

Task Force on the Arizona Rules of Family Law Procedure

Meeting Agenda

Friday, February 17, 2017

10:00 AM to Noon

State Courts Building * 1501 West Washington * Conference Room 119 * Phoenix, AZ

Item no. 1	Call to Order Welcome and introduction of members	<i>Hon. Rebecca Berch and Hon. Mark Armstrong, Chair and Co-chair</i>
Item no. 2	Review of Administrative Order 2016-131 Approval of Task Force Rules for Conducting Business	<i>Justice Berch and Judge Armstrong</i>
Item no. 3	Restyling conventions; the restyled civil rules	<i>Mr. John Rogers</i>
Item no. 4	Workgroups	<i>Justice Berch and Judge Armstrong</i>
Item no. 5	Discussion of specific items: <ul style="list-style-type: none">• R-16-0028 and R-16-0037 [effective January 1, 2017]• R-16-0020, R-17-0017, R-17-0019 [pending]• A.R.S. § 25-403(B)• Immunity [<i>Griggs v Oasis Adoption Services</i>]	<i>Judge Armstrong</i>
Item no. 6	OneDrive Overview	<i>Ms. Julie Graber</i>
Item no. 7	Roadmap <ul style="list-style-type: none">• Meeting schedule	<i>Justice Berch and Judge Armstrong</i>
Item no. 8	Call to the Public Adjourn	<i>Justice Berch</i>

The Chairs may call items on this Agenda, including the Call to the Public, out of the indicated order.

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Karla Williams at (602) 452-3547. Please make requests as early as possible to allow time to arrange accommodations.

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)
)
ESTABLISHMENT OF THE) Administrative Order
TASK FORCE ON THE ARIZONA) No. 2016 - 131
RULES OF FAMILY LAW PROCEDURE)
AND APPOINTMENT OF MEMBERS)
_____)

This Court’s Strategic Agenda, *Advancing Justice Together: Courts and Communities*, includes the review of certain Arizona court rules to restyle, simplify, and clarify the rules. This Court has recently adopted restyled Rules of Civil Appellate Procedure, Rules of Evidence, Justice Court Rules of Civil Procedure, Rules of Protective Order Procedure, and Rules of Civil Procedure.

The current set of the Arizona Rules of Family Law Procedure were adopted October 19, 2005, with an effective date of January 1, 2006. Although they have been amended at various times since their adoption, a comprehensive review of those rules would now be beneficial.

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED that

1. ESTABLISHMENT: The Task Force on the Arizona Rules of Family Procedure is established.
2. PURPOSE: The Task Force shall review the Arizona Rules of Family Law Procedure to identify possible changes to conform to modern usage and to clarify and simplify language. The Task Force shall seek input from various interested persons and entities with the goal of submitting a rule petition by January 10, 2018, with respect to any proposed rule changes.
3. MEMBERSHIP: The individuals listed in Appendix A are appointed as members of the Task Force beginning February 6, 2017, and ending December 31, 2018. The Chief Justice may appoint additional members as may be necessary.
4. MEETINGS: Task Force meetings shall be scheduled at the discretion of the Chair. All meetings shall comply with the Arizona Code of Judicial Administration § 1-202: Public Meetings.
5. STAFF: The Administrative Office of the Courts shall provide staff for the Task Force and shall assist the Task Force in developing recommendations and preparing any necessary reports and petitions.

Dated this 21st day of December, 2016.

SCOTT BALES
Chief Justice

Attachment: Appendix A

Appendix A

Membership List

Task Force on the Arizona Rules of Family Law Procedure

Chair

Justice Rebecca Berch (ret.)

Vice Chair

Judge Mark Armstrong (ret.)

Members

Michael Aaron
Aaron and Rogers PC

Commissioner John Assini
Superior Court in Pima County

Keith Berkshire
Berkshire Law Office PLLC

Mary Boyte Henderson
Solo Practitioner

Annette Burns
Law Offices of Annette T. Burns

Commissioner Dean Christoffel
Superior Court in Pima County

Cheri Clark
Family Court Administrator
Superior Court in Maricopa County

Judge Suzanne Cohen
Family Court Presiding Judge
Superior Court in Maricopa County

Helen Davis
The Cavanagh Law Firm PA

Kiilu Davis
Law Offices of Stone & Davis PC

Judge Karl Eppich
Family Court Presiding Judge
Superior Court in Pinal County

Joi Hollis
Conciliation Court Director
Superior Court in Pima County

Judge Paul McMurdie
Arizona Court of Appeals, Division One

Aaron Nash
Clerk of Court's Office
Superior Court in Maricopa County

Jeffery Pollitt
Jeffrey G. Pollitt PC

Janet Sell
Unit Chief Counsel
Arizona Office of the Attorney General

Steven Serrano
Burch & Cracchiolo PA

Judge Peter Swann
Arizona Court of Appeals, Division One

Steven Wolfson
Dickinson Wright PLLC

Gregg Woodnick
Gregg R. Woodnick PLLC

Task Force on the Arizona Rules of Family Law Procedure
Rules for Conducting Task Force Business and Proxy

1. Quorum Policy

The minimum number for a quorum of members to conduct the business of this Task Force is fifty percent plus one (i.e., twelve members). In-person attendance is preferred, but a member, if necessary and if electronic conferencing devices are available, may attend a meeting by telephone or by video.

2. Decision-Making

Task Force decisions will be considered upon a motion that is properly seconded and following discussion on the motion. Task Force decisions will be made by majority vote of the members attending the meeting. A numerical vote will be recorded unless the decision is unanimous. The chair will vote only to break a tie.

3. Responsibility of Members and Proxy Policy

Members are encouraged to actively participate in Task Force meetings, as members are selected for their expertise. However, Task Force members may send a proxy to attend meetings when necessary. A member should give twenty-four hours' notice to Task Force staff concerning the attendance of a proxy.

- A proxy has all the responsibilities of a member, including voting power. A proxy must review the agenda issues, be prepared for a meeting, and brief the member on the meeting within a reasonable time thereafter.
- Another Task Force member may not serve as a proxy.
- A proxy is included in the count of members present to determine a quorum.
- A member may not use a proxy for more than three meetings without approval of the Task Force chair.

A proxy form and instructions are on the next page.

4. Call to the Public

As provided in A.C.J.A. § 1-202, every meeting agenda will include a "Call to the Public" before the meeting is adjourned. The chair will announce the opportunity for public comment regardless of whether a member of the public is attending the meeting or has expressed any desire to comment. The chair may impose reasonable time, place, and manner limitations upon members of the public who respond to the call, including setting time limits, banning repetition, and prohibiting profanity and disruptive behavior.

Task Force on the Arizona Rules of Family Law Procedure
Proxy Designation Form and Instructions

- Appointed members of the Task Force are responsible for briefing their proxy regarding a pending Task Force meeting so that the proxy is prepared to conduct Task Force business.
- A proxy must similarly communicate with the member after a meeting to inform the member of substantive events that occurred at the meeting.
- A member wishing to appoint a proxy should complete this form and transmit it to Task Force staff indicated below at least one day prior to the scheduled Task Force meeting. A member who sends a proxy to more than one meeting must use a separate proxy form for each meeting.

Proxy designations should be sent to:

Mark Meltzer, Task Force Staff, Administrative Office of the Courts
Phone number: (602) 452-3242
Fax number: (602) 452-3480
E-mail: mmeltzer@courts.az.gov

I (please print your name), _____,
will be absent from the meeting of the Task Force on the Arizona Rules of Family Law
Procedure scheduled for the ____ day of _____, 2017. Accordingly, I
designate the following individual to act as my proxy for this meeting:

Name of proxy: _____

Title of proxy: _____

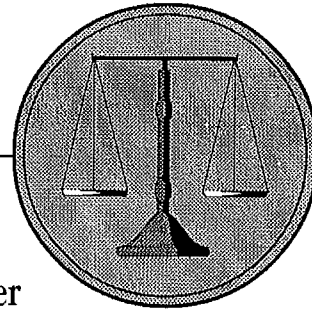
Proxy's e-mail address: _____

Proxy's phone number: _____

Date

Signature of Task Force Member

**GUIDELINES
FOR DRAFTING
AND EDITING
COURT RULES**



By Bryan A. Garner

In January 1996, the Standing Committee on Federal Rules of Practice and Procedure authorized the Secretary of the Rules Committee to publish for comment a revised draft of the Federal Rules of Appellate Procedure. To help explain the drafting and editing choices reflected in the Appellate Rules, the Standing Committee also authorized the Secretary to publish *Guidelines for Drafting and Editing Court Rules*.

As consultant to the Rules Committees, Bryan A. Garner skillfully constructed these Guidelines to help all those working on the Appellate Rules, as well as those engaged in other drafting and editing projects.

Publication of the Guidelines promotes openness of the rulemaking process to the public scrutiny and participation. It is my hope that people who comment on the proposed Appellate Rules – either favorably or unfavorably – will also take time to comment on any of the Guidelines relating to their views.

–ALICEMARIE H. STOTLER, CHAIR
Committee on Rules of Practice and Procedure
Judicial Conference of the United States

Preface

by Robert E. Keeton

1.

Federal Rules of Practice and Procedure ought to be user-friendly. This is the prime characteristic of good rules of procedure. They should be easy to read and understand — as clear in content and meaning as it is possible to make them, and as crisp and readable as clarity permits.

Of almost equal importance is another characteristic. Rules of procedure should be that and no more. They should be substantively neutral. In other words, we should draft procedural rules that neither favor nor disfavor any particular legal interest. To that end, we should do our best to foster institutional arrangements for resolving disputes about substantive issues in the appropriate forums for substantive lawmaking, and to keep substantive issues out of procedural rulemaking. Rules of practice and procedure are used in resolving individual cases and, at their best, are as fair, impartial, and substantively neutral as we can make them.

2.

Even superbly drafted rules are at risk of becoming less consistent, clear, and readable as they are amended. And the need for amendments is inevitable. The only effective remedy for the risks incident to amendment is twofold — eternal vigilance and a commitment to excellence in style as well as content. Fortunately, good style and good content reinforce each other.

3.

The first of the Federal Rules were the Rules of Civil Procedure, drafted in the 1930s. By the year 1990, we had five sets of Federal Rules — Appellate, Bankruptcy, Civil, Criminal, and Evidence — and five Rules Committees of the Judicial Conference of the United States — one each for Appellate, Bankruptcy, Civil, and Criminal (not for Evidence), and a coordinating committee commonly called the Judicial Conference Standing Committee on Rules. Each committee had its own set of consultants and drafters and its own set of stylistic preferences. The predictable result was five sets of

rules that sometimes said almost the same thing, but in different ways and without being clear about whether they meant the same thing. In addition, substantial differences existed both within and among the different sets of rules, without any explanation of why lawyers and judges should have to adjust to so many different ways of behaving in different court proceedings.

Lawyers and judges necessarily have spent — or wasted — precious time thinking, conversing, and writing about ambiguities in the rules. Occasionally a lawyer falls into a procedural trap and a client suffers an injustice that trial and appellate courts, giving due respect to the rules as construed, are unwilling or unable to redress.

4.

When I came to chair the Standing Committee in the fall of 1990, I was tempted by the thought that some of the enormous resources of time and talent being committed to making and interpreting rules might better be redirected. Some resources might be directed toward a long-term aim of combining all the separate sets of rules into one set, integrated in both style and content: the Federal Rules of Practice and Procedure.

Substantive integration would have the benefits of (1) reducing length by stating only once a rule of general application; (2) reducing complexity, even where repetition is warranted, by using precisely the same phrasing when expressing the same idea; and (3) improving clarity by explaining why different phrasing is used to address analogous problems in the different settings — for example, in bankruptcy, civil, and criminal rules. But substantive integration may prove to be an elusive ideal.

Stylistic integration, however, is a different matter: even with different sets of rules, there is much that rulemakers can do to sharpen style. Having a consistent drafting style in all the rules carries major benefits. Foremost among these, of course, is that clear expression promotes clear thought. Variation, elegant or not, impairs clarity: it is seldom commendable where clarity of meaning is paramount.

5.

Good writing of any kind is labor-intensive. Good legal writing is even harder work because content is paramount. One simply cannot arrive at good content without mastery of the subject matter.

Good drafting of a contract, statute, or procedural rule is at least as labor-intensive as good drafting of a judicial opinion, a lawyer's opinion letter, or an article because contracts, statutes, and rules serve as prescriptions for ongoing conduct and relationships. In this context, there must be a heightened sensitivity to such matters as striking an appropriate balance between rigor and flexibility, choosing between hard-edged rules and guidelines for discretion, and determining who among foreseeable actors is to be allowed discretion.

Undertaking to draft all federal rules so that they excel in style as well as content is, to say the least, daunting. The predictable reaction to the proposal to do so runs along these lines: "The federal rulemaking process, even though vested finally in Congress and the Supreme Court, depends in the first instance on volunteer committee members and overloaded staff — including reporters and Administrative Office support staff. Trying to make all federal rules consistent in style asks too much of both the volunteers and the staff." I fully agree that members and staff of the Judicial Conference Rules Committees are overloaded and underappreciated.

6.

Now that I am no longer a member of any of the Rules Committees, I feel free to add that, with two exceptions, I believe no other entities in our legal culture rival the Rules Committees for the impartial drafting of proposals for legislation or rules. The two exceptions are the American Law Institute and the National Conference of Commissioners on Uniform State Laws — both of which are committed to excellence in drafting.

With a view to the importance of style, in 1991 the Standing Committee on Rules of Practice and Procedure created a Style Subcommittee. Its charge was to review the drafting style of all amendments to federal rules. Because of the importance of this new undertaking, we needed a leader with a demonstrated sense of good writing style. Fortunately, Charles Alan Wright, a dedicated stylist whose writings rank with the best in legal literature, was then serving on the Standing Committee. He accepted the appointment to chair the Style Subcommittee. To serve as the original members of the Subcommittee, I invited Judge George C. Pratt, of the Second Circuit; Judge Alicemarie H. Stotler, of the United States District Court in Santa Ana, California, who now chairs the Standing Committee; and Joseph F. Spaniol, Jr., the former Clerk of the United States Supreme Court. I participated in the Subcommittee's work, *ex officio*, during 1991–93.

Not long after the Subcommittee began its work, we realized just how time-consuming — and arduous — the detailed work on the rules would be. We saw the need for a style consultant, and with the support of L. Ralph Meham, Director of the Administrative Office of the United States Courts, we were able to engage Bryan A. Garner, whose books on legal writing the members of the Style Subcommittee were frequently consulting.

Initially, the Style Subcommittee worked on amendments only, but the value of the work was so readily apparent that the Style Subcommittee was asked to produce fully restyled drafts of two sets of rules: the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. The Style Subcommittee finished preliminary versions of the Civil Rules in 1992, and of the Appellate Rules in 1994.

In the course of those two major projects, however, the membership of the Style Subcommittee had changed. When Professor Wright asked to be relieved of this responsibility upon assuming the presidency of the American Law Institute in 1993,

Judge George C. Pratt became the new chair. And when, that same year, Judge Stotler began chairing the Standing Committee, she likewise resigned from the Style Subcommittee. To fill the two open positions, Judge Stotler appointed Judge James A. Parker, of the United States District Court in New Mexico, and Professor Geoffrey G. Hazard, Jr., of the University of Pennsylvania.

In the fall of 1995, Judge Pratt's term on the Standing Committee expired, and Judge Parker became chair of the Style Subcommittee. Meanwhile, Judge Stotler appointed Judge William R. Wilson, Jr. as a member.

Every member of the Style Subcommittee has served with extraordinary skill and energy.

An important part of the subcommittee's work is to call attention to ambiguities of substantive meaning. But the subcommittee does not make substantive recommendations because the Standing Committee and the five Rules Committees (a Committee on Evidence having been added) are responsible for substantive recommendations.

Despite some initial reservations among committee members about the scope of this undertaking regarding style, the several committees have cooperated generously. This team effort has already developed restyled drafts of Civil Rules and Appellate Rules. These drafts dramatically illustrate how readable and easily comprehensible court rules can be — if, that is, the drafters devote themselves to the clearest possible style.

7.

Out of this team effort has evolved, in addition to early model drafts, another product — the *Guidelines for Drafting and Editing Court Rules*. I am delighted and encouraged that this publication will now be available to everyone who has an interest in improving the quality of legal writing.

Improving and maintaining the style of Federal Rules of Practice and Procedure is a long-term project. The early drafts have already demonstrated, in my view, that benefits far outweigh costs. Also, I believe we can maintain a continuing enterprise whose primary resources are the time and energy of talented professional volunteers — members of the rules committees of the Judicial Conference of the United States. This is the group who, with painstaking care, will examine every proposal suggested to them by the Style Subcommittee and will then recommend to the Judicial Conference and the enacting authorities proposed Rules that excel in style and readability as well as fair and impartial content.

—ROBERT E. KEETON
U.S. District Judge
Boston, Massachusetts

Introduction

by George C. Pratt

When Judge Robert E. Keeton, then Chair of the Judicial Conference's Standing Committee on the Rules of Practice and Procedure, asked me to join Professor Charles A. Wright, Judge Alicemarie H. Stotler, and Joseph F. Spaniol, Jr. on a new Style Subcommittee, I expected the work to be a relatively mundane experience of scouting for inconsistencies, typographical errors, and occasional grammatical slip-ups in the existing rules of practice. Working with Professor Wright, however, was an opportunity I couldn't pass up. His treatise on federal courts had been my bible for many years on both the district and circuit courts, and I envied his clarity of expression and his simple, direct style. I knew I could learn a lot, and perhaps our work might be useful to the entire rules process.

Developing the Guidelines

The Style Subcommittee began its work by reviewing a series of amendments that were being proposed by the four advisory committees. Very soon, however, we recognized a need for guiding principles and a more systematic process. With the aid of our consultant, Bryan A. Garner, we initially agreed on and outlined some basic goals, and then more specific guides for achieving those goals. Our goals, which should apply to all legal writing, were clarity, brevity, and readability.

