

Task Force on the Arizona Rules of Family Law Procedure

Meeting Agenda

Monday, June 11, 2018

10:00 AM to 4:00 PM

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

Item no. 1	Call to Order Introductory remarks	<i>Hon. Rebecca Berch and Hon. Mark Armstrong, Co-Chairs</i>
Item no. 2	Approval of the February 16, 2018 meeting minutes	<i>Justice Berch and Judge Armstrong</i>
Item no. 3	Review and discussion of formal and informal comments concerning the Task Force's Rule Petition No. 17-0054	<i>All</i>
Item no. 4	Review and discussion of: <ul style="list-style-type: none">• The Task Force's reply• Appendices to the reply• An implementation order	<i>All</i>
Item no. 5	Roadmap <ul style="list-style-type: none">• The deadline for filing the reply is July 6, 2018	<i>Justice Berch and Judge Armstrong</i>
Item no. 6	Call to the Public Adjourn	<i>Justice Berch</i>

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

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

Persons with a disability may request reasonable accommodations by contacting Sabrina Nash at (602) 452-3849. Please make requests as early as possible to allow time to arrange accommodations.

Task Force on the Arizona Rules of Family Law Procedure
State Courts Building, Phoenix
Meeting Minutes: February 16, 2018

Members attending: Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron, Hon. John Assini, Keith Berkshire, Cheri Clark by her proxy Tracy McElroy (by telephone), Hon. Suzanne Cohen, Helen Davis, Kiilu Davis, Hon. Karl Eppich, Mary Boyte Henderson, Joi Hollis (by telephone), David Horowitz, Hon. Paul McMurdie, Aaron Nash, Jeffrey Pollitt, Janet Sell, Hon. Peter Swann, Steven Wolfson, Gregg Woodnick

Absent: Annette Burns, Hon. Dean Christoffel

Guests: None

Administrative Office of the Courts Staff: Mark Meltzer, Angela Pennington, Jodi Jerich, Theresa Barrett

1. **Call to order; remarks by the Chair; approval of meeting minutes.** The Chair called the thirteenth Task Force meeting to order at 10:03 a.m. She advised that today's meeting would begin with a review and discussion of comments concerning the draft family law rules (version 01.04.2018). But she asked members to first consider the draft December 15, 2017 meeting minutes, and a member made this motion:

Motion: To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 013**

Judge Armstrong added that the Court recently accepted review of a case concerning the "special weight" (the phrase used in A.R.S. § 25-409) given to a fit parent's preferences in a conflict with the child's grandparents. The case is *Friedman v Roels*, 242 Ariz. 463 (App. 2017), review granted in Arizona Supreme Court No. CV-17-0225-PR.

2. **Disposition of comments concerning the 01.04.2018 draft rules.** Staff assembled all the comments submitted prior to the February 12 deadline in a table. Each comment had an assigned number and members discussed these comments sequentially. An additional comment submitted by Ms. Madsen earlier this week was separately included in the meeting materials. If these minutes do not discuss a specific comment, it is because members previously discussed the issue raised by the comment and believed their earlier discussion resolved the issue, or because the comment concerned such things as typographical or formatting errors.

1. *Mr. Smith's comment regarding Rule 72.* This comment was addressed by the 01.04.2018 draft.

Family Law Rules Task Force: Draft minutes
02.16.2018

2. *Mr. Rogers' comment regarding Rule 17.* Rule 17, which concerns sealing, parallels new Civil Rule 5.4 on sealing. Mr. Rogers suggested substituting the word "overriding" for the word "compelling" in Rule 17, which would conform the civil and family rules. One member favored retaining the word "compelling" because it relates to an issue of constitutional dimension, but most members agreed to adopt Mr. Rogers suggestion if Rule 17 includes an explanatory comment. The Chairs will draft a comment.

3. *Ms. Piccarreta's comment regarding Rule 67.3*
considered in conjunction with
10. *Judge Bryson's comment regarding Rule 67.2.*

Rule 67.3(e) ("court-selected private mediator") refers to the court's selection of a private mediator, including choosing "from the court's own list of private mediators." Members agreed that the public might give greater weight to a court's list than it would to mediator lists from other sources. Moreover, those courts that maintain a list don't vet the individuals on it, and may not even set qualifications for inclusion on their list. One member had no objection to parties reviewing a list of names on a court's list, but objected to the court selecting an individual's name from the list to serve as the parties' mediator. Another member asked whether Rule 67.3(g) ("judges pro tempore as mediators") suggested a rent-a-judge philosophy, because the member believed there should not be a charge for a pro tempore's service. But another member believed that the express purpose of Rule 67.3(g) was to allow parties to compensate a pro tempore's service as a private mediator, and contended that merely removing the word "private" from Rule 67.3(g)(1) would not fulfill the rule's intended purpose. One member proposed deleting Rule 67.3(g)(4) ("payment for a judge pro tempore's services") in its entirety. But another member stated that deleting Rule 67.3(g)(4) would gut the entire section. One member recalled an ethics opinion on whether a judge pro tempore could receive compensation for services as a mediator under the circumstances posed by the rule, and members agreed to look for and review the opinion. Other members suggested retaining these rules as currently drafted and requesting formal comments.

Rule 67.2(g), which is a uniform rule, includes a provision about the court's selection of an arbitrator if the parties' selection of an arbitrator in their agreement fails (for example, the arbitrator is no longer available to serve). A member thought that if there was a question about who the parties chose as their arbitrator, then the parties might not have an agreement. The parties could ask the court to interpret the agreement, but they shouldn't ask the court to pick an arbitrator for them.

After further discussion, members agreed to the following changes to Rules 67.2 and 67.3:

Family Law Rules Task Force: Draft minutes
02.16.2018

In Rule 67.2(g), to remove subpart (3), which provided, “If an arbitrator is unable or unwilling to act or if the agreed-on method of selecting an arbitrator fails, on motion of a party, the court will select an arbitrator.”

