

TO: ATTORNEY ETHICS ADVISORY COMMITTEE
DATE: JANUARY 25, 2019
RE: REQUEST FOR ETHICS OPINION

Early Resolution Court – The Process

The Attorney prosecutes the vast-majority of felony cases through a pre-indictment process called Early Resolution Court (ERC). There are no local rules for ERC. ERC begins at the initial appearance in the Justice Court. The Justice of the Peace or Magistrate enters an order requiring the defendant to appear for an ERC hearing in Superior Court. That initial ERC hearing is scheduled for a date prior to the date set for the Preliminary Hearing. Prior to the initial ERC hearing, defense counsel generally enters the case, either by the defendant hiring counsel or by appointment through the County Indigent Defense Coordinator. In some cases, defendants, both in and out of custody, do not have attorneys assigned or retained to represent them at the time of their initial ERC appearance. In such instances, the Superior Court Judge asks any available defense attorneys present in Court if they would be willing to consult with the

defendant, regarding the subject matter of the initial ERC appearance, prior to an official appointment on the case.

After representation is established, the attorney is typically provided with a copy of the Justice Court orders; very limited disclosure (in some instances, just a Probable Cause statement); and an ERC packet consisting of the Waiver of Time for Preliminary Hearing form (Time Waiver), a Direct Information, a plea agreement, and a Preliminary Hearing Waiver/Criminal Procedure Rule 15.8 Wavier form. This documentation is provided anywhere between one week, to one hour, prior to the initial ERC hearing.

Defense attorneys, depending on the date representation begins, may or may not have an opportunity to meet with the defendant prior to the time set for the initial ERC hearing. For incarcerated defendants, whose representation is established just before the initial ERC hearing, they first meet their attorney, and the initial attorney client consultation occurs, while the defendant is seated in a 16-person jury box, alongside other incarcerated defendants, whose cases are likewise being heard in ERC. This jury box is located within feet of the Prosecutor's table and, for obvious security reasons, is surrounded by multiple law-enforcement personnel.

ERC hearings are conducted in the Superior Court and presided over by a Superior Court Judge. The case, however, remains a Justice Court case. The position of the Superior Court Judge is that it lacks jurisdiction to hear or rule on issues raised by counsel – those issues must be brought and ruled on in the Justice Court. The only exception is that the Superior Court will conduct a hearing under *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (2000).

Prior to the first ERC hearing, counsel must advise the defendant regarding the ERC process and the ramifications of agreeing to the Waiver of Time for Preliminary Hearing. The Time Waiver extends the deadline for the Preliminary Hearing for up to five weeks, and results in setting the date for the final ERC hearing up to four weeks from the initial ERC hearing. Even though a plea agreement is normally provided in the ERC packet, agreeing to a Time Waiver offers the defendant no guarantee that the case will continue in ERC, or that the plea agreement will be kept open during the waiver time period. In many instances, the defendant is required to decide whether or not to agree to the Time Waiver, without first having an opportunity to review case documentation or to discuss the merits of the case against them with their newly appointed/retained attorney.

If the defendant refuses to agree to the Time Waiver, the County Attorney considers this a rejection of the plea agreement and, in most cases, requests the Superior Court Judge presiding over the ERC hearing to conduct a *Donald* hearing. It is the standard policy of the County Attorney that any rejection of an ERC plea agreement will result in an increase in severity of any post-indictment plea agreement, if, one is offered at all. Defense counsel is, therefore, obligated to advise the defendant of this policy, prior to the defendant making a Time Waiver decision. Often, the Superior Court Judge conducting the *Donald* hearing will provide the defendant with the same admonition. If, following the *Donald* hearing, the defendant still refuses to agree to the Time Waiver, the ERC process ends and the criminal case proceeds to a Grand Jury proceeding, or in some instances, a Preliminary Hearing.

If the defendant agrees to submit a Time Waiver at the initial ERC appearance, the attorney and defendant will discuss the case, and the defendant's options, based on the limited disclosure provided by the County Attorney. In most instances, the disclosure provided is far less than what actually exists. Since ERC is pre-preliminary hearing and pre-arraignment, it is the position of the County Attorney that Ariz.R.Crim.P 15 *et. seq.* are not

implicated and, therefore, providing disclosure, specifically requested or not, is completely at their discretion.

If the defendant decides to accept the ERC plea agreement, s/he must also agree to waive the preliminary hearing as well as waive the sanctions ordinarily available to the defendant for disclosure violations under Ariz.R.Crim.P 15.8. At that point, the Direct Information, Waiver of Preliminary Hearing/Waiver of Criminal Procedure Rule 15.8, and the Plea Agreement are filed in Superior Court. Jurisdiction is then vested in Superior Court. A change of plea hearing is then conducted, followed by the scheduling of sentencing. The ERC process is finished and the case proceeds to sentencing as a typical felony case would.

