

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

**State Courts Building, Phoenix**

**Meeting Minutes: February 17, 2017**

**Members attending:** Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron, Hon. John Assini, Keith Berkshire, Mary Boyte Henderson, Annette Burns, Hon. Dean Christoffel, Cheri Clark, Hon. Suzanne Cohen, Helen Davis (by telephone), Kiilu Davis, Hon. Karl Eppich, Joi Hollis, Hon. Paul McMurdie, Aaron Nash, Jeffery Pollitt (by telephone), Janet Sell, Steven Serrano, Hon. Peter Swann, Steven Wolfson, Gregg Woodnick [all members present]

**Guests:** Martin Lynch, Patricia Cummins, Cynthia Oxman, Aaron Blase, David Alger

**Administrative Office of the Courts ("AOC") Staff:** John W. Rogers, Mark Meltzer, Karla Williams, Sabrina Nash, Julie Graber, Theresa Barrett, Chris Manes, Alex Fernandez de Jauregui, Amy Love

**1. Call to order; introductory remarks.** The Chair called the first Task Force meeting to order at 10:00 a.m. She welcomed the members and introduced the Co-Chair, Judge Armstrong. Judge Armstrong noted that he had chaired the Committee on Rules of Procedure in Domestic Relations Cases (Administrative Order Number 2003-63) from 2003 to 2005. Those rules, which became effective in 2006, have been utilized for a full decade, and the Court determined that 2017 was an appropriate time to review and restyle those rules.

The Chair advised that staff will audio-record Task Force meetings; these recordings will be deleted as provided by Administrative Order Number 2010-114. A member of the public requested to video-record today's meeting, which the Chair will allow as long as it does not interfere with the conduct of the meeting, and subject to any objections from those present. The Chair noted that the Task Force has a webpage on the Arizona Judicial Branch website; this page will allow Task Force members and the public to review meeting materials before each Task Force meeting. The Chair then proceeded to introduce herself and her Co-Chair, followed by introductions of Task Force members and staff.

**2. Review of Administrative Order Number 2016-131; approval of rules for conducting business.** The Chairs reviewed Administrative Order Number 2016-131 ("the A.O."), which established this Task Force. The A.O. directs the Task Force to "identify possible changes to conform to modern usage and to clarify and simplify language" of the Family Law Rules ("FLR"). The primary objective of the Task Force therefore is restyling the FLR. There have been a series of rule restyling projects in

Arizona, beginning with the Evidence Rules during the strategic agenda of then-Chief Justice Berch. During the current strategic agenda, the Court has overseen the restyling of other procedural rules. These include rules for Protective Orders and Civil Appeals, and more recently, the Civil Rules, which became effective on January 1, 2017, and the Criminal Rules, for which there is a pending rule change petition. Because the civil rules were the source of a number of FLR, the FLR Task Force should review the newly restyled civil rules and consider conforming changes. Justice Berch noted that the A.O. has a goal that this Task Force file a petition with its proposed rule changes in January 2018. The members' terms extend to December 2018, which will allow them to review comments to that rule petition during 2018.

The Chair then asked members to review proposed rules for conducting Task Force business, which were included in the meeting materials. Those rules include a proxy policy and provisions for a "call to the public."

**Motion:** A member moved to approve the proposed rules for conducting business. Another member made a second to the motion, and the motion passed unanimously. **FLR: 001**

**3. Restyling conventions.** The Chair then invited John Rogers, a Supreme Court staff attorney, to discuss rule restyling principles and his recommended conventions for restyling the FLR. Mr. Rogers began his presentation by exhibiting the 1977 volume of the Arizona Rules of Court. The 1977 volume was less than 1000 pages in length, and was printed in a single column of large font. He compared that to the 2017 volume, which is twice as long and has double columns of smaller font. He noted that the 2017 volume presents a tremendous amount of material for users to absorb, and there is considerable need for rules that are more user-friendly and that are easier to locate and comprehend. Mr. Rogers proceeded to trace the modern history of federal rules restyling and to discuss rules restyling conventions prepared by Bryan Garner. (Mr. Garner's *Guidelines for Drafting and Editing Court Rules* were included in the meeting materials.) Mr. Rogers prepared "Style Conventions" that he drafted for the civil rules restyling project, and the Civil and Criminal Rules Task Forces adhered to these conventions. The "Style Conventions" and another document Mr. Rogers prepared, "Rule Restyling: Key Principles and Examples," were also in the meeting materials. The latter document had specific examples for restyling the FLR. The following are among Mr. Rogers' conventions and 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 noted the current version of Rule 64(a), which consists of a long unbroken block of text, and demonstrated how reorganization alone can improve the rule's clarity.

Avoid run-on sentences. Mr. Rogers cited current Rule 44(B)(3) as an example; the rule has two sentences consisting of 195 words.

Avoid archaic terms such as “thereto” or “hereinafter.”

Good restyling uses simpler words and proper word choice. Use “before” rather than “prior to.” Say the court “orders” rather than “directs.” The court also “enters” or “files” its orders rather than “issues” them.

Avoid redundant terms, such as the often-found 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 have outlived their usefulness. Relocate to the body of a rule any substantive requirements that might be contained in a comment. If a comment is necessary to understand a rule, there may be a need to rewrite the rule more clearly. The Civil Rules Task Force eliminated about 80 percent of the former comments; those that were retained stand out, and users probably will read them.

The Chairs thanked Mr. Rogers for his presentation and encouraged the members to review the conventions before beginning their restyling efforts. Judge Armstrong also recommended that members review corresponding civil rules during the FLR project and strive for uniformity with those rules wherever possible. Members need to specifically note any proposed substantive changes in their revisions. Finally, one sentence comments after many of the current FLR state that the rule is based on a specified civil rule. Although the Court prefers minimal comments, Judge Armstrong asked members to consider whether these current comments were useful and should be retained, possibly with a separate correlation table, or whether to remove these comments and provide only a correlation table.

**4. Workgroups.** The Chairs advised that Mr. Rogers and Mr. Meltzer will prepare a preliminary restyling of each FLR. They have now restyled about two-thirds of the FLR and they will complete the remaining rules before the March Task Force meeting. The Chairs will create four workgroups, each of which will be assigned a

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portion of the FLR. (Workgroup 1 will have Rules 1-35; Workgroup 2, Rules 36-48; Workgroup 3, Rules 49-75; and Workgroup 4, Rules 76-96. Each workgroup will also have responsibility for reviewing Rule 97 forms associated with their assigned rules.) The workgroups will review the preliminary restyling and discuss further revisions to each rule. The workgroups can meet in-person or telephonically at a time and place of their choosing. The workgroups will make recommendations to the Task Force based on workgroup discussions, but workgroups will not take formal action and their meetings are not public forums. Rather, the Task Force will decide, during open public meetings, whether to adopt, modify, or reject any workgroup recommendations.

Each workgroup will have a chair designated by Justice Berch and Judge Armstrong. Mr. Meltzer will attend workgroup meetings, and Task Force staff will be available for logistical assistance. The workgroups can access the rules on OneDrive; members should confer with Task Force staff to assure they have OneDrive access. The Chairs will assign members to workgroups following the adjournment of today's meeting. The Chairs will try to assign members to their preferred groups, but they will also consider balancing workgroups by geography and by the number of attorneys and judges in each group. The Chairs added that members may attend meetings of workgroups other than the one to which they are assigned. The Chairs announced a brief recess at this point of the meeting, during which each member indicated on workgroup sign-up sheets their first and second choices of workgroups.

**5. Discussion of specific items.** Judge Armstrong then led a discussion of several recent and pending items, which were included in the meeting materials and that members will need to consider during this project.

- The Court entered Orders in rule petition numbers R-16-0028 and R-16-0037 in late 2016. Judge Armstrong noted that changes made by these Orders to Rules 49(B) and 72, respectively, are not included in the 2017 volume of the Arizona Rules of Court.
- There are three pending rule petitions that affect the FLR. The State Bar filed R-16-0020, which concerns Rule 78 and the subject of attorneys' fees. The Court continued this rule petition to provide this Task Force with an opportunity to review, and possibly improve on, the proposed amendments to that rule. Two Arizona members of the Uniform Law Commission filed R-17-0017, which proposes a new Rule 67.2 regarding arbitration of family law matters. R-16-0019 proposes a new Rule 23.1 concerning improper venue.
- A.R.S. § 25-403(B) requires the Court to make findings on the record in contested legal decision-making and parenting time cases. Judge Armstrong noted the issue of whether the findings could be included in a minute entry or

order, rather than being stated orally and within what might be a lengthy transcript.

- *Griggs v. Oasis*, an October 2016 opinion from Division One, concerns the issue of immunity. Judge Armstrong asked workgroups to consider whether certain FLR, for example, the rule on parenting coordinators, should provide more specific guidance on immunity rather than refer to it generally.

6. **One Drive overview.** The Chairs then asked Julie Graber to introduce and explain OneDrive. Ms. Graber explained that OneDrive for Business is a component of Office 365. It facilitates cloud-based storage of documents and file-sharing, and will allow members to concurrently review and edit documents in real-time. Ms. Graber reviewed the log-on process, and demonstrated how to view documents and make edits. She recommended that each workgroup designate a single scribe during each meeting rather than having multiple ones. Members who have Word 2007 may have challenges with OneDrive, and these members may need to participate in workgroup meetings by WebEx. Ms. Graber invited members to contact her or Alex Fernandez de Jauregui, the AOC's SharePoint webmaster, at any time if they encounter difficulties with OneDrive. She noted that Ms. Williams soon would be sending the members an electronic link to the OneDrive log-in page.

7. **Roadmap.** The Task Force will meet about ten times this year. The Chairs proposed the following dates for the next nine meetings:

March 17 (likely to change)  
April 28  
June 2  
July 14  
August 25  
September 29  
October 20  
December 1  
December 15

Several members indicated they had conflicts with the March 17 and the June 2 dates. The Chairs advised they would look for alternate dates and staff would notify members of those new dates. The Chairs recognize that members may be unable to attend each meeting, and they encouraged members to send proxies in those circumstances. Excluding today and the final meeting, the four workgroups collectively will need to present at least a dozen rules at every Task Force meeting, so the workgroups should proceed accordingly. The Chairs requested workgroups to convene at least once before the March Task Force meeting, and for each workgroup to have several rules ready to

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present at that time. Workgroups also should advise staff which rules they intend to present at upcoming Task Force meetings; this will facilitate staff's preparation of agendas and meeting materials.

**8. Call to the public; adjourn.** The Chair noted that each public comment would be limited to three minutes. She requested that public members provide her with a comment request form before the call to the public. (Forms are available at the sign-in table.) She then made a call to the public, and in response the following individuals addressed the Task Force: Mr. Martin Lynch, Mr. David Alger.

The members then had a brief discussion about whether this Task Force would interact with the State Bar. Judge Armstrong noted the State Bar created a Family Law Practice and Procedure Committee following implementation of the 2006 family law rules. He anticipates this Task Force would liaison with and seek input from that committee, as well as other stakeholders, individuals, and groups, as the Task Force nears completion of a draft set of rules.

The Chairs thanked the members for their willingness to serve on this Task Force. The meeting adjourned at 12:05 p.m.

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

**State Courts Building, Phoenix**

**Meeting Minutes: March 20, 2017**

**Members attending:** Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron (by telephone), Keith Berkshire by his proxy Erica Gadberry, Mary Boyte Henderson, Annette Burns, Cheri Clark, Hon. Suzanne Cohen, Helen Davis, Kiilu Davis, Hon. Karl Eppich, Joi Hollis, Hon. Paul McMurdie, Aaron Nash, Jeffery Pollitt, Janet Sell, Steven Serrano (by telephone), Hon. Peter Swann, Steven Wolfson, Gregg Woodnick

**Absent:** Hon. John Assini, Hon. Dean Christoffel

**Guests:** Martin Lynch, Cynthia Oxman, Julie Coleman, Ed Pizarro Sr.

**Administrative Office of the Courts Staff:** Mark Meltzer, Karla Williams, Julie Graber, Theresa Barrett, Amy Love

**1. Call to order; introductory remarks; approval of meeting minutes.** The Chair called the second Task Force meeting to order at 10:01 a.m. She noted that workgroups have met 5 times since the first Task Force meeting. She encouraged workgroups to set future meetings at the conclusion of each meeting so they always have their “next meeting” scheduled. She reminded members that Ms. Williams is available to assist with connecting to or using OneDrive.

Judge Armstrong introduced a pair of issues that members might contemplate at subsequent meetings. The first issue involves procedural requirements for motions. Civil Rules 5.2 and 7.1 contain pertinent provisions, but there are no corresponding Family Law Rules (“FLR”) on this subject and he suggested that the Task Force consider adding them. He also asked whether the FLR should include an analog to Civil Rule 68 concerning offers of judgment. The previous family law rules committee decided that offers of judgment in family cases would be contrary to public policy; he asked whether this Task Force supports that view. (Judge Swann added that a State Bar committee is considering a proposal to abrogate or modify Civil Rule 68.) Finally, Judge Armstrong brought to the members’ attention *Bobrow versus Bobrow* (Division One, 3/9/17), and particularly its discussion on the enforceability of an attorneys’ fee provision in a premarital agreement.

The Chair asked members if they had corrections to the draft February 17, 2017 meeting minutes. There were none, and a member then made this motion:

**Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 002**

**2. Discussion of jury trials and civil issues in family law actions.** Judge Armstrong explained that the previous family law rules committee included provisions in the family rules concerning civil issues and jury trials, which occur, although rarely, in family law actions. He gave as an example a person's claim against a spouse for breach of fiduciary duty. One member observed that jury trials are permitted in declaratory actions. However, because there are few declaratory actions in family court, the possibility of a jury trial in a family court declaratory action is more theoretical than actual. Members discussed options for dealing with civil issues. One option is to handle the civil matter in family court, but without a jury trial, which might provide a speedier resolution. Another approach would be to transfer the civil component to a civil division, which could conduct a jury trial when appropriate. (However in smaller counties, there may not be a civil division to which a family case could be transferred.)

Because most parties in family court proceedings are not represented by counsel, a member encouraged the Task Force to make the FLR simpler, and not propose rules for circumstances that are unlikely to occur in the overwhelming majority of family cases. Accordingly, the most effective solution to the jury-trial issue might have the FLR refer parties to civil rules if the parties have a civil issue. Members discussed a new family law rule that would codify this approach. The essence of the rule would state that if there is a civil component in the case, the court and the parties should apply the rules of civil procedure.

- Workgroup 1, which was assigned the introductory portions of the FLR where this rule would be located, will discuss drafting such a rule.

The Task Force could utilize this approach to eliminate current FLR that address inherently civil subjects. Rules concerning crossclaims and similar pleadings, and rules for service of process, such as service on a corporation, might be removable. Deleting such rules could simplify the FLR for pleading and service, and make the FLR generally more comprehensible for self-represented litigants. Judge Armstrong observed that one of the goals of the civil rules restyling was making those rules more understandable for self-represented litigants, but perhaps this Task Force can further advance that goal.

The Chairs then requested the workgroups to report their recommendations concerning individual FLR.

**3. Workgroup 1.** Workgroup 1 began with Rule 6.

*Rule 6 ("change of judge"):* Judge Armstrong said the previous FLR committee included Rule 6 to confirm that the civil rules' right to a change of judge also applies in family cases. Ms. Henderson began Workgroup 1's presentation of Rule 6 by noting that the current rule contains a cross-reference to former Civil Rule 42(f) ("change of judge"). However, the restyled civil rules separated Rule 42(f) into two new rules: Rule 42.1

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("change of judge as a matter of right") and Rule 42.2 ("change of judge for cause"). Under Rule 42.1, a party waives the right to a change of judge if it is not exercised within 60 days after an appearance. The workgroup found this problematic because counsel may not appear in a family case until after the 60-day period had run. Therefore, rather than incorporating restyled Civil Rule 42.1 by reference, the workgroup drafted a new Rule 6 concerning a change of judge as a matter of right. Under this rule, the right is preserved until 60 days before the trial date, similar to the timing provision of the former civil rule. A new Rule 6.1 would govern a change of judge for cause. Rule 6.1 mirrors Civil Rule 42.2.

Task Force members discussed how reassignment of a case would be treated under proposed Rule 6(c), and whether there is a distinction between reassignment of a particular case by minute entry and reassignment of a judge's entire calendar by rotation. To address this issue, members used language in the restyled civil rule, i.e., that a notice is timely if it is filed within 10 days "after the party receives notice of the new assignment, or within 10 days after the new judge is assigned, whichever is later." The Task Force's use of language that parallels the civil rule will facilitate the applicability in family cases of appellate opinions interpreting the civil rule, and members agreed with this change.

The members discussed a second issue arising under proposed Rule 6(a): whether the right should apply to one judicial officer, to a judge and a judge pro tem, to a commissioner or a commissioner pro tem, or to a combination of the foregoing? Some members favored limiting the right to a change of only one judicial officer. This would serve the public interest and mitigate the delay caused by multiple changes of judge. Other members observed that different issues in a single case might be heard by more than one judicial officer, and believed the right should be extended to accommodate that circumstance. The members considered, for example, whether a IV-D case, which might be heard by a judicial officer other than the assigned judge, should include a separate right to a change of judge. Members further discussed the time limits provisions in Rule 6(c), and they agreed to revisions in subparts (3) and (4).

- However, because the Task Force did not have consensus on the entirety of Rule 6.1, the Chair returned the draft to Workgroup 1 for further consideration.

Members made other observations for the workgroup's consideration. Is there a distinction in proposed Rules 6(d)(4) ("a scheduled contested hearing begins") and 6(d)(5) ("trial begins")? Is there a distinction throughout the FLR between a "trial" and a "hearing," or are the words used interchangeably? One member suggested that a judge receives evidence at a trial, but does not do so at a hearing. However, another member noted occasions when the court may receive evidence at a hearing. A judge member suggested that a trial is a "final evidentiary hearing." Members should determine if there

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is a meaningful difference between a “hearing” and a “trial,” and if so, they should use the correct term in the appropriate context; otherwise, they should use one of these terms throughout the rules but not both. Another member asked the workgroup to reconsider proposed Rule 6(d)(3); the member suggested that a party’s appearance at a conference where nothing is contested should not operate as a waiver. The Chair indicated the Task Force will revisit these issues after Workgroup 1’s further review.

*Rule 11 (“exclusion of minors”)*: Mr. Davis presented an overview of the revisions the workgroup made to this rule. A member suggested, and the Task Force agreed, to delete gender references (“his or her”). Another member noted inconsistent use of the term “minor child.” The member suggested using the term once at the beginning of each subpart, and thereafter the term “child.” Other members suggested modifications to the section titles, and to the rule’s title.

- In light of the number of suggested changes, the Chair returned this rule to Workgroup 1 for further edits.

*Rule 15 (“affirmation instead of oath”)*: Mr. Davis also presented this rule. One member suggested changing the word “suffices” to “is sufficient.” Another member asked whether the word “solemn” was necessary. But because the language of this proposed rule is identical to restyled Civil Rule 43(b), the members agreed the rule was acceptable without any additional changes.

*Rule 16 (“interpreters”)*: Ms. Burns presented Rule 16. The rule is modeled on restyled Civil Rule 43(c). A judge member criticized draft language that would allow the court to require a party to pay the cost of an interpreter; the member submitted this might impinge on the right of access to the court by a party with limited English proficiency. Members agreed to remove that language. They removed the words “from funds” in the same sentence and agreed to insert the word “as,” so the provision now says, “to be paid ~~from funds~~ as provided by law.”

- The members also agreed to remove the last sentence of the proposed rule, which said, “The interpreter’s compensation may be taxed as cost.” Workgroup 4 will examine the issue of costs when it considers Rule 78.

*Rule 18 (“preserving a record of a court proceeding”)*: Mr. Woodnick, who presented this rule, advised that the workgroup made no changes to staff’s proposed restyling. A member inquired if the rule could include a provision that would allow the unsealing of records to prepare transcripts for an appeal. However, members believed this would exceed the scope of this rule, and they declined to expand it.

*Rule 19 (“lost or destroyed records”)*: Mr. Woodnick noted this proposed rule is based on restyled Civil Rule 80(d). Members had no changes to it.

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*Rule 21 ("reserved"):* Rule 21 previously dealt with local rules of the superior court, but Ms. Henderson noted that the Court abrogated Rule 21 by its Order in rule petition number R-16-0033. Supreme Court Rule 28.1 now governs the promulgation of local rules. Rule 21 will continue to be "reserved."

*Rule 22 ("conduct of proceedings"):* Ms. Burns explained that the restyled rule includes two new section headings, "time limits" and "decorum." Members deleted some of the proposed language in the "time limits" section. As a result, the section provides that the court may impose reasonable time limits that are "appropriate to the proceedings," and a party "may request additional time." The "request" could include an oral request in the course of a hearing, as well as a written motion. Members also modified the "decorum" section to emphasize that rather than the court conducting the proceeding in an "orderly, courteous, and dignified manner," it is the parties who must conduct themselves that way.

*Rule 25 ("family law cover sheet"):* Ms. Burns noted that the workgroup did not make changes to staff's draft. However, Task Force members revised and shortened that draft so it now simply states, "A family law cover sheet must be presented as required by administrative order or local rule." In the course of the discussion, members noted that not all counties utilize a family law cover sheet, and those that do may not use uniform versions. The cover sheet primarily serves administrative rather than judicial purposes. A member also noted the cover sheet may duplicate information on the confidential sensitive data sheet. Members agreed that it might be useful to have a Supreme Court-approved family law cover sheet form in Rule 97. The Chair suggested that members consider such a form at a future point in this project, after obtaining input from superior court clerks.

*Rule 28 ("required response"):* Mr. Woodnick advised that the workgroup approved staff's restyled draft without additional changes, but Task Force members believed the draft was deficient. First, they note that while Rule 28(a) referred to a party "who is served with a petition," the draft omitted the words "and summons." After discussion, those two words were added to the draft. This led to a conversation about the distinction between a "summons" and an "order to appear." Members agreed that this restyling project should clarify which proceedings are initiated with a summons, and which require an order to appear. Pertinent provisions currently are spread throughout a number of rules, but they should be reorganized in a more user-friendly way so litigants can readily understand which document is required for a particular proceeding. Whether a summons or an order to appear is used can affect the need to file a response to a petition, and circumstances allowing the petitioner to obtain a default.

A member observed that "legal decision-making" in section (a) should be followed by the words "by a parent" because under current Rule 91, some legal decision-

making petitions do not require a summons. Another member suggested, and other members agreed, to add to section (a) the words, “and provide a copy to the assigned judicial officer and other parties.” Members also changed the last sentence of draft section (a), which stated that the response must include a “verification,” to instead require the response to include “a declaration under Rule 14(b).”

**4. Workgroup 3.** Mr. Wolfson presented Rules 54, 55, and 56 on behalf of the workgroup.

*Rule 54 (“discovery before an action is filed on pending an appeal”):* The workgroup considered adding to draft Rule 54(a)(3) (“notice and service”) a cross-reference to FLR 37(b) concerning incompetent persons. After further discussion, the workgroup instead recommended adding a reference to FLR 10(h), which would encompass minors as well as incompetent persons. One member concurred with this recommendation because in Pima County, minors occasionally are parties in paternity actions. Another member suggested using a form of the verb “preserve” in this rule rather than “perpetuate” or “perpetuating.” However, a member noted that the civil rules task force spent considerable time on corresponding Civil Rule 27, and conformity to that rule, which uses “perpetuate,” would be appropriate. This member added that Rule 54 is rarely used by self-represented litigants, and an effort is underway that would provide even more simplified FLR for those litigants. Members concluded this discussion with an agreement to incorporate the Rule 10(h) concept, but possibly not the verbatim text of Rule 10(h).

- Members further agreed that Rule 54 might be one of those rules that could be excluded from the FLR, as the members discussed earlier during today’s meeting. The workgroup will accordingly reconsider this rule.

*Rule 55 (“persons before whom depositions may be taken, etc.”):* Mr. Wolfson advised that the workgroup made no changes to staff’s restyling. However, in the future the Task Force should consider whether this rule or another FLR should provide an equivalent to Civil Rule 45.1 (“interstate depositions and discovery”). The current FLR do not include provisions that correspond to Rule 45.1.