In Rule 67.3(e), to remove only the last clause [shown by strikethrough as follows]: “**Court-Selected Private Mediator**. The parties may ask the court to select a mediator for them from a list of private mediators they provide to the court, ~~or from the court’s own list of private mediators.~~”

Members made no changes to Rule 67.3(g)(4), but they agreed that the rule petition should request comments on issues raised by that provision.

4. *Ms. Kane’s comment regarding Rule 10 and attorney’s fees.* Members discussed the question this comment raised about Rule 10 (whether BIA and GAL were interchangeable terms), but they concluded that clarifying changes to the draft were unnecessary. The Chair and staff will discuss uniformity in the punctuation and spelling of attorney’s fees after today’s meeting.

5. *Mr. Evans’ comment regarding Rule 77.* Members discussed whether Rule 77 (“trials”) includes an implicit requirement that a party confer with other parties before requesting a continuance from the court. After this discussion, they agreed that any provision on continuances should be broad enough to apply to other proceedings and not just trials, and that this provision is inappropriately located in Rule 77. They further agreed that the Chairs and staff should draft a comparable provision that would apply to any proceeding, and locate this new provision in a rule that is currently reserved (a member suggested Rule 34). Members requested that the new provision address the need to confer when there are domestic violence issues; and that it address reasonable but unsuccessful attempts to confer.

6. *Ms. Burns’ comment regarding Rules 12, 29, 37, and 40.* The current draft has already corrected the misspellings and erroneous rule cross-references noted in this comment. In response to the perceived ambiguity in Rule 40(g) concerning the word “return,” a member suggested expanding the term to “return of service,” and the Chairs will take this suggestion under consideration.

7. *Ms. Hill’s comment regarding Rule 47.* The Chair acknowledged Ms. Hill’s concerns regarding the resolution management conference, but noted that the Task Force previously had a lengthy discussion on the issue and that the issue also was presented in the rule petition. Members took no further action to modify the draft rule.

8. *Ms. Greene’s comment regarding Form 2.* Mr. Nash and other members agreed that it would be helpful, especially for self-represented litigants, to have further

Family Law Rules Task Force: Draft minutes
02.16.2018

directions on Form 2, the AFI, about not filing sensitive information. Mr. Nash suggested that the directions use the word “redact,” and that the form define “redact.” Members offered “blank out” or “black out” as possible substitute terms. Mr. Nash will check whether the clerk already has standard language on this point.

9. *Professor Atwood’s comment regarding Rules 67.1 and 67.2.* At the Chairs’ direction, references to “must/may” in the 01.04.2018 version of Rule 67.2 were corrected in the 02.12.2018 version to say “must.” Staff has not yet made the necessary numbering and lettering changes, but these will be done before filing the petition.

10. See number 3 above.

11. *Judge Swann’s comment regarding Rule 95.* Judge Swann discussed a possible conflict between Rules 72/74, which require the parties’ consent for services under those rules, and Rule 95(b), behavioral or mental health services, which does not require consent. His concern was that the court might, for example, appoint a private custody evaluator under Rule 95(b), and require the parties to pay the evaluator without their consent to the appointment. Members acknowledged that substance abuse services under section (c) or other services under the rule would not require a party’s consent. After discussing the issue, members made changes to the second sentence of Rule 94(a), which then read: “The court must determine on the record whether the parties have the ability to pay for services as well as allocate the costs of those services.” To minimize the possibility of conflict with Rules 72/74, members also agreed to delete from the first sentence of Rule 95(a) the words, “in addition to services described in other rules.”

12. *Ms. Clairmont’s comment regarding various rules.* Ms. Clairmont proposed adding to Rule 2(d) the words, “as required by Rule 49 or by court order.” After considering *Hays v Gama*, members discussed an alternative modification: adding the words “except as otherwise provided by law.” But after further discussion, members agreed that the concept is adequately covered by other rules, e.g., Rules 49 and 65, and that section (d) was unnecessary. They accordingly deleted Rule 2(d). While still on Rule 2, Judge Armstrong advised that the Court adopted Evidence Rule 807, a rule on the residual hearsay exception, and members modified Rule 2(b) to include a reference to the rule.

Members considered the suggestion for additional definitions in Rule 3, but they declined to adopt any. They agreed that the explanation of “next day” in Rule 4 was not helpful, and they deleted it. Ms. Clairmont’s comment suggested inclusion in Rule 5.1 of a method of communication between the family and juvenile benches, and although members agreed there should be such a method, they did not believe it needed to be based in a court rule. Regarding Rule 8, and what constituted a “reasonable opportunity to respond,” members agreed that what is reasonable depends on the context of each case, which the judge will determine. Members previously had lengthy discussions regarding

Family Law Rules Task Force: Draft minutes
02.16.2018

Rule 9(c) and a good faith consultation certificate. They agreed that the rule's intent was that counsel have a conversation, whether by phone or in-person, and they declined to include consultation via email exchanges. Except for Rule 49, most of the remaining comments concerned spelling and formatting errors, which the next draft will address. The comment on Rule 49 inquired about the authority of different counties to adopt modified forms, and particularly Pima County's adoption of an alternative AFI. Pima County's AFI was included in its local rules, which were approved by the Supreme Court, and members believe the form is accordingly authorized. Members made no changes to Rule 49.

13. *Staff's comment regarding Rules 82 and 83.* Staff proposed removing the words "supplemental hearings" from the title of Rule 83 because taking additional testimony, i.e., holding a supplemental hearing, is just one of several choices permitted under Rule 83(b). Putting those words in the rule's title gave undue emphasis to that option. Staff also believed there was an inconsistency in allowing 15 days for filing a Rule 82(b) motion to amend findings, but allowing 25 days for a motion to amend findings under Rule 83(b). For consistency, staff proposed changing the time in Rule 82(b) to 25 days. The Chairs concurred with these changes, which were shown in the current draft, and members did not object to the changes.

