Task Force on the Arizona Rules of Family Law Procedure

Meeting Agenda

Monday, March 20, 2017
10:00 AM to 4:00 PM
State Courts Building * 1501 West Washington * Conference Room 329/330 * Phoenix, AZ

Item no. 1	**Call to Order** **Introductory remarks**	*Hon. Rebecca Berch and Hon. Mark Armstrong, Chair and Co-chair*
Item no. 2	**Approval of the February 17, 2017 meeting minutes**	*Justice Berch and Judge Armstrong*
Item no. 3	**Discussion of general issues** - **Jury trials** - **Family versus civil**	*All*
Item no. 4	**Workgroup reports:** - **Workgroup 1: Rules 6, 11, 15, 16, 17, 18, 19, 21, 22, 25, 28** - **Workgroup 3: Rules 54, 55, 56** - **Workgroup 4: Rules 80, 86, 90, and 93**	 *Mr. Davis, Ms. Burns, Ms. Henderson, Mr. Woodnick* *Mr. Wolfson* *Ms. Sell, Judge McMurdie, Ms. Davis*
Item no. 5	**Roadmap** - **Meeting schedule** - **Next meeting date: Friday, April 28, 2017**	*Justice Berch and Judge Armstrong*
Item no. 6	**Call to the Public** **Adjourn**	*Justice Berch*

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.

Task Force on the Arizona Rules of Family Law Procedure

State Courts Building, Phoenix

Meeting Minutes: February 17, 2017

Members attending: Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron, Hon. John Assini, Keith Berkshire, Mary Boyte Henderson, Annette Burns, Hon. Dean Christoffel, Cheri Clark, Hon. Suzanne Cohen, Helen Davis (by telephone), Kiilu Davis, Hon. Karl Eppich, Joi Hollis, Hon. Paul McMurdie, Aaron Nash, Jeffery Pollitt (by telephone), Janet Sell, Steven Serrano, Hon. Peter Swann, Steven Wolfson, Gregg Woodnick [all members present]

Guests: Martin Lynch, Patricia Cummins, Cynthia Oxman, Aaron Blase, David Alger

Administrative Office of the Courts ("AOC") Staff: John W. Rogers, Mark Meltzer, Karla Williams, Sabrina Nash, Julie Graber, Theresa Barrett, Chris Manes, Alex Fernandez de Jauregui, Amy Love

1. Call to order; introductory remarks. The Chair called the first Task Force meeting to order at 10:00 a.m. She welcomed the members and introduced the Co-Chair, Judge Armstrong. Judge Armstrong noted that he had chaired the Committee on Rules of Procedure in Domestic Relations Cases (Administrative Order Number 2003-63) from 2003 to 2005. Those rules, which became effective in 2006, have been utilized for a full decade, and the Court determined that 2017 was an appropriate time to review and restyle those rules.

The Chair advised that staff will audio-record Task Force meetings; these recordings will be deleted as provided by Administrative Order Number 2010-114. A member of the public requested to video-record today's meeting, which the Chair will allow as long as it does not interfere with the conduct of the meeting, and subject to any objections from those present. The Chair noted that the Task Force has a webpage on the Arizona Judicial Branch website; this page will allow Task Force members and the public to review meeting materials before each Task Force meeting. The Chair then proceeded to introduce herself and her Co-Chair, followed by introductions of Task Force members and staff.

2. Review of Administrative Order Number 2016-131; approval of rules for conducting business. The Chairs reviewed Administrative Order Number 2016-131 ("the A.O."), which established this Task Force. The A.O. directs the Task Force to "identify possible changes to conform to modern usage and to clarify and simplify language" of the Family Law Rules ("FLR"). The primary objective of the Task Force therefore is restyling the FLR. There have been a series of rule restyling projects in

Arizona, beginning with the Evidence Rules during the strategic agenda of then-Chief Justice Berch. During the current strategic agenda, the Court has overseen the restyling of other procedural rules. These include rules for Protective Orders and Civil Appeals, and more recently, the Civil Rules, which became effective on January 1, 2017, and the Criminal Rules, for which there is a pending rule change petition. Because the civil rules were the source of a number of FLR, the FLR Task Force should review the newly restyled civil rules and consider conforming changes. Justice Berch noted that the A.O. has a goal that this Task Force file a petition with its proposed rule changes in January 2018. The members' terms extend to December 2018, which will allow them to review comments to that rule petition during 2018.

