Task Force on the Arizona Rules of Family Law Procedure

Meeting Agenda

Monday, October 30, 2017

10:00 AM to 4:00 PM
State Courts Building * 1501 West Washington * Conference Room 230 * Phoenix, AZ

Item no. 1	**Call to Order** **Introductory remarks**	*Hon. Rebecca Berch and Hon. Mark Armstrong, Co-Chairs*
Item no. 2	**Approval of the September 29, 2017 meeting minutes**	*Justice Berch and Judge Armstrong*
Item no. 3	**Workgroup reports:** - **Workgroup 1: Rules 1 and 2** - **Workgroup 2: Rule 44 (including new Rule 44.1)** - **Workgroup 3: Rules 66, 67 (including new Rules 67.3 and 67.4), 68, and 71** - **Workgroup 4: Rules 77 and 81, and further review of Rule 78** - **Restyling review of Rules 23.1, 67.1, and 67.2**	 *Ms. Boyte-Henderson, Ms. Burns* *Ms. Clark* *Mr. Wolfson, Mr. Horowitz, Ms. Hollis* *Mr. Berkshire, Judge Eppich* *All*
Item no. 4	**Roadmap** - **Next meeting dates:** Monday, November 13 [Room 119] Friday, December 1 [Room 119] Friday, December 15 [Room 119]	*Justice Berch and Judge Armstrong*
Item no. 5	**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 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: September 29, 2017

Members attending: Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron, Hon. John Assini, Keith Berkshire, Annette Burns by her proxy Barry Brody, Cheri Clark, Hon. Suzanne Cohen by her proxy Hon. Katherine Cooper, Hon. Dean Christoffel, Kiilu Davis, Hon. Karl Eppich, Mary Boyte Henderson by her proxy Lindsay Cohen, Joi Hollis, David Horowitz, Hon. Paul McMurdie, Aaron Nash, Jeffery Pollitt, Janet Sell, Hon. Peter Swann, Steven Wolfson, Gregg Woodnick

Absent: Helen Davis

Guests: Chief Justice Scott Bales, Ed Pizarro Sr., Martin Lynch

Administrative Office of the Courts Staff: Mark Meltzer, Eva Carranza, Karla Williams, Jennifer Albright, Kay Radwanski, Julie Graber

1. Call to order; remarks by the Chief Justice and the Chair; approval of meeting minutes. The Chair called the eighth Task Force meeting to order at 10:03 a.m. She welcomed the proxies and the Chief Justice, who briefly addressed the Task Force. The Chief Justice commended the members' diligent work on this project. He is looking forward to their forthcoming rule petition, which will be the next in a series of significant rule restyling petitions. The Chair thanked the Chief Justice for his remarks. She then advised members that workgroups have met 40 times to-date. If all the rules on today's agenda are presented, the Task Force will have considered about two-thirds of the family law rules. She expressed her appreciation for the work of support staff, especially Ms. Williams and Ms. Nash. The Chair asked members to review the draft August 25, 2017 meeting minutes, and a member made this motion:

> **Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 008**

2. New rules adopted at the August rules agenda. Judge Armstrong summarized two new family law rules the Court adopted at its August rules agenda. The first rule, Rule 23.1, was proposed by Judge Cohen. It concerns family law petitions that are filed in an improper venue. The other new rule, Rule 67.2, is lengthier. It is a uniform rule on arbitration proceedings in family law actions. Both rules have a January 1, 2018 effective date. Members will not need to make changes to these rules, but staff will need to revise the section and paragraph designations of these two rules so they are consistent with the Task Force restyling conventions.

Judge Armstrong also noted the Court of Appeals opinion in *DiPasquale v DiPasquale* (1-CA-CV 16-0356 FC, filed 09.07.2017). The opinion deals with third-party practice in family-related actions, and it relied on Family Law Rule 33, which the Task Force discussed at the August 25 meeting. Although the case presented an unlikely

scenario, the fact that it occurred is justification for a rule that addresses the situation. Judge Armstrong accordingly suggested that the civil rules cross-referenced in Family Law Rule 33 now include Civil Rule 14, which concerns third-party practice. Members agreed with his suggestion.

Judge Armstrong again reminded members that they need to annotate substantive changes to each rule. This is important because the Task Force will need to compile these annotations in an appendix to its rule petition.

The Chair then requested reports from the workgroups.

3. **Workgroup 2.** Commissioners Christoffel and Assini presented Rules 40, 41, and 42. Mr. Nash presented Rule 46.

Rule 40 ("summons"): Commissioner Christoffel noted that following a suggestion from the Task Force at the last meeting, the workgroup made a single change to Rule 40(f). The Task Force requested an additional provision concerning acceptance of service of a post-decree petition. The workgroup accordingly added the words, "or Rule 91" to Rule 40(f), so it begins, "A party subject to service under this rule, Rule 41, Rule 42, or Rule 91, may accept service…." Members were satisfied that this addition adequately addressed the issue.

Rule 41 (formerly, "service of process within Arizona," and as proposed, "service within and outside Arizona;" and Rule 42, formerly, "service of process outside Arizona," and as proposed, "reserved"): Commissioner Christoffel recalled that the Task Force reviewed the majority of Rule 41 at the last meeting, but a couple issues remained pending. One of those issues concerned the effect of publication on the court's jurisdiction, and the other dealt with the feasibility of merging Rules 41 and 42 into a single rule.

Regarding the first issue, Commissioner Christoffel noted that under current Rules 41(N) and 42(E), service by publication does not confer jurisdiction for matters such as paternity, child support, spousal maintenance, division of marital property, "or any other issue requiring personal jurisdiction over a party." Comments to the current rules expressly say that the rules do not follow the holding in *Master Financial v Woodburn*, 208 Ariz. 70 (2004), a civil case dealing with the court's jurisdiction when the defendant was served by publication. Workgroup 2 now proposed (1) a deletion of those comments, (2) a revision to Rule 41 that strikes the jurisdiction provision in the section on service by publication, and (3) adding a new comment stating the rule now follows the holding in *Master Financial*, particularly paragraphs 15 through 22 of that opinion. Commissioner Christoffel reasoned that service, whether personal or by publication, provides notice of a suit, but it does not confer jurisdiction, and that for either type of service, the served party can challenge jurisdiction. The rule as revised would emphasize the need for the court to consider, when service was made by publication, whether the defendant had the requisite minimum contacts with Arizona to exercise personal jurisdiction; and it would allow the party served by publication to later challenge a jurisdictional finding. When a party is served by publication, a subsequent entry of judgment would require an on-the-

record hearing, which the served party could later review to support a challenge to the jurisdictional finding.

One member was concerned that alternative service requires court authorization, but a party needs no such authorization to serve by publication, which seemed incongruous. Commissioner Christoffel responded that a petitioner obtains authorization for alternative service by an *ex parte* motion, a one-sided proceeding without input from the respondent, whereas the respondent could directly challenge service by publication, which a fairer, two-sided proceeding. Other members noted that if a judgment for child support was entered after service by publication, it could result in a failure to pay warrant and the respondent's arrest, which they considered problematic. But Commissioner Christoffel suggested that when the respondent has been served by publication, a fact that should be noted in the court's file, the court should not issue a warrant without a showing that the respondent had actual notice of the judgment. Judge Armstrong added that current Rule 94(b) and A.R.S. § 25-681 require actual notice of an order before the court can issue a warrant. One member suggested that the Task Force consider adding a sentence to the proposed rule stating that it must not be utilized as a method to obtain the respondent's arrest, but members declined that suggestion.

In response to members' concerns that it would be disruptive if respondents served by publication had their bank accounts garnished, another member noted that civil judgment debtors who were served by publication also have their accounts garnished, sometimes for substantial sums. Civil defendants and family court respondents may both seek relief from garnishment or execution by timely challenging the court's jurisdiction to enter the underlying judgment. Another member observed that petitioners may serve by publication even when they know respondents' whereabouts, simply to avoid direct service. The Task Force has not yet considered Rule 44 on default judgments, but when it does, it should assure that the rule includes a provision that a petitioner who has obtained service by publication must show at the default hearing the rationale for using that method of service. After this discussion, the Chair observed that most members favored the revisions proposed by Commissioner Christoffel, but there were concerns as summarized above, and the rule petition should invite comments on those concerns.

Commissioner Assini addressed the second issue concerning the merger of Rules 41 and 42 into a single Rule 41. He noted that the current rules contain several duplicate provisions, and the merged version reduces duplication. The merged version proposes a change to the title of Rule 41 so it encompasses service within and outside Arizona. Commissioner Assini reviewed the changes in Rule 41(a) ("generally"), which includes provisions on jurisdiction, out-of-state service, and authority to serve a summons, which are currently contained in Rules 42(A) and (B). Proposed Rule 41(d) regarding "service by mail or national courier service" now applies to both in-state and out-of-state service. A new provision in Rules 41(d) and 41(g) ("serving an incarcerated person") requires an avowal in petitioner's affidavit that in addition to service by restricted mail or a national

courier service, the petitioner also sent copies of the documents being served to the inmate by first class mail. In Rule 41(m) ("service by publication"), the words "within or outside of Arizona" were added to clarify that it has application to in-state as well as out-of-state respondents. A new Rule 41(n) ("service in other circumstances") was added that contains cross-references to Civil Rules 4.1 and 4.2 for situations not covered by restyled Rule 41, for example, serving a corporation outside the United States. Members then raised the following questions:

- Why does the rule require direct service on a minor? As a collateral issue, is in-state service by mail an appropriate method of service, or should it instead be a variant of alternative service? In-state service by mail is not permitted under the civil rules, but it is allowed under current Family Rule 41, and the revised rule conforms to that. Otherwise, the requirements for service on a minor in draft Rule 41 conform to what is required under the corresponding civil rule.
- Under Rule 41(m), should service by publication also require petitioner to mail documents to respondent's last address, or to respondent's last-known address? After discussion, members agreed the rule should say, last-known address.
- In Rule 41(b), what is the meaning of the sentence, "Service is complete when made." Although the same sentence is contained in Civil Rule 4.1(b), and notwithstanding that eliminating the sentence would deviate from the civil rule, members thought the sentence was a tautology (i.e., service is complete when service is complete), and they deleted the sentence.

With the above changes and with due regard for the concerns noted above, members approved revised Rule 41, as well as Rule 42 as a reserved rule.

Rule 46 ("dismissal"): Mr. Nash explained that the restyled rule was largely adopted from Civil Rule 41, but it also includes elements from current Family Rule 46. Members changed the pronoun "their" in the draft to "its." One member suggested that if a hearing is pending on an order to appear, a notice of dismissal would not be sufficient to vacate the pending hearing, and the party should instead file a motion to dismiss. To the contrary, most members believed that a notice of dismissal could appropriately include a request to vacate the pending court date. Another member observed that a motion to dismiss should be directed at a pending petition, rather than an entire case; and that the rule should provide for dismissal of post-decree as well as pre-decree petitions. The member also suggested that Rule 46 should use the term "filing party," or "applicant," as the Task Force used in Rule 91. Members agreed to these changes. Members suggested revising language in the current rule about a failure to prosecute, but they disfavored the workgroup's alternative of "moving the case forward." However, members agreed to use the phrase, "take the steps required by these rules to resolve the case or petition." With these changes, members approved Rule 46.

4. **Workgroup 1.** Workgroup 1 presented Rules 20, 28, 30, and 31.

Rule 20 ("form of documents"): Mr. Woodnick highlighted the workgroup's changes. The workgroup eliminated a draft provision containing detailed requirements for a caption by tying those requirements to a Rule 97 form. The workgroup simplified Rule 20(b)(6) on handwritten documents to a single requirement: the document must be legible. Members agreed to remove a provision in draft Rule 20(b)(1) regarding line numbers along the left side of each page. One member suggested deleting a requirement in Rule 20(b)(4) for 13-point font. After discussion, members retained that requirement, and reinserted text the workgroup had deleted concerning preferred font styles. Mr. Nash had no suggested changes to Rule 20(c) concerning electronically filed documents. Members approved Rule 20 with these modifications.

Rule 28 ("required response"): Members previously reviewed this rule and returned it to the workgroup with its concerns. Mr. Woodnick presented a revised rule that the members approved with two caveats. First, Mr. Nash will inquire whether it's necessary for a party responding to a petition to provide a copy to the assigned judicial officer. Members were concerned that this step might have no benefit to the judicial officer, and in certain counties, a judge might not have even been assigned at this early stage. The other caveat dealt with whether petitions for legal decision-making are served with a summons or with an order to appear. Members requested Workgroup 1 to consider this issue when it reviews Rule 27, which concerns service on the opposing party. Rule 27 has not yet been presented to the Task Force.

Rule 30 (currently, "form of pleading," and as proposed, "reserved"): This rule was also previously reviewed by the Task Force and returned to the workgroup. Mr. Woodnick advised that after further review, the workgroup relocated portions of the rule either to Rule 20 ("form of documents") or to pending Rule 29 ("general rules of pleading"). There were no remaining provisions in the rule and the workgroup recommended that it be reserved. Members agreed with these changes.

Rule 31 ("signing pleadings, motions, and other documents; representations to the court; sanctions"): Mr. Davis presented this rule and noted changes to the title of the rule that were occasioned by eliminating two sections. The workgroup recommended the deletion of current Rule 31(d) ("assisting filing by self-represented person") because it did not believe it was necessary; the attorney is ghost-writing and is not appearing as counsel of record. The workgroup also recommended the deletion of Rule 41(d) ("verification") because the subject of the rule is covered by Rule 14 ("Written Verifications and Unsworn Declarations Under Penalty of Perjury"), which the Task Force previously approved. The workgroup made a change to the title of subpart (a)(3), from "filing by multiple parties" to "signing for another party." Members discussed alternative phrases in Rule 31(b) ("representations to the court"). Subpart (b)(2) had the options of "good faith argument" or "nonfrivilous argument," while (b)(3) had choices of factual contentions being "well-grounded in fact" or factual contentions that "have evidentiary support." After

discussion, members decided that the rule should conform to restyled Civil Rule 11(b), and they will use in Rule 31(b) the phrases "nonfrivilous argument" and factual contentions "that have evidentiary support." Members approved Rule 31 with these revisions.

5. **<u>Workgroup 3.</u>** Mr. Wolfson, Judge Swann, and Mr. Horowitz presented Rules 65, 69, 72, 74, and 75.

Rule 65 ("failure to make disclosures or to cooperate in discovery; sanctions"): Members discussed this rule at the August 25 meeting, but there were questions about whether the workgroup intended to delete certain provisions. Mr. Wolfson advised the workgroup reviewed the rule further and its members agreed that the sections it intended to delete were titled "failure to timely disclose; inaccurate or incomplete disclosure; disclosure after deadline or during trial;" "failure to timely disclose unfavorable information;" "expenses on failure to admit;" and "party's failure to attend its own deposition or to respond to interrogatories or requests for production." Mr. Wolfson reiterated that these deleted sections duplicated the broader provisions of Rule 65(b) ("failure to comply with court order, discovery or disclosure rule; sanctions"). The workgroup retained a previously presented section on "failure to preserve electronically stored information."

A member asked about a potential overlap of proposed Rules 65(a)(4) and 65(b)(2), both titled "payment of expenses." Mr. Wolfson replied that (a)(4) concerns expenses connected with a motion, whereas (b)(2) is broader and contemplates expenses related to discovery violations. Mr. Wolfson again reviewed Rule 65(b), which allows sanctions for a failure to comply with a disclosure or discovery rule as well as the failure to obey a court order regarding discovery. Another member inquired whether the sanctions in Rule 65(b) apply to entities as well as persons. Mr. Wolfson responded that the workgroup intended that the rule apply to both, and if necessary, the workgroup could clarify that in the future. A member noted that the section numbering was still incorrect and the word "jury" was inadvertently included in the remedies provisions of the section on electronically stored information. Staff will correct the numbering, and members agreed to remove the phrase in which the word "jury" appears. Otherwise, members approved Rule 65.

Rule 69 (currently, "binding agreements; presumption of validity," and as proposed, "binding agreements"): Mr. Horowitz noted that the workgroup made few changes to this rule, but it spent considerable time discussing the underlying issues, such as the required elements for an agreement, and when an agreement becomes binding. The current rule does not include a signature requirement, but Mr. Horowitz explained that under draft Rule 69(a) ("validity"), to bind themselves the parties must have a signed agreement. They also can bind themselves by memorializing the agreement before a court reporter, which is as reliable as a writing provided the parties confirm their assent on the record. A member inquired whether the proposed rule precludes agreements on substantive

issues between counsel for the parties. A couple workgroup members believed it was preferable to err on the side of caution and preclude that under this rule, especially on issues involving children. But others held the view that an attorney has authority to bind the client, in a record made in open court or by a signed writing, without the client's expressed assent. On a straw vote, most members would permit agreements by counsel, either written or on the record; but a significant minority favored a requirement that the client sign or consent. The petition will note this division, but for now, the rule will say, "signed by the parties personally or signed by counsel on a party's behalf." An agreement entered under this draft rule is valid. A new Rule 69(b) ("court approval") provides that an agreement is not binding on the court until it is submitted to and approved by the court. Members agreed to delete a section of the proposed rule concerning separation agreements because that provision is subsumed under other portions of the rule. Members approved the rule as modified.

Rule 70 ("notice of settlement"): Mr. Horowitz observed that the workgroup made few changes to the draft restyling. In Rule 70(a) ("notice of settlement"), it deleted the words "to ensure future compliance with this rule" because it appears that judges do not impose sanctions for the stated purpose. In Rule 70(b) ("settlement without final judgment"), the workgroup deleted the words "and entered in the record" because the provision also requires filing, and a filed document axiomatically becomes part of the record. Members approved Rule 70. In Rule 70 and in other rules, members agreed to use the term "self-represented party" rather than "unrepresented party" or "party not represented by counsel."

Rule 72 ("family law master"): Judge Swann noted that in recent years, revisions to this rule, as well as to Rule 74 concerning the parenting coordinator, have been substantive and controversial. However, with one exception concerning Rule 72, the workgroup's proposed changes to these rules are not substantive, but are simply intended to conform these rules to the restyling conventions. The exception is a proposed new Rule 72.1 entitled "retirement benefits, stock options, and other employment related compensation." The substance of this new rule is currently included in Rule 72(L). The workgroup believed that the person identified in this provision does not perform a judicial function and does not decide anything, but rather performs a ministerial function and acts within the scope of what the court has previously decided to implement the court's decision. In that sense, the person is not a Rule 72 master. The proposed new rule provides that if an issue assigned to the person requires the use of discretion, the person must refer the issue to the court for determination. Members deferred adding a provision that would allow the parties in that circumstance to refer the issue to an arbitrator for determination. Members then discussed three other items.

- The draft rule refers to the person as a "master with special expertise," but the person is not a master as contemplated by Rule 72. Members considered alternative names, such as "court-appointed expert" (which does not fit well with Evidence Rule 706 because the person does not testify), "administrator"

(which also isn't suitable because the person has no discretionary authority), and "drafter" (which was closer but still inadequate.) Members decided to use the term "professional with special expertise," and the draft rule will be modified accordingly.

- Does the substance of Rule 72.1 belong in Rule 95 ("other family law services and resources")? Members discussed both alternatives and for the time being, they agreed to leave it as a new standalone rule.

- Members declined to revisit the issue of appointment of a master on motion, and they agreed to strike the current comment and its reference to Civil Rule 53. They reviewed and agreed to retain the workgroup's proposed comment, but they requested the workgroup to modify the comment so it would allow the court to allocate or shift costs.

With the caveats noted above, members approved Rules 72 and 72.1.

