

Juvenile Rules Task Force
Virtual Public Meeting, April 3, 2020
(All members, guests, and staff attending telephonically)

Meeting Minutes

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

Absent: John Gilmore, Eric Meaux

Guests: Nina Preston, Chanetta Curtis, Randi Alexander, Paul Julien, Carey Turner

AOC Staff: Caroline Lutt-Owens, Joseph Kelroy, Mark Meltzer, Angela Pennington

1. **Call to order; preliminary remarks; approval of meeting minutes.** The Chair called the sixth – and first virtual – Task Force meeting to order at 10:00 a.m. The meeting was virtual because of the ongoing coronavirus pandemic and universal mandates for social distancing. Participants communicated during today’s meeting on a telephone conference call line and by WebEx. The Chair reviewed conference call protocols, including utilizing the mute feature to reduce extraneous noise. She noted that staff posted a public meeting notice on the Task Force webpage on March 27, which included information about non-members’ participation in the call to the public. The meeting packet also was posted on the Task Force webpage, which allowed anyone to view it. In addition to the agenda, draft minutes, and draft rules, the packet included (1) a version of SB 1425 that would affect CASAs, along with a House fact sheet (the bill is no longer moving because the Legislature has recessed); and (2) Arizona case research and three Court of Appeals decisions concerning the issue of ineffective assistance of counsel (“IAC”) in juvenile proceedings. Ms. Beckmann also provided members with a three-page legal analysis of the IAC issue.

The Chair then referred members to draft minutes of the February 28, 2020 Task Force meeting. Members had no corrections to the draft.

Motion: A member moved to approve the February 28, 2020 meeting minutes. The motion received a second and it passed unanimously. **JRTF 006**

2. Report from Workgroup 3. The Chair began today's rules review with a presentation by Ms. Phillis on behalf of Workgroup 2.

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

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

Members approved Rule 27 as presented.

3. Workgroup 3. Workgroup 3 then presented several rules.

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

A member reported instances where a private attorney has been hired for a limited purpose, such as appearing on behalf of a relative only for a placement proceeding. Does the draft rule accommodate these situations? Members discussed whether to address this circumstance with a prefatory phrase in the rule such as, "unless the attorney has appeared for a limited purpose," but a member observed that inserting a solitary phrase on limited appearances in Rule 39 without also adding a more detailed provision on limited scope representation, such as the one in Civil Rule 5.3(c), would not be helpful.

After further discussion, members declined to include either the prefatory phrase or an analog to Civil Rule 5.3(c). (Supplemental note: See further Supreme Court Rule 42, ER 1.2(c).) Draft Rule 39(b)(3)(A) describes termination of the attorney's representation when the action is dismissed. A member inquired about the applicability of this provision to cases where a party had been dismissed but the action continued as to other parties. Members concluded that this circumstance would be covered by Rule 39(b)(3)(B), which provides for the entry of a court order terminating representation. Another member asked whether draft Rule 39 is sufficiently flexible to allow counsel to file a petition for review. Ms. Phillis responded that her office expects appointed appellate counsel to handle the matter until the appeal is resolved. A member also asked if the draft provision would allow a party to be self-represented on appeal following counsel's withdrawal, but after discussion, members did not believe that possibility required any further modifications to the draft.

A member suggested that the provisions of section (c) ("withdrawal") should require moving counsel to include, in addition to the client's physical address, the client's email address. Members agreed with the suggestion. Members then discussed the necessity of having two separate subparts in section (c): subpart (c)(2) concerning the lack of client consent where the client's location was unknown, and subpart (c)(3) concerning the lack of consent when the client's location was known. Members discussed addressing this issue by alternative phrasing or combining these subparts, and they modified the draft during the meeting; but the Chair requested the workgroup to further review these revised provisions to assure they are internally consistent and not contradictory. Another member raised an issue concerning subpart (c)(4), which addresses the withdrawal of an attorney for a child. Although members agreed that this circumstance is unique because children cannot consent to their attorneys' withdrawal, they believed that the draft did not adequately clarify the distinction between the child's and parent's situations. After discussion, members agreed to add a new first sentence to subpart (c)(4) that says, "subparts (1), (2), and (3) do not apply to attorneys for children."

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

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

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

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

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

Rule 42 (“telephonic testimony, video conferencing”). Judge Young presented this brief rule, which allows the court to permit a telephonic appearance or telephonic testimony “on the court’s own initiative or on a party’s motion.” Although the draft rule lacks details, Judge Young observed that its brevity also allows judges flexibility in applying it. A member then observed that this rule has heightened importance because of the pandemic. Two judge members noted that they now are doing their best to set timely telephonic hearings in lieu of in-person appearances, and they are developing a “new normal” for the current and quickly changing court environment. One member would prefer that the rule contain additional content that safeguards the rights of parties

in telephonic hearings. Another member had due process concerns that are inherent in a telephonic termination hearing. A member suggested that the rule include a provision that, if the court sets a telephonic hearing, a party seeking an in-person hearing could still move for one and have a fair opportunity to be heard on the motion; but the judges thought this would add even more motion hearings to their already congested calendars. Another member compared the provisions of draft Rule 42 to Family Law Rule 8; FLR 8 distinguishes evidentiary and non-evidentiary hearings and has more specificity about how to introduce documents during a telephonic hearing. The Chair suggested that members continue their conversation about telephonic hearings at future meetings as the pandemic evolves, and that meanwhile, the workgroup consider the provisions of FLR 8.