*Rule 56 (“modifying discovery and disclosure procedures and deadlines”):* Mr. Wolfson noted the workgroup’s consensus to add a reference in Rule 56(b) to a proposed amended FLR 51(f). The amendment to Rule 51(f), modeled on Civil Rule 7.1(h), would elaborate on the meaning of a “good faith consultation.” It would specifically provide, as the civil rule does, that the consultation “must be in person or by telephone, and not merely by letter or email.” Task Force members supported this concept. They also corrected an erroneous cross-reference in (a)(2) of the draft.

**5. Workgroup 4.** Workgroup 4 presented Rules 80, 86, 90, and 93.

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*Rule 80 (“declaratory judgments”)*: Ms. Sell, who presented this rule, asked whether it was necessary to include this rule in the FLR. She believes the rule is rarely used. She added that the second sentence of the draft, which allows the court to order a speedy hearing, is unnecessary because this is an inherent judicial power. One member responded that when a party seeks the remedy of declaratory relief, it is probably post-decree and often called by a name other than “declaratory relief.” Eliminating Rule 80 won’t change the practice of seeking this type of relief. Another member noted that Rule 80 contains no substance concerning “how-to” proceed with a declaratory action. In the rare instances when a party to a family law action needs declaratory relief, the party should refer to the civil rules. After discussion, the members agreed to eliminate Rule 80.

*Rule 86 (“harmless error”)*: Judge McMurdie presented this rule. Although the rule is modeled on Civil Rule 61, verdicts are atypical in family law cases and the workgroup accordingly removed a reference in the draft to “setting aside a verdict.” Another member questioned whether the rule’s first four words, “unless justice requires otherwise,” modified the legal standard of “prejudice to a substantial right.” Nonetheless, because this rule parallels the civil rule, the members agreed to retain it as proposed.

*Rule 90 (“enforcing relief for or against a nonparty”)*: Ms. Davis noted that this rule is consistent with its Civil Rule 71 counterpart. But she asked whether the rule is instructive, or if it adds anything to the court’s existing authority. For example, if the court enters an order against a non-party, isn’t the order enforceable in its own right? One member thought that the rule might have use if the court awarded attorneys’ fees to counsel, who is not a party to the action. In any event, the rule has a civil rule equivalent, and members agreed to retain it in the FLR.

*Rule 93 (“seizing a person or property”)*: Ms. Davis also presented this rule, which is the analog of Civil Rule 64. Ms. Davis noted that although the rule applies only to a “potential judgment,” i.e., prejudgment, it is misleadingly located in Part XII of the FLR, following the part on post-judgment proceedings. Ms. Davis proposed that the remedies specified in this rule (arrest, attachment, garnishment, replevin, and sequestration) are civil in nature and therefore more appropriately governed by civil rules. Another member suggested that provisional remedies, which are creatures of statute, have only marginal application in family actions. Furthermore, a self-represented litigant who reads Rule 93 might incorrectly conclude that a provisional remedy of arrest is available in a family case. Ms. Davis added that the FLR has no equivalent of Civil Rule 69 concerning “execution” of judgments. Does a judgment creditor in a family action therefore apply to a civil court rather than a family court for a writ of execution? Members agreed that Rule 93 is unclear, that there is no utility in having duplicate civil and family rules on this subject, and that for now, the Task Force should delete and “reserve” Rule 93.

- Workgroup 1 should include the applicability of corresponding civil rules in this subject area when it prepares the rule discussed in item 2 above.

6. **Roadmap.** The Chair confirmed April 28 as the next Task Force meeting date. She also confirmed the subsequent meeting date of June 12. These dates are conditioned on the availability of quorums, and she encouraged the use of proxies to assure quorums.

7. **Call to the public; adjourn.** The Chair made a call to the public, and in response the following individuals addressed the Task Force: Mr. Martin Lynch, Ms. Cynthia Oxman.

The meeting adjourned at 3:04 p.m.

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

**State Courts Building, Phoenix**

**Meeting Minutes: April 28, 2017**

**Members attending:** Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron (by telephone), Hon. John Assini (by telephone), Keith Berkshire, Annette Burns, Cheri Clark, Hon. Suzanne Cohen, Helen Davis by her proxy Therese McElwee, Hon. Karl Eppich, Joi Hollis, Hon. Paul McMurdie, Aaron Nash, Jeffery Pollitt, Janet Sell by her proxy Holly Wan, Gregg Woodnick

**Absent:** Hon. Dean Christoffel, Mary Boyte Henderson, Kiilu Davis, Steven Serrano, Hon. Peter Swann, Steven Wolfson

**Guests:** None

**Administrative Office of the Courts Staff:** Mark Meltzer, Karla Williams, Sabrina Nash

**1. Call to order; introductory remarks; approval of meeting minutes.** The Chair called the third Task Force meeting to order at 10:01 a.m. She welcomed the members and introduced the proxies. The Chair advised that workgroups have met 7 times since the March 20 Task Force meeting, and she thanked the members for their diligence. But she observed that even if the Task Force completed all of the rules on today's agenda, it then would be less than a quarter of the way through the rules. Moreover, the rules completed so far are easier compared to the remaining ones. She requested that workgroups strive to prepare more rules for Task Force review. Because there are 99 rules, the Task Force needs to review, on average, more than a dozen rules at each meeting.

Judge Armstrong reminded (a) Workgroup 1 to consider pending rule petition R-17-0019 concerning proposed Rule 23.1; and (b) Workgroup 3 to consider pending petition R-17-0017 regarding proposed Rule 67.2.

During the call to the public at the March 20 Task Force meeting, a public member suggested that proposed Rule 22 concerning the conduct of proceedings should say that parents cannot expose their children to conflict and are prohibited from making disparaging remarks to their children about the other parent. Staff thereafter located documents used in three different counties that bear on this subject, which were posted on the Task Force meeting information webpage.

The first document was a notice from the Pima County Superior Court that says in part, "You are required to complete a course in Domestic Relations Education on Children's Issues (Parent Education)...if you have natural or adopted minor children

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with the other party....You must attend the course within 45 days of filing a petition [or] being served with a petition...." Attendance is required under A.R.S. § 25-352.

The second document, from the Maricopa County Superior Court, was entitled "Order and Notice to Attend Parent Information Class." It contained information similar to the Pima notice, but it explicitly says, "This is an official court order. If you fail to obey this order, the court may find you in contempt of court." The notice portion of this document says that "the purpose of the program is to give parents information about how children are affected by matters that involve family courts."

The third document was a standard form parenting plan used in Maricopa County. It requires the signatures of both parties. Section I of the plan ("additional arrangements and comments" at page 8) includes agreements to "praise the other parent" ("encourage love and respect between the minor children and the other parent, and [not] do anything that may hurt the other parent's relationship with the minor children"); and to "cooperate and work together...consistent with the best interests of the minor children, and to amicably resolve such disputes as may arise."

The fourth document, a single page, is from the Yavapai County Superior Court. The document lists the goals of parent education, including "helpful and harmful parent behaviors" and "parent conflict and what it does to children."

The Chair accordingly noted that after considering the public comment, the subject addressed by that comment seems to be adequately covered elsewhere, and a rule of procedure on the subject does not appear necessary.

The Chair asked members to review the draft March 20, 2017 meeting minutes, and a member then made this motion:

**Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 003**

**2. Discussion of style and substance.** The Chair then discussed boundaries of rules restyling, and when it might be appropriate for workgroups to cross the threshold of a substantive rule revision. She referred to Administrative Order 2016-131, which established this Task Force. The Order directed that the Task Force recommend rule revisions "to conform to modern usage and to clarify and simplify language." Judge Armstrong observed that changing the way a rule applies in a court proceeding to conform to modern usage might require a substantive revision. But he noted there may be circumstances when these substantive changes are appropriate and desirable. In those instances, the Task Force should "flag" the change in a comment or prefatory comment, explain how the proposed rule differs from the current one, and provide reasons for the change. The Chair added that it might not be easy to draw a "bright line" on when a substantive change may be necessary, and that members might determine on a rule-by-rule basis when these changes are appropriate. The Civil Rules Task Force drafted rules

that were more comprehensible for self-represented litigants by clarifying and simplifying language, and family rules revisions also should further that objective.

The Chairs then requested workgroups to report their recommendations concerning individual FLR.

**3. Workgroup 2.** Mr. Pollitt presented three rules on behalf of Workgroup 2.

*Rule 36 ("real party in interest"):* Mr. Pollitt reviewed the workgroup's draft. He observed that the workgroup deleted a portion of staff's proposed provisions, particularly provisions that would conform the FLR to Civil Rule 17. The workgroup believed these provisions, covering topics such as bailees or executors as parties, had minimal application in family law cases. The Assistant Attorney General who was present at the meeting confirmed that the workgroup's proposed Rule 36(d) ("action in the name of the State for another's use") would be applicable in Title IV-D cases. Members agreed with the workgroup's changes.

*Rule 37 ("death, incompetency, and transfer of interest"):* Proposed Rule 37(a)(2) includes a provision that says, "if a party dies while a petition for paternity or maternity is pending, the action does not necessarily abate." Members believed this was appropriate. For example, after a respondent in a paternity action dies, a family court judge still might need to order DNA testing of the respondent, although the case thereafter could become a probate proceeding against the respondent's estate. However, members also believed that the proposed rule's recitation that the case "does not necessarily abate" did not adequately address what should happen after the petitioner's death. The members discussed whether Rule 37(a)(2) should include a reference to a pertinent statute, A.R.S. § 25-805. The statute provides guidance for the court in the event of the "death, absence, or insanity" of the petitioner in a paternity or maternity action. Members agreed these events were not common, but they were not rare either, and accordingly, the court rule should include a reference to this statute. They further agreed that the reference should be located in a comment to Rule 37 rather than in the body of Rule 37.

- Workgroup 2 will prepare a comment for Rule 37 that incorporates the statutory reference.

*Rule 38 ("reserved"):* Mr. Pollitt noted that the current rule has no text and members agreed that Rule 38 will remain as a "reserved" rule number.

**4. Workgroup 4.** Mr. Berkshire presented Rules 79 and 82, and Judge Eppich presented Rule 88.

*Rule 79 ("summary judgment"):* Mr. Berkshire advised that the restyled family rule mirrors newly restyled Civil Rule 56 in most respects, but the workgroup revised a few

items to conform the rule to family law proceedings. Draft Rule 79(b)(3) requires the filing of a summary judgment motion 90 days before “the date set for trial.” The Task Force had previously discussed using the term “hearing” rather than “trial.” One member suggested that “hearing” would be appropriate in Rule 79, but Judge Armstrong suggested dealing with this issue globally, later in the project, rather than on a piecemeal basis now. The draft of Rule 79(c)(4) (“objections to evidence”) initially included language derived from Civil Rule 7.1(f), a rule for which there currently is no FLR analog. However, the workgroup did not believe Civil Rule 7.1(f) language was necessary in Rule 79, and it substantially pared Rule 79(c)(4) to simply say that a party objecting to the admissibility of evidence must raise the objection in a response, reply, or opposing statement of facts.

Members discussed the proposed requirement of a good faith consultation certificate in draft Rule 79(d)(1)(B). The workgroup proposed a provision that corresponds to Civil Rule 7.1(h). Mr. Berkshire suggested that in lieu of locating this provision in Rule 79, members should consider adding an analog to Civil Rule 7.1(h) in the general provisions of the FLR. Relocating the provision would allow its application to multiple family law rules, including rules on motions, discovery, and disclosure. One member supported adopting language in the FLR from Civil Rule 7.1(h), which requires a consultation “in person or by telephone, and not merely by letter or email.” Counsel in family law cases occasionally will contend that a letter or email is sufficient “consultation,” and adding language from the civil rule will clarify that these methods do not suffice. Members agreed it would be beneficial to insert the “good faith” provision in one of the “general” rules at the beginning of the FLR. Judge Armstrong suggested the workgroup might locate this provision within a new Rule 35.1, following Rule 35 on motion practice.

- The Chairs requested Workgroup 1 to draft language for a proposed rule on “good faith consultation.”

However, Judge Armstrong cautioned about applying such a rule to self-represented litigants who might have orders of protection. The rule should apply in cases where both parties are represented, but this cohort constitutes only about ten percent of family cases. Workgroup 1 should also consider how the good faith consultation rule would apply where one party in a case, the party who has the order of protection, is represented, and the opposing party has no counsel.

*Rule 82 (“findings and conclusions by the court; judgment on partial findings”):* Mr. Berkshire noted that the workgroup removed verbiage in the current rule that makes the draft simpler and clearer. It eliminated in section (a) a sentence that said, “Requests for findings are not necessary for purposes of review.” It also deleted from section (a) specific references to “motions under Rules 32 and 79” because these motions

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are subsumed under the phrase “any other motion,” which section (a) retains. Members agreed that the draft was more readable than the current rule and they had no other comments or revisions.

*Rule 88 (“judge’s inability to proceed”)*: Judge Eppich advised that Ms. Sell’s alternative draft of this rule was stylistically different than staff’s, but it was substantively the same. Members concurred with using Ms. Sell’s version. Members agreed that the rule should refer to the successor judge as “the replacement” rather than “the new” judge. The second sentence of the draft begins with the words, “If an adequate electronic record is unavailable,” and members discussed whether the word “electronic” was necessary. It appeared that not all counties have video recordings of proceedings, some have only audio; and in some cases, a replacement judge may not need to review any electronic record. Accordingly, members agreed to delete the word “electronic” from this phrase, and they otherwise agreed with the rule as modified.

**5. Workgroup 1.** Workgroup 1 presented Rules 11, 14, 23, and 30.

*Rule 11 (“attendance of minors”)*: Mr. Woodnick recalled that at the March meeting, members had requested Workgroup 1 to make additional revisions to this rule. Thereafter, the workgroup modified its use of the words “minor child” and “child” in this rule, and it reorganized section (b). A member said that some practitioners contend the current rule operates to exclude children from testifying as witnesses, and asked the draft rule to address this contention. The members rejected adding to the draft rule the phrase, “unless the child is testifying as a witness,” but they agreed to change the word “present” in sections (a) and (b) to “attending” or “attendance,” which harmonizes the phrasing of the rule with its title. They also agreed to reverse the order of sections (a) and (b), so “exclusion of minors generally” is now the first section, and “attendance of a minor child affected by the proceeding” is the second. Finally, in new section (b), members added the words “affected by the proceeding” after the words “minor child.” Members concurred with this rule as modified.

*Rule 14 (“written verifications and unsworn declarations under penalty of perjury”)*: Mr. Woodnick advised that the workgroup made changes to this rule to make it more readable. In section (a) (“written verification”), the workgroup clarified language and added user-friendly descriptions to cross-referenced rule numbers. In section (b) (“unsworn declarations under penalty of perjury”), the workgroup paid particular attention to making the rule easier for self-represented litigants to understand by removing unnecessary words. Task Force members further streamlined the form of the subscription contained in draft section (b), and eliminated the words “executed on.” Members agreed to the rule’s text after these modifications.

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*Rule 23 (“beginning an action”)*: Judge Cohen explained that Rule 23 is the analog of Civil Rule 3. The workgroup removed language in current FLR 23 about a requirement that parties advise the court of their current address, because this requirement should be in a separate general rule concerning duties and conduct of parties. (The requirement to notify the court of an address change also is frequently mentioned in minute entries.) The members considered locating this general rule regarding duties of a party as Rule 21, which currently is “reserved.” (Note that Rule 9 is a separate rule that concerns “duties of counsel.”) Members discussed whether the remaining language of draft Rule 23 (“a family law action begins when a person files a petition with the court”) is redundant to Rule 24; that rule provides in part, “A family law action is commenced by filing a petition with the clerk of the court.”

- The Task Force returned Rule 23 to the workgroup to consider consolidating it with other rules, and for inclusion of a general provision concerning duties and conduct of parties.

*Rule 30 (“form of pleading”)*: Mr. Woodnick noted the workgroup’s suggestion that section (a) (“caption, names of parties”) say that the petition “should” name all the parties, but after discussion, Task Force members changed this to “must” name all the parties. The workgroup removed from its draft version a Latin phrase (“et. al.”) that is in current section (a). Although the workgroup deleted the entire provision of the current rule where this Latin phrase was used, one member suggested it would be beneficial to retain the portion that says it is unnecessary to include the names of all parties in the caption of subsequent filings. In section (b) (“paragraphs, separate statements”), members requested to reinsert the word “numbered” between “separate” and “paragraphs.”

The discussion evolved to whether rules should have different requirements for filings by attorneys and filings by self-represented parties, many of whom file handwritten documents that are marginally compliant with the rules’ formal mandates. Some members contended the rules should not have one standard for counsel, and another standard for pro per filers. Other members believed the rules should not contain pleading requirements that self-represented litigants do not follow, and that judges don’t enforce. And others suggested that there are certain basic requirements, for example, that filers use only one side of the paper, which all filers are obligated to observe. A few members were reticent to adopt in FLR 30 the relatively rigid requirements of corresponding Civil Rule 5.2 (“form of documents”).

- Workgroup 1, which is assigned Rules 24, 30, and related rules, should consider and propose practical responses to the above issues regarding the requirements of court filings.

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6. **Roadmap.** The Chair confirmed June 12, July 14, and August 25 as Task Force meeting dates. Because of the number of rules remaining for Task Force review, the Chair also set an additional Task Force meeting for August 4, 2017. If the Task Force makes substantial progress at the next two meetings, the Chair might vacate the August 4 date; but it appears that meeting will be necessary for adequate progress toward the January deadline for filing a rule petition. She encouraged workgroups to review their rules as soon as practicable so the Task Force has a reasonable time to consider each rule.

By a show of hands, the Task Force should have a quorum for the June 12 meeting.

7. **Call to the public; adjourn.** There was no response to the Chair's call to the public.

The meeting adjourned at 1:38 p.m.

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

**State Courts Building, Phoenix**

**Meeting Minutes: June 12, 2017**

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

**Absent:** Hon. Dean Christoffel

**Guests:** Hon. Scott Bales, Terry Decker, Tanya Henson, Martin Lynch, Ed Pizarro Sr., Claudia Arrunategui

**Administrative Office of the Courts Staff:** Mark Meltzer, Karla Williams, Sabrina Nash

**1. Call to order; remarks by the Chief Justice.** The Chair called the fourth Task Force meeting to order at 10:01 a.m. She welcomed Chief Justice Scott Bales and invited him to address the Committee. The Chief Justice noted that the work of this Task Force is very demanding, but it's also critically important because rules of procedure affect every family law case. The restyling of the family law rules is a culmination of rules projects that began during his tenure as Chief Justice, which included restyling of the evidence, civil appellate, protective order, civil, and criminal rules. These projects furthered major goals of his strategic agenda, such as promoting access to justice and improving judicial procedures. Clear and simple rules help cases progress through the court system. He anticipated that the restyled family law rules will greatly improve the usability of the rules, especially for self-represented litigants. He recognized that the timetable for the Task Force to complete its work is challenging, yet he commended the capability of the Task Force members and he looked forward to seeing their rule petition next year. He concluded by expressing the justices' appreciation for the work and commitment of Task Force members.

**2. Remarks by the Chair; approval of meeting minutes.** The Chair advised that workgroups had met 20 times to-date, including 8 meetings since the April 28 Task Force meeting; and that each workgroup has a pending meeting date. Based on the number of rules now completed, she said the Task Force was on track to meet the Court's timetable, but many of the completed rules were "easy" and she encouraged the workgroups to remain diligent. She acknowledged that workgroups are time-consuming, and she and Judge Armstrong thanked the members for their excellent effort.

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Judge Armstrong also reminded the workgroups to consistently use terminology by referring to rules, sections, and subparts. The Chair then asked members to review the draft April 28, 2017 meeting minutes, and a member then made this motion:

**Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 004**

The Chair then asked for rule presentations by the workgroups.

**3. Workgroup 2.** Workgroup 2 presented Rules 39 and 43.

*Rule 39 (currently “proof of authority by attorney for respondent not personally served,” and proposed, “reserved”):* Mr. Pollitt noted that in 2008, the Court deleted corresponding Civil Rule 80(f), which is referenced in the comment to the current family rule. What thereafter remained in the family rule concerns the notice of appearance, and this topic will be covered in restyled Rule 9(d)(1)(A). Mr. Pollitt accordingly recommended that the content of current Rule 39 be deleted, and that Rule 39 instead be “reserved.” Task Force members concurred with his recommendation.

*Rule 43 (now, “service and filing of pleadings and other papers; sensitive data form,” and proposed, “serving pleadings and other documents”):* Ms. Clark advised that the workgroup utilized the corresponding civil rule, Rule 5.1, as a starting point, but it removed text that had no application to family cases, for example, a provision about “seizing property.” The workgroup also attempted to eliminate redundancies. Task Force members then offered comments. In (a)(1), a member suggested deleting as unnecessary the words “other parties” from the phrase “service on other parties,” and changing “Rule 43” to “this rule.” In that same sentence, another member suggested changing “summons, petition, and response” to “summons, petition, or order to appear.” Members agreed to these changes. They also agreed to delete the entirety of subpart (a)(3) (“if a party fails to respond to the petition”), because there are circumstances, especially in cases involving children, where a failure to respond should not impair a party’s rights. They further noted that in some situations involving an order to appear or a post-judgment proceeding, a response to a petition is not required and a failure to respond does not result in a party’s default. Members also agreed to delete an inappropriate draft provision concerning “serving numerous defendants.” (The Chair directed staff to do a global search for the word “defendant,” and to replace it with the correct family law term, “respondent.”)

The word “service” is a term of art. It sometimes refers to the original service of a summons and petition, and at other times it refers to “delivery” in the course of litigation. One member suggested that the rules should refer to the latter as “mail,” because that is how service is typically done since it does not require “personal delivery.” Another

member suggested that there were three levels of service: one, service in the course of litigation; two, quasi-personal service (i.e., on an agent or a person of suitable age and discretion); and three, actual service on the person (i.e., what is necessary for a contempt petition.) Many self-represented litigants misunderstand these distinctions. One member observed that Rule 41 and 42 service establishes jurisdiction, whereas Rule 43 service provides notice. Members discussed the possibility of using a distinct word for each level of service (even “levels 1, 2, and 3”), and describing these levels in Rule 40. Members agreed that self-represented litigants in family court should have a simple and clear explanation of service.

- The Chair returned Rule 43 to Workgroup 2 to fashion definitions and explanations, and to determine where these should be located. When the Workgroup next presents Rule 43, it should also present Rules 40, 41, and 42 sequentially.

**4. Workgroup 3.** The Chair then asked Workgroup 3 to present its rules.

*Rule 57 (“depositions by oral examination”):* Mr. Wolfson first advised that the workgroup intends to add a provision about the need for parties to confer and cooperate on deposition scheduling. The workgroup deleted provisions found in Civil Rule 30(b)(5) concerning the “officer’s duties” because it believed those provisions were either antiquated or redundant. However, Task Force members noted the need to include in Rule 57 a provision that the officer administers an oath. (Members agreed that an unsworn audio recording is not a “permitted method” under draft Rule 57(b)(3)(A).) The workgroup discussed whether parties should have equal amounts of time at a deposition, but Task Force members were comfortable with the approach taken by the civil rules, which is reflected in draft Rule 57(c). In draft Rule 57(e), the workgroup did not determine a time limit for a deponent’s review of a transcript when the deposition occurred less than 30 days before trial. And it changed this provision to make submission of the transcript to the deponent optional rather than mandatory.

Members discussed draft Rule 57(g), which allows for sanctions against the noticing party under specified circumstances. The current provision does not provide for sanctions against a non-appearing deponent, and the members considered but did not decide whether to provide for that circumstance in this rule or in Rule 65. Members also discussed draft Rule 57(a)(2), which requires a petitioner to obtain court permission to take a deposition sooner than 30 days after service of a petition. One member suggested changing “petitioner” to “party” so the provision applied to both parties, but other members offered reasons for applying this 30 day requirement solely to petitioners. However, a judge member observed that a “petitioner” in a post-decree proceeding may have been the “respondent” during pre-judgment proceedings, with resulting name confusion. The judge suggested addressing this confusion by treating both sides equally.