14. *Judge Hancock's comment regarding Rules 5, 5.1, 17, 47, 91, and 92.* The comment questioned why Rule 5 disallowed consolidation of a protective order proceeding with a family law action. Members agreed that this couldn't occur because of a change in a federal law during the pendency of the current rule. (The federal law is the Violence Against Women Act, 42 U.S.C. §§ 13701 through 14040.) Members agreed to note this in the petition. Members declined to adopt the comment concerning Rule 5.1 because when a court has multiple departments, one department should not direct another. Members agreed that court-ordered redactions under Rule 17 could become burdensome, but the comment focused on the AFI and the court's burden of redactions to the AFI should be mitigated by the adding redaction directions on Form 2 and a change to Rule 43.1(g) that would permit the clerk to treat the AFI as a confidential document. Members did not find inconsistencies between Rules 47 and 76 and made no changes. They also agreed that Rule 91(e), which provides that "a petition that requests a contempt remedy must comply with this rule and Rule 92," addressed the issue the comment raised.

15. *Mr. Halterman's comment regarding Rules 6, 10.1, 12, and 84.* Mr. Halterman's 3-page comment included a proposed modification to Rule 6(f) to allow a second notice of change of judge following a remand. Members had previously discussed this circumstance and declined to revisit the issue. Members then discussed the comment's suggestion that Rules 10.1 and 12 should require CAAs to record an interview of a child. Members declined to do so because CAAs don't do forensic interviews, recording could

be cumbersome, and the requirement might discourage CAAs from involvement in a case.

Members then discussed the comment's suggestion that Rule 84 expressly allow the filing of a motion for reconsideration. Some members noted that parties would probably continue to file motions for reconsideration even in the absence of any rule authority, or they would file them under Rule 35. After discussion, members declined to add motions for reconsideration back to Rule 84. However, they acknowledged that judges should have a vehicle to correct mistakes in interim orders and the rules should provide a way for parties to bring these issues to the court's attention. They therefore agreed to add a provision—either as a new section of Rule 35, as a new Rule 35.1, or as one of the reserved rules—permitting motions for reconsideration. Members gave the Chairs discretion about where to locate this provision, and its substance, although they believe it should be modeled on current Civil Rule 7.1(e).

16. *Mr. Norris' comment regarding Rule 12 and the rules generally.* In response to a comment concerning making the FLR more user-friendly for self-represented litigants, the Chairs recognized the members' previous discussions on this issue and their plans for explanatory booklets for those litigants. The comment proposed adding the word "permanency" in the family rules, but members did not support that addition. Finally, regarding interviews of children, members shared the comment's aspiration of having reliable information, but they believed there are multiple factors in achieving this goal and that the comment's proposed change might not produce the hoped-for result.

17. *Staff's comment regarding Rules 43 and 47.* Staff noted that current Rules 43(B) ("service; parties served; continuance") and 47(J) ("summary temporary child support order") were not included in the Task Force draft, and asked whether these were intentionally omitted. Members agreed that although there would not be several respondents in a case, there could be several third parties, and without objection, members agreed to add the substance of Rule 43(B) to the draft. They also agreed that Rule 47(J) was intentionally omitted.

18. *Ms. Madsen's comment regarding various rules.* Members declined to adopt additional changes to Rule 2 following their prior and extensive discussions of this rule. They declined to add a definition of intervenor to Rule 3. Members discussed the issue raised in the comment concerning in-home dependency placement, but draft Rule 5.1(d) already allows the juvenile court to establish child support and the trial court should address the issue when it comes up. Proposed Rule 6.1(d) is like the corresponding civil rule, and the comment pertains to one-judge counties, which are few, and members made no changes to this rule. Members revisited Rule 9(c), but they believed their draft rule required no further changes. However, one member suggested that a standard form for a good faith consultation certificate might address Ms. Madsen's concerns, and this led to a brief but general discussion on family law forms. Several members have discussed

forms in workgroup settings, but it appears additional forms will not be completed before the Task Force files its rule petition. However, Judge Armstrong observed that the term of this Task Force extends to the end of 2018, and the Task Force therefore will have an opportunity to address forms later. The members who are working on forms will provide an update at the next Task Force meeting.

Members did not believe that Rule 20 required further clarification. However, they added the words, “or in an action for” to Rule 27(b). In Rule 29, they agreed to change “responding defendant” to “responding third-party.” A member proposed modifying Rule 29(b) in a way that would permit a party’s response to a motion to be in the form of a motion to dismiss that motion. After discussion, members declined to make this modification, but they agreed to note the member’s proposal in the rule petition. Finally, members discussed a comment from Ms. Madsen concerning Rule 45 that suggested the adoption of clearer language concerning genders. Members believed that Rule 45’s content was appropriate and accurately mirrored statutory language.

The Chairs expressed their appreciation to all those who submitted comments for their pre-filing review of the draft rules and for their thoughtful suggestions. These comments improved the proposed rules.

3. Draft rule petition and appendices to the petition. The Chair advised that the draft rule petition, which was included in the meeting materials, will require further revisions based on today’s discussions. Members agreed that Appendix C, which contains conforming amendments to ARCAP 9, is straightforward and requires no additional edits. They also agreed that Appendix B—the contemplated appendix containing rule-by-rule summaries of each draft rule—would not be necessary given the depth of explanations concerning substantive changes in the rule petition and in the prefatory comment.

The Chairs requested that members notify staff of any proposed edits to the correlation table. The correlation table will be included with the proposed rules. Judge Armstrong advised that he had already forwarded this table to a subject matter expert for her review.

There are three rule petitions pending in the current cycle concerning family law rules: R-17-0049, concerning Rule 72; R-18-0019, concerning Rule 65(A)(2)(b); and R-18-0023 concerning family law masters and parenting coordinators. The Chairs summarized these petitions, and members agreed that the petitions did not require modifications to the Task Force rules or its rule petition.

