township. If the second judge determines that the notice is valid, the matter shall be assigned to another judge. If the second judge determines that the notice is invalid, the matter shall continue to be heard by the judge assigned prior to the notice being filed.

(f) **Nondisclosure to Court.** No party shall communicate to the court, or cause another to communicate to the court, the fact of any party's seeking consent to a notice of change.

(f) **Rule ** Unaffected.** This rule does not affect any rights under Rule **.

Rule 31 Transfer of Venue

(a) **Transfer of Venue:** In the District Courts, if a party believes that a fair and impartial jury trial cannot be had in the court location or in the county where the action is pending, that party may move to have the trial of the case take place with a jury from another county or the case transferred to a court location in a county where a fair trial may be held.[105] Such motion may not be granted until after the voir dire examination of the jury has concluded and it is apparent to the court that the selection of a fair and impartial jury cannot be had in the county where the indictment, information or complaint is pending.[106]

(b) **Application for removal:** Making and service; hearing and determination in absence of defendant.[107]

1. The application for removal must be made in open court, and in writing, verified by the affidavit of the defendant or district attorney, and a copy of the affidavit must be served on the adverse party, at least 1 day prior to the hearing of the application.
2. The application may be supported or opposed by other affidavits or other evidence, or other witnesses may be examined in open court.
3. Whenever the affidavit of the defendant shows that the defendant cannot safely appear in person to make such application, because popular prejudice is so great as to endanger the defendant's personal safety, and such statement is sustained by other testimony, such application may be made by the defendant's attorney and must be heard and determined in the absence of the defendant, notwithstanding the charge then pending against the defendant be a felony, and the defendant has not, at the time of such application, been arrested or given bail, or been arraigned, or pleaded to the indictment or information.

(c) **Grounds.** The party seeking a change of venue must prove to the judge at a hearing on the motion, through competent and admissible evidence, that:

1. The community hosting the trial will not yield a jury qualified to deliberate impartially, and solely upon competent trial evidence, the guilt or innocence of the accused;[108]
2. The extent of inflammatory pretrial publicity and demonstrate that such publicity would corrupt the trial; and
3. Jurors harbor preconceived notions of guilt or innocence that existed prior to their call to jury service and that such notions cannot be set aside, and that the Jurors cannot fairly and impartially render a verdict based upon the trial evidence.[109]
4. If the court is satisfied that the evidence presented demonstrates that a change of jury pool or location is justified, the court shall enter an order transferring the case, or

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[105] NRS § 174.455 (1): A criminal action prosecuted by indictment, information or complaint may be removed from the court in which it is pending, on application of the defendant or state, on the ground that a fair and impartial trial cannot be had in the county where the indictment, information or complaint is pending.

[106] NRS § 174.455 (2): An application for removal of a criminal action shall not be granted by the court until after the voir dire examination has been conducted and it is apparent to the court that the selection of a fair and impartial jury cannot be had in the county where the indictment, information or complaint is pending.

[107] NRS 174.464.

[108] Ford v. State, 102 Nev. 126, 129, 717 P.2d 27, 29 (1986).

[109] Sonner v. State, 112 Nev. 1328, 1336, 903 P.2d 707, 712 (1996) (*citing* Rogers v. State, 101 Nev. 457, 462, 705 P.2d 664, 668 (1985).

selecting a jury from a county free from prejudice. If the court is not satisfied that the evidence demonstrates that a change of jury pool or location is justified, the court shall either enter an order denying the motion. or order a hearing to receive further evidence with respect to the alleged prejudice and resolve the matter.[110]

5. In the justice courts, if a party believes that a fair and impartial trial cannot be had in the court location or in the county where the action is pending, that party may move to have the trial of the case take place with a jury from another county or in a court location where a fair trial may be held. Such motion shall be supported by an affidavit setting forth facts. If the trial involves a jury, the rules applicable to the District Court should be followed.

(d) **Time for Filing.** A motion filed pursuant to this Rule 30 shall be filed not later than 14 days after the party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based. If the party fails to allege facts and circumstances that would justify the Court in concluding that the motion was timely under this subsection, the Court may consider said failure in making a ruling on the Motion.

(e) **Entry of order of removal; transmittal of papers.**[111] The order of removal must be entered on the minutes, and the clerk must immediately make out and transmit to the court to which the action is removed a certified copy of the order of removal, record, pleadings, and proceedings in the action, including the undertakings for the appearance of the defendant and of the witnesses.

(f) **Proceedings on removal when defendant is in custody.**[112] If the defendant is in custody, the order must direct the defendant's removal and the defendant must be forthwith removed by the sheriff of the county where the defendant is imprisoned, to the custody of the sheriff of the county to which the action is removed.

(g) **Authority of court to which action is removed; transmission of original papers.**[113] The court to which the action is removed must proceed to trial and judgment therein as if the action had been commenced in such court. If it is necessary to have any of the original pleadings or other papers before such court, the court from which the action is removed must, at any time, on the application of the district attorney or the defendant, order such papers or pleadings to be transmitted by the clerk, a certified copy thereof being retained.

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[110] NRS 174.475.
[111] NRS 174.485.
[112] NRS 174.495.
[113] NRS 174.505.

Rule 32 [Reserved]

Rule 33 [Reserved]

TITLE VI. TRIAL

Rule 34 Time of Trial

(a) **Right of State to trial within 60 days after arraignment; exceptions.**[114] The State, upon demand, has the right to a trial of the defendant within 60 days after arraignment. The court may postpone the trial if:

1. It finds that more time is needed by the defendant to prepare a defense; or
2. The number of other cases pending in the court prohibits the acceptance of the case for trial within that time.

(b) **Postponement: When and how ordered; court may require depositions of and undertakings by witnesses; court may consider adverse effect upon child who is victim or witness.**[115]

1. When an action is called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by either party by affidavit, direct the trial to be postponed to another day. In all cases where a continuance is granted upon the application of either party the court may require, as a condition of granting such continuance, that the party applying therefor consent to taking, forthwith, or at any time to be fixed by the court, of the deposition of any witness summoned by the opposite party whose deposition has not previously been taken.
2. The court also may require all witnesses to enter into undertakings in such sum as the court may order, with or without sureties, to appear and testify on the day to which the case may be continued, but any witness who is unable to procure sureties for the witness's attendance may be discharged on the witness's own recognizance, upon giving a deposition in the manner prescribed in NRS 174.175 and 174.205.
3. If the trial involves acts committed against a child less than 16 years of age or involving acts witnessed by a child less than 16 years of age, the court may consider any adverse effect a continuance or other postponement might have upon the mental or emotional health or well-being of the child. The court may deny a continuance or other postponement if the delay will adversely affect the mental or emotional health or well-being of the child.

(c) **Request for preference in setting date for trial where child is victim or witness; court may consider effect on child of delay in commencement of trial.**[116] If the trial involves acts committed against a child less than 16 years of age or involving acts witnessed by a child less than 16 years of age, the prosecuting attorney shall request the court, in its discretion, to give preference in setting a date for the trial of the defendant. In making a ruling, the court may consider the effect a delay in the commencement of the trial might have on the mental or emotional health or well-being of the child.

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[114] NRS 174.511.
[115] NRS 174.515.
[116] NRS 174.519.

Rule 35 Selection Of The Jury

(a) **Trial by Jury.**[117]

1. In a district court, cases required to be tried by jury must be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the State. A defendant who pleads not guilty to the charge of a capital offense must be tried by jury.
2. In a Justice Court, a case must be tried by jury only if the defendant so demands in writing not less than 30 days before trial. Except as otherwise provided in NRS 4.390 and 4.400, if a case is tried by jury, a reporter must be present who is a certified court reporter and shall report the trial.

(b) **Formation of jury; number of jurors.**[118]

1. Trial juries for criminal actions are formed in the same manner as trial juries in civil actions.[119]
2. Except as provided in subsection 3, juries must consist of 12 jurors, but at any time before verdict, the parties may stipulate in writing with the approval of the court that the jury consist of any number less than 12 but not less than six.
3. Juries must consist of six jurors for the trial of a criminal action in a Justice Court.

(c) **Examination of trial jurors.**[120] The court shall conduct the initial examination of prospective jurors, and defendant or the defendant's attorney and then the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. Any supplemental examination must not be unreasonably restricted. Examination may be limited by the Court to issues regarding grounds for disqualification.

(d) **Challenges for cause for individual jurors: Grounds; trial of challenge.**[121]

1. Either side may challenge an individual juror for disqualification or for any cause or favor which would prevent the juror from adjudicating the facts fairly, including:[122]
    i. Want of any of the qualifications prescribed by law.
    ii. Any mental or physical infirmity which renders one incapable of performing the duties of a juror.
    iii. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted.
    iv. The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A

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117 NRS 175.011.
118 NRS 175.021.
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120 NRS 175.031.
121 NRS 175.036.
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prospective juror shall not be disqualified solely because the juror is indebted to or employed by the state or a political subdivision thereof.

v. Having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by the defendant in a criminal prosecution.
vi. Having served on the grand jury which found the indictment.
vii. Having served on a trial jury which has tried another person for the particular offense charged.
viii. Having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it.
ix. Having served as a juror in a civil action brought against the defendant for the act charged as an offense.
x. If the offense charged is punishable with death, the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions of the court and the juror's oath in subsection (*).
xi. Because the juror is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense.
xii. Because the juror has been a witness, either for or against the defendant on the preliminary examination or before the grand jury.
xiii. Having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged.
xiv. Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

2. Challenges for cause shall be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge. Challenges for cause shall be completed before peremptory challenges are taken.

(e) **Limitation of defendants' right to sever in challenges.**[123] When several defendants are tried together, they cannot sever their peremptory challenges, but must join therein.

(f) **Number of peremptory challenges.**[124] A peremptory challenge is an objection to a juror for which no reason need be given. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

1. If the offense charged is punishable by death or by imprisonment for life, each side is entitled to eight peremptory challenges.
2. If the offense charged is punishable by imprisonment for any other term or by fine or by both fine and imprisonment, each side is entitled to four peremptory challenges.
3. The State and the defendant shall exercise their challenges alternately, in that order. Any challenge not exercised in its proper order is waived.

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123 NRS 175.041.
124 NRS 175.051.

(g) **Alternate jurors.**[125]

1. The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors.
2. Alternate jurors, in the order in which they were called, shall replace jurors who become unable or disqualified to perform their duties.
3. Alternate jurors shall:
    i. Be drawn in the same manner;
    ii. Have the same qualifications;
    iii. Be subject to the same examination and challenges;
    iv. Take the same oath; and
    v. Have the same functions, powers, facilities and privileges, as the regular jurors.
4. If an alternate juror is required to replace a regular juror after the jury has retired to consider its verdict, the judge shall recall the jury, seat the alternate and resubmit the case to the jury.
5. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by statute may not be used against an alternate juror.

(h) **Oath of jurors.**[126] When the jury has been impaneled, the court shall administer the following oath:

Do you and each of you solemnly swear that you will well and truly try this case, now pending before this court, and a true verdict render according to the evidence given, so help you God.