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

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

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

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

changes in a SharePoint document, and it will present a revised version of Rule 44 at a future meeting.

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

4. Report from Workgroup 4. Workgroup 4 presented two rules.

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

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

Rule 66 (“termination adjudication hearing”). Although the workgroup had not yet completed its review of the last parts of Rule 66, Professor Atwood presented the first few sections. She noted that although section (b) contains time limits for an adjudication hearing when the action is initiated by motion, there are no time limits in this rule for setting a hearing when the action is begun by petition. The workgroup believes this dichotomy conforms to statutes and court practices and it is therefore appropriate. She

reviewed provisions in sections (c) (“burden of proof”) and (d) (“burden of proof for an Indian child”). Language in section (e) (“procedure”) concerning a failure to appear, like similar language in Rule 65, is still under workgroup review. Judge Armstrong noted a need for revisions to section (g) (“social study”) to make it compatible with the Task Force’s previous adoption of Rule 3.1(d)(4). The workgroup will complete its review of Rule 66 and present it again to the Task Force.

5. Report from Workgroup 1. Ms. Beckmann led presentations on behalf of the workgroup.

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

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

Members then approved new Rule 103.

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

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

In the context of a dependency or severance proceeding, appellate courts have not expressly recognized a right to the effective assistance of counsel. Ms. Beckmann noted cases such as *John M. v. ADES*, 217 Ariz. 320 (App. 2007), which disposed of the IAC claim without recognizing the right because the appellant had not shown the likelihood of a different result had trial counsel performed diligently. She also noted more general language in other cases that sidestepped addressing the right, for example, “assuming without deciding that ineffective assistance of counsel provides a basis for reversible error in a severance proceeding;” [*Theresa F. v. DCS* (2019)]; or “for the purpose of this case, we need not determine whether Arizona recognizes ineffective assistance of counsel as a separate ground for relief...” [*Shirley R. v. DES* (2018).]

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

- During years on the bench, a Division One judge had seen only a couple IAC claims.
- Because trial counsel would not acknowledge their own ineffectiveness, the court would always need to appoint new counsel to raise these claims.
- Would a right to effective assistance of counsel extend to children's counsel? For example, would there be a remedy when counsel advocates a position contrary to the child's wishes? Would the process for hearing these claims be so protracted that the remedy would be meaningless for a child?
- Does current Rule 106 permit a self-represented party to raise IAC claims on appeal?
- Do any other jurisdictions by statute or case law recognize a right to effective counsel?
- Would it be sensible to provide a remedy for IAC in Arizona delinquency cases, where the right is more deeply rooted, without providing the remedy in dependencies and terminations?
- Would it be premature for Arizona's juvenile rules to recognize such a right in the absence of dispositive case law or a statutory amendment? Would it be going too far?

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

6. Discussion of the COVID pandemic. Judge Kreamer led the discussion. As noted previously in these minutes, trial courts have become increasingly reliant on telephonic court hearings. If the courts are going to continue in this manner, even after the pandemic, how should the juvenile rules accommodate this change? Issues involving the delinquency rules might include (references are to current rules) Rules 11 and 12 involving the appearance of counsel and the juvenile's attendance, certainly Rule 13 concerning attendance by telephone or video, Rule 18 on speedy justice, Rule 19 on public attendance, Rule 21 on victims' rights, and Rule 27 on subpoenas. Other delinquency rules and a number of dependency rules might also require modification. Would it be easier in the future for parents to appear in dependency proceedings by telephone rather than in person? Can an evidentiary hearing be done telephonically, and if so, how? How can technology be utilized to effectively provide parties their legal rights? How will social distancing requirements affect personal appearances in the courthouse? Will courtrooms need to be reconfigured? After further discussion by the Task Force, Judge Kreamer asked members to consider these issues as they continue their revisions to the juvenile rules.

7. Roadmap; call to the public; adjourn. The Chair noted that there were six workgroup meetings between the February 28 and April 3 Task Force meetings, and three workgroup meetings are scheduled for the week of April 6. She encouraged the workgroups to continue to meet. Because the Task Force is approaching the halfway

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point of its rules review, the Chair advised that she might soon convene the editorial group to begin its examination and editing of the draft rules. The next Task Force meeting is set for May 8, 2020, but this date is still tentative, and it might need to be reset. The subsequent Task Force meeting, on June 12, conflicted with the State Bar's annual convention, but it appears the convention will be postponed, and the Task Force will proceed with its previously scheduled June 12 meeting date.

There was no response to a call to the public.

The meeting adjourned at 3:52 p.m.