The Chair advised that the Task Force would not meet again before the filing of the rule petition in March. She asked the members for their authorization for the Chairs

Family Law Rules Task Force: Draft minutes
02.16.2018

and staff to edit and finalize the draft rule petition and companion documents. A member then made this motion:

Motion: The Chair and staff, and members working at the Chair's request, have the members' authority to edit and finalize the rule petition, including appendices, and to revise the proposed rules, consistent with the letter and spirit of today's discussion. Seconded and passed unanimously. **FLR: 014**

4. Roadmap; call to the public; adjourn. The Chair informed the members of the need to set another Task Force meeting in June, after the comment period has ended, to discuss comments and to prepare a reply. Staff will poll the members to determine the best meeting date.

There was no response to a call to the public.

The Chair commended the members and staff for their continuing good work and dedication to this project. The meeting adjourned at 2:37 p.m.

FLR: Comment Summary

For the complete text of comments posted on the Rules Forum – click here	
Source + Date + Rule	Summary
<p>1. Lisa Boddington, Esq. Legal Forms Production Coordinator, Law Library Resource Center, Maricopa County Superior Court 3/23/18 Rules 23, 25, 40 Via email</p>	<p>“I reviewed the posted proposed Rules again and discussed the same with Judge Cohen. It appears that although the intent or the revision noted below was to make it so that petitions to establish legal decision-making and/or parenting time were to require a summons and thus a mandatory response, the current proposed Rules still state that no summons or mandatory response is required.</p> <p>“See Rules 23(a)(8), e(1); 25(c) and 40(1)(a).</p> <p>“As discussed with Judge Cohen, in order to resolve the issue, “establish legal decision-making or parenting time” could be moved from Rule 23(a)(8) and added after “paternity or maternity” under 23(a)(6).”</p> <p><u>Staff Note:</u> Staff said in a March 23 email to Task Force members:</p> <p>“By an email dated February 28, Ms. Lisa Boddington, an attorney with Maricopa County’s Law Library Resource Center, noted a contradiction in the draft rules. She pointed out that Rule <u>23(e)</u> did not require a response to a petition to establish or modify legal decision-making or parenting time that was filed under Rule 23(a)(8). But Rule <u>25(b)</u> required the clerk to issue a summons on that petition, rather than an OTA. Furthermore, Rule 40(a)(1) said, “pleadings that require a summons are petitions...to establish legal decision-making or parenting time by a parent.” Her comment resulted in revisions to Rule 25(b) and the addition of a new Rule 25(c), revisions to Rules 27(a) and (b), revisions to Rule 40(a), and conforming changes to other sections of those rules. The Task Force will discuss these revisions at its June meeting.”</p>
<p>2. Lisa Boddington 3/30/18 Rules 29, 45 Via email</p>	<p>“Rule 29(a)(1)(A)(ii) references additional time for a party to file a response if that party waives service pursuant to Rule 40(f) – however, Rule 40(f) only talks about acceptance of service or voluntary appearance. The language in Rule 29(a)(1)(A)(ii) looks like it was taken from the civil counterpart but not sure it should apply since the prefatory comments to the revisions specifically state the revised rules took out “waiver of service”.</p> <p>“Rule 45(a)(1) also makes reference to the party ‘waiving service’ which, based on the prefatory comments, should be removed (‘To obtain a consent decree for a dissolution or legal separation, the summons and petition must have been served on the respondent, or the respondent must have waived service, at least 60 days before the parties file the consent decree’).”</p>

FLR: Comment Summary

	<p><u>Staff Note:</u> Agree. These provisions should refer to an acceptance of service. See further the comment from the Pima County judges (comment 9 below) regarding Rule 29(a)(1).</p>
<p>3. Annette Burns and Janet Sell 3/26/18 Various rules Email</p>	<p><u>Staff Note:</u> Ms. Burns and Ms. Sell on behalf of the State Bar Family Practice and Procedure Committee recommended the following changes, which staff incorporated in the draft except as noted:</p> <p><u>Rule 47.2.</u> Title leaves out “parenting time” (says it’s only about legal decision-making)</p> <p><u>Rule 49m.</u> Title says “Discover” should be “Discovery”</p> <p><u>Rule 72.1(e)</u> has an excess phrase in the next to last sentence: “In making the determination, the professional must consider the availability of records and the cooperation of the parties in assisting the professional in making the determination.” [<u>Staff note:</u> Staff removed the first “in making the determination” rather than the second one.]</p> <p><u>Rule 76.1(g)</u> - Excess word: “Each of the parties much each file . . . “</p> <p><u>Rule 85(d)(2)</u> still refers to “defendant” [<u>Staff note:</u> Staff changed “defendant” to “respondent,” but should it be “party?”]</p> <p><u>Rule 91(k)(1):</u> The first word “If” needs to be capitalized in Subpart B (because the other two “ifs” are capitalized [<u>Staff note:</u> Staff made all the “if’s” lower case.]</p> <p><u>Rule 91.1(c)</u> requires the parties to file AFIs 30 days AFTER a conference or hearing, and we’re pretty sure that should be “before”</p> <p><u>Rule 91.1(b)(2)</u> is missing the word “support” after “child”</p>
<p>4. AOC April 2018 Rule 20 Verbal</p>	<p>The AOC’s Information Technology team has expressed concern with a provision in Rule 20(b) (“document format”). Subpart (b)(9) says, “Printed court forms may deviate from the requirements of this rule, but they must be single-sided. Forms provided by the superior court or the Supreme Court meet the requirements of this rule.”</p> <p>The concern is that with e-filing, many forms that are ultimately filed with the court are provided by e-filing vendors rather than the court. To address this, staff suggests the following change:</p> <p>“Printed court forms provided <u>by the court or a court-authorized vendor</u> may deviate from the requirements of this rule, but they must be single-sided. Forms provided by the superior court, or the Supreme Court, <u>or a court-authorized vendor</u> meet the requirements of this rule.”</p>

