Task Force on the Rules of Procedure for the Juvenile Court

Meeting Agenda

Friday, March 5, 2021
10:00 a.m. to 4:00 p.m.
Telephonic Meeting: **602-609-7512**, Access Code **537 248 426#**

Item no. 1	**Call to Order**	*Hon. Rebecca Berch, Chair*
Item no. 2	**Approval of the February 5, 2021 meeting minutes**	*Justice Berch*
Item no. 3	**General review of the second draft set of proposed rules**	*All*
Item no. 4	**Discussion of comments concerning the second draft**	*All*
Item no. 5	**Discussion of the first draft of a rule petition, including a discussion of forms**	*All*
Item no. 6	**Roadmap** **Next meeting: To be scheduled**	*Justice Berch*
Item no. 7	**Call to the Public** **Adjourn**	*Justice Berch*

The Chair 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 Angela Pennington at (602) 452-3547. Please make requests as early as possible to allow time to arrange accommodations.

Juvenile Rules Task Force

Public Meeting, February 5, 2021
(All members and guests attending telephonically)

Meeting Minutes

Members attending: Hon. Rebecca Berch (Chair), Hon. Mark Armstrong, Professor Barbara Atwood, Beth Beckmann, Beth Beringhaus, Dale Cardy, Kathleen Coughlin, Maria Christina Fuentes by her proxy Steve Selover, Magdalena Jorquez, Hon. Joseph Kreamer, Tina Mattison, Donna McQuality, Eric Meaux, William Owsley, Christina Phillis, Hon. Maurice Portley, Hon. Kathleen Quigley, Beth Rosenberg, Denise Smith, Denise Avila Taylor, Hon. Patricia Trebesch, Edward Truman by his proxy Carey Turner, Kent Volkmer, Hon. Anna Young

Members absent: John Gilmore, Hon. Rick Williams

Guests: Chanetta Curtis, Lori Ford, Shari Anderson Head

AOC staff: Caroline Lautt-Owens, Joe Kelroy, Mark Meltzer, Angela Pennington

1. Call to order; preliminary remarks; approval of meeting minutes. The Chair called the fourteenth Task Force meeting—its ninth consecutive virtual meeting—to order at 10:31 a.m. The Chair advised members that she had provided an overview at 10 o'clock this morning to the Committee on Superior Court concerning the work of this Task Force.

The Chair noted that Workgroup 3 met twice, and the Editorial Group met 5 times, during January. Materials for today's meeting were posted on February 1. The materials included information provided by Judge Portley regarding a qualified residential treatment program ("QRTP") under the Family First Prevention Services Act ("FFPSA") that are pertinent to today's discussion of a new draft rule provisionally numbered Rule ZZ. The materials also included a page of pending legislative bills regarding Title 8, including SB 1391, which would require the trial court to appoint an attorney for a child in all dependency and termination proceedings. Attached to staff's February 1 email to the members was the Editorial Group's comprehensive progress table, version 01.27.2021. This table included a concise description of changes the Editorial Group made to the draft rules subsequent to the members' approval; the table should assist members when they read the most recent drafts.

The Chair then asked members to review draft minutes of the December 18, 2020 Task Force meeting. A member noted that at page 4, under the heading "report from Workgroup 2," the text incorrectly recited that the presentation was made by workgroup 1; it should have said "workgroup 2." There were no other corrections.

Motion: A member moved to approve the December 18, 2020 meeting minutes with this correction. The motion received a second and it passed unanimously. **JRTF 015**

2. Report from Workgroup 3. Members then heard presentations from Judge Quigley on behalf of Workgroup 3 regarding three new rules and two revisited ones.

Rule 00 ("required admonition and findings"). Multiple rules in Part III require a judge to give an admonition to parents. Rather than repeating the admonition verbiage in each of those rules, this new draft rule proposes to locate uniform admonition provisions in a single place. The text of admonitions in those other rules would be deleted, and instead, each of those rules would include a reference to Rule 00 that, in effect, would simply require the court to give the admonition as provided in Rule 00.

Judge Quigley then reviewed draft Rule 00. Section (a) ("generally"), subpart (1), would require the court "before the conclusion of every hearing in a dependency, guardianship, or termination case" to address the parents and advise them of the consequences of failing to appear and failing to participate in reunification services. A member requested that the word "during" replace the words "before the conclusion" because some parents leave the courtroom before the hearing concludes. Members agreed with this requested change. Subpart (a)(2) provides that the requirements in subpart (a)(1) do not apply to a parent whose rights have been terminated or in cases where the court has established a permanent guardianship.

Section (b) ("admonition") provides that a parent's failure to attend one of the proceedings specified in subparts (b)(1)(A), (b)(1)(B), or (b)(1)(C) would be deemed an admission of the allegation. One of the specified proceedings was "a settlement conference in a dependency proceeding." Members concurred that this provision would be contrary to Rule 53. Members had previously concluded that the sanction of "deemed admitted" was too draconian for the parent's failure to attend a voluntary settlement conference. They previously deleted this requirement in Rule 53 to encourage parental participation in settlement conferences, they did not believe that a sanction was required by A.R.S. § 8-826, and they accordingly deleted a provision in Rule 00 that would have permitted sanctions in this circumstance. After further discussion, members agreed to add a pretrial conference to the enumerated proceedings in subpart (b)(1). Subpart (b)(2) requires the court to advise the parents that if they fail to appear at the specified proceedings, "the court may adjudicate the case in their absence and, based on the evidence presented, may grant the petition or motion." Subpart (b)3) requires the court to determine that the parents understood the admonition, and subpart (b)(4) requires that it provide the parents with Form 1, 2, or 3 and request the parents to sign and return the form to the court before the hearing adjourns. A member asked how a parent returns the form if the hearing is virtual. The practice in Pima County is to provide the form to counsel, who in turn will provide the form to the parents. The parents retain a copy of the form.

Section (c) ("failure to participate in reunification services") requires the court at every hearing to advise a parent of the consequences of not remedying the circumstances that caused their child to be in an out-of-home placement. To be consistent with subpart (a)(2), members added text to section (c) to clarify that the requirements of that section apply only to parents whose rights have not been terminated. Section (d) ("failure to appear") specifies the findings the court must make before it proceeds with an adjudication for a parent who failed to appear. Section (e) ("adjudication") provides, "If the requirements of section (d) are satisfied, the court may proceed with the adjudication as provided by Rules 55, 63, or 66, as applicable." Section (f) ("minute entries") specifies the required findings the court must make that confirm it provided the admonition. Draft subpart (f)(2) said, "before the conclusion of the hearings described in subpart (b)(1) ..." A member did not believe that a pretrial conference, one of the proceedings specified in subpart (b)(1), should be subject to the requirements of subpart (f)(2). Members agreed. They accordingly deleted a general reference in subpart (f)(2) to subpart (b)(1) hearings, and substituted the more specific terms "preliminary protective hearing, initial dependency, initial guardianship, or initial termination hearing …" Members agreed that all sections of the rule should use the term "hearing" rather than "proceeding."

Judge Quigley then provided members with an alternative of (a) adopting Rule 00, or (b) leaving the admonition provisions in the dependency, guardianship, and termination rules as they are now. If members prefer to adopt Rule 00, the Editorial Group would need to remove the redundant provisions in those other rules. If the members prefer to include Rule 00, a member further proposed that the affected Part III rules each include a short provision stating that the court must give the admonition as provided in Rule 00. A workgroup note dated 1/15/21 at the end of the draft anticipated this suggestion. Members agreed to include Rule 00 in their rule petition.

Rule YY ("transfer to a tribal court"). The current juvenile rules do not include a procedure for transferring a case to a tribal court. Judge Quigley drafted a new rule that fills this gap. She noted that the substance of the new rule derives from ICWA and the Regulations, which are both specifically referenced in section (a) ("generally") of her draft rule. Judge Quigley reviewed the remaining sections of the draft. Section (b) ("procedure"), subpart (2) concerns "notice to tribe." Judge Quigley noted issues concerning the best way of providing notice to Arizona tribal courts (for example, does the notice go to the clerk or to the presiding judge?) and the manner in which tribes would respond (subpart (b)(3)(B) permits the tribe to respond orally or in writing.) Judge Quigley would like to discuss the draft provision further with tribal judges. The tribe's response is significant because the draft subpart provides that the superior court "may consider the tribe's failure to respond as a declination of the request to transfer."

Section (c) ("considerations") provides in subpart (c)(1) that the court must grant the request unless one of three criteria are met. Those criteria are that a parent objects, the tribe declines transfer, or there is good cause to decline the transfer. Subpart (c)(2) identifies factors that the court must not consider in determining good cause, which

Judge Quigley advised are based on federal law. She then reviewed sections (d) ("findings") and (e) ("orders"). Subpart (e)(2) requires the court to order the petitioner to expeditiously transfer records or reports in the petitioner's possession that were not admitted into evidence; members agreed to add to that provision the words "or previously disclosed to an intervening tribe." Section (f) ("court oversight of the transfer") requires the superior court to communicate with the tribal court to ensure an orderly transfer, including transfer of the child's custody, "in a manner that minimizes the disruption of services to the family." Members also reviewed and made edits to the proposed "comment to 2022 amendment." Those edits included a correction to the citation of an Arizona case.

Rule ZZ ("qualified residential treatment program; judicial review"). This new rule would address a procedure required by the FFPSA. Judge Quigley drafted her rule based on an analogous rule in Washington State and on the materials provided by Judge Portley, which had been prepared by the Director of the Arizona DCS. She added that the federal QRTP requirements have an October 1, 2021 effective date, and this proposed rule would need to have the same effective date. As Judge Quigley was introducing her draft, Ms. Jorquez noted that a group of stakeholders, including her DCS colleagues and Mr. Turner, had used Judge Quigley's draft as a starting point for a revised draft, which Ms. Jorquez provided to staff this morning. At that point in the meeting, the revised draft was added to SharePoint, and the remaining discussion of Rule ZZ, which was led by Mr. Turner, concerned this revised version.

The revised draft was intended to accomplish two objectives: first, that it would mirror federal law, which would enable Arizona to receive federal funding; and second, that it would be sufficiently flexible to permit DCS' administration of this newly created program. Members agreed with draft section (a) ("generally"), which says, "A child may be placed in a qualified residential treatment program under the conditions set forth in this rule, subject to approval and review by the court." However, members had concerns regarding section (b) ("definitions"). (The three defined terms in section (b) are "qualified residential treatment program," "qualified individual," and "QRTP assessment.") For example, the definition of "qualified individual" means "a trained professional or licensed clinician who (A) is qualified to conduct a QRTP assessment," followed by two more requirements prefaced with the word "not" ("not an employee of DCS" and "not connected to…any placement setting in which children are placed by the State.") Saying, in essence, that a qualified individual means a person who is qualified, is circular. One member suggested changing this to "qualified by education or training," but after discussion, members left the definition unchanged to ensure that implementation of this new law would comply with federal requirements. Mr. Turner emphasized that placements in this program are not level one placements under current Arizona law, and that QRTP placements don't currently exist under Arizona statutes. Rather, federal law now determines the requirements for a QRTP. Various states, including Arizona, are still developing these programs. Because the programs are expected to evolve as they are

more fully developed, Mr. Turner cautioned that this rule should not be unduly rigid. For example, Judge Quigley's original draft included a reference to the CASII ("child and adolescent service intensity instrument") in the definition of "QRPT assessment" because Arizona assessments frequently use this tool. By comparison, the revised draft is more generic and does not refer to CASII. Mr. Turner explained that federal law does not refer to the CASII; instead, it says that the test or tool must be approved by the Department of Health and Human Services, which has not yet approved specific assessments. The philosophy of the drafters of the revised rule was to say less now, with the expectation that more details could be added in the future, if necessary.

Section (c) of the revised draft ("time to complete the QRTP assessment") requires the QRTP assessment to be completed 30 days after the child's placement in the QRTP. Mr. Turner noted that although the QRTP assessment is a confidential document, he did not believe the rule needed to include that qualification, and members agreed. In section (d) ("QRTP placement and approval"), subpart (1) ("notice and disclosure"), Judge Quigley's draft required DCS to provide the assessment to the court no later than 5 days after DCS received it; the revised draft enlarged this to 10 days. DCS must also file a motion seeking court approval of the child's placement in the QRTP. Subpart (d)(2) ("procedure") permits the court to set a hearing on the motion no later than 60 days after the child's placement in a QRTP. At that hearing, the court would review the necessity of the placement, but in the absence of an objection, the court may approve the placement without a hearing. In subpart (d)(3) ("findings"), the revised draft added "kinship care" and "relative care" to the enumerated placements that cannot meet the child's needs. Additional findings are required if the child is an Indian child.

Section (e) is titled "continuing review of QRTP placement." If the child remains in a QRTP for more than 60 days, this section requires periodic reviews of the placement at every subsequent hearing under Rules 58 and 60, or at a QRTP placement review. A member was concerned that a child could be "warehoused" unless there were more frequent reviews; the member recommended that the court review a QRTP placement at least every 60 days. However, members declined to create a substantive right to more frequent reviews and noted that Rule 59 provided another avenue for a parent to seek recourse. Members agreed that the rule should provide for notice to the parent when a child is released from a QRTP. This was codified in a new section (f) ("discharge"). Although members contemplated that DCS would file a motion for change of physical custody to obtain court approval before the discharge, they also recognized that exigent circumstances might arise. While the rule requires the motion to be filed "prior to discharge," if exigent circumstances exist, the new provision permits the motion to be filed "upon discharge or as soon as practicable."

Members added the words "judicial review" to the title of the rule. They agreed that the new rule should be located somewhere in the mid-50's of the current rule numbering.

Rule 50 ("preliminary protective hearing"). Judge Quigley presented this rule at the October and December Task Force meetings, and she is presenting it again to consider further revisions to the ICWA provisions in section (b). The drafting challenge is integrating federal law into Arizona procedures. The most recent revisions to section (b) included no changes to subparts (b)(1) ("inquiry") or (b)(2) ("emergency removal or placement"), but there are changes in subpart (b)(3) ("proceedings"). The first sentence of revised subpart (b)(3)(A) requires a judge at the preliminary protective hearing in a case concerning an Indian child to determine whether the findings required by Rule 47.3(d)(1) and 25 C.F.R. § 23.113(d) had been previously made. If not, then the judge at the preliminary protective hearing must find "whether there was probable cause to believe that the emergency removal or placement was necessary to prevent imminent physical damage or harm to the child pursuant to 25 C.F.R. § 23.113(d)." Judge Quigley noted that while this federal regulation does not expressly provide an evidentiary burden concerning the child's emergency removal from the home, she believed this provision should require probable cause as a state standard. Judge Quigley also added to this provision that "at the preliminary protective hearing, a parent may request a hearing to contest the finding."

If that state court does not make that finding, 25 C.F.R. § 23.114(b) provides the child must be immediately returned to the parents, "unless returning the child to the parents would subject the child to substantial and immediate danger or threat of such danger." The corresponding Rule 50 subpart is (b)(3)(C). In this subpart, Judge Quigley proposed that the court must find substantial or immediate danger "by a preponderance of the evidence." This again would be a burden determined by state law because the federal regulation does not include one. In subpart (b)(5) ("placement preferences"), Judge Quigley proposed adding new references, including 25 C.F.R. § 23.132 and Rule 50.2 ("ICWA placement preferences.") The amendments presented today would render subpart (b)(6) ("additional findings") unnecessary and it would be deleted. After a discussion, members agreed with Judge Quigley's proposed amendments to section (b).

Rule 51 ("review of temporary custody"). Judge Quigley also proposed striking two provisions in draft Rule 51 to conform to the above amendments to Rule 50. The prior draft of Rule 51(b) ("burden of proof") contained two subparts, the first titled "probable cause" and the other titled "clear and convincing evidence." The "clear and convincing" subpart would now be unnecessary. Also, certain provisions in section (d) ("findings") were not congruent with the amendments to Rule 50, and those should also be deleted. Members agreed with these revisions and Ms. Pennington made the changes in SharePoint.

3. **<u>Combined draft rules.</u>** Staff posted on the Task Force webpage an initial draft set of the new rules. However, staff noted for the Chair, and the Chair noted for the members, that the initial draft set had a variety of deficiencies, such as being incorrectly numbered and not being in the right sequence. A couple rules had been inadvertently omitted, and the content and formatting of certain rules contained errors. In addition,

Rules 00, YY, and ZZ had not yet been approved by the Task Force when staff prepared the initial draft, and these rules were not included in the initial set.

The December 18 meeting materials included a draft revised table of contents. A revised table of contents was appropriate for a few reasons. First, there are several numbered rules in the current set that are "reserved," "renumbered," or "repealed." Removing these numbers from the restyled set will lead to gaps in numbering. The delinquency rules have been reorganized and re-sequenced. The 15 current emancipation rules have been consolidated into 5 rules. Other rules have been bifurcated. In addition, there are about two dozen wholly new rules. These factors will necessitate renumbering the entire restyled set. There are currently, and there will continue to be, six Parts in the juvenile rules. Staff proposed renumbering the Part I rules as 100, 101, etc., the Part II rules as 200, 201, etc., an on through Part VI. Numbering the rules in this fashion might provide better cues about the general subject matter of each rule than sequential two- and three-digit numbers. For example, users would know that Rule 402 pertains to adoptions. The Rules of Evidence are organized in this manner; and because we'll have more than 100 juvenile rules, the set will invariably include three-digit rule numbers. And if we later need to renumber certain rules, we will only need to renumber rules in a Part rather than the entire set. The Chair directed staff to number the rules in the second draft set using this numbering scheme.

4. **Roadmap.** Pending the preparation of the second draft rules, the Chair requested members to refrain from making any changes to the rules in SharePoint. Each draft rule is in a separate folder, and it's important that those folders remain stable and unchanged while Ms. Pennington prepares the next draft set. Accordingly, the Chair vacated an Editorial Group meeting set for February 11. Staff will endeavor to circulate the second draft set of rules to stakeholders that members have previously identified, inviting the stakeholders' comments that members can review at the next meeting. Staff will also prepare a draft petition for the members to review and discuss at that meeting. Following further input from the members, the Chair set the next Task Force meeting on March 5, 2021.

5. **Call to the public; adjourn.** There was no response to a Call to the Public.

The meeting adjourned at 3:29 p.m.

First Draft: 03.01.2021 rev

Rebecca White Berch (Justice, ret.), Chair
Task Force on the Rules of Procedure for the Juvenile Court, Petitioner
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Phoenix, AZ 85007

SUPREME COURT OF ARIZONA

PETITION TO AMEND THE RULES OF PROCEDURE FOR THE JUVENILE COURT, AND TO AMEND CIVIL RULE 81	) Supreme Court No. R-20-0044)) PETITION)) Request for a Bifurcated Comment Period) and Expedited Adoption of One Rule

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the Task Force on Rules of Procedure for the Juvenile Court ("Task Force") petitions this Court to abrogate the current Rules of Procedure for the Juvenile Court and to instead adopt the proposed new set of rules. The proposed rules restyle and reorganize the current rules. They also contain substantive changes, including the addition of more than a dozen new rules.

Because the proposed amendments concern every one of the current juvenile rules, this petition presents the revisions as a complete new set of rules, rather than as individual rule amendments. Appendix A to this petition contains a clean version of the proposed rules. A "redline" version is not included because the changes are

so extensive that a redline would be more confusing than helpful. Appendix B contains new forms referenced in these rules.

For reasons explained in Section 10, this petition also requests amendments to Rule 81 of the Rules of Civil Procedure. Appendix C shows the proposed amendments to that civil rule.

The conclusion of this petition, Section 14, includes several other requests.

1. Background. Administrative Order No. 2019-74, entered on July 1, 2019, established the Task Force. This Order directed this Task Force to

> … review the Arizona Rules of Procedure for the Juvenile Court and identify possible changes that would conform these rules to modern usage, simplify the language, clarify and improve current procedures, reorganize the rules to enhance their usability, and account for recent Arizona and federal legislation, including the Family First Prevention Services Act.

The proposed rules address each of these elements.

The 26 members of the Task Force include active and retired judges from the Arizona Court of Appeals and the Superior Court of Arizona in Maricopa, Mohave, Pima, and Yavapai Counties. Task Force membership includes the Pinal County Attorney as well as attorneys from other public agencies, including the Attorney General's Office, the Department of Child Safety ("DCS"), Offices of the Maricopa and Pima County Attorneys, and public defender agencies in Maricopa and Pima Counties. Other members are private practitioners from Pima and Yuma Counties, chief juvenile probation officers in Maricopa, Pima, and Pinal Counties, a

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representative of the Superior Court Clerks, the director of an Office of Public Defense Services, a chief staff attorney for the Arizona Court of Appeals; a Supreme Court staff attorney, a representative of the Governor's Office of Youth, Faith, and Family, a University of Arizona law school professor, and a representative of the Children's Action Alliance. The Chair is a retired Supreme Court Justice. Subject matter experts from the Attorney General's office, DCS, AOC-Legal, and private law practice, as well as active superior court judges, also attended a number of Task Force and workgroup meetings and provided valuable insights and guidance to the members.