Rule 74 ("parenting coordinator"): The meeting materials included a version comparing the restyled version of Rule 74 with the current rule, and Judge Swann again noted that no substantive changes were intended in the proposed restyled version. A member raised a recurring issue about not appointing a coordinator unless the parties agreed, but Judge Swann reminded members that the substance of the current rule was previously approved after extensive study by stakeholders, and Task Force members declined to revisit the substance of this rule. Ms. Clark noted that the restyled draft removed the word "services" after the words "conciliation court," and the Chair directed staff to reinserted "services" in those instances. Pending that edit, members approved draft Rule 74.

Rule 75 (currently, "plan for expedited process," and as proposed, "reserved"): The workgroup recommended deletion of this rule because it is redundant to the referenced statutes, and members agreed. Rule 75 will be reserved.

6. **Workgroup 4.** The workgroup presented Rules 78, 92, 95, and 97.

Rule 78 ("judgment; attorney fees, costs, and expenses"): Mr. Berkshire advised that the workgroup's revisions to Rule 78 took into consideration the Court's 2014 opinion in *Bollermann v Nowliss*, and the subsequent, pending petition by the State Bar to amend this rule (R-16-0020). He then reviewed the workgroup's proposed revisions. Rule 78(a) ("definitions, form") generally follows the corresponding civil rule. Rule 78(b) ("judgment upon multiple claims or involving multiple parties") includes the "express determination" language used in Civil Rule 54, but adds the phrase that "a claim for attorney fees is considered a separate claim from the related judgment…." It appears that far too many partial judgments in family court have unnecessary Rule 78(b) language, which is both risky and problematic for the parties; but this may be an issue that a rule revision cannot adequately address. Rule 78(c) ("entry of judgment after death of a party") was unremarkable.

Revised Rule 78(d) ("attorney fees, costs, and expenses") includes provisions for asserting and establishing a claim, and when the claim must be established. These new provisions represent the workgroup's response to *Bollermann* and R-16-0020. One member suggested that the provisions should be more consistent with corresponding Civil Rule 54. Mr. Berkshire noted that Civil Rule 54 provisions may not be ideally adaptable to family law proceedings. First, A.R.S. § 25-324 allows an award of expenses, which civil cases do not, so the components and calculations in family cases are different than civil cases. In addition, and unlike most civil cases, fees and expenses may be issues that are raised during the trial of a family case. That is why, Mr. Berkshire explained, proposed Rule 78(d) provides that a claim for fees, costs, and expenses "must" be included in any required pretrial statement. Judge McMurdie added that under proposed Rule 78(d)(3), if a party has properly and timely asserted a claim for fees, costs, or expenses, but the claim is omitted in a subsequent judgment, the claimant must file a Rule 83 motion within 15 days after entry of the judgment, or the claim is deemed denied. This new provision therefore provides a time limit for the court's determination of these claims. Members also discussed including in the family law rules a correlate to Civil Rule 54(c), which serves as a useful finish line and avoids a time-consuming need for appellate courts to determine whether they have jurisdiction to review a civil judgment. Workgroup members are open to the possibility of including an analog to Civil Rule 54(c) in Family Rule 81 ("entry of judgment"), which is assigned to Workgroup 4, but that rule has not yet come before the Task Force.

Rule 78(e) ("offers of judgment not applicable") is consistent with the current rule. Ms. Davis, who was not present but who has written articles on this provision, may want to offer her opinions concerning offers of judgment in family cases. But Judge Armstrong said the provision was adopted in 2006 after considerable deliberation. Another member noted a study's conclusion that offers of judgment do not necessarily encourage case resolutions. Members made no changes to proposed Rule 78(e) and they approved Rule 78 as presented.

Rule 92 ("civil contempt and sanctions for non-compliance with a court order"): Judge Eppich noted that current Rule 92(c) refers to "orders to show cause or orders to appear." The workgroup eliminated the outdated reference to orders to show cause in its revised rule. The workgroup also eliminated in proposed Rule 92(d) a finding of a "willful" failure to comply with a court order. Judge Eppich advised that willfulness is not an element of contempt, but the absence of willfulness is a defense to contempt. Members agreed to add to Rule 92(e) ("order and sanctions") a new sentence that states, "The contemnor may show that the failure to comply with the court order was not willful." This language is consistent with A.R.S. § 12-864, although members did not see a need to refer to the statute in the rule. Ms. Sell requested, and members agreed, to add "employment services" to the list of appropriate sanctions in proposed Rule 92(d)(2). Rule 92 was approved with these changes.

Rule 95 ("other family law services and resources"): Judge McMurdie advised that the workgroup added a sentence in section (a) ("generally") that the court must determine on the record whether parties could pay for private services and the allocation of costs. The workgroup proposed substituting a general reference for specific references in Rule 95(b), and substituting "behavioral health" for "mental health." It deleted language in Rule 95(e) ("supervised exchanges") and elsewhere that was informative but not substantive. The workgroup also deleted current Rule 95(F) ("batterer intervention and prevention programs") because it combined those provisions with draft Rule 95(f) ("domestic violence services"). Members agreed with these changes, and with Judge Armstrong's additional suggestion to add to section (f) the words "licensed by the Arizona Department of Health Services." Members declined to add immunity provisions in Rule 95 because that is a statutory subject and members did not want to inadvertently expand the scope of immunity. Members approved Rule 95 as modified.

Rule 97 ("family law forms"): Judge McMurdie briefly reviewed Rule 97 and noted that the workgroup proposed no substantive revisions to the rule. Members approved the rule as presented.

7. Call to the public. Mr. Martin Lynch and Mr. Ed Pizarro Sr. responded to a call to the public and presented remarks to members of the Task Force.

8. Roadmap; adjourn. The Chair commended the members for reviewing 18 rules during today's meeting. She emphasized that the Task Force will need to review about 15 rules during each of its next three sessions to file a petition in January. She encouraged workgroups to review a sufficient number of rule to meet this goal. Due to member conflicts, the Chair reset the October 20 meeting to **Monday, October 30.** Subsequent meetings are set for Monday, November 13, Friday, December 1, and Friday, December 15. The Chair reminded workgroups to keep notes of substantive changes to their respective rules.

The meeting adjourned a**t** 3:25 p.m.

Rule 1. Scope and Applicability of These Rules

(a) **Scope.** These rules govern procedures in family law cases cases, including paternity and all other matters and all amatters arising under Title 25 of the Arizona Revised Statutes.

(b) **Construction:.** Parties and courts should construe these rules, and courts should enforce them, in a manner to secure a just, prompt and inexpensive determination of every action and proceeding.

(c) **Civil Rules:** The *Arizona Rules of Civil Procedure* apply only when these rules expressly incorporate them. Wherever the language in these rules is substantially the same as the language in other statewidethe civil rules, the case law interpreting that language will apply to these rules.

(c)(d) **Applicability of Local Rules.** If a local rule is inconsistent with these rules, these rules will apply.

COMMITTEE COMMENT

This rule is based on Rule 1, *Arizona Rules of Civil Procedure.* Wherever the language in these rules is substantially the same as the language in other statewide rules, the case law interpreting that language will apply to these rules.

NOTE: Section (c) derives from Rule 2(a).

The first sentence of the comment is unnecessary. The second sentence of the comment might be appropriately relocated in a prefatory comment to the restyled rules.

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Rule 1. Scope and Applicability of These Rules

(a) Scope. These rules govern procedures in family law cases and all matters arising under Title 25 of the Arizona Revised Statutes.

(b) Construction. Parties and courts should construe these rules, and courts should enforce them, in a manner to secure a just, prompt and inexpensive determination of every action and proceeding.

(c) Civil Rules. The *Arizona Rules of Civil Procedure* apply only when these rules expressly incorporate them. Wherever language in these rules is substantially the same as the language in the civil rules, case law interpreting that language will apply to these rules.

(d) Applicability of Local Rules. If a local rule is inconsistent with these rules, these rules will apply.

Rule 2. Applicability of the Arizona Rules of Evidence ~~and Local Rules~~

~~[**Note:** Current Rule 2(a) was moved to draft Rule 1(c). Suggest "reserving" Rule 2 and moving the remaining contents to a new Rule 76.1]~~

~~**(a) Applicability of the Arizona Rules of Evidence**~~

~~(1)~~ **(a) Effect of a Rule 2(a) Notice; Time for Filing.** Any party may file a notice to require compliance with the Arizona Rules of Evidence at a hearing or trial A party must file the notice ~~At~~ at least 45 days before ~~a~~ the hearing or trial, or by another date set by the court.~~, any party may file a notice to require compliance with the Arizona Rules of Evidence. [**Note:** Is there a difference between "strict compliance," which is the phrase used in the current rule, and "compliance?" How much discretion does the judge have?]~~ If a hearing or trial is set less than 60 days in advance, the notice is deemed timely if a party files it within a reasonable time after the party is notified of the hearing or trial date.

~~(2)~~ **(b) Effect of No Notice.** If no party files ~~a~~ a timely notice under (a)~~)(1), relevant evidence is admissible, but~~ the court ~~must [or~~ may~~?] exclude~~ admit relevant evidence ~~if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, undue delay, wasting time, needlessly presenting cumulative evidence,~~ except when it is unreliable~~lack of reliability or~~or not ~~failing to~~ adequately and timely disclosed and ~~the evidence.~~ Arizona ~~This admissibility standard replaces~~ Rules of Evidence ~~403,~~ 602, 801-806, 901-903, and 1002-1005~~, Arizona Rules of Evidence,~~ do not apply. The other Rules of Evidence still apply, except as provided in (~~a)(3~~c). ~~All other provisions of the Arizona Rules of Evidence apply.~~

~~(3)~~ **(c) ~~Either Circumstance~~Records of Regularly Conducted Activity.** ~~Regardless of whether a notice is filed under (a)(1):~~

~~(1) A~~Regardless of whether a notice was filed, a record of regularly conducted activity as defined in Rule 803(6) of the Arizona Rules of Evidence may be admitted into evidence without testimony of a custodian or other qualified witness ~~as to~~regarding its authenticity if the record ~~:~~

~~(A) appears complete and accurate on its face;~~

~~(B) appears to be~~is relevant ~~and~~, reliable, ~~;~~ and

~~(C) is~~ was ~~seasonably~~ timely disclosed~~d and a copy is provided to every other party when it is disclosed; and~~ .

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(2) Court-Ordered Reports, Documents, and Forms. wWhen one of thesea rules or a statute requires submitting the submission of a report, document, or standardized form to the court, or the court orders the preparation of a report pursuant to rule or statute, the court may consider the report, document, or form as evidence if it is filed with the court [and admitted into evidence.] [**Note:** This sentence in the current rule concludes with the phrase, "or admitted into evidence by the court." Why is this last phrase necessary? Wouldn't the court consider it if it was admitted into evidence?]

(d) or admitted into evidence.

COMMITTEE COMMENT [Amended in 2007 and 2008]**Applicability of Local Rules.** If a local rule is inconsistent with one or more of these rules, these rules will apply. [Moved To Rule 1.]

COMMITTEE COMMENT [Amended in 2007 and 2008]

Rule 2(B)(4) allows the court to consider as evidence at any stage of the proceedings any report or document ordered or required by the court to be submitted to the court. This allows the court to consider drug testing results and reports from court-appointed attorneys, custody or parenting time evaluators, conciliation services, family law masters, Parenting Coordinators, and other court-appointed experts. The determination of the evidentiary value of the report or document for any proceeding other than the particular trial, hearing or conference for which it was prepared shall be left to the discretion of the court.

COMMENT TO 2016 AMENDMENT

The changes to Rule 2(B)(2) are purely stylistic and are made to conform to the 2012 restyling of the Arizona Rules of Evidence.

NOTE:

Suggest relocating the substance of this rule to Part IX, pretrial and trial procedures. It seems more applicable there. Additionally, Rule 2 might be too technical to be located as one of the first rules of this set.

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Rule 2. Applicability of the Arizona Rules of Evidence

~~**[Note:** Current Rule 2(a) was moved to draft Rule 1(c). Suggest "reserving" Rule 2 and moving the remaining contents to a new Rule 76.1]~~

(a) Effect of a Rule 2(a) Notice; Time for Filing. Any party may file a notice to require compliance with the Arizona Rules of Evidence at a hearing or trial. A party must file the notice at least 45 days before the hearing or trial, or by another date set by the court. If a hearing or trial is set less than 60 days in advance, the notice is deemed timely if a party files it within a reasonable time after the party is notified of the hearing or trial date.

(b) Effect of No Notice. If no party files a timely notice under (a), the court may admit relevant evidence except when it is unreliable or not adequately and timely disclosed and Arizona Rules of Evidence 602, 801-806, 901-903, and 1002-1005 do not apply. The other Rules of Evidence still apply, except as provided in (c).

(c) Records of Regularly Conducted Activity. Regardless of whether a notice was filed, a record of regularly conducted activity as defined in Rule 803(6) of the Arizona Rules of Evidence may be admitted into evidence without testimony of a custodian or other qualified witness regarding its authenticity if the record is relevant, reliable, and was timely disclosed.

(d) Court-Ordered Reports, Documents, and Forms. When a rule or a statute requires the submission of a report, document, or standardized form to the court, or the court orders the preparation of a report pursuant to rule or statute, the court may consider the report, document, or form as evidence if it is filed with the court or admitted into evidence.

COMMITTEE COMMENT [Amended in 2007 and 2008]

Rule 2(B)(4) allows the court to consider as evidence at any stage of the proceedings any report or document ordered or required by the court to be submitted to the court. This allows the court to consider drug testing results and reports from court-appointed attorneys, custody or parenting time evaluators, conciliation services, family law masters, Parenting Coordinators, and other court-appointed experts. The determination of the evidentiary value of the report or document for any proceeding other than the particular trial, hearing or conference for which it was prepared shall be left to the discretion of the court.

COMMENT TO 2016 AMENDMENT

The changes to Rule 2(B)(2) are purely stylistic and are made to conform to the 2012 restyling of the Arizona Rules of Evidence.

NOTE:

Suggest relocating the substance of this rule to Part IX, pretrial and trial procedures. It seems more applicable there. Additionally, Rule 2 might be too technical to be located as one of the first rules of this set.

Rule 44. Default

(a) Entry Application for Default.

(1) *Generally.*

If a party against whom a decree or a judgment for affirmative relief is sought fails to respond or otherwise defendanswer as provided in these rules, the clerk, on application by the party seeking relief, must enter theat other party's default may file an application for default.

The filing of the application for default constitutes the entry of default.

(1) An application for the entry of default must be filed with the clerk in the county where the matter is pending.

(2) ***Application for Default.*** A party seeking entry of default must file a written application that:

(A) states the name of the party against whom default is sought;

(B) states that the party has failed to plead respond or otherwise defend answer within the time allowed by these rules;

(C) provides a current mailingthe last known mailing address for the party claimed to be in default;, oror states that the party requesting the entry of default does not know the whereabouts of the defaulting party claimed to be in default;

(D) identifies any attorney known to represent the defaulting party claimed to be in default, either in the action in which default is sought or in a related matter, whether or not the attorney has formally appeared;, or does not know the identity and address of any such attorney known to represent the party in the action or a related action; and

(D)

(E) if applicable, states that the party requesting the entry of default does not know the whereabouts of the party claimed to be in default, or the identity and address of an attorney known to represent the party in the action or a related action; and

(F)(E) attaches a copy of the Rule XX proof of service, establishing the date and manner of service on the defaulting party claimed to be in default.

(3) ***Notice.*** The party applying for default must provide notice as follows:

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(A) *To the Party***.** If the party requesting ~~the entry of~~ default knows the whereabouts of the defaulting party ~~claimed to be in default~~, a copy of the application for ~~entry of~~ default must be mailed to the defaulting party ~~claimed to be in default~~, even if the party is represented by an attorney who has entered an appearance in the action.

(B) *To the Attorney.* If the party requesting ~~the entry of~~ default knows that the defaulting party ~~claimed to be in default~~ is represented by an attorney either in the action in which default is sought or in a related matter, a copy of the application also must be mailed to that attorney, whether or not that attorney has formally appeared in the action. A party requesting ~~the entry of~~ default is not required to make affirmative efforts to determine the existence or identity of an attorney representing the defaulting party ~~claimed to be in default~~.

(C) *Time of Notice.* The notice required under (~~c~~3)(~~1~~a) or (~~2~~b) must be mailed on the date that the application is filed, or as soon as practicable after its filing.

(D) *To Other Parties.* An application for ~~entry of~~ default must be served on all other parties who have appeared in the action~~, as provided in Rule XX~~.

(4) **A Default's Effective Date.** A default is effective 10 days after the application for ~~entry of~~ default is filed.

(5) ~~**Effect of a Responsive Pleading.**~~ A default will not become effective if the defaulting party ~~claimed to be in default~~ ~~pleads~~ responds ~~or otherwise defends~~ ~~answers~~ ~~as provided in these rules~~ within 10 days after the application for ~~entry of~~ default is filed.

(b) **Setting Aside a Default or a Final Default Judgment.** The court may set aside a ~~n~~ ~~entry of~~ default for good cause, and it may set aside a final default judgment under Rules 83 or 85~~under Rule XX~~.

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(c) **Judgment Against the State.** The court may enter a default judgment against the State of Arizona or one of its officers or agencies only if, after a hearing, ~~the~~ ~~[claimant?]~~ a party establishes a claim or right to relief by evidence that satisfies the court.

(d) **Party Status.** The provisions of this rule apply whether the party entitled to the judgment by default is a petitioner or respondent.

Rule 44.1. Default Judgment [New]

Default Judgment by Motion and Without a Hearing. ~~for Separation, Dissolution, Annulment, or Paternity.~~

The court may not enter a default judgment by motion and without a hearing if the defaulting party is a minor or an incompetent person.

~~(b)~~(a) The court otherwise may enter a default judgment based on documents in the court's file, on motion and without the parties appearing at a hearing, in the circumstances described below.

(1) *Decree of Separation, Dissolution, or Annulment.*

(~~A~~B~~A~~) *Generally.* ~~On a petition for~~ The court may enter a decree of legal separation, dissolution, or annulment of marriage~~, the court may enter a decree~~ on motion and with an affidavit from either or both parties to the marriage, if:

(i) there are no minor children from the relationship between the parties who were born before or during the marriage, or who were adopted by the parties during the marriage, and the wife is not pregnant to the best knowledge of the person signing the affidavit; and

(ii) neither party requests spousal maintenance.

(~~B~~~~C~~B) *Affidavit Contents.* The affidavit must state facts showing ~~that~~

i. jurisdictional requirements have been met ~~and that the~~

ii. conciliation provisions of A.R.S. § 25-381.09 have been met or do not apply. ~~The affidavit also must state facts~~

iii. support~~ing~~ for the requested relief, including, if applicable, an award of attorney's fees.

(~~C~~DC) ~~*Default*~~ *Appearance*. A default decree ~~is not available~~ will not be entered if the other party has appeared, unless the parties have agreed in writing that the matter may proceed as if by default. ~~[**NOTE:** If the parties agree, how is this different from a consent decree? They are agreeing to proceed by default, not agreeing to the contents of the petition. In effect the resulting decree is probably the same but the remedies, process, or timelines may be different.???]~~

(2) *Judgment of Maternity or Paternity.*

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(A) *Generally.* If a petition to establish maternity or paternity does not request an order of custodyregarding legal decision-making or parenting time, the court may enter a judgment on motion and with an affidavit (s) or affidavits of the State, the mother, or the father.

(B) *Affidavit Contents.*

(i) The affidavit(s) must state facts showing that jurisdictional requirements have been met and that a default order is appropriate under A.R.S. § 25-813.

(ii) If the State requests the default judgment, an affidavit of the mother or the father must establish the factual basis for the finding of paternity.

(iii) If the petition requests entry of an order for current and past support, a child support worksheet that establishes the amounts requested must accompany the motion; and an affidavit must state the basis for determining the gross income of the defaulting parent.

(iv) The affidavit also must state facts substantiating any other requested relief.

