Task Force on the Arizona Rules of Family Law Procedure

Meeting Agenda

Friday, April 28, 2017
10:00 AM to 4:00 PM
State Courts Building * 1501 West Washington * Conference Room 345 * Phoenix, AZ

Item no. 1	**Call to Order** **Introductory remarks**	*Hon. Rebecca Berch and Hon. Mark Armstrong, Co-Chairs*
Item no. 2 Page 3	**Approval of the March 20, 2017 meeting minutes**	*Justice Berch and Judge Armstrong*
Item no. 3	**Discussion of general issues** - **Style and substance**	*All*
Item no. 4	**Workgroup reports:**	
Page 11	- **Workgroup 1: Rules 11, 14, 23, and 30**	*Mr. Woodnick and Judge Cohen*
Page 19	- **Workgroup 2: Rules 36, 37, and 38**	*Mr. Pollitt*
Page 29	- **Workgroup 3: Rules 57 and 58**	*Mr. Wolfson and Judge Swann*
Page 49	- **Workgroup 4: Rules 79, 82, and 88**	*Mr. Berkshire and Judge Eppich*
Item no. 5	**Roadmap** - **Next three meeting dates:** Monday, June 12, 2017 Friday, July 14, 2017 Friday, August 25, 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: March 20, 2017

Members attending: Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron (by telephone), Keith Berkshire by his proxy Erica Gadberry, Mary Boyte Henderson, Annette Burns, Cheri Clark, Hon. Suzanne Cohen, Helen Davis, Kiilu Davis, Hon. Karl Eppich, Joi Hollis, Hon. Paul McMurdie, Aaron Nash, Jeffery Pollitt, Janet Sell, Steven Serrano (by telephone), Hon. Peter Swann, Steven Wolfson, Gregg Woodnick

Absent: Hon. John Assini, Hon. Dean Christoffel

Guests: Martin Lynch, Cynthia Oxman, Julie Coleman, Ed Pizarro Sr.

Administrative Office of the Courts Staff: Mark Meltzer, Karla Williams, Julie Graber, Theresa Barrett, Amy Love

1. Call to order; introductory remarks; approval of meeting minutes. The Chair called the second Task Force meeting to order at 10:01 a.m. She noted that workgroups have met 5 times since the first Task Force meeting. She encouraged workgroups to set future meetings at the conclusion of each meeting so they always have their "next meeting" scheduled. She reminded members that Ms. Williams is available to assist with connecting to or using OneDrive.

Judge Armstrong introduced a pair of issues that members might contemplate at subsequent meetings. The first issue involves procedural requirements for motions. Civil Rules 5.2 and 7.1 contain pertinent provisions, but there are no corresponding Family Law Rules ("FLR") on this subject and he suggested that the Task Force consider adding them. He also asked whether the FLR should include an analog to Civil Rule 68 concerning offers of judgment. The previous family law rules committee decided that offers of judgment in family cases would be contrary to public policy; he asked whether this Task Force supports that view. (Judge Swann added that a State Bar committee is considering a proposal to abrogate or modify Civil Rule 68.) Finally, Judge Armstrong brought to the members' attention *Bobrow versus Bobrow* (Division One, 3/9/17), and particularly its discussion on the enforceability of an attorneys' fee provision in a premarital agreement.

The Chair asked members if they had corrections to the draft February 17, 2017 meeting minutes. There were none, and a member then made this motion:

Motion: To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 002**

2. Discussion of jury trials and civil issues in family law actions. Judge Armstrong explained that the previous family law rules committee included provisions in the family rules concerning civil issues and jury trials, which occur, although rarely, in family law actions. He gave as an example a person's claim against a spouse for breach of fiduciary duty. One member observed that jury trials are permitted in declaratory actions. However, because there are few declaratory actions in family court, the possibility of a jury trial in a family court declaratory action is more theoretical than actual. Members discussed options for dealing with civil issues. One option is to handle the civil matter in family court, but without a jury trial, which might provide a speedier resolution. Another approach would be to transfer the civil component to a civil division, which could conduct a jury trial when appropriate. (However in smaller counties, there may not be a civil division to which a family case could be transferred.)

Because most parties in family court proceedings are not represented by counsel, a member encouraged the Task Force to make the FLR simpler, and not propose rules for circumstances that are unlikely to occur in the overwhelming majority of family cases. Accordingly, the most effective solution to the jury-trial issue might have the FLR refer parties to civil rules if the parties have a civil issue. Members discussed a new family law rule that would codify this approach. The essence of the rule would state that if there is a civil component in the case, the court and the parties should apply the rules of civil procedure.

- Workgroup 1, which was assigned the introductory portions of the FLR where this rule would be located, will discuss drafting such a rule.

The Task Force could utilize this approach to eliminate current FLR that address inherently civil subjects. Rules concerning crossclaims and similar pleadings, and rules for service of process, such as service on a corporation, might be removable. Deleting such rules could simplify the FLR for pleading and service, and make the FLR generally more comprehensible for self-represented litigants. Judge Armstrong observed that one of the goals of the civil rules restyling was making those rules more understandable for self-represented litigants, but perhaps this Task Force can further advance that goal.

The Chairs then requested the workgroups to report their recommendations concerning individual FLR.

3. Workgroup 1. Workgroup 1 began with Rule 6.

Rule 6 ("change of judge"): Judge Armstrong said the previous FLR committee included Rule 6 to confirm that the civil rules' right to a change of judge also applies in family cases. Ms. Henderson began Workgroup 1's presentation of Rule 6 by noting that the current rule contains a cross-reference to former Civil Rule 42(f) ("change of judge"). However, the restyled civil rules separated Rule 42(f) into two new rules: Rule 42.1

("change of judge as a matter of right") and Rule 42.2 ("change of judge for cause"). Under Rule 42.1, a party waives the right to a change of judge if it is not exercised within 60 days after an appearance. The workgroup found this problematic because counsel may not appear in a family case until after the 60-day period had run. Therefore, rather than incorporating restyled Civil Rule 42.1 by reference, the workgroup drafted a new Rule 6 concerning a change of judge as a matter of right. Under this rule, the right is preserved until 60 days before the trial date, similar to the timing provision of the former civil rule. A new Rule 6.1 would govern a change of judge for cause. Rule 6.1 mirrors Civil Rule 42.2.

Task Force members discussed how reassignment of a case would be treated under proposed Rule 6(c), and whether there is a distinction between reassignment of a particular case by minute entry and reassignment of a judge's entire calendar by rotation. To address this issue, members used language in the restyled civil rule, i.e., that a notice is timely if it is filed within 10 days "after the party receives notice of the new assignment, or within 10 days after the new judge is assigned, whichever is later." The Task Force's use of language that parallels the civil rule will facilitate the applicability in family cases of appellate opinions interpreting the civil rule, and members agreed with this change.

The members discussed a second issue arising under proposed Rule 6(a): whether the right should apply to one judicial officer, to a judge and a judge pro tem, to a commissioner or a commissioner pro tem, or to a combination of the foregoing? Some members favored limiting the right to a change of only one judicial officer. This would serve the public interest and mitigate the delay caused by multiple changes of judge. Other members observed that different issues in a single case might be heard by more than one judicial officer, and believed the right should be extended to accommodate that circumstance. The members considered, for example, whether a IV-D case, which might be heard by a judicial officer other than the assigned judge, should include a separate right to a change of judge. Members further discussed the time limits provisions in Rule 6(c), and they agreed to revisions in subparts (3) and (4).

- However, because the Task Force did not have consensus on the entirety of Rule 6.1, the Chair returned the draft to Workgroup 1 for further consideration.

Members made other observations for the workgroup's consideration. Is there a distinction in proposed Rules 6(d)(4) ("a scheduled contested hearing begins") and 6(d)(5) ("trial begins")? Is there a distinction throughout the FLR between a "trial" and a "hearing," or are the words used interchangeably? One member suggested that a judge receives evidence at a trial, but does not do so at a hearing. However, another member noted occasions when the court may receive evidence at a hearing. A judge member suggested that a trial is a "final evidentiary hearing." Members should determine if there

is a meaningful difference between a "hearing" and a "trial," and if so, they should use the correct term in the appropriate context; otherwise, they should use one of these terms throughout the rules but not both. Another member asked the workgroup to reconsider proposed Rule 6(d)(3); the member suggested that a party's appearance at a conference where nothing is contested should not operate as a waiver. The Chair indicated the Task Force will revisit these issues after Workgroup 1's further review.

Rule 11 ("exclusion of minors"): Mr. Davis presented an overview of the revisions the workgroup made to this rule. A member suggested, and the Task Force agreed, to delete gender references ("his or her"). Another member noted inconsistent use of the term "minor child." The member suggested using the term once at the beginning of each subpart, and thereafter the term "child." Other members suggested modifications to the section titles, and to the rule's title.

- In light of the number of suggested changes, the Chair returned this rule to Workgroup 1 for further edits.

Rule 15 ("affirmation instead of oath"): Mr. Davis also presented this rule. One member suggested changing the word "suffices" to "is sufficient." Another member asked whether the word "solemn" was necessary. But because the language of this proposed rule is identical to restyled Civil Rule 43(b), the members agreed the rule was acceptable without any additional changes.

