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THE LAWYER'S LENS
IT'S MORE THAN JUST A HEADLINE!
July 1, 2019 to September 15, 2020

Submitted by: Kathleen A. McCarthy, J.D.
THE McCARTHY LAW FIRM

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kathleen@kathleenmccarthylaw.com

COVID-19 NEWS AND RULES

1. **Administrative Orders.**

   a. **Arizona Supreme Court.** The most current version is Arizona Supreme Court Administrative Order No. **2020-143** , which replaced AO 2020-114 (Appendix).

   b. **Pima County.** The most current version is **AO 2020-43**, which replaces AO 2020-41 (Appendix). See Judge Sakall's materials, which summarize the protocols of the Family Law Bench which he anticipates will be in effect through at least October 31, 2020.

   c. **Maricopa County**. The most current version relating to family law is AO 2020-078, restricting physical access to the court.

2. **ARFLP Rules 47 and 48 motions can be filed without an underlying petition if the basis for temporary relief is Covid-19 related.** Admin. Order No. 2020-59 issued by the Arizona Supreme Court on April 3, 2020. A party seeking orders for temporary relief related to or arising primarily from COVID-19 issues does not need to file an underlying petition to modify the long-term parenting plan or child support orders.

3. **In-person parent education programs suspended in Maricopa and Pima Counties.** Parents have authority to complete the parent education online through: positiveparentingthroughdivorce.com or parentingchoice.com. Permission for on-line classes is not required. Parents must file the certificate of completion and they can request a refund through the Clerk's office for any pre-paid in-person class.

4. **Conciliation Court's On-Demand Platform**. The Pima County Conciliation Court's grant application to move parent education to an on-demand platform was approved for FY 2021, pending the availability of appropriations, through the State Justice Institute.

5. **MAP Coaching Sessions.** Need personal or professional support? Join bi-weekly MAP Coaching Sessions. Need more support? Confidential peer support volunteers are standing by. Match yourself or call 602.340.7334.

6. **Latest Coronavirus updates.** COVID - 19 Information Center. They post the most current updates, coronavirus developments, public health recommendations and resources as well as operations at the State Bar and Arizona Courts.

7. **ARFLP Rule 44 for defaults amended effective January 1, 2021.** Judge Bruce Cohen petitioned for this Rule. See his explanatory email in the Appendix and his power point presentation.

8. **Notary requirement for legal filings under ARLFP Rule 14.a. suspended as of April 3, 2020.**

Only ARFLP 14.a. documents normally need to be notarized. Those include an acceptance of service; affidavit in support of application for default decree; a consent decree under Rule 45 and a stipulation that substantially changes parenting time or legal decision making (unless entered into in open court or through conciliation court). This requirement has been **SUSPENDED.** Now all you have to do is file a protected address copy of a driver's license or other government issued identification card with the signed filing. ***Admin. Order No. 2020-59 issued by the Arizona Supreme Court on April 3, 2020.*** http://www.azcourts.gov/Portals/22/admorder/Orders20/2020-59.pdf?ver=2020-04-03-102602-800&fbclid=IwAR2eYuoDnji4xAZXt5z7JnOK8884duTYDyYzcQIPPRYN9-VcH5dD_5H42O4

[**Editor's Tip:** Just FYI, under ARFLP Rule 14.b., any other rule that requires a verification is satisfied with an Unsworn Declaration.] Here is the form:

I declare under penalty of perjury that everything set forth in this Stipulation is true and correct and agreed to by me.

Dated: _____ Dated: _____

_____ _____

NAME NAME

9. **On-line Orders of Protection. (AZPOINT)**. Hearings on OOPs are telephonic. More information for Pimna County is available at https://www.sc.pima.gov/Portals/0/Library/OOP_info_COVID_19b.pdf?no-cache. Contested hearings are being addressed (whether telephonic or in-person) on a case-by-case basis.

CHILDREN'S ISSUES

LEGAL DECISION MAKING

10. ***Nicaise*** and ***In Re Paul:*** All 100 pages plus of these various decisions boil down to these three points:

(1) If one parent has sole, that parent is in charge free of court and interference from other party interference unless the sole parent is doing something dangerous; even then the court restriction has to be specifically and narrowly tailored to prevent the danger.

(2) If both parents have joint and cannot agree, then the court can make the decision based on the children's best interests. Neither parent is entitled to deference. **THERE HAS BEEN CONFUSION** about whether this means the judge can decide **school choice** in a joint parenting dispute. It can. The confusion comes because that issue was not appealed to the Arizona Supreme Court– it apparently was moot by the time of the appeal. However, ***Paul E.*** addressed it squarely:

"Thus, if the court awards joint legal decision-making authority, the court is authorized to resolve any conflict. The court is not limited to merely vesting one parent with sole legal decision-making authority on the disputed issue, and we disapprove of the contrary view in ***Nicaise I.***" **Paragraph 27.**

"The court is also authorized to intervene when parents cannot agree on childrearing decisions to be included in a parenting plan. See A.R.S. §25-403.02(C)(2) (permitting a parenting plan to address any issue and requiring a description of 'each parent's rights and responsibilities for the personal care of the child and for decisions in areas such as education, health care and religious training'). When an impasse occurs, the court is authorized to determine not only the parenting plan element in dispute, but also 'other factors that are necessary to promote and protect the emotional and physical health of the child.' §25-403.02 (D); see also ***Jordan v. Rea,*** 221 Ariz. 581, 589 (App. 2009) (concluding that

former, identical version of §25-403.02(D) authorized the family court to apply best-interest standard to resolve parents' disagreement about which school children should attend.)" Paragraph 26.

(3) If both parents have joint and one has final say and they cannot agree, then the court can make the decision based on the children's best interests, but must give deference to the final say parent's wishes as they are superior to the other parent's wishes.

There you have it and now maybe we can lay the confusion and controversy created during this two year saga to a much deserved rest.

PARENTING TIME

11. **APPLYING COVID PARENTING GUIDELINES: See Appendix.**

12. **THE COURT IS NOT REQUIRED TO EQUALLY DIVIDE PARENTING TIME ABSENT A FINDING OF UNFITNESS OR ENDANGERMENT; THERE IS NO STATUTORY PRESUMPTION OF EQUAL PARENTING TIME**

Father and Mother shared equal parenting time and joint legal decision making pursuant to a 2015 Consent Decree. No child support was ordered. In November 2017, Mother requested a modification of the parenting and child support orders. Mother alleged that Father had abused drugs and emotionally and verbally abused the children. Mother also requested a court order for Father to undergo drug testing. Father's hair follicle test was negative; however, the CAA submitted a report recommending that Mother be designated as primary residential parent; that Father take a parenting skills course; and both parents enroll in a high conflict resolution class. CAA expressed concern about Father's lack of engagement with the children and his sensitivity to their needs. Additionally, Father allowed his negative feelings towards Mother to interfere with his ability to co-parent. After an evidentiary hearing, the Court made relevant best-interests findings under §25-403(A), designated Mother as primary residential parent and reduced Father's time to alternating weekends and some vacation time. Father's appeal was denied. Here's the reasoning:

- A.R.S. §§ 25-403.02, 25-103(B)(1), and 25-411(J) do not require the family court to equally divide parenting time absent a finding of parental unfitness or endangerment. Though as a general rule equal or near-equal parenting time is presumed to be in a child's best interests, the family court

has discretion to determine parenting time based on all the evidence before it.

- The Court of Appeals rejected Father's contention that A.R.S. § 25-411(J) permits the family court to reduce a parent's allotted time with a child only if it finds that "parenting time would endanger" the child. The statutory limitation on the courts power does not apply to a diminution in parenting time, but refers to the court's power to place conditions on how a parent may exercise his or her "parenting time rights," such as by limiting the manner that parenting time is exercised. ***Gonzalez-Gunter v. Gunter***, No. 1 CA-CV 19-0165FC, filed July 23, 2020.

[**Editor's Note**: For a complete history of the case law and statutes (not necessarily addressed by the ***Gunter*** Court), which also support this conclusion, see the Appendix– *"Tsunami or Shifting Sands"* article]

ESTABLISHMENT OR MODIFICATION OF PARENTING TIME

13. *DELUNA:* ANY ACT OF DOMESTIC VIOLENCE CREATES REBUTTABLE PRESUMPTION AGAINST PARENTING TIME, WHICH MUST BE REBUTTED BY SPECIFIC EVIDENCE AND § 25-403.03(E) FACTORS

Trial court awarded joint legal decision making and unsupervised parenting time to Father. The court found that Father had committed domestic violence, but not "significant domestic violence". Mother appealed, contending that the trial court did not correctly apply A.R.S. § 25-403.03. Division One reversed. It held that a finding that domestic violence occurred, but was not "significant" requires additional analysis. Under A.R.S. § 25-403.03(D), *any act* of domestic violence requires the court to apply a rebuttable presumption that it is contrary to the children's best interests to award sole or joint legal decision-making authority to the offending parent. To rebut that presumption, the trial court must then make specific findings based on evidence in the record, and considering the factors in § 25-403.03(E). ***DeLuna v. Petito***, No. 1 CA-CV 18-0631 FC, 2019 WL 4197236 (Div. 1, 9/5/19).

PATERNITY

14. VOLUNTARY ACKNOWLEDGMENT OF PATERNITY HAS SAME FORCE AND EFFECT AS A COURT JUDGMENT; IT TRUMPS ALL OTHER PATERNITY PRESUMPTIONS IDENTIFIED IN A.R.S. §25-812(A)

In January 2016, Father voluntarily acknowledged paternity of Child. Both parents signed a form issued by ADES entitled "Acknowledgment of Paternity" ("Acknowledgment") that identified the Voluntary Father as Child's Father, it was submitted to ADES. ADES then amended the Child's birth certificate to reflect Voluntary Father s the Child's father and to change Child's last name.

In October 2017, Mother filed a paternity petition to establish another man, "Hufford", as the child's biological father and she asked for child support and parenting orders. Genetic testing confirmed that Hufford was the Child's biological father. Hufford moved for summary judgment arguing that Mother was precluded from filing a paternity claim against him because Child already had a legal father. Mother asked the court to set aside the Acknowledgment on the grounds of fraud and apply a presumption of paternity in favor of Hufford based on the genetic test results. The trial Court granted Hufford's motion. On Appeal, Division One affirmed the trial court. In doing so the Court reconciled A.R.S. §25-812 (the statute that provides for an Acknowledgment of Paternity) and §25-814 (the statute that sets out the presumptions of paternity) as follows:

- §25-812 (D) provides that an Acknowledgment has the same force and effect as a superior court judgment.

- One of the presumptions for paternity under §25-814(A)(2) is genetic testing establishing 95% or more probability of paternity. Another presumption for paternity under A.R.S. §25-814(4) is an Acknowledgment. Any presumption shall be rebutted by clear and convincing evidence. If two or more contradictory presumptions apply, the presumption that the court uses, on the facts, is based on weightier considerations of policy and logic will control.... Mother argued that Hufford had not rebutted by clear and convincing evidence the presumption of paternity based on the genetic test and, therefore, it should trump the Acknowledgment.

- The goal of statutory interpretation is to effectuate the legislature's intent. The best indicator of that is the statute's plain language. When statutes related to the same subject or have the same general purpose, they should be read together as one law.

- Any uncertainty about the effect of an Acknowledgment is resolved by the legislature's directive that "a court decree establishing paternity of the child by another man rebuts the presumption." A.R.S. §25-814. C. Because an Acknowledgment has the same force and effect as a superior court judgment, it qualifies as a court decree establishing paternity for the purposes of §25-814. C. Accordingly, the legislature unambiguously expressed a preference for finality in paternity determinations that trumps any weighty considerations of policy and logic.

- Mere presumptions of paternity contained in A.R.S. §25-814 are subordinate to the voluntary establishment of paternity governed by §25-812.

- The above interpretation does not make §25-814(A) meaningless. The mere execution of an Acknowledgment does not create a judgment; the Acknowledgment must be filed with the state- through the clerk of the superior court, ADES or ADHS– before it establishes paternity with the same force and effect as a court order.

- An Acknowledgment is presumed valid and binding unless proven otherwise. Once the 60 day period to rescind an acknowledgment of paternity has expired under §25-812(H)(1), an Acknowledgment may be challenged only on the basis of fraud, duress or material mistake of fact. ARFLP Rule 85(b). The challenger bears the burden of proof. Such relief is never available to someone who has knowingly participated in the fraud, which Mother perpetrated.

- The Mother and Voluntary Father cannot simply stipulate to rescind the Acknowledgment. §25-812(H) specifically limits the time for rescission.

- Although §25-812(E) directs genetic testing and requires an Acknowledgment be vacated if the court finds by clear and convincing evidence that the genetic tests demonstrate that the Voluntary Father is not the biological parent, the statute's provisions must be read together. By its plain language, §25-812(E) requires genetic testing only **after** the court

finds that a party has shown fraud, duress or material mistake of fact sufficient to upset the Acknowledgment. ***McQuillen v. Hufford***, FC 2017-096669, Division One, April 30, 2020.

[**Editor's Note**: Under this same logic, Voluntary Father would not be precluded from challenging an Acknowledgment for fraud as he did not participate in the fraud. One would think that he would be an indispensable or necessary party. However, there is no explanation of Voluntary Father's role in this proceeding. Presumably, he was not challenging his status.]

[**Second Editor's Note:** Had the court found fraud, then presumably genetic testing would be a viable presumption which must be weighed against the Acknowledgment presumption. A.R.S. §25-814(C) states that if two or more presumptions apply, the presumption that the court uses, on the facts, is based on weightier considerations of policy and logic will control.]

15. **WHERE THERE ARE TWO COMPETING PATERNITY PRESUMPTIONS, THE COURT MUST CHOOSE ONE BASED ON THE WEIGHTIER CONSIDERATIONS OF POLICY AND LOGIC; EQUITABLE ESTOPPEL CAN PRECLUDE A PARENT FROM ESTABLISHING A PRESUMPTION; BIOLOGICAL FATHER DID NOT AUTOMATICALLY ESTABLISH HIS PARENTAL RIGHTS; RATHER, HE WAS REQUIRED TO TAKE LEGAL STEPS TO ESTABLISH A PARENT-CHILD RELATIONSHIP BEFORE HE WOULD BE ENTITLED TO CONSTITUTIONALLY PROTECTED PARENTAL RIGHTS**

Bio Father (Ray) donated his sperm to Bio-mother (Giovanah) and her then girl-friend (Dominique). The parties had an oral agreement that Ray would not have any parental rights and he would not be required to pay child support. Giovanah and Dominique married in January 2016. Giovanah gave birth in April 2016. Dominique was named on the birth certificate as the second parent. In the meantime, Dominique and Giovanah lost contact with Ray; Giovanah was incarcerated; and Dominique became the sole caregiver. In May of 2017, Dominique and Giovanah had a falling out and Dominique resumed extensive contact with Ray, who pledged to help Dominique maintain her parental rights. In January 2018, Ray obtained a DNA blood draw from the child without Dominique's knowledge. He also reported Dominique to DCS, and those allegations were dismissed. That was the end of the Ray/Dominique liaison. Ray then filed for paternity, legal decision making, parenting time, and child support. After a hearing, the court denied Ray's legal parentage claim based on a genetic presumption. Ray appealed. These are the take-home points:

- There are four presumptions of parenthood under A.R.S. §25-814 (A): (1) marriage within ten months of birth (marital presumption); (2) genetic testing; (3) birth certificate signed by mother and father of a child born out of wedlock; and, (4) an Acknowledgment.

- Dominique established the **marital presumption** (relying on the ***McLaughlin*** case– the presumption of paternity statute applies to same sex marriages). This marital presumption applies even where the child is conceived by artificial insemination as the legislature has not carved out an exception and the court cannot presume limitations that the legislature did not expressly state.

- Ray established the **genetic presumption** under §25-814(A) (2). Constitutionally, the genetic-testing presumption does not trump the marital presumption. Rather, parents with an existing parental relationship, either in fact or law, are entitled to the highest constitutional protection. A putative bio-father, however, must ***first*** take steps to ***establish*** a parent-child relationship before being accorded that protection. A bio-father who is not married to the bio-mother has no immediate right to custody or duty of support unless paternity is judicially established. Accordingly, the court did not sever Ray's parental rights– he just failed to establish them in the first place.

- There is no hierarchy of presumptions. A.R.S. §25-814(C). If two or more presumptions apply, the court determines the issue based on weightier considerations of policy and logic.

- The trial court found that because both Giovanah and Dominique both expressed a desire to raise the child together as married couple, as well as to work on their marriage, public policy favored giving additional weight to the marital presumption. Despite Ray's financial stability, Dominique had always provided a portion of the financial support, aspired to increase her education to better provide for the child in the future, and both mothers had supportive families. Nor was it realistic to expect the parties to co-parent as they had never been a family unit and had no commonality or relationship. It was, therefore, in the best interests of the child that the marital presumption control because it would permit Dominique, the "parent with the strongest history with the child," to have parental rights.

- §25-814 (C) does not expressly require a best interests finding as is required by 25-403. Insofar as the court denied Ray's claim for paternity, §25-403 was not implicated.

- ***Equitable estoppel*** precludes a party from asserting a right inconsistent with a position previously taken to the prejudice of another acting thereon. It requires: (1) conduct that induces another to believe in certain material facts, (2) acts resulting in justifiable reliance on the inducement, and (3) injury caused by the resulting acts. Nothing prohibits Arizona courts from applying equitable estoppel to preclude the rebuttal of a statutory paternity presumption under 25-814(A). The trial court correctly decided that Ray was barred by equitable estoppel from asserting parental rights. He agreed to donate the sperm with the understanding he would not have any parental rights; he took no action to assert parental rights until more than two years after the child's birth; he took no action to find or contact Giovanah on his own after December 30, 2015; he did not register on the Arizona Putative Father's Registration; and he did not provide any child support. Both Dominique and Giovanah relied profoundly on their understanding that they were the child's parents, not Ray. If Ray were not precluded from repudiating his prior position, "Dominique will suffer injury by losing her position as a parent and her claim to legal decision-making and parenting time."

- There is no "opt-in" requirement (that a bio-father establish his rights by written agreement) and the court did not impose one. However, Ray's status as the biological father did not **automatically** establish his parental rights. He was required to take legal steps to establish a parent-child relationship before he would be entitled to constitutionally protected parental rights, citing ***Pima County,*** No. S-114487, 179 Ariz. at 94. ***Doherty v. Leon and Leon***, No. 2 CA-CV 2019-0124 -FC, Filed July 28, 2020.

16. FAILURE TO INITIATE PATERNITY PROCEEDINGS WITHIN THIRTY DAYS OF A NOTICE OF ADOPTION PRECLUDES FATHER'S RIGHTS

The court terminated the parental rights of a potential and putative father to a minor child. The court correctly denied his request to be heard at or otherwise participate in the best-interests portion of the termination hearing because he failed to initiate paternity proceedings within 30 days of receiving notice of a planned adoption as is required by A.R.S. §§ 8-106(G)(7) and 8-106.01(G). Because of the putative father's

failure to comply with this statutorily mandated process, his interests are as a putative and potential father, not the more expansive rights of an actual father. ***Richard M. v. Patrick M. et al.*** No. 1 CA-JV 19-0288, filed April 2, 2020.

> **[Practice Tip**: If ***In Re Mother Goose*** was not a big enough lesson, this should drive the point home. There are strict time limits on initiating paternity proceedings and on registering with the Child Registry.]

FROZEN EMBRYOS

17. ARIZONA SUPREME COURT: *TERRELL V. TORRES*. COURT MUST INTERPRET A CONTRACT REGARDING DISPOSITION OF FROZEN EMBRYOS ACCORDING TO ITS PLAIN MEANING (THIS CASE WAS DECIDED ON PRINCIPLES BEFORE THE NEW STATUTE WAS EFFECTIVE)

Divorcing couple had entered into an agreement directing the disposition of frozen embryos should the couple divorce. The Agreement the couple signed required that the embryos be treated as joint property and joint consent would be required for their use and disposition. A note warned that any embryos produced could not be used to produce a pregnancy over the other partner's objection. In the event of a divorce, both parties would have to give express, written consent, before one could use the embryos to achieve a pregnancy. In the divorce, Mother wanted to be awarded the embryos so that she could have children. Father objected because he did not want children. The trial court interpreted the Agreement as requiring the court to take a balancing of interests approach. It concluded that the Father's right not to be compelled to be a parent outweighed Mother's right to procreate and have a biologically related child.

On Appeal, Division One vacated the trial court's disposition and directed the court to award them to Mother. The court interpreted the Agreement as providing the parties' consent for a court to use its discretion to make a decision. It agreed with the trial court that a court should balance the parties' interests, but concluded that the trial court had improperly balanced their interests. ***Terrell v. Torres*****,** 438 P.3d 681 (Div. 1, 6/6/19).

The Arizona Supreme Court held that this was a matter of contract interpretation and that the courts have traditionally enforced contracts between divorcing couples over property. The interpretation of the contract is reviewed de novo. Using plain contract interpretation principles, the Supreme Court concluded that the Agreement required the parties to donate the embryos absent a contemporaneous agreement for use by one of them. It particularly focused on the Note. Because the parties did not produce a

settlement agreement directing disposition of the embryos, the Agreement required the family court to interpret the contract. The Supreme Court found that the Agreement unambiguously requires one party's express, contemporaneous permission before the other can use the embryos to achieve a pregnancy after divorce. The Court affirmed the trial court's order directing donation of the embryos. ***Terrell v. Torres,*** No. CV-19-0106 PR, filed January 23, 2020, amended February 21, 2020.

[**Editor's Note:** Arizona's new frozen embryo statute requires the award of in vitro human embryos to the spouse who intends to allow them to develop to birth; however, it only applies to married couples in proceeding for dissolution of marriage or legal separation.]

RELOCATION CASES

18. *WOYTON:* RELOCATION CASES REQUIRE ANALYSIS OF A.R.S. § 25-408(I) BEST INTEREST FACTORS – NOT JUST A.R.S. §25-403 FACTORS, EVEN WHERE ONE PARENT HAS MOVED OUT OF STATE AND THERE IS NO PRIOR CUSTODY ORDER OR PARENTING PLAN.

In early June 2017, Mother left Arizona for Massachusetts with the child without Father's consent. Two days later, Father filed a petition for legal separation and motion for emergency temporary orders without notice. Based on the filing, the Court awarded Father sole legal decision-making and primary parenting time with supervised visitation in Mother on a temporary basis. Armed with a custody warrant, Father traveled to Massachusetts, where law enforcement took custody of the child and the court later released her to Father's care. Mother than filed a Petition for Dissolution in Arizona and challenged temporary orders. After a hearing, the Court granted the parties joint legal decision-making with Father as temporary primary residential parent in Arizona and Mother was awarded additional parenting time. After a divorce trial, the court awarded the parties joint legal decision making and Mother (still living in Boston) was to be the child's primary residential parent. Father appealed and argued that because this was a relocation case, the Court had a duty to consider the best interest and other factors contained in ARS §25-4089(I) (the relocation statute) even where one party has already moved and there are no prior parenting or decision making orders. Division 1 agreed and reversed, reasoning as follows:

- It first recited the law with respect to an equal parenting time presumption. The Court is to determine parenting time in accordance with the best interests of the child. A.R.S. § 25-403(A). The Court must also adopt a parenting plan that maximizes the parents' respective parenting time. A.R.S.

§ 25-403.02(B). As a general rule equal or near-equal parenting time is presumed to be in the child's best interests (***Matter of Appeal in Maricopa Cty. Juvenile Action No. JD-4974***, 163 Ariz. 60, 62, 785 P.2d 1248, 1250 (App. 1990) ("A father has a right to co-equal custody of his child, but not exclusive custody absent a court order to that effect). The Court may not apply a presumption against equal parenting time. ***Barron v. Barron***, ***infra.*** Equal parenting time, however, may not always be possible, particularly when the parties live in different states or are separated by a considerable distance.

- In ***Buencamino v. Noftsinger***, 221 P.3d 41, 42 (App. 2009), the court held that compliance with A.R.S. § 25-408(I) is not required unless §25-408(A)'s conditions are met that: (1) the parents have a written agreement or pre-existing order about legal decision-making or parenting time; *and* (2) both parties reside in the state. If these conditions are not met, the Court does have a duty to consider the best interest factors of A.R.S. § 25-408(I), but it may choose to do so where appropriate.

- Division 1, however, found that ***Buencamino*** limited A.R.S. § 25-408's application based on the language in A.R.S. § 25-408(A) which requires notice prior to relocation if there is a court order or written agreement entitling the parents to joint legal decision making or parenting time and both parties reside in the state. However, by its terms, this subsection does not limit the court's authority to determine relocation issues or define what constitutes a relocation under A.R.S. § 25-408, citing ***Berrier v. Rountree, infra.*** Rather A.R.S. § 25-408(A)'s condition that both parties reside in the same state only describes the circumstances under which a party must give *notice* before effecting certain types of relocations. Thus the court may resolve relocation issues regardless of whether both parents reside in the state or have pre-existing orders or agreement.

- A.R.S. § 25-408 puts the burden of proof on the relocating parent to prove that relocation is in the child's best interests. Here the trial court considered best interest factors under A.R.S. § 25-403, but did not apply all of the factors in A.R.S. § 25-408(I) nor did it require Mother to prove relocation was in the child's best interests.

- The court erred to the extent it relied on Mother's role as the child's primary caregiver during the marriage to determine that she should be the primary residential parent after the entry of the divorce decree. See ***Barron***

I, 443 P.3d at 983).

- Rule 48 governs the procedure for hearings on temporary orders entered without notice. There are no disclosure requirements.

- Letter from Mother's physician was not inadmissible hearsay because Father had not requested strict compliance with the Rules of Evidence.

- Child care costs must be supported by evidence to be considered in a child support calculation.
  Woyton v. Ward, No. 1 CA-CV 18-0677 FC, 2019 WL 5445823 (Div. 1, 10/24/2019).

[Editor's Note: Those who forego strict compliance with the Rules of Evidence do so at their own risk! The Court of Appeals found that a letter from Mother's physician was not inadmissible hearsay "because hearsay is not barred in family court proceedings unless a party requests strict compliance with the Rules of Evidence", citing ARFLP 2(b)(1). Also, note that the Court's reliance upon ***Maricopa County Juvenile Action,*** 163 Ariz 60 (Div. 1, 1990) for it's finding that there is a presumption of equal parenting time is wholly misplaced. ***Maricopa*** involved a paternity action where parentage had been established, but there was **no custody order in place.** ***Maricopa*** stands only for the principle that *until* a custody order is in place, then neither parent's rights are superior to the other. "A father has a "right to co-equal custody of his child, but not exclusive custody **absent a court order** to that effect" (***State v. Donahue,*** 140, Ariz. 55, App. 1984. In domestic relations cases the parents, post dissolution and **absent an order awarding custody,** have co-equal custody. ***Campbell v. Campbell,*** 126 Ariz. 558 (App. 1980).

19. COURT MUST CONSIDER RELOCATION STATUTE FACTORS BEFORE ISSUING TEMPORARY ORDERS PERMITTING RELOCATION; WRITTEN FINDINGS REGARDING EACH FACTOR IS UNNECESSARY IN A TEMPORARY ORDERS HEARING

Child was born in July 2019. On December 2, 2019, Mother left Arizona with the child to visit her family in Ohio. Mother failed to return on her scheduled return date of December 10, claiming she needed more time with her family. Six days later, Father filed an emergency motion for temporary orders and asked the court to grant him sole legal decision making authority and to be designated at the primary parent. The court granted the emergency motion and scheduled a hearing for December 30th. At that hearing, the

parents agreed to equally divide parenting time and share joint decision-making until February 14th, the date of the next court hearing. On January 10, however, Mother petitioned for relocation. After the hearing, the court granted mother sole legal decision-making authority, named her as the primary residential parent, authorized her relocation to Ohio and granted Father up to three days of parenting time in Ohio. The court also found that Father made material misrepresentations to the Court. Although the court considered §25-403 (best interest factors), it did not mention or expressly consider the factors in §25-408(I). Father appealed.

Citing ***Woyton***, Division 1 held that the court must consider the factors set forth in §25-408(I) whenever it authorizes relocation. Because of the nature and sheer volume of temporary orders on which the family division rules, however, the court need not make detailed findings. Accordingly, the Court vacated and remanded, noting that Mother has the burden of proof to show that relocation is in the child's best interests.

Layne v. LaBianca, 1 CA-SA 20-0032, Filed June 23, 2020.

CHILD SUPPORT AND SPOUSAL MAINTENANCE

20. COURT MAY ORDER POST-MORTEM SPOUSAL MAINTENANCE

Husband requested the Court to terminate or modify the Decree ordered medical-insurance spousal maintenance. After an evidentiary hearing, the court entered an order that modified the maintenance to expire when Wife was eligible for Medicare coverage at 65. The court also ordered the insurance payments to be paid from Husband's estate in the event of his death. Husband appealed, contending that (1) the medical insurance requirement was a contractual obligation, not a support order; (2) the court had no authority to order post-mortem spousal maintenance. Division One quickly dispatched the first argument re medical insurance because of Husband's own petition characterized it as a spousal maintenance obligation.

As for post-mortem spousal maintenance, the Court held it was well within the Court's authority under A.R.S. 25-327(B). "*Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated on the death of either party or the remarriage of the party receiving maintenance*. Here the court "expressly provided" that the obligation was to continue post-mortem. This statement satisfies the requirement for "express" language "relating to termination, to the effect that the spousal maintenance obligation will not cease upon the death of the obligor. The plain text of the statute warrants this conclusion."

The statute is in the disjunctive. Maintenance terminates unless it is otherwise (1) "Agreed in writing" **OR** (2) "expressly provided in the decree". The latter expression refers to the powers of the court. A decree of dissolution is a judgment or an *act of a court* which fixes clearly the rights and liabilities of the respective parties (citing ***Zale***). This authority also applies to a modification hearing. Decrees remain subject to the court's continuing jurisdiction to modify support. Division 1 was also persuaded by the commentary to the Uniform Marriage and Divorce Act §316(b) (which the legislature adopted wholesale when it enacted A.R.S. §24-327(B) in 1973), which endorsed this approach. ***Garlan v. Garlan*** No. 1 CA-CV 19-0245 FC, Filed June 18, 2020.

[**Practice Tip**: Post-mortem spousal maintenance can be especially useful in May-December marriages where parties may have been married a long time, but given the age of the payor, any maintenance order could have a short shelf life.]

