JRTF: Rule-by-rule minutes
04.21.2021

The following rule-by-rule minutes are organized by workgroup. Rules then appear sequentially within each workgroup. The date of a discussion is in brackets and precedes the rule number and title. When a rule was discussed at multiple meetings, the earliest discussion appears first.

Here are the workgroup assignments, based on current rule numbers. A bifurcated new rule belongs to the workgroup assigned to the undivided original rule.

WG 1
Rules 1-8 (general provisions)
Rule 45 (assumed from Workgroup 3)
Rules 88-102 (emancipation)
Rules 103-108 (appeals)

WG 2
Rules 9-21 (delinquency generally)
Rules 2-35 (delinquency proceedings)

WG 3
Rules 36-47.3 (dependency generally, including 47.1 + 47.3)
Rules 48-60 (dependency proceedings)

WG 4
Rules 61-63.2 (guardianships)
Rules 64-66 (terminations)
Rules 67-87 (adoptions)

Following the rule-by-rule minutes are several topical discussions, as follows:

[09.27.19] **Welcome by the Chief Justice.**
[9.27.19] **Rules restyling principles**.
[12.13.19] **Presentation on ICWA.**
[08.21.20] **ICWA.**
[04.03.20] **Rule 103 and the ineffective assistance of counsel.**
[04.03.20] **Discussion of the COVID pandemic.**
[07.12.20] **Standardized Juvenile Warrants.**
[10.23.20] **Civil Rule 81.1.**
[02.05.2021] **Combined draft rules**
[03.05.2021] **Review of pre-petition comments**
[04.12.2021] **Further review of pre-petition comments**

Current as of meeting #16 [04.12.2021]

Workgroup 1

[11.08.2019] Rule 1 ("scope and construction"). Judge Kreamer noted that current Rule 1 is lengthy, but it has only a single sentence on "applicability," and instead addresses at length other subjects, including definitions and document formatting. The workgroup concluded that Rule 1 should be introductory, like the corresponding civil, criminal, and family rules, and that topics like "definitions" and "formatting" should be contained in separate, standalone rules. Accordingly, the workgroup limited its proposed Rule 1 to two concise sections, one on "scope" and the other on "construction."

Section (a) on scope would include two additional areas that are omitted from the applicability provision in current Rule 1: in-home intervention and extended foster care.

During its discussion of section (b) on construction, the workgroup contemplated who would construe these rules. The corresponding civil, criminal, and family rules address this question differently. The workgroup concluded that "parties should use" the juvenile rules, and "courts should construe and enforce them, in a manner that is in the child's best interests…." A member did not think the phrase "in the child's best interests" was an appropriate principle of construction for the delinquency rules, and that a reference to protecting "constitutional rights" would be more suitable. Other members thought the "best interests" included "constitutional rights," or that "protects the child's rights and interests…" would be a more appropriate alternative. Another member observed that parents in dependency proceedings and victims in delinquency proceedings have rights that also require protection. One member noted that subsequent, more specific rules, as well as statutes, have provisions for protecting parties' rights, so including a similar provision in Rule 1 would be redundant. (As examples, Rule 21 addresses victims' rights; and the "interpretation" provision of Rule 36(b) refers to interpreting the dependency rules to "protect the child's best interests.") After further discussion, members agreed to remove from Rule 1(b) the phrase that requires construction of the juvenile rules in manner that "is in the child's best interests." Ms. Jorquez requested permission to obtain further input from her DCS colleagues concerning this revision, which the Chair granted; but otherwise, members approved the rule with today's modifications.

[11.08.2019] Rule 2 ("definitions"). Judge Armstrong observed that the current juvenile rules do not include a rule with a comprehensive set of definitions, and draft Rule 2 would fill that gap. He noted that numerous other definitions are included in A.R.S. Title 8, and the list of definitions in Rule 2, although lengthy, is not intended to include all the statutory definitions. Draft Rule 2 is an evolving rule, and Judge Armstrong anticipates other definitions will be added, or existing definitions will be modified, as the Task Force progresses. He asked members to continue to suggest terms

that Rule 2 should define. One member suggested a definition—or possibly a new rule—concerning the Interstate Compact on the Placement of Children. Another member requested a definition of ADJC. Judge Armstrong then noted several defined terms in draft Rule 2.

(1) "Fiduciary" appears only in Rule 104 and the word is undefined in that rule. Judge Armstrong derived a definition of "fiduciary" from the Probate Code because Rule 104 seems to refer to persons appointed under Title 14 statutes. But members believed a definition of "fiduciary" might be unnecessary if Workgroup 1, which is assigned Rule 104, uses an alternative term in that rule, such as "party representative." Members agreed to retain Judge Armstrong's proposed definition of "fiduciary" in Rule 2 pending the workgroup's review of Rule 104.

(2) "Guardian ad litem ('GAL')" has not yet been defined and now appears in draft Rule 2 only as a placeholder. Judge Armstrong suggested that if a definition becomes necessary, it might say that a GAL is "a person appointed by the court to represent a party's best interests." A member observed that the GAL's function is not always to do what is in the party's best interests, but Judge Armstrong noted a court-appointed GAL customarily acts in a party's best interests. Another member noted that a GAL can have many roles and proposed that the definition say, "to represent a party's best interests or as further directed by the court." Judge Armstrong also observed that current Rule 40 ("appointment of guardian ad litem") lacks a comprehensive definition of GAL. He will present a proposed definition of GAL at a future meeting. Members also discussed whether a court-appointed GAL must be an attorney. While smaller counties may appoint a non-attorney GAL as a matter of necessity, those appointments can raise complications and concerns. Judge Young might bring the issue of non-attorney GAL appointments to the Committee on Juvenile Court.

(3) Judge Armstrong added a definition of the Family First Prevention Services Act ("FFPSA"). However, if Arizona adopts its own statutory version of the federal act, the definition may instead refer to the Arizona statutes.

(4) "Juvenile" is patterned after the current definition in Rule 1(b). However, saying that it means a person under the age of 18 (or age 19 in the delinquency context) would omit older youths who are in an extended foster care program and still under the jurisdiction of the juvenile court. Judge Armstrong will work with Mr. Truman to fashion a broader definition.

[12.13.19] Rule 2 ("definitions"). Judge Armstrong noted that Rule 37, discussed above, now has the same title, "definitions," as Rule 2, but members did not think this would be problematic. Judge Armstrong further noted four new definitions that Workgroup 1 added to Rule 2 after the November 8 meeting: "ADJC," "child safety worker," "guardian ad litem ('GAL')," and "out-of-home placement." A second sentence

was added to the definition of "juvenile." The draft comment to the 2022 amendment now includes a citation to Division Two's 2019 opinion in *Holly C. v. Tohono O'Odham Nation.*

In common parlance, a "child safety worker" is a case worker but Rule 2 defines a child safety worker because that term is used in Title 8. Members agreed to remove a reference in this definition to Article 8. The definition of guardian ad litem raised two issues: must a GAL be an attorney, and is a CASA (court-appointed special advocate) a GAL? The Committee on Juvenile Court will discuss these issues at its next meeting. Meanwhile, Judge Armstrong noted that in other rules and statutes, the term "GAL" includes a CASA. (Draft Rule 5 discussed below concerns CASAs.) A corresponding legislative change would be necessary if the Task Force proposes a rule that a GAL must be an attorney. Members also discussed that the court appoints GALs for individuals other than children, such as incompetent adults, and the duties of the GAL might vary based on the status of the protected individual. Ms. Jorquez volunteered to research statutory references to "guardian ad litem." For the time being, the definition of GAL in Rule 2 will say that it "means a person (etc.)" rather than "means an attorney (etc.)"

Members modified the definition of "juvenile" so it no longer refers to the child's age. (The draft definition refers to a person "within the juvenile court's jurisdiction under A.R.S. § 8-202.") The definition of "out-of-home placement" mirrors the definition in A.R.S. § 8-501. During their discussion of the definition of "parent," members proposed various adjectives, including "natural," "biological," "adoptive," or "legal" mother or father. They agreed to "the child's biological, adoptive, or legal mother or father whose rights have not been terminated."

Members will revisit Rule 2 at future meetings as definitions are added or as draft definitions require modification.

[11.20.20] Rule 2 ("definitions"). Judge Armstrong noted that the Task Force had considered Rule 2 at two 2019 Task Force meetings, but it deferred approving the rule pending modifications or additional definitions. Judge Armstrong noted that the revised "comment to 2022 amendment" includes references to several additional Title 8 statutes containing definitions. A member requested Judge Armstrong to also consider adding references in the comment to A.R.S. § 8-456(I). Regarding definitions in the body of Rule 2, Judge Armstrong specifically noted:

- (d), "child safety worker," which has the meaning prescribed by statute and provides context for the term "child safety worker's report" in Rule 3.1(d);
- (k), "guardian ad litem," which means an attorney appointed by the court to protect the best interests of a party "or as otherwise directed by the court," which allows flexibility concerning the nature of the appointment as particular circumstances might require; and

- (r), "parent," which includes a "legal mother or father," for example, someone whose child is born during the course of a marriage although a spouse is not the natural father.

"Indian child" is defined in Rule 37, but because that rule is in Part III, it does not apply to adoption proceedings under Part IV. Members discussed including this definition in Rules 2, 4, or 68; they will revisit this issue offline. Members concurred with the staff note in the draft below the comment concerning Family Law Rule 5.1 ("simultaneous dependency and legal decision-making/parenting time orders") and the desirability of having a corresponding provision in the juvenile rules. Workgroup 1 will draft that rule. Members approved Rule 2 with the caveats noted in this paragraph.

[11.08.2019] Rule 3 ("priority of proceedings; conducting proceedings; applicability of other rules"). Judge Armstrong explained that Rule 3 was a new juvenile rule, but sections (a) ("priority"), (b) ("informality") and (c) ("order of trial") were modeled on provisions found elsewhere in the current juvenile rules. Sections (d) ("applicability of other rules of procedure") and (e) ("applicability of the Arizona Rules of Evidence") were borrowed from other recently restyled rule sets. Judge Armstrong discussed each of these five sections with the members, but proposed section (e) generated the greatest discussion.

In preparing his draft of section (e), Judge Armstrong reviewed the current juvenile rules and located 17 references to evidentiary standards or the Arizona Rules of Evidence. He asked members whether the draft rules should continue to include these 17 references, or whether the draft should instead propose a unified standard. A unified standard might say, "Any non-privileged evidence tending to make a fact at issue more or less probable is admissible under the court determines the evidence lacks reliability or will cause unfair prejudice, confusion, or waste of time." Judge Armstrong also cited to recently restyled Probate Rule 4(a); under that rule, the evidence rules apply in contested proceedings unless the parties agree otherwise, and they do not apply in uncontested proceedings, where all relevant evidence is admissible unless its probative value is outweighed by specified factors. The alternative to the unified standard is a rule that would say that the Evidence Rules apply except as provided in the 17 other Juvenile Rule provisions, which would leave those current provisions intact. Members generally supported the unified standard, which would eliminate the need for multiple references to the Evidence Rules and would be helpful to judges and practitioners. Judge Armstrong proposed locating the unified standard in a new Rule 3.1. However, one member cautioned about the unintended consequence of changing the meaning of those 17 rule references by integrating all of them into a single rule. Another member suggested that there should be higher standards for the admissibility of evidence in a termination proceeding than in a dependency action. Judge Armstrong will consider these comments and present a draft of Rule 3.1 at a future meeting.

The other aspect of draft Rule 3(e) that required discussion was the admissibility of expert reports. Expert reports in juvenile proceedings are generally admissible if they are timely disclosed and the author is available to testify. Judge Armstrong noted that whether the author is available to testify is a confusing and undefined concept. Judge Warner's suggested definition of "available for cross-examination" was based on whether the expert is "subject to the court's subpoena power," unless the person is subpoenaed but is then unable or unwilling to comply with the subpoena. Members would like the workgroup to revisit Judge Warner's draft and recommended an improved version that would be located either in Rule 3 or, possibly, in Rule 45 ("admissibility of evidence").

[12.13.19] Rule 3 ("priority of proceedings; conducting proceedings; applicability of other rules"). Rule 3 was on the meeting agenda only to note that what in the November 8 draft was Rule 3(e) ("applicability of the Arizona Rules of Evidence") has now been deleted. The substance of Rule 3(e) has been relocated to a new Rule 3.1, also titled "applicability of the Arizona Rules of Evidence."

A member also asked about the wording of the priority provision in draft Rule 3(a). The draft now says that juvenile court proceedings have priority "over other proceedings in state court." Members discussed changing this to "superior court," but thought this might inadvertently suggest that a juvenile proceeding has priority over, for example, an order of protection, or that a juvenile traffic case has priority over an appellate court hearing. Members then agreed that juvenile proceedings have priority over other proceedings "except as otherwise provided by law," and modified Rule 3(a) accordingly. On a collateral matter, Judge Armstrong noted that A.R.S. § 8-291.01(B) includes an incorrect cross-reference to Juvenile Rule 3(f). The correct reference is currently Rule 23(D).

Draft Rule 3 was approved as modified.

[12.13.19] Rule 3.1 ("applicability of the Arizona Rules of Evidence"). Judge Armstrong explained that newly drafted Rule 3.1 incorporates all the evidentiary standards in the current rules except one regarding settlement conferences. He noted that the words "contested adjudication proceedings" in Rule 3.1(a) ("contested adjudication proceedings") are synonymous with trial. A member asked whether this term includes pretrial evidentiary hearings. Judge Armstrong believes that the rules of evidence are more relaxed in those hearings, but members might reconsider whether the evidence rules should apply in these ancillary proceedings. In Rule 3.1(b) ("other proceedings"), and to allow for the admissibility of such items as a psychological evaluation, members agreed to change "any non-privileged evidence…is admissible" to "any evidence…is admissible unless the evidence…is subject to a privilege." "Waste time" was changed to "waste of time." Rule 3.1(c) ("admissibility of a child's statement or conduct") is an exception to sections (a) and (b). Members changed the word "any" to

"all" ("in all dependency, termination, and Title 8 guardianship proceedings, etc."), and deleted the extraneous words "for all purposes" in the phrase "admissible for all purposes." One member suggested that the workgroup review each of the 17 references to the admissibility of evidence in the current rules, as noted by Judge Armstrong at a previous meeting, to assure that each reference was adequately addressed by draft Rule 3.1.

Rule 3.1(d) ("admissibility of reports") was the subject of extended discussion. One of the issues concerned an interpretation of current Rule 45 ("admissibility of evidence"), section (c) ("admissibility of reports"), which says that "the court may review reports prepared by the child safety worker and shall admit those reports into evidence…." Because "shall" is a disfavored word in restyled rules, members discussed whether its use in the current rule meant "must" or "may." One member suggested that the admission of an unreliable child safety worker's report will at least assure that it becomes part of the record. Another member responded that it's illogical to say that the court may review a report but must admit it regardless of whether it was reviewed. Members then agreed to "must review" and "may admit" the child safety worker's report. An ensuing discussion addressed how the report would become part of the record on appeal if it was reviewed (i.e., considered) but not admitted. Although practices differ, the consensus was that the report should be admitted and made part of the record if the judge considered the report in the slightest degree. In this circumstance, the judge could make a record about what portions of the report were relied upon. Members further codified this decision by adding to Rule 3.1(d) a new subpart (6) that provides, "If the court considers and affords any weight to a report under this section, the court must admit the report into evidence." Although members generally agreed that requiring automatic admission of an unreliable report might give the report undue credence, one member suggested that the report should always be admitted and that the court could then find on the record that it gave the report no weight. How to make an unadmitted report part of the record on appeal will be deferred to a discussion of the appellate rules.

Another issue in draft Rule 3.1(d) concerned the phrase "if the workers who prepared the report are available for cross-examination." The use of the plural, "workers," was intended to include supervisors who reviewed the report, or anyone at DCS who participated in preparing the report or who had knowledge of its contents. To be more explicit, members changed this phrase to "if the worker or workers who prepared or approved the report are available for cross-examination." Draft Rule 3.1(d)(1)(B) further requires that the report be disclosed to the parties not later than ten days before a hearing. Members thought this period was too short and changed it to fifteen days. Rule 3.1(d)(3) ("report under Rule 61(e)") had another "may/must" couplet concerning the guardianship report. After discussion and consideration of pertinent statutes and rules, members agreed to "must review the investigative report prepared under Rule 61(f) and may admit it into evidence." One member proposed filing these reports to assure they become part of the record, but members declined that proposal

because doing so could make confidential information publicly available. (One county currently files these reports and places them in a "social file," but references to materials in a social file are vague and not specific enough for appellate review.)

Members also discussed what was renumbered as draft Rule 3.1(d)(7) ("available for cross examination"). The language of this provision was suggested by Judge Warner. However, members disagreed on which party has the burden of demonstrating that the witness is "subject to the court's subpoena power." Must the proponent of the witness' report show that the witness is available, or does the adverse party have the burden of showing that the witness is not subject to subpoena, which might necessitate subpoenaing the witness and unintentionally making an unfavorable witness available? Resolving this issue also might require consideration of which party bears the cost of compelling the witness' attendance. A rule that require the witness to be available in the courtroom could be a logistical burden. A telephonic appearance might be insufficient for cross-examination. Members did not reach agreement on the meaning of "available for cross-examination," but instead suggested that members poll judges and request additional input for further Task Force discussion.

[01.24.20] Rule 3.1 ("applicability of the Arizona Rules of Evidence"). Rule 3.1 was initially presented at the December 13 meeting. Today, Judge Armstrong confirmed the members' previous changes to this rule, including their resolution of the "must/may" alternatives. Judge Armstrong also did further research concerning section (b) ("other proceedings") and the appropriate evidentiary standard that judges should use in ancillary proceedings. Arizona case law indicated that formal rules of evidence do not apply in transfer, disposition, and probation hearings. A federal treatise, Wright and Miller, cited a Supreme Court decision for the proposition that the rules of evidence are inapplicable at a suppression hearing. (One Ninth Circuit case took a contrary view.) Arizona Rules of Evidence, Rule 104(a), also supports draft Rule 3.1(b). Judge Armstrong therefore concluded, and members concurred, that the text of draft Rule 3.1(b) is correct, and that the standards in the rules of evidence are relaxed in non-adjudication hearings.

Judge Armstrong then reviewed section (d) ("admissibility of reports"). First, he noted that the addition of draft Rule 3.1(d)(3) ("report ordered under Rule 61(f)") obviates the need for draft Rule 63(e) ("reports") and members agreed. Members then discussed Rule 3.1 subparts (d)(6) ("admission of reports") and (d)(7) ("available for cross-examination"). Mr. Withey had informally suggested a change to subpart (d)(6) that would require the court to admit a report into evidence "before" the court considers it. Although members initially adopted this suggestion, they agreed after further discussion that its effect would be to admit reports automatically, which was not their intent. They consequently used language like the previous draft ("If the court considers ~~and affords any weight to~~ a report under this section, the court must admit the report into evidence.") (Staff Note: Workgroup 1 subsequently met and made further changes to this provision, which it will present at a future Task Force meeting.)

The phrase "available for cross-examination" is used in the current rule, but it is not defined. Subpart (d)(7) attempts to fill this gap by providing that a witness is available for cross-examination if the witness appears in court or is subject to the court's subpoena power. Some members reiterated their previous opposition: that the draft language would require a party who objects to the admission of a report to subpoena the author, which would undermine the purpose of the objection. These members noted that in addition to shifting a foundational burden to the objecting party, it would also shift to the objecting party the cost of procuring the witness' appearance, and that could be expensive if the witness is an expert. Members discussed alternatives. One alternative was to provide separate provisions governing the availability of case managers and experts. Another alternative was to require the actual presence of a case manager, although sometimes the case manager who authored the report is no longer employed by DCS. A drastic alternative would remove the phrase "available for cross-examination" from the content of this rule, but members rejected that option. Still another alternative was to limit "available for cross-examination" to an actual appearance in the courtroom or, possibly, availability by telephone. Members did not reach consensus on any of these options. Judge Kreamer suggested that members who oppose the draft language of subpart (d)(7) prepare a written alternative, and the Chair agreed with that suggestion. Members then approved Rule 3.1, except for subpart (d)(7).

[11.08.2019] Rule 4 ("Indian Child Welfare Act ['ICWA'])." Ms. Mattison reviewed the draft rule, which is based on current Rule 8. Section (a) ("application") is a more concise statement of current section (a). Section (b), "inquiry," is new and requires the court to inquire at the start of "any" dependency, termination, or guardianship proceeding if any party has reason to believe the child is subject to ICWA. The requirement derives from A.R.S. § 8-815, and although some members believe the requirement is burdensome and unrealistic, it is statutorily mandated. (The federal requirement is "knows or has reason to know." The draft rule and the Arizona statute say "believes," which appears to be broader than "knows.") Members might later consider relocating this inquiry requirement to the dependency rules. In draft Rule 4(e) ("jurisdiction"), the workgroup changed "foster placement," which is the term used in federal law, to "out of home placement," which members believe includes foster placement. The workgroup recommends deleting the lengthy comment to the current rule.

Members also discussed concerns about repeated references to ICWA throughout the juvenile rules. One member would prefer to see ICWA provisions confined to a single rule, with a comment to the rule containing links to ICWA and the Arizona Supreme Court's guide on ICWA. Solicitor General Scott Bales' comment in R-00-0004 cautioned against paraphrasing ICWA in the juvenile rules or selectively referring to portions of ICWA's requirements. Although members supported the idea of a comment with pertinent hyperlinks and the reduction of repetitive ICWA references, they agreed to defer consideration of those alternatives until they review the remaining rules.

[12.13.19] Rule 5 ("Court-Appointed Special Advocate ('CASA')." Judge Armstrong's draft of Rule 5 eliminates references to "volunteer special advocate," a term used in current Rule 3; and differentiates CASAs and GALs. The proposed revisions might require legislative changes, and Judge Armstrong's draft noted the pertinent statutes that would require modification. Another member also observed that the changes proposed in this draft rule might require revisions to certain sections of the Arizona Code of Judicial Administration, particularly § 7-101 ("Court Appointed Special Advocate Program"). The members approved the draft of Rule 5 subject to further consideration of the GAL's role.

[01.24.20] Rule 6 ("change of judge"). Provisions for a change of judge are currently in Rule 2. Judge Kreamer noted that draft Rule 6(a) expands on the current rule's definition of "judge" by including a judge pro tem in addition to a commissioner. Section (a) also adds a definition of "presiding judge," which is defined to include the presiding judge's designee. Section (b) is simply titled "for cause," and in parallel, section (c) is titled "without cause." The grounds cited in the current rule for a change for cause ("if a fair and impartial hearing cannot be had by reason of the interest or prejudice of the assigned judge") have been deleted. Draft Rule 6(a) instead refers to A.R.S. § 12-409(B), which includes similar language as well as other grounds. The affidavit required under subpart (b)(2)(A) is no longer limited to an affidavit from the moving party. Subpart (b)(3) allows the presiding judge to decide the challenge summarily and without holding a hearing. The waiver provisions of subpart (b)(5) apply only if the party has participated in a contested hearing, and not simply an uncontested one, before the judge in question.

The workgroup revised subpart (c)(1) to clarify that a party has a right to only one request without cause. Current Rule 2(B)(3) says that a party "loses the right," but the workgroup changed this to "waives the right," which is clearer and consistent with the terminology in draft Rule 6(b). Judge Kreamer also reviewed the provisions of subpart (c)(4) concerning remand by an appellate court. Unlike some other sets of restyled rules, a remand under this draft does not renew the right to a change of judge when the case remains assigned to the original judge. The revised subpart clarifies that the time for filing a request following remand begins to run with a notice that the case has been reassigned to a new judge. Members then approved Rule 6.

[02.28.20] Rule 7 ("form of filed documents"). Ms. McQuality presented Rule 7. Draft Rule 7 is modeled on Civil Rule 5.1 and replaces the format provisions of current Juvenile Rule 1(D). The draft includes a provision on electronic filing, even though there is no e-filing in juvenile court today, in anticipation of its availability in the future. Although the first sentence of section (a) ("the filing of documents with the court is accomplished by filing them with the clerk") is self-evident, it is identical to the respective Civil Rule provision, so members retained it. Section (a) also contemplates the circumstance of filing a document with a judge. In section (b)(1)(C), members removed a requirement that the clerk notify a party of a rejected filing by e-mail to allow the clerk

to provide that notification by other means. The draft rule, like the corresponding Civil Rule, requires 13-point font, and after discussion, members left this requirement unchanged. Ms. McQuality reviewed other sections of the draft rule, and after further discussion, members approved the draft.

[10.23.20] Rule 8 ("service of documents by parties"). Judge Kreamer then presented this newly proposed juvenile rule. He noted that juvenile rules have provisions for service of a case-initiating document, i.e., a petition, but these rules have no comprehensive provisions for service of subsequently filed documents. This new rule, like Civil Rule 5, Family Law Rule 43, and Justice Court Civil Rule 120, fills that void.

Section (a) ("application of this rule") provides that the rule applies "after service of the initial petition, charging document, or other case initiating document that is assigned a new case number." An application for adoption certification, which is assigned a case number, would fall into the third category. Section (b) ("methods of service") requires a party to serve on the other parties or their attorneys "a complete and exact copy of every document" the party files with the court, except for documents that are "confidential," including documents deemed confidential under Juvenile Rule 19 or Supreme Court Rule 123, or documents filed under seal. The draft rule provides that if an attorney represents a party, then service must be on the attorney unless the court orders otherwise. Judge Kreamer then reviewed the specified methods of service. While he was reviewing those methods, it became apparent that the workgroup had not appropriately distinguished which of those methods apply only to service on attorneys, which apply only to service on a party, and which methods might apply to both. The Task Force requested the workgroup to clarify these distinctions in its draft. Pending that, in section (c) ("noting the method of service"), members agreed to add "e-mail" to the service alternatives in the certificate of service. Civil Rule 5(c)(4) and Family Law Rule 43(c) include more stringent requirements for serving post-judgment motions. Members discussed but declined to include a similar requirement for post-final order motions in juvenile proceedings. Workgroup 1 will address the issue noted above and present its revisions at a future Task Force meeting.

[12.18.20] Rule 8 ("service of documents by parties"). Judge Kreamer reminded members that when they considered this rule at the October Task Force meeting, the section on methods of service did not adequately distinguish between service on an attorney and service on a self-represented party. The workgroup thereafter revised the draft rule, this time using Family Law Rule 43 ("service of other documents after service of the summons, petition, and order to appear") as a model. Revised section (b) ("methods of service"), subpart (b)(1), generally provides that if an attorney represents a party, the attorney must be served. Subpart (b)(2) then details the methods of service. Subpart (b)(2)(E) distinguishes leaving a document for a person if the person is represented by an attorney from situations when the person who is served is not represented. Section (c) ("noting the method of service") contains a template statement of service that now includes e-mailing (i.e., "mailed/e-mailed/hand-delivered.") A

member asked about a provision in subpart (b)(2), which provides that when a document is served by mail, "service is complete upon mailing." Judge Kreamer responded that under the text of section (a) ("application of this rule"), Rule 8 applies only after service of a case initiating document, and that service of a case-initiating document requires a higher standard for service. The provision that "service is complete upon mailing" for post-case initiating documents is also in Civil Rule 5.1(c)(2), Criminal Rule 1.7(c)(2), and Family Law Rule 43(b)(2). Members had no other questions.

[11.20.20] Rule 9 ("intervention"). Judge Kreamer presented this new rule on intervention, which was proposed by Judge Randy Warner and assigned to Workgroup 1 for review. At the present time, juvenile court judges are using Civil Rule 24 ("intervention") for guidance, but Civil Rule 24 is primarily designed for the protection of property interests and is not entirely suitable for protecting the best interests of a minor. Juvenile court judges have also relied on the 1986 Supreme Court opinion of *Bechtel v Rose*, 150 Ariz. 68, in which grandparents sought to intervene under Rule 24 in a dependency case involving their parentless grandchildren. However, some now believe that the factors cited in that case are unsuitable or incomplete. The workgroup, while mindful of the *Bechtel* factors, made significant changes to the organization and content of Judge Warner's initial draft, which had incorporated several of those factors.

Section (a) ("generally") of the workgroup's draft introduces the two pathways for intervention, one "of right" and the other "permissive." Section (b) ("factors") requires the court to determine "whether intervention would be in the child's best interests." In making that determination, section (b) requires the court to determine 8 factors, some but not all of which derive from *Bechtel*. Section (b) factors that do not derive from *Bechtel* include:

(2) whether the person is a child's relative as defined in A.R.S. § 8-501, or is another member of the child's extended family or a person who has a significant relationship with a child under A.R.S. § 8-514(B);

(3) whether the person has requested DCS to be placement for the child, and if so, the status of the request; and

(4) whether the person seeks to file a motion for change of physical custody to that person.

Factor (3) as originally proposed by the workgroup included the phrase "and if so, whether the person filed an administrative grievance with DCS regarding the denial." Members disfavored that language, first, because it unduly emphasized that DCS had denied the placement request, and second, because the grievance process could take months, and denial of a motion to intervene pending resolution of a prolonged administrative process might not be appropriate. However, members also agreed that the court should be aware of the pending process. After discussion, members agreed to the modified language shown above.

Draft section (c) ("scope of intervention") permits the court to grant intervention for a limited purpose and allows it to limit the scope and duration of intervention. Section (d) ("procedure") requires a party who files a motion to intervene to include specific facts supporting the motion, and to serve the motion on all parties. If intervention is for the purpose of filing a motion for a change of physical custody, the intervenor must file and serve that motion no later than 10 days after entry of an order granting the motion to intervene.

Although draft section (a) permits intervention under Parts III and IV of the Juvenile Rules, a member asked whether it should also allow intervention under Part V, emancipation. Although members contemplated that individuals would rarely if ever request to intervene in an emancipation action, they nonetheless added a reference to Part V. Members approved Rule 9 with that addition and expressed their appreciation to Judge Warner for proposing this rule.

[12.18.20] Rule 10 ("simultaneous dependency and family law proceedings"). Judge Armstrong presented this new juvenile rule, which is an analog to Family Law Rule 5.1. FLR 5.1 is a statewide rule that applies in both dependency and family law proceedings that involve the same child. Although draft Rule 10 corresponds with FLR 5.1, Judge Armstrong noted these differences. First, FLR 5.1(a) ("transfer to juvenile division") refers to legal decision-making and parenting time, whereas Rule 10(a) uses the term "custodial issues." Judge Armstrong noted that the latter term was more appropriate in juvenile dependency cases because these proceedings determine the custodial setting and who should have custody of the child. However, the use of different terminology should not be a concern because there is no substantive difference. He also noted that the UCCJEA uses the term "custody," and before recent revisions to the FLR, "custody" was also used in those rules. Second, FLR 5.1(b) ("referral to family division") allows the juvenile division to refer legal decision-making or parenting time issues to the family division. Draft Juvenile Rule 10 has a similar provision, but it also allows the juvenile division to "decide those issues." Members had no questions for Judge Armstrong.

[12.18.20] Rule 11 ("computation of time"). Judge Kreamer noted that this new draft rule is part of the effort to reduce the number of juvenile rules. Draft Rules 17, 43, and 72 all involve computation of time. Rule 43, which is in Part III, and Rule 72, which is in Part IV, both include cross-references to Civil Rule 6. Rule 17, a delinquency rule, has unique provisions, such as the exclusion of time, which cannot be collapsed into a single, unified rule. According, proposed Rule 11(a) refers readers to Rule 17 for computing time in a delinquency case, and Rule 11(b) refers them to Civil Rule 6 for computing time in all other juvenile matters. This reformulation will eliminate the need for Rules 43 and 72. The resulting Rule 11 would become a Part I rule. Members had no questions.

[12.18.20] Rule 12 ("virtual proceedings; declared emergencies"). The detailed provisions of Rule 42, which members previously approved, are limited to Part III proceedings. Judge Kreamer explained that new draft Rule 12 would replace draft Rules 42 and 71 and would become a single rule for virtual proceedings and declared emergencies in any juvenile case. Most of the substance of draft Rule 12, including its title, was taken from draft Rule 42. However, new section (a) distinguishes delinquency and non-delinquency matters. Subpart (a)(1) provides that "this rule and Rules 12 and 13 govern virtual appearances in delinquency matters." [Staff note: Current draft Rules 12 ("the juvenile's attendance at court proceedings" and 13 ("attendance of witnesses and counsel by telephone or video conference") would be renumbered as Rules 27 and 28 in staff's proposed Table of Contents.] Subpart (a)(2) permits the court to allow "virtual testimony, argument, or appearances" in any non-delinquency proceeding on a party's motion or the court's own motion. A new subpart (a)(3) recognizes and requires the court in any juvenile matter to consider due process principles before granting a request for a virtual proceeding. Sections (b) ("meaning of 'virtual'") and (c) ("non-evidentiary hearing") are substantially the same as the provisions in draft Rule 42. While section (d) ("request to testify virtually; evidentiary hearing") requires a written motion as a requisite for allowing virtual testimony, the section has new provisions in subpart (d)(2) ("time") to accommodate the shorter time frames for setting delinquency hearings and the relatively longer time frames for setting hearings in non-delinquency matters. A new subpart (d)(2)(C) provides that in all matters, the court may rule or the motion with or without a hearing. Section (e) ("introducing documents during virtual testimony") is largely unchanged.

Section (f) governs "evidentiary hearings during declared emergencies." Subpart (f)(1)(B) has been modified to provide a shorter time for filing a response in a delinquency case; in non-delinquency matters, responses must be filed as provided by Rules 46 or 74, the general rules on Part III and Part IV motions. Subpart (f)(2) (now, "case specific determinations in evidentiary hearings") was modified to broaden the scope of the court's inquiry if a party objects to a virtual proceeding. The subpart now requires the court to make "a case-specific determination that the objecting party's constitutional rights, including the rights to due process, will be satisfied by the evidentiary hearing." The workgroup's intent was that this new language would require the court to consider constitutional rights—in addition to general principles of due process—that might be applicable in a specific case, such as a delinquent's right to confront witnesses. As modified, Rule 12 would become a Part I rule. Members had no questions.

[12.18.20] Rule 14 ("combining hearings"). Judge Kreamer explained that draft Rule 14 permits the court to combine delinquency hearings, which he acknowledged the court could probably do now without a rule, but Rule 14 codifies this practice. That draft provision has been renumbered as Rule 14(a). Proposed Rule 14(b), which is new, would allow the court to aggregate hearings for cross-over youth by setting a youth's dependency and delinquency hearings on the same date and at the same time, but not by

consolidating the cases. This practice would permit families to appear for both hearings at the same date and time, which would be more convenient for them. A newly proposed Rule 14(c) would allow the court to combine Part III hearings, as long as the court provided the parties with notice of this intent, and that it complied with applicable time limits and preserved the parties' due process rights. Doing so would allow the court to accomplish as much as possible at a single Part III court hearing. Rule 14 would be relocated as a Part I rule. Members had no questions.

[07.17.20] Rule 30 ("disposition") section (c) ("amended final order"). Although Rule 30 is assigned to Workgroup 2, Workgroup 1 proposed adding a new section (c) to the rule that would permit a party in a delinquency proceeding, within 10 days after entry of a final order, to move the court to amend its order to correct errors or to make additional findings. This addition is an analog of Rule 46.1, but the grounds in section (c) are much narrower. After Ms. Beckmann presented the rule, members of Workgroup 2 expressed their concerns that this new provision would require the juvenile to be personally present for a court hearing on these post-disposition motions, which could include motions to amend a restitution order, make an additional finding, or enter a modified term of probation. They thought this might be burdensome for the juvenile and generally unwieldy. Moreover, the court's findings at a delinquency disposition hearing are more limited than in a Part III proceeding, so there is less need for amending them. Members agreed that the proposed new section would not work well in the delinquency context, and it was removed from draft Rule 30.

[07.17.20] Rule 46.1 ("altering or amending a final order"). The workgroup drafted this rule to provide a mechanism for bringing potentially appealable issues to the attention of the trial court within the limited time allowed for filing a notice of appeal. A motion under Rule 46.1 would serve as a time-extending motion under draft Rule 104. The need for such a procedural rule was highlighted by Division One's June 23, 3020 opinion in *Francine C.*, particularly paragraphs 22 and 23. ("There is no explicit juvenile rule authorizing a motion for reconsideration or clarification of a dependency or termination order.") Draft Rule 46.1 hits a "sweet spot" by mitigating delays in the appellate process that often result from the filing of a post-judgment motion, and by allowing parties to promptly raise issues that are amenable to correction by the trial court, which could make an appeal unnecessary.

Ms. Beckmann then reviewed the text of the draft rule. Section (a) ("generally"), subpart 1 ("meaning of final order") provides that "final order" has the same meaning as set out in Rule 103(b). Subpart (2) is titled "grounds for altering or amending a final order." The grounds identified in subpart (2) are partly but not wholly derived from Family Law Rule ("FLR") 83 ("altering or amending a judgment.") For example, the ground that the court did not enter sufficient findings of fact or conclusions of law was derived from a Civil Rule. The ground concerning an irregularity in the proceedings synthesizes two grounds in FLR 83. Grounds contained in other rule sets that are akin to a motion for reconsideration, or that concern errors in the admission of evidence, or

overlooked evidence, were excluded in draft Rule 46.1 to discourage repetitive proceedings and because they would invite delay. However, draft Rule 46.1 includes the grounds of newly discovered evidence and a clerical mistake. The draft provides that the trial court as well as a party can move to alter or amend a final order. A member asked whether the court can make a sua sponte motion under this rule after a party has filed a notice of appeal. The ensuing discussion indicated that this scenario, or any sua sponte motion under the draft rule, might cause confusion about when a party must file a notice of appeal. Ms. Beckmann then reviewed the remaining procedural sections of the draft rule, which generated additional discussion.

- Is relief available under Rule 46.1 for any order, or only a final order? Ms. Beckmann's response is that Rule 46.1 was designed to apply only to final orders.

- Can a party file motions under both Rule 46 and Rule 46.1? Rule 46 has time limits grounded in Civil Rule 60, whereas Rule 46.1 has a much shorter 10-day limitation. However, nothing in the draft precludes a party from filing motions under both rules. Members discussed the possibility of merging all or portions or these two rules but doing so might be complicated because Rule 46.1 applies only to final orders, whereas Rule 46 applies to any order. Rule 46 would also permit a motion, for example, based on newly discovered evidence under Civil Rule 60, which allows a longer time for filing the motion, whereas a party must file a motion based on newly discovered evidence under Rule 46.1 within 10 days after entry of the order. However, this duality parallels the Civil Rules, which allow motions for newly discovered evidence under the short time required by Civil Rule 59 or within the longer period allowed under Civil Rule 60. Ms. Beckmann raised the possibility of expressly characterizing motions under Rule 46 that are filed within 10 days after entry of an order as time-extending motions, which might obviate the need for a separate Rule 46.1. Members made no decision on merging Rules 46 and 46.1, but the workgroup should further consider this option.

- A.R.S. § 8-123 permits a party a full year to cure irregularities in an adoption proceeding, and that time greatly exceeds the time allowed under draft Rule 46.1. Ms. Beckmann noted that draft Rule 46.1 is a Part III rule, so it would not apply to adoptions, which are governed by Part IV of the Juvenile Rules.

- Are certain grounds in subpart (a)(2), such as newly discovered evidence, in effect providing grounds for a motion for new trial, a motion that is not allowed under the current rules? Perhaps, but the likelihood of new evidence being discovered within 10 days after entry of the final order is remote, and in circumstances when it does happen, Rule 46.1 would offer a prompt method for obtaining relief. Because a Rule 46.1 motion would be a time-extending

motion, the workgroup should consider what are the most appropriate reasons for extending the time for filing a notice of appeal.