If the defendant decides to reject the ERC plea agreement, the County Attorney, in most cases, requests the Superior Court Judge presiding over the ERC hearing to conduct a *Donald* hearing. It is the standard policy of the County Attorney that any rejection of an ERC plea agreement will result in an increase in severity of any post-indictment plea agreement, if one is offered at all. This policy is conveyed to the defendant by defense counsel and in some cases by the Superior Court Judge conducting the *Donald* hearing. If, following the *Donald* hearing, the defendant still refuses to accept

the ERC plea agreement, the ERC process ends and the criminal case proceeds to a Grand Jury proceeding, or in some instances, a Preliminary Hearing.

ERC Defense Ethical Violations

Ethical Rule 1.1 Competence - A Lawyer shall provide competent representation to the client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Note [5] goes on to state that “[c]ompetent handling ... includes inquiry into and analysis of the factual and legal elements of the problem . . .” “It is not enough to read police reports and interview the client. The lawyer must investigate the facts to determine the appropriate strategy.” *In re Wolfram*, 174 Ariz. 49,55 (1993). “Importantly, the lawyer’s obligation to undertake these tasks does not depend on whether the client is ‘guilty’.” Ariz.Ops. 01-06. “A court must generally presume that counsel has exercised reasonable professional conduct.” *Strickland v. Washington*, 466 US 668, 687 (1984). “No such presumption is warranted when a lawyer advises his client to plea bargain to an offense which the attorney has not investigated because such conduct is always unreasonable.” *Woodward v.*

Collins, 898 F.2d 1027 (5th Cir. 1990). “Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 US at 691. “The failure to investigate potential witnesses can constitute deficient performance under *Strickland*.” *Davis v. Lambert*, 388 F.3d 1052, 1062 (7th Cir. 2004). “Among the specific duties owed by defense counsel to the client are conducting appropriate investigations, both factual and legal, to determine what matters of defense can be developed.” *United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973). To ensure that a defendant is adequately advised, “[d]efense counsel has a duty to communicate . . . not only the terms of a plea bargain offer, but also the relative merits of the offer compared to the defendant’s chances at trial.” *State v. Donald*, 198 Ariz. 406 (2000) (quoting *Commonwealth v. Napper*, 254 Pa.Super. 54 (1978)).

It is clear from the Rule, the note, and the case law, that the defense attorney, on behalf of and in cooperation with the defendant, must conduct a thorough investigation into the case facts and legal issues specific to each client s/he represents. To meet this duty, the defendant and his/her attorney must be provided the information and time with which to do so. The parameters of the amount of time (Rule 8, Ariz.R.Crim.P.) and amount

of information (Rule 15 Ariz.R.Crim.P.) have been laid out in the rules governing criminal procedure. The County Attorney, through its design and control of the ERC process, has limited both the time and information that defense counsel have to work with. This makes a thorough review of the case impossible. It makes it difficult to know how and where to proceed with the defense investigation. The process makes it difficult, and often impossible, to perform a meaningful analysis regarding whether the evidence gathered against the defendant is legally sufficient, or was obtained in violation of the U.S. and/or Arizona Constitutions. This is particularly true when existing media evidence (law-enforcement body camera recordings, motor vehicle video recordings, recorded interviews of defendants, co-defendants, and witnesses, and other video/audio recordings from stores, etc., of charged incidents) is not provided during the ERC process. It is likewise true when the County Attorney does not provide applications for search warrants, search warrants, and returns on search warrants in the limited disclosure provided in ERC.

Based upon ERC process limitations on time and disclosure, defense attorneys are routinely unable to provide competent, effective, and informed advice to defendants regarding the strength of the case against them, the

strength of any potential defenses, and whether it is in the best interests of the defendant to accept or reject the ERC plea offer. Likewise, the defendant is denied an opportunity to make an informed, knowing and intelligent decision, about whether to exercise his/her right to challenge the legal admissibility of the evidence being offered against them, whether to further investigate or pursue potential defenses, and, most importantly, whether to accept or reject the ERC plea proposal.

When defense attorneys accept representation in ERC they know, if they have experience with the ERC, that they will not be provided with full disclosure, as is otherwise required under Rule 15. They know the process is limited to a maximum of four weeks. They know they may not receive critical media evidence at all. If media disclosure is provided, they know they may not be permitted, or given the time necessary, to review that evidence with the defendant. They know that they will not know how much evidentiary disclosure has not been provided or what evidentiary disclosure has not been disclosed. They know they will not be provided exculpatory and impeachment evidence under *Brady v. Maryland*, 373 US 83 (1963) and *Giglio v. US*, 405 US 150 (1972), unless that evidence is already contained in the limited disclosure that is provided. Knowing all of this, they know

accepting representation on an ERC case will often require attorneys to advise their clients regarding the acceptance or rejection of a plea proposal, without having first met their obligations under E.R. 1.1 and the caselaw outlined above.