2. The Juvenile Rules are Complex. Juvenile rules apply to a mixture of case types. These cases can be either criminal or civil in nature. Not only do Arizona statutes and case law apply in juvenile proceedings, but so does federal law, including the Family First Prevention Services Act and the Indian Child Welfare Act. In short, the revision of the juvenile rules has been a major and challenging undertaking.

3. Restyling. Tthe proposed juvenile rules include stylistic revisions that make the rules more understandable and user-friendly. They employ consistent formatting and nomenclature and generally follow the conventions utilized in previous restyling projects.

Many of the current juvenile rules, even lengthy ones, have no titles for sections within the rule. The proposed rules correct this omission by adding titles to virtually every section, and frequently to subparts, too. These titles, along with the uniform organization, makes it easier for users to navigate the rules and locate pertinent provisions.

Many of the proposed rules are related to Title 8 statutes. (The exception is the emancipation rules, which have their origin in Title 12.) The proposed rules include frequent cross-references to particular Arizona statutes and, when appropriate, to federal authority, which should assist the readers in locating and understanding applicable law.

4. Organization and Numbering. The current Juvenile Rules are divided into 6 parts: Part I, General Provisions; Part II, Delinquency and Incorrigibility; Part III, Dependency, Guardianship and Termination of Parental Rights; Part IV, Adoption; Part V, Emancipation; and Part VI, Appeals. Several of these parts are broken down into subparts. The proposed rules retain the structure of these 6 major Parts. However, the titles of some Parts have been edited, and the organization of certain subparts has changed.

What is most notable on a first reading of the proposed rules is the manner of rule numbering. There currently are 116 juvenile rules. (The last numbered rule is currently Rule 108, but some rule numbers include a number to the right of a

decimal point, which accounts for a number higher than 108.) By comparison, the set proposed by this petition includes 124 rules. The following factors affected the total number of proposed rules.

(A) In the current set, 13 rules are shown as "reserved," "repealed," or "renumbered." The proposed rules no longer include these placeholders.

(B) The current 15 emancipation rules in Part V have been reorganized. There are now only 5 proposed emancipation rules.

(C) Several rules were consolidated, but others were bifurcated, or even trifurcated. For example, current Rule 1 is titled, "Applicability; Definitions; Required Format of Stipulations, Motions and Orders." The restyled rules separate these subjects into two rules: proposed Rule 101 ("Scope and Construction," Rule 102 ("Definitions"), and Rule 105 ("Form of Filed Documents"). In other instances, two or more rules have been consolidated into a single rule.

(D) The petition proposes about 20 entirely new rules. These new rules address subjects such as intervention (Rule 113), child's rights (Rule 310), and transfer of a case to a tribal court (Rule 322).

The reduction in the number of rules, combined with the volume of additional rules, made it apparent midway through this project that the proposed set of Juvenile Rules would require renumbering. The Task Force proposes three-digit numbering. Three-digit numbering for the proposed rules is effective because the first number

of a rule corresponds with the Part in which the rule is located, and therefore provides a cue regarding the subject matter of the rule. For example, a reader might not know the subject of Rule 35, but in the proposed rules, that same rule is numbered 227, a signal that the rule is within Part II regarding delinquency. Accordingly, the rules in Part I are numbered 101, 102, etc.; in Part II they are numbered 201, 202, etc.; and this numbering pattern is continued through Part VI. This method of numbering is not unique; the Arizona Rules of Evidence are similarly numbered, with the initial digit of an Evidence Rule number indicating the Article (or "Part") where the rule is located.

5. Task Force Methodology. Task Force members were divided into 4 workgroups, which were assigned to revise roughly equivalent portions of the rules. Workgroups met more than 90 times between October 2019 and January 2021. Outside of meetings, the workgroups reviewed drafts, researched law, and edited documents. The workgroups presented proposed revisions to the full Task Force at public meetings.

The Task Force met 15 times during late 2019, 2020, and early 2021. Members learned early in the process that there was no low-hanging fruit in the juvenile rules; most of the rules were lengthy, included legal or practical issues, or both. Many rules included controversial provisions that were the subject of extensive

discussion. (Click here [ADD HYPERLINK] to review more than 100 pages of meeting minutes, grouped by rule number, that memorialize those discussions.)

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In addition, beginning in July 2020, and with the authorization of Task Force members, an Editorial Group reviewed each rule after it had been considered by the Task Force. Consequently, the proposed rules underwent 3 levels of review: first by a workgroup, then by the Task Force, and again by the Editorial Group. (The Editorial Group was composed of the Chair, Judges Mark Armstrong, Joseph Kreamer, and Kathleen Quigley, as well as Beth Beckmann and Mark Meltzer.) The Editorial Group met more than 20 times. The Editorial Group improved the grammar, syntax, and organization of the approved rules, and made substantive changes that furthered the spirit and intent of Task Force discussions.

6. Court Comments to the Rules. Most of the comments in the current rules have been deleted. The Task Force moved any appropriate substantive content from the comment to the proposed new rule. The Task Force also retained several comments and even added a few new ones.

8. The Proposed Rules. This section summarizes some of the significant and substantive items in the proposed rules.

- **Part I: General Provisions (Rules 101 - 113).** Part I, which are rules that apply in each of the other 5 Parts, currently has 6 rules. By comparison, Part I as proposed includes more than twice that number. Some of the increase is

attributable to the splitting of Rule 1, but several new rules have been added, including new rules on combining hearings (Rule 109) and intervention (Rule 113).

Proposed Rule 1 ("Scope and Construction") has titles for its two sections: Section (a) is "Scope" and corresponds to current Rule 1(A), with modifications. Section (b) is "Construction," which is a new provision that is analogous to introductory provisions regarding construction that are located in Civil Rule 1, Criminal Rule 1.2, Family Law Rule 1(b), and Probate Rule 1(c). Current Rule 1 includes definitions for "juvenile" and "authorized transcriber." By comparison, proposed Rule 2 ("Definitions"), in addition to those definitions, includes more than 20 other defined words and terms.

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Two new Part I rules govern the applicability of other Arizona procedural rules. Rule 103, "Priority of Proceedings; Conducting Proceedings; and Applicability of Other Rules," provides that civil, civil appellate, criminal, family law, probate, protective order, and Supreme Court rules, "are applicable only as specifically set forth or incorporated by reference in these rules." Rule 103(d). For the most part, then, the proposed juvenile rules are self-contained. The second, Rule 104, specifically concerns the Arizona Rules of Evidence. Rule 104 distinguishes the applicability of the Rules of Evidence in a contested adjudication hearing from other, non-adjudication proceedings, where evidentiary standards are relaxed. Rule 104 includes detailed provisions regarding the admissibility of reports, including

reports from a "child safety" or case worker. Rule 104(d)(10) addresses a recurring issue on the meaning of "unavailable for cross-examination." The comprehensive provisions of Rule 104 encompass what is currently Rule 45 ("Admissibility of Evidence").

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Part I includes a new rule, Rule 110, on "virtual proceedings; declared emergencies," which might be the first Arizona court rule on procedures for conducting a proceeding when the governor declares a statewide emergency, such as the current pandemic. Under the provisions of Rule 110, evidentiary hearings would presumptively be conducted in person in the absence of an emergency; but during a declared emergency, evidentiary hearings would presumptively be conducted virtually. The rule provides exceptions for overcoming the presumption in either situation.

- **Part II: Delinquency (Rules 201 - 217).** Although there are very few incorrigibility cases compared to number of delinquency actions, the delinquency rules often use the couplet "delinquency or incorrigibility" to refer to both. The proposed rules eliminate the need for these repeated references by simply saying, "The delinquency rules apply to incorrigibility proceedings." Rule 201 ("Scope of the Delinquency Rules"). Similarly, Rule 202 ("Referral; Diversion") defines "parent" for the delinquency rules as including "parent or guardian." This avoids the need to say "and guardian" every time the rules refer to a parent. There are similar

but slightly different definitions of "parent" in the dependency and adoption rules. See Rule 302 ("Definitions") and Rule 402 ("Meaning of Terms.")

The sequence of the delinquency rules has changed. The current delinquency rules begin with provisions such as the appointment of counsel and the attendance of witnesses, i.e., rules that apply after a proceeding has been initiated. The proposed rules remediate this cart-before-the-horse approach by starting with rules on referrals to juvenile court and the filing and service of a delinquency petition.

Rule 215 ("Records and Proceedings") retains the terms "legal file" and "social file" used in current Rule 19. However, Rule 215(a)(1)(D) adds a new term, "disposition file," which includes the disposition report and any documents from the legal or social file attached to that report. A rule in Part VI ("Appeals") requires transmission of the disposition file to the appellate court as a component of the record on appeal. See Rule 604(a)(1)(A). Part II includes a new Rule 220 ("Admission or Change of Plea"), which permits the court to enter an admission at several different stages of a case. By comparison, current Rule 28(C)(7) ("Advisory Hearing") unintentionally implies that the entry of an admission is limited to that stage of the proceeding.

- **Part III: Child Dependency and Guardianship; Termination of Parental Rights (Rules 301- 351).** There are five subparts in Part III of the current rules. The first subpart ("scope of rules") currently contains only one rule, Rule 36.

This anomaly of having a subpart with one rule has been addressed by abrogating the current first subpart of Part III and by relocating this rule, which is renumbered as Rule 301, in another subpart of Part III. (The first subpart of current Part IV also contains a solitary rule, which has been similarly merged into another subpart of the proposed adoption rules.) Proposed Rule 301, titled "scope of rules," has separate titled sections on "application" and "interpretation." The second section requires the court to interpret the rules not only to protect the child's best interests, but also to protect the rights of the parties.

Commented [BR5]: Consider deleting.

The first two subparts of proposed Part III result from the bifurcation of the current subpart on "general provisions." In both the current and proposed rules, these general provisions apply to dependency, Title 8 guardianship, and termination proceedings. The first of these new subparts concerns "parties and participants." The second new subpart contains general provisions on "proceedings and procedures."

First subpart. The rules in the first subpart require the court to appoint an attorney for a child in any dependency or termination case. See Rule 303(c) ("Appointment of an Attorney for a Child"). Task Force members were not unanimous on this new provision, because some courts prefer to appoint only a guardian ad litem ("GAL"), for example, when the child is an infant and cannot express needs and wishes to an attorney. While the proposed rules require every

child to have a court-appointed attorney, court appointment of GAL for the child would be discretionary and would be in addition to appointed counsel. See Rule 305 "Appointment of a Guardian ad Litem." A GAL appointed under Rule 305 must also be an attorney.

Proposed Rule 306, "Duties and Responsibilities of an Attorney and GAL for a Child," contains a more detailed description of the explanation of the attorney's role to the child than exists in current Rule 40.1(B). It includes guidance on the "Relationship," "Diminished Capacity," and "Substituted Judgment." Rule 306(a). The subpart on diminished capacity includes a cross-reference to Ethical Rule 1.14 ("Client with Diminished Capacity"). The proposed rule requires an attorney to observe the child in the placement home, eliminating the current 5-year age limitation on this requirement.

Commented [BR6]: Nice touch, but can be eliminated if space is an issue

The current continuing education requirements for court-appointed attorneys, GALs, and counsel for parents contained overlap. Rule 40.1 (J), (G). These requirements have been consolidated in a new Rule 309 ("Education Requirements for a Court-Appointed Attorney or Guardian ad Litem"). Part III, subpart 1, also contains new rules on child's rights (Rule 310) and participants' rights (Rule 311).

Second subpart. The second new Part III subpart, concerning "proceedings and procedures," includes a new rule on change of venue to another county (Rule 314). It also includes a new Rule 317 on motions to alter or amend a final order.

Motions under Rule 317 are limited to correcting clerical errors or addressing insufficient findings or conclusion. Rule 318(c), which is derived from current Rule 46(E), concerns motions setting aside a final order on grounds specified in Civil Rule 60. Motions under Rule 317 or Rule 318(c), when filed within 12 days after entry of a final order, extend the time for appealing from the order. See Rule 603(a)(3) ("Effect of Certain Post-Judgment Motions on the Time for Filing a Notice of Appeal"). New Rule 319 ("Motion for Judgement as a Matter of Law") would allow a party other than the petitioner to move for judgment as a matter of law after the petitioner has concluded its presentation of evidence in a dependency, termination, or guardianship adjudication. A Rule 319 motion is analogous to a JMOL motion under Civil Rule 50, but the latter occurs in the context of a jury trial whereas the new juvenile rule would apply in bench trials. Current Juvenile Rule 50.1 ("Deviation from ICWA Placement Preferences") is now Rule 321 of subpart II. There is a new preliminary but related rule, Rule 320 ("Placement Preferences"), which is based on A.R.S. § 8-514 and describes placement preferences for a non-Indian child.

Third subpart. Because removal might be the first judicial proceeding in a dependency case, Rule 327 ("court authorized removal"), was moved from its current location in the subpart on general provisions to proposed subpart 3 on "Dependency Proceedings." Current Rule 48 on filing and service of a dependency

Commented [BR7]: Its number, 327, doesn't make it sound like it has been moved forward much. Can we explain this more clearly? "Removal" was moved from its current position in the general provisions to the front of the subpart on dependency. Is "the front of" accurate? I think the point here is we reorganized the section to parallel the order in which proceedings usually occur. I want to make that thought come through more clearly.

petition is now two rules: Rule 328 on the content of the petition and ancillary documents, and Rule 329 on service of those documents. Rule 329(f) is a new provision for service on an incarcerated person that is based on Family Law Rule 41(g).

Current Rule 49, titled "pre-hearing conference," would become Rule 331 and have the more explanatory title of "preliminary protective conference." Rule 50, which concerns the preliminary protective hearing, has been significantly reorganized in Rule 332. The proposed rule more clearly outlines what occurs at the preliminary protective hearing, and the court findings and orders that are required at the conclusion of the hearing.

Proposed Rule 333 ("Contested Review of Temporary Custody") and Rule 334 ("Initial Dependency Hearing") permit a parent at the initial dependency hearing who had not been served prior to, and did not appear at, the preliminary protective hearing, to request a temporary custody hearing at the parent's first court appearance. Agreement on those new provisions was not unanimous, but they were supported by a strong majority of the members. (The Task Force discussion of this issue included consideration of Division One's opinion in *DCS v. Stocking-Tate (Mark R.)*, 1 CA-SA 19-0001. Rules 332, 333, and 334 also involved a substantial discussion of ICWA, particularly 25 C.F.R. §§ 23.113 and 23.114, as well as pertinent provisions of A.R.S. Title 8.)

Commented [BR8]: Not sure how this sentence relates. We haven't said anything about Indian children or ICWA. Better to say the TF discussion was broad-ranging and extended; a description can be found at: link minutes.

New Rule 335 requires initial and ongoing reviews for a child placed in a qualified residential treatment program ("QRTP"), as provided by the Family First Prevention Services Act. To become compliant concurrently with the effectiveness of the recent federal legislation, this new rule requires an October 1, 2021 effective date. See section 14 of this petition.

Commented [BR9]: Good. Thanks.

Fourth and fifth subparts. The fourth and fifth subparts of Part III respectively concern guardianship and termination proceedings. The proposed rules clarify the process when a parent fails to appear at one of these proceedings. The rules also restyle provisions regarding Indian children. There are frequent citations to specific ICWA statutes and Regulations throughout these subparts and the other Part III rules.

- **Part IV: Adoptions (Rules 401 - 418).** The Task Force bifurcated and also combined rules in current Part IV. For example, current Rule 79 ("Petition to Adopt") has become separate Rules 410 ("Petition to Adopt") and 411 ("Service of the Petition to Adopt and Notice of Hearing"). Conversely, two current rules (Rule 75 on "Release of Information" and Rule 86 on "Adoption Records") would become a single rule 403 ("Confidentiality; Release of Information").

Unlike current Rule 77 ("Certification to Adopt"), which begins with a section on "dismissal of application" yet does not provide for the filing of an application, proposed Rule 408 more logically begins with a new section on "application for

certification." If an application is incomplete, then in lieu of dismissing the application, the proposed rule would allow the court to permit the prospective parent to supplement the application.

As provided by Arizona case law (see *Denia L. v. DCS*, 2 CA-JV 2019-0055), the Task Force modified the provision concerning motions to set aside an adoption judgment in Rule 407 ("Motions"), section (f) ("Motion to Set Aside Judgment") by allowing a challenge to an allegedly void judgment at any time. Rule 414 requires that a petition to revoke consent must be filed before the adoption is finalized. A person who seeks to revoke consent after entry of a final adoption order must proceed under Rule 417 ("Setting Aside an Adoption").

- **Part V: Emancipation (Rules 501 - 505).** There are currently 15 emancipation rules. The Task Force consolidated and reorganized many of the current provisions into only 5 emancipation rules. Otherwise, Part V contains no notable substantive changes.

- **Part VI: Appeals (Rules 601-610).** The rules on appeal, which apply to both delinquency and non-delinquency appeals, have substantial changes that increase their comprehensibility and functionality.

Current Rule 103 states only that an aggrieved party may appeal from a final order of the juvenile court. It does not otherwise specify orders that are final. The proposed corresponding rule, Rule 601 ("Right to Appeal"), section (b) ("Final

Orders") now identifies orders that Arizona appellate courts have recognized as final, appealable orders. Following a list of 13 final orders in non-delinquency cases, a catch-all provision allow an appeal from "any other order that is final pursuant to Arizona case law."

Rule 602 ("General Provisions"), section (b) ("Caption on the Notice of Appeal") prescribes a caption that requires only the type of the proceeding and the child's name; the caption need not include names of parents or other parties. The caption would state, for example, In re the Dependency of A.B., or the Delinquency of C.D. This should eliminate issues concerning the proper alignment of parties in the captions of dependency and severance appeals. Rule 602(f) ("Arizona Rules of Civil Appellate Procedure") contains ARCAP provisions identified in current Rule 103(G), with certain modifications, but in an easy-to-read list format.

Although the trial court generally loses jurisdiction to rule on motions after a party files a notice of appeal, proposed Rule 603 ("Notice of Appeal"), section (a) ("Time for Filing a Notice of Appeal and Notice of Cross-Appeal") includes 3 time-extending motions: a motion to alter or amend a final order under Rule 317, a motion under Rule 318 to set aside a final order in a dependency or termination proceeding, and a motion under Rule 407(f) to set aside a final adoption order. Although a notice of appeal from one of these final orders must be filed no later than 15 days after entry of the order, the filing of one of these motions no later than 12 days after entry

of the final order extends the time for filing the notice of appeal until after the court has disposed of the motion. This provision would allow a trial court to timely remedy a final order without the delay required for the appellate court to revest jurisdiction in the trial court. Rule 603(b) ("Content of the Notice of Appeal or Cross-Appeal"), subpart (4), contains the avowal of counsel currently found in Rule 104(B).

Rule 604 ("The Record on Appeal") describes what is contained in a presumptive record on appeal. These provisions identify the reporters' transcripts of specified proceedings that preceded the final order that is the subject of the appeal. The rule allows either party to designate supplement documents or transcripts for the appellate record. Buried in current Rule 104(C)(2) is a provision allowing a party to file a notice advising that the party will not "participate actively" in the appeal. This untitled provision has been relocated to a freestanding Rule 605 ("Notice of Non-Participation"). The notice that the record on appeal is complete, which is untitled in current Rule 105(F), is now more visible and titled as "Notice of Completion of the Record" in Rule 606(e).

Commented [BR10]: Perfectly fine, but could be deleted to save space if necessary

Rule 607 ("Briefing in the Court of Appeals; Transfer to the Supreme Court") has a notable modification of an untitled provision in current Rule 106(G) that allows appellant's counsel to file an affidavit affirming that counsel has lost contact with the client, or that there is no colorable issue for counsel to raise on appeal. This

provision has been restyled and relocated in Rule 607(e) ("Notice and Avowal in Lieu of Opening Brief; Pro Se Brief"). This section differs from the current provision because it requires counsel who finds no non-frivolous issue to raise on appeal to then notify the client of that finding and advise the client of the opportunity to file a pro se brief. If the client requests to file a pro se brief, counsel must include that information in a court filing, and the court then must allow the client a specified time to file the pro se brief. The client does not have this opportunity under the current rules. If the client does not request to file a pro se brief, or if the client does not timely file a brief, this new section permits the court to accelerate its issuance of the mandate.

Proposed Rule 608, which is new, has four sections derived from various provisions in the current rules: (a) Dismissal; (b) Action by the Appellate Court; (c) No Motion for Reconsideration; and (d) Motion for Publication. Rule 609 is a lengthy but essential rule on petitions for review. Rule 610, the final rule in Part VI, contains provisions on the appellate court mandate.