- Will some grounds, including newly discovered evidence, require an evidentiary hearing, which would unduly delay an appeal? Again, that is possible, but the requirement of raising the issue within 10 days after entry of the final order should minimize delay.

- Accident or surprise should not be available grounds for relief under Rule 46.1 because those grounds are vague and ambiguous. Members agreed with this observation and removed those grounds from the draft.

Workgroup 1 will revisit Rule 46.1 and consider today's comments and discussion. If the workgroup continues to recommend that the proposed rules include a separate Rule 46.1, it will work to assure that the rule's provisions harmonize with the provisions of Rule 46, which Workgroup 3 will present later today.

[09.25.20] Rule 46.1 ("altering or amending a final order"). During her presentation of this rule at the July 21 meeting, Ms. Beckmann noted that the workgroup had been guided in its drafting of this new rule by analogous provisions in the Family and Civil Rules. Based on members' comments on the first draft at the previous meeting, the workgroup pared the grounds for a Rule 46.1 motion. There are only two grounds for this motion in the current draft: correcting a clerical error or amending insufficient findings of fact or conclusions of law. The draft specifies that the time for filing the motion is limited to 12 days after entry of the final order. The workgroup chose this time because it had to be less than the 15-day limit for filing a notice of appeal, and 10 days would require the time calculation to exclude intermediate weekends and holidays, which then might exceed 15 days. She noted that a Rule 46.1 motion would be a time-extending motion under Rule 104, which she will discuss later today.

Ms. Beckmann then reviewed the procedure for the motion, which is detailed in section (b) ("time to file a motion; response"). Because the current draft limits the grounds for the motion, the workgroup modified section (c) ("court action") by removing provisions that would have allowed the court to take additional testimony or to require further proceedings. The workgroup also deleted a sentence that said that a new order need not be a final order, because the purpose of Rule 46.1 is to allow the court to promptly correct an error without lengthening the trial court proceeding and without delaying the appeal. Under modified section (c), the court's options are either denying the motion or vacating the previous order and entering a new or amended final order. Section (d) ("successive motions") prohibits a party from filing a motion to alter or amend an order granting or denying a party's Rule 46.1 motion. The intent is to avoid successive motions that would further delay the proceeding. Ms. Beckmann noted that this provision applies to a party's motion but not to a motion on the court's initiative.

For clarity, should the rule refer to "calendar days?" Ms. Beckmann agreed that it would be useful if the reference to 12 days was "calendar" days, while the reference to the 10-day period for filing a response should be "court" or "business" days. The Editorial Group will address this. How long will a Rule 46.1 motion delay the appeal? A member calculated that it might be as long as a couple months (12 days to file the motion + 10 or 15 days to respond + time for the court to enter an order granting or denying the motion + 15 more days in which to file a notice of appeal from that order.) The member suggested that Rule 103, which permits the trial court to rule on issues "in furtherance of the appeal," could adequately supplant Rule 46.1. Ms. Beckmann disagreed because the trial court might be reluctant to enter orders otherwise allowed under Rule 46.1 without the specific authority provided by this new rule. A judge member agreed with that point, noting that Rule 46.1 provides a clear process for correcting a final order, which becomes necessary in a significant number of cases, and the rule expresses the trial court's authority to do so. Rule 46.1 was accordingly approved.

[08.21.20] Rules 88-102 ("the emancipation rules"). Mr. Volkmer presented the emancipation rules, which comprise Part V of the current Juvenile Rules. Unlike most other juvenile proceedings, which are governed by Title 8 statutes, emancipation is governed by Title 12. Mr. Volkmer noted that some of the current rules are as short as a single sentence. Although the substance of the 15 current rules is generally correct, he described these rules as unnecessarily segmented and choppy. Mr. Volkmer and the workgroup therefore consolidated and reorganized these 15 rules, and as a result there are 5 proposed rules (Rules 88-92). The reorganization improves the flow of the rules. Mr. Volkmer added that two provisions in the current rules were omitted in the reorganization: Rule 90(A), a single sentence rule concerning venue, because it's also covered in current Rule 94(A), now Rule 89(a); and Rule 91(A) that says "the parties may participate in the court proceedings on the parties [sic] own behalf or be represented by counsel chosen independently by the individual party," because this is so basic it doesn't require a rule.

Mr. Volkmer noted that draft Rule 88 ("emancipation generally"), section (c), gives the court discretion to report an allegation of abuse or neglect to DCS. The corresponding provision in current Rule 96 uses the word "shall" but members supported using the word "may" in the draft provision. Section (d) gives the court discretion to appoint a guardian ad litem for the petitioner. A member proposed changing this to "attorney or guardian ad litem." A judge member, after first noting there were fewer than two dozen emancipation petitions in Maricopa County last year, opposed this because, unlike a dependency that requires the court to appoint counsel for children, a juvenile seeking emancipation asks to be treated as an adult, and petitioners validate the request for emancipation by appearing on their own behalf. Another judge member noted that although the statute permits appointment of a GAL, there is no statutory provision authorizing, or providing payment for, an attorney in an

emancipation. On a straw vote, only one member supported adding the words "attorney or…." Mr. Volkmer noted that the draft of section (d) omitted a current sentence that says, "The guardian ad litem may be an attorney, volunteer special advocate, or other qualified person." Members then requested clarification that a GAL appointed under section (d) must be an attorney, but the definition of guardian ad litem in draft Rule 2 already does that. Members also discussed whether to retain draft Rule 88(f) ("fee reduction or waiver"). On the one hand, if the petitioner cannot afford the filing fee, the petitioner might not be financially self-sufficient, and emancipation would be inappropriate. On the other hand, a fee reduction or waiver provision is included in A.R.S. § 12-2451(F); and there might be special situations warranting a fee waiver or reduction. Accordingly, members retained this provision.

Finally, members discussed draft Rule 91 ("proceedings after service of the petition"), section (e), subpart 2 ("parent or guardian"). Members clarified the provision, which requires a parent who filed an objection to a petition to attend the hearing; otherwise, the parent's attendance is optional.

Members approved the draft emancipation rules with these modifications. Judge Kreamer observed that the approved rules provide readers with improved, common sense guidance on emancipation proceedings, and he commended Mr. Volkmer for his work on these rules.

[02.28.20] Rule 103 (now, "general provisions regarding appeals," and as proposed, "right to appeal"). Ms. Beckmann presented only sections (a) ("who may appeal") and (b) ("final orders") of the current rule, which would become a new freestanding Rule 103 with the title "right to appeal." The remaining sections (C) through (G) of current Rule 103 would become a new Rule 103.1 titled "general provisions." In addition to her oral presentation, the meeting materials included Ms. Beckmann's February 20, 2020 memo, which contained numerous citations to statutes and case law concerning appealable orders. In summary, unlike other statutes and procedural rules for civil and criminal appeals, neither A.R.S. § 8-235 nor current Rule 103 specifies the types of orders from which a party may appeal. Instead, a body of case law has developed that identifies who is an "aggrieved party" and which orders are final and appealable. Ms. Beckmann explained that the workgroup's draft attempts to incorporate this body of law into the provisions of new Rule 103.

Section (a) ("who may appeal") limits appeals to aggrieved parties and defines that term based on case law. Section (b) ("final orders") contains three requisites for an appealable order: it must be in writing, signed by a judge, and filed with the clerk. Section (b) also provides that a final order "includes the following," which is followed by two subparts, one pertaining to delinquency and incorrigibility proceedings, and the other to all other juvenile proceedings. A disposition order is included in the list of appealable delinquency orders, and another provision in the first subpart addresses the appealability of a restitution order that is entered after the date of the disposition order. The

workgroup's initial draft required that the appellate court "must" consolidate appeals from these separate orders, but after discussion, members modified this provision to say that the appeals "if practicable…should be consolidated." Members discussed but declined to put a time limit on the entry of a restitution order.

Ms. Beckmann then turned to subpart (2), which concerns appealable orders in other juvenile proceedings. Subpart (2)(A) instructed that an order granting a dependency petition and declaring a child dependent was an appealable order. Members thereafter added to this provision a portion of another subpart that allowed an appeal from an order denying or dismissing a dependency petition. Subpart 2(B) provided that a disposition order entered after a dependency adjudication was appealable. Subpart 2(C), which provided in part that an order was appealable if the court reaffirmed a prior finding that a child was dependent, prompted some discussion about whether every order changing placement should be appealable. This could be problematic because some placements are only temporary. The workgroup will study this issue further. A judge member expressed concern with a provision allowing the appealability of orders entered after periodic dependency reviews because it might lead to repetitive appeals, but Ms. Beckmann noted that the Court of Appeals now treats those order as appealable. One member proposed that such an order be appealable only when it changes the status quo, but Ms. Beckmann again responded that appellate courts treat the judicial finding of continuing dependency as appealable. Another member was concerned with increasing volumes of dependency appeals and suggested distinguishing orders that are appealable of right from those that are amenable to discretionary special action review, but that suggestion had no support. As a practical matter, will a party appeal from an order that maintains the status quo? The Chair asked that the Task Force's rule petition include a discussion of this issue for the Court's consideration.

Ms. Beckmann reviewed other provisions of draft Rule 103. She specifically noted subpart (2)(F), which permits appeals from "an order entered in a dependency proceeding removing a child who has been adjudicated dependent from the parent's physical custody." (*See Jessicah C. vs DCS.*) Members removed from the foregoing subpart the phrase "that affects a party's substantial rights" because that is subsumed under the description of an aggrieved party in section (a). The final subpart, (2)(M), allows an appeal from "any other order determined to be final under Arizona case law," which, along with the words "includes the following" at the beginning of section (b) would permit appeals from other, less common final orders. A member proposed adding to subpart (b)(2) appeals from orders entered under Rule 59 ("return of the child"), although Ms. Beckmann noted case law instructing that those orders are not appealable. This led to 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.

Rule 103 was returned to the workgroup for further consideration.

[04.03.20] Rule 103 (new: "right to appeal"). As noted at page 7 of the February 28 Task Force meeting minutes, new Rule 103 encapsulates only sections (A) and (B) of current Rule 103. The remaining sections (C) through (G) would become Rule 103.1 and be titled "general provisions." Ms. Beckmann noted that Workgroup 1 recently modified new Rule 103 following comments and suggestions at the February 28 Task Force meeting. Section (a) ("who may appeal") was substantially unchanged. Section (b) ("final orders") had several revisions. In subpart (1), which concerns delinquencies, the workgroup revised the provisions concerning appeals from restitution orders, and those provisions are now consistent with criminal rules concerning the appealability of restitution orders. Subpart (2), which concerns appeals from other juvenile proceedings, was more controversial.

Ms. Beckmann noted the workgroup deleted a provision in the previous draft of subpart (2), which provided that a finding of continuing dependency was a separately appealable order. They removed this provision to discourage multiple successive appeals. Some members thought this provision should be added back because case law recognized the right; but other members observed that the right under case law was dicta and not dispositive, and that the right is not statutory. As a practical matter, the issue in those contexts typically does not involve the dependency finding, but more commonly it involves such things as whether services have been provided and whether the case is proceeding expeditiously. Moreover, other provisions of subpart (2) could still provide a basis for these appeals. The introductory language of subpart (2) says, "final orders include," suggesting that the list of final orders is not all-inclusive. Moreover, subpart (2)(L) allows an appeal from "any other order that is final pursuant to Arizona case law." Accordingly, members agreed to the removal of the previous provision. However, the Chair requested that the Task Force petition note this omission for the Court and explain why the provision was omitted, so the Court could then consider and decide the matter. Ms. Beckmann also noted the final order mentioned in subpart 2(E) ("an order entered in a dependency removing a child who has been adjudicated dependent from a parent's physical custody"). This would address the situation in *Jessicah G.,* but it would not apply to a child's initial removal from the home because at that time, the child would not have been adjudicated dependent.

Members then approved new Rule 103.

[09.25.2020] Rule 103 ("right to appeal"). In section (b) ("final orders"), Ms. Beckmann noted the addition of a new subpart (K) and a revised subpart (L). Subpart K was prompted by the addition of Rule 46.1 and makes appealable an order altering or amending a final order under Rule 46.1, or an order denying the motion. Subpart (L) makes appealable an order granting or denying a motion to set aside a final order under Rule 46.2 (which is a Workgroup 3 pending rule) or Rule 74(f), which applies in adoption proceedings. Members approved these modifications.

[06.12.20] Rule 103.1 (general provisions"). A portion of the substance of current Rule 103, sections (a) and (b), became new Rule 103 ("right to appeal"). New Rule 103 addresses who may appeal and orders that can be appealed, and members approved new Rule 103 at the April 3 meeting. New Rule 103.1 includes the remaining provisions of current Rule 103 and concerns subjects such as the form of the caption, suspension of the appeal, appointment of counsel, and applicability of the ARCAP.

Workgroup 1 concluded that provisions concerning the caption of a juvenile appeal in current Rule 103(a) don't work well in practice. The workgroup replaced those provisions with a more concise and easier to understand Rule 103.1(a) ("caption on the notice of appeal") that focus on the abbreviated name of the child who is the subject of the appeal. Rule 103.1(b) concerns the suspension of a trial court order pending the appeal. Although workgroup members agreed that the juvenile court is in the best position to determine whether its order should be stayed, A.R.S. § 8-235(B) authorizes only the appellate court to do so. Although the draft rule therefore conforms to the statute, the workgroup suggests a statutory amendment that would allow a juvenile court to stay its orders. Sections (c) ("priority of juvenile appeals") and (f) ("bond") are uncontroversial.

Section (d) ("suspension of rules") permits the appellate court to suspend a rule, except the rule regarding the time for filing a notice of appeal. Section (e) ("appointment of counsel") permits the juvenile or appellate court to appoint an attorney for a party to an appeal; the workgroup believes its draft is consistent with the process used in Pima County for making appointments from a list maintained by the Office of Court Appointed Counsel. Section (g) ("continuing juvenile court jurisdiction") permits the trial court to "proceed within its legal authority on a remaining or new issue," but it omits a provision in current Rule 103(G) that allows the trial court to grant the appellant's motion to dismiss the appeal; this was omitted because the workgroup believes that dismissal is customarily the appellate court's prerogative. A provision that Rule 103.1(g) does not authorize the juvenile court to extend the time for filing briefs, motions, and other documents in the appellate court appears at the end of draft section (g).

Section (h) ("Arizona Rules of Civil Appellate Procedure") incorporates by reference 17 specified ARCAP rules and sections of rules. The introductory words in the corresponding provision of current Rule 103(G)—that adopts the referenced ARCAP rules "to the extent that they are not inconsistent with or expressly varied by these rules"—was deleted because it causes confusion and undermines certainty. A reference in section (h) to the applicability of ARCAP 4 includes an exception for the case caption, which is governed by draft Juvenile Rule 103.1(a) discussed above. Another reference to computing deadlines notes an exception that allows the juvenile court to excuse the untimely filing of a notice of appeal, which is explained below. Members discussed whether to incorporate ARCAP 22, which concerns motions to reconsider. Members believed that in many cases, these motions simply delay the issuance of the mandate; if

there truly are errors, a party can file a petition for review. Moreover, a motion to publish, which is often filed as a Rule 22 motion, could still be filed outside the scope of Rule 22. On the other hand, the appellate court can summarily deny a motion to reconsider, which minimizes the extent of delay. Members deferred to a later time a determination about including a reference to Rule 22. With reference to ARCAP 24, which pertains to the issuance of mandates, a caveat in draft Juvenile Rule 103.1(h) allows the appellate court to immediately issue its mandate upon counsel filing an affidavit of no colorable claim under a provision currently located in Rule 106(G).

Members approved Rule 103.1 except for the issue noted above regarding the inclusion of a reference to ARCAP 22.

[06.12.20] Rule 104 ("notice of appeal"). In addition to having a convoluted title ("Time Within Which an Appeal May be Taken and Notice Thereof; Preparation of Certified Transcript and Record on Appeal"), current Rule 104 is lengthy and touches on multiple subjects. The workgroup's draft focuses Rule 104 on only the notice of appeal and separates other subjects in the current rule into new, freestanding Rules 104.1 and 104.2.

Ms. Beckmann observed that subparts (1) and (2) of draft Rule 104(a) ("time for filing a notice of appeal and notice of cross-appeal") are clearer and more concise than the current provisions, and these subparts generated no questions or comments. She then explained a newly proposed subpart (3) ("effect of certain post-judgment motions on notice of appeal; amended notice of appeal"). Currently, after a notice of appeal is filed, a trial court cannot consider either a Rule 46(e) motion to set aside the judgment, or—under a rule to be drafted that will use as a starting point Juvenile Rules 52(b) and 59(d) and Family Law Rule 83—a motion to alter or amend the judgment. However, if the juvenile court could consider either of these motions, it might make the appeal moot, or limit the issues on appeal, and therefore serve judicial economy. New subpart (3) would accordingly extend the time for filing a notice of appeal or cross-appeal until the trial court has entered a final order disposing of these motions, and then allow a party to file a notice of appeal after the court enters that order. If a party had previously filed a notice of appeal, the party would notify the appellate court of the pendency of the motion, and the appellate court would suspend the appeal until it is notified of the disposition of the motion. If the juvenile court denies the motion, the draft provides that the appealing party could file an amended notice of appeal.

Subpart (a)(4) clarifies that other than as provided in (a)(3), a post-judgment motion does not extend the time for appeal. Subpart (a)(5) ("delayed appeal or cross-appeal") is the analog for current Rule 108(b), which was curiously located at the end of the appellate rules. The current provision has now been relocated in draft Rule 104 with the other provisions concerning notices of appeal. The draft rule on delayed appeals contains a different standard than the current rule, "good cause" rather than "excusable

neglect," because the latter focuses on counsel's inaction and excludes reasons that might involve client-based good cause or show another legitimate basis for allowing a delayed appeal. The draft rule, unlike the current rule, includes a provision that requires the moving party to file a notice of appeal once the court grants a motion to file a delayed appeal, a step that is occasionally overlooked. At a member's suggestion, the word "juvenile" was added to this subpart to clarify that the motion to file a delayed appeal is heard by the juvenile court, not by the appellate court.

Section (b) addresses the content of the notice of appeal. Forms for the notice of appeal currently used in Pima County allow the appealing party, who is usually represented by trial counsel rather than appellate counsel, to check a series of boxes for designating the record on appeal, but often trial counsel, out of an abundance of caution, will check every box, which is unnecessary and expensive. Ms. Beckmann will look later at revisions to these forms. Subpart (b)(4) requires a notice of appeal to include an attorney's certification confirming that counsel discussed the merits of the appeal with the client and obtained the client's authorization to file the notice. The subpart includes an elaborate process to assure the notice contains this certification. It does not allow the juvenile court to immediately strike the notice, because if the omission is later corrected and a notice is refiled, it could be untimely. But if the notice ultimately lacks the certification, the rule allows the juvenile court to direct the clerk not to process the appeal, or the appellate court to dismiss the appeal. The intent of these provisions, which are also in the current rule, is to make the filing of a notice of appeal thoughtful and deliberative, and to reduce the number of appeals that clients have no genuine interest in pursuing.

Section (c) ("distribution of the notice") is restyled and straightforward, and members had no questions or comments on this section. Members then approved Rule 104 as presented.

[09.25.20] Rule 104 [new] ("time for filing a notice of appeal and notice of cross-appeal") and Rule 104X ("content and distribution of the notice of appeal"). The Task Force previously considered Rule 104, which was titled "notice of appeal." The previous 104 addressed several subjects in a single, lengthy rule. Rule 104 has now been bifurcated as shown in the above titles.

The workgroup's most notable changes in new Rule 104 are in section (c) ("effect of certain post-judgment motions on the time for filing a notice of appeal"), which is modeled on ARCAP 9(e) and concerns time-extending motions. The specific time-extending motions identified in section (c) are timely-filed motions under Rules 46.1, 46.2, and 74(f). Section (c) has 3 subparts, each addressing a different scenario. Subpart (1), as indicated by its title, applies when there has been "no previous notice of appeal." Subpart (2), titled "previous notice of appeal," applies when a notice of appeal was filed prior to the filing of the motion or while the motion was pending. The procedure

specified in this subpart allows the appellate court to "suspend" the appeal (this is the term used in the ARCAP, although some still use the term "stay" the appeal) until the trial court has disposed of the motion. Finally, subpart (3) applies when a final order has been altered or amended on the court's own initiative. If a party has previously filed a notice of appeal, subpart (3) provides that the party is not required to file a new or amended notice to appeal from subsequent sua sponte order. Two members expressed continuing objections to the provisions on time-extending motions because they believed those provisions would delay the finality of permanency determinations in dependency proceedings.

Rule 104(d) ("other post-judgment motions") provides that post-final order motions, other than the motions expressly referred to in this rule but that concern the final order, do not extend the time for filing a notice of appeal or cross-appeal. Once a proper notice of appeal is filed, the rule provides that the juvenile court is divested of jurisdiction to hear the motion unless the appellate court suspends jurisdiction and re-vests jurisdiction in the juvenile court. In that event, a party who challenges the juvenile court's subsequent order must file a new or amended notice of appeal. Ms. Beckmann then briefly reviewed section (e) ("delayed appeal or cross-appeal"), which the workgroup had not recently changed.

Rule 104X was derived from previously drafted Rule 104 sections (b) ("content of the notice of appeal") and (c) ("distribution of the notice of appeal"). Ms. Beckmann advised that other than being relocated to a free-standing rule, the substance of these provisions is the same. Notwithstanding the objection to the time-extending motions noted above, members approved new Rule 104 and Rule 104X.

[06.12.20] Rule 104.1 ("the record on appeal"). This new rule is derived from current Rule 104, sections (D) through (J). The new rule is designed, among other things, to remove from juvenile court clerks any uncertainly about what to include in the record on appeal. Draft section (a) therefore creates a "presumptive" record on appeal, which includes filed documents, admitted exhibits, and transcripts of proceedings that relate to the final order. The transcripts in the presumptive record are identified in subpart (a)(2) by referring to the pertinent hearing. These hearings generally correspond to provisions in draft Rule 103 concerning orders that are appealable. A provision at the end of subpart (a)(2) allows the appellant to exclude a transcript from the presumptive record, but as a practical matter, it's unlikely that counsel would do that.

Section (b) permits the appellant to promptly file a "supplemental designation of record," which can identify an exhibit that was marked and offered but not admitted into evidence, or a transcript that was not in the presumptive record but directly or indirectly resulted in the order from which the appeal is taken. Under section (c), the appellee within a short time thereafter can file a separate supplement designation. The condition for any party's supplement designation is that the designating party "reasonably believe"

that the item is "necessary for proper consideration of issues likely to be raised on appeal." After the time has passed for filing a supplemental designation under sections (b) or (c), a party can file a motion in the appellate court requesting supplemental designation, with the burden becoming higher as more time passes following the appellate clerk's notice that the record is complete. The required showing initially is good cause; if the motion is file thereafter, the burden becomes extraordinary circumstances. A provision in section (f) permits the appellate court to impose sanctions under ARCAP 25 on a party who adds unnecessary items or transcripts to the presumptive record. Members approved Rule 104.1 as presented.

[09.25.20] Rule 104.1 ("the record on appeal"). The changes in Rule 46.1 and elsewhere concerning post-final order motions prompted a change in section (a) ("presumptive record on appeal"). The previously approved version of Rule 104.1 provided that the presumptive record included any documents filed with the clerk "before and including" the filing of the notice of appeal. To assure that post-final order motions also were included in the presumptive record, section (a)(1)(A) now requires the clerk to transmit documents "filed with the clerk before the record is transmitted." Members had no objections to this change.

[06.12.20] Rule 104.2 ("notice of non-participation"). This rule derives from current Rule 104(C)(2). Although it retains the substance of the current rule, it is more focused and comprehensible as a reorganized and free-standing rule. A member noted a conflict between draft section (a), which requires a party to file a notice of non-participation in the appellate court, and draft section (b), which requires filing of the notice in the juvenile court. Members resolved the conflict by deleting the filing location in section (a), thereby retaining in section (b) the juvenile court as the only place for filing the notice. With this correction, members approved Rule 104.2.

[09.25.20] Rule 105 ("assigning an appellate case number; filing, serving, and transmitting the record on appeal"). This rule is presented for the first time. It concerns the mechanics of the appeal in the appellate court after the filing of the notice of appeal. Ms. Beckmann reviewed the rule, which contains subjects such as assigning an appellate case number, and transmitting the record to, and filing the record in, the Court of Appeals.

In subpart (a)(2), Ms. Beckmann detailed the process for filing a motion in the Court of Appeals prior to the assignment of a case number. This occasionally occurs when a party asks the appellate court to stay a trial court's final order. She noted that a statute precludes the trial court from staying its own order, even though it has the most familiarity with the case, and she suggested addressing this anomaly by a statutory amendment. Section (b) requires the appellate court to notify court reporters of the assigned case number, which facilitates inclusion of the case number on the reporters' transcripts. Ms. Beckmann emphasized the importance of section (e) ("notice of

completion of the record") because it triggers the briefing schedule in Rule 106. She also advised that the workgroup deleted a portion of section (f) (now, "supplementing the record by appellate court") that required the superior court clerk to immediately forward to the appellate court any document filed in the superior court after the initial transmission of the record. The workgroup concluded that this requirement was burdensome and unnecessary because many of those documents were not pertinent to the appeal. The modified provision allows the appellate court to request any document, exhibit, or other item necessary for determining the appeal. Members had no questions concerning draft Rule 105 and approved it as presented.

[10.23.20] Rule 106 ("briefing in the Court of Appeals; transfer to the Supreme Court") and Rule 106.1 ("dismissal and other action by the Court of Appeals; no motion for reconsideration"). Ms. Beckmann presented these two rules, which resulted from the bifurcation of current Rule 106.

Draft Rule 106, unlike the current rule, contains useful section titles. The draft rule also reverses the order of current sections (A) and (B), so the draft rule begins with provisions on due dates rather than on the length of briefs. Draft Rule 106 provides that ARCAP 13, 14, and 15 continue to apply to due dates and briefs, with specified exceptions. Draft section (b) has separate provisions on the length of briefs depending on whether the brief is filed electronically, in which case its length is based on word count, or filed in paper at the clerk's counter, in which case the length limit is based on the number of pages. Exclusions for determining the length of a brief that are specified in ARCAP 4(b)(9) are shown in a corresponding provision in draft Rule 106(b)(3). The provision concerning a victim identifier was modified by omitting "in which the victim was a juvenile at the time of the offense" because that is subsumed under "the victim's name," which remains in the provision. Ms. Beckmann observed that a draft provision on the binding of paper briefs should be acceptable to both divisions of the Court of Appeals. Draft section (c) ("extensions of time") reflects the objectives of Chief Justice Brutinel's earlier committee on delay reduction in juvenile appeals. Under this draft section, the Court of Appeals may grant an initial extension (20 days for an opening or answering brief, 10 days for a reply) for good cause, but it will grant further extensions only for extraordinary circumstances. Section (d) ("amicus curiae brief") clarifies that amicus may not file a reply brief.

Draft section (e) ("notice and avowal in lieu of opening brief; *pro se* brief") was derived from current Rule 106(G), with modifications. The current section refers to an affidavit, whereas the draft section calls this an avowal. Under the draft, counsel's avowal can be on one or two grounds: that the appellant has failed to maintain contact with counsel (i.e., the client has abandoned the appeal), or that counsel has reviewed the record and found no non-frivolous issue to raise on appeal. If the avowal is on the second ground, the draft requires counsel to advise the appellant of two things: counsel's intent to file this avowal, and the appellant's opportunity to file a *pro se* brief. When counsel files an avowal on this ground, the avowal must inform the court whether the appellant

requests to file a *pro se* brief. The draft goes on to say that if the appellate court grants the request, then the appellant has 15 days to file a *pro se* brief. When the appellant files that brief, the court may deem the case at issue or it may permit the appellee to file an answering brief, but it may not grant relief without providing the appellee that opportunity. If counsel's avowal indicates that the appellant does not request to file a *pro se* brief, or if the request was made but no *pro se* brief was timely filed thereafter, the court may dismiss the appeal and immediately issue its mandate. Although the rule does not say so, if something goes awry, e.g., the appellant does not get notice that the court granted the request to file a *pro se* brief, then the court could withdraw its mandate. A member raised a due process concern about whether the 15-day limit was unduly short, but after discussion, members made no changes to the draft.

Draft section (f) ("at issue") modestly compresses the time when an appeal is deemed to be at issue. Draft section (g) ("petition for transfer") applies ARCAP 19 to juvenile appeals, although Ms. Beckmann noted that the Supreme Court rarely grants these petitions.

Draft Rule 106.1(a) ("dismissal") derives from current Rule 106(E). It permits the court to dismiss an appeal for the specified reasons, including on its own motion for legal cause, such as a lack of jurisdiction or a lack of prosecution. Section (a) requires the appellate clerk to give prompt notice of the dismissal, which encompasses giving notice to the appropriate court reporters or transcript coordinator to avoid the expense of unnecessary transcript preparation. Draft section (b) ("action by the appellate court") has four subparts that provide alternative dispositions, including number 4, suspending the appeal and re-vesting jurisdiction in the juvenile court. That fourth alternative might be useful in a myriad of circumstances, including when a brief or non-time extending motion raises a plausible issue of ineffective assistance of trial counsel that requires further testimony or findings. Draft section (c) ("no motion for reconsideration") relocates a provision currently contained in Rule 107(A) that disallows these motions. The Task Force had previously inserted a provision in draft Rule 103.1(i)(17) concerning a motion for publication. This was relocated as draft Rule 107(d) ("motion for publication"). The revised title of draft Rule 106.1 reflects the inclusion of new sections (c) and (d).

Members agreed with the bifurcation of Rule 106. They approved Rules 106 and 106.1 as presented and modified.

[11.20.20] Rule 107 ("petition for review"). Ms. Beckmann began her presentation of Rule 107 by observing that the current rule is not particularly easy to follow. The draft rule is clearer, in part because it includes section titles. The draft also harmonizes with provisions of other juvenile appellate rules and with ARCAP 23 ("petition for review"). For example, revised Rule 107(a) ("purpose") now parallels the language of ARCAP 23(a) ("purpose").

Section (b) ("place and time for filing") has two subparts. The subpart on the place of filing was uncontroversial, but the other on timing necessitated some discussion. The

current rule gives a party 30 days to file a petition for review; the revised rule reduces that time to 20 days. Ms. Beckmann explained the rationale for the reduction. The Court of Appeals cannot issue a mandate until the time for filing a petition for review has passed. However, parties file petitions for review in relatively few juvenile appeals. The result is that in the majority of juvenile appeals, the finality of the appeal and the permanency determination for the child is unnecessarily delayed pending the running of the time for filing a petition for review. Therefore, to reduce that time in the majority of cases, the workgroup shortened the time for filing a petition for review to 20 days. Some members questioned this reduction of the time to for filing a petition, noting that the additional 10 days can be significant to appellate practitioners, and the Court does not favor requests for extension of time in juvenile cases. However, a straw vote indicated that about three-fourths of the members supported the 20-day time limit. The draft will accordingly specify 20 days, but the petition should note the minority view.

Section (c) ("form and length of the petition or cross-petition") is substantively similar to the current provision, although there is a new subpart (c)(6), which requires references to case law to comply with ARCAP 13(f). Ms. Beckmann reviewed the other sections of draft Rule 107. In section (g) ("service of the petition, cross-petition, and response"), members agreed that the filing party should serve not only all parties who appeared in the Court of Appeals, but also any person who filed a notice of non-participation under Rule 104.2. Ms. Beckmann suggested, and members agreed, to add to section (k) ("dispositions") an introductory sentence that says, "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…" Members had no other questions or comments and approved Rule 107 as presented.

[11.20.2020] Rule 107.1 ("appellate court mandates"). Ms. Beckmann also presented Rule 107.1, a new freestanding rule that was derived from current Rule 107(H). The draft rule is straightforward and effectively organized, and members readily approved it.

[09.25.20] Rule 108 (currently, "service, how made, filing, extensions of time," and as proposed, "abrogated"). Ms. Beckmann noted that although this is the final rule on juvenile appeals, it contained information that properly belonged in previous rules. Pertinent content has therefore been relocated to other rules, and the workgroup now proposes the abrogation of Rule 108. The members agreed.

[07.17.20] Form 5(a) ("notice of appeal: delinquency/incorrigibility proceeding") <u>and</u> Form 5(b) ("notice of appeal: dependency, severance, Title 8 guardianship, adoption, emancipation proceeding"). Ms. Beckmann presented two notices of appeal, one for use in delinquency cases, and the second for appeals in other juvenile court cases. The core issue with these forms was whether to add or remove language that requires counsel to consult with the client before filing a notice. She noted that current Form 4 is a certification for counsel to file in the juvenile court when counsel is not filing a notice of

appeal, but nonetheless wants to certify an inability to locate or communicate with the client. Form 4 has dubious value, and counsel almost never use it. In a delinquency case, the juvenile has the right to an *Anders*-type review, which would be foreclosed if counsel was unable to certify that he or she had consulted with the client. Ms. Beckmann accordingly recommended that Form 5(a) not include a consultation section.

There is no analog to an *Anders* review in an appeal from other juvenile cases, and the question was whether the juvenile rules should require that counsel consult with the client in those other cases before filing a notice of appeal. Ms. Beckmann presented three options: (1) that the form require counsel to certify that a consultation occurred prior to filing the notice; (2) that counsel certify an inability to contact or communicate with the client, but certify that the appeal is meritorious; or (3) that the form not contain any certification but that the rule provide that counsel cannot file a notice without first consulting with the client. She added that Rule 104 provides a safety net in the third scenario because it would permit a delayed appeal if the client subsequently appeared and if the other requirements of that rule are satisfied. Members did not favor the filing of a notice of appeal in these cases when the client could not be located. They agreed that the notice of appeal form should include counsel's certification that he or she had in fact consulted with the client, and that counsel should not be permitted to file the notice without this certification. Workgroup 1 will need to modify Rule 104 and Forms 5(a) and 5(b) in accordance with that decision.

During the discussion of these forms, members also agreed that there was no benefit in including current Form 4 in the restyling rules. A member asked whether an appeal from a juvenile disposition under Form 5(a) includes an appeal from the adjudication, or if the adjudication is separately appealable. Ms. Beckmann advised that the adjudication issues are raiseable in the appeal from the disposition, but the workgroup will consider ways that the form can clarify this. Another member thought Form 5(b) was too complex, and that it should be simplified by removing boxes 1 through 11 and retaining only item 12, with the addition of specifying the order being appealed. However, other members disagreed, noting that this series of individual checkboxes serves to clarify for clerks and court reporters the documents and transcripts that are necessary for the record on appeal. The checkboxes should mitigate the tendency of the appealing party to request a transcript of every trial court proceeding, even when the proceeding is not pertinent to the issues on appeal.

[12.18.20] Forms 5(a) and 5(b) ("notices of appeal"). Ms. Beckmann revisited Form 5(a), a notice of appeal in a Part II delinquency proceeding, and Form 5(b), a notice of appeal in a Part III, IV, or V proceeding. The recent revisions to Form 5(a) clarify that the order which is the subject of the appeal is the comprehensive final order. This will usually include the adjudication and the disposition. In the event new counsel is appointed on the appeal, the workgroup wanted the form to specify who currently has the client's file, and the recent revisions address this. Members agreed that the avowal by the appealing

party's attorney does not apply if the appealing party is the agency that is prosecuting the case on behalf of the State.

Form 5(b) aligns the specified grounds for appeal with the grounds enumerated in Rule 103, including those grounds recently approved by the Task Force, such as appealing from a denial of adoption certification. Because the State in a non-delinquency appeal appears through a cognizable entity, usually the DCS, the avowal requirement in Rule 104(b) continues to apply to the appellant's attorney in every Form 5(b) notice of appeal.

[07.17.20] Form 6 ("supplemental designation of the record"). This is a new form. It correlates with Rule 104.1 (the record on appeal"), and Form 6 includes cross-references to that rule. The form is designed to allow counsel, in an orderly and easily understood way, to designate additional documents, exhibits, or transcripts for inclusion in the record on appeal. Members had no questions or comments concerning the form, but the form will need to be properly formatted.

[12.18.20] Form 6 ("supplemental designation of the record"). Ms. Beckmann noted that Form 6 includes introductory text that references Rule 104.1 ("record on appeal"). Both the workgroup and the Task Force questioned the benefit of allowing the appellant to exclude items from the presumptive record, but the provision is in current Rule 104(E) and a similar provision is in Criminal Rule 31.8(a). According members agreed to retain that option in Form 6, as permitted by draft Rule 104.1(b)(2).

Workgroup 2

[11.08.2019] Rule X ("scope of the delinquency rules"). This rule is new and has not been assigned a number. It has two sections: (a) ("application"), and (b) ("incorrigibility"). Section (a) recognizes that delinquency proceedings may still occur in limited jurisdiction courts. A member suggested, and Ms. Phillis agreed, that in section (a), the word "delinquency" can be removed in the phrase "these delinquency rules." Section (b)'s reference to incorrigibility ("courts should construe the delinquency rules as applicable to incorrigibility proceedings") should eliminate the need to say "and incorrigibility" after "delinquency" because section (b) clarifies that these rules apply to both. Members generally approved the rule as presented and modified today.

[11.08.2019] Rule XX ("definitions"). Ms. Phillis explained that this rule, which replaces current Rule 9 ("definitions") does not currently contain any definitions, but this rule will serve as the placeholder for future definitions of delinquency terminology.

[11.08.2019] Rule 10 ("appointment of an attorney"). Ms. Phillis reviewed the four sections of this draft rule. Like Workgroup 4, Workgroup 2 prefers the word "attorney"

rather than "counsel." In section (a) ("right to an attorney"), a member suggested adding for completeness, after the phrase "initiated by a petition," the words "or a citation," and Ms. Phillis agreed. The same words will be added after "a petition" in section (b).

Section (b) ("appointment of an attorney") is new. To facilitate appointments upon the filing of a petition, the draft says that "a juvenile is presumed indigent." The workgroup reasoned that if the juvenile was not presumed indigent, the court could not make a finding of indigency, and consequently appoint an attorney, until the juvenile's initial court appearance, and that might impede the efficiency of the advisory hearing. However, members were concerned with creating a presumption of indigency, and thought, for example, that the presumption might be rebutted if the juvenile was employed. Accordingly, and to shift away from the connotations of a presumption, members agreed to change the wording in section (b) to say instead that a juvenile is "deemed indigent."

The subject of appointments led to a discussion about assessing the cost of a court-appointed attorney, which is addressed by draft section (d) ("assessment of the cost of court-appointed attorney"). If the juvenile has adequate resources (e.g., a trust fund), could the court assess the juvenile (in addition to a parent or custodian) for that cost? Ms. Phillis referred to A.R.S. § 8-221(G), which allows the court to make the assessment. Members revised section (d) to reflect the court's ability to do that; they also agreed to revise this section to allow the court to make appropriate inquiries concerning the juvenile's financial resources. They will further revise this provision to clarify that it's the juvenile's own financial resources, and not the parents', that determines the juvenile's ability to pay. Draft section (d) does not allow the court to make the assessment against the DCS, ADJC, or a foster parent, but to expand the application of this provision to any individual who might be receiving financial assistance from the State, members changed "foster parent" to "out of home placement under court supervision."

Section (e) ("waiver of counsel") prompted a discussion of a juvenile waiving counsel because of pressure from a parent who wants to avoid an assessment for the cost of a court-appointed attorney. However, the terms of this provision should not preclude a parent from hiring an attorney for a child, even when the child is indigent, and the workgroup will consider this issue and present a revised provision at a future meeting. Ms. Phillis noted that the workgroup has added a new requirement of a colloquy between the juvenile and the court to assure that any waiver of counsel is knowing, intelligent, and voluntary. Members agreed to delete a sentence shown with strikethrough at the end of section (e) that would have required the court to impose safeguards on the waiver if there's a conflict of the interests of the juvenile and a parent.