E.R. 1.6(e) Confidentiality of Information - A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ERC puts a difficult strain on the establishment of the attorney/client relationship and maintaining the confidential nature of that relationship. Defense attorneys are routinely unable to first meet clients until their initial ERC Court appearance. In some cases, defendants, both in and out of custody, do not have attorneys assigned or retained to represent them at the time of their initial ERC appearance. For incarcerated defendants, whose representation is established just before the initial ERC hearing, they first meet their attorney, and the initial attorney client consultation occurs, while the defendant is seated in a 16-person jury box. That 16-person jury box is almost always filled to capacity with other incarcerated defendants, whose

cases are likewise being heard in ERC. The Prosecutor's table is located within feet of that jury box and the incarcerated defendants. There are always multiple law-enforcement personnel surrounding the jury box (and the incarcerated defendants), for obvious security reasons. For the many Spanish only speaking incarcerated defendants, defense counsel must utilize a Court-Appointed Interpreter to conduct lawyer-client discussions, all in the presence of the other incarcerated defendants, law-enforcement personnel, and within feet of the Prosecution table. At these first meetings, and based upon these logistical realities, attorneys are completely unable to engage in private, lawyer-client confidential communications regarding any, and all, aspects of cases.

The County Attorney often proposes an ERC resolution that stipulates to a probation sentence with no jail time. If incarcerated defendants agree to waive their rights and enter a guilty plea to such an offer at their first ERC appearance, they are normally released from custody, pending sentencing. In those instances, incarcerated defendants routinely seek immediate counsel and advice regarding all aspects of their cases, in order make a counseled choice to plead guilty, and thereby immediately obtain their liberty. In those cases, defense counsel is placed in the position of making a

“Hobson’s” ethical choice. The first option is to discuss every aspect of the ERC process and every aspect of the defendant’s case at this initial in-Court meeting (in a jury box filled with other defendants, with law-enforcement in close proximity, and with the Prosecutors sitting at a table less than 10 feet away), in order to provide the incarcerated defendant an opportunity to waive his/her rights, plead guilty, and be immediately released. Alternatively, defense counsel must advise the incarcerated defendant that he/she will have to stay in jail (for a minimum of at least one additional week) to allow counsel to be able to confidentially discuss the case and the defendant’s options. For defendants who are naturally concerned about being incarcerated, losing their jobs, loved ones, and life responsibilities, the lawyer-client relationships are irrevocably damaged when attorneys advise their clients that they will have to remain in jail for at least an additional week, simply because the attorneys were unable to see their clients and advise them, in advance of the initial ERC appearance.

Meeting clients under the conditions described above often leads defendants to believe that counsel is not properly representing them. In addition, the process is perceived by many defendants as reasonably suggesting that their attorney is working for the State, pushing a quick plea

resolution on them – akin to high pressure sales tactics one might experience at a used car lot or timeshare seminar. This is not a process that is conducive to the efficacious administration of justice and can often place the attorney in violation of E.R. 1.6(e).

E.R. 3.3 Candor Toward the Tribunal - A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

The ERC plea agreement contains a recital for the attorney to sign. It states:

I have discussed this case with my client in detail and advised her of her constitutional rights and possible defenses. I believe that the plea and disposition set forth herein are appropriate under the facts of this case. I concur in the entry of the plea as indicated above, and on the terms and conditions set forth herein.

The reality is that the defense attorney can only discuss the ERC case in as much detail as the County Attorney allows, based upon whatever incomplete evidentiary information is disclosed and the limited time

permitted for discussion/research/investigation. Constitutional rights and possible defenses in most ERC cases can only be discussed in generalities, without analysis specific to the facts of the case. Video/audio recordings of traffic stops/canine alerts/consents to search/executions of search warrants/interviews of defendants and witnesses/ alleged criminal conduct committed at retail establishments are often not provided in ERC. Written applications for search warrants, search warrants themselves, and returns on search warrants are generally not provided in ERC. The result is that defense attorneys are regularly only able to advise that, “you may have a suppression issue, but we won’t know the strength of any such issue, unless you reject this plea agreement, so we can obtain the disclosure needed to flesh out that issue more thoroughly.” Given the brevity of the ERC process and limits on disclosure, it is often impossible for an attorney to conduct appropriate research and/or investigations to adequately form an opinion regarding whether the plea and disposition are appropriate. The signing of this recital in an ERC case will, therefore, often constitute a violation of E.R.

3.3.

ERC Prosecution Ethical Violations

E.R. 8.4(d) Misconduct – It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

The administration of justice in a criminal prosecution includes a determination that the facts and evidence of the case support a prosecution, and that the defendant's constitutional and due process rights have been upheld during the course of the criminal investigation and prosecution. County Attorney attempts to circumvent any of these requirements would constitute prejudice against the administration of justice. Whether intentionally, by design, or as an unintended result of the design of ERC (a process controlled exclusively by the County Attorney), the result is the same: The County Attorney cannot meet its ethical obligations under this Ethical Rule, as ERC is presently designed.