21. PRACTICE TIP ON RETROACTIVE DATES FOR MODIFICATION

Some of you may be having difficulties with effectuating timely service. Remember that modifications and terminations of support are effective on the first day of the first month following **notice** of the petition for modification or termination unless the court, for good cause, orders the change to be effective at a different date, but not earlier than the date of filing. **PLEASE NOTE:** the retroactive date is dependent on **NOTICE,** not **SERVICE.**

22. HOW THE PANDEMIC HAS CHANGED FINANCIAL AFFIDAVITS AND MAINTENANCE

See The Honorable Bruce Cohen's materials and seminar discussion. A lot of the expenses that may have been part of the marital lifestyle may not currently exist. In many cases, earnings have been reduced but the extent, duration, and voluntariness of such reduction may be in issue.

23. MEMORANDUM DECISION: PAYEE NOT REQUIRED TO USE RETIREMENT PRINCIPAL TO SUPPORT SELF BEFORE REACHING RETIREMENT AGE; HOWEVER, THE COURT MUST CONSIDER INCOME FROM THE ACCOUNT, IF APPROPRIATE, AND NOT REQUIRED FOR FUTURE SAVINGS.

The court need not require Wife to use the principal in her retirement account to support herself before reaching retirement age. See ***Gutierrez***,193Ariz. at 348, ¶ 18. The court must, however, consider "all property capable of providing for the reasonable

need of the spouse seeking maintenance." ***Deatherage***,140 Ariz. at 320. ***Lane v. Lane,*** No. 1 CA-CV 18-0165 FC, Division One, March 12, 2020.

PROPERTY AND DEBTS

24. SEVERANCE PAY EARNED DURING THE MARRIAGE IS COMMUNITY PROPERTY

Husband received $38,750 in a negotiated severance pay package. The severance pay was community because Husband's employment began and ended during the marriage and community labor was expended in the acquisition of his severance package. When community labor is expended in the acquisition of a future severance package, the community is entitled to a share of the severance, even if the severance was negotiated and paid after a petition for dissolution is filed. ***Bowser v. Nguyen***, No. 1 CA-CV 19-0217FC, Filed 7/16/20.

25. IF PROPERTY IS PURCHASED AFTER MARRIAGE WITH COMMUNITY FUNDS AND THE COMMUNITY MAKES ALL THE PAYMENTS THEREAFTER, IT HAS A LIEN FOR 100% OF THE INCREASE IN VALUE OF PROPERTY AFTER MARRIAGE PLUS 100% OF COMMUNITY CONTRIBUTIONS, EVEN IF A DISCLAIMER DEED WAS SIGNED

Husband and Wife purchased a home after marriage with community funds for $235,000. However, Husband obtained the mortgage in his name alone and took title to the property as his separate property because of Wife's credit issues. Wife signed a Disclaimer Deed. Notwithstanding the titling, the community paid all of the mortgage and other expenses of the property. Husband sold the property prior to trial for $284,999. At the divorce trial, Wife argued that Husband had committed fraud because he promised to put her name on the title and she would not have signed the deed had she known doing so gave up her rights to the home. The family court ruled that the home was Husband's separate property (implicitly rejecting Wife's fraud argument), but imposed an equitable lien for principal payments the community made on the mortgage **($13,272).** Applying ***Drahos,*** the court credited the community with a portion of the increased value in the property based on the contributions to principal and the community's proportional interest in the appreciation for a total of **$16,095.78.** Wife appealed. Division One affirmed the finding of separate property, but reversed on the amount of the community lien. It's reasoning was as follows:

- **Separate property finding**. Property acquired during marriage is presumed to be community property which requires a party asserting as separate property interest to prove it by clear and convincing evidence. However a signed disclaimer deed does provide such proof and, absent fraud or mistake, rebuts the community presumption. ***Bell-Kilbourn***, 216 Ariz. at 524. The party attempting to nullify the effect of a disclaimer deed has to show by clear and convincing evidence that the deed was the result of fraud or mistake. ***Powers v. Guaranty RV Inc***., 229 Ariz. 555 (App. 2012). Although the trial court did not make an express finding on Wife's fraud allegation, it was unnecessary because Wife did not make a request for findings. Wife had also pled in her dissolution petition that Husband should keep the home and the loan.

- **Amount of the Lien**. Under ***Drahos*** and related cases, the amount of a community lien on real property reflects not just the amount of community funds expended, but also apportions the increase in value as between community and separate contributions. But ***Drahos*** calculated the lien on a **pre-marital** separate asset on which both separate and community funds had been expended. It is improper to apply that formula where the property was acquired **after marriage** and paid for solely with community funds. Under these circumstances, **ALL** appreciation in value and the resulting increase in equity is fully attributable to the community. The net result is that the community gets full credit for payments that were the sole driving force building equity in the separate asset; but the spouse who hold title retains title to the property. The net effect was that the community was entitled to the full appreciation of $49,999 plus the reductions to principal of $13,272 for a total lien of **$63, 271**).
Femiano v. Maust, no. 1 CA-CV 18-0582 FC, Filed April 23, 2020.

  [**Editor's Note:** Disclaimer deeds for property acquired after marriage in one party's name due to credit or other issues are a common occurrence. Does this mean that the "disclaimee" wins the battle of title, but loses the war? If so, why bother to mount a fraud or other such fact intensive claim when you can achieve the same result simply by applying this case where the community gets all of the benefits of its contributions and the appreciation in value?]

  [**Second Editor's Note**: Always ask for findings of fact and conclusions of law– ***before*** the trial.]

[Third Editor's Note: If you plead fraud, make sure you plead all elements. List the issue in your pre-trial statement and then actually prove it at trial.]

[**Fourth Editor's Note:** The preliminary injunction does not preclude a party from selling separate property prior to trial even one that has community lien asserted against it. But the non-owning party should be sure to ask the Court to sequester the proceeds until the issue can be resolved.]

[**Fifth Editor's Note**: Reagan Kulseth suggested that this is actually a pretty narrow holding. After all, we don't know whether the language in that particular disclaimer deed that the disclaiming party forever disclaimed their interest, even future interests and she refers to ***Bell-Kilbourn*** (married couples are free to determine the status of their property, and the disclaimer deed constitutes a binding contract that must be enforced in the absence of fraud or mistake. 216 Ariz. at 524.) Her comment gives rise to a practice tip. If you are preparing the disclaimer deed, make sure you include a disclaimer of all future interests. However, it is good to remember that in ***Bell-Kilbourn***, the Court went out of its way to point out that no community funds had been used with respect to the property. That left an opening for the Court's decision in ***Femiano*** where only community funds had been used. Is this a distinction that Courts will now make regardless of whether there is a disclaimer deed?)

26. TRIAL COURT MUST ACTUALLY DIVIDE PROPERTY UPON DISSOLUTION OF MARRIAGE; IT CANNOT ORDER PARTIES TO HOLD PROPERTY TOGETHER; SPECIAL ACTION MAY ALSO BE ACCEPTED WHEN THE TRIAL COURT'S DECISION CANNOT BE JUSTIFIED UNDER ANY RULE OF LAW

The trial court refused to divide the community's interest in their two homes, but (citing best interests of the parties' six children) ordered the parties to own the properties as joint tenants with rights of survivorship for six years. Father was granted exclusive use of the rental property and Mother was granted exclusive use of the marital residence. Father wanted the court to order both properties to be immediately sold and the net proceeds divided. Mother wanted to remain in the residence, but offered no evidence that she could refinance the home and pay Father his share of the equity. Father filed a Request to Alter/Amend, which was denied. Father then filed a Special Action.

The Court of Appeals noted that jurisdiction over Special Action review is generally appropriate when there is no equally plain, speedy, and adequate remedy by appeal; however, it is also frequently accepted when **under no rule of law can a trial court's actions be justified.**

A.R.S. §25-318 directs the court to divide the community and jointly held property equitably upon dissolution of their marriage; a substantially equal division is not required if "sound reason exists to divide the property otherwise" ***Toth v. Toth***, 190 Ariz. 218, 221 (1997). In arriving at an equitable distribution of property, this statute requires the court to consider certain enumerated factors. A.R.S. §25-318(B)- (C). The court may also consider non-enumerated factors including the source of funds and other equitable factors. ***Toth***. Regardless, the court **must** divide any community property at dissolution. See also ***Koelsch v. Koelsch***, 148 Ariz. 176, 181 (1986) (when the community property is divided at dissolution pursuant to 25-318, each spouse receives an immediate, present and vested separate property interest in the property awarded to them by the trial court).

Although a court has broad discretion in allocating property, it has no authority to compel either party to divest themselves of title to separate property. ***Proffit v. Proffit,*** 105 Ariz. 222, 224 (1969). On remand the trial court was directed to order the parties hold the properties as tenants in common, not with rights of survivorship.

As to Mother's argument that ***In re Marriage of Berger,*** 140 Ariz. 156, 168 (App. 1983) allows the court to consider the children's interests when it divides property, the court reasoned that there were extenuating circumstances in that case. It clarified that a court may consider the parties' children in deciding which party should be awarded a given piece of property; however, in doing so, the court may not impinge on either party's property interests, which must be divided at dissolution. In this case, the trial court deprived both parties of their interests in their separate property for six years after the divorce was finalized. ***Dole v. The Honorable Michael Blair***, No. 1 CA-SA 20-0001, Division One, April 14, 2020.

27. ***HAMMETT*. ANNULMENT DOES NOT ALTER THE COMMUNITY PROPERTY STATUS OF PROPERTY AND DEBT; RATHER, IT REQUIRES THE COURT TO ALLOCATE PROPERTY AND DEBT ACQUIRED DURING MARRIAGE; ALTHOUGH NOT AT ISSUE IN THIS CASE, BIGAMY DOES NOT RENDER THE MARRIAGE VOID AND IS NOT A GROUND FOR ANNULMENT; LOAN SIGNED FOR BY ONE SPOUSE THAT ENCUMBERS THAT SPOUSE'S SEPARATE REAL PROPERTY IS A COMMUNITY DEBT, IF THE LOAN WAS NOT USED TO PURCHASE THE PROPERTY**

In a dissolution action after a six-year marriage, husband alleged he was entitled to an annulment because wife was already legally married in the Philippines and the parties had faked the first husband's death certificate so that they could marry. In all fairness, the first husband had disappeared off the radar screen for 19 years prior to her marriage to Husband here. The trial court then granted Husband's motion to dismiss the dissolution action because of the "mutual fraud committed by both parties". Husband then filed an annulment action. Before the annulment trial, the parties reached a partial agreement on the disposition of some assets and obligations, which the Court found constituted a valid Rule 69 Agreement. The remaining issues were tried after which the trial court held that all community property rights and obligations were void *ab initio* from the date of marriage; and it entered orders for disposition of property and debts in reliance on this assumption. It further ordered that the parties condo was owned by them as tenants in common and that a Loan (which had been secured by Husband's separate property house), but was used for community purposes, would be paid from the proceeds of sale. Wife appealed.

Division One ruled as follows:

(1) **An annulment does not extinguish community property.** Property acquired by either spouse during a marriage is community property and an annulment does not change its status. The court must allocate community property and debt as it would in a dissolution proceeding. If grounds for annulment exist, the court to the extent that it has jurisdiction to do so, shall divide the property of the parties. A.R.S. §25-301(B). A.R.S. § 25-211(A)(2) does not distinguish between a dissolution and annulment action as to community property acquired during a marriage. A Petition for Annulment does not alter the status of preexisting community property. A.R.S. §25-211 (B)(1). §25-213(B) mirrors the same principles as to separate property. Although all of these statutes are in the context of service of a petition, the Court reasoned that "if community property principles do not apply to property acquired during a marriage that is annulled, the distinction the statute draws between property obtained before and after service of an

annulment petition would be immaterial". There is a presumption that the legislature did not intend to do a futile thing by including language that is not operative. ***City of Mesa v. Killingsworth***, 96 Ariz. 290, 294-295 (1964).

(2) **An annulment does not extinguish community debt.** A.R.S. §25-213(C) presupposed that debt acquired by one spouse after marriage binds both parties even after the marriage is annulled. Otherwise it would be unnecessary to discontinue the accrual of community debt after service of the petition if the annulment itself resulted in the nullification of the community.

(3) **Prior case law is overturned.** ***Cross v. Cross***, 94 Ariz. 28, 31 (1963) ("where there was no valid marriage of appellant to appellee, there can be no acquisition of property rights based on their marital status") has been superseded by the current A.R.S. §§ 25-211 to -215, which were enacted or amended after ***Cross***.

(4) **The court in both a dissolution and annulment action must consider community debt when it makes an equitable allocation of community property**. Although the dissolution statutes do not expressly grant authority to allocate debts between the parties, assets and obligations are reciprocally related and there cannot be a complete and equitable disposition of property without a corresponding consideration and disposition of obligations. See also ***Cadwell v. Cadwell***, 126 Ariz. 460, 462 (App. 1980).

(5) **The Rule 69 Agreement is vacated.** The Court's acceptance of the Rule 69 Agreement was predicated on an incorrect legal principle. Therefore, the parties did not act with full knowledge of their property rights nor could the court determine whether the agreement was fair and equitable. See ***Buckholtz v. Buckholtz,*** 246 Ariz. 126, 132-33 (Div. 1, 2019).

(6) **The Loan was not Husband's separate debt even though it was secured by his separate property.** Wife argued that A.R.S. §25-214(C)(1) requires joinder of both spouses to bind the community in any transaction for an encumbrance on real property. However, all liability incurred by either spouse during a marriage is presumed to be a separate obligation, and that presumption applies to debt secured by separate property. A.R.S. §25-214(C)(1) would only apply if the Loan encumbered a community asset or if the Loan was a purchase money loan on for acquisition of the property in question.

(7) **Polygamous marriage is not void *ab initio*.** Neither party raised the issue of whether the dissolution action should have been dismissed or whether annulment was appropriate. However, in a footnote, the court noted that (unlike marriage to a person under the age of 16), polygamous or plural marriages are not void under A.R.S. §25-102; although it is punishable as a criminal offense under A.R.S. §13-3606.

***Hammett Sr. v. Hammett*,** No. 1 CA-CV 18-0632 FC, 2019 WL 5556953, 453 P.3d 1145 (Div. 1. 10/29/2019).

28. COURT MUST LOOK TO FIVE FACTORS IN DETERMINING WHETHER A LOAN SECURED BY A RESIDENCE IS A CONSTRUCTION LOAN OR A HOME IMPROVEMENT LOAN, WHICH IS CRITICAL IN DETERMINING WHETHER THE STATUTORY ANTI-DEFICIENCY PROTECTION IS APPLICABLE

The Arizona Supreme Court finally ended the long and winding appeals road for this case. This issue also has application to family law cases where there is an issue of whether a debt is to be assumed by a party in consideration of the property settlement. You want to make sure a debt is actually owed before giving credit for it.

At issue was the distinction between whether a loan secured by a residence is a construction loan or a home improvement loan. The distinction is critical because under A.R.S. § 33-729(A), statutory anti-deficiency protection is afforded to construction loans but not to home improvement loans. Lenders may not seek a money judgment against the borrower over a construction loan. These are the rules:

- The court must consider the totality of the circumstances surrounding the loan. There are five non-exclusive factors.
- Whether there was a complete or substantially complete demolition of an existing structure and a new building constructed in its place;
- The intent of the parties when executing the loan documents;
- Whether the structure was inhabitable or inhabited during construction;
- Whether the structure was largely preserved and improved or substantially expanded; and

- Whether the project is characterized as "home improvement" or "construction" in the loan documents and in the permits or other official documents.

***Helvetica Servicing, Inc., v. Michael S. Pasquan*,** Supreme Court Arizona, No. CV-19-0242-PR, Filed August 25, 2020.

29. MEMORANDUM DECISION: *AUSTIN* AND *HARBER* DISTINGUISHED FROM OPERATING AGREEMENTS THAT ARE NOT INTENDED TO DEFINE PROPERTY RIGHTS IN THE EVENT OF DEATH OR DIVORCE

LLC operating agreements may qualify as postnuptial agreements under certain circumstances, subjecting them to ***In re Harber's Estate's*** analysis but there are limitations. ***Austin v. Austin,*** 237 Ariz. 201, 206-07, ¶ 14 (App. 2015). In ***Austin,*** a husband and wife used LLC operating agreements to obtain asset valuation discounts and tax savings for the surviving spouse or wife's children from a previous marriage when one or both spouses passed. *Id*. at 207, ¶ 15. The agreements gave the husband exclusive, absolute power and control over the LLC and its assets, placing "severe and permanent" limitations upon the wife's property rights, affecting those rights "to the same or greater extent than would a post-nuptial property settlement agreement". *Id*. The court held the operating agreements qualified as postnuptial agreements, triggering ***Harber's Estate's*** burden of proof. ***Austin***, 237 Ariz. at 208, ¶ 20. However, the operating agreement's purpose and effect in this case were wholly different from those in ***Austin***. While the ***Austin*** spouses used LLC operating agreements to accomplish the same ends as traditional postnuptial agreements; that is, maneuvering property to plan for death or divorce, the operating agreement here was created for the purpose of—and indeed was used for—facilitating real estate purchases and transfers unrelated to estate planning. Further, in contrast to the severe restrictions imposed upon the wife's property rights in ***Austin***, the operating agreement here gave Husband and Wife equal power and control over the LLC's management and assets. Because the GPO Enterprise operating agreement's purpose was not to define property rights in the event of death or divorce, the superior court correctly concluded it did not qualify as a postnuptial agreement. Accordingly, the court properly declined to impose the ***Harber's Estate*** burden upon Husband, and properly imposed upon Wife the burden to rebut by clear and convincing evidence the presumption that her transfer of property into the LLC constituted a gift. ***Osborne v. Osborne***, No. 1 CA-CV 19-0351 FC, Division One, March 5, 2020.

30. ***VAN HAIL:*** **MEMORANDUM DECISION: SPOUSE WHO CONTROLS COMMUNITY BUSINESSES CAN BE ALLOCATED ALL TAX DEBT FROM THE BUSINESSES; DECISION ACCOMPANIED BY FINDING OF WASTE**

The businesses, which had been controlled by husband during the marriage had tax debt at the time of the dissolution action arising out of a failure by husband to pay the taxes since 2011. This unequal division of property was accompanied by a finding of community waste. Division One affirmed. ***Van Hail v. Evans*****,** No. 1 CA CV 18-0758 FC (Div. 1, 10/29/19) (Memorandum Decision).

31. ***CARTER:*** **MEMORANDUM DECISION: SPOUSE WITH SUPERIOR EARNING CAPACITY ALLOCATED ALL OF BACK TAX DEBT; NO FINDING OF WASTE**

The trial court ruled that the spouse who earned more (about 60%) of the community's monthly gross income should be allocated 100% of the parties' tax debt. The trial court did not make a finding of waste. Rather, it made an equitable, but unequal division of the debt.

Carter v. Carter, No. 1 CA CV 18-0718 FC, 2019 WL 4667526 (Div. 1, 09/24/19) (Memorandum Decision).

32. ***SILVA*****: MEMORANDUM DECISION: COURT DOES NOT HAVE TO DIVIDE COMMUNITY DEBT EQUALLY; IN ADDITION, COURT CAN TAKE INTO ACCOUNT THE PARTIES' EARNING ABILITY IN DECIDING ALLOCATION OF DEBT.**

The court ordered Husband to pay 80% of the debt. Husband appealed. Division One affirmed. This is what they had to say:

(1) The superior court has broad discretion in apportioning community property and debt between parties at dissolution***.*** ***Boncoskey v. Boncoskey***, 216 Ariz. 448, 451, ¶ 13 (App. 2007).

(2) We presume that debts incurred during marriage are community obligations unless the party seeking to overcome this presumption provides clear and convincing evidence to the contrary. ***In re Marriage of Flower*****,** 223 Ariz. 531, 537, ¶ 24 (App. 2010).

(3) Under A.R.S. § 25-318, community property is to be divided "equitably" absent a sound reason otherwise appearing in the record. See ***Toth v. Toth,*** 190 Ariz. 218, 221 (1997); see also A.R.S. § 25-318(C) (family court may consider excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community property when dividing such property at dissolution). " 'Equitable' is a concept of fairness dependent upon the facts of particular cases." ***Toth,*** 190 Ariz. at 221.¶21.

(4) An equitable distribution of property need not be exactly equal "but must result in substantial equality." ***Miller v. Miller,*** 140 Ariz. 520, 522 (App. 1984); see **Flower,** 223 Ariz. at537, ¶24("Division of property upon dissolution should. . . take into consideration the overall marital estate.");

(5) See also ***Neal v. Neal,*** 116 Ariz. 590, 594 (1977) (approving consideration of "future earning ability" in the apportionment of community obligations).
Silva v. Silva **(Memorandum decision)** 1 CA-CV 19-0684FC, Division One (Filed 9-8-20.)

PROCEDURE

33. NOTICE OF LIMITED SCOPE REPRESENTATION FORMS

See attached forms. Don't forget to file your Notice of Completion of Limited Scope Representation when you are through (Appendix).

Don't forget to be specific in your fee agreement as to the scope of your representation.

34. CONTEMPT AVAILABLE FOR ANY BREACH OF A SEPARATION AGREEMENT, NOT JUST SUPPORT OBLIGATIONS; COURT NOT PERMITTED TO INCARCERATE FOR BREACH OF NON-SUPPORT OBLIGATIONS; 12-1551 (RENEWAL JUDGMENT STATUTE) ATTACHES AT THE TIME A JUDGMENT BECOMES SUABLE; LACHES CANNOT BE RULED UPON AS A MOTION FOR SUMMARY JUDGMENT WHERE THERE ARE MATERIAL DISPUTED FACTS

All of the above is a mouthful of conclusions, but they are all rooted in some key facts. The parties incorporated an Agreement into a 2006 Consent Decree. It provided that Husband was to pay Wife a $300,000 equalization payment, maintain the business as an ongoing concern, and keep life insurance in place until the debt was paid. Husband was to pay Wife his share of the proceeds from the sale of the residence and then make

monthly payments on the balance. However, the amount and duration of the installment payments were left blank along with the date when interest would start. If Husband failed to pay the debt, the decree stated Wife could file a contempt action.

The sequence of events is critical to an understanding of this decision and are related below:

- In January 2007, the parties signed a handwritten agreement addressing additional payment terms including $5,000 a month beginning 30 days after the sale of the residence; and by February 2, 2007, he would name wife as beneficiary of the life insurance;

- In June 2007, Husband paid Wife $70,000 from the sale of the residence and then $5,000 a month from July 2007 through November 2009. He made two more payments in December 2009 and January 2010;

- In May 2015, Husband filed for personal bankruptcy; however, the equalization debt was not discharged;

- In October 2015, Wife filed the 2007 Agreement with the Court as a Rule 69 Agreement;

- In December 2016, Wife filed a post decree petition for contempt for the failure to pay the equalization payment, transferring the business to a third party, and failing to provide the life insurance.

The trial court granted Husband's motion for summary judgment reasoning that A.R.S. §12-1551's judgment renewal limitations barred Wife's claims because his last installment payment was due on April 30, 2011 and Wife filed the Petition after the five year period for renewing or enforcing judgments. The Court also granted Husband's laches defense. Division One vacated and remanded reasoning as follows.

A. Contempt, but Not Incarceration Is Available:

- Trial court's denial of contempt must be filed as a special action, however, in the court's discretion this direct appeal was treated as a special action;

- In 1973, A.R.S. §25-317(E) was amended to read: Terms of the agreement set forth or incorporated in the decree *are enforceable by all remedies available for enforcement of a judgment, including contempt*. (Emphasis added).

- The only limitation on this remedy for non-support orders is that the court may not order incarceration because it violates Article 2, Section 18 of the Arizona Constitution, which prohibits imprisonment for failure to pay a debt. ***Lagerman v. Arizona State Retirement System***, 248 Ariz. 504 (2020), ***Waldren v. Waldren,*** 217 Ariz. 178 and ARFLP Rule 92(e). The Court distinguished prior court cases which imply the contrary, e.g. ***Proffit v. Proffit*** (decided prior to the statutory amendment); and ***Masta v. Lurie*** and ***Danielson v. Danielson*** (the court did not address whether the superior court had jurisdiction to consider a petition for contempt).

- The court cannot presume the legislature only intended to maintain the status quo when it adopted A.R.S. §25-317(e), rather all words in a statute have a substantive meaningful purpose. ***Nicaise***.

B. Judgment Renewal Statute Did Not Start to Run Until There Is a Suable Judgment:

- At the time of Wife's Petition, A.R.S. §12-1551 provided that judgments must be renewed or an action brought on it within five years of the entry of the judgment or its renewal (it is now ten years);

- The judgment renewal statute applies to payments of a specific amount of money due at a certain time. It does not apply to a decree mandating an equitable real property distribution because such distributions "are not judgments for payments of sums certain or judgments enforcing property liens." ***Jensen,*** 241 Ariz. at 229;

- A judgment has to be **suable** before the statute of limitations is triggered. Even though the Decree specified the amount of the payment, it did not specify with certainty how or when that debt as to be paid. Until the terms of payment were fleshed out in the Rule 69 Agreement, the entire payment was not immediately due upon entry of the decree and Wife had no right to execute on the judgment. The statute of limitations does not begin to run until such a right exists. ***Groves. v. Sorce***, 161 Ariz. 619, 621 (App. 1989);

- Husband's argument that §12-1551 applies to each installment payment as it came due thereby barring Wife from collecting payments more than five years past due was rejected because the Decree did not specify the amount or timing of payments.

- The Rule 69 Agreement did not trigger the statute of limitations even though it specified the payment due date. However, this argument is based on the assumption that a Rule 69 Agreement is a judgment subject to renewal under 12-1551. It is not. A judgment is decree and an order form which an appeal lies. The parties never submitted the Rule 69 Agreement to the Court to have it incorporated into an amended decree. Therefore, even if it established payment terms, it is not a judgment.

C. Wife's Requests for Contempt Relating to Husband's Obligations to Maintain the Business and Life Insurance Are Not Equitable Directives, Not Money Judgments and Failure to Comply Does Not Trigger the Statute of Limitations

- The Court did not address Wife's claims regarding Husband's failure to maintain the business or keep her as beneficiary of life insurance. To the extent the court relied on §12-1551 in dismissing these claims, it erred because these obligations are equitable directives, not money judgments upon which execution or like process may be sought. ***Jensen*** at 229.

D. Summary Judgment Was Improper on the Issue of Laches Where There Are Material Disputed Facts

- To prevail on a laches defense, a party must show that the other party unreasonably delayed asserting their claims and that the party was prejudiced by the delay.

- The existence of material disputed facts about the reasonableness of Wife's delay in raising all of her claims was not subject to summary Judgment. Wife's delay may not be unreasonable if Husband appeared to still be in control of the business, asked Wife to delay collections, or reaffirmed the validity of the outstanding debt, and negotiated alternative payment options or that Husband did not change his financial position in reliance on Wife's delay. Mere allegations of prejudice are insufficient.
Eans-Snoderly v. Snoderly, Division One, August 18, 2020.

[**Editor's Note**: It is ironic that Wife was most harmed by the failure to specify the specific terms of payment, but this is what saved her in the end. Also, note that the six year statute of limitations on written contracts for payment of debt (§12-548(a)) and one year limitation on contempt proceedings (§12-865(a)) could have been raised, but Husband waived them by raising them for the first time on appeal. (Note that the renewal statute was amended in 2019 to extend the term to ten years from five years.]

[**Second Editor's Note: Accord:** ***Braun v. Braun,*** 306 Neb. 890, ___ N.W.2d, August 21, 2020 (Husband failed to pay the joint mortgage debt on the marital home he was awarded and to otherwise hold Wife harmless; the court imposed a jail sentence and purge plan by refinancing the mortgage in his own name by a certain date or selling the property; order was not a modification of the Decree.]

35. **A.R.S. §§ 12-1551, 12-1611, 12-1612, 12-1613 and 33-964: TIME FOR RENEWAL OF JUDGMENTS EXTENDED FROM FIVE YEARS TO 10.**

36. ***McDANIEL v. BANES:*** **MEMORANDUM DECISION: A FOREIGN JUDGMENT IS DUE FULL FAITH AND CREDIT ONLY IF IT IS CONSIDERED FINAL UNDER THE LAW OF THE STATE WHERE IT WAS ISSUED; FOUR YEAR STATUTE OF LIMITATION ON DOMESTICATING AND ENFORCING AN AMENDED FOREIGN JUDGMENT BEGINS TO RUN ON THE DATE THE AMENDED JUDGMENT IS DEEMED FINAL PURSUANT TO THE UEFJA**

The trial court denied a motion to vacate a recorded foreign judgment and refused to quash a writ of garnishment related to that judgment. A.R.S. § 12- 544(3) imposed a four year statute of limitations to a foreign judgment originally issued in 2010. However, the Judgment was amended in 2019 and was considered final at that time and enforceable under the foreign state's laws. Accordingly, the four year Arizona limitations period on domesticating and enforcing that judgment did not begin to run until 2019 - when the amended judgment was entered. In this case, the amended judgment was issued pursuant to a rule permitting correction of clerical errors or omissions. McDaniel v. Banes 2020 WL 4218021, Div. 1, July 23, 2020 (Memorandum Decision).

[**Practice Tip:** If the statute of limitations bars domestication and enforcement of a foreign judgment, consider an attempt to amend it. This case suggests that this re-triggers the statute of limitations for domestication and enforcement.]

37. **ONE WHO CLAIMS ATTORNEY-CLIENT PRIVILEGE HAS THE BURDEN OF PROOF OF MAKING A *PRIMA FACIE* CASE THAT THE PRIVILEGE APPLIES TO A SPECIFIC COMMUNICATION: REFRESHER ON FOUR ELEMENTS OF CLAIMING ATTORNEY CLIENT PRIVILEGE**

This case involved the appointment of a special master to conduct an in camera review of recordings of jail phone calls. The State requested the review in connection with its investigation of an incarcerated person. Although this is a criminal case, there are some significant issues relating to attorney-client privilege that also apply in the civil context.

- A party claiming the attorney-client privilege has the burden of making a prima facie showing that the privilege applies to a specific communication. The court may not invade the privilege to determine the existence of the privilege, even in camera using a special master.

- Upon such a showing, the court may hold hearing to determine whether the privilege applies. To do this, there are four elements. Each element of the privilege inquiry is fact specific:

- First, the proponent must show that there is an attorney-client relationship. The existence of a relationship is evaluated by a subjective test which examines the nature of the work performed and the circumstances under which the confidences were divulged. The court must decide whether the party consulting the attorney believes that they are approaching the attorney in a professional capacity and with the intent of securing legal advice. That is, the inquiry should examine a **client's perception o**f the relationship and **intent** to secure legal advice. Formal representation or status as counsel of record is not required.

