

**Probate Rules Task Force  
State Courts Building, Phoenix  
Meeting Minutes: April 6, 2018**

**Members attending:** Hon. Rebecca Berch (Chair), Marlene Appel, John Barron III, Colleen Cacy, Hon. Julia Connors (by telephone), Robert Fleming, Hon. Andrew Klein, Hon. David Mackey, Aaron Nash, Hon. Patricia Norris, Hon. Robert Carter Olson (by telephone), Hon. John Paul Plante (by telephone), Hon. Jay Polk, Lisa Price, Catherine Robbins, T.J. Ryan, Denice Shepherd, Hon. Wayne Yehling (by telephone) [all members present]

**Guests:** John Rogers

**Task Force Staff:** Theresa Barrett, Jodi Jerich, Mark Meltzer, Angela Pennington

1. **Call to order; introductions; preliminary remarks.** The Chair called the first meeting of this Task Force to order at 10:05 a.m. She expressed her appreciation for the members' service on this project. She noted that some members had previously served on the first Probate Rules Committee (Administrative Order No. 2006-87), the Committee on Improving Judicial Oversight and Processing of Probate Court Matters (Administrative Order No. 2010-52), or both committees. The Chair introduced Task Force staff, and requested the members to introduce themselves. She then advised members that the Task Force has a web page on the Arizona Judicial Branch website where materials for each Task Force meeting will be posted. She recommended that members retain paper packets of meeting materials for future reference. Today's meeting packet includes Rules for Conducting Task Force Business, which the Chair reviewed with the members. Among other things, those Rules specify certain requirements that comply with Arizona Code of Judicial Administration § 1-202 concerning open meetings.

2. **Administrative Order No. 2017-133.** The Chair proceeded to another document in the meeting packet, Administrative Order No. 2017-133, which established this Task Force. The Order noted that other sets of Arizona rules, including the civil, civil appellate, justice court civil, criminal, and protective order rules, have been recently restyled. Although the probate rules were adopted with an effective date of January 1, 2009, the Order stated that "a comprehensive review of those rules would now be beneficial." The Order provided that the purpose of the Task Force is to identify possible changes to the Probate Rules "to conform to modern usage and to clarify and simplify language."

The Order establishes a goal that the Task Force submit a rule change petition by January 10, 2019. However, the Chair recommended that members have an initial draft of proposed rule changes by September 2018. Doing so would allow interested committees and stakeholders to critique the draft, and permit the Task Force to make

appropriate revisions before it files a petition in January. The Order also states that members' terms do not conclude until December 31, 2019, and this will allow the Task Force time to collect comments on its petition, and to consider and respond to those comments during the 2019 rules cycle. Finally, the Order requires the Task Force to seek input from interested persons and entities. As the Task Force progresses through this project, the Chair requested members to reach out to probate, elder law, senior citizen, and other interested groups for feedback.

**3. Rule restyling principles.** The Chair next introduced John Rogers, a Supreme Court staff attorney who has been involved in several previous rule restyling projects, to summarize restyling principles.

Mr. Rogers noted that the objectives of restyling include improving the organization of the rules, making the rules internally consistent, and clarifying the language of each rule. A restyling project concerning the federal civil rules began in the 1990's, but the project bogged down during consideration of substantive rule changes and wasn't completed until 2007. During that project, Bryan Garner prepared a booklet (*Guidelines for Drafting and Editing Court Rules*, which staff previously provided to the members) that was utilized during the federal rules restyling and continues to serve as a guide for Arizona rule restyling projects. Applying those *Guidelines*, and following conventions used in previous Arizona rules restyling projects, Mr. Rogers and staff prepared a preliminary draft of restyled probate rules.

Today's meeting materials included two additional reference documents prepared by Mr. Rogers. One document is a compendium of rule restyling conventions. The other document summarizes restyling principles and provides examples of how they could apply to the probate rules. The following are among Mr. Rogers' suggestions.

Improved formatting and organization will help users more easily find what they want. Make generous use of subparts and subheadings, and make lists when a rule calls for multiple items or factors. Mr. Rogers referred to the current version of Rule 22(a), and demonstrated how reorganization alone can improve the rule's clarity. He also showed how section headings could make Rule 29's provisions easier to locate.

Avoid run-on sentences, which Mr. Rogers characterized as "stream of consciousness" rules. Mr. Rogers cited current Rule 8(B) as an example of such a rule; the rule consists of a single sentence of 98 words. He explained how the rule could be restyled and clarified by using two sentences totaling 82 words. He noted that em-dashes could be used in some rules that have multiple clauses, such as the restyled version of Rule 8(b), but em-dashes should be used sparingly.