County Attorneys assigned to cases in ERC must make prosecutorial decisions, regarding the legality of police conduct (regarding search and seizure issues, admissibility of statements, identification procedures, etc.), to accurately determine what factually occurred, and to decide both, whether to prosecute, and how to prosecute defendants, based upon the same limited, incomplete disclosure that is provided to the defense.

The County Attorney Office's stated policy in ERC is to provide the defendant in ERC with whatever disclosure they, themselves, have received. The determinations made by the County Attorney's Office regarding each of these issues are, therefore, routinely made in ERC without the benefit of prosecutorial review of what can undeniably be said to reliably constitute the best evidence available in a criminal investigation: that is, the relevant, existing, but not acquired or reviewed, recorded media disclosure pertaining to the legality of law-enforcement stops, the legality of arrests and searches of citizens or places within the ambit of Fourth Amendment protection, the recorded interviews of suspects and witnesses, and video/photographic evidence of alleged criminal conduct, crime scenes, injuries, search warrant executions, etc. It is an undeniable truth that prosecutorial decisions regarding all of these issues, cannot be justly made, and therefore, should not be made, absent a thorough review, by the assigned county attorney, of sufficient and reliable case evidence, to enable accurate determinations to be reached which will advance the administration of justice.

As ERC is now designed, the evidence necessary to make accurate prosecutorial determinations and decisions regarding all of these issues is often not available to either the assigned county attorney or the defendant

during the ERC process. As one clear example, ERC offers are routinely made by prosecutors who have not received or reviewed the written application for a search warrant, the search warrant itself, and the return on a search warrant. Decision making without sufficient and necessary case evidence is clearly prejudicial to the administration of justice.

An accused's due process rights are memorialized in the U.S. and Arizona Constitutions, as well as the Rules of Criminal Procedure. Consistently affording and applying these rights and rules to each and every citizen accused of a crime is the only way society can ensure that the criminal justice system is applied equally and fairly. The Office of the County Attorney should not have the power and authority to design an alternative criminal justice system, to apply that alternate system to whatever number of accused citizens they alone deem appropriate, and to fail to meet its heavy responsibility to administer justice fairly to those citizens.

A response that ERC is not really a Court at all, but simply a place where defendants who elect to participate may settle their charges with the State, ignores the fundamental reality that defendants who chose to not plead guilty to the prosecutor's ERC offer do, in fact, thereafter face harsher treatment by the State. This reality alone compels the County Attorney to

ensure that the rights of ERC defendants are fully protected, and that no prosecutorial decisions are made in ERC which may be prejudicial to the administration of justice.

Attorney Brendan Sullivan once declared, "*Well sir, I'm not a potted plant.*" ERC impermissibly limits the scope of an accused's Sixth Amendment right "to have the assistance of counsel for his defense." ERC reduces the defense attorney to a mere adviser, armed only with the ability to explain the importance of whatever limited disclosure the County Attorney decides to provide, and to compare the pre-indictment plea offer against the client's sentencing exposure should s/he reject it. The caselaw cited above emphasizes that a defense attorney must conduct a thorough investigation into the case facts and legal issues specific to each client s/he represents. To do so the attorney and defendant must be provided, in each case, with sufficient information and time to fully and properly evaluate the facts and legal issues presented. The parameters of the amount of time (Rule 8, Ariz.R.Crim.P.) and amount of information (Rule 15 Ariz.R.Crim.P.) deemed appropriate to fulfill these duties have been laid out in the rules governing criminal procedure.

The County Attorney, through its design and control of the ERC process, has limited both the time and information that defense counsel have to work with. This makes a thorough review of the case impossible. It makes it difficult to know how and where to proceed with the defense investigation. The process makes it difficult, and often impossible, to perform a meaningful analysis regarding whether the evidence gathered against the defendant was obtained in violation of the U.S. and/or Arizona Constitutions. In short, the ERC process has castrated the defense attorney's ability to competently, and effectively, represent the defendant. This is clearly prejudicial to the administration of justice.

Article II, Section 11 of the Arizona Constitution states that "Justice in all cases shall be administered openly . . ." Another Sixth Amendment issue is that there are no local rules of criminal procedure for ERC. This may impermissibly limit the choices an accused has in acquiring representation. While some attorneys in [redacted] may be familiar with the ERC process, or have professional contacts that would be of assistance in that regard, out-of-county attorneys may not. As a result, those out-of-county attorneys may feel uncomfortable accepting representation on [redacted] cases in ERC. Out-of-county attorneys may be preferable to the

accused for a variety of reasons. A criminal justice process that operates outside of the normal rules of criminal procedure, but does not provide local rules, is not a criminal justice system that is administered openly. The absence of local rules for ERC inhibits an attorney's ability to familiarize themselves with that process and, may limit the choices of attorneys available to an accused. This is prejudicial to the administration of justice.