- Second, the privilege is limited to communications seeking or providing legal advice. Not all communications made to or received from an attorney are protected. The proponent must explain how the circumstances indicate the communication was made to secure or provide legal advice. For example, the privilege does not apply when an attorney is consulted as a friend or business advisor. ***Fodor,*** 179 Ariz. at 448); ***G&S Investments v. Belman***, 145 Ariz. 258,264 (App. 1984). An attorney's avowal is generally entitled to substantial weight.

- Third, the communication has to be made in confidence. As to this and number four below: one who knows that his conversation may be overheard and makes no effort to safeguard against interception may waive the claim of confidentiality. The court must ask whether the client reasonably understood the communication to be confidential. Permitting the communication to be overheard by individuals who are not a part of the confidential relationship usually destroys the confidentiality requirement.

- Fourth, the communication was treated as confidential. This remains true even in the unusual circumstances, presented in this case, that the party claiming the privilege does not have possession of the recording of the communication (it was a jailhouse recording).

- As for recorded conversations, the court refused to adopt a bright line approach. Instead, when assessing the confidentiality of communications made on a recorded line, a trial court hold consider the content of any recording warning, the reasonableness of any expectation of confidentiality, and (in a criminal matter) whether the jail's recoding policy presents an unreasonable or arbitrary restriction on a defendant's ability to communicate with counsel. ***Clements v. State of Arizona,*** Arizona Supreme Court, No. CR-19-0140-PR, Filed September 9, 2020

38. ARIZONA'S REVOCATION-ON-DIVORCE STATUTE DID NOT REVOKE DECEDENT'S DISPOSITIONS IN FAVOR OF EX-SPOUSE'S ADULT CHILDREN

The Decedent's siblings argued that A.R.S. § 14-2804 superseded the will's and trust's provisions in the stepchildren's favor, leaving the siblings to inherit by intestate succession. However, the superior court had found that undisputed post-divorce acts evinced decedent's intent to reaffirm his dispositions to the stepchildren and held that §14-2804 did not apply because the relationship between them continued after the divorce, with no interruption because of it. ***Podgorski v. Jones,*** Division One, No. 1 CA-CV 19-0467; 2020 WL 4529620, Filed August 6, 2020.

PROCEDURE/EVIDENCE

39. BEHAVIORAL HEALTH PROFESSIONAL PRECLUDED FROM DISCLOSING, THROUGH TESTIMONY OR OTHERWISE, THEIR OBSERVATIONS OF A CLIENT'S BEHAVIOR BASED ON INFORMATION THEY RECEIVED IN THEIR PROFESSIONAL RELATIONSHIP WITH THE CLIENT

In an involuntary treatment hearing, the trial court allowed a clinical liaison to testify regarding information the Appellant relayed to her as part of their confidential relationship, including information relative to her mental condition that the liaison obtained from observing appellant's behavior. Appellant argued this was error because the liaison testified about confidential information in violation of the behavioral health professional–client privilege under A.R.S. § 32-3283. This precluded the liaison from testifying as an acquaintance witness. The statute does not permit behavioral health professionals to disclose, through testimony or otherwise, their observations of a client's behavior based on information they received in their professional relationship with the client.

In Re: MH 2019-004895, Division One, August 4, 2020.

40. CRIMINAL MATTER: AN AUTOMATIC, COMPUTER-GENERATED, EMAIL THAT ATTACHES A VIDEO FILE (SURVEILLANCE SYSTEM EMAIL) IS NOT HEARSAY

In a criminal case (but which applies the Rules of Evidence applicable to civil cases), a property manager testified that he received an automated, computer-generated, email from a security company after a motion-sensor security camera was activated. A video file was attached to the email and the email specified the date and time the video was recorded. The property manager relied solely upon the email in identifying the date and time of the video. Over Defendant's hearsay objection, the superior court admitted it into evidence. Hearsay is generally inadmissible unless an exception applies Ariz. R. Evid. 801, 802. Because the rule against hearsay applies to a person's statements and the person who made the statement, the issue turned on whether a machine that generates information qualifies as a person under the Rules. Because the email and video were "machine produced", they were not made by a "person" and are not hearsay. However, there are other evidentiary concerns, but they should be "addressed through the process of authentication, not by hearsay. ***State of Arizona v. Stuebe***, No 1 CA-CR 19-0032, filed 6/30/20.

41. EVIDENCE AND TESTIMONY IN AN ORDER OF PROTECTION HEARING SHOULD BE LIMITED TO ONLY WHAT IS RELEVANT TO THE ALLEGATIONS IN THE PETITION

At an OOP hearing in May of 2018, the court precluded two of Mother's exhibits: a 2018 psych evaluation of Father in which he claimed to have no criminal history and a 1999 summons showing a felony charge against Father. Father argued that the exhibits were irrelevant. Mother argued that this was relevant because it impeached Father's dishonesty and credibility. Division Two held that Mother did not show that the trial court's preclusion was "manifestly unreasonable or based on untenable grounds." "Limiting the evidence and testimony to that relevant to allegations in the petition is precisely what the court was required to do". ***Martinez v. Pacho***, 2020 WL 4342235, Division Two, July 28, 2020.

42. FAILURE TO SERVE IN A TIMELY MANNER *MUST* BE EXCUSED IF GOOD CAUSE IS SHOWN; AND *MAY BE* EXCUSED IN THE COURT'S DISCRETION, EVEN IF GOOD CAUSE IS NOT SHOWN; GOOD CAUSE FOR BLOWING A DEADLINE IS DEFINED

Under ARCP Rule 4(I), if a plaintiff fails to serve a defendant with a summons and complaint within 90 days of filing the complaint, the court must dismiss the case without prejudice. This is referred to as "abatement". However, if a plaintiff shows good cause for failing to serve a defendant within 90 days of filing the complaint, a court is **required** to extend the time for service. Under this rule, a trial court also has the authority in its discretion to extend the period for service without a showing of good cause. This rule trumps anything in ARCP Rule 6.(b)(1)(B) to the contrary (whenever an act must be done within a specified time the court may extend the time based on a motion made after the time has expired if a party shows *excusable neglect*). Additionally, Rule 4.i. does not impose any particular deadline within which to file a request for extension after the 90 day period has expired.

In this case, Plaintiff filed a motion to extend more than 10 months after the 90 day deadline had expired and alleged that she had attempted to serve the Defendant multiple times at his last known address. The court granted the motion for good cause. After he was served, the Defendant challenged the court's ruling by Special Action and the Supreme Court accepted review citing matters of statewide importance.

It its ruling, the Supreme Court detailed the long and winding history of how the current iterations of Rules 4.i. and 6. b. came into existence together with the conflicts that were created along the way. I will spare you from reading that and go straight to the end of the book. The conclusion was that because Rule 4(I) and Rule 6(b) impose conflicting standards, they cannot both control the granting of an extension. Accordingly, Rule 4(I) - the rule specific to service of process - takes precedence. It further held that although the plaintiff failed to offer a valid reason for her failure to serve and to make reasonably diligent efforts to serve petitioner - and, therefore, there was no good cause for an extension under Rule 4(I) - there were discretionary grounds in the record to deny petitioner's motion to dismiss for untimely service, referred to as "abatement."

The standard for establishing good cause that **requires** an extension is that plaintiff must show under the specific facts of the case that she exercised **reasonable diligence** in trying to serve the defendant. To do that, there must be a valid reason for failing to serve the defendant within the allotted time period. Ignorance of the rule, mistake, and inadvertence are not valid reasons. An attorney's busy schedule is not a valid reason. Valid reasons have to be outside of a person's control, generally involving "sudden illness, natural catastrophe or evasion of service of process". An outside factor could be reliance on faulty advice. Here, the attempts to serve the defendant six different times over 14 days of the 90 days did not constitute diligence. There must be multiple attempts to serve the defendant throughout the allotted time period. It must also include attempts to serve at different locations or alternative means of service.

Discretionary grounds under Rule 4.i. **must be based on facts contained in the record.** The Court's discretion is not limitless. Such factors as whether the statute of limitations would bar the plaintiff from re-filing the action; whether the defendant evaded service; and whether the defendant would be prejudiced if the court grants the extension are all discretionary grounds. ***Sholem v. Hons. Gass/Contes/Melissa Langevin, 1 CA-SA 19-0086,*** Arizona Supreme Court, March 30, 2020.

[**Editor's Tip:** ARFLP Rule 40(I) has language similar to ARCP Rule 4.i. This definition of good cause may be applicable to other situations.]

43. IN A CIVIL CASE, NEITHER THE TRIAL COURT NOR THE COURT OF APPEALS CAN EXTEND THE TIME FOR APPEAL EVEN ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL WHO FAILED TO FILE A TIMELY NOTICE, UNLESS A PARTY DID NOT RECEIVE NOTICE OF ENTRY OF THE JUDGMENT

In a civil case when a notice of appeal is not timely filed, the Court of Appeals does not have jurisdiction to decide the appeal. In addition, a trial court does not have authority to extend the time for appeal **unless a party did not receive notice of the entry of judgment**. This is true even where the delayed appeal is allegedly caused by ineffective assistance of counsel when the attorney failed to timely file his notice of appeal. ***In Re Pima County Mental Health Case*** , Division 2, No. A20170058, January 23, 2020.

44. RULING ON CHALLENGE TO OOP TRANSFERRED TO FAMILY LAW COURT DOES NOT BECOME APPEALABLE UNTIL RULE 78 LANGUAGE IS ENTERED

After a Justice Court order of protection is transferred to Superior Court for a pending family law case, a family law court order maintaining, modifying, or dismissing the order of protection is not appealable unless it contains Rule 78(b) language. Without Rule 78(b) language, that order remains subject to modification by the family law court and is not appealable. ***McCarthy v. McCarthy***, No. 2 CA-CV 2018-0184, 2019 WL 3928643 (Div. 2, 8/20/19).

45. *CROSBY:* ISSUE PRECLUSION DEFINED

This was a juvenile court case that as an excellent primer on the meaning and application of claim preclusion. It means a final judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same claim. Specifically, a party seeking to invoke the doctrine must establish: (1) an identity of claims in the suits; (2) a final judgment on the merits in the prior litigation; and (3) identity or privity between parties in the two suits. ***Lawrence T. v. DCS, MT***, No. 1 CA-JV 18-0214 (February 28, 2019). ***In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. And Source***, 212 Ariz. 64 (2006). However, as a judicially-created doctrine, it is not strictly applied in all instances. ***In re Marriage of Gibbs,*** 227 Ariz. 403 (App. 2011). (The doctrine must give way when mechanical application would frustrate other social policies based on values equally or more important than the convenience afforded by finality in legal controversies.) ***Crosby-Garbotz v. Fell in & for Cty. of Pima***, 246 Ariz. 54, 434 P.3d 143 (Div. 2, 2/5/19) (Chief Justice Bales).

46. SHAM AFFIDAVIT DOCTRINE ALLOWS COURT TO DISREGARD A SUMMARY JUDGMENT DECLARATION WHERE DECLARATION CONTRADICTED PRIOR SWORN DEPOSITION TESTIMONY IN DIVORCE.

In her divorce case, Perdue, gave sworn deposition testimony that she did not have any interest whatsoever in certain Property; she claimed it was under water and she let the LaRues have it. The LaRues sell it and make a profit. Before the closing, Perdue filed a notice of *lis pendens* claiming to have a 50% interest. A year after the divorce, Perdue sues the LaRues in civil court claiming that she actually had an interest in the Property and she deeded it to them so they could qualify for a loan. On Motion for Summary Judgment, Perdue submitted a Declaration to this effect. Suffice it to say that Perdue's positions in the suit and the Declaration were based on facts contrary to her sworn divorce deposition testimony.

Held and affirmed on appeal: A party cannot defeat summary judgment by submitting a sham affidavit, which is an affidavit that contradicts the party's prior sworn testimony. The sham affidavit doctrine does not apply if the affiant was confused at the deposition and the affidavit helps explain the confusion or if the affiant lacked access to material facts and the affidavit sets for the newly discovered evidence. But the time to explain such things is in the Declaration. The Sham Affidavit rule applies even if the deposition testimony was irrelevant to the divorce.

There is also an excellent discussion of the doctrines of unjust enrichment and quantum meruit. ***Perdue v. La Rue,*** No. 1, CV 2017-055020, filed September 3, 2020.

[**Editor's Note**: Remind your clients that deposition testimony in the divorce can come back and haunt them in a later civil proceeding.]

47. MEMORANDUM: COURT NOT BOUND TO ACCEPT UNCONTRADICTED TESTIMONY NOT CORROBORATED BY ANY OTHER EVIDENCE

Although Husband's testimony was uncontradicted, it was not corroborated by any other evidence. Therefore, the court was not bound to accept it. Compare ***Aries v. Palmer Johnson, Inc***., 153 Ariz. 250, 261 (App. 1987) (Courts are "not bound to accept as true the uncontradicted testimony of an interested party."), with ***Fort Mohave Farms, Inc. v. Dunlap,*** 96Ariz. 193, 198 (1964) ("[W]here testimony of an interested witness is corroborated by a disinterested witness, rejection of that evidence amounts to arbitrary action.") ***Stickler v. Stickler***, No. 1 CA-CV 19-0115 FC, Division 1, 1/7/20

RETIREMENT

48. IF A DECREE SPECIFICALLY DEFERS RESOLUTION OF DISPUTES REGARDING THE DIVISION OF A RETIREMENT PLAN, THEN THE *KOELSCH* ISSUE IS NOT WAIVED BY FAILING TO ADDRESS IT AT THE TIME THE DECREE IS ENTERED

Following on the heels of ***Quijada and Quijada***, 246 Ariz. 217, 437 P.3d 876 (2/19/19) (where parties agreed in the Decree that Wife would receive her share of the benefits when they were distributed to the employee spouse, her right to subsequently request a ***Koelsch*** payment was waived), the court in this case clarifies **that the issue may generally be deferred in the Decree to a later date without causing a waiver**. There is no need to specifically reserve it as long as there is general language that future disputes regarding the division of the plans is reserved. Here, Husband worked for the U.S. Border Patrol. As a federal employee, Husband participated in the Federal Employee Retirement System (FERS). When the parties divorced in 2010, Husband still worked for the Border Patrol, but was not yet eligible to retire. The parties agreed to equally divide the community interest in the FERS benefits and the Decree provided additionally: *"The Court reserves jurisdiction to resolve any disputes regarding the division of these retirement plans"*. In 2017, Wife petitioned the court to order Husband to pay her a ***Koelsch*** payment. Here are the take home points:

- **Spouse must wait for the Employee Spouse is eligible to retire.** The Court distinguished this case from ***Boncosky,*** 216 Ariz. At 449-50, 453 (Holding that divorce decree improperly attempted to determine ***Koelsch*** payments fourteen years before the employee spouse was eligible to retire), because the Wife here waited until Husband was eligible to retire.

- ***Barron*** **(246 Ariz. 449 (2019)) does not apply because a FERS benefit is not the same as military retirement insofar as the benefits are not contingent on the government accepting the spouse's application for retirement.** The FERS statute provides that a person "is entitled to an annuity immediately upon separation once he/she has the required number of years of service [after becoming 50 years of age and completing 20 years of service]". 5 U.S.C. 8412(d)(2). Additionally, federal law provides precise and limited authority to state courts to treat only disposable retired pay as community property. There is no such authority precluding Arizona

courts from treating FERS benefits as community property. To the contrary, the FERS statutes allow division of "any payments which would otherwise be made to an employee...to the extent provided for in the terms of...any court decree of divorce..." 5 U.S.C. 8467 (a-(a)(1).

- **Tax consequences should be considered.** The Court agreed that this could be considered on remand citing ***Johnson v. Johnson*** (tax consequences could be considered if they can be immediately and specifically determined). Interestingly, the Court of Appeals failed to address the effect of A.R.S. §25-318.B, ("In dividing property, the court may consider all debts and obligations that are related to the property, including accrued or accruing taxes that would become due on the receipt, sale or other disposition of the property....") even though this statute was passed after the ***Johnson*** case was decided.

- **Husband not precluded from exercising its discretion to defer payments subject to repayment with interest and proper security.**
(Citing ***Koelsch***, 148 Ariz. At 185).
DeLintt v. DeLintt, No. 1 CA-CV 18-0640 FC Division I, March 5, 2020).

[**Editor's Note**: Husband failed to raise the issue of whether it would be inequitable to order an employee spouse to indemnify the non-employee spouse **before** the employee spouse actually retires because **married couples cannot receive retirement benefits before the employee spouse retires**. See ***Nold v. Nold,*** 232 Ariz. 270, 273 (App. 2013). Discerning readers should think about raising this issue.]

49. MAINE: COAP CANNOT CONFER JURISDICTION ON COURT TO ORDER EMPLOYEE SPOUSE TO RETIRE AT A PARTICULAR AGE SO THAT NON-EMPLOYEE SPOUSE CAN RECEIVE THEIR SHARE OF FEDERAL RETIREMENT BENEFITS

MAINE: This case involves a Court Order Acceptable for Processing (COAP) with respect to federal retirement benefits. The Divorce Decree was silent on the issue of whether Wife could collect on her share of Husband's federal retirement benefit when Husband reached retirement age. However, the COAP contained a provision that required Husband to retire at age 62. The Supreme Judicial Court vacated the judgment, holding that the court lacked the authority to order Husband to retire at a certain age. ***Dobbins v. Dobbins,*** 2020 ME 73 (Maine Supreme Judicial Court, May 21, 2020).

50. *IN RE MARRIAGE OF ALARIE*: MEMORANDUM DECISION: PREFERRED MODE OF DIVISION OF COMMUNITY INTEREST IN RETIREMENT BENEFITS IS THE LUMP SUM METHOD

Affirms that the preferable mode of division of a community interest in retirement benefits is to award the pension rights to the employee and property of equal value to the spouse. ***In re Marriage of Alarie & Ha,*** 2 CA-CV 2019-0074, Division Two, February 26, 2020.

ATTORNEYS/ETHICS

51. ARIZONA PERMITS LAYPERSON LAW OWNERSHIP

Arizona's officially become the first state to allow non-lawyers to co-own law firms. The state Supreme Court formally eliminated ethics rule 5.4, which bars such ownership. The rule change is meant to make legal services more affordable to a public increasingly denied access to justice by prohibitive costs. It also allows the licensure of new alternative business structures and legal paraprofessionals - lay people who could provide limited legal services. But some commentators warn of an unintended consequence - Big Four accounting firms competing with law firms that are not as big or as tech-savvy. Similar changes may be coming in Utah and California. (Appendix for court Press Release and commentary).

52. REQUESTS FOR ETHICS OPINIONS

The Supreme Court has finally established its own committee/suborganization that will issue *binding* ethics opinions. These will be available on the Supreme Court website. The current ethics opinions from the State Bar are non-binding. The Attorney Ethics Advisory Committee was created in accordance with Rule 42.1 and Administrative Order Nos. 2018-110 and 2019-168. Recent ones concern the following:

* Termination of Representation (Appendix)
* Recordings by Lawyers (Appendix)
* Fee Sharing

53. CLE DEADLINE EXTENDED TO DECEMBER 30, 2020, BUT DON'T WAIT IF YOU DON'T HAVE TO

The deadline for completing CLE was extended from June 30 to December 30, 2020. Supreme Court Administrative Order 2020-58.

54. **ABSOLUTE PRIVILEGE FOR COMMUNICATIONS WITH THE BAR RELATING TO LAWYER MISCONDUCT DOES NOT PROVIDE ABSOLUTE IMMUNITY FOR AN ABUSE OF PROCESS CLAIM; COMMUNICATIONS THAT OCCUR PRELIMINARY TO A JUDICIAL PROCEEDING, INCLUDING A BAR CHARGE, ARE PRIVILEGED IF A PERSON WAS SERIOUSLY CONSIDERING COMMENCING LITIGATION AT THE TIME OR HAD A GOOD-FAITH BASIS TO BELIEVE SOMEONE ELSE WAS**

The heading above is a mouthful. The thirty page opinion is a mind bender and traverses the entire terrain of privileges, immunities, abuse of process claims, and the anti-abrogation clause of the Arizona Constitution. However, for those of you fed up with an attorney's litigation tactics, it is well worth the read. Here is a short distillation.

In an attorney's appeal of the dismissal of his claims for defamation and abuse of process against another attorney, Division One affirmed the superior court's dismissal of the complaint. The dispute arose out of a letter defendant sent to plaintiff and others and a bar charge defendant filed accusing plaintiff of misconduct. The Court held that:

(1) **Communication that occurs preliminary to a judicial proceeding is privileged when the defendant was seriously considering commencing litigation or had a good-faith basis to believe someone else was.** There is no requirement that litigation actually have commenced. For example, the privilege encompasses demand letters. However, the bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered;

(2) **There is no absolute immunity against all civil actions predicated on a bar charge, including an abuse of process claim**, the elements of which are: a willful act in the use of a judicial process for an ulterior purpose not proper in the regular conduct of the proceedings. The court had dismissed Goldman's abuse of process claim based on Ariz. R.S.Ct. Rule 48.l, which codifies common-law privileges and immunities. In brief, this rule states that disciplinary and fee bar related actions shall be absolutely privileged conduct and no civil action predicated thereon may be instituted against any complainant or witness. Goldman argued and Division One agreed, that this rule protects the content of the communication, but not the conduct of filing a bar charge for an improper purpose. Otherwise such a rule would violate the Arizona Constitution's anti-abrogation clause. In other words, a privilege applies to the content of the communication, but the rule does not provide the actor with an immunity against a right of action premised on

improper litigation conduct. The rule precludes the use of privileged communications to sustain a cause of action. It does not bar the cause of action, but only renders it unsustainable if based exclusively on statements privileged under the law. Under the common law, professional-discipline proceedings are subject to claims of improper litigation conduct, and the Arizona Constitution prevents the abrogation of such claims.
Goldman v. Sahl et al. No. CV 2017-011347, Arizona Court of Appeals, Division One, March 5, 2020.

ETHICS OPINIONS

55. DIMINISHED CAPACITY CLIENTS

Q. My elderly estate planning client seems to be showing signs of dementia. She doesn't remember our conversations, and she once became confused during a meeting and forgot she was in my office. She lives alone, but she has a son who lives a few miles away. Can I contact the client's son to express my concerns?

A. Under certain circumstances, you can take protective action when a client with diminished capacity is at substantial risk of harm and cannot act in her own interest. Protective action can include consulting with a family member, if you believe that family member will act in the client's best interests. This is a difficult issue to navigate, so read ER 1.14 and contact the Ethics Hotline for further guidance.

56. CONFLICTS OF INTEREST WITH FORMER COLLEAGUES

Q. My former colleague left our firm to work for a competitor firm. While associated with our firm, this former colleague represented Husband in divorce from First Wife. Now, years later, Second Wife seeks to retain me to represent her in her divorce from Husband. Can I represent Second Wife, even though Husband is a former client of our firm?

A. Yes, as long as no lawyer in your firm possesses any information about Husband protected by ERs 1.6and 1.9(C) . See amended ER 1.10(b) and cmt. 5, which clarifies the mechanism for determining if the firm is in possession of protected information for conflict purposes.

TECHNOLOGY AND CYBER SPACE TIPS

57. CYBER CRIMINALS LOVE LAW FIRMS; INSURANCE IS AN OPTION

Working remotely has created even more opportunities for criminals. The top vulnerabilities stem from unsecured work stations and data transmissions, personal devices, and not consistently enforcing the policies that keep your practice secure. Consider getting a cyber health checkup and obtaining cyber insurance.

58. VIRTUAL ASSISTANTS ARE NOT BOUND BY CONFIDENTIALITY

Alexa and all those other voice-activated devices in your home office are always listening and pose a risk to attorney-client confidentiality. At a recent Association of Professional Responsibility Lawyers conference, speakers noted that voice-prompted smart devices are on and listening **ALL THE TIME**. True, they may represent a low-level security risk for confidentiality breaches, but at a minimum, they ***must be turned completely off*** if it is within shouting range of where you are working. Because it is always "listening", it is not permitted to have such a device within range when you are speaking on the phone or zoom meeting or whatever. A quick check is to just shout to your device while you are on your call. If she responds, you are in trouble. Experts recommend unplugging them when they're not being used.

59. WAYS TO MAKE ZOOM SAFER

There have been lots of concerns and various legal inquiries and lawsuits about Zoom's privacy standards including a failure to disclose its end to end encryption and scraping analytics from your computer to sell to Facebook. Many of you are familiar with "zoombombing", but the threats to your privacy and your client's data go beyond this. If you use zoom as your go to group communication platform, at the very least you should establish a waiting room and follow other basic protocols.
https://support.zoom.us/hc/en-us/articles/115000332726-Waiting-Room
https://support.zoom.us/hc/en-us/articles/115001051063-Zoom-Rooms-Private-Meetings

If you want to go the extra mile to protect your client data, consider a dedicated zoom laptop or I-Pad or other device that is disconnected from your client data. There are also other options rapidly becoming available, for example, Web-Ex, Signal, or Microsoft Teams. I am really hoping someone will step forward and do a Zoom seminar.

60. **ADVISE YOUR CLIENTS RE CYBER SECURITY CONCERNS.**

a. **Smart Enabled Devices.** Let them know to take precautions to ensure the security of your smart enabled devices, computers, vehicles, phones, Ring Doorbells, garage door openers, and even household lighting.

b. **Removing Malicious Software.** There are several programs out there that can remove this kind of malicious software; one such program is Spybot Search and Destroy.

c. **Recording Calls.** Smart phones allow someone to be recording conversations with third parties, even though such a practice is illegal.

d. **Change Password on All Smart Devices.** On Alexa (and presumably other smart devices), there are options for "drop-in". If those functions are enabled, you can say "Alexa, drop in on the kids' room" and the webcam and/or smart speaker will start listening or viewing those rooms. Smart enabled devices include Ring Doorbells, Garage Door Openers, security cameras, even your household lighting, security cameras, and appliances. Now imagine that you and your spouse have not been living together for a long time and if you have not changed the passwords, your spouse still has the ability to spy on you or your kids from anywhere in the world, at any time. This has created virtual stalking issues. Clients should disable any of the drop in options if the account or passwords were accessible by their spouse. When they were set up, the client was given a password. When going through a separation/dissolution, people forget about these. They may have been set up YEARS ago. Change all passwords on everything.

e. **Stop An Ex From Stalking Through Your Phone.** In your iPhone, there is a thing called iPhone Photo "Locations" in your photos. This shows where you took pictures, where you were, etc. You can disable this. To get them on iPhone: Photos albums, places, maps, you need user names and passwords. Same thing when you are trying to mine data from someone's phone, they might say that they were at one place, but photos tell you that they were actually someplace else. These are pretty well protected by Apple. In order for you to see things you would have to have the owners device, open it and data mine from there. There is also something on Apple products called Significant Location Data: it is generally set to let it collect information from your device automatically. You are able to turn that off

within your settings, but they do not make it easy to find how to do it.

f. **Client should get their own Apple ID for them and their children.** Each person, including the kids, should have their own Apple ID. If a parent or a spouse has the Apple ID or password of their spouse or child, they have access to almost everything. When changing passwords, make sure that they have your own Apple ID and that no one else has access to it. The same thing with the children. A parent could actually log in as a child and obtain information that way. Be certain as to how the child's Apple ID is being utilized. Another consideration for having own Apple ID is this - when your client tries to separate their phone service, if their spouse is primary on the account, they may not want to "release" the phone, Apple ID or even the number to you, even if it has been your number for years. A court order may be required.

THE ALL THINGS EGG SECTION

IN CASE YOU WERE GETTING BORED
Compliments of Tim Eigo

A coronavirus happy ending: Berlin ordered brothels closed because their biz model was social distancing's opposite, but shuttered bondage studios and erotic massage parlors successfully argued they shouldn't be bound by the citywide edict. Owners said it was wrong to tie them to brothels, where transmission risk is far higher. The court agreed, noting that bondage studios are well suited to follow (sanitation) orders and, um, wear masks. Plus, the court took judicial notice of the fact that, unlike brothels, service is strictly limited to contact by hand. Ultimately, the long arm of the law used the safe word: dismissed.

STINKY EGG

A veteran Philadelphia judge is creating disorder in the court by refusing to wear a mask - and scolding those who do. He's ordered lawyers and witnesses to remove their masks while court's in session. Despite recently installed plexiglass partitions, his actions are out of step with the court's own safety requirements - and a "mask-required" sign posted outside his own courtroom. First elected to the bench in 1991, the jurist has won two retention elections, despite the Philly Bar's rating him "not recommended."

SECOND STINKY EGG

An Illinois attorney who let his client write an appeals brief and submit it using his electronic signature was sanctioned. The Seventh Circuit called the 86-page document a monstrosity, incoherent and utterly frivolous. The judges also noted the "typographical nightmare" that used five fonts of various sizes and contained randomly capitalized letters. Wait, there's more: impenetrable arguments, unsupported assertions and chaotic organization. Besides that, it sounds all good. The attorney apologized, saying his client was a longtime friend – who apparently had a hankering to write a brief. Compliments of ***Tim Eigo***. Esteemed and very funny editor of the Arizona Attorney magazine.

THIRD STINKY EGG

A cautionary tale for the chaotic lawyer: A federal judge in California sanctioned two attorneys $500 for their "heaping mess" of binders - so "irregular, cumulative and disorganized" the court could not follow the arguments. In an insurance dispute, the attorneys represented a construction company, but could not construct a coherent case. The judge said they submitted the same or similar declarations 28 times - each time with different exhibits attached. They also entered 535 additional undisputed facts the court called grotesque and unnecessary. The lawyers paid up, but the court said they never seemed to get it: Jumbled filings equal a jumbled case.

AROMATIC EGG

The Dutch Supreme Court has ruled people have fundamental rights to protection from climate change, and government must take urgent action to protect them. The ruling stems from an environmental group's lawsuit – the first to use human rights law to force governments to cut greenhouse gas emissions. The court based its ruling in part on the European Convention on Human Rights – which binds 47 nations. So residents of those countries could use the Dutch ruling to sue their own – increasingly likely as people globally warm up to the climate change fight. ***Again, thanks for this from Tim Eigo.*** Doubly esteemed and very funny editor of the Arizona Attorney magazine.

APPENDIX

1. Supreme Court Administrative Order No. 2020-114

2. Supreme Court Administrative Order No 2020-143

3. Superior Court Administrative Order 2020-43

4. Rule 44 - Defaults; Judge Cohen's email explaining the context for the Rule Change, which will be effective January 1, 2021

5. Covid Parenting Guidelines

6. The Shifting Sands, Tsunami or Mirage, 2012 Article by Kathleen A. McCarthy on whether the changes to Arizona's custody statute mandated equal parenting time.