The Chair then asked members to review proposed rules for conducting Task Force business, which were included in the meeting materials. Those rules include a proxy policy and provisions for a "call to the public."

> **Motion:** A member moved to approve the proposed rules for conducting business. Another member made a second to the motion, and the motion passed unanimously. **FLR: 001**

3. **Restyling conventions.** The Chair then invited John Rogers, a Supreme Court staff attorney, to discuss rule restyling principles and his recommended conventions for restyling the FLR. Mr. Rogers began his presentation by exhibiting the 1977 volume of the Arizona Rules of Court. The 1977 volume was less than 1000 pages in length, and was printed in a single column of large font. He compared that to the 2017 volume, which is twice as long and has double columns of smaller font. He noted that the 2017 volume presents a tremendous amount of material for users to absorb, and there is considerable need for rules that are more user-friendly and that are easier to locate and comprehend. Mr. Rogers proceeded to trace the modern history of federal rules restyling and to discuss rules restyling conventions prepared by Bryan Garner. (Mr. Garner's *Guidelines for Drafting and Editing Court Rules* were included in the meeting materials.) Mr. Rogers prepared "Style Conventions" that he drafted for the civil rules restyling project, and the Civil and Criminal Rules Task Forces adhered to these conventions. The "Style Conventions" and another document Mr. Rogers prepared, "Rule Restyling: Key Principles and Examples," were also in the meeting materials. The latter document had specific examples for restyling the FLR. The following are among Mr. Rogers' conventions and suggestions:

> Improved formatting and organization will help users more easily find what they want. Make generous use of subparts and subheadings, and make lists when a rule calls for multiple items or factors. Mr. Rogers noted the current version of Rule 64(a), which consists of a long unbroken block of text, and demonstrated how reorganization alone can improve the rule's clarity.

Avoid run-on sentences. Mr. Rogers cited current Rule 44(B)(3) as an example; the rule has two sentences consisting of 195 words.

Avoid archaic terms such as "thereto" or "hereinafter."

Good restyling uses simpler words and proper word choice. Use "before" rather than "prior to." Say the court "orders" rather than "directs." The court also "enters" or "files" its orders rather than "issues" them.

Avoid redundant terms, such as the often-found phrase, "the court in its discretion may…." "May" means the court has discretion.

Minimize "of" and "by" phrases. For example, use the phrase "court clerk," which is more direct than "clerk of the court." Say, "unless the court orders otherwise" rather than "unless otherwise ordered by the court."

Eliminate ambiguous terms. "Shall" has various meanings, but "must," "may," "will" or "should" are more specific.

Avoid references to "sections" or "paragraphs." Instead, use the subpart designation.

Use the active voice. It is more comprehensible and using it improves the overall quality of the rule.

Some comments may have outlived their usefulness. Relocate to the body of a rule any substantive requirements that might be contained in a comment. If a comment is necessary to understand a rule, there may be a need to rewrite the rule more clearly. The Civil Rules Task Force eliminated about 80 percent of the former comments; those that were retained stand out, and users probably will read them.

The Chairs thanked Mr. Rogers for his presentation and encouraged the members to review the conventions before beginning their restyling efforts. Judge Armstrong also recommended that members review corresponding civil rules during the FLR project and strive for uniformity with those rules wherever possible. Members need to specifically note any proposed substantive changes in their revisions. Finally, one sentence comments after many of the current FLR state that the rule is based on a specified civil rule. Although the Court prefers minimal comments, Judge Armstrong asked members to consider whether these current comments were useful and should be retained, possibly with a separate correlation table, or whether to remove these comments and provide only a correlation table.

4. **Workgroups.** The Chairs advised that Mr. Rogers and Mr. Meltzer will prepare a preliminary restyling of each FLR. They have now restyled about two-thirds of the FLR and they will complete the remaining rules before the March Task Force meeting. The Chairs will create four workgroups, each of which will be assigned a

portion of the FLR. (Workgroup 1 will have Rules 1-35; Workgroup 2, Rules 36-48; Workgroup 3, Rules 49-75; and Workgroup 4, Rules 76-96. Each workgroup will also have responsibility for reviewing Rule 97 forms associated with their assigned rules.) The workgroups will review the preliminary restyling and discuss further revisions to each rule. The workgroups can meet in-person or telephonically at a time and place of their choosing. The workgroups will make recommendations to the Task Force based on workgroup discussions, but workgroups will not take formal action and their meetings are not public forums. Rather, the Task Force will decide, during open public meetings, whether to adopt, modify, or reject any workgroup recommendations.