FLR: Comment Summary

<p>5. AZ Association of Superior Court Clerks 5/18/18 Rules 6, 7, 17 Rules Forum</p>	<p>The Clerk’s Association comment addresses three rules.</p> <p><u>Rule 6(g)(3)(A)</u>: Rule 6 is the rule concerning change of judge as a matter of right. Subpart (g)(3)(A) allows the parties to stipulation following the filing of a notice to the reassignment of a case to an available judge who agrees to the assignment. The provision corresponds to Civil Rule 42.1(f)(3). The clerks believe that the reassignment of judges by stipulation “will have a negative effect on the balance of judicial workloads, especially in rural counties with few judges and in courts that do not have a designated family department.” The clerks therefore request deletion of the stipulation provision.</p> <p><u>Staff Note</u>: The minutes of the April 26, 2018 meeting of the Commercial Court Review Committee include the following: “...a member inquired why parties were no longer exercising the option of stipulating to a judge under Civil Rule 42.1(f)(3). One of the judges explained that the stipulations became too frequent and disruptive, and because the rule requires a judge who was willing to accept the assignment, judges stopped accepting them.”</p> <p><u>Rule 7(h)</u>: This rule describes the clerk’s duty regarding a protected address. The proposed provision says, “The clerk’s duty to protect the address ends when the person whose address is protected files a notice of published address that sets forth the person’s current mailing address for future service.” The clerks believe this provision will “have a negative effect on records management because it creates a never-ending obligation.” They note that under the current rule, the duty ends at the adjudication of the initial or post-judgment petition. Moreover, individuals rarely file a notice with a new address. The clerks recommend restoring a time frame by adding this language to the above-quoted provision: “...or when the initial or post-judgment or petition has been fully adjudicated by the entry of a final appealable order, judgment, or decree, and the time to appeal has expired such that personal service is again required for later petitions under Rule 43(C)(2).” <u>Staff Note</u>: The Clerks’ reference should have been to Rule 43(c) of the Task Force draft [“Service After Judgment.”]</p> <p><u>Rule 17</u>: The comment says, “The Clerks support Rule 17 on sealing records. The Task Force rightly split from Civil Rule 5.4, which has proven difficult to implement....”</p>
<p>6. State Bar of AZ 5/21/2018 General comment + Rules 2, 41, 44.1, 44.2, 57, 59, 76 Rules Forum</p>	<p><u>Generally</u>: “With only a handful of exceptions, the State Bar supports the Petition of the Task Force on the Arizona Rules of Family Law Procedure... The State Bar believes that the proposed stylistic changes should be adopted because they would make the family law rules easier to understand and more accessible to the general public. Apart from the comments below, the State Bar also agrees with the proposed substantive changes to the family law rules.”</p> <p>The comment notes that four Task Force members also serve on the State Bar’s Family Law Practice and Procedure Committee.</p>

	<p><u>Rule 2 (“Applicability of the Arizona Rules of Evidence”)</u>: The comment states, “Proposed Rule 2 eliminates the automatic admissibility of the Affidavits of Financial Information or expert’s reports, even if the report was prepared pursuant to Court order. The State Bar understands the concerns related to expert reports. However, the State Bar believes that Affidavits of Financial Information should continue to be automatically admissible. Both the current Rules and Proposed Rules require parties to file Affidavits of Financial Information in certain circumstances. Proposed Rule 2 may create confusion or misunderstanding for unrepresented litigants.”</p> <p><u>Rule 41(m) (“Service by Publication”)</u>: This is the lengthiest of the State Bar’s comments on individual rules. It states:</p> <p>“Proposed Rule 41(m) removes the prohibition on obtaining a support order through publication. The State Bar is concerned about the due process implications of this change. The authority of the court to exercise personal jurisdiction over a party has two important components; minimum contacts with the jurisdiction and adequate notice. The Uniform Interstate Family Support Act, A.R.S. § 25-1221, provides important guidance on when the court may exercise long arm jurisdiction over parties to establish support. However, constitutional due process concerns govern the issue of adequate notice. ‘An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’ <i>Mullane v. Cent. Hanover Bank & Trust Co.</i>, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).</p> <p>“There is a split of authority across the country about whether support obligations may be obtained after service by publication. The State Bar believes that prohibiting establishment of support obligations after service by publication is the better public policy because such service is not calculated to provide actual notice to the party. For support proceedings, it is better practice to consider various other types of alternative service that would provide actual notice e.g. mailing to places of employment, posting on the door of residence wherein a party refuses to answer the door, email, mailing to relatives, and other creative approaches.</p> <p>“Default orders should be avoided whenever possible. These orders are generally less likely to get support to children because they are often not based on the paying parent’s real ability to pay’.¹ Permitting support orders to be established after service by publication encourages the entry of default orders. Furthermore, it is</p>
--	---

¹ Office of Child Support Enforcement “Entering Default Orders Bench Card, Child Support and the Judiciary”.