(b) Judgment by Motion for Money DamagesOther than Child Support.

(1) ***Generally.*** If a claim is for a certain sum of money or for a sum of money that can be determined by computation, other than child support, the court may enter judgment on motion with an affidavit and other documentation that establishes the amount due. [**NOTE:** Is child support (and/or spousal support) separate from this section? If so, does that need to be stated?]

(3)(2) ***Spousal Maintenance.*** The court will not enter a default judgment for any amounts of spousal maintenance accruing before the filing date of a petition to establish spousal maintenance.

(4)(3) ***Attorney's Fees.*** If the claim requests an award of attorney's fees, the judgment may include such an award, if the law allows an award and an affidavit establishes a reasonable amount. When the claim includes a specific amount of attorney's fees if the court enters a default judgment, the award may not exceed the amount demanded.

(c) Default Judgment by Hearing.

(5)(1) ***Hearing Required.*** If a party does not meet the requirements for obtaining a default judgment by motion without a hearing, the party must request a default judgment hearing.

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~~(6)~~(2) ~~***Minor or Incompetent Person.*** The court will not enter a default judgment against a minor or an incompetent person unless a guardian or other representative who has properly appeared represents the minor or incompetent person in the action.~~

~~(7)~~(3) ***Notice of Hearing.*** If the defaulted party ~~against whom judgment by default~~ is sought has appeared in the ~~action~~ matter, that party or, if appearing by a representative, that party's representative, must be served with written notice of the hearing no later than 3 days before the hearing.

~~(8)~~(4) ***Conduct of Hearing.*** The court may conduct the hearing as ~~it deems~~ necessary ~~to receive evidence~~ to resolve factual issues, ~~to~~ determine the relief to be granted, ~~or to~~ and enable the court to enter an appropriate decree or judgment ~~or to carry it into effect~~.

~~(9)~~(5) ***Rights of a Defaulted Party***. ~~The~~ A defaulted party is deemed to have admitted every material allegation of the petition. However, if a defaulted party has made a motion under this rule, the court must allow that party to participate in the hearing to determine what relief is appropriate~~, if any,~~ or to establish the truth of any statement.

(d) Support Judgment.

~~(10)~~(1) ***~~Previously Accruing Support~~Past Child Support.*** The court will not enter a default judgment for any amount of child support accruing before the filing date of a petition to establish the first order for child support unless, in the petition or in the notice required under Rule 44(a)(3), the party seeking support has notified the defaulting party ~~from whom support is sought~~:

(A) of the time period for which ~~such~~ past support is sought; and

(B) ~~that~~ the amount of support ~~will be~~ as calculated by retroactive application of the Arizona Child Support Guidelines.

~~(11)~~(2) ***Previously Owed ~~Support~~Arrears.*** The court will not enter a default judgment for any amounts of ~~past~~ child support arrears owed before the filing of a petition for an order to appear under Rule 26(c), unless, in the petition or in a separate written notice filed and served on the responding party no later than 14 days before the hearing, the party filing the petition has notified the responding party of:

(A) the specific time period for which such past support is sought; and

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(B) ~~that~~ the amount of support will be calculated by retroactive application of the Arizona Child Support Guidelines.

[Note regarding (d)(1) and (2): Current Rule 44(B)(3) consists of two sentences with 195 words. The above revisions are a first attempt to restate the provisions of that current rule, but further clarification may be necessary. The workgroup considered deletion of subpart (2) but left it in the draft pending TF discussion.]

~~(12)~~(3) ***Informing Defaulted Party.*** If a decree or judgment is entered by default, except in those cases resulting in default after service by publication, the party obtaining the decree or judgment must certify on the decree or judgment that, within 3 days [**JWR Note:** Don't need to refer to judicial days because the time computation rule provides that weekends and holidays don't count] of the party's receipt of the decree or judgment, the party obtaining the decree or judgment will mail [**NOTE:** the current rule says "will mail" – **JWR Response:** I think "will" is appropriate. It will be going on the judgment being submitted to the court.] a copy of the decree or judgment to the party in default at that party's last known address. Failure to comply with this rule does not affect the validity of the decree or judgment entered or the time to appeal, or relieve a party from any obligations set forth in the decree or judgment. [**NOTE:** If failure to follow the rule has no consequence, what is the motivation to adhere to it?]

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(e) **Judgment if Service Is by Publication; Statement of Evidence.** If service ~~of process is~~ was made by publication and no ~~answer~~ response has been timely filed ~~within the time prescribed by law~~, the court may enter a decree or judgment ~~may be rendered as in other cases, but, unless the court orders otherwise,. t~~The clerk must maintain a record of the default hearing ~~proceedings in a court-approved form~~. **[NOTE**: The civil rule on defaults no longer includes this provision. DEAN'S NOTE: BECAUSE OF THE SUBSTANTIAL CHANGE MADE IN PUBLICATION RULES 41 AND 42, WE REALLY SHOULD KEEP THIS FTR OR TRANSCRIPTION REQUIREMENT.]

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~~(e)~~(f) **Request for Judgment.** [**CC NOTE:** should this section be part of Rule 44 rather than 44.1 or as a General section/statement at the beginning of Rule 44.1?]

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(1) A judgment by default may not be different in kind from or exceed the amount requested in the pleadings.

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(2) A final judgment must grant the relief to which a party is entitled, consistent with the best interests of the children of the parties, even if the

party has not requested such relief in the party's pleadings. However, a party must specifically request spousal maintenance or attorney's fees before the court may award them by default judgment.

Rule 44. Default

(a) Application for Default.

(1) ***Generally.***

If a party against whom a decree or a judgment for affirmative relief is sought fails to respond, the party seeking relief may file an application for default.

(2) ***Application.*** A party seeking default must file a written application that:

(A) states the name of the party against whom default is sought;

(B) states that the party has failed to respond within the time allowed by these rules;

(C) provides the last known mailing address for the party claimed to be in default, or states that the party requesting the default does not know the whereabouts of the defaulting party;

(D) identifies an attorney known to represent the defaulting party, either in the action in which default is sought or in a related matter, whether or not the attorney has formally appeared, or does not know the identity and address of any such attorney; and

(E) attaches a copy of the proof of service, establishing the date and manner of service on the defaulting party.

(3) ***Notice.*** The party applying for default must provide notice as follows:

(A) *To the Party.* If the party requesting default knows the whereabouts of the defaulting party, a copy of the application for default must be mailed to the defaulting party, even if the party is represented by an attorney who has entered an appearance in the action.

(B) *To the Attorney.* If the party requesting default knows that the defaulting party is represented by an attorney either in the action in which default is sought or in a related matter, a copy of the application also must be mailed to that attorney, whether or not that attorney has formally appeared in the action. A party requesting default is not required to make affirmative efforts to determine the existence or identity of an attorney representing the defaulting party.

(C) *Time of Notice.* The notice required under (3)(a) or (b) must be mailed on the date that the application is filed, or as soon as practicable after its filing.

(D) *To Other Parties.* An application for default must be served on all other parties who have appeared in the action.

(4) A Default's Effective Date. A default is effective 10 days after the application for default is filed.

(5) A default will not become effective if the defaulting party responds within 10 days after the application for default is filed.

(b) Setting Aside a Default or a Final Default Judgment. The court may set aside a default for good cause, and it may set aside a final default judgment under Rules 83 or 85.

(c) Judgment Against the State. The court may enter a default judgment against the State of Arizona or one of its officers or agencies only if, after a hearing, a party establishes a claim or right to relief by evidence that satisfies the court.

(d) Party Status. The provisions of this rule apply whether the party entitled to the judgment by default is a petitioner or respondent.

Rule 44.1. Default Judgment [New]

(a) Default Judgment by Motion and Without a Hearing. The court may not enter a default judgment by motion and without a hearing if the defaulting party is a minor or an incompetent person. The court otherwise may enter a default judgment based on documents in the court's file, on motion and without the parties appearing at a hearing, in the circumstances described below.

(1) ***Decree of Separation, Dissolution, or Annulment.***

(A) *Generally.* The court may enter a decree of legal separation, dissolution, or annulment of marriage on motion and with an affidavit from either or both parties to the marriage, if:

(i) there are no minor children from the relationship between the parties who were born before or during the marriage, or who were adopted by the parties during the marriage, and the wife is not pregnant to the best knowledge of the person signing the affidavit; and

(ii) neither party requests spousal maintenance.

(B) *Affidavit Contents.* The affidavit must state facts showing

i. jurisdictional requirements have been met

ii. conciliation provisions of A.R.S. § 25-381.09 have been met or do not apply

iii. support for the requested relief, including, if applicable, an award of attorney's fees.

(C) *Appearance.* A default decree will not be entered if the other party has appeared, unless the parties have agreed in writing that the matter may proceed as if by default.

(2) ***Judgment of Maternity or Paternity.***

(A) *Generally.* If a petition to establish maternity or paternity does not request an order regarding legal decision-making or parenting time, the court may enter a judgment on motion and with an affidavit of the State, the mother, or the father.

(B) *Affidavit Contents.*

(i) The affidavit must state facts showing that jurisdictional requirements have been met and that a default order is appropriate under A.R.S. § 25-813.

(ii) If the State requests the default judgment, an affidavit of the mother or the father must establish the factual basis for the finding of paternity.

(iii) If the petition requests entry of an order for current and past support, a child support worksheet that establishes the amounts requested must accompany the motion; and an affidavit must state the basis for determining the gross income of the defaulting parent.

(iv) The affidavit must state facts substantiating any other requested relief.

(b) Judgment by Motion for Money Other than Child Support

(1) ***Generally.*** If a claim is for a certain sum of money or for a sum of money that can be determined by computation, other than child support, the court may enter judgment on motion with an affidavit and other documentation that establishes the amount due. [**NOTE:** Is child support (and/or spousal support) separate from this section? If so, does that need to be stated?]

~~**(2)** ***Spousal Maintenance.*** The court will not enter a default judgment for any amounts of spousal maintenance accruing before the filing date of a petition to establish spousal maintenance.~~

(3) ***Attorney's Fees.*** If the claim requests an award of attorney's fees, the judgment may include such an award, if the law allows an award and an affidavit establishes a reasonable amount. When the claim includes a specific amount of attorney's fees if the court enters a default judgment, the award may not exceed the amount demanded.

(c) Default Judgment by Hearing.

(1) ***Hearing Required.*** If a party does not meet the requirements for obtaining a default judgment by motion without a hearing, the party must request a default judgment hearing.

~~**(2)** ***Minor or Incompetent Person.*** The court will not enter a default judgment against a minor or an incompetent person unless a guardian or other representative who has properly appeared represents the minor or incompetent person in the action.~~

(3) ***Notice of Hearing.*** If the defaulted party is sought 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 no later than 3 days before the hearing.

(4) ***Conduct of Hearing.*** The court may conduct the hearing as necessary to resolve factual issues, determine the relief to be granted, and enable the court to enter an appropriate decree or judgment.

(5) ***Rights of a Defaulted Party***. A defaulted party is deemed to have admitted every material allegation of the petition. However, if a defaulted party has made a motion under this rule, the court must allow that party to participate in the hearing to determine what relief is appropriate or to establish the truth of any statement.

(d) Support Judgment.

(1) ***Past Child Support.*** The court will not enter a default judgment for any amount of child support accruing before the filing date of a petition to establish the first order for child support unless, in the petition or in the notice required under Rule 44(a)(3), the party seeking support has notified the defaulting party:

(A) of the time period for which past support is sought; and

(B) the amount of support as calculated by retroactive application of the Arizona Child Support Guidelines.

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

(A) the specific time period for which such past support is sought; and

(B) the amount of support will be calculated by retroactive application of the Arizona Child Support Guidelines.

[Note regarding (d)(1) and (2): Current Rule 44(B)(3) consists of two sentences with 195 words. The above revisions are a first attempt to restate the provisions of that current rule, but further clarification may be necessary. The workgroup considered deletion of subpart (2) but left it in the draft pending TF discussion.]

(3) ***Informing Defaulted Party.*** If a decree or judgment is entered by default, except in those cases resulting in default after service by publication, the party obtaining the decree or judgment must certify on the decree or judgment that, within 3 days [**JWR Note:** Don't need to refer to judicial days because the time computation rule provides that weekends and holidays don't count] of the party's receipt of the decree or judgment, the party obtaining the decree or judgment will mail [**NOTE:** the current rule says "will mail" – **JWR Response:** I think "will" is appropriate. It will be going on the judgment being submitted to the court.] a copy of the decree or judgment to the party in default at that party's last known address. Failure to comply with this rule does not affect the validity of the decree or judgment entered or the time to appeal, or relieve a party from any obligations set forth in the decree or judgment. [**NOTE:** If failure to follow the rule has no consequence, what is the motivation to adhere to it?]

(e) **Judgment if Service Is by Publication; Statement of Evidence.** If service was made by publication and no response has been timely filed, the court may enter a decree or judgment.The clerk must maintain a record of the default hearing. **[NOTE**: The civil rule on defaults no longer includes this provision. DEAN'S NOTE: BECAUSE OF THE SUBSTANTIAL CHANGE MADE IN PUBLICATION RULES 41 AND 42, WE REALLY SHOULD KEEP THIS FTR OR TRANSCRIPTION REQUIREMENT.]

(f) **Request for Judgment.** [CC **NOTE:** should this section be part of Rule 44 rather than 44.1 or as a General section/statement at the beginning of Rule 44.1?]

(1) A judgment by default may not be different in kind from or exceed the amount requested in the pleadings.

(2) A final judgment must grant the relief to which a party is entitled, consistent with the best interests of the children of the parties, even if the party has not requested such relief in the party's pleadings. However, a party must specifically request spousal maintenance or attorney's fees before the court may award them by default judgment.

Rule 66. Duties to Consider and Attempt Settlement by Alternative Dispute Resolution ("ADR")

(a) Purpose. The intent of this section is to These rules encourage the resolution of family law cases using non-adversarial means of alternative dispute resolution ("ADR") to the greatest extent possible, whether through a program overseen, administered, or authorized by the court, or by a person or agency independent of the court. Parties are encouraged to participate in mediation independent of the court.

(b) Definitions. [**JWR Note:** Changed the format consistent with the convention in Rule 3 and generally (but not always) followed in the Civil and Criminal Rules.] The court may provide or authorize ADR processes, which may include the following:

(1) ***Arbitration***. An "arbitration" is a process in which the parties agree to submit disputed issues to one or more neutral individuals, whoindividuals, who are retained by the parties and who will render a binding decision in accordance with the Uniform Arbitration Act [**JWR Note:** The cases use this nomenclature], A.R.S. §§ 12-1501 to -1518 or the Revised Uniform Arbitration Act, A.R.S. §§ 12-3001 to -3029, and Rule 67.2.

(2) ***Parenting Coordinator***. A "parenting coordinator" is a person the court appoints to assist parents by making recommendations to the court about implementing, clarifying, modifying, and enforcing legal decision-making and parenting time orders under Rule 74.

(3) ***Family Law Master.*** A "family law master" is a person appointed by the court, including a family law conference officer, who receives evidence on disputed issues and submits a report to the court that sets forth the master's findings of fact and conclusions of law under Rule 72.

(4) ***Mediation.*** "Mediation" is a voluntary and confidential process under Rule 67.3 .1 or Rule 68. [**Note:** Why is this "voluntary" if the court can order it under section (d)?]

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(5) ***Open Negotiation.*** An "open negotiation" is a process of non-confidential negotiations between the parties conducted by a neutral negotiator who attempts to facilitate a resolution of their dispute. The negotiator reports disputed issues to the court if the parties are unable to resolve them. [**Note:** -Is "open negotiation" used in practice? If not, consider deleting this provision. Also, is there any benefit of referring to "conciliation court services" in this Rule 66(b) list of ADR processes?]

(6) ***Settlement Conference.*** A "settlement conference" is a confidential process in which parties meet with a neutral judge, commissioner, or judge pro tempore to discuss settlement under Rule 67.4.

(c) Other ADR Processes. The court may create, administer, approve, or authorize other ADR processes designed to provide the parties, who are or have been involved in a family law matter, or who are thinking about filing a family law matter, with an opportunity to resolve their dispute without court litigation.

(d) Initiation of ADR. On a party's request or on its own, the court may order the parties to participate in one or more [**JWR Note:** This is in the current rule and I think it is worth retaining to preclude an argument that a court can make the parties participate in ADR only once] ADR processes authorized by court rules. If the parties agree, the court also may permit the parties to participate in a private dispute resolution process. **[Note:** the current rule says the court may order private ADR, but if the parties agree to this, is a court order necessary? And is the second section of this section subsumed by the first sentence?]

(e) Duty to Consider ADR. No later than 90 days after a respondent's appearance, the parties must confer, either in person or by telephone, about:

(1) the possibilities for a prompt settlement or resolution **[Note:** Is the distinction here between settlement and resolution meaningful, or should it be one or the other?] of the case; and

(2) whether they might benefit from participating in an ADR process, and, if so:

(A) the type of process that would be most appropriate in their case;

(B) the selection of an ADR service provider; and

(C) the scheduling of ADR proceedings.

(f) Duty to Attempt Settlement, and Report to Court.

(1) ***Duty.*** Attorneys of record and unrepresented parties in a case are jointly responsible for having a good faith discussion about settlement of the case, or agreeing on an ADR process for resolving it, and for reporting the outcome of their discussion to the court.

(2) ***Report.*** No later than 30 days after their discussion or at the Resolution Management Conference, whichever is earlier, the parties must inform the court, using a statement substantially in the form set forth in Rule 97, Form 6 ("Joint Alternative Dispute Resolution Statement to the Court"), of the following:

(A) if the parties have agreed to use a specific ADR process, the type of ADR process to be used, the name and address of the ADR service provider they will use, and the date by which they anticipate the ADR proceedings will be completed;

(B) if the parties have not agreed to use a specific ADR process, the position of each party as to the type of ADR process that might be appropriate for the case or, in the alternative, why ADR is not appropriate; and

(C) if any party requests that the court conduct a conference to consider ADR.

(g) Assistance in Choosing Appropriate ADR Process. Unless the parties have agreed to use a specific ADR process, the court may direct the parties to discuss with a court-appointed ADR specialist, either in person or by telephone, whether ADR is appropriate and if so, the types of ADR processes that might benefit them.

COMMITTEE COMMENT

This rule is based on Rule 16(g), Arizona Rules of Civil Procedure.

Rule 66. Duties to Consider and Attempt Settlement by Alternative Dispute Resolution ("ADR")

(a) Purpose. These rules encourage the resolution of family law cases using non-adversarial means of alternative dispute resolution ("ADR") to the greatest extent possible, whether through a program overseen, administered, or authorized by the court, or by a person or agency independent of the court. Parties are encouraged to participate in mediation independent of the court.

(b) Definitions. [**<u>JWR Note:</u>** Changed the format consistent with the convention in Rule 3 and generally (but not always) followed in the Civil and Criminal Rules.] The court may provide or authorize ADR processes, which may include the following:

(1) ***Arbitration***. An "arbitration" is a process in which the parties agree to submit disputed issues to one or more neutral individuals, who are retained by the parties and who will render a binding decision in accordance with the Uniform Arbitration Act [**<u>JWR Note:</u>** The cases use this nomenclature], A.R.S. §§ 12-1501 to -1518 or the Revised Uniform Arbitration Act, A.R.S. §§ 12-3001 to -3029, and Rule 67.2.

(2) ***Parenting Coordinator***. A "parenting coordinator" is a person the court appoints to assist parents by making recommendations to the court about implementing, clarifying, modifying, and enforcing legal decision-making and parenting time orders under Rule 74.

(3) ***Family Law Master.*** A "family law master" is a person appointed by the court, including a family law conference officer, who receives evidence on disputed issues and submits a report to the court that sets forth the master's findings of fact and conclusions of law under Rule 72.