(i) **Personal knowledge of jurors.**[127]

1. The judge shall then admonish the jury that:
    i. No juror may declare to any fellow jurors any fact relating to the case as of the juror's own knowledge; and
    ii. If any juror discovers during the trial or after the jury has retired that he or she or any other juror has personal knowledge of any fact in controversy in the case, the juror shall disclose such situation to the judge out of the presence of the other jurors.
2. When any such disclosure is made, the judge shall examine the juror who admits or is alleged to have personal knowledge, under oath, in the presence of counsel for the parties, and may allow such counsel to examine the juror.
3. If the juror has disclosed the juror's own knowledge to the judge and it appears that the juror has not declared any fact relating to the case to any fellow jurors as of the juror's own knowledge, the judge shall after the examination decide whether the juror shall remain or shall be replaced by an alternate juror.

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125 NRS 175.061.
126 NRS 175.111.
127 NRS 175.121.

4. If it appears that the juror has declared any fact relating to the case to any fellow jurors as of the juror's own knowledge, or that the juror's vote was influenced by such knowledge undisclosed, the judge shall declare a mistrial.

(j) **Judge to inform jury of right to take notes.**[128] Before any evidence has been introduced the judge may inform the jury they may individually take notes during the trial, but the judge shall further caution them not to rely upon their respective notes in case of conflict among them, because the reporter's notes contain the complete and authentic record of the trial.

(k) **Discharge of juror where juror dies or unable to perform duty.**[129] If, before the conclusion of the trial, and there being no alternate juror called or available, a juror dies, or becomes disqualified or unable to perform the juror's duty, the court may duly order the juror to be discharged and a new juror may be sworn and the trial begun anew, or the jury may be discharged and a new jury then or afterward impaneled.

(l) **Discharge of jury after retirement upon accident or cause.**[130] If, after the retirement of the jury, any accident or cause occurs to prevent their being kept for deliberation, the jury may be discharged.

[128] NRS 175.131.
[129] NRS 175.071.
[130] NRS 175.081.

Rule 36 The Trial

(a) **Defendant's Presence.**[131] In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

1. In prosecutions of misdemeanors and infractions, the defendant may consent in writing to trial in his absence;
2. In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and
3. The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) **Calendar Priorities.**[132] Cases shall be set on the trial calendar to be tried in the following order:

1. misdemeanor cases when defendant is in custody;
2. felony cases when defendant is in custody;
3. felony cases when defendant is on bail or recognizance; and
4. misdemeanor cases when defendant is on bail or recognizance.

(c) **Order of trial.**[133] The jury having been impaneled and sworn, the trial shall proceed in the following order:

1. If the indictment or information be for a felony or gross misdemeanor, the clerk must read it and state the plea of the defendant to the jury. In all other cases this formality may be dispensed with.
2. The district attorney, or other counsel for the State, must open the cause. The defendant or the defendant's counsel may then either make the defendant's opening statement or reserve it to be made immediately prior to the presentation of evidence in the defendant's behalf.
3. The State must then offer its evidence in support of the charge, and the defendant may then offer evidence in his or her defense.
4. The parties may then respectively offer rebutting testimony only, unless the court, for good reasons, in furtherance of justice, permit them to offer evidence upon their original cause.
5. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the district attorney, or other counsel for the State, must open and must conclude the argument.

(d) **Number of counsel who may argue case.**[134] If the indictment or information be for an offense punishable with death, two counsel on each side may argue the case to the jury, but in such case, as

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133 NRS 175.141.

134 NRS 175.151.

well as in all others, the counsel for the State must open and conclude the argument. If it be for any other offense, the court may, in its discretion, restrict the argument to one counsel on each side.

(e) **Presumption of innocence: Acquittal in case of reasonable doubt.**[135] A defendant in a criminal action is presumed to be innocent until the contrary is proved; and in case of a reasonable doubt whether the defendant's guilt is satisfactorily shown, the defendant is entitled to be acquitted.

(f) **Presumption of innocence: Conviction of lowest degree of offense.**[136] Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been proved against the person, and there exists a reasonable doubt as to which of two or more degrees the person is guilty, the person shall be convicted only of the lowest.

(g) **Definition of reasonable doubt; no other definition to be given to juries.**[137] **The jury must be instructed on the definition of reasonable doubt.**

1. ***Definition of Reasonable Doubt***: A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
2. No other definition of reasonable doubt may be given by the court to juries in criminal actions in this State.

(h) **Evidence.**[138]

1. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by statute.
2. The admissibility of evidence and the competency and privileges of witnesses shall be governed by:
    i. The general provisions of title 4 of NRS;
    ii. The Rules of Evidence;
    iii. The specific provisions of any other applicable statute; and
    iv. Where no statute applies, the principles of the common law as they may be interpreted by the courts of the State of Nevada in the light of reason and experience.

(i) **Proof of corporate existence generally.**[139] If, upon a trial or proceeding in a criminal case, the existence, constitution or powers of any corporation shall become material, or be in any way drawn in question, it is not necessary to produce a certified copy of the articles or acts of incorporation, but the same may be proved by general reputation, or by the printed statutes of the state, or government, or country by which such corporation was created.

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135 NRS 175.191.
136 NRS 175.201.
137 NRS 175.211.
138 NRS 175.221.
139 NRS 175.241.

(j) **Conspiracy: Allegation and proof of overt act; evidence of overt acts not alleged.**[140] Upon a trial for conspiracy, in a case where an overt act shall be necessary to constitute the offense, the defendant shall not be convicted unless one or more overt acts shall be expressly alleged in the indictment or information, nor unless one of the acts alleged shall have been proved; but other overt acts not alleged may be given in evidence.

(k) **False pretenses: What evidence necessary.**[141] Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person, to a written instrument, or having obtained from any person any money, personal property, or valuable thing, the defendant shall not be convicted if the false pretense shall have been expressed in language, unaccompanied by a false token or writing, unless the pretense or some note or memorandum thereof be in writing, subscribed by or in the handwriting of the defendant, or unless the pretense be proved by the testimony of two witnesses, or that of one witness and corroborating circumstances; but this section shall not apply to a prosecution for falsely representing or personating another, and, in such assumed character, marrying, or receiving any money or property.

(l) **Plea bargain: Inspection by jury; instruction of jury; cross-examination of defendant.**[142] If a prosecuting attorney enters into an agreement with a defendant in which the defendant agrees to testify against another defendant in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser charge or for a recommendation of a reduced sentence, the court shall:

1. After excising any portion it deems irrelevant or prejudicial, permit the jury to inspect the agreement;
2. If the defendant who is testifying has not entered a plea or been sentenced pursuant to the agreement, instruct the jury regarding the possible related pressures on the defendant by providing the jury with an appropriate cautionary instruction; and
3. Allow the defense counsel to cross-examine fully the defendant who is testifying concerning the agreement.

(m) **Testimony of accomplice must be corroborated; sufficiency of corroboration; accomplice defined.**[143]

1. A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.
2. An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

(n) **Testimony of person upon or with whom abortion was allegedly committed.**[144] Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, the defendant must

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[140] NRS 175.251.
[141] NRS 175.261.
[142] NRS 175.282.
[143] NRS 175.291.
[144] NRS 175.301.

not be convicted upon the testimony of the person upon or with whom the offense has allegedly been committed, unless:

1. The testimony of that person is corroborated by other evidence; or
2. The person giving the testimony is, and was at the time the crime is alleged to have taken place, a police officer or deputy sheriff who was performing his or her duties as such.

(o) **Procedure when higher offense is shown by evidence.**[145] If it appears by the testimony that the facts proved constitute an offense of a higher nature than that charged in the indictment or information, the court may direct the jury to be discharged, and all proceedings on the indictment or information to be suspended, and may order the defendant to be committed, or continued on, or admitted to bail, to answer any new indictment or information which may be found or filed against the defendant for the higher offense.

(p) **Procedure if higher offense ignored.**[146] If an indictment for the higher offense be dismissed by the grand jury, or be not found at its next session, or if an information be not filed before the next session of the grand jury, the court shall again proceed to try the defendant on the original indictment or information.

(q) **When defendant on bail appears for trial defendant may be committed and held.**[147] When a defendant who has given bail appears for trial, the court may, in its discretion, at any time after the defendant's appearance for trial, order the defendant to be committed to the custody of the proper officer, to abide the judgment or further order of the court, and the defendant must be committed and held in custody accordingly.

(r) **Mistake in charging proper offense: Defendant not discharged; commitment or bail.**[148] When it appears, at any time before verdict or judgment, that a mistake has been made in charging the proper offense, the defendant must not be discharged, if there appears good cause to detain the defendant in custody; but the court must commit the defendant, or require the defendant to give bail for his or her appearance to answer to the offense; and may also require the witnesses to give bail for their appearance.

(s) **Discharge of defendant when jury discharged for want of jurisdiction.**[149] If the jury is discharged because the court has not jurisdiction of the offense charged, and it appears that it was committed out of the jurisdiction of this state, the defendant must be discharged, unless the court orders that the defendant be detained for a reasonable time, to be specified in the order, to enable the district attorney to communicate with the chief executive officer of the country, state, territory or district where the offense was committed.

(t) **Offense committed in other county: Commitment to await warrant; admission to bail; transmittal of papers to district attorney of proper county; expense of transmission.**[150] If the offense was committed within the jurisdiction of another county of this state, the court may direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the

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145 NRS 175.311.
146 NRS 175.321.
147 NRS 175.331.
148 NRS 175.341.
149 NRS 175.351.
150 NRS 175.361.

proper county for the defendant's arrest, or it may admit the defendant to bail in an undertaking, with sufficient sureties that the defendant will, within such time as the court may appoint, render himself or herself amenable to a warrant for arrest from the proper county; and, if not sooner arrested thereon, will attend at the office of the sheriff of the county where the trial was had, at a certain time particularly specified in the undertaking, to surrender himself or herself upon the warrant, if issued, or that the defendant's bail will forfeit such sum as the court may fix, to be mentioned in the undertaking; and the clerk must forthwith transmit a certified copy of the indictment or information, and of all the papers filed in the action, to the district attorney of the proper county, the expenses of which transmission are chargeable to that county.

(u) **Discharge where defendant not arrested on warrant from other county; proceedings in case of arrest.**[151]

1. If the defendant is not arrested on a warrant from the proper county, as provided in NRS 175.361, the defendant must be discharged from custody, or the defendant's bail in the action is exonerated, or money deposited instead of bail must be refunded, as the case may be, and the sureties in the undertaking, as mentioned in that section, must be discharged.
2. If the defendant is arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant issued by a magistrate.