7. Limited Scope Representation Forms

8. Attorney Ethics Advisory Commission Opinions

    a. **Termination of representation-** Ethics Opinion File No. EO-20-0001.
    b. **Attorney Recording of conversations.** Ethics Opinion File No. EO-20-0002

9. Press Release regarding rule on Ownership of Law Firms by Non-Lawyers– (Alternative Business Structures) and click on this link. The basic requirements of the ABS application process appear in proposed Code section 7-209(E) and (G)(1) (https://www.azcourts.gov/ACJA-Forum/aft/1120). If the AJC approves code section changes, the application process and form will be posted under the "Licensing & Regulation" tab at the top of the page at https://www.azcourts.gov/.

10. ***The Impact of Video Proceedings on Fairness and Access to Justice in Court***. Brennan Center for Justice by Alicia Bannon and Janna Adelstein

11. What Business Valuation Experts Are Being Advised to Say about the Impact of the Pandemic on the Reliability of Their Report.

12. Tips for Video Testimony

13. Steve Evert's tip for using a big screen in addition to laptop screens

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	
	)	
AUTHORIZING LIMITATION OF	)	Administrative Order
COURT OPERATIONS DURING A	)	No. 2020 - 114
PUBLIC HEALTH EMERGENCY	)	(Replacing Administrative
AND TRANSITION TO RESUMPTION	)	Order No. 2020-79)
OF CERTAIN OPERATIONS	)	
	)	

Due to concern for the spread of COVID-19 in the general population, the Governor of the State of Arizona declared a statewide public health emergency on March 11, 2020 pursuant to A.R.S. § 26-303 and in accordance with A.R.S. § 26-301(15). Since March 18, 2020, several administrative orders have been issued in response to the COVID-19 public health threat that limited and modified court operations to ensure justice in Arizona is administered safely. The most recent such order, Administrative Order No. 2020-79 issued on May 20, 2020, directed Arizona's courts to conduct business in a manner that reduced the risks associated with COVID-19. This order supersedes that administrative order and provides additional direction on transition to resumption of certain operations in an orderly way that prioritizes the safety of the public, judges, and employees of the judiciary.

For the purposes of this order, the term "judicial leadership" refers, as applicable, to the chief judge of the court of appeals, the presiding superior court judge, the Presiding Justice of the Peace in Maricopa County, the Chief Administrative Justice of the Peace of the Pima County Consolidated Justice Court, the presiding judge of a municipal court that has multiple judges, or, for other limited jurisdiction courts that have only one judge, the judge of such court.

Arizona courts remain open to serve the public. Nevertheless, given the ongoing threat to public safety, certain limitations and changes in court practices and operations are still necessary. These changes will occur in phases consistent with this order and the Standards in Attachment A.

Therefore, pursuant to Article VI, Sections 3 and 5, of the Arizona Constitution,

IT IS ORDERED that all Arizona Courts and the office of the presiding disciplinary judge may continue transitioning to in-person proceedings to the extent this can be safely accomplished.

IT IS FURTHER ORDERED that presiding superior court judges continue to meet with local criminal justice system stakeholders to coordinate how best to handle the phasing-in of normal procedures in criminal proceedings, including resuming petit and grand jury proceedings.

IT IS FURTHER ORDERED that presiding superior court judges shall determine for the courts in their respective counties how in-person court proceedings and courthouse activities are

to be phased-in and conducted, consistent with this order, in a manner that protects the health and safety of all participants. The chief judge of each court of appeals division shall determine how in-person court proceedings are to be phased-in and conducted.

IT IS FURTHER ORDERED that:

I. TO PROTECT COURTHOUSE SAFETY:

1. The presiding superior court judge of each county and the chief judge of each division of the court of appeals is authorized to adopt or suspend any local rule or order as needed to address the current public health emergency in cooperation with public health officials and to take any reasonable action that circumstances require to enable necessary operations of the Court of Appeals (COA) in each division and the superior, justice and municipal courts in each county.

2. Until Arizona enters Phase II and except where the size of the staff or other constraints will not allow, judicial leadership shall implement a staffing plan, which may include dividing personnel into two or more teams or using other methods to prevent all or a substantial portion of court personnel from becoming infected or requiring quarantine at the same time due to work-related contact. The presiding superior court judge may exempt personnel who perform critical court functions from this provision if there is no practical alternative.

3. Courts should modify operations to limit the number of transportation events to necessary in-court hearings for individuals in custody or receiving services pursuant to court order, including combining hearings subject to maximum gathering size required by this order, and to minimize mixing of populations to eliminate avoidable quarantines when such individuals are returned to custody following court hearings.

4. Rule 10.2, Rules of Criminal Procedure; Rule 42.1, Rules of Civil Procedure; Rule 2(B), Rules of Procedure for Juvenile Court; Rule 6, Rules of Family Law Procedure; Rule 133(d), Justice Court Rules of Civil Procedure; Rule 9(c), Rules of Procedure for Eviction Actions; and any local rule that provides litigants with a change of judge as a matter of right are suspended until December 31, 2020 to reduce the risk of virus exposure inherent in out-of-county judges' travel, and to ensure adequate judicial resources for backlog reduction.

5. Judicial leadership shall adopt practices following the gathering size and social distancing standards in Attachment A, considering the size of the courtrooms and other spaces where people gather in and around the courthouse. Until Phase II, depending on the size of the facility, and with appropriate precautions, courts may authorize a maximum of 30 persons. A court should not schedule in-

person multiple, simultaneous proceedings that are inconsistent with these standards. In extraordinary circumstances, the presiding superior court judge may authorize more than 30 persons to gather in one location to conduct court business based on social distancing recommendations and the space available at the location. Courts should coordinate with law enforcement to require staggered citation appearance times.

6. Judicial leadership must require all participants in court proceedings, including attorneys, parties, victims, witnesses, jurors, court personnel, and other necessary persons, to notify the court prior to appearing at the courthouse, of any COVID-19 diagnosis, symptoms, or exposure notification by public health authorities and to make alternative arrangements to participate.

7. Until Phase III, judicial leadership should limit any required in-person proceedings to attorneys, parties, victims, witnesses, jurors, court personnel, and other necessary persons, where necessary to maintain the recommended social distancing within the courthouse, including each courtroom, and the judge in each proceeding is authorized to make reasonable orders to ensure the health and safety of hearing participants consistent with the parties' right to due process of law.

8. Judges shall liberally grant continuances and make accommodations, if necessary and possible, for attorneys, parties, victims, witnesses, jurors, and others with business before the courts who are at a high risk of illness from COVID-19 or who report any COVID-19 diagnosis, symptoms, or exposure notification by public health authorities.

9. The Administrative Office of the Courts shall provide judicial leadership with a health screening protocol used to detect COVID-19-related symptoms consistent with recommendations by public health officials to prevent the spread of the virus. Through Phase I, judicial leadership should implement the COVID-19 screening protocol for court personnel and judicial officers and shall require them to wear their own or court-provided masks, face coverings, or face shields when having any in-person contact with other personnel or the public, or as allowed by section I(11) of this order.

10. The Administrative Office of the Courts shall provide judicial leadership with a health screening protocol used to detect COVID-19-related symptoms consistent with recommendations by public health officials to prevent the spread of the virus. Through Phase I, judicial leadership should implement the COVID-19 screening protocol for the public. Through Phase I, and where courthouse entrance security screening is available, the COVID-19 screening protocol may require body temperature screening for the public. Judicial leadership shall require court participants and visitors to wear a mask or other face covering in the courthouse. Courts may provide the required face covering for use by persons who do not have their own. Courts shall exclude persons

from the courthouse who refuse to cooperate with or who do not pass established screening protocols or refuse to wear a mask or other face covering. Judicial leadership shall post these requirements at entrances and on their public website.

11. During in-courtroom proceedings, the judge may authorize removal of masks or face coverings for purposes of witness testimony, defendant identification, making an appropriate record, or other reasons as deemed necessary by the judge; provided that appropriate social distancing or other protective measures are followed.

12. Judicial leadership should establish and implement social distancing and sanitation measures established by the United States Department of Labor and the CDC.

II. TO USE TECHNOLOGY TO MINIMIZE IN-PERSON PROCEEDINGS:

1. Proceedings in all Arizona appellate, superior, justice, juvenile, and municipal courts and before the presiding disciplinary judge may be held by teleconferencing or video conferencing, consistent with core constitutional rights.

2. During Phases I and II, judicial leadership should limit in-person contact in the conduct of court business as much as possible by using available technologies, including alternative means of filing, teleconferencing, video conferencing, and use of email and text messages to reasonably ensure the health and safety of all participants.

3. Judges may hold ex parte and contested hearings on orders of protection electronically.

4. Judicial leadership may authorize the use of available online dispute resolution (ODR) platforms to resolve cases.

5. Judicial leadership may authorize the use of electronic, digital, or other means regularly used in court proceedings to create a verbatim record, except in grand jury proceedings.

6. When court proceedings are not held in-person or the public is limited from attending in-person proceedings, the presiding superior court judge shall provide public access by video or audio to civil and criminal court proceedings typically open to the public to maximize the public's ability to observe court proceedings to the extent logistically possible. The presiding superior court judge or single judge of a limited jurisdiction court should make video or audio proceedings, excluding small claims cases, available to the public to the greatest extent possible. The presiding superior court judge should also list the public availability of video and audio proceedings on the AZCourt site.

7. The 100-mile distance requirement for a limited jurisdiction court to accept a telephonic plea under Rule 17.1(f) of the Rules of Criminal Procedure is suspended through December 31, 2020.

8. Clerks may attend court proceedings by teleconferencing or video conferencing to comply with A.R.S. § 12-283(A)(1).

9. Arizona Revised Statutes, Title 36, Chapter 5 matters are confidential and not open to persons other than the parties, witnesses, their respective counsel, and additional persons the court permits to attend. When these proceedings are not conducted in-person, judicial leadership must use technology in a manner that protects the patient's rights to privacy and confidentiality.

10. The judge in each proceeding conducted using video-conferencing may limit and permit recording as appropriate to apply the policies provided in Rule 122, Rules of the Supreme Court, to those proceedings.

11. When conducting virtual hearings, courts may establish procedures to collect the defendant's fingerprint, or to otherwise establish the defendants identity as an alternative means of complying with the procedures required by A.R.S. § 13-607 and Rule 26.10 of the Rules of Criminal Procedure.

III. TO CALCULATE TIME CONSIDERING THE EMERGENCY:

1. The period of March 18, 2020 through September 30, 2020 is excluded from calculation of time under rule provisions and statutory procedures that require court proceedings to be held within a specific period of time, including Rule 8, Rules of Criminal Procedure; Rules 17, 25, 79 and 100, Rules of Procedure for the Juvenile Court; Rules 2, 3, 11(c) and 15, Rules of Procedure for Eviction Actions; and Rule 38.1(d)(2), Rules of Civil Procedure. After September 30, 2020 and notwithstanding Rules 8.1(e) and 8.4(a)(4), the presiding superior court judge may exclude additional time from individual cases or groups of cases due to trial calendar congestion or, at the request of the trial judge, due to extraordinary circumstances caused by COVID-19 public health emergency.

2. The time for conducting preliminary hearings for in-custody defendants under Rule 5.1(a) and (d) and probation revocation arraignments under Rule 27.8 (a)(1), Rules of Criminal Procedure is extended to twenty (20) days from an initial appearance that occurs through September 30, 2020.

3. Until September 30, 2020, notwithstanding Rule 6 (b)(2), Rules of Civil Procedure, in an individual case, the court may extend the time to act under Rules 50(b), 52(b), 59(b)(1), (c), and (d), and 60(c) as those rules allow, or alternatively, may extend the time to act under those rules for 30 days upon a showing of good cause.

4. The following are not excluded from calculations of time:

   (a) For persons held in-custody: initial appearances, arraignments, preliminary hearings, in-custody probation violation, and conditions of release;
   (b) Domestic violence protective proceedings and injunctions;
   (c) Child protection temporary custody proceedings;
   (d) Court-ordered evaluation and treatment proceedings under Title 36, A.R.S.;
   (e) Appointment of a temporary guardian or temporary conservator;
   (f) Habeas corpus proceedings;
   (g) COVID-19 public health emergency proceedings;
   (h) Juvenile detention hearings;
   (i) Election cases; and
   (j) Any other proceeding that is necessary to determine whether to grant emergency relief.

5. For the period of March 18, 2020 through September 30, 2020, if a judge is unable to rule on a pending matter due to the judge's illness or is otherwise unable to work, the judge is deemed to be physically disabled, and the period of time the judge is ill or unable to work is excluded from the calculation of the 60 days from the date of submission in which a matter must be determined under A.R.S. § 12-128.01 or § 11-424.02.

IV. TO APPROPRIATELY PRIORITIZE CASE PROCESSING:

1. Constitutional and statutory priorities for cases continue to apply unless otherwise waived.

2. For cases where the right to a jury trial has not been waived, but where limits on courthouse facilities or judicial or court personnel capacity require prioritization and recognizing that constitutional and statutory priorities govern for specific issues raised in a specific case, trials shall be scheduled in the following order of priority:

   (a) Criminal felony and misdemeanor cases, where the defendant is in custody;
   (b) Sexually violent person cases;
   (c) Criminal felony cases, where the defendant is not in custody;
   (d) Criminal misdemeanor cases, where the defendant is not in custody; and
   (e) Civil and any other jury trial cases.

3. Recognizing that the priority required by the regular calculation of time for the proceedings listed in section III(4) applies first, where limited availability of courthouse facilities, judicial officers, or court personnel require prioritization, court proceedings shall be scheduled in the following order of priority:

   (a) In superior court:
      (1) Juvenile;

(2) Criminal;
(3) Evaluation and treatment (under chapter 5, title 36, A.R.S;) ;
(4) Family (involving minor children);
(5) Family (not involving minor children);
(6) Probate (under chapter 5, title 14, A.R.S);
(7) Civil;
(8) General Probate; and
(9) Tax and Administrative cases.

(b) In justice and municipal courts:
(1) Juvenile;
(2) Criminal misdemeanors;
(3) Other criminal;
(4) Residential eviction;
(5) Civil traffic;
(6) Civil; and
(7) Small claims.

4. Where backlogs exist, judicial leadership should expand case disposition capacity, including calling back retired judges, using judges pro tempore and temporarily reassigning judges from other assignments.

5. The court shall expedite a guardianship or conservatorship proceeding regarding an adult for whom a healthcare institution provides notice under Arizona Executive Order 2020-48, Section 14.

V. TO SAFELY PROVIDE FOR JURY TRIALS AND GRAND JURIES:

1. Trials of cases to a jury may resume when Arizona enters Phase I. When considering when and how to restart jury trials, courts should consult the guidance provided in the Arizona Jury Management Subgroup Best Practice Recommendations During the COVID-19 Public Health Emergency.

2. The presiding superior court judge in each county should determine when jury trials can safely begin, taking into consideration the physical space of individual courthouses and courtrooms and the public health threat in the county. Judicial leadership shall employ appropriate social distancing and other measures necessary for the protection of jurors and the general public and shall post on court websites a schedule and information describing the protective measures taken.

3. Until December 31, 2020, to reduce the number of citizens summoned to jury duty, procedural rules (including Rule 18.4(c), Rules of Criminal Procedure; Rule 47(e), Rules of Civil Procedure; Rule 134(a)(1), Justice Court Rules of Civil Procedure and Rule 12, Rules of Procedure for Eviction Actions) are modified to afford litigants only two peremptory strikes for potential jurors per

side in all civil and felony cases tried in the superior court, and one peremptory strike per side in all misdemeanor cases, and all civil cases tried in limited jurisdiction courts. This provision does not apply to capital murder cases.

4. To accommodate social distancing standards, courts may stagger times for prospective jurors to report for jury duty, direct them to individual courtrooms rather than jury assembly rooms, and conduct voir dire remotely or in multiple groups. At the direction of the presiding superior court judge, more than 30 prospective jurors may be summoned to a courthouse and non-courthouse facilities provided social distancing standards can be accommodated.

5. Judicial leadership may authorize the use of technology to facilitate alternatives to in-person appearance for selecting grand and petit jurors and for conducting grand jury proceedings, and with the permission of the presiding superior court judge, for jury trials.

6. As required by A.R.S. § 21-202(b)(2), jury commissioners must temporarily excuse prospective jurors whose jury service would substantially and materially affect the public welfare in an adverse manner, including but not limited to those who report a COVID-19 diagnosis, symptoms, or notification by a public health official of exposure to COVID-19 and may temporarily excuse potential jurors who are highly vulnerable to COVID-19.

7. The presiding superior court judge in coordination with the county attorney in each county may determine when grand juries can be resumed in a safe manner with proper social distancing. Grand jury selection may be conducted in-person by staggering the appearance of prospective jurors or remotely by use of technology. The presiding superior court judge may authorize grand jury proceedings to be held by video-conferencing.

IN GENERAL:

1. Court offices shall remain accessible to the public by telephone and email during their regular business hours to the greatest extent possible, including using drop boxes for documents.

2. During this period of reduced operations, courts and court clerks shall make reasonable efforts to provide alternative methods of accessing court records.

3. Probation officers are authorized to use social distancing and technology of all types to supervise those on criminal and juvenile probation, including, where appropriate, for contacts with such individuals.

4. Clerks of the court shall continue to issue marriage licenses and may do so remotely if the available technology allows licenses to be properly issued.

5. A judge may perform a marriage ceremony at the courthouse with no more than 10 persons present with proper social distancing and may perform a marriage ceremony in the electronic presence of the couple and witnesses at the parties' request.

6. The Administrative Office of the Courts may use technology to ensure social distancing for its operations, including the Court Appointed Special Advocate program, the Foster Care Review Boards program, and the Certification and Licensing programs under Part 7, Chapter 2, of the Arizona Code of Judicial Administration.

7. Limited jurisdiction judicial leadership may issue orders as necessary to implement the provisions of this order and take actions consistent with this order and orders issued by their presiding superior court judge.

8. Judicial leadership must notify court customers, the public, and the Administrative Director of all administrative orders issued under the authorization provided by this order using the most effective means available.

9. Judicial leadership must provide information regarding court access and operations in both English and Spanish.

10. The presiding superior court judge of a county and judges and staff in leadership in the limited jurisdiction courts in the county shall periodically meet to coordinate county-wide court activities impacted by the current COVID-19 crisis. Attendance at such properly scheduled meetings is mandatory unless excused by the presiding superior court judge.

Dated this 15th day of July, 2020.

FOR THE COURT:

_____

ROBERT BRUTINEL
Chief Justice

ATTACHMENT A

Standards for Resumption of On-site Court Operations During a Public Health Emergency

In planning for a phased resumption of on-site court operations, courts[1] must consider the following factors:

1. The status of the pandemic in each local court jurisdiction;
2. The size and functionality of courthouse facilities, both in terms of courtrooms and other public meeting areas; and
3. The size of the bench and supporting court staff.

The timing of the phases will be largely determined by Arizona specific directives. The Administrative Director will notify the judicial leadership of the current phase. Taking these factors into account, local courts should systematically resume on-site operations as follows:

Phase Zero: Due to the statewide public health emergency, all in-person court proceedings should be avoided to the greatest extent possible, consistent with constitutional rights.

- Courts should follow CDC social distancing guidelines and limit the number of persons at any court event to 10. Judicial leadership may authorize groups larger than 10, but not to exceed 30.
- The empaneling of new petit juries is suspended.
- In-person contact is to be limited through the use of virtual hearings (audio or video), electronic recording of court proceedings and electronic transmission of documents.
- Certain state and local court rules are suspended or amended to maximize public safety.
- Courts shall require masks or face coverings to be worn in the courthouse.

Phase I: Courts may begin transitioning to in-person proceedings to the extent this can be safely accomplished on June 1, 2020 in compliance with the following standards:

- Courthouse Safety:
    - Until Arizona enters Phase II and except where the size of the staff or other constraints will not allow, judicial leadership shall implement a staffing plan, which may include dividing personnel into two or more teams or other methods to accomplish the goal of preventing all or a substantial portion of court personnel from becoming infected or requiring quarantine at the same time due to work-related contact.
    - Judicial leadership shall limit any required in-person proceedings to attorneys, parties, victims, witnesses, jurors, court personnel, and other necessary persons.

[1] In this attachment, courts include Arizona courts, Office of the Presiding Disciplinary Judge, and Court of Appeals.

- Judicial leadership should modify operations to limit the number of transportation events to necessary in-court hearings for individuals in custody.
- Courts should limit the number of persons at any court event to 30 people depending on the size of the facility and with appropriate precautions. In extraordinary circumstances, the presiding superior court judge may authorize more than 30 people to gather in one location to conduct court business based on social distancing recommendations and the space available at the location.
- Courts shall utilize the AOC's health screening protocol.
- Courts shall require masks or face coverings to be worn in the courthouse.
- Courts shall exclude persons failing the screening protocol from entry to the courthouse.
- Rules which provide litigants a change of judge as a matter of right are suspended until December 31, 2020.
- Courts shall exclude persons failing the screening protocol from entry to the courthouse and attempt to make alternative arrangements for them to conduct court business. If an excluded person is attempting to attend a scheduled court proceeding, the appropriate court shall be notified of the person's inability to enter the courthouse.

- Technology
  - Courts shall continue the use of virtual hearings, electronic recording and electronic transmission of documents.
  - Courts shall provide public access by video or audio to court proceedings which are typically open to the public, specifically for the case types designated in this Administrative Order.
  - Courts shall consider and encourage the use of on-line dispute resolution (ODR).
- Appropriately Prioritize Case Processing
  - Courts shall follow the prioritization of case types, both for jury and non-jury cases.
  - Courts shall expand case disposition capacity, using retired judges and judges pro tempore and temporarily reassigning judges from other assignments.
- Jury Trials and Grand Juries
  - Jury trials may resume, subject to the approval of the presiding superior court judge.
  - Courts shall utilize appropriate social distancing and measures necessary for the protection of jurors, including the use of technology for virtual selection of petit and grand jurors and conducting of grand jury proceedings and, with the approval of the presiding superior court judge, for jury trials.
  - The presiding superior court judge may determine when grand juries can be resumed.
- In General
  - Courts shall provide for the use of drop boxes for filing documents.

Phase II: Scheduling of in-person court proceedings can resume, while limiting the projected number of courthouse visitors during peak times.

- Courthouse Safety
    - On-site court staffing should systematically increase during Phase II, as necessary to serve the increased number of visitors at the courthouse. Courts should continue to maintain two or more teams, with some teams working at the courthouse while others work remotely, or otherwise ensure that an exposed employee will not interrupt the operations of the court.
    - Courts should limit the number of persons at any court event to 50 people depending on the size of the facility and with appropriate precautions. In extraordinary circumstances, the presiding superior court judge may authorize more than 50 people to gather in one location to conduct court business based on social distancing recommendations and the space available at the location.
- Technology
    - The use of technology should continue, both to maximize public safety and to maximize efficiencies in court operations.
- Appropriately Prioritize Case Processing
    - Some courts may no longer have a need to expand case disposition capacity.
- The other Phase I provisions remain in effect during Phase II, specifically the sections of this Administrative Order regarding:
    - Jury Trials and Grand Juries
    - In General

Phase III: Scheduling of in-person court proceedings and other on-site court services can fully resume, while limiting the projected number of courthouse visitors during peak times.

- Courthouse Safety
    - On-site court staffing should be largely restored during this phase to serve the increased number of visitors at the courthouse. Courts may still opt to have some staff continue working remotely. These staff would be available for deployment to the courthouse in the event that on-site staff become infected.
    - Courts should follow CDC social distancing guidelines and limit the number of persons at any court event accordingly.
    - Consistent with guidance from CDC, courts may relax screening protocols for court participants and visitors, including the wearing of masks in the courthouse.
- Technology
    - The use of technology should continue, both to maximize public safety and to achieve efficiencies in court operations.
- Jury Trials and Grand Juries
    - Courts should continue to employ appropriate social distancing and other measures necessary for the protection of jurors, including the use of technology for virtual selection of petit and grand jurors and conducting of grand jury proceedings and, with the approval of the presiding superior court judge, for jury trials.

- In General
    - Courts shall provide for the use of drop boxes for filing documents.

Phase IV: Return to normal operations – no restrictions.

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	
	)	
AUTHORIZING LIMITATION OF	)	Administrative Order
COURT OPERATIONS DURING A	)	No. 2020 - 143
PUBLIC HEALTH EMERGENCY	)	(Replacing Administrative
AND TRANSITION TO RESUMPTION	)	Order No. 2020-114)
OF CERTAIN OPERATIONS	)	
	)	

Due to concern for the spread of COVID-19 in the general population, the Governor of the State of Arizona declared a statewide public health emergency on March 11, 2020 pursuant to A.R.S. § 26-303 and in accordance with A.R.S. § 26-301(15). Since March 18, 2020, several administrative orders have been issued in response to the COVID-19 public health threat that limited and modified court operations to ensure justice in Arizona is administered safely. The most recent such order, Administrative Order No. 2020-114 issued on July 15, 2020, directed Arizona's courts to continue to conduct business in a manner that reduced the risks associated with COVID-19 but to resume certain operations in an orderly way that prioritizes the safety of the public, judicial officers, and employees of the judiciary. This order updates and continues the effect of that order.

For the purposes of this order, the term "judicial leadership" refers, as applicable, to the chief judge of the court of appeals, the presiding superior court judge, the Presiding Justice of the Peace in Maricopa County, the Chief Administrative Justice of the Peace of the Pima County Consolidated Justice Court, the presiding judge of a municipal court that has multiple judges, or, for other limited jurisdiction courts that have only one judge, the judge of such court.

Arizona courts remain open to serve the public. Nevertheless, given the ongoing threat to public safety, certain limitations and changes in court practices and operations are still necessary. These changes will occur in phases consistent with this order and the Standards in Attachment A.

Therefore, pursuant to Article VI, Sections 3 and 5, of the Arizona Constitution,

IT IS ORDERED that all Arizona Courts and the office of the presiding disciplinary judge may continue transitioning to in-person proceedings to the extent this can be safely accomplished.

IT IS FURTHER ORDERED that presiding superior court judges continue to meet with local criminal justice system stakeholders to coordinate how best to handle the phasing-in of normal procedures in criminal proceedings, including resuming petit and grand jury proceedings.

IT IS FURTHER ORDERED that presiding superior court judges shall determine for the courts in their respective counties how in-person court proceedings and courthouse activities are to be phased-in and conducted, consistent with this order, in a manner that protects the health and safety of all participants. The chief judge of each court of appeals division shall determine how in-person court proceedings are to be phased-in and conducted.

IT IS FURTHER ORDERED that:

I. TO PROTECT COURTHOUSE SAFETY:

1. The presiding superior court judge of each county and the chief judge of each division of the court of appeals is authorized to adopt or suspend any local rule or order as needed to address the current public health emergency in cooperation with public health officials and to take any reasonable action that circumstances require to enable necessary operations of the Court of Appeals (COA) in each division and the superior, justice and municipal courts in each county.

2. Except where the number of judicial officers and court employees or other constraints will not allow, judicial leadership shall implement a staffing plan, which may include dividing judicial officers and employees into two or more teams or using other methods to prevent all or a substantial portion of judicial officers and court employees from becoming infected or requiring quarantine at the same time due to work-related contact. The presiding superior court judge may exempt judicial officers and court employees who perform critical court functions from this provision if there is no practical alternative.

3. Courts should modify operations to limit the number of transportation events to necessary in-court hearings for individuals in custody or receiving services pursuant to court order, including combining hearings subject to maximum gathering size required by this order, and to minimize mixing of populations to eliminate avoidable quarantines when such individuals are returned to custody following court hearings.

4. Rule 10.2, Rules of Criminal Procedure; Rule 42.1, Rules of Civil Procedure; Rule 2(B), Rules of Procedure for Juvenile Court; Rule 6, Rules of Family Law Procedure; Rule 133(d), Justice Court Rules of Civil Procedure; Rule 9(c), Rules of Procedure for Eviction Actions; and any local rule that provides litigants with a change of judge as a matter of right are suspended until December 31, 2020 to reduce the risk of virus exposure inherent in out-of-county judges' travel, and to ensure adequate judicial resources for backlog reduction.

5. Judicial leadership shall adopt practices following the gathering size and social distancing standards in Attachment A, considering the size of the courtrooms and other spaces where people gather in and around the courthouse. Until Phase II, depending on the size of the facility, and with appropriate precautions, courts may authorize a maximum of 30 persons. A court should not schedule in-person multiple, simultaneous proceedings that are inconsistent with these standards. In extraordinary circumstances, the presiding superior court judge may authorize more than 30 persons to gather in one location to conduct court business based on social distancing recommendations and the space available at the location. Courts should coordinate with law enforcement to require staggered citation appearance times.

6. Judicial leadership must require all participants in court proceedings, including attorneys, parties, victims, witnesses, jurors, judicial officers, court employees, and other necessary persons to notify the court prior to appearing at the courthouse of any COVID-19 diagnosis, symptoms, or exposure notification by public health authorities and to make alternative arrangements to participate.

7. Until Phase III, judicial leadership should limit any required in-person proceedings to attorneys, parties, victims, witnesses, jurors, judicial officers, court employees, and other necessary persons, where necessary to maintain the recommended social distancing within the courthouse, including each courtroom, and the judicial officer in each proceeding is authorized to make reasonable orders to ensure the health and safety of hearing participants consistent with the parties' right to due process of law.

8. Judicial officers shall liberally grant continuances and make accommodations, if necessary and possible, for attorneys, parties, victims, witnesses, jurors, and others with business before the courts who are at a high risk of illness from COVID-19 or who report any COVID-19 diagnosis, symptoms, or exposure notification by public health authorities.

9. The Administrative Office of the Courts shall provide judicial leadership with a health screening protocol for judicial officers and court employees used to detect COVID-19-related symptoms consistent with recommendations by public health officials to prevent the spread of the virus. Judicial leadership shall implement this protocol and require judicial officers and court employees to wear their own or court-provided masks, face coverings, or face shields when having any in-person contact with judicial officers, court employees, or the public, or as allowed by section I(11) of this order.