Each workgroup will have a chair designated by Justice Berch and Judge Armstrong. Mr. Meltzer will attend workgroup meetings, and Task Force staff will be available for logistical assistance. The workgroups can access the rules on OneDrive; members should confer with Task Force staff to assure they have OneDrive access. The Chairs will assign members to workgroups following the adjournment of today's meeting. The Chairs will try to assign members to their preferred groups, but they will also consider balancing workgroups by geography and by the number of attorneys and judges in each group. The Chairs added that members may attend meetings of workgroups other than the one to which they are assigned. The Chairs announced a brief recess at this point of the meeting, during which each member indicated on workgroup sign-up sheets their first and second choices of workgroups.

5. **Discussion of specific items.** Judge Armstrong then led a discussion of several recent and pending items, which were included in the meeting materials and that members will need to consider during this project.

- The Court entered Orders in rule petition numbers R-16-0028 and R-16-0037 in late 2016. Judge Armstrong noted that changes made by these Orders to Rules 49(B) and 72, respectively, are not included in the 2017 volume of the Arizona Rules of Court.

- There are three pending rule petitions that affect the FLR. The State Bar filed R-16-0020, which concerns Rule 78 and the subject of attorneys' fees. The Court continued this rule petition to provide this Task Force with an opportunity to review, and possibly improve on, the proposed amendments to that rule. Two Arizona members of the Uniform Law Commission filed R-17-0017, which proposes a new Rule 67.2 regarding arbitration of family law matters. R-16-0019 proposes a new Rule 23.1 concerning improper venue.

- A.R.S. § 25-403(B) requires the Court to make findings on the record in contested legal decision-making and parenting time cases. Judge Armstrong noted the issue of whether the findings could be included in a minute entry or

order, rather than being stated orally and within what might be a lengthy transcript.

- *Griggs v. Oasis*, an October 2016 opinion from Division One, concerns the issue of immunity. Judge Armstrong asked workgroups to consider whether certain FLR, for example, the rule on parenting coordinators, should provide more specific guidance on immunity rather than refer to it generally.

6. **One Drive overview.** The Chairs then asked Julie Graber to introduce and explain OneDrive. Ms. Graber explained that OneDrive for Business is a component of Office 365. It facilitates cloud-based storage of documents and file-sharing, and will allow members to concurrently review and edit documents in real-time. Ms. Graber reviewed the log-on process, and demonstrated how to view documents and make edits. She recommended that each workgroup designate a single scribe during each meeting rather than having multiple ones. Members who have Word 2007 may have challenges with OneDrive, and these members may need to participate in workgroup meetings by WebEx. Ms. Graber invited members to contact her or Alex Fernandez de Jauregui, the AOC's SharePoint webmaster, at any time if they encounter difficulties with OneDrive. She noted that Ms. Williams soon would be sending the members an electronic link to the OneDrive log-in page.

7. **Roadmap.** The Task Force will meet about ten times this year. The Chairs proposed the following dates for the next nine meetings:

March 17 (likely to change)
April 28
June 2
July 14
August 25
September 29
October 20
December 1
December 15

Several members indicated they had conflicts with the March 17 and the June 2 dates. The Chairs advised they would look for alternate dates and staff would notify members of those new dates. The Chairs recognize that members may be unable to attend each meeting, and they encouraged members to send proxies in those circumstances. Excluding today and the final meeting, the four workgroups collectively will need to present at least a dozen rules at every Task Force meeting, so the workgroups should proceed accordingly. The Chairs requested workgroups to convene at least once before the March Task Force meeting, and for each workgroup to have several rules ready to

present at that time. Workgroups also should advise staff which rules they intend to present at upcoming Task Force meetings; this will facilitate staff's preparation of agendas and meeting materials.

8. **Call to the public; adjourn.** The Chair noted that each public comment would be limited to three minutes. She requested that public members provide her with a comment request form before the call to the public. (Forms are available at the sign-in table.) She then made a call to the public, and in response the following individuals addressed the Task Force: Mr. Martin Lynch, Mr. David Alger.