9. Forms. There are currently 6 forms that follow the concluding Juvenile Rule. Current Forms 1, 1A, 2, and 3 are notices to a parent in, respectively, dependency, in-home intervention, guardianship, and termination actions. The Task Force recognizes the potential need to modify these forms, but it has not yet proposed any changes.

Current Form 4 ("counsel's certification of diligent search") would be subsumed in the requirements of the juvenile appellate rules. Accordingly, the Task Force recommends abrogation of Form 4.

Current Form 5 is a sample notice of appeal. The Task Force proposes two new forms to replace Form 5. Form 5(a) would be the notice of appeal in a delinquency proceeding. Form 5(b) would be the notice of appeal in any other juvenile case.

As noted above, the restyled appellate rules provide for a presumptive record on appeal and specify what would be included in the presumptive record. The Task Force proposes a new Form 6, which a party would use to make a supplemental designation of the record on appeal.

[**Note to the draft:** Do we want the Court to adopt the new forms as part of the amended rules? We should discuss whether the forms could be approved by the Court yet not included within the rules. With appropriate wording in the rules or an Implementation Order, the forms could thereafter be modified by Administrative Directive rather than requiring the filing of another rule petition.]

10. Amendments to Civil Rule 81.1. Surprisingly, there is a Civil Rule 81.1 concerning emancipations. This short and often unnoticed rule says that "these [civil] rules apply to juvenile emancipation proceedings except as provided in Part V, Rules of Procedure for Juvenile Court." By virtue of the amendments proposed

Commented [BR11]: If 4 is abrogated, should these be renumbered? Should they contain "6" numbers to correspond to the Part VI rules on appeals? (I don't think so . . . .)

Commented [BR12]: May become form 5

Commented [BR13]: Yes, please include this on the TF agenda for the 5th. I agree we don't want the court to have to approve forms themselves.

by this petition, that statement would be incorrect because the Civil Rules do not apply. The Task Force accordingly requests to amend Rule 81.1 so it would instead say, "The rules that apply to juvenile emancipation proceedings are located in Part V of the Rules of Procedure for the Juvenile Court."

11. Pre-filing Comments. Task Force workgroups continued to meet throughout January 2021, and the Task Force reconvened on February 5, 2021. On February 17, 2021, the Task Force sent its 240-page draft set of rules, with an invitation to comment, to the following organizations and individuals:

Children's Action Alliance
Arizona Center for Law in the Public Interest
Arizona Council of Human Service Providers
Governor's Legal Staff
Arizona Public Defender Association
Arizona Court of Appeals, Division One and Division Two
State Bar of Arizona Juvenile Law Section
Committee on Superior Court
Committee on Juvenile Court
Rita Meiser (a fellow of the American Academy of Adoption Attorneys)

The Task Force received several written prefiling comments. Members discussed those comments at its March 5, 2021 meeting and made appropriate changes to its initial draft. The Editorial Group also met after the March 5 meeting to further review the draft rules and a draft rule petition.

12. Request for a Bifurcated Comment Period and Consideration of this Petition at the December 2021 Rules Agenda. The prefiling stakeholder comment period was only two weeks. Furthermore, the Court's consideration of this petition

at its August 2021 Rules Agenda would necessitate a public comment period of about two months, i.e., April and May 2021, to allow sufficient time for Petitioner to file a Reply in June. Given the volume and complexity of the proposed rules, these two limited comment intervals may not be adequate.

On the other hand, the Court's consideration of this petition on its December Rules Agenda would allow an extended time for comments and a bifurcated comment period. Petitioner believes the Court could open this petition for comments for two months (April and May 2021), then allow the Task Force to reconvene in June and file an amended petition in July. The amended petition could be followed by a reasonable comment period, with Petitioner's Reply due in the fall. Here is a proposed schedule:

First round of comments due:

Amended petition due:

Second round of comments due:

Petitioner's Reply due:

If the Court adopts this schedule, Petitioner proposes that the effective date of the newly adopted rules be deferred until July 1, 2022. Because of the extensive changes proposed by these rules, it would be desirable to have time for stakeholder training and familiarization with the new rules. This later effective date would

facilitate judicial and attorney education during the first six months of 2022. [**Note to the draft:** Do we want to discuss proposed statutory amendments here?]

13. Request for Early Adoption of Rule 335. Proposed Rule 335 ("Qualified Residential Treatment Programs; Judicial Review") is an exception to the delayed effective date discussed in the preceding section. For Arizona to be compliant with the Family First Prevention Services Act, Rule 335 should be adopted with an effective date of October 1, 2021.

For Rule 335 to have an October 1, 2021 effective date, the Court should consider this proposed Rule at its August 2021 Rules Agenda. New Juvenile Rule 335 would be effective for 9 months before the effective date of the remaining rules. However, Rule 335 would have a number that is incompatible with the numbering scheme of the current Juvenile Rules, which would continue to be effective until July 1, 2022. Petitioner therefore proposes that the rule be assigned a temporary number of Rule 52.1, as it follows, in both the current (Rule 52) and proposed (Rule 334) rules, the rule on the "Initial Dependency Hearing." On July 1, 2022, Rule 52.1 would revert to rule number 335.

14. Conclusion. The Task Force makes the following requests:

(a) that the Court abrogate the current Juvenile Rules and, in their place, adopt the proposed new Juvenile Rules shown in Appendix A.

(b) that the Court order that the newly adopted rules become effective on July 1, 2022, with the exception noted in the next request;

(c) that the Court adopt Rule 335 on an expedited basis, with an effective date of October 1, 2021 and with the temporary rule number 52.1; and that on July 1, 2022, Rule 52.1 revert to Rule number 335, with no changes to its title or content;

(d) that the Court adopt/approve [we need to explain what we are requesting regarding the forms; see the note in section 9 above]

Commented [BR14]: Discuss with TF. Do we have exemplar language from the probate rules?

(e) that the Court adopt the proposed amendments to Civil Rule 81, as shown in Appendix C, with an effective date of July 1, 2022; and

(f) that the Court open this petition for two rounds of public comments, with an opportunity for Petitioner to file an Amended Petition after the first round of comments and a Reply after the second round of comments, as provided in the schedule set out in section 12 of this petition

RESPECTFULLY SUBMITTED this 30th day of March 2021.

By _____
Rebecca White Berch (Justice, ret.)
Chair, Juvenile Rules Task Force

Part	Comment number in the following table + (source) + rule addressed by the comment
Part I	#1 (Bibbens): Rule 102 #3 (Warner): Rules 103, 104, 110 #6 (Owen): Rules 104, 110 #9 (Rosenberg): Rules 102, 104, 109, 111, 113 (as shown in her document on SharePoint) #12 (Pima PD): Rule 104 #13 (Conant): Rule 113 #14 (COA-1 via Vaught): Rule 102
Part II	#9 (Rosenberg): Rules 202, 204, 205, 206, 208, 209, 211, 217, 218, 220, 221, 222, 224, 225, 226, 227 (as shown in her document on SharePoint) #12 (Pima PD): Rules 206, 209, 218
Part III	#1 (Bibbens): Rule 309 #3 (Warner): Rules 303, 304, 306, 315, 316, 319, 323, 326, 329, 337, 338, 339, 342, 349 #4 (Pima County LGBTQ+ Task Force): Rule 309 #5 (Jorquez): Rule 335 #6 (Owen): Rules 302, 306, 307, 308, 309, 311, 313, 314, 315, 323, 333, 337 #7 (Euchner): Rule 317 #8 (Farrar): Rules 323, 329 #9 (Rosenberg): Rules 335, 345, 347 #9 (Rosenberg): Rules 302, 304, 306, 307, 309, 312, 313, 314, 315, 320, 322, 325 through 330, 332, 334 through 339, 341 through 345, 347, 349, 350 (as shown in her document on SharePoint) #11 (Jorquez): Rule 311 #12 (Pima PD): Rules 338, 340, 342, 344 #13 (Conant): Rules 306, 311, 312, 317, 349 #14 (COA-1 via Vaught): Rules 317, 318
Part IV	#2 (Meiser): Rules 408, 411, 416 #9 (Rosenberg): Rules 402, 404, 407, 408, 409, 410, 411, 413, 414, 415, 416, 417 (as shown in her document on SharePoint) #11 (Jorquez): Rule 417 #13 (Conant): Rules 404, 407, 408, 409, 410, 411, 413, 415
Part V	#9 (Rosenberg): Rules 501 and 504 (as shown in her document on SharePoint)
Part VI	#7 (Euchner): Rules 601, 602, 604, 606, 608. Proposed edits to Part VI rules #10 (Truman via Beckmann): Rules 601, 604, 609 #10: (COA-2 via Beckmann): 601, 603* #14 (COA-1 via Vaught): Rules 601, 602, 604, 607, 608
Other	#6 (Owen): distinctions between dependency and termination adjudications; form titles. #7 (Euchner): scope of project; IAC. #9 (Rosenberg): General comments on spelling, grammar, and phrasing. #14 (COA-1 via Vaught): General comments on deadlines and timing, appellate counsel, and use of the term “final order” versus “judgment.”

Pre-petition Comment Table

On February 17, 2021, staff circulated a request for comments on the second draft of the proposed rules. To date, staff has received the responses shown in this table.

Each response is separately numbered. Numbers followed by **- #** indicate that the responding person provided one or more supporting documents, and those documents are included with this table.

1.
2/19/21
Commissioner Lisa Bibbens (via Judge Quigley)

Rule 102: Any thought to have rule 102 match ARS 25-401(4) definition? It may help clarify confusion when it comes to paternity issues.

Rule 309: I notice that a broad range of education topics have been included for GALs and attorneys for minors under Rule 309. I suggest adding a category to include education regarding gender identity and sexual orientation issues for court involved youth. [**Staff Note:** See comment 4 below.]

Compliments to the Task Force:

Thank you for including 9(c) of ARCAP in appellate rules.

The inclusion of Rule 603(a)(3) is an extremely important addition and I'm glad it was included.

Staff note: A.R.S. 25-401(4) says,

"Legal parent" means a biological or adoptive parent whose parental rights have not been terminated. Legal parent does not include a person whose paternity has not been established pursuant to section 25-812 or 25-814.

2.
2/22/2021
Rita Meiser

As you know, I was only involved in the discussions of the last few Adoption Rules. My comments are limited to the Adoption Rules, but I reviewed them all. My comments are as follows:

Rule 408

The Rule does not address an issue that I have had home study agencies call me about repeatedly over the years, occasionally with the threat of a lawsuit hanging over the agency's head. The new Rule may possibly be an opportunity to address this issue and resolve how the issue should be handled, as I am informed that agency licensure regulations do not address it.

As I understand the process, when a family applies for certification, the agency receiving the application immediately opens an AC number (Adoption Certification) with the court, at least in Maricopa County, that establishes a court record of the application. As the investigation proceeds, if the agency discovers information that makes them decide that they will not recommend certification, I believe most agencies inform the family of that decision and permit them to withdraw their application. Those reasons may not always be things that are public record and will automatically resurface. They may include disqualifying information obtained from the interviews with the family or from references. I assume the file is closed with the Court, or just remains open with no follow up information provided to the court on the application. I don't really know.

The issue is that once the family knows why they agency is not going to recommend them, they close the case with that agency and often go to another agency and start the certification process over. I assume they just say that they did not like the first agency. This time, they either don't provide the disqualifying information or list different references. The first agency may be contacted, but I don't believe can discuss the case with the second agency. I know of one situation where the agency was so concerned about the family being able to side step the information they obtained in their investigation that they sent a report to the court under the assigned AC number with a statement that the family was withdrawing from the certification process, and included the information that caused the withdraw request. I assume the initial AC number is raised get when the second agency opens their file with the court. My understanding is that the agency was sued or threatened to be sued for doing that.

Here are some suggested possible solutions, which may or may not be within this Committee's purview. Perhaps whenever an AC number is established (or whatever process a County uses to open a certification file), the agency should be required to submit something to the Court closing out the application process and stating something that would create a potential "red flag" to a second application. Since the family might not have had a chance to defend the allegations against them, I know their rights have to be balanced as well. Perhaps it would be enough to have the agency say that that the family opted not to proceed with the certification process after receiving nonspecific feedback from the agency. Ideally, it would be great if applicants were required to state if they applied previously for certification with another agency and give permission to the current agency to obtain information from the first agency. That would give the family the opportunity to say why the first agency was wrong or biased against them and address the issues relied upon by the first agency, but the

full story would be included in the report to the court submitted by the second agency. A final option would be to require that a family continue an application with the first agency they select, and not be allowed to switch agencies, knowing they can always appeal the denial of certification if they feel the agency relied on false information.

Perhaps this is not something we can address, but I know that home study agencies would love clarity on how to deal with this situation.

Rule 411

I believe that subsection (b)(3) should be amended to state that notice of an adoption hearing must be provided to anyone who has:

"filed A TIMELY paternity action".

Notice of an adoption should not be provided to a biological father who was served with an 8-106 Notice to Birth Father and did not file and serve a paternity action within should include the 30-day statutory period. There are cases where a paternity action is filed months after the baby was born as an end run to stop an adoption, even though the Notice to Birth Father was properly served on the father. I believe this is an important change.

Rule 416

I do not hold myself out as an ICWA guru. I know that Barbara knows more about ICWA than I ever will. However, my reading of the Baby Veronica (Adoptive Couple v. Baby Girl) case would indicate that Subsection (c)(5)(C) should include the words "if applicable" at the end of the provision. I believe that case held that there are situations where the placement preferences are not applicable, so requiring that finding would not be appropriate in all cases.

Staff Note: The following subsequent emails are pertinent to Ms. Meiser's suggested change to Rule 411.

From Ms. Meiser
2/23/2021

2/23/21
Rita Meiser

With respect to Rule 411, and my suggestion to amend it, look at ARS 25-804. My one and only foray lobbying was to amend this statute to be consistent with the adoption code. So, a paternity action by a man who was served with a Notice Birth father must be dismissed in Family Court if not filed and served within 30 days of service. The proposed Rule would

appear to give him the right to notice of an adoption hearing that he has no ability to participate in and give him otherwise confidential information about the adoptive family. Of my suggestions, this is the one that is most critical because the Rule could create a conflict with the existing statutory scheme. I should have added the paternity code cite before.

From Professor Atwood
2/25/2021

Workgroup 4 has unanimously endorsed Rita Meiser's suggestion to amend Rule 411 to clarify that the filing of a paternity action needs to be timely. Rita suggested simply adding the word "timely," but Judge Quigley recommended a more specific statutory cite. I am recommending the following (with a slightly more general statutory reference than that suggested by Judge Quigley, since time limitations appear in more than one subsection):

b. Persons to Serve. The petitioner must serve the petition and a notice of hearing on the following persons:

1. the person, department, or agency conducting the social study required by A.R.S. § 8-112;
2. any person, department, or agency required by A.R.S. § 8-106 to give consent, unless consent and a waiver of notice were filed previously; and
3. any person who has initiated a paternity action within the time required by A.R.S. 8-106.

From staff
2/25/2021

First, I can't make the change to Rule 411 before the meeting. We've locked down the drafts until then. But the workgroup consensus will be provided in the comment summary for the March 5 meeting.

Second, what was Judge Quigley's statutory reference? Did she include a suffix after "8-106?" The statute is quite lengthy, and perhaps it would be helpful to include the additional specification. (I could also be persuaded that it's not necessary.)

From Professor Atwood
2/25/2021

Judge Quigley suggested citing to 8-106(j). The 30-day deadline is also mentioned in an earlier subsection. But I'm fine with the specific cite to (j).

3.
2/23/21
Hon. Randy Warner (via Judge Kreamer)

Some comments to the proposed rules. As a general matter, the task was huge, and the committee met it. These rules are a great improvement. You are free to ignore any and all of this or pass along as little or as much as you want.

An overall comment about summary adjudications. These rules, like the old ones, talk about dependency and termination adjudications as if they're the same thing in a summary setting and a contested setting. They're not. And someone reading these rules ought to know that a summary adjudication when someone fails to appear or doesn't contest is a whole other thing. I think we need a rule that describes what a summary adjudication is, what evidence is required, and what rules of evidence apply. Then the dependency, guardianship, and termination rules can distinguish between a summary adjudication and a contested adjudication.

As an added benefit, giving a name to these summary proceedings would hopefully cause people to stop using the term "drive by," which is bad for the court.

Now, specific rules.

Rule 103(d): A good development, eliminating the need to guess about when the civil procedure rules might apply.

Rule 104(d)(1): I would anticipate fights over whether a report contains all of the elements, but it looks like the committee considered this already.

Rule 104(d)(3): I don't understand the term "Before any." Do you mean in advance or? Or a proceeding "before" the court? If it's in the hearing (as opposed to prior to the hearing), why not say "In any."

Rule 104(d)(10): Should be "in court" not "in courts."

Rule 104(d)(10): Excellent rule. Thank you.

Rule 110(f)(2): "An objections" should be "objections"

Rule 303(d): "The court must enter an order or issue a minute entry." This is an issue throughout. Rule 324 says that a minute entry is a court order. Then, in lots of places, the rules refer to an order or a minute entry. This is superfluous but, worse, it can be read to imply a minute entry is not a court order. In light of Rule 324, I'd suggest deleting "or issue a minute entry" wherever this phrase appears.

Rule 304(c)(1): I think you still need the client's address and other contact information even if withdrawal is with consent.

Rule 304(c)(4): To make sure lawyers comply with the requirement (and because I think it's the law), add: "The attorney remains the person's attorney of record until a notice of withdrawal is filed."

Rule 306(a): "Their child's caregivers" should be "the child's caregivers."

Rule 306(a)(1)(C): I would have preferred a bright line that presumes children of a certain age have the capacity to direct the attorney and children below a certain age cannot. I think that gives lawyers comfort but also flexibility because it's just a presumption. But I'm sure that was considered.

Rule 315(e): References the civil rules but does not address limits on discovery. Do the civil rule limits apply? Does the court apply proportionality? If a lawyer wants to take 10 depositions, I assume the court has the authority to limit that under Civil Rule 26. I suppose just referring to the civil rule is better than creating a separate standard by which the court in a juvenile case can limit discovery.

Rule 316(a): "Motions must be in writing. . .." I'm glad you all kept your sense of humor.

Rule 319(d): I think this forces the Department in most cases to call the parents in their case in chief.

Rule 319(g): Okay, this is hyper-technical, but if you grant a motion for judgment as a matter of law, it's because you made a legal determination of insufficient evidence. That's not a finding. When a court concludes that the evidence does not support a finding, that's a legal conclusion, not a finding. I'd suggest this alternative: "If the court grants a motion under this rule in whole or in part, the court must state the reasons that support granting the motion in writing in a signed order." Also, missing a period at the end of the paragraph.

Rule 323: Again, hyper-technical, but it doesn't make sense to talk about one judge or division having "jurisdiction." This kind of imprecise language leads to confusion among lawyers and what personal and subject matter jurisdiction mean. We are one court, statewide. The court either has jurisdiction or it doesn't. Parts of the court don't have jurisdiction over other parts. A better option is to say: "If pending family law and dependency proceedings concern the same parties, the judge presiding over the juvenile case makes decisions concerning the children." Or, if you need "judicial division" as a shorthand for "judge presiding over the juvenile case": "If pending family law and dependency proceedings concern the same parties, the juvenile division makes decisions concerning the children."

Rule 326(f): I don't know if we want to wed ourselves to minute entries. Different counties use minute entries differently, and I can foresee a day when we use hearing orders with all the required findings in lieu of minute entries.

Rule 329(f): Capitalize "incarcerated" in the subheading.

Rule 337(a): Glad you made the pretrial conference optional.

Rule 338: This is really good work and a useful rule. See my comment above regarding summary adjudications.

Rule 339(b): Suggest adding: ". . . and may accelerate the disposition to the time a dependency finding is made."

Rule 339(e): "Advisement" not "Advisal." Advisal sounds like a prescription advertised on prime-time television. Don't take if you're allergic to Advisal.

Rule 342(b): I've always been concerned about the mandatory nature of this rule. Can a parent keep filing a motion to return every 30 days and are hearings always mandatory? I'd like to see a limit, such as the court is not required to set a hearing if a motion for return was filed in the prior 6 months and the court finds that conditions have not materially changed since that motion was ruled on.

Rule 349(b): I don't know that we've ever addressed whether the Department has the authority to decline to file a motion for termination when ordered by the court, or what happens if it determines that it should not or cannot ethically seek termination. Maybe the rule is not the place to do that.

Now, if we can only get lawyers, judges, and our own court systems to stop using the anachronistic term "severance."

Thanks for the opportunity.

4. - #.
2/25/21
Pima County Task Force for LGBTQ+ Court-involved Youth (via Prof. Atwood)

Our task force consists of attorneys, social workers, juvenile court judges, academics, and others interested in supporting LGBTQ youth who end up in foster care or in delinquency proceedings. The LGBTQ population is over-represented in foster care nationally, according to several recent studies -- a fact I was not aware of until I started working with the Task Force. I'm attaching one such study (reporting that sexual-minority youth are nearly 2.5 times more likely to be involved in the foster care system relative to heterosexual youth).

