COMMITTEE ON RULES OF PROCEDURE
IN DOMESTIC RELATIONS CASES

Monday, November 17, 2003 (10:00 am – 3:00 pm)
Judicial Education Center
Teleconference #: (602) 542-9007
Web Site: http://www.supreme.state.az.us/drrc/

Members Present:
Hon. Mark Armstrong, Chair
Annette T. Burns, Esq.
Hon. Norm Davis
Annette Everlove, Esq.
Bridget Humphrey, Esq.
Hon. Michael Jeanes
Phil Knox, Esq.
Janet Metcalf, Esq.
Hon. John Nelson
Hon. Dale Nielson
Richard Scholz, Esq.
Robert Schwartz, Esq.
Debra Tanner, Esq.
Hon. Nanette Warner
Brian W. Yee, Ph.D

Member Not Present:
Deborah Fine, Esq.

Staff Present:
Konnie K. Young
Karen Kretschman
Isabel Gillett

Guests:
Kim Gillespie, Office of the Attorney General
Stan O'Dell, Office of the Attorney General
Hon. Eve Parks, Maricopa Superior Court
Janet Sell, Office of the Attorney General

Quorum: Yes

1. Call to Order: Hon. Mark Armstrong

Judge Armstrong welcomed Committee members, and all present members introduced themselves. He also introduced the new member, Judge John Nelson from the Superior Court in Yuma County. He asked the guest presenters from the Attorney General's office to introduce themselves, including Kim Gillespie, Janet Sell and Stan O'Dell.

There were new handouts distributed: the revised membership list and the new 2004 calendar dates, which had been previously distributed in electronic format.

2. Approval of Minutes . . . . . Hon. Mark Armstrong

Michael Jeanes proposed some new language on page 10 that had been included in the revised minutes that were distributed at the meeting.

Minutes Approved, Seconded.

3. New Materials from Workgroups

Judge Armstrong reviewed the new material from the workgroups: a memo from Judge Davis dated November 17, 2003; one page from Debra Tanner – revision on the Scope of the Rules and Applicability of the *Arizona Rules of Civil Procedure* (*ARCP*) and the Applicability of the Rules of Evidence. Debra Tanner indicated that there should be a change under "Definitions." It should say "complaint" instead of "complainant."

4. IV-D Presentation: Kim Gillespie, Janet Sell, and Stan O'Dell

Judge Armstrong told the Committee that the speakers would assist the Committee in drafting rules if the Committee decides they are appropriate for Title IV-D cases.

Kim Gillespie was the first speaker. She gave background on what the IV-D agency is, what they do and what kind of services they provide, as well as federal funding and federal expedited process requirement for courts. She said the new hire reporting was an incredibly valuable change in the system, as well as the automated system.

Janet Sell then gave her presentation. She spoke about what the IV-D program does on a system-wide basis, as well as basic components and what they are trying to do for the public. The first component is establishing paternity if it is needed. After paternity has been established, they need to establish a child support order for any case where there is no order. They then take steps to effectuate collection. This service is for anyone who is on public assistance or not. The IV-D program also provides services to third-party caretakers.

Stan O'Dell was the last presenter; he said there was never an end to the cases, and that it is a practice that is numbers-driven. Stan distributed statistical report documents and reviewed them with the Committee in order for the Committee to see the high volume.

He provided the following handouts: Attorney General's Statistics for the Week of November 3-7, 2003; Child Support Enforcement Section; Maricopa County Scheduled Court Appearances; Court Appearances SFY 1997 – SFY 2003; Current IV-D (AG) Work Station Assignments; Federal Expedited Process Requirements and Funding for the Courts report. Every week they receive about 100 files and they complete 100 cases. Stan said that without automation and team structure, they would not be able to keep up. The only way to handle this kind of volume is for attorneys to know what their case load is and where they are going each day of the week.

Kim Gillespie spoke again. She handed out a document entitled, "Federal Expedited Process Requirements and Funding for Courts." The federal law requires using expedited process. She said there was a specific time frame for getting IV-D matters heard. The federal government made funding available to courts through the IV-D agency through contracts with DES with courts subject to some limitations. For instance, you cannot get reimbursement for judges and the cost of judges' staff; however, you can get reimbursed for the cost of commissioners and commissioners' staff. Many counties have contracts with the government for funding the cost of commissioners and their staff. The total is about 2.1 million dollars that DES sends to courts to assist in having IV-D matters handled expeditiously.