The members then had a brief discussion about whether this Task Force would interact with the State Bar. Judge Armstrong noted the State Bar created a Family Law Practice and Procedure Committee following implementation of the 2006 family law rules. He anticipates this Task Force would liaison with and seek input from that committee, as well as other stakeholders, individuals, and groups, as the Task Force nears completion of a draft set of rules.

The Chairs thanked the members for their willingness to serve on this Task Force. The meeting adjourned at 12:05 p.m.

Rule 6. Change of Judge

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. If a post-decree or post-judgment petition is filed, a party or side may exercise a right to change of judge as a matter of right only if that party or side has not previously exercised or waived that right during the action's prior proceedings.

Rule 6. Change of Judge as a Matter of Right

(a) Generally. In each action, whether single or consolidated, each party is entitled as a matter of right to a change of one judge and one court commissioner.

(b) Notice Requirements. A party seeking a change of judge as a matter of right must either file a written notice, or make an oral request on the record, in the manner provided below:

(1) ***Written Notice.*** A written notice of change of judge must be served on all other parties, the presiding judge, the noticed judge, and the court administrator, if any, by any method provided in Rule 43(c). The notice must contain:

(A) the name of the judge to be changed;

(B) a statement that:

(i) the notice is timely under Rule 6.1(c);

(ii) no waiver has occurred under Rule 6.1(d); and

(iii) the party has not been granted a change of a judge as a matter of right previously in the action. The notice cannot specify grounds for the change of judge.

(2) ***Oral Notice.*** An oral request for change of judge must include the information required by Rule 6.1(b)(1)(A) and (B). When made, it is deemed to be an "oral notice of change of judge" for purposes of this rule. The judge must enter on the record the date of the oral notice, the requesting party's name, and the judge's disposition of the request. A party obtaining a change of judge based on an oral notice is deemed to have exercised its right to a change of judge under Rule 6.1(a). For purposes of this rule, an oral notice is deemed "filed" on the date that it is made on the record.

(c) Time Limits. A party is precluded from obtaining a change of judge as a matter of right unless the party files a timely notice.

(1) The notice must be filed 60 or more days before the date set for trial.

(2) If a new judge is assigned within 60 days of the date set for trial, a notice is timely filed as to the newly assigned judge if filed within 10 days after such new assignment.

(3) If the right to a change of judge is renewed on under Rule 6(e), a notice is timely if filed within 15 days after issuance of the appellate court's mandate under ARCAP 24.

(4) A notice of change of judge is ineffective if filed within 3 days of a scheduled proceeding unless the parties have received less than 5 days' notice of that proceeding or the assignment of the judge.

(d) Waiver. A party waives the right to change of a judge assigned to preside over any proceeding in the action, if:

(1) the party agrees to the assignment;

(2) the judge rules on any contested issue, or grants or denies a motion to dispose of any claim or defense, if the party had an opportunity to file a notice of change of judge before the ruling is made;

(3) a resolution management, scheduling, pretrial, or similar conference begins;

(4) a scheduled contested hearing begins; or

(5) trial begins.

(e) Actions Remanded from an Appellate Court. In actions remanded from an appellate court, the right to a change of judge is renewed and no event connected with the first trial constitutes a waiver:

(1) if the appellate decision requires a new trial; and

(2) the party seeking a change of judge has not previously exercised its right to a change of judge in the action.

(f) Procedures on Notice.

(1) ***On Proper Notice.*** If a notice is timely filed and no waiver has occurred, the judge named in the notice should proceed no further in the action except to make such temporary orders as are absolutely necessary to prevent immediate and irreparable injury, loss, or damage from occurring before the action can be transferred to another judge. If the named judge is the only judge in the county, that judge may also reassign the case.

(2) ***On Improper Notice.*** If the court determines that the party who filed the notice is not entitled to a change of judge, the named judge may proceed with the action.

(3) ***Reassignment.***

(A) *On Stipulation.* If a notice of change of judge is filed, the parties should inform the court in writing if they have agreed on an available judge who is willing to hear the action. An agreement of all parties may be honored and, if so, bars further changes of judge as a matter of right unless the agreed-on judge becomes unavailable. If a judge to whom an action is assigned by agreement later becomes unavailable because of a change of calendar assignment, death, illness, or other incapacity, the parties may assert any rights under this rule that existed immediately before the assignment to that judge.