We need to ensure that these children are placed in supportive environments and are represented by individuals with appropriate training. Although I understand that the list of education topics in Rule 309 isn't a mandate by any means, the inclusion of the language we suggest would at least bring visibility to the unique challenges faced by LGBTQ youth. So -- we recommend that section (d) be amended as follows:

(d) Later Training. Each year, an attorney or GAL must complete at least 8 hours of continuing education on the relevant state and federal juvenile laws described in section (b). This continuing education may include topics such as ICWA, child welfare policy, child and adolescent development (including infant/toddler mental health), bonding and attachment, behavioral health services, effects of parental incarceration, educational opportunities and challenges, parent and child immigration issues, the need for timely permanency, the impact of out-of-home placements, the needs of LGBTQ youth in care, the traumatic effects of domestic violence, substance abuse and addiction, mental illness and treatment options, psychological evaluations and how to read them, the effects of trauma and trauma-informed practices, cultural awareness, issues surrounding families involved in the dependency process, and other related topics and issues concerning abused or neglected children.

Staff Note: See comment 1 above. Please also see the article that's included with this table, document number 04(a), titled "Are sexual minority youth overrepresented in foster care, child welfare, and out-of-home placement? Findings from nationally representative data."

5.
2/25/2021
Ms. Jorquez

Judge Quigley suggested that I reach out to you about an issue that we discovered after the QRTP rule was passed at the last taskforce meeting. To recap, Section (b)(2) of the QRTP rule defines Qualified Individual as:

(b)(2) ***"Qualified Individual"*** means a trained professional or licensed clinician who:

A. is qualified to conduct a QTRP assessment;

B. is not an employee of DCS; and

C. is not connected to or affiliated with any placement setting in which children are placed by the State.

Since the taskforce meeting, it has come to my attention that FFPSPA contains a waiver provision for the definition of Qualified Individual. PUBLIC LAW 115–123—FEB. 9, 2018 132 STAT. 259 states:

''(D)(i) Subject to clause (ii), in this subsection, the term 'qualified individual' means a trained professional or licensed clinician who is not an employee of the State agency and who is not connected to, or affiliated with, any placement setting in which children are placed by the State.
''(ii) The Secretary may approve a request of a State to waive any requirement in clause (i) upon a submission by the State, in accordance with criteria established by the Secretary, that certifies that the trained professionals or licensed clinicians with responsibility for performing the assessments described in subparagraph (A) shall maintain objectivity with respect to determining the most effective and appropriate placement for a child.

Based on this waiver provision, the Department can petition the Feds to be the *Qualified Individual*. Though have not chosen this route, it's an option we'd like to preserve.

Staff Note: Ms. Jorquez' email included proposed revisions that she, Mr. Truman, and Mr. Turner had prepared. Here are the proposed revisions, shown in capital letters:

(b) Definitions.

(1) ***"Qualified Residential Treatment Program"*** ("QRTP") means a program licensed as described in 42 U.S.C. § 672(k) to serve children with specific treatment needs who need short term placement out of their homes and qualifies for funding under the federal Family First Prevention Services Act.

(2) ***"Qualified Individual"*** means a trained professional or licensed clinician who:

(A) is qualified to conduct a QRTP assessment;

(B) is not an employee of DCS UNLESS THIS REQUIREMENT IS WAIVED PURSUANT TO 42 U.S.C. § 675a (c)(1)(D)(ii); and

(C) is not connected to or affiliated with any placement setting in which children are placed by the State UNLESS THIS REQUIREMENT IS WAIVED PURSUANT TO 42 U.S.C. § 675a (c)(1)(D)(ii).

(3) ***"QRTP Assessment"*** means an evaluation by a qualified individual that assesses the strengths and needs of the child using an age-appropriate, evidence-based, validated, functional assessment tool as described in 42 U.S.C. § 675a(c)(1).

(c) Time to Complete the QRTP Assessment. The QRTP assessment must be prepared by a qualified individual and completed no later than 30 days after the child's placement in the QRTP.

Staff also proposed a more generic option:

First, in the definition of QRTP in subpart (b)(1), after Family First Prevention Services Act, we could add in parentheses ("FFPSA.") Then in (b)(2):

"Qualified Individual" means a trained professional or licensed clinician who is qualified to conduct a QTRP assessment; is not an employee of DCS; and is not connected to or affiliated with any placement setting in which children are placed by the State. However, any of these requirements may be waived pursuant to the process provided in the FFPSA.
6. - # **2/28/2021** **Laurie Owens** Ms. Owens is an attorney in Pima County. She submitted a 12-page comment concerning certain rules in Parts I and III, including Rule 104(d)(2) ("Admissibility of Child Safety Worker's Report"), and Rules 110, 306, 307, 308 309, 310, 311,313, 314 315, 323, 333, and 337. At pages 3 and 4, her comment addresses other concerns regarding termination proceedings. **Staff Note:** This table includes (1) Ms. Owens comment to committee members (document number 04b), and (2) a 1997 Division One opinion, *Appeal in Maricopa County Juvenile Action JD 6123,* which she submitted with her comment (document number 04c.)
7. - # **03/01/2021** **David Euchner** Mr. Euchner is also an attorney in Pima County. He submitted a 10-page memo to the Task Force directed to the Part VI rules on juvenile appeals. Mr. Euchner attached to his memo the most recent version of the Part VI rules that contains his suggested edits to those rules, shown by redlines. Staff Note: Mr. Euchner's memo, including his redline changes to the draft rules, are also included with this table, document number 04d.
8. **03/01/2021** **Hon. Erin Farrar** So far, I have two comments on the rule revisions. 1) As to proposed Rule 323, the current rule (5.1, A.R.F.L.P.) and the proposal address pending family law and dependency proceedings but do not account for private severance proceedings. We have a number of private severances filed with pending family law matters in Superior Court or cases where temporary or final orders were entered. The issue becomes whether or not the Juvenile court can or should entertain

pre-adjudication motions, for example, to suspend contact with the Respondent, in other words, "modify" the Superior Courts orders pending the TPR trial.

2) As to proposed rule 329, Service of the Dependency Petition, Temporary Orders, and Notice of Hearing, in Yuma County we have a large number of parents residing in Mexico. Most of whom are not U.S. Citizens and therefore unable to cross. We are aware of Rule 4.2(f) and the Hague Convention requirements when an individuals' address is "known". However, there are occasions when a parent is made aware of the proceedings, has been provided with a copy of the Petition and related documents (i.e. mailed and/or Consulate has provided) and chooses to participate telephonically. I would ask the committee to consider the above scenario and whether a "telephonic" appearance under the circumstances has or should have any significance. In other words, does a telephonic appearance constitute an "appearance" for purposes of a Rule 5(c) (Rules Civ. Proc.) analysis?

Thank you and the committee for your time and hard work.

9. - #
03/01/2021
Ms. Rosenberg

I do have some suggestion/questions as outlined in the attachments. I have tried to highlight suggested changes in yellow. I have also made comments for consideration. Most of which can be addressed by Mark or the editorial committee. A general summary of my review follows:

- Substantive suggestions:
  - Rule 335 – QRTP, where I suggest there be specific reference to a qualified individual having a background in children's mental health issues.
  - Rule 345 and 347 - consider directing the court to inquire if the potential guardian has applied for a Guardianship Subsidy. This is a part of the court direction in Rule 348 and it would be good to include here as well since a subsidy cannot be approved AFTER a guardianship is granted.
- Caught a few spelling errors
- There appears to be inconsistency when a portion of a rule refers to another part of the same rule or another rule. Sometimes references in a draft rule may include "…. of this rule" or "…. of these rules" and sometimes the draft rule does not include this. I would suggest the rules be consistent. Personally, I like when it refers to "…of this rule" or "…. of these rules." I pointed some of these inconsistencies out, but not all of them.
- Question on the use of the term "counsel" rather than attorney or GAL. "Counsel" is not defined.
- As has been discussed by the workgroup and the full TF, please check throughout the relevant sections to assure that Rule 326 on Admonishment is incorporated correctly

in other rule content. There seems to still be inconsistency in the rules on how this is addressed. For instance, consider language in Rules 331, 336, 337, 338., 339, 341, 342, 343, and 345

- Given that there has been a tremendous amount of work done by Judge Quigley and others to recognize the provisions of ICWA, and emphasis might be wise, there are a number of rules in Part III that address – "parent, guardian or Indian custodian", however," guardian" and "Indian custodian" are included in the "parent" definitions in rules 102 and 302, so perhaps the rules can just refer to "parent". And sometimes, "guardian" is included in this breakout and sometimes only "Indian custodian". So there should be consistency in the breakout as warranted.
- I believe there is need for a definition of "agency" in Part IV.
- I also believe that "division" should be replaced by "DCS" in Part IV

That's it for now. And again, I truly appreciate everyone's hard work in setting out these rules. Hopefully, my comments are helpful. (I do know how easy it is to miss even simple spelling errors if you have reviewed the document innumerable times.) Please let me know if any of my comments need clarification.

Staff Note: Ms. Rosenberg attached to her email Parts I thorough V with her highlighted edits and comments, and those five attachments should be considered with this comment table. However, rather than being included with the table, those edited Parts are available for Task Force members on SharePoint, in the member drafts folder, labelled "Beth R. edits."

10.
03/02/2021
Ms. Beckmann

Comments & Suggestions, Office of the Arizona Attorney General (through Ed Truman) Regarding the Appellate Rules (Part VI).

Rule 601

(b)(2)(B). Provides disposition orders are final orders. Suggestion is that we specify the order is entered under Rule 333

(b)(2)(D). Specify in this subsection that the order is entered under Rule 340 relieving DCS of the obligation to provide reunification services.

(b)(2)(F) Specify the order the order is one that terminates parent's or guardianship's visitation.

Rule 604

(a)(2)(F) Needs to add removing a child from the parent's or guardian's physical custody, and should add parent's or guardian's to termination of visitation.

(a)(2)(G) Should add Title 8 to Guardianship.

Rule 609

They are opposed to reducing the time for filing a petition for review to 20 days from 30 days because they need that time to internally review the case to determine whether the AG wishes to file the PR. A variety of factors contribute to that decision.

Comments & Suggestions Court of Appeals, Div. Two (judges and staff).

Some of the suggestions were editorial and stylistic and have already been caught between the time the rough draft version was distributed and the current version was posted to the TF websites. Other than that, response to the proposed rules was favorable. Some individuals were disappointed to see there is still no mechanism for bringing a claim of ineffective assistance of counsel in the juvenile court, particularly in delinquency cases. But these individuals understand the reasons the task force did not propose such changes at this juncture.

Rule 602(c)(1): Suspension of order. Questioned why a stay should not be sought in the juvenile court first. But A.R.S. § 8-235(B) prohibits it, stating: "The order of the juvenile court shall not be suspended and the execution of the order shall not be stayed pending the appeal, except that the appellate court may, by order, suspend or stay the execution of the order if suitable provision is made for the care and custody of the juvenile." This was among the statutes on the Task Force's list for recommended change, because doing so would be consistent with other kinds of cases. Factual issues, including best interests of a child, could be resolved in the trial court, which is in a better position to address them.

Rule 603(a)(3). Concern was expressed about the time-extending motions because of the tight timeline. If a party files a Rule 317 motion to alter or amend the final order, or a motion to set aside the final order under Rule 318(c) or Rule 407(f), no later than 12 days after the order from which the appeal is taken, this extends the time? What happens if the juvenile court extends the time or excuses an untimely motion, as permitted under Rule 317(b)(1)? If the court grants an extension of time to file the motion does that automatically extend the time for filing a notice of appeal if the party has not filed it yet? And if the motion is late and the court excuses it, does that either permit a party to file the notice of appeal beyond the 15 days, and does it retroactively cure an untimely filed notice of appeal? There was concern this would cause confusion and inconsistent results.

11.
03/02/2021
Ms. Jorquez

I also wanted to flag two more rules.

Rule 311 Participants' Rights

Rule 311 (b) currently reads:
b. Right to be Heard. Participants have a right to be heard at any hearing regarding a child.

Ed, Carey and I were just wondering if it should be reworded to clarify that participants can only on issues concerning the child versus the entire case? A possible fix could be:

b. Right to be Heard. Participants have a right to be heard REGARDING THE CHILD at any hearing.

Rule 417 Setting Aside an Adoption

The rule is pretty lengthy, so I won't paste it here. But if memory serves me correctly, I don't believe the taskforce had time to review this rule. I think this rule was one that went straight to the editing committee. We were wondering if this language was intended to track the motion rule in 407 (f)? The reason for asking is that in its current form there are some inconsistencies between the two motion proceedings that could lead to incongruent results. For example, if you proceed with setting aside an adoption with a 417 (f) motion, then it is not a time extending motion. However, if the same motion is filed under 407, then it is a time extending motion. Again, not sure if this was the intended result, but just thought I'd bring it to your attention before Friday's Task Force.

12.
03/02/2021
Derek Koltunovich, Team Leader, Pima County Public Defender's Office, Juvenile Defender and Dependency Units (via Judge Quigley)

Mr. Koltunovich also noted that he concurs with the comments submitted by Dave Euchner regarding the appeals rules.

104 (d)(2) – allow for objections to hearsay; make any declarant or author be present for testimony (proponent of report is obligated to subpoena or call them) not just available for cross-examination as it is defined. Allowing the report, with hearsay elements or attached reports, based on declarant being "available" shifts the burden from the state to the parent or child. Making opposing party call witness creates potential expense for that party and possible prejudice.

104 (d)(3) – report should only be admitted after author lays proper foundation and is subject to cross-examination. This creates another situation of burden shifting.

206(d) - Consider waiving fees since all juveniles are indigent, parent's income should not be considered since it creates a situation where a parent may wish to waive the right to counsel.
206 (f) – No waiver. Either court appointed attorney or privately retained attorney must represent the youth. A juvenile really isn't in a good position to knowingly, voluntarily, or intelligently waive that right and as mentioned above a waiver may be something that a parent is pushing for economic reasons.

(Note from Susan Kelly: I have dealt repeatedly with parents/guardians who have told both their children and the court (and me) that the child does not need an attorney and that it is a waste of time and money because "he did it". I have witnessed parents advising their children to just admit because the adult can't afford the added expense, or the time off from work, etc. required to meet with an attorney and, if desired, have an adjudication. Children are so easily influenced / pressured into asking to waive an attorney that I do not feel any measure - particularly including the parents during the questioning by the court - will ensure that it is a knowing and, more importantly, VOLUNTARY waiver. Added to the concerns that the parents' desire to waive counsel will be either expressly or impliedly forced upon a youth is the fact that numerous juvenile charges essentially serve as predicates for adult charges and enhancements. No juvenile can be reasonably expected to know this and may irreparably harm their future by foregoing competent legal advice. Another consideration is the he growing field of evidence in connection with juvenile brain development which emphasizes that, no matter how mature a youth may present, they simply do not possess the knowledge or maturity to handle a quasi-criminal matter without the assistance of an attorney well-versed in juvenile law. They are not yet sufficiently equipped to consider future consequences, and function almost exclusively in the immediate present.)

209 (a) – only allow witnesses to appear virtually if all parties agree, otherwise they must appear in person to testify.

218 (c) – Note from Susan Kelly: The timing of an initial appearance before a judicial officer in order to determine probable cause needs to be clearly capped at 24 hours, in conformity with the universal practice for persons facing charges in the adult division of the Arizona Superior Court, Rules 4.1 and 4.2(a)(4), Ariz.R.Crim.P, and the 24 hour requirement on violations of probation contained in current juvenile rule 32 and draft rule 224 (cn)(A)(1). There is no constitutional basis to permit extension of that time by up to nearly 24 hours while waiting for the filing of a delinquency petition pursuant to draft rule 204(l) [and current rule 25(B)(1)]. See JV-111701 v. Superior Court In and For County of Maricopa, 163 Ariz. 147, 786 P.2d 998, (App. Div.1 1989), reconsideration denied, review denied. Moreover, in the current practice where virtually all documents are created and transmitted electronically, any argument as to a need to add in delay for juveniles - who by their very youth are treated

more rapidly that adults - is rendered moot by the ongoing ability of the State to amend the initial petition filed on any given referral. See draft rule 203(i) [and current rule 24(B)].

338 (g) – while it is understood that a dependency is considered civil, the nature of government intervention and the constitutional rights at stake really give it the weight of a government prosecution, therefore I would suggest making this rule mirror 221(d).

340 (b)(1) – would like to have this reconsidered. I think a waiver of hearing would be more appropriate, when the parent is in agreement, than an affirmative duty to request the hearing.

342(a) – this rule should allow any party to the case to file the motion, not just a parent. It would allow children to assert their desire to return home.

344(f)(2) – it may present problems regarding cross-examination or contesting the report if an attorney prepares it personally. It may make it clearer to say that the attorney must make provisions for the preparation of the report.

13. - #
03/02/2021
Jonathan Conant

Mr. Conant provided comments and suggested edits as shown in the text of Rule 113 and Parts III and IV. Those parts are provided separately as documents 04(e), 04(f), and 04(g) (respectively, "Conant.edits. Rule 113," "Conant.edits. Part III" and "Conant.edits. Part IV.")

14.
03/03/2021
Barbara Vaught (COA-1)

Court of Appeals, Division One Comments for Revised Juvenile Rules
March 3, 2021
Comments for specific rules:

- **Rule 102**. Some clarification may be needed. For example, as currently drafted, the definition of "presiding judge" would allow the Maricopa County Superior Court Juvenile presiding judge to act on cases pending in the superior court in other counties, which may not be intended. The UCCJEA definition is to Arizona's version of the UCCJEA only; perhaps that was intentional. Suggest that the second sentence of the comment be moved to the text so it doesn't get overlooked.
- **Rule 317**. This rule is helpful but could be clarified. Rule 317(a)(2) purports to discuss grounds but then talks about timing in a way that is inconsistent with

317(b)(1). Suggest that 317(b)(2) should state that if the court does not act within 10 days, the motion is deemed denied.

- **Rule 318**. Suggest that the heading should use "or" rather than "and". For 318(a), should it be instead "impending and expired"? It would be helpful if 318(a) addressed the timing of a motion to continue. For 318(b), no reply is referenced. Suggest that the rule either (1) provide a deadline for a reply or (2) state that no reply is allowed unless authorized by the court. It would make sense for 318(c) to require that such motions be submitted "within a reasonable time but no more than …" and would track Civil Rule 60(b). Rule 318 uses "filed" while Civil Rule 60(b)(1) uses "made;" it would seem to make sense to use the same term in both.

- **Rule 601(b)(1).** Suggest adding (e) "any other order that is final pursuant to Arizona case law" as a catch all for potential new case law, similar to Rule 601(b)(2)(N).

- **Rule 601(b)(2)(A)**. The rule appears to be attempting to give an either/or situation: an order granting a dependency petition/an order declaring a child dependent or an order denying a dependency petition/dismissing the dependency. The wording could be clarified.

- **Rule 602(a)**. May want to consider a provision for dependency cases with multiple children with the same first initial. Also, is it contemplated that the rules for a caption in a judicial bypass case will be handled elsewhere?

- **Rule 602(c)**. The draft rules do not incorporate ARCAP 7 and this rule does not seem to allow the superior court to stay the order or require that the party seeking the stay must have first asked the superior court before asking the appellate court. If that is not required, it might be helpful to state it expressly.

- **Rule 602(e)(1)**. We want to make sure we are not contemplating that Division One will be taking over appointment of counsel and it is expected that the superior court will continue with that responsibility. Currently, when counsel withdraw, Division One sends the case back to the superior court for appointment.

- **Rule 602(e)(3)**. This seems like a harsh deadline compared to our current practice, which is to stay and remand any time a party asks for appointed counsel (the requests have always been prior to briefing or panel assignment). Also, there are timing issues for counsel: trial counsel is released from his/her contract 15 days after the final order is issued, so trial counsel usually does not file anything beyond the notice of appeal. Appellate counsel may be appointed immediately but it sometimes takes several days. Either way, appointed appellate counsel usually does not get up to speed on a case for several weeks.

- **Rule 604(b) - (d)**. These all seem like very short deadlines. In addition, the due dates are complicated to calculate and track because of numerous embedded conditions.

- **Rule 607(a)(3)**. This wording should be clarified. The rule talks about when a reply brief must be filed and states it must be filed (1) 10 days after the answering brief or (2) "a notice stating that no reply brief will be filed."

- **Rule 607(e)(1)(B).** This language could be revised to clarify that counsel's notice must include (1) an avowal that counsel has informed appellant of the intent to file the notice, and (2) an avowal that counsel has informed appellant that he/she has an opportunity to file a pro se brief.

- **Rule 607(e)(3).** It would be helpful to develop the pro se briefing process more fully. Right now, it is not clear whether the case would proceed as a regular appeal or more like an *Anders*, which case law currently does not support for dependency/severance cases. The draft rule allows the court to choose either path, which would require it to make an assessment for each case and could create disparities between how similar cases are handled. Suggest that it would be better to allow an answering brief and a reply in every case.