10. The Administrative Office of the Courts shall provide judicial leadership with a health screening protocol for the public used to detect COVID-19-related symptoms consistent with recommendations by public health officials to

prevent the spread of the virus. Judicial leadership shall implement this protocol. Where courthouse entrance security screening is available, the COVID-19 screening protocol may require body temperature screening for the public. Judicial leadership shall require court participants and visitors to wear a mask or other face covering in the courthouse. Courts may provide the required face covering for use by persons who do not have their own. Courts shall exclude persons from the courthouse who refuse to cooperate with or who do not pass established screening protocols or refuse to wear a mask or other face covering. Judicial leadership shall post these requirements at entrances and on their public website.

11. During in-courtroom proceedings, the judicial officer may authorize removal of masks or face coverings for purposes of witness testimony, defendant identification, making an appropriate record, or other reasons as deemed necessary by the judicial officer; provided that appropriate social distancing or other protective measures are followed.

12. Judicial leadership should establish and implement social distancing and sanitation measures established by the United States Department of Labor and the CDC.

II. TO USE TECHNOLOGY TO MINIMIZE IN-PERSON PROCEEDINGS:

1. Proceedings in all Arizona appellate, superior, justice, juvenile, and municipal courts and before the presiding disciplinary judge may be held by teleconferencing or video conferencing, consistent with core constitutional rights.

2. During Phases I and II, judicial leadership should limit in-person contact in the conduct of court business as much as possible by using available technologies, including alternative means of filing, teleconferencing, video conferencing, and use of email and text messages to reasonably ensure the health and safety of all participants.

3. Judicial officers may hold ex parte and contested hearings on orders of protection electronically.

4. Judicial leadership may authorize the use of available online dispute resolution (ODR) platforms to resolve cases.

5. Judicial leadership may authorize the use of electronic, digital, or other means regularly used in court proceedings to create a verbatim record, except in grand jury proceedings.

6. When court proceedings are not held in-person or the public is limited from attending in-person proceedings, the presiding superior court judge shall provide public access by video or audio to civil and criminal court proceedings typically open to the public to maximize the public's ability to observe court proceedings to the extent logistically possible. The presiding superior court judge or single judge of a limited jurisdiction court should make video or audio proceedings, excluding small claims cases, available to the public to the greatest extent possible. The presiding superior court judge should also list the public availability of video and audio proceedings on the AZCourt site.

7. The 100-mile distance requirement for a limited jurisdiction court to accept a telephonic plea under Rule 17.1(f) of the Rules of Criminal Procedure is suspended through December 31, 2020.

8. Clerks may attend court proceedings by teleconferencing or video conferencing to comply with A.R.S. § 12-283(A)(1).

9. Arizona Revised Statutes, Title 36, Chapter 5 matters are confidential and not open to persons other than the parties, witnesses, their respective counsel, and additional persons the court permits to attend. When these proceedings are not conducted in-person, judicial leadership must use technology in a manner that protects the patient's rights to privacy and confidentiality.

10. The judicial officer in each proceeding conducted using video-conferencing may limit and permit recording as appropriate to apply the policies provided in Rule 122, Rules of the Supreme Court, to those proceedings.

11. When conducting virtual hearings, courts may establish procedures to collect the defendant's fingerprint, or to otherwise establish the defendants identity as an alternative means of complying with the procedures required by A.R.S. § 13-607 and Rule 26.10 of the Rules of Criminal Procedure.

III. TO CALCULATE TIME CONSIDERING THE EMERGENCY:

1. The period of March 18, 2020 through November 1, 2020 is excluded from calculation of time under rule provisions and statutory procedures that require court proceedings to be held within a specific period of time, including Rule 8, Rules of Criminal Procedure; Rules 17, 25, 79 and 100, Rules of Procedure for the Juvenile Court; Rules 2, 3, 11(c) and 15, Rules of Procedure for Eviction Actions; and Rule 38.1(d)(2), Rules of Civil Procedure. After November 1, 2020 and notwithstanding Rules 8.1(e) and 8.4(a)(4), the presiding superior court judge may exclude additional time from individual cases or groups of cases due to trial calendar congestion or, at the request of the trial judge, due to extraordinary circumstances caused by COVID-19 public health emergency.

2. The time for conducting preliminary hearings for in-custody defendants under Rule 5.1(a) and (d) and probation revocation arraignments under Rule 27.8 (a)(1), Rules of Criminal Procedure is extended to twenty (20) days from an initial appearance that occurs through November 1, 2020.

3. Through November 1, 2020, notwithstanding Rule 6 (b)(2), Rules of Civil Procedure, in an individual case, the court may extend the time to act under Rules 50(b), 52(b), 59(b)(1), (c), and (d), and 60(c) as those rules allow, or alternatively, may extend the time to act under those rules for 30 days upon a showing of good cause.

4. The following are not excluded from calculations of time:

   (a) For persons held in-custody: initial appearances, arraignments, preliminary hearings, in-custody probation violation, and conditions of release;
   (b) Domestic violence protective proceedings and injunctions;
   (c) Child protection temporary custody proceedings;
   (d) Court-ordered evaluation and treatment proceedings under Title 36, A.R.S.;
   (e) Appointment of a temporary guardian or temporary conservator;
   (f) Habeas corpus proceedings;
   (g) COVID-19 public health emergency proceedings;
   (h) Juvenile detention hearings;
   (i) Election cases; and
   (j) Any other proceeding that is necessary to determine whether to grant emergency relief.

5. For the period of March 18, 2020 through November 1, 2020, if a judicial officer is unable to rule on a pending matter due to the judicial officer's illness or is otherwise unable to work, the judicial officer is deemed to be physically disabled, and the period of time the judicial officer is ill or unable to work is excluded from the calculation of the 60 days from the date of submission in which a matter must be determined under A.R.S. § 12-128.01 or § 11-424.02.

IV. TO APPROPRIATELY PRIORITIZE CASE PROCESSING:

1. Constitutional and statutory priorities for cases continue to apply unless otherwise waived.

2. For cases where the right to a jury trial has not been waived, but where the availability of courthouse facilities, judicial officers or court employees require prioritization and recognizing that constitutional and statutory priorities govern for specific issues raised in a specific case, trials shall be scheduled in the following order of priority:

(a) Criminal felony and misdemeanor cases, where the defendant is in custody;
(b) Sexually violent person cases;
(c) Criminal felony cases, where the defendant is not in custody;
(d) Criminal misdemeanor cases, where the defendant is not in custody; and
(e) Civil and any other jury trial cases.

3. Recognizing that the priority required by the regular calculation of time for the proceedings listed in section III(4) applies first, where the limited availability of courthouse facilities, judicial officers, or court employees require prioritization, court proceedings shall be scheduled in the following order of priority:

(a) In superior court:
(1) Juvenile;
(2) Criminal;
(3) Evaluation and treatment (under chapter 5, title 36, A.R.S.);
(4) Family (involving minor children);
(5) Family (not involving minor children);
(6) Probate (under chapter 5, title 14, A.R.S.), subject to paragraph 5 below;
(7) Civil;
(8) General Probate; and
(9) Tax and Administrative cases.

(b) In justice and municipal courts:
(1) Juvenile;
(2) Criminal misdemeanors;
(3) Other criminal;
(4) Residential eviction;
(5) Civil traffic;
(6) Civil; and
(7) Small claims.

4. Where backlogs exist, judicial leadership should expand case disposition capacity, including calling back retired judges, using judges pro tempore and temporarily reassigning judges from other assignments.

5. The superior court shall give priority to cases in which the appointment of a guardian under title 14, A.R.S. has been requested for an incapacitated person whom a healthcare institution has determined is medically appropriate for discharge from that healthcare institution. For purposes of this paragraph, 'healthcare institution' has the same meaning as prescribed in A.R.S. § 36-401(22).

V. TO SAFELY PROVIDE FOR JURY TRIALS AND GRAND JURIES:

1. Trials of cases to a jury may resume when Arizona enters Phase I. When considering when and how to restart jury trials, courts should consult the guidance provided in the Arizona Jury Management Subgroup Best Practice Recommendations During the COVID-19 Public Health Emergency.

2. The presiding superior court judge in each county should determine when jury trials can safely begin, taking into consideration the physical space of individual courthouses and courtrooms and the public health threat in the county. Judicial leadership shall employ appropriate social distancing and other measures necessary for the protection of jurors and the general public and shall post on court websites a schedule and information describing the protective measures taken.

3. Until December 31, 2020, to reduce the number of citizens summoned to jury duty, procedural rules (including Rule 18.4(c), Rules of Criminal Procedure; Rule 47(e), Rules of Civil Procedure; Rule 134(a)(1), Justice Court Rules of Civil Procedure; and Rule 12, Rules of Procedure for Eviction Actions) are modified to afford litigants only two peremptory strikes for potential jurors per side in all civil and felony cases tried in the superior court, and one peremptory strike per side in all misdemeanor cases, and all civil cases tried in limited jurisdiction courts. This provision does not apply to capital murder cases.

4. To accommodate social distancing standards, courts may stagger times for prospective jurors to report for jury duty, direct them to individual courtrooms rather than jury assembly rooms, and conduct voir dire remotely or in multiple groups. At the direction of the presiding superior court judge, more than 30 prospective jurors may be summoned to a courthouse and non-courthouse facilities provided social distancing standards can be accommodated.

5. Judicial leadership may authorize the use of technology to facilitate alternatives to in-person appearance for selecting grand and petit jurors and for conducting grand jury proceedings, and with the permission of the presiding superior court judge, for jury trials.

6. As required by A.R.S. § 21-202(b)(2), jury commissioners must temporarily excuse prospective jurors whose jury service would substantially and materially affect the public welfare in an adverse manner, including but not limited to those who report a COVID-19 diagnosis, symptoms, or notification by a public health official of exposure to COVID-19 and may temporarily excuse potential jurors who are highly vulnerable to COVID-19.

7. The presiding superior court judge in coordination with the county attorney in each county may determine when grand juries can be resumed in a safe manner with proper social distancing. Grand jury selection may be conducted in-person by staggering the appearance of prospective jurors or remotely by use of technology. The presiding superior court judge may authorize grand jury proceedings to be held by video-conferencing.

IN GENERAL:

1. Court offices shall remain accessible to the public by telephone and email during their regular business hours to the greatest extent possible, including using drop boxes for documents.

2. During this period of reduced operations, courts and court clerks shall make reasonable efforts to provide alternative methods of accessing court records.

3. Probation officers are authorized to use social distancing and technology of all types to supervise those on criminal and juvenile probation, including, where appropriate, for contacts with such individuals.

4. Clerks of the court shall continue to issue marriage licenses and may do so remotely if the available technology allows licenses to be properly issued.

5. A judge may perform a marriage ceremony at the courthouse with no more than 10 persons present with proper social distancing and may perform a marriage ceremony in the electronic presence of the couple and witnesses at the parties' request.

6. The Administrative Office of the Courts may use technology to ensure social distancing for its operations, including the Court Appointed Special Advocate program, the Foster Care Review Boards program, and the Certification and Licensing programs under Part 7, Chapter 2, of the Arizona Code of Judicial Administration.

7. Limited jurisdiction judicial leadership may issue orders as necessary to implement the provisions of this order and take actions consistent with this order and orders issued by their presiding superior court judge.

8. Judicial leadership must notify court customers, the public, and the Administrative Director of all administrative orders issued under the authorization provided by this order using the most effective means available.

9. Judicial leadership must provide information regarding court access and operations in both English and Spanish.

10. The presiding superior court judge of a county and the judicial officers and court employees in leadership in the limited jurisdiction courts in the county shall periodically meet to coordinate county-wide court activities impacted by the current COVID-19 crisis. Attendance at such properly scheduled meetings is mandatory unless excused by the presiding superior court judge.

Dated this 26th day of August, 2020.

FOR THE COURT:

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ROBERT BRUTINEL
Chief Justice

ATTACHMENT A

Standards for Resumption of On-site Court Operations During a Public Health Emergency

In planning for a phased resumption of on-site court operations, courts [1] must consider the following factors:

1. The status of the pandemic in each local court jurisdiction;
2. The size and functionality of courthouse facilities, both in terms of courtrooms and other public meeting areas; and
3. The size of the bench and supporting court staff.

The timing of the phases will be largely determined by Arizona specific directives. The Administrative Director will notify the judicial leadership of the current phase. Taking these factors into account, local courts should systematically resume on-site operations as follows:

Phase Zero: Due to the statewide public health emergency, all in-person court proceedings should be avoided to the greatest extent possible, consistent with constitutional rights.

- Courts should follow CDC social distancing guidelines and limit the number of persons at any court event to 10. Judicial leadership may authorize groups larger than 10, but not to exceed 30.
- The empaneling of new petit juries is suspended.
- In-person contact is to be limited through the use of virtual hearings (audio or video), electronic recording of court proceedings and electronic transmission of documents.
- Certain state and local court rules are suspended or amended to maximize public safety.
- Courts shall require masks or face coverings to be worn in the courthouse.

Phase I: Courts were authorized to begin on June 1, 2020 transitioning to in-person proceedings to the extent it could be safely accomplished in compliance with the following standards:

- Courthouse Safety:
    - Except where the size of the employees or other constraints will not allow, judicial leadership shall implement a staffing plan, which may include dividing employees and judicial officers into two or more teams or other methods to accomplish the goal of preventing all or a substantial portion of court employees and judicial officers from becoming infected or requiring quarantine at the same time due to

[1] In this attachment, courts include Arizona courts, Office of the Presiding Disciplinary Judge, and Court of Appeals.

work related contact. The presiding superior court judge may exempt employees and judicial officers who perform critical court functions from this provision if there is no practical alternative.

- Judicial leadership shall limit any required in-person proceedings to attorneys, parties, victims, witnesses, jurors, judicial officers, court employees, and other necessary persons.
- Judicial leadership should modify operations to limit the number of transportation events to necessary in-court hearings for individuals in custody.
- Courts should limit the number of persons at any court event to 30 people depending on the size of the facility and with appropriate precautions. In extraordinary circumstances, the presiding superior court judge may authorize more than 30 people to gather in one location to conduct court business based on social distancing recommendations and the space available at the location.
- Courts shall utilize the health screening protocols provided by the AOC.
- Courts shall require masks or face coverings to be worn in the courthouse.
- Courts shall exclude persons failing the screening protocol from entry to the courthouse.
- Rules which provide litigants a change of judge as a matter of right are suspended until December 31, 2020.
- Courts shall exclude persons failing the screening protocol from entry to the courthouse and attempt to make alternative arrangements for them to conduct court business. If an excluded person is attempting to attend a scheduled court proceeding, the appropriate court shall be notified of the person's inability to enter the courthouse.

- Technology
  - Courts shall continue the use of virtual hearings, electronic recording and electronic transmission of documents.
  - Courts shall provide public access by video or audio to court proceedings which are typically open to the public, specifically for the case types designated in this Administrative Order.
  - Courts shall consider and encourage the use of on-line dispute resolution (ODR).
- Appropriately Prioritize Case Processing
  - Courts shall follow the prioritization of case types, both for jury and non-jury cases.

- Courts shall expand case disposition capacity, using retired judges and judges pro tempore and temporarily reassigning judges from other assignments.

- Jury Trials and Grand Juries
  - Jury trials may resume, subject to the approval of the presiding superior court judge.
  - Courts shall utilize appropriate social distancing and measures necessary for the protection of jurors, including the use of technology for virtual selection of petit and grand jurors and conducting of grand jury proceedings and, with the approval of the presiding superior court judge, for jury trials.
  - The presiding superior court judge may determine when grand juries can be resumed.
- In General
  - Courts shall provide for the use of drop boxes for filing documents.

Phase II: Scheduling of in-person court proceedings can resume, while limiting the projected number of courthouse visitors during peak times.

- Courthouse Safety
  - On-site court staffing should systematically increase during Phase II, as necessary to serve the increased number of visitors at the courthouse. Except where the number of judicial officers and court employees or other constraints will not allow, judicial leadership shall implement a staffing plan, which may include dividing judicial officers and court employees into two or more teams or using other methods to prevent all or a substantial portion of judicial officers and court employees from becoming infected or requiring quarantine at the same time due to work-related contact. The presiding superior court judge may exempt judicial officers and court employees who perform critical court functions from this provision if there is no practical alternative.
  - Courts should limit the number of persons at any court event to 50 people depending on the size of the facility and with appropriate precautions. In extraordinary circumstances, the presiding superior court judge may authorize more than 50 people to gather in one location to conduct court business based on social distancing recommendations and the space available at the location.
  - Courts shall utilize the health screening protocols provided by the AOC.
  - Courts shall require masks or face coverings to be worn in the courthouse.

- Courts shall exclude persons failing the screening protocol from entering the courthouse.

- Technology
  - The use of technology should continue, both to maximize public safety and to maximize efficiencies in court operations.
- Appropriately Prioritize Case Processing
  - Some courts may no longer have a need to expand case disposition capacity.
- The other Phase I provisions remain in effect during Phase II, specifically the sections of this Administrative Order regarding:
  - Jury Trials and Grand Juries
  - In General

Phase III: Scheduling of in-person court proceedings and other on-site court services can fully resume, while limiting the projected number of courthouse visitors during peak times.

- Courthouse Safety
  - On-site court staffing should be largely restored during this phase to serve the increased number of visitors at the courthouse. Courts may still opt to have some judicial officers and court employees continue working remotely. These judicial officers and court employees would be available for deployment to the courthouse in the event that on-site judicial officers and court employees become infected.
  - Courts should follow CDC social distancing guidelines and limit the number of persons at any court event accordingly.
- Technology
  - The use of technology should continue, both to maximize public safety and to achieve efficiencies in court operations.
- Jury Trials and Grand Juries
  - Courts should continue to employ appropriate social distancing and other measures necessary for the protection of jurors, including the use of technology for virtual selection of petit and grand jurors and conducting of grand jury proceedings and, with the approval of the presiding superior court judge, for jury trials.
- In General
  - Courts shall provide for the use of drop boxes for filing documents.

Phase IV: Return to normal operations – no restrictions.

IN THE SUPERIOR COURT

IN AND FOR THE COUNTY OF PIMA

IN THE MATTER OF: RESTRICTING PHYSICAL ACCESS TO PIMA COUNTY SUPERIOR COURT FACILITIES DUE TO A PUBLIC HEALTH EMERGENCY	ADMINISTRATIVE ORDER 2020-43 (Replaces AO 2020-41)

Due to concern for the spread of COVID-19 in the general population, Arizona Governor Doug Ducey declared a statewide public health emergency. Arizona Supreme Court Chief Justice Robert Brutinel issued Administrative Order No. 2020-143 to address measures to be taken by the Judicial Branch to conduct business in a manner that reduces the risk associated with this public health emergency. Supreme Court Administrative Order No. 2020-143 directs the presiding superior court judge of each county to determine how in-person proceedings are to be conducted in each of the county's courtrooms under conditions that protect the health and safety of participants and the public. The Order allows individual presiding judges to issue orders limiting in-person courtroom contact, following the social distancing recommendations of the Center for Disease Control, and limiting the number of persons present in a courtroom. The Order further sets forth a process courts in Arizona are to use to return to full operation over time in phases. The Order identifies the present state of the courts as Phase 1. No timetable to safely move the courts to Phase II has been established.

This Court issued Administrative Orders 2020-12 and 2020-41 to address the Court's response to the COVID-19 pandemic. This Administrative Order replaces 2020-41. The extent to which it impacts 2020-12 is set forth below. This Order addresses only Pima County Superior Court functions. As a result of increased spread of COVID-19 and pursuant to Supreme Court Administrative Order No. 2020-143 and Supreme Court Administrative Order No. 2017-79:

IT IS ORDERED Arizona Supreme Court Administrative Order 2020-143 is hereby incorporated by this reference and adopted in its entirety.

IT IS ORDERED beginning July l, 2020 and through November 1, 2020, all matters to be heard by the Court, as set forth hereinafter, shall presumptively be conducted telephonically or via video conferencing. Although most in-person hearings and events will presumptively not occur in superior court during the pendency of this Administrative Order, the court, may for good cause shown, conduct an event in person. Any request for an in-person hearing must be made not less than two court days in advance of the time of hearing, and not at the time of hearing. With the exception of the Juvenile Bench, any request for an in-person hearing must be made to the assigned Division with a copy to the bench presiding judge. Any in-person event shall be conducted in full compliance with the terms and conditions of this Administrative Order, Arizona Supreme Court Administrative Order 2020-114 and guidelines established by the Center for Disease Control, the Arizona Department of Health Services, and the Pima County Health Department. If the Court determines a party has failed to reasonably comply with this Order, the Court will determine what sanctions, if any, including contempt of court, are appropriate.

IT IS FURTHER ORDERED that attendance at any in-person event held pursuant to one of the limited exceptions below will be limited to parties, witnesses, victims, sheriff's deputies, detention officers, law

enforcement officers, parents in juvenile delinquency matters, lawyers who are participating in the hearing or event and any other person the judge may deem, in exercise of sound discretion, to be appropriate or necessary. Each judge has discretion to control and limit the number of people in a courtroom and may excuse any person from the courtroom as deemed appropriate or necessary to meet the ends of this Administrative Order.

IT IS FURTHER ORDERED that any person intending to be present at a court proceeding who has been diagnosed with COVID-19, has had exposure to COVID-19, or has symptoms of COVID-19 as defined by the Center for Disease Control must contact via telephone or email the assigned division to arrange to appear telephonically, have their appearance waived, or have the proceeding reset. Any person shall not attend the court event in person.

IT IS FURTHER ORDERED that all persons entering the courthouse, including attorneys, parties, victims, witnesses, jurors, court personnel, and others, must notify the court in advance of any COVID-19 diagnosis, symptoms, or exposure notification by public health authorities, and to make alternative arrangements to participate. Failure to do so may result in issuance of sanctions, including but not limited to contempt of court.

IT IS FURTHER ORDERED all persons, upon entering Pima County Superior Court and the buildings on the campus of Pima County Superior Court Juvenile Division, will have their temperature checked upon entering the building. Protocols for the process of allowing entry into the building will be posted at points of entry. Court security personnel shall have the authority to direct any such person whose body temperature exceeds the standard established by protocol to leave the building.

IT IS FURTHER ORDERED that all persons entering the courthouse, including but not limited to attorneys, parties, victims, witnesses, jurors, court personnel, and other necessary persons wear their own or court-provided masks or face shields while in the courthouse. This Order does not serve to require the Court to provide masks or face shields.

IT IS ORDERED any in-person appearance may be converted to a telephonic or video appearance by order of the court, unless an in-person appearance is required by United States or Arizona Constitutions, or by statute or rule.

IT IS ORDERED the following bench-specific hearings may be conducted during the term of this Administrative Order, and that all other matters not listed specifically hereinafter will not be conducted:

I. CIVIL:

The following hearings may be conducted, and will presumptively be conducted telephonically unless the Court orders otherwise:

- TROs and preliminary injunctions
- Stay of judgment pending appeal
- Elections cases
- Special Action relief against arbitrary or capricious acts by local governmental entities
- Forcible Entry and Detainer Actions (evictions)
- Motions for Summary judgment arguments
- Structured Settlement approvals
- Motions to Dismiss
- Motions for Judgment on the Pleadings
- Excess Proceeds matters

- Defaults
- Recitation of terms of a settlement agreement (as approved by the civil presiding judge, and dependent upon availability of a courtroom clerk)
- Any other matter as the Court may deem appropriate or necessary.

The court will continue to expect that any hearings scheduled while this Administrative Order is in effect will be necessary and productive. Counsel shall determine in advance of any court appearance whether the matter meets those criteria and notify the Court accordingly. Trial divisions will continue to coordinate calendars through the bench presiding judge.

II. CRIMINAL:

The following hearings may be conducted, and will presumptively be conducted telephonically unless the Court orders otherwise:

- Initial Appearances
- Arraignments
- Changes of Plea
- Motions to Modify Conditions of Release
- Sentencings and Dispositions
- Preliminary Hearings
- Case Management Conferences
- Status Conferences
- Any other matter as the Court may deem appropriate or necessary.

The court will continue to expect that any hearings scheduled while this Administrative Order is in effect will be necessary and productive. Counsel shall determine in advance of any court appearance whether the matter meets those criteria and notify the Court accordingly. Trial divisions will continue to coordinate calendars through the bench presiding judge.

III. FAMILY:

The following hearings may be conducted, and will presumptively be conducted telephonically or by Microsoft Teams unless the Court orders otherwise:

Tier 1:

- Ex Parte Orders of Protection and Injunction Against Harassment hearings.
- Hearings regarding Child Support Warrants if the person is in custody
- Contested Order of Protection Hearings
- Rule 48(d) hearings (conducted by the assigned judge)
- Expedited process request to enforce parenting time or legal decision-making

Tier 2:

- Rule 47 and Rule 47.2 motions for parenting time, legal decision-making and support
- Motions for temporary orders for exclusive use of marital home
- Petitions and motions relating to school choice for a minor child
- Child support hearings (establishment, modification and enforcement), IV-D and non IV-D
- Defaults

Tier 3:

- Resolution Management Conferences
- Settlement conferences
- Modification of parenting plans not covered above (Duration: 3 hours or less)
- Trials (Duration: 3 hours or less)
- Enforcement of prior orders and judgments, non-parenting time and legal decision-making
- Any other matter as the Court may deem appropriate or necessary.

Priority will be given to Tier 1 hearings. Tier 1 and 2 hearings may be conducted in person for good cause shown. Any request for an in-person hearing must be made not less than two court days in advance of the hearing, and not at the time of hearing. Tier 3 hearings and trials may not be conducted in person, and if in-person attendance is necessary, then the matter shall be continued.

The court will continue to expect that any hearings scheduled while this Administrative Order is in effect will be necessary and productive. Counsel shall determine in advance of any court appearance whether the matter meets those criteria and notify the Court accordingly. Trial divisions will continue to coordinate calendars through the bench presiding judge.

Unless there is a current order prohibiting contact between the parties or a history of domestic violence between self-represented parties, parties and counsel, if any, must engage in a good faith attempt to resolve any issues before the hearing. This good faith consultation requires a meeting either in person, by conference call, or by other remote means, and does not include merely a letter or email. For any party or counsel that fails to comply with this good faith consultation requirement, the court may enter sanctions consistent with Rule 76.2.

IV. JUVENILE:

The following hearings will be conducted in-person if the child has been detained, unless otherwise ordered by the Court:

- Detention hearings
- Trial reviews
- Adjudications
- Dispositions
- Evidentiary hearings

The following hearings may be conducted in person if requested by a party, or as ordered by the Court:

- Contested dependencies .
- Contested severances
- Temporary custody hearings
- Rule 59 Motions
- Other hearings required by law to be heard at juvenile subject to a statutory or juvenile rules timelines, or as the Court may deem appropriate or necessary

All other matters will be conducted telephonically, unless, for good cause shown, the Court orders otherwise.

In addition to necessary courtroom staff and support personnel, those attending hearings in person may include parties and their attorneys, parents in delinquency matters, victims and victim witness advocates and witnesses. All others, including placement representatives, supporting family, and service providers must appear by phone. Witnesses may appear by telephone through agreement of the parties or as ordered by the Court pursuant to Ariz. R. P. Juv. Ct. 42.

V. PROBATE:

The following hearings may be conducted, and will presumptively be conducted telephonically unless the Court orders otherwise:

- Title 36 Mental Health Hearings
- Appointment of Guardian and/or Conservator, both emergency/temporary requests and permanent requests
- Requests to remove a guardian and/or conservator
- Petitions to open a probate with or without a will and the appointment of a personal representative or special administrator
- Requests to remove a personal representative or special administrator
- Requests for the release of restrictions on assets in estate
- Petitions to remove a trustee
- Petitions regarding disposition of a decedent's body
- Petitions to determine the validity of or enforce a health care directive
- Any other matter as the Court may deem appropriate or necessary

The court will continue to expect that any hearings scheduled while this Administrative Order is in effect will be necessary and productive. Counsel shall determine in advance of any court appearance whether the matter meets those criteria and notify the Court accordingly. Trial divisions will continue to coordinate calendars through the bench presiding judge.

OTHER ORDERS:

IT IS ORDERED that each bench presiding judge may issue bench-specific internal protocols to manage personnel and process caseloads during the pendency of this Administrative Order. Each bench presiding judge is to make any such internal protocols available upon request, subject to any limitations or conditions provided by rule, statute or constitutional considerations.

IT IS ORDERED each bench presiding judge will establish and maintain a roster of judges who are on duty each day during the term of this Administrative Order. Judges who are not on duty will not be available to conduct hearings and will presumptively be out of session.

IT IS ORDERED each bench presiding judge may limit the number of hearings judges on that particular bench may conduct. Judges conducting hearings may place time limits on matters and exercise any other control over proceedings deemed appropriate or necessary to meet the terms of this Administrative Order and to further the interests of justice.

IT IS ORDERED that all emergency public health cases will proceed as directed by the court.

IT IS ORDERED that requests by media to appear at a proceeding must be made to the Court's Public Information Officers via email at communityrelations@sc.pima.gov to coordinate such an appearance.

IT IS FURTHER ORDERED that any person not authorized to attend a proceeding may submit a request to the assigned judicial officer for permission to attend.

IT IS FURTHER ORDERED the Presiding Judge may grant contractors and attendant personnel access to Court buildings.

IT IS FURTHER ORDERED that to the extent this order is inconsistent with Superior Court Administrative Order 2020-12, this order controls.

Dated this 26th day of August, 2020.

__/s/_____
KYLE BRYSON
PRESIDING JUDGE

CC: Ron Overholt, Court Administrator
Superior Court Judges
Juvenile Court Judges
Community Relations
Gary Harrison, Clerk of Court
Michelle Madrid, Director, Case Management Services
Terri Faust, Managing Court Reporter
Ramiro Alviar, Director, Interpreter's Office
Barbara LaWall, Pima County Attorney
Dean Brault, Pima County Public Defense Services
Joel Feinman, Pima County Public Defender
James Fullin, Pima County Legal Defender
Verne Hill, Office of Court Appointed Counsel
Kevin Burke, Pima County Legal Advocate's Office
Judicial Security
Conciliation Court

From: Bruce Cohen (SUP)
Sent: Tuesday, September 1, 2020 1:51 PM
To: All Family Court Judges and Commissioners <drjudcom@jbazmc.mail.onmicrosoft.com>; Family Court Administrators <FamilyCourtAdministrators@jbazmc.maricopa.gov>; Family Court Supervisors <FamilyCourtSupervisors@superiorcourt.maricopa.gov>; Sandra Monz (SUP) <Sandra.Monz@jbazmc.maricopa.gov>; Shawn Friend (SUP) <friends@superiorcourt.maricopa.gov>; All Family Court JAs <alldrjas@jbazmc.mail.onmicrosoft.com>; All Family Court Bailiffs <AllFamilyCourtBailiffs@jbazmc.mail.onmicrosoft.com>
Subject: Rule Change- ARFLP 44 Defaults

Yesterday, I sent you updates regarding the Order of Protection rule change in section 38 of the Arizona Rules of Protective Order Procedure.