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The members agreed with the judge and revised (a)(2) to provide that “a party” must obtain the court’s permission unless both parties otherwise agree in writing, or if the deponent may leave Arizona within the 30 day period. Members made a conforming change to the title of (a)(2). They also made a conforming change to the title of section (c) by removing the words, “written questions.”

Section (d) includes provisions for a motion to terminate or limit a deposition. The draft rule is comparable to restyled Civil Rule 30(d)(3). Members discussed how the rule works in practice, and whether or how the parties could contact a judge. Can a party terminate a deposition unilaterally? If a party terminates a deposition without judicial input, should the party be required to file a subsequent motion, and if so, what should be the filing deadline? (Members agreed that within 10 days was an appropriate time.) Should a provision allow sanctions for a frivolous motion, one interposed solely for delay, or one that is not granted? Should the opportunity to terminate or limit be available to either side (the deponent and the deposing party)? Should there be a good faith requirement?

- The Chair asked the workgroup to consider these issues.

Section (d) also includes a 4-hour deposition limit. Members discussed whether time spent during breaks, or when the parties were “off-the-record,” should be excluded from that limit. Would it matter whether it was the deponent or the examiner who requested a break? Members concluded that the family rule is modeled on the corresponding civil rule, which does not go into this level of detail, and they accordingly made no changes to the family rule. One member proposed relocating (c)(3) (“conferences between deponent and counsel”) to section (d), but after discussion, the Task Force declined this suggestion. Members agreed to retain (a)(4), which specifies that a subpoena is not necessary to require a party’s attendance at a deposition; this provision is particularly for the benefit of self-represented litigants.

Members made stylistic changes elsewhere in the rule, such as using the word “party” rather than “it,” adding the words “or affirmation” after the word “oath,” and in places, changing the word “officer” to “certified court reporter.” A member asked whether Rule 57 should specify who may be present at a deposition. The member proposed limiting those present, absent a court order, to the parties and their counsel. But other members noted that an expert may want to attend, as may a parent of a minor in a paternity case. On the other hand, and without the parties’ agreement, the attendance of friends and significant others could be problematic.

- The Chair asked the workgroup to address this issue, including how notice of a non-party’s attendance would be provided, and who would have the burden of obtaining a court order to allow or disallow a non-party to attend. The Chair

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would also like the workgroup (1) to consider the sanctions issue noted earlier, including whether to relocate section (g); (2) to further review (c)(2) regarding objections; and (3) to make additional conforming changes consistently with the first sentence of the paragraph above.

*Rule 58 (now, “depositions by written questions” and proposed, “reserved”):* Judge Swann advised that the procedure provided by this rule had no ongoing relevance. The workgroup recommended, and Task Force members agreed, that the text of this rule be deleted, and that the rule be “reserved.”

*Rule 60 (“interrogatories to parties”):* Mr. Wolfson and Judge Swann jointly presented this rule. The rule, which as drafted includes uniform as well as non-uniform interrogatories, provides for a limit on the number of interrogatories. There are different ways of counting uniform and non-uniform interrogatories; in uniform interrogatories, subparts are not counted, but subparts are counted in non-uniform interrogatories. Also, spousal maintenance is now a subject for non-uniform interrogatories, but the workgroup envisions drafting uniform interrogatories for spousal maintenance. (Mr. Wolfson will advise members when the workgroup will be discussing spousal maintenance interrogatories.) The workgroup also considered whether some uniform interrogatories might be inapt or misplaced and whether those should be deleted. Members discussed the numerical limit for interrogatories, but they did not reach consensus on a particular number. However, they concurred that each uniform interrogatory and its subparts should only count as one interrogatory.

One member suggested that interrogatories were more “affordable” for self-represented litigants than other types of discovery, but said these litigants may not understand the meaning of “interrogatories.” The member suggested that the rule include clearer language, and that the word “oath” be added to the definition in Rule 60(a)(1).

- The workgroup will review this rule further.

*Rule 61 (now, “uniform and non-uniform interrogatories; limitations; procedures,” and proposed, “reserved”):* Mr. Wolfson advised that the substance of the current rule is now in proposed Rule 60, and the workgroup recommended that Rule 61 be “reserved.” Members concurred.

*Rule 62 (“production of documents, etc.”):* Judge Swann reviewed the restyled rule. He noted additional language modeled on the revised civil rule concerning electronically stored information. Members proceeded to a discussion of the limit provided in draft Rule 62(b)(1) of “10 items or distinct categories of items.” Members criticized this phrasing and noted that a category could include multiple subsections of documents. For example, a single category might request “business records” plus numerous sub-

categories under that general item. Judge Swann acknowledged that the word “category” was not particularly specific; he asked members to propose a better term, but none were proposed.

One member suggested that disclosure should be the touchstone of production; that this concept should be built into the rules; and that a party should be able to demand compliance with disclosure without the necessity of serving a request for production. Another member agreed and noted that disclosure, discovery, and mandatory forms may require the production of duplicate information. In addition, parties occasionally ask for information, e.g., records of joint bank accounts, which both parties can access. Members concurred that requests for production could be used abusively, and that courts may not have the resources to effectively manage discovery. Members discussed possible ways to address this problem. Proposed solutions included uniform requests for production; or an enforceable standard of “reasonableness,” that is, that the requested information be relevant and reasonable in both scope and quantity. Judge Swann observed that uniform requests for production, like uniform interrogatories, might be overused and be requested in cases where they don’t apply. Members also should be mindful of cases in which experts may ask counsel to request particular documents. And there are situations in which there is an imbalance of power between spouses, where notwithstanding the joint nature of an account or asset, one party is in control of information.

- Workgroup 3 will reconsider draft Rule 62 in light of this discussion. Ms. Davis and Mr. Berkshire offered to prepare and present a set of uniform requests for production.

*Rule 63 (“physical, mental, and vocational evaluations of persons”)*: Mr. Wolfson and Judge Swann, who also jointly presented this rule, noted that it raised a variety of evidentiary and logistical issues. An example of an evidentiary issue of concern was the difference in treatment between a report from the conciliation court, which typically is admitted as evidence even when the author does not testify; and a report from, for example, a vocational expert, which may not be admitted as evidence even if the expert has testified. The workgroup was divided on how to treat these differences. Some believed that application of the rules of evidence would keep all of these reports out of evidence; that the mere preparation of a written report does not make it admissible; and that because a report, such as one from the conciliation court, was court-ordered should not render it automatically admissible. One member said that the court’s appointment of an expert under Rule 63 should not invariably render the expert “court-appointed,” because the expert still may have been selected by a party. Some members believed that expert opinions need to be tested by courtroom cross-examination. Others believed that if an expert witness testified and laid a proper foundation, then the expert’s written report should be admitted even when the expert did not testify about the entire contents of the

report. One member made a distinction between a report that simply contains the content of an interview, which would be admissible, and a report that includes conclusions and recommendations, such as a § 25-406 custody evaluation, which should not be admitted. Rule 63 does not address these issues, but Judge Swann proposed that Rule 2 should address them. Judge Armstrong noted that Evidence Rule 702 applied even if the rules are not invoked under Rule 2.

- Following this discussion, members asked Workgroup 1 to consider these issues when they review Rule 2.

Elsewhere in Rule 63, members discussed the meaning in section (d) of “like reports of the same condition.” They modified this phrase by saying “all other reports for the same condition, except for a vocational exam protected by the work product privilege.” Distinguishing Rule 63 from corresponding Civil Rule 35, members further revised the “waiver of privilege” provision of Rule 63(d) to say that a Rule 63 examination “does not constitute a waiver of any privilege that the examined party is otherwise entitled to assert under law.” Members also discussed the provisions of draft Rule 63(c) concerning the attendance of a representative and making an audio or video recording of an examination. They agreed that whether to allow a representative or a recording should depend on the type of examination at issue. They concurred that the examining expert for a physical or vocational exam could determine if a representative or recording would “adversely affect the examination’s outcome,” but if the examined person insisted on a representative or recording and the court did not order otherwise, the examiner could decline to perform the exam. On the other hand, the workgroup concluded that a representative or recording would presumptively and adversely affect the outcome of a mental examination, and it drafted a provision to this effect. However, the provision still allows the parties and the examiner to agree to the presence of a representative or a recording, or to request the court to permit the representative or recording for good cause.

- The Chair asked the workgroup to further review this draft rule and add other clarifying language where needed.

*Rule 64 (“requests for admission”):* Mr. Wolfson noted that the workgroup’s changes streamlined the rule. One member objected to shortening the response time from 40 days, which is in the current family rule, to 30 days, which is the time for responding in corresponding Civil Rule 36. Another member believed that 30 days would be easier to calculate for practitioners who do both civil and family work, and that 30 days, i.e., one month, is also easier to calculate than 40 days. But other members supported the 40 day period, and noted that while most civil litigants have counsel, most family litigants do not, and they would benefit from the additional time. Another member noted the omission from this draft rule of a 60 day period to respond after service of requests for admission with the summons and petition, and the member asked that this be added

back. After discussion and a straw vote, the members favored the 40/60 day period not only for responding to requests for admissions, but also for responding to requests for production and for answering interrogatories.

Draft Rule 65(b) concerns the effect of an admission, and the withdrawal or amendment of an admission. A member asked whether there should be a time limit for a withdrawal or amendment. For example, if a party files a summary judgment motion based on admissions, would the opposing party's subsequent request to withdraw or amend be untimely? Members discussed the standard and the burden. Judge Armstrong noted that the second sentence of Civil Rule 36(b) contains a standard based on federal case law, and members agreed that this sentence should be incorporated in Rule 65(b). (Members also agreed that the words "requesting party" in the referenced sentence refers to the party who requested the admission rather than the party requesting relief.)

- The Chair requested the workgroup to add the sentence from Civil Rule 36(b). She also asked the workgroup to consider whether Rule 64 should include an equivalent to Justice Court Rule of Civil Procedure 126(b), which among other things requires a notice to the opposing party of a calendar date when responses to requests for admission are due.

**5. Workgroup 4.** Mr. Berkshire presented Rule 85, and Judge McMurdie and Ms. Davis jointly presented Rule 91.

*Rule 85 ("relief from judgment or order"):* Mr. Berkshire noted that the language of proposed Rule 85 was almost identical to corresponding Civil Rule 60, and this would facilitate the application in family law matters of case law under the civil rule. Members had no questions and no suggested changes regarding Rule 85.

*Rule 91 ("modification or enforcement of a judgment"):* Judge McMurdie and Ms. Davis advised that the workgroup reorganized current Rule 91 into a newly written Rule 91 and new Rules 91.1 through 91.7. Their presentation today concerned the newly written Rule 91 only. The workgroup revised this rule to reflect actual practices in post-judgment proceedings, and to eliminate traps for self-represented litigants. For example, on a post-judgment petition to modify child support under the proposed rule, an affidavit of financial information would not need to accompany the petition, but would be due at a more realistic time set at the return hearing. Moreover, the procedure for the initial filing would be more straightforward; see proposed Rule 91(j)(1), "setting a return hearing or rejecting a petition." A judicial officer would first screen a post-judgment petition under the proposed rule. As in a Civil Rule 12(b)(6) proceeding, the judicial officer would presume that all of the information in the petition was true, and then determine whether that information would be sufficient to state a claim upon which the court could grant relief. If it did, the judicial officer would issue an order to appear; and

if it did not, the judicial officer would reject the petition, and provide the applicant with an explanation of the deficiency and an opportunity to correct it.

The workgroup also considered a requirement that parties submit to mediation before they can file a post-judgment petition. The workgroup concluded that this is counterproductive because it empowers a recalcitrant party to delay judicial proceedings. Judge McMurdie observed that some self-represented litigants who have a decree that requires mediation before seeking judicial intervention believe they are precluded from filing a post-judgment petition if the other party won't first engage in mediation. Proposed Rule 91(l) ("mediation") accordingly provides that "no party may be required to submit to mediation before filing a petition." This provision would allow a judge to require mediation, but after rather than before the filing of a post-judgment petition. (Members noted that a mediation provision in a decree is often "boilerplate" rather than the result of a knowing agreement, and such a provision may even constitute a deprivation of due process.) However, after discussion, members agreed to add to the language of Rule 91(l) quoted above the underlined words "before filing a petition for modification of legal decision-making or parenting time." Members discussed current Rule 66(C) ("initiation of ADR") and further agreed to add a new sentence to section (l) that says, "The court may not order private mediation absent an agreement of the parties."

This led to a discussion about the availability of mediation services through courts in all 15 Arizona counties. Some counties have conciliation courts that offer mediation for a nominal fee or no fee. But other counties don't have that resource. Courts in those counties may have contracts with private providers ("court-annexed mediators"), but members were not sure which counties had those arrangements. And even Maricopa County is not offering free dispute resolution in post-decree proceedings, not as a policy choice, but because of its high volume of cases.

- The Chair requested staff to research arrangements each county has for mediation services.

Ms. Davis observed that the workgroup deleted requirements for exchanging resolution management statements and other disclosure before the return hearing. The workgroup believed that the resolution statements sometimes have marginal application in post-judgment proceedings. Moreover, early disclosure requirements do not make the litigation more productive, and Ms. Davis noted that generally, neither attorneys nor self-represented litigants are disclosing information before the return hearing. Draft rule 91(m) would allow the court to set times to comply with disclosure at the return or other hearing. The workgroup removed a current provision that allows the return hearing to be an evidentiary proceeding. Members also discussed draft Rule 91(d), which would require the petitioner to submit an order to appear with a post-judgment petition. One

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member inquired whether a petition that requested modification of legal decision-making should include a summons rather than an order to appear.

- The Chairs noted that Rule 91 is a work-in-progress. The rule will go back to Workgroup 4, which will consider the members' comments today and make further revisions.

**6. Roadmap.** The Chair confirmed July 14, August 4, August 25, and September 29 as Task Force meeting dates. All of these dates are on Friday. By a show of hands, the Task Force should have a quorum for the July 14 meeting. The Chair encouraged workgroups to schedule future meeting dates. The Chair also advised that Mr. Serrano had resigned from the Task Force, and the Chief Justice has appointed David Horowitz to fill that vacancy. The Chair assigned Mr. Horowitz to Workgroup 3.

**7. Call to the public.** The Chair made a call to the public. Mr. Terry Decker, Mr. Martin Lynch, and Mr. Ed Pizzaro, Sr., responded and addressed the members.

**8. Adjourn.** The meeting adjourned at 4:02 p.m.

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

**State Courts Building, Phoenix**

**Meeting Minutes: July 14, 2017**

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

**Absent:** Hon. Peter Swann

**Guests:** Lindsay Cohen, Nick Brown, Julie Coleman, Ed Pizarro Sr.

**Administrative Office of the Courts Staff:** Mark Meltzer, Karla Williams

**1. Call to order; preliminary remarks by the Chairs; approval of meeting minutes.** The Chair called the fifth Task Force meeting to order at 10:01 a.m. She welcomed the members and introduced a new member, Mr. Horowitz. Workgroups have met 26 times to-date, including 6 occasions since the June 12 Task Force meeting. The Chair discussed the Task Force's progress and commended the members' dedication to this project. The August 4 Task Force meeting represents the "halfway" point, and the Chair will determine at the conclusion of that meeting whether to add one more plenary meeting to the Task Force schedule. Judge Armstrong requested the workgroups to prepare explanations of changes the Task Force is making to each rule, and to note in those explanations whether changes are substantive or are restyling only. The Task Force rule petition will include an appendix with those rule-by-rule explanations, similar to appendices filed by the Civil and Criminal Rules Task Force with their rule petitions. Judge Armstrong emphasized that it's easier for members to keep track of those changes as the work progress, rather than compiling them retrospectively. Judge Armstrong also noted that if the Task Force proposes a new comment, it should be titled, "Comment to the 2019 Amendment."

The Chair then asked members to review the draft June 12, 2017 meeting minutes, and a member made this motion:

**Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 005**

**2. Workgroup 4.** The Chair asked Workgroup 4 to begin today's presentations.

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*Rule 91 (“modification or enforcement of a judgment”)*: Judge McMurdie and Ms. Davis made an initial presentation of Rule 91 at the June 12 meeting. Ms. Davis today continued the presentation of Rule 91 and new ancillary Rules 91.1 through 91.6. She observed that current Rule 91 is unnecessarily repetitive and cumulative, that its provisions made compliance difficult for attorneys as well as self-represented litigants, and as a result, portions of the current rule were commonly ignored. To address these issues, the workgroup reduced the size of the rule, and made it more practical and accessible for attorneys and self-represented litigants. The workgroup also reorganized the rule by placing provisions applicable to any post-judgment petition in Rule 91, and by adding separate Rules 91.1 through 91.6 that contain provisions applicable to specific types of modification or enforcement actions. Ms. Davis said that the increased clarity of these draft rules remove “hurdles to the courthouse.” She gave these examples:

- An applicant does not need to file an Affidavit of Financial Information (“AFI”) with a petition, a practice that now results in a considerable amount of blank answers and “unknowns.” Instead, the AFI completion date would be keyed to the return hearing date.
- Petitions for unreimbursed medical expenses would not require the considerable information specified by the current rule, but would instead require a meaningful amount of supporting detail.
- Parties may now be required to engage in pre-petition mediation for legal decision-making disputes, which can be counter-productive and may delay resolution. The workgroup’s draft would require mediation at a later time, i.e., before an evidentiary hearing on the petition.

The Chair opened the draft rule for member comments.

- A member asked how the rule would treat parenting plans that require mediation before filing a petition. Ms. Davis suggested that a new comment to the rule could further explain the mediation requirement.
- Another member raised a concern with a requirement in draft Rule 91(b) that the petition include a copy of the judgment the applicant seeks to modify or enforce. If the judgment is already in the court’s file, the judge should be able to locate it when the applicant provides the filing date. On the other hand, the court will need an attachment when the petition involves a judgment from another venue or jurisdiction.
  - Members agreed to carve out a “IV-D” exception to this requirement in Rule 91(b)(3), and the workgroup will prepare revised language. Meanwhile,

members discussed and inserted in Rule 91(b)(4) text that would require a reference to the page number and section of the underlying judgment.

- A member asked whether the rule should require the attachment of a child support worksheet when the petition concerns child support. Members deferred this inquiry to their discussion of Rule 91.1; see page 4 of these minutes.
- In Rule 91(d) (“mediation”), a member suggested changing the phrase “schedule an evidentiary hearing” to “hold an evidentiary hearing.” Members agreed with the suggestion.
- Members also commented on the last sentence of Rule 91(d) (“the court may not order private mediation absent an agreement of the parties.”) They discussed the interaction of this provision with Rule 66, which concerns alternative dispute resolution, and the availability of mediation services in particular counties. Members agreed to remove this sentence pending their discussion of Rule 66.

*Rule 91.1 (“post-judgment petition to modify spousal maintenance or child support”) and the issue of return hearings:* Members proceeded to an extensive discussion of the “return hearing,” which is a term used throughout Rule 91; see, for example, Rule 91(i)(1) (“setting a return hearing or rejecting a petition”). The issue was precipitated by a member’s observation that Rule 91.1(c) (“affidavit of financial information”) bases the time for the parties to exchange this document on the date of the return hearing, but there is no return hearing in a IV-D case. In other counties, notably Yuma and Pima, courts set orders to appear (“OTA”) for an evidentiary hearing rather than a return hearing because they may have insufficient resources to conduct both hearings. A member also suggested that a single hearing is practical because self-represented litigants are less likely to appear if the court sets more than one hearing on a petition. If mediation is required before an evidentiary hearing, the court would be reluctant to set a return hearing solely to order mediation, because the court could do that by a written order sent to the parties. But other members had different points of view and expressed a preference that courts set OTAs for return hearings. They observed that return hearings facilitate due process by permitting responses and disclosures before an evidentiary hearing. These members emphasized that brief return hearings are useful for confirming service on the respondent and for resolving cases, and they help avoid the need for a longer evidentiary hearing. A “return hearing” simply means the parties will “return to court,” and the term does not imply an evidentiary proceeding.

Regardless, members agreed that the OTA should specify whether the court will consider evidence at the hearing. But there was a split among the members about whether the hearing must be non-evidentiary. About half the members agreed with the proposed text of Rule 91(i) (“initial review of petitions and return hearing”) that states, “If the court

issues the Order to Appear, it must set a return hearing where, excepting emergent circumstances, no evidence will be taken.” But the other half of the members preferred a rule that allows the court to set either a non-evidentiary return hearing or an evidentiary hearing according to local practice. The Chair advised that the Task Force’s rule petition would note the split of opinion and solicit comments from stakeholders on this subject. Members agreed that if the rule ultimately provides for a non-evidentiary return hearing (absent exigent circumstances), judicial education would be necessary to assure its implementation as a uniform statewide procedure. They also agreed that a rule that eventually permits an OTA for an evidentiary hearing would require several additional changes to Rule 91.

Members also discussed a new provision in Rule 91(j) (“manner and timing of service”). The version introduced at the June 12 meeting required service of the petition “at least 10 days before the scheduled conference or hearing.” The workgroup’s revised version would require service “no later than 10 days after receipt of the issued Order to Appear...” A member suggested that in IV-D cases, respondents may move frequently and it may be difficult to serve the respondent this quickly as proposed; the member suggested “20 days before the hearing” as a compromise. Members disfavored an exception in this rule for IV-D cases that would allow a state agency more time to effect service than a private litigant. After a further discussion of alternatives, members concurred with bracketing the service time in Rule 91(j) as follows: “The applicant must make good faith efforts to complete service promptly and within 10 days after the receipt of the issued order to appear, but must complete service in no event later than 20 days before the hearing.” In proposing this language, members expressed concern about making the rule more complicated rather than simpler. They discussed whether different times for completing service should apply if the OTA was for an evidentiary hearing rather than a return hearing. During the course of the discussion they reconsidered the Rule 91(i) issue discussed above, but they again concluded they would identify that issue in their petition and request comments. Although a member proposed language that the applicant must complete service 20 days before a return hearing and 30 days before an evidentiary hearing, members declined to adopt this proposed change at today’s meeting.

While on the subject of Rule 91.1(b)(1), which concerns a petition for child support in a “standard procedure” case, members resumed their discussion on appending to the petition a copy of a child support worksheet. Members acknowledged that the worksheet might not always be available, but the worksheet would be useful for showing how the existing number was derived and what the applicant was asking the court to modify. Members agreed to this addition, and to describe the appropriate worksheet, they used this language: that the applicant must “attach a copy of the most recent child support worksheet that supports the existing child support order, if available.” They agreed that

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it was not necessary to include a worksheet for a “simplified procedure” case (Rule 91.1(b)(2)), which is governed by the Arizona Child Support Guidelines.

*Rule 91.2 (“post-judgment petition to enforce spousal maintenance or child support”):* The workgroup draft of this rule required “a current summary calculation of the arrears derived from the Clearinghouse records of the Department of Child Support Enforcement....” Members discussed the practice of obtaining an arrearage calculation and the distinction between that calculation and a “payment history,” which may not show the amount due. One member also noted that in Maricopa County, the court does an independent calculation of the arrearage. Because an applicant may need to submit a clearinghouse calculation from out-of-state, the members agreed to use lower case letters, which are more generic, rather than capital letters, and they made other modifications to this provision. Their agreed-upon language for this portion of Rule 91.2(a) is, “The petition also must include a current summary calculation of arrears derived from support payment clearinghouse records....”

*Rule 91.3 (“Post-Judgment Petition to Modify Legal Decision Making or Parenting Time”), Rule 91.4 (“Post-Judgment Petition to Relocate or Prevent Relocation”), and Rule 91.5 (“Post-Judgment Petition for Enforcement of Legal Decision-Making or Parenting Time; Warrant to Take Physical Custody”):* Members discussed these rules but they had no significant revisions to the workgroup’s drafts.

*Rule 91.6 (“other post-judgment petitions”):* The workgroup’s draft of this rule required the petition to state “the specific legal authority that confers subject matter jurisdiction on the family court, or authorizes it to grant the relief requested.” One member observed that the “family” court is actually the “superior court,” so members deleted the word “family.” The also removed the words “subject matter jurisdiction” from the remaining part of this provision and revised it to say, “the specific legal authority that permits the court to grant the relief requested.”