(4) ***Mediation.*** "Mediation" is a voluntary and confidential process under Rule 67.3 or Rule 68. ~~[**Note:** Why is this "voluntary" if the court can order it under section (d)?]~~

(5) ***Open Negotiation.*** An "open negotiation" is a process of non-confidential negotiations between the parties conducted by a neutral negotiator who attempts to facilitate a resolution of their dispute. The negotiator reports disputed issues to the court if the parties are unable to resolve them. [**<u>Note:</u>** Is "open negotiation" used in practice? If not, consider deleting this provision. Also, is there any benefit of referring to "conciliation court services" in this Rule 66(b) list of ADR processes?]

(6) ***Settlement Conference.*** A "settlement conference" is a confidential process in which parties meet with a neutral judge, commissioner, or judge pro tempore to discuss settlement under Rule 67.4.

(c) Other ADR Processes. The court may create, administer, approve, or authorize other ADR processes designed to provide the parties, who are or have been involved in a family law matter, or who are thinking about filing a family law matter, with an opportunity to resolve their dispute without court litigation.

(d) Initiation of ADR. On a party's request or on its own, the court may order the parties to participate in one or more [**JWR Note:** This is in the current rule and I think it is worth retaining to preclude an argument that a court can make the parties participate in ADR only once] ADR processes authorized by court rules. If the parties agree, the court also may permit the parties to participate in a private dispute resolution process. **[Note:** the current rule says the court may order private ADR, but if the parties agree to this, is a court order necessary? And is the second section of this section subsumed by the first sentence?]

(e) Duty to Consider ADR. No later than 90 days after a respondent's appearance, the parties must confer, either in person or by telephone, about:

(1) the possibilities for a prompt settlement or resolution **[Note:** Is the distinction here between settlement and resolution meaningful, or should it be one or the other?] of the case; and

(2) whether they might benefit from participating in an ADR process, and, if so:

(A) the type of process that would be most appropriate in their case;

(B) the selection of an ADR service provider; and

(C) the scheduling of ADR proceedings.

(f) Duty to Attempt Settlement, and Report to Court.

(1) ***Duty.*** Attorneys of record and unrepresented parties in a case are jointly responsible for having a good faith discussion about settlement of the case, or agreeing on an ADR process for resolving it, and for reporting the outcome of their discussion to the court.

(2) ***Report.*** No later than 30 days after their discussion or at the Resolution Management Conference, whichever is earlier, the parties must inform the court, using a statement substantially in the form set forth in Rule 97, Form 6 ("Joint Alternative Dispute Resolution Statement to the Court"), of the following:

(A) if the parties have agreed to use a specific ADR process, the type of ADR process to be used, the name and address of the ADR service provider they will use, and the date by which they anticipate the ADR proceedings will be completed;

(B) if the parties have not agreed to use a specific ADR process, the position of each party as to the type of ADR process that might be appropriate for the case or, in the alternative, why ADR is not appropriate; and

(C) if any party requests that the court conduct a conference to consider ADR.

(g) Assistance in Choosing Appropriate ADR Process. Unless the parties have agreed to use a specific ADR process, the court may direct the parties to discuss with a court-appointed ADR specialist, either in person or by telephone, whether ADR is appropriate and if so, the types of ADR processes that might benefit them.

COMMITTEE COMMENT

This rule is based on Rule 16(g), Arizona Rules of Civil Procedure.

Rule 67. ~~Mediation, Arbitration, Settlement Conferences, and Other Dispute Resolution Processes Outside of Conciliation Court Services~~

[**Notes:** Suggest two new freestanding rules for mediation (Rule 67.3) and settlement conferences (Rule 67.4)~~), and the abrogation of current Rule 67~~.

~~[**Note** that a pending rule petition, R-17-0017, proposes a new uniform Rule 67.2 for arbitration of family cases and the abrogation of current Rule 67(C) concerning arbitration.~~

~~[Current Rule 68 governs conciliation court services, although there appears to be significant overlap between that rule and current Rule 67(B).]~~

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Rule 67. Types of Alternative Dispute Resolution

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Rule 67 describes 4 types of Alternative Dispute Resolution, as follows:

(a) A collaborative law process in Rule 67.1;

(b) Family law arbitration in Rule 67.2;

(c) Private mediation in Rule 67.3; and

(d) A settlement conference in Rule 67.4.

(e) A fifth type of Alternative Dispute Resolution, conciliation court services, is provided in Rule 68.

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Rule 67.3. Private Mediation

(a) Generally. ~~“M~~Private mediation~~”~~ is a voluntary and confidential process in which parties confer with a neutral individual (a “mediator”) to help them resolve the dispute. ~~A~~ The parties may retain a private mediator under Rule 67.3(d), ~~may be privately retained by the parties~~, or a private mediator may be assigned by the court under Rule 67.3(e). ~~from a court roster of mediators, or assigned as a conciliation court counselor~~.

(b) Confidentiality; Communications with the Court; Other Roles of the Mediator.

(1) ***Confidentiality.*** Mediation conferences are conducted privately. Oral and written communications exchanged during a mediation are confidential. Unless these rules specifically state otherwise, the provisions of A.R.S. § 12-2238 apply to mediation conferences under this rule.

Commented [RJW1]: “Verbal” means “using words” and can be either oral or written.

Commented [RJW2]: “Concerning” is too vague.

(2) ***Communications with the Court.*** The mediator must not communicate with the assigned judge or commissioner about anything that was said, submitted, or done before or during the mediation, except: [**Note:** This draft excludes a provision in current Rule 67(B)(9) that would permit the court to sanction a mediator for violating the confidentiality requirement. Is the provision necessary, does it occur in practice?]

Although the court may order a party ~~is required~~ to appear for a mediation conference, participation in mediation is voluntary. [**Note:** This language in current Rule 67(B)(9), shown here ~~in strikethrough~~, is puzzling and it is not included in the draft. The current language allows a party to appear but not participate. Is there no obligation to participate in good faith? See further current Rule 67(D)(6), where the court may impose sanctions for failure to appear "and participate" at a settlement conference.]

(A) the mediator may advise the court in writing about the mediation schedule and any procedural matter related to the mediation, so long as the substance of what the parties or their counsel say or do during the mediation remains confidential;

(B) the mediator may report matters to the court if the parties agree or if the law requires or permits the disclosure;

(C) the mediator may report to the court a party's failure to appear at a scheduled mediation conference as required under (k), or a party's failure to submit a mediation memo as required by the mediator under (l); and

(D) the mediator may report to the court information as allowed in (n).

(3) ***Other Roles of a Mediator.*** The mediator may not conduct any other form of dispute resolution process in the same case, unless the parties agree and the court approves. [**Note:** A subsequent provision in the current rule states, "The mediator may not conduct any subsequent family assessment or evaluation in the same case."]

(c) Subjects for Mediation. The parties may privately mediate any issue in dispute.

~~**(1)** ***Private Mediation.*** The parties may privately mediate any issue in dispute.~~

~~**(2)** ***Conciliation Court.*** Unless the parties agree to private mediation, the conciliation court may mediate issues involving legal decision-making and parenting time.~~

(d) Privately Retained Mediator. The parties may agree to, and jointly select, a private mediator. The parties must sign and file a notice that states that private mediation will

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take place, identifies the name of the jointly-selected mediator, and specifies the date set for the initial mediation conference.

(e) Court-Selected Private Mediator. The parties may ask the court to choose 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.

(f) Payment for a Private Mediator's Services. The parties must contract directly with a private mediator and be responsible for payment of the mediator's fees. Unless the parties agree or the court orders otherwise, the cost of mediation must ~~should~~ [**JWR Note:** I would use "must" here to clearly identify "shared equally" as the default absent agreement or a court order] be shared equally by the parties.

(g) Judges Pro Tempore as Mediators.

(1) ***Request.*** The parties may ask the court to appoint an active judge pro tempore in good standing to conduct a private mediation. The request must be accompanied by an affidavit signed by the judge pro tempore stating that he or she is an active judge pro tempore in good standing, and was appointed by the Supreme Court at the request of the presiding judge of the superior court in that county.

(2) ***Order.*** A court order appointing a judge pro tempore to conduct a private mediation may authorize him or her to:

(A) approve binding agreements made by the parties that comply with Rule 69;

(B) make any findings necessary to approve party agreements under A.R.S. § 25-317;

(C) make the jurisdictional findings under A.R.S. § 25-312 or A.R.S. § 25-313; and

(D) sign any Decree of Dissolution that conforms to the agreements reached by the parties.

(3) ***Effect.*** A Decree of Dissolution signed by a judge pro tempore under (g)(2) has the same force and effect as a Decree of Dissolution signed by a judge or court commissioner. The judge pro tempore must promptly deliver the signed decree to the judge who authorized the judge pro tempore to conduct the mediation, and that judge will file the decree and enter it into the court's minutes. [**JWR Note:** What does that mean? "File a minute entry acknowledging its receipt"?]

(4) ***Payment for a Judge Pro Tempore's Services.*** The parties may pay a judge pro tempore for his or her services as a private mediator. But the parties may not pay, and the judge pro tempore may not ask them for, remuneration or anything of

value for his or her service as a judge pro tempore involving the approval of agreements, or for signing and entering a Decree of Dissolution. [**Note:** But under the preceding paragraph, a sitting judge must "enter" the decree; entering the decree seems to exceed the authority of the pro tem.]

~~**(h) Conciliation Court Mediation.** Either party may file a motion to ask for mediation by the conciliation court if the parties disagree about an issue concerning legal decision-making or parenting time. The moving party must provide the assigned judge and the conciliation court with a copy of the motion.~~

~~(i)~~**(h) Discretion to Order Mediation.** On a party's motion or on its own, the court may enter an order referring a matter to mediation. The court may decline to refer a matter to mediation if it appears that mediation is inappropriate because of parental unfitness, substance abuse, mental incapacity, domestic violence, or other good cause, or because mediation will cause undue delay.

~~(j)~~**(i) Consideration of Domestic Violence.**

(1) ***Limit on Referring a Matter to Mediation.*** In a case concerning legal decision-making or parenting time, if an order of protection is in effect involving the parties or if the court finds that a party's conduct would justify the entry of a protective order, the court may order mediation or refer the parties to mediation only if policies and procedures are in place that protect the victim from harm, harassment, or intimidation.

(2) ***Disclosure.*** Before a mediation, the court must notify parties in writing or orally in open court of their right to ask to waive mediation, or to ask the court to order reasonable procedures at the mediation, to protect a victim of domestic violence. A party is not required to appear for mediation pending the court's ruling on such a request.

(3) ***Mediator's Duty.*** The mediator must decline to mediate, or must terminate mediation, if the mediator determines that domestic violence makes mediation inappropriate.

~~(k)~~**(j) Applications for Default.** Upon entry of an order to mediate or a referral to mediation, and unless the court orders otherwise, a party may not file an application for entry of default until the mediator files a report advising that the mediation has concluded,.

~~(l)~~**(k) Scheduling Mediation Conferences; Persons Who May Attend.**

(1) ***Scheduling.*** After the court has entered an order or referral to mediation, the mediator will schedule joint or individual conferences with the parties. Each party must attend conferences as the mediator directs.

(2) ***Persons Who May Attend.*** The mediator may permit persons other than parties and their counsel to attend or participate in a mediation, if those other persons agree in writing to be bound by this rule's confidentiality provisions. Counsel for a party may be excluded from a private mediation conference only if the party and counsel agree. However, a conciliation court mediator or conciliation court policy may authorize the exclusion of counsel.

(3) ***Failure of a Party to Appear.*** The parties are required to appear at mediation conferences as the mediator directs. The mediator must report to the court the identity of a party who fails to appear, and the court may impose sanctions on that party under Rule 71.

(4) ***Failure to Complete Mediation.*** The court will not continue a scheduled trial or hearing based on a failure to complete mediation unless a party shows good cause for the continuance.

~~(m)~~(l) **Mediation Statement.**

(1) ***Generally.*** The mediator may require each party to submit a mediation statement before a conference, and the court may impose sanctions if a party fails to do so. If a mediation statement is required, a party must submit it to the mediator but must not file it with the clerk.

(2) ***Content.*** A mediation statement must include the following information along with any other information required by the mediator:

(A) a general description of the issues in dispute, the party's position on each issue, and the evidence that will be presented to support the party's position;

(B) if the issues involve financial matters, a current Affidavit of Financial Information, a list of outstanding debts and the party responsible for each debt, and an inventory of community or joint assets, including dates of acquisition, amounts of encumbrances, and present values;

(C) a summary of negotiations the parties have had previously; and

(D) any other information the party believes will be helpful to resolving the issues.

~~(n)~~(m)**Binding Agreements in Mediation.** Any binding agreement reached by the parties during a private mediation must comply with Rule 69. Any agreement between the parties during the mediation must contain their acknowledgement that:

(1) each party entered the agreement voluntarily, without threat or undue influence, and after full disclosure of all relevant facts and information;

(2) each party intends the agreement to be final and binding;

(3) the agreement is fair and equitable; and

(4) if the parties have minor children in common, the agreement is in the best interests of the children.

~~(o)~~**(n)** **Report to the Court.**

(1) ***By the Parties.*** The parties must notify the court when the mediation has concluded and advise the court of any agreements that fully resolve their issues. [**Note:** "Advise" is the word use in current Rule 67(B)(7), but what exactly does this mean or require?] The parties must provide this notice no later than 10 days after the mediation concludes, but also no later than 10 days before the date set for trial or hearing. [**Note:** Current Rule 68(B)(6) has a 30-day window for providing agreements to the court. But the current provision also allows objections to the agreement. How can the parties have an agreement if one of them is filing objections to it?]

(2) ***By the Mediator.*** If the parties reach a partial agreement or no agreement during mediation, the mediator must file a brief report with the court stating that the parties met and attempted to resolve their differences but that the mediation was unsuccessful. The report also must state any agreements the parties reached and the remaining unresolved issues. The mediator must not report the parties' respective positions and must not comment on or offer any opinion about a party's position. The mediator also may advise the court if the parties or the mediator believes that further mediation would be helpful for resolving the remaining issues

Arbitration. ~~The parties may agree to arbitrate any and all issues in accordance with the Arizona Arbitration Act, A.R.S. §§ 12-1501 to 1518 or any other law permitting arbitration. The parties or counsel, if any, shall file with the court a written notice of their agreement to arbitrate some or all of the issues before the court, attaching their written agreement to arbitrate, stating the name of the arbitrator(s), and the date(s) of arbitration. The decision of the arbitrator(s) shall be submitted to the court for a determination that said decision conforms to statute for entry of a decree or other written orders in accordance therewith. The parties shall contract directly with the arbitrator(s) and be responsible for payment of any fees for such arbitration.~~ [**Note:** This provision - Rule 67(B) –

is shown with strikethrough because it may be abrogated and replaced with proposed Rule 67.2 per R-17-0017.]

Rule 67.4. Settlement Conferences

(a) Generally. On a party's motion or on its own, the court may order the parties to attend a settlement conference. If the parties agree, the assigned judge or commissioner may conduct the settlement conference. The court also may order that another judge, a commissioner, or a judge pro tempore conduct the conference. The word "judge" when used in the remainder of this rule includes a judge, commissioner, and a judge pro tempore assigned to conduct a settlement conference. A Decree of Dissolution signed by a judge pro tempore under this rule has the same force and effect as a Decree signed by the judge or commissioner to whom the case is assigned.

(b) Procedures.

(1) ***Who May Attend.*** The court may order the parties, their attorneys, and any other person who the court deems necessary to facilitate settlement of the issues, to attend and participate in the settlement conference.

(2) ***Scheduling and Other Orders.*** The court may enter an order setting the date for the conference. The court also may enter other orders that facilitate the settlement conference. The parties and counsel are required to appear in person at all scheduled settlement conferences, and the court may impose sanctions under Rule 71 if a party fails to appear at, or participate in, the conference.

(3) ***Settlement Memorandum.*** The settlement judge may require each party to submit a settlement memorandum before a conference, and the court may impose sanctions if a party fails to do so. If a settlement memorandum is required, a party must submit it to the judge conducting the conference, but must not file it with the clerk. A settlement memorandum should include the following information, along with any other information required by the court:

(A) a general description of the issues in dispute, the party's position on each issue, and the evidence that will be presented to support the party's position;

(B) if the issues involve financial matters, a current Affidavit of Financial Information, a list of outstanding debts and the party responsible for each debt, and an inventory of community or joint assets, including dates of acquisition, amounts of encumbrances, and present values;

(C) a summary of negotiations the parties have had previously; and

(D) any other information the party believes will be helpful to settlement of the issues.

(c) Communication with One Party. If the court determines that it will facilitate settlement, and with consent of all those participating in the conference, the court may communicate with one party during the conference outside the presence of the other parties.

(d) Domestic Violence. On a party's motion or on its own, the court must put reasonable procedures in place to protect the victim from harm, harassment, or intimidation if it finds that domestic violence has occurred between the parties.

(e) Agreements. Any binding agreement that is reached by the parties at a settlement conference must comply with Rule 69 and include the parties' acknowledgement that:

(1) each party entered the agreement voluntarily and without threat or undue influence, and after full disclosure of all relevant facts and information;

(2) each party intends the agreement to be final and binding;

(3) the agreement is fair, equitable; and

(4) if there are minor children common to the parties, the agreement is in the best interests of the children.

(f) Findings and Approval. The judge conducting the settlement conference must make any findings under A.R.S. § 25-317 that are necessary to approve the agreement. The judge may sign any Decree of Dissolution presented that conforms to the parties' agreements.

(g) Report to the Court. If the parties reached a partial agreement or no agreement during the settlement conference, the settlement conference judge must file a brief report with the court stating that the parties met and attempted to resolve their differences, but that the settlement conference was unsuccessful. The report also must state any agreements the parties reached and the remaining unresolved issues. The report of the settlement conference judge must not include the parties' respective positions and must not comment on or offer any opinion about a party's position. The settlement conference judge also may advise the court if the parties or the judge believes that a further settlement conference would be helpful to resolve the remaining issues.

(h) Other Dispute Resolution Processes; Fees. The court may establish, approve, or administer other dispute resolution processes designed to assist the parties in resolving disputes without contested proceedings. Participants in a dispute service provided through the court may be charged a fee in accordance with the law.

COMMITTEE COMMENT

It is the intention of these drafters to create rules that encourage the use of alternative dispute resolution to resolve disputes in family law matters to the greatest extent possible. It is believed that ADR will assist in the effective management of the caseloads of the family court divisions and facilitate the resolution of family disputes. ADR services are usually less expensive, less time consuming and less traumatic than litigation. This rule is intended to establish a framework in which the parties are required to attend and voluntarily participate in the ADR process. Through their participation it is hoped that a mutually satisfactory resolution of the issues can be achieved. This rule is not intended to create, encourage, or result in ancillary court proceedings involving the motives, conduct or communications of the parties, unless otherwise required by law.

Rule 67. ~~Mediation, Arbitration, Settlement Conferences, and Other Dispute Resolution Processes Outside of Conciliation Court Services~~

[**<u>Notes:</u>** Suggest two new freestanding rules for mediation (Rule 67.3) and settlement conferences (Rule 67.4).

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Rule 67. Types of Alternative Dispute Resolution

Rule 67 describes 4 types of Alternative Dispute Resolution, as follows:

(a) A collaborative law process in Rule 67.1;

(b) Family law arbitration in Rule 67.2;

(c) Private mediation in Rule 67.3; and

(d) A settlement conference in Rule 67.4.

(e) A fifth type of Alternative Dispute Resolution, conciliation court services, is provided in Rule 68.

Rule 67.3. Private Mediation

(a) Generally. Private mediation is a voluntary and confidential process in which parties confer with a neutral individual (a "mediator") to help them resolve the dispute. The parties may retain a private mediator under Rule 67.3(d), or a private mediator may be assigned by the court under Rule 67.3(e). .