	<p>important to children that the court establish a realistic and appropriate order based on the paying parent’s real ability to pay support so that:</p> <ul style="list-style-type: none">• the parent can make regular child support payments that the children can depend on;• an uncollectible arrearage does not accrue; and• the paying parent is motivated to remain in the formal economy.² <p>“A party with no actual notice of the order cannot be expected to pay. In proposing to change this practice, the Taskforce relies on <i>Master Fin., Inc. v. Woodburn</i>, 208 Ariz. 70, 73, ¶ 11, 90 P.3d 1236, 1239 (App.2004). The commercial collection issues in that case are fundamentally different than the issues faced by parties in family support proceedings. In <i>Master Fin.</i>, and in the proposed comment to ARFLP Rule 41, it is suggested that any irregularities created by using service by publication can be cured by the party who was served by publication filing to set aside the judgment. This is an unrealistic expectation for the majority of self-represented litigants. These parties do not demonstrate the skills necessary to navigate this issue on their own, and the vast majority of them do not have the resources to obtain counsel. As such, this is an access to justice issue. Furthermore, proposed ARFLP Rule 83 limits the time period to have such an order set aside to one year from entry of judgment. This limitation bears no relationship to when the party actually learns of the default judgment.</p> <p>“If publication is to be allowed as a method of service in support cases, pre-authorization by the court should be required to determine whether ‘service by publication is the best means practicable in the circumstances for providing the person with notice of the action’s commencement’ as required by the rule. Judicial pre-authorization would be consistent with the practice required for other types of alternative service.”</p> <p>Staff Note: See comment #6 below, from the Department of Economic Security, and the Pima County Judges’ comment #9 below regarding Rule 41(m), which express similar views.</p> <p><u>Rule 44.1 (“Default Decree or Judgment by Motion and Without a Hearing”):</u> Section (e) of this rule is titled, “When Children Are Involved or a Party is Pregnant.” The section details 8 items that the default decree must include. Item 5 is “copies of the filing parent’s certificate of completion of the parent</p>
--	---

² Office of Child Support Enforcement - “Establishing Realistic Support Orders: Child Support and the Judiciary Bench Card.” See also **Project to Avoid Increasing Delinquencies: Establishing Realistic Child Support Orders: Engaging Noncustodial Parents, Office of Child Support Enforcement, Administration for Children & Families, U.S. Department of Health and Human Services.**

information program.” The State Bar’s comment says, “This should be revised to state ‘a copy of the filing parent’s certificate of completion of the parent information program, if it has not already been filed with the clerk of court.’ In Maricopa County, parties have the option of taking the parent information program online and the provider then e-files the certificate of completion. It may be unduly burdensome for self-represented parties to meet this requirement in this situation.”

Rule 44.2 (“Default Decree or Judgment by Hearing”): Section (b) of this draft rule says, “**Notice of Hearing.** If the defaulted party has appeared in the matter, that party or, if appearing by a representative, that party’s representative, must be served with written notice of the hearing not later than 3 days before the hearing.” The State Bar’s comment says, “Proposed Rule 44.2(b) would be clearer if it was revised to state, ‘service pursuant to Rule 43’ instead of simply stating ‘service.’ This would create more clarity for self-represented litigants. **Staff Note:** The draft does not use the word “service,” it says “served.” It appears that the State Bar’s request is for the rule to state, “...served under Rule 43 with written notice of the hearing....”

Rule 57 (“Depositions by Oral Examination”): [**Staff Note:** Because the Task Force proposes abrogation of current Rule 58 (“Depositions upon Written Questions”), the title of Rule 57 could be shortened to “depositions.”] The State Bar’s comment concerns Rule 57(a) (“When a Deposition May be Taken”), and a provision in that section that says, “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.” The State Bar’s comment says, “Proposed Rule 57(a) does not define the term ‘action.’ This may cause confusion as to whether or not depositions are precluded in post-decree matters. Either the term ‘action’ should be defined, or it should be stated that depositions are not precluded in post-decree matters if a deponent was deposed as part of a previous petition, pre or post decree.”

Rule 59 (“Using Depositions in Court Proceedings”): Rule 59(d)(3) says, “A party objecting to a deponent’s competence or to the competence, relevance, or materiality of testimony must make the objection before or during the deposition if the ground for the objection could have been corrected at that time.” The State Bar’s comment expresses concern that this may be confusing to attorneys and litigants.

Rule 76 (“Resolution Management Conference”): The State Bar’s comment says, “Proposed Rule 76(a) [“purpose and setting”] states that ‘the court may, and on a party’s request must, set an RMC.’ It would be unduly burdensome to require the

FLR: Comment Summary

	<p>Court and parties to participate in an RMC in every case where one is requested. For example, an RMC (on one party’s request) is unnecessary in some cases, such as establishment or enforcement of child support and the concern is that the RMC request may be used for purposes of delay or to waste the parties’ or Court’s resources. Statewide, counties utilize RMCs at varying rates, and it may be disruptive to well established practices to make them mandatory upon the request of a party.”</p>
<p>7. Dept. of Economic Security (Molly McCaihy) 5/30/18 Rule 41(m) Rules Forum</p>	<p>“On behalf of the Department of Economic Security/Division of Child Support Services (DCSS), I respectfully comment on the proposed changes to Rule 41 of the Arizona Rules of Family Law Procedure (ARFLP). DCSS is generally supportive of the changes made including the consolidation of former rules 41 and 42. However, DCSS has serious concerns with the proposed change that would allow child support and other family support obligations to be established after service by publication.</p> <p>“The due process goal of service is to provide parties with notice of the action and provide the opportunity to appear, participate and provide the court with their position and evidence. For this reason; many states decline to permit establishment of support obligations after service by publication. Because service by publication is not expected to provide actual notice to the party, it is DCSS's position that it is a better practice to avoid publication. For support proceedings, it is preferable to consider various types of alternative service that would provide actual notice. This may include first class mail to a confirmed address, mailing to relatives or places of employment, posting on the door of residence when a person refuses to answer the door or email. All of these alternatives have a better likelihood of achieving actual notice than publication.</p> <p>“Guidance from the Federal Office of Child Support Enforcement directs that default orders should be avoided whenever possible because default orders are often not based on the paying parent's real ability to pay and therefore do not get paid. Service by publication is, by its nature, the entry of default order without notice. While DCSS could elect not to use publication as a method of service when it obtains an order, DCSS will certainly be called upon to enforce orders obtained in this way and will have difficulty assessing the legitimacy of the service. It should be noted that a parent who is unable to find and serve the other parent with a request for support can apply for IV-D services from DCSS and the agency can use its myriad of locate resources to find the obligor and establish support.</p> <p>“Child support cases are very different than the commercial litigation involved in <i>Master Fin., Inc. v. Woodburn</i>, 208 Ariz. 70, 73, 11, 90 P.3d 1236, 1239 (App.2004). It is suggested that a person served by publication can simply move to set aside the judgment if it was not appropriately done. However, in IV-D litigation, the vast majority of parties are self-represented litigants who</p>