[12.13.19] Rule 10 ("appointment of an attorney"). In section (a) ("right to an attorney"), after the phrase "right to be represented by an attorney in all delinquency proceedings initiated by a petition," members had previously added the words "or a citation." (They had made a corresponding change in section (b) ("appointment of an

attorney").) Members reconsidered those revisions at today's meeting. Adding these words could require the appointment of counsel on citations to juveniles to appear in a municipal traffic court, or for other low-level offenses where the appointment of counsel might not be warranted. Members expressed concern with creating a right to counsel by rule—especially one that creates a financial burden on municipalities—that does not exist under the constitution or by statute. However, Ms. Phillis believed that a juvenile was entitled to court-appointed counsel even on a misdemeanor, because the juvenile could be detained on that charge. After reviewing A.R.S. § 8-221(B), members consolidated draft Rule 10(b) and (c) ("finding of indigent") into a revised Rule 10(b), which now simply provides, "**Appointment of an Attorney.** After the filing of a petition or citation in juvenile court, the court must appoint an attorney for the juvenile as provided in A.R.S. § 8-221."

Earlier versions of Rule 10 had alternatively said that a juvenile was "deemed indigent" or was "presumed indigent," which would allow the court to appoint counsel promptly upon receipt of a delinquency petition. Doing so would eliminate the need for a subsequent court hearing to make a finding of indigency, which could create delay. These alternative phrases were removed at today's meeting because members determined that A.R.S. § 8-221(C) requires the court to appoint counsel "before any court appearance which [sic] may result in institutionalization or mental health hospitalization of a juvenile."

Members also revisited draft section (d) ("assessment of the cost of court-appointed attorney"). Members previously agreed that an assessment for the cost of counsel should not be made against the DCS or ADJC when the juvenile was in the custody of either of those entities, and this draft section expresses that intent. Today, some members construed this provision as not relieving the juvenile's parents from the assessment notwithstanding that the juvenile was in custody. Other members disagreed with that construction and contended that if the juvenile was in DCS or ADJC custody, parents should not bear that assessment. Due to the lateness of the hour, the discussion of this issue ended without a resolution. However, in the last sentence of section (e) ("waiver of counsel"), members agreed to change "the court should obtain a waiver [of counsel from the juvenile's parent]" to "the court must also obtain a waiver…."

Members approved the draft of Rule 10 subject to the items mentioned above.

[11.08.2019] Rule 11 (attorney's appearance). The draft rule, like the current rule, has two sections, and the workgroup revised both. Section (a) would permit counsel to file a notice of appearance or to orally announce an appearance in open court. For case management systems, it might be preferable to require counsel to file a written notice of appearance and a written notice of withdrawal. Nonetheless, Rule 10 requires the court to issue a minute entry when it appoints counsel, so appointments of those attorneys should already be reflected in the case file. Draft section (b) ("withdrawal of an attorney") pertains only to court-appointed counsel. It automatically relieves the attorney of

representing a juvenile if no further hearings are scheduled and the time for filing a notice of appeal has expired. A member raised an issue that court-appointed attorney contracts in some Arizona counties require the attorney to remain as counsel of record for 6 months after case completion, but members did not believe this contractual provision would undermine the application of the draft rule. Members discussed a process that would allow retained counsel to withdraw by notice versus by motion. Members agreed that the draft was deficient because it did not address the withdrawal of retained counsel, and Rule 11 was returned to the workgroup for further revision. Members also requested the workgroup to consider whether probation officers or GALs should receive copies of filings concerning withdrawal.

[01.24.2020] Rule 11 ("attorney's appearance and withdrawal"). Ms. Phillis made the presentation. She noted that this rule was initially presented at the November 8 meeting and returned to the workgroup for further consideration. After the workgroup's subsequent revisions, each of the two sections (one on appearance, the other on withdrawal) now has one subpart for court-appointed counsel and a second subpart for a retained attorney. Under the revised provisions, a court-appointed attorney is "automatically relieved" from representation at the end of the case (i.e., no hearings are set and the time for filing a notice of appeal has expired), whereas retained counsel must file a notice of withdrawal when the case ends.

In response to a question about substitution of counsel, Ms. Phillis advised that substitutions are uncommon, but if one is requested, counsel would presumably follow routine substitution procedures. Another member asked whether court-appointed counsel could file documents after being automatically relieved, such as a motion for early termination of probation. Ms. Phillis advised that this rule would not answer this question; rather the answer should be in court-appointed counsel's contract with the county. She added that the filing of such a motion would probably be allowed in Maricopa County, which compensates court-appointed counsel on a per-case basis. Ms. McQuality said that clerks would prefer that court-appointed counsel memorialize their withdrawal in the case management system by a filing a notice, but Ms. Phillis explained that this would result in paperwork that the proposed rule would avoid. Members concluded the discussion by approving Rule 11.

[01.24.2020] Rule 12 ("the juvenile's attendance at court proceedings; restraints"). Mr. Meaux presented this rule on behalf of the workgroup. In section (a) ("personal appearance"), the workgroup added two events—a detention hearing and an advisory hearing—to a list of events requiring the juvenile's personal attendance. It also sequenced the events identified in this section in the order in which those events occur. Under draft section (b) ("telephonic or video appearance"), an appearance by telephone or video is considered a personal appearance. A subpart in section (c) ("voluntary appearance") said that the juvenile "has not provided an acceptable reason for the non-appearance." Members agreed that the court has discretion to determine what constitutes an "acceptable reason," but they changed this to instead say, "has not provided good cause

for the non-appearance," which they agreed was a clearer legal standard. A member expressed concern that a juvenile's non-appearance at an advisory hearing might be deemed voluntary, and the court might issue a warrant, without confirming that the juvenile had been served with a summons. However, members concluded that section (d) ("failure to appear") took this into account, and that as a practical matter, a judicial officer will confirm that the juvenile was served before issuing a warrant. See further the discussion concerning Rule 26(b)(2), *infra*.

Draft Rule 12(e) ("mechanical restraints") modified the current provision. The description of mechanical restraints was relocated from the end to the beginning of section (e). In addition, the workgroup revised a few of the factors justifying the use of restraints. Members discussed whether a proposed modification to the second factor ("the juvenile ~~is likely to flee~~, has expressed an intention to flee, or has previously attempted to flee") required a further edit, such as "has demonstrated or expressed an intention to flee" so the intention would not be limited to verbal or written expressions. Members concluded that the edit was unnecessary, and that a judicial officer could decide whether an expressed intention includes a demonstrated intention. The workgroup deleted the factor that "a juvenile detention officer…recommended the use of mechanical restraints," recognizing that a judicial officer rather than a detention officer makes that determination and because a detention officer would customarily provide input under the other factors. Members also agreed that the words "through counsel" (i.e., a juvenile…my object to the use of restraints through counsel") were unnecessary because counsel, not the juvenile, would ordinarily make the objection. Members then approved Rule 12 as modified.

[01.24.2020] Rule 13 ("attendance of witnesses and appearance of attorneys by telephone or video conference"). Ms. Beringhaus noted that in section (a) ("at adjudication proceedings"), the word "parties" was deleted in the phrase "all parties and witnesses must personally appear" to avoid confusion with Rule 12(b), which permits a juvenile, with court approval, to personally appear by telephone or video. She also noted that the workgroup clarified the language of section (b) ("at other proceedings"), but it made no substantive changes. Members approved the rule as presented.

[01.24.2020] Rule 14 ("combining hearings"). Ms. Phillis explained that the first sentence of the draft derives from the current rule, and the second sentence is new. Ms. Phillis explained that the current rule excludes transfer hearings, but the first sentence of the draft rule does not have this exclusion because a transfer hearing might lead to a plea and a disposition, which could be combined under the proposed rule.

The ensuing discussion focused on the second sentence, which says, "The court also may combine a delinquency hearing and a dependency hearing involving the same child." One member proposed adding criteria about when the court could combine these hearings, and suggested that some hearings, particularly adjudications, should not be combined. Another member was concerned that the rule might conflict with procedural

requirements in statutes. Ms. Phillis replied that juvenile courts already combine hearings for cross-over youth, and this new sentence simply recognizes the current practice. A judge member observed that judicial officers exercise sound discretion in combining hearings; adding criteria could be problematic because situations can be fluid or unique, and a rule should not limit the judicial officers' ability to conduct hearings efficiently by combining them and doing what is in the child's best interests. A member proposed adding to this sentence the words "in accordance with the law," but others noted this would not be helpful because these words are implicit in every rule. At this point, members approved Rule 14. The Chair noted that all the rules, including this one, will be open for public comment and opposing views.

[01.24.2020] Rule 15 ("motions"). Mr. Cardy observed that the workgroup's revisions to Rule 15 borrowed from the motion provisions of Criminal Rule 1.9. However, the 10 days permitted under Criminal Rule 1.9 for filing a response was shorted to 5 days in draft Rule 15 because of the compressed schedule of delinquency proceedings. Members agreed to these two edits in section (b) ("time for filing"): "A motion must be filed <u>and served</u> no<u>t</u> later than 10 days…." Regarding the first edit (adding "and served"), Mr. Cardy noted that the workgroup deleted current section (b) ("filing"), which currently requires the filing party to provide a copy of the motion to the assigned judge and probation officer, and this proposed rule would supersede that provision. Regarding the other edit, members agreed that "not later than" will be the Task Force's convention going forward, and the phrase "no later than" when it appeared in subsequent sections of this rule was changed accordingly. A member observed that although draft section (b) included a time for filing a motion "unless otherwise ordered by the court," there was no comparable "otherwise ordered" provision in section (c) ("response and reply"). Members then reorganized the rule to permit the court to extend the time for filing a motion, a response, or a reply. With these changes, members approved Rule 15.

[02.28.20] Rule 16 ("discovery"). Ms. Beringhaus noted that Rule 16 was substantially re-organized, and it is now easier to read and more closely tracks corresponding Criminal Rule 15 ("disclosure"). Unlike the current juvenile rule, which begins with a section on "general standards," the restyled rule begins with section (a) on "disclosure by the State," which aligns with the disclosure provisions in Criminal Rule 15. A provision in restyled Rule 15(a) requires the State to disclose statements of the juvenile "and of any co-defendant—juvenile or adult," which is new. The workgroup changed another provision in section (a) that requires disclosure of experts to conform to a corresponding provision in Criminal Rule 15. In Rule 16(b) ("disclosure by juvenile"), the workgroup added a provision in subpart (1) ("physical evidence") that requires a court order if, for example, the juvenile must appear in a line-up or provide hair or fluid samples. That new provision follows the current practice in Maricopa County. Requirements for the juvenile's disclosure of experts mirrors the requirements for the State's disclosure of experts. Ms. Beringhaus reviewed the other sections of Rule 16,

including section (f) ("sanctions"). Section (f) is somewhat different from the corresponding provision in Criminal Rule 15, and in addition to specified sanctions, it permits the court to impose "any other appropriate sanction." Members approved the workgroup's draft of Rule 16.

[01.24.2020] Rule 17 ("computation of time"). Ms. Beringhaus noted that section (a) ("computation") expressly follows the time computation provisions of Criminal Rule 1.3. She also noted that section (b) ("excluded time") is substantively unchanged from the current provision, but it has been extensively reorganized. She also explained that the "juvenile's inability to be arrested, cited, or detained in Arizona" falls within "the juvenile's absence," and therefore the former phrase was deleted. Members had no questions and approved Rule 17 as presented.

[02.28.20] Rule 18 ("speedy justice"). Ms. Beringhaus explained that the current rule differentiates the duties of the prosecutor and the duties of defense counsel. The draft rule eliminates this distinction so that both attorneys have responsibility for advising the court of the "impending expiration of time limits in the juvenile's case." Members approved the draft as presented.

[02.28.20] Rule 19 ("records and proceedings"). As the titles of the draft and the current rule suggest, the rule applies to access to records as well as access to proceedings. In section (a) ("juvenile court delinquency files") the court's records (also referred to as "files") are either in a "legal file" or a "social file." Mr. Meaux explained how the workgroup reorganized the provisions to delineate in a parallel manner when the public does, or does not, have access to these files, who maintains the files (the clerk versus a probation officer), and the contents of the files. Mr. Meaux noted that A.R.S. § 8-208 might require legislative changes to conform to the restyled rule. In section (b) ("proceedings"), the workgroup used the word "proceedings" consistently in its draft, rather than intermittently using the word "hearing," which appears in the current rule.

Members discussed distinctions between files that are "closed," "sealed," and "confidential." Mr. Meaux explained that in practice, juvenile court files are not sealed, but certain documents are segregated and are considered confidential. The term "closed" is ambiguous; does it mean "sealed" or "archived?" Members agreed to use the term "confidential" rather than "closed," and this revision may require additional edits in section (a). The Chair also asked the workgroup to consider the terminology in, and relationship between, subparts (1)(A) and (1)(D). Workgroup members might also consider using parallel language in the "closed" provisions of sections (a) and (b). Also, in section (a), staff inquired whether the word "clear" was necessary in the phrase "clear public interest in confidentiality." A member explained that it was necessary because it emphasizes the First Amendment interest in open court files. In subpart (b)(1)(A), members agreed to add the word "reasonable," so it now says, "must give the parties reasonable notice of the request."

Members also discussed section (c) ("release of juvenile court files"). Judge Kreamer recommended that the section provide more specificity and guidance for judicial officers. For example, when the court receives a records request, should it go to the presiding judge, the judge assigned to the case, or to any judicial officer? The rule should also identify categories of requests. Judge Kreamer will take into consideration Pima County's practices in this area and he will prepare draft revisions to section (c) for the members' consideration at a future meeting.

[12.18.20] Pairing (c) (Rules 19, 30, and 104.1). An issue arose under draft Rules 19 ("records and proceedings"), 30 ("disposition"), and 104.1 ("record on appeal") regarding the distinction between the legal file and the social file (also known as the "red file" in Maricopa County and the "blue file" in Pima County), and ways to assure that the appellate record includes social file items the trial court considered in determining a disposition. Several years ago, the concept of a "segregated portion of the legal file" was added to Rule 19 to assure that social file documents considered by a judicial officer, which had not been introduced into evidence, were nonetheless included in the court's record. Anecdotally, the requirement was not always followed, and as a result, the record on appeal was occasionally incomplete. The Editorial Group proposed to address this issue by adding new provisions in these three rules for a "disposition file," which would serve a similar purpose as the segregated portion of the legal file but could be maintained by the probation department or the court. Ms. Phillis advised that Workgroup 2 modified this concept by relocating the proposed disposition file provision of Rule 19 within the subpart on the legal file, thereby assuring that the court would keep the disposition file. Members suggested adding cross-references to new Rule 19(a)(1)(D) in Rules 30(a)(6) and 104.1, and those cross-references references were added

[07.17.20] Rule 19.1 ("mandatory judicial determinations"). Judge Trebesch presented Rule 19.1. She observed that this delinquency rule is a counterpart to dependency Rule 47.1 ("mandatory judicial determinations"), which Mr. Turner presented at the June 12 Task Force meeting. Judge Trebesch discussed the workgroup's restyling and streamlining of the rule, and how it clarified what findings were required and when they must be made. The members' ensuing discussion primarily concerned the workgroup's proposed comment to the 2022 amendment, which consisted of text relocated from introductory language of the current rule. The text might be informative for judicial officers who are unaware of the need to make the required findings, especially in the case of a delinquent who later becomes the subject of a dependency proceeding. However, the text in this comment does not provide a basis for making the required findings, and the consensus of the members was to approve the draft rule without the comment.

[07.17.20] Rule 20 ("intercounty transfers"). Ms. Smith presented the rule. The reorganized rule focuses on three matters: transfer of a disposition hearing, post-disposition transfer of a case, and courtesy probation supervision. Each of these matters presents an issue concerning the need for the sending and receiving counties to confer

regarding a transfer, and who within each county—a judicial officer, a court administrator, or a probation officer—should be holding that conference. Ms. Smith said that when the juvenile resides in another county, some counties will do a pre-disposition transfer without much in the way of consultation. This is especially so in Pinal County, which adjoins two larger metropolitan counties. But prosecutor members in those two counties expressed a preference for retaining dispositions in their counties, i.e., the county in which the offense occurred, even when the juvenile resides in another county. Post-disposition transfers of probation supervision and courtesy transfers, on the other hand, are more routine when the juvenile lives in another county, especially when the juvenile is already on probation in another county. However, transfers are not automatic.

Members also considered situations where the sending county's attempt to initiate a consultation fails to produce a response in the receiving county; or when the court approves a request to transfer based on an anticipated change of residence, but neither the juvenile nor the juvenile's family ever moves or moves only temporarily. Judge Quigley advised that she has discussed with other stakeholders a rule for change of venue in dependency cases, and she believes issues that arise in dependency venue transfers might also arise with transfers of probation. She therefore suggested, and members agreed, that the dependency rules workgroup should have further discussions with the delinquency rules workgroup on this topic. Finally, the delinquency rules require the disposition hearing to be held within 30 days after the adjudication. It might not be practical to process a pre-disposition transfer of a detained juvenile within 30 days. One member proposed a rule amendment that would exclude time for processing the transfer. However, another member noted that such an amendment could result in a case having an undetermined date for disposition and suggested instead that the juvenile waive time for disposition when the court approves a pre-disposition transfer. Workgroup 2 will consider codifying that suggestion.

[02.28.20] Rule 21 ("victims' rights"). The restyled rule has two sections: (a) ("applicable offenses" and (b) ("enforcement"). Ms. Beringhaus noted that although the applicable offenses in restyled section (a) are described differently than they are currently, the restyled and current versions are substantively equivalent. The rights in section (b) are not individually enumerated; rather, the rule refers to the Victims' Bill of Rights and A.R.S. §§ 8-381 et seq. Members agreed to add after the VBR a specific reference to the Arizona Constitution, Article 2, Section 2.1. With that change, members approved Rule 21.

[01.24.2020] Rule 22 ("referral; diversion"). The current rule is titled "pre-petition investigation and diversion" but the current rule never mentions investigations and the title was revised accordingly. The draft rule focuses on two subjects: referral and diversion (because a high number of referrals are resolved by diversion.) Mr. Cardy, who presented this rule, suggested resequencing the five items in section (a) ("referral") so that the juvenile's name is the first item and a concise statement of facts is the fourth, and members agreed with his suggestion. Mr. Cardy also noted that four words in current

section (a), which say that a referral can come from "an individual or agency," seemed unnecessary, and those words were deleted. In section (b) ("record of referral"), the workgroup changed "authorized juvenile court officer" to "authorized juvenile court personnel," because of vagaries about who or what constituted an "officer." In section (c) (currently titled "diversion or deferral"), the word "deferral" was removed from the title. Mr. Cardy explained that deferral is a post-petition process, which is largely county-specific, although the workgroup might at a later time address deferral in subsequent rules. Draft section (c) includes a new definition of "diversion" ("a way of resolving a referral under A.R.S. § 8-321 without filing a petition"). Section (d) ("submission") restates the current rule but does not change its substance. Members approved the rule as modified.

[02.28.20] Rule 22 ("referral; diversion"). A.O. 2020-31, filed on February 12, 2020, adopted juvenile referral forms. The Chair asked members whether they should make any changes to their draft of Rule 22, which they approved at the January 24 Task Force meeting, in response to the adoption of these forms. Some members believed that Rule 22 should include a cross-reference to the adopted forms, but this was not a unanimous view. The Chair envisioned that a future editorial group, with the members' authorization, would review the draft set of rules prior to the Task Force filing its rule petition, and that this group would make necessary and appropriate edits to the draft rules. She suggested deferring the inclusion of a cross-reference in Rule 22 to that editorial group, which would determine if it should be added and if so, in which section of the rule the reference should be located. Members agreed with that plan.

Also see under Rule 33 below: *[08.21.20] Rule 33 ("disposition of non-felony offenses") <u>and</u> Rule 22 ("referral; diversion"), section (c) ("citation").*

[12.18.20] Pairing (a) (Rules 22 and XX). Rule XX was initially intended as a repository for definitions in delinquency proceedings, but the workgroup later determined that Rule XX would include only one short definition, of the word "parent," i.e., "'Parent' as used in the delinquency rules includes a parent, guardian, or custodian." The definition eliminates the need to repetitively say, "parent, guardian, or custodian," and instead allows the delinquency rules to say "parent" that by definition includes all three. Ms. Phillis advised that the definition has now been relocated to Rule 22 ("referral; diversion"), where it has become a new section (a) ("definition of 'parent'").

[06.12.20] Rule 23 ("detention and probable cause hearing"). Ms. Phillis noted that the workgroup revised the intake process described in this rule, so it more accurately reflects actual practices. Mr. Meaux and Ms. Smith obtained further input on the process from their respective staffs to assure the rule's accuracy. Ms. Phillis proceeded to review each section of draft Rule 23, including draft section (c) ("length of detention"), which affirms the existing 24-hour requirement for filing a petition or complaint when the juvenile has been detained.

If a detention hearing is not conducted within 24 hours after the filing of a petition or criminal complaint, then subpart (c)(2) requires that the juvenile be released to a parent or other responsible person, and if there is none, be released to DCS. Although release to DCS is allowed under the current rule in this circumstance, a member asked about the legal authority for doing so. The inquiring member noted that by statute, DCS cannot assume custody without first completing an investigation, which might ultimately determine that DCS custody is not required. Another member responded that if there was no parent or responsible person, the juvenile would be considered abandoned upon release from detention, and other than releasing the juvenile to DCS, the only remaining alternative would be releasing the juvenile back to the street, which is unacceptable. Judge Kreamer advised that he Maricopa County bench is working with DCS and other stakeholders to informally address this. The remedy might include reporting the situation on the DCS hotline, as provided by A.R.S. §§ 8-455 and 8-456, and that would trigger a DCS investigation. To add clarity to the rule provision, Judge Kreamer proposed adding the words "to assume physical custody" in subpart (c)(2) ("if no parent or other responsible person can be located to assume physical custody, the court must release the juvenile to DCS.") On a straw poll, two members opposed this rule amendment because they believed this provision is not legislatively authorized. However, the other members approved this amendment.

Section (f) permits the court to enter a pre-adjudication order requiring DNA testing pursuant to A.R.S. § 13-610(O). The workgroup found the taking of a DNA sample before the juvenile's adjudication legally and logistically problematic. The workgroup requested the members to defer approval of section (f) until the workgroup clarifies the legal requirements or, if appropriate, suggests a legislative change. With that caveat, members approved Rule 23.

[12.18.20] Pairing (b) (Rules 23 and 28). Rules 23 ("detention and probable cause hearing") and 28 ("advisory hearing") each have provisions regarding the collection of DNA samples from juveniles charged with specified offenses. Ms. Phillis noted that while *Mario W.* allows the pre-adjudication collection of DNA samples, it precludes the processing of the samples until the juvenile has been adjudicated. Ms. Phillis also noted that the manner of DNA collection varies by county, for example, some counties, and current Rule 28(C)(8), specify collection by a law enforcement agency, and other counties have a juvenile probation officer collect the sample. To comply with *Mario W.* and to add a provision with general applicability, draft Rules 23(h) and 28(c) each include a new subpart that says, "DNA may not be submitted to DPS for testing unless the juvenile has been adjudicated delinquent for an offense in §13-610(O)(3)."

[01.24.2020] Rule 24 ("content of a petition"). Mr. Cardy continued with a presentation of Rule 24. He noted that in section (a) ("content"), the workgroup deleted the sentence, "A prosecutor may file a petition alleging delinquent or incorrigible acts," because that is understood. Section (a) identified four informational items the petition

must include. As in Rule 22, Mr. Cardy suggested resequencing these four items, with the name of the juvenile listed first and a concise statement of facts listed fourth, and members agreed. The fourth item refers to "the law or standard of conduct allegedly violated." The workgroup recommended removing "standard of conduct" because it is vague and confusing. Although some members thought "standard of conduct" was necessary to allege an incorrigible act, even an incorrigible act requires a violation of law, and after discussion, members agreed to delete that phrase. In section (b) ("amendments to a petition"), Mr. Cardy noted the workgroup's modification of the current rule clarifies that only a prosecutor can move to amend a petition. Members then approved draft Rule 24.

[01.24.2020] Rule 25 ("filing a petition"). Ms. Smith presented the rule. The workgroup shortened section (a) ("filing") by removing unnecessary verbiage. Section (b) ("time limit for filing") is substantively the same as the current rule, except that it includes a subpart on diversion that was previously contained in a separate section. A member proposed adding an actor to section (b) to clarify that only a prosecutor can file a petition, in contrast to a dependency petition, which a private person can file. After reviewing A.R.S. § 8-301, members thought this addition was not needed, but they agreed to reconsider this decision later, if necessary. Otherwise, Rule 25 was approved.

[01.24.2020] Rule 26 ("notice to appear; service; failure to appear"). Ms. Phillis presented Rule 26. She said that although the workgroup made no significant changes to section (a) ("notice to appear"), it made notable changes to section (b) ("service of the petition and notice to appear"). Under subpart (1), the initial attempt at service, like the current rule, is by first class mail. However, the current rule only requires service on a juvenile who is at least 14 years of age. The workgroup believes that every juvenile should be served, regardless of age. Also, the workgroup's draft of section (b) clarifies that "a single notice may be mailed to both the parent and the juvenile if they have the same residence address." Ms. Phillis advised that a notice to a parent has the same content as a notice to a juvenile.

Members discussed two due process issues: is a child more likely to receive notice if the child is mailed a separate copy of the notice? And what is the rationale or origin for the 14 years of age requirement? After discussion, no one had an answer to the latter question, and members concurred on removing that limitation. As to the former question, and for clarification, members added a clause in subpart (1) that requires service on the parent or guardian if the child is not living with the parent, which is a common scenario for a dually adjudicated child. Members are interested in receiving public comments on both issues. Subpart (2) ("certified mail; personal service") did not require extensive discussion, and members agreed that the court "may approve" service by certified mail or personal service for not appearing at the advisory hearing after receiving a notice to appear by first class mail.

In section (c) ("failure to appear"), the workgroup added a new subpart concerning a "discretionary warrant." The term, which has not yet been defined in the rule, would allow the child or a law enforcement officer to call the court and get a new court date following a failure to appear. This warrant would presumably be used for minor offenses and only when the juvenile did not have a significant record or prior failures to appear. The document would still be referred to as a warrant to give the officer legal authority to stop and detain the child. Pima County already uses this process and refers to the court-issued document as a "provisional warrant." Members preferred that term, and it will be defined in Rule XX. Members did not believe that electronically issued provisional warrants would present processing challenges because they would be handled like other warrants. Members made stylistic changes to the wording of subpart (c)(2) to improve its clarity and to clarify that the court may issue a warrant under this section only for a juvenile. Members then approved Rule 26 as modified.

[04.03.20] Rule 27 ("subpoenas"). Ms. Phillis advised that a process server from the Office of Public Defense Services was on this portion of the conference call and would be able to answer members' questions, if any, concerning service of subpoenas. Ms. Phillis then explained that in section (a) ("generally"), the workgroup added two new sentences, one concerning the ADA requirement for reasonable accommodations, and the other regarding requests for interpreters. She noted that the court clerk will not issue a subpoena that does not contain language concerning reasonable accommodations. However, the draft language of this Rule 27 provision differed in one respect from corresponding language in Civil Rule 4, which concerns the summons; the draft juvenile rule requires that witnesses notify the court of a need for accommodation, which is unlike Civil Rule 4 that requires notice to the parties.

Under section (b) ("service"), a subpoena must be personally served. However, the court may approve service by a less restrictive method, i.e., by mail. The provision allows certified mail (not "certified or registered," as in the current rule), and if mailing is used, restricted delivery is required. Under the revised language of section (c) ("contempt"), the court can no longer issue an arrest warrant if the person to be served with a subpoena cannot be found, although that is permissible under the current rule. The draft provision requires the court to issue an order to show cause if a served witness fails to appear, although one member noted that judicial officers in Pima County occasionally issue an arrest warrant in that circumstance.

Members approved Rule 27 as presented.

[06.12.20] Rule 28 ("advisory hearing"). Ms. Beringhaus began the presentation of Rule 28 by noting that the change of plea provisions in current Rule 28 were relocated to a new, free-standing Rule 28.1, because a change of plea does not always occur at a Rule 28 advisory hearing. She then reviewed each section of draft Rule 28, including section (b) on time limits. The restyled rule reiterates that the advisory hearing for a detained juvenile must be held within 24 hours after the filing of the petition, but it also clarifies

that if a juvenile is already detained on a prior matter and a new petition is filed, the advisory hearing on the new petition must be held within 72 hours after the filing. Members noted that advisory hearings for detained juveniles are frequently conducted with the detention hearing (although in Yavapai County, if the detention hearing occurs on a weekend, the advisory hearing is held the following Monday.) Draft subpart (c)(6) includes a provision concerning DNA testing, and the observations Ms. Phillis made about DNA testing in her presentation of Rule 23 also apply here. Except for revisiting the DNA provision, members approved Rule 28 as presented.

[06.12.20] Rule 28.1 ("admission or change of plea"). Ms. Phillis explained that this new rule is based on the substance of current Rule 28(C), but the workgroup also used the change of plea provisions in the criminal rules as a model this new rule. Ms. Phillis reviewed the draft. Rule 28.1(a) would allow the juvenile to enter an admission "at any pre-adjudication or adjudication hearing." Section (b) ("procedure"), subpart (2) ("advise the juvenile of rights") requires the court to advise the juvenile of immigration consequences. Members reformatted the provision by adding a period after "immigration consequences," and then describing those consequences in subsequent sentences. Members had concerns that the workgroup's draft language might be suitable for a criminal defendant, but certain terms, such as "pleading guilty" or "admission of guilt," were not appropriate for a juvenile proceeding. The Chair requested the workgroup to make the requisite changes. Members also commented on subpart (b)(3) ("determine compliance with victim's rights"). They agreed that saying "rights provided under law" was appropriate in lieu of enumerating each right. However, they believed the phrase "right to be present and, if present, to be heard" was inaccurate, and they changed that to "right to be present and to be heard." Members will review the workgroup's revisions to the subpart on immigration consequences at a future meeting.

[07.17.20] Rule 28.1 ("admission or change of plea"). Ms. Phillis presented this new rule at the June 12 Task Force meeting, and members at that time requested Workgroup 2 to review the immigration consequences in subpart (b)(2)(D) to assure that the text was appropriate for a delinquency proceeding. Ms. Phillis advised the Task Force today that the workgroup did so. The workgroup replaced "pleading guilty," "admitting guilt," or "admission of guilt" in the draft with "admitting to a delinquent act" or an appropriate variation of that phrase. In response to a question, Ms. Phillis advised that the admonition appears in the rule with quotation marks because a judicial officer customarily reads it verbatim. In section (b)(3) ("determine compliance with victim's rights"), the words beginning with "been complied with by and find that" and continuing to the end of (b)(3) were deleted as unnecessary. The provision now concludes with the words "the victim has been afforded rights provided under law." Members approved Rule 28.1 with these revisions.

[08.21.20] Rule 29 ("adjudication hearing"). Ms. Phillis presented Rule 29. She characterized the workgroup's revisions to this rule as a restyling, albeit with some

reorganization but without substantive changes. She then reviewed each section of the draft. She noted that in section (d) ("procedure") the workgroup deleted provisions requiring that "the adjudication hearing be as informal as the requirements of due process and fairness permit" and that the adjudication proceed in a manner similar to the trial of an action without a jury, because those principles are now contained in restyled Rule 3(b) ("informality"). Regarding section (d), subpart (1) ("amendments to conform to evidence"), Ms. Phillis explained that amendments are permitted "to correct mistakes of fact or to remedy formal or technical defects," such as an incorrect address or a misspelled name, but the rule would not permit substantive amendments to the allegations. Section (f) ("disposition") requires the court to set a disposition hearing after a finding of delinquency. Rule 29 does not specify the time limit for the disposition hearing; instead, that will be addressed in Rule 30 on dispositions. However, Rule 29(a) ("time limits") specifies the time limit after the advisory hearing when the court "must hold" an adjudication hearing. A member noted that this draft does not allow the court to exceed those limits, even when the juvenile waives time. According, members added to subparts (b)(1) ("detained juvenile") and (b)(2) ("juvenile not detained") the words "unless the juvenile waives time." Members approved Rule 29 with these modifications.

[09.25.20] Rule 30 ("disposition"). Ms. Phillis presented this rule. She noted in section (a) (now, "disposition report") that the workgroup changed the word "shall" in the current rule to "may" as follows: "…the court ~~shall~~ may order the juvenile probation officer [to prepare a report]." The workgroup believed the court should have discretion to proceed to disposition without a report. Ms. Phillis also explained that subparts (a)(1) ("contents of the report") and (a)(2) ("availability of report to the victim") were revised, but the content of those subparts is substantively equivalent to the current provisions.

One member disagreed with the change of "shall" to "may" and believed that a disposition report should be required in every case ("must"), even if the report is a short one, and that this report would be useful if the juvenile commits a subsequent offense. Ms. Phillis disagreed, noting first that many juveniles do not reoffend, and further, that the current practice is to dispense with a report in appropriate cases. Current Rule 30(A)(3) allows the waiver of a report, and so does draft subpart (a)(3) ("waiver of report"), provided the victim has had an opportunity to provide input. Draft subpart (a)(3), unlike the current provision, permits the victim to provide information in writing or orally. The member asked how the victim can obtain access to the report, as provided under subpart (a)(2), if no report was prepared. Other members responded that prosecutors can provide pertinent information to victims in those circumstances, sometimes by providing a document referred to as a "current information report." After discussion, members retained the word "may" in section (a) and made no changes to subparts (a)(1) through (a)(5). (Subpart (a)(4) is "evaluation of juvenile," and subpart (a)(5) is "release of information.") Subpart (a)(6) ("filing disposition reports and records") requires that the disposition report and social file record "be filed in a segregated portion of the legal file." Ms. Beckmann observed that this can be problematic

because these documents aren't always transmitted to the appellate court with the record on appeal. Ms. Phillis responded that the workgroup would reexamine the provision to address that issue.

In section (b) ("disposition hearing"), subpart (1) ("time limits"), members added the underlined words to be consistent with a change the Editorial Group recently made to Rule 29 ("adjudication hearing"): "…unless the juvenile waives time <u>or time is excluded by the court under Rule 17."</u> A member asked why the word "signed" was included in subpart (b)(3) ("findings and orders"). The answer was that Rule 103 requires that an appealable final order be signed. Ms. Phillis reviewed subpart (b)(4) ("advisals"), including the requirement that these advisals be provided to the juvenile in writing and that they include, when appropriate, a felony offender warning and the prohibition concerning firearms. Members approved Rule 30 subject to reexamination of the issue noted above.

[09.25.20] Rule 31 ("probation"). Mr. Cardy presented Rule 31. In section (a) ("imposition of probation"), the current rule refers to conditions "that will promote rehabilitation and public safety." The restyled rule instead says, "designed to promote the juvenile's positive development, assure accountability, and protect the public." Although the current rule and Criminal Rule 27 refer to the probation officer imposing "regulations," the workgroup preferred the term "directives," which members agreed was the term customarily used for juvenile probationers. Section (b) ("notice") requires that when a juvenile receives oral notice of a directive under exigent circumstances, the juvenile must thereafter receive prompt written notice that confirms the oral one. The workgroup revised section (c) ("modification of probation") to clarify the parties' right to be heard on modifications of directives or conditions of probation. In subpart (c)(2), the following sentence was added: "The court must give the juvenile a written copy of a modification or clarification." Subpart (c)(4) concerns the victim's rights regarding modifications. Section (d) ("termination of probation") has a statutory basis, and the workgroup reorganized and restated current section (d).

Members discussed whether the restyled juvenile rules should include a rule on set-asides. Judge Armstrong suggested that if the Task Force adopts such a rule, it could be as simple as referring readers to the statute, which would provide the details. The workgroup will consider this suggestion and it will consult with Judge Quigley, who was involved in drafting set-aside provisions for other projects. Although Rule 31 does not mention destruction of juvenile records, a member asked whether these records should be sealed rather than destroyed, because destruction could impact a juvenile's subsequent military enlistment. Members had no consensus on this collateral issue, but otherwise approved Rule 31 as presented.

[08.21.20] Rule 33 ("disposition of non-felony offenses") <u>and</u> Rule 22 ("referral; diversion"), section (c) ("citation"). Mr. Cardy presented these two rules.

Notwithstanding its inapt title, the subject matter of current Rule 33 is citations, more specifically, initiating a case by an Arizona Traffic Ticket and Complaint ("ATTC"). Because the subject of Rule 33 concerns case initiation, the workgroup proposed deleting Rule 33 and relocating its substance to Rule 22, within a new section (c) titled "citation." Rule 22(d), which concerns diversion, provides that diversion is a way of resolving a referral without filing a petition. However, the workgroup wanted to assure that a case could be diverted even after the filing of a citation. Accordingly, the workgroup added a sentence to section (c) that says, "Notwithstanding the filing of a citation, a juvenile who is cited may be diverted by the prosecutor pursuant to section (d)." During the ensuing discussion, a member noted that draft Rule 26(a) requires the parent or guardian to be notified of the filing of a petition, but current Rule 33 and draft Rule 22(c) require only that the juvenile be served with the citation. Members acknowledged this anomaly, but they made no changes to Rule 22(c) to address it. They approved the deletion of Rule 33 and the inclusion of new Rule 22(c) as presented.

[11.20.20] ***Rule 32 ("revocation of probation").*** Ms. Phillis noted that the workgroup added to, removed, or modified content of the current rule. Consistent with changes to Rule 31, the workgroup used the term "directive" rather than "regulation." The workgroup also used the word "parent" to encompass "guardian or custodian" in lieu of using all three references throughout the rule. Ms. Phillis then reviewed each section. In section (a) ("initiation"), the requirement that the court provide notice to the victim is preceded in the draft by the words "if the victim requests notice." In the same sentence, the phrase "as provided by law" was changed to "as provided by victims' rights laws." Section (b) ("petition"), subpart (1) ("notice to appear") requires that the written notice to appear be given to the juvenile's attorney, in addition to the juvenile and the juvenile's parent. Subpart 2 ("service and failure to appear") requires service "as provided in Rule 26(c)," that is, in the same manner as the case-initiating petition. Subpart (3) ("amendment to the petition"), permits amendments "as provided in Rule 24(b)." The workgroup changed the title of section (c), which is currently "probable cause determination," to "warrant." This helps clarify that the judicial officer reviews the petition and makes a probable cause determination only in cases where the probation officer requests a warrant; in other circumstances, there is no need for a probable cause determination.

Current Rule 32(d) ("advisory hearing") has two subparts, one for "time limits" and the other for "procedure." The restyled rule makes each of these subparts a separate section: section (d) ("advisory hearing: time limits") and section (e): ("advisory hearing: procedure"). The time limits for the advisory hearing are different based on whether the juvenile is detained. The section on advisory hearing procedure was reorganized to clarify that the court is required to do 6 things, as specified in the 6 subparts of this section: "advise of rights;" "confirm disclosure," which is new; "allow a victim to be heard;" advise the juvenile about "juvenile's statements at revocation proceeding;" "enter the juvenile's admission or denial," and "set an adjudication hearing." The workgroup

deleted a provision found in the current rule that requires the court "to determine how a verbatim record of the probation violation hearing will be made," because the juvenile court as a court of record should have an established procedure for doing so. Section (e) ("probation violation hearing") has 7 subparts that by-and-large track the organization of current Rule 32(e). However, one of these subparts, on "amendment to conform to the evidence," is currently within another subpart; the workgroup made it a freestanding subpart (4) and renumbered the subsequent subparts accordingly.