(b) Confidentiality; Communications with the Court; Other Roles of the Mediator.

(1) ***Confidentiality.*** Mediation conferences are conducted privately. Oral and written communications exchanged during a mediation are confidential. Unless these rules specifically state otherwise, the provisions of A.R.S. § 12-2238 apply to mediation conferences under this rule.

Commented [RJW1]: "Verbal" means "using words" and can be either oral or written.

Commented [RJW2]: "Concerning" is too vague.

(2) ***Communications with the Court.*** The mediator must not communicate with the assigned judge or commissioner about anything that was said, submitted, or done before or during the mediation, except: [**<u>Note:</u>** This draft excludes a provision in current Rule 67(B)(9) that would permit the court to sanction a mediator for violating the confidentiality requirement. Is the provision necessary, does it occur in practice?]

Although the court may order a party to appear for a mediation conference, participation in mediation is voluntary. [**Note:** This language in current Rule 67(B)(9), shown here, is puzzling and it is not included in the draft. The current language allows a party to appear but not participate. Is there no obligation to participate in good faith? See further current Rule 67(D)(6), where the court may impose sanctions for failure to appear "and participate" at a settlement conference.]

(A) the mediator may advise the court in writing about the mediation schedule and any procedural matter related to the mediation, so long as the substance of what the parties or their counsel say or do during the mediation remains confidential;

(B) the mediator may report matters to the court if the parties agree or if the law requires or permits the disclosure;

(C) the mediator may report to the court a party's failure to appear at a scheduled mediation conference as required under (k), or a party's failure to submit a mediation memo as required by the mediator under (l); and

(D) the mediator may report to the court information as allowed in (n).

(3) ***Other Roles of a Mediator.*** The mediator may not conduct any other form of dispute resolution process in the same case, unless the parties agree and the court approves. [**Note:** A subsequent provision in the current rule states, "The mediator may not conduct any subsequent family assessment or evaluation in the same case."]

(c) Subjects for Mediation. The parties may privately mediate any issue in dispute.

(d) Privately Retained Mediator. The parties may agree to, and jointly select, a private mediator. The parties must sign and file a notice that states that private mediation will take place, identifies the name of the jointly-selected mediator, and specifies the date set for the initial mediation conference.

(e) Court-Selected Private Mediator. The parties may ask the court to choose 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.

(f) Payment for a Private Mediator's Services. The parties must contract directly with a private mediator and be responsible for payment of the mediator's fees. Unless the parties agree or the court orders otherwise, the cost of mediation must ~~should~~ [**JWR Note:** I would use "must" here to clearly identify "shared equally" as the default absent agreement or a court order] be shared equally by the parties.

(g) Judges Pro Tempore as Mediators.

(1) ***Request.*** The parties may ask the court to appoint an active judge pro tempore in good standing to conduct a private mediation. The request must be accompanied by an affidavit signed by the judge pro tempore stating that he or she is an active judge pro tempore in good standing, and was appointed by the Supreme Court at the request of the presiding judge of the superior court in that county.

(2) ***Order.*** A court order appointing a judge pro tempore to conduct a private mediation may authorize him or her to:

(A) approve binding agreements made by the parties that comply with Rule 69;

(B) make any findings necessary to approve party agreements under A.R.S. § 25-317;

(C) make the jurisdictional findings under A.R.S. § 25-312 or A.R.S. § 25-313; and

(D) sign any Decree of Dissolution that conforms to the agreements reached by the parties.

(3) ***Effect.*** A Decree of Dissolution signed by a judge pro tempore under (g)(2) has the same force and effect as a Decree of Dissolution signed by a judge or court commissioner. The judge pro tempore must promptly deliver the signed decree to the judge who authorized the judge pro tempore to conduct the mediation, and that judge will file the decree and enter it into the court's minutes. [**JWR Note:** What does that mean? "File a minute entry acknowledging its receipt"?]

(4) ***Payment for a Judge Pro Tempore's Services.*** The parties may pay a judge pro tempore for his or her services as a private mediator. But the parties may not pay, and the judge pro tempore may not ask them for, remuneration or anything of value for his or her service as a judge pro tempore involving the approval of agreements, or for signing and entering a Decree of Dissolution. [**Note:** But under the preceding paragraph, a sitting judge must "enter" the decree; entering the decree seems to exceed the authority of the pro tem.]

(h) Discretion to Order Mediation. On a party's motion or on its own, the court may enter an order referring a matter to mediation. The court may decline to refer a matter to mediation if it appears that mediation is inappropriate because of parental unfitness, substance abuse, mental incapacity, domestic violence, or other good cause, or because mediation will cause undue delay.

(i) Consideration of Domestic Violence.

(1) ***Limit on Referring a Matter to Mediation.*** In a case concerning legal decision-making or parenting time, if an order of protection is in effect involving the parties or if the court finds that a party's conduct would justify the entry of a protective order, the court may order mediation or refer the parties to mediation only if policies and procedures are in place that protect the victim from harm, harassment, or intimidation.

(2) ***Disclosure.*** Before a mediation, the court must notify parties in writing or orally in open court of their right to ask to waive mediation, or to ask the court to order reasonable procedures at the mediation, to protect a victim of domestic violence. A party is not required to appear for mediation pending the court's ruling on such a request.

(3) ***Mediator's Duty.*** The mediator must decline to mediate, or must terminate mediation, if the mediator determines that domestic violence makes mediation inappropriate.

(j) Applications for Default. Upon entry of an order to mediate or a referral to mediation, and unless the court orders otherwise, a party may not file an application for entry of default until the mediator files a report advising that the mediation has concluded.

(k) Scheduling Mediation Conferences; Persons Who May Attend.

(1) ***Scheduling.*** After the court has entered an order or referral to mediation, the mediator will schedule joint or individual conferences with the parties. Each party must attend conferences as the mediator directs.

(2) ***Persons Who May Attend.*** The mediator may permit persons other than parties and their counsel to attend or participate in a mediation, if those other persons agree in writing to be bound by this rule's confidentiality provisions. Counsel for a party may be excluded from a private mediation conference only if the party and counsel agree. However, a conciliation court mediator or conciliation court policy may authorize the exclusion of counsel.

(3) ***Failure of a Party to Appear.*** The parties are required to appear at mediation conferences as the mediator directs. The mediator must report to the court the identity of a party who fails to appear, and the court may impose sanctions on that party under Rule 71.

(4) ***Failure to Complete Mediation.*** The court will not continue a scheduled trial or hearing based on a failure to complete mediation unless a party shows good cause for the continuance.

(l) Mediation Statement.

(1) ***Generally.*** The mediator may require each party to submit a mediation statement before a conference, and the court may impose sanctions if a party fails to do so. If a mediation statement is required, a party must submit it to the mediator but must not file it with the clerk.

(2) ***Content.*** A mediation statement must include the following information along with any other information required by the mediator:

(A) a general description of the issues in dispute, the party's position on each issue, and the evidence that will be presented to support the party's position;

(B) if the issues involve financial matters, a current Affidavit of Financial Information, a list of outstanding debts and the party responsible for each debt, and an inventory of community or joint assets, including dates of acquisition, amounts of encumbrances, and present values;

(C) a summary of negotiations the parties have had previously; and

(D) any other information the party believes will be helpful to resolving the issues.

(m) Binding Agreements in Mediation. Any binding agreement reached by the parties during a private mediation must comply with Rule 69. Any agreement between the parties during the mediation must contain their acknowledgement that:

(1) each party entered the agreement voluntarily, without threat or undue influence, and after full disclosure of all relevant facts and information;

(2) each party intends the agreement to be final and binding;

(3) the agreement is fair and equitable; and

(4) if the parties have minor children in common, the agreement is in the best interests of the children.

(n) Report to the Court.

(1) ***By the Parties.*** The parties must notify the court when the mediation has concluded and advise the court of any agreements that fully resolve their issues. [**Note:** "Advise" is the word use in current Rule 67(B)(7), but what exactly does this mean or require?] The parties must provide this notice no later than 10 days after the mediation concludes, but also no later than 10 days before the date set

for trial or hearing. [**<u>Note:</u>** Current Rule 68(B)(6) has a 30-day window for providing agreements to the court. But the current provision also allows objections to the agreement. How can the parties have an agreement if one of them is filing objections to it?]

(2) ***By the Mediator.*** If the parties reach a partial agreement or no agreement during mediation, the mediator must file a brief report with the court stating that the parties met and attempted to resolve their differences but that the mediation was unsuccessful. The report also must state any agreements the parties reached and the remaining unresolved issues. The mediator must not report the parties' respective positions and must not comment on or offer any opinion about a party's position. The mediator also may advise the court if the parties or the mediator believes that further mediation would be helpful for resolving the remaining issues

Arbitration. ~~The parties may agree to arbitrate any and all issues in accordance with the Arizona Arbitration Act, A.R.S. §§ 12-1501 to 1518 or any other law permitting arbitration. The parties or counsel, if any, shall file with the court a written notice of their agreement to arbitrate some or all of the issues before the court, attaching their written agreement to arbitrate, stating the name of the arbitrator(s), and the date(s) of arbitration. The decision of the arbitrator(s) shall be submitted to the court for a determination that said decision conforms to statute for entry of a decree or other written orders in accordance therewith. The parties shall contract directly with the arbitrator(s) and be responsible for payment of any fees for such arbitration.~~ [**<u>Note:</u>** This provision - Rule 67(B) – is shown with strikethrough because it may be abrogated and replaced with proposed Rule 67.2 per R-17-0017.]

Rule 67.4. Settlement Conferences

(a) Generally. On a party's motion or on its own, the court may order the parties to attend a settlement conference. If the parties agree, the assigned judge or commissioner may conduct the settlement conference. The court also may order that another judge, a commissioner, or a judge pro tempore conduct the conference. The word "judge" when used in the remainder of this rule includes a judge, commissioner, and a judge pro tempore assigned to conduct a settlement conference. A Decree of Dissolution signed by a judge pro tempore under this rule has the same force and effect as a Decree signed by the judge or commissioner to whom the case is assigned.

(b) Procedures.

(1) ***Who May Attend.*** The court may order the parties, their attorneys, and any other person who the court deems necessary to facilitate settlement of the issues, to attend and participate in the settlement conference.

(2) ***Scheduling and Other Orders.*** The court may enter an order setting the date for the conference. The court also may enter other orders that facilitate the settlement conference. The parties and counsel are required to appear in person at all scheduled settlement conferences, and the court may impose sanctions under Rule 71 if a party fails to appear at, or participate in, the conference.

(3) ***Settlement Memorandum.*** The settlement judge may require each party to submit a settlement memorandum before a conference, and the court may impose sanctions if a party fails to do so. If a settlement memorandum is required, a party must submit it to the judge conducting the conference, but must not file it with the clerk. A settlement memorandum should include the following information, along with any other information required by the court:

(A) a general description of the issues in dispute, the party's position on each issue, and the evidence that will be presented to support the party's position;

(B) if the issues involve financial matters, a current Affidavit of Financial Information, a list of outstanding debts and the party responsible for each debt, and an inventory of community or joint assets, including dates of acquisition, amounts of encumbrances, and present values;

(C) a summary of negotiations the parties have had previously; and

(D) any other information the party believes will be helpful to settlement of the issues.

(c) Communication with One Party. If the court determines that it will facilitate settlement, and with consent of all those participating in the conference, the court may communicate with one party during the conference outside the presence of the other parties.

(d) Domestic Violence. On a party's motion or on its own, the court must put reasonable procedures in place to protect the victim from harm, harassment, or intimidation if it finds that domestic violence has occurred between the parties.

(e) Agreements. Any binding agreement that is reached by the parties at a settlement conference must comply with Rule 69 and include the parties' acknowledgement that:

(1) each party entered the agreement voluntarily and without threat or undue influence, and after full disclosure of all relevant facts and information;

(2) each party intends the agreement to be final and binding;

(3) the agreement is fair, equitable; and

(4) if there are minor children common to the parties, the agreement is in the best interests of the children.

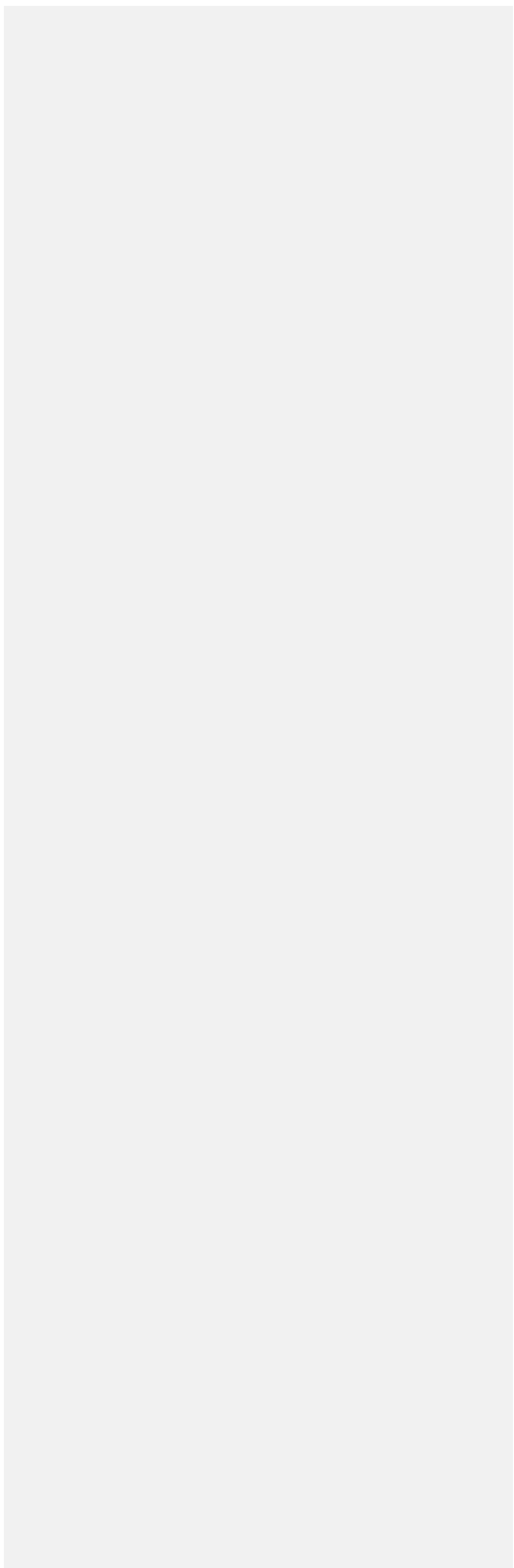
(f) Findings and Approval. The judge conducting the settlement conference must make any findings under A.R.S. § 25-317 that are necessary to approve the agreement. The judge may sign any Decree of Dissolution presented that conforms to the parties' agreements.

(g) Report to the Court. If the parties reached a partial agreement or no agreement during the settlement conference, the settlement conference judge must file a brief report with the court stating that the parties met and attempted to resolve their differences, but that the settlement conference was unsuccessful. The report also must state any agreements the parties reached and the remaining unresolved issues. The report of the settlement conference judge must not include the parties' respective positions and must not comment on or offer any opinion about a party's position. The settlement conference judge also may advise the court if the parties or the judge believes that a further settlement conference would be helpful to resolve the remaining issues.

(h) Other Dispute Resolution Processes; Fees. The court may establish, approve, or administer other dispute resolution processes designed to assist the parties in resolving disputes without contested proceedings. Participants in a dispute service provided through the court may be charged a fee in accordance with the law.

COMMITTEE COMMENT

It is the intention of these drafters to create rules that encourage the use of alternative dispute resolution to resolve disputes in family law matters to the greatest extent possible. It is believed that ADR will assist in the effective management of the caseloads of the family court divisions and facilitate the resolution of family disputes. ADR services are usually less expensive, less time consuming and less traumatic than litigation. This rule is intended to establish a framework in which the parties are required to attend and voluntarily participate in the ADR process. Through their participation it is hoped that a mutually satisfactory resolution of the issues can be achieved. This rule is not intended to create, encourage, or result in ancillary court proceedings involving the motives, conduct or communications of the parties, unless otherwise required by law.



Rule 68. Conciliation Court Services

(a) Conciliation Court Services. The conciliation court provides the following services:

(1) conciliation counseling both before filing a petition for dissolution of marriage, legal separation, or annulment, or while a petition for dissolution of marriage, legal separation, or annulment is pending, as provided in Rule 68(b);

(2) mediation under Rule 67.3 of issues relating to legal decision-making and parenting time, as provided in Rule 68(c); and

(1)

(2)(3) assessments and evaluations regarding legal decision-making and parenting time, as provided in Rule 68(d);

(3)(4) family education services, as provided in Rule 68(e); and

(4)(1) mediation under Rule 67.3 of issues relating to legal decision-making and parenting time; and

(5) other services designed to assist the parties and the court in resolving disputes, as provided under Rule 68(f).

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(b) Conciliation Counseling.

(1) ***Generally.*** Either spouse may file a Petition for Conciliation, as provided in A.R.S. § 25-381.09, to preserve a marriage or to resolve controversies through counseling.

(2) ***Before Filing for Dissolution, Separation, or Annulment.*** If no pending petition for dissolution, separation, or annulment is pending, a party may file a petition requesting conciliation counseling with the clerk, or may submit the petition directly to the conciliation court, as established by local rule or administrative order.

(3) ***After Filing for Dissolution, Separation, or Annulment.*** If a petition for dissolution, legal separation, or annulment is pending, a party may file a petition for conciliation counseling [“or in a separate file with a notice or minute entry of the filing of Petition for Conciliation filed in the court file as provided by local rule or administrative order.” **Note:** The language in quotes, which is taken from the current rule, seems cumbersome. If a case is already pending, isn’t filing with the clerk the most direct way of doing this?] The clerk will send a copy of the petition for conciliation counseling to the conciliation court.

(4) ***Further Proceedings.***

(A) *Time.* The conciliation court must conduct and complete counseling no later than 60 days after the petition is filed.

(B) *Stay.* During the 60-day period in (b)(4)(A), neither party may file a petition for dissolution, separation, or annulment. If a party has already filed a petition for dissolution, separation, or annulment, the action is stayed. The court may lift the stay before the expiration of the 60-day period and it may grant an extension as provided in (b)(4)(D). But in no event may more than one stay may be entered during any 12-month period.

(C) *Protective and Temporary Orders.* During a stay, the court may consider and enforce Petitions for Orders of Protection under A.R.S, § 13-3602 and requests for temporary orders under A.R.S. § 25-381.17.

(D) *Extension of the Stay.* If a party wants to extend a stay, the party must ask the court for the extension in writing. The request must provide good cause for the extension and include either a plan for reconciliation or a counseling schedule. The court may grant a reasonable extension of no more than 120 days, but it must not grant an extension if the other party has good cause to object to it.

(5) ***Counseling.*** After the conciliation court accepts a petition for conciliation counseling, a counselor will schedule individual or joint meetings with the parties. Each party must attend scheduled meetings as the counselor directs. The person who filed the petition for conciliation counseling may withdraw the request with the conciliation court's approval. If the parties agree, the conciliation court may retain jurisdiction while reconciliation efforts are continuing. The parties may not participate in alternative dispute resolution under Rule 66 [**Note:** That term is not defined in this rule] or evaluation services under (c) until the conciliation court terminates its jurisdiction.

(6) ***Report.*** The conciliation court must notify the assigned judge or the conciliation court presiding judge when it concludes conciliation counseling. The notice should include a recommendation about whether to terminate the conciliation court's jurisdiction. In addition, the notice should disclose whether a party withdrew the petition for conciliation counseling, whether a party failed to appear for a scheduled meeting, or if ~~a formal~~ [Note: Isn't a written agreement formal?] the parties reached and signed a written agreement.