Rule 16 ("interpreters"): Ms. Burns presented Rule 16. The rule is modeled on restyled Civil Rule 43(c). A judge member criticized draft language that would allow the court to require a party to pay the cost of an interpreter; the member submitted this might impinge on the right of access to the court by a party with limited English proficiency. Members agreed to remove that language. They removed the words "from funds" in the same sentence and agreed to insert the word "as," so the provision now says, "to be paid ~~from funds~~ as provided by law."

- The members also agreed to remove the last sentence of the proposed rule, which said, "The interpreter's compensation may be taxed as cost." Workgroup 4 will examine the issue of costs when it considers Rule 78.

Rule 18 ("preserving a record of a court proceeding"): Mr. Woodnick, who presented this rule, advised that the workgroup made no changes to staff's proposed restyling. A member inquired if the rule could include a provision that would allow the unsealing of records to prepare transcripts for an appeal. However, members believed this would exceed the scope of this rule, and they declined to expand it.

Rule 19 ("lost or destroyed records"): Mr. Woodnick noted this proposed rule is based on restyled Civil Rule 80(d). Members had no changes to it.

Rule 21 ("reserved"): Rule 21 previously dealt with local rules of the superior court, but Ms. Henderson noted that the Court abrogated Rule 21 by its Order in rule petition number R-16-0033. Supreme Court Rule 28.1 now governs the promulgation of local rules. Rule 21 will continue to be "reserved."

Rule 22 ("conduct of proceedings"): Ms. Burns explained that the restyled rule includes two new section headings, "time limits" and "decorum." Members deleted some of the proposed language in the "time limits" section. As a result, the section provides that the court may impose reasonable time limits that are "appropriate to the proceedings," and a party "may request additional time." The "request" could include an oral request in the course of a hearing, as well as a written motion. Members also modified the "decorum" section to emphasize that rather than the court conducting the proceeding in an "orderly, courteous, and dignified manner," it is the parties who must conduct themselves that way.

Rule 25 ("family law cover sheet"): Ms. Burns noted that the workgroup did not make changes to staff's draft. However, Task Force members revised and shortened that draft so it now simply states, "A family law cover sheet must be presented as required by administrative order or local rule." In the course of the discussion, members noted that not all counties utilize a family law cover sheet, and those that do may not use uniform versions. The cover sheet primarily serves administrative rather than judicial purposes. A member also noted the cover sheet may duplicate information on the confidential sensitive data sheet. Members agreed that it might be useful to have a Supreme Court-approved family law cover sheet form in Rule 97. The Chair suggested that members consider such a form at a future point in this project, after obtaining input from superior court clerks.

Rule 28 ("required response"): Mr. Woodnick advised that the workgroup approved staff's restyled draft without additional changes, but Task Force members believed the draft was deficient. First, they note that while Rule 28(a) referred to a party "who is served with a petition," the draft omitted the words "and summons." After discussion, those two words were added to the draft. This led to a conversation about the distinction between a "summons" and an "order to appear." Members agreed that this restyling project should clarify which proceedings are initiated with a summons, and which require an order to appear. Pertinent provisions currently are spread throughout a number of rules, but they should be reorganized in a more user-friendly way so litigants can readily understand which document is required for a particular proceeding. Whether a summons or an order to appear is used can affect the need to file a response to a petition, and circumstances allowing the petitioner to obtain a default.

A member observed that "legal decision-making" in section (a) should be followed by the words "by a parent" because under current Rule 91, some legal decision-

making petitions do not require a summons. Another member suggested, and other members agreed, to add to section (a) the words, "and provide a copy to the assigned judicial officer and other parties." Members also changed the last sentence of draft section (a), which stated that the response must include a "verification," to instead require the response to include "a declaration under Rule 14(b)."

4. Workgroup 3. Mr. Wolfson presented Rules 54, 55, and 56 on behalf of the workgroup.

Rule 54 ("discovery before an action is filed on pending an appeal"): The workgroup considered adding to draft Rule 54(a)(3) ("notice and service") a cross-reference to FLR 37(b) concerning incompetent persons. After further discussion, the workgroup instead recommended adding a reference to FLR 10(h), which would encompass minors as well as incompetent persons. One member concurred with this recommendation because in Pima County, minors occasionally are parties in paternity actions. Another member suggested using a form of the verb "preserve" in this rule rather than "perpetuate" or "perpetuating." However, a member noted that the civil rules task force spent considerable time on corresponding Civil Rule 27, and conformity to that rule, which uses "perpetuate," would be appropriate. This member added that Rule 54 is rarely used by self-represented litigants, and an effort is underway that would provide even more simplified FLR for those litigants. Members concluded this discussion with an agreement to incorporate the Rule 10(h) concept, but possibly not the verbatim text of Rule 10(h).

- Members further agreed that Rule 54 might be one of those rules that could be excluded from the FLR, as the members discussed earlier during today's meeting. The workgroup will accordingly reconsider this rule.

Rule 55 ("persons before whom depositions may be taken, etc."): Mr. Wolfson advised that the workgroup made no changes to staff's restyling. However, in the future the Task Force should consider whether this rule or another FLR should provide an equivalent to Civil Rule 45.1 ("interstate depositions and discovery"). The current FLR do not include provisions that correspond to Rule 45.1.

Rule 56 ("modifying discovery and disclosure procedures and deadlines"): Mr. Wolfson noted the workgroup's consensus to add a reference in Rule 56(b) to a proposed amended FLR 51(f). The amendment to Rule 51(f), modeled on Civil Rule 7.1(h), would elaborate on the meaning of a "good faith consultation." It would specifically provide, as the civil rule does, that the consultation "must be in person or by telephone, and not merely by letter or email." Task Force members supported this concept. They also corrected an erroneous cross-reference in (a)(2) of the draft.

5. Workgroup 4. Workgroup 4 presented Rules 80, 86, 90, and 93.

Rule 80 ("declaratory judgments"): Ms. Sell, who presented this rule, asked whether it was necessary to include this rule in the FLR. She believes the rule is rarely used. She added that the second sentence of the draft, which allows the court to order a speedy hearing, is unnecessary because this is an inherent judicial power. One member responded that when a party seeks the remedy of declaratory relief, it is probably post-decree and often called by a name other than "declaratory relief." Eliminating Rule 80 won't change the practice of seeking this type of relief. Another member noted that Rule 80 contains no substance concerning "how-to" proceed with a declaratory action. In the rare instances when a party to a family law action needs declaratory relief, the party should refer to the civil rules. After discussion, the members agreed to eliminate Rule 80.

Rule 86 ("harmless error"): Judge McMurdie presented this rule. Although the rule is modeled on Civil Rule 61, verdicts are atypical in family law cases and the workgroup accordingly removed a reference in the draft to "setting aside a verdict." Another member questioned whether the rule's first four words, "unless justice requires otherwise," modified the legal standard of "prejudice to a substantial right." Nonetheless, because this rule parallels the civil rule, the members agreed to retain it as proposed.

Rule 90 ("enforcing relief for or against a nonparty"): Ms. Davis noted that this rule is consistent with its Civil Rule 71 counterpart. But she asked whether the rule is instructive, or if it adds anything to the court's existing authority. For example, if the court enters an order against a non-party, isn't the order enforceable in its own right? One member thought that the rule might have use if the court awarded attorneys' fees to counsel, who is not a party to the action. In any event, the rule has a civil rule equivalent, and members agreed to retain it in the FLR.

Rule 93 ("seizing a person or property"): Ms. Davis also presented this rule, which is the analog of Civil Rule 64. Ms. Davis noted that although the rule applies only to a "potential judgment," i.e., prejudgment, it is misleadingly located in Part XII of the FLR, following the part on post-judgment proceedings. Ms. Davis proposed that the remedies specified in this rule (arrest, attachment, garnishment, replevin, and sequestration) are civil in nature and therefore more appropriately governed by civil rules. Another member suggested that provisional remedies, which are creatures of statute, have only marginal application in family actions. Furthermore, a self-represented litigant who reads Rule 93 might incorrectly conclude that a provisional remedy of arrest is available in a family case. Ms. Davis added that the FLR has no equivalent of Civil Rule 69 concerning "execution" of judgments. Does a judgment creditor in a family action therefore apply to a civil court rather than a family court for a writ of execution? Members agreed that Rule 93 is unclear, that there is no utility in having duplicate civil and family rules on this subject, and that for now, the Task Force should delete and "reserve" Rule 93.

- Workgroup 1 should include the applicability of corresponding civil rules in this subject area when it prepares the rule discussed in item 2 above.

6. **Roadmap.** The Chair confirmed April 28 as the next Task Force meeting date. She also confirmed the subsequent meeting date of June 12. These dates are conditioned on the availability of quorums, and she encouraged the use of proxies to assure quorums.

7. **Call to the public; adjourn.** The Chair made a call to the public, and in response the following individuals addressed the Task Force: Mr. Martin Lynch, Ms. Cynthia Oxman.

The meeting adjourned at 3:04 p.m.

Rule 11. Attendance of Minors

(a) Attendance of a Minor Child Affected by the Proceeding. 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 child from any proceeding if:

(1) the child's presence is not in the child's best interest, or

(2) the child's presence might be disruptive or distracting.