For clarity, we sought to express rules in terms and in a form that could most accurately express the idea behind the rule. This meant avoiding ambiguities and developing consistent modes of expression. Readability, we found, could be enhanced by using an outline format, applying it consistently, keeping sentences relatively short, and adhering to a series of conventions on how to treat exceptions, conditions, and qualifying phrases. Brevity is always a hallmark of good legal writing. While we consciously worked for it by eliminating all unnecessary words and searching for shorter, more accurate expressions, in many instances we found that our quest for clarity and readability had automatically given us brevity through shorter, more tightly written rules.

We reached a turning point when the subcommittee agreed to undertake a complete reworking of two set of rules — civil and appellate. We began with the civil rules. Our procedure was to have Bryan Garner first do a restyled version of an entire set of rules. Then the subcommittee would separately review his work, looking first for any inadvertent substantive changes but also making further suggestions on style. Next, we would put our collective thoughts into a final version, which the subcommittee, with an occasional additional edit, would approve for eventual submission to the Civil Advisory Committee.

Having successfully followed that process, we have now completed a restyled version of the appellate rules and substantial work on the civil rules. For various reasons, the appellate rules have moved more swiftly through the Advisory Committee, and in January 1996 the Standing Committee voted unanimously to publish those rules for comment by the bench and bar. As of early 1996, the appellate rules represent a bellwether for the desirability of revising sets of federal rules for clarity and consistency. Ultimately, a restyled set of rules is subject to approval by the Judicial Conference and the Supreme Court, and to review by Congress.

When the Style Subcommittee first went to work, we realized after a few conferences that the matters we were discussing, debating, and agreeing upon represented valuable conventions for our work, and that they needed to be preserved and collected in a coherent, organized manual. We asked Bryan Garner to undertake that task, using his notes from the hundreds of edits and decisions that the subcommittee had already made. Bryan has now formalized his work into this manual, *Guidelines for Drafting and Editing Court Rules*.

Using the Guidelines

The subcommittee has found the Guidelines to be invaluable. They provide a handy reference to the conventions we have previously addressed and agreed on. When Professor Wright and Judge Stotler left us for higher callings, their replacements, Judge James A. Parker and Professor Geoffrey G. Hazard, Jr., quickly picked up the nature and direction of our work by referring to the Guidelines, which permit us to operate from a common base of understanding.

Bryan Garner has always worked closely with the reporters of the respective advisory committees. Using the Guidelines, the reporters now draft their proposed amendments and new rules following what has rapidly become the accepted style for federal rules.

The potential value of these Guidelines is not restricted to federal rulemaking. They could fruitfully be applied to the practice codes and even the substantive statutes of the various states. Even local ordinances would benefit from their use. When clarity and readability of statutes and rules increase, the need for litigation over meaning decreases and voluntary compliance increases.

Outside the rulemaking area, many types of legal drafting — contracts, opinion letters, and even judicial opinions — might be improved if legal writers followed these Guidelines. And it goes without saying that these Guidelines could provide a core for teaching legal writing and legal drafting — areas in which law-school graduates are notoriously deficient.

Lessons Learned from the Style Process

Working on the Style Subcommittee has underscored a number of lessons for many of us. Three in particular stand out in my mind. First, legal drafting is not easy; it is a demanding, exacting discipline that requires careful and constant attention. Second, if the result of any drafting effort is to be successful, style must be an integral part of the process. Third, paying attention to writing style requires us to clarify our own thinking. Clear style demands clear thinking, which is a prerequisite to any effective legal writing.

The Style Subcommittee is grateful to Bryan Garner for his inspiration and guidance through our labors on restyling the rules. His *Guidelines for Drafting and Editing Court Rules* will not only help us as we continue working through demanding, exacting revisions of all of the rules; they also will provide continuing benefit to future members of the rules committees and ultimately, through the clarity and readability that these Guidelines can produce, to the legal profession as a whole.

—GEORGE C. PRATT
Retired Judge of the U.S. Court
of Appeals for the Second Circuit and Former
Chair of the Style Subcommittee

Author's Note

The reader might consider these Guidelines a stylesheet for rule-drafters. In a sense, they are just that.

But calling them a “stylesheet” might minimize some of the innovative ideas that the Style Subcommittee, in its work on federal rules, has elaborated. For example, the principles on placing conditions and exceptions (2.4(A), 2.4(B)) are entirely fresh. To my knowledge, they have no precedent in the literature on legal drafting. The same might be said of the principles on using the double-dash construction (2.4(C)(2)); on placing adverbs in relation to verb phrases (2.4(C)(3)); and on enumerating only at the end of the sentence, not in midsentence (3.3(B)). Several principles of good drafting, then, make their debut in these pages.

Many other principles are fairly standard, and their value here lies primarily in illustrating how to carry out those principles in the context of rule-drafting.

The Guidelines contain only a “blackletter” statement of principles, followed by illustrations. I have omitted any detailed explanation of their rationale, which must await publication of *The Elements of Legal Drafting*, forthcoming from Oxford University Press. In any event, there is much to be said for a cleanly stated set of principles uncluttered by pro-and-con arguments and extended rationales.

—BRYAN A. GARNER
Dallas, Texas

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Basic Principles

1.1 Be clear.

- A. Identify instances of vagueness and ambiguity and sharpen the wording.
- B. If you need substantive directions, consider alternative wordings and set them out as possibilities for the decision-maker.

1.2 Make the draft readable.

- A. Prefer short sentences. The average sentence length in good drafting is no more than 30 words.
- B. Use the simplest possible words to express the idea clearly. Avoid legal jargon.
- C. Use a word or phrase consistently to express a single idea. Do not vary your terminology for the sake of “elegant variation.”

1.3 Be as brief as clarity and readability permit.

1.4 Organize the rule to serve clarity, readability, and brevity.

- A. Organize the draft logically, with headings and subheadings, so that the reader has bearings.
- B. Use structure to enhance readability and reinforce meaning.

General Conventions



2.1 Number. Draft in the singular number unless the sense is undeniably plural.

Before

When *issues* not raised by the pleadings *are* tried by express or implied consent of the parties, *they* shall be treated in all respects as if they had been raised in the pleadings.

Fed. R. Civ. P. 15(b).

Papers filed by an inmate confined in an institution are timely filed if . . .

Fed. R. App. P. 25(a).

After

When *an issue* not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings.

A *paper* filed by an inmate confined in an institution is timely filed if . . .

(Rule as published for comment in Oct. 1993.)

2.2 Tense. Generally, draft in the present tense, not in the past or future.

Before

No additional fees will be required for filing an amended notice.

Fed. R. App. P. 4(a)(4).

The pendency of such a suggestion whether or not included in a petition for rehearing *shall not affect* the finality of the judgment of the court of appeals or stay the issuance of the mandate.

Fed. R. App. P. 35(c).

After

No additional fee is necessary for filing an amended notice.

A pending suggestion for a rehearing en banc *does not affect* the finality of the appellate judgment or stay the issuance of the mandate.

2.3 Voice. Prefer the active over the passive voice.

A. When feasible, rephrase a passive-voice verb by putting it in active voice.

Before

... costs *must be taxed* by the clerk against the losing party

Fed. R. Civ. P. 76(c)
(intermediate draft).

After

... the clerk *must tax* costs against the losing party

A stay in a criminal case *shall be had* in accordance with the provisions of Rule 38 of the Federal Rules of Criminal Procedure.

Fed. R. App. P. 8(c).

Rule 38 of the Federal Rules of Criminal Procedure governs a stay in a criminal case.

(*Rule as published for comment in April 1996.*)

B. When feasible, rephrase a passive-voice verb by using an adjective.

Before

... the parties may . . . file a joint statement that shows how the issues *presented by the appeal* arose

Fed. R. Civ. P. 75(b)(1)
(intermediate draft).

After

... the parties may . . . file a joint statement that shows how the *appellate* issues arose

C. Use passive voice primarily in two circumstances: (1) when naming the actor would unduly narrow the meaning or impede the flow of the sentence; or (2) when changing to active voice would undesirably shift the emphasis from one subject to another.

Examples

When the constitutionality of a statute affecting the public interest *is questioned* in any action, the court must

Fed. R. Civ. P. 24(c)(2) (revised for style).

A party who has *been permitted* to proceed in a district-court action in forma pauperis, or who *was considered* financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization

Fed. R. App. P. 24(a)(2) (revised for style).

2.4 Syntax. Use a syntactic arrangement that enhances clarity, logic, and readability.

- A. *Conditions.* Place conditions where they can be read most easily, preferably using the word *if*. Use *when* (not *where*) if the sentence needs an *if* to introduce another unrelated clause or if the condition is something that may occur with regularity.

Before

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case *on application of a party or on its own motion.*

Fed. R. App. P. 2.

After

On its own motion or a party's motion, a court of appeals may — to expedite its decision or for other good cause — suspend the provisions of any of these rules in a particular case, except as otherwise provided in Rule 26(b).

1. If a condition is just a few words, and seeing it first would help the reader avoid a miscue, then put it at the beginning of the sentence.
2. If a condition is long and the main clause is short, put the main clause first and move directly into the condition.

Before

When without the parties consent, either a prisoner petition challenging the conditions of confinement or a pretrial matter dispositive of a party's claim or defense is referred to a magistrate judge, the magistrate judge must promptly conduct the required proceedings.

Fed. R. Civ. P. 72(b) (intermediate draft).

After

A magistrate judge must promptly conduct required proceedings *when assigned, without the parties' consent, to hear either a prisoner petition challenging the conditions of confinement or a pretrial matter dispositive of a party's claim or defense.*

3. If a condition and the main clause are both long, foreshadow the condition and put it at the end of the sentence. If there are several conditions, a phrase such as *in the following circumstances* will serve to foreshadow the conditions at the end.

Before

(b) *Interlocutory Sales*. If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

Supp. R. Adm. & Mar. Claims E(9)(b).

After

(2) *Interlocutory Sales*.

(A) In any of the following circumstances, the court may, on application of a party or some other warrant-holder, order the property or any part of it sold:

(1) if the attached or arrested property is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action;

(2) if the expense of keeping the property is excessive or disproportionate; or

(3) if there is an unreasonable delay in securing the release of property.

(B) The proceeds, or as much of them as will satisfy the judgment, may be ordered brought into court to await the disposition. Alternatively, the court may, upon a party's motion, order the property delivered to the party, who must give security under these rules.

Before

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it.

Fed. R. Civ. P. 58.

After

(a) Subject to Rule 54(b), *the following rules* govern entry of judgment:

- (1) When the jury returns a general verdict or the court decides that a party may recover only a sum certain or costs, or that all relief should be denied, the clerk shall, unless the court orders otherwise, promptly prepare, sign, and enter the judgment without awaiting the court's direction.
- (2) When the court grants other relief or the jury returns a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, which the clerk shall enter.

4. If a condition states a definitional test to be met — not a standard of applicability — put it at the end of the sentence.

Example

A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the paper within the time fixed for filing, except that a brief is timely filed *if it is mailed to the clerk by first-class mail, postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing.*

Fed. R. App. P. 25(a) (as revised and published for comment in October 1993).

5. Unearth hidden conditions to make them explicit, using the word *if*.**Before**

A party must make advance arrangements with the clerk for the transportation and receipt of *exhibits of unusual bulk or weight*.

Fed. R. App. P. 6(b)(2)(iii).

After

If the exhibits are unusually bulky or heavy, the party must arrange with the clerk in advance for their transportation and receipt.

The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial *on application of any party*, unless the court orders that the hearing and determination thereof be deferred until the trial.

Fed. R. Civ. P. 12(d).

If a party so requests, the defenses listed in Rule 12(b)(1)-(7) — whether made in a pleading or by motion — and any motion for judgment on the pleadings under Rule 12(c)(1) must be heard and determined before trial unless the court orders that the hearing and determination be deferred until trial.

B. *Exceptions*. Place exceptions where they can be read most easily.

1. If an exception needs to be generally alluded to before the sentence can be read without a miscue, allude to it or state it briefly at the beginning of the sentence.

Before

(a) It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, *except to the extent required to show the jurisdiction of the court. . . .*

Fed. R. Civ. P. 9(a).

After

(a) Capacity.

(1) *Except when necessary to show that the court has jurisdiction*, a pleading need not aver:

(A) a party's capacity to sue or be sued;

(B) a party's authority to sue or be sued in a representative capacity; or

(C) the legal existence of a named party.

(2)

2. If an exception cannot be stated briefly, put it at the end.

Example

(a) **Compulsory Counterclaim.** A pleading must state as a counterclaim any claim that, at the time of its service, the pleader has against an opposing party, if the claim arises from the transaction or occurrence that is the subject matter of the opposing party's claim and does not require, for adjudication, the presence of a third party over whom the court cannot acquire jurisdiction. *But the pleader need not state the claim:*

(1) *if, when the action began, the claim was the subject of another pending action; or*

(2) *if the opposing party sued upon its claim by attachment or other process by which the court did not acquire personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.*

Fed. R. Civ. P. 13(a) (revised for style).

C. Interruptive Phrases

1. Avoid interruptive phrases between the subject and the verb by moving them to the beginning or end of the sentence.

Before

The court, *on motion of the Government made within one year after the imposition of the sentence*, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense

Fed. R. Crim. P. 35(b).

The court *at every stage of the proceeding* must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Fed. R. Civ. P. 61.

After

If the Government so moves within a year after sentence is imposed, the court may reduce a sentence to reflect a defendant's later substantial help in investigating or prosecuting another person who has committed an offense

At every stage of the proceeding, the court must disregard all errors or defects that do not affect a substantial right of any party.

2. For interruptive phrases that must appear in midsentence — because of what they modify — use a double-dash construction instead of commas.

Before

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81.

After

These rules govern procedure in the United States district courts in all civil actions — whether arising at law, in equity, or in admiralty — except as stated in Rule 81.

Fed. R. Civ. P. 1.

3. Put adverbial interruptive phrases in the midst of the verb phrase, not before it; if a modal verb such as *must* or *may* appears in the verb phrase, put the adverbial phrase immediately after that modal verb.

Before

If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule *may allow* the action to be continued by or against the party's representative.

After

If a party becomes incompetent, the district court *may*, on motion served according to (a)(3), *allow* the action to be continued by or against the party's representative.

Fed. R. Civ. P. 25(b).

D. *Modifiers*

1. To avoid ambiguity, place a modifier next to the word or phrase it modifies.

Before

The notice shall be published in such newspaper or newspapers as the court may direct *once a week for four successive weeks* prior to the date fixed for the filing of claims.

After

Before the date fixed for the filing of claims, the notice must be published *once a week for four successive weeks* in a court-designated newspaper or newspapers.

Supp. R. Adm. & Mar. Claims F(4).

2. If moving a misplaced modifier will not cure the ambiguity, rephrase the sentence.

Before

In an action begun by seizure of property, *in which no person need be or is named as a defendant*, any service

Fed. R. Civ. P. 5(a).

After

If an action is begun by seizing property *and* no person is named as a defendant, service

E. *Prepositional Phrases*

1. Minimize *of*-phrases. They tend to encumber sentences.

Before

The content *of* the notice *of* appeal, the manner *of* its service, and the effect *of* the filing *of* the notice and *of* its service shall be as prescribed in Rule 3.

Fed. R. App. P. 13(c) — (six *ofs*).

If a notice *of* appeal is mistakenly filed in the court *of* appeals, the clerk *of* the court *of* appeals shall note thereon the date on which it was received and transmit it to the clerk *of* the district court and it shall be deemed filed in the district court on the date so noted.

Fed. R. App. P. 4(a)(1) — (five *ofs*).

After

Rule 3 prescribes what a notice *of* appeal must contain, how it should be served, the effect *of* its filing, and the effect *of* its service.

(Three *ofs*.)

If a notice *of* appeal is mistakenly filed in the court *of* appeals, the circuit clerk must note on the notice the date when it was received and send it to the district clerk. It is then considered filed in the district court on the date so noted.

(Two *ofs*.)

2. When feasible, change prepositional phrases to adjectives.

Before

. . . violation *of the United States*

Supp. R. Adm. & Mar. Claims E(9)(a).

Unless provided otherwise by statute or order *of the court*,

Fed. R. Civ. P. 54(d)(2)(B).

After

. . . violation of a *federal* statute

Unless a statute or *court order* provides otherwise,

Before

The petition shall be filed with the clerk of the court of appeals within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties to the *action in the district court*.

Fed. R. App. 5.1(a).

After

The petition must be filed with the circuit clerk within the time provided by Rule 4(a) for filing a notice of appeal, with proof of service on all parties *to the district-court action*.

3. When feasible, change prepositional phrases to possessives.

Before

Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal

Fed. R. App. P. 3(a).

After

An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal

F. *Antecedents*

1. Ensure that an antecedent precedes a referent, not vice-versa; use a noun twice rather than having a referent precede its antecedent.
2. Ensure that an antecedent agrees in number with its referent.

Before

[T]he court may, on motion, order any person having possession or control of such *property or its proceeds* to show cause why *it* should not be delivered into the custody of the marshal or other person or organization having a warrant for the arrest of the property, or paid into court to abide the judgment

Supp. R. Adm. & Mar. Claims C(5).

After

[T]he court may, on motion, order any person possessing or controlling the property or its proceeds to show cause:

- (A) if the property has not been sold, why a marshal or other person or organization having an arrest warrant should not take the property into custody; or
- (B) if the property has been sold or consists of U.S. currency, why the proceeds should not be paid into court pending judgment.

G. *Sentence Length*. Strive for an average sentence length of fewer than 25 words — 30 words at most.

1. Break long compound sentences into two or more sentences.

Before

Sentence shall be imposed without unnecessary delay, but the court may, when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved.

Fed. R. Crim. P. 32(a)(1), prior to 1994 amendments.

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Fed. R. Civ. P. 23(e).

After

Sentence must be imposed without unnecessary delay. But if some factor important to sentencing cannot be resolved promptly, the court may postpone sentencing for a reasonable time until that factor becomes resolvable.

A class action must not be dismissed or compromised without court approval. Notice of a proposed dismissal or compromise must be given to all class members as the court directs.

2. For purposes of computing sentence length, count a tabulated or set-off subpart as a separate sentence.

H. Punctuation

1. End each subpart (except the last) with a semicolon. After the next-to-last subpart, put a conjunction— either *and* or *or*.