(7) ***Confidentiality.*** All oral and written communications during conciliation counseling are confidential and must not be disclosed without the consent of the party making a communication, or as required by law.

~~[**Note:** The provisions of Rule 68(B) regarding mediation in conciliation court are merged into Rule 67.3, the new rule on mediation.]~~

(c) Mediation/ADR ~~.~~ All family law cases that involve a ~~controversy~~ dispute over ~~child custody~~ legal decision-making or parenting time ~~shall be~~are subject to mediation or other alternative dispute resolution (“ADR”) ~~or~~ process ~~provided for in~~ under local rules. Unless the parties agree to private mediation ~~by a private mediator~~ under Rule 67.3, the court [or conciliation services: David proposes to delete these three words] ~~shall~~ must determine whether mediation or ADR services are appropriate in a particular case. The court or conciliation services may deem mediation inappropriate for reasons such as parental unfitness, substance abuse, mental incapacity, domestic violence, or other good cause. The mediator may not conduct any subsequent family assessment or evaluation in the same case.

(1) Commencement. If there is a disagreement between the parties concerning child custody or parenting time, either or both parties may file a motion or request for mediation or ADR services ~~with the clerk of the court~~. The requesting party shall provide a copy of the request to the assigned judge and the conciliation court. An order for mediation or ADR services may also be made on the court’s own motion.

(2) Domestic Violence.

(A) In a proceeding concerning ~~custody~~ legal decision-making or parenting time ~~of a child~~, if an order of protection is in effect involving the parties or there is a finding by the court of any conduct that would form the basis for an order of protection, the court may order mediation or ADR services [or refer the parties to mediation – **NOTE:** what is the difference between this and ordering mediation?] only if there are policies and procedures in place that protect the victim from harm, harassment, or intimidation.

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(B) ~~Every~~ The court will notify every party ~~shall be notified~~ in writing or orally in open court ~~prior to~~ before mediation or ADR services ~~to~~ that a party may request a waiver of mediation or ~~to~~ request that reasonable procedures be in place at the mediation to protect a victim of domestic violence as determined by the court or conciliation services. Neither party ~~shall be~~ is required to appear for mediation pending determination of this ~~matter~~ issue.

(C) Conciliation services ~~shall~~ must reject for mediation or terminate mediation in any case if the mediator deems mediation ~~to be~~ is inappropriate because of domestic violence.

(3) Confidentiality. All communications, both oral and written, made by a party in mediation shall beare confidential and must not be not divulged to third parties, in accordance with as provided by Arizona statutes and court rules.

(4) Mediation Conferences. When a matter has been ordered or referred to mediation, an Conciliation Services will schedule one or more individual or conjoint conference or conferences will be scheduled by Conciliation Services that each party must attend. The mediator shall be entitled to may meet with either or both parties in a confidential conference to determine the appropriateness of mediation prior to commencement of before the start of the process. Counsel are not permitted to attend mediation conferences unless approved by the mediator or conciliation court policy. The mediator may in their sole discretion may permit any person to attend a conference that the mediator, in his or her sole discretion, believes is appropriate. Any person not a party to the action attending who attends the mediation shall must sign an agreement to be bound by the confidentiality provisions of this rule.

(5) *Reports to the Court.* At the conclusion of mediation bya conciliation services mediation, the mediator shall must file a report with the court setting forth describing any agreements, full or partial, the parties reached by the parties, and. The report must also identify identifying the parties' areas of disagreement, but shall the report must not identify the parties' position regarding areas of disagreement. If no agreements are reached in mediation, the mediator's report to the court will advise the court only that the mediation was unsuccessful in resolving the dispute.

(6) *Agreements, Signature of Counsel, Notice to Counsel, and Notice of Objection.* Any agreements reached as a result of mediation by conciliation services mediation must be placed in writing. ALTERNATIVE LANGUAGE TO (A) AND (B) BELOW. The parties must sign the agreement and their attorneys, if any, must sign or object to the agreement within 30 days. Conciliation services will submit agreements signed by the parties, and approved by their attorneys, if any, to the court for approval., following either procedure set forth below. Upon receipt of an objection, conciliation services will terminate the mediation and issue a memorandum to the court indicating that there is no agreement in the matter.

(A) The agreement shall must be signed by the parties and signed and approved as to form by their attorneys, if any, and submitted to the court for approval no later than thirty (30) 30 days from the date of signing.

(B) Alternatively, the agreement ~~shall~~ must be signed by the parties, and conciliation services ~~shall~~ must then submit a copy of the agreement to the parties' attorneys, who, unless a different period is specified by the court or in correspondence transmitting the agreement ~~shall~~ have ~~thirty (30)~~ 30 days from the date of signing to file a Notice of Objection to the agreement~~, unless a different period is specified by the court or in correspondence transmitting the agreement~~. If no timely objection is filed, the agreement will be forwarded to the court with a proposed order for the court's consideration and signature. Any ~~Notice of Objection to the Agreement~~ Notice of Objection must be filed with the court, ~~a copy~~ and a copy must be provided to conciliation services and the other party's attorney or, if the party is not represented, to the party. The Notice of Objection ~~shall~~ must not state ~~the~~ reasons for the objections, but reasons must be~~. Such objections shall, however, be set forth~~ stated in separate correspondence to the party's attorney, or if the party is not represented, to the party. Upon receipt of a Notice of Objection, conciliation services will terminate the mediation and issue a memorandum to the court indicating that as a result of the objection being received, there is no agreement in the matter.

(C) The court ~~shall~~ retains final authority to accept, modify or reject the agreement, or to set a further hearing on the agreement. Upon the entry of a written order by the court approving or modifying an agreement reached by the parties in mediation, it ~~shall be~~ is considered binding.

(d) Assessment or Evaluation. [**Note:** Is there a difference between an "assessment" and an "evaluation?" The current rule uses these terms in conjunction, but if they are the same process, the rule probably should use only one of the terms. Suggest "evaluation."]

(1) ***Referral.*** If the court believes it would be in a child's best interests, it may refer a case to the conciliation court for the assessment or evaluation of legal decision-making or parenting time issues.

(2) ***Scheduling.***

(A) *Notice of Appointments.* Conciliation services must notify the parties and counsel, if any, of all scheduled appointments. However, counsel is not permitted to attend these appointments unless the evaluator deems counsel's presence is necessary for the process to be successful. Conciliation services will not reschedule appointments without good cause.

(B) *Appearance Required.* All parties are required to appear at all scheduled appointments. If one or both parties fail to appear, the evaluator will not

proceed but will report to the court the identity of each party who failed to appear. The court may sanction any party who fails to appear for an appointment.

(C) *Notice of Agreements.* If the parties reach an agreement concerning legal decision-making or parenting time before the assessment or evaluation begins, the parties must immediately notify the court and conciliation services of the agreement.

(3) ***Conducting the Assessment or Evaluation.***

(A) *Generally.* Conciliation services will conduct the assessment or evaluation ~~according to standard practices~~ [**Note:** What or where are these "standard practices?" If it's a meaningless term, it probably should be deleted.] ~~regarding~~ to determine what allocation of legal decision-making or parenting time would be in a child's best interests.

(B) *Interviews.* Conciliation services may conduct interviews that it deems appropriate, including interviewing the parents jointly or individually, interviewing the children, and observing interactions between parents and children.

(C) *Documents.* Conciliation services also may review documents that it deems appropriate. If either party submits documents to the evaluator, the party submitting the documents must promptly provide copies to the other party.

(D) *Notification of Agreement.* Conciliation services will notify the court if the parties reach an agreement concerning legal decision-making or parenting time before the evaluation is complete. [**Note:** (2)(C) requires the parties to notify the court; this provision should be harmonized with (4).]

(E) *Confidentiality.* Conciliation services' assessment or evaluation files are confidential, and only an order of the assigned judge or the family court presiding judge may release a file.

(4) ***Report.***

(A) *Obligation to Prepare a Report.* When the assessment or evaluation is complete, conciliation services must provide the court and the parties with a written report, but must not file it with the clerk. The court may direct the evaluator to provide an oral report in open court instead of a written report.

(B) *Report's Contents.* The report may include recommendations to the court regarding legal-decision making, parenting time, or therapeutic interventions allowed by law.

(C) *Confidentiality.* A written report is confidential but it will be available for appellate purposes. [**Note:** Is this last sentence necessary? What does it mean? If it is not filed, how can it be available for appellate purposes?]

(5) ***Testimony.***

(A) *Court Appearances.* Conciliation services evaluators may testify in court proceedings only if a party properly and timely subpoenas the evaluator.

(B) *Depositions.* Conciliation services evaluators may be deposed only by subpoena and with the judge's approval. The judge may set reasonable limits concerning the time, duration, and location for the deposition, the nature of the questions, and the release of conciliation services files and records.

(C) *Stipulation that Testimony Will Not Be Sought.* Before the evaluator begins an evaluation or assessment, the parties may stipulate that the parties will not call the evaluator as a witness in any court proceeding or depose the evaluator, unless the court orders otherwise. ~~If the parties enter into such a stipulation, this subsection shall not apply.~~ [**Note:** This last sentence appears confusing and unnecessary and is therefore shown with strikethrough.]

(e) Family Education Services. The [family court presiding judge or the] presiding superior court judge ~~of the superior court~~ in a county [or a designee] may implement family education services that parties must attend as the court deems appropriate.

(f) Other Services; Fees. Conciliation services may approve, establish, or administer other services designed to assist the parties or the court in resolving a dispute, including open negotiation, parenting conferences, or early post- decree conferences. The conciliation court may charge fees to persons participating in these services. The court may defer or waive these fee as provided by statute.

~~**(g) Failure to Appear.** The parties are required to appear at all scheduled mediation conferences, open negotiations and other alternative dispute proceedings scheduled by Conciliation Services. If one or both parties fail to appear, the mediator shall report to the court the identity of each person who failed to appear and the court may impose sanctions, as permitted by Rule 71(A).~~ [**Note:** This is covered by (d)(2)(B).]

COMMITTEE COMMENT

The purpose of subdivision B(2) is to ensure that all counties have sufficient policies and procedures to protect victims of domestic violence participating in mediation and ADR processes through the court and conciliation services. These procedures and policies should include screening cases for appropriateness for mediation where there has been domestic violence between the parties and declining to conduct mediation where it is not

appropriate. The procedures to protect victims from harm, harassment, or intimidation should include procedures to assist victims where there is a power disparity due to domestic violence. The court and conciliation services should consider the request of any party that mediation be waived if there is a history of domestic violence between the parties. Other examples of policies and procedures that the court or conciliation services could offer include separate waiting areas, telephonic mediation, shuttle mediation, or parties appearing on separate days for mediation. This list is not intended to be viewed as mandatory or exhaustive.

68b6 – add the following?

Rule 69(a)(1) does not apply to agreements reached under Rule 68(b)(6) without court approval of the agreement.

Rule 68. Conciliation Court

(a) Services. The conciliation court provides the following services:

(1) conciliation counseling both before filing a petition for dissolution of marriage, legal separation, or annulment, or while a petition for dissolution of marriage, legal separation, or annulment is pending, as provided in Rule 68(b);

(2) mediation of issues relating to legal decision-making and parenting time, as provided in Rule 68(c)

(3) assessments and evaluations regarding legal decision-making and parenting time, as provided in Rule 68(d);

(4) family education services, as provided in Rule 68(e); and

(5) other services designed to assist the parties and the court in resolving disputes, as provided under Rule 68(f).

(b) Conciliation Counseling.

(1) ***Generally.*** Either spouse may file a Petition for Conciliation, as provided in A.R.S. § 25-381.09, to preserve a marriage or to resolve controversies through counseling.

(2) ***Before Filing for Dissolution, Separation, or Annulment.*** If no pending petition for dissolution, separation, or annulment is pending, a party may file a petition requesting conciliation counseling with the clerk, or may submit the petition directly to the conciliation court, as established by local rule or administrative order.

(3) ***After Filing for Dissolution, Separation, or Annulment.*** If a petition for dissolution, legal separation, or annulment is pending, a party may file a petition for conciliation counseling [“or in a separate file with a notice or minute entry of the filing of Petition for Conciliation filed in the court file as provided by local rule or administrative order.” **Note:** The language in quotes, which is taken from the current rule, seems cumbersome. If a case is already pending, isn’t filing with the clerk the most direct way of doing this?] The clerk will send a copy of the petition for conciliation counseling to the conciliation court.

(4) ***Further Proceedings.***

(A) *Time.* The conciliation court must conduct and complete counseling no later than 60 days after the petition is filed.

(B) *Stay.* During the 60-day period in (b)(4)(A), neither party may file a petition for dissolution, separation, or annulment. If a party has already filed a petition for dissolution, separation, or annulment, the action is stayed. The court may lift the stay before the expiration of the 60-day period and it may grant an extension as provided in (b)(4)(D). But in no event may more than one stay may be entered during any 12-month period.

(C) *Protective and Temporary Orders.* During a stay, the court may consider and enforce Petitions for Orders of Protection under A.R.S, § 13-3602 and requests for temporary orders under A.R.S. § 25-381.17.

(D) *Extension of the Stay.* If a party wants to extend a stay, the party must ask the court for the extension in writing. The request must provide good cause for the extension and include either a plan for reconciliation or a counseling schedule. The court may grant a reasonable extension of no more than 120 days, but it must not grant an extension if the other party has good cause to object to it.

(5) ***Counseling.*** After the conciliation court accepts a petition for conciliation counseling, a counselor will schedule individual or joint meetings with the parties. Each party must attend scheduled meetings as the counselor directs. The person who filed the petition for conciliation counseling may withdraw the request with the conciliation court's approval. If the parties agree, the conciliation court may retain jurisdiction while reconciliation efforts are continuing. The parties may not participate in alternative dispute resolution under Rule 66 [**Note:** That term is not defined in this rule] or evaluation services under (c) until the conciliation court terminates its jurisdiction.

(6) ***Report.*** The conciliation court must notify the assigned judge or the conciliation court presiding judge when it concludes conciliation counseling. The notice should include a recommendation about whether to terminate the conciliation court's jurisdiction. In addition, the notice should disclose whether a party withdrew the petition for conciliation counseling, whether a party failed to appear for a scheduled meeting, or if ~~a formal~~ [Note: Isn't a written agreement formal?] the parties reached and signed a written agreement.

(7) ***Confidentiality.*** All oral and written communications during conciliation counseling are confidential and must not be disclosed without the consent of the party making a communication, or as required by law.

(c) Mediation/ADR All family law cases that involve a dispute over legal decision-making or parenting time are subject to mediation or other alternative dispute resolution ("ADR") process under local rules. Unless the parties agree to private mediation under Rule 67.3, the court [or conciliation services: David proposes to

delete these three words] must determine whether mediation or ADR services are appropriate in a particular case. The court or conciliation services may deem mediation inappropriate for reasons such as parental unfitness, substance abuse, mental incapacity, domestic violence, or other good cause. The mediator may not conduct any subsequent family assessment or evaluation in the same case.

(1) Commencement. If there is a disagreement between the parties concerning child custody or parenting time, either or both parties may file a motion or request for mediation or ADR services. The requesting party shall provide a copy of the request to the assigned judge and the conciliation court. An order for mediation or ADR services may also be made on the court's own motion.

(2) Domestic Violence.

(A) In a proceeding concerning legal decision-making or parenting time, if an order of protection is in effect involving the parties or there is a finding by the court of any conduct that would form the basis for an order of protection, the court may order mediation or ADR services [or refer the parties to mediation – **NOTE:** what is the difference between this and ordering mediation?] only if there are policies and procedures in place that protect the victim from harm, harassment, or intimidation.

(B) The court will notify every party in writing or orally in open court before mediation or ADR services that a party may request a waiver of mediation or request that reasonable procedures be in place at the mediation to protect a victim of domestic violence as determined by the court or conciliation services. Neither party is required to appear for mediation pending determination of this issue.

(C) Conciliation services must reject for mediation or terminate mediation in any case if the mediator deems mediation is inappropriate because of domestic violence.

(3) Confidentiality. All communications, both oral and written, made by a party in mediation are confidential and must not be divulged to third parties, as provided by Arizona statutes and court rules.

(4) Mediation Conferences. When a matter has been ordered or referred to mediation, Conciliation Services will schedule one or more individual or conjoint conferences that each party must attend. The mediator may meet with either or both parties in a confidential conference to determine the appropriateness of mediation before the start of the process. Counsel are not permitted to attend mediation conferences unless approved by the mediator or conciliation court

policy. The mediator in their sole discretion may permit any person to attend a conference that the mediator believes is appropriate. Any person not a party to the action who attends the mediation must sign an agreement to be bound by the confidentiality provisions of this rule.

(5) ***Reports to the Court.*** At the conclusion of a conciliation services mediation, the mediator must file a report with the court describing any agreements, full or partial, the parties reached. The report must also identify the parties' areas of disagreement, but the report must not identify the parties' position regarding areas of disagreement. If no agreements are reached in mediation, the mediator's report to the court will advise the court only that the mediation was unsuccessful in resolving the dispute.

(6) ***Agreements, Signature of Counsel, Notice to Counsel, and Notice of Objection.*** Any agreements reached as a result of conciliation services mediation must be placed in writing. ALTERNATIVE LANGUAGE TO (A) AND (B) BELOW. The parties must sign the agreement and their attorneys, if any, must sign or object to the agreement within 30 days. Conciliation services will submit agreements signed by the parties, and approved by their attorneys, if any, to the court for approval. Upon receipt of an objection, conciliation services will terminate the mediation and issue a memorandum to the court indicating that there is no agreement in the matter.

(A) The agreement must be signed by the parties and signed and approved as to form by their attorneys, if any, and submitted to the court for approval no later than 30 days from the date of signing.

(B) Alternatively, the agreement must be signed by the parties, and conciliation services must then submit a copy of the agreement to the parties' attorneys, who, unless a different period is specified by the court or in correspondence transmitting the agreement have 30 days from the date of signing to file a Notice of Objection to the agreement. If no timely objection is filed, the agreement will be forwarded to the court with a proposed order for the court's consideration and signature. Any Notice of Objection must be filed with the court, and a copy must be provided to conciliation services and the other party's attorney or, if the party is not represented, to the party. The Notice of Objection must not state reasons for the objections, but reasons must be stated in separate correspondence to the party's attorney, or if the party is not represented, to the party. Upon receipt of a Notice of Objection, conciliation services will terminate the mediation and issue a memorandum to the court indicating that as a result of the objection being received, there is no agreement in the matter.

(C) The court retains final authority to accept, modify or reject the agreement, or to set a further hearing on the agreement. Upon the entry of a written order by the court approving or modifying an agreement reached by the parties in mediation, it is considered binding.

(d) Assessment or Evaluation. [**Note:** Is there a difference between an "assessment" and an "evaluation?" The current rule uses these terms in conjunction, but if they are the same process, the rule probably should use only one of the terms. Suggest "evaluation."]

(1) ***Referral.*** If the court believes it would be in a child's best interests, it may refer a case to the conciliation court for the assessment or evaluation of legal decision-making or parenting time issues.

(2) ***Scheduling.***

(A) *Notice of Appointments.* Conciliation services must notify the parties and counsel, if any, of all scheduled appointments. However, counsel is not permitted to attend these appointments unless the evaluator deems counsel's presence is necessary for the process to be successful. Conciliation services will not reschedule appointments without good cause.

(B) *Appearance Required.* All parties are required to appear at all scheduled appointments. If one or both parties fail to appear, the evaluator will not proceed but will report to the court the identity of each party who failed to appear. The court may sanction any party who fails to appear for an appointment.

(C) *Notice of Agreements.* If the parties reach an agreement concerning legal decision-making or parenting time before the assessment or evaluation begins, the parties must immediately notify the court and conciliation services of the agreement.