(B) *Absent Stipulation.* If no judge is agreed on, the presiding judge must promptly reassign the action.

Rule 6.1. Change of Judge for Cause

(a) Definitions. The term "judge" as used in this rule refers to any judge, judge pro tem, or court commissioner. The term "presiding judge" as used in this rule refers to the presiding superior court judge in the county where the action is pending, or that judge's designee.

(b) Grounds. A party seeking a change of judge for cause must establish grounds by affidavit as required by A.R.S. § 12-409.

(c) Filing and Service. The affidavit must be filed and copies served on the parties, the presiding judge, the noticed judge, and the court administrator, if any, by any method provided in Rule 43(c).

(d) Timeliness and Waiver. A party must file an affidavit seeking a change of judge for cause within 20 days after discovering that grounds exist for a change of judge. Case events or actions taken before that discovery do not waive a party's right to a change of judge for cause.

(e) Hearing and Assignment. If a party timely files and serves an affidavit complying with A.R.S. § 12-409:

(1) Within 5 days after the affidavit is served, any other party may file an opposing affidavit or a responsive memorandum of no more than two pages in length. No reply memorandum or affidavits are permitted unless authorized by the presiding judge.

(2) The presiding judge may hold a hearing to determine the issues raised in the affidavit, or may decide the issues based on any affidavits and memoranda filed by the parties.

(3) On filing of the affidavit for cause, the named judge should proceed no further in the action except to make such temporary orders as are absolutely necessary to prevent immediate and irreparable harm from occurring before the request is decided and the action transferred. However, if the named judge is the only judge in the county, that judge may also perform the functions of the presiding judge.

(4) The presiding judge must decide the issues by the preponderance of the evidence. Under A.R.S. § 12-409(B)(5), the sufficiency of any "cause to believe" must be determined by an objective standard, not by reference to the affiant's subjective belief. If grounds for disqualification are found, the presiding judge must promptly reassign the action. Any new assignment must comply with A.R.S. § 12-411.

(5) If the court determines that the party who filed the affidavit is not entitled to a change of judge, the named judge may proceed with the action.

Rule 11. Attendance of Minors

(a) Attendance of a Minor Child Affected by the Proceeding. ~~The presence of a minor child affected by a family law proceeding is generally not in the child's best~~ A minor child may not be present during any proceeding involving the child or the child's parents without the court's prior permission.

(b) Exclusion of Minors Generally. The court may exclude a minor from any proceeding if the minor's presence is not in his or her best interest, or if his or her presence at the proceeding might be disruptive or distracting.

Rule 15. Affirmation Instead of Oath

When these rules require an oath, a solemn affirmation suffices.

[**JWR Note:** This what the restyled civil rule says. It also is the same as Fed. R. Civ. P. 43(b).]

COMMITTEE COMMENT

This rule is based on Rule 43(b), Arizona Rules of Civil Procedure.

Rule 16. Interpreters

The court may appoint an interpreter of its choosing and may set the interpreter's reasonable compensation, to be paid from funds provided by law or by one or more of the parties. The interpreter’s compensation may be taxed as cost.

COMMITTEE COMMENT

This rule is based on Rule 43(c), Arizona Rules of Civil Procedure.

[**JWR Note:** As edited, the rule is the same as the restyled Civil Rule 43(c).]

Rule 17. Limits on Examining a Witness

Unless allowed by the court, only one attorney for each party may examine a witness.

NOTE: This is modeled on restyled Civil Rule 43(d).

Rule 18. Preserving a Recording of a Court Proceeding

(a) Transcripts and Other Recordings. The official verbatim recording of any court proceeding is an official record of the court. The original recording must be kept by the person who recorded it, a court-designated custodian, or the clerk in a place designated by the court. The recording must be retained according to the records retention and disposition schedules adopted by the Supreme Court, unless the court specifies a different retention period.

(b) Transcription. If a court reporter's verbatim recording will be transcribed, the court reporter who made the recording must be given the first opportunity to make the transcription, unless that court reporter no longer serves in that position or is unavailable for any other reason.

NOTE: This draft is taken from restyled Civil Rule 43(g).

