**Task Force on the Arizona Rules of Family Law Procedure**

**State Courts Building, Phoenix**

**Meeting Minutes: October 30, 2017**

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

**Absent:** Hon. Dean Christoffel, Helen Davis, Hon. Paul McMurdie

**Guests:** Terry Decker, Ed Pizarro Sr., Martin Lynch, Misty Williams

**Administrative Office of the Courts Staff:** Mark Meltzer, Sabrina Nash, Jodi Jerich, Theresa Barrett

**1. Call to order; remarks by the Chair; approval of meeting minutes.** The Chair called the ninth Task Force meeting to order at 10:00 a.m. and introduced the proxies. She noted that workgroups have met 44 times to-date, including 6 times after the September 29th Task Force meeting. She commended the workgroups for their progress and encouraged them to continue to meet early and often. The Chair asked members to review the draft September 29, 2017 meeting minutes, and a member made this motion:

> **Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 009**

The Chair then requested workgroup reports, beginning with Workgroup 1.

**2. Workgroup 1.** Ms. Henderson and Ms. Burns presented two rules on behalf of Workgroup 1.

*Rule 1 (currently, "scope of rules," and as proposed, "scope and applicability of these rules"):* Ms. Henderson advised that the workgroup shortened and revised the applicability language in the current rule as follows: "in ~~all~~ family law cases~~, including paternity,~~ and all ~~other~~ matters arising ~~out of~~ under Title 25…." The workgroup added as a new Rule 1(c) a provision currently found in Rule 2(A) concerning the applicability of the Rules of Civil Procedure. It included in proposed Rule 1(c) a provision derived from the second sentence of the Committee Comment to current Rule 1. It also added as a new Rule 1(d) another provision that is currently in Rule 2(C) regarding the applicability of local rules. Members had no questions or comments concerning the workgroup's revisions, and they approved the rule as revised.

*Rule 2 (currently, "applicability of other rules," and as proposed, "applicability of the Arizona Rules of Evidence"):* Ms. Burns began with an observation that the current rule is

unduly complicated and the language is awkward. She then noted modifications to the title of Rule 2 because of the changes to Rule 1 discussed above. Because proposed Rule 2 focuses on the Rules of Evidence, she also noted changes to its section titles. Revised section (a) deals with the effect of, and time for filing, a Rule 2(a) notice. The timing is the same as the current rule. Revised section (b) discusses the effect of not filing a notice. The language in the revised section is shorter than the current rule and is more user-friendly. The revisions contain the same cross-references to certain Rules of Evidence as current Rule 2. The revisions succinctly state that "the court may admit relevant evidence except when it is unreliable or not adequately and timely disclosed…." A member suggested that section (b) would be more understandable if its provisions were separated into 3 subparts, and during the meeting, Workgroup 1 conferred and made the suggested modification.

Revised Rule 2(c) is like the current provision concerning records of regularly conducted activity, which are admissible without a custodian's testimony. Ms. Burns then presented an issue under section (d) ("court-ordered reports, documents, and forms"). The workgroup's proposed version would permit the court to consider a report, document, or form that was required by a rule or a statute, and any report that the court ordered prepared pursuant to a rule or statute. Members agreed that forms, such as an affidavit of financial information ("AFI"), or certain reports, such as a report of a court-ordered interview of a child, should be admitted. But they were concerned whether other court-ordered reports, such as a business valuation report, should be admissible under the proposed rule, especially when there was no statutory authority for the report. After a discussion of alternatives, members agreed to delete section (d), and to add to section (c), after the reference to the Arizona Rules of Evidence, the words "or reports prepared pursuant to Rules 68 or 73." Because this phrase is now included in section (c), those reports are subject to the section's requirements of "relevant, reliable, and…timely disclosed." Members approved the rule with these modifications.

**3.** **<u>Workgroup 3.</u>** Workgroup 3 presented Rules 66, 67 (including proposed new Rules 67.3 and 67.4), and 71. Mr. Wolfson prefaced the discussion by observing that the workgroup's task concerning Rules 66, 67, and 68 was complicated by distinct alternative dispute resolution ("ADR") processes in different counties.