ERC interferes with an accused's Fourth Amendment right against unreasonable searches and seizures. Due to the limited disclosure in ERC, defense counsel's ability to provide any meaningful analysis regarding whether the evidence gathered against the defendant was obtained in violation of the U.S. and/or Arizona Constitutions, has been drastically limited or completely barred. The accused cannot make a knowing and intelligent decision about whether to accept the ERC plea offer or to exercise the right to challenge the legality of the evidence against her. The failure by the County Attorney, the defense, and ultimately the Court, to review the actions of law-enforcement in conducting investigations and acquiring evidence, in and of itself, has deleterious consequences for the administration of justice. The unfortunate, but almost inevitable consequence of the vast-majority of felony cases in (. being

prosecuted and resolved in ERC, is that law-enforcement may become less careful, diligent, and obedient to citizen Fourth Amendment rights in their practices, secure in the knowledge that Fourth Amendment challenges are more and more rare, due to the limited disclosure provided, the pressure exerted upon defendants to plead guilty, and the lack of prosecutorial/defense/judicial examination of police conduct in ERC cases.

In the normal course of a criminal case – one complying with the Arizona Rules of Criminal Procedure – there are certain rights that an accused is required to waive when a decision has been made to accept a plea offer. These are rights the accused has concerning trial and the appeal thereafter. These rights include, the right to be represented by an attorney; the right to trial by jury; the right to confront and cross-examine witnesses against him/her; the right to compel, through the subpoena power, witnesses to appear and testify; the right to remain silent and to be presumed innocent until proven guilty beyond a reasonable doubt; and the right to present evidence and a defense. The rationale is that, since a plea is being accepted, the accused is required to waive these “trial” rights. Since there isn’t going to be a trial, the court needs to ensure that the accused is making a knowing, voluntary, and intelligent waiver of these “trial” rights. It may

constitute misconduct however, when a prosecutor conditions a plea upon the waiver of other due process rights – rights that have nothing to do with trial.

If a defendant wants to accept the ERC plea offer, the County Attorney requires the accused to waive important due process rights. First, the accused must permanently waive the right to a Preliminary Hearing. The Preliminary Hearing is an important safeguard in the criminal justice system. It protects the accused from a malicious, baseless prosecution by requiring the State to present evidence to an unbiased Justice of the Peace or Magistrate, who will then decide if there is probable cause for the case to proceed. By design, ERC avoids this step in the criminal justice process. In every case that is resolved in ERC, the County Attorney has successfully avoided having to present its case for a probable cause determination at either a Preliminary Hearing or Grand Jury Proceeding. In ERC, if the accused refuses to sign the Preliminary Hearing waiver, s/he has rejected the ERC plea offer – the offer is contingent upon the accused waiving this due process right. The Preliminary Hearing/Grand Jury process constitutes due process safeguards enshrined in Arizona Law to protect its citizens. The

elimination of these safeguards in ERC is detrimental to the administration of justice.

In addition to waiving the Preliminary Hearing, the accused must also waive Rule 15.8 of the Arizona Rule of Criminal Procedure. Rule 15.8 is a safeguard against disclosure violations under Rule 15. Essentially, the rule states that disclosure (under Rule 15.1) must be provided to the accused not later than 30-days prior to any plea deadline. It then lays out sanctions for violations of the Rule. Rule 15.8 clearly states that disclosure is required in Arizona, even when the case is being resolved via the plea process, as opposed to trial. This is a departure from the Federal system, where no such rule exists. *United States v. Ruiz*, 536 U.S. 622 (2002). It leaves no doubt that Arizona has chosen to deviate from the Federal system and instead, strives to ensure that citizens accused of criminal activity have sufficient information available to them, and time to review it with their attorney, prior to making any decision regarding the acceptance of a plea agreement.

Compared to the Arizona Rules governing the amount, and timing, of disclosure, the design of ERC manifestly results in prejudice to the administration of justice in this regard. The County Attorney's position is that Rule 15 is not implicated because the system operates pre-indictment.

Therefore, they alone control what is disclosed to the accused in ERC. Finally, if the accused chooses to accept the ERC plea offer, the accused must waive his/her right to petition the court for sanctions against the County Attorney for disclosure violations. The elimination of enshrined disclosure requirements, and the ability to address the court regarding sanctions for disclosure violations, is clearly prejudicial to the administration of justice.