Today's information relates to a rule change to Rule 44 of ARFLP (Defaults), which the Supreme Court adopted and which will go into effect on January 1, 2021.

A brief explanation of why the rule change was sought: The version of the rule that is now in effect requires that with the Application for Default, the petitioning party must attach the service documents. When a party fails to attach the service documents (which occurs frequently), the rule in its current version did not detail whether that failure to attach was fatal to the default process. Some judicial officers interpreted the rule in a fashion that it was fatal and, as such, the default process would have to start all over again. Other judicial officers would not find it to be fatal if the proof of service could be found within the court file.

Given the disparate treatment, I asked that the rule be clarified. And the following is what the Supreme Court adopted:

RULES OF FAMILY LAW PROCEDURE
Rule 44. Default

(a)(1) to (a)(2)(D) [No change]

(a)(2)(E) establishes that service of process has been effectuated by **either** (i) attaching a copy of the proof or acceptance of service on the party in default, **or (ii) if proof or acceptance of service appears in the court record, by setting forth in the application the date and manner of service on the party in default**; and

(a)(2)(F) [No change]

(b) to (d) [No change]

So, a party seeking a default against the other will, as of January 1, 2021, be able to secure the default **either** by attaching the proof of service **OR** by detailing within the application how and when service was effectuated. To ensure that this is clear, we will be updating the forms used at the self-service center.

Given the decisions made by the Supreme Court in modifying this rule, I can safely say that if a party seeking a default does not attach a copy of the proof of service and also fails to detail in the application for default how service was effectuated, the new rule should be read to suggest that the default application is defective, even if there is proof of service somewhere within the court file. The defect would be "notice-related," which is what was intended when they came up with the current version of the rule.

If you have any questions about this, please let me know.

Judge Bruce R. Cohen

Arizona Supreme Court
Administrative Office of the Courts

Family Court Guidelines for Parenting Time of Children During the COVID-19 Pandemic

These are challenging and stressful times for everyone. During the COVID-19 pandemic, the Court knows you may be seeking additional direction as to parenting time. We have, therefore, put together a list of guidelines[1] that may help you navigate these waters.

The goal of these guidelines is to encourage you to follow your existing parenting plan as closely as possible.[2] Doing so will ensure a level of consistency and stability, which is in your children's best interests.

The guidelines are adopted to assist the parents and the court, however the facts of any given case shall dictate the result. In all cases, the court must determine the best interest of the child in resolving contested issues.

We want to assure you, that, if needed, the Court remains available to hear essential matters, including entering new orders in emergency situations. However, the Court strongly encourages all parents to first attempt to work together to resolve any issues, even if coordinating parenting time or making adjustments to exchange locations becomes more challenging in the days and weeks to come.

If you both agree to modify your parenting plan, you are encouraged to put your agreement in writing and sign it, if possible. If both parents cannot decide on a revised parenting time plan, and one of you believes an adjustment is

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[1] These guidelines were based upon a review of various courts' approaches to the pandemic, and rely heavily upon the Oregon Statewide Family Law Advisory Committee (SFLAC) Recommendations for Oregon Courts: Information for Parents sharing Custody or Parenting Time of Children During the COVID-19 Pandemic, available here, and work done by Pima Judge Greg Sakall

[2] These guidelines recognize Arizona's declared public policy and practices of assuring minor children's frequent and continuing contact with parents, encouraging parents to share in the rights and responsibilities of raising their children which include developing their own parenting plan within legal confines and considering the best interest of children and safety of all in developing the parenting plan. A.R.S. §§1-601, 25-403, and 25-403.02.

necessary, you may consider filing a request for temporary modification with the Court under Rule 48, ARFLP.

Finally, in cases where a parent or child must self-quarantine or access is restricted, parents should permit liberal telephone or videoconference visits.

GUIDELINES

PARENTING TIME ORDERS

Parents must comply with any existing parenting time orders unless they agree otherwise, or until the orders are modified.

A parent who refuses without good cause to comply with a parenting time order is subject to legal penalties, which may include being held in contempt of court, fines, and sanctions.

- A parent currently exercising parenting time/physical custody who is not entitled to it under the court-ordered parenting schedule must immediately return the children to the permitted parent.
- The Court reminds parents that "[a]n order for sole legal decision-making does not allow the parent designated as sole legal decision-maker to alter unilaterally a court-ordered parenting time plan." A.R.S. §25-403.01(C).
    - The same applies to a parent who has final decision-making authority under a legal decision-making order.

Self-help is not an acceptable course of action. If both parents cannot agree on a modified parenting time plan and one of you believes an adjustment is necessary, you may consider filing a request for temporary modification with the Court under Rule 48, ARFLP.

If there are no orders in place and unless otherwise ordered, legal parents are entitled to co-equal, but not exclusive, physical custody of children, and A.R.S. §13-1302(A)(2) forbids "either parent from hiding a child from the other."[3]

Third-party visitation orders, including grandparent visitation, shall remain in effect unless modified by the court consistent with these guidelines. All

[3] *State v. Wood*, 198 Ariz. 275, 279, 8 P.3d 1189, 1193 (App. 2000). *See also Gutierrez v. Fox,* 242 Ariz. 259, 270, 394 P.3d 1096, 1107 (App. 2017).

parties are encouraged to confer before seeking court intervention, to achieve the best interest of the child.

DENIAL OF PARENTING TIME

The COVID-19 pandemic is not generally a reason to deny parenting time. However parents should use common sense during this health emergency to protect the safety of their child(ren) .

- Unless otherwise ordered by the Court, or exhibiting signs of illness, parents are considered fit to care for their children and make decisions regarding day-to-day aspects of parenting while children are in their care.

    - This day-to-day care includes following federal, state, and local directives regarding social distancing and safety-related measures (such as frequent handwashing).

DEFINITION OF SPRING BREAK, SUMMER BREAK/VACATION OR HOLIDAYS

While schools are closed, parenting time should continue as if the children are still attending school under the school calendar of the relevant district.

- 'Spring break,' 'summer break/vacation,' 'fall break,' and other designated breaks/holidays/vacation mean the regularly calendared breaks/holidays/vacations in the school district where the children are attending school (or would attend school if they were school-aged).
- The closure of the school for public health purposes will not be considered an extension of any break/holiday/vacation period or weekend.

POSITIVE COVID-19 DIAGNOSIS

First and foremost, understand that self-quarantine is for the protection of all parties, especially if they are included in the group of people most adversely affected by COVID-19.

Parents should consider agreeing to modify existing orders temporarily including whether to **suspend parenting time for a period of 14 days** for any person who:

- Tests positive for COVID-19 or shares a household with someone who tests positive for COVID-19;

- Has been advised by governmental officials that the parent, or someone with whom the parent shares a household, has been exposed to COVID-19, and has been directed by government officials to self-quarantine; or
- Has traveled internationally within the last 14 days, consistent with the CDC's Global COVID-19 Pandemic Notice.

If parenting time is temporarily suspended, the parent affected should be allowed liberal virtual contact with the children via videoconference or telephone.

The Court may order that suspended parenting time be made up, when requested and when appropriate.

PARENTING TIME IN PUBLIC PLACES

If your parenting plan states that parenting time will occur in a public place, it should continue at locations permitted under the applicable government orders. *See* State of Arizona Executive Order 2020-18.

- **Public places such as parks, where people routinely touch common-contact surfaces (play equipment, picnic tables, railings) should be avoided.**
    - Outings and activities where parents and children can maintain social distancing and avoid common-contact surfaces are encouraged.
    - If that is not possible, parenting time should be conducted virtually, via videoconferencing or telephone.

SUPERVISED PARENTING TIME

If supervised parenting time is ordered and the supervisor is unavailable for any reason, parents should work collaboratively to ensure parenting time continues to occur in a manner that promotes the children's safety and wellbeing, such as finding an alternative supervisor.

- If that is not possible, parenting time should be conducted virtually via videoconferencing or by telephone.
    - The primary residential parent may supervise virtual contact.

EXECUTIVE/GOVERNMENT ORDERS RE TRAVEL RESTRICTIONS

In Arizona, all schools are closed for the remainder of the Spring 2020 semester.

As of April 1, 2020, there are no executive orders that limit travel for parenting time exchanges. Governor Ducey's Executive Order 2020-18 includes the following as an essential activity for which travel is permitted under that Order: "[e]ngaging in activities essential for the health and safety of family, household members and pets. . . ." Executive Order 2020-18, ¶4(b). Parenting time orders provide for the best interests and essential well-being of children, and travel for exchanges facilitates those orders.

Parents being on the road for the purpose of transporting children under a parenting plan does not violate Governor Ducey's order. Pursuant to section 2e of Governor Ducey's Executive Order, no person will be required to provide documentation to support their essential activities.

If a government order is issued that specifically restricts travel for parenting time and exchanges, parents must comply with that order.

- Unless otherwise directed, parents should continue to follow their parenting plan as written.
- If a government order restricts travel for parenting time exchanges, parents should work together to encourage children's contact with both parents and keep the arrangements as normal as possible.

EXCHANGES

During the exchange of children, parents should follow the CDC guidelines and State of Arizona Executive Order 2020-18 for limiting the spread of the virus. Parents may wish to consider the following:

- An alternative location for the exchange, where fewer people congregate or touch public objects may be necessary.
- If an exchange location is closed, the parents should choose an alternative location nearby that remains open.
- For ongoing safety considerations, exchanges should occur in a neutral setting such as at a fire or police station.

If the children's exchange under the parenting plan includes long distance or **air travel**, parents should review the CDC travel guidelines and discuss

whether ground transportation for the exchange is preferable or possible. If the parenting plan includes long distance parenting time to be exercised at a location that is disproportionately impacted by the COVID-19 virus, the parents are encouraged to confer to determine alternative options. If the parents cannot agree, the parties shall seek direction from the court.

For supervised exchanges, parents should continue to follow the parenting plan and use the designated exchange agency or supervisor.

- If that is not possible, parents should work collaboratively to find an alternative exchange agency or supervisor, which can include an agreed-upon friend or family member.
    - If that is not possible, parenting time should be conducted virtually via videoconferencing or by telephone.

TRANSPARENCY

Unless restrained from communicating, parents are encouraged to talk honestly and openly about precautions they are taking to slow the spread of COVID-19. Parents should ensure that, unless otherwise ordered, both parents have current contact information for the children's doctor(s).

- A parent is not permitted to deny parenting time based upon the other parent's unwillingness to discuss precautionary measures taken, or belief that the other parent's precautions are insufficient.

MAKEUP PARENTING TIME

If parenting time is missed due to COVID-19-related issues or government orders, parents are encouraged to work collaboratively to schedule makeup parenting time that promotes their children's safety and wellbeing. Makeup parenting time during these extraordinary times may not be logistically possible. A parent may seek and the Court may order makeup parenting time when appropriate.

FIRST RESPONDERS / SAFETY-RELATED ISSUES / HEALTH PROTOCOLS

First responders must remain available for actual emergencies and support related to the COVID-19 outbreak.

- Please do not call first responders for parenting-related disputes, but only in circumstances where your reasons are real, immediate,

significant, and safety-related, or if you or a child are in imminent danger.

ADDITIONAL RESOURCES

General recommendations and guidelines published by the American Academy of Matrimonial Lawyers (AAML) and the Association of Family and Conciliation Courts (AFCC) can be found here. Additional materials from AFCC can be found here.

SB 1127: THE SHIFTING SANDS
TSUNAMI OR MIRAGE?

Submitted by Kathleen A. McCarthy, J.D.
The McCarthy Law Firm
Kathleen@KathleenMcCarthylaw.com

1. **INTRODUCTION**. Much has been made of the potential sea change that could possibly be created by the passage of SB 1127. The reality on the ground, however, may be far less dramatic. Depending on your particular lens, these statutory changes may be like the much heralded tsunami that shriveled up and tip toed out the back door before hitting land or it will overrun the floodgates with change. However, when stripped of the numerous and expansive name changes from physical custody to parenting time and legal custody to decision making, there are only a handful of substantive, actual changes. These materials are intended to focus on the actual significant changes and address the impact that the SB 1127 may have on prior Arizona cases. Other presenters will discuss the changes in the statute in much greater detail than here. There are separate materials that provide a case history from 1996 to the present time of all the custody and parenting time cases for you to use as a guide.

2. **A.R.S. § 25-103(B) THE PUBLIC POLICY STATUTE**.

   a. **The 2012 Amendment. §** 25-103(B)(2) was amended to clarify that the public policy of having both parents participate in decision-making about the child applied to **LEGAL** decision making. That in and of itself appears to be just a clarificatory change. However, it is important to understand the 2010 change to **§** 25-103 to set some context for other changes created by SB 1127.

   b. **The 2010 Amendment.** In 2010, subsection B was added which declared it to be a public policy of this state, that **absent evidence to the contrary**, it is in a child's best interests to (1) have substantial, frequent, meaningful and continuing parenting time with both parents; and (2) to have both parents participate in decision making about the child. Although couched as a declaration of public policy, this statutory change significantly did **NOT** provide for a *presumption* of joint physical or legal custody, nor did it alter the statutory scheme for determining parenting time and decision making pursuant to A.R.S. **§** 25-401, et. seq.

With the exception of adding the word "substantial", the language in (1) did nothing more than mirror one of the historical factors in determining custody set forth in **§** 25-403(A)(6): *"Which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent."* While some might argue that the addition of the word *"substantial*" was, a substantial change in and of itself, in the context of the other words: *"frequent and meaningful continuing contact",* it is difficult to say what additional fire power adding the word "substantial" brings to the party.

The 2010 statutory change that declared it a public policy to have both parents share in decision making regarding the child had the potential for a more dramatic effect. Again, however, the statute did not provide that joint legal decision making was a presumption; nor did it repeal that portion of **§** 25-403.01(A) that specifically stated that there was *no presumption in favor of sole or joint custody.*

In any event **no** cases have been reported relating to this statutory change since its passage.

3. **A.R.S. § 25-401. DEFINITIONS. THE NAME CHANGE.** This Chapter now leads off with a comprehensive definitions section. The impact of these definitions, if any, on currently existing Arizona case law will be addressed as the defined terms are used in the rest of the statutory changes in **§** 25-401, et. seq. Significantly, however, the statute provides that the name change of the phrase "legal custody" to "legal decision making will have no impact on the interpretation of application of any international treaty, federal law, uniform code or statutes of other jurisdictions. Although the Amendment did not specifically apply this interpretation language to prior Arizona cases, presumably, if the name change is not to have any impact on the interpretation of a host of other laws, the same will apply to the interpretation of prior Arizona cases.[1]

4. **A.R.S. § 25-402. JURISDICTION.**

   a. **§ 25-402(A). The Court's Authority.** This statute (previously **§**25-401)

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[1] What is curious is the requirement in §25-401. 5. that requires the parent exercising parenting time to provide the child with food, clothing and shelter, or perhaps it is just a metaphor for the times.

previously provided simply that jurisdiction for child custody proceedings is governed by Chapter 8 of the title (25-1001), the UCCJEA. The amendment is more expansive in scope and requires a Court to initially determine its authority to conduct such a proceeding to the exclusion of any other state, Indian tribe or foreign nation by complying with the UCCJEA, the PKPA and any applicable international law concerning the wrongful abduction or removal of children (think Hague convention cases). **§** 25-1001 already required the Court to do this, so there is not expected to be any significant legal effect arising out of this change, except that now the statute requires judges to make an initial determination that they have jurisdiction to proceed, but, statute or not, that has always been a requirement, otherwise none of the Orders the Court enters would be valid..

b. **§ 25-402(B). The Requesting Party**.

i. **Parent.** Previously **§**25-401(B) provided that a parent could commence a custody proceeding by filing a petition for dissolution or legal separation; or for custody in a paternity case where there has been a prior establishment of parenthood; or could request it if that person was a party to a maternity or paternity proceeding. The Amendment clarifies that this right also applies to annulment cases, paternity cases (without the requirement that there be a prior establishment of paternity, and modification proceedings (which was always the case previously in any event). Accordingly, there should not likely be an impact on existing Arizona case law.

ii. **Non-Parent**. Previously a non parent could file such a proceeding only if the child was not in the physical custody of one of the parents; or as a party to a maternity/paternity proceeding. The Amendment provides only that a non parent has to file a petition for third party rights under **§** 25-409 for the Court to have jurisdiction. This change will be discussed in the context of **§** 25-409.

5. **A.R.S. § 25-403(A). CUSTODY; BEST INTERESTS OF THE CHILD.**

a. **Introductory Paragraph A.** While the Amendment seems to have been driven in large part by a significant contingent of "father's rights activists", the central focus continues to be children's rights as exemplified in the phrase children's "best interests". Significantly the heading of the **§ 25-403 Amendment** statute still includes the phrase "best interests of child",

so presumably regardless of anything else in the statute, the Court must look to the child's best interests–which has been a constant throughout the extensive history of changes to Arizona's custody/parenting time statutes. There is no point in string citing the numerous Arizona cases that underscore that the best interests of the child drives the very heart beat of custody/parenting time decisions. The very first sentence in § 25-403.A retains the provision that the Court make these determinations in accordance with the best interests of the child. § 25-403 as does the very first sentence of **§ 25-403.02. B. (Parenting Plans)**. § 25-403.A then reiterates that the Court must consider all relevant factors, but (as if it was not already clear from the context of the statute) clarifies that the relevant factors to be considered must be relevant to "the child's physical and emotional well-being". While it might be clear to the drafters as to why this change in wording was important, it doesn't appear to change anything. Accordingly, there are no Arizona cases that are likely to be impacted by this change.

b. **A.R.S. § 25-403(A)(4). Child's wishes.** This Amendment clarifies that in order for the child's wishes to be considered, the child has to be *"of suitable age and maturity."* It is unlikely that this will change reality on the ground. Prior Arizona law (*Higgins*–see case law materials) established that the hearsay of the child cannot be considered. So the only way that the child's wishes could be considered would be through a hearsay exception, i.e. by either an interview with the judge, or more commonly through child psychologist expert testimony. In order to lay the proper foundation for the psychologist to express the child's wishes, normally the psychologist is asked questions regarding the suitable age and maturity of the child. If the Court is doing the interview, it is expected that the judge would naturally be looking for this same foundation. This has always been a judgment call and is fact specific to a particular case. Now that the language is actually in the statute, however, laying this foundation will be statutorily required and subject to appeal if not laid. In anticipation of this, there are some cases outside of Arizona family law that may be useful to look at for examples, such as service of process cases as to whether a child is of suitable age or maturity to accept service or the bypass of parental consent for abortions. However, these types of cases focus primarily on teenagers and not younger children and may not be applicable for laying these foundations for younger children.

When looking at adequate maturity to bypass parental consent for abortions the Supreme Court has recognized that maturity is "difficult to define, let alone determine." ***Bellotti v. Baird***, 443 U.S. 622, 643, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979). Division One has said that "maturity may be measured by examining the minor's experience, perspective, and judgment." ***In re B.S.***, 74 P.3d 285, 290 (Ariz. App. 1st Div. 2003). From these cases it is clear that experience, perspective and judgment are three measures that a family court could take into consideration when determining suitable maturity for the child's wishes to be considered.

6. **A.R.S. § 25-403(A)(1). Past, present and potential future relationship**. The Amendment adds to **§ 25-403(A)** the requirement that the *Court consider the past, present and potential future relationship between the parent and child.* At the same time it eliminated prior § 25-403(A)(7) that the court *consider whether one parent, both parents or neither parent has provided primary care of the child*. While much has been made of the fact that (7) was eliminated with the inference being that the Court can no longer consider the historical primary caregiving arrangements, this is simply not the case. Clearly the historical caregiving arrangements comes under the requirement that the Court consider the past and present relationships between the parent and child. In addition, the Amendment left intact §25-403(A)(3)*: The interaction and interrelationship of the child with the child's parent or parents, the child's siblings and any other person who may significantly affect the child's best interests*; and § 25-403(A)(4): *The child's adjustment to home, school and community*. Arguably these two provisions would also encompass facts related to historical primary care of the children. Adding the requirement that the Court consider the potential future relationships of parent and child, by no means obliterates the duty of the Court to examine the prior relationships and historical caregiving nor does it mean that the Court must not consider any attachments that the child currently has to either parent child. Arguably former § 25-403(A)(3)-(4) [now § 25-403(A)(2)-(3)] already encompass the concept of the Court's consideration of the potential future relationship between the child and the parent based on the history of interaction and interrelationship of the child with the parent and the child's adjustment to home and the addition of this phrase "potential future relationship" simply states this requirement more clearly. There are no prior reported appellate Arizona cases where custody was decided solely on the primary caregiver factor and it is unlikely that any prior Arizona cases will be impacted by this change. It remains to be seen, however, what evidence the Court would accept as meaningful concerning the potential future relationship other than prior history, especially in light of the ***Daubert*** evidentiary rule.

7. **A.R.S. § 25-403(A)(6). Frequent, Meaningful and Continuing contact**. The language of the former statutory provision clearly required the Court to consider which parent is more likely to allow the child *frequent and meaningful continuing contact* with the other parent. The Amendment preserves this idea, but makes a change in the actual language to *frequent, meaningful and continuing contact*. In this sense, the amended language is arguably watered down compared to § 25-103(B). which declares the public policy of this State to be (absent contrary evidence) that both parents have *substantial, frequent, meaningful and continuing parenting time* insofar as the word "*substantial"* is not included in this section. In any event, nowhere in the statute does it state that there is an actual presumption of equal parenting time nor does the statute require that in order for the substantial, frequent, meaningful and continuing parent requirement to be met that there be equal parenting time. Indeed, §25-403.02 makes it clear that shared legal decision-making does not necessarily mean equal parenting time. There have been no Arizona appellate court cases interpreting the former A.R.S. § 25-403(A)(6) language as equating to equal parenting time. Nor have there been any cases interpreting the amendment to A.R.S. § 25-103.

8. **A.R.S. § 25-403(A)(7). Fraud on the Court**. This Amendment adds as a separate factor whether one parent intentionally misled the court to cause an unnecessary delay, to increase the cost of litigation or to persuade the court to give a legal decision-making or a parenting time preference to that parent. Interestingly, the "phrase unnecessary delay, to increase the cost of litigation." is not limited to parenting related matters with respect to If interpreted literally, this section could apply to a situation where one party increases the cost of litigation for non parenting time matters, but behaves perfectly reasonably with respect to parenting time matters. One has to question whether that was the intended result.

   There are three Arizona cases dealing with the imposition of sanctions on a parent in a custody matter. In all three cases, the Court allowed sanctions, but refused to deny the introduction of evidence as a sanction. In all three cases, the Court held that a sanction pertaining to modification of custody or visitation can be imposed only if it is in the best interests of the child. Because this section does not eliminate the Court's requirement generally to consider the best interests of the child, these cases likely are still valid.

   In ***Gama v. Hays***, 205 Ariz. 99, 67 P.3d 695 [where mother was in direct contempt of court orders related to taking the child to a psychologist], it was an abuse of discretion for the trial court to exclude testimony and notes of the child's

therapist as a sanction. ***Gama's*** holding is consistent with the Amendment. ***Gama*** does not prohibit the court from taking bad behavior into consideration for determining what is in the best interest of the child for parenting-time and decision making, but rather says that the court cannot exclude evidence that is necessary to make a best interests determination. The Amendment basically provides that a judge can take the parents action into consideration when looking at, on the whole, if the parent will make decisions that are in the best interests of the child.

In ***Woodworth and Woodworth,*** 202 Ariz. 179, 42 P.3d 610 (App. Div. 1 2002), the Court was emphatic that it could ***modify custody or visitation as a sanction only if it is in accordance with the child's best interests. This is appropriate because the health of the family is "critical to the health and vibrancy of our communities."***

In ***Montoya v. Superior Court in and for the County of Maricopa,*** 173 Ariz. 129, 840 P.2d 305 (App. Div. 1 1992) the trial court abused its discretion by striking the pleadings of the father in his child custody proceeding and entering a default judgment. The father invoked his privilege against self-incrimination rather than answer questions about his past drug use. Although drug use would have been relevant in determining his parental fitness, such a sanction improperly dispensed with a hearing on the merits and deprived the Court of evidence relating to factors necessary in making a specific finding in the best interests of the child.

9. **A.R.S. § 25-403(A)(8). Domestic Violence.** This section is almost an exact restatement of the current section on domestic violence. Previously in **§**25-403.A. 11, the Court had to determine whether there was domestic violence or child abuse *as defined in* section § 25-403.03. The Amendment changes this language to require the court to determine if there has been domestic violence or child abuse *pursuant to* section § 25-403.03. Whether there is a radical difference between "as defined in" and "pursuant to" remains to be seen, but clearly it would eliminate any argument that the domestic violence or child abuse had to fit a carefully defined phrase in the statute and, instead, could be any domestic violence or child abuse addressed in the statute. In any event, there will not likely be any change in prior Arizona case law related to this section.

10. **A.R.S. § 25-403.01. SOLE AND JOINT LEGAL DECISION MAKING AND PARENTING TIME.** The Amendment at **§ 25-403.01.A.** eliminates the prior language that stated *"this section does not create a presumption in favor of one custody arrangement over another. The Court in determining custody shall not*

prefer a parent or custodian because of that parent's sex." It also eliminated any reference to the Court having to make findings if a parent objects to joint custody. Although the language regarding there being no presumption was eliminated, it was also not replaced with a statement calling for a presumption. The gender language is provided for in 25-403. B.

The Amendment to this section effectively restates the factors previously set forth in the statute that the Court should consider when ordering decision making. It also clarifies that an order for sole legal decision-making does not allow the parent designated as sole legal decision maker to alter a court-ordered parenting time plan. There is no change in Arizona case law on this point.

However, what *appears* to be a significant change is that a parent who is not granted sole or *joint legal decision making* has greater parenting time rights than a parent who has joint legal decision making. The *non legal* custodial parent *must* be granted *substantial*, frequent, meaningful and continuing contact unless the Court find that parenting time would endanger the child's physical, mental, moral or emotional health. This presumption does not apply when both parents share legal decision making. Presumably if the parties exercise joint decision making and one parent has primary parenting time, then the non primary parent is not entitled to the presumption of substantial, frequent, meaningful and continuing contact. The former A.R.S. **§** 25-408(A) previously applied this presumption to a parent who was not granted *custody* of the child, meaning legal or physical or both. See former A.R.S. **§** 25-402. There are no Arizona cases that currently relate to this issue.

11. **A.R.S. § 25-403.02 PARENTING PLANS.**

a. **§ 25-403.02(A)-(B).** The Amendment provides that the Court *must* adopt a parenting plan that provides for shared legal decision making and that *maximizes* the parties' respective parenting time (again, there is no presumption of equal parenting time language), however, this decision must be consistent with a child's best interests pursuant to in §§ 25-403, 25-403.03, 25-403.04 and 25-403.05. So while it appears that there is a presumption of joint legal decision making and "*maximization"* of parenting time, whatever that means, all the rest of the other factors previously discussed have to apply and the child's best interests are the trump card. In this respect, this is no different that prior Arizona case law. Subsection B also provides that the Court shall not prefer a parent's proposed plan because of the parent's *or child's* gender. The reference to a

parent's gender does not represent a change over prior Arizona law, to-wit: § 25-403.01(A) ("*The court in determining custody shall not prefer a parent as custodian because of that parent's sex*") and A.R.S. § 25-415. There is only one previously reported Arizona case that relates to the parent's gender (excluding it as a factor). ***Riepe v. Riepe*****,** 208 Ariz. 90, 91 P.3d 312 (App. Div.1, 2004). There are no prior reported Arizona cases that relate to the child's gender.

b. **§ 25-403.02(C).** This Amendment spells out the specifics of Parenting plans, which, in addition, to all the other common sense items that should be included, also provides for a *practical schedule* of parenting time. It is difficult to say how the concepts of *maximizing parenting time* and devising a *practical schedule* will play out, but no prior Arizona cases are affected by this.

c. **§ 25-403.02(E)**. Significantly, this Subsection continues the prior concept that *"shared legal decision-making does not necessarily mean equal parenting time."*

12. **A.R.S. § 25-403.04. SUBSTANCE ABUSE**. This Amendment preserves the requirement that joint legal decision making not be ordered if there is finding of significant domestic violence and a rebuttable presumption for joint parenting time. This Amendment adds a requirement that if the Court has determined that a parent has *abused drugs or alcohol* or been convicted of any drug offense with in twelve months prior to a custody request, then there is a rebuttable presumption that sole or joint custody by that parent is not in the child's best interests.. This is an enlargement of the previous statutory provision, but the Courts in the past have shown a propensity to expand its consideration of such factors. See ***Diezsi and Diezsi*****,** 201 Ariz. 524, 38 P.3d 1189 (App. Div. 2 2002).

13. **A.R.S. § 25-408. RELOCATION.** The former statute provided that if both parents have custody or parenting time, then the relocation statute's 60 day prior advance written notice kicks in. The Amendment provides that this section kicks in where parents have *joint legal decision making* or *unsupervised parenting time*. This seems to narrow the circumstances under which notice is required and that notice would not be required if the other parent had supervised parenting time. A parent with sole legal decision authority or joint legal decision making authority **AND** primary parenting time may temporarily relocate in less than 60 days under certain circumstances (the circumstances under which the relocation can occur were not changed by the Amendment). While it is not probable that a parent might

have sole legal decision making authority and not be the primary parent, under the Amendment, that party would also have a right to temporarily relocate. There are a number of relocation cases in the materials.

14. **A.R.S. § 25-409. THIRD PARTY RIGHTS [prior A.R.S. § 25-409 (Grandparent rights) and prior A.R.S. § 25-415 (Non-parent custody)].**

a. **Coverage in One Section.** There are several nuanced changes that won't be discussed here and will be fully presented by the other speakers. Both grandparental visitation rights and non legal parent (in loco parentis) rights are now covered in this one section. A non legal parent can petition for legal decision-making authority or *placement* of the child provided the appropriate factors are pled in the petition, including an in loco parentis relationship. However, the Court can grant *visitation* rights under § 25-409(C) to a non-parent including a grandparent for the same reasons that a grandparent or great grandparent could apply for such rights under former § 25-409, including that the marriage of parents had been dissolved for at least three months; a parent of child was deceased or missing for at least three months; or the child was born out of wedlock as long as such visitation is in the best interests of the child, except an in loco parent need only show that a proceeding for dissolution of marriage or legal separation of the legal parents is pending at the time the petition is filed. This section appears to expand the definition of who can apply for *visitation* as including someone other than a grandparent or one standing in loco parentis, as long as the visitation is in the child's best interests. See the grand history of the development of grandparental visitation rights, step-parent rights and other third party rights in the case materials.

b. **Grandparent rights**. A pressing question is whether the Amendment dilutes the U.S. Supreme Court case of ***Troxel v. Granville*****,** 530 U.S. 57 (2000). The answer is no. The statutory language from the previous A.R.S. § 25- 409(A)-(B) (Visitation rights of grandparents and great-grandparents) has just been added to other third party rights. In ***Jackson v. Tangreen***, 199 Ariz. 306, 18 P.3d 100 (2000), a post ***Troxel*** case, Division One upheld the previous version of A.R.S. § 25- 409 in a ***Troxel*** based unconstitutionality claim.