Avoid archaic terms such as “thereto” or “hereinafter,” which are not ordinarily used in conversations.

Good restyling uses simpler words and proper word choice. He suggested saying the court “orders” rather than “directs.” The court also “enters” or “files” its orders rather than “issues” them. Use “later” rather than “subsequently,” and “under” instead of “pursuant to.”

Avoid redundant intensifiers, such as the phrase, “the court in its discretion may....” “May” means the court has discretion.

Minimize “of” and “by” phrases. For example, use the phrase “court clerk,” which is more direct than “clerk of the court.” Say, “unless the court orders otherwise” rather than “unless otherwise ordered by the court.”

Eliminate ambiguous terms. “Shall” has various meanings, but “must,” “may,” “will” or “should” are more specific.

Avoid references to “sections” or “paragraphs.” Instead, use the subpart designation.

Use the active voice. It is more comprehensible and using it improves the overall quality of the rule.

Some comments may no longer be useful, or may be inaccurate or misleading, and the Task Force should consider deleting those comments. A comment is not part of a rule’s substance, and the Task Force should relocate to the body of a rule any substantive requirements that might currently be in a comment. If a comment is necessary to understand a rule, there may be a need to rewrite the rule more clearly.

The Chair asked Mr. Rogers if an apostrophe was necessary in the term “attorneys fees,” and if it was, whether it should be after the “y” or after the “s.” Mr. Rogers responded that using the term without an apostrophe might eliminate ambiguity about the number of attorneys entitled to fees, but the most important consideration for any term, including that one, is using it consistently throughout the rules. The Chair advised members that staff’s restyled probate rules are a starting point; members should modify staff’s versions, or disregard them entirely, as they deem appropriate. She also noted that staff have added a variety of questions and comments for members in the restyled drafts. Mr. Rogers’ comments are identified as “JWR notes” and those from Ms. Jerich and Mr. Meltzer are tagged as “staff notes.” The Chair thanked Mr. Rogers for his informative presentation.

4. **OneDrive.** Staff's preliminarily restyled rules are stored in the Cloud, and members can access them through OneDrive, a feature of Microsoft Office. OneDrive will facilitate collaboration among workgroup members when they prepare revisions to those draft documents, and members will need to utilize OneDrive during this project. Ms. Pennington had previously distributed a OneDrive information sheet, and the Chair invited her to demonstrate the functionality and use of OneDrive. Ms. Pennington reminded members that whatever computer they first use to log on to OneDrive will be the one the program thereafter recognizes. She also explained that any member with Microsoft 2007, or an early version, may have limitations when using OneDrive. Ms. Pennington will be available to answer members' questions concerning OneDrive throughout this project. The Chair thanked Ms. Pennington for her assistance and further advised that the functionality of OneDrive might be affected if more than one person attempts to make changes during a workgroup session, so only one person should serve as the designated scribe during a workgroup meeting.

5. **Roundtable discussion.** Before discussing workgroups, the Chair asked members if they had issues or concerns regarding this rule restyling project. A member inquired how the Task Force would distinguish a restyling change from a substantive one. The Chair assured members that they did not need to pose the philosophical question about whether a proposed change is stylistic or substantive. Rather, they should ask whether a change – whether stylistic or substantive – will make the rule work better. She noted the administrative order that established this Task Force used broad terms about identifying possible rule changes, so the Task Force can propose changes not only concerning a rule's language, but also changes that improve the way a rule works.

Members then discussed the relationship between the probate rules and other sets of rules, particularly the civil rules. Current Probate Rule 3 makes these other rules applicable in probate proceedings. But especially with the recent civil rules restyling (2017) and civil justice reform amendments (2018), some civil rules have dubious application in probate proceedings. One member suggested that the committees that proposed those recent civil rule changes may not have appreciated or contemplated the effect those changes would have on other case types, such as probate proceedings. For example, the newly adopted requirements for tiering civil discovery might be incongruent with mental health cases, which are heard by the probate court.

Members of the first probate rules committee were divided on whether the probate rules should be a standalone set, and a judge member of this Task Force requested reconsideration of this issue. The member believed that a standalone set of probate rules would not only be better for stakeholders who routinely use the probate rules, but also would be more helpful for self-represented litigants who might use them for a single matter. One member gave an example of an adult exploitation case, which might proceed as a civil case in a civil department, but could also be in probate court and present different procedural issues in that context. The member recommended that probate rules

acknowledge distinctions between probate and civil proceedings. One judge member with two other Task Force attorney members has begun a preliminary review of the civil rules to see which ones are applicable to probate proceedings, and how those applicable provisions could be relocated and recreated, with modifications, in the probate rules.