*Rule 89 (“enforcing a judgment for a specific act”):* Judge Eppich presented this rule. He advised that it was modeled on restyled Civil Rule 70. Members approved the rule without any changes to the draft.

**3. Workgroup 1.** Workgroup 1 then presented several of its rules.

*Rule 6 (“change of judge as a matter of right”) and Rule 6.1 (“change of judge for cause”):* Ms. Henderson advised that these rules are based on restyled civil rules, but the workgroup made appropriate modifications for family law proceedings. She reminded the members that they had reviewed these rules at a previous Task Force meeting. One issue then was who was a “judge” under these rules. The workgroup added a definition of “judge” in Rule 6(a) (“definitions”) that defined this word, as used in Rule 6 and Rule 6.1, as “any judge, judge pro tem, or court commissioner.” Rule 6 clarified that there is

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only one change as a matter of right. On the “time limits” in Rule 6(d), members discussed a 60-day requirement for holding a temporary orders hearing and concluded that no change to the draft of Rule 6 was warranted. But in Rule 6(f) (“actions remanded from an appellate court”), the members concurred that a remand for a “new trial” did not encompass a remand of a “contested hearing,” and they added “contested hearing” to this provision.

*Rule 8 (“telephonic appearance and testimony”)*: Mr. Woodnick noted that the workgroup took a pragmatic approach to this rule but it had concerns with the manner of supplying exhibits to a witness who testified telephonically. If a party provided only a limited number of exhibits to the witness, the party could signal a cross-examination strategy; but producing for the witness all of the exhibits in the case could be burdensome. The members agreed that it’s difficult for the rule to anticipate a myriad of scenarios, yet section (c) permits the court to use its discretion as these scenarios arise. Members discussed A.R.S. § 25-1256(F) and made minor modifications to section (c) to accommodate the statute. They revised the titles of Rule 8 and sections (a) and (d) for more consistent and clearer meaning, and made other conforming changes to the text of the rule. The members then approved the draft of Rule 8.

*Rule 9 (“duties of parties or counsel”)*: Ms. Henderson observed that the workgroup consolidated various provisions, such as the second and third sentences of current Rule 23 regarding a mailing address, into its draft of Rule 9. However, members took issue with the phrasing of draft Rule 9(b) (“responsibility to the court”) that requires parties to keep the court “informed of material changes in the status of their cases.” “Material changes” is too vague, and the workgroup will prepare revised language. Ms. Henderson reviewed the substitution provisions of section (d), including subpart (2)(C) that continues to require a signed order approving a substitution of counsel.

Staff based the initial restyling of Rule 9 on restyled Civil Rule 5.3. Task Force members noted the omission in staff’s restyling of a provision that is in the current family rule, but which has no Civil Rule 5.3 counterpart. That current provision, in Family Rule 9(A)(1), provides that counsel of record is deemed responsible “until the time for appeal from a judgment has expired or a judgment has become final after appeal....” Members agreed to reinsert this. Then they discussed whether, after the time for appeal has expired or a judgment has become final after appeal, the court should automatically remove counsel from the record as representing the party, or whether the rule should require counsel to file a motion to formally disengage from the client in the court record. Judge Armstrong noted that Maricopa County Local Rule 6.2(e) contains a procedure where, in these circumstances, counsel may file a “notice of withdrawal of attorney of record.” The current Family Rule is silent on whether a notice is required, but members concurred that

this local “notice” procedure would be useful. Ms. Henderson will draft additional language for Rule 9(d) regarding a notice of withdrawal.

Members discussed a provision added by staff to Rule 9(d), also prompted by a recent change to Civil Rule 5.3, concerning change of counsel within the same firm or office. This provision also applies to governmental entities, but given the volume of family cases in the Attorney General’s office and the absence of difficulties in locating the assigned assistant attorney general, members agreed to delete “governmental law office” from the draft rule.

*Rule 10 (“representation of children”) and Rule 10.1 (“court-appointed advisor”)*: Ms. Burns noted that the workgroup divided current Rule 10 into two draft rules, one for the child’s attorney and best interests attorney; and a new Rule 10.1 for a court-appointed advisor. Current Rule 10(A) contains a list of reasons for appointing an attorney for the child, which includes “any other reason deemed appropriate by the court.” Draft Rule 10(b) (“grounds”) shortens the list by simply saying, “any reason the court deems appropriate.” The body of draft Rule 10(c) (“qualifications”) contains a reference to American Bar Association standards, which are referenced in a comment to current Rule 10. Provisions in section (F) of the current rule, which concern fees and expenses, were relocated to section (d) (“appointment order”) of the draft rule. The workgroup did not include in its Rule 10 draft any provisions that correspond to current Rules 10(H) and 10(I) (“minors and incompetent persons” and “appointment of guardian”) because it believed Rule 37 (“substitution of parties”) is a more appropriate place for those provisions, and that rule is assigned to Workgroup 2.

Judge Cohen reviewed Rule 10.1. The draft rule reflects text and organizational changes similar to changes the workgroup made to Rule 10. The body of Rule 10.1(b) includes a reference to a relevant act of the Uniform Law Commission concerning child abuse, neglect, and custody. The draft rule includes a provision, similar to current Rule 10(E), which distinguishes permissible actions a court-appointed advisor may take from actions that an attorney may take. A member suggested that a court-appointed advisor’s report should include a discussion of A.R.S. § 25-403 factors. Members declined to include a specific reference to this statute, but they agreed to add to section (d) (“participation”), subpart (5), that the report should discuss “applicable statutory factors.” Members had no other comments and approved draft Rules 10 and 10.1.

*Rule 12 (“court interviews of children”)*: Judge Cohen and Mr. Woodnick jointly presented this rule. They noted that the workgroup deleted current Rule 10(B) (“special precautions”) because this section appeared to be more in the nature of a “how-to-do” provision than a court rule. However, Judge Armstrong advised that this provision was prepared after a lengthy study by a State Bar workgroup, and that workgroup expressly recognized that its proposed rule did not contain “typical rule language.” Judge

Armstrong also advised that the Court adopted these “special precautions” relatively recently (2015). Accordingly, he recommended reinserting this provision, and the members agreed with his recommendation.

The workgroup’s draft of Rule 12 says, in part, that “unless the parties stipulate otherwise, the court must record the interview....” This is different from the current rule, which provides that “the interview must be recorded....” A member proposed reverting to the current language. One judge member suggested that parties should be able to waive a recording, but another expressed caution about not having a record of an interview that a judge may rely upon. Another member noted that even if the parties waive a record, they would nonetheless receive a report of the interview, and that judges customarily rely on the report more than they rely on the actual interview. Another member observed that if the judge does the interview, the judge probably wouldn’t prepare a report. Judge Armstrong proposed keeping in the rule the language shown in the first sentence of this paragraph above, but adding to section (c) (“record of the interview”) the words, “except that the court must record any interview conducted by the judicial officer.” Members agreed with this compromise language. Judge Armstrong further explained that “sealing” as used in this rule means the interview is not available to the public, but it is available to the parties. To clarify this concept, members added in Rule 12(c)(2) (“sealing”) three words: “...the court may seal from the public part or all of the record of the interview.” They also agreed that draft Rule 10(d)(4) (“admissibility”) was redundant to Rule 2, and they removed this provision.

*Rule 13 (“public access to proceedings and records”)*: Judge Cohen reviewed the draft rule and explained that the workgroup made no substantial changes to staff’s initial restyling. However, the workgroup deleted the comment to this rule. Members had no questions concerning the draft and they approved the rule as presented.

**4. Workgroup 2.** Workgroup 2 presented Rules 39, 43, and 43.1.

*Rule 39 (formerly “reserved,” now “meaning of ‘service’”)*: Commissioner Christoffel explained that current Rule 39 is titled, “proof of authority by attorney for respondent not personally served.” At a previous Task Force meeting, the workgroup recommended deleting this rule and maintaining it as “reserved.” Thereafter, the workgroup decided to utilize Rule 39 to describe the different meanings of “service,” a term-of-art that Rules 40, 41, and 42 use. Draft Rule 39(a) (the “general rule”), requires service “promptly after filing.” Section (b) (“meaning of service”) describes the different meanings of service in three broad circumstances: service of a summons and petition; service of documents filed in the course of a case; and service of contempt petitions. Section (c) introduces the concepts of waiver and acceptance of service. One member noted that section (b)(1) says, in part, that “the petitioner” must serve an OTA with a petition, but that person might be the “respondent” in the case. To avoid confusion, this should refer to “the applicant.”

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Members concurred, and they will consider at a later time bifurcating this provision for pre- and post-decree situations.

*Rule 43 (“service of other documents after service of the summons, petition, and order to appear”) and Rule 43.1 (“filing of pleadings and other documents”):* Ms. Clark noted that the Task Force returned Rule 43 to the workgroup for reasons noted at page 2 of the June 12, 2017 meeting minutes. The workgroup made the revisions suggested by the Task Force. The workgroup also included, as the Task Force suggested, an explanation regarding the meaning of “service;” see Rule 39 above. A member inquired about the meaning of the term “service is complete” as used in Rule 43(b), but use of this term conforms to its use in the restyled civil rules, and members can consider whether further clarification of the term is appropriate when they review Rule 4 (“time”). Members had no additional comments and approved Rule 43 as presented.

Mr. Nash presented Rule 43.1. He advised that the draft rule is modeled on restyled Civil Rule 5.1. There is a new provision in draft Rule 43.1(b)(4) regarding filing by an incarcerated party. For the sanctions provision of section (d)(4), the workgroup inserted Rule 71(a) as the appropriate cross-reference. Section (e), which concerns proposed orders and judgments, modified provisions of the restyled civil rule so they conform to family law procedures. A new “exception” was added in section (e)(3) that allows the filing of a proposed order or judgment to preserve the record on appeal. Section (f) governs “sensitive data.” Ms. Sell discussed recent changes to federally mandated forms, and she agreed to prepare additional conforming language for section (f) that accommodates those forms. Mr. Nash noted that section (f)(3) now refers to “income withholding orders,” which is the revised federal term, rather than to “orders of assignment,” which current Rule 43(G) uses. The workgroup recommended the deletion of a lengthy comment to current Rule 43. Except as otherwise noted, members approved draft Rules 43 and 43.1.

**5. Roadmap; call to the public; adjourn.** The Chair reminded members of pending Task Force meeting dates (August 4, August 25, September 29, October 20, December 1, and December 15, all Fridays), which are shown on today’s meeting agenda. A show of hands indicated the Task Force would have a quorum of members present for the August 4 meeting.

The Chair made a call to the public. There was no response. The meeting adjourned at 4:04 p.m.

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

**State Courts Building, Phoenix**

**Meeting Minutes: August 4, 2017**

**Members attending:** Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron, Annette Burns, Cheri Clark, Hon. Suzanne Cohen, Helen Davis, Kiilu Davis, Hon. Karl Eppich, Mary Boyte Henderson, David Horowitz, Hon. Paul McMurdie, Aaron Nash, Jeffery Pollitt, Janet Sell, Hon. Peter Swann, Steven Wolfson, Gregg Woodnick

**Absent:** Hon. John Assini, Keith Berkshire, Hon. Dean Christoffel, Joi Hollis

**Guests:** Martin Lynch

**Administrative Office of the Courts Staff:** Mark Meltzer, Julie Graber, Sabrina Nash, Theresa Barrett

**1. Call to order; preliminary remarks by the Chairs; approval of meeting minutes.** The Chair called the sixth Task Force meeting to order at 9:30 a.m. She congratulated Judge Eppich on his appointment to the Court of Appeals, Division Two. She reintroduced Julie Graber, who made a presentation about OneDrive at the first Task Force meeting and will be making revisions on OneDrive during today's meeting. The Chair again commended the members for their progress. The Task Force to-date has approved 35 rules. The Task Force reviewed 9 other rules that it returned to workgroups with recommended edits, and two rules are on today's agenda, for a total of 46 rules considered by the Task Force. There are 53 rules remaining, and the Chair believed it would be appropriate to schedule an additional meeting. Most members indicated they were available for another meeting on Monday, November 13, and the Chair requested any members having a conflict with this date to send an email to staff. Adding this meeting date would permit members to utilize the December 15 meeting primarily for a discussion of their rule petition.

The Chair asked members to review the draft July 14, 2017 meeting minutes, and a member made this motion:

**Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 006**

**2. Workgroup 2.** The Chair then asked Workgroup 2 to present Rule 40.

*Rule 40 ("summons"):* Ms. Clark began the presentation by noting the workgroup's intent to keep Rule 40 focused on the summons, including when a summons is required, the contents of a summons, and service and acceptance of a summons.

Rule 40(a) includes a provision on when a summons is required. The workgroup's draft required a summons for "petitions for dissolution, legal separation, annulment, or for paternity or maternity." A judge member noted that petitions to establish legal

decision-making or parenting time also should be served with a summons, and those petitions were added to the text of Rule 40(a). Such a petition might be filed, for example, where the father acknowledged paternity, but legal decision-making or parenting time issues were unresolved. After discussion, the words “by a parent” were included with the additional text. But the implication is that an “in loco parentis” petition for legal decision-making or parenting time under A.R.S. § 25-409, or a petition for third-party visitation under that statute, would require an order to appear (“OTA”) rather than a summons. The Chair asked the members to consider at a future time whether an explanatory comment on this distinction might be appropriate. Judge Armstrong added that the 2006 rule revisions changed the term “order to show cause” to “order to appear” because self-represented litigants better understood “order to appear.”

Members were unfamiliar with private counsel filing initial petitions solely for the purpose of establishing child support, but they contemplated whether such petitions should be initiated with a summons. Ms. Sell said that in IV-D cases, respondents rarely file a responsive pleading, and an OTA sufficiently instructs respondents in those cases to appear in court and what documents to bring. She also said that a summons in a child support action may impair federal mandates for expedited processing of those petitions. Another member noted that proceedings under Rule 91, which members discussed at the July 14 meeting, are initiated with an OTA. Members briefly discussed the State using an OTA for its child support petitions and private counsel utilizing a summons for theirs, but members concurred that this was not a useful distinction. Another member observed that the overwhelming majority of petitions regarding child support are in the IV-D context, that the OTAs appear to be functioning well in those proceedings, and there was no need to change that. Members then concluded that the restyled rules should allow the use of an OTA rather than a summons for petitions to establish child support. Members preferred to describe petitions that require a summons using narrative text, as the workgroup had done in draft Rule 40(a), rather than in a columnar list. Members also discussed whether Rule 40(a) should include a reference to the preliminary injunction, which also must be served, but they agreed that this requirement was adequately covered by Rules 26 and 27.

Draft Rules 40(b)(1)(D) and (E) used the phrase “appear and defend.” Members disfavored the word “defend” and changed the phrase to “appear and respond.” The workgroup’s draft of Rule 40(b)(2) (“actions for annulment, dissolution of marriage, or legal separation”) restated statutory language regarding conciliation to make that language more meaningful for self-represented litigants. The workgroup presented two alternate versions of the restated language. Members preferred Commissioner Christoffel’s version, but they deleted the words “or both spouses” to clarify that either spouse may request the conciliation court’s assistance. Members reviewed A.R.S. §§ 25-312(2) and 25-381.09 and concluded that the statutes do not guarantee free marriage counselling, and that the workgroup’s draft rule complied with statutory requirements. The workgroup revised draft Rule 40(c) (“replacement summons”) to make it clearer. In Rule 40(d) (“who may serve a summons”) and elsewhere, the workgroup replaced the

phrase “service of process” with “service of a summons.” The workgroup also recommended deletion of a section of Rule 40 entitled “statewide certification of process servers” because that topic is addressed by the Arizona Code of Judicial Administration. In Rule 40(e) (“service of summons in Title IV-D cases”), Ms. Sell advised that the Office of Special Investigations, which is the entity named in the current rule, had become “the Inspector General,” and members accordingly deleted the words “Office of Special Investigations.”

Workgroup 2 discussed the provisions of “accepting” and “waiving” service under Rule 40(f). The workgroup found that the distinction of these two terms made by restyled Civil Rule 4(f) was not useful for family cases. But Task Force members asked whether Rule 40(f) should provide an incentive, such as additional time to respond, for returning an acceptance. Alternatively, should Rule 40(f) provide a sanction for a refusal to accept service? After discussion, members agreed to use the term “accept,” which self-represented litigants would understand better than “waiver,” rather than both terms; and they declined to provide incentives for accepting service or additional sanctions for refusing to accept service. In Rule 40(f)(2)(A), members agreed to delete “or authorized agent” in the following sentence: “A party on whom service is required may, in person or by an attorney ~~or authorized agent~~, enter an appearance in open court.” Members also agreed that there was no need for the rule to distinguish a special appearance from a general appearance. In Rule 40(f)(3), members deleted the word “waiver” and changed “acceptance and appearance” to “acceptance or appearance.” In Rule 40(g)(6) (“validity of service”), members changed “make” proof of service to “file” proof of service. In Rule 40(i) (“time limit for service”), the workgroup maintained the 120-day time limit in current Rule 40(I). Members had no further comments or changes regarding Rule 40.

Ms. Clark then returned to Rule 39 (“meaning of service”), a rule the Task Force discussed at the July 14 meeting. Ms. Clark noted that the workgroup added the words “by Rule 40 and” in Rule 39(b)(1) before the references to Rule 41 and Rule 42. To be consistent with the above-noted changes to Rule 40, the workgroup removed the term “waiver” in Rule 39(c). A member took issue with a portion of Rule 39(a) that required the filing party to serve other parties “promptly after” filing a document; the member believed this would preclude mailing a copy before filing the document. This comment led the members to reorganize Rule 39 by combining prior draft sections (a) and (b). Section (a) as reorganized now begins, “(a) General Rule. When filing a document with the court, a party must provide every other party with an exact copy of the filed document. The method by which that document must be provided depends on the type of document filed, as follows: ... [Subparts (1), (2), and (3)] ....” Members also removed quotation marks in Rule 39 around the words “service” and “serve.” They had no further changes to Rule 39.

**3. Workgroup 3.** Mr. Wolfson and other members of Workgroup 3 then presented Rule 49. Mr. Wolfson prefaced this presentation by requesting members’ input on the workgroup’s draft in-progress.

*Rule 49 (“disclosure”)*: Mr. Wolfson referred to a provision in draft Rule 49(d) concerning the resolution statement—this provision currently is Rule 49(A)—and said the workgroup looked at the role of resolution statements and when parties should file them. The current rule requires the filing of a resolution statement concurrently with the party’s initial disclosure. The workgroup believed this timing was impractical for the parties and made the resolution statement less useful for the court. The workgroup recommended decoupling the disclosure and resolution statements, and changing the time for filing the latter to 30 days after exchanging initial disclosure statements, or 5 days before a court hearing. The workgroup further proposed a requirement that the court set a resolution management conference 30 days after the parties exchange disclosures. The workgroup envisioned that the court would take a more hands-on approach to case management at these conferences, and would encourage the parties to reach agreements on issues that might otherwise require temporary orders hearings. This, in turn, would free-up court time spent on those evidentiary hearings, and allow for earlier trial settings.

Judge Swann elaborated on the workgroup’s concept. He said that a culture change during the past decade has resulted in more temporary orders hearings than previously contemplated. The scheduling of more temporary orders hearings has the dual effects of duplicating the presentation of evidence the parties would ordinarily present only at trial; and it polarizes the parties rather than getting them to consensus. Judge Swann noted that the original concept of the resolution management conference, as developed by Judge Norman Davis, was to have parties reach agreements on their issues early, expediently, and efficiently. Now, however, with the proliferation of temporary orders hearings, a large number of cases proceed through mini-trials in advance of trial. The workgroup’s proposal would have judges take an active role in resolving cases or issues as promptly as possible. A member noted that complex cases often are not amenable to early resolution. Judge Swann responded that trial judges actually see few complex cases, and he is agreeable to excluding those cases; but judges do see a vast number of self-represented litigants who would benefit from prompt and practical resolutions. He added that by resolving these non-complex cases more quickly, judges would have more time to spend on the truly complex ones, which would ameliorate criticism that judges have insufficient time for those cases. Judge Armstrong suggested that the workgroup add a new provision or comment that explains the purposes of a resolution management conference rather than changing the terminology.

Judge Swann further mentioned a pending rule petition that included a recommendation for tiering of civil cases, and that such a system, which would differentiate judicial management of cases having varying levels of complexity, might be useful in family cases, too. A judge member asked whether this would be useful when the parties already can opt out of discovery requirements. Judge Swann responded that it might be of use when the parties cannot agree on discovery issues, but members generally believed that the current system allows the court reasonable discretion in controlling discovery, the current system is simple, and retaining this system eliminates the need for new rules concerning tiering.

If a resolution management conference would occur near the inception of a case, a member questioned how a party would fashion a settlement position before discovery had occurred. Workgroup members responded that a resolution statement need not provide extensive detail to be useful. One member noted that the forms referenced in Yuma Local Rule 6 may provide a workable template for a resolution statement, and in Maricopa County, the family law conference officer has a useful form. Moreover, the resolution statement does not necessarily require a party's position regarding settlement. Rather, it should provide the party's statement about what needs to be done (for example, retain a business valuation expert) to get the case resolved, or at least it should say what should happen next to move the case towards resolution. The resolution statement should not be a reiteration of the party's demands, because those were stated in the petition or response. The workgroup's concept presupposes that parties will file a statement of disputed issues before every court conference. But these conferences, unlike a temporary orders hearing, need not be evidentiary or adversarial. Some members of the workgroup are open to changing the name of a resolution management conference to a different name that refocuses its original purpose, as developed by Judge Davis, but a name change is not necessary as long as his original intent for having a resolution management conference remains intact. Judge Swann added that some self-represented litigants don't comprehend the distinction between family and severance proceedings, and it would be useful if the court made these litigants aware of the less draconian outcomes concerning their children in family court.

Members then proceeded to discuss specific text in draft Rule 49. Draft Rule 49(b)(2)(B) ("time for additional or amended disclosures") was taken from Civil Rule 26.1(d)(2). Some members believed this provision is problematic because it requires a party to disclose information that the opposing party should have previously disclosed, it encourages gamesmanship, and it reduces opportunities to get candid reactions during depositions. A majority of members agreed to remove the word "deposition" from the draft, but others wanted to retain this word; the Chair suggested that the rule petition note this divergence of views and request comments. Draft Rule 49(b)(2)(C) ("disclosure by written discovery or deposition") borrowed a provision from the civil rules that allows disclosure during a deposition or by another form of communication. The provision elevates the substance of disclosure over the form in which it is made. Members agreed to keep this provision but added the word "written" before communication. Workgroup 3 added a note to draft Rule 49(b)(3) ("failure to disclose, false or misleading disclosure, untimely disclosure") that would add to Rule 65 ("failure to make disclosure or discovery; sanctions") the sanction of an adverse inference; members generally agreed with this addition, as long as the sanction was permissive rather than mandatory. But they otherwise deferred this proposal to their discussion of Rule 65.

Members proceeded to discuss draft Rule 49(c) ("signature under oath"). This provision was derived verbatim from Civil Rule 26.1(e), but it has no corollary in current Rule 49. Members were critical of this provision. One member raised the distinction

between disclosing statements of fact, which were amenable to verification, and position statements, which were not. In response, members added the underlined words, “each disclosure of fact ...” to the draft. Another member presumed that the verification requirement would exempt document disclosures, although this provision did not expressly say that. And one member asked, if Rule 49(b)(2)(C) would allow disclosures by alternate forms of written communication, whether Rule 49(c) would require verification of counsel’s letters. Additionally, parties might disagree whether a statement is one of fact or one of position, or whether it could be both. On a straw vote, the great majority of members favored eliminating Rule 49(c) from the draft, and it was deleted. But the Chair suggested that this issue also be noted in the rule petition and that the petition invite comments.