Before

Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant

- (A) who could be subjected to the jurisdiction in the state in which the district is located, or
- (B) who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or
- (C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or
- (D) when authorized by a statute of the United States.

Fed. R. Civ. P. 4(k)(1).

After

Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

- (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;
- (B) who is a party under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place where the summons issues;
- (C) who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335; or
- (D) when authorized by a federal statute.

2. Place a comma after an introductory phrase or subordinate clause.

Before

When a transfer is ordered the clerk shall transmit

Fed. R. Crim. P. 21(c).

After

When a transfer is ordered, the clerk must send

3. In an enumerated series, use the serial comma before the conjunction.

Before

... books, documents or tangible things
 ... possession, custody or control

Fed. R. Civ. P. 45(a)(1).

After

... books, documents, or tangible things
 ... possession, custody, or control

4. Prefer long dashes to parentheses.

Before

All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if

Fed. R. Civ. P. 20(a).

After

Persons — as well as a vessel, cargo, or other property subject to admiralty process in rem — may be joined in the same action as defendants if

5. Eliminate hyphens separating a prefix from a root word: *nonparty* and *pretrial*, not *non-party* and *pre-trial*.

6. Hyphenate phrasal adjectives.

Before

civil process clerk
 district court order
 trial preparation material

After

civil-process clerk
 district-court order
 trial-preparation material

I. End sentences emphatically — with a word or phrase that most naturally receives stress.

Before

Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise.

Fed. R. App. P. 15.1.

After

Unless the court orders otherwise, a party adverse to the National Labor Relations Board in an enforcement or a review proceeding must, in briefing and at oral argument, proceed first.

Structure

3

3.1 Organization of Rules

A. Organize rules logically and clearly so that referring to them is relatively easy. Do this by adhering as much as possible to these organizational principles:

- Put the broadly applicable before the narrowly applicable.
- Put the general before the specific.
- Put more important items before less important.
- Put rules before exceptions.
- Put contemplated events in chronological order.

B. Group similar items together, preferably introducing them with parallel headings and subheadings.

Before

(9) **Disposition of Property; Sales.**

(a) *Actions for Forfeitures.* In any action in rem to enforce a forfeiture for violation of a statute of the United States the property shall be disposed of as provided by statute.

(b) *Interlocutory Sales.* If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

(c) *Sales, Proceeds.* All sales of property shall be made by the marshal or a deputy marshal, or by other person or organization having the warrant, or by any other person assigned by the court where the marshal or other person or organization having the warrant is a party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

Supp. R. Adm. & Mar.
Claims E(9) (in full).

After

(9) **Disposition of Property; Sales.**

[Reorganize section as follows:]

(a) Action for Forfeiture.

(b) Sale.

(1) *Generally.*

(2) *Interlocutory Sale.*

(c) Proceeds.

(d) Alternative Interlocutory Remedies.

3.2 Structural Divisions

A. The parts of a rule are as follows:

Fed. R. Crim. P. 6(e)(3)(A)(ii)

Rule 6

(e) [subdivision]

(3) [paragraph]

(A) [subparagraph]

(ii) [item]

- B. At any level, use a subpart only if there is at least one corresponding subpart.
- C. Preface a subdivision with a brief descriptive heading. Headings are optional with paragraphs, subparagraphs, and items. Add headings when they will help orient readers.

Before**Rule 23.1. Derivative Actions
by Shareholders**

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court desires.

Fed. R. Civ. P. 23.1 (in full).

After**Rule 23.1. Derivative Actions
by Shareholders**

- (a) **Prerequisites.** One or more shareholders of a corporation or members of an unincorporated association may, on behalf of the corporation or association, bring a derivative action to assert and enforce a right that the corporation or association has failed to enforce. A derivative action may be maintained only if the plaintiff fairly and adequately represents the interests of similarly situated shareholders or members.
- (b) **Pleading Requirements.** The complaint must be verified and must allege:
- (1) that the plaintiff was a shareholder or member at the time of the transaction complained of, or that the plaintiff's share or membership devolved on it after that time by operation of law;
 - (2) that the action is not a collusive one to confer jurisdiction that the court would otherwise lack; and
 - (3) the particular efforts, if any, made by the plaintiff to obtain the desired action from the directors or similar authority and, if necessary, from the shareholders or members, and the reasons for not obtaining the action or not making the effort.
- (c) **Dismissal and Compromise.** A derivative action must not be dismissed or compromised without court approval. Notice of a proposed dismissal or compromise must be given to shareholders or members as the court directs.

- D. If redrafting results in new subparts, ensure that the numbering of oft-cited rules — such as Rule 12(b)(6) of the Civil Rules — does not change.
- E. As part of the official format, use so-called “hanging indents,” which reveal structure cleanly.

Before**(c) Relation Back of Amendments.**

An amendment of a pleading relates back to the date of the original pleading when:

- (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
- (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth

Fed. R. Civ. P. 15(c).

After**(c) Relation Back of Amendments.**

- (1) An amendment of a pleading relates back to the date of the original pleading when:

- (A) the applicable statute of limitations permits relation back; or
- (B) the amendment asserts a claim or defense that arose from the conduct, transaction, or occurrence set forth

3.3 Enumerations

- A. Set off enumerated items into subparts when feasible. Create new paragraphs, subparagraphs, and items in the order in which they naturally occur.

Before

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written question; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admissions.

Fed. R. Civ. P. 26(a)(5).

After

Parties may obtain discovery by one or more of the following methods:

- (A) depositions upon oral examination or written question;
- (B) interrogatories;
- (C) production of documents or things or permission to enter upon land or other property, under Rule 34 or 45(a)(1)(C), for inspection and other purposes;
- (D) physical or mental examinations; and
- (E) requests for admissions.

Before

The front covers of the briefs and of appendices, if separately printed, shall contain: (1) the name of the court and the number of the case; (2) the title of the case (see Rule 12(a)); (3) the nature of the proceeding in the court (e.g., Appeal; Petition for Review) and the name of the court, agency, or board below; (4) the title of the document (e.g., Brief for Appellant, Appendix); and (5) the names and addresses of counsel representing the party on whose behalf the document is filed.

Fed. R. App. P. 32(a).

After

The front cover of a brief must contain:

- (A) the number of the case centered at top;
- (B) the name of the court;
- (C) the title of the case (see Rule 12(a));
- (D) the nature of the proceeding (e.g., Appeal; Petition for Review) and the name of the court, agency, or board below;
- (E) the title of the document, identifying the party or parties for whom the document is filed; and
- (F) the name, office address, and telephone number of counsel representing the party for whom the document is filed.

(Rule as published for comment in April 1996.)

B. Enumerate at the end — not at the beginning — of a sentence.

Before

(a) The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

Fed. R. App. P. 10.

After

- (a) The following items constitute the record on appeal:
- (1) the original papers and exhibits filed in the district court;
 - (2) the transcript of proceedings, if any; and
 - (3) a certified copy of the docket entries prepared by the district clerk.

C. When introducing an enumeration, consider using a phrase such as *the following* to foreshadow what will follow.

Before

Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.

Fed. R. Civ. P. 5(a).

After

Except as these rules provide otherwise, *the following papers* must be served on every party:

- (A) an order required by its terms to be served;
- (B) a pleading filed after the original complaint, unless the court orders otherwise because of numerous defendants;
- (C) a discovery paper required to be served upon a party, unless the court orders otherwise;
- (D) a written motion, other than one that may be heard *ex parte*; and
- (E) a written notice, appearance, demand, offer of judgment, designation of record on appeal, or similar paper.

D. When stating more than one requirement — and the requirements can be stated in parallel form — put them in parallel enumerations.

Before

A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies.

Fed. R. Civ. P. 8(b).

After

In pleading, a party must:

- (A) state in short and plain terms the party's defenses to each claim asserted; and
- (B) admit or deny the averments on which the adverse party relies.

E. Avoid unnumbered “dangling” sections — that is, flush-left text that, following an enumeration, has no numbered designation.

Before

- (1) Every subpoena shall
- (A) state the name of the court from which it is issued; and
 - (B) state the title of the action, the name of the court in which it is pending, and its civil action number; and
 - (C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and
 - (D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

Fed. R. Civ. P. 45(a)(1).

After

- (1) (A) A subpoena must:
- (i) state the court in whose name it is issued;
 - (ii) state the title of the action, the name of the court in which it is pending, and its civil-action number;
 - (iii) command the person to whom it is directed to attend and testify; or to produce and permit inspection and copying of designated books, documents, or tangible things in that person’s possession, custody, or control; or to permit inspection of premises at a specified time and place; and
 - (iv) set forth the text of Rule 45(c) and (d).
- (B) A command to produce evidence or to permit inspection may be included in a subpoena commanding appearance at a trial, hearing, or deposition, or may be issued by a separate subpoena.

F. Use bullets to ease the reading of a list when no citation to any individual item is likely. “Dangling” text is unobjectionable after a list of bulleted items.

Before

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Fed R. Civ. P. 8(c).

After

In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- discharge in bankruptcy;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

If a party has mistakenly designated a defense as a counterclaim, or a counterclaim as a defense, the court must — if justice requires — treat the pleading as if the party had used the correct description.

Words and Phrases

4

4.1 Verbose Phrasing

A. Omit every superfluous word.

Before

Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to *the provisions of Rules 26 through 37.*

Fed. R. Civ. P. 11(d).

Each court of appeals *by action* of a majority of *the circuit* judges in regular active service may

Fed. R. App. P. 47.

. . . a judgment for a sum of money. . . .

Fed. R. Civ. P. 67.

. . . a judgment for the payment of money

Fed. R. Civ. P. 69.

The forms *contained* in the Appendix of *Forms are sufficient* under these rules and *are intended to* indicate the simplicity and brevity of *statement* which the rules contemplate.

Fed. R. Civ. P. 84(a).

When the owner complies with *the requirements* of Rule F(1),

Supp. R. Adm. & Mar. Claims F(2)
(intermediate draft).

After

This rule does not apply to disclosures and discovery requests, responses, objections, and motions that are subject to Rules 26 through 37.

Each court of appeals acting by a majority of its judges in regular active service may

(Rule as published for comment in Oct. 1993.)

. . . a money judgment

. . . a money judgment

The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.

(Rule as published for comment in Oct. 1993.)

When the owner complies with Rule F(1),

B. Uncover so-called “buried verbs” — i.e., abstract nouns usually ending in the suffixes *-tion*, *-sion*, *-ment*, *-ence*, *-ance*, *-ity* — and make them into verbs. Doing so has several advantages:

- it saves words by helping eliminate prepositional phrases;
- it increases readability by forcing the writer to be explicit about implied actors; and
- it makes sentences more vivid by substituting action verbs in place of stagnant *be*-verbs.

Before

Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on all parties to the action in the trial court.

Fed. R. App. P. 21(a).

Upon *receipt* of the record, the clerk . . .

Fed. R. App. P. 6(b)(2)(iv).

If without substantial justification a certification *is made in violation* of this rule

Fed. R. Civ. P. 26(g)(2).

The complaint shall contain a short and plain *statement* of

Fed. R. Civ. P. 71A(c)(2).

After

A party applying for a writ of mandamus or of prohibition must file a petition with the circuit clerk, with proof of service on all parties to the district-court action.

Upon *receiving* the record, the clerk . . .

If a certification *violates* this rule without substantial justification. . . .

The complaint must briefly and plainly *state*

C. Collapse clauses into phrases when possible. For example, instead of *case to be tried without a jury*, use *nonjury trial* or *nonjury case*.

4.2 Words of Authority*

A. Use words of authority in accordance with the following glossary:

<i>must</i>	=	is required to
<i>must not</i>	=	is required not to
<i>may</i>	=	has discretion to is permitted to has a right to
<i>is entitled to</i>	=	has a right to
<i>will</i>	=	(expresses a future contingency)
<i>should</i>	=	(denotes a directory provision)

B. Replace *shall* with *must*, *may*, or some other, more appropriate term.
[For an alternative, see (C).]

Before

The clerk *shall*, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Fed. R. App. P. 36.

No response *shall* be filed unless the court *shall* so order.

Fed. R. App. P. 35(b).

After

On the date judgment is entered, the clerk *must* mail to all parties a copy of the opinion — or the judgment, if no opinion was written — and a notice of the date when the judgment was entered.

No response *may* be filed unless the court orders it.

C. In the alternative to (B), use *shall* exclusively to mean “has a duty to.” Avoid it when it does not impose a duty on the subject of the clause. [Note: Either the convention in (B) or this convention (C) should appear consistently in one set of revisions: the two should not be mixed.]

*For the rationale underlying these conventions, see BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939–42 (2d ed. 1995).

D. Avoid roundabout wordings to create a duty.

Before

A party who has made a disclosure under Rule 26(a) or responded to a request for discovery *is under a duty* to supplement or correct

Fed. R. Civ. P. 26(e) (intermediate draft).

After

A party who has made a disclosure under Rule 26(a) or responded to a request for discovery *must* supplement or correct

E. Change *may not* to *must not* or *cannot*.

Before

(A) Monetary sanctions *may not* be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions *may not* be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

Fed. R. App. P.11(c)(2).

In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ *may not* proceed unless a district or a circuit judge issues a certificate of probable cause.

Fed. R. App. P. 22(b).

After

The court *must not* impose monetary sanctions:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own initiative, unless it issued the show-cause order before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

If the detention complained of in a habeas corpus proceeding arises from process issued by a state court, the applicant *cannot* take an appeal unless a district or circuit judge issues a certificate of probable cause.

(Rule as published for comment in April 1996.)

4.3 Relative Pronouns

A. Use *that*, not *which*, as a restrictive relative pronoun.

Before

Any such motion *which* is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires.

Fed. R. App. P. 4(a)(5).

After

Any such motion *that* is filed before the prescribed time expires may be ex parte unless the court requires otherwise.

Before

A pleading *which* sets forth a claim for relief . . . shall contain

Fed. R. Civ. P. 8(a).

The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement *which* the rules contemplate.

Fed. R. Civ. P. 84

After

A pleading *that* includes a claim for relief . . . must contain

The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity *that* these rules contemplate.

- B. Use *which* as a nonrestrictive relative pronoun. The word should almost always follow a comma.

Example

A judge or other person designated by the court may preside over the conference, *which* may be conducted in person or by telephone.

Fed. R. App. P. 33 (revised for style).

- C. To avoid the problem of the so-called “remote relative,” place the relative pronoun *that* or *which* directly after the word it modifies.

Before

[A] party shall, without awaiting a discovery request, provide to other parties . . . a copy of . . . all documents, data compilations, and tangible things in the possession, custody, or control of the *party that* are relevant

Fed. R. Civ. P. 26(a)(1)(B).

After

[A] party must, without awaiting a discovery request, provide to other parties . . . a copy of . . . all documents, data compilations, and tangible things *that are* in the possession, custody, or control of the party *and* are relevant

4.4 Conjunctions

- A. Use *but* instead of *and* to introduce a contrasting idea.

Before

The remedy herein provided is in addition to *and* in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

Fed. R. Civ. P. 22(2).

After

This remedy . . . supplements — *but* does not supersede or limit — the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361, and these rules govern actions under those statutes.

B. For a contrast, use *But* to begin a sentence instead of *However*.

Before

A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. *However*, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order.

Fed. R. App. P. 40(a).

After

Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment. *But* in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

(Rule as published for comment in April 1996.)

4.5 Ambiguity and Undesirable Vagueness. Sharpen the wording when doing so more clearly achieves the same result.

Before

Demurrers, pleas, and exceptions for insufficiency of a pleading *shall not be used*.

Fed. R. Civ. P. 7(c).

After

Demurrers, pleas, and exceptions for insufficiency of a pleading *are abolished*.

The discovery plan must *indicate* the parties' views

Fed. R. Civ. P. 26(f) (intermediate draft).

The discovery plan must *state* the parties' views

The plaintiff *shall* also give security for costs and, *if the plaintiff elects* to give security, for interest at the rate of 6 percent per annum from the date of the security.

Supp. R. Adm. & Mar. Claims F(1).

(This wording first makes the security compulsory [*shall*], but then suggests that the plaintiff may choose not to give it [*if the plaintiff elects*]. The rule can bear only one of these meanings.)

An owner *must* give security for costs and, when doing so, must include 6 percent annual interest from the date of the security.

[Or:]

An owner who elects to give security for costs must include 6 percent annual interest from the date of the security.

4.6 Specific Words and Forms to Avoid

- **as to:** prefer *about, for, of, on, with, to, by, or in*. E.g., “If any difference arises *as to* [read *about*] whether the record truly discloses what occurred in the district court,” Fed. R. App. P. 10(e)./ “The parties are encouraged to agree *as to* [read *on*] the contents of the appendix.” Fed. R. App. P. 30(b).
- **every:** prefer *a* or *an*.
- **except as:** use *unless* when referring to some future action by the court or by the parties. E.g., “*Except as* [read *Unless*] otherwise stipulated or directed by the court,” Fed. R. Civ. P. 26(a)(2)(B).
Except as is appropriate when referring to something that an existing rule does. E.g., “*Except as* otherwise provided in Rule 26(b),”
- **except that:** use *but* or some other, more pointed term. E.g., “[T]he parties may by written stipulation . . . modify other procedures . . . , *except that* [read *but*] stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may . . . be made only with the approval of the court.” Fed. R. Civ. P. 29.
- **except when:** use *unless*. E.g., “*Except when* [read *Unless*] a federal statute or these rules provide otherwise,”
- **except with [+ noun]:** use *unless [+ verb]*. E.g., “*Except with the written consent of the defendant,* [read *Unless the defendant consents in writing,*] the report shall [read *must*] not be submitted to the court” Fed. R. Crim. App. 32(b)(1).
- **following:** if it means “after,” write *after*.
- **hereof, herein, thereof, therein, and the like:** use everyday words instead — usually a demonstrative pronoun such as *that, this, these, and those*.
- **if any:** try placing *any* before the noun. E.g., “[T]he complaint must further show . . . *what voyages or trips, if any,* [read *any voyages or trips*] *she* [read *the ship*] has made since the voyage or trip on which the claims sought to be limited arose.” Supp. R. Adm. & Mar. Claims F(2).
- **in the event that:** use *if*.
- **limitation:** unless referring to a statute of limitations, use *limit*.
- **not later than:** use *no later than* or *within*. The phrasing “*within* 10 days after entry of judgment” is usually better than “*no later than* 10 days after entry of judgment,” but the latter may be needed if you want to allow the act to be done before the entry of judgment as well as in the following 10 days.
- **partially:** use *partly*.
- **portion:** use *part*.