E.R. 3.8(d) Special Responsibilities of a Prosecutor – The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. Note [1] states that [a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient, legally admissible evidence, and that special precautions are taken to prevent and to rectify the convictions of innocent persons. “A prosecutor’s duty is to seek justice and not merely convict, and a prosecutor should not intentionally avoid pursuit of evidence merely because he

believes it will damage his case or aid the accused.” *State v. Fisher*, 141 Ariz. 227, 244 n.5 (1984); *State v. Dogan*, 150 Ariz. 595 (App. 1986).

E.R. 3.4(a) Fairness to Opposing Party and Counsel – A lawyer shall not unlawfully obstruct another party’s access to evidence.

E.R. 3.4(d) Fairness to Opposing Party and Counsel – A lawyer shall not, in pretrial procedure, fail to make a reasonably diligent effort to comply with legally proper discovery request by an opposing party.

Whether intentionally, by design, or as an unintended result of the design of ERC, disclosure to the defendant is extremely limited during the ERC process. After reviewing the disclosure that is provided, the defense attorney may discover that there is critical disclosure, regarding either guilt or innocence, or the admissibility of acquired evidence, that has not been provided. The defense can request additional, necessary disclosure from the County Attorney. Since ERC is pre-preliminary hearing and pre-arraignment, it is the position of the County Attorney that Ariz.R.Crim.P 15 *et. seq.* are not implicated and therefore, providing disclosure, specifically requested or not, is completely at their discretion. Although defense attorneys may request additional critical disclosure, the decision regarding whether to provide it to the defense rests entirely within the discretion of the

County Attorney. Due to the limited time period created by the County Attorney for ERC resolutions, even relevant disclosure that the County Attorney might agree is being properly requested may not be acquired by the County Attorney/defendant within the allotted ERC time frame.

The County Attorney's standard policy is to not permit an ERC defendant to submit a Time Waiver extension, beyond the 4-week limit imposed by that office, to be able to obtain and review any additional disclosure, no matter how important or necessary that disclosure might be to the defendant's decision-making process. These policies result in prejudice to the administration of justice. They also result in violations of the prosecutor's special responsibilities under E.R. 3.8, ER. 3.4(a), and E.R.3.4(d).

If the defense desires to request additional disclosure, conduct investigation, acquire mitigation evidence, engage in additional plea negotiation efforts, or engage in further discussion and explanation regarding legal issues/possible defenses, etc., the defendant must, almost always, reject the ERC plea offer. Defense counsel must also advise the defendant that any rejection of an ERC plea agreement will result in an increase in severity of any post indictment plea agreement, if, one is offered at all.

Conclusion

“The prosecutor must refrain from using improper methods to obtain a conviction.” *State v. Hughes*, 193 Ariz. 72 (1998). Whatever the intended purpose, the ERC process is an improper method for obtaining a conviction and is clearly prejudicial to the administration of justice. By designing a system, without local rules, that exists only pre-indictment, is not subject to the Arizona Rules of Criminal Procedure, and requires the accused to waive important due process rights, the County Attorney has created a system that is nothing less than a high-pressure plea system, in which critically important decisions affecting the lives of each defendant must be made in extremely short time periods, with incomplete information and uninformed, and therefore ineffective, advice by counsel. ERC tramples upon the constitutional rights guaranteed every accused Arizona citizen. ERC circumvents the due process protections laid out in the Arizona Rules of Criminal Procedure. ERC prevents the prosecutor from obtaining critical information necessary to make informed, accurate determinations regarding whether to prosecute a case, and if so, how to prosecute that case. A process that fails to acquire the best evidence available

(and, therefore, precludes any review of such evidence), related to citizen-police interactions, will inextricably lead to law-enforcement having less reason to uphold the constitutional protections afforded to Arizona citizens.

ERC turns the criminal justice system on its head, from a system predicated on the careful examination of whether the State is in possession of legally sufficient, and legally admissible evidence, to prove a defendant committed an offense, to a system designed to pressure defendants “who know, or are willing to accept, that they are guilty” to plead guilty to an ERC proposal. The accused must make this decision – without necessary disclosure and without informed advice – before the State moves forward with treating the defendant more harshly, if they reject the ERC proposal. The accused must make this decision without the ability to obtain necessary disclosure, to have a thorough investigation conducted, to have the necessary time to acquire mitigation evidence, to further negotiate, or to simply have their attorney provide them with informed, effective, and competent advice about their case. For all the reasons stated herein, ERC violates the ethical duties for prosecutors requiring they act in a manner that advances the administration of justice. ERC also requires defense attorneys to violate their own ethical obligations.