Returning to draft Rule 49(d), a member questioned the need for a resolution statement if a party requested a temporary orders hearing. The member explained that relevant facts and issues should have been previously noted in the motion for temporary orders, and that a resolution statement would be duplicative. Mr. Wolfson responded that if the temporary orders motion is filed with an initial pleading, the parties would not have had the benefit of disclosure statements that precede preparation of a resolution statement. But he acknowledged the possibility of duplicative filings. He suggested that the rule on resolution statements be a new, stand-alone rule located earlier in the rule sequence, possibly as a new Rule 33. Judge Armstrong observed that the articulation of the parties’ positions was fundamental to Judge Davis’ concept of resolution management, and the draft rule should require parties to present their positions. If the rule requires the filing of a resolution statement at an early stage of the proceedings, a party’s statement could simply say such things as the party is not ready to state a position, or the party’s position depends on additional discovery. With regard to the organization of Rule 49, a member proposed relocating sections (e) through (k), which are more particular, into a new Rule 49.1, and leaving the general disclosure provisions in Rule 49, but this proposal did not gather support.

Members had suggestions and comments regarding Rule 49(f) (“child support”). In (f)(2)(A), they agreed that the applicable period should be three completed calendar years rather than two. Because the provision refers to completed calendar years, and a tax return or other pertinent tax documents might not be available in January or February, members agreed to add this phrase: “...and year-end information for the most recent calendar year for which tax returns are not yet due.” One member inquired whether proof of court-ordered support and maintenance under (f)(3) included arrearages; and whether proof of health insurance premiums under (f)(4) included (a) premiums for stepchildren, and (b) whether health insurance was available, and if so, the cost of coverage. Subparts (f)(5) through (7) also should be reviewed further to assure these provisions are accurate, consistent, and complete.

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- Workgroup 3 should clarify these items. The workgroup might find it helpful to review Maricopa's list of what parties should bring to court conferences concerning child support.

The acronym "AFI" was added to refer to the Affidavit of Financial Information following the first reference to the affidavit in Rule 49.

With regard to draft Rule 49(h) ("property"), a member inquired whether it's realistic for a party to disclose the listed documents within 40 days. The member also inquired whether all of the listed information was necessary; for example, whether all of the "escrow documents" are relevant merely to learn a property's purchase price and encumbrances. This member also questioned the need to disclose beneficial interests under (h)(5) and (h)(7), and asked whether the draft would require a party to disclose, for example, wills or trusts in which the party had a contingent and even revocable expectancy. Another member suggested as a starting point deletion of the word "all" in (h)(1), and members agreed to this. In this subpart, the member also recommended that the rule specify information that should be provided, e.g., a legal description or the purchase price, without requiring specific documents that could furnish that information.

- Workgroup 3 should review Rule 49(h) and determine what is necessary, and what could be eliminated. The Chair suggested that the workgroup consider adding language that the listed documents must be produced only when they are relevant to an issue in the case.

Workgroup members explained a change in Rule 49(i) ("debts") that would require disclosure of 11 months of statements rather than 6 months, which the current rule requires. (Online statements are typically available for not more than 12 months; and 6 months would be too brief.) They also explained that draft Rule 49(l) ("disclosure of hard-copy documents and electronically stored information") was taken from restyled Civil Rule 26.1(b). Draft Rule 49(l) includes a provision for resolution of disputes. Draft Rule 49 also includes a new section (o) ("motion to compel disclosure") that corresponds with restyled Civil Rule 26(g). However, this draft section will require integration with other proposed family law rules regarding good faith consultations.

**4. Roadmap; call to the public; adjourn.** The Chair reviewed pending Task Force meeting dates (August 25, September 29, October 20, December 1, and December 15, (all Fridays). The new meeting date is Monday, November 13.

The Chair made a call to the public. Mr. Martin Lynch responded and addressed the Task Force.

The meeting adjourned at 2:09 p.m.

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

**State Courts Building, Phoenix**

**Meeting Minutes: August 25, 2017**

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

**Absent:** Helen Davis, Hon. Peter Swann

**Guests:** Ed Pizarro Sr.

**Administrative Office of the Courts Staff:** Mark Meltzer, Sabrina Nash, Karla Williams, Jodi Jerich

**1. Call to order; preliminary remarks by the Chair; approval of meeting minutes.** The Chair called the seventh Task Force meeting to order at 10:00 a.m. She acknowledged the members' commitment to this project and their ongoing work, which includes 5 workgroup meetings since the August 4 Task Force meeting; 33 workgroup meetings since February; and totals to-date of more than 63 hours spent in workgroup meetings and 26 hours spent at Task Force meetings. The Chair reminded members to keep notes of revisions to their assigned rules, and requested the workgroup chairs to assure these notes are taken and maintained.

The Chair asked members to review the draft August 4, 2017 meeting minutes, and a member made this motion:

**Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 007**

**2. Workgroup 1.** The Chair then asked Workgroup 1 to present its rules.

*Rule 5 ("consolidation"):* Mr. Woodnick advised that the workgroup did not alter the rule substantially, however, it deleted the word "only" and added the word "not" in (a)(4), as follows: "The court may not consolidate a case involving ~~only~~ an order of protection with the substantive family law case." Members agreed that consolidating the order of protection case with a family case might result in impermissible protective order information appearing in the court's online records, and this could impair federal funding. Nonetheless, the rule should allow the court to conduct a hearing that involves both cases. Members agreed that an explanatory comment to the rule might explain this nuance. But after additional discussion, members instead revised the rule to simply provide, "the court may not consolidate a case involving an order of protection with a family law case, but may conduct a joint hearing." (During that discussion, members agreed to delete the word "substantive" in (a)(4) ("the substantive family law case") as

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unnecessary.) In draft rule (a)(2) (“assigned judge”), members substituted “first-filed case” for “earliest-filed case” because the latter term (“earliest”) implies there are more than two cases. The draft rule randomly used the words “actions” and “cases,” and members concurred that the rule should use the word “cases” throughout.

Members made syntax changes to section (b) and eliminated unnecessary words, including the word “specifically” in the phrase, “unless the court specifically orders otherwise.” Members agreed the phrase “not only for the purpose” in that section was a better choice than “not merely for the purpose.” They also added the word “hearing” so it is now “hearing or trial.” In section (c), members struck the word “previously” as an incorrect modifier in the phrase “previously filed a petition,” and substituted “will be treated as a response” for the phrase “will constitute that party’s response.” Ms. Sell raised the issue of consolidating multiple child support enforcement actions that are pending in different counties, and she proposed a new subpart (a)(5) to address this. Members responded that this is a venue rather than a consolidation issue, and the Chair directed Workgroup 1 to consider this when it reviews Rule 23 and pending rule petition number R-17-0019, which concerns a proposed new venue Rule 23.1. A member suggested that if the workgroup prepares a new rule, it also should consider a mechanism to assure that the record of proceedings is provided to each county when proceedings from various counties are joined.

*Rule 5.1 (“simultaneous dependency and legal decision-making/parenting time proceedings”)*: Mr. Woodnick also presented Rule 5.1, which concerns the interplay between proceedings under Title 8 and Title 25. The workgroup recommended the deletion of portions of the current family rule that direct the juvenile court rather than the family court. The members discussed each of the workgroup’s three proposed sections of Rule 5.1. In each section, including section titles, members changed juvenile or family court to juvenile or family division. In section (a) (“transfer to juvenile court”), members agreed that the word “may” transfer rather than “must” transfer was appropriate because the family court may keep aspects of the case that do not involve children, such as dissolution of the marriage or division of property. The children’s issues are transferred to, rather than consolidated with the juvenile action, and both actions continue under their respective case numbers. Although the word “transfer” might not be legally precise, it fairly describes for self-represented litigants what is happening with their cases. Consistently with these concepts, members revised section (a) to simply state, “if pending family law and dependency proceedings concern the same parties, the juvenile division has jurisdiction over the children.” But the rule does not specify the actions that a juvenile judge may take; that should be addressed by a juvenile rule.

Members discussed how the family court would be informed of a pending dependency proceeding. Often the family court is informed of the dependency fortuitously. Accordingly, members added a new subpart (a)(1) regarding “notice.” This provision provides, “the parties must notify the family division of a pending dependency

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proceeding.” Under this provision, a party can provide the notice by a filed document, in open court, or by other means.

Members also discussed the extent of the juvenile court’s jurisdiction over child support issues. Workgroup members noted that they preserved current Rule 5.1(E) (now proposed Rule 5.1(c) entitled “support orders”) to clarify the juvenile judge’s authority to enter support orders in a dependency or guardianship proceeding. Members discussed the interplay between Rule 5.1(c) and A.R.S. § 25-403.09. Under the rule and statute, the court must calculate child support when entering orders concerning parenting time or legal decision-making. In practice, some counties prefer to make the calculation in the juvenile court during the dependency proceeding. In other counties, and to assure the accuracy of arrearage calculations and ensure that the court makes all the required findings under A.R.S. § 25-403, the child support aspect of the case is referred to the family court.

Either the family or the juvenile court may enter a support order; that is discretionary and section (c) uses the word “may.” But to assure that one of the courts enters an order and that both courts are aware of it, members added to section (c) the sentence, “any order regarding child support must be filed in both the family division and the juvenile division.” This also assures that the order is publicly accessible, because it would not be if it was only filed in the juvenile division. If there is no pending family case, judicial education rather than another rule provision should address how to proceed. Educational literature might describe whether a family court proceeding should be initiated in that circumstance, as well as how the court should modify support orders if one party’s parental rights are severed. Rule 5.1 does not specify what happens in every one of a multiplicity of scenarios the members contemplated; rather, members agreed that the rule is intended to provide the courts with authority to do what is necessary, and to utilize their discretion in accomplishing those objectives. Finally, members agreed to add the word “establish” in the first sentence of section (c) (“the juvenile division may establish, suspend, modify, or terminate a child support order”), and to change “wage assignment” to “income withholding order.” With these changes, members completed and approved their revisions to Rule 5.1.

*Rule 7 (“protected and unpublished addresses”)*: Ms. Burns, who presented Rule 7, advised that although the workgroup made few substantive changes to this rule, the current rule is not easy to follow and the workgroup reorganized it. Ms. Burns noted recent changes she had made to the draft of Rule 7(d)(3)(B): “...after a hearing and ~~upon a finding that the party with the protected address does not reasonably believe that there is no reasonable belief that...~~” Members concurred with these changes and made further organizational changes to the rule. They deleted section (a) (“generally”) and merged provisions of sections (b) and (c) (“on request” and “request procedure”). As revised, these provisions require the court to protect the requesting party’s address if the other party does not know that address, and there is either a reasonable belief of harm without a protected address, or there is a valid order of protection. In addition, the court must

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(not may) protect the address if the party shows the requisite elements; and the party must show a reasonable belief that the party may (not will) suffer harm. Also, as revised, the party's address would be automatically protected upon filing a request and pending a court determination within 5 days after the filing.

Members reversed the order of references to the companion form (in the draft rule it is now, "Form 15, Rule 97," rather than vice versa), and made other changes that align the text of Rule 7 with Form 15. Members preferred the term "protected address" rather than "unpublished address" throughout the rule, and they made conforming changes to the title and body of the rule. Mr. Nash informed members of certain practices in Maricopa's Superior Court regarding protected addresses. He said that the clerk charges for mailing, as provided by statute; when mail is undeliverable to the protected address, the clerk will scan the returned envelop, but not necessarily the contents, and put the scan in the court's file; that in that circumstance, the filing party is generally not notified of non-delivery; and the procedure of the protected person providing an address on a separate sheet of paper, as the rule provides, works well. The workgroup recommended deletion of language that the clerk's duty to protect an address ended upon entry of a final appealable order; the workgroup believed that a party should not lose the protection just because the case has concluded. However, at Mr. Nash's suggestion, and given his familiarity with the rule's operation, members agreed to delete this provision, thereby simplifying when the clerk's duty terminates. (The clerk's duty would now end "when the person whose address is protected files a notice of published address that sets forth the person's current mailing address for future service.") There were no additional comments and members approved this rule.

*Rule 17 (currently, "limits on examining a witness," and as proposed, "reserved") and Rule 22 ("conduct of proceedings")*: Judge Cohen reported the workgroup's recommendation that the single sentence of Rule 17 be relocated as Rule 22(c). Rule 17 would then be reserved. Members agreed that these were sensible changes and approved them.

*Rule 23 (currently, "beginning an action," and as proposed, "reserved")*: Mr. Davis noted that Rule 23 currently is composed of three sentences. The Task Force previously approved moving the second and third sentences of Rule 23 to Rule 9 ("duties of parties and counsel"). Mr. Davis advised that the workgroup now recommended transferring the remaining sentence of Rule 23 ("a family law action is commenced by filing a petition with the clerk of the court") to Rule 24 ("pleadings"), although the workgroup has not yet restyled Rule 24. Rule 23 would be "reserved." Members approved these changes.

*Rule 33 (currently, "counterclaims; third party practice," and as proposed, "third party rights and other claims")*: Ms. Burns presented the workgroup's proposed reorganization of Rule 33, which included a reference in section (a) to A.R.S. § 25-409 and the incorporation by reference of several civil rules in section (b). This led to an extensive discussion about claims and joinder.

Following that discussion, members agreed to add a reference in section (b) to Civil Rule 24. Members discussed a change to that portion of draft Rule 33(a) that provided that a person “may intervene in an existing action pursuant to A.R.S. § 25-409.” Some members were reluctant to use the term “intervene” because it is not used in the referenced statute. The statute instead says that a person “may petition the superior court....” Members considered conforming the language in section (a) to what is shown in the statute, but they concluded that the person’s appearance is in the nature of an intervenor, and that captions of these petitions often identify those persons as intervenors. Members accordingly did not revise the draft of section (a). However, they added to the proposed title of Rule 33 the words, “in an existing action.” One member proposed an alternative to the draft rule that would simply provide, “a party who wishes to join in a family action may petition the court to do so.” Members declined this proposal. They also declined a suggestion to rewrite section (b) to eliminate cross-references to the civil rules; the cross-references assure that case law developed under the civil rules can be cited on the rare occasions when one of those civil rules is utilized in a family case. Ms. Sell requested a new section in Rule 33 that would codify the State’s right to intervene under A.R.S. § 25-509, but the Chair deferred her request pending Workgroup 1’s presentation of other rules concerning pleadings and parties. Members had no other changes to Rule 33 and approved the rule in its current form.

**3. Workgroup 3.** Mr. Wolfson presented Rule 65.

*Rule 65 (currently, “failure to make disclosure or discovery; sanctions,” and as proposed, “failure to make disclosures or to cooperate in discovery, sanctions”):* In draft Rule 65(a) (“motion for order compelling disclosure or discovery”), the workgroup condensed several provisions of current Rule 65(A) (such as failing to answer a question at a deposition, answer an interrogatory, produce materials, etc.) into a single provision that simply says a party “has not complied with a discovery rule.” The workgroup removed superfluous references to Rule 53 protective orders. It modified the standard for not awarding expenses of a discovery motion; the current rule says the opposing party was “substantially justified,” and the revised rule says the opposing party acted “in good faith.” In section (b), the workgroup proposed that a sanction of dismissal not be available in circumstances where dismissal “would be contrary to the best interests of a child.” It modified the sanction of prohibiting “claims or defenses” to one that prohibited “arguments.” It changed the contempt sanction to one that would instead allow the court to schedule a proceeding to treat a violation as contempt of court. The workgroup eliminated proposed section (c) (“failure to timely disclose; inaccurate or incomplete disclosure; disclosure after deadline or during trial”) because these violations are subsumed under proposed section (a), the remedies under section (b) apply, and section (c) is therefore duplicative. The Chair then requested the members’ comments.

One member inquired whether the sanctions in section (b) should include “any other sanction that the court deems appropriate.” Members noted that the draft already used the language, “including the following,” and interpretation of similar statutory

language suggests that alternatives are not limited to those listed. Another member asked whether “arguments” includes “claims or defenses,” or whether all three terms should be used. For example, is a *Cockrell* claim a variety of argument, or would the term argument fail to preserve a *Cockrell* claim on appeal? Members concluded that arguments probably include claims and defenses, and regardless, a court order that precludes an argument would specify the claim or defense it is precluding. Members agreed to use the word “argument” in Rule 65, although they might take a different approach when they consider Rule 78. A provision on failure to disclose information before trial has a proposed cutoff of less than 30 days before trial. The corresponding civil rule is less than 60 days before trial, and members discussed which time was more appropriate. One member argued in favor of 60 days because expert disclosure is required 60 days before the trial of a family case; and disclosure of a lay witness 31 days before trial is too close to trial. Moreover, the court might not timely decide a motion to preclude that witness if the motion is filed only four weeks before trial, and a ruling on the eve of trial might make the parties’ trial preparation difficult. On the other hand, disclosure 30 days before trial appears to be common in family cases, and the discussion concluded with a general agreement to leave the time at 30 days.

- One member observed that multiple references to “after giving an opportunity to be heard” are formatted with different punctuation, and requested the workgroup to modify these for uniformity. The workgroup should recheck cross-references to other rules to assure they are accurate. Mr. Wolfson advised the workgroup also will revisit Rule 65 to confirm the extent of deletions of the remaining portions of the rule.

**4. Workgroup 2.** Commissioner Christoffel presented Rule 41 and the workgroup’s further revisions to Rule 40(f).

*Rule 40 (“summons”):* Commissioner Christoffel reminded members that they approved the workgroup’s changes to Rule 40 at the August 4 meeting, but thereafter Workgroup 2 made further changes to Rule 40(f) (“accepting service; voluntary appearance”). He said that the acceptance provisions of Rule 40(f) as previously proposed did not include details on the mechanics of accepting service; those details were included in staff’s initial versions of Rules 41 and 42. In reviewing Rule 41, workgroup members concurred that instead of splitting the provisions on acceptance into multiple rules, these details should be consolidated in Rule 40(f).

Task Force members believed the workgroup’s revised draft inadequately addressed issues of waiving jurisdiction and certain other defenses. Members discussed, reorganized, and revised the text of Rule 40(f)(1) (“accepting service”). The revised text included, among other things, the phrase “if the respondent agrees to sign an acceptance of service.” This phrase emphasizes the voluntary nature of an acceptance and allows the respondent to change a decision to accept at any time before signing and returning an acceptance. These changes also would allow the respondent to sign an acceptance

before a court clerk, as the current rule provides. One member noted that a party also should be able to accept service of a post-decree petition.

- The workgroup should consider a separate rule for acceptance of a post-decree petition, or include the post-decree acceptance process in a new Rule 41 provision. Ms. Sell also requested the workgroup to determine whether service of a summons in IV-D cases, as provided in draft Rule 40(e), also should be relocated in Rule 41.

*Rule 41 (currently, "service of process within Arizona," and as proposed, "service within Arizona")*: Commissioner Christoffel prefaced his review of Rule 41 by advising that the workgroup was considering merging duplicate provisions of Rule 42 into Rule 41. He then noted the workgroup revised the title of Rule 41 by removing a reference to process. He advised that Ms. Clark had determined that the Servicemembers' Civil Relief Act did not impact the service provisions of Rule 41. In draft Rule 41(d) ("service by mail or national courier service"), the workgroup added a requirement that the serving party must request (1) restricted delivery to the party being served, and (2) a receipt signed by the addressee. This should mitigate concerns that someone other than the party being served is the recipient of the mailing, a concern that is amplified when the signature on the return receipt is illegible. The workgroup deleted a section of Rule 41 entitled "serving a minor who has a guardian or conservator" because it is covered by another section entitled "serving a person who has a court-appointed guardian or conservator." In the latter section, the workgroup removed unnecessary references to persons who are "insane, gravely disabled, incapacitated, or mentally incompetent," because the court's order of appointment ordinarily would be based on such a determination. Draft Rule 41(g) concerns service on a governmental entity. Subpart (g)(2) is entitled "alternative procedure for serving the state in a Title IV-D case." Ms. Sell advised that she had not yet seen any use of the alternative procedure, and the rule might precede the availability of technology described in the rule.

Workgroup 2 proposed revisions to section (k) ("service by publication"), and Commissioner Christoffel reviewed those revisions with the Task Force. After the most recent workgroup meeting, Commissioner Christoffel proposed further revisions to subpart (k)(2) ("jurisdiction"), which were projected on-screen. The first sentence of Commissioner Christoffel's version provided, "Service by publication is not sufficient to confer jurisdiction upon the court to determine issues of paternity, child support, spousal maintenance, division of marital property not located in Arizona, or any other issue requiring personal jurisdiction over a party." He added the words "not located in Arizona," which are not included in current Rule 41(N), after "marital property" to indicate that an Arizona court has *in rem* jurisdiction over property that is located in Arizona. A comment following current Rule 41(N) indicates that the court cannot divide property in Arizona when service was made by publication. Although this comment is relatively recent, Commissioner Christoffel advised that he disagrees with it. Other members, however, agreed with it, and suggested that the court only obtains jurisdiction

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when there is another level of service, e.g., alternative service, in addition to publication. Alternative service requires court approval, but publication does not.

- The workgroup should review draft Rule 41(k)(2) and the rule on alternative service to clarify what service is required for an Arizona court to have jurisdiction over property in Arizona when a respondent is served by publication. The workgroup also should bring this rule back to the Task Force for further review following the proposed merger of Rule 41 with Rule 42.

5. **Call to the public.** Mr. Ed Pizarro Sr. responded to a call to the public and addressed members of the Task Force.

6. **Roadmap; adjourn.** The Chair reviewed pending Task Force meeting dates (September 29, October 20, December 1, and December 15 (all Fridays) and the newly added meeting date of Monday, November 13. She would like to reserve the December 15 meeting for a discussion of a rule petition, rather than reviewing rules, so the Task Force has 4 meetings currently set to discuss the remaining 46 rules. Several members expressed conflicts with the October 20 date, and the Chair directed staff to determine if an alternative date is available.

The meeting adjourned at 4:09 p.m.

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

**State Courts Building, Phoenix**

**Meeting Minutes: September 29, 2017**

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

**Absent:** Helen Davis

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

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

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

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

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

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

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

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

The Chair then requested reports from the workgroups.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (which also isn't suitable because the person has no discretionary authority), and "drafter" (which was closer but still inadequate.) Members decided to use the term "professional with special expertise," and the draft rule will be modified accordingly.
- Does the substance of Rule 72.1 belong in Rule 95 ("other family law services and resources")? Members discussed both alternatives and for the time being, they agreed to leave it as a new standalone rule.
  - Members declined to revisit the issue of appointment of a master on motion, and they agreed to strike the current comment and its reference to Civil Rule 53. They reviewed and agreed to retain the workgroup's proposed comment, but they requested the workgroup to modify the comment so it would allow the court to allocate or shift costs.

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

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

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

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

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

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

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

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

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

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

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

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

The meeting adjourned at 3:25 p.m.

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

**State Courts Building, Phoenix**

**Meeting Minutes: October 30, 2017**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting adjourned at 4:01 p.m.

**Task Force on the Arizona Rules of Family Law Procedure**  
**State Courts Building, Phoenix**  
**Meeting Minutes: November 13, 2017**

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

**Absent:** Helen Davis, Kiilu Davis

**Guests:** None

**Administrative Office of the Courts Staff:** Mark Meltzer, Sabrina Nash, Theresa Barrett, Eva Carranza, Geraldine Tacdol-Tiokasin

**1. Call to order; remarks by the Chair; approval of meeting minutes.** The Chair called the tenth Task Force meeting to order at 10:00 a.m. All four workgroups have meetings set for later this month, and the Chair appreciates their progress. As noted at the October 30 Task Force meeting, the Chairs and staff have begun the process of informally editing and wordsmithing the rules. A.O. 2016-131 established a January 10, 2018 deadline for the Task Force to file its rule petition, but considering the magnitude of this restyling project, the Chairs will ask the Court for an extension until March 2018. Judge Armstrong added that a March filing date would permit the Task Force to vet the draft rules and request prefiling comments from interested groups. Judge Armstrong will present the draft rules to the Family Law Institute in mid-January, so it is still important that the Task Force complete its initial draft by the end of December.

The Chair asked members to review the draft October 30, 2017 meeting minutes, and a member made this motion:

**Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 010**

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

**2. Workgroup 1.** Mr. Woodnick, Ms. Henderson, and Ms. Burns presented on behalf of Workgroup 1.

*Rule 3 (“definitions”):* Mr. Woodnick explained that some of the definitions in current Rule 3 were deleted in the restyling because those words are defined in the rules to which they pertain. See, for examples, the relocation of definitions of “pleading,” which will be in Rule 24 on pleadings; and “motion,” which is now in Rule 35 on motions. The workgroup removed the definition of a Title 14 guardian because the restyled family rules, including proposed Rules 10 through 13, don’t refer to that person. They also

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removed a comment to current Rule 3 that refers to that guardian. However, members will revisit the definition and the comment if they subsequently find references to guardians elsewhere in the restyled rules. One member suggested that there be no rule for definitions, and that all definitions be within the pertinent rules. A member responded that it is useful to have certain definitions in Rule 3, for example, “in camera,” which comes up in multiple rules, but is specific to none. After discussion, the members agreed to retain a limited number of definitions in Rule 3, and they approved the revised rule.