- **prior to:** use *before*. E.g., “The court shall inform counsel of its proposed action upon the requests *prior to* [read *before*] their arguments to the jury.” Fed. R. Crim. P. 30.
- **provided that, provided however that:** reword to eliminate all provisos, usually with *if* (for conditions), or *except* or *but* (for exceptions).
- **pursuant to:** use *under Rule 3*, not *pursuant to Rule 3*; *as authorized by* or *in accordance with 26 U.S.C. § 1333*, not *pursuant to 26 U.S.C. § 1333*. E.g., “Depositions may be taken in a foreign country . . . *pursuant to* [read *under*] any applicable treaty or convention” Fed. R. Civ. P. 28(b).
- **said, adj.:** use *the, this, or that*.
- **subsequent to:** use *after*. E.g., “Immediately upon the entry of an order made on a written motion *subsequent to* [read *after*] arraignment[,] the clerk” Fed. R. Crim. P. 49(c).
- **such, adj.:** use *the, this, that, or those*. E.g., “Copies of the reporter’s transcript and other papers . . . may be inserted in the appendix; *such* [read *those*] pages may be informally renumbered if necessary.” Fed. R. App. P. 32(a).
- **such [noun +s] as:** use *any [noun] that* or *a [noun] that*. E.g., “At the close of the evidence or at *such earlier time during the trial as the court reasonably directs* [read *an earlier time during the trial, as the court reasonably directs,*] any party may file written requests” Fed. R. Crim. P. 30./ “[T]he court may, on *such terms and conditions as are just* [read *on just terms*], order” Fed. R. Civ. P. 26(c)(2).
- **therefor:** avoid altogether, often merely by deleting it, sometimes by writing *for it* or *for them*.
- **there is, there are:** delete when possible. Use only if you are referring to the existence of something.
- **transmit:** use *send* or *forward*. E.g., “The clerk *shall transmit* [read *must send*] the notice to the chief judge” Fed. R. Crim. P. 49(e).
- **upon:** prefer *on*. Thus, *service on a defendant*, not *service upon a defendant*. But use *upon* when introducing a condition or event — e.g.: “*Upon* being served with a request, a party must”
- **whenever:** use *when*. E.g., “*Whenever* [read *When*] a deposition is taken at the instance of the government, or *whenever* [read *when*] a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct” Fed. R. Crim. P. 15(b).

4.7 Other Stylistic Preferences

A. *Cross-References*. Omit the full reference to a rule number when not needed for clarity. For example, typically when referring to a provision on the same level within the same rule, subdivision, or paragraph, you might state:

(a) Except as provided otherwise in (b), a party must

But include an appropriate reference when needed for clarity — particularly if the other provision is on a different level or is not near the reference.

Repeating the rule number — *subject to Rule 4(h)* — is shorter and better for courts' and practitioners' quotations than *subject to subdivision (h) of this rule*.

B. *Particular Words*

- *may . . . only*: this is an alternative to *must not . . . except* for a conditional prohibition. E.g., “A request *may* be served *only* after”
- *only*: place this word carefully before the word it modifies.
- *otherwise*: for emphasis, this adverb should usually end a clause — e.g., “Unless this court *directs otherwise* . . . ,” not “Unless this court *otherwise directs*.” But sometimes, for the sake of parallel phrasing, this term should precede the verb — e.g.: “Unless *otherwise* directed by the court or stipulated by the parties”
- *will*: use for the future tense, not as an imperative.

**Terms, Phrases & Words of Choice
and Other Style Conventions**
(Revised 11/30/15)

1. **General Rule:** Use the style conventions used in the Federal Rules of Civil Procedure, unless there is a good reason for not doing so. The Federal Rules provide easily identified, and readily accessible, “default” conventions.
2. **Terms/Words of Choice**
 - (a) **Shall:** Consider changing references to “shall” to “must,” “should,” “may,” “will” or “is/are,” as the context dictates. *See* Bryan Garner, *Guidelines for Drafting and Editing Court Rules* (the “*Guidelines*”) at 29. Note that the word “should” is generally considered the preferred word of choice if a rule’s command is “directory” but not “mandatory.”
 - (b) **Clerk:** Currently, the Arizona rules refer to “clerk of court,” “court clerk,” or “clerk.” The federal rules use “clerk”—*see, e.g.*, Fed. R. Civ. P. 79(a)(1). Unless the context of the rule calls for a more specific reference (*i.e.*, if distinguishing a superior court clerk from an appellate court clerk or a justice court clerk), use “clerk.”
 - (c) **Days:** The current rules sometimes use words (*e.g.*, “ten”), sometimes use numbers instead of words (*e.g.*, “10” instead of “ten”) and sometimes does both (*e.g.*, “ten (10)”). The convention used in the federal rules is to use numbers only if the number is above two. *See, e.g.*, Fed. Rs. Civ. P. 6(d) & 12(a), 18(b) (“two”). Follow the federal convention.
 - (d) **Service:** When cross-referencing Rule 4 service of process use the phrase “in the same manner that a summons and pleading are served under Rules 4, 4.1, or 4.2, as applicable.” Note that Rule 4, 4.1 and 4.2 refer *only* to the service of a summons and pleading. Thus, for service of other items (such as a subpoena or a Rule 27 petition), it makes no sense to say that it should be served “under Rules 4.0, 4.1 or 4.2, as applicable.”
 - (e) **Avoid redundancies.** Thus: “*may*” and not “*may, in its discretion.*”
 - (f) **“Upon” v. “on”:** Unless there is a temporal element (*i.e.*, something has to happen when an act occurs), use “on,” *e.g.*, “serve on”, not “serve upon.”
 - (g) **Where/When vs. If:** The word “where” is not to be used as a synonym for “if” (*e.g.*, “If there are multiple parties on a side,” not “Where there are multiple parties on a side”). “When” is appropriate in some limited circumstances, but, in most cases, “if” should be preferred to “when.” *See Guidelines* at 5.

- (h) Use “*if*” instead of “*in the event that*” or “*on the condition that.*”
- (i) Use “*later*” rather than “*subsequently.*” Similarly, use “*after*” rather than “*subsequent.*”
- (j) Use “*before*” rather than “*prior to.*”
- (k) Use “*under,*” “*by,*” “*prescribed by*” or “*provided in*” rather than “*pursuant to*” or “*provided by.*”
- (l) ***Hereof, herein, thereof, therein:*** Avoid use of these words. Either restructure the sentence or use a demonstrative pronoun such as “that,” “this,” “these,” or “those.”
- (m) Use “*on its own,*” not “*on its own initiative.*” See, e.g., Fed. Rs. Civ. P. 39(a)(2), 56(f)(3) & 60(a).
- (n) Use “*after a pleading is filed*” rather than “*after filing of the pleading*”; similarly, use “*after a pleading is served*” rather than “*after service of the pleading.*” If giving direction to the same person/party who just filed/served, “*after filing/serving a pleading.*”
- (o) Use “*a party who*” rather than “*a party that.*” See, e.g., Fed. R. Civ. P. 35(b)(1) & 65(b)(3).
- (p) Use “*attorney’s fees*” not “*attorneys’ fees.*” See, e.g., Fed. R. Civ. P. 37(d)(3).
- (q) Use “*attorney,*” not “*lawyer.*” See, e.g., Fed. R. Civ. P. 5(b)(1).
- (r) Use “*local rule*” rather than “*Local Rules of Practice.*” See Ariz. R. Civ. P. 83.
- (s) Use “*the State of Arizona*” when referring to the governmental entity; use “*Arizona*” when referring to activity or persons within or outside state boundaries.
- (t) When referring to a specific number of days or a specific number of items, use “*fewer than*” rather than “*less than.*” But note, if you are talking about a period of time, the proper phrase is “less than.” (E.g., “Not many of these buildings are less than thirty years old.”)
- (u) Use “**no later than**” rather than “**not later than.**” (Synonymous, but “no later than” is considered less formal.)
- (u) ***Other Words:*** See *Guidelines* at 33-34.

3. Other Style Conventions

(a) **Cross-references:** References to other rules or other subdivisions should refer to the rule (i.e., “Rule 15(a)(2)”) and **not** use the words “subpart,” “subdivision” or similar words (i.e., “Rule 15(a)(2)” and not “subpart (a)(2)”). If it does not cause confusion and is on the same level, refer simply to the subdivision (e.g., “if allowed in (b)”, not “if allowed in subpart (b)”). See *Guidelines* at 35. When referring to “this rule” or “these rules,” the first letter of “rule(s)” should not be capitalized.

(b) **Heading & Subheading Titles:**

(i) If the heading or subheading of a federal rule counterpart differs from the state rule’s heading or subheading, adopt the federal rule’s heading or subheading, unless you have a good reason for not doing so.

(ii) **Capitalization:** Note that the Arizona rules are inconsistent in capitalizing the first letter in each major word in a rule’s heading.

A. If there is a federal rule counterpart, follow the capitalization used in the headings and subheadings for the federal rule.

B. Capitalize the first letter of the first word in a heading or subheading, even the rules below indicate that you should not capitalize the first letter of the word.

C. If there is no federal rule counterpart, capitalize the first letter in major words in the rule’s title or subheading, consistent with the federal rules’ current format.

D. Capitalize the first letter in the words “Not,” “Are,” “Is,” and “Be.”

E. Do not capitalize the first letter of a conjunction: “but,” “and,” “or.”

E. Unless the word begins the heading or subheading, the first letter in the words “to,” “and,” “or,” “but,” and “as” should not be capitalized.

F. **Prepositions:** Generally, the first letter of preposition should be capitalized only if it is 5 letters or more. This appears to be the convention in the federal rules. Thus, the following should be capitalized: “After,” “Against,” “Before,” “Between,” “Outside,” “Through,” “Within,” and “Without.” The

following should not be capitalized: “with,” “for,” “if,” “by,” “on,” “in,” “at.”

(iii) ***Bolding & Italics:***

- (A) The heading to each rule should be in **bold**.
- (B) Each first-level lettered subdivision (*e.g.*, (a)) should have a subheading, which should appear in **bold**.
- (C) Each second-level numbered subdivision (*e.g.*, (a)(1)) also should have a subheading, which should appear in ***bolded italics***.
- (D) Each third-level letter subdivision (*e.g.*, (a)(1)(A)) should have a subheading, which should appear in *unbolded italics*.
- (E) In contrast to the subheadings, all alpha-numeric subdivision designations (*e.g.*, (a), (1), (A) & (iv)) should be in **bold** and not be in italics or bolded-italics. (For an illustration, *see* Fed. R. Civ. P. 45(a)(1)(A)(iv).)

(iv) ***Use of Parenthesis:*** Subheading alpha-numeric designations should appear in parenthesis (*i.e.*, “(a)(1)(A)(ii),” not “a.1.A.ii.”).

(v) ***Use of Periods:***

- (A) In the title of a rule, the rule number should be followed by a period, but a period should not follow the title of the rule (*e.g.*, “Rule 4. Summons”).
- (B) In all the subdivisions of a rule, the subheading should be followed by a period, but not the alpha-numeric designation (*i.e.*, “(b) Issuance.”, not “b. Issuance”).

(c) ***Indentation:*** Use the federal format for indentation:

- (i) The heading of each rule (*e.g.*, “Rule 1.”) should be flush with the left margin. The rest of the heading should start at least three spaces to the right. If the heading goes on to a second line, the text should start at least three spaces after the start of the text on the second line. (*See, e.g.*, Fed. R. Civ. P. 37.)
- (ii) The first-level subdivision heading (*e.g.*, (a)) should be flush with the left margin, with the subheading generally starting one space after the

letter designation. The left margin for the second line should be the same as where the heading for the subdivision begins.

- (iii) Generally, add one space for each additional subdivision heading (*e.g.*, (a)(1), (b)(2)(A), (c)(3)(B)), and follow the convention set forth in (i).
- (iv) For a good general illustration of (ii)-(iii), look at Fed. R. Civ. P. 45.
- (d) **Bullets:** Contrary to the recommendation in the *Guidelines*, do not use “bullets” to separate subdivisions.
- (e) **Comments:**
 - (i) *Placement of Comments:* Currently, some comments appear in the middle of a rule following the subdivision to which the comment pertains (*e.g.*, Rule 13(a)), and sometimes comments appear right after the heading for a rule (*e.g.*, Rule 39). In all cases, move such comments so they appear after the end of the rule (and not just the subdivision).
 - (i) *Note:* Moving a comment to the end may require the title of the comment (or the comment itself) to be modified to identify the subdivision to which the comment pertains. For example, if a comment refers only to subdivision of a rule but that is not clear from the comment’s text, consider inserting the subdivisions alpha-numeric designation into the title of the comment. For example, in moving the first comment to Rule 11(a) to the end of the rule, consider modifying the comment to say “1984 Amendment to Rule 11(a).” (Addition underscored.)
 - (ii) *Comment Titles:* Currently, comments to the Arizona rules have various titles, depending on who wrote them—State Bar Committee Notes, Committee Comment, Comment, Court Comment, Supplemental Note. For now, if you decide to keep a comment, retain its existing title. The title should be centered over the comment, and, generally, only the first letter in each major word in the comment title should be capitalized.
- (f) **Abrogated Subdivisions:** The current rules are littered with subdivisions that are totally “abrogated” (*e.g.*, Rule 5(e)), “deleted” (*e.g.*, Rule 26(h)), “renumbered” (*e.g.*, Rule 42(d)), or “repealed” (*e.g.*, Rule 53(g)). Unless it would cause confusion or there is some other reason for not doing so, all the

references to these subdivisions should be deleted and the remaining subdivisions renumbered.

- (g) ***Font, Spacing and Margins:*** Consistent with the Arizona Supreme Court’s preferred font style and size for rule amendments, use Times New Roman, 13 point font, except, at the beginning of each rule, the words “Rule X.” should be in 14 point font. Each subdivision should be single spaced, with each subdivision separated by a 6 point space (including the title of the rule and the first subdivision). Each rule should be separated from the next rule by a 24 point space. The margins should be standardized, and be right-justified.
- (h) ***Commas:*** In an enumerated series, use the serial comma before the conjunction. Thus: “books, documents, or tangible things” and not “books, documents or tangible things.”

Rule Restyling

Key Principles and Examples

Objectives: Improve the rules' organization, clarity, and consistency, and adopt plainer, more easily understood language.

Key Resource: Bryan Garner, *Guidelines for Drafting and Editing Court Rules* (1996).

Key Principles:

1. **Formatting:** To make it easier to find what you are looking for, make generous use of subparts and subheadings, and make lists if a rule calls for multiple items or factors to follow a general rule. Also use left-side indents so that a rule's hierarchy is displayed graphically.

Example: Rule 64

Rule 64. Requests for Admission [Current version]

- (a) Request for Admission Regarding Authenticity of Documents.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 51(B) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request. The request may, without leave of court, be served upon the petitioner after commencement of the action and upon any other party with or after service of the summons and petition upon that party. Each matter for which an admission is requested shall be separately set forth. The matter is admitted unless, within forty (40) days after service of the request, or, in the case of a respondent, within sixty (60) days after service of the summons and petition upon that respondent or execution of a waiver of service by that respondent, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the authenticity of any document of documents or set forth in detail the reasons why the answering party cannot truthfully admit or deny the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter for which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the

information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter for which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 65(C), deny the matter or set forth reasons why the party cannot admit or deny it. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial.

- (b) **Procedure.** Each request shall contain only one (1) request for genuineness of all documents or categories of documents. Each party shall be entitled to submit no more than twenty-five (25) requests in any case without leave of court, except upon agreement of all parties or upon order of the court for good cause shown.
- (c) **Effect of Admission.** Any matter admitted under this rule is conclusively established unless the court for good cause shown permits withdrawal or amendment of the admission. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose, nor may it be used against the party in any other proceeding.

Rule 64. Requests for Admission [Restyled version]

(a) **Scope and Procedure.**

- (1) **Scope.** A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 51(b) relating to:
 - (A) facts, the application of law to fact, or opinions about either; and
 - (B) the genuineness of any described documents.
- (2) **Form; Copy of a Document.** Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.
- (3) **Number.** Unless the parties agree or the court orders otherwise, a party may serve on any other party no more than 25 requests for admission.

- (4) ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or the party's attorney. But a defendant may serve its answers and any objections within 60 days after service—or execution of a waiver of service—of a summons and petition on that defendant. A shorter or longer time for responding may be agreed to by the parties or ordered by the court.
- (5) ***Answer.*** If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.
- (6) ***Objections.*** The grounds for objecting to a request must be stated. A party may not object solely on the ground that the request presents a genuine issue for trial.
- (7) ***Motion Regarding the Sufficiency of an Answer or Objection.*** The requesting party may move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served. If the court finds that an answer does not comply with this rule, the court may order either that the matter is admitted or that an amended answer be served. The court may defer its final decision until a pretrial conference or a specified time before trial. Rule 65(c) applies to an award of expenses.
- (b) **Effect of an Admission; Withdrawing or Amending It.** A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. The court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

2. Run-On Sentences: Break-up or simplify overlong sentences.

Example: Current Rule 44(B)(3), which consists of two sentences with 195 words.

Past Support Judgments. No judgment by default under this rule shall be entered for any amount of child support accruing for periods of time prior to the date of filing of the petition to establish the first order for child support unless, in the petition or in the notice required pursuant to paragraph A, the party seeking support has notified the party from whom support is sought of the time period for which such past support is sought and that it will be calculated by retroactive application of the Arizona Child Support Guidelines. No judgment by default for any amounts of past child support owed for periods of time prior to the filing of a petition for order to appear pursuant to Rule 26(C) shall be entered for failure to appear at such hearing unless, in the petition or in a separate written notice filed and served upon the responding party at least ten (10) judicial days prior to the hearing, the party filing the petition has notified the responding party of the specific time period for which such past support is sought and that it will be calculated by retroactive application of the Arizona Child Support Guidelines.