Stan O'Dell explained to the members why it would be important to have portions of the rules devoted to Title IV-D world. He believes the IV-D cases are about one-third of the entire caseload in Maricopa County. If family court rules were written in such a way to put down on paper some of the protocols and the procedures that they have evolved over the years, it would help the public understand how things work and help the bar to understand how things work. Codifying some of the procedures could assist in putting them down on paper and memorializing them, and also achieve some standardization across the state. It will achieve some standards that make sense to case efficiency. Publishing them would at least allow attorneys to know what is going on. Stan said that they would be funneling some ideas through Debra Tanner in our meetings, and they will be presenting drafts and proposals to the members in the future.

Judge Armstrong stated that the Committee has talked about two ways of dealing with Title IV-D, one being to intersperse those rules throughout the rules that would be applicable or having a separate section dealing with IV-D cases. He stated that the latter was his personal preference because it makes it simpler to follow and understand. He also stated that Debra Tanner will be our representative, but anyone can participate in drafting.

Judge Warner stated that there is no way to know the case before her is a IV-D case when the State has never made an appearance, and they have never filed anything; she only finds out when she is in the middle of a contempt hearing. She asked if there was any way to put in the rules that the State must do something to indicate to judges when a case is IV-D. Kim Gillespie said they could come up with a better way to notify judges. However, there are problems with that, in that at times a case does not start off IV-D, but later becomes IV-D.

Stan said that part of the education is for parties to notify the state when they get ready to file an action. He also stated that Maricopa County has the Integrated Court Information System (ICIS) system that has a IV-D flag on it. Other courts are looking at revising or modernizing their automation systems. He would like to work out a way to get a IV-D flag on their systems so that the judicial assistant or clerk can look at it; this would make it easier.

Annette Everlove stated that most attorneys representing clients do not know the case is IV-D, and it really creates havoc. She asked if Stan would look at a uniform way of notifying the state. Maricopa County designed a new DR filing coversheet, and it expanded the questions which would help the clerk's office identify it as a IV-D case. The questions would be written in such a way that lay persons would understand them, such as, "Have you an ATLAS number?" and "Have you received DES assistance?" and other such questions. If any one of the answers is yes, it is a red flag that this is a IV-D case.

Robert Schwartz asked if such cases involving a child who becomes incapacitated and receives benefits from the state for this incapacitation become IV-D cases. Kim Gillespie said these are not IV-D cases automatically.

Judge Armstrong said that there were two remaining issues:

1) Does the Committee prefer to receive a package at end of the workgroup's work on drafting IV-D rules, or does the Committee want to be kept up-to-date as the group progresses?
2) Does anyone else from the Committee want to participate on the workgroup? Judge Warner said she would ask Judge Karen Adam to work with the AG's office.

LUNCH

5. Report from Workgroup #1: Sections I & II (Bridget Humphrey, Chair)

Bridget Humphrey reviewed that the Committee had agreed to eliminate Rule 5.1—Notice of Appearance in section A(1). She stated that the only other changes that were made in the limited scope representation portion of the rules (discussed at the last meeting) are regarding withdrawal and substitution. For withdrawal and substitution with consent, the Committee agreed that the attorney would file a Notice of Withdrawal with Consent by the party; the judge would also lodge an Order so that the clerk's office would see the Order and be able to key into the computer system that the person was not *pro se*. She made it parenthetical that if there is a Notice of Withdrawal with Consent, a 10-day waiting period should not be needed; it should be automatic. If notice is without consent, the 10-day waiting period takes place. If there is no objection within the 10 days, then the Court would grant the Order that the attorney has withdrawn. If there is an objection, the Court may conduct a hearing, at which they will determine whether the purpose for which the attorney appeared has been completed. If the attorney wants to withdraw for any other reason, Part A will apply.

Bridget drafted two forms of Notice of Limited Scope Appearance and handed out copies. Different states have done one of two different formats: one allows the attorney to file a brief Notice of Limited Scope of Representation, and the other, which is basically a California form, identifies specific areas in which counsel would be appearing with a provision for some brief explanation of the more involved matters.