15. **A.R.S. § 25-415. SANCTIONS FOR LITIGATION MISCONDUCT**. The Amendment provides for a whole new section concerning sanctions if a party has presented a false claim under §§ 25-403, 25-403.03 or 25-403.04 with knowledge

that the claim was false; or a party knowingly accuses an adverse party of making a false claim with knowledge that the claim was actually true; violated a court order compelling disclosure or discovery under Rule 65 of ARFLP, unless the failure was substantially justified (there is a question as to whether this is any disclosure violation or just a violation related to parenting time issue). In addition to a mandatory award of fees, the Court may impose additional financial sanctions, but only if that party can show direct economic loss; it can institute civil contempt proceedings; or it can modify legal decision making or parenting time as long as such modification would serve the best interests of the child. Specifically a false claim does not mean a claim that is merely unsubstantiated. This section appears to be cumulative with § 25-403(A)(7), to-wit: *Fraud on the Court in making custody decisions, whether one parent intentionally misled the court to cause an unnecessary delay, to increase the cost of litigation or to persuade the court to give a legal decision-making or a parenting time preference*. See the analysis with respect to § 25-415.

16. **CONCLUSION.**

The statute certainly changes the language related to custody, legal custody and parenting time. It also expands and clarifies a lot of general concepts that the Court must consider in awarding parenting time and legal decision making. In recognition of modern blended and expansive families, it expands the classes of persons who may obtain visitation, placement or legal decision making of a child. However, this much is clear: there is no presumption of equal parenting time; there is no suggestion that the Court cannot consider the attachment of the child to each parent; there is no requirement that in the absence of specific evidence, the Court may speculate about the potential future relationship of a child to a parent; there is no suggestion that the term *frequent, meaningful and continuing parenting time* requires equal parent time; and, as it should be, best interests of the child is the overriding standard trumping all other considerations.

Submitted by:

Kathleen A. McCarthy, J.D.
THE McCARTHY LAW FIRM
300 N. Main Ave., Ste. 203
Tucson, AZ 85701
520-623-0341
520-628-9495 (fax)
kathleen@kathleenmccarthylaw.com

STATE BAR OF ARIZONA

PRACTICE 2.0

TIPS FOR LAWYERS REPRESENTING CLIENTS ON A LIMITED SCOPE

INTRODUCTION TO THE ETHICAL DUTIES AND REQUIREMENTS IN A LIMITED SCOPE REPRESENTATION

Your duties and responsibilities when representing a client on a limited basis (also called limited scope) are guided by the ethics rules, the comments to the ethics rules, and three ethics opinions. There are numerous applicable ethics rules such as ER 1.1 (Competence), 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer), 1.5 (Fees), 1.6 (Confidentiality of Information), 3.3 (Candor Toward the Tribunal), and 5.2 (Communication with Person Represented by Counsel). ER 1.2 is most directly related to representing clients on a limited scope. In addition, there are three directly pertinent ethics opinions to provide guidance: 06-03, 05-06, and 91-03. This guide will summarize the highlights and provide tips about undertaking a limited scope representation. If you would like to discuss limited scope representations in further detail, contact the Practice 2.0 hotline at (602) 340 – 7332.

DETERMINING WHETHER A LIMITED SCOPE REPRESENTATION IS REASONABLE

Ethics Rule 1.2(c) deals with the scope of representation and the allocation of authority between a lawyer and a client. Under ER 1.2(c), lawyers may limit the scope of representation of a client but only if the limitation is reasonable.

Comment 7 to ER 1.2 elaborates on when a limited representation is reasonable by way of example. The comment provides, "[i]f, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the

legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Thus a lawyer should ensure that he/she devotes a sufficient amount of time to the client's case or problem such that a client can justifiably and reasonably rely on the advice that the lawyer provides.

It is okay to limit the representation to a discrete task but the lawyer must have enough knowledge and skill to give reliable counsel to the client. *See* Ethics Opinion 05-06. This requires that lawyers have the requisite competence, knowledge, and skill to be able to discern whether limiting the scope of the representation in a particular circumstances is reasonable for the client. For example, if a client approaches a lawyer asking for a basic will, the lawyer should be able to determine whether that limitation is necessary. If the client has a complex estate or a large amount of assets, a simple will is unreasonable and therefore there should not be such a limited scope representation.

PROVIDING INFORMED CONSENT

Ethics Rule 1.2 requires that a client give informed consent to a limited scope representation. Informed consent is defined in Ethics Rule 1.0(e). To comply with the informed consent requirement, the lawyer has to communicate enough information about the material risks and reasonably available alternatives to the course of conduct and the client must agree to the representation under those circumstances. Comment 8 to ER 1.2 points out that the informed consent does not necessarily need to be in writing. It is a best practice, however, that the informed consent is in writing and accompanies a written fee agreement.

DISCLOSING THE LIMITED SCOPE REPRESENTATION

Lawyers are not required to disclose to the court or another tribunal that the lawyer is providing limited scope representation to a client who is proceeding in propria persona. *Ethics Opinion 05-06.*

An attorney who limits the scope of representation and coaches the client or ghost-writes papers must direct the client to be truthful and candid in the client's activities. While an attorney is not required to disclose to opposing counsel that the attorney is providing limited-scope representation, the attorney must maintain client confidentiality if doing so. Though a lawyer is not affirmatively required to inform opposing counsel about a limited scope

representation, the lawyer must nonetheless make true statements to opposing counsel. The attorney must advise opposing counsel about a limited scope representation if it is necessary to avoid assisting the client with a criminal or fraudulent act. The attorney should also note that this disclosure should only be made if he/she is authorized by his/her client because the disclosure could adversely affect the client. *Ethics Opinion 06-03.*

If the attorney does end up disclosing the limited scope representation, the attorney "should provide opposing counsel with explicit instructions, after consultation with the client, as to when opposing counsel may communicate about the subject of the representation with the client. The ground rules could include directions about whom the opposing counsel should contact and on what matters, to whom and where opposing counsel should send pleadings, correspondence and other notices, and whether the attorney is authorized to accept service for the client." *Ethics Opinion 06-03*. Engaging in a limited scope representation is not a license to play bait and switch with opposing counsel, clients or the court.

OTHER NOTES

Attorneys should also consult the relevant court rules for their practice. For example, family law attorneys can look at the Arizona Rules of Family Law Procedure for rules regarding limited scope as well as a form to file for a Notice of Limited Scope Representation. The Arizona Rules of Civil Procedure including Rule 11 should also be consulted.

When engaging in a limited scope representations attorneys should consider, and avoid, what is commonly known as "scope creep." If hired for a specific discrete task, or until a certain stage of the case, the lawyer should draft the scope of representation carefully to be certain that the parameters of the representation are clearly defined.

FORMS AND CHECKLISTS

CHECKLIST FOR UNDERTAKING A LIMITED SCOPE REPRESENTATION

- ✓ Determine whether a limited scope representation is reasonable for the case at hand.
- ✓ Ensure that you have enough time to render advice upon which a client can rely.
- ✓ Discuss the case issues with your client and how the tasks will be divided between you and the client.
- ✓ Obtain a written fee agreement that details the scope of representation in detail including what tasks will and will not be performed, price, and other expectations.
- ✓ Obtain informed consent from your client for the limited scope representation. The best practice is that the informed consent is in writing.
- ✓ If you will be the attorney of record, file a Notice of Limited Scope Appearance and inform opposing counsel about whether you or the client is the appropriate party to communicate with.
- ✓ Work on the case.
- ✓ When the tasks that were outlined in the fee agreement are complete and/or when the case is finished (depending on what was agreed to with the client), send the client a disengagement letter.
- ✓ When the tasks that were outlined in the fee agreement are complete and/or when the case is finished (depending on what was agreed to with the client) and if appropriate, prepare and file a Notice of Withdrawal from Limited Scope Appearance.
- ✓ Abide by rules of confidentiality for former clients.
- ✓ Review the pertinent ethics rules and opinions such as ER 1.1 (Competence), 1.2 (Scope of Representation and Allocation of Authority between Client and Lawyer), 1.5 (Fees), 1.6 (Confidentiality of Information), and 3.3 (Candor Toward the Tribunal) along with three ethics opinions on point which are 06-03, 05-06, and 91-03.
- ✓ Stay current on court rules that may pertain to limited scope representations.

SAMPLE LIMITED SCOPE FEE AGREEMENT LANGUAGE

_____ ("Client") hires [NAME/LAW FIRM] ("Firm") to pursue claims he or she may have in connection with [INSERT DESCRIPTION OF REPRESENTATION OF WHAT YOU SPECIFICALLY ANTICIPATE DOING, INCLUDING WHEN THE REPRESENTATION STARTS AND WHEN THE REPRESENTATION CONCLUDES (e.g. DECREE IS ENTERED). ALSO INDICATE WHAT IS NOT INCLUDED IN THIS FEE AGREEMENT, (e.g. APPEAL, MISTRIAL, QUADRO AND IF FURTHER REPRESENTATION IS NEEDED AFTER THAT A SEPARATE FEE AGREEMENT WILL BE DRAFTED).

You are agreeing that the scope of this representation is limited as follows: (provide limitations)

Notwithstanding anything to the contrary in this agreement, this representation is terminated when the services listed in this document have been completed, and you will not expect any further services to be performed, including document-drafting, giving legal advice, or court appearances, unless you sign a new fee agreement with this firm.

Unless the opposing party or attorney knows of this firm's representation, you are considered to be unrepresented; you will be expected to communicate with the opposing party or attorney as though you do not have a lawyer representing you.

[OR]

We will inform the opposing party or attorney of the limited scope representation, and we will instruct them as to when they may communicate directly with you. These instructions will include which of us to contact concerning specific matters, to whom and where they should send pleadings, correspondence and other notices, and whether you have authorized us to accept service on your behalf.

If this matter involves litigation, we will notify the Court that we have agreed to provide you with limited scope representation, specifying the matters, hearings or issues on which we will represent you. When we have completed the representation, we will withdraw from the action with your consent, and we will surrender all documents and property to which you are entitled, and all documents reflecting work done for you. We will provide your contact

information, including your address, telephone number, and e-mail address to the Court and the other parties.

You agree not to unreasonably withhold your consent to our withdrawal or make it subject to any conditions.

At the end of the representation, we anticipate that the status of the matter will be as follows: We will inform you of any outstanding deadlines at that time. Unless you get another lawyer to represent you, you will be responsible for representing yourself. This includes communicating with the opposing attorney, but if the party is unrepresented, then with the party directly. This also includes appearing at all court hearings and filing whatever documents are appropriate within the timeframes specified by statute, order or rule, and sending copies to the opposing party or their lawyer.

Note that Practice 2.0 provides confidential reviews of your fee agreement!

SAMPLE INFORMED CONSENT

You have retained the Firm to [explain the scope of representation]. The risks with the Firm representing you on a limited scope are as follows: [explain the risks]. The reasonably available alternatives to this are: [explain the alternatives]. You are encouraged to consult outside counsel to determine if this is the best course of conduct. You agree to the risks as outlined above and agree that we should proceed.

Signed: _____ Date: _____

Client

Signed: _____ Date: _____

Firm

SAMPLE DISENGAGEMENT LETTER

[Date]

Dear [Name]:

Thank you for allowing us to represent you in the [describe limited scope matter]. In order to complete your legal matter, and according to the agreement we reached when we were hired, we will [explain anything the firm needs to complete]. In addition, you will need to [explain anything the client needs to complete].

Since this matter has now concluded, we suggest that you keep all of your copies of information related to this matter in a safe place where you can easily locate them. We are closing our file which we will retain for a [explain your document retention policy].

We hope that this matter has been concluded to your satisfaction. Thank you for allowing us to represent you. If we can be of further assistance on this or any other matter, please let us know.

The form that follows is Form 1 from the Arizona Rules of Family Law Procedure. While the State Bar of Arizona makes every effort to ensure that the information contained herein is up to date, lawyers are responsible for ensuring accuracy of any documents they submit to the Court.

FORM 1: NOTICE OF LIMITED SCOPE REPRESENTATION

Name: _____

Mailing Address: _____

City, State, Zip Code: _____

Daytime Phone Number: _____

Evening Phone Number: _____

Representing: [ ] Self [ ] Petitioner [ ] Respondent

State Bar Number: _____

ARIZONA SUPERIOR COURT, COUNTY OF _____

Case No. _____

_____

Petitioner

ATLAS No. _____

_____

Respondent

NOTICE OF LIMITED SCOPE REPRESENTATION

The undersigned attorney enters a Notice of Limited Appearance for [ ] Petitioner [ ] Respondent _____, pursuant to Rule 9(B).

1. Counsel's appearance in this matter shall be limited in scope to the following matter(s): (Select all that are applicable and provide a detailed description of services, including any scheduled appearances, as needed.)
   - [ ] Protective Orders
     - [ ] Order of Protection
     - [ ] Injunction Against Harassment
     - [ ] Injunction Against Workplace Harassment
   - [ ] Voluntary acknowledgement of paternity
   - [ ] Establishment of Child Support (IV-D)
   - [ ] Rule 32 motion (specify) _____

     _____

     _____

Case No. _____

[ ] U.C.C.J.E.A. Hearing _____

_____

_____

[ ] Temporary Orders (Pre-Decree) (specify any limitations) _____

_____

_____

[ ] Accelerated or Expedited Petition (Pre-Decree) _____

_____

[ ] Resolution Management Conference

[ ] Arbitration

[ ] Mediation

[ ] Other ADR process (specify) _____

[ ] Settlement Conference

[ ] Expedited Services Conference (specify type, e.g. child support establishment, enforcement, or modifications; custody or parenting time enforcement or modification; or other) _____

[ ] Enforcement of Decree or Order (specify, as follows):

- [ ] Child support _____
- [ ] Custody & parenting time _____

_____

_____

- [ ] Spousal maintenance _____
- [ ] Property/debt issues _____
- [ ] Other: _____

_____

_____

[ ] Modification of Decree or Order (specify as follows):

- [ ] Child support _____
- [ ] Custody & parenting time _____

Case No. _____

[ ] Spousal maintenance

[ ] Other: _____

_____

_____

[ ] Emergency Petition (Post-Decree) _____

_____

_____

[ ] Qualified Domestic Relations Order _____

_____

_____

[ ] Filing of Foreign Decree _____

_____

[ ] Warrant to take Physical Custody _____

_____

_____

[ ] Child Custody or Parenting Time by a Non-Parent _____

_____

_____

[ ] Other motion and hearing theron, specifically: _____

_____

[ ] Attend Deposition(s) of (names) _____

[ ] Conduct the following discovery: _____

_____

_____

_____

[ ] Other: _____

Name: _____

Mailing Address: _____

City, State, Zip Code: _____

Daytime Phone Number: _____

Evening Phone Number: _____

Representing: [ ] Self [ ] Petitioner [ ] Respondent

State Bar Number: _____

ARIZONA SUPERIOR COURT, COUNTY OF _____

Case No. _____

_____
Petitioner

ATLAS No. _____

_____
Respondent

NOTICE OF WITHDRAWAL OF ATTORNEY WITH CONSENT

Under Arizona Rules of Family Law Procedure Rule 9, notice is given that Limited Scope Attorney _____ concluded the limited scope representation and withdraws as an attorney of record in this case.

1. I entered a Notice(s) of Limited Appearance on the following date[s]:

2. I have completed all services within the limited scope representation agreement and will no longer be representing the Petitioner/Respondent _____.

3. The last known address and telephone number of the party who will no longer be represented is (unless protected):

4. This Notice of Withdrawal is effective _____.

5. Now that _____ is no longer represented by me, all communication must be made directly to _____.

Case No. _____

Signed and Agreed by:

_____

Attorney's Name

Contact Information

_____

Former Client's Name

Contact Information

Termination of Representation

SUPREME COURT OF ARIZONA
ATTORNEY ETHICS ADVISORY COMMITTEE
Ethics Opinion File No. EO-20-0001

The Attorney Ethics Advisory Committee was created in accordance with Rule 42.1 and Administrative Order Nos. 2018-110 and 2019-168.

Lawyer-client relationships sometimes end earlier than the lawyer and client anticipated at the start of the representation. A lawyer's withdrawal from representation is not always agreed upon by the client and may also be under touchy circumstances, such as dishonesty of the client or non-payment of fees owed to the lawyer. Further, a client may fire a lawyer at any time, for good or bad reasons. A lawyer faced with such situations must uphold the lawyer's ethical responsibilities to the client despite that the representation is at, near, or has reached an end. Client confidentiality must be protected unless the ethical rules specifically allow disclosure, and any disclosures must be made as narrowly as possible. If, in a court setting, the tribunal does not allow the withdrawal, the lawyer can seek relief from a higher court, but must protect the client's interests and competently represent the client until and unless an order for withdrawal is granted. A withdrawing lawyer must advise the client and new counsel of pending court dates, status of the case, and anything else necessary and appropriate for the smooth transfer of the representation. Any fees charged to the client for withdrawal-related work must be reasonable. Of course, the client is entitled to the client file consistent with Ethics Opinion No. EO-19-0009, regardless of the circumstances for the withdrawal.

FACTS

Lawyers have raised many questions about ethical obligations when a decision for withdrawal from representation has been made. These questions most often involve the intersection of ER 1.16 (withdrawal) and ER 1.6 (confidentiality obligations). Questions also frequently arise regarding whether fees may be charged for withdrawal-related work. In light of these frequent requests for informal ethics advice, the Attorney Ethics Advisory Committee has chosen to issue this formal opinion *sua sponte*.

QUESTIONS PRESENTED

1. What are a lawyer's ethical responsibilities when withdrawing from representation of a client?

2. May a lawyer charge a client for withdrawal-related work?

3. What obligations does the withdrawn lawyer have to the former client?

4. What confidential client information can be disclosed, either orally or as part of the client file, by withdrawn counsel to successor counsel in the absence of the client's informed consent?

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT ("ER _")

ER 1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee.

. . . .

ER 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

. . . .

Comment

[21] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in ER 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in ER 1.6. Neither this Rule nor ER 1.8(b) nor ER 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

ER 1.9 Duties to Former Clients

. . .

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ER 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer shall comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering documents and property to which the client is entitled and refunding any advance payment of a fee that has not been earned. Upon the client's request, the lawyer shall provide the client with all of the client's documents, and all documents reflecting work performed for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client's rights.

Comment

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also ER 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under ERs 1.6 and 3.3.

ER 3.3 Candor Toward the Tribunal

Comment

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by ER 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client lawyer relationship that the lawyer can no longer competently represent the client. Also see ER 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by ER 1.6.

RELEVANT ARIZONA ETHICS OPINIONS

State Bar of Arizona, Rules of Professional Conduct Opinion Committee, Ethics Ops. 93-02, 94-02, 00-11, 04-01, 05-05, 08-02, 15-02.

Supreme Court of Arizona Attorney Ethics Advisory Committee, Ethics Op. EO-19-0009.

OTHER RELEVANT ETHICS OPINIONS

2007 N.C. Ethics Op. 8; Mich. Ethics Op. RI-296

OPINION

1. What are a lawyer's ethical responsibilities when withdrawing from representation of a client?

ER 1.16 sets forth the circumstances under which a lawyer may and shall withdraw from further representation of a client. See ER 1.16(a) and (b). The lawyer's responsibility to follow the law and procedures of the tribunal in attempting withdrawal is set forth in ER 1.16(c). Further, "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." ER 1.16(c). The lawyer is not prohibited from seeking withdrawal relief from a higher tribunal. While the lawyer is seeking relief, and if relief is not sought or granted, at all times the lawyer must continue to represent the client competently and diligently. ERs 1.1 and 1.3.

ER 1.16 does not relieve the withdrawing lawyer from the duties of confidentiality set forth in ER 1.6. This Committee cautions the withdrawing lawyer to carefully review and follow ER 1.6 during the withdrawal process. Comment [3] to ER 1.16 addresses the practical problem that a lawyer seeking to withdraw may face questions from the tribunal about the reasons for withdrawal: "The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient."

ER 1.6(d)(4) allows disclosure of confidential information "to respond to allegations in any proceeding concerning the lawyer's representation of the client." Yet, that disclosure must be made only "to the extent the lawyer reasonably believes necessary." ER 1.6(d). The withdrawing lawyer ordinarily should resist any disclosure during the withdrawal process in favor of citing and following the directions in Comment [3] to ER 1.16 to state that professional considerations require withdrawal of the lawyer. *See Lawyer Disciplinary Bd. v. Farber*, 488 S.E.2d 460 (W. Va. 1997) (lawyer moving to withdraw from representation violated Rule 1.6 by adding affidavit reporting on his plea discussions with defendant).

"Reasonably necessary" has been construed quite narrowly in connection with ER 1.6(d)(4) disclosures. Ariz. Ethics Op. 93-02 (March 1993) addressed whether the inquiring lawyer could speak to an author and refute the former client's accusations to the author that the lawyer had represented the client incompetently and had engaged in a conspiracy with the prosecution. In holding that the Ethical Rules allow the lawyer to do so, the narrowness of the "reasonably necessary" component of ER 1.6(d) was stressed:

We emphasize that our conclusion should not imply that an attorney may simply open his or her file in response to any such derogatory allegations. ER 1.6(d) permits disclosure only to the extent the lawyer reasonably believes necessary to establish a claim or defense. Therefore, an attorney must determine whether he or she can adequately establish a claim or defense against accusations of misconduct without disclosing information protected by ER 1.6(a). Whether disclosure is "reasonably necessary" for the purposes of ER 1.6(d) is ultimately within the independent

judgment of the attorney involved, after a careful assessment of the facts and the nature of the controversy.

Ariz. Ethics Op. 93-02.

Even when a lawyer has learned that his or her client has submitted fraudulent evidence warranting the lawyer to withdraw the evidence, the lawyer must first try to withdraw the evidence without revealing that the client submitted fraudulent evidence:

If an attorney can refuse to offer evidence the attorney reasonably believes to be false, see ER 3.3(a)(3), there seems to be no good reason why the attorney could not move to withdraw evidence from a tribunal's consideration that he or she knows to be false. This measure, too, should be done without revealing any client misconduct. The attorney should cite client confidentiality, attorney-client privilege, and the client's Fifth Amendment privilege, if appropriate, should the tribunal insist upon an explanation why the attorney is seeking withdrawal of the evidence.

Ariz. Ethics Op. 05-05 (July 2005) (footnotes omitted). See also ER 3.3, Comment [15] ("In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by ER 1.6.")

Given the narrowness of exceptions to the confidentiality requirements of ER 1.6 even in light of a lawyer's obligation of candor towards the tribunal as set forth in ER 3.3, if the lawyer believes it is reasonably necessary to disclose a client confidence as part of withdrawal proceedings, the withdrawing lawyer should consider whether an *ex parte* submission may be warranted and permitted under the rules of the tribunal.

Comment [15] to ER 3.3 supports a lawyer revealing the least possible confidential information in support of the lawyer's withdrawal: "In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by ER 1.6."

Withdrawing and withdrawn lawyers also should be mindful that what constitutes confidential information about the client is construed quite broadly. In addressing what a lawyer should do when subpoenaed for client information, the State Bar of Arizona Rules of Professional Conduct Opinion Committee, in Ariz. Ethics Op. 00-11 (November 2000), wrote: "Under ER 1.6, a lawyer is required to maintain the confidentiality of all information relating to representation, regardless of the fact that the information can be discovered elsewhere.... Indeed, the lawyer is required to maintain the confidentiality of information relating to representation even if the information is a matter of public record." (Internal citations omitted.)

Despite the lawyer's obligation to keep a client's confidences, Comment [21] to ER 1.6 is clear that, once withdrawn, the lawyer may give notice of the fact of withdrawal, "and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like." See Ariz. Ethics Op. 05-05.

2. May a lawyer charge a client for withdrawal-related work?

A lawyer's charged fees must be reasonable. See ER 1.5. Neither ER 1.5 nor its comment addresses the particular circumstances of whether a lawyer may charge for withdrawal-related work such as preparation, filing, and arguing a motion to withdraw. Other jurisdictions have addressed this question, however, in 2007 N.C. Ethics Op. 8 (http://www.ncbargoviethics) (July 13, 2007), the North Carolina State Bar opined that the act of the withdrawal with the Court is the professional obligation of the lawyer, and therefore the lawyer may not shift the cost of the withdrawal to the client. "Whether the client or the lawyer is the first to conclude that the relationship must end, determining who is at fault or the motivation of the client or the lawyer when ending the relationship is often impossible and, ultimately, beside[s] the point. Regardless of who may be at fault, the cost of the work necessary to file and argue a motion to withdraw must be incurred because the lawyer is required by the Rules of Professional Conduct and the court rules to obtain the permission of the court to withdraw." Further, in North Carolina, a fee agreement provision requiring the client to pay for the cost of preparing, filing, and arguing a motion to withdraw if the client terminates the lawyer's services is improper because "[s]uch a provision would have an improper chilling effect on a client's right to terminate a lawyer's services at will." *Id.*[1]

North Carolina poses two exceptions to the general rule of not charging for withdrawal-related work. One exception is when "a lawyer must file a motion to withdraw, with the consent of the client, to advance the client's objectives for the representation and not because the client is dissatisfied with the lawyer's services or the lawyer wishes to terminate the representation." *Id.* An example:

[A]n insurance carrier hires a lawyer to defend its insured in a personal injury lawsuit. Before trial, the carrier offers the full policy limits to the plaintiff. The carrier hires another lawyer to file the appropriate motion seeking to have the carrier relieved of its duty to defend the insured. The lawsuit must go forward, however, to determine whether there is liability entitling the plaintiff to recover the proceeds from an underinsured or other excess liability insurance policy. If the motion to be relieved of the duty to defend is allowed, the lawyer originally hired to defend the insured must make a motion to withdraw to further the insurance carrier's objective of being relieved of the duty to defend. The insurance carrier typically anticipates and assumes that it will pay the legal fees associated with the preparation and presentation of the motion to withdraw.

Id.

The second exception identified by North Carolina is where a court-appointed lawyer's withdrawal is necessary because of a conflict of interest, a breakdown of the relationship, or other similar circumstance, and the cause of such is not the lawyer's conduct. "Judicial review provides oversight to insure that the fee charges are warranted and, unlike in private representation, seeking

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1 See Ariz. Ethics Op. 94-02 (March 1994) (In opining that a fee agreement provision preventing the client from discharging the lawyer without "good cause" was unethical, the State Bar of Arizona Rules of Professional Conduct Opinion Committee stated: "Such a provision would likely discourage or deter a client, who no longer had confidence in or even distrusted counsel, from discharging the lawyer and hiring a new lawyer.")

compensation for filing the motion will not have a chilling effect on the client's right to terminate the relationship." *Id.*

The State Bar of Michigan's Standing Committee on Professional and Judicial Ethics takes somewhat of a different view, allowing the lawyer to charge a client for withdrawal-related services if the withdrawal is the client's choice and the lawyer has explained the consequences of withdrawal to the client, including the cost:

When a client seeks to discharge a lawyer, the lawyer has an obligation under MRPC 1.4(b) to explain to the client the effect of the withdrawal, including the likelihood of the judge granting the withdrawal under MRPC 1.16(c), that the lawyer continues as counsel until the judge grants the motion to withdraw, and that the motion to withdraw may not terminate the lawyer's ethical obligations to refrain from assisting illegal or fraudulent conduct of the client [MRPC 1.2(c), 1.2(d), 3.3(a)]. Presuming that the lawyer has fulfilled all obligations at the time of the contract and at the time withdrawal is requested, and as in this case, the contract is hourly [not contingent or fixed fee], the lawyer may charge to fulfill the client's wishes.

On the other hand, when it is the lawyer who has decided to withdraw, whether with cause or otherwise, the lawyer is not serving the interest of the client and therefore may not charge the client for expenses incurred in seeking the withdrawal.

Mich. Ethics Op. RI-296 (July 15, 1997) (http://www.michbar.org/opinions)

While the North Carolina opinion better serves the client's right to have counsel of his or her own choice, we do not believe the circumstances a lawyer may charge for withdrawal-related work are as narrow as adopted in North Carolina. Because a breakdown in a lawyer-client relationship is often difficult to distill down to client choice or lawyer choice (and in the same case, the client and the lawyer may perceive the decision-maker and the reasons therefor differently), we do not adopt the Michigan decision. Rather, we refer withdrawing lawyers to the reasonableness requirement of ER 1.5. The work a lawyer reasonably undertakes in support of a smooth transition to new counsel or *pro per* representation is usually work that may be charged to the client if otherwise appropriate under the fee agreement and if the withdrawal is not clearly solely due to the lawyer's circumstances (such as a lawyer closing the lawyer's law office in favor of public employment). Nevertheless, clients will likely scrutinize closely withdrawal-related charges, and a lawyer must be able to justify all such charges as reasonable under the circumstances.

3. What obligations does the withdrawn lawyer have to the former client?

"Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering documents and property to which the client is entitled and refunding any advance payment of a fee that has not been earned." ER 1.16(d). Even if money is owed by the client to the withdrawn lawyer, the client is entitled to the client's property, including the file. See ER 1.16(d); Ariz. Ethics Ops. 04-01 (January 2004) and 08-02 (December 2008) (as amended by Ethics Op. 15-02 (June 2015)); Ethics Op. No. EO-19-0009.

A withdrawn lawyer can find duties to former clients generally set forth in ER 1.9. For example, ER 1.9(c) makes clear that duties of confidentiality continue for former clients:

A lawyer who has formerly represented a client in a matter shall not thereafter:

> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

4. What confidential client information can be disclosed, either orally or as part of the client file, by withdrawn counsel to successor counsel in the absence of the client's informed consent?