(3) ***Conducting the Assessment or Evaluation.***

(A) *Generally.* Conciliation services will conduct the assessment or evaluation ~~according to standard practices~~ [**Note:** What or where are these "standard practices?" If it's a meaningless term, it probably should be deleted.] ~~regarding~~ to determine what allocation of legal decision-making or parenting time would be in a child's best interests.

(B) *Interviews.* Conciliation services may conduct interviews that it deems appropriate, including interviewing the parents jointly or individually,

interviewing the children, and observing interactions between parents and children.

(C) *Documents.* Conciliation services also may review documents that it deems appropriate. If either party submits documents to the evaluator, the party submitting the documents must promptly provide copies to the other party.

(D) *Notification of Agreement.* Conciliation services will notify the court if the parties reach an agreement concerning legal decision-making or parenting time before the evaluation is complete. [**Note:** (2)(C) requires the parties to notify the court; this provision should be harmonized with (4).]

(E) *Confidentiality.* Conciliation services' assessment or evaluation files are confidential, and only an order of the assigned judge or the family court presiding judge may release a file.

(4) ***Report.***

(A) *Obligation to Prepare a Report.* When the assessment or evaluation is complete, conciliation services must provide the court and the parties with a written report, but must not file it with the clerk. The court may direct the evaluator to provide an oral report in open court instead of a written report.

(B) *Report's Contents.* The report may include recommendations to the court regarding legal-decision making, parenting time, or therapeutic interventions allowed by law.

(C) *Confidentiality.* A written report is confidential but it will be available for appellate purposes. [**Note:** Is this last sentence necessary? What does it mean? If it is not filed, how can it be available for appellate purposes?]

(5) ***Testimony.***

(A) *Court Appearances.* Conciliation services evaluators may testify in court proceedings only if a party properly and timely subpoenas the evaluator.

(B) *Depositions.* Conciliation services evaluators may be deposed only by subpoena and with the judge's approval. The judge may set reasonable limits concerning the time, duration, and location for the deposition, the nature of the questions, and the release of conciliation services files and records.

(C) *Stipulation that Testimony Will Not Be Sought.* Before the evaluator begins an evaluation or assessment, the parties may stipulate that the parties will not call the evaluator as a witness in any court proceeding or depose the evaluator, unless the court orders otherwise. ~~If the parties enter into such a stipulation,~~

~~this subsection shall not apply.~~ [**Note:** This last sentence appears confusing and unnecessary and is therefore shown with strikethrough.]

(e) Family Education Services. The [family court presiding judge or the] presiding superior court judge in a county [or a designee] may implement family education services that parties must attend as the court deems appropriate.

(f) Other Services; Fees. Conciliation services may approve, establish, or administer other services designed to assist the parties or the court in resolving a dispute, including open negotiation, parenting conferences, or early post- decree conferences. The conciliation court may charge fees to persons participating in these services. The court may defer or waive these fee as provided by statute.

~~**(g) Failure to Appear.** The parties are required to appear at all scheduled mediation conferences, open negotiations and other alternative dispute proceedings scheduled by Conciliation Services. If one or both parties fail to appear, the mediator shall report to the court the identity of each person who failed to appear and the court may impose sanctions, as permitted by Rule 71(A).~~ [**Note:** This is covered by (d)(2)(B).]

COMMITTEE COMMENT

The purpose of subdivision B(2) is to ensure that all counties have sufficient policies and procedures to protect victims of domestic violence participating in mediation and ADR processes through the court and conciliation services. These procedures and policies should include screening cases for appropriateness for mediation where there has been domestic violence between the parties and declining to conduct mediation where it is not appropriate. The procedures to protect victims from harm, harassment, or intimidation should include procedures to assist victims where there is a power disparity due to domestic violence. The court and conciliation services should consider the request of any party that mediation be waived if there is a history of domestic violence between the parties. Other examples of policies and procedures that the court or conciliation services could offer include separate waiting areas, telephonic mediation, shuttle mediation, or parties appearing on separate days for mediation. This list is not intended to be viewed as mandatory or exhaustive.

68b6 – add the following?

Rule 69(a)(1) does not apply to agreements reached under Rule 68(b)(6) without court approval of the agreement.

Rule 71. Sanctions; Sealing [Note: Current Rule 71(a) is two sentences with 191 words.]

(a) Sanctions.

(1) ***Generally.*** The court may impose a sanction if a party or attorney fails to comply with these rules.

(2) ***Available Sanctions.*** On a party's motion or on its own, the court may enter appropriate orders concerning such conduct unless the noncompliant party or attorney shows good cause. An order may, among other things:

(A) refuse to allow the party to support or oppose a designated claim or defense;

(B) prohibit a party from introducing designated matters in evidence;

(C) stay further proceedings until the party or attorney obeys a previous order;

(D) dismiss a claim;

~~(E) reassign the case to a deferred position on the court's calendar;~~

~~(F)~~**(E)** find the party or attorney in contempt of court; or

~~(G)~~**(F)** enter a default judgment against the disobedient party.

(b) Fees and Costs.

(1) ***Reasonable Expenses.*** Instead of or in addition to another sanction, the court may require a noncompliant party or attorney, or both, to pay reasonable expenses incurred by the opposing party because of the noncompliance. Reasonable expenses may include attorney's fees and costs.

(2) ***Assessment to the Clerk.*** Instead of or in addition to an order to pay another party's reasonable expenses, the court may order the noncompliant party or attorney, or both, to pay an assessment to the clerk. [statutory authority?]

(3) ***Limitation.*** The court may not order the payment of reasonable expenses or an assessment if it finds that a party's or attorney's noncompliance was substantially justified, or that other circumstances make an award of expenses or an assessment unjust.

(c) [deleted] ~~**Sealing the File.** Upon request of any court-appointed professional [**JWR Note:** Who is that? The court clerk? Shouldn't the parties have the right to ask to have defamatory material put under seal?], the court may seal a file or any portion of the file if the court finds that it contains defamatory information about that person. [**Note:** This is a very limited rule on sealing. See, for comparison, pending rule~~

petition R-17-0007, which proposes a comprehensive new Civil Rule 5.4 on procedures for sealing and unsealing court documents. See further current Maricopa County Local Rule 2.19 on sealing.]

(c) [add Maricopa LR re sealing?]

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Maricopa Local Rule 2.19.

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Sealing or Redacting Court Records

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a. Request to Seal or Redact Court Records; Service. Any person may request that the court seal or allow the filing of a redacted court record for a case that is subject to these rules by filing a written motion, or the court may, upon its own motion, initiate proceedings to seal or allow the filing of a redacted court record. A motion to seal or allow the filing of a redacted court record must disclose in its title that sealing or redaction is being sought. The motion must be served on all parties in accordance with the applicable rules of service for the case type.

b. Hearing. The court may conduct a hearing on a motion to seal or allow the filing of a redacted court record.

c. Grounds to Seal or Redact; Written Findings Required. The court may order the court files and records, or any part thereof, to be sealed or redacted, provided the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling interests that outweigh the public interest in access to the court record. The findings should include the following:

(1) there exists a compelling interest that overcomes the right of public access to the record;

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(2) the compelling interest supports sealing or redacting the record;

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(3) a substantial probability exists that the compelling interest will be prejudiced if the record is not sealed or redacted;

(4) the proposed sealing or redaction is narrowly tailored; and

(5) no less restrictive means exist to achieve the compelling interest.

COMMITTEE COMMENT

This rule is based on Rule 16(f), Arizona Rules of Civil Procedure.

Rule 71. Sanctions; Sealing [Note: Current Rule 71(a) is two sentences with 191 words.]

(a) Sanctions.

(1) ***Generally.*** The court may impose a sanction if a party or attorney fails to comply with these rules.

(2) ***Available Sanctions.*** On a party's motion or on its own, the court may enter appropriate orders concerning such conduct unless the noncompliant party or attorney shows good cause. An order may, among other things:

(A) refuse to allow the party to support or oppose a designated claim or defense;

(B) prohibit a party from introducing designated matters in evidence;

(C) stay further proceedings until the party or attorney obeys a previous order;

(D) dismiss a claim;

(E) find the party or attorney in contempt of court; or

(F) enter a default judgment against the disobedient party.

(b) Fees and Costs.

(1) ***Reasonable Expenses.*** Instead of or in addition to another sanction, the court may require a noncompliant party or attorney, or both, to pay reasonable expenses incurred by the opposing party because of the noncompliance. Reasonable expenses may include attorney's fees and costs.

(2) ***Assessment to the Clerk.*** Instead of or in addition to an order to pay another party's reasonable expenses, the court may order the noncompliant party or attorney, or both, to pay an assessment to the clerk. [statutory authority?]

(3) ***Limitation.*** The court may not order the payment of reasonable expenses or an assessment if it finds that a party's or attorney's noncompliance was substantially justified, or that other circumstances make an award of expenses or an assessment unjust.

(c) [deleted]

[add Maricopa LR re sealing?]

Maricopa Local Rule 2.19.

Sealing or Redacting Court Records

a. Request to Seal or Redact Court Records; Service. Any person may request that the court seal or allow the filing of a redacted court record for a case that is subject to these rules by filing a written motion, or the court may, upon its own motion, initiate proceedings to seal or allow the filing of a redacted court record. A motion to seal or allow the filing of a redacted court record must disclose in its title that sealing or redaction is being sought. The motion must be served on all parties in accordance with the applicable rules of service for the case type.

b. Hearing. The court may conduct a hearing on a motion to seal or allow the filing of a redacted court record.

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(1) there exists a compelling interest that overcomes the right of public access to the record;

(2) the compelling interest supports sealing or redacting the record;

(3) a substantial probability exists that the compelling interest will be prejudiced if the record is not sealed or redacted;

(4) the proposed sealing or redaction is narrowly tailored; and

(5) no less restrictive means exist to achieve the compelling interest.

COMMITTEE COMMENT

This rule is based on Rule 16(f), Arizona Rules of Civil Procedure.

Rule 77. Trials

~~**(a) Trial Time Limits and Decorum.**~~

~~**(1)** ***Time Limits.*** The court may impose reasonable time limits on all or any portion of trial proceedings, and may limit the trial to a scheduled amount of time. No later than 45 days before the scheduled trial date, any party may file a motion requesting additional time.~~

~~**(2)** ***Decorum.*** Trials will be conducted in an orderly, courteous, and dignified manner. Parties must address their arguments and remarks to the court, unless the court permits counsel to ask opposing counsel questions.~~

~~**(b)**~~**(a)** **Setting Cases for Trial.** Unless the court has already set a trial on its own or at a Resolution Management Conference, any party may file a motion to set a case for trial. The motion must state:

(1) the date by which the case will be ready for trial;

(2) the names, addresses and telephone numbers of the parties or their attorneys who are responsible for the conduct of the litigation;

(3) whether the case is entitled to a preference for trial because custody is at issue; and

(4) the estimated time for trial.

~~**(c)**~~**(b)** **Continuances and Scheduling Conflicts.**

(1) ***Continuance.*** The court will not reschedule a case that has been set for trial, hearing, or conference except on written motion showing good cause, or unless the court orders otherwise. The court will consider a stipulation for continuance as a joint motion to continue, which must show good cause. Only a court order can vacate or continue a trial setting or hearing date.

(2) ***Motion to Continue; Unavailability of a Witness or Party.*** On a motion to continue a trial based on the unavailability of a party or witness, the party requesting the continuance must show:

(A) why the testimony of the party or witness is material;

(B) when the party learned of the party's or witness's unavailability;

(C) the party's diligence and efforts in attempting to ~~obtain the~~obtain the party's or witness's testimony; and

(D) the postponement is for good cause and not for delay.

(3) ***Scheduling Conflicts Between Courts.*** **[<u>JWR Note:</u>** Restyled consistent with Civil Rule 38.1(c)]

(A) *Notice to the Courts and Counsel.* Upon learning of a scheduling conflict between a trial in superior court and another trial or hearing in state or federal court, counsel must promptly notify the affected judges and counsel.

(B) *Resolving a Conflict.* Upon being notified of a scheduling conflict, the respective judges should confer with each other and counsel to resolve the conflict. Neither federal nor state court actions have priority in scheduling. A court may consider the following factors in resolving the conflict:

(i) whether the other action is a criminal matter, and, if so, whether postponement of that matter will deprive a defendant of a speedy trial;

(ii) each action's relative length, urgency, or importance;

(iii) whether the conflicting trials or hearings involve out-of-town witnesses, parties, or counsel;

(iv) the actions' respective filing dates;

(v) which action was first set for trial;

(vi) any priority granted by rule or statute; and

(vii) any other pertinent factor.

(C) *Inter-Division Conflicts.* Conflicts in scheduling between divisions of the same court may be governed by local rule or general order.

COMMITTEE COMMENT [AMENDED 2007]

Paragraph B is based on Rule 80(a), Arizona Rules of Civil Procedure.

Rule 77. Trials

(a) Setting Cases for Trial. Unless the court has already set a trial on its own or at a Resolution Management Conference, any party may file a motion to set a case for trial. The motion must state:

(1) the date by which the case will be ready for trial;

(2) the names, addresses and telephone numbers of the parties or their attorneys who are responsible for the conduct of the litigation;

(3) whether the case is entitled to a preference for trial because custody is at issue; and

(4) the estimated time for trial.

(b) Continuances and Scheduling Conflicts.

(1) ***Continuance.*** The court will not reschedule a case that has been set for trial, hearing, or conference except on written motion showing good cause, or unless the court orders otherwise. The court will consider a stipulation for continuance as a joint motion to continue, which must show good cause. Only a court order can vacate or continue a trial setting or hearing date.

(2) ***Motion to Continue; Unavailability of a Witness or Party.*** On a motion to continue a trial based on the unavailability of a party or witness, the party requesting the continuance must show:

(A) why the testimony of the party or witness is material;

(B) when the party learned of the party's or witness's unavailability;

(C) the party's diligence and efforts in attempting to obtain the party's or witness's testimony; and

(D) the postponement is for good cause and not for delay.

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conflict. Neither federal nor state court actions have priority in scheduling. A court may consider the following factors in resolving the conflict:

(i) whether the other action is a criminal matter, and, if so, whether postponement of that matter will deprive a defendant of a speedy trial;

(ii) each action's relative length, urgency, or importance;

(iii) whether the conflicting trials or hearings involve out-of-town witnesses, parties, or counsel;

(iv) the actions' respective filing dates;

(v) which action was first set for trial;

(vi) any priority granted by rule or statute; and

(vii) any other pertinent factor.

(C) *Inter-Division Conflicts.* Conflicts in scheduling between divisions of the same court may be governed by local rule or general order.

COMMITTEE COMMENT [AMENDED 2007]

Paragraph B is based on Rule 80(a), Arizona Rules of Civil Procedure.

Rule 78. Judgment; Attorney Fees, Costs, and Expenses

(a) Definitions; Form.

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

~~A.~~(2) ~~*For purposes of this rule, a*~~ *"~~D~~decision"* as used in this rule is a written order, ruling, or minute entry that adjudicates at least one claim or defense.

(b) Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines there is no just reason for delay and recites that the judgment is entered under Rule 78(b). ~~of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment~~ If there is no such express determination and recital, any decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties, and ~~may be revised~~ is subject to revision at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities. ~~. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.~~ For purposes of this ~~sub~~section, a claim for attorney~~s~~' fees ~~may be~~is considered a separate claim from the related judgment regarding the merits of ~~a cause~~ the action.

~~B.~~**(c) Judgment as to All Claims and Parties.** A judgment as to all claims and parties is not final unless the judgment recites that no further matters remain pending and that the judgment is entered under Rule 78(c).

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

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(e) Attorneys' Fees, Costs, and Expenses.

D.

(1) *Asserting a CClaims for Attorneys' Fees, Costs, and Expenses*. A claim for attorneys' fees, costs, and expenses initially shall must be made in the pleadings, pretrial statement, or by motion filed prior tobefore trial or a post-decree evidentiary hearing. A claim for attorney fees, costs, and expenses must also be included in any required pretrial statement.

1. Costs and expenses also shall be claimed by an itemized statement.
2. *Time of Determination*. Except as to temporary awards of attorneys' fees and costs, when attorneys' fees are claimed, the determination as to the claimed attorneys' fees shall be included with a decision on the merits of the case or as otherwise ordered by the court

(2) *Method of Establishing a Claim.* A claim for attorneys' fees, costs, and expensesThe claim must be supported shall be supported by an itemized affidavit, or exhibits submitted as directed by the court,, or, at in the court's discretion of the court, by testimony.

If the motion is contested, opposing parties may respond to the motion and a hearing may be granted in the discretion of the court. In addition, the court may refer issues relating to the value of services to a family law master under Rule 72.

(3) *Time of Determination*. Except as to temporary awards of attorneys' fees and costs, when attorneys' fees are claimed, tThe determination as to the claimedof attorneys' fees, costs, and expenses shallmust be included in the judgment with a decision on the merits of the case or as otherwise ordered by the court. If a party requested asserts a claim for attorney 's fees, costs, and expenses pursuant tounder Rule 78(fe)(1), and a decision adjudicates all claims and liabilities of all of the parties and a judgment is to be entered under Rule 78(e) 81except that omits attorney's fees, a ruling on the claim, the claim is deemed denied unless the party files any Rule 83 motion for attorney's fees must be filedmotion within 15 days after the decision is filedentry of the judgment., or by such other date as the court may order,

or the request is deemed denied.

(f) Form of Judgment; Objections to Form.

(1) ***Proposed Forms of Judgment.*** Proposed forms of judgment must be served on all parties.

(2) Objections to Form.

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(A) A judgment may not be entered until 5 days after the proposed form of judgment is served, unless:

(i) the opposing party endorses on the judgment its approval of the judgment's form; or

(ii) the court waives or shortens the 5-day notice requirement for good cause; or

(iii)the judgment is against a party in default.

(B) An opposing party not in default may file an objection to the proposed form of judgment within 5 days after it is served. If an objection is made:

(i) the party submitting the proposed form of judgment may reply within 5 days after the objection is served; and

(ii) after that time expires, the court may decide the matter with or without a hearing.

(g) Entering Judgment.

(1) *Written Document.* All judgments must be in writing and signed by a judge or a court commissioner duly authorized to do so.

(2) *Time and Manner of Entry.* A judgment is not effective before entry, but a court may direct the entry of a judgment nunc pro tunc in such circumstances and on such notice as justice requires, stating the reasons on the record. A judgment, including a judgment in the form of a minute entry, is entered when the clerk files it.

(h) Notice of Entry of Judgment.

(1) *Manner of Notice.*

(A) *By the Clerk.* Immediately upon the entry of a judgment, or the entry of a minute entry constituting a judgment, the clerk must:

(i) distribute notice, in the form required by Rule 81(c)(2), either electronically, by U.S. mail, or attorney drop box, to every party not in default for failing to appear; and

(ii) make a record of the distribution.

(B) *By Any Party.* In addition to the clerk's notice under Rule 81(c)(1)(A), any party may serve notice of entry of judgment in the manner provided in Rule 43(c).

(2) *Form of Notice.* Notice of entry of judgment must be in the following form:

(A) a written notice of the entry of judgment;

(B) a minute entry; or

(C) a conformed copy of the file-stamped judgment.

(3) ***Lack of Notice.*** Lack of notice of the entry of judgment by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party from the failure to appeal within the allowed time, except as provided in Arizona Rule of Civil Appellate Procedure 9(f).

Enforcement of Judgment; Special Writ. On motion, the court must [cause the judgment to be carried into execution.] [**JWR Note:** What does this mean? "assist in the judgment's execution'?] If the judgment is for personal property and a petitioner or prevailing party shows that the property has a special value to the petitioner or prevailing party, the court may award the petitioner or prevailing party a special writ for the seizure and delivery of the property and may, in addition to the other relief granted, enforce its judgment in the manner provided by law. [**Note:** This provision is currently Rule 81(B). If the Task Force retains the provision, it might consider relocating it to a different rule, for example, Rule 89. The provision also requires restyling.]