*Rule 66 (currently, "alternative dispute resolution: purpose, definitions, initiation, and duty," and as proposed, "duties to consider and attempt settlement by alternative dispute resolution ('ADR')"):* Mr. Wolfson reviewed the draft of Rule 66. In the definition of "arbitration," members added a reference to Rule 67.2, the newly adopted rule on arbitration. They also removed the word "binding" in the definition because some aspects of arbitration are subject to court approval. Members discussed and agreed to retain the provision concerning "open negotiation" as a form of ADR. They distinguished this process from mediation under Rule 67.3 because open negotiation is not private. Open negotiation is also distinguishable from the family law conference officer procedure

under Rule 70. They also discussed and agreed to remove staff's notes in this and other rules.

Members discussed sections (d) ("initiation of ADR"), (e) ("duty to consider ADR"), and (f) ("duty to attempt settlement and report to court"). A member expressed concern that a rule permitting the court to order the parties to participate in ADR may open the possibility of the court ordering the parties to participate in proceedings under Rules 72 or 74. In response, members agreed to modify the first sentence of (d) as follows: "On ~~a party's~~ the parties' request ~~or on its own~~…." The member also noted that if the court orders mediation, the rule should provide an option that is available without cost to the parties. After further discussion, members agreed to delete section (d) entirely. Regarding (e), members noted the absence of any provision that would excuse the draft rule's requirement that the parties confer if there is an existing order of protection or domestic violence concerns. Members will consider incorporating text from draft Rule 67.3(i) or current Rule 76(a)(2)(A). Language concerning domestic violence situations should be consistent throughout the rules, including the rule on protected addresses. A statutory reference to a "significant history" of domestic violence might be useful, but the workgroup should consider the context of that statute before utilizing that phrase in the rules. Members raised additional concerns regarding draft section (f), including the requirement that parties submit a report (Rule 97, Form 6) to the court regarding ADR. It appears that in practice, parties rarely submit the form, and even if reports are submitted, members agreed they have minimal benefit to the court. Although one member thought the report encouraged parties to consider ADR, members after further discussion agreed to delete section (f)(2), a reference in (f)(1) that would require parties to report the outcome of their discussion to the court, and a reference to a report in the title of (f). They also agreed to add to the revised section the sentence, "the court may impose sanctions under Rule 71 for any party's failure to participate in good faith in such discussions." Members approved Rule 66 subject to the additional modifications noted above.

*Rule 67 (currently, "mediation, arbitration, settlement conferences, and other dispute resolution processes outside of conciliation court services," and as proposed, Rule 67, "types of alternative dispute resolution," Rule 67.3, "private mediation," and Rule 67.4, "settlement conferences"):* Mr. Wolfson presented these rules. He began by noting two rules, Rules 67.1 and 67.2, that are related and that originated with the Uniform Law Commission. Rule 67.1, which concerns a collaborative law process, became effective on January 1, 2017. Rule 67.2, which becomes effective on January 1, 2018, concerns arbitration. Revised Rule 67 identifies these and other ADR processes in a list format. Members revised the list so it now identifies four types of ADR and separately identifies conciliation court services under Rule 68.

The Chair noted that additional wordsmithing by the Task Force on this and other rules was not necessary, and if the members are in substantial agreement on a rule, the chairs and staff can refine the language with non-substantive changes. This process will

mitigate the need to return rules to the workgroups and the Task Force, and will expedite preparation of a complete set of rules by the December 15 meeting.