Ethical Questions for the Commission

Based on the process described above, and the law and argument describing the ethical rules that we, the undersigned attorneys, believe are violated by both the defense attorneys and prosecutors who participate in ERC, we request that this Commission evaluate each of the following questions and advise if the ethical rules detailed above, or any ethical rules, are violated in the following case specific situations, all of which have presented themselves in ERC, and will undoubtedly re-occur:

1. Representation is established late in the day on Tuesday, or on Wednesday (the day of the initial ERC hearing) morning. No ERC paperwork (disclosure or the ERC plea offer) is available prior to the initial ERC hearing at 8:30am. The defense attorney has no ability to discuss any aspect of the case, specific to the client's case, with the accused before the s/he must decide whether to submit a Preliminary Hearing Time Waiver or, if not, to thereby effectively reject an ERC plea offer that has not yet been provided to the defense, but might be provided, prior to the second ERC appearance. The defense attorney takes a blank Time Waiver form to court, advises the client regarding

the ERC process, and asks the defendant whether s/he wishes to agree to the Time Waiver. For incarcerated defendants, this meeting takes place in the 16-person jury box, with other incarcerated defendants sitting next to the client, with the prosecutor's desk located within feet of the client, and with other attorneys and law enforcement personnel in close proximity.

2. Representation is established late in the day on Tuesday, or on Wednesday (the day of the initial ERC hearing) morning. The ERC packet (limited disclosure and the ERC plea offer) is provided to the defense attorney minutes before the initial ERC hearing. The defendant is incarcerated. Neither the defendant nor the defense attorney have a meaningful opportunity to review the ERC packet prior to the initial ERC hearing. Defense counsel has no ability to discuss, at least confidentially, any aspect of the case, specific to the client's case, with the accused before s/he must decide whether to submit a Preliminary Hearing Time Waiver or, if not, to thereby effectively reject an ERC plea offer provided minutes before. The defense attorney advises the client regarding the ERC process and the ERC offer, but does not discuss any aspect of the client's case (facts,

legal issues, trial exposure, etc.), due to lack of confidentiality. The defense attorney then asks the defendant whether s/he wishes to agree to the Time Waiver. This meeting takes place in the 16-person jury box, with other incarcerated defendants sitting next to the client, with the prosecutor's desk located within feet of the client, and with other attorneys and law enforcement personnel in close proximity.

3. Representation is established late in the day on Tuesday, or on Wednesday (the day of the initial ERC hearing) morning. The ERC packet (limited disclosure and the ERC plea offer) is provided to the defense attorney minutes before the initial ERC hearing. The defendant is incarcerated. Neither the defendant nor the defense attorney have a meaningful opportunity to review the ERC packet prior to the initial ERC hearing. Defense counsel has no ability to discuss, at least confidentially, any aspect of the case, specific to the client's case, with the accused before s/he must decide whether to submit a Preliminary Hearing Time Waiver or, if not, to thereby effectively reject an ERC plea offer provided minutes before. The defense attorney advises the client regarding the ERC process and ERC offer, and further, does discuss the facts, legal issues, trial

exposure, etc., with the defendant, to the extent reasonably possible (given the timing of the receipt of the ERC packet and the time available to speak before the case is called). The defense attorney then asks the defendant whether s/he wishes to agree to the Time Waiver. This meeting takes place in the 16-person jury box, with other incarcerated defendants sitting next to the client, with the prosecutor's desk located within feet of the client, and with other attorneys and law enforcement personnel in close proximity.

4. Representation is established late in the day on Tuesday, or on Wednesday (the day of the initial ERC hearing) morning. The ERC packet is provided to the defense attorney minutes before the initial ERC hearing. Neither the defendant nor the defense attorney have a meaningful opportunity to review the ERC packet prior to the initial ERC hearing. Defense counsel has no ability to discuss, at least confidentially, any aspect of the case, specific to the client's case, with the accused. The ERC plea agreement stipulates that if the accused pleads guilty to the felony offense(s), s/he will receive a sentence of probation with no additional jail time - the accused would be released on the day the guilty plea is entered. The defense attorney advises the

client regarding the ERC process, the plea agreement, the Preliminary Hearing/Criminal Procedure Rule 15.8 Waiver form, and the right to submit a Preliminary Hearing Time Waiver to have additional time to review and discuss with counsel, confidentially, issues related to the case. Defense counsel does discuss with the defendant the facts, legal issues, trial exposure, etc., to the extent possible (and without confidentiality). Due to the plea offer envisioning the defendant being released from custody on the day the guilty plea is entered, the defendant advises the defense attorney that s/he wishes to accept the plea offer and pleads guilty at the initial ERC hearing. This meeting takes place in the 16-person jury box, with other incarcerated defendants sitting next to the client, with the prosecutor's desk located within feet of the client, and with other attorneys and law enforcement personnel in close proximity. The defendant also agrees, as required before any plea agreement may be accepted in ERC, to waive the Preliminary Hearing and waive the requirements and sanctions available under Criminal Procedure Rule 15.8. The defense attorney signs the plea agreement, thereby avowing agreement with the language laid out in the recital. Disclosure provided in ERC consists

only of a Probable Cause (PC) Statement. Defense counsel requests additional disclosure, but none is provided. Defense counsel advises the client regarding the plea agreement, the apparent strength of the State's case (based exclusively on the PC Statement) and exposure if the client rejects the plea agreement and proceeds to trial. Constitutional safeguards, potential defenses, and possible areas of investigation are discussed only in generalities, due to the lack of disclosure. The defendant accepts the plea offer and pleads guilty to felony offense(s) at the initial ERC hearing. The defense attorney signs the plea agreement, thereby avowing agreement with the language laid out in the recital.