Ms. Phillis concluded by observing that although Rule 32 is a lengthy rule (it requires three full columns of text in the current rule book), the workgroup believes the restyling and reorganization has made it more readable and user-friendly. Task Force members agreed. They had no further suggestions and approved the rule as presented.

[11/20.20] Rule 34 ("transfer for criminal prosecution"). Ms. Beringhaus noted that section (a) of the current rule begins with the words, "if, in the opinion of the prosecutor, the juvenile is not a proper person over whom the juvenile should retain jurisdiction, the prosecutor may file a motion…." However, the prosecutor's opinion is inherent in the prosecutor's filing of the motion. Draft section (a) ("generally") accordingly begins with the words, "the prosecutor may file a motion…." Unlike the current section, which refers to a transfer to "the appropriate court," the draft section specifies that the transfer is to "the criminal division of the superior court." Section (b) of the draft rule ("motion and complaint") provides that copies of the motion and criminal complaint "must be served pursuant to Rule 15 ['motions']." Section (c) ("amending the complaint") permits amendments, but a new sentence requires that an amended complaint "must be served upon the parties in the same manner as the original motion and complaint." Section (d) ("time limits") was modestly restyled.

Section (e) ("transfer investigation") now includes a reference to the pertinent statute, A.R.S. § 8-327. Current section (E) requires the probation officer to provide a copy of the transfer investigation to the parties "not less than 5 days before the transfer hearing." To permit counsel a full week to prepare for the hearing, draft section (e) specifies "at least 7 calendar days" before the hearing. Draft subpart (e)(1) is titled "evaluation of juvenile." The current rule requires an expert to submit a report "within 10 working days of completion of the examination." This can be problematic if the expert completes the exam shortly before the hearing. Accordingly, the revised rule requires the expert to submit a report "at least 7 calendar days before the transfer hearing." The revised subpart also requires the juvenile's counsel to "provide" an edited version of the report to the prosecutor rather than "make [it] available," as the current provision provides. Draft subpart (e)(2) ("incompetence") contains a reference to A.R.S. § 8-291 et seq.

Section (F) of the current rule says, "a transfer hearing shall be conducted only by a judge, except as provided in Ariz. R. Sup. Ct. 91(f)." The intent of the reference to Rule 91(f) was unclear and the reference was deleted. Members also noted that transfer

hearings are frequently conducted by commissioners serving as judges pro tempore. Members considered adding a reference to pro tems in section (f) ("transfer hearing"), but another member noted that Rule 2 already defines "judicial officer" as including a commissioner or pro tem. Accordingly, members changed the reference to "judge "in section (f) to "judicial officer." The time limit for the transfer hearing in current section (F)(1) ("time limits") is variable. To establish a single transfer hearing time limit in subpart (f)(1) ("time limits"), members agreed that the hearing must be held no later than 30 days after the filing of a motion to transfer. Subpart (e)(3) ("probable cause determination"), subpart (B) ("evidence") was restated and it is now identical to Criminal Rule 5.3(b) ("unlawfully obtained evidence"). If the court does not find probable cause, current subpart (F)(2)(d) requires the court to "dismiss the complaint," and members used the same phrase in draft subpart (f)((3)(D). However, if the court determines that transfer is not appropriate, current subpart (F)(5)) requires the court to "dismiss the motion." Members thought this phrase was inapt and changed it to "deny the motion." In the same subpart, the running of the time limit was changed from entry of the order of dismissal to entry of the order denying the motion.

Members had no additional comments or questions and approved Rule 34.

[12.28.20] Rule 35 ("post transfer"). Mr. Cardy presented this rule, which specifies procedures after a judicial officer has decided to transfer the proceeding under Rule 34. Like Rule 34, Rule 35 uses the term "criminal division of the superior court" rather than "adult court," which is used in current Rule 35. Unlike the current rule, the restyled rule includes section and subpart titles. In section (a) ("court actions"), the workgroup organized the subparts in a more logical and sequential order and clarified or restyled the language in several subparts. In subpart (a)(2) ("amendments"), the workgroup declined to include the words "formal or" in the phrase "formal or technical defects" because the meaning of "formal" was not clear. In section (b) ("time limits"), the workgroup clarified the application of Criminal Rule 8.2, which is unclear in the current rule. A member asked whether subpart (a)(3)(B) should mention the indigency determination before the appointment of counsel, but after discussion, members agreed that the workgroup's phrasing was appropriate.

<u>Workgroup 3</u>

[11.08.2019] Rule 36 ("scope of rules"). Current Rule 36 is a standalone subpart of the dependency, guardianship, and termination rules in Part III. The workgroup eliminated this unnecessary subdivision and instead made Rule 36 the first rule in a larger subpart on "general provisions." Draft Rule 36 separates the substance of current Rule 36 into two sections, section (a) on "application" and section (b) on "interpretation." The workgroup added "in-home intervention" and "extended foster care" to the content of section (a). In section (b), the workgroup considered deleting the phrase, "and gives paramount consideration to the child's health and safety." However, because the provision omits any reference to parental rights, and especially after hearing the discussion earlier today concerning Rule 1, the workgroup would like to revisit this rule and bring it back to the Task Force at another meeting.

[12.13.19] Rule 36 ("scope of rules"). At the November 8 meeting, Task Force members raised concerns that the draft of Rule 36(b) ("interpretation") omitted any mention of parental rights. Accordingly, the workgroup today proposed modifying the phrase "protect the child's best interests" in the previous draft to "protects the rights of the parties and the child's best interests…." The new draft still includes the phrase, "gives paramount consideration to the child's health and safety." Some members believed that the latter phrase subordinated parents' statutory rights. However, most members concluded that parental rights yield to the court's responsibility to protect children's health and safety, and further observed that during the past several years, similar language in the current rule has not been problematic. Members then approved the workgroup draft without further changes.

Members discussed two related matters. First, although statutes refer to both "best interest" and "best interests," they agreed that the rules should refer to "best interests" as a plural noun. Second, they discussed adding a new Rule 36(c) that would incorporate in Part III of the Juvenile Rules all the Civil Rules, unless specific civil rules were excluded. Workgroup 1's draft Rule 3 only applies civil rules that are specifically incorporated by reference. Proposed Rule 36(c) would have the benefit of making a broader spectrum of Civil Rules applicable in Part III juvenile proceedings, for example, rules for withdrawal or substitution of counsel (Civil Rule 5.3), judgment as a matter of law, and relief from a judgment or order (Civil Rule 60). Workgroup 3 will discuss further the options of adding a new Rule 36(c) versus amending draft Rule 3.

[11.08.2019] Rule 37 ("meaning of terms"). Judge Quigley explained that the workgroup expanded the definition of "participant" to encompass multiple placements and multiple tribes, but the workgroup will need to improve upon the awkward phrase "or more than one of the foregoing." Members agreed with the workgroup's decision to retain the first six "definitions under ICWA" in section (c) ("parent," Indian child," "Indian child's tribe," "Indian custodian," "Indian tribe," and "extended family member") and to relocate the seventh definition ("foster care or pre-adoptive placement preferences") because it is more substantive and is not merely a defined term. Because

subpart (c)(7) was in the draft, staff initially titled Rule 37 "meaning of terms," but in anticipation of its relocation, members agreed to change the title of Rule 37 to "definitions." During a broader discussion of ICWA, members asked the workgroup to consider adding to Rules 40 ("appointment of guardian ad litem"), 40.1 ("duties and responsibilities of appointed counsel and guardians ad litem"), or 40.2 ("duties and responsibilities of appointed counsel for parental representation") a duty to have knowledge of ICWA.

[12.13.19] Rule 37 ("definitions"). Judge Quigley reported that the workgroup revised section (b), a definition of "participant," and noted that a statutory reference in the draft should be removed. She reaffirmed the workgroup's decision to relocate a provision on placement preferences in Rule 37(c) because it is an ICWA standard rather than a defined term. One member proposed a new standalone rule that would include all the ICWA provisions, but another member requested that the Task Force study the proposal further before making this determination. Mr. Withey preferred that ICWA references be in the rules where the standards would apply, because stakeholders will more likely notice standards when they are embodied in the related rule. The Chair advised that the Task Force would consider a standalone rule concept only after it has reviewed more rules. But the Task Force otherwise approved the definitions in Rule 37.

[09.25.20] Rules 37 ("meaning of terms"), 38 ("assignment and appointment of an attorney; advisory attorney"), 40 ("appointment of a guardian ad litem"), and 40.1 ("duties of an appointed attorney and guardian ad litem"). [Note: See also Rules 38, 40, and 40.1 below.] Mr. Owsley, who is a member of Workgroup 4, has worked with Mr. Gilmore and other Workgroup 3 members in trying to clarify a recurring issue regarding the appointment of attorneys and GALs for children in dependency proceedings. Mr. Owsley now proposes modifications to these four rules, each of which was previously conditionally approved by the Task Force members pending further review. The proposed rule modifications are highlighted in today's meeting materials.

Mr. Owsley acknowledged that Arizona statutes are not clear on the nature of appointments for children in dependency and termination cases, and accordingly, county practices can vary. Most notably, Maricopa County initially appoints a GAL for the subject child in these cases, whereas Pima County initially appoints an attorney for the child. Mr. Owsley acknowledged that both of these practices are probably permissible. However, his proposal, which is based on the Pima model, would require the court to initially appoint an attorney for the child in every case, with discretion to subsequently appoint a GAL. Referring to the law review articles, Mr. Owsley added that this is not a new concept, but rather it has been the practice in other jurisdictions for years. A model act proposed by the American Bar Association a decade ago requires the court to appoint an attorney for a child in every dependency case. Mr. Owsley then began his review of his proposed rule modifications, beginning with Rule 37.

Rule 37. In Rule 37, Mr. Owsley would add new definitions of "child's attorney" and "guardian ad litem." A member noted that the proposed definition of "child's attorney" refers to "an attorney who provides legal services," which Mr. Owsley said derives from the model act, but members preferred "provides legal representation," and members agreed to make that change. An Oxford comma was added in the definition after the word "confidentiality." A member asked whether the role of a "best interests attorney" for a child, which is included in the Family Law Rules, would be included in the proposed modifications; Mr. Owsley responded that it would not. Although the definition of GAL expressly provides that the appointed person is an attorney, after discussion, members agreed to include text in this provision that says the GAL "is not bound by the client's expressed preferences or the attorney-client privilege." Judge Armstrong then noted that Rule 2 also defines GAL, a definition that applies to adults as well as minors, and in the Rule 2 definition, "best" appears before the word "interests," but "best" was not added to the definition in Rule 37 at this point in the discussion.

Rule 38. The proposed changes to this rule are in section (c) ("appointment of an attorney for a child"). Mr. Owsley noted that a proposed provision regarding the appointment of a GAL for a child is now in Rule 40, which he will address next, and the provision for appointment of a GAL was accordingly deleted in Rule 38. The proposed changes to Rule 38(c) are as follows:

> Children in dependency and termination cases are presumed indigent and are entitled to a court-appointed attorney ~~or guardian ad litem, or both~~. ~~In determining which court appointments to make for the child, the court should first consider whether the child can communicate a position to an attorney because of the child's age, mental health, or intellectual functioning.~~ The appointment of a child's attorney should be made as soon as practicable to ensure effective representation of the child and, in any event, before the first court hearing.

Mr. Owsley noted that the prior version gave the court discretion to appoint either an attorney or a GAL or both, while his version would require the appointment of an attorney as soon as practicable.

Judge Kreamer then expressed his three primary reasons for opposing the proposed changes to Rule 38(c). First, he believes the proposed changes conflict with A.R.S. § 8-221(I), which provides that in all dependency petitions containing an allegation of abuse or neglect (which is virtually every petition) that "the court shall appoint a guardian ad litem to protect the juvenile's best interests. This guardian may be an attorney or a court appointed special advocate." Second, even when the court appoints an attorney for a child, in many cases—and especially in cases involving infants and toddlers—the child's attorney by necessity performs the function of a GAL. The child needs an attorney only as the child becomes older and is better able to express preferences. Third, the GAL's input to the court is beneficial not only to the child, but also

to the court, which relies on the GAL's input. Judge Kreamer noted that while the law review articles discuss the need for a child's voice to be heard in court, a two-year old has no articulable voice; the child benefits more from having a GAL. He believes that while neither Maricopa nor Pima's method is ideal, he prefers retaining the Task Force's former draft of Rule 38.

Mr. Gilmore, the proposal's co-author, then spoke. Mr. Gilmore believes Pima's system of appointing attorneys has worked well, and he added that when necessary, the court can also appoint a CASA. Although Pima's system requires the appointment of an attorney for a very young child, Mr. Gilmore observed that Ethical Rule 1.14 ("client with diminished capacity") provides appropriate guidance in that situation. His experience has shown that it's preferable to first appoint an attorney for a child, and later, if needed, the court can appoint a GAL. He added that DCS often serves in the role of protecting the child's best interests, and that attorneys, who are not trained as social workers, might not be the most effective best interests advocates, especially if they lack experience in juvenile matters. Mr. Owsley then noted that A.R.S. § 8-221(I) was initially enacted to facilitate the State's access to federal funding, but other jurisdictions have adopted the attorney appointment model without jeopardizing that funding.

<u>Rule 40.</u> Mr. Owsley advised that modified Rule 40 provides the court discretion to appoint a GAL. While recognizing that A.R.S. § 8-221(I) should be amended, he also proposed modifications to A.R.S. § 8-221(A), which says in part that "in all proceedings involving offenses, dependency or termination of parent rights…that may result in detention, a juvenile has the right to be represented by counsel." He suggested deleting the words "that may result in detention" because those words have no application to dependency proceedings. In response to Judge Kreamer's comment that a GAL can be a better advocate for the interests of a child of tender years, Mr. Owsley observed that the model act and ER 1.14 allow the attorney to use "substituted judgment." He believes that an attorney who uses substituted judgment to represent a young child can be just as effective as a GAL. During the discussion of Rule 40, Judge Armstrong reiterated his belief that the word "best" should appear before "interests" in the definition of GAL in Rule 37, and Mr. Owsley then agreed with that proposed change.

<u>Rule 40.1.</u> Mr. Owsley substantially reorganized proposed Rule 40.1(a) ("explain the role") by adding two subparts. Subpart (1) includes a lengthy description of the attorney's duties, and it includes references to ER 1.14 and "substituted judgment." Most significantly, Mr. Owsley explained that the rule places the responsibility on the child's attorney, rather than on the court, of making a diminished capacity determination. He believes that the child's counsel, not the court, is in the best position to make that determination. He highlighted certain language in subpart (1), particularly the words "when a child client has diminished capacity, the child's attorney shall make a good faith effort to determine the child's needs and wishes." He said that this language was derived from the model act. The last sentence of this subpart requires the attorney to advise the court of the determination of capacity, so that the court knows whether the attorney is

using substituted judgment or advocating for the child's wishes. Subpart (2), which is a single sentence, requires the GAL to "assist the court in determining what is in the child's best interest and is not bound by the client's expressed preferences."

In making the capacity determination, Rule 40.1 requires counsel to contemplate whether the child is capable of making "an adequately considered decision." One member criticized this language and questioned whether there can be an objective basis for an attorney to make the determination. Mr. Owsley replied that this language is taken from the model act and includes the child's ability to thoughtfully communicate. The member would prefer that the text refer to the child's ability to vocalize his or her wishes, but Mr. Owsley replied that a developmentally disabled child might be able to vocalize but still have diminished decision-making capacity. A judge member added that a five-year old's communications alone doesn't rise to the level of considered decision-making. One member reminded the Editorial Group that if these provisions go forward, it will need to make them gender neutral (e.g., Rule 40.1(a)(1) refers to "his or her"). Another member expressed concerns with the application of these rules to guardianship proceedings (see further A.R.S. § 8-872(D), which refers to the appointment of an attorney for a child when a GAL has not been appointed), but no changes followed the discussion of this point. And another member asked whether proposed Rule 38(c), which refers to the appointment of an attorney in a dependency or termination case, should also refer to guardianship proceedings, but (1) A.R.S. § 8-872(D) addresses this, and (2) a dependency proceeding precedes a Title 8 guardianship, and the court's appointments in the dependency should remain effective during the guardianship.

The Chair then asked Mr. Owsley and Judge Kreamer to summarize their positions. Mr. Owsley emphasized that every child should have a court-appointed attorney at the very beginning of a case in which the child is the primary subject. He noted that although the court sometimes appoints a GAL at the start of a case involving a young child with the expectation that the court will appoint an attorney as the child ages, this rarely happens in practice. He added that the attorney rather than the court is in the best position to determine whether the child has diminished capacity and whether it is necessary for the attorney to exercise substituted judgment. He concluded that this change is consistent with the ethical rules and represents a good compromise. Judge Kreamer responded that this was not a compromise but was instead a substantial change, because Maricopa would no longer be able to continue its practice of appointing a GAL at the inception of a case rather than a lawyer. Not only will the court lose the benefit of information that a GAL could provide, but the child will lose a person who will advocate for the child's best interests. He concluded by saying that substituted judgment is another way of advocating for the child's best interests, and it would align the title of the appointment more closely with that function by allowing the court to appoint a GAL for the child rather than an attorney.

<u>Straw vote:</u> The Chair then called for a straw vote on the issue. An aye vote would support Mr. Owsley's proposed rule modifications, and a no vote would not and

would instead retain the previous draft, particularly without the proposed strikethrough in Rule 38(c). The vote was 9 aye and 7 no. Note that 3 members who were present during the vote took no position, and 3 members who were present at the start of the meeting were absent when the vote occurred.

The Chair said that the Task Force's rule petition would note this division and explain the reasons for its recommendation. The rule petition will be opened for public comments, and the Task Force should anticipate feedback on this issue.

[11.20.20] Rule 37 ("definitions"). Judge Quigley presented this rule. Although members approved Rule 37 at a previous meeting, it was on today's agenda because the workgroup added a new and significant definition. The definition says, "'Parent,' as used in Part III, and in addition to the definition in Rule 2, includes a guardian appointed by the court under Title 8 or Title 14 and an Indian custodian." The intent of the definition is to avoid saying "parent, guardian, or Indian custodian" multiple times in the Part III rules, and to simply say "parent" as a reference to all three.

Professor Atwood raised an issue about the definition of "Indian child" in this rule that the members had approved earlier. The second sentence of the definition said, "The findings and elevated burden of proof required by the Indian Child Welfare Act shall not apply until the court finds that the child is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of the Indian tribe." She believed this definition was not accurately aligned with the requirements of 25 C.F.R. § 23.107. After further discussion members agreed, and they substituted this sentence: "If there is reason to know that the child is an Indian child, the court must treat the child as an Indian child unless and until it is determined on the record that the child does not meet the definition of an Indian child pursuant to 25 C.F.R. § 23.107."

[11.08.2019] Rule 38 ("assignment and appointment of an attorney"). Like the other workgroups, Workgroup 3 utilized "attorney" rather than "counsel." Members agreed that the process of assigning attorneys in dependency cases before their appointment was effective, but the workgroup might relocate draft subpart (a)(3), which describes limitations on the role of an assigned attorney. The workgroup will also determine the appropriate statutory reference in section (b) ("appointment of an attorney"), and whether it's necessary or helpful to include the reference in this rule.

[01.24.20] Rule 38 ("assignment and appointment of an attorney; advisory attorney"). [Note: This rule is also discussed in the 09.25.20 entry for Rule 37 above.] Judge Quigley initially presented this rule at the November 8 meeting, and today she presented modifications to the previous draft. The title of section (b) (formerly, "appointment of an attorney") was revised (now, "appointment of an attorney for parent or guardian") to reflect its more focused content. A newly added section (c) ("appointment of an attorney or guardian ad litem for a child") states, "children in dependency cases are presumed indigent and are entitled to a court-appointed attorney

or a guardian ad litem, or both." A new section (e) ("advisory attorney") says, "if authorized by a county, an attorney who is neither assigned nor appointed may provide legal advice to a parent or guardian before a petition is filed." Judge Quigley explained that an advisory attorney is useful for facilitating resolutions when parents seek pre-petition advice. A member requested that this provision say "assigned" rather than "neither assigned nor appointed" to assure that the county pays for these services. Members agreed with the request. Another member requested that in section (a), the phrase "representation by law or by ICWA" conclude with a period after "law" because ICWA is law. Members accordingly changed the provision to say, "by law, including ICWA." Members approved Rule 38 as modified.

[06.12.20] Rule 38 ("assignment and appointment of an attorney; advisory attorney"). Although the Task Force approved Rule 38 at its January 24, 2020 meeting, Ms. Rosenberg informed members that Workgroup 3 added another sentence to section (c) ("appointment of an attorney or guardian ad litem for a child") during a subsequent discussion of the rule. Rule 38(c), as modified by the new, underlined sentence below, would provide:

> Children in dependency cases are presumed indigent and are entitled to a court-appointed attorney or a guardian ad litem, or both. The court must appoint an attorney for every child at the first hearing, but if the court has reason to believe that the child cannot communicate a position to an attorney because of the child's age, mental health, competency, or intellectual functioning, the court may instead appoint a guardian ad litem for the child.

Judge Kreamer expressed concern that this new sentence might inhibit Maricopa's practice of appointing an attorney for a child in every case. Staff noted the use of the word "instead" in this sentence rather than the word "also," which indicates the court would appoint one or the other rather than both. A member also noted that this provision might be incompatible with A.R.S. § 8-211(I), which provides in part, "In all juvenile court proceedings in which the dependency petition includes an allegation that the juvenile is abused or neglected, the court shall appoint a guardian ad litem to protect the juvenile's best interests." Members discussed a potential need for a legislative change to this statute. Another member added that the workgroup's proposed provision might conflict with the Arizona Code of Judicial Administration concerning the appointment of a CASA. Judge Kreamer renewed his concern that this provision might require a change in Maricopa's current practices, which function well. Judge Quigley noted that the new sentence would not affect Pima's practices for appointments, which differ from Maricopa's.

Members did not approve this modification at today's meeting. Rather, Judge Kreamer will obtain input from his bench on this provision and determine if a modified provision would be workable in Maricopa County, as well as counties statewide.

Members will also revisit the use of the term "competency," which is a criminal law concept that might be inappropriately used in a dependency rule.

[04.03.20] Rule 39 ("appearance, substitution and withdrawal; responsibility of parties"). Rule 39 is lengthy, and the Chair commended the workgroup's substantial effort in preparing its draft. Judge Quigley, who presented this rule, noted that the workgroup's draft incorporates several elements of Civil Rule 5.3 ("duties of counsel and parties"). Judge Quigley reviewed several draft provisions concerning withdrawal and substitution of counsel for a parent. She noted a separate provision that would allow an attorney for a child to withdraw or substitute only by court order. Draft section (g) ("responsibility to the court") contains provisions applicable to both attorneys and self-represented litigants. The Chair then invited members to comment on the draft.

A member reported instances where a private attorney has been hired for a limited purpose, such as appearing on behalf of a relative only for a placement proceeding. Does the draft rule accommodate these situations? Members discussed whether to address this circumstance with a prefatory phrase in the rule such as, "unless the attorney has appeared for a limited purpose," but a member observed that inserting a solitary phrase on limited appearances in Rule 39 without also adding a more detailed provision on limited scope representation, such as the one in Civil Rule 5.3(c), would not be helpful. After further discussion, members declined to include either the prefatory phrase or an analog to Civil Rule 5.3(c). (Supplemental note: See further Supreme Court Rule 42, ER 1.2(c).) Draft Rule 39(b)(3)(A) describes termination of the attorney's representation when the action is dismissed. A member inquired about the applicability of this provision to cases where a party had been dismissed but the action continued as to other parties. Members concluded that this circumstance would be covered by Rule 39(b)(3)(B), which provides for the entry of a court order terminating representation. Another member asked whether draft Rule 39 is sufficiently flexible to allow counsel to file a petition for review. Ms. Phillis responded that her office expects appointed appellate counsel to handle the matter until the appeal is resolved. A member also asked if the draft provision would allow a party to be self-represented on appeal following counsel's withdrawal, but after discussion, members did not believe that possibility required any further modifications to the draft.

A member suggested that the provisions of section (c) ("withdrawal") should require moving counsel to include, in addition to the client's physical address, the client's email address. Members agreed with the suggestion. Members then discussed the necessity of having two separate subparts in section (c): subpart (c)(2) concerning the lack of client consent where the client's location was unknown, and subpart (c)(3) concerning the lack of consent when the client's location was known. Members discussed addressing this issue by alternative phrasing or combining these subparts, and they modified the draft during the meeting; but the Chair requested the workgroup to further review these revised provisions to assure they are internally consistent and not contradictory. Another member raised an issue concerning subpart (c)(4), which addresses the withdrawal of an

attorney for a child. Although members agreed that this circumstance is unique because children cannot consent to their attorneys' withdrawal, they believed that the draft did not adequately clarify the distinction between the child's and parent's situations. After discussion, members agreed to add a new first sentence to subpart (c)(4) that says, "subparts (1), (2), and (3) do not apply to attorneys for children."

Members also discussed section (d) ("attorney substitution"), subpart (2) ("within the same firm or office"). The provision is modeled on Civil Rule 5.3(a)(2)(D), but it omitted an element in the Civil Rule, specifically, that a court order approving the substitution is not required. Members added the omitted verbiage. They also removed a reference in the draft to "association" because "association" did not seem applicable in juvenile proceedings. The modified draft requires the notice of substitution to include "the email address of the attorney substituting." Some large offices have a single, central email address for receiving communications from the court to assure that notices and minute entries are not overlooked, and in that instance the notice should include the central address rather than an attorney's individual address. Judge Kreamer noted that hearings might now be scheduled on short notice, so it's important that individual counsel promptly and directly receive court notices, but members made no further changes to the provision.

Draft section (e) ("withdrawal or substitution of counsel when matter set for trial") specified the content of a motion in these circumstances, but members agreed that the formatting of this section was confusing. They agreed to address this by relocating the "ethical grounds" and "good cause" alternatives from subsequent subparts to the main body of the section. A member noted that the word "trial," which is used in section (e), is not defined in the rules, although "proceeding" is defined; and Workgroup 1 should consider adding a definition of "trial" in Rule 2. Members had no questions or comments concerning section (f) ("duty of attorney after withdrawal or substitution"), which requires the former attorney to transfer the file and to provide client contact and other information to the new lawyer or to the newly self-represented client.

Workgroup 3 will review the members' suggestions noted above and return a revised Rule 39 to the Task Force at a future meeting.

[06.12.20] Rule 39 ("appearance, substitution, and withdrawal; responsibility of parties"). Judge Quigley advised that the workgroup reviewed comments made during the April 3 meeting about whether the withdrawal provisions in draft section (c) were internally consistent. The workgroup concluded that the provisions were consistent and appropriate, and they made no further revisions. However, concerning a provision in section (d) ("attorney substitution"), subpart (2) ("within the same firm or office"), the workgroup proposed replacing the previous draft provision with these sentences: "If a pending case is transferred within the same law firm or governmental office, the court must be notified of the new attorney of record, including any changes in the physical or email address. An order of substitution is not required." Members agreed with the replacement sentences and approved Rule 39 with this modification.

[01.24.20] Rule 40 ("appointment of a guardian ad litem"). [Note: This rule is also discussed in the 09.25.20 entry for Rule 37 above.] Mr. Gilmore presented this rule. Section (a) ("guardian ad litem for a child") provides that the court may appoint a GAL or a CASA to protect the bests interests of a child. Section (a) further provides that the GAL must be an attorney. One member asked whether this provision was consistent with A.R.S. § 8-221, which provides a child the right to counsel. Mr. Gilmore replied that Rule 40.1 allows the GAL to file pleadings, which implies that the GAL must be an attorney. Judge Young noted that allowing the court to appoint a CASA makes the provision compliant with the Child Abuse Prevention and Treatment Act ("CAPTA"). Members then added the words "or CASA" to the title of the rule. In the body of section (a), members added the words "or both" after the words "may appoint a guardian ad litem or a CASA," which clarifies that the court can appoint either a GAL or a CASA, or if the circumstances require, the court can appoint a GAL and a CASA. Judge Young noted the requirement that a GAL be an attorney is a topic on the January 30 agenda of the Committee on Juvenile Court.

The workgroup combined current sections (b) and (c), both of which lack titles, into a new section (b) with the title "guardian ad litem for parent, guardian, or Indian custodians." However, draft section (b) did not say that the GAL needed to be an attorney, although that was the members' intent. To address this, members added a new section (a) ("generally") that says, "a guardian ad litem appointed under this rule must be an attorney." The subsequent sections were renumbered (b) and (c), and the attorney requirement was deleted from the second section because section (a) applies to both.

Although section (c) now suggests that a GAL would protect another person's interests, a member would add to the draft a provision that the GAL's job is not necessarily to act in the person's (parent's) best interests, but rather, it is to advocate on the person's behalf. The member believes that the proper role of the GAL in these circumstances is to assist the person by ascertaining and communicating their wishes. Other members reported that they have seen parents' GALs advocate for termination of their parental rights, which might not serve parents' wishes or their best interests. Another member questioned whether section (c) is consistent with A.R.S. § 8-221 or provisions of the Arizona Code of Judicial Administration ("ACJA"). Should Rule 40(c) clarify the GAL's role and authority? Judge Quigley informed members that Judge Jay Polk had recently raised an issue at a State Bar committee meeting concerning the process for appointing a GAL under the civil rules; he had proposed the appointment of a special investigator, rather than a GAL, to make a preliminary determination of incapacity. Should the Task Force consider a similar process for the juvenile rules? Judge Quigley advised that Workgroup 3 will study these issues further, and that it also might propose changes to the statute.

[02.28.20] ***Rule 40 ("appointment of a guardian ad litem").*** Judge Quigley presented this rule, which Workgroup 3 had previously presented to the Task Force. The

workgroup's most recent revisions removed references to the CASA because the CASA is covered by Rule 5. Members approved the revised draft. They will determine later whether Rule 5 should be relocated in Part III of the Juvenile Rules.

[01.24.20] Rule 40.1 ("duties and responsibilities of an appointed attorney and guardian ad litem for a child"). [Note: This rule is also discussed in the 09.25.20 entry for Rule 37 above.] Mr. Gilmore also presented Rule 40.1. Although he reviewed each section of the draft rule, he noted that the workgroup did not make many changes because another committee had recently drafted the current rule. However, for ease of use, staff added about a dozen titles to the currently untitled provisions of this rule. Mr. Gilmore noted that the workgroup also added a new sentence in section (a) ("explain the role") that says, "the attorney must represent the position of the child and the guardian ad litem must advocate for what is in the best interests of the child." Regarding section (c) ("participate in the proceeding"), member discussed whether a GAL could call or cross-examine witnesses; they agreed that GAL had that authority.

The workgroup's draft of section (d) ("meet with the child") allowed "trained support staff" to fulfill the responsibility of having "meaningful communication" with the child before every substantive hearing after the preliminary protective hearing. The provision does not expressly require face-to-face contact because the child might be out-of-state, and because some adolescent children reportedly prefer communications by text messaging or other electronic means. Although Rule 40.1 does not define "support staff," Ethical Rule 5.2 does. After further discussion, members agreed to delete "trained support staff" from section (d) because the subject is addressed in section (h) ("use support staff"). Moreover, members agreed to retain a sentence in section (d) that provides, "upon a showing of extraordinary circumstances, a judge may modify the requirements of this section regarding a particular substantive hearing." In section (e) ("observe placements"), Mr. Gilmore noted that the workgroup clarified the requirement by including the words "if practical and appropriate." A subsequent provision that requires the attorney and GAL to "identify conflicts of interest" was deleted because that requirement is addressed in the Ethical Rules. The workgroup recommended retaining a portion of the current comment; Judge Armstrong then recommended changing the title from "comment" to "comment to the 2022 amendment." After agreeing to these recommendations, members approved Rule 40.1 as modified.

[01.24.20] Rule 40.2 ("duties and responsibilities of attorneys and guardians ad litem who represent parents, guardians, and Indian custodians"). Judge Young presented Rule 40.2. She initially noted that the workgroup modified the current title to inform readers that the rule applied to GALs as well as attorneys, and to those who represent guardians and Indian custodians as well as parents. Like restyled Rule 40.1, restyled Rule 40.2 includes section titles. Current section (A), which is untitled, but which concerns ethical conflicts, was deleted for the same reason a corresponding provision in Rule 40.1 was removed—that the identification of conflicts is addressed in the Ethical Rules. A new section (a) ("meaning of parent") defines a "parent" for purposes of this

rule to include a parent, a court-appointed guardian, and an Indian custodian, which avoids the need to repeat this trilogy throughout the rule. A provision concerning communicating with the parent, which is in current section (F), was relocated as section (b) ("communicate with the parent") to give it primacy and to emphasize its importance. The workgroup modified section (c) ("explain the role"), which corresponds to current section (B); and Task Force members further modified the provision for consistency with revisions to Rule 40. As revised, it says, "an attorney must explain to a parent the attorney's role and the ethical obligations associated with that role."

Section (e) is titled "participate in proceedings," and contains provisions concerning both attorneys and GALs. Members agreed that it would be appropriate to separate the respective responsibilities of attorneys and GALs that are detailed in this rule. Accordingly, references in section (e) to the GAL will be deleted, the title of Rule 40.2 will be modified by removing a reference to the GAL, and a new rule (possibly numbered 40.3) will detail the GAL's duties. Members further agreed that because there are lengthy but similar provisions in Rules 40.1 and 40.2 concerning continuing education, and to avoid duplication, those provisions will be removed from these rules and combined in a new rule. Members also agreed to delete the proposed comment to Rule 40.2 and to incorporate its substance in the body of the rule, including a statement that Rule 40.2 applies to retained as well as court-appointed attorneys.

[04.03.20] Rule 40.2 ("duties and responsibilities of attorneys who represent parents, guardians, and Indian custodians") and Rule 40.4 ("education requirements for a court-appointed attorney or guardian ad litem"). Mr. Truman presented these rules. He noted that Rule 40.2 was on the agenda only to show that the education requirements in the previous draft of that rule had been deleted and relocated in new Rule 40.4.

Various sections of Rule 40.4 repetitively refer to "an attorney and guardian ad litem." Members agreed that there should be language in section (a) ("scope") to advise that "as used in this rule, the term attorney includes a guardian ad litem," and they asked the editorial group to include this revision. Section (c) addresses "initial training," and section (d) covers "later training." In section (d), members agreed to delete as unnecessary the word "subsequent" in the introductory phrase "each subsequent year." But does "year" refer to a calendar year? Section (e) ("affidavit of completion") directs attorneys to file the annual affidavit concurrently with the affidavit required by Supreme Court Rule 45, so members agreed that the rule sufficiently explains the meaning of "year." Section (d) ("later training") said that "continuing education should include topics such as…," but members changed "should" to "may." Mr. Truman reviewed the revised list of topics, which merges what were formerly separate lists for parents' attorneys and children's counsel. Members had no further comments or suggested changes, and they approved Rule 40.4 with the above-mentioned modifications.

[02.28.20] Rule 40.3 ("duties and responsibilities of a guardian ad litem for a parent"). Mr. Gilmore presented this new rule and acknowledged Mr. Owsley's

assistance in preparing the draft. Mr. Gilmore reminded members that during a discussion of Rule 40.2 ("duties and responsibilities of attorneys and guardians ad litem who represent parents, guardians, and Indian custodians") at the January 24 Task Force meeting, members agreed "that it would be appropriate to separate the respective responsibilities of attorneys and GALs that are detailed in this rule." (See those meeting minutes at page 10.) The result is this new rule, which specifically applies to the appointment and the duties of a GAL for a parent.

Section (a) ("appointment") of this new rule requires the court to define the purpose and scope of the GAL's appointment, the GAL's role in contested proceedings, and the court's expectation of the GAL's role in the case. Mr. Gilmore noted that the workgroup added this last clause because judges have varied expectations about the GAL's role. Section (b) ("confer with the client") notes the absence of an attorney-client privilege in the GAL's relationship with the client. He added that the workgroup preferred the term "client" rather than "parent" because "client" includes a parent and a guardian. After discussion, members agreed that section (a) should initially refer to a "parent, guardian, or Indian custodian," and that subsequent references could say "client." Section (c) ("investigate the case") describes the primary duties of the GAL. Members agreed to change a provision in section (c) that said, "the GAL assists in determining appropriate services for the client" to "may assist" because that function might not be pertinent in some cases. Section (d) ("attend hearings") requires the GAL to report to the court on what is in the client's best interests. It allows the GAL with the court's permission to call and cross-examine witnesses. Section (d) also instructs that "the GAL's position must not be substituted for the client's position as advocated by the client's attorney." Members approved Rule 40.3 with the noted modifications.

[02.28.20] Rule 40.4 ("education requirements for a court-appointed attorney or guardian ad litem"). Mr. Truman presented Rule 40.4. The versions of Rules 40.1 and 40.2 presented at the January 24 meeting each included lengthy continuing education requirements. Members agreed that "to avoid duplication, those provisions will be removed from these rules and combined in a new rule [40.4]." (Minutes at page 10.) The workgroup's initial draft of this rule would have made its educational requirements applicable to court-appointed attorneys in delinquency proceedings, but members disfavored that change and it was deleted because there currently is no such requirement, and if there was one, the training subjects would be different from those identified in the draft rule.

Section (c) of the draft rule requires that attorneys and GALs have later training on topics "such as the following," and the rule then contains two long paragraphs that detail training topics. One paragraph includes topics for those representing children, and the other has topics for those representing parents and guardians. The first paragraph, subpart (d)(1), includes as a topic "the traumatic effects of parental domestic violence on a child." Some members wanted the "traumatic effects" topic to have a broader scope, such as the effect of dependency proceedings on a child, or the impact of an out-of-home

placement. After discussing several alternative ways to phrase this topic, including "the effects of out-of-home care on the health and welfare of a child," members agreed on "trauma-informed practice." Section (b) ("generally") includes a reference to laws concerning education and advocacy for children in schools, and a member asked to broaden this phrasing to include, for example, issues concerning dependent children who change schools and education for disabled dependent children. Members were mindful that the focus should be on abuse and neglect, and they cautioned against a long list of training subjects, which would inevitably omit some topics. They recommended concluding the paragraphs with language such as "other issues affecting children." Ultimately, members agreed that the topics in subparts (d)(1) and (d)(2) are largely duplicative, and the subjects in both subparts are generally applicable to anyone representing either children or parents. They accordingly returned the rule to Mr. Truman and the workgroup to consolidate these subparts.

Members agreed that lawyers in the Attorney General's office would not be subject to these requirements, because they are not court-appointed, they represent an agency rather than individuals, and that office provides in-house training. Members made grammatical corrections to the draft rule, and they agreed that as drafted, section (e) appropriately requires attorneys and GALs to provide their proofs of completion to the presiding judge or the judge's designee, rather than to file the proofs with the clerk.

[06.12.20] Rule 41 ("public attendance at hearings"). Ms. Rosenberg explained that because of the length of the current rule, members relocated some of its current provisions to new Rules 41.1 and 41.2, which are discussed below. Rule 41 required the workgroup to consider A.R.S. § 8-525 and other statutory provisions parenthetically noted at the beginning of the draft rule. Ms. Rosenberg noted that the purpose of these statutes on open hearings was to allow the media, as well as the public, to attend dependency hearings, while at the same time maintaining the confidential nature of the proceedings. (However, see A.R.S. § 8-537, which excludes the public from termination adjudication hearings.)