(v) **Court may advise jury to acquit defendant when evidence on either side closed; motion for judgment of acquittal after verdict of guilty or guilty but mentally ill; subsequent motion for new trial.**[152]

1. If, at any time after the evidence on either side is closed, the court deems the evidence insufficient to warrant a conviction, it may advise the jury to acquit the defendant, but the jury is not bound by such advice.
2. The court may, on a motion of a defendant or on its own motion, which is made after the jury returns a verdict of guilty or guilty but mentally ill, set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. The motion for a judgment of acquittal must be made within 7 days after the jury is discharged or within such further time as the court may fix during that period.
3. If a motion for a judgment of acquittal after a verdict of guilty or guilty but mentally ill pursuant to this section is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed. The court shall specify the grounds for that determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial is granted conditionally and the judgment is reversed on appeal, the new trial must proceed unless the appellate court has otherwise ordered. If the motion is denied conditionally, the defendant on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings must be in accordance with the order of the appellate court.

(w) **Withdrawal, discharge or change of defense counsel; limitations.**[153] If a counsel seeks to withdraw from the case or is discharged by the defendant for the purpose of delaying the trial, the

[151] NRS 175.371.
[152] NRS 175.381.
[153] NRS 175.383.

court shall not allow the counsel to be changed. The counsel for a defendant may not be changed after a trial has commenced except upon good cause shown to the court.

(x) **Misconduct of defendant; sanctions.**[154]

1. Whenever a defendant interferes with the orderly course of a trial by disruptive, disorderly or disrespectful conduct, the court may:
    i. Order the defendant bound and gagged.
    ii. Cite the defendant for contempt.
    iii. Order the defendant removed from the courtroom and proceed with the trial.
2. No such order or citation shall issue except after the defendant has been fully and fairly informed that the defendant's conduct is wrong and intolerable and has been warned of the consequences of continued misconduct.
3. A defendant who has been removed from the courtroom may be returned upon the defendant's promise to discontinue such misconduct. If the defendant's misconduct continues after the defendant's return the court may proceed as provided in subsection 1.

[154] NRS 175.387.

Rule 37 Conduct of the Jury

1. **Separation or custody of jury before submission.**[155] The jurors sworn to try a criminal action may, at any time before the submission of the case to the jury, in the discretion of the court, be permitted to separate, depart for home overnight or be kept in charge of a proper officer. Upon commencing deliberation, the jurors shall be kept in charge of a proper officer, unless at the discretion of the court they are permitted to depart for home overnight. When the jurors are kept together, the officer in charge shall keep the jurors in some private and convenient place and separate from other persons. The officer shall not permit any communication to be made to them, or make any personally, unless by order of the court, except to ask them if they have agreed upon their verdict. The officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon. The officer shall return them into court when they have reached their verdict or when ordered by the court.

2. **Jury to be admonished at each adjournment.**[156] At each adjournment of the court, whether the jurors are permitted to separate or depart for home overnight, or are kept in charge of officers, they must be admonished by the judge or another officer of the court that it is their duty not to:

1. Converse among themselves or with anyone else on any subject connected with the trial;
2. Read, watch or listen to any report of or commentary on the trial or any person connected with the trial by any medium of information, including without limitation newspapers, television and radio; or
3. If they have not been charged, form or express any opinion on any subject connected with the trial until the cause is finally submitted to them.

3. **Accommodations for jury upon retirement; power of court to furnish.**[157] A room shall be provided by the sheriff of each county for the use of the jury upon their retirement for deliberation, with suitable furniture, fuel, lights and stationery, unless such necessaries have been already furnished by the county. The court may order the sheriff to do so, and the expenses incurred by the sheriff in carrying the order into effect, when certified by the court, shall be a county charge.

4. **Jury provided food and lodging when kept together.**[158] While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, they shall be provided, at the expense of the county, with suitable and sufficient food and lodging.

5. **Questions by jurors.**[159] A judge may invite jurors to submit written questions to a witness as provided in this section.

1. If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

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155 NRS 175.391.
156 NRS 175.401.
157 NRS 175.431.
158 NRS 175.421.
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2. If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.
3. The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

6. **Jury may take written instructions, materials received in evidence, certain papers and own notes of trial on retiring for deliberation.**[160] Upon retiring for deliberation, the jury may take with them:

1. All papers and all other items and materials which have been received as evidence in the case, except depositions or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession.
2. The written instructions given, and notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

(f) **Juries visiting off-site places.**[161] When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, the officer will suffer no person other than the person so appointed to speak to them nor shall the officer speak to the jury on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time. The judge and all parties shall attend any on-site visits with the jury.

(g) **Admonition prior to recess.**[163] At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(h) **Return of jury for information.**[163] After the jury have retired for deliberation, if there is any disagreement between them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of, or after notice to, the district attorney and the defendant or the defendant's counsel.

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160 NRS 175.441.

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163 NRS 175.451.

(i) **Deliberations.**[164] Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(j) **Jury under officer's charge.**[165] When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under the officer's charge shall not allow any communication to be made to them, nor shall the officer speak to the jury except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(k) **Juror questions during deliberations.**[166] After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(l) **Jury not to be discharged after cause submitted; exceptions.**[167] Except as provided in NRS 175.081, the jury shall not be discharged after the cause is submitted to them, until they have agreed upon their verdict and rendered it in open court, unless by the consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

(m) **Incorrect verdict.**[168] If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(n) **Directed verdict.**[169] At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

(o) **Adjournment of court during absence of jury.**[170] While the jury are absent, the court may adjourn from time to time, as to other business, but it shall nevertheless be deemed to be open for every purpose connected with the cause submitted to the jury, until a verdict be rendered or the jury discharged.

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167 NRS 175.461.

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170 NRS 175.471.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 38 Expert Witnesses And Interpreters

(a) **Expert witnesses.**[171] The court may appoint any expert witness agreed upon by the parties or of its own selection. An expert so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed. An expert so appointed shall advise the court and the parties of his findings and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court shall determine the reasonable compensation of the expert and direct payment thereof. The parties may call expert witnesses of their own at their own expense. Upon showing that a defendant is financially unable to pay the fees of an expert whose services are necessary for adequate defense, the witness fee shall be paid as if he were called on behalf of the prosecution.

(b) **Interpreters.**[172] The court may appoint an interpreter of its own selection and shall determine reasonable compensation and direct payment thereof. The court may allow counsel to question the interpreter before he is sworn to discharge the duties of an interpreter.

[171] Replaces NRS 175.271.

[172] .

Rule 39 Out Of Court Statement And Testimony Of Child Victims Or Child Witnesses Of Sexual Or Physical Abuse - Conditions Of Admissibility

(a) **Previously recorded statements.**[173] In any case concerning a charge of child abuse or of a sexual offense against a child, the oral statement of a victim or other witness younger than 14 years of age which was recorded prior to the filing of an information or indictment is, upon motion and for good cause shown, admissible as evidence in any court proceeding regarding the offense if all of the following conditions are met:

1. the child is available to testify and to be cross-examined at trial, either in person or as provided by law, or the child is unavailable to testify at trial, but the defendant had a previous opportunity to cross-examine the child concerning the recorded statement, such that the defendant's rights of confrontation are not violated;
2. no attorney for either party is in the child's presence when the statement is recorded;
3. the recording is visual and aural and is recorded on film, videotape or other electronic means;
4. the recording is accurate and has not been altered;
5. each voice in the recording is identified;
6. the person conducting the interview of the child in the recording is present at the proceeding and is available to testify and be cross-examined by either party;
7. the defendant and his attorney are provided an opportunity to view the recording before it is shown to the court or jury; and
8. the court views the recording before it is shown to the jury and determines that it is sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence.

(b) **Remote transmission of testimony.**[174] In a criminal case concerning a charge of child abuse or of a sexual offense against a child, the court, upon motion of a party and for good cause shown, may order that the testimony of any victim or other witness younger than 14 years of age be taken in a room other than the court room, and be televised by closed circuit equipment to be viewed by the jury in the court room. All of the following conditions shall be observed:

1. Only the judge, attorneys for each party and the testifying child (if any), persons necessary to operate equipment, and a counselor or therapist whose presence contributes to the welfare and emotional well-being of the child may be in the room during the child's testimony. A defendant who consents to be hidden from the child's view may also be present unless the court determines that the child will suffer serious emotional or mental strain if required to testify in the defendant's presence, or that the child's testimony will be inherently unreliable if required to testify in the defendant's presence. If the court makes that determination, or if the defendant consents:
    i. the defendant may not be present during the child's testimony;
    ii. the court shall ensure that the child cannot hear or see the defendant;
    iii. the court shall advise the child prior to his testimony that the defendant is present at the trial and may listen to the child's testimony;

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iv. the defendant shall be permitted to observe and hear the child's testimony, and the court shall ensure that the defendant has a means of two-way telephonic communication with his attorney during the child's testimony; and
v. the conditions of a normal court proceeding shall be approximated as nearly as possible.

2. Only the judge and an attorney for each party may question the child.
3. As much as possible, persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror so the child cannot see or hear them.
4. If the defendant is present with the child during the child's testimony, the court may order that persons operating the closed circuit equipment film both the child and the defendant during the child's testimony, so that the jury may view both the child and the defendant, if that may be arranged without violating other requirements of Subsection (b)(1).

(c) **Remote recording of testimony.**[175] In any criminal case concerning a charge of child abuse or of a sexual offense against a child, the court may order, upon motion of a party and for good cause shown, that the testimony of any victim or other witness younger than 14 years of age be taken outside the courtroom and be recorded. That testimony is admissible as evidence, for viewing in any court proceeding regarding the charges if the provisions of Subsection (b) are observed, in addition to the following provisions:

1. the recording is visual and aural and recorded on film, videotape or by other electronic means;
2. the recording is accurate and is not altered;
3. each voice on the recording is identified; and
4. each party is given an opportunity to view the recording before it is shown in the courtroom.

(d) **Presence of child when recording is used.**[176] If the court orders that the testimony of a child be taken under Subsection (b) or (c), the child may not be required to testify in court at any proceeding where the recorded testimony is used.

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Rule 40 Instructions

(a) **Instructions before opening statements.**[177] After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the alleged crime, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case. Preliminary instructions shall be in writing and a copy provided to each juror. At the final pretrial conference or at such other time as the court directs, a party may file a written request that the court instruct the jury on the law as set forth in the request. The court shall inform the parties of its action upon a requested instruction prior to instructing the jury, and it shall furnish the parties with a copy of its proposed instructions, unless the parties waive this requirement.

(b) **Instructions during trial.**[178] During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. Prior to giving the written instruction, the court shall advise the parties of its intent to do so and of the content of the instruction. A party may request an interim written instruction.