Mr. Wolfson proceeded to Rule 67.3. A member was concerned that proposed language in Rule 67.3(a) ("generally") allowing the court to assign a private mediator could require the parties to pay for a mediator when they might not have the ability to do so. Members addressed this concern by saying, "…a private mediator may be selected by the court under Rule 67.3(e)." Similarly, in draft Rule 67.3(h) ("discretion to order mediation"), members deleted words that would have allowed the court to refer a matter to mediation "on its own," and added that the court could enter such an order only "on agreement of the parties." A member questioned the need for Rule 67.3(f) ("payment for a private mediator's services") when the parties agree to mediation. Members noted that parties can discuss the mediator's fee in advance of the mediation, or it can be a subject during the mediation. The mediator is probably also going to ask parties to sign a fee agreement. But Rule 67.3(f) provides a fallback if there is no agreement: the cost is shared equally by the parties. With the modification noted above, members approved this rule.

Mr. Horowitz reviewed Rule 67.4. Members had no questions or comments concerning that rule, and it was approved without changes.

*Rule 68 (currently, "conciliation court services; counseling, mandatory mediation, assessment or evaluation and other services," and as proposed, "conciliation court"):* Mr. Horowitz, joined by other workgroup members, reviewed the sections of draft Rule 68. Members had a general concern that draft section (b) ("conciliation counseling") did not include a provision for objecting to a petition requesting conciliation. A procedure for objecting should consider the effect of an objection on the 60-day stay that the rule provides, and other timing issues. Judge Cohen and Ms. Clark offered to draft a new subpart for section (b) concerning objections. In section (b)(5) and elsewhere, members discussed use of the word "counseling." Counseling is a term used in Title 25, and while some counties use licensed counselors, not all of them do, so "counseling" would be inaccurate if it was used in the rules on a statewide basis. Members discussed alternative terms to use in Rule 68, such as "services" or "conferences," but did not achieve consensus on which was most appropriate. The Chair and staff will review this provision and propose revisions for the terminology.

Mr. Horowitz suggested that a provision in Rule 68(c) ("mediation/ADR") that allows the court or conciliation services to determine whether services are appropriate in a case, be revised so it reserves the issue solely for the court's determination, but members disagreed and kept the provision as drafted. Elsewhere in section (c), members discussed revisions to a subpart on domestic violence to make the subpart consistent with what members discussed earlier today. Mr. Horowitz also proposed a revision to the draft section that would permit a party access to an unsigned mediation agreement, which would allow the party to review the agreement with counsel. Some counties already follow that practice, but others do not, and a party is bound by the agreement once the party signs it. This leads some attorneys to advise clients to not sign any conciliation

court agreement. The Chair found merit in the suggestion that a party have an opportunity to obtain the advice of counsel before signing an agreement, and she recommended that the petition include this alternative as well as the contrary one. Rule 68(d) is titled, "assessment or evaluation." The members' discussion of whether there is any distinction between these two terms was unresolved, and the Chair requested the workgroup to consider this further.

*Rule 71 ("sanctions; sealing"):* Mr. Horowitz noted that the workgroup removed a sanction in the current rule of reassigning the case to a deferred position on the inactive calendar because the workgroup did not believe that delay was an appropriate sanction. The workgroup also removed the substance of current Rule 71(B), "sealing the file," which is now limited to sealing defamatory information about a court-appointed professional. Members reviewed existing Maricopa Local Rules 2.19 and 2.20, and Civil Rule 5.4 that becomes effective on January 1, 2018. They agreed to adopt provisions of the Local Rules, and to locate them toward the front of the rules in one of the "reserved" locations. Members otherwise approved Rule 71 as proposed by the workgroup.

**4.** **Workgroup 4.** Judge Eppich and Mr. Berkshire presented Rules 77, 78, and 81.

*Rule 77 (currently, "trial procedures," and as proposed, "trials"):* Judge Eppich advised of the workgroup's recommendation to delete staff's proposed Rule 77(a) ("time limits and decorum") because the substance of that provision is covered by draft Rule 22. He added that the workgroup did not believe the proposed 45-day time limit for requesting more time was realistic, because the need for additional time may not become apparent until the parties are in trial. An errant reference to custody was changed to legal decision-making or parenting time. (There should be a global search of the rules before filing the rule petition to catch similar outdated references to custody and visitation.) Members approved the rule with these modifications.