Rule 11. ~~Exclusion~~ Attendance of Minors

~~**(a) 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.~~

(~~a~~b) 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 interest. [**JWR Note**: Is that sentence necessary? It doesn't seem to add anything.]~~ A minor child may not be present during any proceeding involving the child or ~~the child or~~ the child's parents without the court's prior permission.

(~~a~~b) Exclusion of Minors Generally. The court may exclude a minor child from any proceeding if:

(1) ~~the minor child's presence~~ the child's presence is not in ~~his or her~~the child's best interest, or ~~if~~

(2) the ~~his or her~~ child's presence ~~at the proceeding~~ might be disruptive or distracting. ~~[send back to workgroup]~~

Rule 14. Written Verifications and Unsworn Declarations Under Penalty of Perjury

(a) Written Verification. A written verification is a sworn statement before a notary public or other officer who is authorized to administer an oath. A verification is required for:

(1) an acceptance or waiver of service under Rule 40(F);

(2) an affidavit submitted in support of an application for a default decree;

(3) a consent decree under Rule 45; or

(4) a stipulation or agreement that substantially changes the terms of a legal decision-making or parenting time order, unless the stipulation is entered in open court or through conciliation services.

(b) Unsworn Declarations Under Penalty of Perjury. Except as provided in (a), when these rules require a verification, the requirement is satisfied if it is signed by the person andsubstantially in the following form:

> "I declare under penalty of perjury that the foregoing is true and correct. Executed on [date].
>
> [Signature]."

This rule does not apply to a deposition.

COMMITTEE COMMENT

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

NOTE: Rule 14(b) mirrors restyled Civil Rule 80(c), with the addition of the words, "except as provided in (a)…."

Rule 14. Written Verifications and Unsworn Declarations Under Penalty of Perjury

(a) Written Verification. A written verification is a sworn statement before a notary public or other officer who is authorized to administer an oath. A verification is required for:

(1) an acceptance or waiver of service under Rule 40(F);

(2) an affidavit submitted ~~under Rule 44(B)(1)(b)~~ in support of an application for a default decree;

(3) a consent decree ~~submitted to the court~~ under Rule 45; or

(4) a stipulation or agreement that substantially changes the terms of a ~~custody~~ legal decision-making or parenting time order, unless ~~it~~ the stipulation is entered ~~into~~ in open court or through conciliation services.

~~(b)~~ **Unsworn Declarations Under Penalty of Perjury.** Except as provided in (a), when these rules require ~~or allow a matter to be supported, evidenced, established, or proved by~~ a ~~sworn written declaration,~~ verification, ~~certificate, statement, oath, or affidavit,~~ the ~~same may be unsworn~~ requirement is satisfied ~~and have the same force and effect~~ if it is signed by the person and~~:~~

~~(1) signed by the person as true under penalty of perjury;~~

~~(2) dated; and~~

~~(3)~~(b) ~~in~~ substantially in the following form:

> "I declare ~~[or certify, verify or state]~~ under penalty of perjury that the foregoing is true and correct. Executed on [date].
>
> [Signature]."

This rule does not apply to a deposition~~, oath of office, or an oath required to be taken before a specified official other than a notary public~~.

COMMITTEE COMMENT

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

NOTE: Rule 14(b) mirrors restyled Civil Rule 80(c), with the addition of the words, "except as provided in (a)…."

Rule 23. Beginning an Action

A family law action begins when a person files a petition with the court.

COMMITTEE COMMENT

This rule is based on Rule 3, Arizona Rules of Civil Procedure.

Save yellow highlight for a rule on “duties of parties”

Rule 23. Beginning an Action

A family law action begins when a person files a petition with the court. ~~During the pendency of an action, parties who are not represented by counsel must keep the court apprised of their current mailing addresses. Each party must notify the court within 10 days of any changes in the party's mailing address.~~

COMMITTEE COMMENT

This rule is based on Rule 3, Arizona Rules of Civil Procedure.

Save yellow highlight for a rule on “duties of parties”

Rule 30. Form of Pleading

(a) Caption; Names of Parties. Every pleading must have a caption in the form prescribed by Rule 20(a), along with the pleading's designation under Rule 24. The title of the petition should name all the parties.

(b) Paragraphs; Separate Statements. A party must state claims or defenses in separate paragraphs, each limited to a single fact or issue.

(c) Exhibits. Exhibits to a pleading are a part of the pleading.

(d) Using a Fictitious Name to Identify a Respondent. Fictitious names are allowed if a party's name is unknown. When the party's true name is discovered, the pleading must be amended accordingly.

Rule 30. Form of Pleading

(a) Caption; Names of Parties. Every pleading must have a caption in the form prescribed by Rule 20(a), along with the pleading's designation under Rule 24. The title of the ~~complaint~~ petition should ~~must~~ name all the parties~~; the title of other pleadings and documents, after naming the first party on each side, may refer generally to other parties by the designation "*et al.*"~~.

(b) Paragraphs; Separate Statements. A party must state ~~its~~ claims or defenses in ~~numbered~~ separate paragraphs, each limited ~~as far as practicable~~ to a single ~~set of circumstances~~ fact or issue. ~~A later pleading may refer by number to a paragraph in an earlier pleading.~~

(c) ~~Adoption by Reference;~~ Exhibits. ~~A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit~~ Exhibits to a pleading ~~is~~ are a part of the pleading ~~for all purposes~~.

~~(d) **Using a Fictitious Name to Identify a Respondent.** If the name of the respondent is unknown to the petitioner, the respondent may be designed in the pleadings or proceeding by any name. If the respondent's true name is discovered, the pleading or proceeding should be amended accordingly.~~

(d) Using a Fictitious Name to Identify a Respondent. Fictitious names are allowed if a party's name is unknown. When the party's true name is discovered, the pleading must be amended accordingly.

~~**JWR NOTE:** Same as restyled Civil Rule (and Federal Rule) 10(a)-(c), except the third sentence of Rule 10(b) was not included because the Family Law Rule does not contain the counterpart to the third sentence found in the prior Civil Rule.~~

~~Rule 30(d) comes from restyled Civil Rule 10(d). Note that Civil Rule 10(d) says that the complaint "should" be amended. The prior civil rule and the current Family Law Rule say "may" be amended.~~

Rule 36. Real Party in Interest

(a) Generally. An action must be brought in the name of the real party in interest.

(b) Minor or an Incompetent Person. A general guardian, conservator or similar fiduciary may bring or defend an action on behalf of a minor or an incompetent person. A minor or incompetent person without a duly appointed representative may bring or defend an action by a next friend or guardian ad litem appointed by the court to protect the minor or incompetent person.

(c) Compensation. The court may allocate between the parties the fees and expenses of the minor or incompetent person's representative under (b) as the court deems appropriate.

(d) Action in the Name of the State for Another's Use. When a state statute so provides, an action for another's use or benefit must be brought in the name of the State of Arizona.

NOTE: Amended from ARCP 17 (a) and (f) (1) and (2).

Rule 36. Real Party in Interest

(a) ~~Designation Gener~~Generally. An ~~a~~action must be ~~prosecuted~~ brought in the name of the real party in interest.

Minor or an Incompetent Person. A general guardian, conservator or similar fiduciary may bring or defend an action on behalf of a minor or an incompetent person.

(b) A minor or incompetent person without a duly appointed representative may bring or defend an action by a next friend or guardian ad litem appointed by the court to protect the minor or incompetent person.

(c) Compensation. The court may allocate between the parties the fees and expenses of the minor or incompetent person's representative under (b) as the court deems appropriate.

(d) Action in the Name of the State for Another's Use. When a state statute so provides, an action for another's use or benefit must be brought in the name of the State of Arizona.

~~**(a)** The following may sue in their own names without joining the person for whose benefit the action is brought:~~

~~**(1)** a personal representative or executor;~~

~~**(2)** an administrator;~~

~~**(3)** a guardian;~~

~~**(4)** a bailee;~~

~~**(5)** a trustee of an express trust;~~

~~**(6)** a party with whom or in whose name a contract has been made for another's benefit; and~~

~~**(7)** a party authorized by statute.~~

~~**(b) Action in the Name of the State for Another's Use or Benefit.** When a state statute so provides, an action for another's use or benefit must be brought in the name of the State of Arizona.~~

~~**(c) Joinder of the Real Party in Interest.** The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a~~

~~reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest.~~

NOTE: ~~Based on restyled Civil Rule (and Federal Rule) 17(a). Unlike the civil rule, subpart (a) does not enumerate who may sue on behalf of another. The change was made to reflect a difference between the current Family Law Rule and its prior civil rule counterpart~~ Amended from ARCP 17 (a) and (f) (1) and (2).

Rule 37. Death, Incompetency, and Transfer of Interest

(a) Death.

(1) If a party dies while a petition for dissolution, legal separation, or annulment is pending, the action abates and the court will dismiss the case.