(c) **Instructions at the close of trial.**[179]

1. Upon the close of the argument, the judge shall charge the jury. The judge may state the testimony and declare the law, but may not charge the jury in respect to matters of fact. The charge must be reduced to writing before it is given, and no charge or instructions may be given to the jury otherwise than in writing, unless by the mutual consent of the parties. If either party requests it, the court must settle and give the instructions to the jury before the argument begins, but this does not prevent the giving of further instructions which may become necessary by reason of the argument.
2. In charging the jury, the judge shall state to them all such matters of law the judge thinks necessary for their information in giving their verdict.
3. Either party may present to the court any written charge, and request that it be given. If the court believes that the charge is pertinent and an accurate statement of the law, whether or not the charge has been adopted as a model jury instruction, it must be given. If the court believes that the charge is not pertinent or not an accurate statement of law, then it must be refused.
4. An original and one copy of each instruction requested by any party must be tendered to the court. The copies must be numbered and indicate who tendered them. Copies of instructions given on the court's own motion or modified by the court must be so identified. When requested instructions are refused, the judge shall write on the margin of the original the word "refused" and initial or sign the notation. The instructions given to the jury must be firmly bound together and the judge shall write the word "given" at the conclusion thereof and sign the last of the instructions to signify that all have been given. After the instructions are given, the judge may not clarify, modify or in any

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179 NRS 175.161.

manner explain them to the jury except in writing unless the parties agree to oral instructions.

5. After the jury has reached a verdict and been discharged, the originals of all instructions, whether given, modified or refused, must be preserved by the clerk as part of the proceedings.
6. Conferences with counsel to settle instructions must be held out of the presence of the jury and may be held in chambers at the option of the court.
7. When the offense charged carries a possible penalty of life without possibility of parole a charge to the jury that such penalty does not exclude executive clemency is a correct and pertinent charge, and must be given upon the request of either party.

(d) **No special instructions to be given relating exclusively to defendant's testimony.**[180] In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at the person's own request, but not otherwise, be deemed a competent witness, the credit to be given the person's testimony being left solely to the jury, under the instructions of the court, but no special instruction shall be given relating exclusively to the testimony of the defendant.

(e) **Restriction on comments of evidence.**[181] The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(f) **Instruction not to be given relative to failure of defendant to testify.**[182]

1. No instruction shall be given relative to the failure of the person charged with the commission of crime or offense to testify, except, upon the request of the person so charged, the court shall instruct the jury that, in accordance with a right guaranteed by the Constitution, no person can be compelled, in a criminal action, to be a witness against himself or herself.
2. Nothing herein contained shall be construed as compelling any such person to testify.

(g) **Instructions in prosecution for sexual assault or statutory sexual seduction: Use of certain terms and instructions prohibited.**[188]

1. In any prosecution for sexual assault or statutory sexual seduction or for an attempt to commit or conspiracy to commit either crime, the term "unchaste character" may not be used with reference to the alleged victim of the crime in any instruction to the jury.
2. In a prosecution for sexual assault or statutory sexual seduction, the court may not give any instructions to the jury to the effect that it is difficult to prove or establish the crime beyond a reasonable doubt.

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180 NRS 175.171.

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182 NRS 175.181.

183 NRS 175.186.

Rule 41 Verdict

(a) **Return.**[184] The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(b) **Verdict where there are several defendants.**[185] If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) **Jury may convict of lesser included offense or attempt.**[186] The defendant may be found guilty or guilty but mentally ill of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(d) **When offenses to be stated separately.**[187] When the defendant may be convicted of more than one offense charged, each offense of which the defendant is convicted must be stated in the verdict or the finding of the court.

(e) **Polling jury; further deliberation or discharge.**[188] When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged.

(g) **Acquittal.**[189] If judgment of acquittal is given on a verdict or the case is dismissed and the defendant is not detained for any other legal cause, he shall be discharged as soon as the judgment is given. If a verdict of guilty is returned, the court may order the defendant to be taken into custody to await judgment on the verdict or may permit the defendant to remain on bail.

(f) **Notice to defendant of provisions concerning sealing of records of proceedings leading to acquittal.**[190] Upon the entry of a judgment of acquittal, the court shall provide the defendant with a written notice of the provisions of NRS 179.255 which concern the sealing of records of the proceedings leading to the acquittal.

(g) **Finding of guilty but mentally ill upon plea of not guilty by reason of insanity; required findings; effect of finding.**[191]

1. During a trial, upon a plea of not guilty by reason of insanity, the trier of fact may find the defendant guilty but mentally ill if the trier of fact finds all of the following:
    i. The defendant is guilty beyond a reasonable doubt of an offense;

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184 NRS 175.481.
185 NRS 175.491.
186 NRS 175.501.
187 NRS 175.511.
188 NRS 175.531.
189 Replaces NRS 175.541.
190 NRS 175.543.
191 NRS 175.533.

ii. The defendant has established by a preponderance of the evidence that due to a disease or defect of the mind, the defendant was mentally ill at the time of the commission of the offense; and
iii. The defendant has not established by a preponderance of the evidence that the defendant is not guilty by reason of insanity pursuant to subsection 6 of NRS 174.035.

2. Except as otherwise provided by specific statute, a defendant who is found guilty but mentally ill is subject to the same criminal, civil and administrative penalties and procedures as a defendant who is found guilty.
3. If the trier of fact finds a defendant guilty but mentally ill pursuant to subsection 1, the court shall cause, within 5 business days after the finding, on a form prescribed by the Department of Public Safety, a record of the finding to be transmitted to the Central Repository for Nevada Records of Criminal History, along with a statement indicating that the record is being transmitted for inclusion in each appropriate database of the National Instant Criminal Background Check System.
4. As used in this section:
   i. "Disease or defect of the mind" does not include a disease or defect which is caused solely by voluntary intoxication.
   ii. "National Instant Criminal Background Check System" has the meaning ascribed to it in NRS 179A.062.

(h) Acquittal by reason of insanity: Defendant to be examined; hearing to be held to determine whether defendant is mentally ill; procedure for committing defendant to custody of Division of Public and Behavioral Health.[192]

1. Where on a trial a defense of insanity is interposed by the defendant and the defendant is acquitted by reason of that defense, the finding of the jury pending the judicial determination pursuant to subsection 2 has the same effect as if the defendant were regularly adjudged insane, and the judge must:
   i. Order a peace officer to take the person into protective custody and transport the person to a forensic facility for detention pending a hearing to determine the person's mental health;
   ii. Order the examination of the person by two psychiatrists, two psychologists, or one psychiatrist and one psychologist who are employed by a division facility; and
   iii. At a hearing in open court, receive the report of the examining advisers and allow counsel for the State and for the person to examine the advisers, introduce other evidence and cross-examine witnesses.
2. If the court finds, after the hearing:
   i. That there is not clear and convincing evidence that the person is a person with mental illness, the court must order the person's discharge; or
   ii. That there is clear and convincing evidence that the person is a person with mental illness, the court must order that the person be committed to the custody of the Administrator of the Division of Public and Behavioral Health of the Department of Health and Human Services until the person is

[192] NRS 175.539.

discharged or conditionally released therefrom in accordance with NRS 178.467 to 178.471, inclusive.

The court shall issue its finding within 90 days after the defendant is acquitted.

3. The Administrator shall make the reports and the court shall proceed in the manner provided in NRS 178.467 to 178.471, inclusive.
4. If the court accepts a verdict acquitting a defendant by reason of insanity pursuant to this section, the court shall cause, within 5 business days after accepting the verdict, on a form prescribed by the Department of Public Safety, a record of that verdict to be transmitted to the Central Repository for Nevada Records of Criminal History, along with a statement indicating that the record is being transmitted for inclusion in each appropriate database of the National Instant Criminal Background Check System.
5. As used in this section, unless the context otherwise requires:
    i. "Division facility" has the meaning ascribed to it in NRS 433.094.
    ii. "Forensic facility" means a secure facility of the Division of Public and Behavioral Health of the Department of Health and Human Services for offenders and defendants with mental disorders. The term includes, without limitation, Lakes Crossing Center.
    iii. "National Instant Criminal Background Check System" has the meaning ascribed to it in NRS 179A.062.
    iv. "Person with mental illness" has the meaning ascribed to it in NRS 178.3986.

Rule 42 Written Orders, Judgments And Decrees.[198]

(a) In all pretrial and postconviction rulings by a court, counsel for the party or parties obtaining the ruling shall within 14 days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(b) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(c) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered based on a ruling after a hearing or argument, the stipulation of counsel, the motion of counsel or upon the court's own initiative, and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made. If the order, judgment, or decree is the result of a hearing, the order shall include the date of the hearing, the nature of the hearing, and the names of the attorneys and parties present at the hearing.

(d) The trial court shall prepare the final judgment and sentence, and any commitment order. The trial court shall serve the final judgment and sentence on the parties and immediately transmit the commitment order to the county sheriff.

(e) All orders, judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court.

(f) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

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Rule 43 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 44 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

TITLE VII. POST-CONVICTION PROCEDURES

Rule 45 Presentence Investigation Reports; Restitution.

(a) **Presentence investigation and report: When required; time for completing.**[194]

1. Except as otherwise provided in this section and NRS 176.151, the Division shall make a presentence investigation and report to the court on each defendant who pleads guilty, guilty but mentally ill or nolo contendere to, or is found guilty or guilty but mentally ill of, a felony.
2. If a defendant is convicted of a felony that is a sexual offense, the presentence investigation and report:
    i. Must be made before the imposition of sentence or the granting of probation; and
    ii. If the sexual offense is an offense for which the suspension of sentence or the granting of probation is permitted, must include a psychosexual evaluation of the defendant.
3. If a defendant is convicted of a felony other than a sexual offense, the presentence investigation and report must be made before the imposition of sentence or the granting of probation unless:
    i. A sentence is fixed by a jury; or
    ii. Such an investigation and report on the defendant has been made by the Division within the 5 years immediately preceding the date initially set for sentencing on the most recent offense.
4. Upon request of the court, the Division shall make presentence investigations and reports on defendants who plead guilty, guilty but mentally ill or nolo contendere to, or are found guilty or guilty but mentally ill of, gross misdemeanors.

(b) **Presentence investigation and report: Psychosexual evaluation of certain sex offenders required; standards and methods for conducting evaluation; access to records; rights of confidentiality and privileges deemed waived; costs.**[195]

1. If a defendant is convicted of a sexual offense for which the suspension of sentence or the granting of probation is permitted, the Division shall arrange for a psychosexual evaluation of the defendant as part of the Division's presentence investigation and report to the court.
2. The psychosexual evaluation of the defendant must be conducted by a person professionally qualified to conduct psychosexual evaluations.
3. The person who conducts the psychosexual evaluation of the defendant must use diagnostic tools that are generally accepted as being within the standard of care for the evaluation of sex offenders, and the psychosexual evaluation of the defendant must include:
    i. A comprehensive clinical interview with the defendant; and

[194] NRS 176.135.
[195] NRS 176.139.

ii. A review of all investigative reports relating to the defendant's sexual offense and all statements made by victims of that offense.