A.R.S. § 8-525(D) requires an admonition. The statute says, "At the beginning of a hearing that is open to the public, the court shall … (1) admonish all attendees…." Are attorneys and parties included within the phrase "all attendees?" If the hearing is closed to the public, the statute does not require the court to give the admonition. Because only the parties and their attorneys would be present at a closed hearing, then arguably the admonition should not apply to parties and their counsel when the hearing is open. Accordingly, Ms. Rosenberg asked if the word "public" should be included in draft Rule 41(f) ("admonition at public hearings"). Her proposed change is shown here in brackets: "At the beginning of a hearing that is open to the public, the court must admonish all [public] attendees as follows…." The ensuing discussion led members to draft Rule 41(a), which is new and includes a definition of "public." After concluding that participants are more akin to the public than to parties, members agreed to remove the word

"participant" from section (a)'s enumeration of who was not included within the meaning of "public." Section (a) as modified would therefore define "public" as "anyone who is not a party, an attorney, or a CASA." With that change in section (a), members agreed with the insertion of the word "public" in section (f) (that is, "the court must admonish all public attendees.") A member further observed that this qualification in the admonition is consistent with the fundamental right of parents to discuss their cases outside the courtroom, without being restricted by the admonition. Members approved Rule 41 as modified.

[06.12.20] Rule 41.1 ("child's rights"). Judge Quigley reiterated that the substance of this new rule was imported from provisions in current Rule 41. New Rule 41.1 includes a requirement that at any hearing after the initial hearing, if the child is not present, the court must inquire whether the child requested to attend the hearing. A member suggested that the provision clarify who the judge should direct this inquiry to, but the majority believed the court did not require that direction. Another member asked what would happen in cases involving infants, but others agreed that the court can make appropriate determinations in those situations without the need for additional specificity in the rule. Members accordingly approved Rule 41.1 as presented.

[06.12.20] Rule 41.2 ("participants' rights"). Judge Quigley again observed that the substance of this new rule is derived from current Rule 41. However, members discussed a provision in draft Rule 41.1(a) ("right to notice") that requires the DCS to give notice to participants in cases where the DCS is a party. A.R.S. § 8-847, as well as current Rule 41, require the court to give notice, although in practice, the DCS provides notice and the draft rule conforms to that practice. A member noted that this practice is more effective because DCS often has better contact information for non-parties than the court. Another member observed that the purpose of notice is best fulfilled if the court gives notice as required by statute, and the DCS also gives notice as required by rule. Another suggested that the court can discharge its duty to give notice by requiring a party, i.e., DCS, to do so. Ms. Jorquez requested an opportunity to bring this issue to her DCS colleagues, and members deferred their approval of this rule pending her discussion.

A recurring issue in this and other rules is whether to refer to court events as "hearings" or "proceedings." It appears that Title 8 statutes as well as the draft rules utilize both terms. The choice of which term to use can vary based on the context, and until determined otherwise, these draft rules will continue to use both terms.

[08.21.20] Rule 41.2 ("participant's rights"). Judge Quigley's previous presentation of this rule raised issues concerning the application of A.R.S. § 8-847. In response to those issues, the workgroup thereafter added to section (a) ("right to notice") a new subpart (3) that requires DCS, if it is a party, to give notice "for any periodic review hearings under A.R.S. § 8-847, [to] any placements where the child has resided for more than 10 days during the past 6 months." Members observed that this provision appears

to overlap with current Rule 58(B) ("review hearing/notice") and whatever the corresponding provision might be in the draft rules. Members also discussed the potential conflict between Rule 41.2, which requires DCS to provide notice, and the statute, which imposes that duty on the court. Although draft subpart 41.2(a)(3) is consistent with current Rule 40(I) ("attendance at hearings/notice in cases with regard to children in foster care"), a minority of members believed a rule that requires the DCS to give notice necessitates a statutory change. Another member contended that (a)(3) does not supplement the statute but rather supplants it. Judge Quigley noted that whereas Rule 41.2 and current Rule 40(I) concern a DCS duty to provide notice, Rule 58 concerns the court's duty to do so, and both provisions in tandem promote the judiciary's interest in providing actual notice of these proceedings to interested participants. Other members observed that DCS would have better knowledge than the court about the names and addresses of potential adoptive placements, which supports a rule that imposes this duty on DCS.

After further discussion, members agreed to the following changes. In subpart (a)(2), the words "any relative" were moved to follow rather than precede pre-adoptive placement (i.e., "pre-adoptive placement or any relative"). In section (e) ("review hearings"), the word "supplement" was replaced by the words "does not limit" ("this rule does not limit ~~supplements~~ the notice requirements of A.R.S. § 8-847(B) regarding periodic review hearings.") The Chair added that the Task Force's rule petition should note the issue of who has a duty to provide notice, and the potential need for a legislative amendment if the Court adopts this draft rule.

At a later point in the meeting, a member asked whether Rule 41.2 should include a reference to ICWA, because periodic reviews might trigger ICWA notice provisions. The Chair directed Workgroup 3 to address this question and to propose the addition of an ICWA reference if the workgroup believes one is appropriate.

[12.18.20] Rule 41.2 ("participant's rights"). This rule was previously presented to the Task Force. Judge Quigley noted the workgroup thereafter added a requirement in section (a) ("right to notice"), subpart 4, saying that if DCS is a party, it must provide notice to "a participant Indian tribe that has not intervened or is not endorsed on the court's minutes entries." The workgroup also added a reference to 25 C.F.R. § 23.111. A tribe often will have intervened or been previously endorsed on a minute entry because DCS will generally know the tribe's identity and DCS would have been working with a tribal social worker. In lieu of providing a separate notice, this new provision's notice requirement will be satisfied if the tribe is endorsed on the minute entry. Judge Quigley also noted section (e) ("review hearings"), which provides that "this rule does not limit the notice requirements of A.R.S. § 8-847(B) regarding periodic review hearings." That statute requires the court to provide notice of periodic review hearings.

[04.03.20] Rule 42 ("telephonic testimony, video conferencing"). Judge Young presented this brief rule, which allows the court to permit a telephonic appearance or telephonic testimony "on the court's own initiative or on a party's motion." Although the draft rule lacks details, Judge Young observed that its brevity also allows judges flexibility in applying it. A member then observed that this rule has heightened importance because of the pandemic. Two judge members noted that they now are doing their best to set timely telephonic hearings in lieu of in-person appearances, and they are developing a "new normal" for the current and quickly changing court environment. One member would prefer that the rule contain additional content that safeguards the rights of parties in telephonic hearings. Another member had due process concerns that are inherent in a telephonic termination hearing. A member suggested that the rule include a provision that, if the court sets a telephonic hearing, a party seeking an in-person hearing could still move for one and have a fair opportunity to be heard on the motion; but the judges thought this would add even more motion hearings to their already congested calendars. Another member compared the provisions of draft Rule 42 to Family Law Rule 8; FLR 8 distinguishes evidentiary and non-evidentiary hearings and has more specificity about how to introduce documents during a telephonic hearing. The Chair suggested that members continue their conversation about telephonic hearings at future meetings as the pandemic evolves, and that meanwhile, the workgroup consider the provisions of FLR 8.

[08.21.20] Rule 42 (currently, "telephonic testimony, video conferencing," and as now proposed, "telephonic testimony, videoconferencing, declared emergencies"). Judge Quigley began her presentation of this draft rule by noting that it significantly expands the current rule on this subject, which is only two sentences. She also noted that today's draft rule was produced by an informal workgroup led by Maricopa Superior Court Judge Sara Agne; JRTF member Chris Phillis participated in the workgroup. At the start of Judge Quigley's presentation, a member proposed substituting the word "virtual" in the title of the rule and throughout its provisions. The member explained that technology changes occurring in the next few years might render the term "telephonic" archaic, and "virtual" is a more inclusive and farsighted term. Members agreed with the member's proposal, and with another suggestion to add the word "digital" to the definition in section (b), because digital more accurately describes a connection to online proceedings. Judge Quigley said that although draft Rule 42 was initially modeled on Family Law Rule 8, the changes noted above as well as the addition of section (f) ("evidentiary proceedings during declared emergencies") make draft Rule 42 significantly different from FLR 8.

Judge Quigley then reviewed each section of draft Rule 42. She emphasized the importance of due process determinations, a subject that first appears in section (a) and continues in other sections of the rule. Section (d) (now, "request to testify by a virtual appearance; evidentiary proceedings") includes a presumption in subpart (1) that "evidentiary hearings will be conducted in-person" unless section (f) applies. Subpart (d)(2) contains specified time limits in advance of a hearing for making a request for

virtual testimony. In section (e) ("introducing documents during virtual testimony"), members added the words "previously disclosed" before the word "exhibits" to clarify that a party who wants to introduce documents during virtual testimony must not only provide those documents before the hearing to opposing parties, but also must have previously disclosed the documents under the disclosure rule.

Section (f) addresses evidentiary proceedings during emergencies declared by the governor. The section includes a detailed process in subpart (f)(2) for making case-specific due process determinations. Among other things, that subpart requires the court to find that "each person will be audible and visible to every other person participating in the proceeding." Members posed questions during the ensuing discussion, such as the following. How can each person be visible if one or more persons appear by telephone only (such as an appearance by a prison inmate, who might only have telephonic access)? Does the judge need to recess the proceeding if the video function is lost during the hearing, even if the audio function is still operable? What if only one person loses the video connection, but is still able to hear and be heard? Members generally believed the hearing judge should address these issues on a case-by-case basis, and they made no changes to the draft. However, one member suggested adding a requirement that the court make a finding that the circumstances of the virtual proceeding "will not substantially prejudice any party." The Chair asked the workgroup to consider this suggestion and to give the issue further consideration. Finally, in subpart (f)(2)(E), members agreed to remove the words "in open court" ("the court must admonish witnesses and attendees ~~in open court~~ that the virtual evidentiary proceeding will proceed…") inasmuch as those words are unnecessary because there will be no witnesses or attendees in the courtroom during an emergency.

[09.25.20] Rule 42 (now, "virtual proceedings; declared emergencies"). Judge Quigley, who presented this rule, noted that Judge Agne joined the workgroup to discuss modifications proposed at the August 21 Task Force meeting. As recommended by the members on August 21, the word "virtual" rather than "telephonic" is used throughout the rule. The workgroup also made other non-substantive changes. For example, in section (b) ("meaning of virtual"), it changed "audio or video technology" to "audio or visual technology" in anticipation of future technological innovations. In section (d)(2) ("time"), it changed "objecting party" to "moving party." The workgroup also added a sentence in this section, as well as in section (f) ("evidentiary proceedings during declared emergencies") that says, "responses must be filed as provided by Rule 46 or as the court otherwise directs." In section (e) ("introducing documents during virtual testimony"), and in section (f), the workgroup changed "judicial officer to which the case has been assigned" to "assigned judicial officer." Section (f) now includes the words "if practicable" in the phrase "will be audible and, if practicable, visible to every other person…." In response to a question, Judge Quigley said that the rule would apply to termination proceedings as well as dependencies, but the court in both circumstances must make appropriate due process determinations. A presumption in section (d)

includes a presumption that evidentiary proceedings in non-emergency circumstances will be conducted in-person. She also clarified that section (f) is not triggered by a county or a court declaration; it instead requires a gubernatorial declaration, signifying a bona fide statewide emergency. There were no further questions and Rule 42 was approved.

[04.03.20] Rule 43 ("computing and extending time"). Judge Quigley presented this one-sentence rule. ("Unless these rules provide otherwise, time is computed, and may be extended, in accordance with Civil Rule 6.") Members had no comments or suggested changes, and they approved the rule as presented.

[***08.21.20] Rule 43.1 ("change of venue").*** Judge Quigley presented Rule 43.1, which has no analog in the current rules. She explained that this new rule is beneficial because the current rules lack a procedure for transferring the venue of a case, and transfers are occasionally done now without prior notice to the court in the receiving county, which is problematic. She then reviewed each section of the draft. In response to a question regarding section (b) ("factors"), Judge Quigley advised that "any other factor that promotes the interests of justice" could encompass an ICWA factor. Section (c) ("procedure in the sending county") requires the sending court to set a hearing on a change of venue, regardless of whether the motion is by a party, by the parties jointly, or by the court. Section (c) also requires the sending court to contact the receiving court before that hearing and obtain a conditional court date in the receiving county. The date is conditional on the sending court granting the motion to change venue. If the sending court grants the motion, it must advise parties at the hearing of the date and location of the first court proceeding in the receiving county. Section (d) ("procedure in the receiving county") requires that county, upon receipt of an order changing venue, to assign a new case number and, if necessary, appoint new counsel and endorse former counsel on its order or minute entry. Former counsel must share the client's file with new counsel and then withdraw from the case. Section (e) ("request pending hearing") provides the sending court options when a motion to transfer is made when an initial, adjudication, or publication hearing is pending.

Regarding section (c), a member from a rural county advised that the court will not set a court date on a transferred matter until it has assigned a new case number, and it won't assign a case number until it has received a transfer order. Given that procedure, the member questioned whether the process in section (c) is practical. Judge Quigley advised that a judicial assistant in the receiving county should simply reserve the date on the judge's calendar; the date would not need to be entered in that court's case management system until the receiving county is provided with the transfer order. Judge Young added that if the receiving county has multiple courthouse locations and judges, the sending county will know which judicial assistant in the receiving county to contact because juvenile judges statewide have collaborated on the preparation of a comprehensive contact list for transfer purposes. A transferred case might also be permanently reassigned after the first proceeding in the receiving county. Members made minor edits to the rule: in section (a), the words "Title 8" were added before the

word "guardianship," in section (d), the words "14 days of receipt" were changed to "14 days after receipt," and in other sections, lists in the subparts were formatted with semicolons rather than periods after each item. Members approved Rule 43.1 with these changes.

[04.03.20] Rule 44 ("disclosure and discovery"). Ms. Jorquez, who presented Rule 44, noted that the workgroup's goals were to streamline the current rule and reduce its redundancy. She then reviewed each section of the draft, and a discussion followed.

In section (a) ("generally"), a member questioned whether "or confidential" was appropriate in the requirement that a party disclose all relevant information "that is not privileged or confidential." Members agreed that some information, such as a medical report, might be confidential but is nonetheless subject to disclosure, and they deleted "or confidential." Section (c) concerns the content of the initial disclosure statement. Members believed the draft more closely described the content of a pretrial statement and that it omitted necessary substance contained in the current rule. Section (d) requires a party to provide supplemental disclosure "at least 30 days" before a contested hearing. Some members thought 30 days was inadequate; for example, if the supplement identifies an expert, can the opposing party obtain rebuttal evidence in that short window before the hearing? A member thought the supplemental disclosure requirement also should apply even when a pending hearing is uncontested. Another member noted that the draft omitted an ongoing duty of disclosure, which is in current Rule 44(B)(1).

Draft section (f) ("conclusion of discovery") contained a provision that parties may supplement their list of witnesses and exhibits "no later than 10 days" before the adjudication hearing. This provision might be inconsistent with the supplemental disclosure requirement in draft section (d). And although Workgroup 3 also proposed reducing the time in section (f) to 7 days, members opposed this provision, which would allow last-minute discovery and could be especially troublesome before a severance adjudication. In section (h) ("sanctions"), the workgroup acknowledged that some of the proposed language was flowery (e.g., "Any sanction…should generally be limited to the least possible power adequate to the end proposed...") and that was deleted during the meeting. Workgroup 3 acknowledged that it might not have included all its proposed changes in a SharePoint document, and it will present a revised version of Rule 44 at a future meeting.

[06.12.20] Rule 44 ("disclosure and discovery"). Ms. Jorquez' presentation of this rule addressed issues raised during the April 3 meeting. Since then, the workgroup substantially revised and improved the draft. The timing provisions are now more consistent, and the sections are in a more rational sequence. Ms. Jorquez noted that section (c) ("ongoing disclosure requirement") applies in both uncontested and contested proceedings, whereas section (d) concerns pretrial disclosure statements in contested cases only. The section (d) term "pretrial disclosure statements" was utilized to accommodate practices in different counties, some of which refer to "disclosure

statements" and others which called the identical filing a "pretrial statement." A Workgroup 4 member advised that her workgroup used the qualifier "relevant" in a corresponding rule regarding disclosure in adoption cases; and although section (a) ("generally") refers to a duty to disclose "relevant" information, "relevant" was added to section (c) before the word "document." Workgroup 3 modified the text in draft Rule 44(g) ("sanctions") and it is no longer flowery like the previous draft.

Members had divergent opinions regarding the timing requirement in section (f) ("disclosure in contested hearings other than adjudications"). Subpart (f)(2) would require, if a contested hearing does not require a report prepared by DCS, that the parties disclose all relevant information "at least 10 days prior to the hearing or as ordered by the court." Some members favored a 5-day limit and contended that this would facilitate the parties' compliance with the rule. Other members thought 10 days was more reasonable and noted that the provision would permit the court to "order otherwise" when circumstances warranted a shorter time. On a straw poll, 12 members supported 10 days, and 7 would use 5 days. The draft will therefore specify 10 days, but the Chair requested that the rule petition flag this issue for the Court. Members approved Rule 44 as modified.

[07.17.20] Rule 46 ("motions"). Mr. Gilmore presented Rule 46. There were no substantive changes in section (a) ("form"). In section (b) ("filing"), the workgroup considered but decided against adding a requirement that the moving party submit a notice of hearing with the motion. However, if there is no assigned judge, the proposed rule requires that the motion be provided to the presiding judge rather than the court administrator, which the current rule requires. Members discussed the time limits in section (c) ("response"), which is 10 days if the motion is served by mail and 5 days when served by other methods. Section (d) ("court ruling") permits the court to rule on a motion when the time for a response has expired or if no party objects, unless a rule or statute provides otherwise. The workgroup's draft of section (e) ("motion for summary judgment") contained modified times; the motion must be filed not less than 45 days before trial (rather than 30 days under the current rule), and a response must be filed within 20 days thereafter (the current rule does not specify a time.) This new timing should avoid the necessity of the court considering the motion on the day of, or immediately before, the trial. Members again discussed the matter of the availability of summary judgment in an adoption proceeding, with one member observing that at one time, no one filed summary judgment motions in dependency cases until they realized the rules did not preclude them from doing so. (The possibility of Rule 74 continuing to include a reference to Rule 46 will abide further discussion by Workgroup 4.) If summary judgment will dispose of an adjudication in a Part III proceeding, should the rule actively encourage parties to file them? After discussion of this question, Judge Young offered to submit proposed language that addresses the matter.

Section (f) ("motion to set aside a final order") led to a discussion of whether the provision should apply to any order, or only to a "final" order. An order under Rule 59 is not a final order, so adding the word "final" to section (f) excludes consideration of a ruling that might be amenable to a motion under this section. Members also discussed whether a motion to set aside a "final order" under section (f) would be considered a time-extending motion under Rule 104. Section (f) includes references to Rule 60, and a member observed that an order denying a motion to set aside under Rule 60 would be an appealable order under Rule 103(b), so the use of "final" would be appropriate. Members discussed bifurcating Rule 46, leaving sections (a) through (d) within the rule, but creating another rule, possibly numbered 46.2, for specific motions, such as motions for summary judgment or to set aside. Although members generally approved Rule 46 sections (a) though (d), these other issues will require further discussion by Workgroup 3.

[11.20.20] Rule 46 ("motions"). Mr. Gilmore presented Rule 46, the general rule on motions. The rule as previously presented at the July Task Force meeting consisted of sections (a) through (g). At that time, members had approved sections (a) ("form"), (b) ("filing"), (c) ("response"), and (d) ("court ruling"). Mr. Gilmore noted that sections (e), (f), and (g) were relocated to a new Rule 46.2, which is the next rule on today's agenda. Members made one change to Rule 46(a). The draft required the filing party to serve all other parties with a copy of the motion "by mail, hand delivery, fax, or by electronic means." Members changed that to "pursuant to Rule 8," which is a new and general rule on service. Members then approved Rule 46.

[11.20.20] Rule 46.2 ("motions to continue, for summary judgment, and to set aside a final order"). As noted previously, these three sections of Rule 46.2 derive from sections (e), (f), and (g) of the former draft of Rule 46, although these sections have now been sequenced in the order in which these motions are most likely filed. Members had no questions concerning section (a) ("motion to continue"). Mr. Gilmore noted that while section (b) ("motion for summary judgment") generally incorporates Civil Rule 56 by reference, it modifies the deadline for filing the motion (to no fewer than 45 days before the adjudication hearing, compared to 90 days before the trial date under Rule 56 and 30 days under current Rule 46(D)), and it shortens the time for responding to the motion (20 days, versus 30 days in the Civil Rule and not specified in current Rule 46(D).)

Section (c) ("motion to set aside a final order") was not by itself controversial, but the section led to a discussion about whether a Rule 46.2(c) motion that is filed within 12 days after entry of a final order should be a time-extending motion, as provided by draft Rule 104. One member observed that new Rule 46.1, which allows motions only to correct a clerical error or add omitted findings, is based on a sound rationale for extending the time for filing a notice of appeal. On the other hand, a Rule 46.2(c) motion could raise a multitude of grounds specified in Civil Rule 60 and therefore could be much broader in scope than a Rule 46.1 motion. The member suggested that even when a Rule 46.2(c) motion is filed within 12 days after entry of a final order, the time-extending feature of

Rule 104 could delay the filing of a notice of appeal in that case by as long as two or three months. The member contended that Rule 46.2(c) motions should not be time extending. Another member acknowledged that the time-extending feature will result in some delay in the trial court but believed that not extending time would ultimately result in even more delay. The reasoning was that the filing party in many instances would first be required to file a motion in the Court of Appeals requesting it to re-vest jurisdiction in the superior court. If the Court of Appeals grants that motion, jurisdiction would then be returned to the trial court for consideration of a Rule 46.2(c) motion that it otherwise could have considered without the extra time-consuming step of going to the Court of Appeals. Moreover, the time-extending feature only applies to Rule 46.2(c) motions that are filed within 12 days after entry of a final orders, and that should limit the number of these motions that trigger a Rule 104 extension of time. Members concluded the discussion by approving Rule 46.2 and without making any changes to Rule 104.

[11.20.20] Rule 46.3 ("judgment as a matter of law"). Judge Quigley presented this rule, which allows a party to move for judgment when the petitioner has not met the burden of proof. The proposed rule has no counterpart in the current juvenile rules; the closest analog is Civil Rule 50, but that rule applies only to jury trials. Judge Quigley reviewed each section of proposed Rule 46.3. Section (a) ("generally") has four subparts. Subpart (a)(1) permits a party to make the motion "on some or all of the grounds or allegations" at the conclusion of the petitioner's presentation of evidence. This subpart also clarifies that when used in this rule, "petitioner" is "the party who initiated a dependency, permanent guardianship, or termination action, either by petition or motion." Subpart (a)(2) requires the party moving for judgment as a matter of law to specifically identify the basis of the motion and supporting law and facts. When considering the motion, subpart (a)(3) requires the court to view the evidence and reasonable inferences in the light most favorable to the petitioner. Finally, subpart (a)(4) permits the court to grant the motion "only if the facts in support of the petition have so little probative value that no judge could reasonably find for the petitioner."

There might be instances where a party other than the petitioner would like to present evidence in support of the petition before the judge considers the motion, for example, when a child's and the petitioner's interests align, and the child would like to present evidence. Accordingly, section (b) ("required inquiry") requires the court, before granting a motion, to inquire if any party other than the petitioner wishes to present evidence in support of the petition, and if so, the court must allow the party to present evidence. Sections (c) ("dependency adjudication"), (d) ("termination adjudication"), and (e) ("guardianship adjudication") contain the standard for granting the motion in each of those respective proceedings. Section (d) contains a bifurcated standard, one for insufficient evidence on the alleged grounds for termination, and the other for insufficient evidence that termination would be in the child's best interests. Section (f) ("ICWA") permits a motion under this rule on whether the petitioner has presented sufficient evidence as required by federal law. The reference to the 25 C.F.R. is to the entirety of

that part, and not merely to a single section. Section (g) ("findings and orders") requires the court to make written findings when granting a motion under this rule in whole or in part.

Members had no suggested revisions or questions, and they approved Rule 46.3 as presented.

[06.12.20] Rule 47.1 ("mandatory judicial determinations"). Mr. Turner began his presentation of Rule 47.1 by noting how the draft reorganized the current sections of this rule. He also advised that some determinations specified in this rule are mandated by federal law, while others are required under Arizona law. He reviewed each section of the draft. Section (c) ("the court's first order") is commonly referred to as the "contrary to welfare order." Under section (e) ("the periodic review hearing," also known as a "report and review"), if the court has not previously made a "reasonable efforts" finding, it must do so within 60 days after removal. This is substantively the same as the current rule. During his presentation of section (h) ("12 months after removal and thereafter"), the words "be in writing" were added. Section (j) ("extended foster care finding") was added in 2019 following a legislative enactment, and this section includes a reference to the pertinent statute, A.R.S. § 8-521.02. Mr. Turner suggested adding to section (j) the words "in writing," and those two words were added after "court must determine."

Judge Kreamer inquired whether section (c) refers to an emergency order removing the child from the home, or the first order during a subsequent court hearing. In response, it was noted that subpart (c)(2) refers to an order entered "in a dependency proceeding," that is, after a dependency petition was filed. Because a dependency petition has not been filed when an emergency order is entered, there is not yet a "dependency proceeding." According, the reference in section (c) means the first court order in a pending dependency proceeding. Professor Atwood asked if Rule 47.1 should contain ICWA requirements. Mr. Turner replied that the requirements in the draft rule mirror federally mandates in any dependency proceeding, and that ICWA matters are addressed elsewhere. Finally, Judge Armstrong suggested a change in subpart (c)(2), from "60 days of the removal" to "60 days after the removal." After making that change, members approved Rule 47.1 as presented.

[04.03.20] Rule 47.2 ("minute entries"). Judge Quigley presented this rule, which also consists of a single sentence: "Except as the rules and requirements of juvenile appellate procedure may provide, an unsigned minute entry containing the court's findings or orders constitutes an order of the court." Members had no questions or comments regarding this provision, and they approved the draft rule as presented.

[09.25.20] Rule 47.3 ("court authorized removal"). Ms. Jorquez, who presented this rule, noted that Mr. Truman and Mr. Turner collaborated on the proposed revisions, and because the rule is relatively new, those revisions are stylistic rather than substantive. Section (a) of the draft ("generally") adds this new concluding sentence, which they

believe adds clarity and direction: "The court must then determine whether to authorize DCS to take temporary custody of a child." In section (b) ("burden of proof"), the word "current" was removed from the phrase "child's current home." The word "current" overlooks the possibility that the child might be in a location other than the "current home." For example, the child might be in a temporary shelter, living in a car, or even homeless. (See further A.R.S. § 8-821(B), which says, "…it is contrary to the child's welfare to remain in the home.") The word "why" was added in section (c) ("procedure") subpart 1 ("application") in the phrase "the particular reasons why each child is presently or imminently in danger…." The phrase "presently or imminently in danger" is used in current Rule 47.3(C)(1)(b), whereas A.R.S. § 8-821(B) uses the phrase "clearly necessary," but the draft rule tracks the current rule in this regard rather than the statute. Section (c) also includes organizational changes.

Section (d) ("findings and orders") includes a subpart on notice that refers to certain statutes, including A.R.S. § 8-807(L). The (L) designation was removed so that the entirety of the statute is applicable. Subpart (d)(4) of the current rule ("execution and duration") includes provisions regarding whether the child is or is not receiving inpatient care. This subpart was reorganized into new and separate subparts, one titled "duration of the order," which is generally applicable, and the other titled "inpatient care extension of order," when that circumstance is present. These subparts allow 10 days for execution of the order. A member asked why DCS should have 10 days to execute an order for a child who is not in-patient if the situation is a true emergency. After discussion, it appears that situations may occur where DCS cannot immediately locate the child, or that DCS attempts to work with the family over the ensuing days to alleviate circumstances that prompted it to obtain the order. In subpart (d)(4)(c), the words "temporary custody authorization order will expire after…" were replaced by the words, "a child shall not remain in temporary custody for more than…." In three places, Rule 47.3 referred to 25 CFR § 23.113; in each instance, members added to these references the underlying statute, ICWA section 1922. Members had no other suggested revisions and approved the rule with these modifications.

[08.21.20] Rule 48 ("petition, temporary orders and findings, notice of preliminary protective hearing, amended petition"). Judge Young, who presented this rule, noted at the outset that the workgroup removed the lengthy provisions on service in current Rule 48(D) and relocated those provisions to a new rule provisionally numbered 48X, discussed below. Draft Rule 48(a) ("form and content of a petition") uses the word "verification" rather than "oath" because A.R.S. § 8-841(C) refers to a verified petition. In section (b) ("temporary orders and findings"), the workgroup added the word "other" ("other findings required by law"). Section (c) ("setting a preliminary protective hearing") is new and derives from A.R.S. § 8-824(A). Members added to section (c) the second sentence of that statutory provision: "If clearly necessary to prevent abuse or neglect, to preserve the rights of a party or for other good cause shown, the court may grant one continuance that does not exceed 5 days."

Section (d) ("notice of the preliminary protective hearing") originated from current section (C) ("notice of hearing"). However, the opening clause of the section, which is currently "in addition to information required by law," now says, "in addition to information required by A.R.S. § 8-841(E), …." The draft also reorganizes the content of this section. Section (e) ("amended petition") is based on section (E) of the current rule, which permits the court to order an amendment "no less than thirty (30) days prior to trial unless good cause is shown." Members discussed a workgroup proposal about shortening this time to 20 days before trial. Members concluded that the shortened time would impair the other party's ability to adequately prepare for trial and could also adversely impact the time for submitting a pretrial statement. The time therefore continues to be 30 days. Members agreed to add a new sentence to this section that says, "leave to amend must be freely given when justice requires," a principle that is codified in Civil Rule 15(a). The last sentence of draft section (e) provides that "an amended petition must be served under Civil Rule 5(c)." This differs from the current rule, which requires service of amended petition under Civil Rule 5(c) only when a petition is "amended to add allegations against a parent not set forth in the original petition."

Members approved Rule 48 as modified.

[08.21.20] Rule 48X ("service of the dependency petition, temporary orders, and notice of hearing"). Judge Quigley, who presented Rule 48X, reminded members that this draft rule is based on current Rule 48(D) ("service of the petition"), but it is significantly restyled and reorganized. Although service is required as provided by the Civil Rules, in section (a) ("service under Civil Rules 4(f), 4.1, and 4.2") members added a new subpart (3) with the provisional title "no responsive pleading to the petition is required." As the title of section (a) indicates, this section now includes a reference to Civil Rile 4(f) ("accepting or waiving service; voluntary appearance").

Members discussed several issues arising under this rule. First, and unlike the Civil Rules on service, current Rule 48(D) and draft Rule 48X provide a new category of "service within Arizona but outside the county." These rules provide that in the county, a petition must be personally served, but outside the county yet within the state, it may be served by mailing or by a national courier service with a return receipt. Members discussed whether service anywhere in Arizona should be the same, regardless of the county of service, but they nevertheless agreed to leave this other method of service in the draft rule.

Members also had a lengthy discussion of section (b), which allows service of the case-initiating documents at a court proceeding. Anecdotally, service is frequently accomplished in that manner, and parents' counsel typically acquiesce in such service. Members revised the title of the section governing this method of service; it is now "completing service at a court proceeding." The provision provides that service is complete when the petition and temporary orders are provided to the parent, guardian, or Indian custodian at the preliminary protective conference or the preliminary protective hearing. If service is made outside the confines of a proceeding, for example, in the

hallway outside the courtroom or in a building lobby, the parties will then confirm on the record during the proceeding that service was completed, or counsel can accept service. If there is an issue regarding service, a party can raise it at the proceeding.

Section (f) ("service on an incarcerated person") is a new section that is derived from Family Law Rule 41(g) ("serving an incarcerated person"). The draft provision has a belt-and-suspenders requirement of service on an institutional official plus mailing the documents to the inmate. A member objected to allowing service in this manner because even with these requirements, the inmate might not receive actual notice and could be at risk of losing parental rights. This member would prefer that service on the inmate be accomplished by a process server, who the member said routinely serve process at jails and prisons. Members from at least three counties observed that when it appears from the pleadings that a parent is incarcerated, the court typically and promptly appoints counsel, who can then assure that the incarcerated client has knowledge of the proceeding. Accordingly, members made no change to section (f).

In draft section (h) ("service under ICWA"), members removed several words (i.e., "an Indian child ~~as defined by ICWA~~") because the draft rules already define an "Indian child." Section (h) permits service by registered or certified mail. Professor Atwood again noted that registered mail is required under Arizona statutes, but certified mail is also permitted under the Regulations, and she suggested that the statutes be amended to conform to the Regulations. Members agreed to retain the comment to this rule, which will have the title "comment to 2022 amendments." They also agreed to remove the first few words ("the committee concluded that") because it will be a Court comment rather than a committee comment. With these changes, members approved Rule 48X.

[12.18.20] Rule 48X ("service of the petition, temporary orders, and notice of hearing"). Mr. Truman reminded members that the Task Force previously approved this rule, but the Editorial Group subsequently revised it and returned it to Workgroup 3 for reconsideration. The meeting materials include the workgroup's further revisions. Mr. Truman noted that Rule 48X, which is derived from current Rule 48(D) ("service of petition"), applies only to service of the dependency petition and related documents. Rule 48X is a unique rule on service of documents because of the short interval between the filing of a dependency petition and the occurrence of a preliminary protective hearing. Accordingly, revised section (a) ("service or acceptance of service"), subpart 1, allows service to be completed when the documents are "provided to a parent at the preliminary protective conference or at the preliminary protective hearing." Mr. Truman believes this is the preferred method of service, although he added that this method ceases to be available after the preliminary protective hearing. Subpart (a)(2) is broader and provides that service is complete if the parent signs an acceptance of service "any time after the dependency petition is filed." If neither option provided by section (a) is utilized, the remaining sections of the draft rule include methods of service that are available under Civil Rules 4(f), 4.1, and 4.2. Section (h), which is not in the Civil Rules, provides for "service under ICWA." Although other sections of Rule 48X use the term

"parent" to refer to "parent, guardian, or Indian custodian," section (h) expressly refers to "parent or Indian custodian." Members agreed to retain the comment to this rule but made edits to the form of ICWA citations in the comment.

[08.21.20] Rule 48.1 ("in-home intervention"). Mr. Truman, who presented this rule, began by noting that although in-home interventions occur in some counties, they are relatively infrequent. He also said that the objectives of the workgroup's draft were to adhere to statutory provisions while also providing as much flexibility as possible for the court's application of those provisions.

In section (a) ("generally"), the workgroup added references to the criteria established in A.R.S. § 8-891 and subpart (b)(2) of this rule. Section (b) ("procedure") refers to Form 1A, but Mr. Truman acknowledged that the workgroup has not yet considered the content of that form. The current rule provides that if the parent does not agree to in-home intervention, the court may order "the appropriate party" to file an amended petition; the draft changed this to "the petitioner." The findings in subpart (b)(2) are required by statute. One member asked how the FFPSA will affect in-home intervention. This is a matter that will require the workgroup's further consideration and Ms. Jorquez will make additional inquiries. The workgroup modified the report requirement in subpart (b)(3) to accommodate filing the report sooner than the one-year deadline; a judge might request earlier reports. This subpart also provides a one-year period for completing in-home intervention, but the current rule does not specify when the year begins to run. The draft removes this ambiguity by providing that the period runs "from the date of the filing of the petition." Subpart (b)(4) ("non-compliance") of the current rule says that if removal is contested, the court "shall order" the filing of an amended petition; the draft rule provides that the court "may allow" the filing of an amended petition in that circumstance. This subpart also requires the court to set a dependency adjudication hearing; although neither the current provision nor this subpart specify a time for setting that hearing, members did not believe it was necessary to add a specified time. Approval of this rule will abide the follow-up described above.

[11.20.20] Rule 48.1 ("in-home intervention"). The August 21 meeting minutes say, "One member asked how the FFPSA will affect in-home intervention. This is a matter that will require the workgroup's further consideration and Ms. Jorquez will make additional inquiries." Mr. Truman and Ms. Jorquez advised members today that they have made that inquiry, which included consultation with the DCS Family First administrator. They concluded that no further changes to Rule 48.1 are necessary, and the rule is accordingly approved.

[07.17.20] Rule 49 ("preliminary protective conference"). This is the first rule that Workgroup 3 is presenting in Part III, Subpart 3 ("dependency"). Judge Quigley presented the rule and reviewed each section, beginning with the title of the rule. The title of the current rule is "pre-hearing conference," which does not specify what conference the rule concerns. The revised title is "preliminary protective conference."

Several of the edits to this draft rule were necessary to conform text to that title change. In section (d) ("procedure"), Judge Quigley added the words "parenting time" to conform to a statutory change and current terminology. The other workgroup edits to Rule 49 were primarily stylistic. Members discussed the use in section (d) of the word "must" in the phrase "must meet outside the presence of the judge," and after discussion, they declined to change that to "may." Section (e) ("use of statements") provides that statements made by parties and participants during the conference "are not protected and may be used in future proceedings." A member suggested that making those statements confidential would encourage candor during the conference, but other members disagreed and noted that this is an information-gathering process, and that to impose confidentiality would unreasonably interfere with the introduction of pertinent evidence at the preliminary protective hearing. Members had no other questions or comments and they approved the rule as presented.

[10.23.20] Rule 50 ("preliminary protective hearing"). Judge Quigley presented Rule 50, which Workgroup 3 had discussed at length.

In section (a) ("generally"), the workgroup added the word "physical" in the phrase "temporary physical custody of DCS," because a parent challenges physical custody at a preliminary protective hearing ("PP5"). Section (b) ("ICWA") is derived from section (a) of the current rule; it was separated into a freestanding section because it concerns a different subject than draft section (a). Judge Quigley then advised that the workgroup spent considerable time discussing and reorganizing the next three sections of the draft—sections (c) ("procedure"), (d) ("findings"), and (e) ("orders"). These three sections are derived from current sections (B) ("procedure") and (C) ("findings and orders"). The workgroup's draft improves on the current rule by providing a logical sequence for the PP5 proceeding. Judge Quigley noted that statutory requirements for the PP5 are spread throughout Title 8. Draft Rule 50 attempts to aggregate those requirements and include useful cross-references to pertinent statutes.

Section (c) lists the PP5 procedures. Section (c) contains 10 subparts; a few of these have further subparts. Judge Quigley reviewed all those subparts, some of which were modified or relocated during her presentation and the ensuing discussion. Judge Quigley noted that subpart (c)(2)(C), which concerns paternity, is currently in Rule 52(c)(5), but it has been relocated in Rule 50. Subpart (c)(2)(D), concerning reasonable efforts, is a new determination that is derived from A.R.S. § 8- 8-825(D), and the statute is referenced in this subpart. Subpart (c)(2)(E) was added. This subpart requires a probable cause determination ("that continued temporary physical custody is clearly necessary to prevent abuse or neglect pending the [dependency] hearing"). Although a parent may request a temporary custody hearing where that finding would be made, the requirement to find probable cause appears to apply to any PP5 proceeding, even when a parent does not request a temporary custody hearing. *See further* A.R.S. § 8- 8-824(F). Subpart (c)(2)(G), on whether the parent admits, denies, or doesn't contest the allegations, is not in current Rule 50(B), but it was added because it's required under A.R.S. § 8-824(I).

Judge Quigley raised the issue of whether the rule could state "parent" rather than "parent, guardian, or Indian custodian." See a further discussion of this issue under Rule 53 below. The workgroup also added a subpart about whether to close the proceeding, which is also a mandatory determination under the statute and the rule cited in that subpart. The workgroup had included this subpart further down in section (c), but a member suggested that the court needed to make this determination early in the proceeding and it was relocated toward the beginning of section (c) as subpart (c)(2)(B).