As revised:

Previously Owed Support. The court will not enter a default judgment for any amounts of past child support owed before the filing of a petition for an order to appear under Rule 26(c), unless, in the petition or in a separate written notice filed and served on the responding party no later than 14 days before the hearing, the party filing the petition has notified the responding party of:

- (A) the specific time period for which such past support is sought; and
- (B) that the amount of support will be calculated by retroactive application of the Arizona Child Support Guidelines.

3. Ambiguous Terms: Avoid using ambiguous terms.

Do not use “shall,” which has lost all meaning over the years. Instead, use “must,” “may,” “should,” “will,” or “is/are,” depending on the context. Note that the word “should” is generally considered the preferred word of choice if a rule’s command is “directory” but not mandatory. And sometimes it is better to use the present tense of the operative verb if the rule does not involve an act or duty of a court or party (*e.g.*, Rule 24(a): “A party begins the following actions by filing a verified petition with the superior court clerk....” rather than “A party *shall* commence the following actions by filing a verified petition with the clerk of the superior court:....”).

Use “enter” or “file” instead of “issues.” Some people understand the term “issue” to mean the date when a judge signs an order rather than the date when the order is filed.

Use “order” instead of “direct” when describing court actions. Courts enter orders, not directions.

4. Redundant Terms: Avoid saying the same thing twice, and especially avoid “redundant intensifiers.”

Use “may” instead of “may, in its discretion” (*e.g.*, Rule 11: “The court may, in its discretion, exclude minor children from any proceeding....”). Same for “may, if appropriate.”

Use “must show” rather than “must show affirmatively.”

Use “unless the court orders” rather than “unless the court expressly orders.”

Use “on its own, a court may” not “on its own initiative, a court may.”

5. Archaic Terms: Avoid archaic, outdated “legalistic” terms such as “hereto,” “therein,” “thereto,” “hereinafter,” “thereafter,” “therewith,” “wherein.” Either restructure the sentence or use a demonstrative pronoun such as “that,” “this,” “these,” or “those.”

6. Simpler Words and Proper Word Choice: Prefer simpler words over the more complex and choose words that have the meaning you intend (not a near-miss). For example:

Use “if” instead of “where,” “when” (unless there is a temporal element), “in the event that” or “on the condition that.”

Use “later” rather than “subsequently.” Similarly, please use “after” rather than “subsequent.”

Use “before” rather than “prior to.”

Use “under,” “by,” or “provided in” rather than “pursuant to” or “provided by.”

Use “unless” rather than “provided that.”

Unless there is a temporal element (*i.e.*, something has to happen when an act occurs), use “on” instead of “upon” (*e.g.*, “serve on”, not “serve upon”).

The word “where” is not to be used as a synonym for “if” (e.g., “If there are multiple parties on a side,” not “Where there are multiple parties on a side”). “When” is appropriate in some limited circumstances, but, in most cases, “if” should be preferred to “when.”

Use “a party who” rather than “a party that.”

Use “affected” rather than “impacted.”

Avoid use of the words “paragraph,” “section,” “subsection,” “subpart,” and the like when describing portions of a rule. Their use inevitably leads to inconsistency. Refer instead to “this rule,” “Rule 16(b),” or, if the same rule, “(b)” (i.e., the relevant subpart).

7. **“Of” Phrases:** Minimize the use of “of” phrases. Use possessives if needed.

Use “Supreme Court clerk” rather than “clerk of the Supreme Court.”

Use “superior court clerk” or “clerk” rather than “clerk of the superior court.”

Say “Commencing Proceedings” rather than “Commencement of Proceedings.”

Say “after counsel’s appointment” rather than “after appointment of counsel.”

Say “Supreme Court justices” rather than “justices of the Supreme Court.”

Say “opposing counsel’s response” rather than “the response of opposing counsel.”

Say “court’s order” rather than “the order of the court.”

8. **“By” Phrases:** Similarly, minimize the use of “by” by putting the subject in front of the verb. Thus, say “unless the court orders otherwise” rather than “unless otherwise ordered by the court”

9. **The Active Voice:** Use the active voice, i.e., the subject of the sentence is performing an action, which is reflected by the verb.

Example: Rule 5.1: “The motion shall be filed in the juvenile division and a copy shall be provided to the assigned family law division.”

As revised: “A party moving for consolidation must file the motion in the juvenile division and provide a copy to the assigned family law division.

Example: Rule 6: “All notices and requests for change of judge shall be made in accordance with Rule 42(f), *Arizona Rules of Civil Procedure*.”

As revised: “A party may notice or request a change of judge in the manner provided in Rules 42.1 and 42.2 of the Arizona Rules of Civil Procedure.”

Example: Rule 23: “A family law action is commenced by filing a petition with the clerk of the court.”

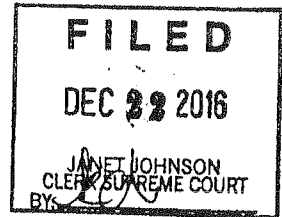
As revised: “A family law action begins when a person files a petition with the court.”

Example: Rule 91: “The clerk of the court shall file the original Order to Appear when signed by the assigned judicial officer.”

As revised: “The clerk will file the original Order to Appear when the assigned judicial officer signs it.”

10. Comments:

- (a) ***Deletion of No Longer Useful Comments:*** In reviewing a rule, consider whether any of the comments can be profitably deleted altogether. Some of the comments may no longer be accurate or are of historical use only.
- (b) ***Insertion of a Comment into the Rule:*** If a comment sets forth a requirement not found in the rule and you decide that the requirement is worth retaining, consider adding the requirement to the rule’s text.
- (c) ***“Applicability” Notes:*** Delete notes entitled “Application,” which generally indicate that a rule is not applicable during certain time periods that have long ago expired.
- (d) ***Placement of Comments:*** In all cases, if a comment still has currency, it should appear after the end of the rule, not after a subpart.



SUPREME COURT OF ARIZONA

In the Matter of) Arizona Supreme Court
) No. R-16-0028
 RULES 2, 5, 10, 14, 24, 26, 27,)
 28, 41, 42, 44, 45, 49, 66, 67)
 68, 73, 76, 91, and 95, RULES OF)
 FAMILY LAW PROCEDURE)
)
)
)
)

SUPPLEMENTAL ORDER
 AMENDING RULE 49(B), ARIZONA RULES OF FAMILY LAW PROCEDURE

A petition having been filed proposing to amend certain Rules of Family Law Procedure, and the Court having adopted the amendments in an order filed September 2, 2016, such amendments to become effective January 1, 2017, upon consideration,

IT IS ORDERED that Rule 49(B), Arizona Rules of Family Law Procedure, be amended in accordance with the attachment hereto, effective January 1, 2017. This amended version of Rule 49(B) replaces the amended version of the Rule that was approved by the Court in the order filed September 2, 2016, which version had inadvertently inserted Rule 47(B) into Rule 49(B).

DATED this 22nd day of December. 2016.

SCOTT BALES
 Chief Justice

Page 2 of 3

TO:
Rule 28 Distribution
John A Furlong
Patricia Seguin

ATTACHMENT¹

Arizona Rules of Family Law Procedure

Rule 49. Disclosure

A. [No change in text.]

B. Legal Decision-Making ~~Child Custody~~ or Parenting Time. In a case in which legal decision-making ~~child custody~~ or parenting time is an issue, unless good cause is shown, the following documents and information shall be served on the other party with the Resolution Statement:

1. A copy of any past or current protective order and underlying petition involving a party or member of the party's household.
2. The name and address of each treatment provider and period of treatment involving any party for psychiatric or psychological issues, anger management, substance abuse or domestic violence, for the period beginning five years prior to the filing of the petition.
3. The date, description, location and documentation of any criminal charge against or conviction of any party or member of the party's household occurring within ten years of the filing of the petition.
4. The date, description, location and documentation of any Department of Child Safety investigation or proceeding involving any party or member of the party's household occurring within ten years of the filing of the petition.

C.-J. [No change in text.]

¹ Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by strikeouts.

SUPREME COURT OF ARIZONA

In the Matter of) Arizona Supreme Court
) No. R-16-0037
RULE 72, ARIZONA RULES OF FAMILY)
LAW PROCEDURE)
)
)
) **FILED 12/14/2016**
)
)
_____)

**ORDER
AMENDING RULE 72, ARIZONA RULES OF FAMILY LAW PROCEDURE**

A petition having been filed proposing to amend Rule 72, Arizona Rules of Family Law Procedure, and comments having been received, upon consideration,

IT IS ORDERED that Rule 72, Arizona Rules of Family Law Procedure, be amended in accordance with the attachment hereto, effective January 1, 2017.

DATED this 14th day of December, 2016.

_____/s/_____
SCOTT BALES
Chief Justice

TO:

Rule 28 Distribution

Hon Peter B Swann

Hon Paul J McMurdie

Martin Lynch

Patricia L Cummins

Barry L Brody

Annette T Burns

Aris J Gallios

Helen R Davis

Keith Berkshire

Michael J Shew

Edwin Pizarro

David Alger

Vicki Alger

Alexander Poulos

Marguerite Patterson

ATTACHMENT

(new language is underlined and deletions are ~~struck through~~)

Arizona Rules of Family Law Procedure

Rule 72. Family Law Master.

A. Appointment and Compensation. Upon written stipulation by the parties and application by the parties, or on the court's own motion, or oral agreement on the record in open court, the court may appoint a family law master who is an attorney or other professional with education, experience, and special expertise regarding the particular issues to be referred to the master. The compensation to be allowed to a master shall be fixed by the court. The parties may stipulate to a particular family law master and the amount of compensation, but the court must approve the family law master and compensation, and the court shall review the qualifications of the family law master prior to appointment. Compensation of the family law master shall be allocated by the court and shall be treated as a taxable cost.

B. Powers. The order of reference appointing a family law master shall specify the particular issues referred to the family law master and shall fix the time and place for beginning and closing the hearings and for filing the master's report. An appointment under this rule may not direct a master to perform services within the scope of Rule 74 or otherwise make decisions or recommendations concerning legal decision-making or parenting time. ~~Other than legal decision-making and parenting time,~~ the master may deal with any issues pursuant to Title 25, A.R.S., that could be presented to the assigned judge including post-decree matters. Subject to any limitations in the order, the master shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production of evidence upon all matters embraced in the reference. The master may rule upon the admissibility of evidence, unless otherwise directed by the order of reference, and has the authority to place witnesses under oath and may examine the parties and witnesses. When a party requests, the master shall cause a record to be made of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 104, Arizona Rules of Evidence, for a court sitting without a jury. The cost of the record shall be paid by the parties as allocated by the court and shall be a treated as a taxable cost.

C. through F. [No change in text.]

G. Court Actions. If no objection is filed by either party pursuant to this rule, the master's report shall become an order of the court, unless the court on its own motion sets a hearing upon a particular issue in the report within ten (10) days after the time for filing an objection has passed. ~~If the master's report covers all issues in the case, and no objection is filed and the court does not set a hearing, the court shall enter judgment on the master's report.~~ In the event any objection(s) are filed, the court may set oral argument on the objection(s), adopt the report, modify it, reject it in whole or in part or may receive further evidence. The court shall hold a hearing or enter an order in connection with any objection to the master's report within thirty (30) days of the filing of the response or other ordered pleading to such objection.

H. through L. [No change in text.]

M. Effective date. The rule as it exists on January 1, 2017, applies to any appointment or reappointment of a family law master that occurs on or after January 1, 2017. All family law master appointments made prior to January 1, 2017, continue to be governed by the prior version of Rule 72 for the remaining term of that appointment.

Comment to 2017 Amendment

The Court recognizes that in cases involving complex property or financial issues, appointment of a neutral expert witness may be helpful to the court in resolving these issues. A court may appoint a neutral expert witness to testify concerning these issues pursuant to Arizona Rule of Evidence 706 over a party's objection and at the parties' expense upon a showing that the parties can afford the expert without undue hardship.

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3 State Bar of Arizona
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6 (602) 340-7236
7 John.Furlong@staff.azbar.org

8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**

10 In the Matter of:

11 **PETITION TO AMEND RULE 78,**
12 **ARIZONA RULES OF FAMILY**
13 **LAW PROCEDURE**

Supreme Court No. R-

PETITION

14
15
16 Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar
17 of Arizona hereby petitions this Court to amend Rule 78 of the Arizona Rules of
18 Family Law Procedure. The purpose of the amendment is to conform the Family
19 Law Rule to the corresponding Rule of Civil Procedure regarding time to request
20 attorney's fees after a ruling on the other pending issues.

21
22 **INTRODUCTION**

23 Under the current version of ARFLP 78, there is no time limit to request
24 attorney's fees after resolution of the other pending issues. This creates an issue
25

1 when a party requests attorney's fees in a pleading prior to trial, but the Court does
2 not rule on the issue. ARFLP 78(D) states:
3

4 **D. Attorneys' Fees, Costs, and Expenses.**

5 1. *Claims for Attorneys' Fees, Costs, and Expenses.* A
6 claim for attorneys' fees, costs and expenses initially shall
7 be made in the pleadings, pretrial statement, or by motion
8 filed prior to trial or post-decree evidentiary hearing. Costs
and expenses also shall be claimed by an itemized
statement.

9 2. *Time of Determination.* Except as to temporary awards
10 of attorneys' fees and costs, when attorneys' fees are
11 claimed, the determination as to the claimed attorneys'
12 fees shall be included with a decision on the merits of the
case or as otherwise ordered by the court.

13 3. *Method of Establishing Claim.* A claim for attorneys'
14 fees, costs, and expenses shall be supported by an
15 itemized affidavit, exhibits, or, at the discretion of the
16 court, by testimony. If the motion is contested, opposing
17 parties may respond to the motion and a hearing may be
18 granted in the discretion of the court. In addition, the
court may refer issues relating to the value of services to
a family law master under Rule 72.

19 4. *Scope.* The provisions of subdivisions (1) through (3)
20 do not apply to claims for fees, costs, and expenses as
21 sanctions pursuant to statute or rule, or to causes in which
22 the substantive law governing the action provides for the
23 recovery of such fees, costs, and expenses as an element
24 of damages to be proved at trial.
25

1 **Summary of Proposed Amendment**

2
3 The proposed amendments would conform the Family Law Rule to the
4 existing Civil Rule attorney’s fees, under ARCP 54(g) which requires a motion be
5 filed within 20 days of entry of the judgment. ARCP 54(g) states:

6 (1) *Claims for Attorneys' Fees.* A claim for attorneys' fees
shall be made in the pleadings.

7 (2) *Time of Determination.* When attorneys' fees are
8 claimed, the determination as to the claimed attorneys'
9 fees shall be made after a decision on the merits of the
10 cause. The motion for attorneys' fees shall be filed within
11 20 days from the clerk's mailing of a decision on the merits
of the cause, unless extended by the trial court.

12 (3) *Method of Establishing Claim.* A motion for attorneys'
13 fees may be supported by affidavit, and exhibits or, at the
14 discretion of the court, by testimony. If the motion is
15 contested, opposing parties may respond to the motion,
and a hearing may be granted in the discretion of the court.
In addition, the court may refer issues relating to the value
of services to a special master under Rule 53.

16 (4) *Scope.* The provisions of subparagraphs (1) through (3)
17 do not apply to claims for fees and expenses as sanctions
18 pursuant to statute or rule, or to causes in which the
19 substantive law governing the action provides for the
20 recovery of such fees as an element of damages to be
proved at trial.

21 The issue has been discussed by the Arizona Supreme Court in *Bollermann v.*
22 *Nowlis*, 234 Ariz. 340 (2014), where the Court discussed the issue related to a Court
23 not ruling on attorney’s fees, as follows:

24 ¶ 9 The civil rules are admittedly clearer on this point than
25 are the family rules. Civil Rule 58(g) specifies that no

1 judgment shall be entered that does not address attorneys'
2 fees, except as provided in Rule 54(b). Ariz. R. Civ. P.
3 58(g); see Nat'l Broker, 211 Ariz. at 217–18 ¶ 36, 119 P.3d
4 at 484–85. Under the family rules, “the determination as
5 to the claimed attorneys' fees shall be included with a
6 decision on the merits of the case or as otherwise ordered
7 by the court.” Ariz. R. Fam. L.P. 78(D)(2) (emphasis
8 added). We read the latter phrase as an allusion to the
9 procedure set forth in Rule 78(B) for entry of final
10 judgment on fewer than all the claims.

11 The proposed change would allow for fee awards to be denied if a Motion to
12 Amend is not timely filed. The proposed language would be:

13 **D. Attorneys' Fees, Costs, and Expenses.**

14 1. *Claims for Attorneys' Fees, Costs, and Expenses.* A
15 claim for attorneys' fees, costs and expenses initially shall
16 be made in the pleadings, pretrial statement, or by motion
17 filed prior to trial or post-decree evidentiary hearing. Costs
18 and expenses also shall be claimed by an itemized
19 statement.

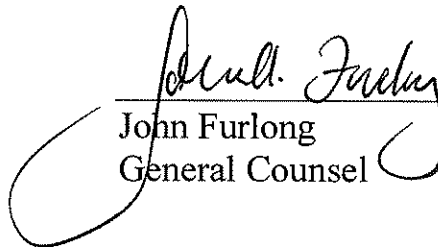
20 2. *Time of Determination.* Except as to temporary awards
21 of attorneys' fees and costs, when attorneys' fees are
22 claimed, the determination as to the claimed attorneys'
23 fees shall be included with a decision on the merits of the
24 case or as otherwise ordered by the court. **SHOULD THE
25 COURT RULE ON ALL PENDING ISSUES
EXCEPT ATTORNEY'S FEES IN A JUDGMENT,
THE CLAIM FOR ATTORNEY'S FEES SHALL BE
DEEMED DENIED AS OF THE DATE OF THE
ENTRY OF THAT JUDGMENT IF A SEPARATE
MOTION PURSUANT TO RULE 83 IS NOT FILED
WITHIN 15 DAYS OF THE ENTRY OF THE
JUDGMENT ON ALL OTHER ISSUES.**

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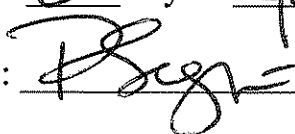
CONCLUSION

Under the current rule a minute entry could remain as a not final judgment indefinitely until the court rules on fees. The proposed change fixes this issue. The State Bar of Arizona respectfully requests amendment of Rule 78, Ariz. R. Fam. L. P. as stated herein.