4. The psychosexual evaluation of the defendant may include:
   i. A review of records relating to previous criminal offenses committed by the defendant;
   ii. A review of records relating to previous evaluations and treatment of the defendant;
   iii. A review of the defendant's records from school;
   iv. Interviews with the defendant's parents, the defendant's spouse or other persons who may be significantly involved with the defendant or who may have relevant information relating to the defendant's background; and
   v. The use of psychological testing, polygraphic examinations and arousal assessment.
5. The person who conducts the psychosexual evaluation of the defendant must be given access to all records of the defendant that are necessary to conduct the evaluation, and the defendant shall be deemed to have waived all rights of confidentiality and all privileges relating to those records for the limited purpose of the evaluation.
6. The person who conducts the psychosexual evaluation of the defendant shall:
   i. Prepare a comprehensive written report of the results of the evaluation;
   ii. Include in the report all information that is necessary to carry out the provisions of NRS 176A.110; and
   iii. Provide a copy of the report to the Division.
7. If a psychosexual evaluation is conducted pursuant to this section, the court shall:
   i. Order the defendant, to the extent of the defendant's financial ability, to pay for the cost of the psychosexual evaluation; or
   ii. If the defendant was less than 18 years of age when the sexual offense was committed and the defendant was certified and convicted as an adult, order the parents or guardians of the defendant, to the extent of their financial ability, to pay for the cost of the psychosexual evaluation. For the purposes of this paragraph, the court has jurisdiction over the parents or guardians of the defendant to the extent that is necessary to carry out the provisions of this paragraph.

(c) **Presentence investigation and report: Contents of report.**[196]

1. The report of any presentence investigation must contain:
   i. Any:
      A. Prior criminal convictions of the defendant;
      B. Unresolved criminal cases involving the defendant;
      C. Incidents in which the defendant has failed to appear in court when his or her presence was required;
      D. Arrests during the 10 years immediately preceding the date of the offense for which the report is being prepared; and

[196] NRS 176.145.

E. Participation in any program in a specialty court or any diversionary program, including whether the defendant successfully completed the program;

F. Information concerning the characteristics of the defendant, the defendant's financial condition, including whether the information pertaining to the defendant's financial condition has been verified, the circumstances affecting the defendant's behavior and the circumstances of the defendant's offense that may be helpful in imposing sentence, in granting probation or in the correctional treatment of the defendant;

ii. Information concerning the effect that the offense committed by the defendant has had upon the victim, including, without limitation, any physical or psychological harm or financial loss suffered by the victim, to the extent that such information is available from the victim or other sources, but the provisions of this paragraph do not require any particular examination or testing of the victim, and the extent of any investigation or examination is solely at the discretion of the court or the Division and the extent of the information to be included in the report is solely at the discretion of the Division;

iii. Information concerning whether the defendant has an obligation for the support of a child, and if so, whether the defendant is in arrears in payment on that obligation;

iv. Data or information concerning reports and investigations thereof made pursuant to chapter 432B of NRS and NRS 392.275 to 392.365, inclusive, that relate to the defendant and are made available pursuant to NRS 432B.290or NRS 392.317 to 392.335, inclusive, as applicable;

v. The results of the evaluation of the defendant conducted pursuant to NRS 484C.300, if such an evaluation is required pursuant to that section;

vi. A recommendation of a minimum term and a maximum term of imprisonment or other term of imprisonment authorized by statute, or a fine, or both;

vii. A recommendation, if the Division deems it appropriate, that the defendant undergo a program of regimental discipline pursuant to NRS 176A.780;

viii. If a psychosexual evaluation of the defendant is required pursuant to NRS 176.139, a written report of the results of the psychosexual evaluation of the defendant and all information that is necessary to carry out the provisions of NRS 176A.110; and

ix. A specific statement of pecuniary damages. This statement shall include, but not be limited to, a specific dollar amount recommended by the Division to be paid by the defendant to the victim(s). In cases where a specific dollar value is not known, and is not an accumulating amount, e.g. continuing medical expenses, the court may continue the sentencing. If sentencing occurs, it shall be done with the concurrence of defense counsel/defendant and the prosecutor and an agreement shall be reached as to how restitution shall be determined. In no instance shall the restitution amount be determined by the Department of Corrections without approval of the court, defendant, defense counsel and the

prosecutor. If the parties disagree about the restitution amount, a restitution hearing shall be scheduled.[197]

x. Such other information as may be required by the court.

2. The Division shall include in the report all scoresheets and scales used in determining any recommendation made pursuant to paragraphs (g) and (h) of subsection 1.
3. The Division shall include in the report the source of any information, as stated in the report, related to the defendant's offense, including, without limitation, information from:
   i. A police report;
   ii. An investigative report filed with law enforcement; or
   iii. Any other source available to the Division.
4. The Division may include in the report any additional information that it believes may be helpful in imposing a sentence, in granting probation or in correctional treatment.

(d) **General investigation and report on defendant convicted of category E felony: When required; time for completing; contents of report.**[198]

1. If a defendant pleads guilty, guilty but mentally ill or nolo contendere to, or is found guilty or guilty but mentally ill of, one or more category E felonies, but no other felonies, the Division shall not make a presentence investigation and report on the defendant pursuant to NRS 176.135, unless the Division has not made a presentence investigation and report on the defendant pursuant to NRS 176.135 within the 5 years immediately preceding the date initially set for sentencing on the category E felony or felonies and:
   i. The court requests a presentence investigation and report; or
   ii. The prosecuting attorney possesses evidence that would support a decision by the court to deny probation to the defendant pursuant to paragraph (b) of subsection 1 of NRS 176A.100.
2. If the Division does not make a presentence investigation and report on a defendant pursuant to subsection 1, the Division shall, not later than 45 days after the date on which the defendant is sentenced, make a general investigation and report on the defendant that contains:
   i. Any prior criminal convictions of the defendant;
   ii. Information concerning the characteristics of the defendant, the circumstances affecting the defendant's behavior and the circumstances of the defendant's offense that may be helpful to persons responsible for the supervision or correctional treatment of the defendant;
   iii. Information concerning the effect that the offense committed by the defendant has had upon the victim, including, without limitation, any physical or psychological harm or financial loss suffered by the victim, to the extent that such information is available from the victim or other sources, but the provisions of this paragraph do not require any particular examination or testing of the victim, and the extent of any investigation or examination and the extent of the information included in the report is solely at the discretion of the Division;

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[197] .

[198] NRS 176.151.

iv. Data or information concerning reports and investigations thereof made pursuant to chapter 432B of NRS and NRS 392.275 to 392.365, inclusive, that relate to the defendant and are made available pursuant to NRS 432B.290or NRS 392.317 to 392.335, inclusive, as applicable; and

v. Any other information that the Division believes may be helpful to persons responsible for the supervision or correctional treatment of the defendant.

(e) **Disclosure of report of presentence investigation: Report to include certain information relating to any gang affiliation of defendant.**[199]

1. Except as otherwise provided in subsection 3, the Division shall disclose to the prosecuting attorney, the counsel for the defendant, the defendant and the court, not later than 14 calendar days before the defendant will be sentenced, the factual content of the report of any presentence investigation made pursuant to NRS 176.135 and the recommendations of the Division.
2. In addition to the disclosure requirements set forth in subsection 1, if the Division includes in the report of any presentence investigation made pursuant to NRS 176.135 any information relating to the defendant being affiliated with or a member of a criminal gang and the Division reasonably believes such information is disputed by the defendant, the Division shall provide with the information disclosed pursuant to subsection 1 copies of all documentation relied upon by the Division as a basis for including such information in the report, including, without limitation, any field interview cards.
3. The defendant may waive the minimum period required by subsection 1.
4. As used in this section, "criminal gang" has the meaning ascribed to it in NRS 193.168.

(f) **Disclosure of report of presentence or general investigation; corrections to report; persons entitled to use report; confidentiality of report.**[200]

1. The Division shall disclose to the prosecuting attorney, the counsel for the defendant and the defendant the factual content of the report of:
   i. Any presentence investigation made pursuant to NRS 176.135 and the recommendations of the Division and, if applicable, provide the documentation required pursuant to subsection 2 of NRS 176.153, in the period provided in NRS 176.153.
   ii. Any general investigation made pursuant to NRS 176.151.

   The Division shall afford an opportunity to each party to object to factual errors in any such report and to comment on any recommendations. The court may order the Division to correct the contents of any such report following sentencing of the defendant if, within 180 days after the date on which the judgment of conviction was entered, the prosecuting attorney and the defendant stipulate to correcting the contents of any such report.
2. Unless otherwise ordered by a court, upon request, the Division shall disclose the content of a report of a presentence investigation or general investigation to a law enforcement agency of this State or a political subdivision thereof and to a law

[199] NRS 176.153.
[200] NRS 176.156.

enforcement agency of the Federal Government for the limited purpose of performing their duties, including, without limitation, conducting hearings that are public in nature.

3. Unless otherwise ordered by a court, upon request, the Division shall disclose the content of a report of a presentence investigation or general investigation to the Division of Public and Behavioral Health of the Department of Health and Human Services for the limited purpose of performing its duties, including, without limitation, evaluating and providing any report or information to the Division concerning the mental health of:
    i. A sex offender as defined in NRS 213.107; or
    ii. An offender who has been determined to be mentally ill.
4. Unless otherwise ordered by a court, upon request, the Division shall disclose the content of a report of a presentence investigation or general investigation to the Nevada Gaming Control Board for the limited purpose of performing its duties in the administration of the provisions of chapters 462 to 467, inclusive, of NRS.
5. Except for the disclosures required by subsections 1 to 4, inclusive, a report of a presentence investigation or general investigation and the sources of information for such a report are confidential and must not be made a part of any public record.

(g) **Delivery of report of presentence or general investigation to Director of Department of Corrections.**[201]

1. Except as otherwise provided in subsection 2, when a court imposes a sentence of imprisonment in the state prison or revokes a program of probation and orders a sentence of imprisonment to the state prison to be executed, the court shall cause a copy of the report of the presentence investigation to be delivered to the Director of the Department of Corrections, if such a report was made. The report must be delivered not later than when the judgment of imprisonment is delivered pursuant to NRS 176.335. Delivery of the report may, at the court's discretion, also be accomplished by electronic transmission or by affording the Department of Corrections the required electronic access necessary to retrieve the report.
2. If a presentence investigation and report were not required pursuant to paragraph (b) of subsection 3 of NRS 176.135 or pursuant to subsection 1 of NRS 176.151, the court shall cause a copy of the previous report of the presentence investigation or a copy of the report of the general investigation, as appropriate, to be delivered to the Director of the Department of Corrections in the manner provided pursuant to subsection 1.

(h) **Portion of certain presentence or general investigations and reports to be paid by county in which indictment found or information filed.**[202]

1. Seventy percent of the expense of any presentence or general investigation and report made by the Division pursuant to NRS 176.135 or 176.151, other than the expense of a psychosexual evaluation conducted pursuant to NRS 176.139, must be paid by the county in which the indictment was found or the information filed.
2. Each county shall pay to the Division all expenses required pursuant to subsection 1 according to a schedule established by the Division, which must require payment on at least a quarterly basis.

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[201] NRS 176.159.
[202] NRS 176.161.

(i) **Presentence reports confidential.**[203] Presentence reports shall either be physically removed from the case file and kept in a separate storage area or retained in the case file in a sealed envelope marked "Confidential".

[203] .

Rule 46 Sentence, Judgment And Commitment.