FLR: Comment Summary

	<p>would have great difficulty doing this. Most of them cannot afford to hire an attorney to represent them. Furthermore, proposed ARFLP Rule 83 limits the time period to have such an order set aside to one year from entry of judgment without regard to when actual notice occurs. DCSS sees this as a fundamental access to justice issue.</p> <p>“DCSS urges the court to reject this change to the rules allowing for publication. However, if publication is to be allowed, the rule should require pre-authorization by the court to determine whether "service by publication is the best means practicable in the circumstances for providing the person with notice of the action's commencement" as the proposed rule requires. Judicial pre-authorization is required for other types of alternative service.”</p>
<p>8. Ann Haralambie 6/1/18 Rule 47 Rules Forum</p>	<p>“I don't like the requirement in proposed Rule 47 for mandatory RMCs. I realize that this is the practice in Maricopa County, but Pina County [sic] does not require it, and it would impose multiple burdens on clients. Not including the additional attorneys fees for attending this 15 minute conference, many of our clients can't afford to take off time for work, arrange child care, and get themselves downtown for the hearing. This is really inconsiderate to our clients and to pro series [sic] litigants. In Pima County we have generally not been using RMCs in most cases to assist in settling cases or simplifying issues. If you must keep this in, please provide that it can be waived by local rule, since I am quite confident that the vast majority of Pima County family law practitioners oppose this.”</p>
<p>9. Pima County Judges 6/1/18 Multiple rules Rules Forum</p>	<p>“With only a handful of exceptions, the members of Pima County’s Family Law Bench support the Petition of the Task Force on the Arizona Rules of Family Law Procedure (“Task Force”) to amend the Arizona Rules of Family Law Procedure (“family law rules”) and related rules.</p> <p>“These comments are a compilation of comments by individual members of the family law bench, and they are not comments of the entire Family Law Bench or the Pima County Superior Court. Following are brief summaries [repeated verbatim from the comment] of the proposed revisions.</p> <p><u>Rule 7(d)(3)(A)</u>: There appears to be some language missing.</p> <p>Staff note: The comment is correct. The provision should say [the underlined language was missing]:</p> <p>(3) Later Orders. At any time, the court may order that a protected address is no longer protected:</p> <p>(A) <u>on request of the party whose address is protected; or</u></p> <p>(B) <u>after a hearing and on a finding that there is no reasonable belief that disclosure of the party’s address will cause the party or a minor child to suffer physical or emotional harm.</u></p>

Rule 13(c): Noting that requests to close the courtroom sometimes happen during a hearing based on information that may not have been known in advance, the suggestion is that this provision be revised such that “a *written* motion under this rule” must be filed not later than two days before the hearing or proceeding.

Staff note: The provision says, “An interested person must file and serve a motion under this rule not later than two days before the applicable hearing or proceeding.” The words “file and serve” imply a written motion, so other language might be necessary to address the issue the comment raises.

Rule 23(b): Suggestion is to rewrite this proposed rule part as follows:

(b) Notice of Filing Foreign Judgments

(1) A party may register a legal decision making and/or parenting time order from another state under A.R.S. § 25-1051 et seq. The party may then file a petition as referenced in (a)(8) above.

(2) A party may register a support order from another state under A.R.S. §§ 25- 1301 et seq. The party may then file a petition as referenced in (a)(9) above.

(3) A party may file a decree concerning disposition of property or spousal maintenance from another state under A.R.S. §§ 12-1701 et seq. The party may then file a petition as referenced in (a)(10) above specifying the relief sought.

Rule 23(d): Suggestion is to delete or move the provision. The statutes require a petition to be filed, and by themselves, such motions do not initiate a case.

Rule 25(c): Was it intentional to remove the requirement of a summons as to a Petition to Establish Legal Decision-Making and Parenting Time?

Staff Note: See comment #1.

Rule 25(f): Suggestion is to consolidate this provision with Rule 25(d) and renumber the remaining subparts accordingly.

Rule 27(c): Suggestion to modify title to read “Petition to Establish Legal Decision-Making...” Also, insert “summons” after “petition” in the next to last line.

Staff Note: See comment #1.

Rule 27(d): Delete “and (b)” and insert “through (c).”

Staff Note: See comment #1.

Rule 28(a): Change proposed Rule 28(a)(1)(C) to Rule 28(a)(2) with title “Amending by Leave of Court.” Also, move the last sentence of proposed Rule 28(a)(3) to its own subpart with title “Response to Amended Pleading.” Renumber remaining part of rule accordingly.

Staff Note: Suggestions are well-taken.

Rule 29(a)(1)(A)(i): Replace “complaint” with “petition”. Suggestion to include “order to appear” along with “summons.”

Staff Note: Suggestion is well-taken.

Rule 29(b): In second sentence, replace “But” with “However.”

Rule 29(a)(1)(A): Reword (ii) and new (iii) as follows for clarity:

- (ii) Within 60 days after the request for waiver was sent if the respondent or responding third-party has timely waived service under Rule 40(f) with the respondent or responding third-party is within any judicial district of the United States
- (iii) Within 90 days if after the request for waiver was sent if the respondent or responding third-party has timely waived service under Rule 40(f) with the respondent or responding third-party is outside any judicial district of the United States

Staff Note: Rule 40(f) eliminates the concept of waiving service. Instead, under the revised rule, a party may accept service. The provisions above must be modified accordingly.

Rule 29(c): There is a conflict between proposed Rule 29(c) and 29(g)(2) as Rule 29(c) seems to limit when a motion for failure to state a claim to only before the responsive pleading is filed, and (g)(2) provides that it may be raised at trial. Reorganize and reword as follows:

- (c) Time to Assert Certain Defenses; Waiver of Certain Defenses
 - (1) Lack of subject matter jurisdiction under subpart (b)(1) may be made at any time.
 - (2) The defenses listed in subpart (b)(2) through (5) must be made before filing or within a responsive pleading. A party waives these defenses by failing to timely:
 - (a) Make a motion under this rule; or
 - (b) Include it in a responsive pleading or an amendment to a pleading.