(2) If a party dies while a petition for paternity or maternity is pending, the action does not necessarily abate. [**NOTE:** need input from TF members; x-ref ARS 25-805]

(b) Incompetency. If a party becomes incompetent, the court may—on motion or on stipulation of the parties and the incompetent party's representative—permit the action to be continued by or against the party's representative. Anyone filing such a motion must serve the motion on the parties as provided in Rule 43 and on the incompetent party's representative in the same manner that a summons and pleading are served under Rule 41 or 42, as applicable.

(c) Transfer of Interest. If a party's interest in property is transferred, the action may be continued by or against that party, unless the court—on motion or on stipulation of the parties and the transferee—orders the transferee to be substituted in the action or joined with the original party. Anyone filing such a motion must serve the motion on the parties as provided in Rule 43 and on the transferee—if a nonparty—in the same manner that a summons and pleading are served under Rule 41 or 42, as applicable.

NOTE: Based on restyled Civil Rule 25 (a)-(c).

Rule 37. ~~Substitution of Parties~~ Death, Incompetency, and Transfer of Interest

(a) Death.

~~(b)~~(1) If a party dies while a petition for dissolution, legal separation, or annulment is pending, the action abates and the court will dismiss the case.

~~(1)~~(2) If a party dies while a petition for paternity or maternity is pending, the action does not necessarily abate. [**NOTE:** need input from TF members; x-ref ARS 25-805]

~~(2) ***Substitution if the Claim Is Not Extinguished.*** If a party dies and the claim is not extinguished, the court may order substitution of the proper party. Any party or the decedent's successor or representative may file a motion to substitute. If the motion is not made within 90 days after a statement noting the death is served, the court must dismiss the claims by or against the decedent.~~

~~(3) ***Statement Noting Death.*** A party or the decedent's successor or representative may file a statement noting the death of a party. If filed by a party, the statement must identify the decedent's successor or representative if one exists and is known by the filing party. Anyone filing a statement noting death must serve the statement on the parties as provided in Rule 43 and on nonparties in the same manner that a summons and pleading are served under Rule 41 or 42, as applicable.~~

~~(4) ***Service of Motion to Substitute.*** Anyone filing a motion to substitute must serve the motion on the parties as provided in Rule 43 and on the decedent's successor or representative if a nonparty in the same manner that a summons and pleading are served under Rule 41 or 42, as applicable.~~

~~(5) ***Continuation Among the Remaining Parties.*** After a party's death, if the claim survives only for or against the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death should be noted on the record.~~

~~(c)~~(b) **Incompetency.** If a party becomes incompetent, the court may—on motion or on stipulation of the parties and the incompetent party's representative—permit the action to be continued by or against the party's representative. Anyone filing such a motion must serve the motion on the parties as provided in Rule 43 and on the incompetent party's representative in the same manner that a summons and pleading are served under Rule 41 or 42, as applicable.

~~(d)~~(c) **Transfer of Interest.** If a party's interest in property is transferred, the action may be continued by or against that party, unless the court—on motion or on

stipulation of the parties and the transferee—orders the transferee to be substituted in the action or joined with the original party. Anyone filing such a motion must serve the motion on the parties as provided in Rule 43 and on the transferee—if a nonparty—in the same manner that a summons and pleading are served under Rule 41 or 42, as applicable.

NOTE: Based on restyled Civil Rule 25 (a)-(c).

Rule 38. [Reserved]

Rule 38. [Reserved]

Rule 57. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) ***Depositions Permitted.*** A party may depose: (A) any party; (B) any party's current spouse; and (C) any person disclosed as an expert witness under Rule 49(h). A party also may depose any document custodian to secure production of documents and establish evidentiary foundation. Unless all parties agree or the court orders otherwise for good cause, a party may not depose any other person or depose a person who has already been deposed in the action. A party may not unreasonably withhold its agreement to additional depositions under this rule.

(2) ***Depositions by Petitioner or Other Party Earlier Than 30 Days After Serving the Summons and Petition.*** A petitioner or other party must obtain leave of court to take a deposition earlier than 30 days after serving the summons and petition on any respondent or other party unless: (A) a respondent or other party has served a deposition notice or otherwise sought discovery under these rules; or (B) the petitioner or other party certifies in the deposition notice, with supporting facts, that the deponent is expected to leave Arizona and will be unavailable for deposition after expiration of the 30-day period.

(3) ***Incarcerated Deponents.*** Subject to Rule 57(a)(1), a party may depose an incarcerated person only by agreement of the person's custodian or by leave of court on such terms as the court orders.

(4) ***Attendance of a Party.*** A party's attendance at a deposition is required without service of a subpoena.

(5) ***Compelling Attendance of Non-Party Deponent.*** A party may compel a nonparty deponent's attendance by serving a subpoena under Rule 52.

Note: add a provision from the civil rules in 57(b)(1) about counsel consulting before setting a deposition date.

(b) Notice of a Deposition; Method of Recording; Deposition by Remote Means; Deposition of an Entity; Other Formal Requirements.

(1) ***Notice Generally.*** Unless all parties agree or the court orders otherwise, a party who wants to depose a person by oral questions must serve written notice to every other party at least 10 days before the date of the deposition. The notice must state the date, time, and place of the deposition and, if known, the deponent's name and address. If the deponent's name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) ***Producing Materials.*** If a subpoena for documents, electronically stored information, or tangible things has been or will be served on the deponent, the materials designated for production in the subpoena must be listed in the deposition notice or in an attachment to the notice. A deposition notice to a deponent who is a party to the action may be accompanied by a separate request under Rule 62 to produce documents, electronically stored information, or tangible things at the deposition. The procedures under Rule 62 apply to any such request.

(3) ***Method of Recording.***

(A) *Permitted Methods.* Unless all parties agree or the court orders otherwise, testimony must be recorded by a certified reporter and may in addition be recorded by audio or audiovisual means.

~~**(B)** *Method Stated in the Notice.* The party who notices the deposition must state Unless the parties agree or the court orders otherwise, the noticing party bears the recording costs.~~

(C) *Notice of Method of Recording.* With at least two days written notice to the deponent and other parties, any party may designate another method for recording the testimony in addition a certified reporter. Unless the parties agree or the court orders otherwise, that party bears the expense of the additional recording.

(D) *Transcription.* Any party may request that the testimony be transcribed. If the testimony is transcribed, the party who originally noticed the deposition is responsible for the cost of the original transcript. Any other party may, at its expense, arrange to receive a certified copy of the transcript.

(4) ***By Remote Means.*** The parties may agree or the court may order that a deposition be taken by telephone or other remote means. For the purposes of this rule and Rules 55(a), 65(a)(2), 62(b)(3)(B), and 62(e), the deposition takes place where the deponent answers the questions, but an Arizona certified court reporter may record the testimony in Arizona. If the deponent is not in the officer's physical presence, the officer may nonetheless place the deponent under oath or affirmation with the same force and effect as if the deponent was in the officer's physical presence.

~~**(5)** ***Officer's Duties.***~~

~~**(A)** *Before Deposition.* Unless the parties agree otherwise under Rule 56, a deposition must be conducted before an officer appointed or designated under~~

~~Rule 55. The officer must begin the deposition with a statement or notation on the record that includes:~~

~~**(i)** the officer's name, certification number, if any, and business address;~~

~~**(ii)** the date, time, and place of the deposition;~~

~~**(iii)** the deponent's name;~~

~~**(iv)** the officer's administration of the oath or affirmation to the deponent; and~~

~~**(v)** the identity of all persons present.~~

~~**(B)** *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded by audio or audiovisual means, the officer must repeat the items in Rule 57(b)(5)(A)(i) through (iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance, voice, and demeanor must not be distorted through recording techniques.~~

~~**(C)** *After the Deposition.* At the end of the deposition, the officer must state or note on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other relevant matters. **[JWR Note:** Note that this is not in the current Family Law Rule 57(B)(4), although it was in the former Civil Rule 30(b)(4). Was the omission intentional?]~~

(6) ***Notice or Subpoena Directed to an Entity.*** In its deposition notice or subpoena, a party may name as the deponent a public or private corporation, a limited liability company, a partnership, an association, a governmental agency, or other entity, and must then describe with reasonable particularity the matters for examination. The named entity must then designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf. If the entity designates more than one person to testify, it must set out the matters on which each designated person will testify. Each designated person must testify about information known or reasonably available to the entity. This Rule 30(b)(6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Conferences Between Deponent and Counsel; Written Questions.

(1) ***Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Arizona Rules of Evidence..including Rule 615. Parties may not make evidentiary objections, including relevance objections.. Any party not present within 30 minutes after

the time specified in the notice of deposition waives any objection that the deposition was taken without its presence. After putting the deponent under oath or affirmation, the officer personally—or a person acting in the presence and under the direction of the officer—must record the testimony by the method(s) designated under Rule 57(b)(3).

(2) ***Objections.*** The officer must note on the record any objection made during the deposition—whether to evidence, to a party's, deponent's, or counsel's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition. An objection must be stated concisely, in a nonargumentative manner, and without suggesting an answer to the deponent. Unless requested by the person who asked the question, an objecting person must not specify the defect in the form of a question or answer. Counsel may instruct a deponent not to answer—or a deponent may refuse to answer—only when necessary to preserve a privilege, to enforce a limit ordered by the court, or to present a motion under Rule 57(d)(3). Otherwise, the deponent must answer, and the testimony is taken subject to any objection.