(a) **Prompt hearing; court may commit defendant or continue or alter bail before hearing; statement by defendant; presentation of mitigating evidence; rights of victim; notice of hearing.**[204]

1. Sentence must be imposed without unreasonable delay. Pending sentence, the court may commit the defendant or continue or alter the bail.
2. Before imposing sentence, the court shall:
    i. Afford counsel an opportunity to speak on behalf of the defendant; and
    ii. Address the defendant personally and ask the defendant if:
        A. The defendant wishes to make a statement in his or her own behalf and to present any information in mitigation of punishment; and
        B. The defendant is a veteran or a member of the military. If the defendant meets the qualifications of subsection 1 of NRS 176A.280, the court may, if appropriate, assign the defendant to:
            i. A program of treatment established pursuant to NRS 176A.280; or
            ii. If a program of treatment established pursuant to NRS 176A.280 is not available for the defendant, a program of treatment established pursuant to NRS 176A.250 or 453.580.
3. After hearing any statements presented pursuant to subsection 2 and before imposing sentence, the court shall afford the victim an opportunity to:
    i. Appear personally, by counsel or by personal representative; and
    ii. Reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution.
4. The prosecutor shall give reasonable notice of the hearing to impose sentence to:
    i. The person against whom the crime was committed;
    ii. A person who was injured as a direct result of the commission of the crime;
    iii. The surviving spouse, parents or children of a person who was killed as a direct result of the commission of the crime; and
    iv. Any other relative or victim who requests in writing to be notified of the hearing.

    Any defect in notice or failure of such persons to appear are not grounds for an appeal or the granting of a writ of habeas corpus. All personal information, including, but not limited to, a current or former address, which pertains to a victim or relative and which is received by the prosecutor pursuant to this subsection is confidential.
5. For the purposes of this section:
    i. "Member of the military" has the meaning ascribed to it in NRS 176A.043.
    ii. "Relative" of a person includes:
        A. A spouse, parent, grandparent or stepparent;
        B. A natural born child, stepchild or adopted child;
        C. A grandchild, brother, sister, half brother or half sister; or
        D. A parent of a spouse.
    iii. "Veteran" has the meaning ascribed to it in NRS 176A.090.
    iv. "Victim" includes:

[204] NRS 176.015.

A. A person, including a governmental entity, against whom a crime has been committed;
B. A person who has been injured or killed as a direct result of the commission of a crime; and
C. A relative of a person described in subparagraph (1) or (2).

v. This section does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing.

(b) **Imposition of sentence on person convicted as adult for offense committed when person was under age of 18 years: Additional considerations; reduction of sentence.**[205]

1. If a person is convicted as an adult for an offense that the person committed when he or she was less than 18 years of age, in addition to any other factor that the court is required to consider before imposing a sentence upon such a person, the court shall consider the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth.
2. Notwithstanding any other provision of law, after considering the factors set forth in subsection 1, the court may, in its discretion, reduce any mandatory minimum period of incarceration that the person is required to serve by not more than 35 percent if the court determines that such a reduction is warranted given the age of the person and his or her prospects for rehabilitation.

[205] NRS 176.017.

Rule 47 Arrest of Judgment.

(a) **Arrest of judgment: When granted and time in which motion is to be made.**[206] The court shall arrest judgment if the indictment, information or complaint does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after determination of guilt or within such further time as the court may fix during the 7-day period.

(b) **Effect of arresting judgment.**[207] The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which the defendant was before the indictment was found or information or complaint filed.

(c) **Procedure after allowance of arrest of judgment.**[208]

1. If, from the evidence on the trial, there is reasonable ground to believe the defendant guilty, and a new indictment, information or complaint can be framed upon which the defendant may be convicted, the court may order the defendant to be recommitted to the officers of the proper county, or admitted to bail anew to answer the new indictment, information or complaint.
2. If the evidence shows the defendant guilty of another offense, the defendant shall be committed or held thereon, and in neither case shall the verdict be a bar to another prosecution.
3. But if no evidence appear sufficient to charge the defendant with any offense, the defendant shall, if in custody, be discharged; or, if admitted to bail, the defendant's bail shall be exonerated; or, if money has been deposited instead of bail, it shall be refunded to the defendant, and the arrest of judgment shall operate as an acquittal of the charge upon which the indictment, information or complaint was founded.

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[206] NRS 176.525.
[207] NRS 176.535.
[208] NRS 176.545.

Rule 48 Motion For New Trial[209]

(a) The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.

(b) If trial was by the court without a jury, the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment.

(c) Except as otherwise provided in NRS 176.09187, a motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt.

(d) A motion for a new trial based on any other grounds must be made within 7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period.

[209] NRS 176.151

Rule 49 Stays Of Sentence Pending Appeal From Courts Of Record.[210]

(a) Staying sentence terms other than incarceration.

1. A sentence of death is stayed if an appeal or a petition for other relief is pending. The defendant shall remain in the custody of the warden of the Utah State Prison until the appeal or petition for other relief is resolved.
2. When an appeal is taken by the prosecution, a stay of any order of judgment in favor of the defendant may be granted by the court upon good cause pending disposition of the appeal.
3. Upon the filing of a notice of appeal, and motion of the defendant, the court may stay any sentenced amount of fines, conditions of probation (other than incarceration) pending disposition of the appeal, upon notice to the prosecution and a hearing if requested by the prosecution.
4. A party dissatisfied with the trial court's ruling on such a motion may petition for relief in the court in which the appeal is pending.

(b) Staying sentence terms of incarceration. A defendant sentenced, or required as a term of probation, to serve a period of incarceration in jail or in prison, shall be detained, unless released by the court in conformity with this rule.

1. In general. Before a court may release a defendant after the filing of a notice of appeal, the court must:
    i. issue a certificate of probable cause; and
    ii. determine by clear and convincing evidence that the defendant:
        A. is not likely to flee; and
        B. does not pose a danger to the safety of any other person or the community if released under any conditions as set forth in subsection (c).
2. A defendant shall file a written motion in the trial court requesting a stay of the sentence term of incarceration.
    i. That motion shall be accompanied by a copy of the filed notice of appeal; a written application for a certificate of probable cause; and a memorandum of law. The memorandum shall identify the issues to be presented on appeal and support the defendant's position that those issues raise a substantial question of law or fact reasonably likely to result in reversal, an order for a new trial or a sentence that does not include a term of incarceration in jail or prison. The memorandum shall also address why clear and convincing evidence exists that the defendant is not a flight risk and that the defendant does not pose a danger to any other person or the community.
    ii. A copy of the motion, the application for a certificate of probable cause and supporting memorandum shall be served on the prosecuting attorney. An opposing memorandum may be filed within 14 days after receipt of the application, or within a shorter time as the court deems necessary. A hearing on the application shall be held within 14 days after the court receives the opposing memorandum, or if no opposing memorandum is filed, within 14 days after the application is filed with the court.

[210] .

3. The court shall issue a certificate of probable cause if it finds that the appeal:
    i. is not being taken for the purpose of delay; and
    ii. raises substantial issues of law or fact reasonably likely to result in reversal, an order for a new trial or a sentence that does not include a term of incarceration in jail or prison.
4. If the court issues a certificate of probable cause it shall order the defendant released if it finds that clear and convincing evidence exists to demonstrate that the defendant is not a flight risk and that the defendant does not pose a danger to any other person or the community if released under any of the conditions set forth in subsection (c).
5. The court ordering release pending appeal under subsection (b)(4) shall order release on the least restrictive condition or combination of conditions set forth in subsection (c) that the court determines will reasonably assure the appearance of the person as required and the safety of persons and property in the community.
6. Review of trial court's order. A party dissatisfied with the relief granted or denied under this subsection may petition the court in which the appeal is pending for relief.
    i. If the petition is filed by the defendant, a copy of the petition, the affidavit and papers filed in support of the original motion shall be served on the Utah Attorney General if the case involves any felony charge, and on the prosecuting attorney if the case involves only misdemeanor charges.
    ii. If the petition is filed by the prosecution, a copy of the petition and supporting papers shall be served on defense counsel, or the defendant if the defendant is not represented by counsel.

(c) If the court determines that the defendant may be released pending appeal, it may release the defendant on the least restrictive condition or combination of conditions that the court determines will reasonably assure the appearance of the person as required and the safety of persons and property in the community, which conditions may include, without limitation, that the defendant:

1. is admitted to appropriate bail;
2. not commit a federal, state or local crime during the period of release;
3. remain in the custody of a designated person who agrees to assume supervision of the defendant and who agrees to report any violation of a release condition to the court, if the designated person is reasonably able to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community;
4. maintain employment, or if unemployed, actively seek employment;
5. maintain or commence an educational program;
6. abide by specified restrictions on personal associations, place of abode or travel;
7. avoid all contact with the victim or victims of the crime(s), any witness or witnesses who testified against the defendant and any potential witnesses who might testify concerning the offenses if the appeal results in a reversal or an order for a new trial;
8. report on a regular basis to a designated law enforcement agency, pretrial services agency or other agency;
9. comply with a specified curfew;
10. refrain from possessing a firearm, destructive device or other dangerous weapon;
11. refrain from possessing or using alcohol, or any narcotic drug or other controlled substance except as prescribed by a licensed medical practitioner;

12. undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol abuse or dependency;
13. execute an agreement to forfeit, upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the defendant as required, and post with the court such indicia of ownership of the property or such percentage of the money as the court may specify;
14. return to custody for specified hours following release for employment, schooling or other limited purposes; and
15. satisfy any other condition that is reasonably necessary to assure the appearance of the defendant as required and to assure the safety of persons and property in the community.

(d) The court may at any time for good cause shown amend the order granting release to impose additional or different conditions of release.

Rule 50 Stays Pending Appeal From A Court Not Of Record- Appeals For A Trial De Novo[211]

(a) Except as outlined in subsection (d) below, the procedures in this rule shall govern stays of terms of sentences when a defendant files an appeal in a court not of record for a trial de novo.

(b) Upon the timely filing of a notice of appeal for a trial de novo, the court shall:

1. order stayed any fine or fee payments until the appeal is resolved; and
2. order stayed any period of incarceration, unless:
    i. at the time of sentencing, the judge found by a preponderance of the evidence that the defendant posed a danger to another person or the community; or
    ii. the appeal does not appear to have a legal basis.

(c) If a stay is ordered, the judge may leave in effect any other terms of probation the judge deems necessary including:

1. continuation of any pre-trial restrictions or orders;
2. sentencing protective orders;
3. orders that limit or monitor a defendant's drug and alcohol use, including use of an ignition interlock device; and
4. requiring defendant's bail to continue until defendant's appearance in the district court. The judge shall only order bail to continue if the court finds by clear and convincing evidence that, without such security, the defendant will likely fail to appear at district court.

(d) A party dissatisfied with the findings made by the justice court judge in staying a sentence under this rule shall utilize the procedure outlined in rule ** to obtain relief in the district court.

(e) A court may at any time for good cause shown amend its order granting release to impose additional or different conditions of release. However, the justice court may only act under this subsection (f) if the district court has not docketed or held any hearings pursuant to this rule.