Discussion ensued to determine whether an attorney may come in and explain what the perimeters of his limited scope representation are, or whether the Committee would prefer that attorneys just check the box on a form. Bridget came up with categories that covered distinct areas of practice.

Judge Warner stated that she likes the one without the boxes because it is more open. She said if the check-the-box form is used, she would like to have something that would say, "Temporary Orders Only" and take off "In Re the Marriage," as well. Robert Schwartz agreed because the boxes are too limited. An explanation of exactly what the attorney is going to do might be more helpful. Bridgett asked the Committee if anyone liked the check-the-box system, and discussion continued.

Judge Nelson asked, "Why would a client need to sign a limited scope representation document?" Bridgett said it was on all of the forms she had reviewed. She said the attorney wants to make sure the client understands it. She thinks it is an option that is not necessarily needed. Judge Armstrong said that the rules would require that there is an underlying agreement between the client and attorney.

Judge Davis stated that he has concerns that checking the box may be better, because a free-form would be open to a lot of chances of abuse. He thinks that the rule needs to be tightened. He said he was in favor of a more clearly delineated form that indicates when the representation begins and when it ends. He also stated that if the rule is going to be that the Court is required to sign a Withdrawal when it is submitted, then why is it necessary to have an Order of Withdrawal, instead of simply having a Notice of Withdrawal.

Judge Armstrong indicated that it seems like there ought to be an opportunity to object. He also stated that the form with the boxes is similar to California's form. Annette Everlove stated that she agrees with boxes, because this type of form makes it easier for a client to understand and more attractive for an attorney to use. She is also in favor of adding an automatic withdrawal that the client agrees to on the form.

Bridget asked if it was the Clerk's Office that needed the withdrawal and said that they could include the Notice with Consent, and automatic withdrawal; if with consent, there would be no 10-day order.

Judge Davis stated that maybe we are saying we let anyone withdraw. Judge Armstrong added that with full scope representation, there is a motion and objection period, so maybe we should have the same for limited scope representation. Judge Warner said that nothing triggers a court to do anything (regarding attorney withdrawal) unless there is something to bring it to the court's attention. In Pima County, attorneys file a motion saying the case is all done, and they do not even need the client's signature.

Bob Schwartz stated that he has questions about what we are actually doing, and he sees problems with that being abused; we need to acknowledge what court is and is not doing.

Bridget suggested designing a form that requires an attorney to plug in the language of limited scope agreement into the form. Bob Schwartz responded that then court is put in the position of being the moderator and said the limited scope agreement needs to be decided in advance of the hearing to clear up any ambiguities. Judge Davis stated that anyone should be able to look at the limited scope agreement and determine whether the attorney should be there or not. Another member indicated that it sounds like we are trying to define pornography, and he does not know how to tighten it up but thinks it is going to be a nightmare.

Judge Armstrong reminded the Committee that we talked about making this an experimental rule with some sort of limited scope representation because it is already blessed by Supreme Court. He suggested making the rule as good as we can, but maybe with a limited duration. Janet Metcalf indicated that there may be a place where we need to be as specific as possible, such as on the check-the-box form. Judge Warner recommended that the form does not include hearing dates. Judge Davis added that we need to make it clear, so that attorneys have entry and egress with ease. Judge Warner added that the form must include child support.

Judge Armstrong mentioned that there could be an aspiration sentence included in the rules for the Volunteer Lawyers Program. Judge Davis stated that it is ludicrous to talk about helping people with very low incomes, but also say you will only represent client in one area and just help low income people for a time, then get out. Judge Davis disagrees with having separate subject matter representation. Judge Armstrong asked, "Do we want to limit it for time tables or allow subject matter representation?" Judge Nelson responded that he thinks it might be mass confusion if there are two lawyers representing different clients on different issues.

Judge Armstrong said that the majority of the members support the form with boxes. He asked if everyone agrees that it should be experimental on a one-year basis. Everyone agreed. Bob Schwartz said that as of December 1st the new Rules of Ethics go into effect. They require a written retainer agreement in every case, and that the retainer agreement needs to define the scope of representation. Judge Armstrong stated that the Notice is supposed to reflect the retainer agreement.

TASK: Judge Armstrong asked Bridget to revise the draft of the "In Re: the Matter of" form and go with a check-the-box form without dates for hearings, and that she also include a sentence about this being a one-year experimental rule.