- **Rule 607(e)(4)**. There needs to be a reference to "this rule" or some such in the last sentence, allowing the mandate to issue immediately if the court dismisses the appeal. Otherwise, that might be read more broadly to apply to all dismissals.

- **Rule 607(f)**. Division One and Division Two have different processes for scheduling cases. Division One currently deems a juvenile case "At Issue" when the answering brief is filed. There is time for a reply brief (when filed) to come in before the panel conferences the case due to Division One's scheduling practices.

- **Rule 608(d)**. It is not clear why the motion for publication needs to be filed before a petition for review.

General comments:

- The reasoning behind different deadlines is not clear and the deadlines will be a large adjustment for trial and appellate counsel. Twelve days to fix deficient findings is very fast as deficient findings are usually not even considered until appeal.

- The new rules seem to allow trial counsel to represent a party on appeal. If the superior court continues its current practice of separately contracting for trial and appellate counsel, it will be very difficult for counsel to meet some of the short deadlines.

- The proposed rules use final order instead of judgment, but there are some references to "judgment." Rules 603(a)(3) & (a)(3)(C) & (4).

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February 28, 2021

Re: Comments to Proposed Rules

Dear Juvenile Court Rules Committee Members:

For reasons I will explain in each section, I submit the following comments and suggested changes for your consideration:

A. Proposed changes to Proposed Rule 104(D)(2):

> Admissibility of Child Safety Worker's Report. Before any dependency, Title 8 guardianship, or termination hearing, the court must review a child safety worker's report and may admit the report into evidence if the worker or workers who prepared or approved the report are available for cross-examination**, identifying and contact information for hearsay declarants contained in the report has been or is contemporaneously disclosed,** and the report was ~~**disclosed**~~ **provided** to the parties no later than:
> (A) one day before a Rule 333 temporary custody hearing; or
> (B) fifteen days before any ~~**other**~~ **periodic review** hearing at which the report may be introduced**; or**
> **(C) thirty days before any contested adjudication hearing at which the report may be introduced.**

My suggestions would rectify due process and equal protection issues that the proposed rule appear, as written, to implicate (as does present Juvenile Rule 45(C) if interpreted or used to authorize admission of a DCS report containing hearsay) as

implicated by the holding in *In the Matter of Appeal in Maricopa County Juvenile Action No. JD-6123*, 956 P.2d 511, 191 Ariz. 384 (Ariz. App. 2 1997) ("Juv. Action No. JD-6123") (upholding then-existing Juvenile Rule 16.1 permitting DCS reports' admission into both dependency and arguably in severance adjudication hearings because it does not impermissibly impose on a respondent's due process and equal protection rights because this rule is *conditional*, and offers protections, including that the respondents have been provided a timely pretrial statement and have had an adequate "opportunity to cross-examine the author of the report and to subpoena the persons whose statements are reported in the report are provided") (attached).

Specifically, my proposed amendments would provide the respondents with the required ability to prepare to adequately confront the hearsay contained in the DCS reports, which, as the Court explains in *Juv. Action No. JD-6123*, should not be admitted unless respondents are provided with a timely, specific pretrial statement and contact information for the declarants so that all declarants whose statements the DCS reports contain can be subpoenaed. *Juv. Action No. JD-6123*, 956 P.2d at 517.

Note, too, the support contained for this protection that current Juvenile Rule 55(D) provides: "The presentation of evidence at the dependency adjudication hearing **shall be as informal as the requirements of due process and fairness permit and shall generally proceed in a manner similar to the trial of a civil action before the court without a jury**" (emphasis added).

Thus timewise: the Proposed Rule's fifteen days' disclosure does not provide a long enough period to meet the requirements "similar to the [court] trials of a civil action" as hearsay declarants are not "available for cross-examination." R. Juv. P 55(C); Proposed R. Juv. P. 104(d)(10). The current Civil Rule 45, in particular, allots subpoenaed individuals twenty days to object to their subpoena, and thus a fifteen-day cut-off could easily lead to a battle of conflicting rights, and an inevitable continuance, and thus thirty days, a period to which the *Juv. Action No. JD-6123* Court approvingly nods, appears to be a better choice for judicial economy. Note, too, that in *Juv. Action No. JD-6123* that the prior Juvenile Rule (16.1) on which the Court relied provided a 30-day disclosure requirement for all parties.

Another section of my suggested change relates to declarant identity. To meet the due process and equal protection demands explained above, DCS reports (or within their subsequent disclosure) must also contain the identity of each declarant cited in the DCS reports (for reports they plan to or may use in subsequent contested adjudications) and the declarant's contact information in order for parties to be able to contact the declarants (without being required to propounding interrogatories after each preliminary protective hearing), and thus assess whether a subpoena is required for the declarants' cross-examination. **Any disclosure, including sections of DCS reports, that do/es not identify declarants and for whom contact information has not been properly provided (e.g.,**

thirty days prior to adjudication hearings) should be redacted before admission in <u>any</u> contested adjudication hearing to strike from evidence the anonymous hearsay contained in any DCS Report, and I request that the team also assess whether this requirement should also be added to this particular rule.

In order to satisfy this requirement, pretrial statements should also be provided thirty days prior to any adjudication hearing.

<u>Secondly</u>: **An Equal Protection issue that I request the team reconsider not only in this rule but in others as well is its troubling equivalization in treatment of dependency and severance adjudication hearings and the other pertinent matters related to each**. Equalizing dependency and severance adjudications should be reconsidered because the two are vastly different in terms of *Matthews v. Elridge* weighing, and thus evidence and procedure that implicate the rights of the parent respondents should be modified to meet these differences.

In particular, temporary custody and dependency adjudications differ from severance adjudications with regard to the weight of the State's *parens patriae* duty to protect the health and safety of children on one side (presumably encompassing the child's interest in safety and health) versus the parents' Constitutional right to parent their children; the cited case and other caselaw makes clear that the moderate imposition on the parents' Constitutional right to parent at issue during a temporary custody hearing or a dependency adjudication must bow to the greater *parens patriae* duty to protect the health and safety of children if the two are of otherwise equal weight. The logic for this is clear: if a parent prevails at either of these two hearings, the children return to the parents and potentially to a dangerous situation. Juvenile Rule 51 provides further evidence of this intent; at temporary custody hearings, the rule explicitly allows hearsay in order to protect the child safety interest, presumably providing that, as is the custom in other emergency civil situations, such as during orders of protection and in other civil cases, the proponent requesting admission of the hearsay evidence avers that the witness whose hearsay is used is identified and will disclosed at a later date.

In severance adjudication hearings, however, the weight of the competing interests falls far differently: if DCS prevails, the parents permanently lose their Constitutional right to parent their child, which a deprivation of the highest level, whereas if the parents prevail in a severance adjudication hearing, the children remain in DCS' custody, and their sole impaired interest is that they may linger a few months longer in foster care, which hardly as weighty as being exposed to a potential safety risk, and thus in calculus this constitutes a fairly low, far less weighty imposition on their interests than at adjudication, and if the interests are equal, the pendulum should swing toward the parent.

I urge the team to adopt a provision that requires all parties timely and adequately disclosure of the identity and contact information of all hearsay declarants in any

document that may be sought to be admitted as evidence in any contested hearing, and underline the more weighty issues for parents in severance adjudications.

Another, related issue: A Juvenile Court recently explained as part of a ruling on a evidentiary objection during a severance trial that it interprets the rights of the parent(s) differently depending on if the severance is by petition or by motion; I researched this issue and did not find any authority that supports this distinction with regard to hearsay – or in fact that would support any imposition on a party's rights. The effect of both requests to sever deliver an identical impact on all parties, and I request an explanation, perhaps in the comments to this Rule, that clarifies that no distinction be made regarding substantive or procedural changes to the parties' rights on this basis.

B. Proposed comment to Proposed Rule 315(d)(1)(E):

In Pima County, the identical rule is commonly, yet without supporting authority, interpreted to require a page-by-page or even line-by-line requirement to meet the standard of an adequately "specific" objection. A review of caselaw suggests that the purpose of that "specific" terminology is to ensure that blanket objections like "I object to the social study" should be insufficient to keep a document from being admitted. Instead, I urge the committee to add either a sentence to the rule or in a comment clarifying that a "sufficiently specific objection" requires that a party specifically identify what objections apply to each document to meet the due process notification requirement, and if it relates only to a specific provision, that the objecting party so specify.

C. Proposed addition to Proposed Rules 110 and 315:

I urge the committee to adopt a requirement that amends the rule to include a provision requiring parties to electronically disclose their exhibit list and a copy of all exhibits to the court parties at least 72 hours before any contested hearing even if the exhibits have been previously disclosed. It would create only a slight imposition on the evidence's proponent as they are providing the exhibit list and exhibits to the court anyway, and it would allow all the other parties to far more competently represent their clients as they would not have to search for documents during testimony. Many other courts currently require this practice, it works well, and doing so would increase the quality of representation for all parties in the Juvenile Court.

D. Proposed addition to the proposed comment to Proposed Rule 110 and to Rule 302:

I urge the committee to clarify in the comments to both rules that the ICWA does not apply if the child's suspected membership is through a father for whom paternity is not legally established (as a "parent" under ICWA "does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9)). This is a common area of confusion.

E. Proposed addition to Proposed Rules 306 and 309:

I urge the committee to amend the Proposed Rules to reflect that the duties and requirements contained in this rule apply to <u>all attorneys</u> serving in the juvenile courts, and not just to those appointed. Otherwise, a loophole is created where privately-hired and agency-employed attorneys are not required to meet these duties and requirements, which contravenes the obvious purpose of the rule, and is also, as written, manifestly unfair to parties and to attorneys as it targets only private, contracted attorneys when all attorneys who practice in the juvenile courts should be competent and should meet these standards. To avoid imposing on the "occasional attorney" situations, the rule could set a floor number of practice hours or cases as a threshold, such as:

> **Scope.** This rule applies to an attorney or GAL appointed by the court in a proceeding under Part III of these rules**; an attorney or GAL who, during any calendar year, engages more than two times in party representation in an Arizona Juvenile Court;** and **to** any attorney who is or will be subject to the requirements of Rule 306, 307, or 308.

F. Proposed amendment to Proposed Rule 307:

I urge the committee to amend the Proposed Rule to remove the requirements that inappropriately intrude into the attorney-client relationship. The State Bar's ethical rules already require competent and meaningful client representation. No other set of court rules in federal court or in any state that I could find imposes any level of management of attorney's cases that nears this almost employer-employee level, and no authority would support this intrusion, nor this cross into ethical rule territory. Instead, the

client is the designated person who determines whether and when the attorney is not providing an adequate level of service, and those ethical rules would not permit an attorney to disclose the contents of their discussions with their client, which is a topic this rule seems to encourage. If a court believes an attorney is not meeting their ethical duties, a court could instead lodge a complaint with the State Bar, the authority charged with enforcing ethical issues, or perhaps it might develop a handout or verbally inform all parties of all attorneys' duties.

G. Proposed addition to Proposed Rule 308:

I urge the committee to add a requirement that the GAL prepare and disclose a report within 60 days of appointment outlining their findings and recommendations. This would allow the Court and parties to better consider the issues that caused a GAL to be appointed. I would also encourage the committee to consider requiring that the GAL render an opinion concerning whether the party is competent to participate in the case, and could explain and define that and perhaps use the criminal rules as a guideline.

H. Proposed amendment to Proposed Rule 310:

I urge the committee to strike the requirement contained in subsection (b) that requires a court to "inquire whether the child requested to attend the hearing." This rule creates a situation where courts are required to improperly inquire into the attorney-client relationship.

I. Proposed addition to Proposed Rule 311(f):

I urge the committee to adopt two clarifying additions to this section of the Proposed Rule:

> **Limiting a Participant.** The court may limit the presence of a participant to the time the participant is heard or testifies, if:
>
> **(1)** it is in the best interests of the child; or

(2) a party requests at any time during a contested hearing that witnesses be excluded; or

(3) it is necessary to protect the parties' privacy interests and will not be detrimental to the child; **but**

(4) the court may not limit the presence of a participant who has statutory right to be present without finding that good cause exists for the limitation.

J. Proposed amendment to Proposed Rule 313:

I urge the committee to adopt the following additions to this Proposed Rule as no authority supports limiting juvenile court information in a manner that burdens a former-party parent or former dependent child; A.R.S. § 8-807(E), for instance, requires without such limitation that a "person or agent of a person who is the subject of DCS information shall have access to DCS information concerning that person."

(a)Records Confidential Generally. All records of proceedings under Rule 327 and of dependency, guardianship under A.R.S. §§ 8-871 through 8-874, termination of parental rights, and other related proceedings are confidential and must be withheld from public inspection unless authorized by law, rule, or court order.

(1) Access without Court Order. A parent, petitioner, **former dependent child,** or**, [←add a comma here to appropriately bracket the phrase]** when named as a party, a court-appointed legal guardian or DCS, may inspect and copy case records ~~**while that individual remains a party to the case**~~. On appeal, a party may inspect and copy records created prior to the ruling upon which the appeal is taken. The following other individuals and entities are authorized to inspect and copy case records without review by the court:

(A) a current party's attorney of record, and current guardian ad litem;

(B)Arizona judicial officers, clerks, administrators, professional, or other staff employed by or working under supervision of the court, including staff of the Administrative Office of the Courts, dependent children's services division, or the local foster care review boards as needed to carry out their assigned duties;

(C) Court Appointed Special Advocates (CASAs) pursuant to A.R.S. § 8-522 (F);
(D) a designated member or staff of the Arizona Commission on Judicial Conduct performing duties under the Commission's rules;
(E) a court-appointed legal guardian not a party to the case who requests a certified copy of the guardian's appointment order during the term of the guardian's appointment; and
(F) a designee of ADJC as needed to carry out the designee's assigned duties for any individual who is subject to a commitment order.
(2) Access by court order. The following individuals and entities must obtain a court order before inspecting the case record:
(A) ~~**an individual who was the subject of a dependency, a guardianship under A.R.S. §§ 8-871 through 8-874, or a termination of parental rights action as a minor;**~~
~~**(B) an individual who is not qualified under subpart (a)(1) or whose parental rights were terminated or who was dismissed from the case;**~~
~~**(C)**~~ a designee of DCS when DCS is not a party in the case upon a showing that inspection is required to carry out DCS responsibilities;
(~~D~~ B) a foster parent to inspect and copy records other than records a foster parent is authorized to inspect under A.R.S. § 8-514(D)(5);
(~~E~~ C) a participant as defined under Rule 302(c); and
(~~F~~ D) any other individual or entity not otherwise authorized by this rule to inspect records.

K. Proposed amendment to Proposed Rule 314(a):
I urge the committee to adopt the following amendment for added clarity:

Generally. On its own motion, a party's motion, or by ~~**joint motion**~~ **stipulation** of ~~**all**~~ the parties, the court may transfer the venue of a dependency, termination, or Title 8 guardianship proceeding to a different county.

L. Proposed amendment to Proposed Rule 315(a):

I urge the committee to adopt the following amendment to comport with the larger body of law that addresses both substantive and procedural due process concerns arising when documents are secretly withheld:

> **Generally.**
> ***Duty to Disclose.*** A party must disclose to other parties all relevant information that is not privileged. A party must allow other parties to inspect materials, with or without copying and regardless of whether those materials are in physical, paper, or electronic form.
>
> **(i) If a party withholds documents or items it believes privileged or otherwise nondisclosable, it must within five days provide the parties with sufficient written notification which includes a description of the withheld items and the basis for their withholding. Opponents may, within ten days of notification, request an *in camera* review of the withheld documents or items.**

M. Proposed amendment to Proposed Rule 315(d)(1):

I urge the committee to adopt the following amendment which would permit parties adequate notice and an adequate opportunity to prepare:

> **(G) The names of and contact information for all hearsay declarants contained in any document proposed to be admitted as an exhibit.**
> **(H) Any specific caselaw on which the party plans to rely.**

N. Proposed amendment to Proposed Rule 315(d)(2):

I urge the committee to adopt the following amendment to meet the due process and equal protection requirements outlined above:

> Unless the court order**s [add an "s" to correct a grammatical error]** otherwise **for good cause shown**, parties may supplement their list of witnesses and exhibits for the adjudication hearing no later than 10 days before the hearing**, providing that the party has disclosed the identity and contact information for the witness or, for documentary exhibits, the names and contact information for all hearsay declarants contained in the proposed document was disclosed at least thirty days prior to any adjudication hearing.**

O. Proposed amendment to Proposed Rule 315(e):

I urge the committee to adopt the following amendment to correct a loophole created if a party fails to provide timely, complete disclosure, which, without amendment, would lead to an incentive for parties to not provide disclosure and thus force the other parties to litigate a cause without possessing the required, necessary information to which they are entitled:

> **Methods of Discovery.** The parties may agree to utilize the discovery methods in Civil Rules 26 through 37. Absent such agreement, a party may utilize those discovery methods only after the court grants a party's motion stating why these methods are necessary. **A party's failure to request disclosure in time for ~~Failure to complete discovery before~~** the date set for the dependency adjudication hearing does not constitute good cause or extraordinary circumstances under Rule 338(b)**, but an opposing party's failure to provide timely, complete disclosure may constitute good cause.**

P. Proposed amendment to Proposed Rule 323(c):
I urge the committee to adopt the following amendment for clarity:

> Transfer to Juvenile Division. If pending family law and dependency proceedings concern the same parties, the juvenile division has jurisdiction over **legal and physical custody, including parenting time, of** the children.

Q. Proposed amendment to Proposed Rule 333(a)(2)(A):
I urge the committee to adopt the following amendment for clarity and to establish the appropriate standard for the court's decision:

> whether removal of the child from the home was clearly necessary **to prevent abuse or neglect**.

R. Proposed amendment to Proposed Rule 333(c)(5):
I urge the committee to adopt the following amendment for clarity:

> A parent may present, and the court must consider as a mitigating factor, whether the availability of reasonable services would prevent or eliminate the need for removal and the effort**s [added "s"]** to obtain and participate in these services.

S. Proposed amendment to Proposed Rule 337(d):
I urge the committee to adopt the following amendment for clarity:

> Admission/No Contest. If the court finds the parent admits or does not contest that the child is dependent, the court may, **if the sum of the evidence in the court's possession proves by the preponderance of the evidence that the child is a dependent child,** adjudicate the child dependent**,** and enter its findings and orders pursuant to Rule 338 and set or conduct a disposition hearing pursuant to Rule 339.

T. Regarding all Proposed Rules:

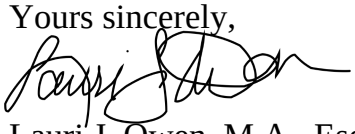
1. To comply with current grammatical rules, I urge the committee to use words when the number is less than 10 (e.g., "five").
2. Would it be clearer to refer to the Notice to Parents as "Notice to Parents in a Dependency Action," or as "Form 1," and similar for Form 3?

U. Adding nonattorney committee members:

I would encourage the team consider adding nonattorney committee members to future rulemaking panels, as some of these recommended rules do not appear to consider these persons' perspectives and thus inadvertently, and unfairly, erect barriers to the nonattorney/agency persons' resolution of issues and to their access to and participation in juvenile cases.

I thank you for considering both my proposals and comments. I remain available if you want to further discuss anything contained in this letter.

Yours sincerely,



Lauri J. Owen, M.A., Esq.

Law Office of the
Pima County Public Defender

TO: Juvenile Rules Task Force (JRTF)

FROM: David Euchner
Appellate Unit Supervisor & Resource Counsel
Pima County Public Defender's Office

DATE: March 1, 2021

RE: Comments to Proposed Rules in Part VI (Appeals)

Dear Justice Berch and Members and Staff of the JRTF:

I would like to begin by thanking you all for undertaking this monumental task to restyle the Juvenile Rules. Having served on the Criminal Rules Task Force in 2016-17 and the Criminal Rule 32 Task Force in 2018-19, I am well aware of the time commitment you each have made to this project.

In 2016, Pima County Public Defense Services arranged for the creation of a unit within the Public Defender's Office to represent parents in dependency and severance proceedings. Just under three years ago, I began handling the appeals for that unit. The only three published opinions in juvenile cases from Division Two of the Court of Appeals during that time are my cases. Several of my cases have involved interpretations of the Juvenile Rules where obvious gaps exist and I have attempted to analogize to criminal rules or to civil rules in order to achieve an equitable result. My interest pertains to Parts I, III, and VI of the Draft Rules, but due to time constraints, I am focusing my comments only on Part VI.

What I have found most challenging, however, has been perfecting an appeal and assemble the record in an orderly manner. I am very pleased to see several changes in the proposed Juvenile Rules that will repair cracks in the procedure.

I am appending to this memorandum an excerpted, marked-up version of the rules in Part VI (Appeals), with some suggested changes. Some suggestions are simple and require no explanation. To the extent that a suggstion requires a more developed explanation, I will include that analysis in this memorandum.