RESPECTFULLY SUBMITTED this 8th day of January, 2016.



John Furlong
General Counsel

Electronic copy filed with the Clerk of the Arizona Supreme Court this 8th day of January, 2016.
by: 

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APPENDIX A

Rule 78

A. Definition; Form. "Judgment" as used in these rules includes a decree and an order from which an appeal lies. A judgment shall not contain a recital of pleadings or the record of prior proceedings, but may contain findings by a family law master appointed by the court.

B. Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, or third-party claim, or when multiple parties are involved, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. For purposes of this subsection, a claim for attorneys' fees may be considered a separate claim from the related judgment regarding the merits of a cause.

C. Entry of Judgment after Death of Party. Judgment may be entered after the death of a party upon a decision or upon an issue of fact rendered in the party's lifetime, except that an order dissolving the marriage may not be entered after the death of either party.

D. Attorneys' Fees, Costs, and Expenses.

1. Claims for Attorneys' Fees, Costs, and Expenses. A claim for attorneys' fees, costs and expenses initially shall be made in the pleadings, pretrial statement, or by motion filed prior to trial or post-decree evidentiary hearing. Costs and expenses also shall be claimed by an itemized statement.

2. Time of Determination. Except as to temporary awards of attorneys' fees and costs, when attorneys' fees are claimed, the determination as to the claimed attorneys' fees shall be included with a decision on the merits of the case or as otherwise ordered by the court. **SHOULD THE COURT RULE ON ALL PENDING ISSUES EXCEPT ATTORNEY'S FEES IN A JUDGMENT, THE CLAIM FOR ATTORNEY'S FEES SHALL BE DEEMED DENIED AS OF THE DATE OF THE ENTRY OF THAT JUDGMENT IF A SEPARATE MOTION PURSUANT TO**

RULE 83 IS NOT FILED WITHIN 15 DAYS OF THE ENTRY OF THE JUDGMENT ON ALL OTHER ISSUES.

3. Method of Establishing Claim. A claim for attorneys' fees, costs, and expenses shall be supported by an itemized affidavit, exhibits, or, at the discretion of the court, by testimony. If the motion is contested, opposing parties may respond to the motion and a hearing may be granted in the discretion of the court. In addition, the court may refer issues relating to the value of services to a family law master under Rule 72.

4. Scope. The provisions of subdivisions (1) through (3) do not apply to claims for fees, costs, and expenses as sanctions pursuant to statute or rule, or to causes in which the substantive law governing the action provides for the recovery of such fees, costs, and expenses as an element of damages to be proved at trial.

E. Offers of Judgment Not Applicable. The procedure governing offers of judgment, authorized in civil actions under Ariz. R. Civ. Proc. 68, shall not apply in any legal matter subject to these Rules.

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**IN THE SUPREME COURT
STATE OF ARIZONA**

**In the Matter of
PETITION TO AMEND
ARIZONA RULES OF
FAMILY LAW PROCEDURE**

**Supreme Court No. R-_____
Petition to Amend Arizona Rules
of Family Law Procedure**

Pursuant to Rule 28, Rules of the Supreme Court, Barbara Atwood and Timothy Berg, Commissioners with the Uniform Law Commission, respectfully petition this Court to adopt amendments to the Arizona Rules of Family Law Procedure (ARFLP) to implement the Uniform Family Law Arbitration Act (UFLAA), as set out in Appendix A. Petitioners recommend that Rule 67(C) be deleted and that the proposed rule be inserted in the ARFLP as a new Rule 67.2.

I. BACKGROUND

The use of consensual family law arbitration is on the increase nationwide. The American Academy of Matrimonial Lawyers (AAML) promulgated a Model Family Law Arbitration Act in 2005, and the AAML regularly offers training and certification for family law arbitrators. In recent years, family law arbitration statutes and rules have been adopted in several states. *See, e.g.*, Mich. Comp. Laws. Ann. §§ 5071 – 82; N. Car. Gen. Stat. §§ 50-41—62.

With the growing interest in this mode of alternative dispute resolution and the inadequacy of commercial arbitration law, the Uniform Law Commission in 2013 began the project of drafting a family law arbitration act. In July of 2016 the Uniform Family Law Arbitration Act (UFLAA) received final approval.

For those couples who are not realistic candidates for mediation or settlement, voluntary arbitration offers an attractive alternative to court. When arbitration works well, the advantages are significant. Unlike court proceedings, arbitration hearings are not public, and parties can agree to their own terms of confidentiality. The arbitration process is flexible. The parties identify the precise disputes to be arbitrated and, in conjunction with the arbitrator, can structure the rules to be followed, the schedule, and fees. Sometimes arbitration by agreement is used in combination with mediation in a “med-arb” structure. For couples who

have experienced unpleasant and protracted litigation, arbitration also may be preferred as a method of resolving post-decree issues.

The parties' ability to select the decision-maker is a key attraction of arbitration over litigation. The choice of arbitrator is often shaped by the type of dispute. For example, a lawyer with experience in real estate appraisals might be an optimal decision-maker for couples disputing lands held as marital property. In contrast, a custody dispute over an autistic child might best be arbitrated by an individual with expertise in child psychology.

Because arbitration can move forward without regard to judicial calendars, it usually reaches finality more quickly than litigation. For that reason, it also is touted as being less expensive than litigation, even taking into account the responsibility of the parties to pay the arbitrator's fee. As the United States Supreme Court has recognized, "[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

The trade-off with arbitration is the limited nature of judicial review. The agreement to arbitrate is a waiver of the right to go to court in the first instance, and the opportunity to challenge an award in court is limited. In commercial

arbitration, awards typically are vacated only for arbitrator misconduct or grounds going to the fairness of the arbitration process and not for errors of law. In family law arbitration, likewise, parties who agree to arbitrate relinquish judicial oversight to a significant degree. As discussed below, however, judicial review of awards determining child custody or child support must be more rigorous.

Notwithstanding limited judicial review, voluntary arbitration may be an appealing alternative for many people in light of drawbacks, limitations and restrictions associated with litigation.

II. NEED FOR UNIFORM FAMILY LAW ARBITRATION RULE IN ARIZONA

Family law arbitration is not new to Arizona, but Arizona law does not provide comprehensive guidelines for arbitration in the context of family dissolution. Rule 67(C) of the ARFLP states that “parties may agree to arbitrate any and all issues in accordance with the Arizona Arbitration Act, A.R.S. §§ 12-1501 to 1518 or any other law permitting arbitration.” The statutory reference in Rule 67(C) is to the Uniform Arbitration Act. In 2010, several years after the promulgation of Rule 67(C), Arizona enacted the Revised Uniform Arbitration Act (RUAA), A.R.S. §§ 12-3001—29, applicable to arbitration agreements made on or after January 1, 2011. *See* A.R.S. § 12-3003(A). The legislature did not repeal the original Uniform Arbitration Act, apparently because the RUAA excludes four

categories of disputes covered under the original Act. *See* A.R.S. § 12-3003(B); Bruce E. Meyerson, *Arizona Adopts the Revised Uniform Arbitration Act*, 43 Ariz. St. L.J. 481, 486 (2011). The RUAA exclusions do not relate to family law disputes. Thus, going forward, the RUAA is presumably the governing statutory law for family law arbitration in Arizona. Although it is a more complete arbitration framework than the original Uniform Arbitration Act, the RUAA does not provide an adequate framework for family law arbitration.

The shortcomings of commercial arbitration law in the family law context derive, in part, from the State's non-waivable *parens patriae* duty to protect children and vulnerable family members. *See Hays v. Gama*, 205 Ariz. 99, 102 ¶¶ 18, 67 P.3d 695, 698 (2003) (“[w]e have repeatedly stressed that the child’s best interest is paramount in custody determinations”) (citing cases); *Nold v. Nold*, 232 Ariz. 270, 304 P.3d 1093 (Ariz. App. 2013) (best interests of child are for court alone to decide, and court cannot delegate or abdicate its responsibility to exercise independent judgment). In light of the State’s *parens patriae* responsibility, any family law arbitration framework must provide for close judicial review of arbitration awards determining child custody or child support. Family law arbitration procedure also needs to address the possibility of domestic violence or child abuse and to provide a mechanism for engaging court processes to protect the safety of individuals involved. In addition, family law arbitration law should make

available the remedies that are uniquely necessary for families in dissolution, such as temporary orders and post-decree modifications.

Recent case law from Arizona reveals the need for greater legal clarity governing family law arbitration. In *Chang v. Siu*, 234 Ariz. 442, 323 P.3d 725 (Ariz. Ct. App. 2014), a divorcing couple had agreed to arbitrate their property dispute before a retired judge, but they provided in the agreement that judicial review of the arbitrator's award would go directly to the court of appeals. After the award was issued, the wife obtained confirmation in the superior court, and the husband appealed. The court of appeals affirmed the superior court's order and held that the parties could not expand the appellate court's jurisdiction by agreement. The court also noted the uncertainty in the law regarding the parties' ability to contractually expand the scope of judicial review of arbitration awards. *See also In re Marriage of Yeatts*, 2014 WL 3731350 (Ariz. Ct. App. 2014) (unpublished decision) (dismissing for lack of jurisdiction and noting confusion among parties as to the roles of settlement judge and arbitrator in marital dissolution case).

The reviewing authority of Arizona's superior and appellate courts is clearly set forth in the proposed Rule. See Paragraphs O through W of proposed Rule 67.2. In addition, parties and arbitrators in Arizona would likely benefit by having

a more detailed framework for family law arbitrations, including where the best interests of children are involved.

III. OVERVIEW OF PROPOSED UNIFORM FAMILY LAW ARBITRATION RULE

Since 2006, Arizona has provided detailed procedural guidelines for resolving family law cases arising under Title 25 of the Arizona Revised Statutes, both through judicial processes and alternative dispute resolution methods. *See* Rules 1 & 67, ARFLP. Similar to Rule 67.1, implementing the Uniform Collaborative Law Act by rule, proposed Rule 67.2 would implement the Uniform Family Law Arbitration Act by rule to provide a procedural framework for voluntary family law arbitration. It includes guidelines for parties, arbitrators, and courts both during an arbitration and after an award has been issued. Proposed Rule 67.2 incorporates by reference Arizona's RUAA but supplements that statutory framework to meet the needs of family law dispute resolution. *See* Paragraph C. Given certain limitations in rule-making, proposed Rule 67.2 does diverge from the UFLAA in some respects. For example, proposed Rule 67.2 does not include the immunity provision of the UFLAA (Section 25) because a grant of immunity may be beyond the scope of rule-making. Importantly, however, Arizona's RUAA contains a substantially similar immunity provision for arbitrators that would apply to family law arbitrators. *See* A.R.S. § 12-3014.

Consistent with the directive in ARFLP Rule 67(C) that “[t]he parties may agree to arbitrate any and all issues,” proposed Rule 67.2 allows the parties to agree to arbitrate any family law dispute, *see* Paragraph B(1), extending the Rule to any “contested issue arising under” Title 25 of the Arizona Revised Statutes and within the scope of the Arizona Rules of Family Law Procedure, *see* Paragraph (A)(6). Typical issues could include property division, allocation of debt, spousal maintenance, legal decision-making, parenting time, child support, and attorneys’ fees. Proposed Rule 67.2, however, does exclude certain status determinations, such as adoption and termination of parental rights, from arbitration. *See* Paragraph B(2).

Under the proposed Rule, an arbitration agreement must be in writing and must identify the dispute to be arbitrated as well as the arbitrator or a way of selecting the arbitrator. *See* Paragraph D. The agreement to arbitrate should be a voluntary and informed choice of each party, not an alternative that is the product of coercion or ordered by the court absent full agreement of the party. In light of the likely preemptive effect of the Federal Arbitration Act, 9 U.S.C. § 2, the proposed Rule adopts the FAA’s requirements for arbitration agreements and, as a general matter, accepts the enforceability of pre-dispute arbitration agreements, such as arbitration clauses in pre-marital agreements. Of course, traditional contract defenses (lack of voluntariness, fraud, duress, unconscionability, and the

like) remain available as a basis to challenge the validity of any arbitration agreement. The proposed Rule contains procedural guidelines for challenging the enforceability of an arbitration agreement in court. See Paragraph F.

While pre-dispute arbitration agreements are generally enforceable under the proposed Rule, pre-dispute arbitration agreements for child-related disputes are not enforceable. See Paragraph D(3). A parent's choice to arbitrate is likely to be better informed and based on a fuller understanding of the child's interests after the dispute has materialized. In light of the State's *parens patriae* duty to protect children, the proposed Rule generally requires that an agreement to arbitrate child-related issues must be entered into or reaffirmed *after* the dispute has arisen. See Paragraph D(3). The one exception under the proposed Rule is when an arbitration agreement involving child-related disputes has been incorporated in an earlier court decree—such as a marital settlement agreement or separation agreement. *Id.*

As in commercial arbitration, the proposed Rule gives maximum flexibility to the parties in choosing an arbitrator. While default requirements are that the arbitrator be an active or retired attorney or a retired judge and be trained in identifying domestic violence and child abuse, those requirements can be waived by agreement of the parties. See Paragraph K. If the parties cannot agree on an arbitrator, it is up to the court to appoint a qualified individual.

The proposed Rule recognizes the state's *parens patriae* responsibility for children and vulnerable family members in several non-waivable provisions. The Rule requires that arbitration proceedings involving child-related issues must be recorded, Paragraph M, and any award regarding children must spell out the underlying reasons, Paragraph N(3). In contrast to the limited judicial review that typifies commercial arbitration, the proposed Rule requires robust judicial scrutiny of child-related awards, a subset of awards authorized by the proposed Rule. In particular, under Paragraphs O and R, a court cannot confirm an award determining legal decision-making, parenting time, or other child-related dispute unless it finds that the award complies with applicable substantive law and is in the child's best interests. Under Paragraph R(4), a court in its discretion may exercise *de novo* review of a child-related award. At the same time, in order to preserve the efficiency of arbitration, the proposed Rule provides for limited judicial review of purely financial issues between the parties. See Paragraph R(1).

The proposed Rule also includes special protections for children and family members if the arbitrator learns that abuse or family violence is occurring. If an arbitrator has a reasonable basis to believe that a child is the subject of abuse or neglect, the proposed Rule requires the arbitrator to terminate the arbitration of any child-related disputes and report the findings to the Arizona Department of Child Safety. See Paragraph K. In addition, if the arbitrator believes domestic violence

is present, the arbitrator must stay the arbitration and refer the parties to court. In order for arbitration to proceed, the party at risk of harm must reaffirm the agreement to arbitrate, and the court must find that adequate procedures are in place to protect the party from risk of harm or intimidation. See Paragraph K(2).

Under the proposed Rule, arbitrators have authority to enter temporary awards as needed under Arizona law governing temporary orders, A.R.S. § 25-404; Rules 47, 48, ARFLP. See Paragraph J. Parties seeking modification of confirmed awards based on changed circumstances can seek relief in court under Rule 91 or agree to further arbitration. See Paragraph U.

In addition, the proposed Rule provides a non-exclusive list of arbitrator powers, including the authority to interview children and appoint a representative for a child consistent with Arizona law. See Paragraph L.

IV. CONCLUSION

Petitioners respectfully request that the Court consider this petition and proposed Rule at its earliest convenience. Petitioners additionally request that the petition be circulated for public comment until May 20, 2017, and that the Court adopt the proposed Rule as attached in Appendix A, or as modified in light of comments received from the public, with an effective date of January 1, 2018.

Respectfully submitted January 9, 2017.

/s/ Timothy Berg

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Appendix A

Rule 67.2. Uniform Family Law Arbitration Rule

A. Definitions. In this rule:

(1) “Arbitration agreement” means an agreement that subjects a family law dispute to arbitration.

(2) “Arbitration organization” means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration or is involved in the selection of an arbitrator.

(3) “Arbitrator” means an individual selected, alone or with others, to make an award in a family law dispute that is subject to an arbitration agreement.

(4) “Child-related dispute” means a family law dispute regarding legal decision-making, parenting time, visitation, or financial support regarding a child.

(5) “Court” means the Arizona Superior Court.

(6) “Family law dispute” means a contested issue arising under Title 25 of the Arizona Revised Statutes and within the scope of the Arizona Rules of Family Law Procedure.

(7) “Party” means an individual who signs an arbitration agreement and whose rights will be determined by an award.

(8) “Person” means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or

instrumentality, or any other legal entity.

(9) “Record”, used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(10) “Sign” means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(11) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

B. Scope.

(1) This rule governs arbitration of a family law dispute.

(2) This rule does not authorize an arbitrator to make an award that:

(a) grants a legal separation, dissolution of marriage, or annulment;

(b) grants a guardianship of a child or incapacitated adult; or

(c) grants an adoption, terminates parental rights, or determines

dependency or other status of a child under Title 8 of the Arizona Revised Statutes.

C. Applicable law.

(1) Family law arbitration shall be conducted according to A.R.S. §§ 12-3001 through 3029, as supplemented by this Rule.

(2) In determining the merits of a family law dispute, an arbitrator shall apply the law of this state, including its choice of law principles.

D. Arbitration agreement.

(1) An arbitration agreement must:

(a) be in a record signed by the parties;

(b) identify the arbitrator, an arbitration organization, or a method of selecting an

arbitrator; and

(c) identify the family law dispute the parties intend to arbitrate.

(2) Except as otherwise provided in subdivision D(3), an agreement in a record to arbitrate a family law dispute that arises between the parties before, at the time, or after the agreement is made is valid and enforceable as any other contract and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.

(3) An agreement to arbitrate a child-related dispute that arises between the parties after the agreement is made is unenforceable unless:

(a) the parties affirm the agreement in a record after the child-

related dispute arises, or

(b) the agreement was entered during a family law proceeding and the court

approved or incorporated the agreement in an order issued in the proceeding.