(3) ***Conferences Between Deponent and Counsel.*** The deponent and his or her counsel may not engage in continuous and unwarranted conferences off the record during the deposition. Unless necessary to preserve a privilege, the deponent and his or her counsel may not confer off the record while a question is pending.

(d) Duration; Sanctions; Motion to Terminate or Limit.

(1) ***Duration.*** Unless the parties agree or the court orders otherwise, a deposition is limited to 4 hours and must be completed in a single day.

(2) ***Sanctions.*** The court may impose appropriate sanctions—including any order under Rule 65—against a party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist conduct in connection with a deposition, including an unreasonable refusal to agree to extend a deposition beyond 4 hours.

(3) ***Motion to Terminate or Limit.***

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit the deposition on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The deponent or party must file the motion in the court where the action is pending or the court where the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or that its scope and manner be limited as provided in Rule 51(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* Rule 65(a)(5) applies to the award of expenses.

(e) Review by the Deponent; Changes.

(1) ***Review; Statement of Changes.*** If requested by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: ~~When the officer has fully transcribed a deposition or has completed the recording of a deposition taken by audio-visual means only, the officer must notify the deponent that the transcript or recording is available for review. After receiving such notice, the deponent has 30 days in which:~~ [**JWR Note:** Note that current Family Law Rule 57(E) departed from the former Civil Rule 30(e). Under the civil rule (like the federal rule), notice was sent only if requested by the deponent at the end of the deposition. The family law rule flipped that, making notice mandatory. (That used to be the federal rule until it was changed.) I revised the draft rule to incorporate the current rule's requirement that the officer must always notify the deponent. I did not, however, retain the requirement of signature, which also was deleted in the old federal rule in 1993 because court reporters often had a hard time getting the deponents to sign the transcript.]

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign and deliver to the officer a statement listing the changes and the reasons for making them.

(2) ***Officer's Certificate to Attach Changes.*** The officer must note in the certificate prescribed by Rule 57(f)(1) whether the officer received a statement of changes from the deponent and, if so, the officer must attach any changes the deponent made during the 30-day period. [**Note:** what if the trial or hearing is less than 30 days after the deposition?]

(f) Officer's Certification and Delivery; Documents and Tangible Things; Copies of the Transcript or Recording; Filing.

(1) ***Certification and Delivery.*** The officer must certify in writing that the deponent was duly sworn by the officer and that the deposition accurately records the deponent's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly deliver it to the attorney who arranged

for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) ***Documents and Tangible Things.***

(A) *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition—and any party may inspect and copy them—but if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) *Order Regarding the Originals.* On motion, the court may order that the originals be attached to the deposition until final disposition of the action.

(3) ***Copies of the Transcript or Recording.*** Unless the parties agree or the court orders otherwise, the officer must retain the record of a deposition according to the applicable records retention and disposition schedules adopted by the Supreme Court. [**JWR Note:** Note that Family Law Rule 30(F)(3) requires that the record may not be kept outside Arizona. That is not part of the old Civil Rule 30(f). No idea why that provision was added and I don't recommend including it here.] Upon payment of a reasonable charge, the officer must provide a copy of the transcript or recording to any party or to the deponent.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who attends a noticed deposition in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who did not attend as a result of the lack of service. [Consider merging this with Rule 65(f) and the failure of a party to attend his or her deposition.]

COMMITTEE COMMENT

This rule is based upon Rule 30, Arizona Rules of Civil Procedure.

Committee Comment

1991 Amendment to [Civil] Rule 30(a)

Rule 30(a) is intended to address the problem of overuse of expensive and unnecessary depositions. Any party may take the deposition of any other party, including depositions taken under Rule 30(b)(6), the deposition of any disclosed expert, and the depositions of the custodian of documents without agreement or leave of court. Treating physicians are regarded as disclosed experts for purposes of this rule. Depositions of custodian taken as a matter of right shall be limited to questions necessary to secure the documents and to provide evidentiary foundation for their admissibility. The rule, along with Rule 26.1 and Rule 16, is intended to encourage voluntary disclosure of information between the parties and is further intended to require at a minimum consultation between counsel prior to the setting of depositions. Any party may take the deposition of any other party, including depositions taken under Rule 30(b)(6) and the deposition of any disclosed expert, without agreement or leave of court. Any other depositions must be taken either by agreement of the parties, on motion and order of the court, or pursuant to an order of the court following a Comprehensive Pretrial Conference under Rule 16. Refusing to agree to the taking of a reasonable and necessary deposition should subject counsel to sanctions under Rule 26(f).

Rule 57. Depositions by Oral Examination

(a) When a Deposition May Be Taken.

(1) ***Depositions Permitted.*** A party may depose: (A) any party; (B) any party's current spouse; and (C) any person disclosed as an expert witness under Rule 49(h). A party also may depose any document custodian ~~in order~~ to secure production of documents and establish evidentiary foundation. Unless all parties agree or ~~,~~ the court orders otherwise for good cause, ~~or by court order following a resolution management conference,~~ a party may not depose any other person or depose a person who has already been deposed in the action. A party may not unreasonably withhold its agreement to additional depositions under this rule.

(2) ***Depositions by Petitioner or Other Party Earlier Than 30 Days After Serving the Summons and Petition.*** A petitioner or other party must obtain leave of court to take a deposition earlier than 30 days after serving the summons and petition on any respondent or other party unless: (A) a respondent or other party has served a deposition notice or otherwise sought discovery under these rules; or (B) the petitioner or other party certifies in the deposition notice, with supporting facts, that the deponent is expected to leave Arizona and will be unavailable for deposition after expiration of the 30-day period. ~~If a party shows that it was unable, despite diligent efforts, to obtain counsel to represent it at a deposition taken under this Rule 57(a)(2), the deposition may not be used against that party.~~

(3) ***Incarcerated Deponents.*** Subject to Rule 57(a)(1), a party may depose an incarcerated person only by agreement of the person's custodian or by leave of court on such terms as the court orders.

(4) ~~***Compelling Attendance of Deponent.*** A party may compel a nonparty deponent's attendance by serving a subpoena under Rule 52.~~ ***Attendance of a Party.*** A party's attendance at a deposition is required without service of a subpoena. ~~noticing the deposition of a party or an officer, director, or managing agent of a party need not serve a subpoena under Rule 52.~~

(5) ***Compelling Attendance of Non-Party Deponent.*** A party may compel a nonparty deponent's attendance by serving a subpoena under Rule 52.

~~**(4)**~~ **Note**: add a provision from the civil rules in 57(b)(1) about counsel consulting before setting a deposition date.

(b) Notice of a Deposition; Method of Recording; Deposition by Remote Means; Deposition of an Entity; Other Formal Requirements.

(1) ***Notice Generally.*** Unless all parties agree or the court orders otherwise, a party who wants to depose a person by oral questions must serve written notice to every other party at least 10 days before the date of the deposition. The notice must state the date, time, and place of the deposition and, if known, the deponent's name and address. If the deponent's name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) ***Producing Materials.*** If a subpoena for documents, electronically stored information, or tangible things has been or will be served on the deponent, the materials designated for production in the subpoena must be listed in the deposition notice or in an attachment to the notice. A deposition notice to a deponent who is a party to the action may be accompanied by a separate request under Rule 62 to produce documents, electronically stored information, or tangible things at the deposition. The procedures under Rule 62 apply to any such request.

(3) ***Method of Recording.***

(A) *Permitted Methods.* Unless all parties agree or the court orders otherwise, testimony must be recorded by a certified reporter and may ~~also~~ in addition be recorded by audio or audiovisual means.

~~**(B)** *Method Stated in the Notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the parties agree or the court orders otherwise, the noticing party bears the recording costs.~~

(C) ~~*Additional Method*~~ *Notice of Method of Recording*. With at least two days ~~prior~~ written notice to the deponent and other parties, any ~~other~~ party may designate another method for recording the testimony in addition ~~to that specified in the original notice~~ a certified reporter. Unless the parties agree or the court orders otherwise, that party bears the expense of the additional recording.

~~**(D)** *Notice of Recording by Audiovisual Means.* Any notice of recording the testimony by audiovisual means must identify the placement of the camera(s).~~

~~**(E)**~~**(D)** *Transcription.* Any party may request that the testimony be transcribed. If the testimony is transcribed, the party who originally noticed the deposition is responsible for the cost of the original transcript. Any other party may, at its expense, arrange to receive a certified copy of the transcript.

(4) ***By Remote Means.*** The parties may agree or the court may order that a deposition be taken by telephone or other remote means. For the purposes of this

rule and Rules 55(a), 65(a)(2), 62(b)(3)(B), and 62(e), the deposition takes place where the deponent answers the questions, but an Arizona certified court reporter may record the testimony in Arizona. ~~.~~ If the deponent is not in the officer's physical presence, the officer may nonetheless place the deponent under oath or affirmation with the same force and effect as if the deponent was in the officer's physical presence.