*Rule 4 (“computing and extending time”)*: Ms. Henderson noted that a section in the current rule regarding orders to appear was relocated to Rule 35; see the discussion of Rule 35 below. The provisions in restyled Rule 4(a) regarding computing time are derived from the restyled civil rules. The process for extending time, contained in section (b), is derived from the existing family rule, but the restyled provisions are modeled on the civil rules and modified for applicability to family law cases. The workgroup proposed reciprocal mechanisms for relief, which would be available for moving parties who may have missed a deadline to file a Rule 83 or 85 motion as well as for adverse parties who are responding to these motions. The Task Force will consider this subject further when Workgroup 4 presents Rules 83 and 84 later today. It will also consider whether the provision should clarify that a party can obtain an extension before as well as after the deadline, the grounds and process for obtaining an extension, and if the provision should remain in Rule 4 or be relocated in the post-trial section of the rules. The members approved Rule 4 pending that discussion.

*Rule 21 (formerly, “reserved,” and as proposed, “sealing, redacting, and unsealing court records”)*: Ms. Burns advised that following directions from the Task Force, the workgroup used this formerly reserved rule as the location for importing Maricopa Local Rules 2.19 and 2.20. These provisions will replace current Family Rule 71(B), which was deleted. One member suggested that court staff, and not just judicial officers, have access to sealed documents, but after discussion of security and other considerations, members retained the provision as-is. Members shortened the definition of “sealing” in Rule 3, and they eliminated “paper or electronic” and substituted the word “record.” They also included in Rule 3 a cross-reference to Rule 21. Members then approved the new Rule 21.

*Rule 35 (“family law motion practice”)*: Ms. Burns noted that draft reflects the workgroup’s efforts to simplify the current rule. The workgroup eliminated the word “memoranda” and instead used “motion,” “response,” or “reply.” Rule 35(d) includes a new procedure, adopted with modifications from the civil rules, which permits the parties to agree to extensions of time without the necessity of a court order. The workgroup’s draft removed a provision in current Rule 35(C)(3) that begins, “to expedite its business,” because it was unaware of any county that utilized that procedure. Language concerning orders to appear was initially relocated from Rule 4 to Rule 35, but on reconsideration, the workgroup removed that language as not being appropriate in Rule 35. Page limits under this rule are based on the limits in the restyled civil rules.

Members considered moving those limits to Rule 20, which deals with the form of documents, but concluded these limits should remain in Rule 35. A member asked about the meaning of “sur-reply” in section (a)(3). Members revised the pertinent sentence of section (a)(3) to state instead, “a party may not respond to a reply unless authorized by the court.” The member also asked if the requirement in section (a)(1), that “an application for a court order in a pending action must be by motion,” was necessary, and if it was, whether it should be restated. Members discussed revising this provision to restate the definition of “motion” they had previously eliminated in Rule 4. Rather than using that definition, however, they revised (a)(1) to state, “a party must request a court order in a pending action by motion, unless otherwise provided by these rules.” With these modification, members approved Rule 35.

**3. Workgroup 2.** Commissioner Christoffel presented Rule 44.1.

*Rule 44.1 (“Default Decree or Judgment”):* Commissioner Christoffel explained that Rule 44.1 is the result of separating current Rule 44 into two rules, Rule 44 on “default,” which Ms. Clark presented at the previous meeting, and a new Rule 44.1. Rule 44.1(a) begins by describing circumstances when a party can obtain a decree or judgment by motion without a hearing. Commissioner Christoffel recommended during his presentation, and without objection from the members, that subpart (a)(1)(C) be retitled, from “default” to “appearance.” In section (b), he also recommended removing the word “damages” after the word “money” in the title, so the title now simply says, “judgment by motion for money other than child support.”

Draft Rule 44.1(b) would not allow a party to obtain by motion a money judgment for spousal maintenance. Members discussed whether the rule should provide otherwise. If a self-represented litigant has properly prepared the required paperwork, why should that person need to take time off work to appear for a hearing that adduces no additional pertinent information? A judge member contended that these rules should not impose such barriers. Court personnel check the sufficiency of the party’s default paperwork, and the court can set the matter for hearing if the paperwork is deficient; but otherwise, a hearing should be unnecessary. Another member felt that the record produced at a hearing lends an element of legitimacy to the proceeding, which is absent if there is no hearing. The member was particularly concerned about the absence of a hearing for parties whose documents were prepared by a document preparation service, when parties may not be fully aware of the contents. The judge member reiterated that the court may order a hearing, or a party may request one, but a hearing should not always be mandatory. Commissioner Christoffel raised the possibility of combining the provisions of a default decree without a hearing with the provisions for entry of a consent decree under Rule 45, which also does not require a hearing.

Yet another judge member expressed that obtaining a divorce is a major event in a person’s life, and it is not unreasonable or burdensome for the rules to require the person’s attendance in court for that event. A court hearing serves to provide the requisite level of due process. Failure to pay maintenance or support are jailable

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obligations, and decrees that order these obligations deserve commensurate judicial attention. Unlike a consent decree, where these obligations can be established without a personal appearance if both parties consent, a default decree is usually entered without the consent of both parties. Another member noted the benefit of having a transcript of a default proceeding for review in subsequent modification proceedings, but there is no transcript for a decree entered by motion. The issue was characterized as one of expediency versus due process. A straw poll on whether the proposed rule should allow the court to award spousal maintenance by motion without a hearing showed the members were fairly divided on the issue.

The first judge-member then proposed that rather than attending a hearing, a party could submit a new form with a default application that would contain the information the party would testify to at a hearing. If a party does not provide all the necessary information in the form, the court could set the matter for hearing. The form could include information that might not be in the party's verified petition. The form could also provide specific information that A.R.S. § 25-319(B) requires for an award of spousal maintenance. Detailed information in a form might allow judges to make better, more informed decisions than if a party had personally appeared at a hearing. On the other hand, self-represented litigants might find it difficult to complete a form, or to complete it correctly. The form would need to be accompanied by educational tools that would facilitate a party's ability to complete the form fully and accurately, and the party would be required to provide a copy of the form to the party in default. After the discussion, a strong majority of members were interested in the form alternative, and the Chair directed Workgroup 2 to draft and propose such a form. Pending that, members agreed to delete from draft Rule 44.1(b) the provision that would not allow the court to award spousal maintenance by motion without a hearing. Members also discussed whether child support should be awarded by motion without a hearing if a form fully provided the necessary information. Members agreed that might be workable, but asked the workgroup to consider the issue first.

Members proceeded to discuss another section of Rule 44.1 regarding child support. Commissioner Christoffel suggested that the rule should address past child support, and that another draft paragraph concerning previously owed support, i.e., arrearages, is unnecessary and could be eliminated. One member proposed eliminating this entire section because it duplicates statutory directives, but Commissioner Christoffel believes the rule reinforces the need for, and the manner of making, a proper calculation. The members then modified the draft section, including the section title, which is now "past child support judgment." Members also discussed whether the rule allows the calculation to be made at a hearing as well as before a hearing; members agreed that it does ("will be calculated"), but in either event the rule requires notice of the calculation.

In section (f), members changed a requirement that the clerk maintain a verbatim record of a default proceeding when service was made by publication to a requirement

that the court maintain the record. The members also agreed that the words “attorney’s fees” should be in the singular possessive throughout the rules, to make the term consistent with the civil rules restyling.

**4. Workgroup 4.** Mr. Berkshire presented Rules 83 and 84.

*Rule 83 (formerly, “motion for new trial or amended judgment,” and as proposed, “altering or amending a judgment; supplemental hearings”) and Rule 84 (“motion for reconsideration or clarification”):* Mr. Berkshire observed that current Rule 83’s reference to a new trial is inappropriate because in family cases, the granting of a motion does not result in a new trial. Rather, a party will request the judge, based on evidence presented at the concluded trial, to alter or amend its ruling and, if appropriate, to conduct a supplemental hearing at which the court could receive additional evidence. The workgroup also intended that its draft deal with the circumstance of self-represented litigants filing post-trial motions using the titles of new trial (in current Rule 83) and reconsideration (in current Rule 84) without meaningful differentiation. Mr. Berkshire believes the draft will synthesize Rules 83 and 84 into a single, Rule 83 post-trial motion to alter or amend the judgment, which will be time-extending. The proposed rule would give the court a gate-keeping function and permit it to weed out meritless motions by allowing it to deny a motion without requiring a response. The draft rule would add a new (a)(1)(A) (that the court “did not properly consider or weigh all of the admitted evidence”), which was derived from Rule 84. Misconduct of the prevailing party was modified to misconduct of the other party. Draft section (a) added a new ground concerning mathematical errors.

Members discussed whether to include in the proposed rule an element of the current rule that provides a limit of granting no more than two new trials to either party. One member suggested that the rule provide that all motions, by all parties, must be filed within a specified time. The member’s concern was that if the court grants a motion, the aggrieved party may need to file a subsequent motion. For example, if the court grants a motion regarding a business valuation, it might prompt another motion to also alter or amend an award of spousal maintenance, which in turn may lead to successive motions. At some point, the number of time extending motions should end and the judgment should be final. One member suggested a one-and-done approach to post-trial motions in the superior court, but a judge member observed that he rarely sees more than a single Rule 84 motion in a case anyway. On the other hand, remedies by appeal are costly and time-consuming. Judge Armstrong noted a case pending Supreme Court review that concerns a post-trial motion regarding a QDRO entered a decade earlier. Judge Armstrong also noted the need to amend ARCAP 9 because of Task Force action on the post-judgment motions section of the family rules. One member suggested that the appellate rule be amended by referring to the rule’s title rather than its number, although other members disagreed and the Chairs will determine this later.

As the discussion progressed, members expressed the desirability of retaining a rule on motions for clarification, notwithstanding the proposed elimination of Rule 84. One member proposed adding such a motion to the provisions of Rule 85. But the

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response to a motion to alter or amend should not be another motion to alter or amend, and if the granting of a Rule 84 motion would precipitate another issue, the non-moving party should raise that issue in the response. Members discussed various methods and language to deal with this situation. Members partially addressed the issue of multiple motions by a new Rule 83(d), which provides, “no party may file a motion to alter or amend an order granting or denying a motion under this rule.” The workgroup will work on a rule regarding clarification, including an appropriate location for that rule, after the conclusion of today’s meeting.

Members also returned to the Rule 4 issue raised earlier today. Under proposed Rule 83(c)(2), the court must set a deadline for a response if the motion is not summarily denied. Members discussed extensions of time to file the motion and to file a response, and questioned why parties cannot agree to extend time, for example, because a transcript is unavailable. But Judge Armstrong recommended that the rule provide specific outside time limits for filing the motion and response. Members then agreed that the motion must be filed within 25 days after entry of judgment (compared to 15 days under the current rule), and that if the court orders a response, the other party should have 30 days to file one. The proposed rule would also provide that the deadline for filing the motion may not be extended by stipulation or court order. Members agreed that the moving party should have 15 days after the filing of a response to file a reply.

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

The Chairs and staff will continue their editing and review process of approved rules. About two dozen rules are pending workgroup review. The next two Task Force meetings are set for Friday, December 1, and Friday, December 15. At the December 1 meeting, the Task Force will review the remaining rules of Workgroups 2 and 4, and half of the remaining rules of Workgroup 3. A judge member asked Workgroup 2 to consider whether Rule 47 needs clarification about whether those hearings are evidentiary. The Task Force will consider the balance of Workgroup 3’s rules, and the remaining rules of Workgroup 1, at the December 15 meeting. Because of the short intervals between meetings, members will again need to access materials in an electronic format. The Task Force should set a meeting in early January to review a draft petition; staff will poll the members whether they prefer Friday, January 5, or Monday, January 8, 2018.

The Task Force’s rule petition will mention outreach to stakeholder groups, and members should consider a list of stakeholders to whom they may present the draft and from whom they will invite pre-filing comments. The Chairs again reminded the members of the importance of preparing rule-by-rule summaries. Staff explained that the petition will not include a redline version of the proposed rules, and these summaries, which will be included in an appendix to the petition, will explain how and why a rule was modified, and particularly whether there are any proposed substantive changes.

The meeting adjourned at 2:07 p.m.

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

**State Courts Building, Phoenix**

**Meeting Minutes: December 1, 2017**

**Members attending:** Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron, Hon. John Assini, Keith Berkshire, Annette Burns, Hon. Dean Christoffel, Cheri Clark, Hon. Suzanne Cohen, Helen Davis, Kiilu Davis, Hon. Karl Eppich, Mary Boyte Henderson, Joi Hollis, David Horowitz, Hon. Paul McMurdie, Aaron Nash, Jeffrey Pollitt, Janet Sell, Steven Wolfson, Gregg Woodnick

**Absent:** Hon. Peter Swann

**Guests:** None

**Administrative Office of the Courts Staff:** Mark Meltzer, Sabrina Nash, Angela Pennington, Jodi Jerich

**1. Call to order; remarks by the Chair; approval of meeting minutes.** The Chair called the eleventh Task Force meeting to order at 10:01 a.m. She commended the members of Workgroup 4 for completing a review of their assigned rules. The Chair was optimistic that the Task Force could conclude its initial review of the rules at the December 15 meeting. Her goal is to have a complete preliminary draft by the beginning of January and to start vetting the rules before filing a rule petition. Judge Armstrong filed a motion yesterday to extend the petition filing deadline until the end of March. The chairs and staff are continuing to meet and edit rules.

The Chair asked members to review the draft November 13, 2017 meeting minutes, and a member made this motion:

**Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 011**

The Chair then requested workgroup reports, beginning with Workgroup 2.

**2. Workgroup 2.** Workgroup 2 continued its discussion of the default rules, and it presented Rule 45 on consent decrees.

*Rule 44.1 ("default decree or judgment by motion and without a hearing;" Rule 44.2 ("default decree or judgment by hearing;" and a form ("default information for spousal maintenance")):* Commissioner Christoffel explained at the November 13 meeting that Rule 44.1 is the result of separating current Rule 44 into two rules, Rule 44 on "default," which Ms. Clark presented at an October meeting, and a new Rule 44.1 on default decrees and judgments. After the discussion at the November 13 meeting, Workgroup 2 further divided Rule 44.1 into a rule on default decrees or judgments by motion without a hearing, and a new Rule 44.2 that provides for default decrees or judgments following a hearing. The workgroup's most recent revisions to Rule 44.1 would permit the court to enter a decree by motion for spousal maintenance and on children's issues. With these

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revisions, a petitioner would not be required to attend court for a perfunctory default hearing, but could instead complete a required spousal maintenance form or provide specified documents that provide a basis for orders concerning legal decision-making and parenting time. If the form or documents are incomplete or deficient, the court would set the matter for a default *hearing*. Some of the information required by the revised default rule is modeled on what is required for a consent decree, which also is entered without a hearing. The default form and supporting filings could also document the basis of those orders in the event they are the subject of a subsequent modification proceeding.

None of the members had objections to proceeding with these concepts. However, Commissioner Christoffel said that a Pima County hearing officer was concerned that self-represented litigants could not accurately complete the spousal maintenance form. On the other hand, Pima County's law library holds clinics for self-represented litigants, and those clinics could provide information and guidance on completing the form. If self-represented litigants have clinics and other tools available, then in a significant number of cases, they should be able to properly complete the form. In response to a question, Commissioner Christoffel confirmed that under the revised rules, cases where a respondent was served by publication still would require petitioner to appear at a default hearing. However, under the revised rule for service, the court could enter a decree concerning children's issues and spousal maintenance notwithstanding service by publication. Members suggested that Rule 44.2 should include a cross-reference to Rule 41 to clarify this point.

Commissioner Christoffel then reviewed the workgroup's proposed default information for spousal maintenance form. He noted that the form requires a verification, and that petitioner would be required to send the form to respondent. The form begins with a series of checkboxes that are based on A.R.S. § 25-319(B). It then poses 7 questions, and members had comments concerning those questions. For example, the questions did not ask about the respondent's income. The form did not show what amount petitioner requested, and the duration of petitioner's requested spousal maintenance award. Question 1, "Were you employed during the marriage? How?" does not include relevant questions about when and where the petitioner was employed. Question 2, which asked for a description of physical or emotional limitations, raised concerns under the Americans with Disabilities Act, and it did not relate any limitation to the petitioner's earnings capacity. Some members also thought Question 3, "describe any contributions you've made to your spouse's earning ability and how you have reduced your income or career opportunities to benefit your spouse" might be difficult for some people to understand. But members noted the challenge of drafting a form that applies to a myriad of individual situations. In addition, the form is not designed for high net-worth individuals, who would probably have attorney representation. Moreover, the form would provide judicial officers with more information to base a ruling on than they might obtain from in-court testimony. The form might even assist judicial officers in obtaining useful information when they conduct in-person hearings. One member proposed that the form focus on an explanation of what amount the petitioner is asking for, and for how

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long, and why petitioner thinks the respondent spouse can afford to make those payments. Another member suggested that all the necessary information be in a single, self-contained form. Commissioner Christoffel advised that the workgroup will revise the form based on members' comments during today's meeting. The form will be included in the draft rules that will be circulated for public comments in January.

Members also discussed when the petitioner should file the form and provide a copy to the respondent. Members generally believed that the form should be sent early enough that respondent has an opportunity to review it before the court acts on it. Although Rule 44 only requires petitioner to mail a copy of the default application to respondent, Commissioner Christoffel proposed adding to that rule, or to Rule 44.1, a requirement that petitioner mail the form with the application. Commissioner Christoffel also proposed that the form include an abbreviated affidavit of financial information, in lieu of a full, multi-page financial affidavit.

As a result of other changes to Rule 44.1, members revised Rule 44.1(c)(1) ("judgment of maternity or paternity: generally") to remove references to legal decision-making and parenting time, and to improve the provision's syntax. They also discussed whether a reference in subpart (c)(2) to A.R.S. § 25-813 was correct or complete. They agreed that this statutory reference is a federal requirement for a default order in a paternity or maternity action that did not need to be changed, and that other jurisdictional authorities could be alleged in a petition.

*Rule 45 ("consent decree")*: Mr. Nash presented this rule. A member expressed a preliminary concern that the title of the draft rule inappropriately removed the words "order or judgment," and after discussion, members agreed to add these words to the title and elsewhere in the rule. The workgroup proposed that subpart (b)(1) state, "whether the wife is pregnant with the husband's child," but after discussing recent case law and issues that arise with surrogates, members changed this to "whether one party is pregnant with a child common to the parties." A similar revision was made in section (c). Members discussed whether subpart (b)(4) should require a recitation that the division of property was "fair and equitable" or "fair and reasonable." A.R.S. § 25-318 refers to "not unfair," and one member proposed removing the word "fair" from this rule. However, judges typically rely on the parties' representation that the division is "fair and equitable" and they retained that phrase. Subpart (b)(5) requires parties to sign a consent decree, order, or judgment before a notary public. Although some members believed that Rule 45 consent orders should be notarized, in practice, they may not be. However, proposed Rule 14(a) requires a notarized verification for a consent decree.

The workgroup relocated a provision concerning TANF from section (b) to section (c), and added "or county attorney" after "written approval of the Attorney General." They also deleted the word "benefits under" before TANF and added "services from" before the Title IV-D program. A Task Force member requested in subpart (c)(4) that "parent information program" be capitalized. Members discussed whether a party would file a certificate of completion of the program, or if the program provider filed them with

the court. The rule does not need to differentiate who files the certificate if it winds up in the court record, but members nonetheless added to the provision, "if not previously filed with the court." There is no requirement in Rule 45 concerning conciliation; however, there is a reference in subpart (a)(2) to Form 8, which does mention the conciliation provision. The workgroup deleted a subpart in section (c) that required a completed judgment data sheet because that form is no longer in use. Members declined to require an income withholding order for spousal maintenance in proposed Rule 45 because an order is optional in that circumstance. With these changes, members approved Rule 45.

**3. Workgroup 3.** Mr. Wolfson presented 5 rules on behalf of the workgroup.

*Rule 50 ("complex case designation"):* Mr. Wolfson noted that complex cases require specific and detailed attention by the assigned judge. Although under the current rule a party simply files a notice of complex designation, the proposed rule would require the filing of a motion for complex designation. The proposal provides factors for the court to consider when deciding if it should designate a case as complex. If the court grants the request, it must set a scheduling conference and provide additional time for trial. The proposed rule eliminates the current rule's requirement for disclosure under Civil Rule 26.1 because it does not apply to every case. The workgroup believed it was preferable for the court to conduct a conference where the parties could discuss specific disclosure needs that are appropriate to an individual case.

One of the factors for the court to consider in determining complexity is "numerous difficult or novel legal issues." A member suggested eliminating "difficult" because it is ambiguous, and members then agreed on "issues that would take time to resolve." After discussion, they also agreed to retain the word "significant" before "expert testimony." Members had concerns that the rule's requirement for 12 hours of trial time might lead to 12 hours becoming a default limit rather than a floor, and that it might be contrary to current Rule 77 standards and Evidence Rule 611's text to "avoid wasting time," but members nonetheless retained the 12-hour provision. Members also discussed the time for requesting complex designation. Staff's draft said, "no later than 20 days after receipt of the opposing party's initial disclosure under Rule 49." Because initial disclosures may be incomplete or cursory, members changed this to 60 days after the filing of a responsive pleading, or later for good cause. Members approved Rule 50 as modified, but they would like to have public comment on the proposed rule.

*Rule 51 ("general provisions governing discovery"):* These revisions are based on restyled Civil Rule 26, with modifications. The draft rule provides that a party may not request discovery of information that an opposing party is required to disclose under Rule 49. The purpose of this provision is not to limit discovery, but rather, to assure that the opposing party complies with his or her Rule 49 disclosure duties. The workgroup removed a provision that would have provided for a limit of one expert per issue per side, which is the civil rule. After discussion, members agreed with this deletion because two experts on a complex family issue may be appropriate. Another provision in draft

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Rule 51 requires a party to present disclosure and discovery issues under Rule 65. Members approved the rule as modified.

*Rule 52 ("subpoena")*: Mr. Wolfson noted that the workgroup added a new provision, Rule 52(a)(3) ("interstate depositions and discovery"), which incorporates Civil Rule 45.1. He then raised two policy issues presented by Rule 52. The first issue is whether the family rule should mirror Civil Rule 45 on subpoenas. Among the reasons for doing so is the availability of a civil subpoena form; the family rules do not include a form of subpoena. The second and related issue dealt with objections to a subpoena. Under the civil rule, an objecting party is required to file an objection, whereas the current family rule permits the subpoenaed person to object in writing, without a court filing; it then becomes the burden of the subpoenaing party to file a motion to compel enforcement. The workgroup recommended that the family subpoena rule be modeled on the current family rule rather than the civil rule. Members overwhelmingly preferred the current family rule process, and the workgroup will need to modify the draft to reflect that preference. Finally, Mr. Wolfson noted that the draft civil rule requires the subpoenaing party to give other parties two days' notice of a document subpoena before it's served, and the family rule simply requires prior notice. Members agreed that a revised family rule should instead require the subpoenaing party to give notice concurrently with service of the subpoena. Members also recommended that the rule include a minimum, presumptive response time for the subpoenaed records custodian to respond to a documents subpoena of either 10 or 14 days.

*Rule 53 ("protective orders regarding discovery requests")*: Mr. Wolfson reviewed the proposed rule and advised that it is modeled on Civil Rule 26(c), without substantive modifications. Members had no comments or questions and approved the rule as proposed.