(4) If a party objects to arbitration on the ground the arbitration agreement is unenforceable or the agreement does not include a family law dispute, the court shall decide whether the agreement is enforceable or includes the family law dispute.

E. Notice of Arbitration. A party may initiate arbitration by giving notice to arbitrate to the other party in the manner specified in the arbitration agreement or, in the absence of a specified manner, under the law and procedural rules of this state, other than this rule, governing contractual arbitration.

F. Motion for Judicial Relief.

(1) A motion for judicial relief under this rule must be made to the court in which a proceeding is pending involving a family law dispute subject to arbitration or, if no proceeding is pending, a court with jurisdiction over the parties and the subject matter.

(2) On motion of a party, the court may compel arbitration if the parties have entered into an arbitration agreement that complies with paragraph D unless the court determines under paragraph K that the arbitration should not proceed.

- (3) On motion of a party, the court shall terminate arbitration if it determines that:
- (a) the agreement to arbitrate is unenforceable;
 - (b) the family law dispute is not subject to arbitration; or
 - (c) under Paragraph K, the arbitration should not proceed.
- (4) Unless prohibited by an arbitration agreement, on motion of a party, the court may order consolidation of separate arbitrations involving the same parties and a common issue of law or fact if necessary for the fair and expeditious resolution of the family law dispute.

G. Qualification and Selection of Arbitrator.

(1) Except as otherwise provided in subdivision G(2), unless waived in a record by the parties, an arbitrator must be:

(a) an attorney in good standing admitted to practice or on inactive status or a judge on retired status; and

(b) trained in identifying domestic violence and child abuse according to standards established under law of this state other than this rule for a judicial officer assigned to hear a family law proceeding.

(2) The selection of the arbitrator must be in accordance with the identification in the arbitration agreement of an arbitrator, arbitration organization, or method of selection.

(3) If an arbitrator is unable or unwilling to act or if the agreed-on method of selecting an arbitrator fails, on motion of a party, the court shall select an arbitrator.

H. Disclosure by Arbitrator; Disqualification.

(1) Before agreeing to serve as an arbitrator, an individual, after making reasonable inquiry, shall disclose to all parties any known fact a reasonable person would believe is likely to affect:

(a) the impartiality of the arbitrator in the arbitration, including bias, a financial or personal interest in the outcome of the arbitration, or an existing or past relationship with a party, attorney representing a party, or witness; or

(b) the arbitrator's ability to make a timely award.

(2) An arbitrator, the parties, and the attorneys representing the parties have a continuing obligation to disclose to all parties any known fact a reasonable person would believe is likely to affect the impartiality of the arbitrator or the arbitrator's ability to make a timely award.

(3) An objection to the selection or continued service of an arbitrator and a motion for a stay of arbitration and disqualification of the arbitrator must be made under the law and procedural rules of this state, other than this rule, governing arbitrator disqualification.

(4) If a disclosure required by subdivision H(1) or (2) is not made, the court may:

(a) on motion of a party not later than 30 days after the failure to disclose is known or by the exercise of reasonable care should have been known to the party, suspend the arbitration;

(b) on timely motion of a party, vacate an award under subdivision R(1)(b); or

(c) if an award has been confirmed, grant other appropriate relief under law of this

state other than this rule.

(5) If the parties agree to discharge an arbitrator or the arbitrator is disqualified, the parties by agreement may select a new arbitrator or request the court to select another arbitrator as provided in paragraph G.

I. Party Participation.

(1) A party may:

(a) be represented in an arbitration by an attorney;

(b) be accompanied by an individual who will not be called as a witness or act as an advocate; and

(c) participate in the arbitration to the full extent permitted under the law and procedural rules of this state, other than this rule, governing a party's

participation in contractual arbitration.

(2) A party or representative of a party may not communicate ex parte with the arbitrator except to the extent allowed in a family law proceeding for communication with a judge.

J. Temporary Order or Award.

(1) Before an arbitrator is selected and able to act, on motion of a party, the court may enter a temporary order under A.R.S. § 25-404 and Rule 47 or 48.

(2) After an arbitrator is selected:

(a) the arbitrator may make a temporary award under A.R.S. § 25-404 and Rule 47 or 48; and

(b) if the matter is urgent and the arbitrator is not able to act in a timely manner or provide an adequate remedy, on motion of a party, the court may enter a temporary order.

(3) On motion of a party, before the court confirms a final award, the court under paragraph O, Q, or R may confirm, correct, vacate, or amend a temporary award made under subdivision J(2)(a).

(4) On motion of a party, the court may enforce a subpoena or temporary award issued by an arbitrator for the fair and expeditious disposition of the arbitration.

K. Protection of Party or Child.

(1) In this paragraph, “protection order” means an injunction or other order, issued under the domestic-violence, family-violence, or stalking laws of the issuing jurisdiction, to prevent an individual from engaging in a violent or threatening act against, harassment of, contact or communication with, or being in physical proximity to another individual who is a party or a child under the custodial responsibility of a party.

(2) If a party is subject to a protection order or an arbitrator determines there is a reasonable basis to believe a party’s safety or ability to participate effectively in arbitration is at risk, the arbitrator shall stay the arbitration and refer the parties to court. The arbitration may not proceed unless the party at risk affirms the arbitration agreement in a record and the court determines:

- (a) the affirmation is informed and voluntary;
- (b) arbitration is not inconsistent with the protection order; and
- (c) reasonable procedures are in place to protect the party from risk of harm, harassment, or intimidation.

(3) If an arbitrator determines that there is a reasonable basis to believe a child who is the subject of a child-related dispute is abused or neglected, the arbitrator shall terminate the arbitration of the child-related dispute and report the abuse or neglect to the Arizona Department of Child Safety.

(4) An arbitrator may make a temporary award to protect a party or child from harm, harassment, or intimidation.

(5) On motion of a party, the court may stay arbitration and review a determination or temporary award under this paragraph.

(6) This paragraph supplements remedies available under law of this state other than this rule for the protection of victims of domestic violence, family violence, stalking, harassment, or similar abuse.

L. Powers and Duties of Arbitrator.

(1) An arbitrator shall conduct an arbitration in a manner the arbitrator considers appropriate for a fair and expeditious disposition of the dispute.

(2) An arbitrator shall provide each party a right to be heard, to present evidence material to the family law dispute, and to cross-examine witnesses.

(3) Unless the parties otherwise agree in a record, an arbitrator's powers include the power to:

- (a) select the rules for conducting the arbitration;
- (b) hold conferences with the parties before a hearing;
- (c) determine the date, time, and place of a hearing;
- (d) require a party to provide:
 - (i) a copy of a relevant court order;
 - (ii) information required to be disclosed in a family law

proceeding under law of this state other than this rule; and

(iii) a proposed award that addresses each issue in arbitration;

(e) meet with or interview a child who is the subject of a child-related dispute in accordance with Rule 12;

(f) appoint a private expert at the expense of the parties;

(g) administer an oath or affirmation and issue a subpoena for the attendance of a witness or the production of documents and other evidence at a hearing;

(h) compel discovery concerning the family law dispute and determine the date, time, and place of discovery;

(i) determine the admissibility and weight of evidence;

(j) permit deposition of a witness for use as evidence at a hearing;

(k) for good cause, prohibit a party from disclosing information;

(l) appoint a child's attorney, best interests attorney, or court-appointed advisor for a child at the expense of the parties in accordance with Rule 10;

(m) impose a procedure to protect a party or child from risk of harm, harassment, or intimidation;

(n) allocate arbitration fees, attorney's fees, expert-witness fees, and other costs to the parties; and

(o) impose a sanction on a party for bad faith or misconduct during the arbitration according to standards governing imposition of a sanction for litigant misconduct in a family law proceeding.

(4) An arbitrator may not allow ex parte communication except to the extent allowed in a family law proceeding for communication with a judge.

M. Recording of Hearing.

(1) Except as otherwise provided in subdivision M(2) or required by law of this state other than this rule, an arbitration hearing need not be recorded unless required by the arbitrator, provided by the arbitration agreement, or requested by a party.

(2) An arbitrator shall require a verbatim recording be made of any part of an arbitration hearing concerning a child-related dispute.

N. Award.

(1) An arbitrator shall make an award in a record, dated and signed by the arbitrator. The arbitrator shall give notice of the award to each party by a method agreed on by the parties or, if the parties have not agreed on a method, under the law and procedural rules of this state other than this rule governing notice in contractual arbitration.

(2) Except as otherwise provided in subdivision N(3), the award under this rule must state the reasons on which it is based unless otherwise agreed by the

parties.

(3) An award determining a child-related dispute must state the reasons on which it is based as required by law of this state other than this rule for a court order in a family law proceeding.

(4) An award under this rule is not enforceable as a judgment until confirmed under paragraph O.

O. Confirmation of Award.

(1) After an arbitrator gives notice under subdivision N(1) of an award, including an award corrected under paragraph P, a party may move the court for an order confirming the award.

(2) Except as otherwise provided in subdivision O(3), the court shall confirm an award under this rule if:

(a) the parties agree in a record to confirmation; or

(b) the time has expired for making a motion, and no motion is pending, under paragraphs Q or R.

(3) If an award determines a child-related dispute, the court shall confirm the award under subdivision O(2) if the court finds, after a review of the record if necessary, that the award on its face:

(a) complies with paragraph N and law of this state other than this rule governing a child-related dispute; and

(b) is in the best interests of the child.

(4) On confirmation, an award under this rule is enforceable as a judgment.

P. Correction by Arbitrator of Unconfirmed Award. On motion of a party made not later than 20 days after an arbitrator gives notice under subdivision N(1) of an award, the arbitrator may correct the award:

(1) if the award has an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property;

(2) if the award is imperfect in a matter of form not affecting the merits on the issues submitted; or

(3) to clarify the award.

Q. Correction by Court of Unconfirmed Award.

(1) On motion of a party made not later than 90 days after an arbitrator gives notice under subdivision N(1) of an award, including an award corrected under paragraph P, the court shall correct the award if:

(a) the award has an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property;

(b) the award is imperfect in a matter of form not affecting the merits of the issues submitted; or

(c) the arbitrator made an award on a dispute not submitted to the arbitrator and the award may be corrected without affecting the merits of the issues submitted.

(2) A motion under this paragraph to correct an award may be joined with a motion to vacate or amend the award under paragraph R.

(3) Unless a motion under paragraph R is pending, the court may confirm a corrected award under paragraph O.

R. Vacation or Amendment by Court of Unconfirmed Award.

(1) On motion of a party, the court shall vacate an unconfirmed award if the moving party establishes that:

(a) the award was procured by corruption, fraud, or other undue means;

(b) there was:

(i) evident partiality by the arbitrator;

(ii) corruption by the arbitrator; or

(iii) misconduct by the arbitrator substantially prejudicing the rights of a party;

(c) the arbitrator refused to postpone a hearing on showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing

contrary to paragraph L, so as to prejudice substantially the rights of a party;

(d) the arbitrator exceeded the arbitrator's powers;

(e) no arbitration agreement exists, unless the moving party

participated in the arbitration without making a motion under paragraph F not later than the beginning of the first arbitration hearing;

(f) the arbitration was conducted without proper notice under paragraph E of the initiation of arbitration, so as to prejudice substantially the rights of a party; or

(g) a ground exists for vacating the award under law of this state other than this rule.

(2) Except as otherwise provided in subdivision R(3), on motion of a party, the court shall vacate an unconfirmed award that determines a child-related dispute if the moving party establishes that:

(a) the award does not comply with paragraph N or law of this state other than this rule governing a child-related dispute or is contrary to the best interests of the child;

(b) the record of the hearing or the statement of reasons in the award is inadequate for the court to review the award; or

(c) a ground for vacating the award under subdivision R(1) exists.

(3) If an award is subject to vacation under subdivision R(2)(a), on motion of a party, the court may amend the award if amending rather than vacating is in the best interests of the child.

(4) The court may determine a motion under subdivision R(2) or (3) based on the record of the arbitration hearing and facts occurring after the hearing or may exercise de novo review.

(5) A motion under this paragraph to vacate or amend an award must be filed not later than 90 days:

(a) after an arbitrator gives the party filing the motion notice of the award or a corrected award; or

(b) for a motion under subdivision R(1)(a), after the ground of corruption, fraud, or other undue means is known or by the exercise of reasonable care should have been known to the party filing the motion.

(6) If the court under this paragraph vacates an award for a reason other than the absence of an enforceable arbitration agreement, the court may order a rehearing before an arbitrator. If the reason for vacating the award is that the award was procured by corruption, fraud, or other undue means or there was evident partiality, corruption, or misconduct by the arbitrator, the rehearing must be before another arbitrator.

(7) If the court under this paragraph denies a motion to vacate or amend an award, the court may confirm the award under paragraph O unless a motion is pending under paragraph Q.

S. Clarification of Confirmed Award. If the meaning or effect of an award confirmed under paragraph O is in dispute, the parties may:

- (1) agree to arbitrate the dispute before the original arbitrator or another arbitrator; or
- (2) proceed in court under law of this state other than this rule governing clarification of a judgment in a family law proceeding.

T. Judgment on Award.

(1) On issuing? an order confirming, vacating without directing a rehearing, or amending an award under this rule, the court shall enter judgment in conformity with the order.

(2) On motion of a party, the court may order that a document or part of the arbitration record be sealed or redacted to prevent public disclosure of all or part of the record or award to the extent permitted under law of this state other than this rule.

U. Modification of Confirmed Award or Judgment. If a party moves under Rule 91 for modification of a confirmed award or a judgment on the award based on a fact occurring after confirmation:

(1) the parties shall proceed under the dispute-resolution method specified in the award or judgment; or

(2) if the award or judgment does not specify a dispute-resolution method, the parties may:

(a) agree to arbitrate the modification before the original arbitrator or another arbitrator; or

(b) absent agreement proceed under law of this state other than this rule governing modification of a judgment in a family law proceeding.

V. Enforcement of Confirmed Award.

(1) The court shall enforce an award confirmed under paragraph O, including a temporary award, in the manner and to the same extent as any other order or judgment of a court.

(2) The court shall enforce an arbitration award in a family law dispute confirmed by a court in another state in the manner and to the same extent as any other order or judgment from another state.

W. Appeal.

(1) An appeal may be taken under this rule from:

(a) an order denying a motion to compel arbitration;

(b) an order granting a motion to stay arbitration;

(c) an order confirming or denying confirmation of an award;

- (d) an order correcting an award;
- (e) an order vacating an award without directing a rehearing; or
- (f) a final judgment.

(2) An appeal under this paragraph may be taken as from an order or a judgment in a civil action.

X. Transitional Provision. This rule applies to arbitration of a family law dispute under an arbitration agreement made on or after January 1, 2018. If an arbitration agreement was made before January 1, 2018, the parties may agree in a record that this rule applies to the arbitration.

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Honorable Suzanne Cohen
Family Department Presiding Judge
Superior Court of Arizona in Maricopa County
201 W. Jefferson St.
Phoenix, AZ 85003
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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

PETITION TO ADD RULE 23.1 TO
THE RULES OF FAMILY LAW
PROCEDURE

} Supreme Court No. R-17_____

Pursuant to Rule 28, Arizona Rules of the Supreme Court, the Presiding Judge of the Superior Court of Arizona in Maricopa County petitions this Court to create Rule 23.1, Arizona Rules of Family Law Procedure, regarding Change of Venue in Family Law Cases, as proposed below in Attachment A.

The proper venue for commencement of a family law action is set forth in A.R.S. §12-401 (for dissolution of marriage and legal separation), A.R.S. §25-502 (for actions to establish, enforce or modify duties of support), and A.R.S. §25-802 (for actions to establish maternity or paternity). However, when venue is improper and an action is brought in the wrong county, the court retains jurisdiction over the action unless the defendant or respondent to the action timely objects to the improper venue (pursuant to A.R.S. §12-404), or a party applies for change of venue for cause (pursuant to A.R.S. §12-406). When venue is improper, the venue statutes do not provide the court with any clear authority to act *sua sponte* to transfer a case to a county of proper venue.

The result is that Maricopa County is presently handling hundreds of family cases for residents of Pinal County. For example, A.R.S. §12-401(13) requires that actions for dissolution of marriage or legal separation be brought in the county in which the petitioner is residing at the time the action is filed. A recent review of new dissolution actions filed in the Superior Court in Maricopa County in a one year period from July 1, 2015 to June 30, 2016 found 197 dissolution cases with children where the petitioner did not reside in Maricopa County and respondent did not object; in 123 of those cases the children resided with the petitioner outside of Maricopa County. In 16 of those 197 cases, the children resided with respondent, but neither petitioner nor respondent (nor the children) resided in Maricopa County. During the same time period, there were 114 dissolution actions with no children that were filed in Maricopa County where the petitioner resided outside of Maricopa County and respondent did not object. In 56 of those 114 cases, neither the petitioner nor the respondent resided in Maricopa County.

This amounts to over 300 dissolution cases in one year, or basically the pre-decree case load of one judge, that were filed in the Superior Court in Maricopa County where petitioners resided outside of Maricopa County. There may be reasons in some of these cases why venue would remain with the Superior Court in Maricopa County—such as when the petitioner resides outside of Arizona and respondent resides in Maricopa County—but the significant number of dissolution cases filed where neither party reside in the County suggests that the statutorily mandated venue requirements are regularly being

disregarded; and this is just pre-decree. The proposed Rule 23.1 would give Superior Courts more control over ensuring that the clear legislative intent contained in the venue statutes in A.R.S. §12-401(13), A.R.S. § 25-502 and A.R.S. §25-802 are adhered to by the parties in family law actions.

Respectfully submitted this 9th day of January, 2017.

/s/ Suzanne Cohen

Hon. Suzanne Cohen

Family Department Presiding Judge

Superior Court of Arizona, Maricopa County

Electronic copy filed the
Clerk of the Supreme Court
of Arizona this 9th day of
January, 2017.

Exhibit A

Rules of Family Law Procedure

Rule 23.1. Improper Venue.