Rule 19. Lost or Destroyed Records

(a) Motion to Substitute. If a court record is lost or destroyed, any party may file a motion to supply the court with an accurate copy of the record. The motion must identify the lost or destroyed record, be accompanied by an accurate copy of the record, and offer proof that the copy is accurate.

(b) Order and Further Proceedings. If the court finds that the copy is accurate, the court must order the copy substituted for the lost or destroyed record. If the court finds that the copy may not be accurate, it may take further evidence and direct the parties to prepare an accurate copy of the record based on that evidence.

(c) Filing and Effect. If the court enters an order substituting a copy for a lost or destroyed record, the moving party must file the copy with the clerk. Upon filing, the copy will constitute a part of the record in the action and will have the force and effect of the original record.

[NOTE: This restyled version is based on restyled Civil Rule 80(d). Unlike the current rule, it eliminates the cross-reference to a civil rule.]

Rule 21. [Reserved]

NOTE: The Supreme Court abrogated Rule 21, which concerned local rules, by its Order in R-16-0033. The promulgation of local rules is now governed by Supreme Court Rule 28.1.

Rule 22. Conduct of Proceedings

(a) Time Limits. The court may impose reasonable time limits on proceedings and may limit the length of a proceeding to what was scheduled. A party may file a motion to request additional time.

(b) Decorum. The court will conduct proceedings in an orderly, courteous, and dignified manner. Parties must address their arguments and remarks to the court and not to the other parties or their counsel.

COMMITTEE COMMENT

This rule is based on Rule 80(a), Arizona Rules of Civil Procedure.

NOTE: In the civil rules restyling, Civil Rule 80(a) was abrogated because it overlaps Arizona Rule of Evidence 611.

Rule 25. Family Law Cover Sheet

An administrative order of the presiding judge or a local rule may require a party to include, with any original filing, a family law cover sheet as the administrative order or local rule designates.

Rule 28. Required Response

(a) Verified Response. In an action for annulment, dissolution, legal separation, legal decision making or parenting time, dissolution of covenant marriage, legal separation in a covenant marriage, paternity or maternity, a party who is served with a petition must file a timely response with the clerk. A party's response must include a verification.

(b) Failure to File a Response. If a party who is served does not file a response, the petitioner has the right to request a default and obtain a default judgment against that party under Rule 44.

[**JWR Note:** The rules elsewhere refer to "opposing party." The adjective "opposing" may not be needed but if it is eliminated here, it also needs to be eliminated elsewhere.]

Rule 54. Discovery Before an Action Is Filed or Pending an Appeal [JWR Note: Again, the Task Force might consider whether it just wants to incorporate the Civil Rule by reference. This rule is rarely used, and, as shown here, is identical to the civil rule, although the rule cross-references are a little different.]

(a) Before an Action Is Filed.

(1) ***Petition.*** A person who wants to perpetuate testimony—including his or her own—or to obtain discovery to preserve evidence about any matter cognizable in an Arizona court may file a verified petition in the superior court in the county where any expected adverse party resides. The petition must be titled in the petitioner's name and must:

(A) show that the petitioner expects to be a party to an action cognizable in an Arizona court but cannot presently bring it or cause it to be brought;

(B) identify the subject matter of the expected action and the petitioner's interest;

(C) show the facts that the petitioner desires to establish by the proposed discovery and the reasons for perpetuating it in advance of the expected action;

(D) identify the name or a description of each person whom the petitioner expects to be an adverse party and the person's address to the extent known;

(E) identify the name and address of each person from whom discovery is sought—who may but need not be a person identified as an expected adverse party under Rule 54(a)(1)(D)—and the evidence the petitioner expects to obtain from the discovery; and

(F) ask for an order: (i) directing the clerk to issue a subpoena under Rule 52 at the petitioner's request to obtain testimony or other evidence from each named person in order to preserve the testimony or other evidence; (ii) under Rule 63, for a physical or mental examination of an expected adverse party or of a person in the custody or under the legal control of an expected adverse party; or (iii) permitting the petitioner's deposition under Rule 57 to preserve his or her testimony.

(2) ***Hearing Required.*** Unless the petitioner and all expected adverse parties file a stipulation agreeing to the discovery requested in the petition, or unless the court orders otherwise for good cause, the court must hold a hearing on the relief that the petition seeks.