I. ADOPTING CHANGES THAT OVERRULE EXISTING CASE LAW

In reading the minutes and the changes that were made, it appears that the JRTF was skittish about using the rulemaking process to overturn existing case law. The minutes of the meeting on February 28, 2020, reflect "a discussion about whether the Task Force could recommend adoption of a rule that deviated from case law. The Chair observed that it was possible, but any such recommendation in the rule petition should be supported by a good reason." I agree the JRTF should tread carefully when deciding whether to rewrite the rule in a manner that effectively overrules existing case law, but I think that this statement is incomplete.

First, the JRTF should also take into account that the court of appeals "consider[s] decisions of coordinate courts as highly persuasive and binding, unless [it is] convinced that the prior decisions are based upon clearly erroneous principles, or conditions have changed so as to render these prior decisions inapplicable." *Scappaticci v. Southwest Sav. and Loan Ass'n*, 135 Ariz. 456, 461 (1983) (quoting *Castillo v. Indus. Comm'n*, 21 Ariz. App. 465, 471 (1974)). If the JRTF rewrites the rule, those changes would "render those prior decisions inapplicable." There is recent precedent for this. For example, the Rule 32 Task Force rewrote the PCR rules with the express intention of overruling the Supreme Court's holding in *Canion v. Cole*, 210 Ariz. 598 (2005), and the Court adopted those changes in 2019.

Second, in my discussions with appellate judges and staff over the years, I am unaware of any who take offense when their interpretation of an existing rule is overtaken by a rewrite of the rule. If anything, they will appreciate the clarity that comes to a change in the rule through the rulemaking process. Especially with an issue like this that the court of appeals has repeatedly stated through case law is difficult to understand, the JRTF should infer within that language a plea for the rulemaking process to clarify the rule. Sometimes a judge will do so explicitly,[1] but the judge who is writing for the court usually will not issue such a direct "call to action."

Although I disagree with some of the conclusions with the cases discussed above, I certainly appreciate the challenges those panels faced in trying to reconcile several prior cases—particularly when stare decisis requires the court of appeals to make every attempt to reconcile cases that are seemingly irreconcilable. Sometimes, when the existing case law is in disarray, the rulemaking body should seize the opportunity to write on a clean slate.[2]

Yet another reason to address an issue through the rulemaking process is that the failure to address it will only further exacerbate ongoing confusion or disarray in the law. As an example, the Rule 32 Task Force recently confronted the issue whether it should write into the rule a process for *Anders* review. A recently decided opinion of the court of appeals, *State v. Chavez*, 243 Ariz. 313 (App. 2017), held that notwithstanding a recently published opinion of a federal district judge holding that Arizona's Rule 32 process violated *Anders*, only the Arizona Supreme Court could authorize changes to the Arizona rules or overrule its prior cases. The

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[1] *E.g.*, *State v. Miles*, 243 Ariz. 511, 518 ¶ 32 n.6 (2018) (Pelander, V.C.J., concurring) ("Recently, our Chief Justice appointed a new 'Task Force on Rule 32' to review the rule as a whole and 'identify possible substantive changes that improve upon the objectives of Rule 32 and the post-conviction relief process.' Supreme Court of Arizona, Admin. Order No. 2018-07 (Jan. 24, 2018). In my view, Rule 32.1(h) is a prime candidate for the Task Force's consideration."); *State v. Porter*, 248 Ariz. 392, 406-07 ¶ 47 (App. 2020) (McMurdie, J., dissenting), *review granted* (Dec. 9, 2020) ("A rule change petition was recently submitted advocating for our supreme court to adopt a new procedural rule governing jury selection modeled after Washington General Rule 37. Indeed, the rule-making process may be the ideal forum to engage in this much-needed discussion.") (citation omitted).

[2] *See State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 604-05 ¶ 67 (2017) (Bolick, J., concurring) ("Resort to the Constitution's plain meaning is especially essential where, as the Court freely acknowledges, the state of the law is disarray. *See, e.g.*, [infra] ¶ 46 (noting that the Court has at least twice described our jurisprudence as creating a 'twilight zone.' In such instances, our fidelity should be to the Constitution rather than to the disarray.").

Supreme Court then denied Chavez's petition for review without comment. Most R32TF members interpreted the denial of review as an unwillingness to entertain changes, despite the fact that the Court was obviously aware that the R32TF was considering the issue. So Chavez was denied any remedy in Arizona. Judge Cattani predicted that failure to address the issue would result in the federal courts continuing to grant habeas relief "years after a defendant's conviction has become final in state court." *Chavez*, 243 Ariz. at 319 ¶ 22 (Cattani, J., specially concurring). The chickens came home to roost last week when Chavez was granted habeas relief. The moral of this story is that the rulemaking body should not turn away from making appropriate changes just because its members are concerned what the Supreme Court will think. If the Court does not agree with any particular changes, it is not required to adopt them.

I offer these observations at the beginning of my comments because you will note that some of my comments may have the effect of overruling existing cases.

II. INEFFECTIVE ASSISTANCE OF COUNSEL (IAC)

It is beyond debate that indigent parents whose fundamental liberty right to parent their natural children is at stake are entitled not only to the appointment of counsel but also to the effective assistance of counsel. Yet, Arizona's appellate courts have avoided directly addressing the issue, and in a manner that has created an unfortunate misconception that there is not a problem. Having read the minutes of the past meetings, it appears that the JRTF does not perceive a problem that needs to be fixed. The problem is that this becomes a self-fulfilling prophecy: if you believe that IAC does not really exist, then you won't see it when it is right in front of you as clear as day.

The meeting minutes of April 3, 2020, reflect a thorough and vibrant discussion on this topic. I would like to address the points that appear on page 9 of those minutes:

- "During years on the bench, a Division One judge had seen only a couple IAC claims." While I do not challenge this observation, I can say that my observations are significantly different, and that when I have encountered IAC, it has been impossible to litigate the claim because the rules do not explain how to do it. In one case, Division Two remanded the case back to the juvenile court to take evidence but provided no further guidance, resulting in a proceeding that deprived the parent of an opportunity to present and obtain evidence. In another, our office represented the parent in the criminal proceeding and advised the appellate attorney in the termination case of the IAC issue but that attorney ignored our advice and thus contributed to the IAC. In one case that my office tried, I identified a clear IAC issue and withdrew our office from representation on the appeal—and when I advised new counsel of the issue, new counsel berated me for thinking that this parent deserved any relief. Even I have become gun-shy about identifying IAC claims because I fear withdrawing and then leaving my client to an incompetent lawyer who will not even try to raise a claim.
- "Because trial counsel would not acknowledge their own ineffectiveness, the court would always need to appoint new counsel to raise these claims." In Pima County, I am aware of only one lawyer who has a contract for both trials and appeals. The Pima County Legal Defender does not yet have an appellate attorney, and if I review a case tried by one of my colleagues, I do not have to withdraw if I cannot identify IAC.

Assuming *arguendo* that in Maricopa County the same office or same attorney who handled the trial also handles the appeal, withdrawal is not required unless there is an identifiable IAC issue, or if the client raises the issue with the attorney.

- "Would a right to effective assistance of counsel extend to children's counsel?" I am not aware of any controlling case law holding that children's counsel must be effective. In any event, this is not the forum to answer that question.
- "Does current Rule 106 permit a self-represented party to raise IAC claims on appeal?" It does not, but the rule is procedural and does not define the substantive claims. Notably, Criminal Rule 32 (as well as Rule 33) says nothing about IAC; such claims are raised under Rules 32.1(a) and 33.1(a) because "the defendant's conviction was obtained, or the sentence was imposed, in violation of the United States or Arizona constitutions." But self-represented defendants can raise any claim that an attorney could raise.
- "Do any other jurisdictions by statute or case law recognize a right to effective counsel?" My understanding is that Beth Beckmann has already assembled a compendium of authority from other jurisdictions to answer this question.
- "Would it be sensible to provide a remedy for IAC in Arizona delinquency cases, where the right is more deeply rooted, without providing the remedy in dependencies and terminations?" This question misses the point: the substantive right has already been recognized, and the question is how to craft procedural rules that give effect to the substantive right.
- "Would it be premature for Arizona's juvenile rules to recognize such a right in the absence of dispositive case law or a statutory amendment? Would it be going too far?" Again, this assumes that the right has not yet been recognize, but the least that can be said of Arizona's cases is that they recognize the right and merely fail to define the exact contours of the right or the procedural mechanism for enforcing the right. In fact, it is the JRTF's duty to establish this mechanism. An example is how the Rule 32 Task Force addressed the defendant's right to competency in PCR proceedings. The R32TF noted that the Supreme Court's opinion in *Fitzgerald v. Myers*, 243 Ariz. 84 (2017), clearly held that Rule 32 did not provide a mechanism for challenging or securing the defendant's competency in PCR proceedings, and that the defendant did not raise a constitutional due process challenge. Nevertheless, the R32TF correctly recognized that the Rule should include something. The new Rules 32.11(d) and 33.11(d) now state: "The court may order a competency evaluation if the defendant's competence is necessary for the presentation of a claim." This rule is not perfect, but the R32TF did not allow the perfect to become the enemy of the good.

There is no doubt that permitting IAC claims would extend the length of a case, and finality is particularly important in cases of terminating parental rights because children need permanency. But that need cannot justify a denial of constitutional rights. Ignoring the problem of IAC is tantamount to an embrace of the denial of fundamental fairness in our juvenile court.

I would dispute the orthodoxy that would claim that there are not many meritorious claims of IAC that could be brought against attorneys in juvenile court. But even if it is true that the number is small, could that justify throwing the baby out with the bathwater and denying justice to those few litigants who are being deprived of fundamental rights for no other reason than the incompetence of a lawyer that was appointed by the court?

I will gladly to contribute to an effort to craft a rule that provides a procedure by which the juvenile court can take evidence and sort those claims that have merit from those that do not.

III. POST-TRIAL MOTIONS AND APPEALS FROM THOSE MOTIONS

The draft rules provide some clarification about which post-trial motions are permissible, and it is particularly helpful to include Rule 317 so that a court may amend its order to include the written findings that are necessary for appropriate appellate review. But there is confusion as to whether motions for new trial are permitted or not, and in this case, the maxim "silence is tacit consent" may not hold true in practice. Notably, neither Rule 317 nor any other rule expressly states whether motions for new trial are permitted.

I have been involved in two recent cases where a party has moved for a new trial or alternatively to re-open evidence pursuant to Civil Rule 59(a). If used properly, a motion for new trial can be extremely efficient, because the juvenile court may be presented with an opportunity to cure an error without the necessity of an appeal. Especially since the juvenile court would hear the motion in the context of a contested proceeding that only recently occurred—including assessing credibility of witnesses—there is no better opportunity to present such a claim.

Any concern that such a procedure could further delay the proceeding is overblown and even untrue depending on the circumstance. First, if the juvenile court grants relief, it would rarely require retrying the entire case; instead, whatever error could be cured by calling only those witnesses affected by the error. Second, if the juvenile court grants relief, then the party who obtained that ruling no longer needs to appeal a ruling that surely would have been appealed; but it is not equally true that the other party would definitely appeal. Third, the time for deciding a motion for new trial does not need to toll the time for filing a notice of appeal—nor should it. Instead, the appellate rules should permit for the juvenile court to retain jurisdiction to hear any motion that was timely filed, which would avoid unnecessary motions to revest jurisdiction for the purpose of allowing the juvenile court to hear the motion.

In the event the JRTF disagrees with my view, it should include language in Rule 317 that expressly states that motions for new trial are disallowed.

IV. THE LIST OF FINAL ORDERS IN RULE 601 SHOULD BE REVISED

I agree with the myriad opinions of the court of appeals that have commented on the difficulty in defining what constitutes an appealable order. The court has commented on the source of the challenge being that no statute or rule defines what constitutes a "final order" for purposes of appeal. I agree with the purpose behind Rule 601(b); if the rule provides a comprehensive list of final orders, neither the parties nor the courts will suffer this confusion.

I think use of the word "includes" prior to what clearly purports to be an exhaustive list may suggest that the list is nonexhaustive. If the JRTF intends the list to be exhaustive, then it should say so clearly.

I also think that the list includes some orders that clearly are not final, while excluding others that are arguably "more final" than some that are on the list. First, I cannot see how orders terminating visitation or relieving DCS of its duty to provide reunification services is a final order. *Francisco F. v. ADES*, 228 Ariz. 379, 381-82 ¶ 8 (App. 2011), relies on two prior cases but did not independently examine them for their correctness. But closer examination of *Matter*

of Appeal in Maricopa County Juv. Act. No. JD-5312, 178 Ariz. 372, 374 (App. 1994), shows that the reasoning is based on the assumption that courts should eschew "technical" conceptions of "final order" in favor of the impact on the parents. All orders of the court impact the fundamental rights of parents to some degree. This ad hoc approach to appellate procedure is no doubt the proximate cause of today's confusion.

Notwithstanding cases to the contrary, neither termination of visitation nor relieving DCS of providing reunification services should constitute a final order. Instead, both are preliminaries in the process of termination a parent's rights, because any court that permits DCS to do either has necessarily implicitly authorized DCS to file a motion for termination. What is more concerning is that by allowing such orders to be challenged through the normal direct appeal process, the time for resolving the claim will be substantially longer than should be tolerated when visitation and reunification services have been terminated. Such claims are best challenged immediately through a special action.

Brionna J. v. DCS, 247 Ariz. 346, 349-50 ¶ 10 (App. 2019), held that a reason why a parent cannot take an appeal from denial of a motion for return of child under Rule 59 is that the parent's rights are unaffected because the denial maintains the status quo. Yet, if the juvenile court had granted the Rule 59 motion, DCS could appeal—as was the case in *DCS v. Juan P.*, 245 Ariz. 264 (App. 2018). The problem with this reasoning is that it makes the appealability of the order dependent on who was the prevailing party, rather than the type of order that is being challenged. Except in criminal cases where the State is barred from appealing after an acquittal, the rules for appeals should not be dependent on which party wins the ruling. When viewing the nature of the order rather than its effect, I cannot see how a Rule 59 order is any less "final" than terminating visitation or relieving DCS of providing reunification services.

With that said, I do agree with *Brionna J.*'s statement that issues such as placement of the children require speedy resolution that is best accomplished through special action. But this is true of other appealable orders as well. "[A]ccepting special action jurisdiction is particularly appropriate where the welfare of children is involved and the harm complained of can only be prevented by resolution before an appeal." *Monique B. v. Duncan*, 245 Ariz. 371, 374 ¶ 9 (App. 2018) (quoting *DCS v. Beene*, 235 Ariz. 300, 303 ¶ 6 (App. 2014)).

For these reasons, I would suggest either adding orders granting or denying a motion for return of children to the list of final orders, or alternatively deleting "an order relieving DCS of its obligation to provide reunification services" and "an order terminating visitation" from Rule 601(b)(2)(D) & (F).

Finally, I suggest deleting the catch-all provision for "any other order that is final pursuant to Arizona case law" in Rule 601(b)(2)(N). Not only does the list of thirteen enumerated orders seek to be exhaustive, but the rule should not be so amorphous that it is subject to change through the decisional process in future cases. *See Allen v. Sanders*, 240 Ariz. 569, 573 ¶ 22 (2016) (Bolick, J., concurring) ("I believe we should … make any appropriate changes through our rulemaking process rather than on a case-by-case basis."). To the extent that any other orders could have been included in this list but for whatever reason were not included, the aggrieved party can still file a petition for special action, and a subsequent rule change petition can be filed to include the missing item from the list.

V. WHEN A JUVENILE COURT HAS CONTINUING JURISDICTION

It is axiomatic that the juvenile court retains jurisdiction over new matters as well as those matters that the appellate court has specifically authorized it to consider, as reflected in Draft Rule 602(g)(1), (3), and (4). I am confused, however, by the meaning of Rule 602(g)(2), which authorizes the juvenile court to "proceed within its legal authority on a remaining or new issue to the extent … the juvenile court's ruling on the issue would be in furtherance of the appeal."

This phrase is ambiguous. Especially considering the level ofo specificity that is brought to the list of final orders in Rule 601(b), it seems appropriate to be equally specific about what kind of matters are "in furtherance of the appeal." For example, this rule may or may not intend to allow consideration of a motion to alter or amend the judgment under Rule 317 or a motion to set aside a judgment under Rule 318(c).

The typical practice among practitioners and the juvenile court is to assume that it never has jurisdiction to consider such matters unless the court of appeals revests jurisdiction in the juvenile court for the purpose of considering the matter. In fact, Draft Rule 603(a)(4) seems to conflict with Rule 602(g)(2) by specifically divesting the juvenile court of jurisdiction to hear such issues once the notice of appeal is filed. Thus, Rule 602(g)(2) may be unnecessary.

I may be misunderstanding or overlooking the rationale for this particular rule, but if so, then I probably am not alone. If this rule is necessary, then some clarification would be very helpful.

VI. SANCTIONS

Rule 602(i) specifically incorporates several of the Arizona Rules of Civil Appellate Procedure (ARCAP) in order to avoid wholesale repeating of all of those rules. This is a sensible approach. The one rule that I am concerned with incorporating is "(15) ARCAP 25," which permits sanctions to be imposed against lawyers for their conduct in juvenile appeals.

Sanctions in juvenile appeals is a bad idea. Almost everyone who practices in juvenile court either works for a government agency or has a contract to provide indigent legal services. The few litigants in juvenile court who are able to retain counsel usually do not pay fees that will make the attorneys rich. There is no rule for sanctions in the Criminal Rules for this reason. There is no compelling reason to expose juvenile court practitioners to sanctions but not criminal practitioners. If a lawyer's conduct is that outrageous, the lawyer should be referred to the state bar for possible discipline. Most lawyers are more fearful of professional discipline than they are of a monetary sanction, so a rule permitting sanctions is unnecessary.

Furthermore, Rule 602(i)(15) provides an exception to sanctions for lawyers "who file[ ] a frivolous appeal from a final order in a delinquency or transfer order." First, does "frivolous appeal" mean it was frivolous to file a notice of appeal, or to file a brief that is frivolous? Presumably it refers to the notice of appeal, because not even criminal appeals lawyers are permitted to file frivolous issues in a merits brief, which is the *raison d'être* for *Anders* briefs. But parents in dependency proceedings have a constitutional right to pursue an appeal, and so it cannot be frivolous for an attorney to file a notice of appeal if the parent demands it. In fact, in

criminal cases it constitutes IAC to refuse to file a notice of appeal if the client demands it,[3] and I see no reason why it is any less so in appeals from juvenile court judgments.

Draft Rule 604(f) is a modification of Current Rule 104(G) and permits sanctions against attorneys who order preparation of transcripts that are not necessary for the appeal. I think the draft rule is a slight improvement over the existing rule, but I find this rule to be entirely unworkable and counterproductive. I understand that we do not want to waste the taxpayers' dollars by ordering transcripts that are unnecessary to the appeal. But threatening sanctions for ordering too many transcripts will have the inevitable effect of attorneys ordering too few transcripts. If either trial counsel or appellate counsel determines that a particular transcript is reasonably necessary for the appeal, is the appellate court going to second-guess that decision? Again, it is notable that no such rule exists in the Criminal Rules, even though the number of hearings that are available to be ordered in criminal proceedings is significantly more than in juvenile proceedings.

Finally, Rule 606(d) includes the word "Sanctions" in the heading, but nothing in the text of the rule discusses any kind of sanctions. Possibly there was an intent to add something to this rule, for example, sanctions against court reporters who fail to comply with court rules for preparing and filing transcripts. But if nothing about sanctions is going to be included in the rule, then the word should be removed from the heading because it is misleading.

VII. THE RECORD ON APPEAL

In addition to the sanctions issue described above, I have a few minor concerns with the language in Draft Rule 604.

First, Rule 604(d)(1)(B) requires a party moving to supplement the record to attempt to obtain the positions of all other parties. At such an early stage of the appeal, this is a meaningless exercise. The other parties would have no say if a party designated additional transcripts at the time of the filing of the notice of appeal; what could have changed in only seven days? Moreover, because seven days is such a short period of time, requiring good cause is unnecessary.

For motions to expand the record filed more than seven days after the notice of appeal, Rule 604(d)(2) requires extraordinary circumstances. This is an impossible standard for such a mundane request, especially if it is made as soon as only eight days after the notice of appeal is filed. I have no quarrel with the requirement that counsel should explain why the additional materials are necessary for proper review of the appeal—but I note that this requirement is included in both sentences in this subsection and thus the repeated statement should be removed.

Rule 604(e) requires the parties to submit to the juvenile court any disputes about the record—but it does not explain how the juvenile court obtains jurisdiction to do so. Criminal Rule 31.8(g) similarly lacks this explanation, but criminal practitioners are generally aware that the procedure requires a motion in the appellate court for revesting jurisdiction in the trial court.