Subpart (c)(3) applies if DCS is the petitioner. The workgroup was not certain about the legal basis of these provisions, some which are not even included in the current rule. However, the workgroup added three statutory references in its draft of subpart (c)(3)(B) that provide a rational basis for these requirements. Subpart (c)(4), pertaining to an Indian child, now includes the language "if any party has reason to know." The words "at issue" in the phrase "child at issue" were stricken from this subpart. Subpart (c)(5) requires the court to "review any agreements reached at the preliminary protective conference." The word "stipulations" is redundant, and it was not included in the provision. A "paramount consideration to the health and safety of the child" in current Rule 50(b)(5) was not included in the corresponding draft subpart because the phrase is included in draft Rule 50(a) and it applies throughout the rule. Draft subpart (c)(6), which concerns the temporary custody hearing, includes references to the applicable statute and rule. Subpart (c)(8), concerning the right to be heard, was modified to include a relative identified as a possible placement. *See further* A.R.S. § 8- 8-824(e)(11) and (j)(2). Subpart (c)(9) contains a reference to Form 1, which Judge Quigley acknowledged might require modification. However, a reference to the form and applicable statutes in this subpart reduces the necessity of adding explanatory text in the rule itself.

The workgroup made a significant organizational change to Rule 50 by creating separate sections for findings, which are governed by section (d), and for orders, which are now addressed in section (e). The first finding in section (d) is new; subpart (d)(1) requires a finding that the court has jurisdiction over the subject matter and the persons before the court. Subpart (d)(2) requires a finding that an initial dependency hearing was held pursuant to Rule 52 for those parents who were present. (*Compare* A.R.S. § 8- 8-826 ("If a parent or guardian denies the allegations at the preliminary protective hearing the court may set the date for the dependency adjudication hearing as to that parent or guardian. An initial dependency hearing shall not be held as to that parent or guardian.") with current Rule 50(C)(2) ("Make findings and enter orders as required by Rule 52(d).") Subpart (d)(3) requires the court to find that a temporary custody hearing was held, if one had been requested. A separate subpart (d)(4) addresses the probable cause finding. Issues regarding the ICWA findings required by subparts (d)(5) and (d)(6) were not resolved at the Task Force meeting. Specific ICWA standards and findings apply, and Professor Atwood and others will confer with Workgroup 3 to properly phrase those required findings; they may also relocate these provisions. In subpart (d)(7), members separated findings that the parents were advised of and understood the consequences of

(A) failing to participate in reunification services, and (B) failing to attend future proceedings. Subpart (d)(8), which requires a finding about siblings who are not placed together, is not included in the current rule, but the requirement of such a finding is implied by § 8- 8-824(G). Subpart (d)(9) is a catchall finding ("other findings as appropriate and required by law").

Section (e), subpart (1) requires an order "returning the child to the parent, or if the child is not returned…, regarding placement pending the determination of the dependency petition, and visitation/parenting time, if any." This differs from any orders that are found in current section (C); however, the subpart is aligned with the requirements of the referenced statutes and Rule 51. Subparts (e)(2), (e)(3), and (e)(4), which respectively concern agreements, paternity, and siblings, are straightforward and related to the previous determinations and findings. Subpart (e)(5) concerns order for reunification services and includes two subparts whose application depends on whether the child is, or is not, in DCS custody. Subparts (e)(6) and (e)(7) concern ICWA, and these provisions, like the findings noted above, are subject to further revision or relocation. The workgroup will also consider whether "tribe" should be included in pertinent provisions of section (e). Subparts (e)(10) and (e)(11) concern the setting of future hearings; subpart (e)(10) includes statutory and rule references. Subpart (e)(12) is the catchall: "enter other orders as appropriate and required by law."

A new section (f) ("copies for the parties") requires the court at the conclusion of the PP5 hearing to provide the parties who appeared at the hearing with a written copy of the court's findings and orders. This provision is derived from current Rule 50(C).

Workgroup 3 will have further discussions of this rule as noted above and will present a revised draft at a future Task Force meeting.

[12.18.20] Rule 50 ("preliminary protective hearing"). Judge Quigley presented this rule at the October Task Force meeting, but members asked Judge Quigley to reconsider the ICWA provisions. Judge Quigley thereafter met with individuals having special ICWA expertise, including Professor Atwood, Mr. Withey, Ms. Preston, and Mr. Turner, particularly with regard to emergency proceedings under 25 C.F.R. § 23.113. Judge Quigley noted that draft Rule 50(b), now titled "ICWA," incorporates the federal emergency hearing requirement upon the child's removal, but Rule 50(b) also recognizes the overlap of federal and state requirements on this subject. Most notably, subpart (b)(2) provides that if there is reason to know the child is an Indian child and the child was removed from the physical custody of the parent or Indian custodian, the preliminary protective hearing must be held as an emergency hearing as provided by § 23.113, and the court must find, under subpart (b)(1)(A), whether the emergency removal was necessary to prevent imminent physical damage or harm to the child *unless those findings were made prior to the removal pursuant to Rule 47.3(D)(1) and C.F.R. § 23.113(d); …."* The court also must find, under subpart (b)(2)(B), "that the emergency removal or placement terminated upon the filing of the dependency petition." Thus, if the state court conducts

a preliminary protective hearing, that hearing constitutes an emergency hearing under ICWA, and the filing of the dependency petition terminates the emergency. Subpart (b)(2)(B) also includes a new provision that provides that "if there is a request to transfer the proceeding to the jurisdiction of the Indian tribe, see Rule YY [Rule YY will be subsequently drafted]."

In section (c) ("procedure"), subpart (c)(2)(C), the draft provides that at the preliminary protective hearing, the court must determine whether paternity has been established as to any father, and if not, the court "must/may" ask the mother and "must/may" take her testimony concerning the identity and location of any potential father. Judge Quigley asked members to decide which verb was appropriate. After discussion, members concluded that the court "must ask the mother, and may take her testimony …." Finally, in section (e) ("orders"), subpart 7, "reason to believe" that the child is an Indian child was changed to "reason to know." Members approved Rule 50 with these changes.

[02.05.2021] 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).

[12.18.20] Rules 50.1 and 50.2 (as proposed, "placement preferences" and "ICWA placement preferences"). Mr. Gilmore presented these two rules. Current Rule 50.1 is inappropriately named "deviation from placement preferences" because it specifically concerns deviations from ICWA placement preferences. That rule has been retitled by adding the word "ICWA," and it has been renumbered as Rule 50.2. The workgroup drafted a new Rule 50.1 to fill a void in the current rules by addressing placement preferences in cases not subject to ICWA. New Rule 50.1 is derived from A.R.S. § 8-514(B). Section (a) ("generally") mirrors the statute by providing, "A child should be placed in the least restrictive placement available, consistent with the best interests of the child." Section (b) ("placement preferences") parallels the prescribed order of placement (i.e., parent, grandparent, kinship, etc.). Section (c) concerns a child with developmental disabilities and requires the court's consideration of A.R.S. § 8-514.01. Section (d) ("Indian child") refers the reader to Rule 50.2 for placement preferences for an Indian child.

Current Rule 50.1 specifies deviations from ICWA placement preferences. Its successor, Rule 50.2, goes a step further by first specifying the placement preferences under ICWA, and then providing criteria for deviating from those preferences. The rule has application beyond dependency proceedings. Section (a) ("placement preferences") provides that the provisions of this rule also apply "in any foster care, guardianship, pre-adoption, or adoption proceeding." Section (a) also states that "if a tribe has established preferences, those preferences apply to the placement of an Indian child." Section (b) ("deviation from ICWA placement preferences") includes subpart titles, which are not used in the current rule. Members agreed to relocate the comment to current Rule 50.1 as a comment to new Rule 50.2. Members approved Rules 50.1 and 50.2 as presented.

[12.18.20] Rule 51 ("review of temporary custody"). Ms. Avila Taylor presented Rules 51, 52, and 58. The most significant question posed by Rules 51 and 52 is this: does a parent who did not appear at a Rule 50 preliminary protective hearing, presumably because of lack of service or notice, have a right to a review of temporary custody after the parent is subsequently served and appears for a Rule 52 initial dependency hearing? Ms. Avila Taylor believes that Division One did not answer this question in *DCS v Stocking Tate*, and she therefore proposes to answer it in the restyled rules. She contended that upon a parent's request, the court has a duty to do an initial review of temporary custody and the duty continues when a parent was not served until after the preliminary protective hearing. She asked, how can a parent waive the right to request a temporary custody hearing if the parent had not been served and advised of that right? She further noted that although no Title 8 statute provides authority for her proposal, no statute precludes it. But she believes that if the court at the initial dependency hearing has authority to affirm temporary custody, then it arguably can hold a hearing to make that determination. Finally, she proposed a change in the title of Rule 51, from "review of

temporary custody" to "contested review of temporary custody," because if a parent requests a hearing, then temporary custody has become contested.

Not all members of the workgroup agreed with Ms. Avila-Taylor's position, and Mr. Truman presented an opposing view. He began by noting that there is statutory direction on this issue, citing A.R.S. § 8-824 for the proposition that a parent must make the request for a review of temporary custody at the preliminary protective hearing (specifically section (F), which provides, "The petitioner has the burden of presenting evidence as to whether there is probable cause to believe that continued temporary custody is clearly necessary to prevent abuse or neglect pending the hearing on the dependency petition."). He noted that a parent who does not attend the preliminary protective hearing has a right to subsequently request a return of the child under Rule 59. He also noted the history of the temporary custody hearing and said that it originated during the 1990's in a Pima County "model court" and in omnibus legislation, both of which intended to "frontload" the hearing for challenging temporary custody. He cited *Stocking Tate's* analysis that as a dependency case proceeds, the available evidence typically expands, leading to logistical and evidentiary issues if a temporary custody hearing is held at a later time. Mr. Truman concluded with a recommendation that if Ms. Avila Taylor's proposal has merit, it should be adopted by legislation rather than a rule change.

Other members then offered comments. A member who participated in Pima's model court confirmed that this program was designed to promptly get parents into court, appoint their counsel, and then afford them an immediate hearing on temporary custody. Unfortunately, not every parent was served before the hearing, although the member observed that the unserved parent in some cases might have been an appropriate placement for the child. The member believed that depriving that parent of a temporary custody hearing after later service would prejudice the parent, whereas providing a hearing at a later stage would not prejudice the State. The member also noted that although the Rule 59 process might be available at a later stage, it is not prompt; under current Rule 59(b), the court has 30 days to set a hearing on a Rule 59 request. The member supports Ms. Avila Taylor's proposal. Another member supported Mr. Truman's position, contending that the legislature alone can articulate the dependency process, and that this new proposal would impose an unintended burden on the State. Two judge members supported Ms. Avila Taylor's proposal. One judge noted that a parent should have a right to challenge custody at the parent's first court appearance, and that given the short time between the filing of a dependency petition and the preliminary protective hearing, some parents aren't served and are otherwise unaware of the court date. The judge echoed Ms. Avila Taylor contention: how can a parent be deprived of a right that exists at a hearing if the parent was not notified of the hearing? Another judge member recounted instances where one parent failed to inform DCS of the other parent's ability to provide a safe home for the child. The judge affirmed that it is difficult to set a Rule 59 hearing within fewer than 30 days.

The Chair asked for a straw vote on the issue. Two members supported Mr. Truman's position. The remaining members supported Ms. Avila Taylor's position. With this in mind, Ms. Avila Taylor's presentations of Rules 51 and 52 will incorporate her proposal. The Task Force's petition will do likewise, although the Chair noted that Mr. Truman will have the opportunity to elaborate on his viewpoint in that filing.

According, Rule 51, section (a) ("generally") now begins, "if requested by the parent at the preliminary protective hearing <u>or at the initial dependency hearing, if the parent was not served and did not appear for the preliminary protective hearing,</u> the court must … ." Members discussed whether the words "was not served" should be replaced by the words "was not notified," but concluded that "served" was more accurate, and that "notified" could result in collateral litigation over the meaning of notice, e.g., can a phone call constitute notice? In subparts (a)(1) and (c)(2), the word "physical" was added in the phrase "temporary physical custody" because the hearing applies only in cases of out-of-home placement. In subpart (a)(2), the workgroup added the word "clearly" in the phrase "whether removal of the child from the home was clearly necessary."

Section (b) specifies the burden of proof: "probable cause" in subpart (1), and "clear and convincing evidence" in subpart (2), which applies to an Indian child and that includes an "active efforts" showing. Section (c) ("procedure") now includes citations to pertinent statutory provisions. Current subpart (C)(3) says that the parent "shall" be permitted to present evidence; draft subpart (c)(3) says "must" be permitted. That subpart also includes a new sentence that says, "The court may consider as mitigating factors the participation of the parent in healthy families or whether the availability of reasonable services would prevent or eliminate the need for removal and the effort to obtain and participate in these services." Current section (D) ("findings and orders") has been bifurcated into new sections (d) ("findings") and (e) ("orders"). Subpart (d)(2) specifically applies if the child is an Indian child. At Professor Atwood's request, the Editorial Group will determine if the word "that" in the second sentence ("that active efforts have been made") should be replaced by the word "whether." Section (e) has two subparts set out in the alternative. Subpart (1) applies if the petitioner failed to meet the burden of proof and requires the court to order return of the child to the parent. Subpart (2) applies if the petitioner has met the burden of proof and allows the court to declare the child a temporary ward of the court. Judge Quigley concluded the discussion of Rule 51 by confirming with Mr. Truman that a reference in Rule 50 to Rule 51 was correct.

[02.05.2021] 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.

[12.18.20] Rule 52 ("initial dependency hearing"). Current Rule 52 and the restyled rule are both lengthy. Ms. Avila-Taylor noted that the workgroup in preparing the new draft rule reviewed several statutes, including A.R.S. §§ 8-842, -843, -844, -824, and -825, as well as Rules 50 and 51. It also considered circumstances where the initial dependency hearing could be a parent's first court appearance in the case.

Ms. Avila Taylor reviewed each of the sections and subparts of draft Rule 52. In section (a) ("generally"), the workgroup added a new sentence, derived from A.R.S. § 8-843: "The court must give paramount consideration to the health and safety of the child." Draft section (b) ("time for the hearing") differentiates the time for the initial dependency hearing, depending on whether the parent did not appear at the preliminary protective hearing or whether service by publication is required. The content of section (c) ("procedure") reflects corresponding content in Rule 50. Notably and based on the earlier discussion of Rule 51, subpart (c)(3) requires the court to conduct a temporary custody hearing if requested by a parent at the initial dependency hearing. Current Rule 52(C)(6) amalgamates the provisions concerning admission, denial, and failure to appear. However, in draft Rule 52, the provisions on admission and denial are in subpart (c)(7), and provisions on failure to appear are in a new section (d) ("failure to appear").

Similarly, findings and orders, which are consolidated in current Rule 52(D), are separated in draft Rule 52(f) ("findings") and (g) ("orders"). Ms. Avila Taylor noted in subpart (g)(1) that the court must enter orders "returning the child to the parent, or if the child is not returned to the parent, affirming or modifying the prior orders regarding the placement of the child …." Members discussed and revised draft subpart (g)(7) regarding placement of siblings. As revised, the subpart now directs the court to enter an order, "if siblings have not been placed together, requiring that DCS make reasonable efforts to place a child with siblings if such placement is in the children's best interests or if that is not possible, to maintain frequent visitation or other ongoing contact between the siblings." Subpart (g)(8) requires the parent to "immediately" inform the court of new information concerning the location of a relative. Members discussed changing "immediately" to "promptly" but did not because "immediately" is used in the statute. Subpart 13 allows the court to enter other orders "as appropriate and required by law." After discussion, members changed this to "as appropriate or required by law."

[10.23.20] Rule 53 ("settlement conference"). Judge Young, who presented Rule 53, noted that the draft rule contained no substantive changes. Although draft section (a) ("generally") does not expressly state that a settlement conference is voluntary, she confirmed that the parties must agree to participate in the conference. Judge Young also clarified that this rule does not apply to a mediation or a conciliation conference. In draft section (b) ("settlement conference memorandum"), Judge Young noted that the

workgroup deleted a current provision that requires the parties to identify "matters not in dispute" because workgroup members did not believe that this information was helpful for resolving disputed issues. Although all Task Force members did not agree with this belief, the Task Force nonetheless omitted that provision in the draft. Section (b) also requires the parties to "provide" the court with their memos, but members agreed this was insufficient and they added the words, "but not file or exchange [the memo] with other parties." The draft also required the parties to do so at least 5 days before the conference, and members added the words, "or as otherwise provided by the court." In section (c) ("procedure"), subpart (1), in the phrase "the assigned trial judge may only participate in the conference," members changed "participate" to "conduct." In other subparts of this section, members changed settlement "discussions" or "negotiations" to "settlement conference." Subpart (c)(4) modified the phrasing of the current provision; the draft provision now says, "the parties must inform the assigned judge of the result of the settlement conference." In draft section (d) ("findings and orders; further proceedings") and elsewhere, members used only the word "parent." This change was conditioned on adding a universal definition of "parent" that includes a "guardian or Indian custodian." Because an adjudication hearing might already be set, members changed "set" a hearing date to "set or affirm" the date.

A new section (e) ("admonitions") was derived from current section (d). Among other things, the current provision permits the settlement conference judge to adjudicate a child dependent if the parent fails to appear for the settlement conference. Members questioned the rationale for this provision because, as noted previously, a settlement conference is a voluntary proceeding. One judge member rationalized the current provision by explaining that although the parent need not participate in the conference, the court could still require the parent to appear. But other judge members noted that an attorney could be discouraged from requesting a voluntary settlement conference if the client's failure to appear at the conference could have such dire consequences. The members accordingly agreed to omit a default provision. (There are far fewer settlement conferences than mediations, and none of the judge members recalled conducting an adjudication following a parent's failure to appear at a conference.) Regardless, section (e) retained the other portions of the admonition. Subpart (e)(3) requires the court to find not only that it advised the parent of the admonition, but also to find that the parent "understands" the consequences of failing to appear or to participate in reunification services. During the discussion of section (e), members agreed that the admonition should be uniform throughout the rules and they requested the Editorial Group to review the language of the admonition.

Section (f) is titled "ICWA." Members did not revise the draft of this section other than modifying the ICWA cite. The modified cite is now ICWA followed by a section symbol and then a section number. Members adopted this as the convention for ICWA citations throughout the draft rules. This convention parallels citations to the A.R.S. and the C.F.R. Finally, in section (g) ("other findings and orders"), a reference to a Rule 56

disposition report was deleted inasmuch as the workgroup anticipates recommending a deletion of a reference to the report when it presents Rule 56. Members then approved Rule 53 as modified.

[11.20.20] Rule 54 ("pretrial conference"). Judge Young, who presented Rule 54, noted that the workgroup reorganized portions of the current rule. Unlike the current rule, for example, the draft rule includes separate sections (b), "procedure before the conference" and (c) "procedure during the conference." Judge Young reviewed sections (c) through (i) of the draft, whose content was primarily derived from a lengthy section (C) ("findings and orders") in the current rule. Although a parent is required to appear at the pretrial conference (and there are consequences for a non-appearance), a member reported that DCS occasionally does not appear at a pretrial conference and asked whether the petitioner can be similarly sanctioned. The member proposed a sanction of dismissal, but other members believed that was draconian and declined to make that change. Moreover, A.R.S. § 8-844(F) mentions only a parent's failure to appear. Members had no other questions or comments and approved the rule.

[11.20.20] Rule 55 ("dependency adjudication hearing"). Judge Quigley, who presented this rule, noted that the draft is generally clearer and more readable than the current rule. She reviewed each section. Section (b) ("time limits") now has separate subparts, one stating the general requirement and the other addressing a continuance. Section (c) ("burden of proof") was also broken into subparts, the first concerning "cases not subject to ICWA," and the second concerning "ICWA cases." The draft subpart on ICWA cases includes a "clear and convincing" burden of proof for showing active efforts. Judge Quigley noted that draft section (h) ("findings and orders") includes a new subpart (h)(2) for addressing cases in which the petitioner has failed to meet the required burden of proof, in which event the court must dismiss the petition and return the child to the parent. Members concurred with the addition of this new subpart and approved Rule 55 as presented.

[11.20.20] Rule 56 ("disposition hearing"). Judge Quigley noted that the workgroup added pertinent statutory references to draft sections (a) ("generally") and (b) ("time limits"). The workgroup believed that courts were no longer using disposition reports, as provided in section (C) of the current rule, and they omitted that section from the draft. Section (c) ("considerations"), which corresponds to current section (d) ("procedure"), specifies what the court can consider in determining an appropriate disposition, including placement of the child and the case plan. The restyled provision provides that the court may consider "the parties' positions, any reliable statements or documents, and any testimony or other evidence, including information the court may have considered at a previous hearing." Section (E) of the current rule, titled "findings and orders," is now draft section (d), "court action." Current subpart (E)(1) was inadequate to address services when DCS was not the petitioner; the workgroup remedied this by drafting subparts (d)(1) and (d)(2), one of which concerns services when DCS is a party and the other when DCS is not a party. Judge Quigley suggested creating

a new form that the court would provide to the parent at the conclusion of the disposition hearing. Members had no questions and approved Rule 56 as presented.

[11.20.20] Rule 57 (currently, "provision of reunification services hearing," and as proposed, "motion to determine the provision of reunification services"). Judge Quigley presented this rule, which is based on A.R.S. § 8-846. The title of the current rule is not entirely accurate, because the rule actually permits the court to determine if DCS is not required to provide of reunification services. The workgroup revised the current rule to align with this refocused title and objective. Draft section (a) ("generally") includes two subparts. Subpart (1) is a general provision and includes a statutory reference. Subpart (2) contains a caveat that if the child is an Indian child, the granting of a motion under this rule does not determine whether active efforts are necessary under ICWA. Draft section (b) ("procedure") is more detailed than the current section; the draft section advises that the court may rule on a motion without a hearing, and it lists the types of evidence that may be presented at the hearing. Current section (C) is titled "findings and orders." The draft rule has separate sections (c) ("findings") and (d) ("orders.) Subpart (d)(2) clarifies that the petitioner is relieved of the duty to provide services only when the court enters an order granting the motion. Members found that the current comment was instructive and retained it in the draft. Members then approved Rule 57 as presented.

[12.18.20] Rule 58 ("review hearing"). Ms. Avila Taylor noted that although the workgroup restyled and reorganized this rule and added a couple new statutory references, it did not intend to make substantive changes. Members had questions and suggestions following Ms. Avila Taylor's overview of the draft. A member inquired why section (e) ("procedure") did not require DCS to provide a safety plan concerning a child's potential return to the home. During the ensuing discussion, members strongly supported that addition; they added subpart (e)(4) as a placeholder for the provision and requested the Editorial Group to draft its content. In subpart (f)(1)(B), members deleted the word "specific" in a provision that required the court to "make specific findings." (Current Rule (F)(2) says "specific findings.") In subpart (f)(2)(A), members replaced the phrase "educational stability," which they found ambiguous, with "educational needs." The workgroup added subpart (f)(2)(B), which requires the court, if it does not place the child with a parent, to "determine whether DCS has identified and assessed whether placement of the child with a relative or person who has a significant relationship with the child is possible." In subpart (f)(2)(G), which concerns ICWA, members replaced the introductory phrase, "if ICWA applies," with the more conventional "if the child is an Indian child."

[11.20.20] Rule 59 ("motion for return of the child"). Judge Quigley also presented Rule 59. The workgroup added the words "motion for" at the beginning of the rule's title. In section (a) ("generally"), the workgroup added a requirement that a motion must include "a supporting factual basis." Section (b) ("time limits") retains the current 30-day requirement but adds, "unless the parties agree otherwise." A new section (c) ("burden of proof") provides that the moving party has the burden of establishing by a

preponderance of the evidence that return of the child would not create a substantial risk of harm to the child. Draft section (d) ("report and response") corresponds with current section (C) ("reports") but contains separate subparts that apply based on whether DCS is the petitioner. Current section (D) ("procedure") provides that the court "shall" consider evidence; draft section (e) uses the word "may" in this instance. Factual findings are expressly required under draft section (f) ("findings and orders") even when no party objects to the motion. If the court denies the motion, it does not need to affirm the prior placement. Members had no questions for Judge Quigley and approved the rule as presented.

[12.18.20] Rule 60 ("permanency hearing"). Ms. Jorquez presented Rule 60. She noted that section (A) of the current rule requires the court to "determine the future permanent legal status of the child." The workgroup changed this to "determine the child's permanency plan." In light of the Task Force's anticipated approval earlier today of Rule 14 ("combining hearings"), the workgroup believed that current Rule 60(B) ("consolidation of hearings") would no longer be necessary, and the workgroup recommended that draft Rule 60 not include a section that corresponds to current section (B). The workgroup restyled section (c) ("time limits") for greater clarity. The workgroup reorganized current section (D) ("procedure"), now section (c) ("procedure") into subparts. The current section permits the court to consider "an age-appropriate consultation with the child." Members restated that provision in subpart (c)(3) as, "may allow the child to speak with the court during the hearing to assist the court in determining a permanency plan for the child." The provision is designed to remove uncertainty about whether the child would speak with the judicial officer in open court and on-the-record.

Draft section (d) is titled "findings and orders." The workgroup proposed adding a provision in this section, initially discussed at a Task Force meeting a year ago, which would deem a review hearing conducted subsequent to a permanency hearing to be a permanency hearing. This would facilitate compliance with statutory requirements concerning the time for filing guardianship and termination actions. However, a member noted that doing so could require the court to make all of the permanency findings again at every subsequent review hearing. After discussion, members agreed to address this issue by providing in subpart (d)(2) that the court must set a review hearing, "but every review hearing after a permanency hearing for that child may be designated a permanency hearing."

[02.05.2021] 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.

[02.05.2021] 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.

[02.05.2021] 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.

Workgroup 4

[11.08.2019] Rule 61 ("motion, notice of hearing, service of process, and order for permanent guardianship"): Professor Atwood noted that the current rule is relatively complex and difficult to follow. Among other reasons, the rule applies to both pre- and post-dependency adjudication guardianships. The workgroup's draft rule attempts to clarify the procedural distinctions of each proceeding.

Professor Atwood then reviewed draft section (a) ("motion"). A member asked the workgroup to further clarify that the last sentence of that draft section applied only to pre-adjudication guardianships. Members also discussed who can file a pre-adjudication guardianship motion. Although members initially disagreed on who could file this motion, Professor Atwood cited A.R.S. § 8-871(A)(1) as authority that only the DCS could do so. The issue of filing the motion is further complicated in circumstances where the child has been adjudicated dependent in a proceeding as to one but not both parents. A judge member noted that the legislative intent in adopting this statute was to facilitate DCS's ability to establish a guardianship early in the process, without the necessity of a dependency adjudication. Another member observed that the workgroup's draft deleted a consent provision that is a statutory requirement for a pre-adjudication motion, and the workgroup will need to add that back.

In section (b) ("notice of hearing"), members substituted a phrase used in the current rule, "information required by law," with "information required by A.R.S. § 8-872." However, Professor Atwood questioned whether this change was accurate or even necessary, and after discussion, members agreed to remove that phrase. Section (c) ("service") of the current rule is a long block paragraph; the workgroup reorganized the provision for clarity. Members discussed whether service under ICWA could be made by certified mail rather than registered mail because certified mail is less expensive, but members agreed to use registered mail because that's what the federal statute requires.

During their discussion of section (d) ("hearing involving an Indian child"), members again considered reducing repetitive references to an ICWA requirement for service. But other members believed that having the requirement appear in multiple rules would assist judges and practitioners in determining when the requirement applies. The workgroup could not locate legal authority for the requirement that a parent who requests a hearing under this section must do so by registered mail, and it eliminated that requirement in this section. Section (e) ("service of the notice of hearing on other persons") was also reorganized by separating it from the general service provisions of section (c).

Section (f) (now, "investigation and report") was derived from current section (D) ("orders") and given a new title that more accurately describes the section's subject matter. Members discussed repeating the content of this section in Rule 62 but declined to do so. They also (1) in (f)(1) eliminated the word "the" before "DCS" (this should be a global edit); (2) changed the requirement in (f)(1) that the court "must" order DCS to prepare a report to "may," because A.R.S. § 8-872(E) allows the court to waive the

requirement; (3) modified (f)(2) to allow a party, rather than only the child's attorney or GAL, to prepare the report; and (4) decided to remove (f)(4) concerning the filing of a report, because it is not merely filing the report, but rather, its admission into evidence, that allows a judge to consider it. The workgroup extracted from this section a provision on "other orders," which does not pertain to reports, and that new section is now section (g).

[12.13.19] Rule 61 ("motion, notice of hearing, service of process, and order for permanent guardianship"): Professor Atwood advised that the workgroup reorganized and reformatted this rule to more clearly delineate pre- and post-adjudication guardianships. Although the federal regulations apparently permit service under Rule 61(c) by either registered or certified mail, the workgroup limited service to registered mail to be consistent with an Arizona statute. However, the Task Force's list of proposed legislative changes should include adding the option of certified mail, which is less expensive than registered mail. The revised rule was then opened for member comments.

A judge member had a concern with draft Rule 61(a)(1), which would allow any party to a dependency proceeding to file a post-adjudication guardianship motion. The concern centered on giving any party an opportunity to file the motion even when a permanent guardianship was not the court's plan. Compare current Rule 61(a), which permits the filing of a guardianship motion only "if the court determines that the establishment of a permanent guardianship is in the best interests of a [child]…." Although the judge member thought the draft rule diluted the judge's ability to control the filing of the motion, the judge would ultimately decide the motion on its merits and in that sense would still retain control of the outcome. Another judge member advised that the original version of a bill concerning Title 8 guardianships would have allowed anyone to file a pre-adjudication guardianship petition, which is beneficial to everyone because it avoids the need for dependency proceedings, and the member suggested that this be added to the Task Force's list of proposed legislative amendments. Ms. Jorquez will ask her colleagues if they agree with this proposal. Another member expressed concern about how pre-adjudication consent could be obtained from a parent who cannot be located, and this issue might need to be re-examined in the context of other Part III rules. In draft Rule 61(f)(2), if the DCS is not the legal custodian, the court may order "a party" to prepare the investigative report. Members discussed changing this to "a person," but left the provision unchanged because a person who prepares a report would probably be doing so at the request of a party.

Members had no further changes to Rule 61 and they approved the revised draft.

[11.08.2019] Rule 62 ("initial guardianship hearing"). The draft rule is generally modeled on current Rule 62, but certain portions have been reorganized to enhance clarity and to eliminate redundancy with items already covered by Rule 61. Professor Atwood also noted that the workgroup used the word "attorney" rather than "counsel" throughout this rule.

One provision that prompted discussion was section (c) ("procedure"), subpart 7, which requires the court to determine whether the parent admits, denies, or does not contest the motion. The subpart contains another alternative: that the parent failed to appear. In that circumstance, the draft allows the court to proceed with adjudication of the motion if the parent had notice of the hearing and had received specified admonitions concerning the consequences of a non-appearance. Professor Atwood advised that the workgroup would like to further consider the consequences of non-appearance following the Supreme Court's recent *Tricia A.* opinion. For example, should Rule 62(c) include a list of additional requirements that the court must consider before proceeding with an adjudication following a non-appearance? Should a motion to set aside an adjudication following a non-appearance require the moving party to demonstrate a meritorious defense? Alternatively, should Form 2 contain this requirement? Should the Task Force consolidate Forms 1 and 2 and call them "advice to parent in a dependency action?"

A judge member questioned a requirement in section (d) ("findings and orders") that the judge make specific findings that the court advised the parent of the consequences of failing to appear at a future proceeding. Should the requirement be revised to simply require the court to give the advice, rather than the court find that it gave the advice? Alternatively, could it say that the court is required to give the parent the form, and then make a finding that it provided the form? The Chair believes a reviewing court would find it useful if the record contained the findings required by the workgroup's draft, and that due process is served by making those findings.

A member noted that draft Rules 61 and 62 do not address the timing of pre-adjudication hearings for permanent guardianship. But Rule 62(b) provides that the court may "order or permit otherwise [the time for the hearing]", and this should provide the court with the necessary flexibility.

Workgroup 4 will revise Rules 61 and 62 to conform to today's discussions.

[12.13.19] Rule 62 ("initial guardianship hearing"). Professor Atwood noted that the workgroup revised the time limit in section (b) for setting the initial guardianship hearing to account for cases in which there had not been a permanency hearing. The revised provision says, "Unless the court orders or permits otherwise under A.R.S. § 8-864, the initial guardianship hearing must be held within 30 days after the Rule 60 permanency hearing, or if there has not been a permanency hearing, within 30 days after the filing of a motion for permanent guardianship."

A member suggested deleting the reference to the permanency hearing as a starting point for measuring time because, while there will not always be a preceding permanency hearing, there will always be a preceding motion. The member also suggested adding the words "good cause" after "permits otherwise." Other members acknowledged that the decision to proceed with a permanent guardianship might not be made at a permanency hearing. Another member noted that all hearings after the

permanency hearing, including report and review hearings, are in effect "permanency hearings," although they are not titled as such. One member disagreed with removing a reference to a permanency hearing in section (b) because A.R.S. § 8-862(f)(2) specifically includes that reference. Some members suggested that legislative changes to A.R.S. §§ 8-864 and 8-872 would be useful in clarifying what is otherwise an inconsistent and confusing statutory process. But even without those changes, a member proposed a new provision in Rule 60 ("permanency hearing") that would expressly say that any hearing after a disposition hearing is a permanency hearing. This would add flexibility in setting the hearing date under the present draft of Rule 62(b). Further discussion concerning Rule 62(b) will abide Workgroup 3's consideration of Rule 60.

Professor Atwood also discussed the workgroup's proposed changes to Rule 62(c)(7), which concerns the procedure at the initial guardianship hearing. The workgroup reorganized subpart (C) on "failure to appear," and the draft begins with a statement that "the court may proceed with the guardianship adjudication hearing under Rule 63" if the parent or custodian fails to appear at the initial guardianship hearing without good cause, and the court finds that the parent or custodian had notice of the initial guardianship hearing, was properly served, and had been admonished regarding the consequences of failing to appear at the initial guardianship hearing. Members agreed that good cause for a failure to appear could be established after the initial guardianship hearing.

[02.28.20] Rule 62 ("initial guardianship hearing"). Although members had previously approved Rule 62, the workgroup added language to Rule 62(c)(7)(C) like the language it added to Rule 65(c)(6)(C), as mentioned in the preceding paragraph. And like a change to Rule 65(c)(6)(C) described above, the workgroup deleted a reference in Rule 62(c)(7)(C) to Rule 63. Professor Atwood recognized that other edits to Rule 62(c)(7)(C) might be necessary to add further clarity, particularly concerning the words "has proven," which the editorial group should consider later.

[12.13.19] Rule 63 ("guardianship adjudication hearing"). The discussion of time limits under Rule 62(b) was revisited during the discussion of the time limits in Rule 63(b), which again makes the permanency hearing the beginning point for measuring time. After further consideration, members revised the time limit for the guardianship adjudication hearing to "90 days after the filing of a motion for permanent guardianship," unless the court orders or permits otherwise under A.R.S. § 8-864. However, removing the reference to the permanency hearing deviates from the statute, and the Chair suggested that each workgroup maintain a list of this and other proposed statutory changes. A member asked whether the 90-day requirement applied to the commencement or the conclusion of the hearing; members agreed that requiring that the hearing "be held" refers to the commencement of the hearing. However, the Chair cautioned that courts should not construe a provision that the hearing must start within 90 days as a suggestion to set the hearing on the ninetieth day; the hearing should be set sooner if feasible.

A provision in draft Rule 63(c) ("burden of proof"), subpart 2, says that if the child is an Indian child, "the moving party must prove [by clear and convincing evidence] that active efforts have been made to provide remedial services…." Professor Atwood suggested removing the bracketed language because the first sentence of subpart (2) already establishes the burden of proof as beyond a reasonable doubt, and it would be illogical to have different burdens of proof regarding active efforts in guardianships and terminations.

A provision in current Rule 63(D), which was preserved in draft Rule 63(d) and that concerns conducting the hearing informally, was removed because it duplicates a provision that is already in draft Rule 3(b) ("informality"). In draft Rule 63(d)(1) ("admitted or not contested"), the workgroup substituted the words "not contested" for the former phrase "plea of no contest" to remove a connotation that this proceeding is criminal in nature. The workgroup revised draft Rule 63(d)(2) ("failure to appear") similarly to its revisions to draft Rule 62(c)(7). Draft Rule 63(d)(3) ("child's interests") was also revised. One member suggested adding a provision that would require the court to consider parental rights, but members declined to do this because that consideration was addressed by Rule 36. For the same reason, members deleted a draft provision about giving primary consideration to the child's needs. After additional discussion, members retitled this subpart as "child's position," and shortened it to simply say, "The court may appoint as guardian the person nominated by a child 12 years of age or older, unless that court finds it would not be in the child's best interests to do so."

Judge Armstrong observed that Rule 63(e) ("reports") repeats a provision on admissibility already covered by Rule 3.1, and he suggested deleting Rule 63(e), but his suggestion was reserved for later discussion. The workgroup revised Rule 63(f)(3) to say, "if the case involves an Indian child" instead of "if ICWA applies…." The workgroup modified Rule 63(f)(4), which governs the denial of a guardianship motion, to clarify that the court rather than a party thereafter establishes a revised permanency plan. Finally, section (g) ("successor permanent guardians,"), which in the current rules is a subpart of Rule 63(F) ("findings and orders"), was made a freestanding section because it deals with a notice to the court that is submitted by a party, which is neither a required finding nor a requirement for a court order.

Members approved the draft of Rule 63 subject to the conditions mentioned above.

[01.24.20] Rule 63.1 ("successor permanent guardianships"). The current rule includes references to various sections of A.R.S. § 8-872, which are followed by text that substantially duplicates what's in the statute. The workgroup retained the statutory references but removed the redundant text. Members observed that this approach is reasonable because (a) even if the statutory language changes in the future, the rule will continue to be correct, and (b) any differences between the language of the rule and that of the statute could raise legal issues. Most users of these rule are law-trained and can readily locate the statute. One member suggested referring to the statute generally and

deleting the section references, but members retained the statutory section references because they correspond to the section references in the rule. Professor Atwood added that the rule uses the phrase "if the child is an Indian child," which should be the convention going forward when a rule refers to the applicability of ICWA. Members discussed but declined the suggestion to include a requirement in this rule for submission of a proposed order. They also declined a suggestion that the rule refer to the appointment of a GAL or an attorney for the child, because Rules 38 and 40 would be applicable. Members concluded the discussion by approving Rule 63.1.

[01.24.20] Rule 63.2 ("initial successor permanent guardianship hearing"). Professor Atwood reviewed each section of the draft rule. In sections (a) ("generally") and (c) ("procedures"), members changed a reference to Rule 63.1(d) to instead refer to A.R.S. § 8-874(D), because Rule 63.1(d) directs the moving party to provide notice as required by the statute. Professor Atwood noted that Rule 63.2(d) ("child's position") resembles the language of a corresponding provision in Rule 63(d)(3). In section (g) ("provisional permanent guardian"), members discussed whether to include criteria for the appointment of a provisional permanent guardian, but they declined to do so because judges will use their discretion and the statute does not contain criteria. In section (h) ("other orders"), Task Force members removed the words "natural or adoptive" before parents. The workgroup had previously changed "relatives or kin" to "relatives or others." Members also rephrased portions of section (i) ("denial of the motion") by changing, for example, "if the motion to appoint a successor permanent guardian is denied" to "if the court denies the motion or does not appoint a successor permanent guardian…." It made other stylistic changes to this section but in doing so, it did not intend any substantive deviation from the statutory provisions regarding reunification services. Members concluded their discussion by approving Rule 63.2.