(3) ***Notice and Service.*** Unless the court orders otherwise for good cause, the petitioner must serve each expected adverse party with a copy of the petition and

a notice stating the time and place of the hearing at least 20 days before the hearing date. If an expected adverse party is incompetent, Rule 37(b) applies. [ADD: The provisions of Rule 10(h) apply when any expected adverse party is a minor or incompetent person.] The petition and notice may be served either inside or outside Arizona in the same manner that a summons and pleading are served under Rule 41 or 42, as applicable. If the petition seeks an order under Rule 63 for a physical or mental examination, the petition and notice must be served on the expected adverse party whose examination is sought or who has custody or legal control of the person whose examination is sought. In all other instances, if service cannot be made with reasonable diligence on an expected adverse party, the court may order service by publication or otherwise.

(4) ***Opposition and Reply.*** Unless the court orders otherwise, any expected adverse party may file an opposition to the petition at least 5 days before the hearing date. The opposition must be served on the petitioner and each other expected adverse party using any of the methods described in Rule 43. Unless the court orders otherwise, the petitioner may not file a reply memorandum.

(5) ***Order and Effect.***

(A) *Order*. If satisfied that perpetuating the testimony or preserving other evidence may prevent a failure or delay of justice, the court must enter an order that: (i) identifies each person who may be served with a subpoena under Rule 52 to obtain testimony or for the inspection of documents or premises and specifies the subject matter of the permitted examination; (ii) permits the physical or mental examination of an expected adverse party or of a person in the custody or under the legal control of an expected adverse party; or (iii) permits the deposition of the petitioning party.

(B) *Effect and Use.* Discovery authorized by the court must be conducted, and may be used, as provided in these rules. A reference in these rules to the court where an action is pending means, for this rule's purposes, the court where the petition for the discovery was filed. A deposition to perpetuate testimony taken under these rules may be used under Rule 59 in any later-filed action in an Arizona state court involving the same subject matter. Subpoena recipients have the rights of nonparties under Rule 52 regardless of whether they are identified as an expected adverse party under Rule 54(a)(1)(D).

(C) *Appointment of Counsel.* If a court authorizes a deposition, but an expected adverse party is not served in the same manner that a summons and pleading are served under Rule 41 or 42, as applicable, and is otherwise unrepresented by counsel, the court must appoint an attorney to represent that expected

adverse party and to cross-examine the deponent. The petitioner must pay for an appointed attorney's services in an amount fixed by the court.

(b) Pending Appeal.

(1) ***Generally.*** The superior court that rendered judgment may, if an appeal has been taken or may still be taken, permit a party to conduct discovery under the rules to preserve evidence for use in any later superior court proceedings in that action.

(2) ***Motion.*** A party who seeks to perpetuate testimony or preserve evidence under the rules may move for leave to conduct discovery. The moving party must provide the same notice and serve the motion in the same manner as if the action was still pending in superior court. The motion must:

(A) identify the name and address of each person to be deposed or from whom discovery under the rules is sought, and the expected substance of the testimony or other discovery; and

(B) show the reasons for perpetuating the testimony or other discovery.

(C) *Order and Effect.* If satisfied that perpetuating the testimony or preserving the other evidence may prevent a failure or delay of justice, the court may order the requested discovery. Discovery authorized by the court must be conducted, and may be used, as provided in these rules.

Rule 55. Persons Before Whom Depositions May Be Taken; Depositions in Foreign Countries; Letters of Request and Commissions

(a) Deposition in the United States.

(1) ***Generally.*** Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths by federal law, Arizona law, or the law of the place of examination;

(B) a person appointed by the court where the action is pending to administer oaths and take testimony; or

(C) any certified reporter designated by the parties under Rule 56.

(2) ***Definition of "Officer."*** The term "officer" as used in Rules 57, 58, and 59 includes a person appointed by the court under this rule or designated by the parties under Rule 56.

(b) Deposition in a Foreign Country.

(1) ***Generally.*** A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a "letter rogatory";

(C) on notice, before a person authorized to administer oaths by federal law, Arizona law, or the law of the place of examination; or

(D) before a person commissioned by the court where the action is pending to administer any necessary oath and take testimony.

(2) ***Form of a Request, Notice, or Commission.*** When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(3) ***Letter of Request—Admitting Evidence.*** Evidence obtained in response to a letter of request need not be excluded because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.