~~**(5) *Officer's Duties.***~~

~~**(A)** *Before Deposition.* Unless the parties agree otherwise under Rule 56, a deposition must be conducted before an officer appointed or designated under Rule 55. The officer must begin the deposition with a statement or notation on the record that includes:~~

~~**(i)** the officer's name, certification number, if any, and business address;~~

~~**(ii)** the date, time, and place of the deposition;~~

~~**(iii)** the deponent's name;~~

~~**(iv)** the officer's administration of the oath or affirmation to the deponent; and~~

~~**(v)** the identity of all persons present.~~

~~**(B)** *Conducting the Deposition; Avoiding Distortion.* If the deposition is recorded by audio or audiovisual means, the officer must repeat the items in Rule 57(b)(5)(A)(i) through (iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance, voice, and demeanor must not be distorted through recording techniques.~~

~~**(C)** *After the Deposition.* At the end of the deposition, the officer must state or note on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other relevant matters. **[JWR Note:** Note that this is not in the current Family Law Rule 57(B)(4), although it was in the former Civil Rule 30(b)(4). Was the omission intentional?]~~

(6) *Notice or Subpoena Directed to an Entity.* In its deposition notice or subpoena, a party may name as the deponent a public or private corporation, a limited liability company, a partnership, an association, a governmental agency, or other entity, and must then describe with reasonable particularity the matters for examination. The named entity must then designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf. If the entity designates more than one person to testify, it must set out the matters on which each designated person will testify. Each designated person must testify

about information known or reasonably available to the entity. This Rule 30(b)(6) does not preclude a deposition by any other procedure allowed by these rules.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Conferences Between Deponent and Counsel; Written Questions.

(1) ***Examination and Cross-Examination.*** The examination and cross-examination of a deponent proceed as they would at trial under the Arizona Rules of Evidence.~~, except~~ .including Rule 615. ~~for Rules 103~~ Parties may not make evidentiary objections, including relevance objections.~~and 615~~. Any party not present within 30 minutes after the time specified in the notice of deposition waives any objection that the deposition was taken without its presence. After putting the deponent under oath or affirmation, the officer personally—or a person acting in the presence and under the direction of the officer—must record the testimony by the method(s) designated under Rule 57(b)(3).

(2) ***Objections.*** The officer must note on the record any objection made during the deposition—whether to evidence, to a party's, deponent's, or counsel's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition. An objection must be stated concisely, in a nonargumentative manner, and without suggesting an answer to the deponent. Unless requested by the person who asked the question, an objecting person must not specify the defect in the form of a question or answer. Counsel may instruct a deponent not to answer—or a deponent may refuse to answer—only when necessary to preserve a privilege, to enforce a limit ordered by the court, or to present a motion under Rule 57(d)(3). Otherwise, the deponent must answer, and the testimony is taken subject to any objection.

(3) ***Conferences Between Deponent and Counsel.*** The deponent and his or her counsel may not engage in continuous and unwarranted conferences off the record during the deposition. Unless necessary to preserve a privilege, the deponent and his or her counsel may not confer off the record while a question is pending.

~~**(4)** ***Participating Through Written Questions.*** Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party who noticed the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.~~

(d) Duration; Sanctions; Motion to Terminate or Limit.

(1) ***Duration.*** Unless the parties agree or the court orders otherwise, a deposition is limited to 4 hours and must be completed in a single day.

(2) ***Sanctions.*** The court may impose appropriate sanctions—including any order under Rule ~~71(?)~~ 65—against a party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist conduct in connection with a deposition, including an unreasonable refusal to agree to extend a deposition beyond 4 hours.

(3) ***Motion to Terminate or Limit.***

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit the deposition on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The deponent or party must file the motion in the court where the action is pending or the court where the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or that its scope and manner be limited as provided in Rule 51(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* Rule 65(a)(5) applies to the award of expenses.

(e) Review by the Deponent; Changes.

(1) ***Review; Statement of Changes.*** If requested by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: ~~When the officer has fully transcribed a deposition or has completed the recording of a deposition taken by audio-visual means only, the officer must notify the deponent that the transcript or recording is availble~~available ~~for review. After receiving such notice, the deponent has 30 days in which:~~ [**JWR Note:** Note that current Family Law Rule 57(E) departed from the former Civil Rule 30(e). Under the civil rule (like the federal rule), notice was sent only if requested by the deponent at the end of the deposition. The family law rule flipped that, making notice mandatory. (That used to be the federal rule until it was changed.) I revised the draft rule to incorporate the current rule's requirement that the officer must always notify the deponent. I did not, however, retain the requirement of signature, which also was deleted in the old federal rule in 1993 because court reporters often had a hard time getting the deponents to sign the transcript.]

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign and deliver to the officer a statement listing the changes and the reasons for making them.

(2) ***Officer's Certificate to Attach Changes.*** The officer must note in the certificate prescribed by Rule 57(f)(1) whether the officer received a statement of changes from the deponent and, if so, the officer must attach any changes the deponent made during the 30-day period. [**Note:** what if the trial or hearing is less than 30 days after the deposition?]

(f) Officer's Certification and Delivery; Documents and Tangible Things; Copies of the Transcript or Recording; Filing.

(1) ***Certification and Delivery.*** The officer must certify in writing that the deponent was duly sworn by the officer and that the deposition accurately records the deponent's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [witness's name]" and must promptly deliver it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) ***Documents and Tangible Things.***

(A) *Originals and Copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition—and any party may inspect and copy them—but if the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals—after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals after they are marked—in which event the originals may be used as if attached to the deposition.

(B) *Order Regarding the Originals.* On motion, the court may order that the originals be attached to the deposition until final disposition of the action.

(3) ***Copies of the Transcript or Recording.*** Unless the parties agree or the court orders otherwise, the officer must retain the record of a deposition according to the applicable records retention and disposition schedules adopted by the

Supreme Court. [**JWR Note:** Note that Family Law Rule 30(F)(3) requires that the record may not be kept outside Arizona. That is not part of the old Civil Rule 30(f). No idea why that provision was added and I don't recommend including it here.] Upon payment of a reasonable charge, the officer must provide a copy of the transcript or recording to any party or to the deponent.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who attends a noticed deposition in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who did not attend as a result of the lack of service. [Consider merging this with Rule 65(f) and the failure of a party to attend his or her deposition.]

COMMITTEE COMMENT

This rule is based upon Rule 30, Arizona Rules of Civil Procedure.

Committee Comment

1991 Amendment to [Civil] Rule 30(a)

Rule 30(a) is intended to address the problem of overuse of expensive and unnecessary depositions. Any party may take the deposition of any other party, including depositions taken under Rule 30(b)(6), the deposition of any disclosed expert, and the depositions of the custodian of documents without agreement or leave of court. Treating physicians are regarded as disclosed experts for purposes of this rule. Depositions of custodian taken as a matter of right shall be limited to questions necessary to secure the documents and to provide evidentiary foundation for their admissibility. The rule, along with Rule 26.1 and Rule 16, is intended to encourage voluntary disclosure of information between the parties and is further intended to require at a minimum consultation between counsel prior to the setting of depositions. Any party may take the deposition of any other party, including depositions taken under Rule 30(b)(6) and the deposition of any disclosed expert, without agreement or leave of court. Any other depositions must be taken either by agreement of the parties, on motion and order of the court, or pursuant to an order of the court following a Comprehensive Pretrial Conference under Rule 16. Refusing to agree to the taking of a reasonable and necessary deposition should subject counsel to sanctions under Rule 26(f).

Rule 58. [Reserved]

Rule 58. ~~Depositions by Written Questions~~ [Reserved]

~~(a) When a Deposition May Be Taken.~~

~~(1) *Depositions Permitted.* A party may, by written questions, depose: (A) any party; (B) any person disclosed as an expert witness under Rule 49(h); and (C) any document custodian in order to secure production of documents and establish evidentiary foundation. [Note: Unlike Rule 57, Rule 58 does not permit the deposition of a party's current spouse.] Unless all parties agree, the court orders otherwise for good cause, or by court order following a resolution management conference, a party may not, by written questions, depose any other person or depose a person who has already been deposed in the action. A party may not unreasonably withhold its agreement to additional depositions under this rule.~~

~~(2) *Service of Written Questions by Plaintiff Earlier Than 30 Days After Serving the Summons and Complaint.* Unless a defendant has served a deposition notice or otherwise sought discovery under these rules, a plaintiff must obtain leave of court to serve written questions under Rule 58(b) earlier than 30 days after serving the summons and complaint on that defendant.~~

~~(3) *Incarcerated Deponents.* Subject to Rule 58(a)(1), a party may depose an incarcerated person only by agreement of the person's custodian or by leave of court on such terms as the court orders.~~

~~(4) *Compelling Attendance of Deponent.* A party may compel a nonparty deponent's attendance by serving a subpoena under Rule 52. A party noticing the deposition of a party—or an officer, director, or managing agent of a party—need not serve a subpoena under Rule 52.~~

~~(b) Notice; Service of Questions and Objections; Questions Directed to an Entity.~~

~~(1) *Service of Written Questions; Required Notice.* A party who wants to depose a person by written questions must serve them on all parties, with a notice stating, if known, the deponent's name and address. If the deponent's name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.~~

~~(2) *Service of Additional Questions.* Unless the parties agree or the court orders otherwise, any additional questions to the deponent must be served on all parties as~~