[02.28.20] Rule 64 ("motion, petition, notice of hearing, and service of process and orders"). Rule 64 is the first of three consecutive rules on termination of parental rights. Current Rule 64 allows a termination proceeding to be initiated by motion under section (A) (if there was a previous determination of dependency) or otherwise by petition under section (B) (although a petition can be filed even after a dependency determination). The workgroup attempted to clarify these distinctions and reversed the current sequence so that the provision on petitions appears before the one on motions. Although one proceeding may have a JS case number and the other may have a JD number, they proceed similarly. Professor Atwood reviewed other sections of the draft rule. In Rule 64, the workgroup used some of the phrasing from its guardianship rules; for example, these rules have similar language concerning a failure to appear, or for service if the child is an Indian child.

Draft section (b), which concerns a motion for termination, requires judicial determinations that a child is dependent, and that termination of parent rights "is" in the child's best interests. Because a best interests determination is an element of a termination adjudication, and to avoid the dilemma of making that determination before

the adjudication, members agreed to change the word "is" to "may be in the child's best interests." To address a related issue arising under A.R.S. § 8-862, members requested Workgroup 3 to add a provision in Rule 60 specifying that every review hearing after the permanency hearing will be considered a permanency hearing. Subpart (c)(2) concerns the initial hearing notice and a requirement that the notice advise of the consequence of failing to appear without good cause. Members agreed that this provision should include references to specific hearings, and they added "at the initial hearing, pretrial conference, status conference, or a termination adjudication hearing." Members agreed that the consequences of failing to appear apply regardless of whether the termination proceeding was initiated by motion or by petition. Section (d) concerning service was reorganized to be more logical and to refer to the pertinent service requirements of the Civil Rules. If the child is an Indian child, the rule should allow service by certified rather than registered mail, which would be consistent with ICWA; but members deferred making this change because it would contradict an Arizona statute.

Members approved Rule 64 with these modifications.

[02.28.20] Rule 65 ("initial termination hearing"). Professor Atwood noted that draft Rule 65, consistently with draft Rule 64, refers to the petition process before the motion process. In section (c) ("procedure"), subpart (2), members discussed an issue raised by the workgroup: can the court appoint counsel for a private petitioner? Members concluded it could not for two reasons. First, the statute governing appointment of counsel does not provide for this; also, unlike a parent in a termination proceeding, the petitioner is not at risk for losing parenting rights, which have a constitutional dimension. In subpart (c)(3), members concurred on language that would permit the court to appoint an attorney or a GAL for a child, or both, if none had been previously appointed.

Professor Atwood explained that the workgroup revised subpart (c)(6) (which concerns admitting, denying, or failing to appear) in the same manner as similar provisions in other restyled rules However, Professor Atwood noted that the restyled versions might have omitted essential language in the current rules (i.e., "based on the record and evidence presented"), and this language therefore was added to the draft of subpart (c)(6)(C). Members also discussed whether, if the parent fails to appear at the initial termination hearing, the court proceeds to take evidence at the initial hearing or at a later adjudication hearing. A judge member observed that conducting the adjudication concurrently with the initial hearing under this circumstance is not a favored practice. Even if the parent failed to appear, the parent's attorney has a right to examine witnesses, and counsel might not be prepared to do so if testimony is taken at the initial hearing. Additionally, the absent parent might have a good reason for failing to appear, which could moot the need for an accelerated or so-called "drive-by" adjudication. *See Tricia A. vs DCS*. However, to avoid confusion about the court process following a failure to appear, and considering *Tricia A.*, members agreed to remove a proposed reference to Rule 66 in draft Rule 65(c)(6). One member also proposed retaining the current comment to Rule 65; members will determine that later. Members agreed to delete a proposed

subpart (c)(8), which would have required the court at the initial termination hearing to set a deadline for amendments to a termination petition, because setting a rigid deadline might impair a late amendment that is in the child's best interests. The workgroup will present the remainder of Rule 65 at a future meeting.

[04.03.20] Rule 65 ("initial termination hearing"). A portion of Rule 65 had been presented at a previous Task Force meeting, and Professor Atwood and Ms. Coughlin continued the presentation. They noted that Mr. Withey had attended a recent workgroup meeting and reminded members of the rationale for including specific references in the draft rules to ICWA and the regulations. The workgroup agreed that the draft rules should include these references, and it also proposed an appendix to the rules that would include easy access to the verbatim text of referenced regulations. Whether an appendix would be feasible might ultimately depend on the number of regulations that are referenced in the final Task Force work product, which is yet to be determined, and the cumulative length of those regulations. The appendix might eliminate the need for Rule 50.1 ("deviation from placement preferences") and other current provisions concerning ICWA. In response to a proposed appendix, members thought the regulations could just as easily be found online. They also were concerned that the appendix would need to be regularly updated whenever there were changes to the regulations, although Mr. Withey had indicated that the regulations had not changed much, if at all, since their adoption. Additionally, pending court challenges to the ICWA regulations could impact the content or application of the regulations. Members agreed to defer further consideration of the appendix to a later time.

Elsewhere in Rule 65, Professor Atwood and Ms. Coughlin noted that the workgroup had re-sequenced subparts in section (c) ("procedure") so they now appear in a more logical order. They also noted that the language in subpart (c)(6)(B) ("failure to appear") is still awkward; the workgroup will continue to improve the language and present a revised version of this provision, which has counterparts in several other rules, at a future workgroup meeting. Current Rule 65 includes a brief comment; the Task Force consensus was to delete the comment.

[06.12.20] Rule 65 ("initial termination hearing") <u>and</u> ***Rule 66 ("termination adjudication hearing").*** Professor Atwood explained the workgroup's recent revisions to Rule 65(f) and a parallel provision in Rule 66(g), which both concern a parent's failure to appear at a termination hearing. An issue with the workgroup's previous versions of these sections is that they required the court before proceeding to a hearing to first acknowledge that the petitioner had proven grounds upon which relief could be granted. However, determining whether those grounds were proven was the purpose of conducting a hearing. The revised language addresses this contradiction by saying that "the court may terminate parental rights based on the record and evidence presented if the requirements of subpart (1) [that concern a parent's failure to appear] are satisfied and the petitioner or moving party can meet the burden of proof required for

termination." Subsequent provisions in both rules were modified by adding specific references to federal ICWA statutes and regulations. Rule 66(h) also included a corrected reference to Rule 3.1(d)(4) concerning the social study.

A member noted that if a termination proceeding was initiated by motion, service of the motion might have been made on the parent's attorney rather than the parent, and the parent might not have personally received the requisite admonitions concerning the need to appear at court hearings. It is therefore important to assure the parent has been served with the required admonition forms before these hearings. Members then approved the changes to these two rules.

[04.03.20] Rule 66 ("termination adjudication hearing"). Although the workgroup had not yet completed its review of the last parts of Rule 66, Professor Atwood presented the first few sections. She noted that although section (b) contains time limits for an adjudication hearing when the action is initiated by motion, there are no time limits in this rule for setting a hearing when the action is begun by petition. The workgroup believes this dichotomy conforms to statutes and court practices and it is therefore appropriate. She reviewed provisions in sections (c) ("burden of proof") and (d) ("burden of proof for an Indian child"). Language in section (e) ("procedure") concerning a failure to appear, like similar language in Rule 65, is still under workgroup review. Judge Armstrong noted a need for revisions to section (g) ("social study") to make it compatible with the Task Force's previous adoption of Rule 3.1(d)(4). The workgroup will complete its review of Rule 66 and present it again to the Task Force.

[06.12.20] Rule 67 ("scope of rules"). Professor Atwood noted that Rule 67 is the first of the adoption rules (Part IV of the current rules.) Draft Rule 67 is brief and for the most part tracks language used in Rule 36 ("scope of rules," which is the first rule in current Part III.) Members had no questions or comments and the rule was approved as presented.

[06.12.20] Rule 68 ("meaning of terms"). Professor Atwood noted that the definition of "parent" in section (a) ("generally") is inclusive ("parent includes…") rather than exclusive. The workgroup's draft said that "'parent' includes the birth parent whose parental rights have not been terminated, etc." but a member noted that an adoptive parent's rights can also be terminated, so the revised draft says "includes the birth or adoptive parent, etc." The workgroup shorted the explanation of "investigative report" in section (a) because the required substance of the report is prescribed by statute. Revised section (b) on ICWA placement preferences includes cross-references to pertinent federal authority. Members approved Rule 68 as presented.

[06.12.20] Rule 69 ("appointment, appearance, and withdrawal of counsel"). Ms. Coughlin reviewed the revisions, which for the most part conformed to the provisions of Rule 39 ("appearance, substitution, and withdrawal; responsibility of parties").

Members discussed whether a provision in current Rule 69, that the court "shall order the person to provide proof of financial resources by filing a financial questionnaire provided by the court," was directive or permissive. The workgroup concluded that although the court must inquire into the party's ability to pay, it may do so by oral questions or by requiring written information, and it used the word "may" in these provisions. A member observed that the court appoints counsel in adoption cases only infrequently. Ms. Coughlin requested the editorial group to harmonize a phrase in Rule 69(b)(1) ("personally appearing") with a corresponding phrase in Rule 39(a)(1) ("appearing personally"). Members then approved Rule 69.

[06.12.20] Rule 70 ("appointment of guardian ad litem"). Mr. Owsley presented Rule 70. Rather than duplicating what is already contained in a dependency rule, the workgroup reduced current Rule 70 to a single sentence that says, "The court may appoint a guardian ad litem in an adoption proceeding under the standards set forth in Rule 40." Members had no questions or comments and approved the draft rule.

[06.12.20] Rule 71 ("telephonic testimony; video conferencing"). Judge Portley advised that Workgroup 4's revisions to this rule were pending Workgroup 3's revisions to Rule 42, which concerns the same subject. Judge Quigley added that Workgroup 3's revisions to Rule 42, although still in progress, will be modeled on Family Law Rule 8.

[06.12.20] Rule 72 ("computing and extending time"). Judge Portley noted that Rule 72 includes a reference to Civil Rule 6 and governs extensions as well as computations of time. Rule 72 is like Juvenile Rule 43, which has the identical title, but Rule 72 does not contain a cross-reference to Rule 43. Members approved Rule 72 as presented.

[07.17.20] Rule 73 ("Disclosure and Discovery in Contested Adoptions"). Ms. Coughlin presented Rule 73. She noted that most of its content mirrors dependency Rule 44 ("disclosure and discovery"). The titles of Rule 73 and section (c) ("pretrial disclosure statement in contested adoption") emphasize that these provisions apply in contested proceedings. Subpart (a)(4) ("ongoing disclosure requirement") confirms that the duty to disclose in these cases is ongoing. In subpart (b)(4), which requires the disclosure of witnesses, a member suggested that disclosure include a witness' email address. A member proposed changing the words "competent and potentially significant evidence" in section (d) ("sanctions") to "relevant evidence," but after noting that the former phrase was also used in Rule 44(g) ("sanctions"), members declined to make that change. Ms. Coughlin pointed out a workgroup note at the end of the draft, which suggested that this rule would be more sequential if it appeared after Rule 79 on filing a petition.

Because Rule 73 applies in contested adoption proceedings, a member asked when a proceeding becomes contested. Members responded that intervening in an adoption proceeding, objecting to a proceeding, or revoking parental consent could all be events

that precipitate a contested adoption. To add clarity to Rule 73, members agreed that the rule should include specificity, i.e., "an adoption is contested when…." The workgroup will draft additional language, but it will be mindful of not triggering a disclosure requirement when it's not warranted. The workgroup also will consider how disclosure should be undertaken if opposition to a petition occurs at a later stage of the proceeding, for example, because of an ICWA issue that's raised belatedly.

[09.25.20] Rule 73 (now, "disclosure and discovery in contested adoptions"). Ms. Coughlin presented the modifications to Rule 73. The duty to disclose arises only in contested adoptions. The Task Force asked the workgroup to clarify when an adoption matter is contested. The solution proposed by the workgroup is new language in section (a)(1) that requires a judicial determination "at any stage of the proceeding, on its own or upon request of a party…." This removes guesswork about when an adoption is contested, because a judicial officer makes that determination, and it allows a determination at a late stage of the adoption if the contest arises at a later time, such as a late challenge under ICWA. For clarity, the title of this rule now includes the words, "in contested adoptions." Members had no questions or objections and approved the modified rule as presented.

[07.17.20] Rule 74 ("motions"). Professor Atwood presented Rule 74. She noted that the workgroup's draft eliminated almost all the content of the current rule. The workgroup draft simply says, "Any motion in an adoption proceeding must conform to, and is subject to, the requirements of Rule 46 ['motions']." But Professor Atwood asked whether the summary judgment provisions in Rule 46 should apply to adoption proceedings; if they do not, the cross-reference in draft Rule 74 to Rule 46 would be misleading. However, at least one member believed partial summary judgment might be appropriate in an adoption. As a separate issue, A.R.S. § 8-123 permits a collateral challenge to an adoption order within one year following its entry, so motions to set aside an adoption order might not fit well within the 3-month or 6-month time limitations in Rule 46(f) ("motion to set aside a final order"). See further the discussion of Rule 46.1, infra. Workgroup 3 will present Rule 46 later today, and the Task Force deferred further consideration of Rule 74 pending that presentation.

[08.21.20] Rule 74 ("motions"). The adoptions rule on motions that Professor Atwood presented at the July 17 Task Force meeting simply cross-referenced the provisions of dependency Rule 46 on motions. It became apparent during the discussion of that version that the shortcut was inadequate, and today Professor Atwood presented a revised version of Rule 74 that is organized more like the current rule. She noted that this version, unlike Rule 46, does not include a provision on summary judgment motions, but neither does current Rule 74. On the other hand, the first five sections of draft Rule 74 ("form, filing, response, court ruling," and "motion to continue") include content that is similar to the corresponding provisions in Rule 46. She also observed that the time provisions (respectively, one year and 6 months) in draft Rule 74(f) ("motion to

set aside judgment") concerning motions under Civil Rule 60 differ from the analogous time provisions in Rule 46 (6 months and 3 months). Section (f), unlike current section (E) ("motion to set aside judgment") includes references to federal ICWA statutes.

The members' discussion of draft section (f) included consideration of A.R.S. § 8-123. The statute provides, "After one year from the date the adoption decree is entered, any irregularity in the proceeding shall be deemed cured and the validity of the decree shall not thereafter be subject to attack on any such ground in any collateral or direct proceeding." Draft section (f) requires a party to file motions that raise specified grounds under Rule 60 "within one year of the final judgment." If such a motion is filed, for example, 50 weeks after entry of the judgment, can the court rule on it three weeks later, or under the statute, would it be too late to grant the motion? Members did not conclude that the court would lose jurisdiction after one year, but they thought the application of the statute under this scenario was ambiguous, and it would be helpful if the legislature clarified the statute. To provide some further clarity, members added to section (f) a sentence that says, "the court may not extend these [Rule 60] time limits." Professor Atwood also noted additional time requirements under ICWA, and the members added another sentence to this section that says, "If the child is an Indian child, the provisions of ICWA §§ 1913 and 1914 apply." Members approved Rule 74 with these modifications.

[12.18.20] Rule 74 ("motions"). Professor Atwood explained that the workgroup, in conjunction with its review of Rule 85 ("setting aside an adoption"), made a change to Rule 74(f) ("motion to set aside judgment"). A.R.S. § 8-123 provides, "After one year from the date the adoption decree is entered, any irregularity in the proceeding shall be deemed cured and the validity of the decree shall not thereafter be subject to attack on any such ground in any collateral or direct proceeding." *Denia L.*, which was provided in the materials, considered the meaning of "irregularity." The opinion held that a void judgment is not merely an irregularity, and A.R.S. § 8-123 should not operate as a time bar. Civil Rule 60, incorporated by reference in Rule 74(f), sets forth the grounds and time limits for setting aside a judgment. After considering *Denia L.*, the workgroup concluded that Rule 74(f) should clarify that a challenge that an adoption decree is void should not be time limited. Accordingly, the workgroup added this sentence to Rule 74(f): "A motion to set aside a judgment under Civil Rule 60(b)(4) may be filed at any time."

[07.17.20] Rule 75 (as proposed, "confidentiality; release of information") <u>and</u> Rule 86 (currently, "adoption records"). Mr. Owsley presented these two rules, which both address confidentiality of information. Current Rule 75 deals generally with release of information, but it does not detail the process, which is in Rule 86. The workgroup accordingly consolidated Rule 86 with Rule 75, and Rule 86(a) and (b) have become Rule 75 sections (b) ("request for records") and (c) ("records of Indian adoption.") Members agreed that consolidation of these rules was appropriate. However, they noted that the

provisions of section (a) ("confidentiality of adoption records") and section (b), although taken verbatim from Rule 86, merely parse the requirements of A.R.S. § 8-121. Members suggested that the rule should refer to the statutes without trying to summarize them. Another member suggested deleting the Committee Comment to Rule 75 because its references to federal statutes now appear in section (c). The Task Force returned the rule to the workgroup for consideration of these suggestions.

[09.25.20] Rule 75 ("release of information"). Mr. Owsley presented the modifications to Rule 75. Members believed the workgroup's previous draft unartfully parsed the statutory requirements for release of information. In response, the workgroup deleted almost all of the specified requirements in its previous draft and replaced that language with "as provided by A.R.S. §§ 8-121 and 8-129." Mr. Owsley also proposed adding to the foregoing clause a reference to A.R.S. § 8-134, which, like § 8-129, is referenced in § 8-121. He suggested that adding this third statutory reference would make Rule 75 more complete. Members discussed whether the rule should refer to all three statutes or only to § 8-121, which refers to the other two. They concluded that the single statutory reference would be sufficient to make readers aware of all three statutes, and they revised the draft accordingly. They also changed the title of section (b) from "request for record" to "release of information," which is more accurate. They agreed to delete the comment to the current rule, which is substantially contained in draft section (c) ("records of Indian adoption"). Members approved Rule 75 with these revisions.

[08.21.20] Rule 76 ("service of process") <u>and</u> Rule 79.1 ("service of the petition to adopt and notice of hearing"). Judge Portley presented these rules. He noted that current Rule 76 precedes current Rule 79 ("petition to adopt"), but logically, these two rules should be adjacent. Accordingly, the workgroup proposed abrogating Rule 76 but relocating its content to a new Rule 79.1. Judge Portley also noted the workgroup's change to the title of the new rule, which more accurately describes the content of Rule 79.1. Members agreed with these workgroup proposals.

To be consistent with changes to Rule 48X(a), Rule 79.1(a) ("generally") includes two new subparts: (1) "no summons," and (2) "petitioner and respondent," which are useful for clarifying in adoption cases the application of the referenced Civil Rules on service. However, Rule 79.1(a) does not include a third subpart of Rule 48X(a) that instructs that no response to the dependency petition is required, because responses in the form of objections to adoption proceedings are common. On that point, members added to Rule 79.1 a new section (b) ("objections"), which says, "any person objecting to the petition must promptly file an objection before the hearing." Members agreed to use the words "any person" rather than "party" because the objecting individual might be, for example, a relative who has not filed a formal motion to intervene. Members declined to specify in section (b) a time within which an objection must be filed because objections are occasionally filed as the hearing date approaches. However, the word "promptly" was included to encourage the early filing of objections. In draft section (c)

("persons to serve"), members deleted an illogical requirement that the petitioner serve the petition and a notice of hearing on the petitioner him- or herself. Draft section (d) includes provisions for service when the child is an Indian child. Members approved the draft rule as modified.

[10.23.20] Rule 77 ("certification to adopt"). Professor Atwood presented this rule. She noted that the current rule omits various requirements of A.R.S. § 8-105, and the workgroup accordingly added certain statutory requirements to this rule. She further noted that the first section of the current rule is "dismissal of application" and the current rule therefore omits the prerequisite of filing the application. The draft rule addresses this omission by including a new section (a) ("application for certification") that states this initial requirement. Draft section (a) also instructs that "this requirement does not apply to individuals identified in A.R.S. § 8-105(N)," for example, a prospective adoptive parent who is the spouse of the birth parent or a licensed foster parent where the child is already placed in that person's home.

Draft section (b) ("dismissal of the application due to insufficient information") includes a new alternative that enhances procedural efficiency. In lieu of the court dismissing an incomplete application, draft section (b) would allow the applicant to submit supplemental information. The current rule does not mention the submission of an investigative report and recommendation, which are required by A.R.S. § 8-105; draft section (c) ("court action") fills that gap. Draft section (c) also describes the court's options after receiving the investigative report and recommendations. Moreover, and parallel to the above-noted change in section (b), section (c) provides the court a new alternative: it may "require further investigation if it finds that additional information is necessary for making an appropriate decision regarding certification." Finally, although the current rule vaguely implies that the court must inform the applicant of the reasons for its denial of an application, it is not explicit on this point; the draft rule is.

Professor Atwood then reviewed remaining sections (d) through (i). The workgroup made only a few minor changes to those sections. The workgroup's title of section (d), taken verbatim from the current rule, was "motion for reconsideration of denial of certification." For greater accuracy, the Task Force agreed to change this to "motion for hearing on denial of certification." The workgroup's draft of section (h) ("findings and orders") says that "the court may consider all reliable evidence." After discussion, Task Force members changed "may" to "must."

Professor Atwood then raised the issue of whether a denial of certification to adopt is an appealable final order, or whether appellate review is instead by way of special action. Court of Appeals cases provided by Professor Atwood and Ms. Beckmann indicated that the remedy was an appeal, although special action might be appropriate if an appeal was not sufficiently speedy. The next issue was whether these orders should be expressly included in the list of appealable orders in draft Rule 103, or whether they fall within the catchall provision of Rule 103(b)(2)(N) ("any other order that is final

pursuant to Arizona case law"). Although it appears that appeals from these orders are rare, the intent of Rule 103 is to include every identifiable and appealable final order, and members agreed to add the denial of adoption certification to the Rule 103 list. Ms. Beckmann will draft the additional language. Members had no further comments, and they approved Rule 77 with these modifications.

[11.20.20] Rule 78 (currently, "temporary custody," and as proposed, "petition for child's custody by a non-certified person"). Professor Atwood presented this rule, which relates to A.R.S. § 8- 108. She noted the proposed change in the title of the rule to more accurately reflect its contents. Moreover, practitioners have reported that "temporary custody" is a problematic term for a prospective adoptive parent who is seeking insurance coverage for the child, and the draft rule therefore avoids use of that term. Draft section (a) ("petition") has two subparts. Subpart (a)(1) concerns a petition filed by a prospective adoptive parent who has custody of the child but who is not yet certified to adopt, unless there is a statutory exception. Subpart (a)(2) concerns other petitioners, including DCS or an agency. In section (b) ("notice of hearing"), the draft attempts to accommodate local practices for providing a hearing notice by including the phrase, "unless otherwise provided by a local rule or practice." Section (c) ("service") includes an ICWA service requirement "if there is reason to know that the child who is the subject of the petition under this rule is an Indian child." The section uses the word "involuntary" rather than "not placed voluntarily," which is used in the current rule. Section (d) ('procedure") reorganizes the provisions of the current rule.

Draft section (e) ("findings and orders") provides more detail than the current section, particularly in subpart (e)(3), which concerns the time for applying for adoption certification and the identification of the agency who will prepare the report and recommendations required by A.R.S. § 8-105. Subpart (e)(4), which concerns ICWA, includes the alternative phrases, "if the child is an Indian child or if there is reason to know that the child is an Indian child." Sections (f) ("expiration of custody order") and (g) ("revocation of custody") were restyled but not substantively changed. The workgroup recommended the deletion of the "committee comment" to the current rule. Members had no questions or comments and approved the rule as presented.

[09.25.20] Rule 79 ("petition to adopt"). Professor Atwood noted that the Task Force recently approved Rule 79.1 ("service of the petition to adopt and notice of hearing"), which was formerly included as Rule 79(c) and is now a freestanding rule. Professor Atwood reported that the workgroup did not make substantive changes in Rule 79(a) ("contents of the petition") but she noted restyling changes, including use of the phrase "if the child is an Indian child" in subpart (a)(4). However, she recommended an amendment to A.R.S. § 8-109 ("petition to adopt; contents") concerning whether the child is an Indian child. Both current and draft Rule 79(a) contain a requirement to include this information in the adoption petition, but the requirement is omitted in the statute.

Professor Atwood advised that the workgroup spent considerable time on section (b) ("setting a hearing on a petition"), which is not easily understandable in the current rule. She reviewed each of the subparts in section (b): subpart (1), on time limits, subpart (2), on expedited hearings, and subpart (3), if the child is an Indian child. The subpart on time limits clarifies provisions concerning the child's residence in the prospective adoptive parent's home and the nuance concerning the length of time a prospective adoptive parent has been married to the birth or legal parent. The subpart on expedited hearings derives from a recent statutory amendment and is substantively unchanged. In subpart (c), Professor Atwood suggested adding the ICWA cite, ICWA section 1912, in addition to the CFR cite. On CFR cites, Judge Armstrong advised that the Editorial Group is using periods after each letter, as recommended by the Blue Book, even though the government's CFR website does not follow that convention. Members approved Rule 79 following this discussion.

[12.18.20] Rule 80 ("birth parent living expenses"). Judge Portley noted that the intent of the rule is to discourage adoption fraud. The substance of the current comment to the rule has been relocated to section (a) ("motion for approval"), and the comment has been eliminated. Section (a) of the draft rule now requires that a person or agency wishing to pay living expenses for a birth parent in excess of one-thousand dollars must file a motion supported by an affidavit justifying those expenses, as provided by A.R.S. § 8-114. Section (b) specifies the procedure, which includes a requirement that the court verify the birth parent's identity before entering any orders. The court for good cause may waive a hearing on the motion, but if it holds a hearing, it may require the attendance of the birth parent or the person who will be paying the expenses. Section (c) requires a determination of whether the proposed expenses are permissible under the statute.

A judge member asked if a motion to approve expenses and an adoption petition concerning the same child could be filed in different counties. The judge asked whether the rule should specify the venue for filing the motion, thereby minimizing county-shopping. Judge Portley responded that expenses under this section should be included with the accounting that is filed with the court under Rule 83, which should close the loop. Nonetheless, the judge member had concerns because the motion to approve expenses might be assigned a miscellaneous case number and would be difficult to match with an adoption petition number. Another member advised that in her county, a motion in an adoption proceeding cannot be filed unless there is a pending adoption petition with an assigned case number. Due to the lateness of the hour, members agreed that the Editorial Group should consider this issue.

[12.18.20] Rule 81 ("consent to adopt"). Professor Atwood presented this rule. Draft section (a) has general application, while the content of draft section (b) is limited to consents in out-of-state adoptions and adoptions under ICWA. The workgroup revised section (b) to clarify this limited scope by, among other things, relocating instructive content from the current comment to the body of the draft rule. Section (A) of the current

rule has the odd name, "motion to set hearing." The workgroup added new section (a) ("generally") as a more instructive introduction, and then combined current sections (A) and (B) ("procedure") into a new section (b) titled "consent in open court for an out-of-state adoption." Section (b) contains a detailed yet practical procedure. For example, while the current rule requires the person giving consent to arrange for the presence of a court reporter, the draft allows either that person or the prospective adoptive parent to make the arrangement. Draft section (c) is "consent to adopt an Indian child," which parallels current section (C). Draft section (d) ("findings and orders") includes references to ICWA authorities. In cases involving an Indian child, the workgroup changed the phrase "terms and conditions" in the current section to "terms and consequences" in the draft. Draft section (e) ("invalid consent") is similar to the current section.

[12.18.20] Rule 82 ("petition to revoke consent"). A.R.S. § 8-106(D) provides that a consent to adopt is revocable only for fraud, duress, or undue influence, but Professor Atwood advised that there is no statutory guidance for the revocation procedure. Rule 82 provides a procedure. She noted in draft section (a) ("petition to revoke consent") a nuanced edit by the workgroup specifying that a person may seek to revoke only "their own consent." Because a petition to revoke consent must be filed before the adoption is finalized, the workgroup also added a new sentence to section (a) that says, "A person who seeks to revoke consent after entry of a final adoption order must proceed under Rule 85 ['setting aside an adoption']." Inasmuch as these petitions are uncommon and are likely to be filed by a self-represented person, and because the court should have more knowledge than the petitioner of the location of interested parties, draft section (b) ("service") requires that the court, not the petitioner, must prepare a notice of hearing and "provide a copy of the petition and notice of hearing to the adoptive parent or the parent's attorney, DCS, or the agency to whom the consent was originally given." The provision further requires the court to provide these copies "in a manner that is reasonable calculated to provide prompt notice." However, if the original consent was given to DCS or an agency, the entity rather than the court must provide copies to the prospective adoptive parent.

Section (c) ("appointment of counsel"), like the current rule, requires the court to appoint counsel for an indigent petitioner. Under section (d) ("appointment of a guardian ad litem"), appointment of a GAL for the child is discretionary, as is the authority of the GAL to file a dependency petition if the court grants the petition to revoke consent. Professor Atwood reviewed sections "(e) initial hearing and evidentiary hearing," "(f) burden of proof," "(g) procedure," and "(h) findings and orders." The workgroup made a change in section (i) ("revocation of consent to adopt an Indian child"). Under the current provision, a parent or Indian custodian can revoke consent at any time before entry of a final adoption order, in which case the child "shall then be returned to the custody of the parent or Indian custodian." The workgroup's draft provides for return of the Indian child "as soon as practicable." The draft section also includes a reference to 25 C.F.R. § 23.128.

[12.18.20] Rules 83 ("documentation required to adopt"), 84 ("hearing to finalize adoption"), 85 ("setting aside an adoption"), and 87 ("modification of post-placement agreements"). There was insufficient time remaining at the meeting for Workgroup 4 to present Rules 83, 84, 85, and 87. The Chair requested members to review the rules after the meeting concluded and to forward any comments or suggestions to Professor Atwood. The Editorial Group will consider these four rules at its next meeting. Professor Atwood noted an issue with a timing provision in Rule 85, which she will discuss with staff.

Topical presentations

[09.27.19] **Welcome by the Chief Justice.** The Chair called the first meeting of the Task Force to order at 10:00 a.m. and invited Chief Justice Robert Brutinel to welcome the members.

Chief Justice Brutinel thanked the members for their participation in this Task Force and encouraged them to obtain input from other stakeholders as the project progresses. In recognizing the importance of this Task Force's work to improve the juvenile justice system, he noted that Administrative Order No. 2019-74, which established this Task Force, was the first order he entered after he became Chief Justice.

The Chief Justice also noted that several sets of Arizona procedural rules, including rules of evidence, civil appeals, civil procedure, criminal procedure, protective order procedure, family law, and probate, have been restyled during the last 10 years, and this project will encompass restyling of the current juvenile rules. The juvenile rules were comprehensively restated 20 years ago, and since then, the juvenile justice system has seen a number of changes – such as the establishment of a new Department of Child Safety ("DCS") and Office of Child Welfare Investigations, reduced use of detention, more alternatives in dependency proceedings, special consideration of dually adjudicated ("cross-over") youth, specialized juvenile dockets, such as drug and health and wellness courts, and new federal and state legislation. The Chief Justice added that the goal of this project is not merely to restyle the juvenile rules. The goal also includes recommending substantive revisions in response to the many changes in this area of law during the past two decades. The Task Force's objective should be proposing the best possible set of juvenile rules, and the Chief Justice accordingly confirmed that substantive rule changes would be appropriate.

The Chief Justice briefly mentioned two specific issues. A.O. No. 2019-74 directs the Task Force to consider whether there should be separate rule sets for delinquency and dependency cases. Members should not read this directive as a recommendation for two

rule sets, but rather it is an issue they should discuss. He also noted accelerated hearings in termination cases under the current rules. He asked members to suggest provisions in their proposed rules that would balance the due process rights of parents in these cases with the reality that some parents have little or no interest in the case outcomes.

Reflecting on his experience as a juvenile court judge, Chief Justice Brutinel observed that juvenile proceedings can make a significant difference in people's lives, and procedural rules have a substantial impact on court proceedings. Arizona has been a leader in juvenile justice innovations, and he believes the members' work product will further that reputation. He looks forward to seeing the Task Force's recommendations.

[9.27.19] **Rules restyling principles**. The Chair then invited Supreme Court staff attorney John Rogers, who participated in previous rule restyling projects, to introduce the principles of restyling. Mr. Rogers began by noting that the key to restyling is good writing. Good writing will improve the rules' clarity. Restyling also uses terminology consistently and improves the rules' organization, both of which make the rules easier to comprehend. Some rules are not clearly written. Mr. Rogers noted that over the years, rules have grown in complexity, and they became harder to find and more difficult to understand. He compared the 1977 volume of the Arizona Rules of Court with the 2017 volume. The latter is nearly double the length of the former. The 2017 volume also used smaller font on larger pages, and had a double rather than a single column, to accommodate more text. Recent Arizona restylings have utilized good writing and reorganization to simplify many of these formerly complex rules.

Bryan Garner's *Guidelines* demonstrate a variety of techniques for accomplishing these restyling goals. Mr. Rogers and staff also prepared materials that are in the meeting packet, which summarize restyling principles and provide examples on how to apply them to the current juvenile rules. Mr. Rogers explained the principles and provided examples, which included the following:

- Improving the formatting, which includes the generous use of subparts and subheadings
- Breaking-up or simplifying unduly long sentences
- Avoiding the use of ambiguous terms (including the word "shall")
- Avoiding the use of redundant terms (e.g., "the court may in its discretion")
- Avoiding the use of archaic terms
- Using simpler words (e.g., use "later" rather than "subsequently") and proper word choice
- Minimizing the use of "of" phrases (e.g., use "superior court clerk" rather than "clerk of the superior court")
- Minimizing the use of "by" phrases (e.g., say "unless the court orders otherwise" rather than "unless otherwise ordered by the court")
- Using the active voice

- Deleting outdated comments or comments that repeat or contradict a rule, relocating substantive provisions in the current comments into the body of the restyled rules, eliminating "applicability" notes, and formatting comments uniformly

On the last point, Judge Armstrong noted that because the Court has adopted comments that appear in the rules, it is not necessary to refer to a comment as a "State Bar Comment" or a "Committee Comment." The template for comments in the restyled juvenile rules should simply be, "Comment to 2022 Amendment."

[12.13.19] **Presentation on ICWA.** The Chair invited Mr. Withey to speak about the relationship between ICWA regulations and Arizona's juvenile rules. Mr. Withey began by noting that federal ICWA regulations have the full force and effect of federal law, which is supreme under the United States Constitution. Federal law recognizes Indian children as a special responsibility of the federal government (i.e., "our kids"), and procedures in state courts must follow that law. The federal ICWA regulations became effective in 2016; the Arizona Supreme Court by Order No. R-17-0025 adopted conforming amendments to numerous juvenile rules in 2017.

Accordingly, Juvenile Rule 8(C) now requires an Arizona trial court to follow the federal regulations if the court "has reason to know" that the child is an Indian child, and to treat the child as an Indian child until the court determines otherwise. A comment to current Rule 8 includes circumstances that, under the regulations, indicate a "reason to know." Current Rule 8(D) authorizes the trial court to transfer a proceeding involving an Indian child to tribal court, and the comment provides details of federal regulations that support transfer or establish good cause for denying transfer. Mr. Withey acknowledged that recently restyled rules frequently omit lengthy comments, but if the Task Force deletes the comment to Rule 8, he suggested that the Task Force preserve the comment's substance in the body of the rule. He also noted that time limits concerning a preliminary protective hearing under current Rule 50, and placement preferences in current Rule 50.1, also derive from federal regulations, and he urged the Task Force to retain pertinent references to the regulations in these rules.

Mr. Withey was aware that a workgroup had discussed the standard of proof for "active efforts" under Rule 63, and he provided a handout containing an excerpt from the Code of Federal Regulations ("CFR") on this point. The CFR reported that the Department of the Interior "declines to establish a uniform standard of proof on this issue ['active efforts'] in the final rule but will continue to evaluate this issue for consideration in any future rulemaking." Members then discussed whether Arizona's standard for "active efforts" should be clear and convincing evidence, or proof beyond a reasonable doubt. During that discussion, a member cited *Valerie M. vs. A.D.E.S.*, a 2009 opinion of the Arizona Supreme Court, which held that in a termination proceeding governed by ICWA, the trial court applied the correct standard of proof: clear and convincing evidence. The Chair observed that the standard can be at or above a standard required

by federal law, but it cannot fall below that standard. See further the discussion of ICWA in Rule 63 below. Mr. Withey invited members to contact him if additional ICWA questions arise. The Chair then proceeded to the workgroup reports.

[08.21.20] **ICWA.** During the discussion of draft Rule 79.1(d), members asked about the appropriate form of citation to ICWA references. For the time being, they agreed that "CFR" should appear without periods after each letter. Workgroup 4 will consider a uniform system of citing provisions of ICWA and the Regulations throughout the draft rules. Staff also prepared a table that was distributed to the members and that displays references to ICWA and the Regulations in the current rules. The table might have benefit for cross-checking the restyled rules and assuring that all the current ICWA references have been included in the drafts. The table might be modified later to include ICWA references in the draft rules.

[04.03.20] **Rule 103 and the ineffective assistance of counsel.** This issue arose in conjunction with the appellate rules, including Rule 103, but it is broader and complex. Ms. Beckmann noted, and her meeting materials confirm, that during the past several years, parties have raised an increasing number of IAC issues on appeal, but there is no established mechanism for considering these claims. IAC claims can arise in two contexts.

In the context of a delinquency, Ms. Beckmann said that a delinquent has a right under the Sixth Amendment to effective counsel and that the existence of that right is no longer debatable. Arizona decisional law, including *State v. Spreitz,* 202 Ariz. 1 (2002), recognizes that because criminal post-conviction proceedings usually require consideration of matters outside the record, Arizona law requires parties to initially raise IAC claims in post-conviction proceedings in the trial court, which can conduct any necessary evidentiary hearings, rather than in appellate courts, which are not fact-finding tribunals. In juvenile court, post-disposition motions for new trial are occasionally the vehicle for raising these claims, but the practice is inconsistent and uncodified. Moreover, if the trial court denies the post-disposition motion without an evidentiary hearing, and an appellate court determines that the motion had raised a colorable claim, the appellate court might remand the matter to the trial court for further proceedings, which results in further delaying the finality of a case.

In the context of a dependency or severance proceeding, appellate courts have not expressly recognized a right to the effective assistance of counsel. Ms. Beckmann noted cases such as *John M. v. ADES*, 217 Ariz. 320 (App. 2007), which disposed of the IAC claim without recognizing the right because the appellant had not shown the likelihood of a different result had trial counsel performed diligently. She also noted more general language in other cases that sidestepped addressing the right, for example, "assuming without deciding that ineffective assistance of counsel provides a basis for reversible error in a severance proceeding;"[*Theresia F. v. DCS* (2019)]; or "for the purpose of this

case, we need not determine whether Arizona recognizes ineffective assistance of counsel as a separate ground for relief…" [*Shirley R. v. DES* (2018).]

Ms. Beckmann's primary premise is that the right to counsel is meaningless if counsel is ineffective. She acknowledged a variety of issues that would require resolution if the right to effective counsel is codified, including the need to appoint new counsel. Now, procedurally, appellate counsel who raise these issues are in a conundrum because they might not be able to raise the issue in the trial court, which no longer has jurisdiction, and because the appellate court is not the most effective forum for hearing the matter. She suggested one rule modification that could be helpful; she envisioned a new provision that would allow a motion in the trial court challenging the effective assistance of counsel to extend the time for filing a notice of appeal until disposition of the motion, like similar provisions in ARCAP 9. The alternative is for the appellate court to suspend the appeal and re-vest jurisdiction in the trial court. A discussion ensued, and members' comments included the following.