	<p>(3) Failure to state a claim upon which relief can be granted under subpart (b)(6), to join a person required by Rule 33(c), or to state a legal defense to a claim may be raised at any time prior to or at trial.</p> <p><u>Rule 29(g):</u> Delete as language moved up to (c).</p> <p><u>Rule 29(h):</u> Change title to insert “Defenses and ...”</p> <p><u>Rule 35:</u> It is suggested that the duty to consult found in proposed Rule 34(c) also be included in Rule 35.</p> <p><u>Rule 35.1:</u> Regarding motions for reconsideration, the suggestion is that similar to Rule 7.1(e), Ariz. R. Civ. P., provide that the court may order oral argument if it so desires.</p> <p><u>Staff Note:</u> Civil Rule 7.1(e)(2) provides: “(2) Procedure. All such motions, however denominated, must be submitted without oral argument and without the filing of a responsive or reply memorandum, unless the court orders otherwise. No motion for reconsideration may be granted, however, without the court providing all other parties an opportunity to respond.”</p> <p><u>Rule 39(a):</u> There are some stray dashes.</p> <p><u>Staff Note:</u> Agreed.</p> <p><u>Rule 41(m):</u> Adopt the State Bar’s comment to this proposed rule.</p> <p><u>Rule 70(a):</u> With regards to notices of settlement, the current rule only requires notice to the assigned judge/commissioner. With the proposed new rule requiring notice to three different entities at the court, there is a concern that the proposed rule is unnecessarily burdensome, especially given the difficulties of self-represented litigants navigating the system.</p> <p><u>Rule 72(b)-(j):</u> In terms of a family law master, the suggestion is to replace the term “order of reference” with “order of appointment.”</p> <p><u>Staff Note:</u> Suggest “appointment order” rather than “order of appointment.” In some provisions, the change could be accomplished by deleting the words “of reference,” for example, in Rule 70(b)(1)(A), which provides: “<i>Contents of Order</i>. The order of reference appointing a family law master must specify the particular issues referred to the master....”</p> <p><u>Rule 72(b)(2)(E):</u> Change “taxable cost” to “taxable costs” to be consistent with the prior reference to “allocated costs”</p>
--	--

Staff Note: Staff believes the word “taxable cost” is appropriate in the context of this provision, which provides, “The court must allocate the cost of creating the record among the parties, with allocated costs being treated as a taxable cost.”

Rule 72(e): In terms of the master circulating a draft before filing a report, was it intended to omit “Or the parties themselves if self-represented”?

Staff Note: The provision now says, “Before filing the report, a master may circulate a draft to the parties’ counsel and solicit their comments and suggestions.” Should it say, “to the parties?”

Rule 72(j): Apparently awkward phrasing of “undertaken under.” Suggestion to use phrasing “undertaken pursuant to.”

Staff Note: The provision now says, “**Immunity.** A family law master has immunity in accordance with Arizona law as to all acts undertaken under and consistent with the order of reference.”

Rule 72.1(b)-(e): In terms of a professional with special expertise, the suggestion is to replace the term “order of reference” with “order of appointment.”

Staff Note: Suggest “appointment order” rather than “order of appointment.”

Rule 73(a)(1): The prior version of the rule defined “support” as also including spousal maintenance for the purpose of this rule. Was this an intentional omission? Suggestion to be consistent with Rule 73(b), insert the term “spousal maintenance” after “child support,” and also “attorney fees” in Rule 73(a)(1).

Rule 74(l): Apparently awkward phrasing of “undertaken under.” Suggestion to use phrasing “undertaken pursuant to.”

Staff Note: The provision now says, “**Immunity.** The parenting coordinator has immunity in accordance with Arizona law as to all acts undertaken under, and consistent with, the court’s appointment order.”

Rule 76(a): Support for the State Bar’s comment to this proposed rule suggesting a deletion of the requirement that the court set an RMC.

Rule 83(b): Recommend revising the proposed rule to read as follows:

The court may on its own or, on motion, vacate the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment. The relief granted must be limited to the grounds justifying relief under this rule.

FLR: Comment Summary

	<p><u>Rule 83(c)(2)</u>: In light of busy family law calendar, there is a suggestion to expand the time for the court to act on the motion to 30 days, rather than 15 days, and to revise the proposal rule as follows:</p> <p style="padding-left: 40px;">Within 30 days or a reasonable time of the filing of a motion pursuant to this Rule, the court must either summarily deny the motion or provide the non-moving party an opportunity to file a response. The court may limit the scope of a response to specified issues. The court may not grant a motion without providing the nonmoving party an opportunity to file a response. The response deadline will be 30 days after the entry of an order allowing a response.</p> <p><u>Rule 83(e)</u>: Modify the title to read “Motion by the defaulted party after Service by Publication”</p> <p><u>Rule 85(A)</u>: Recommend to rephrase the third sentence to read: “After an appeal has been filed and is pending in an appellate court ...”</p> <p><u>Rule 91</u>: Support for the restructuring of Rule 91 into discrete rules.</p>
<p>10. Staff Rule 23 6/4/18</p>	<p>The title of Part II of the rules is “pleadings and motions.” Rule 23 is titled, “pleadings: petition and response.” But Rule 3 does not contain a definition of “pleadings,” and the term is not defined anywhere else in the rules.</p> <p>A definition is necessary because, for example, Rule 29 concerns motions for judgment on the pleadings, and presenting matters outside the pleadings. A definition would specify documents that constitute pleadings.</p> <p><u>Recommendation</u>: Add a definition in Rule 3 that defines “pleadings” as documents filed under Rules 23, 28, ad 33.”</p>