Another member acknowledged that adopting pertinent civil provisions as probate rules would probably result in a doubling of the number of probate rules. The member further recognized that even if the Task Force did this, it might not resolve issues that could arise from filing a different matter in probate court, such as a family court petition that is governed by another set of rules. The Chair recognized that creating a standalone set of probate rules would could greatly expand the work of this Task Force. Other members made these comments:

- A freestanding set of probate rules might result in the loss of a rich body of interpretation in civil case law and treatises.
- Just as the standalone family rules duplicate many civil rule provisions, such as those concerning service, discovery, and motions, a standalone set of probate rules might also be redundant.
- The civil rules in effect at the time of adoption of the probate rules are far different than the current civil rules. If the probate rules were freestanding, they would eventually diverge from amended civil rules unless they were continually amended to conform to the civil rules.
- Tiering might be beneficial in certain probate cases, and could promote appropriately limited discovery. The recently adopted civil concept of proportional discovery might be useful in probate cases.
- Probate proceedings have a broad scope (one can find virtually any type of case in probate court) and it would be challenging to have a freestanding set of rules that covered every type of probate proceeding. But some civil rules don't translate well to probate proceedings, for example, service of process, and the Task Force should address those incongruous rules. Moreover, is a breach of fiduciary duty claim governed by the civil rules or the probate rules? The probate rules should clarify these types of issues.
- Members should consider what effects SB 1204 (Chap. 102, Laws 2018) has on this project. Members also should consider the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act recently promulgated by the Uniform Law Commission.

- The first probate rules committee didn't methodically consider how each of the civil rules applied in probate proceedings, but this Task Force should do so. The Task Force should target certain civil rules that would make filings in probate court easier and more straightforward.
- The Task Force should clarify Probate Rule 3. The restyled probate rules should also carve out specific civil rules that might apply in a probate case. For example, a probate rule could say that Civil Rule 56 applies to summary judgment motions in probate court. This would be a simple modification, and if the civil rule thereafter changed, the probate rule would not require a conforming amendment.

The Chair concluded the discussion by asking members to review pertinent civil rules. Workgroups should determine whether a civil rule as written would serve the needs of probate proceedings, and if not, how the rule should be modified for application in a probate matter. Members also should consider sections of the Arizona Code of Judicial Administration that apply in probate proceeding, and whether all or some of those provisions should be further highlighted in the probate rules because self-represented litigants are often unaware of these code sections.

**6. Workgroups.** At this point in the meeting, the Chair distributed a sheet that showed which members were assigned to each of three Task Force workgroups and the rule assignments for each workgroup. The rule assignments, which are not exactly but are relatively equal, are:

**Workgroup 1: General Administration** – Part II (general procedures)

**Workgroup 2: Petitions and Proceedings** – Part I (scope, applicability, and definitions), Part III (applications, petitions, and motions), Part V (contested probate proceedings, except Rule 27.1), and Part VIII (forms)

**Workgroup 3: Fiduciaries** – Part IV (procedures relating to the appointment of fiduciaries), Part VI (post-appointment procedures), and Part VII (other matters), as well as Rule 27.1 (training for non-licensed fiduciaries)

The Chair advised members that workgroup meetings are not public meetings and workgroups do not need to comply with open meeting requirements, because workgroups merely propose rule amendments. The Task Force will make decisions on workgroup proposals during open meetings that the public can attend. Accordingly, workgroups can meet at any location, including a private office. Members can participate in workgroup meetings by telephone, and workgroup members can attend meetings of other workgroups. At least one staff member should be present at each workgroup meeting to provide assistance.

The Chair would like each workgroup to propose amendments for about 3 to 5 rules at the next Task Force meeting. She suggested that workgroups begin their tasks with comparatively easy rules that don't require major changes. The workgroups should designate one of their members to present each completed rule at the upcoming Task Force meeting. Each workgroup should assure that Task Force staff has the workgroup's proposed amendments at least a week before the Task Force meeting. She requested that workgroup members confer after adjournment to set dates for their initial meetings.

7. **Roadmap.** After discussion, it appears that Friday is the best day of the week for members to attend a Task Force meeting. However, to stay on a monthly schedule, the Chair proposed Monday, May 7, or Tuesday, May 8 for the second Task Force meeting. She further proposed Friday, June 8 for the third Task Force meeting. She directed staff to poll the members after adjournment regarding their availability on these dates.

8. **Call to the public.** There was no response to a call to the public.

9. **Adjourn.** The meeting adjourned at 12:42 p.m.