(f) For purposes of this rule, "term of sentence" or "sentence" shall include findings of contempt pursuant to NRS **.

[211]

Rule 51 RESERVED

Rule 52 Disposition After Appeal[212]

(a) If a judgment of conviction is reversed, a new trial shall be held unless otherwise specified by the appellate court. Pending a new trial or other proceeding, the defendant shall be detained, or released upon bail, or otherwise restricted as the trial court on remand determines proper. If no further trial or proceeding is to be had a defendant in custody shall be discharged, and a defendant restricted by bail or otherwise shall be released from restriction and bail exonerated and any deposit of funds or property refunded to the proper person.

(b) Upon affirmance by the appellate court, the judgment or order affirmed or modified shall be executed.

(c) Unless otherwise ordered by the trial court, within 28 days after receipt of the remittitur, the trial court shall notify the parties and place the matter on the calendar for review.

[212] .

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 53 [Reserved]

Rule 54 [Reserved]

TITLE VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 55 Exceptions Unnecessary.[213]

Exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party state his objections to the actions of the court and the reasons therefor. Failure to object generally precludes appellate review.

[213] .

Rule 56 Dismissal Without Trial[214]

(a) **Dismissing an information.** In its discretion, for substantial cause and in furtherance of justice, the court may, either on its own initiative or upon application of either party, order an information or indictment dismissed.

(b) **Mandatory dismissal.** The court shall dismiss the information or indictment when:

1. There is unreasonable or unconstitutional delay in bringing defendant to trial;
2. The allegations of the information or indictment, together with any bill of particulars furnished in support thereof, do not constitute the offense intended to be charged in the pleading so filed;
3. It appears that there was a substantial and prejudicial defect in the impaneling or in the proceedings relating to the grand jury;
4. The court is without jurisdiction; or
5. The prosecution is barred by the statute of limitations.

(c) **Record of dismissal.** The reasons for any such dismissal shall be set forth in an order and entered in the minutes.

(d) **Effects of dismissal.** If the dismissal is based upon the grounds that there was unreasonable delay, or the court is without jurisdiction, or the offense was not properly alleged in the information or indictment, or there was a defect in the impaneling or of the proceedings relating to the grand jury, further prosecution for the offense shall not be barred and the court may make such orders with respect to the custody of the defendant pending the filing of new charges as the interest of justice may require. Otherwise the defendant shall be discharged and bail exonerated.

An order of dismissal based upon unconstitutional delay in bringing the defendant to trial or based upon the statute of limitations, shall be a bar to any other prosecution for the offense charged.

(e) **Dismissal by compromise.** In misdemeanor cases, upon motion of the prosecutor, the court may dismiss the case if it is compromised by the defendant and the injured party. The injured party shall first acknowledge the compromise before the court or in writing. The reasons for the order shall be set forth therein and entered in the minutes. The order shall be a bar to another prosecution for the same offense; provided however, that dismissal by compromise shall not be granted when the misdemeanor is committed by or upon a peace officer while in the performance of his duties, or riotously, or with an intent to commit a felony.

(f) **Voluntary dismissal by the State.** Pursuant NRS ***.***, the state may exercise its discretion to a one-time dismissal of a case in the justice or municipal court.

[214] .

Rule 57 Appeals From Justice Court To District Court by Defendant

(a) **Appeal must be taken within 10 days.**[215] Except as otherwise provided in NRS 177.015, a defendant in a criminal action tried before a justice of the peace may appeal from the final judgment therein to the district court of the county where the court of the justice of the peace is held, at any time within 10 days from the time of the rendition of the judgment.

(b) **Notice of intention to appeal: Filing and service; stay of judgment pending appeal.**[216]

1. The party intending to appeal must file with the justice and serve upon the district attorney a notice entitled in the action, setting forth the character of the judgment, and the intention of the party to appeal therefrom to the district court.
2. Stay of judgment pending appeal is governed by NRS 177.105 and 177.115.

(c) **Transmission of transcript, other papers, sound recording and copy of docket to district court.**[217]

1. The justice shall, within 10 days after the notice of appeal is filed, transmit to the clerk of the district court the transcript of the case, all other papers relating to the case and a certified copy of the docket.
2. The justice shall give notice to the appellant or the appellant's attorney that the transcript and all other papers relating to the case have been filed with the clerk of the district court.
3. If the district judge so requests, before or after receiving the record, the justice of the peace shall transmit to the district judge the sound recording of the case.

(d) **Procedure where transcript defective.**[218]

1. Except as provided in subsection 2, if the district court finds that the transcript of a case which was recorded by sound recording equipment is materially or extensively defective, the case must be returned for retrial in the justice court from which it came.
2. If all parties to the appeal stipulate to being bound by a particular transcript of the proceedings in the justice court, or stipulate to a particular change in the transcript, an appeal based on that transcript as accepted or changed may be heard by the district court without regard to any defects in the transcript.

(e) **Action to be judged on record.**[219] An appeal duly perfected transfers the action to the district court to be judged on the record.

(f) **Grounds for dismissal of appeal; enforcement of judgment.**[220]

1. The appeal may be dismissed on either of the following grounds:
    i. For failure to take the same in time.

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215 NRS 189.010.
216 NRS 189.020.
217 NRS 189.030.
218 NRS 189.035.
219 NRS 189.050.
220 NRS 189.060.

ii. For failure to appear in the district court when required.

2. If the appeal is dismissed, a copy of the order of dismissal must be remitted to the justice, who may proceed to enforce the judgment.

(g) **Dismissal for failure to set or reset appeal for hearing.**[221]

1. An appeal must be dismissed by the district court unless the appeal is perfected by application of the defendant, within 60 days after the appeal is filed in the justice court, by having it set for hearing before the District Court.
2. If an appeal has been set for hearing and the hearing is vacated at the request of the appellant, the appeal must be dismissed unless application is made by the appellant to reset the hearing within 60 days after the date on which the hearing was vacated.

(h) **Grounds for dismissal of complaint on appeal.**[222] Any complaint, upon motion of the defendant, may be dismissed upon any of the following grounds:

1. That the justice of the peace did not have jurisdiction of the offense.
2. That more than one offense is charged in any one count of the complaint.
3. That the facts stated do not constitute a public offense.

[221] NRS 189.065.
[222] NRS 189.070.

Rule 58 Appeals From Justice Court To District Court by State[223]

Appeal by State from order granting defendant's motion to suppress evidence.

1. The State may appeal to the district court from an order of a justice court granting the motion of a defendant to suppress evidence.
2. Such an appeal shall be taken:
    i. Within 2 days after the rendition of such an order during a trial or preliminary examination.
    ii. Within 5 days after the rendition of such an order before a trial or preliminary examination.
3. Upon perfecting such an appeal:
    i. After the commencement of a trial or preliminary examination, further proceedings in the trial shall be stayed pending the final determination of the appeal.
    ii. Before trial or preliminary examination, the time limitation within which a defendant shall be brought to trial shall be extended for the period necessary for the final determination of the appeal.

[223] NRS 189.120.

Rule 59 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 60 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

TITLE IX. GENERAL PROVISIONS

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 61 Definitions

As used within this title, unless the context requires otherwise, the words and terms defined in this Rule have the meaning ascribed to them in the following sections:[224]

(a) **"Arrest"** defined. "Arrest" is defined under NRS 171.104.
(b) **"Attorney General"** defined. "Attorney General" includes any deputy attorney general or special prosecutor appointed by the Nevada Attorney General to prosecute individuals for the commission of a criminal offense.
(c) **"Case in chief of the defendant"** defined. "Case in chief of the defendant" means the first opportunity of the defendant to present evidence after the close of the case in chief of the State during trial.
(d) **"Case in chief of the state"** defined. "Case in chief of the state" means the first opportunity of the prosecutor to present evidence at the beginning of the trial.
(e) **"Complaint"** defined.[225] "Complaint" means a written statement of the essential facts constituting the public offense charged. The "Complaint" shall be made upon:

1. Oath before a magistrate or a notary public; or
2. Declaration which is made subject to the penalty for perjury.

(f) **"Criminal action"** defined. "Criminal action" means the proceedings by which a party charged with a public offense is accused and brought to trial and punishment. A criminal action is prosecuted in the name of the State of Nevada, as plaintiff.
(g) **"Defendant"** defined. "Defendant" means the party prosecuted in a criminal action. "The defendant" is the person named as such in a complaint, indictment, or information. "The defendant" as used in these rules includes an arrested person who at the time of arrest is not named in a charging document. "The defendant" in the context of certain rules includes the attorney who represents the defendant.
(h) **"Defense attorney"** defined. "Defense attorney" means the lawyer appointed or retained to represent a defendant in a criminal action. In a case in which multiple attorneys represent the same defendant, the term may be read to be plural.
(i) **"District attorney"** defined. "District attorney" includes the elected or appointed district attorney of the county and any deputy district attorney appointed .
(j) **"Issues of Fact"** defined. "Issues of Fact" those issues which must be tried by a jury if a jury trial is required under the Constitution of the United States or the State of Nevada or by any statute of the State of Nevada.[226]
(k) **"Law"** defined. "Law" means: Any rule, statute, ordinance or judicial opinion.
(l) **"May"** defined. "May" means: Generally, a discretionary choice to act or not, as distinguished from "shall" which generally makes the act imperative in nature. However, in certain

[224] Many of these definitions mirror the definitions under Chapter 169 of the Nevada Revised Statutes.
[225] NRS 171.102.
[226] NRS 174.135.

contexts "may" can have an imperative meaning, the word "may" must in those circumstances be read in context to determine if it means that the act is optional/discretionary or mandatory/required.

(m) **"Provision of Law"** defined. "Provision of law" means a clause or condition contained within a law that requires a party or some parties to perform a particular requirement by some specified time or prevents a party or some parties from performing a particular requirement by some specified time.

(n) **"Limited Jurisdiction Court"** defined. A "limited jurisdiction court" is a justice court under NRS §§ 4.370 *et seq.*, or a municipal court under NRS §§ 5.050 *et seq.*

(o) **"Magistrate"** defined. "Magistrate" means an officer having power to issue a warrant for the arrest of a person charged with a public offense and includes:

1. The justices of the Supreme Court;
2. The judges of the court of appeals;
3. The judges of the district courts;
4. The justices of the peace;
5. The judges of the municipal courts; and
6. Others upon whom are conferred by law the powers of a justice of the peace in a criminal case.

(p) **"Master"** defined. "Master" means a person appointed by the district court to inform defendants of their rights, assign counsel for indigent defendants and perform other similar administrative duties assigned by the court.

(q) **"Month"** defined. "Month" means a calendar month unless otherwise expressed.

(r) **"Oath"** defined. "Oath" includes an affirmation.

(s) **"Party"** defined. "Party" means the parties to the case, which generally include, but are not limited to, the State of Nevada and the defendants in a case. Use of the word "party" in these rules means all parties to the action unless specifically limited to a particular party (i.e. State or Defendant) or limited by the context of the word.

(t) **"Peace officer"** defined. "Peace officer" includes any person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to 289.360, *inclusive*.