5. The client agrees to the Time Waiver at the initial ERC hearing. A review of the disclosure, and discussion with the defendant and/or witnesses, reveal that a meritorious suppression issue may exist. There is relevant law-enforcement dash cam/body cam video in existence that hasn't been provided to either the County Attorney or the defense. Defense counsel requests the video, but it is not provided prior to the plea deadline. No extension of time is permitted by the prosecutor to provide time for the parties to acquire or review the

video. Defense counsel advises the client regarding the plea agreement, strength of the State's case (based exclusively on the limited disclosure provided in ERC), and exposure if the client rejects the plea agreement and proceeds to trial. Constitutional safeguards and potential defenses are discussed mostly in generalities, due to the lack of disclosure and the State's refusal to acquire, review, and provide to the defense the best evidence (the videos), prior to the defendant being compelled to decide whether to accept or reject the ERC offer. The defendant also agrees, as required before any plea agreement may be accepted in ERC, to waive the Preliminary Hearing and waive the requirements and sanctions available under Criminal Procedure Rule 15.8. The defense attorney signs the plea agreement, thereby avowing agreement with the language laid out in the recital.

6. The client agrees to the Time Waiver at the initial ERC hearing. A review of the disclosure indicates that the crux of the State's case consists of a recorded "confession" yet to be disclosed. Based upon a review of disclosure and discussions with the defendant and/or witnesses, the admissibility and/or content of the recorded interview is in question. Defense counsel requests the recording, but it is not

provided prior to the plea deadline. No extension of time is permitted by the prosecutor to provide time for the parties to acquire or review the recording. Defense counsel advises the client regarding the plea agreement, strength of the State's (case based exclusively on the limited disclosure provided in ERC), and exposure if the client rejects the plea agreement and proceeds to trial. Constitutional safeguards and potential defenses are discussed mostly in generalities, due to the lack of disclosure. The defendant accepts the plea offer and pleads guilty to felony offense(s) at the second (and final) ERC hearing. The defendant also agrees, as required before any plea agreement may be accepted in ERC, to waive the Preliminary Hearing and waive the requirements and sanctions available under Criminal Procedure Rule 15.8. The defense attorney signs the plea agreement, thereby avowing agreement with the language laid out in the recital.

7. The client agrees to the Time Waiver at the initial ERC hearing. A review of disclosure reveals that the evidence seized, and the charges filed against the defendant, were the result of a written application for a search warrant, the signing by a magistrate of a search warrant, and law-enforcement's execution of that signed search warrant. The

disclosure provided to the defense does not contain the application for the search warrant, the search warrant itself, or the return on the search warrant. The defense attorney requests that the State obtain this information, both for the State to review, and to provide to the defense for review. The prosecution does not obtain this evidence or provide this information to the defense. No extension of time is permitted by the prosecutor to provide time for the parties to obtain and review disclosure related to the search warrant. The defense attorney advises the client regarding the plea agreement, strength of the State's case (based exclusively on the limited disclosure provided in ERC), and exposure if the client rejects the plea agreement and proceeds to trial. Constitutional safeguards (Fourth Amendment issues surrounding the issuance and execution of the search warrant) and potential defenses are discussed mostly in generalities, due to the lack of disclosure. The defendant accepts the plea offer and pleads guilty to felony offense(s) at the second (and final) ERC hearing. The defendant also agrees, as required before any plea agreement may be accepted in ERC, to waive the Preliminary Hearing and waive the requirements and sanctions available under Criminal Procedure Rule

15.8. The defense attorney signs the plea agreement, thereby avowing agreement with the language laid out in the recital.

8. Finally, is the ERC process, in the aggregate, prejudicial to the administration of justice? Specifically, does it limit the scope of representation and choices of representation, impede meaningful inquiry into Constitutional violations regarding the acquisition of evidence, lead prosecutors to neglect their ethical duties with regard to the advancement of the administration of justice, improperly limit the defendant's access to disclosure, coerce the defendant, as a condition of plea acceptance, to waive important due process rights, and require defense attorneys to neglect ethical responsibilities through the signing of an avowal that they have competently and effectively represented clients in ERC?

We, the undersigned attorneys who are practicing, or whom have practiced criminal defense in () hereby endorse the arguments made herein and request the Attorney Ethics Advisory Commission to render their opinion regarding the Early Resolution Court process:

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