- During years on the bench, a Division One judge had seen only a couple IAC claims.
- Because trial counsel would not acknowledge their own ineffectiveness, the court would always need to appoint new counsel to raise these claims.
- Would a right to effective assistance of counsel extend to children's counsel? For example, would there be a remedy when counsel advocates a position contrary to the child's wishes? Would the process for hearing these claims be so protracted that the remedy would be meaningless for a child?
- Does current Rule 106 permit a self-represented party to raise IAC claims on appeal?
- Do any other jurisdictions by statute or case law recognize a right to effective counsel?
- 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?
- 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?

Ms. Beckmann agreed to research statutory and case law in other jurisdictions that might recognize the right to effective counsel in juvenile proceedings, and she will report back to the Task Force at a future meeting.

[04.03.20] **Discussion of the COVID pandemic.** Judge Kreamer led the discussion. As noted previously in these minutes, trial courts have become increasing reliant on telephonic court hearings. If the courts are going to continue in this manner, even after the pandemic, how should the juvenile rules accommodate this change? Issues involving the delinquency rules might include (references are to current rules) Rules 11

and 12 involving the appearance of counsel and the juvenile's attendance, certainly Rule 13 concerning attendance by telephone or video, Rule 18 on speedy justice, Rule 19 on public attendance, Rule 21 on victims' rights, and Rule 27 on subpoenas. Other delinquency rules and a number of dependency rules might also require modification. Would it be easier in the future for parents to appear in dependency proceedings by telephone rather than in person? Can an evidentiary hearing be done telephonically, and if so, how? How can technology be utilized to effectively provide parties their legal rights? How will social distancing requirements affect personal appearances in the courthouse? Will courtrooms need to be reconfigured? After further discussion by the Task Force, Judge Kreamer asked members to consider these issues as they continue their revisions to the juvenile rules.

[07.17.20] **Standardized Juvenile Warrants.** Mr. Jerry Landau, the Government Affairs Director for the Administrative Office of the Courts ("AOC"), presented this item. The AOC's Court Services Division had approached Mr. Landau about leading a workgroup to standardize juvenile arrest warrants forms if the AOC undertook such an initiative in the future. Mr. Landau has previously led a workgroup that standardized the arrest warrant forms in the Criminal Rules, and another workgroup that proposed further revisions to the warrant forms in Criminal Rule 41 (current Forms 2(a) and 2(b)). See pending rule petition R-20-0004. In conjunction with this agenda item, staff provided members with juvenile arrest warrants from 4 counties (Mohave, Pima, Maricopa, and Yavapai), all of which were different. There were even variations in forms that were used within the same county. Mr. Landau noted that a standardized juvenile warrant form might be easier for use by stakeholders statewide, including law enforcement, because the fields of information would be phrased consistently, and the data fields would appear in uniform locations. Moreover, standardized juvenile warrant forms would be necessary if these warrants are eventually entered into an electronic database.

Mr. Landau then requested the members' input on whether standardized juvenile warrants were desirable. A member noted that juvenile arrest warrants differ from adult warrants because they might not result in the named juvenile's detention. Mr. Landau acknowledged that the word "warrant" was generic, that some counties are now using warrants in ways that did not mandate the juvenile's arrest, and that a standardization project would need to address those variations. Members had no further comments, and there appeared to be neither definitive support nor opposition for this project. Mr. Landau provided his contact information for anyone to provide additional information. Mr. Landau advised that he'll be presenting this issue to the Committee on Juvenile Courts next month. The Chair thanked Mr. Landau for his presentation.

[10.23.20] **Civil Rule 81.1 ("juvenile emancipation").** Judge Kreamer presented an issue concerning Civil Rule 81.1. This single-sentence rule provides, "These rules [the Civil Rules] apply to juvenile emancipation proceedings except as provided in Part V, Rules of Procedure for Juvenile Court." Workgroup 1 had previously presented a set of emancipation rules that was entirely self-contained and did not require the reader to

refer to the Civil Rules. Accordingly, the workgroup believed that Civil Rule 81.1 was unnecessary and possibly confusing, and it recommended the abrogation of Rule 81.1.

Although Task Force members did not know the origin of Rule 81.1, they surmised it was added because emancipation proceedings are governed by Title 12, the title on civil proceedings, and individuals looking for rules on emancipation would accordingly consult the civil rules rather than the juvenile rules. Rule 81.1 therefore might provide some useful guidance, much like recently adopted Civil Rule 16.3 serves to direct readers to a new probate rule. Members then agreed, in lieu of abrogating Rule 81.1, to instead propose that it be amended as follows: "The rules that apply to juvenile emancipation proceedings are located in Part V of the Rules of Procedure for the Juvenile Court." The Task Force will need to include this requested amendment to the Civil Rules in its rule petition.

[02.05.2021] **Combined draft rules.** 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., and 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.

[03.05.2021] **Review of prepetition comments.**

Review of comments to Parts I, II, and VI. Comment #1, from Commissioner Bibbens, suggested that the definition of "parent" in Rule 102(r) match the definition of parent in A.R.S. § 25-401(4). After discussion, members agreed to make the suggested

change by adding the second sentence of the statutory definition to the definition in Rule 102.

In Rule 104(d)(3) ("evaluation report"), Judge Warner noted in comment #3 that beginning the provision with the words "before any dependency [etc.]" was confusing. He suggested saying instead "in any dependency." Members agreed with the suggestion. They agreed to make a similar change in Rule 104(d)(2) ("admissibility of child safety worker's report"), which also begins with the words "before any." While on the subject of Rule 104(d)(2), a member commented that current Rule 45 ("admissibility of evidence"), section (c) ("admissibility of reports") uses the word "shall [admit those reports]," which the member contended means "must admit." The draft rule, on the other hand, says "must review…and may admit." The member asked to change "may" to "must." Comment #12 from Mr. Koltunovich also proposed a change to Rule 104(d)(2). A judge member reminded members that they had extensive discussions on this section at previous meetings and asked whether today's meeting was an appropriate forum for reconsidering issues that had been previously resolved. The Chair agreed that it was not. Therefore, members did not make the suggested changes to Rule 104(d). The Chair noted that members did not have consensus on every one of the hundreds of proposed rule changes. If members believe the Task Force incorrectly resolved an issue, rather than reconsidering the issue at today's meeting, they should propose adding an explanatory note in the rule petition.

Members then turned to comment #7, a lengthy memo to the Task Force from David Euchner primarily concerning Part VI rules. For the reasons specified in the preceding paragraph of these minutes, members did not consider the portions of Mr. Euchner's comment concerning ineffective assistance of counsel or motions for new trial. Ms. Beckmann, who expressed appreciation for Mr. Euchner's comment, took the lead on addressing the remainder of his comment. One area of his comment asked whether the list of appealable final orders in Rule 103(b) was actually inclusive, as it purports to be. His comment said, "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." Ms. Beckmann responded that the listed orders are based on case law, but with a catch-all in Rule 601(b)(2)(N) ("any other order that is final pursuant to Arizona case law") because future appellate opinions might change what is a final appealable order. Neither Ms. Beckmann nor members saw the need to change the draft rule in this regard. Mr. Euchner's comment also raised issues concerning the nature of time-extending motions and the associated tight deadlines. Ms. Beckmann will speak with her Division One counterpart on those issues.

Ms. Beckmann added a related concern regarding the 12-day deadline under Rule 317 ("altering or amending a final order"), subpart (b)(1), the second sentence of which allows the court to extend or excuse the deadline for extraordinary circumstances. (See comment #10 from COA-2.) Ms. Beckmann proposed an outer limit on when the court can do this, for example, no later than 6 months after entry of the order. Members favored

adding such a limit; they did not support the alternative or removing the second sentence of Rule 317(b)(1). Another issue in comment #10 (the portion from Mr. Truman) noted concerns with reducing the time for filing a petition for review under Rule 609 to 20 days; it is 30 days under the current rule. The members' rationale for 20 days was that most appellants don't file a petition for review, and the shorter time would allow an appellate court to issue its mandates more promptly, which would benefit many children. However, a member suggested a compromise: retain the 30-day limit for filing the petition for review but require a party who intends to file the petition to file a notice of that intent within 15 days. Judge Kreamer advised that workgroup 1 will consider this suggestion.

Rule 603 ("notice of appeal"), subpart (a)(5) allows the court for good cause to excuse an untimely notice of appeal. Mr. Euchner proposed an edit that would preclude the State or DCS from filing a delayed notice. Although members did not generally favor that change, one member supported it, and observed that the State does not have constitutional rights at stake, whereas parents do. Counsel may also have difficulty locating a parent within the time for filing a notice of appeal, whereas the State should not have a similar difficulty. The workgroup will consider Mr. Euchner's proposed amendment. [Note: Mr. Euchner subsequently spoke at the Call to the Public and commented on this issue. He said that dependency and termination appeals are not purely civil; rather, they have aspects that are quasi-criminal in nature. Parents in those proceedings typically have appointed counsel, and if their counsel did not timely file a notice of appeal, it would constitute ineffective assistance and be an error of constitutional dimension. He said that similar to the State in a criminal case, the State in these juvenile cases does not have the same constitutional rights as an individual, and accordingly, should not have a co-extensive right to file an untimely notice of appeal. Mr. Euchner said his proposed amendment is a recognition of this difference.]

Rule 604 ("the record on appeal"), section (f) ("sanctions") would allow the appellate court to impose sanctions on a party for a supplemental designation of items for the appellate record that were unnecessary. Mr. Euchner's comment contended that the proposed rule "is entirely unworkable and counterproductive" and would require the appellate court to second-guess an attorney's decision to make a supplemental designation. Although current Rule 104(G) permits sanctions for unnecessary designations, members generally concurred with Mr. Euchner's observations. They also agreed that in egregious circumstances, the appellate court would have inherent authority to impose sanctions. However, a judge member cautioned that removing the provision could open the door for attorneys using supplemental designations solely with the intent of extending time. The workgroup will also look at this issue.

A member noted an issue raised by Ms. Owen (comment #6) concerning the admission of DCS reports that contain statements from unidentified declarants. The member believed that parties should know the identities of declarants, or their statements should be stricken from the reports. Another member replied that neither case law nor

statutes contain a requirement that reports disclose a hearsay declarant's identity. One member proposed adding to the pertinent sections of Rule 104(c) ("admissibility of reports") that a timely disclosed report is admissible "with proper foundation." Because Rule 104(d)(2) says that the court "may" admit the report, the court has discretion to exclude it or to give it little weight. Workgroup 1 will discuss this issue.

Although members did not raise other issues during the morning session concerning comments to Parts I, II, and VI, Judge Kreamer noted that a number of the remaining comments raise important issues. He cited as an example portions of comment #12 regarding Part II rules. He noted that many of the comments were received just days before today's meeting, and he supported allowing the workgroups additional time to review the comments.

Review of comments to Parts III and IV. A portion of Commissioner Bibbens' comment (comment #1) overlapped with a parallel comment from the Pima LGBTQ+ Task Force (comment #4). Comment #4 proposed adding to the subjects enumerated in Rule 309 ("education requirements for a court-appointed attorney or GAL"), section (d) ("later training") "the needs of LGBTQ youth in care." Members did not oppose this amendment, but several members felt that it didn't go far enough in identifying other disproportionately affected minority youth. A workgroup will follow-up on this issue.

Judge Warner's comment (#3) observed that Rule 303(d) ("manner of appointment") requires the court to "enter an order or issue a minute entry" assigning or appointing counsel. Rule 324 ("minute entries") provides that "an unsigned minute entry is an order of the court." Accordingly, the language of Rule 303(d) – and similar language in other rules – is duplicative. The members supported a suggestion to relocate Rule 324, which is a two-sentence rule, to Rule 102 ("definitions"). But in doing so, members should assure that the new definition is consistent with Supreme Court Rule 125 and make appropriate conforming changes to other juvenile rules. A workgroup will address this. Judge Warner's comment also proposed adding this sentence to Rule 304(c) ("withdrawal"), subpart 4: "The attorney remains the person's attorney of record until a notice of withdrawal is filed." Members agreed to make that change and another change Judge Warner proposed to Rule 304(c)(1) concerning withdrawal with the client's consent.

Judge Warner also suggested a change to the wording of Rule 323 ("simultaneous dependency and legal-decision making/parenting time proceedings"). Members preferred his suggested language for section (a) ("transfer to juvenile division") to the current wording. His clearer language says, "If pending family law and dependency proceedings concern the same parties, the judge presiding over the juvenile case makes decisions concerning the children." Members requested that a workgroup also consider Professor Bennett's margin comment concerning the applicability of rules on a Rule 323 determination. (He asked whether family law rules apply when a juvenile court makes decisions regarding parenting time.) Judge Warner requested that the juvenile rules

distinguish summary adjudications from contested adjudications, and that a new rule describe "what a summary adjudication is." However, while a word search of Part III rules revealed references to summary judgment motions, there were no references to summary adjudications. Members supported Judge Warner's proposed amendment to Rule 339(b) ("time limits"), which would add to that section the words "and may accelerate the disposition to the time a dependency finding is made."

Rule 342 ("motion for return of the child"), section (b) ("time limits") would require the court ("must set"), as current Rule 59(b) requires ("shall be set), to schedule a hearing on a motion for return of the child. Judge Warner noted the possibility of recurring motions under this rule and the rule's requirement in that circumstance to set repeated hearings. He suggested that the rule should require the court to set a hearing, for example, only when a motion had not been filed in the previous six months. One member noted that the pertinent statute contains no such limitation. Another member observed that a parent might be able to rectify a situation within weeks and should not need to wait months to file the motion. Members concluded that currently there is not an actual problem with the number of Rule 59 motions that are filed, and they declined to add a limitation to Rule 342.

Professor Bennett's narrative comment raised an issue of attorneys for parents not attending DCS child and family team meetings, either because the attorneys were concerned about violating ER 4.2 ("communication with person represented by counsel") or because they were explicitly told by DCS staff that they could not attend. (Compare Rule 306(g), which requires a child's attorney to attend and provide input at a DCS staffing.) Counsel's attendance poses an ethical issue because the DCS caseworker at these meetings is a representative of an attorney-represented party in litigation. A member acknowledged that parents are occasionally excluded from these meetings. Sometimes, but not always, it is because the parent's attorney assumes an adversarial role at a staffing. But the member added that a staffing is supposed to be more open than DCS sometimes acknowledges. Those who attend should participate in good faith, and guidelines are in place to further that objective. A judge member noted that attorneys could abuse the intended purpose of a staffing, but also believed there a rule concerning a DCS staffing might be needed to assure that everyone is aware of who can participate and the nature of the engagement. A workgroup will review this issue further.

At a later point in the meeting, members considered Professor Bennett's proposed amendment to Rule 306 ("duties and responsibilities of an attorney and GAL for a child"). Professor Bennett's proposed section (h) (untitled), would exempt the child's attorney and GAL from the requirement of ER 4.2 for the limited purpose of communicating with child safety workers. His proposed text would also impose a duty on the Attorney General's office to inform the child's attorney and GAL of any scheduled staffing and inform DCS that the child's attorney and GAL "are encouraged to fully participate in child and family team meetings." A member from the Attorney General's office thought that appropriate contact would be reasonable, but it might be problematic to give the

child's attorney unlimited access to the case worker. Members distinguished contact with a case worker on routine matters from contact involving contested issues. The Chair referred the matter to the workgroup but noted that there might not be an easy fix and it might be difficult to resolve this issue in a court rule.

Professor Bennett also proposed adding a new untitled section (d) to Rule 315 ("disclosure and discovery"). This one-sentence section would provide, "If a child is moved to a new placement, the DCS must disclose full contact information to the attorney and GAL for the child within 36 hours of the move." Members generally favored the amendment but proposed both longer and shorter times for the requirement (24, 48, or 72 hours.) A member noted that pursuant to current DCS policy, DCS has up to 10 days to notify the child's attorney and GAL of a child's relocation, which most agreed was too long. Members agreed that the court-appointed attorney and GAL representing the child should know the child's whereabouts at all times, and it is the court's responsibility to assure that DCS timely provides this information. They also agreed that DCS could provide this information by telephone or email (see Rule 315(a)(2)). The workgroup will review the proposed amendment and include the necessary details.

Members also discussed Professor Bennett's comment regarding the admission of a parent's report under Rule 104. If Professor Bennett's comment was directed at the admission of an evaluation report from the parent's expert, Rule 104(d)(3) would already allow admission of the report, and his proposed amendment would be unnecessary. A related question in Professor Bennett's comment was whether a report admitted at a preliminary protective hearing remains admitted for purposes of future hearings, including a termination adjudication. Members initially disagreed on the answer to that question. While the initial response of some members was "no," others noted Rule 351 ("termination adjudication hearing"), section (g) ("social study"), permitting the admissibility of a social study as provided in Rule 104(d). They also cited Rule 340 ("motion to determine the provision of reunification services"), which allows the court to consider "documents entered into evidence at prior proceedings." Some members preferred to leave this question for trial judges. Judges can determine if, notwithstanding the admission of a report at a prior hearing, there are reasons to exclude it at a subsequent proceeding. This might also be an issue for judicial education, i.e., instruction that previous admission of a report is by itself an insufficient basis for admitting it at a subsequent hearing.

Professor Bennett proposed adding a third sentence to Rule 305 ("appointment of a guardian ad litem") that would direct the court appointing a GAL for a child or an adult to "state the reason for the appointment and the expected role of the guardian ad litem." Members had previously included similar, but not identical, language in Rule 308 ("duties and responsibilities of a guardian ad litem for a parent, guardian, or Indian custodian"). Members discussed the benefit of having language like this in those two rules as well as in Rule 306 ("duties and responsibilities of an attorney and GAL for a child"). One proposed solution would expand the language of Rule 308 to make it

applicable to a child's GAL. The workgroup will consider how to best achieve the members' objective.

Members then discussed various other comments concerning the Part III rules. Ms. Jorquez, in comment #11, wanted a participant's right to be heard under Rule 311 ("participants' rights") to be limited to matters concerning the child. Members agreed with the change and the workgroup will review her proposed modification to Rule 311(b). In his text changes to Rule 311 associated with comment #13, Mr. Conant requested the addition of an amendment regarding a participant's right to counsel. Members agreed that participants have a right to retain counsel, but not a right to court-appointed counsel, and that a participant's attorney can address the court. But members believed the proposed amendment implied that participants had a status approaching that of a party and concluded that the amendment was unnecessary. Ms. Rosenberg's comment (#9) proposed adding text regarding a guardianship subsidy to the guardianship rules; she will provide the workgroup with specific language. The comment from Ms. Owen (comment #6) proposed adding to Rule 333 ("contested review of temporary custody"), subpart (a)(2)(A), the words "to prevent abuse or neglect" (i.e., "whether removal of the child from the home was clearly necessary to prevent abuse or neglect.") Members agreed to add those words.

A member proposed that comments concerning the QRTP, including comments #5 from Ms. Jorquez, #17 from Ms. Dunn on behalf of the Children's Action Alliance, and #19 from Ms. Ronan on behalf of the Center for Law in the Public Interest, be referred to the workgroup. Judge Portley expressed the view that the new federal statute provides the essential requirements for QRTPs, i.e., that judges timely consider assessments and set subsequent review hearings. He believes that proposed Rule 335 accomplishes these objectives. He suggested that proposals contained in comments #17 and #19 exceed the basic federal requirements and add what he considers to be best practices. Although Arizona can adopt its own statutes that incorporate the FFPSA's requirements and add best practices, as other states, e.g., Washington. have done, Arizona has not yet done so. A member added that until the FFPSA is operationalized in Arizona, Arizona stakeholders might not even know which best practices would be desirable. Some members agreed with Judge Portley, but to get a better sense, the Chair called for a straw poll. By a ratio of 5:1, a majority concluded that Arizona currently needed a rule containing a basic structure required by the FFPSA, and that incorporating additional best practices should be deferred until after Arizona has implemented the program.

However, one member had a concern with comment #5. The concern was that if DCS is doing its own assessments, as the proposed amendment in comment #5 would allow after DCS obtains a waiver, then DCS might use a QRTP as a substitute for a group home when a foster family is unavailable. A DCS representative advised that DCS does not currently intend to request waivers, but it might do so in the future and wanted to preserve that option. Members declined to simply cross-reference in Rule 335 the federal statute that contains the waiver provisions, but rather they preferred to add appropriate

text to the body of the rule, as proposed by comment #5. Another comment noted that the acronym "QRTP" as it appeared in Rule 335 was sometimes erroneous and requires correction. Judge Kreamer posed the possibility that DCS might implement the QRTP sooner than October 1, 2021, and the rule petition might need to request an even earlier effective date for Rule 335. He will keep the Task Force advised of any news on this point.

Members then turned to comments on the Part IV rules.

Rule 411 ("service of the petition to adopt and notice of hearing") requires the petitioner to serve, among others, "any person who has initiated a paternity action." Ms. Meiser (comment #2) suggested adding the words "within the time required by A.R.S. § 8-106." Members agreed and added "(J)" to the statutory reference. Ms. Meiser also had a concern with Rule 408 ("certification to adopt"). The concern was that a prospective adoptive parent who anticipated an unfavorable determination from an agency might withdraw the application and reapply through a different agency. She suggested that there be a record of withdrawn applications, such as requiring that the subsequent application provide the details of a prior application. During their discussion, members noted that a prospective adoptive parent might be dissatisfied with an agency for legitimate reasons, and withdraw their application accordingly, and there shouldn't be a negative inference from the withdrawal of a previous application. In addition, if this is actually a widespread problem, it should be addressed by statute. Members also considered but declined to make a change to the ICWA provisions in Rule 416 ("hearing to finalize adoption"), as comment #2 proposed.

Members then reviewed another portion of comment #11, from Ms. Jorquez, concerning Rule 417 ("setting aside an adoption"). Her comment indicated that the timing in Rule 417(a) ("motion to set aside"), which required the court to hold a hearing within 10 days of filing, was inconsistent with the time in Rule 417(c) ("initial hearing"), which requires the court to set an initial hearing no later than 15 days after filing. Members agreed that the contradiction could be remedied by deleting the first sentence of section (c). However, during the ensuing discussion, members noted two other anomalies. First, although Rule 317 ("altering or amending order") includes a 12-day time limit, Rule 407(f), which can also be a time extending motion under Rule 603(a)(3), contains no similar procedure. Second, Rule 407(f) and Rule 417(a) address the same subject: a motion to set aside an adoption judgment. On the second item, a member proposed relocating the substance of Rule 407(f) to Rule 417(a). The workgroup will address these issues.

Mr. Conant's comment (#13) included a few additional matters. Professor Atwood will discuss his comment in Rule 408 ("certification to adopt") regarding the ICPC with a subject matter expert. (The ICPC is a defined term in Rule 102(l).) Members declined his proposed amendment to Rule 404 ("appointment, appearance, and withdrawal of counsel") because it would tend to elevate a prospective adoptive parent to near-party status and lead to a situation that could be detrimental to the actual parties, especially if

the goal of an ongoing dependency proceeding is family reunification. The workgroup will discuss Mr. Conant's proposed amendment to Rule 410 ("petition to adopt").

A member proposed adding a definition of "agency," because sometimes this word refers to an adoption agency and other times it refers to DCS. The member also suggested that the term "DCS" be used wherever the rules now mention "division" or "department."

[04.12.2021] **Further review of prepetition comments.** The Chair proposed that the Task Force proceed through the rules on today's agenda in numerical order, beginning with the rules in Part I.

Part I rules. Judge Kreamer and Judge Armstrong presented the changes to Rules 102 and 104. Rule 102 ("definitions") now includes a definition for "A.R.S." Rule 102 also includes a new definition of "court day," which is intended to replace "business day" used elsewhere in the proposed set. A definition of "minute entry" was added to Rule 102 to replace the "minute entry" provisions in the prior version of Rule 324. The new Rule 102 definition includes a reference to Supreme Court Rule 125, which is the primary explanation of a minute entry; the new definition also provides that "an unsigned minute entry may constitute an order of the court. However, to be appealable, and order must be signed as required by Rule 601." The last change to Rule 102 is a modified definition of "parent," which now includes a second sentence derived from A.R.S. § 25-401(4). (See further a prefiling comment from Commissioner Bibbens.) The change to Rule 104 ("applicability of the rules of evidence, admissibility of evidence and reports") was in subpart (d)(9) ("reports offered but not admitted"). The change clarifies that a report that is marked but not admitted becomes part of the appellate record only by a party's supplemental designation of the record. (See further a change to Rule 604, *infra.*)

Part II rules. Rule 205 ("notice to appear; service; failure to appear") includes a subpart (c)(1) titled "provisional warrant." Workgroup 2 expanded the explanation of a provisional warrant. Generally, a provisional warrant is used to obtain the next court date for an alleged delinquent who failed to appear without the need for the juvenile's arrest and detention. Ms. Phillis noted that some counties are already using these warrants, but they are called by different names and might be used differently. The workgroup intended that its explanation be sufficiently flexible to accommodate those variations on usage. The next rule, Rule 217 ("mandatory judicial determinations") was modified by Workgroup 3 upon learning that juvenile probation departments in the future might request Title IV funding for placement of a delinquent in a QRTP. Judge Quigley noted that Workgroup 3 added a reference to the Family First Prevention Services Act in section (a) ("application") of Rule 217. Most noteworthy was the addition of a new section (f) ("QRTP"), which refers the reader to Rule 335 when a child in placed in a QRTP in a delinquency proceeding.

Ms. Phillis observed that after discussing a prefiling comment concerning Rule 218(c) ("length of detention"), the workgroup recommended no changes to the draft rule. The rule precludes a juvenile from being held in detention for longer than 24 hours if no petition has been filed, or from being held if not brought before the court within 24 hours after the filing of the petition. In the vast majority of cases, these deadlines are met. But particularly in a smaller county, if a minor misses the initial court appearance by a short time, the next court appearance might be slightly past the deadline. Like the workgroup, the Task Force considered whether setting a flat 48-hour deadline might be clearer than two 24-hour deadlines. They both concluded, however, that each of the 24-hour deadlines was discrete, and a single 48-hour deadline might inadvertently extend rather than expedite the process. Accordingly, members made no changes to Rule 218(c) as previously proposed. Finally, in Rule 221(e) ("judgment of acquittal"), Ms. Phillis noted the use of the word "judgment," because there was not an appropriate substitute term. She added that the rule requires the court to enter a "judgment" rather than an "order of dismissal" because the latter term does not convey that the matter had proceeded to adjudication.

Parts III rules. Judge Quigley noted that the previous version of Rule 302 ("definitions") included sections (d) ("child's attorney") and (e) ("guardian ad litem"). However, sections (d) and (e) are not strictly definitions. Accordingly, the substance of section (d) was relocated in Rule 303(c) ("appointment of an attorney for a child"), and the substance of Rule 302(e) was moved to Rule 305 ("appointment of a GAL"). When SB 1391 becomes law, the Task Force should consider adding to these provisions that the attorney under Rule 302 does not have the role of a GAL, and vice versa in Rule 305. The relocated provision from Rule 302(e) included text that said, "A GAL is not bound by the client's expressed preferences or the attorney-client privilege." Some members objected to keeping this language in Rule 305, although they were unable to cite any authority that contravened the language. The word "privilege" is not in the corresponding current rule. After further discussion, members changed the language of the last sentence of Rule 305 to instead say, "A GAL is not bound by the minor's, incompetent's, or protected person's expressed preferences, and communications are not privileged." In related rules, a provision concerning an attorney's withdrawal from a case was modified by adding, "The attorney remains the person's attorney of record until the court grants the motion to withdraw." (See Rule 304(c).) A definition of "parent" in Rule 307 ("duties of attorneys who represent parents, etc.") was deleted because it duplicated the definition of "parent" in Rule 302.

A modification to Rule 309 on "education requirements for court-appointed attorneys and GALs, section (d) ("later training") generated a lengthy discussion. The initial modification, which was proposed by Commissioner Bibbens and the Pima County LGBTQ Task Force, was limited to adding training on LGBTQ issues. At the March 5 meeting, members agreed to expand this amendment to include training regarding other

similarly affected groups. Ms. Rosenberg contacted national experts, who proposed language that included the phrase, "diversity, equity, and inclusion." Ms. Rosenberg also observed that the name of the Court's Commission on Minorities recently changed to the Commission on Diversity, Equity, and Justice. However, a member noted the goal of that Commission was to increase diversity in the judiciary, a focus that went beyond the training contemplated under Rule 309. Members had various other concerns about the proposed new language for Rule 309(d). One concern was that the list of topics in section (d) had become so lengthy that the individual subjects were no longer distinctive. A second concern was the lack of a bridge between disproportionate involvement and other subjects, such as placement and services. Another concern was whether "diversity, equity, and inclusion," in the context in which they appeared in this draft, made sense, or whether the terms were popular but inapt as subjects for training of attorneys and GALs in child welfare proceedings. After discussion, members removed "diversity, equity, and inclusion" from the draft of Rule 309(d) and added "…cultural awareness, issues in the child welfare system related to race, ethnicity, disability, sexual orientation, gender identity and expression, and implicit bias, and other topics and issues concerning abused and neglected children." The Editorial Group will further review this language at its upcoming meeting.

In Rule 311 ("participants' rights"), section (b) ("right to be heard"), members agreed to a change that had been proposed by Ms. Jorquez. The former verbiage was, "have a right to be heard at any hearing regarding a child." The revised language is, "have a right to be heard regarding the child at any hearing." Workgroup 1 made changes to Rule 317 ("altering or amending a final order"). The changes included a new section (e) ("effect on appeal time"), which has two subparts: (1) appeal time extended, and (2) appeal time not extended. These changes, in conjunction with Rule 603, should clarify when the filing of such a motion extends the time for appeal. Rule 323 ("simultaneous dependency and legal decision-making/parenting time proceedings") now includes a revision proposed by Judge Warner: "… ~~the juvenile division has jurisdiction over~~ the judge presiding over the juvenile case makes decisions concerning the children."

Rule 324 ("providing notice of a change in a child's placement") is a new rule that also precipitated discussion. The objective of the rule is to assure that the parties' representatives receive prompt notice of a change in the subject child's whereabouts. Section (a) requires DCS to notify the child's attorney and GAL of the new placement address, the type of placement, and contact information. Section (b) requires notice to the parent's attorney, but the notice must not include the new placement address or contact information, which is expressly confidential. Section (c) allows DCS to provide the notices under sections (a) and (b) "verbally or electronically, including by email." Section (c) requires that DCS provide the notices "as soon as practical before the child is relocated," and if not, "as soon thereafter as possible and no later than [blank] hours after the change of placement, excluding weekends and holidays." The ensuing discussion centered on the number of hours that should go in the blank space. Some members

proposed 24 hours. They contended that the giving of notice by a voice or text message wouldn't be onerous and that counsel, especially children's counsel, had a substantial need to have this information provided as promptly as possible. Others thought 24 hours would not be doable in every county and that 72 hours would be more practical. Professor Bennett, whose comment was the genesis of this new rule, proposed 36 hours. One member noted that experienced case managers are currently providing notice within 24 hours without a rule requirement and without difficulty. Another member expressed concern about setting any time requirement if the rule did not provide a sanction for violations. On a straw vote, three-fourths of the members favored 24 hours, and one-fourth opposed that time limit. The petition should note the lack of unanimity.

Rule 326 is a new rule titled "required admonition and findings." The rule would supplant the admonition provisions that are already in various dependency, guardianship, and termination rules, however, those provisions remain in these rules. The workgroup inquired whether the Task Force preferred to retain Rule 326 and to delete those other provisions, or to simply delete Rule 326. The workgroup had no preference, nor did the Task Force. If Rule 326 is retained, members saw a need to carefully review the admonition provisions in those other rules to assure they are adequately replicated in the new rule. After discussion, members agreed to retain Rule 326 and to also retain the admonition provisions in the other rules, to note the duplication in the rule petition, and to solicit comments on stakeholder preferences.

Rule 335 ("Qualified Residential Treatment Program; Judicial Review") was introduced by workgroup 3 at the February meeting as Rule ZZ, and it has been the subject of ongoing revisions. Judge Quigley reviewed the most recent version of Rule 335. Section (b)'s definition of "qualified individual" now includes the waiver option under federal law in case DCS seeks such a waiver in the future. Section (c) ("time to complete the assessment and documentation") now distinguishes these various requirements and provides additional details. Members had a lengthy discussion of section (d) ("QRTP placement and approval"), particularly concerning the process and the time for notifying the parties and court of the placement and providing the assessment and supporting documentation. As a result of that discussion,

- In subpart (d)(1)(A), DCS must notify the parties of the child's placement in a QRTP within 24 hours, in the manner prescribed in Rule 324;
- In subpart (d)(2)(B), DCS must file a notice with the court of the child's placement in a QRTP not later than 5 days (formerly 10 days) after the placement;
- In subpart (d)(2)(A), upon receiving notice of the placement from DCS, the court must set a hearing on the placement not later than 60 days thereafter;
- In subpart (d)(2)(B), DCS must file a motion with supporting documents seeking approval of the placement no later than 10 days after receiving the assessment (under section (c), the assessment must be completed within 30 days after the placement); and

- In subpart (d)(2)(C), the court must consider specified items when deciding the motion, even if the motion is uncontested.

Judge Quigley further reviewed the required findings and orders in section (d), the process for continuing review of a QRTP placement in section (e), and discharge of the minor from a QRTP in section (f). In subpart (d)(4)(C), which contemplates entry of an order when the court does not approve the QRTP placement, members modified the workgroup's language to now provide that the court must "[order] DCS to investigate alternative placements and [set] a further hearing if necessary."

In Rule 346 ("guardianship adjudication hearing"), an amendment to subpart (g)(2)(E) now requires the court at the conclusion of the hearing to "direct DCS to assist the permanent guardian in making an application for guardianship subsidy, if available." (Rule 348(g), which concerns a successor permanent guardian, already includes such a provision.)

The former version of Rule 349 ("petition, motion, notice of hearing, and service of process and orders") included section (d) on service, but the section did not specify the manner of service. The workgroup addressed this omission in a new subpart (d)(1)(B). A termination petition must be served pursuant to Civil Rules 4.1 or 4.2. A termination motion must be served as provided by Juvenile Rule 106. If the matter involves the parent of an Indian child, additional service must be accomplished as provided in subpart (d)(2) ("service involving an Indian child"). A member noted that subpart (d)(1)(A) ("who must be served") required service on "any individual who is in loco parentis to the child." Members found this provision to be problematic (for example, would that person be entitled to services?), but they agreed the person should receive notice. They accordingly removed the in loco parentis language and substituted that service must be made on "the person with legal custody or decision-making regarding the child." They also removed service on the child's guardian because "parent" as defined in Rule 302 includes a guardian under Title 8 or Title 14.

Rule 350 ("initial termination hearing"), section (d) ("findings and orders") requires the court to address the parent and advise that a failure to appear at certain proceedings, including a settlement conference, could be deemed an admission of the allegations. A.R.S. § 8-537(C) does not mention a settlement conference, but it does mention a status conference. While acknowledging that loss of parental rights is a significant consequence for failure to attend a court event, members accordingly deleted the reference to settlement conference and added status conference to this provision. A reference in Rule 351 ('termination adjudication hearing"), section (g) ("social study") to Rule 104(d)(4) was corrected to Rule 104(d)(5).

Judge Quigley concluded the presentation of Part III rules by noting Professor Bennett's comment about the attendance of attorneys and GALs at a DCS staffing.

Workgroup 3 discussed his comment but determined the issues were too complex to resolve in the limited time that was available.

Part IV rules. Professor Atwood led the discussion. In Rule 402 ("meaning of terms"), members added a new definition: "'Agency' has the meaning provided in A.R.S. § 8-101(2)." The objective is to no longer refer to DCS as an agency. Any references in the proposed rules to "division" or "department" should also be changed to "DCS." Members also added a second sentence to the definition of "parent" in Rule 402 to make it consistent with the definitions of that word that appear in Rules 102 and 302.

Members considered together the changes to Rule 407 ("motions"), section (f) ("motions to set aside") and Rule 417 ("setting aside an adoption"). Professor Atwood explained that Workgroup 4 considered ways to relocate the substance of Rule 407(f) to Rule 417. It was not possible to do this, however, because Rule 407(f) addresses motions to set aside in adoption proceedings other than Rule 417 motions concerning final orders. Accordingly, the workgroup added a sentence at the end of Rule 407(f) that says, "If a motion under this section seeks to set aside a final order of adoption, Rule 417 also applies." The second, third, and fourth sentences of Rule 417(a) ("motion to set aside") were deleted, either because they duplicated or because they conflicted with other Part IV provisions. Members agreed that Rule 603 should include a reference to Rule 417, in addition to Rule 407(f).

Part V rules. Mr. Volkmer presented the changes to these rules on behalf of Workgroup 1. The changes were necessary because of the enactment of SB 1332. In Rule 502 ("petition and documentation requirements"), section (a) ("requirements"), the workgroup deleted a subpart that provided as a requisite for emancipation that the petitioner was not a ward of the court. However, because that information might be useful for the judge considering the emancipation petition, Task Force members added a provision in section (b) ("content of petition") requiring that the petition state whether the petitioner was a ward of the court or in the care, custody, or control of a state agency. The workgroup also added to section (b) a newly required allegation about "whether the petitioner is employed or has obtained an offer of employment." The workgroup made modifications in Rule 505 ("determination and order of emancipation") that corresponded with the modifications in Rule 502.

Part VI rules. Ms. Beckmann presented the Part VI rule changes. She began with Rule 601 ("right to appeal"), section (b) ("final orders"). In delinquencies, Workgroup 1 added a catch-all that an appeal may be taken from "any other order that is final pursuant to Arizona case law." Pursuant to the earlier discussion of the adoption rules, the provision in Rule (b)(2)(M) concerning motions to set aside now includes a reference to Rule 417. Also, recent input from a Division One judge prompted the workgroup to add a comment to the rule concerning subpart (b)(2)(E), which allows an appeal from an order in a dependency that removed a child who has been adjudicated dependent from a parent's physical custody. The comment recognizes the subpart (b)(2)(E) "may be

considered inconsistent with certain case law," including *Jessicah C. v. DCS* (Division One, 2020), but, the comment continues, the Court has determined that such orders should be deemed final and appealable.

Rule 602 ("general provisions"), section (a), ("caption on the notice of appeal"), now an example caption that accommodates more than one child in the case. Rule 603 ("notice of appeal"), subpart (a)(3), now includes a reference to Rule 417 in the provisions on time extending motions. In the delayed appeal provisions of Rule 603(a)(5), the workgroup added a sentence that says, "Good cause may include but is not limited to clerical errors of counsel that are not attributable to the client." A modification to Rule 604 ("the record on appeal"), subpart (a)(1)(B), deleted a reference to reports marked but not admitted under Rule 104(d)(8); these reports are not part of the presumptive record under section (a) but they may be included in the record by a supplemental designation under section (b). At Mr. Euchner's suggestion, the workgroup removed in its entirety section (f) ("sanctions") concerning unnecessary supplemental designations. The workgroup acknowledged that this sanction is available under current Rule 105(J), but Task Force members concurred in removing the provision.

The final Workgroup 1 changes involved Rules 609 ("petition for review) and 610 ("appellate court mandate"). Under Rule 609, a party has 30 days to file a petition for review. Anecdotally, few petitions are filed in juvenile cases, but as a consequence of this rule, issuance of the mandate is unnecessarily delayed for 30 days, which adversely affects a child's need for finality and permanency. The workgroup addressed this dilemma by adding in Rule 609 a new section (b) titled "notice of intent to file petition for review." A party who intends to file a petition for review must file this new notice within 15 days after a disposition by the Court of Appeals. A party who files such a notice may ultimately decide not to file a petition, without consequence. However, a party who fails to file the notice within 15 days loses the opportunity to subsequently file one. Under new Rule 610(b) ("no notice of intent to file petition for review"), the Court of Appeals clerk may issue the mandate if a notice of intent is not timely filed.