Janet stated that someone had suggested a box for temporary orders. She suggested a box for different orders. Annette Burns pointed out that 1.2 is a new rule, and speaks to limited scope representation. She said it was important that it our rule be consistent with this.

Bob Schwartz asked, "If there is something vague or problematic, do we need to allow a hearing to challenge it?" Judge Nelson and Judge Armstrong said they would not want to invite more hearings.

Judge Armstrong suggested that if there is no client consent, it needs to be handled by motion with a ten-day objection period, and then the court would sign off the order as it is done now for any other appearance. The members agreed.

Bridget said that she thinks she included a provision that "the above-named attorney of record is available for service of process, only for the issues indicated above." This seems to be used by any state that has forms. Judge Davis stated that a petition for Order to Show Cause is filed on three or four proceedings, and he believes it could get really confusing.

TASK: Bridget will reconcile these, and Judge Armstrong asked her to change the language to: "Once an attorney is in, that attorney can be served . . . ."

Confidentiality Rule

Next, discussion turned to the Confidentiality Rule, and Bridget stated that she had met with Michael Jeanes and his staff a couple of weeks ago to discuss the following:

1. Closing of file for first 45 days—handout prepared by Michael Jeanes;
2. Determining items as confidential;
3. Certain documents being automatically sealed.

The Committee had agreed that sealing certain documents may not be the best practice, because the court would have a separately sealed portion in virtually every file; the burden would not be justified by the risk. Bridget said that the Supreme Court ruling on modification to 123 will be in January.

A handout regarding the 45-day rule was distributed. Judge Nelson stated that he would like to see this as an elective for a judge. Janet Metcalf added that the opposing party should get a copy of the change of judge.

Judge Armstrong said the other issue is whether to make it discretionary that counties could opt out. Phil Knox indicated that this might be an issue for clerks. Michael will bring it up this week at the clerk's meeting. Judge Armstrong stated that there is a need to add prefatory language. Judge Davis stated that we should delete the definition for family law. Bridget said that the rule may be limited to this one single paragraph. Judge Armstrong said that Bridget should put it in final order, and make any refinements.

Rule 12

Janet Metcalf said it was pretty basic. She said they needed to change the word "defendant" to "respondent, and "plaintiff" to "petitioner," and a few other word changes. Where the rule refers to "when a petition and summons is filed," she wanted to add language about "when a summons is necessary." She also wants to add what will be filed as a petition vs. what will be filed as a motion. In Rule 12.f, regarding motion to strike, she would like to see stopping inclusion of superfluous documentation, such as police reports, friend and family letters, etc., and also stopping inclusion of children's statements.

Regarding the motion to strike, Judge Davis stated that the judge does not really strike it from the file; it is still in the file. He suggested that it would need to be sealed.

Judge Armstrong stated that in the case of confidentiality, it should be dealt with on a case-by-case basis. He also said that on the other hand, if someone is filing an emergency petition for change of custody, these are the things they need them to include. His preference would be not to be any more specific with the rule. He said that different judges view motion to strike differently. Michael Jeanes agrees—the Clerk's office has seen some confusion regarding this. Judge Armstrong said that perhaps it is best to be more specific and to seal it upon order of the court.

There was discussion about the confidential information sheet. Michael said his office would prefer that the sheet not be kept, and use it only as a data information sheet. Judge Davis said this might be a good place to deal with the issue of what is considered a motion and a petition. If not here, then in each of the post decree areas and temporary orders areas, to specify exactly what is intended—Order to Show Cause, Order to Appear. We need a uniform procedure. Judge Nelson said we should not have petitions any more but motions. Judge Armstrong asked Janet to include it in Rule 12. Also, Judge Davis said that the OSC rule needed to be addressed somewhere in each of post decrees.

Judge Armstrong asked Janet to do a first draft that distinguishes the original complaint petition from subsequent motions.

Annette Everlove stated that an Order to Show Cause does not need a written response, but motion practice does. If changed, we need to be really specific as to what needs a written response to avoid an adverse judgment being entered. She said there is a substantial amount of confusion—what is an evidentiary hearing, motion?

Judge Armstrong said there would be separate workgroups on temporary orders and post-decree. Judge Davis suggested we might want to make decisions about other areas before post-decree, and Judge Armstrong said that might be the easiest way to do it.

TASK: Judge Armstrong asked Janet to come back with Rule 12 in a strikeout version.