(c) Letters of Request and Commissions.

(1) ***Not Required.*** A deposition in a pending superior court action may be taken anywhere upon notice prescribed by these rules without a letter of request, commission, or other like writ.

(2) ***Issuing Letter of Request or Commission.*** The clerk may issue a letter of request—whether or not captioned a "letter rogatory"—a commission, or both:

(A) on appropriate terms after an application and one full-day's notice to the other parties; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) ***Objections; Waiver.*** A party waives any error in the form of a letter of request or commission if it does not file a written objection before the clerk issues the letter of request or commission. The court must rule on any timely filed objection before the clerk may issue a letter of request or commission.

(d) Disqualification. A deposition may not be taken before a person who is:

(1) any party's relative, employee, or attorney;

(2) related to or employed by any party's attorney; or

(3) financially interested in the action.

Rule 56. Modifying Discovery and Disclosure Procedures and Deadlines

(a) By Written Agreement.

(1) ***Generally.*** Unless the court orders otherwise, the parties may agree in writing to:

(A) take a deposition before any certified reporter, at any time or place, on any notice, and in any manner specified, in which event it may be used in the same way as any other deposition; and

(B) modify other procedures in these rules governing or limiting discovery or disclosure.

(2) ***Court Order.*** Unless it interferes with court-ordered deadlines, the time set for a hearing, or the time set for trial, a written agreement under Rule 29(a)(1) is effective without court order.

(b) By Motion. A party may move to modify any procedure governing or limiting discovery or disclosure. The motion must:

(1) set forth the modification sought;

(2) show good cause for the modification; and

(3) comply with Rule 51(f). ~~[Note: Rule XX is the FLR analog to Civil Rule 26(g) requiring a good faith consultation on a discovery or disclosure motion.]~~

COMMITTEE COMMENT

This rule is based upon Rule 29, Arizona Rules of Civil Procedure.

JWR Note: The Civil Justice Reform Committee rule petition is proposing to gut this rule because it wants to circumscribe the ability of parties to modify discovery. But if the FLR TF is not interested in doing that (and may not be), this language fits the bill. Be prepared to delete the comment, however, because the Civil Rule might be gone next January.

March 9 Workgroup Note: The workgroup will add the following text, taken from Civil Rule 7.1(h), to FL Rule 51(f):

Good Faith Consultation Certificate. When these rules require that a "good faith consultation certificate" accompany a motion or that the parties otherwise consult in good faith, the movant must attach to the motion a separate statement certifying and demonstrating that the movant has tried in good faith to resolve the issue by conferring with—or attempting to confer with—the party or person against whom the motion is directed. The consultation required by this rule must be in person or by telephone, and not merely by letter or email.

Rule 80. Declaratory Judgments

These rules govern the procedure for obtaining a declaratory judgment. The existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate. The court may order a speedy hearing of a declaratory judgment action.

Rule 86. Harmless Error

Unless justice requires otherwise, an error in admitting or excluding evidence—or any other error by the court or a party—is not grounds for granting a new trial, ~~for setting aside a verdict,~~ or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

Rule 90. Enforcing Relief for or Against a Nonparty

When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party.

COMMITTEE COMMENT

This rule is based on Rule 71, Arizona Rules of Civil Procedure.

Rule 93. Seizing a Person or Property

(a) Remedies--Generally. At the commencement of and throughout an action every remedy authorized by law is available for the seizure of a person or property to secure satisfaction of a ~~judgment or~~ potential judgment.

(b) Specific Kinds of Remedies. The remedies available under this rule include the following—however designated and regardless of whether the remedy is ancillary to the action or requires an independent action:

(1) arrest;

(2) attachment;

(3) garnishment;

(4) replevin;

(5) sequestration; and

(6) other corresponding or equivalent remedies.

COMMITTEE COMMENT

This rule is based on Rule 64, Arizona Rules of Civil Procedure.

Note: Rule 93 is based on Civil Rule 64.

March 9 Workgroup Note: ~~I added "judgment or" because it seems that these words should be here. These remedies are not applicable only to potential judgments.~~

I highlighted "or requires an independent action" because this is the crux of our discussion earlier this week. I think this means that a separate action might be required to, for example, initiate a garnishment; however, this language in our context can be used as an example that a separate civil action is necessary. This requires discussion.