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[3] *See Garza v. Idaho*, 139 U.S. 738 (2019) (attorney may not refuse to file notice of appeal even for pleading defendant who has limited issues available to raise); *State v. Varela*, 245 Ariz. 91 (App. 2018) (attorney who identifies no issues for appeal may not dismiss the appeal without client's consent and certainly not over the client's objection).

I doubt this lapse is a problem, but I point it out in case the JRTF believes that practitioners would benefit from additional clarity.

VIII. MOTIONS FOR RECONSIDERATION AND PUBLICATION

I understand that motions for reconsideration slow down the process, but it is important that litigants have the opportunity to point out oversights that the appellate court makes in a timely manner. Especially if the court of appeals publishes an opinion, it is important that the court be apprised of errors in the opinion that could easily be fixed. An example from my own cases was *Holly C. v. Tohono O'odham Nation*, 247 Ariz. 495 (App. 2019), which on initial review by the court of appeals resulted in a dismissal of the appeal for a reason that no party raised and which the Supreme Court determined in a one-page order to be erroneous. Because reconsideration was so critical in that case, I filed a motion to suspend the rules to allow a motion for reconsideration, but that motion was denied. Maybe the court would not have reconsidered the opinion anyway, but it should have had the opportunity to do so. The decision in Holly's case was delayed by more than nine months.

Motions for reconsideration do not result in substantial delays in criminal cases except in those cases where the court actually reconsiders the decision. Since most of the deadlines in the juvenile appeal rules are half that for criminal appeals, a deadline of 7 days for a motion for reconsideration is not unreasonable in order to prevent manifest injustice. And just as the Criminal Rules shorten the deadline for filing a petition for review when a motion for reconsideration is filed, the Juvenile Appeal Rules can do the same by shortening the time for filing a petition for review from 20 to 15 days.

It is peculiar that the only time a party can ask for reconsideration is when, pursuant to Draft Rule 609(j), asking the Supreme Court to permit the filing a motion for reconsideration of a denial of a petition for review. Criminal Rule 31.20(f) uses stronger language to ensure that such motions for reconsideration may only be filed after first obtaining leave from the appellate court to do so.

Regarding motions for publication, I suggest removing the latter clause "and before a petition for review is filed." With that clause in the rule, a person who loses a decision and believes the opponent may file a motion for publication can defeat the motion simply by rushing to file a petition for review. There is no reason why the decision on publication must be made prior to a petition for review being filed; if the petition for review is filed first, then the other party may notify the Supreme Court if publication was granted—either through a simple notice or in the response to the petition for review.

IX. OTHER COMMENTS

I have redlined Part VI with several other suggestions. Occasionally I placed a comment in the margin if I had a question or felt that my suggested change required a minor explanation. I believe those suggestions are all self-explanatory, but I am available to explain them if needed.

CONCLUSION

The JRTF Members and Staff have my sincerest gratitude for the hard work that was put into this restyling project. I look forward to the opportunity to discuss some of these comments during call to the public and to answer any questions you may have.

Sincerely,

Encl: redlined edited version of Part VI (Appeals)

DAVID EUCHNER COMMENTS, MARCH 1, 2021

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DAVID EUCHNER COMMENTS, MARCH 1, 2021

PART VI. APPEALS

Rule 601. Right to Appeal

(a) Who May Appeal. Any aggrieved party may appeal to the Court of Appeals from a final order of the juvenile court. A party is aggrieved under this rule if the order from which the appeal or cross-appeal is taken denies the party a personal or property right or imposes a substantial burden on the party.

(b) Final Orders. A final order must be in writing, signed by a judge, and filed with the clerk.

(1) In delinquency and incorrigibility proceedings:

(A) A disposition order for a juvenile who is adjudicated incorrigible or delinquent is a final order.

(B) A restitution order entered after the date of the disposition order is a separately appealable final order, but if a separate appeal is filed and if practicable, it should be consolidated with an appeal of the disposition order.

(C) When the court finds that the juvenile violated probation, its disposition order is a final order.

(D) An order transferring a juvenile for prosecution as an adult is a final order.

(2) In all other juvenile proceedings, a final orders ~~include~~is any of the following:

(A) an order granting a dependency petition and declaring a child dependent or denying or dismissing a dependency petition;

(B) a disposition order entered after a juvenile has been adjudicated dependent;

(C) an order granting or denying a motion to intervene;

(D) an order relieving DCS of its obligation to provide reunification services;

(E) an order entered in a dependency removing a child who has been adjudicated dependent from a parent's physical custody;

(F) an order terminating visitation;

(G) an order granting or denying a petition or motion for termination of parental rights;

(H) an order denying an application for adoption certification under A.R.S. § 8-105 and Rule 408, after a hearing under Rule 408(d);

(I) an order granting or denying an adoption petition;

(J) an order granting or denying a Title 8 guardianship petition or motion;

(K) an order granting or denying a petition for emancipation;

(L) an order altering or amending a final order under Rule 317 and an order denying a motion to alter or amend a final order under Rule 317;

(M) an order granting or denying a motion to set aside a final order under Rule 318(c) or Rule 407(f); and

(N) any other order that is~~f~~ final pursuant to Arizona case law.

Rule 602. General Provisions

(a) Priority of Juvenile Appeals. The appellate court must give a juvenile appeal precedence over all the other actions except extraordinary writs or special actions.

(b) Caption on the Notice of Appeal. The notice of appeal must be captioned using the type of proceeding and the initials of the juvenile's name. Examples: "In re Delinquency of A.B.," "In re Dependency as to C.D.," or "In re Termination of Parental Rights as to E.F."

(c) Suspension of Order.

(1) ***Generally.*** The filing of a notice of appeal does not suspend an order of the juvenile court, and execution of the order is not stayed while the appeal is pending, unless the appellate court suspends the order or stays the execution.

(2) ***Request for Stay.*** A party may file a motion in the appellate court requesting a stay of the order after a notice of appeal has been filed. The filing party must state in that motion whether other parties stipulate or object to staying the order while the appeal is pending.

(3) ***Factors.*** In deciding whether to stay a juvenile court order, the appellate court may consider the best interests of the child, the likelihood that the order will be reversed, and any other pertinent legal or equitable matters. If the juvenile court order requires restitution, its clerk will hold monies paid for restitution until the appellate court issues its mandate.

(d) Suspension of Rules. On its own or on a party's motion, the appellate court for good cause may suspend, supplement, or vary the requirements of any provision of Rules 601 through 610, and may substitute another appropriate order of proceeding. However, the time specified in Rule 603(a) for the filing of a notice of appeal or notice of cross-appeal may not be shortened or extended, except as provided in that rule.

(e) Appointment of Counsel.

(1) ***Requirement.*** ~~When required by law, t~~The juvenile court or the appellate court must appoint an attorney for an indigent party to an appeal from a final juvenile court order in accordance with Rules 206, 303, and 404. A party who was previously determined to be indigent by the juvenile court need not make any further showing of indigency.

(2) ***Party with Appointed Counsel in the Juvenile Court.*** The juvenile court or the appellate court may order the attorney who had been appointed in the juvenile

court proceedings to continue representing that party on appeal, unless the juvenile court or appellate court finds that the party is currently able to employ counsel. Either court may also appoint a different attorney for a party to an appeal.

(3) ***Party with Appointed Counsel in the Juvenile Court.*** A party who did not have appointed counsel in the juvenile court may request appointed counsel on appeal by filing a request in the juvenile court no later than 5 days after the notice of appeal is filed. If the juvenile court denies the party's request for appointed counsel, the party may request the appellate court to appoint counsel.

(f) Bond. A bond is not required on appeal from a juvenile court order.

(g) Continuing Juvenile Court Jurisdiction. While an appeal is pending, the juvenile court may proceed within its legal authority on a remaining or new issue to the extent:

(1) the appellate court has specifically authorized or directed the juvenile court to rule on the issue;

(2) the juvenile court's ruling on the issue would be in furtherance of the appeal;

(3) a statute or court rule confers continuing jurisdiction on the juvenile court; or

(4) the juvenile court's ruling on the issue would not legally or practically prevent the appellate court from granting the relief requested on appeal.

This rule does not authorize the juvenile court to extend the time for filing briefs, motions, transcripts, or other documents or items with the appellate court.

(h) Service of Filings Under These Rules. A party who files documents with the superior court clerk or an appellate clerk pursuant to Rules 601 through 610 must serve copies of the documents on the other parties as provided by Rule 106.

(i) Arizona Rules of Civil Appellate Procedure (ARCAP). In addition to any ARCAP rule specifically incorporated by these rules, the following apply:

(1) Rule 2 (Definitions);

(2) Rule 3(b) (Suspension of an Appeal);

(3) Rule 4 (Filing Documents with an Appellate Court; Format; Service), except that the caption for all filings in the appellate court must be as provided in Rule 103.1(a), not as provided in ARCAP 4(a) and the related ARCAP forms;

(4) Rule 4.1 (Paper Filing)

(5) Rule 4.2 (Electronic Filing)

(6) Rule 5 (Computing and Modifying Deadlines), except as provided in Rule 603(a)(5), which permits the juvenile court to excuse the untimely filing of a notice of appeal or cross-appeal;

(7) Rule 6 (Motions)

(8) Rule 8(g) (Joint or Consolidated Appeals or Cross-Appeals);

(9) Rule 9(c) (Filing of Notice of Appeal Before Entry of Judgment);

(10) Rule 11, (d), (e), and (h) (Narrative Statement, Agreed-Upon Statement, Multiple Appeals from the Same Judgment);

(11) Rule 17 (Supplemental Citation of Legal Authority);

(12) Rule 18 (Oral Argument in the Court of Appeals);

(13) Rule 20 (Notice of Decisions and Orders);

(14) Rule 24 (Appellate Court Mandates), except that the appellate court may issue its mandate immediately if the appeal is dismissed upon the filing of a notice by counsel under Rule 607(e), and the party has not filed a brief on the party's own behalf;

(15) Rule 25 (Sanctions) except that incorporation of ARCAP 25 must not be construed to permit the imposition of sanctions against an appellant, a cross-appellant, or their counsel who files a frivolous appeal from a final order in a delinquency or transfer matter;

(16) Rule 27 (Substitution of Parties); and

(17) Rule 28(a) through (f) (Decisions; Publication of Opinions).

Commented [DE1]: Given the stark difference between ordinary civil cases (and clients) and juvenile cases, it makes sense to place this burden on the appellate court to ensure that only one case is docketed.
I am making best efforts to ensure that all appealing parties are filing a joint notice of appeal, but I can't control everyone (certainly not people outside my office), and the court docketing multiple appeals creates far too much confusion.

Rule 603. Notice of Appeal

(a) Time for Filing a Notice of Appeal and Notice of Cross-Appeal.

(1) ***Notice of Appeal.***

(A) Except as otherwise provided by this rule, a party must file a notice of appeal in the juvenile court no later than 15 days after entry of the final order from which the appeal is taken.

(B) An order is entered on the date the clerk files it, as shown by the clerk's date stamp on the filed order.

(2) ***Notice of Cross-Appeal.*** Except as otherwise provided by this rule, a party must file a notice of cross-appeal in the juvenile court no later than 10 days after the appellant filed a notice of appeal, or 15 days after entry of the final order from which the appeal is taken, whichever is later.

(3) ***Effect of Certain Post-Judgment Motions on the Time for Filing a Notice of Appeal.*** If a party within 12 days after entry of a final order files a motion under Rule 317 to alter or amend the final order, or a motion to set aside the final order under Rule 318(c) or Rule 407(f), the time to file a notice of appeal or cross-appeal under section (a) is extended as follows:

(A) *No Previous Notice of Appeal.* If a party has not previously filed a notice of appeal, the time for filing a notice of appeal begins to run on the date of entry of:

(i) the altered or amended order, regardless of whether that order was entered on a party's motion or the court's initiative;

(ii) an order denying a party's motion to alter or amend; or

(iii) an order granting or denying a party's motion to set aside.

(B) *Previous Notice of Appeal.* If a party has filed a notice of appeal before timely filing one of these motions, or files a notice of appeal while the motion is pending, then after the appellate court assigns a case number under Rule 606(a), the appellant must promptly ~~notify~~ file a notice with the appellate court of the pending motion. Upon receipt of that notice, the appellate court will suspend the appeal. The appellant must promptly notify the appellate court when the juvenile court has decided the motion. The appellate court will then reinstate the appeal as of the entry of the order disposing of the last motion. A party intending to appeal the juvenile court's ruling on such a motion must file a new or amended notice of appeal or cross-appeal within the

time prescribed in subpart (a)(1) or (a)(2) as measured from the entry of the order disposing of the motion.

(C) *Altering or Amending a Judgment on the Court's Initiative.* If a party has filed a notice of appeal before the court enters an altered or amended final order on its own under Rule 317, the party is not required to file an amended notice of appeal after the court enters the altered or amended order.

(4) ***Other Post-Judgment Motions.*** Other than as provided in subpart (a)(3), the filing of any post-judgment motion that concerns the order from which the appeal is taken does not extend the time for filing a notice of appeal or cross-appeal. Once a proper notice of appeal is filed, the juvenile court is divested of jurisdiction to address such motions, unless the appellate court suspends the appeal and re-vests in the juvenile court the jurisdiction to rule on the motion. If jurisdiction to address the motion is re-vested, an aggrieved party who challenges the juvenile court's ruling on the motion must file a new or amended notice of appeal as provided in subpart (a)(1) or (a)(2).

(5) ***Delayed Appeal or Cross-Appeal.*** If a party other than DCS or the State fails to file a timely notice of appeal or cross-appeal and the juvenile court finds good cause for the failure, the juvenile court must allow the appeal or cross-appeal to proceed.

(A) To obtain relief under this rule, a party must file a motion in the juvenile court that shows good cause for the failure. Good cause includes, but is not limited to, clerical errors of counsel that are not attributable to the client.

(B) If the juvenile court enters an order granting the motion, the party must file the delayed notice of appeal or cross-appeal no later than 7 days after entry of the order permitting it.

(C) If a party files an untimely notice of appeal or cross-appeal before the juvenile court enters an order permitting a delayed appeal or cross-appeal, and the appeal remains pending when the court enters its order granting relief under this rule, the appellate court must treat the untimely notice as if it had been timely filed.

(b) Content of the Notice of Cross-Appeal. The notice of appeal or notice of cross-appeal must be in substantially the same form as Form 5 and must include the following:

(1) the party filing the notice;

(2) the final order or portion of the order the party is appealing;

(3) whether the party was represented by appointed or private counsel when the final order was entered, unless the party filing the notice is a government agency; and

(4) if the notice of appeal or cross-appeal is filed by an attorney, it must be in substantially the same form as Form 5, and must include the following statement: "By signing and filing this notice of appeal, undersigned counsel avows that counsel communicated with the client after entry of the order being appealed, discussed the merits of the appeal, and obtained authorization from the client to file this notice of appeal or cross-appeal." If the attorney for a party files a notice of appeal or cross-appeal that does not contain the required statement, the clerk must refer the notice of appeal or cross-appeal to the juvenile court judge assigned to the case. After reviewing the notice of appeal or cross-appeal, the assigned judge must issue an order informing the attorney and the appellant or cross-appellant that the notice does not comply with this rule and permit counsel to file an amended notice of appeal or cross-appeal no later than 5 days after the order is entered. If a proper notice of appeal or cross-appeal is not filed within that period, the court must strike the notice of appeal or cross-appeal and direct the clerk not to process it under Rules 603, 604, and 606. If the appellate court receives a notice of appeal or cross-appeal that does not comply with this rule and the juvenile court has taken no action on it, the appellate court must give counsel for the appellant or cross-appellant a reasonable opportunity to file an amended notice and if a compliant notice of appeal is not filed, the court must dismiss the appeal or cross-appeal.

(c) Distribution of the Notice. Unless otherwise provided, no later than two business days after the filing of a notice of appeal or cross-appeal, the juvenile court clerk must distribute copies of the notice to:

(1) all parties;

(2) each certified court reporter who reported any juvenile court proceeding that is part of the presumptive record as described in Rule 604(a) or the court's designated transcript coordinator, if the record was made by electronic or other means; and

(3) the appellate court clerk. The juvenile court clerk must include with the copy of the notice served on the appellate court clerk a copy of the order from which the appeal is taken and the names of the persons to whom the clerk distributed a copy of the notice of appeal or cross-appeal.

Rule 604. The Record on Appeal

(a) Presumptive Record on Appeal. The presumptive record on appeal consists of documents filed and exhibits admitted in the juvenile court, and transcripts of reported or recorded proceedings as follows:

(1) ***Documents and Exhibits.*** The presumptive record on appeal:

(A) Includes all documents filed with the clerk before the record is transmitted, and in a delinquency case, the disposition file under Rule 215(a)(1)(D). No other filings may be transmitted without an order from the appellate court.

(B) Includes all exhibits admitted into evidence, as well as any report offered into evidence but not admitted under Rule 104(d)(8).

(C) Must not include any document or exhibit deleted pursuant to Rule 606(c)(2)(B) or any item of a size, bulk, or condition that makes transmission impractical, in which case the provision of ARCAP 11.1(c)(2) apply.

(2) ***Transcripts.*** The presumptive record in each of the following types of appeals includes the transcripts respectively specified below:

(A) *From a delinquency or incorrigibility adjudication:* transcripts of the adjudication and disposition hearings and any separate restitution hearing.

(B) *From a probation violation proceeding:* transcripts of the contested violation hearing or the admission hearing and the disposition hearing.

(C) *From an order transferring a juvenile for prosecution as an adult:* transcripts of the probable cause and public safety phases of the transfer hearing.

(D) *From an order adjudicating a child dependent or dismissing a dependency petition:* transcripts of the hearing or hearings that generated the order. If the notice of appeal or cross-appeal states the appeal is also taken from the disposition order, the transcript also includes the disposition hearing.

(E) *From an order granting or denying a motion to intervene:* transcripts of the hearing on the motion.

(F) *From an order relieving DCS of its obligation to provide reunification services, removing a child who has been adjudicated dependent from a parent's physical custody, or terminating visitation:* transcripts of the hearing or hearings that resulted in that order.

(G) *From an order establishing or denying a guardianship or an order granting or denying a motion or petition to terminate parental rights:* transcripts of the

contested guardianship, termination, or other hearing that generated the order being appealed.

(H) *From an order denying an adoption certification under A.R.S. § 8-105 and Rule 408:* the transcript of the hearing under Rule 408(d).

(I) *From an order granting or denying an adoption petition:* transcripts of any hearing on the validity of a parent's consent to adoption and the adoption hearing.

(J) *From an order granting or denying a petition for emancipation:* transcripts of any hearings on the petition.

(K) *From any other final order:* transcripts of any hearing that resulted in that order.

Notwithstanding the preceding provisions, the certified transcript must not include any proceeding or portion thereof excluded pursuant to section (b).

(b) Appellant's Supplemental Designation.

(1) No later than 5 days after filing a notice of appeal, the appellant may file "appellant's supplemental designation of record" that requests the juvenile court clerk to include in the record transmitted to the court of appeals the following, which the party reasonably believes may be necessary for proper consideration of issues likely to be raised on appeal:

(A) any exhibit that has been marked and offered but not admitted into evidence; and

(B) all or part of the transcript of any designated proceeding that is not part of the presumptive record under section (a), but that directly or indirectly resulted in the order from which the appeal is taken.

(2) The appellant's supplemental designation of record also may request the juvenile court clerk to delete exhibits or transcripts from the presumptive record.

(3) The appellant must serve the supplemental designation of record on all parties, on each court reporter who reported a designated proceeding, and as applicable, on the court's transcript coordinator. The certified transcript on appeal must not include any proceeding or portion of any proceeding excluded from the presumptive record under this subpart.

(c) Appellee's Supplemental Designation. No later than 12 days after the filing of the notice of appeal, any appellee may file with the juvenile court clerk "appellee's

supplemental designation of record" for any items not included in section (a) or deleted by appellant under section (b)(2) that the appellee reasonably believes may be necessary for proper consideration of issues likely to be raised on appeal. The appellee must serve the supplemental designation as provided in section (b).

(d) Supplementing the Record by Motion. After the time for filing a supplemental designation under section (b) or (c) has passed, a party may request to supplement the record only by motion filed in the appellate court.

(1) ***Within 7 days.*** No later than 7 days after the appellate clerk sends a notice under Rule 606(f) that the record on appeal is complete, a party may file a motion that requests adding to the record on appeal items the party reasonably believes are necessary for proper consideration of issues the party intends to raise on appeal. The motion must:

(A) show good cause for supplementing the record; and

(B) state whether other parties consent or object to the proposed supplementation of the record or explain why the moving party was unable to contact the other parties before filing the motion.

(2) ***After 7 days.*** If a party files a motion under this section more than 7 days after the appellate clerk has issued a notice of completion of the record under Rule 606(f), the party must show that the requested records are necessary for the proper consideration of issues the party intends to raise on appeal. The appellate court may not grant a party's motion to supplement the record under this subpart unless the court finds extraordinary circumstances exist to excuse the party's failure to file the motion within the time specified in subpart (d)(1), and the party has established the supplemental materials are necessary for the proper consideration of the issues the party intends to raise on appeal.