(u) **"Person"** defined. "Person" includes an entity.

(v) **"Personal property"** defined. "Personal property" includes money, goods, chattels, things in action and evidences of debt.

(w) **"Presiding Judge"** defined. "Presiding Judge" means:

(1) **For the District Court**: In a district having more than one judge, the presiding judge is designated by the appropriate rule or law or procedure. In a district that has only one district court judge, the lone judge is the presiding judge.

(2) For a Limited Jurisdiction Court. In courts having more than one judge, the presiding judge is designated by the appropriate rule or law or procedure. If a limited jurisdiction court consists only of one judge, the lone judge is the presiding judge.

(x) **"Property"** defined. "Property" includes both real and personal property.

(y) **"Prosecuting attorney"** defined. "Prosecuting attorney" means an attorney who conducts proceedings in a court on behalf of the government.

Commented [TW3]: You had the phase but no definition. I could not find a definition in the NRS but located this one.

(z) **"Public officer"** defined. "Public officer" means a person elected or appointed to a position which:

1. Is established by the constitution or a statute of this State, or by a charter or ordinance of a political subdivision of this State; and

2. Involves the continuous exercise, as part of the regular and permanent administration of the government, of a public power, trust or duty.

(aa) **"Real property"** defined. "Real property" is coextensive with lands, tenements, and hereditaments.

(bb) **"Shall"** defined. "Shall" means generally, an imperative mandate to act or not, as distinguished from "may" which generally makes the act permissive in nature. However, in certain contexts "shall" can have a permissive meaning, the word "shall" must in those circumstances be read in context to determine if it means that the act is optional/discretionary or mandatory/required.

(cc) **"The State."** "The State" means the State of Nevada, or any other Nevada state or local governmental entity or political subdivision that files a criminal charge in a Nevada court. "The State" in the context of certain rules includes the prosecuting attorney representing the State. "The State," when under context in which it is used refers to the different parts of the United States, includes within its reference all the States of the United States, including the District of Columbia and the territories.

(dd) **"Trial"** defined. "Trial" means that portion of a criminal action which:

(a) If a jury is used, begins with the impaneling of the jury and ends with the return of the verdict, both inclusive.

(b) If no jury is used, begins with the opening statement, or if there is no opening statement, when the first witness is sworn, and ends with the closing argument or upon submission of the cause to the court without argument, both inclusive.

The term "Trial" does not include any proceeding had upon a plea of guilty or guilty but mentally ill to determine the degree of guilt or to fix the punishment.

(ee) **"Trier of Fact"** defined. "Trier of Fact" as used in these rules means a jury who is shall determine issues of fact that are required to be tried by a jury under either the Constitution of the United States or of the State of Nevada and any statute.

(ff) **"United States"** defined. "United States" means all the State of the United States and includes the District of Columbia, Puerto Rico, territories or insular possessions as the context may require.

(gg) **"Victim"** defined. "Victim" means a person as defined in NRS § 217.070.

(hh) **"Writing"** defined. "Writing" means any typewritten, printed, computer generated, handwritten, or other document which contains letters or marks placed upon paper, parchment, or other material substance.[227]

(ii) **"Oral Statement"** defined. Every mode of oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose." [228]

[227] NRS 169.215

[228] NRS 169.215

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 62 Time

(a) **Computing time.** The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.[229] The following applies to counting time:

1. When the period is stated in days or a longer unit of time, the following applies:
    i. The day of the event that triggers the period of time shall be excluded from the calculation of the time period;
    ii. If the period of time is greater than seven (7) days, count every day, including intermediate Saturdays, Sundays, and legal holidays;
    iii. If the period of time is less than seven (7) days, count every day, excluding intermediate Saturdays, Sundays, and legal holidays; and
    iv. Include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.
2. When the period is stated in hours:
    i. Begin counting immediately on the occurrence of the event that triggers the period; and
    ii. Count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays.
3. Unless the court orders otherwise, if the clerk's office is inaccessible.
    i. On the last day for filing under Rule **, then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or
    ii. During the last hour for filing under Rule **, then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.
4. Unless a different time is set by a statute or court order, filing on the last day means:
    i. For electronic filing, at midnight; and
    ii. For filing by other means, the filing must be made before the clerk's office is scheduled to close.
5. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.
6. "Legal holiday" means the day for legal holidays set forth in NRS 236.015.

(b) **Extending time.**[230]

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229 NRS 178.472 provides that: "In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a nonjudicial day, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a nonjudicial day. When a period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and nonjudicial days shall be excluded in the computation.

230 NRS 178.476 provides that:

1. When an act may or must be done within a specified time, the court may, for good cause, extend the time unless a provision of law governing the act does not permit the Court to extend the time period:
    i. With or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
    ii. On motion made after the time has expired if the party failed to act because of excusable neglect.
2. A court must not extend the time for taking any action under the rules applying to a judgment of acquittal, new trial, arrest of judgment and appeal, unless otherwise provided in these rules. Nor may the court extend times for filing and perfecting appeals.

(c) **Motions; affidavits.**[231]

1. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof must be served not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on ex parte application.
2. When a motion is supported by affidavit, the affidavit must be served with the motion; and opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.
3. A certificate of service must accompany each motion filed.

(d) **Additional time after service by mail.** When a party may or must act within a specified time after service and service is made by mail, three days are added after the period would otherwise expire under paragraph (a).

When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:

1. With or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or
2. Upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect,

but the court may not extend the time for taking any action under NRS 176.515 or 176.525 except to the extent and under the conditions stated in those sections.

The statutory exceptions under NRS 176.515 and 176.525 are covered by the language "unless a provision of law governing the act does not permit the Court to extend the time period."

[231] NRS 178.478

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 64 Service And Filing Of Papers

(a) **Service Required.** All written motions, notices and pleadings shall be filed with the court and served on all other parties.

(b) **Service Upon Counsel.** Whenever service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney, unless service upon the party himself is ordered by the court or required by a specific rule or statute. Service upon the attorney or upon a party shall be made in the manner provided in civil actions. If a Court has implemented an e-filing system, service effectuated by the e-filing system shall constitute service under these rules.

(c) **Certificate of Service.** The motion, notice, or pleading shall also have a Certificate of Service which indicates that the party, the legal counsel for the party, or an employee of either has served the document and shall indicate the method of service employed. The party preparing an order shall, upon execution by the court, serve upon each party a Notice of Entry of Order which has a copy of the Order attached thereto and certify to the court such service in a Certificate of Mailing.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 65 Rules Of Court

(a) District courts may make local rules for the conduct of criminal proceedings not inconsistent with these rules and statutes of the state. Copies of all rules made by a court shall, upon promulgation, be furnished to the Supreme Court and to the Judicial Council and shall be made available to members of the state bar and the public.

(b) If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or statutes.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 66 Victims And Witnesses

Commented [TW4]: Need to update with the new law

(a) The prosecuting agency shall inform all victims and subpoenaed witnesses of their responsibilities during the criminal proceedings.

(b) The prosecuting agency shall inform all victims and subpoenaed witnesses of their right to be free from threats, intimidation and harm by anyone seeking to induce the victim or witness to testify falsely, withhold testimony or information, avoid legal process, or secure the dismissal of or prevent the filing of a criminal complaint, indictment or information.

(c) If requested by the victim, the prosecuting agency shall provide notice to all victims of the date and time of scheduled hearings, trial and sentencing and of their right to be present during those proceedings and any other public hearing unless they are subpoenaed to testify as a witness and the exclusionary rule is invoked.

(d) The informational rights of victims and witnesses contained in paragraphs (a) through (c) of this rule are contingent upon their providing the prosecuting agency and court with their current telephone numbers and addresses.

(e) In cases where the victim or the victim's legal guardian so requests, the prosecutor shall explain to the victim that a plea agreement involves the dismissal or reduction of charges in exchange for a plea of guilty and identify the possible penalties which may be imposed by the court upon acceptance of the plea agreement. At the time of entry of the plea, the prosecutor shall represent to the court, either in writing or on the record, that the victim has been contacted and an explanation of the plea bargain has been provided to the victim or the victim's legal guardian prior to the court's acceptance of the plea. If the victim or the victim's legal guardian has informed the prosecutor that he or she wishes to address the court at the change of plea or sentencing hearing, the prosecutor shall so inform the court.

(f) The court shall not require victims and witnesses to state their addresses and telephone numbers in open court.

(g) Judges should give scheduling priority to those criminal cases where the victim is a minor in an effort to minimize the emotional trauma to the victim. Scheduling priorities for cases involving minor victims are subject to the scheduling priorities for criminal cases where the defendant is in custody.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 67 Regulation Of Conduct In The Courtroom

(a) All pleadings, written motions and other papers must be free from burdensome, irrelevant, immaterial, scandalous, or uncivil matters. All attorneys must likewise govern their conduct. Pleadings, written motions and other papers and attorney conduct which are not in compliance may be disregarded or stricken, in whole or in part, and the court may impose sanctions against the offending person.

(b) The court may make appropriate orders regulating the conduct of officers, parties, spectators and witnesses prior to and during the conduct of any proceeding.

Rule 68 Withdrawal Of Counsel

(a) Withdrawal of counsel prior to entry of judgment.

1. Consistent with the Rules of Professional Conduct, an attorney may not withdraw as counsel of record in criminal cases without the approval of the court.
2. A motion to withdraw as an attorney in a criminal case shall be made in open court with the defendant present unless otherwise ordered by the court. Counsel must certify that the withdrawal meets the requirements of the Rules of Professional Conduct.

(b) Withdrawal of counsel after entry of judgment. Prior to permitting withdrawal of trial counsel, the trial court shall require counsel to file a written statement certifying:

1. That the defendant has been advised of the right to file a motion for new trial or to seek a certificate of probable cause, and if in counsel's opinion such action is appropriate, that the same has been filed.
2. That the defendant has been advised of the right to appeal and if in counsel's opinion such action is appropriate, that a Notice of Appeal, a Request for Transcript, and in appropriate cases, an Affidavit of Impecuniosity and an Order requiring the appropriate county to bear the costs of preparing the transcript have been filed.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 69 Minute Entry

The case file shall include copies of all minute entries of proceedings made in that case.

Rule 70 Errors And Defects

(a) Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

(b) Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court may order.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 71 Citation To Decisions

Published decisions of the Supreme Court and the Court of Appeals may be cited as precedent in all criminal proceedings. Unpublished decisions may also be cited as precedent, so long as all parties and the court are supplied with accurate copies at the time the decision is first cited and said unpublished decisions are entitled to precedential effect as set forth by an appropriate rule.

Rule 72 Coordination Of Cases Pending In District Court And Juvenile Court

(a) All parties have a continuing duty to notify the court of a delinquency case pending in juvenile court in which the defendant is a party.

(b) The notice shall be filed with a party's initial pleading or as soon as practicable after the party becomes aware of the other pending case. The notice shall include the case caption, file number and name of the judge or commissioner in the other case.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 73 [Reserved]

Rule 74 [Reserved]