BREAK

6. Workgroup #2—Section XI (Hon. Norm Davis, Chair)

Debra Tanner changed the Scope of Rules to:

1. Add injunctions against harassment where ordered by the presiding family court judge or designee;
2. Put definitions under Rule 1;
3. Fix the rule regarding the applicability of *ARCP* to say that they would only apply when incorporated by reference in these rules, and the rest of the time they will not apply; and

4. Add to the applicability of *Rules of Evidence* that in family law cases there would be an exception to the *Rules of Evidence* to presumptively allow the court to admit relevant and reliable evidence. The court will apply the exception to the *Rules of Evidence* unless the party files a timely motion 60 days before trial or within other time specified by the court to require a strict application of the rules of evidence.

Judge Nelson asked if there was a consensus to ease the *Rules of Evidence*. Discussion ensued. Judge Armstrong filled him in on the history of this issue. Judge Armstrong said that there was a point when the Committee did discuss relaxing the rules for documentary evidence. However, at the last meeting, the consensus was to go beyond that and relax the rules of evidence generally, but still allow an attorney to invoke them on a case-by-case basis.

Judge Davis said that 804(b)(5) has some language on the catchall exceptions for hearsay as follows:

> [I]f the court determines that (A) the statement as offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interest of justice will be best served by the admission of the statement of evidence. However a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Judge Davis stated that the goal of evidence was to allow reliable and relevant information into the courtroom. He anticipates comments from the State Bar that this needs to be streamlined.

Judge Armstrong suggested eliminating the language in the draft that says "60 days before trial or within other time as specified by the court." There was a discussion over the use of the word "timely." Judge Armstrong suggested that rather than use "timely," which is subject to too much discretion, that we be more specific about it. Janet Metcalf suggested breaking this up into two areas: 1) Documentary Evidence and 2) Testimonial Evidence.

Judge Warner agreed with documentary evidence but had a hard time easing up rules for testimony. She said we were talking about "inherently" reliable**. Judge Armstrong told the members that we would just leave "timely motion" in the rule, and that we will continue this discussion the next meeting.**

Phil Knox distributed 42(a) – Consolidation of Cases and Inclusion of Parties. He said he had spoken with the clerk's office about administrative handling of this consolidation effort. There was discussion about how to file multiple filings in the lower case number.

Judge Armstrong asked if the Committee should decide who makes the motion to consolidate. **The decision was that it would be decided by the judge assigned to the first filed case. Any motion to consolidate will be consolidated into the first filed case.**

7. Presentation on the Default Rule: Eve Parks

Eve Parks proposed adding Rule 6.6 (the Consent to Decree Process) into Rule 54, as well as a stipulation which would be signed by both parties. She stated that Maricopa County requires 60 days before submitting the decree. Maricopa County has no storage area. This is basically an option for the counties. This is just an option to the judgment. It is cheaper for attorneys because they do not have to appear for default. This contemplates no hearing, on a consent decree, but a Response fee is paid as required, because the parties are appearing.

TASK: Eve will add, "Response fee must be paid" and additional language to make it clear.

Judge Armstrong asked Eve Parks to get her revisions to Annette Burns. He also stated that since we were approaching the end of the meeting, that we continue with the report from Annette's Workgroup at the next meeting.

8. Consolidation of Workgroups' Drafts for Next Meeting

TASK: Judge Armstrong stated that every chairperson should e-mail his/her workgroup's product to Konnie in a timely manner so that she can consolidate them into one document.

9. Public Comment: Sam Coleman

Mr. Coleman from Flagstaff spoke regarding some changes in the system that he would like to have happen, such as: making help available to *pro pers* at the desk, where questions could be answered; split community property evenly at the beginning of the trial; have law technicians rather than lawyers.

Mr. Coleman stated that no fault divorces were a problem, and that he feels many divorces would not occur if there were no such thing as "no fault divorces." He would like a committee be set up to study no-fault divorces. He stated that laws do not have to follow society, they can lead society. If they lead society, they can make a difference, he believes.

10. Next Meeting: Konnie Young

The next meeting will be on December 12, 2003 from 10:00 am until 3:00 pm at the State Courts Building in Room 119.

11. Adjournment: Hon. Mark Armstrong

Judge Armstrong adjourned the meeting at 3:05 pm.