*Rule 78 (currently, "judgment; costs; attorneys' fees," and as proposed, "judgment; attorney fees, costs, and expenses;" and Rule 81 (currently, "entry of judgment," and as proposed, "reserved"):* Although the Task Force previously approved Rule 78, Mr. Berkshire reported that the workgroup had subsequently worked on merging the provisions of Rule 81 into Rule 78, and he presented Rule 78 again to discuss the merged rules. He noted that Rule 78's new sections (f) ("form of judgment, objections to form"), (g) ("entering judgment"), and (h) ("notice of entry of judgment") were based on Civil Rule 58 and were relocated to Family Rule 78 from Family Rule 81. Members requested staff to double-check cross-references in the relocated sections to assure they were accurate. A judge member noted that family courts generally resolve "issues" more than "claims," and suggested revising the wording in Rule 78, sections (b) and (c) accordingly. Members agreed with this suggestion, and noted that the titles of those two sections also will need to be revised to be consistent with this wording change.

Members proceeded to discuss section (e) ("attorney fees, costs, and expenses"), and whether the requirement that a claim under this section be included in the pretrial

statement was an unnecessary belt-and-suspenders approach because the draft rule already required a party to make the claim in the pleadings or by motion. Some members preferred retaining the additional requirement, but others thought it might be a trap for the unwary. Members compromised by adding language that a claim not in compliance with this provision is waived absent good cause. Another member had a concern with a provision in draft section (f) that would require service of proposed forms of judgment on the parties. The concern was whether this would apply to judgments prepared by the court. Members added an exception for judgments originally prepared by the court. Members again discussed section (i), which concerns offers of judgment, and why its inclusion was necessary if the family rules don't incorporate Rule 68. Members concluded that practitioners would wonder why the restyled rules removed this provision, which is in the current rules, and they agreed to retain it in the restyling draft.

**5.** **Workgroup 2.** Workgroup 2 split current Rule 44 into two rules, a revised Rule 44 and a new Rule 44.1.

*Rule 44 (currently, "default decree," and as proposed, "default"):* Ms. Clark noted that the workgroup shortened "failed to respond or otherwise defend" to simply "failed to respond." The workgroup recommended deleting references to "entry" of default because the clerk isn't required to enter default. The workgroup also recommended that a notice of the default application be mailed to the defaulting party's last known address, which would include that party's current address.

Members discussed whether the notice needs to be mailed to an attorney who has not formally appeared in the dissolution case. They believed that the term "related matter" as used in the corresponding civil rule might not fit well in family law cases. For example, a juvenile dependency action might be related, but because counsel in those cases are court-appointed should they get a default notice in a family action? Members also were concerned that merely knowing a party talked to an attorney is too tenuous to conclude that the party is represented; and knowing that an attorney formerly represented a party does not mean that the party is currently represented. But members agreed that subpart (B) concerning notice to the attorney sufficiently clarifies this provision, and they concluded after considering the consequences of a default that the preferable alternative is to provide rather than not provide notice to counsel. Accordingly, they retained the requirement without modification.

Other provisions of section (c) concerning notice were reorganized for clarity. Ms. Clark advised that the workgroup used the term "defaulting party" in draft Rule 44, rather than the current term, "a party claimed to be in default." One member proposed using the term "party in default," and the rule was revised to reflect this suggestion. Members approved Rule 44 with these modifications.

**6.** **Call to the public.** Mr. Terry Decker and Mr. Martin Lynch responded to a call to the public and presented remarks to members of the Task Force.

**7.** **Roadmap; adjourn.** The Chair reviewed the number of rules remaining for workgroup review. Because of the shortened time between today's meeting and the next meeting, which is set for Monday, November 13, and subsequent meetings set for Friday, December 1, and Friday, December 15, paper packets probably will not be available. Members therefore will need to access materials for these upcoming meetings in an electronic format.

The meeting adjourned a**t** 4:01 p.m.