A. Transfer Upon Court's Motion. When a family law action has been commenced in an improper county in violation of A.R.S. § 12-401, A.R.S. § 25-502, or A.R.S. § 25-802, the court, upon a finding that venue is improper, may on its own motion transfer the case to a county where venue is proper, so long as such transfer occurs no later than thirty (30) days after a Resolution Management Conference has been scheduled pursuant to Rule 76.

B. Fees. If a change of venue is ordered under this Rule, the plaintiff must pay the transmittal fee under A.R.S. § 12-284 to the clerk of the court transferring the case no later than 20 days after the order directing the change. No later than 30 days after the clerk of the receiving court receives the file, the plaintiff must pay that clerk the initial case filing fee. If the plaintiff fails to timely pay either the transferring court's transmittal fee or the receiving court's filing fee, the court that ordered the change must dismiss the case without prejudice. The court ordering the transfer of venue may order the clerk of that court to refund the plaintiff's original filing fee.

25-403. Legal decision-making; best interests of child

A. The court shall determine legal decision-making and parenting time, either originally or on petition for modification, in accordance with the best interests of the child. The court shall consider all factors that are relevant to the child's physical and emotional well-being, including:

1. The past, present and potential future relationship between the parent and the child.
2. The interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interest.
3. The child's adjustment to home, school and community.
4. If the child is of suitable age and maturity, the wishes of the child as to legal decision-making and parenting time.
5. The mental and physical health of all individuals involved.
6. Which parent is more likely to allow the child frequent, meaningful and continuing contact with the other parent. This paragraph does not apply if the court determines that a parent is acting in good faith to protect the child from witnessing an act of domestic violence or being a victim of domestic violence or child abuse.
7. Whether one parent intentionally misled the court to cause an unnecessary delay, to increase the cost of litigation or to persuade the court to give a legal decision-making or a parenting time preference to that parent.
8. Whether there has been domestic violence or child abuse pursuant to section 25-403.03.
9. The nature and extent of coercion or duress used by a parent in obtaining an agreement regarding legal decision-making or parenting time.
10. Whether a parent has complied with chapter 3, article 5 of this title.
11. Whether either parent was convicted of an act of false reporting of child abuse or neglect under section 13-2907.02.

B. In a contested legal decision-making or parenting time case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

THOMAS and JENNIFER GRIGGS, husband and wife,
Plaintiffs/Appellants,

v.

OASIS ADOPTION SERVICES, INC.; CATHERINE BRAMAN;
SARAH L. PEDRAZZA,
Defendants/Appellees.

No. 1 CA-CV 15-0289
FILED 10-6-2016

Appeal from the Superior Court in Maricopa County
No. CV 2012-014904
The Honorable Mark H. Brain, Judge

VACATED AND REMANDED

COUNSEL

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Counsel for Defendants/Appellees

OPINION

Judge Margaret H. Downie delivered the opinion of the Court, in which Presiding Judge Patricia K. Norris and Judge Samuel A. Thumma joined.

D O W N I E, Judge:

¶1 Thomas and Jennifer Griggs appeal from the entry of summary judgment in favor of Oasis Adoption Services, Inc., Catherine Braman, and Sarah L. Pedrazza (collectively, “Oasis”) on the grounds of judicial immunity.¹ For the following reasons, we vacate that judgment and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY²

¶2 The Griggses met D.R. through their church and agreed to adopt her unborn child. The Griggses retained Oasis to “provide adoption services,” including the statutorily required investigation and report (also called a “home study”) that prospective adoptive parents must obtain to be certified to adopt. *See* Ariz. Rev. Stat. (“A.R.S.”) § 8-105(A).

¶3 After retaining Oasis, the Griggses filed an adoption certification application, whereupon the juvenile court issued a July 8, 2011 minute entry that provided, in pertinent part:

IT IS ORDERED pursuant to ARS 8-104, that Oasis Adoption Services shall complete the investigation and file an Adoptive Home Study with the Court by 10/06/2011.³

¹ During the relevant time period, Braman was the adoption agency’s executive director, and Pedrazza served as assistant director.

² We consider the facts and reasonable inferences therefrom in the light most favorable to the non-moving party – the Griggses. *See Hill-Shafer P’ship v. Chilson Family Tr.*, 165 Ariz. 469, 472 (1990).

³ We agree with the superior court that the reference to A.R.S. § 8-104, instead of § 8-105, appears to be a typographical error.

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¶4 Disagreements arose between Oasis and the Griggses about the scope of the certification investigation, causing the Griggses to terminate Oasis’s services in a July 27, 2011 letter, stating:

[We] have consulted with legal counsel and other adoption agencies regarding the adoption process and your recommendations. We have made a decision to respectfully withdraw our application for adoption through the Oasis Adoption Agency.

Thereafter, the Griggses worked with Olos Adoption and Child Welfare Agency (“Olos”) to complete the certification process.

¶5 Unbeknownst to the Griggses, on July 28, 2011, Braman sent an *ex parte* letter to the juvenile court detailing concerns Oasis had about Thomas Griggs and advising the court that the Griggses were “withdrawing from the home study process” with Oasis.

¶6 D.R. gave birth to a baby girl in August 2011. The Griggses took the child home the next day, and the juvenile court awarded them temporary custody of her. *See* A.R.S. § 8-108 (delineating procedure for uncertified persons to obtain temporary custody pending certification). Meanwhile, Olos submitted a home study recommending that the court certify the Griggses as acceptable to adopt.

¶7 In late September 2011, the juvenile court denied the Griggses’ certification application without explanation. The Griggses timely requested reconsideration. *See* Ariz. R. P. Juv. Ct. 77(C) (if denied certification to adopt, applicant may request evidentiary hearing).

¶8 During an October status conference, the juvenile court discussed the *ex parte* letter received from Oasis, which the Griggses had not seen. The court ordered the Griggses to appear at an order to show cause hearing three days later. The court also vacated the temporary custody order and directed Child Protective Services to take custody of the child. The court further ordered Oasis to disclose its July 28, 2011 letter to the Griggses, as well as “all relevant and discoverable information in [their] file.”⁴ The court set an evidentiary hearing in December on the Griggses’ motion for reconsideration.

⁴ The Griggses had previously asked Oasis to provide a copy of its July 28 letter, but Oasis refused.

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¶9 At the evidentiary hearing, the juvenile court heard testimony from Braman, Pedrazza, Thomas Griggs, Jennifer Griggs, and a representative of Olos. On January 31, 2012, the court certified the Griggses as acceptable to adopt. By that time, though, D.R.'s child had been placed with another family.

¶10 The Griggses filed a civil complaint against Oasis, alleging abuse of process, negligence, and infliction of emotional distress. Among other things, the Griggses alleged that Oasis's *ex parte* letter to the court contained "untruths and misstatements" that caused them to lose custody of D.R.'s baby. Oasis moved for summary judgment on the basis of judicial immunity. After briefing and oral argument, the superior court granted Oasis's motion. The Griggses filed a timely notice of appeal from a final judgment entered after the superior court denied their motion for new trial. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

DISCUSSION

¶11 We review both the grant of summary judgment and the application of judicial immunity *de novo*. See *Emmett McLoughlin Realty, Inc. v. Pima Cty.*, 212 Ariz. 351, 353, ¶ 2 (App. 2006) (summary judgment); *Lavit v. Superior Court*, 173 Ariz. 96, 99 (App. 1992) (judicial immunity).

I. Adoption Certification Process

¶12 In determining whether Oasis is entitled to judicial immunity for the challenged conduct, we first examine the role adoption agencies fulfill in the certification process – a role that is comprehensively defined by statutes and regulations. See *In re Webb's Adoption*, 65 Ariz. 176, 179 (1947) (adoption is a purely statutory right unknown at common law); *Sargent v. Superior Court*, 28 Ariz. 605, 607 (1925) ("An adoption proceeding is a statutory one, and is governed by the terms of the statute providing for it.").

¶13 The Department of Child Safety ("DCS") licenses adoption agencies. A.R.S. § 8-126. DCS also oversees licensed agencies, assists "the staffs of all agencies by giving advice on methods and procedures," and establishes rules for "[t]he form and content of investigations, reports and studies concerning adoption placement." A.R.S. § 8-126(3), (4)(c). DCS has promulgated extensive rules governing adoption-related activities, including certification investigations and reports. See Ariz. Admin. Code ("A.A.C.") R21-5-301, *et seq.*

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¶14 The version of A.R.S. § 8-105(A) in effect when the certification proceedings at issue here occurred stated, in pertinent part:⁵

Before any prospective adoptive parent may petition to adopt a child the person shall be certified by the court as acceptable to adopt children. A certificate shall be issued only after an investigation conducted by an officer of the court, by an agency or by the division.

The legislature has defined the scope of certification investigations, as well as the content of home study reports that agencies must submit to the court:

This investigation and report to the court shall consider all relevant and material facts dealing with the prospective adoptive parents' fitness to adopt children and shall include:

1. A complete social history.
2. The financial condition of the applicant.
3. The moral fitness of the applicant.
4. The religious background of the applicant.
5. The physical and mental health condition of the applicants.
6. Any court action for or adjudication of child abuse, abandonment of children, dependency or termination of parent-child relationship in which the applicant had control, care or custody of the child who was the subject of the action.
7. Whether the person or persons wish to be placed on the central registry established in subsection M of this section.
8. All other facts bearing on the issue of the fitness of the prospective adoptive parents that the court, agency or division may deem relevant.

⁵ We rely on statutory provisions in effect at the time of the juvenile court proceedings – 2011 – some of which have since been amended.

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A.R.S. § 8-105(F).⁶

¶15 The legislature has also mandated timeframes for certification-related activities:

Within ninety days after the original application . . . has been accepted, the division or the agency or a person or agency designated by the court to conduct an investigation shall present to the juvenile court the written report required by subsection F of this section, which shall include a definite recommendation for certifying the applicant as being acceptable or nonacceptable to adopt children and the reasons for the recommendation.

A.R.S. § 8-105(H). Within 60 days of receiving a home study, the juvenile court “shall certify the applicant as being acceptable or nonacceptable to adopt children based on the investigation report and recommendations of the report.” A.R.S. § 8-105(I). The court may require additional investigation necessary to “make an appropriate decision regarding certification.” A.R.S. § 8-105(J).

II. Judicial Immunity

¶16 In Arizona, judicial immunity is a common law exception to the general rule of tort liability. *See Adams v. State*, 185 Ariz. 440, 447 (App. 1995) (“Judicial immunity is a creature of common law and the courts are responsible for shaping and monitoring the course of the common law.”). “There is perhaps no doctrine more firmly established than the principle that liability follows tortious wrongdoing; that where negligence is the proximate cause of injury, the rule is liability and immunity is the exception.” *Stone v. Ariz. Highway Comm’n*, 93 Ariz. 384, 392 (1963). “[I]mmunity deprives individuals of a remedy for wrongdoing and should be bestowed only when and at the level necessary.” *Grimm v. Ariz. Bd. of Pardons and Paroles*, 115 Ariz. 260, 265–66 (1977) (rejecting absolute immunity for parole board members in favor of qualified immunity).

⁶ DCS has prescribed additional information agencies must obtain as part of their certification investigations. *See* A.A.C. R21-5-404. DCS also dictates substantive requirements for certification investigations and reports. *See* A.A.C. R21-5-405.

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¶17 Judicial officers are absolutely immune “from damages lawsuits for their judicial acts.” *Burk v. State*, 215 Ariz. 6, 9, ¶ 7 (App. 2007). Over the years, judicial immunity has been extended to “[c]ourt officers, employees, and agents who perform functions intimately related to or . . . an integral part of the judicial process.” *Id.* See, e.g., *Acevedo v. Pima Cty. Adult Prob. Dep’t*, 142 Ariz. 319, 321–22 (1984) (probation officers submitting presentence investigation reports); *Lavit*, 173 Ariz. at 98–99 (psychologist acting under court directive to evaluate family court litigants); *Burk*, 215 Ariz. at 12–13, ¶ 19 (court employee making child custody recommendation); *Widoff v. Wiens*, 202 Ariz. 383, 386, ¶ 11 (App. 2002) (court-appointed guardian *ad litem* in family court proceeding); *Desilva v. Baker*, 208 Ariz. 597, 599, ¶ 1 (App. 2004) (probation officers filing revocation petitions).

¶18 “The nature and scope of judicial immunity raise perplexing and somewhat amorphous issues, which are not susceptible to easy resolution in some cases.” *Adams*, 185 Ariz. at 443. As in *Adams*, “[t]his is such a case.” *Id.* For purposes of our analysis, we assume, without deciding, that adoption agencies are entitled to judicial immunity for home studies they submit to the court pursuant to A.R.S. § 8-105. Indeed, this Court relied on a similar assumption in *Adams*, when considering whether Arizona Department of Economic Security adoption caseworkers were entitled to immunity for certain conduct. 185 Ariz. at 445.

¶19 Oasis, though, did not submit a home study report pursuant to A.R.S. § 8-105. It instead sent an *ex parte* letter to the court after its services were terminated. Other than expressing concerns about Thomas Griggs, Oasis did not provide the statutory detail required of an investigative report and made no “definite recommendation” regarding certification, as required for home study reports. See A.R.S. § 8-105(H). Nor did Oasis’s letter address topics that adoption agencies must consider in making certification recommendations. See A.A.C. R21-5-406. Had the submission been a home study, the Griggses would have been entitled by law (and by their contract with Oasis) to receive a copy of the report before it was filed with the court. See A.A.C. R21-5-406(D) (adoption agency recommending against certification “shall send the applicant written notice of the unfavorable recommendation, the reason for the denial, and an explanation of the applicant’s right under A.R.S. § 8-105, to petition the court for review” at least five days before filing report with the court).

¶20 “To determine when a non-judge is cloaked with judicial immunity, we examine the nature of the function entrusted to that person

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and the relationship of that function to the judicial process.” *Burk*, 215 Ariz. at 9, ¶ 8. A generalized connection to the judicial process does not confer immunity for all activities. In *Acevedo*, for example, the court held that probation officers are entitled to judicial immunity for presentence reports submitted to the court, but rejected as over-broad the proposition that judicial immunity attaches to the supervision of probationers “because the task arises out of a judicial proceeding and is a continuation of that proceeding.” 142 Ariz. at 321–22. And in *Adams*, we rejected the notion that “because DES [adoption] caseworkers work closely with the court and are expected to comply with its guidelines as well as the statutory and regulatory requirements, these nonjudicial employees are absolutely immune from liability for all adoption-related acts or omissions.” 185 Ariz. at 446.

¶21 In submitting its *ex parte* letter, Oasis was not acting pursuant to delegated judicial authority or any mandate from the legislative or executive branch. Oasis’s suggestion that adoption agencies are immune for anything they do in furtherance of or in connection with a certification investigation finds no support in our appellate jurisprudence. See *Lavit*, 173 Ariz. at 101 (“Narrow parameters . . . apply to the activities to which absolute immunity applies.”). Even probation officers, “a well-recognized part of the judicial department,” *Desilva*, 208 Ariz. at 603, ¶ 23, do not enjoy immunity for all of their probation-related activities.

¶22 In evaluating whether conduct is protected by judicial immunity, some courts consider whether due process protections exist for individuals potentially aggrieved by the underlying conduct – a consideration we also deem relevant. See, e.g., *Demoran v. Witt*, 781 F.2d 155, 158 (9th Cir. 1985) (probation officers filing presentence reports are immune, in part because “a plethora of procedural safeguards surround the filing of a presentencing report”); cf. *Adams*, 185 Ariz. at 446 (“We cannot say there are sufficient accountability safeguards inherent to or routinely used . . . to warrant the granting of absolute immunity in this context.”). Although due process considerations were not specifically discussed in *Lavit* or *Widoff*, the aggrieved parties in those cases received notice and an opportunity to be heard about the conduct later deemed immunized. See *Lavit*, 173 Ariz. at 98 (court order entitled parties to copy of evaluator’s report); *Widoff*, 202 Ariz. at 385, ¶ 4 (guardian *ad litem* recommendations presented at evidentiary hearing attended by the parties).

¶23 Protections exist for prospective adoptive parents who are facing adverse certification recommendations. See A.A.C. R21-5-406(D)

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(agency recommending against certification must give written notice of recommendation and reasons therefor at least five days before report is filed with court). The same is not true for the *ex parte* letter at issue here. Moreover, the record reflects that Oasis refused to give the Griggses a copy of the July 28 letter after they learned of its existence, depriving them of the right to notice and an opportunity to be heard before the court took adverse action against them. See *Curtis v. Richardson*, 212 Ariz. 308, 312, ¶ 16 (App. 2006) (Due process rights include “notice and an opportunity to be heard at a meaningful time and in a meaningful manner.”). Oasis shared the letter with the Griggses only after being ordered to do so by the court.

¶24 Oasis contends that, as a matter of public policy, its conduct should be insulated from liability because the best interests of potential adoptive children are at stake. But that argument sweeps too broadly, in contravention of the tenet that immunity “should be bestowed only when and at the level necessary.” *Grimm*, 115 Ariz. at 265–66; see also *Ryan v. State*, 134 Ariz. 308, 311 (1982) (“[W]e propose to endorse the use of governmental immunity as a defense only when its application is necessary to avoid a severe hampering of a governmental function or thwarting of established public policy.”). To the extent Oasis had qualms about the Griggses’ suitability as adoptive parents, it could have communicated those concerns in a court filing that afforded the Griggses notice and an opportunity to be heard regarding information submitted to (and relied on by) the court in making a decision about their ability to adopt children.

CONCLUSION⁷

¶25 We vacate the judgment in favor of Oasis and remand for further proceedings regarding the Griggses’ complaint.⁸ The Griggses are

⁷ We do not address Oasis’s alternative argument – urged for the first time on appeal – that the Griggses cannot establish the necessary elements of negligence. See *In re MH 2008-002659*, 224 Ariz. 25, 27, ¶ 9 (App. 2010) (“We do not consider arguments raised for the first time on appeal except under exceptional circumstances.”).

⁸ Our decision to vacate the judgment in its entirety obviates the need to separately address the Griggses’ challenge to the award of taxable costs.

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entitled to recover their taxable costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.



AMY M. WOOD • Clerk of the Court
FILED: AA