~~follows: cross-questions, within 15 days after being served with the notice and direct questions; redirect questions, within 5 days after being served with cross-questions; and recross-questions, within 5 days after being served with redirect questions.~~

~~(3) *Service of Objections.* A party who objects to the form of a written question served under Rule 58(b)(1) or (2) must serve the objection in writing on all parties within the time allowed for serving the succeeding cross-, redirect, or recross-questions, or, if to a recross-question, within 5 days after service of the recross-questions.~~

~~(4) *Questions Directed to an Entity.* In accordance with Rule 57(b)(6), a party may depose by written questions a public or private corporation, a limited liability company, a partnership, an association, a governmental agency, or other entity.~~

~~(c) Delivery to the Officer; Officer's Duties. The party who noticed the deposition must deliver to the officer designated in the notice a copy of the notice and copies of all the questions and objections served under Rule 58(b). The officer must promptly proceed in the manner provided in Rule 57(b), (c), (e), and (f) to:~~

~~(1) take the deponent's testimony in response to the questions;~~

~~(2) prepare and certify the deposition; and~~

~~(3) deliver it to the party who noticed the deposition, attaching a copy of the notice, the questions, and the objections.~~

~~COMMITTEE COMMENT~~

~~This rule is based upon Rule 31, Arizona Rules of Civil Procedure.~~

Rule 79. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion.

(1) ***Claimant.*** A claimant may move for summary judgment only after:

(A) the date when a responsive pleading is due from the party against whom summary judgment is sought; or

(B) the filing of a Rule 32(b)(6) motion to dismiss or a summary judgment motion by the party against whom summary judgment is sought.

(2) ***Other Parties.*** Any other party may move for summary judgment at any time after the action is commenced.

(3) ***Filing Deadline.*** A summary judgment motion may not be filed later than the dispositive motion deadline set by the court or local rule, or absent such a deadline, 90 days before the date set for trial. [**Workgroup note:** "hearing" v "trial" TBD]

(c) Procedures.

(1) ***Oral Argument.*** On timely request by any party, the court must set oral argument, unless it determines that the motion should be denied or the motion is uncontested. The court may set oral argument even if not requested by a party.

(2) ***Opposition and Reply.*** An opposing party must file a response and any supporting materials within 30 days after the motion is served. The moving party must serve any reply memorandum and supporting materials 15 days after the response is served.

(3) ***Supporting and Opposing Statements of Fact.***

(A) *Moving Party's Statement.* The moving party must set forth, in a statement separate from the supporting memorandum, the specific facts relied on in support of the motion. The facts must be stated in concise, numbered paragraphs. The statement must cite the specific part of the record where support for each fact may be found.

(B) *Opposing Party's Statement.* An opposing party must file a statement in the form prescribed by Rule 79(c)(3)(A), specifying:

(i) the numbered paragraphs in the moving party's statement that are disputed; and

(ii) those facts that establish a genuine dispute or otherwise preclude summary judgment in favor of the moving party.

(C) *Joint Statement.* In addition or as an alternative to submitting separate statements under Rule 79(c)(3)(A) and (B), the moving and opposing parties may file a joint statement in the form prescribed by this rule, setting forth those facts that are undisputed. The joint statement may provide that any stipulation of fact is not binding for any purpose other than the summary judgment motion.

(4) ***Objections to Evidence.*** A party objecting to the admissibility of evidence submitted by another party must raise the objection in the party's response or reply, or state the objection concisely in an opposing statement of facts, and not in a separate motion to strike.

(5) ***Affidavits.*** An affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If an affidavit refers to a document or part of a document, a properly authenticated copy must be attached to or served with the affidavit.

(6) ***Other Materials.*** Affidavits may be supplemented or opposed by deposition excerpts, interrogatory responses, admissions, additional affidavits, or other materials that would be admissible in evidence.

(d) When Facts Are Unavailable to the Opposing Party; Request for Rule 79(d) Relief; Expedited Hearing.

(1) ***Requirements.*** If an opposing party cannot present evidence essential to justify the party's opposition, that party may file a request for relief and expedited hearing. The request must be titled: "Request for Rule 79(d) Relief and for Expedited Hearing." The request must be accompanied by:

(A) a supporting affidavit establishing specific and adequate grounds for the request and addressing, if applicable, the following:

(i) the particular evidence beyond the party's control;

(ii) the location of the evidence;

(iii) what the party believes the evidence will reveal;

(iv) the methods to be used to obtain it;

(v) an estimate of the amount of time the additional discovery will require; and

(B) a good faith consultation certificate complying with Rule 7.1(h). [Note: The FLR do not include an equivalent of Rule 7.1(h). Civil Rule 7.1(h) says, in part: "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." Consider including an exception for self-represented litigants when there is a protective order or potential for violence.]

(2) ***Effect.*** Unless the court orders otherwise, a request for relief under Rule 79(d)(1) does not by itself extend the date for an opposing party to file a responsive memorandum and separate statement of facts under Rule 79(c).

(3) ***Responses to Request.*** Unless the court orders otherwise, the party moving for summary judgment is not required to respond to a Rule 79(d) request for relief. If such a party elects to file a response, it must be filed no later than two days before any hearing scheduled to consider the requested relief.

(4) ***Expedited Hearing.*** The court must hold an expedited hearing, in person or by telephone, within 7 days after a request is filed in compliance with Rule 79(d)(1). If the court's calendar does not allow a hearing within 7 days, the court should set a hearing date at the earliest available time allowed by the court's calendar.

(5) ***Relief.*** When a request is filed in compliance with Rule 79(d)(1), the court may, after holding a hearing:

(A) defer considering the summary judgment motion and allow time to obtain affidavits or to take discovery before a response to the motion is required;

(B) deny the requested relief and require a response to the summary judgment motion by a date certain; or

(C) issue any other appropriate order.

(e) Failing to Properly Oppose a Motion. When a summary judgment motion is made and supported as provided in this rule, an opposing party may not rely merely on allegations or denials of that party's own pleading. The opposing party must, by affidavits or as otherwise provided in this rule, set forth specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment, if appropriate, shall be entered against that party.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmoving party;

(2) grant summary judgment on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Declining to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, or if judgment is not rendered on the whole case under Rule 79(f), the court may enter an order identifying any material factthat is not genuinely in dispute and treat the fact as established in the case.

(h) Affidavit Submitted in Bad Faith. If a Rule 79 affidavit is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, incurred as a result, or may impose other appropriate sanctions.

Rule 79. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion.

(1) ***Claimant.*** A claimant may move for summary judgment only after:

(A) the date when a responsive pleading is due from the party against whom summary judgment is sought; or

(B) the filing of a Rule 32(b)(6) motion to dismiss or a summary judgment motion by the party against whom summary judgment is sought.

(2) ***Other Parties.*** Any other party may move for summary judgment at any time after the action is commenced.

(3) ***Filing Deadline.*** A summary judgment motion may not be filed later than the dispositive motion deadline set by the court or local rule, or absent such a deadline, 90 days before the date set for trial. [**Workgroup note:** "hearing" v "trial" TBD]

(c) Procedures.

(1) ~~***Hearings***~~ ***Oral Argument*****.** On timely request by any party, the court must set oral argument, unless it determines that the motion should be denied or the motion is uncontested. The court may set oral argument even if not requested by a party.

(2) ***Opposition and Reply.*** An opposing party must file ~~its~~ a response and any supporting materials within 30 days after the motion is served. The moving party must serve any reply memorandum and supporting materials 15 days after the response is served.

(3) ***Supporting and Opposing Statements of Fact.***

(A) *Moving Party's Statement.* The moving party must set forth, in a statement separate from the supporting memorandum, the specific facts relied on in support of the motion. The facts must be stated in concise, numbered

paragraphs. The statement must cite the specific part of the record where support for each fact may be found.

(B) *Opposing Party's Statement.* An opposing party must file a statement in the form prescribed by Rule 79(c)(3)(A), specifying:

(i) the numbered paragraphs in the moving party's statement that are disputed; and

(ii) those facts that establish a genuine dispute or otherwise preclude summary judgment in favor of the moving party.

(C) *Joint Statement.* In addition or as an alternative to submitting separate statements under Rule 79(c)(3)(A) and (B), the moving and opposing parties may file a joint statement in the form prescribed by this rule, setting forth those facts that are undisputed. The joint statement may provide that any stipulation of fact is not binding for any purpose other than the summary judgment motion.

(4) ***Objections to Evidence.*** ~~Rule 7.1(f)(3) governs objections to the admissibility of evidence on summary judgment motions, but an objection may be included in a party's response to another party's separate statement of facts in place of, or in addition to, including it in the party's responsive memorandum. Any objection presented in the party's response to the separate statement of facts must be stated concisely. [*Alternative:*~~ A party objecting to the admissibility of evidence ~~offered~~ submitted ~~on~~ by another party must raise the objection in the party's response or reply, or state the objection concisely in an opposing statement of facts, and not in a separate motion to strike. ~~An objection also may be made in a party's response to another party's separate statement of facts, but it must be stated concisely.] [**Note:** The FLR do not include an equivalent of Rule 7.1(f).]~~

(5) ***Affidavits.*** An affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If an affidavit refers to a document or part of a document, a properly authenticated copy must be attached to or served with the affidavit.