(e) Disputes, Omissions, and Misstatements. The parties must submit any dispute about whether the record accurately includes what occurred in the juvenile court to that court, which will resolve the dispute. If anything material is omitted from or misstated in the record, the parties may add to or correct the record by a court-approved stipulation. Alternatively, the juvenile court, before the record is transmitted to the appellate court, or the appellate court, on motion by a party or on its own, may direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be certified and transmitted. All other questions concerning the form and content of the record must be presented to the appellate court.

(f) Sanctions. If a party requests adding to the presumptive record any item or transcript that is not necessary for proper consideration of the issues on appeal, the appellate

court may impose sanctions under ARCAP 25, as made applicable in juvenile appeals by Rule 602(i).

Rule 605. Notice of Non-Participation

(a) Generally. Any party to the case or a party's fiduciary, which includes a personal representative, Title 14 guardian, conservator, or trustee, who has appeared in the proceedings on behalf of a party, may file a notice of non-participation stating that the party or fiduciary does not intend to actively participate in the appeal. Such a notice may ~~and~~ adopt~~s~~ and agree~~s~~ to be bound by the appellate positions, filings, representations, actions, and omissions of another party or parties who are identified in the notice, but such is not required.

(b) Time for Filing. A notice of non-participation may be filed in the juvenile court no later than 10 calendar days after the juvenile court clerk has distributed copies of the notice of appeal or cross-appeal under Rule 603(c). Otherwise, a notice of non-participation must be filed in the appellate court. A party or fiduciary filing a notice of non-participation must serve a copy of the notice on all persons on whom service was made under that provision.

(c) Effect of Filing. By filing a notice of non-participation, a party or fiduciary does not waive the right to continue to receive orders, notices, or other documents issued by the juvenile court or the appellate court, or service of motions, briefs, notices, or other documents filed by any other party in connection with the appeal. Filing a notice of non-participation does not relieve the party or fiduciary who files it of the obligation to serve upon the remaining parties other documents filed by the party or fiduciary in the juvenile court or the appellate court in connection with the appeal. A notice of non-participation must not be used or relied upon as a substitute for a notice of appeal, notice of cross-appeal, petition for review, or cross-petition for review.

Commented [DE2]: By this time, the case is docketed in the appellate court and the record may have already been transferred… in which case the appellate court may never receive the notice. I would suggest "3 days" after distribution of the notification of appeal for filing in JuvCt, and after that it goes to the appellate court.

Rule 606. Assigning an Appellate Case Number; Filing, Serving, and Transmitting the Record on Appeal

(a) Assigning an Appellate Case Number and Caption.

(1) The appellate clerk must assign an appellate case number upon receipt of the notice of appeal from the superior court clerk. The appellate court clerk must establish the official caption of appeal pursuant to the criteria in Rule 602(b).

(2) All notices of appeal and notices of cross-appeal from the same final order must be filed under the same appellate case number by the appellate clerk.

Commented [DE3]: I am working on getting appellants to file a joint notice of appeal, but in the end the buck should stop with the appellate court to ensure that everything ends up in the same case.

~~(2)~~**(3)** If a party files a timely notice of appeal but the court of appeals has not received the notice before the party files a motion seeking to stay the superior court's order pending resolution of the appeal, the appellate court clerk may assign the appeal an appellate case number when the party files that motion. The moving party must attach to the motion a copy of the timely filed notice of appeal.

(b) Notification of Assignment of the Appellate Case Number. The appellate court clerk must provide notice of the assigned appellate case number and the official caption to:

(1) all parties;

(2) the superior court clerk; and

(3) the court reporter or authorized transcriber for all presumptive transcripts as provided in Rule 604(a) and for any proceeding or part thereof designated pursuant to Rule 604(b) or (c).

(c) Filing and Transmitting Documents. No later than 20 days after the notice of appeal is filed, the superior court clerk must:

(1) prepare a certified copy of the following by individually numbering each document in filing-date order, beginning with the first-filed document:

(A) the documents that are part of the presumptive record, identified in Rule 604(a)(1), except documents excluded from the presumptive record under Rule 604(b)(2), and

(B) any documents added to the presumptive record under Rule 604(b) or (c);

(2) identify and assemble all exhibits identified in Rule 604(a)(1)(B) and admitted into evidence, as well as any report offered into evidence but not admitted under Rule 104(d)(9), except:

(A) any exhibit an appellant has excluded under Rule 604(b), unless ~~appellee~~ another party has re-designated the exhibit under Rule 604(c), and

(B) any item of a size, bulk, or condition that makes transmission impractical, in which case the provisions of ARCAP 11.1(c)(2) apply;

(3) prepare an index of the record on appeal separately listing:

(A) the documents prepared pursuant to subpart (c)(1), in numerical order, indicating for each the title or a brief description of the document and its filing date, and

(B) the exhibits identified and assembled pursuant to subpart (c)(2), by number, with a brief description of each and the date it was admitted into evidence;

(4) transmit the documents, exhibits, and index to the appellate court clerk; and

(5) serve copies of the index on all parties to the appeal.

(d) Filing and Serving Certified Transcripts; Sanctions.

(1) ***General Requirements.*** Unless otherwise ordered by the appellate court, the court reporter or authorized transcriber must file the completed certified transcript with the appellate court clerk and must serve one copy on each appellant and each appellee who has not filed a Notice of Non-Participation under Rule 605. The court reporter or authorized transcriber must file a notice of service with the transcript, stating when, upon whom, and by what means service was made. The transcript must show the assigned appellate court case number.

(2) ***Time for Filing.*** The court reporter or authorized transcriber must file the transcript no later than 30 days after whichever of the following occurs first:

(A) the filing of a notice of appeal by a governmental agency or of a notice of appeal stating that appellant was represented by appointed counsel in the juvenile court when the final order was entered;

(B) service of notice on the court reporter or authorized transcriber that the juvenile court or the appellate court has appointed counsel to represent the appellant on appeal; or

(C) the appellant makes satisfactory arrangements to pay for the certified transcript.

(e) Supplementing the Record by Appellate Court. On a party's motion filed under Rule 604(d) or on its own initiative, the appellate court may direct the transmission of

any document, exhibit, or other item necessary for determining the appeal that was not transmitted under sections (c) and (d) of this rule.

(f) Notice of Completion of the Record. Upon receipt of all documents, exhibits, and transcripts that are included in the presumptive record, or added by supplemental designation, or by the appellate court's order under section (e), the appellate court clerk must send a notice to all parties of the date on which the record on appeal is complete.

Rule 607. Briefing in the Court of Appeals; Transfer to the Supreme Court

(a) Generally. ARCAP 15 ("Due Dates; Filing and Service of Briefs") applies in appeals from the juvenile court, except that:

(1) the opening brief must be filed with the Court of Appeals no later than 20 days after the appellate clerk sends the notice of completion of the record required by Rule 606(f), unless the appellate court orders otherwise;

(2) any answering brief must be filed with the Court of Appeals no later than 20 days after service of the opening brief; and

(3) a reply brief must be filed no later than 10 days after service of appellee's answering brief. ~~or a notice stating that no reply brief will be filed. The Court of Appeals encourages the appellant to~~If an appellant does not intend to file a reply brief, the appellant should file a notice stating that no reply brief will be filed~~the notice~~ as soon as possible after the answering brief is filed.

(b) Length and Content of Briefs. ARCAP 13 ("Content of Briefs"), 13.1 ("Appendix"), and 14 ("Length and Form of Briefs") apply in appeals from the juvenile court, except:

(1) ***Word Limit for an Electronically Filed Brief.*** An electronically filed opening, answering, or amicus curiae brief must not exceed 7,000 words, and a party's reply brief must not exceed 3,500 words.

(2) ***Page Limit for Paper Filed Brief.*** If a brief is submitted for filing at the appellate clerk's filing counter, an opening, answering, or amicus curiae brief must not exceed 22 pages, and a reply brief must not exceed 12 pages.

(3) ***Exclusions from Word or Page Limits.*** The word and page limits specified in this rule do not include the table of contents, table of citations, certificate of service, certificate of compliance, and any appendix.

(4) ***Victim Identification.*** Appellate briefs must use a victim identifier in place of the victim's name in any case in which a delinquent act is alleged. "Victim identifier" means a victim's initials, a pseudonym, or other substitute for the victim's true full name.

(5) ***Binding a Paper Brief.*** A party permitted to file a brief in paper under ARCAP 4.1(c) must securely bind the brief (for example, the pages of the brief may be clipped or banded), but the binding must not use adhesives, staples, or two-pronged fasteners that perforate the pages of the brief.

(c) Extensions of Time.

(1) A party seeking an extension of time for filing a brief must file a motion stating the reasons the extension is needed, and whether any party objects, or that the moving party's attempts to communicate with the other parties have been unsuccessful.

(2) The Court of Appeals for good cause may grant a party an initial extension of 20 days for the filing an opening or answering brief and 10 days for the filing of a reply brief.

(3) The Court of Appeals may grant further extensions only for extraordinary circumstances.

(d) Amicus Curiae Brief. ARCAP 16 ("amicus curiae") applies to appeals from final orders of the juvenile court. An amicus curiae may not file a reply brief.

(e) Notice and Avowal in Lieu of Opening Brief; Pro-se Brief.

(1) When or before the opening brief is due in an adoption, dependency, Title 8 guardianship, or severance appeal, a court-appointed attorney may file a Notice and Avowal in Lieu of Opening Brief, avowing either or both of the matters in subparts (e)(1)(A) and (e)(1)(B).

(A) The appellant has failed to maintain contact with counsel, and despite diligent efforts, counsel has been unable to locate appellant. Counsel must state the last date on which the appellant and counsel had contact, and the efforts counsel has made to locate the appellant. Counsel must avow that for this or any other reason, which counsel must specify, counsel believes the appellant has abandoned the appeal.

(B) Counsel has reviewed the entire record on appeal and finds no non-frivolous issue to raise. Counsel must include avowals that counsel has informed the appellant of counsel's intent to file a notice under this rule, and the appellant's opportunity to file a pro se brief.

(2) If the appellant's attorney files a notice under subpart (e)(1)(B), the attorney must provide the appellate court with appellant's contact information and inform the court in its notice whether appellant requests to file a pro se brief.

(3) ~~If the Court of Appeals grants appellant's request to file a pro se brief, it~~The appellate court must order appellant to file the brief no later than ~~15~~ 20 days after the date of the order. No extensions may be granted absent extraordinary circumstances. When appellant files the pro se brief, the court may deem the

Commented [DE4]: I don't see how the COA could reasonably deny the appellant the right to file a pro se brief.

Commented [DE5]: Keep in mind that some attorneys will transmit the file to the client by mail, thus losing a few days.

case at issue, or it may permit or direct an appellee to file an answering brief. The court may not grant relief without permitting the appellee to file an answering brief. No pro se reply brief may be filed.

(4) If the appellant's attorney files a Notice and Avowal in Lieu of Opening Brief and avows that the appellant does not request to file a pro se brief, or if the appellant notwithstanding the request fails to timely file a pro se brief, the Court of Appeals may dismiss the appeal. If the court dismisses the appeal, it may accelerate and immediately issue its mandate.

(f) "At Issue." Except as otherwise provided in subpart (e)(3), an appeal will be deemed "at issue" upon the filing of the reply brief, the filing of a notice that no reply brief will be filed, or the expiration of the time for filing the reply brief, whichever occurs first.

(g) Petition for Transfer. ARCAP 19 applies in appeals from final orders of the juvenile court, except that a party's petition for transfer of the appeal to the Supreme Court must be filed before the case is at issue under section (f).

Commented [DE6]: This is not fair. It builds into the rules a structural prejudice against the pro se litigant whose issues may be meritorious but whose attorney did not recognize it.

Commented [DE7]: Could the petition be filed simultaneously with a reply brief?
Of course, it is best to file it with the opening brief because the issue is already identified.

Rule 608. Dismissal and Other Action by the Court of Appeals; No Motion for Reconsideration; Motion for Publication

(a) Dismissal. Before or after briefing is completed, the appellate court may dismiss an appeal:

(1) if it is withdrawn by the appellant; or

(2) on it own or an appellee's motion, for any legal cause, including lack of jurisdiction or lack of prosecution, unless the appellant shows good cause why the appeal should not be dismissed.

(b) Action by the Appellate Court. The appellate court may:

(1) affirm the order of the juvenile court;

(2) vacate or reverse the order and remand for appropriate action by the juvenile court;

(3) take the matter under advisement and order the filing of additional matters in the appellate court;

(4) take other actions the court deems just and proper under the circumstances, including suspending the appeal and re-vesting jurisdiction in the juvenile court for further proceedings in that court.

(c) No Motion for Reconsideration. A party may not file a motion for reconsideration of a final order, decision, or opinion of the Court of Appeals.

(d) Motion for Publication. A party may file a motion for publication or depublication no later than 10 days after the filing of the decision ~~and before a petition for review to the Supreme Court is filed~~.

Rule 609. Petition for Review

(a) Purpose. A petition for review or cross-petition for review asks the Supreme Court to review a decision of the Court of Appeals.

(b) Place and Time for Filing.

(1) ***Place for Filing.*** A party must file a petition or cross-petition for review, a response to a petition or cross-petition for review, or a motion to extend the time for filing any of these documents, with the Supreme Court clerk.

(2) ***Timing.***

(A) *Petition for Review.* A party must file a petition for review no later than 20 days after Court of Appeals files its decision or any final order disposing of the appeal.

(B) *Cross-Petition for Review.* A party must file a cross-petition for review no later than 15 days after service of a petition for review or no later than 20 days after the Court of Appeals files its decision or final order, whichever is later.

(c) Form and Length of the Petition or Cross-Petition; Service.

(1) ***Application of ARCAP 4.*** The petition and cross-petition must comply with the provisions of ARCAP 4(a) through (c), (f), and (g), unless the Supreme Court suspends a requirement of that rule.

(2) ***Caption.*** The parties must use the caption required by Rule 602(b)~~103.1(a)~~.

(3) ***Word Limit for Electronic Filing.*** An electronically filed petition for review, response, or cross-petition must not exceed 3,500 words. However, a cross-petition combined with a response to a petition must not exceed 6,500 words.

(4) ***Word Limit for Paper Filing; Number of Copies.*** A petition, response, or cross-petition filed in paper must not exceed 12 pages. A party who files in paper must file an original and one copy of the document, including any appendix.

(5) ***Exclusion from Word or Page Limit.*** The word and page limits specified in this rule do not include the table of contents, table of citations, certificate of service, certificate of compliance, and any appendix.

(6) ***References to Case Law.*** References to case law must comply with ARCAP 13(f).

Commented [DE8]: Is this necessary here? It is incorporated by reference to ARCAP in the briefs rule.

(7) ***Certificate of Compliance.*** The petition or cross-petition for review must be accompanied by a certificate of compliance, as provided by ARCAP 23(g)(3).

(d) Contents of the Petition or Cross-Petition for Review. The party who files a petition for review must include with the filing a copy of the Court of Appeals decision or final order, and the following information:

(1) ***Statement of the Issues.*** A petition or cross-petition must include, without argument, a list of the issues decided by the Court of Appeals that the petitioner or cross-petitioner wishes to present to the Supreme Court for review. The petition or cross-petition for review must also list separately and without argument any additional issues that were presented to but not decided by the Court of Appeals, which the Supreme Court may need to decide if review is granted.

(2) ***Material Facts.*** A petition or cross-petition must include the facts material to the issues presented to the Supreme Court for review. No evidentiary matter may be included if it is not material to proper consideration of these issues. The party must include a reference to the record or page of the certified transcript where the material evidence appears.

(3) ***Reasons the Supreme Court Should Grant Review.*** A petition or cross-petition must state the reasons the Supreme Court should grant review, which may include the following: no Arizona decision controls the point of law in question; a decision of the Supreme Court should be overruled or qualified; conflicting decisions have been rendered by the Court of Appeals; or important issues of law have been incorrectly decided.

(4) ***Appendix.***

(A) *Necessity.* If there are documents in the record on appeal that are necessary for determination of the issues raised by the petition or cross-petition, and hyperlinking to the record is unavailable, the petitioner and cross-petitioner must file with the petition or cross-petition an appendix that contains only those documents.

(B) *Form.* An appendix must comply with the requirements of ARCAP 13.1.

(5) ***Rejection of Petition or Cross-Petition.*** The Supreme Court Clerk may return any petition or cross-petition for review presented for filing that does not substantially comply with this rule. The Supreme Court clerk must include with the returned petition written instructions to the petitioner or cross-petitioner to file a proper petition or cross-petition no later than the date specified in the clerk's instructions.

(e) Availability of Briefs. When the Court of Appeals clerk is notified that a petition for review has been filed, the clerk must make available to the Supreme Court clerk the briefs filed in the Court of Appeals.

(f) Responses to the Petition or Cross-Petition.

(1) ***Timing.*** Any party opposing the petition or cross-petition for review may file a response with the Supreme Court no later than 20 days after the date the petition or cross-petition for review was served. ~~However, t~~The Supreme Court will not consider a failure to file a response as an admission that the petition or cross-petition for review should be granted.

(2) ***Contents.*** If a response is filed, it must list, separately and without argument, any additional issues not listed by the petitioner or cross-petitioner that were presented to but not decided by the Court of Appeals and may need to be decided if review is granted. If the record on appeal contains documents that are necessary for a determination of the issues raised by the petition or cross-petition for review, and hyperlinking to the record is unavailable, a party must file with the response an appendix that complies with the requirements set forth in subpart (d)(4). An appendix to a response may contain only those documents not included in the appendix to the petition or cross-petition for review.

(3) ***Reply.*** No reply to a response to either a petition or cross-petition is permitted~~If a response is filed, neither the petitioner nor cross-petitioner may file a reply unless the Supreme Court has ordered otherwise~~.

(g) Service of the Petition, Cross-Petition, and Response. The petitioner or cross-petitioner must serve a copy of the petition, cross-petition, response, and any appendices, on all parties who appeared in the Court of Appeals and on any person who filed a notice of non-participation under Rule 605.

(h) Order Granting Review. If the Supreme Court grants review, it must promptly notify the parties and the Court of Appeals clerk and specify the issue or issues to be reviewed. The Supreme Court may require the parties to file additional briefs, it may order oral argument, or it may do both. If the order granting review does not provide for supplementation of briefs or for oral argument, either party, no later than 15 days after the Supreme Court clerk sends notice of the court's order, may request the court to do so by filing a motion that specifies the reasons.

(i) Availability of the Record. Upon notification by the Supreme Court clerk that a petition or cross-petition for review has been granted, the Court of Appeals clerk must make the remaining record available to the Supreme Court clerk and the Supreme Court's staff attorneys.

(j) Order Denying Review. If the Supreme Court denies review, its order must specify those justices, if any, who voted to grant review. The Supreme Court must notify the Court of Appeals and the parties when all petitions and cross-petitions for review have been decided and must return any original paper copies of the briefs to the Court of Appeals clerk. Unless the Supreme Court permits otherwise, a party may not file a motion for reconsideration of an order denying a petition or cross-petition for review.

(k) Dispositions. If the Supreme Court grants review, it may decide the appeal in any manner specified in ARCAP 28(a). The Supreme Court may also do the following:

(1) after a petition for review has been filed, if the parties to the appeal resolve the issues by agreement, the Supreme Court may vacate the decision of the Court of Appeals or designate a Court of Appeals opinion as a memorandum decision;

(2) when the Supreme Court grants review, it may remand the appeal to the Court of Appeals for reconsideration in light of authority identified in the Supreme Court's order; or

(3) if the issues were raised in, but not decided by, the Court of Appeals and the Supreme Court grants review, the Supreme Court may consider and decide those issues, may remand the appeal to the Court of Appeals to decide those issues, or may otherwise dispose of those issues as it deems appropriate.

Rule 610. Appellate Court Mandate

(a) Generally. The Court of Appeals will issue a mandate in the manner and at the times provided in this section, except as provided in Rule 607(e)(4).

(b) No Petition for Review. If no petition for review is filed, the Court of Appeals clerk must issue the mandate at the expiration of the time for the filing of a petition for review.

(c) Petition for Review Denied. If a petition for review is filed, the Court of Appeals clerk must issue a mandate upon receiving an order of the Supreme Court denying the petition for review.

(d) Petition for Review Granted. If the Supreme Court grants a petition for review, the Supreme Court clerk issues the mandate.

(e) Return of Exhibits and Other Objects. The appellate court clerk must return to the juvenile court with the mandate any exhibits or other objects the juvenile court transmitted as originals. The appellate court may either return to the juvenile court with the mandate or destroy pursuant to rule or the appellate court's administrative orders any papers, exhibits, or other objects that the juvenile court transmitted as certified copies.