3. *Scope*. The provisions of subdivisions (1) through (3) do not apply to claims for fees, costs, and expenses as sanctions pursuant to statute or other rule, or to causes in which the substantive law governing the action provides for the recovery of such fees, costs, and expenses as an element of damages to be proved at trial. [note – KB – I am not sure on this statement]

E. **(i)** **Offers of Judgment Not Applicable.** The procedure governing offers of judgment, authorized in civil actions under Ariz. R. Civ. Proc. 68, shall does not apply in any legal matter action under Title 25 that is subject to these Rules.

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Rule 78. Judgment; Attorney Fees, Costs, and Expenses

(a) Definitions; Form.

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

(2) *"Decision"* as used in this rule is a written order, ruling, or minute entry that adjudicates at least one claim or defense.

(b) Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines there is no just reason for delay and recites that the judgment is entered under Rule 78(b). If there is no such express determination and recital, any decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties, and is subject to revision at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities. For purposes of this section, a claim for attorney fees is considered a separate claim from the related judgment regarding the merits of the action.

(c) Judgment as to All Claims and Parties. A judgment as to all claims and parties is not final unless the judgment recites that no further matters remain pending and that the judgment is entered under Rule 78(c).

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

(e) Attorney Fees, Costs, and Expenses.

(1) *Asserting a Claim for Attorney Fees, Costs, and Expenses*. A claim for attorney fees, costs, and expenses must be made in the pleadings or by motion filed before trial or a post-decree evidentiary hearing. A claim for attorney fees, costs, and expenses must also be included in any required pretrial statement.

(2) *Establishing a Claim.* The claim must be supported by an itemized affidavit or exhibits submitted as directed by the court, or, in the court's discretion, by testimony.

(3) *Time of Determination*. The determination of attorney fees, costs, and expenses must be included in the judgment or as otherwise ordered by the court. If a party asserts a claim for attorney fees, costs, and expenses under Rule 78(e)(1), and a judgment is entered under Rule 81 that omits a ruling on the claim, the claim is deemed denied unless the party files a Rule 83 motion within 15 days after entry of the judgment.

(f) Form of Judgment; Objections to Form.

(1) ***Proposed Forms of Judgment.*** Proposed forms of judgment must be served on all parties.

(2) ***Objections to Form.***

(A) A judgment may not be entered until 5 days after the proposed form of judgment is served, unless:

(i) the opposing party endorses on the judgment its approval of the judgment's form; or
(ii) the court waives or shortens the 5-day notice requirement for good cause; or

(iii)the judgment is against a party in default.

(B) An opposing party not in default may file an objection to the proposed form of judgment within 5 days after it is served. If an objection is made:

(i) the party submitting the proposed form of judgment may reply within 5 days after the objection is served; and

(ii) after that time expires, the court may decide the matter with or without a hearing.

(g) Entering Judgment.

(1) ***Written Document.*** All judgments must be in writing and signed by a judge or a court commissioner duly authorized to do so.

(2) ***Time and Manner of Entry.*** A judgment is not effective before entry, but a court may direct the entry of a judgment nunc pro tunc in such circumstances and on such notice as justice requires, stating the reasons on the record. A judgment, including a judgment in the form of a minute entry, is entered when the clerk files it.

(h) Notice of Entry of Judgment.

(1) ***Manner of Notice.***

(A) *By the Clerk.* Immediately upon the entry of a judgment, or the entry of a minute entry constituting a judgment, the clerk must:

(i) distribute notice, in the form required by Rule 81(c)(2), either electronically, by U.S. mail, or attorney drop box, to every party not in default for failing to appear; and

(ii) make a record of the distribution.

(B) *By Any Party.* In addition to the clerk's notice under Rule 81(c)(1)(A), any party may serve notice of entry of judgment in the manner provided in Rule 43(c).

(2) ***Form of Notice.*** Notice of entry of judgment must be in the following form:

(A) a written notice of the entry of judgment;

(B) a minute entry; or

(C) a conformed copy of the file-stamped judgment.

(3) ***Lack of Notice.*** Lack of notice of the entry of judgment by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party from the failure to appeal within the allowed time, except as provided in Arizona Rule of Civil Appellate Procedure 9(f).

(i) Offers of Judgment Not Applicable. The procedure governing offers of judgment, authorized in civil actions under Ariz. R. Civ. Proc. 68, does not apply in any action under Title 25 that is subject to these Rules.

Rule 81. ~~**Entering Judgment**~~ **(Reserved)**

~~**(a) Form of Judgment; Objections to Form.**~~

~~**(1)** ***Proposed Forms of Judgment.*** Proposed forms of judgment must be served on all parties and must comply with Rule ##(#) and 78(h).~~

~~**(2)** ***Objections to Form.***~~

~~**(A)** A judgment may not be entered until 5 days after the proposed form of judgment is served, unless:~~

~~**(i)** the opposing party endorses on the judgment its approval of the judgment's form; or~~

~~**(ii)** the court waives or shortens the 5-day notice requirement for good cause; or~~

~~**(iii)** the judgment is against a party in default.~~

~~**(B)** An opposing party not in default may file an objection to the proposed form of judgment within 5 days after it is served. If an objection is made:~~

~~**(i)** the party submitting the proposed form of judgment may reply within 5 days after the objection is served; and~~

~~**(ii)** after that time expires, the court may decide the matter with or without a hearing.~~

~~**(b) Entering Judgment.**~~

~~**(1)** ***Written Document.*** All judgments must be in writing and signed by a judge or a court commissioner duly authorized to do so.~~

~~**(2)** ***Time and Manner of Entry.*** A judgment is not effective before entry, but a court may direct the entry of a judgment nunc pro tunc in such circumstances and on such notice as justice requires, stating the reasons on the record. A judgment, including a judgment in the form of a minute entry, is entered when the clerk files it.~~

~~**(c) Notice of Entry of Judgment.**~~

~~**(1)** ***Manner of Notice.***~~

~~**(A)** *By the Clerk.* Immediately upon the entry of a judgment, or the entry of a minute entry constituting a judgment, the clerk must:~~

(i) distribute notice, in the form required by Rule 81(c)(2), either electronically, by U.S. mail, or attorney drop box, to every party not in default for failing to appear; and

(ii) make a record of the distribution.

(B) *By Any Party.* In addition to the clerk's notice under Rule 81(c)(1)(A), any party may serve notice of entry of judgment in the manner provided in Rule 43(c).

(2) ***Form of Notice.*** Notice of entry of judgment must be in the following form:

(A) a written notice of the entry of judgment;

(B) a minute entry; or

(C) a conformed copy of the file-stamped judgment.

(3) ***Lack of Notice.*** Lack of notice of the entry of judgment by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party from the failure to appeal within the allowed time, except as provided in Arizona Rule of Civil Appellate Procedure 9(f).

Remittitur.

(4) Procedure. A party in whose favor a verdict or judgment has been rendered may, in open court, or in a writing filed with the court, remit any part of the verdict or judgment. A remittitur announced in open court must be set forth in a minute entry.

(5) Effect on Execution. After remitting a portion of a judgment or verdict, a party may execute on a judgment only for the balance of the judgment or verdict after deducting the amount remitted.

(6) Effect on Right of Appeal. The remittitur does not affect the rights of the opposing party to appeal from the judgment, and for purposes of appeal the amount of the original judgment must be considered the amount in controversy.

(d) Enforcement of Judgment; Special Writ. On motion, the court must [cause the judgment to be carried into execution.] [**JWR Note:** What does this mean? "assist in the judgment's execution'?] If the judgment is for personal property and a petitioner or prevailing party shows that the property has a special value to the petitioner or prevailing party, the court may award the petitioner or prevailing party a special writ for the seizure and delivery of the property and may, in addition to the other relief granted, enforce its judgment in the manner provided by law. [**Note:** This provision is currently Rule 81(B). If the Task Force retains the provision, it might consider

~~relocating it to a different rule, for example, Rule 89. The provision also requires restyling.]~~

COMMITTEE COMMENT

This rule is based on Rule 58, Arizona Rules of Civil Procedure.

Rule 81. (Reserved)

COMMITTEE COMMENT

This rule is based on Rule 58, Arizona Rules of Civil Procedure.

Rule 23.1. Improper Venue.

~~(A)~~ (a) **Transfer Upon Court's Motion.** When a family law action has been commenced in an improper county in violation of A.R.S. § 12-401, A.R.S. § 25-502, or A.R.S. § 25-802, the court, upon a finding that venue is improper, may on its own motion transfer the case to a county where venue is proper, so long as such transfer occurs no later than ~~thirty (30)~~ 30 days after a Resolution Management Conference has been scheduled pursuant to Rule 76. Prior to ordering a transfer of the case under this rule, the court must provide the parties notice of its intent to transfer the case and allow the parties ~~ten (10)~~ 10 days to file objections to the proposed transfer.

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

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SUPREME COURT OF ARIZONA

In the Matter of RULE 5.4, ARIZONA RULES OF CIVIL PROCEDURE	) Arizona Supreme Court) No. R-17-0007)) **FILED 08/31/2017**))

ORDER
ADOPTING NEW RULE 5.4,
ARIZONA RULES OF CIVIL PROCEDURE

A petition having been filed proposing to adopt a new Rule 5.4 of the Arizona Rules of Civil Procedure and no comments having been received, upon consideration,

IT IS ORDERED that Rule 5.4 of the Arizona Rules of Civil Procedure is adopted as set forth in the attachment to this Order, effective January 1, 2018.

DATED this 31st day of August, 2017.

_______________/S/_____________
SCOTT BALES
Chief Justice

TO:

Lisa M. Panahi
Rule 28 Distribution List

ATTACHMENT

ARIZONA RULES OF CIVIL PROCEDURE

Rule 5.4. Sealing and Unsealing Court Records

(a) Generally. Unless authorized by statute, rule, or court order, no document may be filed under seal in an unsealed civil action.

(b) Definitions. For this rule's purposes:

(1) "document" means any filing, exhibit, record, or other documentary material to be filed or lodged with the court;

(2) "lodged document" means a document that is temporarily deposited with the court but is not filed or made available for public access;

(3) "public access" means the inspection or copying of a document by a member of the public; and

(4) "sealed document" means a document filed or lodged with the court for which public access is prohibited by statute, rule, or court order.

(c) Order Permitting a Document to Be Filed Under Seal.

(1) ***Generally.*** On motion, stipulation or on its own, a court may order a document to be filed under seal if this rule's requirements are met. Unless the court determines that an entire category or type of document meets this rule's requirements, a court may not enter an order that gives advance authorization to file such documents under seal.

(2) ***Requirements.*** Unless a statute, rule, or prior court order authorizes a document to be filed under seal, a court may order that a document may be filed under seal only if it finds in a written order that:

(A) an overriding interest exists that supports filing the document under seal and overcomes the right of public access to it;

(B) a substantial probability exists that the person seeking to file the document under seal (or another person) would be prejudiced if it is not filed under seal;

(C) the proposed restriction on public access to the document is no greater than necessary to preserve the confidentiality of the information subject to the overriding interest; and

(D) no reasonable, less restrictive alternative exists to preserve the confidentiality of the information subject to the overriding interest.

(3) ***Order's Contents.***

(A) *If All of a Document Is Protected.* If the court finds that the requirements for filing a document under seal are met and the entire document meets those requirements, it must order the clerk to file the document under seal.

(B) *If Only Part of a Document Is Protected.* If the court finds only certain pages or portions of pages of a document contain information that merit being placed under seal, it must order:

(i) the submitting person, if he or she has not already done so, to file a publicly accessible version of the document that redacts only those portions of the document; and

(ii) the clerk to file under seal the unredacted version of the document lodged under Rule 5.4(e).

(C) *Advance Authorization.* If the court determines that an entire category or type of document meets this rule's requirements, it may enter an order:

(i) authorizing one or more designated parties or persons to file under seal any document that falls within a designated document category or type; and

(ii) directing the clerk to file under seal any document submitted by a designated party or person if the clerk is presented with a copy of the court's order.

(4) ***The Clerk's Duties.*** If the court orders the sealing of a document, the clerk must file the order to seal, file the document under seal as directed in the court's order, and secure the sealed document from public access. Unless the court orders otherwise, the date of the sealed document's filing is the date the document was lodged with the clerk. The clerk must maintain the document under seal until further order of the court. Nothing in this rule is intended to affect the clerk's normal records disposition policy.

(5) ***Record on Appeal.***

(A) *Generally.* Unless the appellate court orders otherwise, a document that is filed under seal remains sealed when transmitted to an appellate court as part of the record on appeal.

(B) *Denial of a Motion or Stipulation to Seal.* If a request is made under Rule 5.4(f)(2)(A) that the clerk retain a lodged document for the purpose of transmitting it to an appellate court in connection with a challenge to a complete denial of a motion or stipulation to file the document under seal, the

clerk must transmit the document to the appellate court under seal. Upon transmittal, the appellate clerk must maintain the document under seal unless the appellate court orders otherwise.

(6) ***Sanctions.*** A court may issue monetary sanctions against any person who discloses any document, or any protected portion of a document, the person knows or should know is sealed or lodged under this rule. A court may also issue monetary sanctions against any person who knowingly violates any provision of this rule.

(d) Motion or Stipulation to File a Document Under Seal.

(1) ***Generally.*** Any person may file a motion or join in a stipulation to file a document under seal.

(2) ***Contents.*** Any motion or stipulation to file a document under seal must set forth a clear statement of the facts and legal authority justifying the filing of the document under seal, including, if applicable, why the request satisfies the requirements of Rule 5.4(c)(2). It also must state whether any party opposes the request, and, if no party opposes it, the submitting person also must insert the phrase "Not Opposed" below the title of the motion or stipulation.

(3) ***Good Faith Consultation.*** If the request is made by a motion or by a stipulation joined by fewer than all the parties, the motion or stipulation must be accompanied by a Rule 7.1(h) good faith consultation certificate.

(4) ***Proposed Order.*** A proposed order complying with Rule 5.1(d) must accompany a motion or stipulation to file a document under seal.

(5) ***Public Version.*** Unless the motion or stipulation seeks to file under seal all of a document's contents, the submitting person must file a publicly accessible version of the document that redacts the portions of the document subject to the motion or stipulation. If a person files a document under seal under an order providing advance authorization to do so and if only part of the document falls within the category or type protected from disclosure under the order, the submitting person must file a publicly accessible version of the document that redacts only the protected portions of the document.

(e) Lodging and Serving a Document to Be Filed Under Seal.

(1) ***Generally.*** Unless the court orders otherwise or the motion or stipulation seeks advance authorization to file under seal a specific category or type of documents, the submitting person must:

(A) separately lodge with the court the entire document subject to the motion or stipulation; and

(B) serve a copy of the entire document on all parties to the action and provide a courtesy copy to the assigned judge.

(2) ***Submission.*** Unless the clerk has a procedure allowing such documents to be lodged electronically, the person filing the motion or stipulation must submit the document or documents to the clerk in paper form in a secured envelope. A cover sheet must be affixed to the envelope prominently displaying the notation "DOCUMENT(S) PROPOSED FOR FILING UNDER SEAL" and clearly identifying:

(A) the case number and title of the action in which the document or documents are to be filed;

(B) the motion or stipulation seeking to have the document or documents filed under seal;

(C) the underlying motion to which the document or documents pertain; and

(D) each document contained in the envelope with sufficient detail so the court can readily identify it, and the number of pages in each document.

(3) ***The Clerk's Duties.***

(A) *Retention.* If a document is lodged with the court under this rule, the clerk must retain but not file the document unless the court orders it filed. The clerk may scan the document and retain it electronically. If it does so, it may destroy the paper copy of the document or return it the submitting person.

(B) *Public Access.* Until the court decides whether to permit the document to be filed under seal, the clerk must not allow public access to the document. If the court denies the motion or stipulation to file the document under seal, the clerk must continue to restrict public access to the document until it may destroy, delete, or return it as provided in Rule 5.4(f) or as the court orders otherwise.

(C) *Documents Already in the Public File.* If a copy of a lodged document is already in the public file when the motion or stipulation is filed and if the person files a separate written request specifically directed to the clerk asking for such relief (entitled "Request to Clerk to Disallow Public Access to a Document Pending Judicial Review"), the clerk must discontinue allowing public access to the document pending the court's decision whether to permit the document to be filed under seal.

(f) Procedures if a Request to File a Document Under Seal Is Completely or Partly Denied.

(1) ***The Submitting Person's Duties***. If the court completely or partially denies a motion or stipulation to file a document under seal, the submitting person must file within 7 days of the order's entry:

(A) a publicly accessible version of the entire document that conforms to the court's order;

(B) a notice stating that the person no longer wants to file the document; or

(C) an unredacted copy of the document.

(2) ***The Clerk's Duties.***

(A) *If Completely Denied.* If the court denies in full a motion or stipulation to file a document under seal, the clerk must retain the lodged document for at least 7 days after the entry of the order. After that period of time, the clerk may destroy or delete the lodged document or return it to the submitting person unless the submitting person files a written request specifically directed to the clerk (and entitled "Request to Clerk to Retain Lodged Document for Appellate Review") asking the clerk to retain the lodged document to allow the person to seek appellate review of the denial. If such a request is made, the clerk must maintain the lodged document under seal until the person withdraws the request, the superior court or the appellate court orders otherwise, or the time for appeal expires, at which time the clerk may destroy or delete the lodged document or return it to the submitting person.

(B) *If Partly Denied.* If the court partly denies a motion or stipulation to file a document under seal and the submitting person files a notice stating that the person no longer wants to file the document, the clerk may destroy or delete the lodged document or return it to the submitting person.

(g) Documents Produced by Others that Are Governed by a Protective Order or Confidentiality Agreement.

(1) ***Scope.*** Unless the court orders otherwise, this rule governs the procedure a party should follow if it seeks to file (or disclose the contents of) a document produced by another person and if a protective order or confidentiality agreement requires the party to ask the court to file the document (or the portion of a brief or affidavit disclosing its contents) under seal.

(2) ***Good Faith Consultation.*** Before filing anything with the court, the party seeking to file the document or disclose its contents must first attempt to resolve the matter by good faith consultation, as provided in Rule 7.1(h), with the person who

produced the document. Among other things, they must confer about whether the document (or a proposed filing describing its contents) meets Rule 5.4(c)(2)'s requirements.

(3) ***Notice of Lodging.*** If the issue is not resolved, the party seeking to file the document or disclose its contents must lodge and serve the document (or the proposed filing) under seal under Rule 5.4(e) and file and serve a notice of lodging on all other parties, and, if applicable, on any nonparty who produced the document at issue. The notice must summarize the dispute and set forth the submitting party's position. It also must be accompanied by a Rule 7.1(h) good faith consultation certificate.

(4) ***Response to Notice.*** Within 14 days after the notice is served, the person who produced the document must file and serve either:

(A) a notice withdrawing its confidentiality designation or waiving any other right to require a party to ask the court to file the document (or the portion of a filing quoting its contents) under seal; or

(B) a motion to seal and a supporting memorandum meeting the requirements of Rule 5.4(d). No response to the motion may be filed unless the court authorizes it.

(5) ***If the Producing Person Does Not Respond.*** If the producing person does not file a notice or a motion as required by Rule 5.4(g)(4), the court may enter an order making the document (or the portion of a filing quoting its contents) part of the public record.

(h) Unsealing a Document. On motion by any person or on its own after providing reasonable notice to the parties, the court may order that a document be unsealed based on the standards of Rule 5.4(c)(2). The court's order must state the reasons for unsealing the document or, if the order denies a motion to unseal the document, the reasons for denying it.