(6) ***Other Materials.*** Affidavits may be supplemented or opposed by deposition excerpts, interrogatory responses, admissions, additional affidavits, or other materials that would be admissible in evidence.

(d) When Facts Are Unavailable to the Opposing Party; Request for Rule 79(d) Relief; Expedited Hearing.

(1) ***Requirements.*** If an opposing party cannot present evidence essential to justify ~~its~~ the party's opposition, ~~it~~ that party may file a request for relief and expedited hearing. The request must be titled: "Request for Rule 79(d) Relief and for Expedited Hearing." The request must be accompanied by:

(A) a supporting affidavit establishing specific and adequate grounds for the request and addressing, if applicable, the following:

(i) the particular evidence beyond the party's control;

(ii) the location of the evidence;

(iii) what the party believes the evidence will reveal;

(iv) the methods to be used to obtain it;

(v) an estimate of the amount of time the additional discovery will require; and

(B) a good faith consultation certificate complying with Rule 7.1(h). [Note: The FLR do not include an equivalent of Rule 7.1(h). Civil Rule 7.1(h) says, in part: "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." Consider including an exception for self-represented litigants when there is a protective order or potential for violence.]

(2) ***Effect.*** Unless the court orders otherwise, a request for relief under Rule 79(d)(1) does not by itself extend the date for an opposing party to file ~~its~~ a responsive memorandum and separate statement of facts under Rule 79(c).

(3) ***Responses to Request.*** Unless the court orders otherwise, the party moving for summary judgment is not required to respond to a Rule 79(d) request for relief. If such a party elects to file a response, it must be filed no later than two days before any hearing scheduled to consider the requested relief.

(4) ***Expedited Hearing.*** The court must hold an expedited hearing, in person or by telephone, within 7 days after a request is filed in compliance with Rule 79(d)(1). If the court's calendar does not allow a hearing within 7 days, the court should set a hearing date at the earliest available time allowed by the court's calendar.

(5) ***Relief.*** When a request is filed in compliance with Rule 79(d)(1), the court may, after holding a hearing:

(A) defer considering the summary judgment motion and allow time to obtain affidavits or to take discovery before a response to the motion is required;

(B) deny the requested relief and require a response to the summary judgment motion by a date certain; or

(C) issue any other appropriate order.

(e) Failing to Properly Oppose a Motion. When a summary judgment motion is made and supported as provided in this rule, an opposing party may not rely merely on allegations or denials of ~~its~~ that party's own pleading. The opposing party must, by affidavits or as otherwise provided in this rule, set forth specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment, if appropriate, shall be entered against that party.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmoving party;

(2) grant summary judgment on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Declining to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, or if judgment is not rendered on the whole case under Rule 79(f), the court may enter an order identifying any material fact ~~including an item of damages or other relief~~ that is not genuinely in dispute and treat~~ing~~ the fact as established in the case.

(h) Affidavit Submitted in Bad Faith. If a Rule 79 affidavit is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, incurred as a result, or may impose other appropriate sanctions.

Rule 82. Findings and Conclusions by the Court; Judgment on Partial Findings

(a) Findings and Conclusions.

(1) ***Generally.*** If requested before trial, the courtmust make separate findings of fact and conclusions of law. The findings and conclusions may be stated orally on the record after the close of the evidence or may appear in an opinion, minute entry, or memorandum of decision filed by the court. Judgment must be entered under Rule 81.

(2) ***For a Motion.*** The court is not required to state findings or conclusions in a ruling on any motion unless these rules provide otherwise.

(3) ***Effect of a Master's Findings and Conclusions.*** A master's findings and conclusions become the court's findings and conclusions to the extent adopted by the court.

(4) ***Contesting the Evidentiary Support.*** A party may contest the sufficiency of the evidence supporting the findings of fact, whether or not the party requested, objected to, or moved to amend the findings.

(5) ***Setting Aside the Findings.*** Findings of fact must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the credibility of witnesses.

(b) Amended or Additional Findings. On a party's motion filed no later than 15 days after the entry of judgment, the court may amend or make additional findings, and may amend the judgment accordingly. This deadline may not be extended by stipulation or court order, except as allowed by Rule 4. The motion to amend or make additional findings may be included in a motion for new trial under Rule 83.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment against that party on a claim or defense that can be maintained or defeated only with a favorable finding on that issue. A judgment on partial findings must be supported by findings of fact and conclusions of law if requested as required by Rule 82(a).

(d) Submission on Agreed Statement of Facts. The parties may submit a matter in controversy to the court on an agreed statement of facts, signed by them and filed with the clerk. The court must render its decision based on the agreed statement unless it finds the statement to be insufficient.

Rule 82. Findings and Conclusions by the Court; Judgment on Partial Findings

(a) Findings and Conclusions.

(1) ***Generally.*** ~~In any family law action in which there is a trial on the facts,~~ If requested before trial, the court~~, if requested before trial,~~ must ~~find~~ make separate findings of fact and ~~the facts specially and state its~~ conclusions of law ~~separately~~. The findings and conclusions may be stated orally on the record after the close of the evidence or may appear in an opinion, minute entry, or memorandum of decision filed by the court. Judgment must be entered under Rule 81.

~~**(2)** ***Not Required for Review.*** Requests for findings are not necessary for purposes of review. [**JWR Note:** I am not sure what this sentence means. Isn't this covered by (a)(5)?]~~

~~(3)~~**(2)** ***For a Motion.*** The court is not required to state findings or conclusions ~~if ruling~~ in a ruling on any motion ~~under Rule 32 or 79 or,~~ unless these rules provide otherwise~~, on any other motion~~.

~~(4)~~**(3)** ***Effect of a Master's Findings and Conclusions.*** A master's findings and conclusions~~, to the extent adopted by the court, must be considered~~ become the court's findings and conclusions to the extent adopted by the court.

~~(5)~~**(4)** ***~~Question~~Contesting the Evidentiary Support.*** A party may ~~later question~~ contest the sufficiency of the evidence supporting the findings of fact, whether or not the party requested, objected to, or moved to amend the findings~~, .objected to them, moved to amend them, or moved for partial findings.~~

~~(6)~~**(5)** ***Setting Aside the Findings.*** Findings of fact ~~, whether based on oral or other evidence,~~ must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the credibility of witnesses.

(b) Amended or Additional Findings. On a party's motion filed no later than 15 days after the entry of judgment, the court may amend ~~its findings —~~or make additional findings~~—~~, and may amend the judgment accordingly. This deadline may not be extended by stipulation or court order, except as allowed by Rule 4. The motion to amend or make additional findings may ~~accompany~~ be included in a motion for ~~a~~ new trial under Rule 83.

(c) Judgment on Partial Findings. If a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment against that party on a claim or defense ~~that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue~~ that can be maintained or defeated

only with a favorable finding on that issue. ~~The court may, however, decline to render any judgment until the close of the evidence.~~ A judgment on partial findings must be supported by findings of fact and conclusions of law if requested as required by Rule 82(a).

(d) Submission on Agreed Statement of Facts. The parties may submit a matter in controversy to the court on an agreed statement of facts, signed by them and filed with the clerk. The court must render its decision based on the agreed statement unless it finds the statement to be insufficient.

Rule 88. Judge's Inability to Proceed

If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed with the hearing or trial upon certifying familiarity with the record and determining that the action may be completed without prejudice to the parties. The successor judge must, at a party's request and if an adequate electronic record is unavailable, recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden. The successor judge also may recall any other witness.

COMMITTEE COMMENT

This rule is based on Rule 63, Arizona Rules of Civil Procedure.

Janet's proposed version:

If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed with the hearing or trial if that judge certifies familiarity with the record and determines that the action may be completed without prejudice to the parties. If an adequate electronic record is unavailable, the replacement judge must recall any witness if all of the following are true:

(a) it is requested by a party;
(b) the testimony is material and disputed; and
(c) the witness is available to testify again without undue burden.

The new replacement judge also may recall any other witness.

Rule 88. Judge's Inability to Proceed

If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed with the hearing or trial upon certifying familiarity with the record and determining that the action may be completed without prejudice to the parties. The successor judge must, at a party's request and if an adequate electronic record is unavailable, recall any witness whose testimony is material and disputed, and who is available to testify again without undue burden. The successor judge also may recall any other witness.

COMMITTEE COMMENT

This rule is based on Rule 63, Arizona Rules of Civil Procedure.

Janet's proposed version:

If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed with the hearing or trial if ~~the~~ that judge ~~is familiar~~ certifies familiarity with the record and determines that the action may be completed without ~~harm~~ prejudice to the parties. If an adequate electronic record is unavailable, the ~~new [replacement]~~ replacement judge must recall any witness if all of the following are true:

1. ~~1.~~ (a) ~~It~~ it is requested by a party;
2. ~~2.~~ (b) the testimony is material and disputed; and
3. ~~3.~~ (c) the witness is available to testify again without undue burden.

The new ~~[replacement]~~ replacement judge also may recall any other witness.