*Rule 59 ("using depositions in court proceedings")*: This rule is patterned on Civil Rule 32, and it includes in subpart (a)(6) a provision that is not in the civil rule but is in the current family rule: "A deposition may also be used as permitted by Rule 2(a) of these rules." Mr. Wolfson's review of this rule noted a provision in subpart (c)(2) that requires a person intending to offer deposition testimony at a hearing to designate the appropriate portions, except for deposition testimony offered for impeachment. Members approved this provision, but they first discussed concerns with a practice whereby a party does not purchase a deposition transcript but expects to receive a copy without charge if the other party designates it for trial. Members had different views on whether the designating party is required to provide a copy, but the discussion did not result in any modifications to the rule. Members did delete subpart (d)(3)(C), relating to objections to a written question at a deposition under Rule 58, because they had previously abrogated Rule 58. Otherwise, members approved Rule 59.

**4. Workgroup 4.** Workgroup members presented several rules including rules the Task Force had previously considered.

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Rule 76 (“resolution management conference”), Rule 76.1 (“pretrial statement; pretrial conference”), and Rule 76.2 (“sanctions for failure to participate in a court proceeding”): Ms. Davis observed that the workgroup divided current Rule 76 (“pretrial procedures”) into three new rules. Proposed Rule 76 deals solely with the resolution management conference (“RMC”). The proposed rule, like the current rule, requires the court to set an RMC no later than 60 days after a party files a request for one, unless the court extends the time for good cause. Members discussed whether 60 days was too long an interval, but they agreed to retain that time pending the receipt of comments on this matter. In subpart (b)(1)(A), members agreed to delete “significant” as an adjective before the words “history of domestic violence.” The workgroup’s draft of subpart (b)(1)(B) refers to compliance with applicable disclosure requirements under Rules 49 and 50, but after further discussion, members deleted (b)(1)(B) because disclosure may be incomplete at the time of the conference. Otherwise, members approved the draft rule.

On Rule 76.1, members discussed the timing of the pretrial conference and pretrial statements. The draft rule followed the current rule and provided for the filing of a pretrial statement 20 days before either a trial date or the date set for a pretrial conference. However, the workgroup preferred a process that would allow the parties to interact with the court sooner than immediately before trial; this would allow a discussion with the court of what was at issue in an individual case, and for scheduling an appropriate trial date and other pretrial proceedings. Members discussed the possibility of having an initial pretrial statement and supplemental and final pretrial statements, or only one. A judge member suggested calling one filing a preconference statement, to distinguish it from a pretrial statement, and to possibly include a provision in Rule 50 for these statements in complex cases. Members did not resolve these issues and they returned the rule to the workgroup for further consideration. Before the discussion concluded, members agreed that in section (b), if the parties are unrepresented and there are allegations of domestic violence, the parties must file separate statements under this rule.

Ms. Davis explained that Rule 76.2 made no substantive changes to the current rule. But in subpart (b)(5), members added after “unless dismissal would be contrary to the best interests of a child” the words, “or the complying party.” In response to a question, Ms. Davis confirmed that the contempt referenced in subpart (b)(7) is civil and not criminal contempt. Members then approved this rule.

Rule 80 (“declaratory judgments”): Under the agenda item entitled “other rules issues,” Ms. Davis noted that the Task Force had previously abrogated Rule 80, which concerned declaratory judgments. Thereafter, she has seen family cases utilizing declaratory actions, and she requested that the rule be reinstated. Judge Armstrong noted that it is a short rule that can be readily reinserted into the set, and he suggested doing this if declaratory actions are used. No one objected, and the rule will be added back.

Rule 83 (formerly, “motion for new trial or amended judgment,” and as proposed, “altering or amending a judgment; supplemental hearings”) and Rule 84 (currently, “motion for reconsideration or clarification” and as proposed, “motion for clarification”): Mr. Berkshire

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explained that the workgroup revised these two rules following their presentation during the November 13 meeting. Although the workgroup initially proposed the abrogation of Rule 84, it now proposed a Rule 84 that is only for clarification, and not for reconsideration. The revised rule expressly provides that it does not extend the time for filing a notice of appeal, that it may not be combined with a Rule 83 motion, and that under Rule 84, the court may not open the judgment or accept additional evidence as it can under Rule 83. Members discussed and approved this version of Rule 84. Mr. Berkshire further noted that the members had concerns at the last meeting with successive motions under Rule 83. He observed that Rule 83(d) expressly precludes the filing of a motion to alter or amend an order granting or denying a motion under the rule, which should curtail successive motions. Moreover, the workgroup added a new sentence to subpart (c)(3) (“contents of response”) that expressly requires a party’s response to address any issue that might arise if the court grants the moving party’s Rule 83 motion. Mr. Berkshire noted that under subpart (c)(1), the deadline for filing a motion is 25 days, and under subpart (c)(2) the court has up to 15 days to deny the motion before setting a deadline for a response, so the responding party may have up to 40 days to review the motion before the response deadline begins to run, which should be adequate. With these revisions, members approved Rule 83.

*Rule 87 (“stay of proceedings to enforce a judgment”)*: Judge Eppich advised that the workgroup made stylistic but not substantive changes to staff’s draft. However, in section (g) (“stay of a judgment in rem”), it expanded the specified time from 15 days to 25 days, which is more consistent with changes to the provisions on post-trial motions. In section (e), subpart (1) is titled “money judgments,” and members agreed to change the title of subpart (2) from “nonmoney judgements” to “other judgments.” With these modifications, members approved Rule 87.

*Rule 94 (“civil and child support arrest warrants”)*: Ms. Sell observed that this rule provides more substance on civil arrest warrants than child support arrest warrants because the latter are primarily governed by statute. In subpart (b)(1), the standard for issuing a civil warrant for failure to appear for a subpoena is the same as a failure to appear on an order to appear. A member questioned a provision in subpart (c)(3) (“effectiveness”) that indicated a civil arrest warrant is in effect until it is executed or extinguished by the court. The member thought there might be a one-year time limit for execution, but no one located any statutory authority for that proposition. In section (d) (“time and manner of execution”), members disfavored the phrase “twenty-four judicial business hours” and, after discussion of applicable law, changed the time to 48 hours. Section (f) (“forfeiture of a bond on a civil arrest warrant”) refers generally to the procedure for forfeiture of bonds in criminal cases, and members agreed that the provision should refer to a specific criminal rule or statute. Members conditionally approved the rule pending these changes.

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

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The Chair noted there are about 13 rules remaining for review, all of which will be on the December 15 meeting agenda. If those rules are completed on December 15, a January Task Force meeting should not be necessary. She encouraged members to complete their rule-by-rule summaries and provide them to staff. A summary should note any substantive changes, or if the rule was merely restyled; should cross-reference any corresponding civil rule; and should mention any changes to a form necessitated by the rule revisions. Members should consider preparing a reference table that correlates civil and family rules. Ms. Davis and Mr. Pollitt are working on a new uniform request for production. A member suggested that the Task Force consider Pima County's simplified affidavit of financial information, which is a single page. A simplified set of procedures for self-represented litigants will abide adoption of the restyled family rules.

A complete set of draft family rules will be posted on the Task Force webpage. There will be a link on the webpage to an Outlook mailbox allowing anyone to submit comments to the Task Force concerning the draft. Judge Armstrong noted that his deadline for submitting a draft set of rules, which he will use for his presentation to the Family Law Institute next month, is January 5, 2018. Because of the limited length of his presentation, he cannot discuss each rule, but he will highlight significant changes, such as the Task Force revisions to Rules 2, 6, and 10.

The meeting adjourned at 2:43 p.m.

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

**State Courts Building, Phoenix**

**Meeting Minutes: December 15, 2017**

**Members attending:** Hon. Rebecca Berch (Chair), Hon. Mark Armstrong (Co-Chair), Michael Aaron, Hon. John Assini, Annette Burns, Hon. Dean Christoffel, Cheri Clark, Hon. Suzanne Cohen, Helen Davis, Kiilu Davis, Hon. Karl Eppich, Mary Boyte Henderson, Joi Hollis, David Horowitz, Aaron Nash, Jeffrey Pollitt by his proxy Jennifer Raczkowski, Janet Sell, Hon. Peter Swann, Steven Wolfson, Gregg Woodnick

**Absent:** Keith Berkshire, Hon. Paul McMurdie

**Guests:** Ed Pizarro, Sr., Terry Decker

**Administrative Office of the Courts Staff:** Mark Meltzer, Sabrina Nash, Angela Pennington, Jodi Jerich

**1. Call to order; remarks by the Chair; approval of meeting minutes.** The Chair called the twelfth Task Force meeting to order at 10:03 a.m. She reported that workgroups have met 59 times this year, including 4 meetings after the December 1 Task Force meeting. Staff calculated that since February, members have invested more than 1,500 hours of their time attending Task Force and workgroup meetings, and this figure does not include their additional time preparing for, and traveling to, these meetings. The Chair commended the members' investment of time and effort in this project, which she expects will benefit the legal community and the public in years to come.

Judge Armstrong announced that the Chief Justice has entered an Order allowing the Task Force until March 31, 2018 to file its rule petition. However, the Task Force should have a draft set of rules ready in early January for pre-filing vetting. Before proceeding with today's rules, Ms. Clark followed-up on an item at the December 1 meeting by advising that she had further researched the issue of expiration dates for civil arrest warrants. She concluded that although Maricopa's civil arrest warrant form has a one-year expiration, no statutes or rules require such a date, and she believes that no further revisions to Rule 94 are necessary in this regard. The Chair then asked members to review the draft December 1, 2017 meeting minutes, and a member made this motion:

**Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 012**

The Chair requested workgroup reports, beginning with Workgroup 4. Members approved all the rules presented at today's meeting, with the caveats noted below.

**2. Workgroup 4.** The Task Force returned Rule 76.1 to the workgroup at the December 1 meeting, and Ms. Davis presented the workgroup's revisions to that rule.

*Rule 76.1 ("pretrial statement; scheduling conference; scheduling conference statement"):* The workgroup intended its recent changes to promote more thoughtful pretrial

management of family court litigation. Following the discussion on December 1, the workgroup changed “pretrial conference” to “scheduling conference.” It modified section (b) (“joint and separate statements”) to require the parties to file separate statements if there are concerns with domestic violence. The workgroup’s most significant changes were in Rule 76.1(c) (“contents”). The workgroup bifurcated the provisions of section (c) into (1) statements filed for a scheduling conference; and (2) statements filed for trial. The revised rule requires parties to include their positions on disputed issues, as well as other items that apply only at trial, such as designating deposition testimony, only to statements filed for trial. By comparison, a scheduling statement has a shorter list of required items. The workgroup raised an issue in section (g) (“scheduling conference”) about whether the court would “hold” or “conduct” a conference. After a brief discussion, the members preferred “hold.” Section (g) also provides that a conference is set only on the court’s initiative or on a party’s request, rather than automatically in every case. The workgroup envisioned that parties would utilize a simplified affidavit of financial information in conjunction with this rule, but the workgroup has not yet drafted the form.

**3. Workgroup 3.** Mr. Wolfson presented several rules that had been returned to the workgroup, and one new rule.

*Rule 52 (“subpoena”)*: Revised subpart (a)(1)(D) now includes language taken from the current family rule about the manner of and time for making an objection to a subpoena. The revised rule does not require objections to a subpoena in a family case to be made by motion, as they are made in civil cases. The rule also specifies that a copy of a subpoena must be served on other parties in the case; Mr. Wolfson explained that service should be accomplished like service of other documents under Rule 43.

*Rule 57 (“depositions by oral examination”)*: Although members had previously discussed a provision about the attendance of nonparties at a deposition, the workgroup declined to include such a provision. Instead, it concluded that counsel and the court should address this circumstance on a case-by-case basis. The workgroup modified the amount of time allowed for a deposition. The revised rule specifies that the deposition “should be of reasonable length, is presumptively limited to 4 hours, and must be completed in a single day,” unless the parties agree or the court orders otherwise. A new provision in subpart (b)(3) (“method of recording”) allows a party to designate another method of recording, in addition to the certified reporter; that other recorder need not be a formal videographer, and a party could even record the deposition with a cell phone. The revised rule omits a provision contained in the corresponding civil rule concerning placement of a video recording device. Mr. Wolfson noted another newly added provision in subpart (d)(3) (“motion to terminate or limit”). This provision requires the party who limits or terminates a deposition to file a motion within 10 days thereafter. If the party who limited or terminated the deposition does not timely file such a motion, the other party may move to compel the continuation of the deposition or seek sanctions under Rule 65.

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*Rule 60 (“interrogatories to parties”)*: Mr. Wolfson reported that an *ad hoc* Task Force group of members from multiple workgroups contemplated revisions to the uniform interrogatories, but those have not yet been completed.

*Rule 63 (“physical, mental, and vocation evaluations of persons”)*: Members previously discussed who may be present at, or record, an examination under this rule. The workgroup further reviewed section (c) (“attendance of representative; recording) in light of that discussion and considered the effect a representative or a recording may have on a mental exam compared to a physical or vocational exam. Following Mr. Wolfson’s presentation, members agreed to the following changes. First, in subpart (c)(1) concerning a physical or vocational exam, the sentence will begin with the words, “the person to be examined...has the rights...,” and it will conclude with the words, “unless the court determines it may adversely affect the examination’s outcome.” Second, in subpart (c)(2) regarding a mental health exam, the sentence will begin with the words, “Unless the examiner agrees or the court orders otherwise, the person to be examined may not....” Finally, in the title of this rule and elsewhere in the body of the rule, members agreed to use the phrase “mental health exam” rather than “mental exam.”

*Rule 64 (“requests for admission”)*: Mr. Wolfson noted the addition of a standard in the second sentence of section (b) (“effect of an admission”) for the withdrawal of an admission, which is derived from the current Arizona civil rule. Members discussed whether an admission is “for purposes of the pending action only,” or whether the admission might be allowed in other actions. Members had concerns with conducting discovery in a family case with the intent to use those responses in another case. They concurred that these rules should not encourage that practice. The workgroup had omitted the phrase “for purposes of the pending action only,” but Task Force members agreed to add it back to Rule 64. They also agreed, for the time being, to add it back to other rules, or even to add it as a global provision in Rule 51. Parenthetically, members noted the use of “he or she” in subpart (a)(5); the Chairs will do a comprehensive search for these pronouns and replace them with words that are gender neutral.

*Rule 68 (“conciliation court”)*: The title of draft Rule 68(d) is “assessment or evaluation,” and those words are used elsewhere in the section. Members briefly discussed whether there is a meaningful distinction between an “assessment” and an “evaluation,” and whether they should use a single word rather than both. They believed that an assessment is briefer and an evaluation is fuller, and accordingly, they retained both words and made no changes to the draft.

*Rule 73 (“family law conference officer”)*: Mr. Wolfson advised that the December 15 meeting was the workgroup’s initial presentation of this rule to the Task Force. The workgroup believed that the use of family law conference officers (“FLCO”) varied by county. But generally, the workgroup’s proposed revisions to this rule would curtail a FLCO’s ability to serve a quasi-judicial function. The workgroup believed that a FLCO should assist parties, but should not forward recommendations to the assigned judicial officer. Accordingly, the workgroup removed provisions found in the current rule that

permit a FLCO to make such recommendations. However, section (d) (“failure to comply with an order to bring information”) allows a FLCO to report to the court a party’s failure to cooperate. Because the FLCO would not serve a judicial function, the workgroup also removed the immunity provision. (Members also hypothesized that if this rule contained an immunity provision for a FLCO, then shouldn’t the rules require analogous immunity provisions for everyone? And in any event, immunity is as provided by law.) As one workgroup member observed, these revisions eliminate the FLCO’s role as a special master, and restore the FLCO’s role as a mediator.

Members discussed other issues under draft Rule 73. First, the draft rule would permit a FLCO to record a session with the parties. However, if the FLCO is not performing a judicial function, members questioned whether a recording was necessary. After discussion, members agreed to keep this provision. First, a recording might be helpful in preparing written documentation of an agreement the parties reach during a session. Second, a FLCO might be subject to attack for something the FLCO allegedly said at a session, and a recording might provide a clear record for the FLCO’s protection. The rule provides that recording is optional. Members recognized that parties could request a recording after a session, but members did not consider that a significant factor during their discussion. Members considered whether the FLCO’s report to the court under Rule 73(b) should also be provided to the parties. Members believe that although the rule is silent on this question, in Maricopa County the current practice is to provide the FLCO’s report to the parties. The FLCO’s report is particularly helpful for self-represented parties who do not reach agreements because it informs them of the issues that will be tried. Finally, members also discussed whether the rule should allow a FLCO to interview children. Because the FLCO would not make recommendations, members thought it was unlikely that a FLCO would conduct interviews. Regardless, interviews are governed by Rule 12.

**4. Workgroup 2:** Members then considered Workgroup 2’s revisions to Rules 47 and 48 and its recent revisions to the default form for spousal maintenance.

*Rule 44.1 (“default decree or judgment by motion and without a hearing;” and a form (“default information for spousal maintenance”):* Commissioner Christoffel explained at the outset that he prepared most of the recent revisions to the form, but he inadvertently omitted a paragraph that said, “I am requesting spousal maintenance in the amount of X dollars per month for X years.” Staff then added this new paragraph 10 to the OneDrive version of the form. Members had previously discussed the checkboxes on the first page of the form, which are derived from A.R.S. § 25-319, and Commissioner Christoffel proceeded with a review of the questions below the checkboxes.

Question 2 as proposed by the workgroup asked, “Do you have a physical or emotional condition that would require spousal maintenance to meet your needs? Describe: \_\_\_.” The workgroup thought this language reflected the statute, but after discussion, members agreed that the question should relate to employability. They accordingly revised the question to ask, “Do you have a physical or emotional condition

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that limits your ability to work? Describe: \_\_\_\_.” In question 4 regarding educational expenses, members added the words, “be able to contribute....” After the question, they added the word “describe.” Question 8 concerns the spouse’s monthly income. Revised question 8 asks, if there is no documentation of that income, how the moving party estimated the income. Members made syntactical edits to other questions, but continued to use the phrases “the other party” and “your spouse” as suitable in the context. Commissioner Christoffel also reviewed a newly added page of the form that requests information concerning expenses, debt payments, and income. He reminded members that the form is designed for use in a default proceeding without a hearing, and represents an effort to get sufficient information on which to base a financial decision.

*Rule 47 (“motions for temporary orders”), Rule 47.1 (“simplified child support orders”) and Rule 47.2 (“motions for post-decree temporary legal decision-making orders”):* Commissioner Christoffel noted that Mr. Pollitt, who was not present at today’s meeting, was instrumental in revising these rules. He also noted that the workgroup proposed dividing current Rule 47 into three separate rules to simplify the process and to assist users in locating appropriate provisions.

Stylistically, the workgroup referred to a temporary order throughout the rule in the plural, i.e., “temporary orders.” Commissioner Christoffel explained that the workgroup removed several statutory references found in current Rule 47(A) and instead used descriptive language in the restyled rule. An exception appears in subpart (a)(1), which includes a reference to A.R.S. § 25-402 and requires specification of the court’s authority to enter temporary orders concerning legal decision-making and parenting time. Although the moving party should include a jurisdictional reference in a pleading, it would be helpful for the court to also have this in the Rule 47 motion. Members also believed Rule 47 should expressly provide that the court does not have jurisdiction if the moving party did not previously or concurrently file a petition; members therefore added a new sentence in section (a) that states, “The motion must be filed either after or concurrently with the initial petition.” In what is now section (b) (“order to appear” [“OTA”]), the workgroup removed requirements concerning the number of copies that are currently in Rule 47(C): the workgroup thought this matter should be addressed by local rules.

This led to a discussion about the timing of an OTA and service of a Rule 47 motion. Because of the immediacy of a Rule 47 motion, some members believed Rule 43 service of the motion should be required on the date of filing, even if a concurrently filed petition had not yet been served under Rules 40 or 41. Other members observed that there may be strategic reasons not to serve a Rule 47 motion so quickly. After discussion, members approved section (d) (“service”), which requires “good faith efforts to complete service promptly, and, absent good cause, [the moving party] must complete service within 5 days after receipt of the issued order to appear and no later than 14 days before the date set in the order.”

Members then discussed whether the hearing set by the OTA could be an evidentiary hearing. The return on an OTA is often a resolution management conference, but case law precludes the taking of evidence at a resolution conference. However, the objective of the hearing is to enter orders, which typically require the taking of evidence. This is a quandary in Maricopa County, where some OTAs say evidence may be taken at the return hearing, and other OTAs are silent on the issue. These OTAs require attorneys to prepare for evidentiary hearings even though the court may not receive evidence at the return. On the other hand, judges may be able to encourage parties to reach agreements if the return is set for a resolution management conference, and this would be an effective use of time for both the court and the parties. If the parties don't agree on temporary orders, and since they are already present in the courtroom, an evidentiary hearing may be necessary as a practical matter. On the other hand, some judges set the return for an evidentiary hearing and omit a resolution conference altogether. After further discussion, members agreed that a resolution conference should presumptively be the first step of a temporary orders hearing. Judge Swann then proposed the following new language for section (c) ("scheduling"):

Upon receiving a motion for temporary orders and the required supporting documents, the court must schedule a resolution management conference. No evidence shall be taken at a resolution management conference, unless the parties agree. The purpose of a resolution management conference is to engage the court in an effort to facilitate agreements between the parties that permit the entry of temporary orders at the conclusion of the conference. If, at the conclusion of the resolution management conference, issues remain that require an evidentiary hearing concerning temporary orders, the court must schedule an evidentiary hearing on those issues. If the court finds that the circumstances of a specific case demonstrate that a resolution management conference would not serve the interests of efficiency, it may schedule an evidentiary hearing on temporary orders instead of a resolution management conference.

Members appreciated the flexibility of this language, which allows the court to set an evidentiary hearing concerning temporary orders on a case-by-case basis when it determines that a resolution conference would not be efficient. But otherwise, a resolution conference would be the presumptive first step on the return of an OTA. The Chair would welcome stakeholder comments on the new provision, but members agreed to incorporate the provision in their draft rule. Members retained other portions of the draft rule that deal with when the court must set a conference or hearing, disputed issues of fact, and extensions of time. Commissioner Christoffel added that under subpart (c)(3), a judge who enters temporary parenting time orders must determine an amount of child support under A.R.S. § 25-320, as required by A.R.S. § 25-403.09.

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Members also discussed draft section (f) (“requirements before a conference or hearing”). In the domestic violence exception to the meet and confer requirement, they deleted the word “significant” before the word “history.” They also rearranged the order of the subparts so the domestic violence exception applied to the exchange of witness lists and exhibits, as well as to the general meet and confer conference. In section (h), members changed the captioning requirement in current Rule 47(K) from “expedited hearing required” to “expedited hearing requested.” Members also modified subpart (j)(1) to provide that temporary orders “are enforceable as final orders but terminate and are unenforceable upon dismissal of the action, [etc].”

Commissioner Christoffel reviewed draft Rules 47.1 and 47.2. The workgroup intended its restyled versions to clarify and simplify these provisions, and members had no questions or comments.

*Rule 48 (“temporary orders without notice”):* Commissioner Christoffel proposed adding “serious or life-threatening” to the elements of this rule, but members disagreed because they are not included in statute. Otherwise, the workgroup made no substantive changes. Members added “evidentiary” before the word “hearing” in section (d) (“hearing”). A member inquired whether the rule applied when the other party could not be located, but after discussion, the question was unresolved.

**5. Workgroup 1.** Judge Cohen introduced the rules on “pleadings and motions” in Part II of the family rules by noting that the current rules are not in a sensible sequence. As part of its reorganization of these rules, the workgroup proposed relocating what had become Rule 21 on “sealing, redacting, and unsealing court records” to Rule 17, which was previously reserved. The workgroup then renumbered Rule 23.1 concerning “improper venue,” which the Court adopted earlier this year, as Rule 21. Both renumbered rules would fall within the rules on general administration. Most of the “reserved” rules in Part II would be located toward the end of the rules on pleadings and motions. The rule on motions would retain its current number, Rule 35. In summary, Part II of the family rules would be reorganized as follows:

<b>Part II</b>	<b>As proposed: Pleadings and Motions</b>	<b>Part II</b>	<b>Currently: Pleadings and Motions</b>
<b>Proposed #</b>	<b>Proposed Title</b>	<b>Current #</b>	<b>Current Title</b>
23 FKA R. 24	Pleadings; Petition and Response	23	Commencement of Action
24 FKA R. 29	Contents of Pleadings	24	Pleadings Allowed
25 FKA R. 26	Additional Filings	25	Family Law Cover Sheet
26 FKA R. 31	Signing Pleadings, Motions, and Other Documents; Representations to the Court; Sanctions	26	Additional Filings

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27	Service of the Petition	27	Service on the Opposing Party or Additional Parties
28 FKA R. 34	Amended and Supplemental Pleadings	28	Mandatory Responsive Filings
29 FKA R. 32	Defenses and Objections; Motion for Judgment on the Pleadings; Joining Motions; Waiving Defenses; Pretrial Hearing	29	General Rules of Pleading
30	Reserved	30	Form of Pleading
31	Reserved	31	Signing of Pleadings
32	Reserved	32	Defenses and Objections; When and How Presented; By Pleading or Motion; Motion for Judgment on Pleadings
33	Third-Party Rights and Other Claims in an Existing Action	33	Counterclaims; Third Party Practice
34	Reserved	34	Amended and Supplemental Pleadings
35	Family Law Motion Practice	35	Family Law Motion Practice

*Proposed Rule 23 (“pleadings; petition and response”)*: Ms. Henderson explained that this proposed rule merges content from current Rule 23 (“commencement of action”) with content from current Rule 24 (“contents of pleadings”). The proposed rule also includes a definition of “petition” derived from current Rule 3. In section (a) (“petition”), and in contemplation of whatever future legislation might be passed, the workgroup added a provision that permits a party to begin an action by filing a petition seeking “relief otherwise authorized by statute.” Section (e) (“response”) has provisions that differentiate whether a response to a petition is required or permissive.

*Proposed Rule 24 (“contents of pleadings”)*: Ms. Henderson also explained that current Rule 29 (“general rules of pleading”), which is the source of this proposed rule, requires pleadings to contain “short and plain” statements. The workgroup changed this to “simple, concise, and direct,” but after discussion, members further modified this to require “simple” statements in a petition (section (a)) and in a response (section (b).) In subpart (a)(1), members added two words as follows: “unless the court already has exercised its jurisdiction....” In section (b), members agreed to delete as unnecessary the word “fairly” in the phrase, “a denial must fairly respond to the substance of an allegation.”

*Proposed Rule 25 (“additional filings”)*: Ms. Burns noted that this proposed rule incorporates content from current Rule 26 (“additional filings”) as well as a single sentence that composed current Rule 25 (“family law cover sheet”), which has become Rule 25(d). Members added a statutory reference in the second sentence of section (b) (“petition for legal decision-making or parenting time, paternity, or maternity”) to clarify

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that a preliminary injunction is issued when a party files a petition to establish legal decision-making or parenting time for a child whose paternity has been established. Section (e) (“order to appear”) requires a party in certain proceedings to provide the court with two copies of an order to appear.

*Proposed Rule 26 (“Signing Pleadings, Motions, and Other Documents; Representations to the Court; Sanctions”)*: Mr. Woodnick briefly reviewed proposed Rule 26, and members corrected cross-references in the draft.

*Rule 27 (“service of the petition”)*: This rule number corresponds with current Rule 27, but Mr. Davis explained the differences. The proposed rule removes references in the title and body of section (a) (“annulment, dissolution of marriage, or legal separation”) to dissolution of a covenant marriage or legal separation in a covenant marriage. He raised the issue whether the title and body of section (b) should refer to legal-decision making or parenting time “by a parent,” and after discussion, members agreed that it should. In section (c) (“order to appear and petition”), members again considered the issue of how many days before a court hearing a petitioner must serve the respondent. Members discussed 20 days and 10 days, and concluded by adding the following new sentence: “Petitioner must complete service not later than 20 days before the scheduled hearing, or not later than 10 days if the only issue is child support, unless the court orders otherwise.” The Chair welcomes public comment on this proposed provision.

*Proposed Rule 28 (“amended and supplemental pleadings”)*: This proposed rule corresponds to current Rule 34, and the rule’s title remains the same as it is currently. Ms. Burns noted that the rule provides for amendments before a response is filed, as well as thereafter. The current provision concerning the relation back of amendments was substantially shortened in the draft because families know the identity of their members, and amendments changing the identity of a putative father, rather than just correcting the putative father’s name, should not proceed simply by an amendment to the pleadings under this rule. Members removed a provision in the draft rule concerning service of an amended pleading on a government entity.

*Proposed Rule 29 (“Defenses and Objections; Motion for Judgment on the Pleadings; Joining Motions; Waiving Defenses; Pretrial Hearing”)*: Mr. Woodnick advised that this rule corresponds to current Rule 32. Section (c), which concerns the time to assert defenses under this rule, has been revised and clarified. The workgroup’s draft of section (d) (“motion for judgment on the pleadings”) proposed a filing deadline of not later than 90 days before trial, but after discussion, members changed that to “within such time as not to delay trial.” In section (f) (“motions to strike”), members added a reference to the limitations on such motions that is specified in Civil Rule 7.1(f). Members reviewed section (g) (“waiving and preserving certain defenses”) to assure the provision, including the defense of lack of subject matter jurisdiction, was legally correct. They revised the subpart titles of section (g) to say “(1) waiver of certain defenses,” and “(2) how to preserve other defenses.” The title of current section (D) (“preliminary hearings”) was

changed in draft section (h) to “hearing on Rule 29 motions.” Under the draft provision, a party may request to have the motion heard and decided before trial.

6. **Other rules issues.** Judge Armstrong raised an issue regarding Rule 49 (“disclosure”), which members had discussed extensively at the August 4 meeting. Judge Armstrong said that during a review session, the Chairs and staff believed that the meet and confer requirement for electronically stored information (“ESI”) was burdensome, unnecessary, and omitted a provision concerning self-represented litigants with protective orders. Judge Armstrong inquired if members objected to removing this meet and confer requirement. There were no objections. Judge Armstrong also advised that draft Rule 49 includes a provision that requires parties to file a joint motion in the event of a dispute regarding ESI. However, the Family Law Rules do not provide for joint motions, and he also requested the members’ consent to remove that provision. After discussion, members believed it would be useful to have an expedited process for resolving ESI disputes, and the Chairs and staff will refashion the provision.

Justice Berch also noted an issue raised by AOC-Legal that touches on Rules 13(e) (“access to records”), 17 (“sealing, etc.”), and 43.1(f) (“sensitive data”). The issue is whether the draft rules should include a provision that makes psychological evaluations in family cases presumptively confidential. These evaluations are not usually filed over the counter, but sometimes they are. When that occurs, the assigned judge may seal the document. But on some occasions, evaluations are attached as exhibits to motions and become publicly accessible. Members expressed concerns with other reports and filings regarding children’s issues and other matters that may raise issues of confidentiality. Justice Berch suggested adding a confidentiality provision to the rule on protected addresses, and she’ll consider that provision with Judge Armstrong and staff.

7. **Call to the public; roadmap; adjourn.** There was no response to a call to the public.

The Chairs and staff are continuing to meet and review the draft rules. Their goal is to have a complete draft set of rules ready for submission to the State Bar by January 8. Once the draft set is complete, staff also will circulate it to the members. The Chair requested members to review the draft from top to bottom, and to pay special attention to rules prepared by their respective workgroups. She asked that members send any comments and corrections to staff. She also asked that they continue to work on their rule summaries. But in doing this work, the Chair stressed the importance of members not making edits or revisions on OneDrive. She requested that as of the close of today’s meeting, members refrain from making changes to the rules on OneDrive. This is necessary to assure that the version of the rules on OneDrive is stable and final.

The draft set of rules will be available for public review next month on the Task Force webpage. There will also be an Outlook mailbox on the webpage to facilitate the submission of comments concerning the draft. Staff will compile comments and distribute them to Task Force members. The Task Force will not meet in January, but it

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probably should meet in early to mid-February to discuss comments. Staff will poll the members for an available date. At the next meeting, members should also consider any necessary revisions to forms and interrogatories.

The Chair again expressed her appreciation for the members' work and diligence. The meeting adjourned at 3:34 p.m.

**Task Force on the Arizona Rules of Family Law Procedure**  
**State Courts Building, Phoenix**  
**Meeting Minutes: February 16, 2018**

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

**Absent:** Annette Burns, Hon. Dean Christoffel

**Guests:** None

**Administrative Office of the Courts Staff:** Mark Meltzer, Angela Pennington, Jodi Jerich, Theresa Barrett

1. **Call to order; remarks by the Chair; approval of meeting minutes.** The Chair called the thirteenth Task Force meeting to order at 10:03 a.m. She advised that today's meeting would begin with a review and discussion of comments concerning the draft family law rules (version 01.04.2018). But she asked members to first consider the draft December 15, 2017 meeting minutes, and a member made this motion:

**Motion:** To approve the draft minutes. Seconded, and the motion passed unanimously. **FLR: 013**

Judge Armstrong added that the Court recently accepted review of a case concerning the "special weight" (the phrase used in A.R.S. § 25-409) given to a fit parent's preferences in a conflict with the child's grandparents. The case is *Friedman v Roels*, 242 Ariz. 463 (App. 2017), review granted in Arizona Supreme Court No. CV-17-0225-PR.

2. **Disposition of comments concerning the 01.04.2018 draft rules.** Staff assembled all the comments submitted prior to the February 12 deadline in a table. Each comment had an assigned number and members discussed these comments sequentially. An additional comment submitted by Ms. Madsen earlier this week was separately included in the meeting materials. If these minutes do not discuss a specific comment, it is because members previously discussed the issue raised by the comment and believed their earlier discussion resolved the issue, or because the comment concerned such things as typographical or formatting errors.

1. *Mr. Smith's comment regarding Rule 72.* This comment was addressed by the 01.04.2018 draft.

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2. *Mr. Rogers' comment regarding Rule 17.* Rule 17, which concerns sealing, parallels new Civil Rule 5.4 on sealing. Mr. Rogers suggested substituting the word "overriding" for the word "compelling" in Rule 17, which would conform the civil and family rules. One member favored retaining the word "compelling" because it relates to an issue of constitutional dimension, but most members agreed to adopt Mr. Rogers suggestion if Rule 17 includes an explanatory comment. The Chairs will draft a comment.

3. *Ms. Piccarreta's comment regarding Rule 67.3*  
considered in conjunction with
10. *Judge Bryson's comment regarding Rule 67.2.*

Rule 67.3(e) ("court-selected private mediator") refers to the court's selection of a private mediator, including choosing "from the court's own list of private mediators." Members agreed that the public might give greater weight to a court's list than it would to mediator lists from other sources. Moreover, those courts that maintain a list don't vet the individuals on it, and may not even set qualifications for inclusion on their list. One member had no objection to parties reviewing a list of names on a court's list, but objected to the court selecting an individual's name from the list to serve as the parties' mediator. Another member asked whether Rule 67.3(g) ("judges pro tempore as mediators") suggested a rent-a-judge philosophy, because the member believed there should not be a charge for a pro tempore's service. But another member believed that the express purpose of Rule 67.3(g) was to allow parties to compensate a pro tempore's service as a private mediator, and contended that merely removing the word "private" from Rule 67.3(g)(1) would not fulfill the rule's intended purpose. One member proposed deleting Rule 67.3(g)(4) ("payment for a judge pro tempore's services") in its entirety. But another member stated that deleting Rule 67.3(g)(4) would gut the entire section. One member recalled an ethics opinion on whether a judge pro tempore could receive compensation for services as a mediator under the circumstances posed by the rule, and members agreed to look for and review the opinion. Other members suggested retaining these rules as currently drafted and requesting formal comments.

Rule 67.2(g), which is a uniform rule, includes a provision about the court's selection of an arbitrator if the parties' selection of an arbitrator in their agreement fails (for example, the arbitrator is no longer available to serve). A member thought that if there was a question about who the parties chose as their arbitrator, then the parties might not have an agreement. The parties could ask the court to interpret the agreement, but they shouldn't ask the court to pick an arbitrator for them.

After further discussion, members agreed to the following changes to Rules 67.2 and 67.3:

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In Rule 67.2(g), to remove subpart (3), which provided, “If an arbitrator is unable or unwilling to act or if the agreed-on method of selecting an arbitrator fails, on motion of a party, the court will select an arbitrator.”

In Rule 67.3(e), to remove only the last clause [shown by strikethrough as follows]: “**Court-Selected Private Mediator**. The parties may ask the court to select a mediator for them from a list of private mediators they provide to the court, ~~or from the court’s own list of private mediators.~~”

Members made no changes to Rule 67.3(g)(4), but they agreed that the rule petition should request comments on issues raised by that provision.

4. *Ms. Kane’s comment regarding Rule 10 and attorney’s fees.* Members discussed the question this comment raised about Rule 10 (whether BIA and GAL were interchangeable terms), but they concluded that clarifying changes to the draft were unnecessary. The Chair and staff will discuss uniformity in the punctuation and spelling of attorney’s fees after today’s meeting.

5. *Mr. Evans’ comment regarding Rule 77.* Members discussed whether Rule 77 (“trials”) includes an implicit requirement that a party confer with other parties before requesting a continuance from the court. After this discussion, they agreed that any provision on continuances should be broad enough to apply to other proceedings and not just trials, and that this provision is inappropriately located in Rule 77. They further agreed that the Chairs and staff should draft a comparable provision that would apply to any proceeding, and locate this new provision in a rule that is currently reserved (a member suggested Rule 34). Members requested that the new provision address the need to confer when there are domestic violence issues; and that it address reasonable but unsuccessful attempts to confer.

6. *Ms. Burns’ comment regarding Rules 12, 29, 37, and 40.* The current draft has already corrected the misspellings and erroneous rule cross-references noted in this comment. In response to the perceived ambiguity in Rule 40(g) concerning the word “return,” a member suggested expanding the term to “return of service,” and the Chairs will take this suggestion under consideration.

7. *Ms. Hill’s comment regarding Rule 47.* The Chair acknowledged Ms. Hill’s concerns regarding the resolution management conference, but noted that the Task Force previously had a lengthy discussion on the issue and that the issue also was presented in the rule petition. Members took no further action to modify the draft rule.

8. *Ms. Greene’s comment regarding Form 2.* Mr. Nash and other members agreed that it would be helpful, especially for self-represented litigants, to have further

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directions on Form 2, the AFI, about not filing sensitive information. Mr. Nash suggested that the directions use the word "redact," and that the form define "redact." Members offered "blank out" or "black out" as possible substitute terms. Mr. Nash will check whether the clerk already has standard language on this point.

9. *Professor Atwood's comment regarding Rules 67.1 and 67.2.* At the Chairs' direction, references to "must/may" in the 01.04.2018 version of Rule 67.2 were corrected in the 02.12.2018 version to say "must." Staff has not yet made the necessary numbering and lettering changes, but these will be done before filing the petition.

10. See number 3 above.

11. *Judge Swann's comment regarding Rule 95.* Judge Swann discussed a possible conflict between Rules 72/74, which require the parties' consent for services under those rules, and Rule 95(b), behavioral or mental health services, which does not require consent. His concern was that the court might, for example, appoint a private custody evaluator under Rule 95(b), and require the parties to pay the evaluator without their consent to the appointment. Members acknowledged that substance abuse services under section (c) or other services under the rule would not require a party's consent. After discussing the issue, members made changes to the second sentence of Rule 94(a), which then read: "The court must determine on the record whether the parties have the ability to pay for services as well as allocate the costs of those services." To minimize the possibility of conflict with Rules 72/74, members also agreed to delete from the first sentence of Rule 95(a) the words, "in addition to services described in other rules."

12. *Ms. Clairmont's comment regarding various rules.* Ms. Clairmont proposed adding to Rule 2(d) the words, "as required by Rule 49 or by court order." After considering *Hays v Gama*, members discussed an alternative modification: adding the words "except as otherwise provided by law." But after further discussion, members agreed that the concept is adequately covered by other rules, e.g., Rules 49 and 65, and that section (d) was unnecessary. They accordingly deleted Rule 2(d). While still on Rule 2, Judge Armstrong advised that the Court adopted Evidence Rule 807, a rule on the residual hearsay exception, and members modified Rule 2(b) to include a reference to the rule.

Members considered the suggestion for additional definitions in Rule 3, but they declined to adopt any. They agreed that the explanation of "next day" in Rule 4 was not helpful, and they deleted it. Ms. Clairmont's comment suggested inclusion in Rule 5.1 of a method of communication between the family and juvenile benches, and although members agreed there should be such a method, they did not believe it needed to be based in a court rule. Regarding Rule 8, and what constituted a "reasonable opportunity to respond," members agreed that what is reasonable depends on the context of each case, which the judge will determine. Members previously had lengthy discussions regarding

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Rule 9(c) and a good faith consultation certificate. They agreed that the rule's intent was that counsel have a conversation, whether by phone or in-person, and they declined to include consultation via email exchanges. Except for Rule 49, most of the remaining comments concerned spelling and formatting errors, which the next draft will address. The comment on Rule 49 inquired about the authority of different counties to adopt modified forms, and particularly Pima County's adoption of an alternative AFI. Pima County's AFI was included in its local rules, which were approved by the Supreme Court, and members believe the form is accordingly authorized. Members made no changes to Rule 49.

13. *Staff's comment regarding Rules 82 and 83.* Staff proposed removing the words "supplemental hearings" from the title of Rule 83 because taking additional testimony, i.e., holding a supplemental hearing, is just one of several choices permitted under Rule 83(b). Putting those words in the rule's title gave undue emphasis to that option. Staff also believed there was an inconsistency in allowing 15 days for filing a Rule 82(b) motion to amend findings, but allowing 25 days for a motion to amend findings under Rule 83(b). For consistency, staff proposed changing the time in Rule 82(b) to 25 days. The Chairs concurred with these changes, which were shown in the current draft, and members did not object to the changes.

14. *Judge Hancock's comment regarding Rules 5, 5.1, 17, 47, 91, and 92.* The comment questioned why Rule 5 disallowed consolidation of a protective order proceeding with a family law action. Members agreed that this couldn't occur because of a change in a federal law during the pendency of the current rule. (The federal law is the Violence Against Women Act, 42 U.S.C. §§ 13701 through 14040.) Members agreed to note this in the petition. Members declined to adopt the comment concerning Rule 5.1 because when a court has multiple departments, one department should not direct another. Members agreed that court-ordered redactions under Rule 17 could become burdensome, but the comment focused on the AFI and the court's burden of redactions to the AFI should be mitigated by the adding redaction directions on Form 2 and a change to Rule 43.1(g) that would permit the clerk to treat the AFI as a confidential document. Members did not find inconsistencies between Rules 47 and 76 and made no changes. They also agreed that Rule 91(e), which provides that "a petition that requests a contempt remedy must comply with this rule and Rule 92," addressed the issue the comment raised.

15. *Mr. Halterman's comment regarding Rules 6, 10.1, 12, and 84.* Mr. Halterman's 3-page comment included a proposed modification to Rule 6(f) to allow a second notice of change of judge following a remand. Members had previously discussed this circumstance and declined to revisit the issue. Members then discussed the comment's suggestion that Rules 10.1 and 12 should require CAAs to record an interview of a child. Members declined to do so because CAAs don't do forensic interviews, recording could

be cumbersome, and the requirement might discourage CAAs from involvement in a case.

Members then discussed the comment's suggestion that Rule 84 expressly allow the filing of a motion for reconsideration. Some members noted that parties would probably continue to file motions for reconsideration even in the absence of any rule authority, or they would file them under Rule 35. After discussion, members declined to add motions for reconsideration back to Rule 84. However, they acknowledged that judges should have a vehicle to correct mistakes in interim orders and the rules should provide a way for parties to bring these issues to the court's attention. They therefore agreed to add a provision—either as a new section of Rule 35, as a new Rule 35.1, or as one of the reserved rules—permitting motions for reconsideration. Members gave the Chairs discretion about where to locate this provision, and its substance, although they believe it should be modeled on current Civil Rule 7.1(e).

16. *Mr. Norris' comment regarding Rule 12 and the rules generally.* In response to a comment concerning making the FLR more user-friendly for self-represented litigants, the Chairs recognized the members' previous discussions on this issue and their plans for explanatory booklets for those litigants. The comment proposed adding the word "permanency" in the family rules, but members did not support that addition. Finally, regarding interviews of children, members shared the comment's aspiration of having reliable information, but they believed there are multiple factors in achieving this goal and that the comment's proposed change might not produce the hoped-for result.

17. *Staff's comment regarding Rules 43 and 47.* Staff noted that current Rules 43(B) ("service; parties served; continuance") and 47(J) ("summary temporary child support order") were not included in the Task Force draft, and asked whether these were intentionally omitted. Members agreed that although there would not be several respondents in a case, there could be several third parties, and without objection, members agreed to add the substance of Rule 43(B) to the draft. They also agreed that Rule 47(J) was intentionally omitted.

18. *Ms. Madsen's comment regarding various rules.* Members declined to adopt additional changes to Rule 2 following their prior and extensive discussions of this rule. They declined to add a definition of intervenor to Rule 3. Members discussed the issue raised in the comment concerning in-home dependency placement, but draft Rule 5.1(d) already allows the juvenile court to establish child support and the trial court should address the issue when it comes up. Proposed Rule 6.1(d) is like the corresponding civil rule, and the comment pertains to one-judge counties, which are few, and members made no changes to this rule. Members revisited Rule 9(c), but they believed their draft rule required no further changes. However, one member suggested that a standard form for a good faith consultation certificate might address Ms. Madsen's concerns, and this led to a brief but general discussion on family law forms. Several members have discussed

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forms in workgroup settings, but it appears additional forms will not be completed before the Task Force files its rule petition. However, Judge Armstrong observed that the term of this Task Force extends to the end of 2018, and the Task Force therefore will have an opportunity to address forms later. The members who are working on forms will provide an update at the next Task Force meeting.

Members did not believe that Rule 20 required further clarification. However, they added the words, “or in an action for” to Rule 27(b). In Rule 29, they agreed to change “responding defendant” to “responding third-party.” A member proposed modifying Rule 29(b) in a way that would permit a party’s response to a motion to be in the form of a motion to dismiss that motion. After discussion, members declined to make this modification, but they agreed to note the member’s proposal in the rule petition. Finally, members discussed a comment from Ms. Madsen concerning Rule 45 that suggested the adoption of clearer language concerning genders. Members believed that Rule 45’s content was appropriate and accurately mirrored statutory language.

The Chairs expressed their appreciation to all those who submitted comments for their pre-filing review of the draft rules and for their thoughtful suggestions. These comments improved the proposed rules.

**3. Draft rule petition and appendices to the petition.** The Chair advised that the draft rule petition, which was included in the meeting materials, will require further revisions based on today’s discussions. Members agreed that Appendix C, which contains conforming amendments to ARCAP 9, is straightforward and requires no additional edits. They also agreed that Appendix B—the contemplated appendix containing rule-by-rule summaries of each draft rule—would not be necessary given the depth of explanations concerning substantive changes in the rule petition and in the prefatory comment.

The Chairs requested that members notify staff of any proposed edits to the correlation table. The correlation table will be included with the proposed rules. Judge Armstrong advised that he had already forwarded this table to a subject matter expert for her review.

There are three rule petitions pending in the current cycle concerning family law rules: R-17-0049, concerning Rule 72; R-18-0019, concerning Rule 65(A)(2)(b); and R-18-0023 concerning family law masters and parenting coordinators. The Chairs summarized these petitions, and members agreed that the petitions did not require modifications to the Task Force rules or its rule petition.

The Chair advised that the Task Force would not meet again before the filing of the rule petition in March. She asked the members for their authorization for the Chairs

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and staff to edit and finalize the draft rule petition and companion documents. A member then made this motion:

**Motion:** The Chair and staff, and members working at the Chair's request, have the members' authority to edit and finalize the rule petition, including appendices, and to revise the proposed rules, consistent with the letter and spirit of today's discussion. Seconded and passed unanimously. **FLR: 014**

**4. Roadmap; call to the public; adjourn.** The Chair informed the members of the need to set another Task Force meeting in June, after the comment period has ended, to discuss comments and to prepare a reply. Staff will poll the members to determine the best meeting date.

There was no response to a call to the public.

The Chair commended the members and staff for their continuing good work and dedication to this project. The meeting adjourned at 2:37 p.m.