When a lawyer withdraws from a representation or is terminated by the client, any disclosure of confidential information relating to the representation of the client to successor counsel or prospective successor counsel not specifically allowed by ER 1.6(a) is prohibited regardless of the reason for the withdrawal or termination. It frequently happens that when a representation is being transferred from one lawyer to another, the withdrawing or terminated lawyer has little or no direct communication with the client and, therefore, limited opportunity to obtain the client's informed consent to disclose confidential information to successor counsel. Exactly what steps are entailed in a withdrawing or withdrawn lawyer participating in the orderly transition of the matter will be a case-by-case analysis. In most situations, a withdrawing lawyer must advise the new counsel (as well as the client) of any pending court dates, a detailed status of the matter and issues, and anything else necessary and appropriate for the smooth and efficient transfer of the representation. Confidential disclosures of this nature to new counsel are impliedly authorized by ER 1.6(a) so long as the withdrawing lawyer reasonably believes that the disclosures will advance the interests and objectives of the client in the representation. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 61 (2000) ("A lawyer may use or disclose confidential client information when the lawyer reasonably believes that doing so will advance the interests of the client in the representation."). The withdrawing lawyer, however, must always remain mindful of reasons that may make further briefing of successor counsel imprudent or not in accordance with the client's interests and objectives. "Indeed, if the withdrawal is occasioned by a conflict, briefing successor counsel may taint the successor." Mich. Ethics Op. RI-296. In short, the withdrawing or withdrawn lawyer should participate in the transition of representation due to withdrawal such that the lawyer has reasonably tried to minimize (or alleviate, if possible) prejudice to the client from the withdrawal. The lawyer must always be mindful of protecting the client's interests during and for an orderly transition to new counsel or *pro per* representation.

As a general rule, transfer of the client file consistent Ethics Opinion No. EO-19-0009 to successor counsel is impliedly authorized by ER 1.6(a) to protect the client's interests even in the absence of express direction from the client. Regardless of the basis for the authority to transfer the file, i.e., implied or express, however, the lawyer must remain vigilant to the fact that the file may contain confidential client information that cannot or should not be disclosed to successor counsel without

the client's informed consent. This admonition applies to both hard-copy and electronic file contents. In some circumstances, the client may be entitled to receive portions of the client file that the withdrawn lawyer cannot or should not disclose directly to successor counsel in the absence of the client's informed consent. The burden is on the withdrawn lawyer to facilitate a transfer of the client file, either to the client or to successor counsel, in accordance with the Rules of Professional Conduct.

Because of these uncertainties inherent in transfer of the representation and client file, it is the recommendation of the Committee that a withdrawing lawyer actively seek the client's informed consent to disclose specific confidential information to successor counsel as part of the transition. This approach maximizes the probability of a complete and fully informed transfer of the representation and client file and applies equally when, as frequently happens, successor counsel (or prospective successor counsel) seeks input about the matter directly from withdrawn counsel.

CONCLUSION

A client remains so until the lawyer's withdrawal is complete regardless of the reasons for and timing of the cessation of the lawyer-client relationship. The withdrawing lawyer must protect the client's interests despite any dispute between the lawyer and the client and despite any wrongdoing of the client. Any disclosures of confidential information must be strictly limited to those circumstances authorized by the Rules of Professional Conduct. Fees must always be reasonable and appropriate. A withdrawing or withdrawn lawyer should participate in an orderly transition to new counsel or *pro per* representation to minimize prejudice to the client from the withdrawal. Once a lawyer is withdrawn, ethical obligations continue as for any former client.

Recording By Lawyer

SUPREME COURT OF ARIZONA
ATTORNEY ETHICS ADVISORY COMMITTEE
Ethics Opinion File No. EO-20-0002

The Attorney Ethics Advisory Committee was created in accordance with Rule 42.1 and Administrative Order Nos. 2018-110 and 2019-168.

Undisclosed recording of a telephone or other conversation by a lawyer, or a person acting at the lawyer's direction, is not a *per se* violation of the Rules of Professional Conduct, provided that the recording does not violate applicable laws. This Opinion revisits prior Arizona Ethics Opinions, including Arizona Ethics Opinions 75-13, 90-02, 95-03, and 00-04, as they relate to a lawyer's involvement in recording activities or directing others, including agents and clients, concerning the recording of communications with others. To the extent those opinions, or any other opinions, may have created a rule that an attorney who records another individual without disclosing the recording is acting *per se* unethically or with some form of "inherent deception," or otherwise conflict with this opinion, those opinions are superseded.

While the Supreme Court Attorney Ethics Advisory Committee (the "Committee") is unable to find a textual basis that supports a *per se* ban on undisclosed recordings, the Committee cautions lawyers to proceed with such recordings very carefully, if at all. The particular manner in which a recording is made or used could easily violate specific provisions of the Rules, such as the prohibition on making of false statements of fact or law, the requirement that information relating to the representation of a client remain confidential, and the prohibition on using means that have no purpose other than embarrassment. It is also rare that a client's interest would ever be served by lawyers making undisclosed recordings of conversations between lawyer and client, and therefore unlikely that undisclosed recording of a lawyer-client conversation would ever be appropriate. Undisclosed recordings may also have serious negative effects on what would otherwise be collegial working relationships with opposing counsel. Before choosing to make an undisclosed recording, the Committee strongly recommends that lawyers consider whether a *disclosed* recording would serve the same purpose, in order to avoid unnecessarily risking the potential pitfalls of undisclosed recording.

Facts and Issue Presented:

The Committee *sua sponte* addresses whether an attorney may ethically record a telephone or in-person communication between the lawyer and another without disclosing that the lawyer is recording the conversation when the recording does not violate applicable federal or state law.

Relevant Ethical Rules:

ER 1.1:

A lawyer shall provide competent representation to a client.

ER 1.2(d):

A lawyer shall not counsel to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

ER 1.3:

Comment 1: A lawyer shall pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate the client's cause or endeavor.

ER 1.6(a):

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d) or ER 3.3(a)(3).

ER 3.3(a):

A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

ER 3.4:

Comment 1: Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery and the like.

ER 4.1:

In the course of representing a client a lawyer shall not knowingly

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by ER 1.6.

ER 4.3:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

ER 4.4(a):

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden the other person, or use methods of obtaining evidence that violate the legal rights of such a person.

ER 8.4:

It is professional misconduct for a lawyer to:

. . . .

(b) commit a criminal act that reflects adversely on the lawyers honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

(d) engage in conduct that is prejudicial to the administration of justice.

ER 8.5(a):

A lawyer may be subject to the disciplinary authority of this jurisdiction and another jurisdiction for the same conduct.

Relevant Ethics Opinions:

ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001); Alaska Bar Ass'n, Ethics Op. 2003-01 (2003); DC Ethics Op. 229; Me. Prof'l Ethics Comm'n, Op. 168 (1999); Mich. Informal Ethics Op. RI-309 (1998); Mo. Sup. Ct. Advisory Comm., Formal Op. 123 (2006); Neb. Ethics Advisory Op. for Lawyers, No. 06-07 (2006); N.Y.C. Bar Ass'n, Formal Op. 2003-02 (2003); Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2012-1 (2012); Okla. Bar Ass'n Legal Ethics Panel, Op. 307 (1994); Tenn. Rules of Prof'l Conduct 8.4 cmt. 6; The Prof'l Ethics Comm. For the State Bar of Tex., Op. 575 (2006); Utah State Bar Ethics Op. 96-04 (1996).

OPINION

A. Both Arizona and Federal Law Permit Recordings Where Only One Party to the Conversation Is Aware the Recording Is Being Made.

Arizona law, characterized as a "one party consent" law, permits the recording of wire, electronic, and oral communications so long as one party to the communication consents to the recording. A.R.S. §§ 13-3005; 13-3012(9). Thus, when one party to a communication records the communication with another, the party doing the recording "consents" to the communication, making a communication "legal" under Arizona law. Federal law likewise permits one-party consent to the recording of a wire, electronic, or oral communication. *See* 18 U.S.C. § 2511(2)(d).

Although Arizona and federal law allow for one-party consent, some states require that all parties to the communication consent to a recording in order for the recording to be legal. As of the date of the publication of this Opinion, these states include, with some variations in the specific requirements among them, California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Montana, Nevada, New Hampshire, Oregon, Pennsylvania, and Washington.[1] This bears noting because Arizona lawyers whose practices lead them to engage in professional services in another state that does not permit one-party consent may violate the professional responsibility rules of that jurisdiction, *see* ER 8.5(a), and by doing so, would violate the Arizona Rules of Professional Conduct by engaging in criminal conduct that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." ER 8.4(b).

Nonetheless, as a result of the Arizona and federal one-party-consent laws, lawyers practicing in Arizona can legally record telephone communications to which they are a party. Although an attorney may legally record such communications, the Committee recognizes, and appreciates, that we, as attorneys, hold ourselves to a higher standard. As such, the legality of a lawyer's actions has never been sufficient to conclusively demonstrate ethical conduct.

B. Prior Opinions Absolutely Prohibit Undisclosed Recording, Subject to a Series of Exceptions that Have Been Articulated Over Time.

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[1] *See, e.g.*, Cal. Penal Code § 632(a)–(d); Conn. Gen. Stat. § 52-570d; Del. Code. Ann. tit. 11, §§ 1335(a)(4), 2402(c)(4); Fla. Stat. Ann. § 934.03(3)(d); 720 I.L.C.S. § 5/14-2(a); Md. Code Ann., Cts. & Jud. Proc. § 10-402(c)(3); Mass. Gen. Laws Ann. ch. 272, § 99(B)(4) and (C)(1); Mont. Code Ann. § 45-8-213; Nev. Rev. Stat. §§ 200.620 (requiring all parties to consent to telephonic recording), 200.650 (allowing one-party consent for in-person recording); N.H. Rev. Stat. Ann. § 570-A:2; Or. Rev. Stat. Ann. §§ 165.540 (allowing one-party consent for recording of telephone conversations, but requiring all parties consent to the recording of an in-person conversation); 18 Pa. Cons. Stat. Ann. §§ 5702, 5704; Wash. Rev. Code Ann. § 9.73.030.

The ethical ramifications of recording by lawyers of their communications with others, the direction by lawyers to third persons, such as investigators, to record communications, and the advice given by lawyers to clients concerning recording of communications with others, especially with opposing parties, are matters of much controversy among lawyers. Throughout the years, the prior State Bar Committee on Professional Responsibility (the "State Bar Ethics Committee") struggled to define the boundaries of what constitutes ethical conduct when it comes to undisclosed recording of communications by a lawyer, and the resulting opinions are somewhat difficult to reconcile.

Up until 1975, the State Bar Ethics Committee had determined that it was unethical in essentially all circumstances for an attorney to surreptitiously record a telephone conversation, including a conversation with another attorney, *see* Ariz. Ethics Op. 176A (1965); a conversation with a witness, potential witness, or an adverse party, *see* Ariz. Ethics Op. 74-18 (1974); and unethical to cause or encourage police or other investigators to surreptitiously record a conversation with a witness or potential defendant, s*ee* Ariz. Ethics Op. 74-35 (1974) (overruled by Ariz. Ethics Op. 75-13).

In Arizona Ethics Opinion 75-13 (1975), the State Bar Ethics Committee continued to recognize a broad, general rule that it was "improper for a lawyer to record by tape recorder or other electronic device any conversation between the lawyer and another person, or between third persons, without the consent or prior knowledge of all parties to the conversation." However, in Arizona Ethics Opinion 75-13, the State Bar Ethics Committee created four exceptions to the general rule against undisclosed recording: (1) "an utterance that is itself a crime, such as an offer of a bribe, a threat, an attempt to extort or an obscene telephone call"; (2) "[A] conversation in order to protect himself, or his client, from harm that would result from perjured testimony. . . . [S]olely to provide a shield for the lawyer, or his client... not...secret recordings for the purpose of obtaining impeachment evidence or inconsistent statements"; (3) "...conversations with informants and/or persons under investigation simply as a matter of self-protection"; and (4) conversations "specifically authorized by statute, court rule or court order."[2]

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[2] The Committee notes that one published Arizona Supreme Court opinion cites to Arizona Ethics Opinion 75-13 (1975) with approval and references that Opinion's broad rule against undisclosed recording under the predecessor to the Rules of Professional Conduct. *See In re Wetzel*, 143 Ariz. 35, 44, 691 P.2d 1063, 1072 (1984). The *Wetzel* opinion did not address the particular considerations addressed in this opinion, nor does the Arizona Supreme Court appear to have revisited the issue of undisclosed recording since the issuance of subsequent opinions recognizing exceptions to the broad rule stated in Opinion 75-13. The Committee encourages interested attorneys to review the *Wetzel* opinion.

In Arizona Ethics Opinion 90-02 (1990), the State Bar Ethics Committee considered whether an investigator for the public defender could ethically tape record an interview—without disclosure—with a potential witness in a criminal case for impeachment purposes at trial. The State Bar Ethics Committee acknowledged that it was "common practice for law enforcement agencies to surreptitiously record interviews and/or conversations in criminal investigations," and decided that criminal defense attorneys should have the same opportunities. Ariz. Ethics Op. 90-02, at 4. The State Bar Ethics Committee expanded the exceptions to the general prohibition against recording by an attorney to allow "the recording of witness conversations by criminal defense attorneys or their agents, with the consent of only one party to the conversation, . . . for the purpose of protecting against perjury or for the purpose of obtaining impeachment material should the testimony of the witness be different at trial." Ariz. Ethics Op. 90-02, at 6.

In 1995, the State Bar Ethics Committee addressed whether an attorney could ethically record a telephone conversation with opposing counsel without disclosure. Ariz. Ethics Op. 95-03 (1995). Citing ER 8.4(d), prohibiting "conduct involving dishonesty, fraud, deceit, or misrepresentation," the State Bar Ethics Committee determined that "the objective" of undisclosed recording an opposing counsel is "inherently deceptive." At that time, the State Bar Ethics Committee decided that the only reason that an attorney could want to record an opposing counsel is to "capture his or her opponent on tape, making a statement that would not be made if the taping were revealed." Ariz. Ethics Op. 95-03, at 4. The State Bar Ethics Committee noted that, at the time, the ABA Committee on Ethics and Professional Responsibility as well as various State Bar ethics committees (Iowa, Kentucky, and Idaho) had reached similar conclusions.

Most recently, in Arizona Ethics Opinion 00-04 (2000), the State Bar Ethics Committee addressed whether an attorney could ethically advise his or her client that the client may record a conversation without disclosing the recording. The State Bar Ethics Committee recognized that both federal and Arizona laws allow tape recording of a telephone conversation without the consent of all parties involved. Moreover, the State Bar Ethics Committee concluded that, so long as the attorney determines that the client may legally tape record certain conversations, the attorney is not ethically prohibited from advising the client of his or her legal rights to do so. Ariz. Ethics Op. 00-04. The State Bar Ethics Committee reiterated, however, that "while an attorney may advise a client about the client's right to surreptitiously record conversations, the attorney may not participate in the surreptitious recording of a conversation, except as permitted by our prior opinions." Ariz. Ethics Op. 00-04. Review

C. The Existing Opinions Provide Little Guidance in Circumstances Not Specifically Addressed, and Are Difficult to Reconcile.

Where does this leave the issue? In the past 40 years, the State Bar Ethics Committee imposed a general blanket prohibition against an attorney recording a conversation without

disclosure, based on the view that any such recording is inherently deceptive and in violation of ER 8.4(c3). However, despite taking the position that undisclosed reporting is inherently deceptive, the State Bar Ethics Committee has opined that such recording is nonetheless permissible in a host of particular circumstances:

- When the recording is of a statement that is itself a crime (such as a bribe or obscene phone call). Op. 75-13.
- To protect the lawyer or client against perjured testimony, but not merely to record evidence of inconsistent statements or for other impeachment purposes. Op. 75-13.
- When speaking with an informant or the subject of an investigation "as a matter of self-protection." Op. 75-13.
- For criminal defense attorneys, when conducting an investigation. Op. 90-02.
- By the lawyer's client, with advice from the lawyer regarding the legal right to do so. Op. 00-04.
- When authorized by statute, court rule, or court order. Op. 75-13.

Taken as a whole, the State Bar Ethics Committee's prior opinions appear to recognize that undisclosed recording, by the lawyer or by the client with the lawyer's advice, may be an appropriate action to protect the interests of the client or the attorney in the context of a particular matter. But if, as Op. 95-03 stated, undisclosed recording is "inherently deceptive" and violative of ER 8.4(c), then it would be beyond the authority of this Committee to create any exceptions to that rule without some textual support.

The piecemeal nature of the exceptions defined by the Committee also leaves attorneys with little guidance regarding how the Rules of Professional Conduct will be applied in circumstances that have not yet been specifically addressed. If criminal defense attorneys may record interviews to protect their clients, may civil defense attorneys do so as well? If lawyers may advise their clients regarding their legal right to make an undisclosed recording, may lawyers then use the recordings their clients make, despite the general prohibition on directing others to do what the lawyer cannot do her or himself? *See* ER 5.3(c).

And some of the articulated exceptions are themselves difficult to implement. If a lawyer may record a conversation that includes speech constituting a crime, how is the lawyer to know before the conversation starts that the conversation will fall into that category? The lawyer cannot reasonably be expected to wait until her conversational partner offers a bribe and then ask that person to hold while she turns on recording equipment, and then to repeat the criminal statement. The crime exception works only if lawyers can record conversations they reasonably believe in advance may involve

[3] This reference appears to be a typo because the quote is from ER 8.4(c).

statements constituting a crime, even though their predictions will sometimes be wrong and innocent statements recorded as a result. Similarly, no guidance is provided on how to draw the line between a recording that "protect[s] . . . against perjured testimony" and one that merely seeks to "obtain[] impeachment evidence or inconsistent statements." Op. 75-13.

This Committee believes that there comes a point where so many exceptions to a rule indicate that the rule itself should be reexamined. *Cf.* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) ("A degree of uncertainty is common in the application of rules of ethics, but an ethical prohibition that is qualified by so many varying exceptions and such frequent disagreement as to the viability of the rule as a basis for professional discipline, is highly troubling."); Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2012-1 (2012) (noting that "so many exceptions have been recognized to justify surreptitious recording that it seems patently unfair to maintain that it is misconduct per se when a lawyer does it").

D. Undisclosed Recordings Are Not "Inherently Deceptive," and Are Therefore Not Per Se Prohibited by the Rules of Professional Conduct.

The inconsistent nature of the State Bar Ethics Committee's prior opinions suggests that reexamination may be in order. We begin that reexamination with the text from which our authority derives – the Rules of Professional Conduct themselves.

To the extent that our prior opinions have referenced specific provisions of the Rules in articulating a blanket prohibition on undisclosed recording, they have focused on the provision of Rule 8.4(c) that defines as professional misconduct actions "involving dishonesty, fraud, deceit or misrepresentation." Specifically, our 1995 opinion reasoned that the only purpose for an undisclosed recording was to capture a statement "that would not be made if the taping were revealed," and that this was an "inherently deceptive" objective. Ariz. Ethics Op. 95-03, at 4.

The exceptions articulated in our prior opinions undercut this conclusion. Take, for example, the 1975 opinion that an undisclosed recording would be permissible to capture "an utterance that is itself a crime, such as an offer of a bribe, a threat, an attempt to extort or an obscene phone call." Ariz. Ethics Op. 75-13. The lawyer who records such a call certainly seeks to make a record of a statement that likely would not be made if the recording had been known, but not to deceive the speaker into making the criminal statement. Rather, the lawyer seeks to record the statement so that the speaker cannot later falsely deny the criminal statement was made, and thereby avoid the consequences of his or her wrongdoing. In that instance, recording the conversation does not constitute deception, but avoids it. A similar purpose is served in recording a conversation with opposing counsel manifesting an agreement, thereby preventing the counsel from reneging on and denying that agreement, or by recording a conversation with opposing counsel who

acts abusively and unprofessionally when they believe that there will be no witnesses to their misconduct.

Similarly, the exceptions we have previously identified regarding witness interviews likewise serve an important, non-deceptive purpose. Ariz. Ethics Op. 75-13 (to prevent perjury and to protect the interviewer of an informant or person under investigation); Ariz. Ethics Op. 90-02 (for impeachment purposes in criminal cases). In those instances, the conversation is one whose contents are sufficiently important that it may be necessary to have an accurate record at a later point, and an audio recording is a superior record to handwritten or typewritten notes that might be less complete or subject to concerns about accuracy. Surely we expect competent and diligent counsel to make notes as necessary to memorialize important conversations, and anyone speaking with a lawyer (particularly one who represents someone else) should reasonably expect that the lawyer will want to remember what was said and make some records to that end. If taking accurate notes of a conversation by hand or on a computer would be both appropriate and expected, then how does making an accurate audio recording of the same conversation put the speaker in any worse position with regard to future accountability for statements made during the conversation? In fact, given the greater accuracy and completeness of an audio recording, that method may provide more protection for all participants in the conversation than either side's handwritten notes or memories.[4]

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[4] In this regard, although the Committee's analysis does not rest on this ground, it is worth noting that contemporary understandings of the prevalence of recording may be changing in response to widespread access to and use of audio and video recording technology, on even inexpensive mobile telephones. To the extent prior opinions rested on an unspoken, shared understanding that conversations were, by default, *not* recorded, for society in general it is possible that understanding may be changing. The Committee's changed viewpoint is supported by the numerous similar opinions issued by fellow State Bar ethics committees from other jurisdictions as well as the ABA's opinion. *See, e.g.*, ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) ("Devices for the recording of telephone conversations on one's own phone readily are available and widely are used. Thus, even though recording of a conversation without disclosure may to many people 'offend a sense of honor and fair play,' it is questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party . . . ."); Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2012-1 (2012) (finding that an attorney's surreptitious recording of a conversation is not inherently unethical based in part on the fact that "public expectations of privacy have changed given advances in technology and the increased availability of recording equipment. The public has an almost ubiquitous ability to record others through the use of smart phones, tablets, and other portable devices."); Utah State Bar Ethics Op. 96-04 (1996) (determining that "a lawyer will not violate the Rules of Professional Conduct by making an undisclosed recording of a telephone conversation" based in part on a

Our prior opinion that all undisclosed recordings have a deceptive purpose, and are thus in violation of Rule 8.4(c), does not appear to withstand closer scrutiny. We therefore overrule our prior Opinion 95-03, and find that Rule 8.4(c) does not support a *per se* prohibition on undisclosed recordings by, or at the direction of, lawyers, provided that the recording otherwise complies with applicable laws.[5] In reaching this conclusion, the Committee does not endorse deception or trickery on the part of lawyers to the end of harming members of the public, but rather concludes that, in considering the benefit of recording as a way of advancing the interests of the client against the burden to the public of compromising expectations of privacy, the balance inures in the direction of permitting undisclosed recording. *See* Comment 1 to ER 4.4; Preamble, ¶ 9.

E. Undisclosed Recordings Can Be Deceptive, or Violate Other Ethical Rules, in the Manner in Which They Are Made or Used.

"changing environment" where "[t]echnology has put the power to secretly tape record within the easy reach of every lawyer and litigant").

[5] Based on the Committee's review of ethics opinions and ethical rules from other states in which one-party consent recording is legal, the Committee is comfortable that making such a change in the interpretation of Arizona attorneys' ability to record a communication is in line with a majority of our sister states. *See, e.g.*, Alaska Bar Ass'n, Ethics Op. 2003-01 (2003) ("[T]he Committee is of the opinion that, while the better practice may be for attorneys to disclose or obtain consent prior to recording a conversation, attorneys are not per se prohibited from ever recording conversations without the express permission of all other parties to the conversation"); Me. Prof'l Ethics Comm'n, Op. 168 (1999); Mich. Informal Ethics Op. RI-309 (1998); Mo. Sup. Ct. Advisory Comm., Formal Op. 123 (2006) (agreeing with the reasoning of ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001)); Neb. Ethics Advisory Op. for Lawyers, No. 06-07 (2006); N.Y.C. Bar Ass'n, Formal Op. 2003-02 (2003); Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2012-1 (2012); Okla. Bar Ass'n Legal Ethics Panel, Op. 307 (1994); Tenn. Rules of Prof'l Conduct 8.4 cmt. 6 ("The lawful secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty"); The Prof'l Ethics Comm. For the State Bar of Tex., Op. 575 (2006) ("In view of the fact that persons in Texas are generally not prohibited from making undisclosed recordings of their telephone conversations on business premises with or without notice, the Committee does not believe that an undisclosed recording of a telephone conversation by a party to a conversation can be termed to involve 'dishonesty, fraud, deceit or misrepresentation' within the meaning of Rule 8.04(a)(3)"); Utah State Bar Ethics Op. 96-04 (1996).

However, this Opinion should not be read as a wholesale endorsement of undisclosed recordings in all circumstances. The misgivings expressed in our previous opinions about the potential uses of undisclosed recordings and their effects were real and meaningful, and should not be ignored or dismissed. In reviewing these concerns, the Committee believes that they are largely addressed in a number of the Rules of Professional Conduct, which guide the actions of lawyers in these circumstances and provide a means of sanctioning improper behavior.

The difference between this Opinion and our prior guidance on this subject is that we now recognize that any ethical problems with undisclosed recording arise not because the act of recording itself is inherently deceptive, but because the manner in which it is conducted or the ways in which the recording is used may implicate specific Rules of Professional Conduct. We thus conclude our analysis by discussing several ways in which undisclosed recordings may violate the Rules, and cautioning lawyers to consider these issues carefully before deciding to make an undisclosed recording.

Deception During the Recorded Conversation. Among the most obvious ways in which an undisclosed recording could violate the Rules requiring lawyers to be honest in their dealings with others[6] is by acts of deception prior to or during the recorded conversation itself. If the lawyer is asked whether the conversation is being recorded, they must answer honestly. Even if the lawyer is not asked, they may not make false statements as to whether the conversation is being recorded, either directly or by implication. Thus, they may not state that the conversation is unrecorded, while knowing that it is being recorded, nor may they imply that the conversation is unrecorded, by making statements such as "it's just us, you can tell me, no one will ever know." *See* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) ("A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded."); Utah State Bar Ethics Op. 96-04 (1996) ("[I]t would be unethical for an attorney to fail to answer candidly if asked whether the conversation is being recorded.").

Deception After the Recorded Conversation. Similarly, lawyers must not use the recording of the conversation in ways that are deceptive or false. Examples would include using partial recordings of the conversation that have the effect of altering its meaning, or manipulating the recording to omit or change its contents. Also impermissible would be lying about how the recording was obtained, for example by stating that both parties knew

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[6] *See* ER 1.2(d) (lawyers may not engage or assist in criminal or fraudulent conduct); 3.3(a) (lawyers may not make or fail to correct false statements of fact or law to tribunals); 4.1(a) (lawyers may not make false statements of material fact or law to third parties); 4.3 (lawyers may not falsely state or imply that they are disinterested, when dealing with unrepresented persons); 8.4(d) (lawyers may not engage in dishonesty, fraud, deceit or misrepresentation).

they were being recorded, if that was not the case. Similarly, an Arizona attorney may not engage in undisclosed recording if the act of recording is to be used to assist the client in criminal or fraudulent activity, *see* ER 1.2(d) and ER 4.1(b).

Improper Recording Purposes. Lawyers must also be mindful of ER 4.4(a), which prohibits the use of "means that have no substantial purpose other than to embarrass, delay, or burden the other person, or use methods of obtaining evidence that violate the legal rights of such a person." It would be ethically impermissible to make a recording that had no relevance to the lawyer's work on behalf of the client other than to embarrass the opposing party or counsel, or that interfered with the other party's rights. Undisclosed recordings of conversations between an adverse party and their lawyer, or recordings of highly personal matters not relevant to a legal dispute, would fall within this prohibition.

Violation of the Duty of Loyalty to the Client. Lawyers should also avoid undisclosed recordings of conversations with their own clients, due to the likelihood that such recordings, if later discovered, would undermine the trust and candor that are essential to the lawyer-client relationship. *See Amfac Distrib. Corp. v. Miller*, 138 Ariz. 155, 159, 673 P.2d 795, 799 (App. 1983) (discussing the "essential element of trust in the attorney-client relationship); ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-422 (2001) (the relationship of trust and confidence that clients need to have with their lawyers likely would be undermined by client's discovery that lawyer secretly recorded communications with client).

F. Lawyers Should Consider Whether a *Disclosed* Recording Would Serve Their Purposes Equally Well.

As reflected in the above discussion, in order to remain in compliance with the Rules of Professional Conduct, an Arizona attorney must be conscious of the reason and purpose behind the need to record a conversation without disclosure, and the manner in which the recording will be used. Given the potential for ethical pitfalls, as well as the potential negative impact on working relationships with opposing parties, counsel, and witnesses, the Committee strongly recommends that any lawyer contemplating making an undisclosed recording consider whether they could achieve the desired result through making a recording with full disclosure. If the purpose of the recording is to make sure there is an accurate record of what was said for future use, then lawyers may wish to simply let their conversational partners know that they record conversations for record-keeping purposes. If they do so, then there can be no later accusations of unfairness or deception, nor any adverse effects on professional relationships as a result of being surprised with a recording.

CONCLUSION

This Committee believes that it is not *per se* unethical or "inherently deceptive" for an attorney in Arizona to record a telephone communication between the attorney and another individual without disclosing that the attorney is recording the communication, so long as the recording does not violate applicable federal or state law. The lawyer must still act consistent with all applicable Arizona Rules of Professional Conduct in making and using the recording, and an attorney's undisclosed recording may still violate various Ethical Rules, depending on the facts of each case.

NEWS RELEASE

Arizona Supreme Court
Administrative Office of the Courts

Contact: Aaron Nash
Phone: 602-452-3656
Email: anash@courts.az.gov

August 27, 2020

Arizona Supreme Court Makes Generational Advance in Access to Justice

PHOENIX – The Arizona Supreme Court voted this week to make far-reaching changes that could transform the public's access to legal services. The approved changes, stemming from the Court's Task Force on the Delivery of Legal Services, chaired by Vice Chief Justice Ann A. Scott Timmer, focused on reforming regulations to allow for more innovation and to make legal services more affordable while still protecting the public. Arizona Supreme Court Chief Justice Robert Brutinel said of the development, "The Court's goal is to improve access to justice and to encourage innovation in the delivery of legal services. The work of the task force adopted by the Court will make it possible for more people to access affordable legal services and for more individuals and families to get legal advice and help. These new rules will promote business innovation in providing legal services at affordable prices. I thank and commend the Task Force and its chair, Vice Chief Justice Timmer for their groundbreaking work." The Utah Supreme Court recently made similar changes to their court rules while other states have task forces looking at reforms.

The Court approved modifications to the court rules regulating the practice of law, which allows for two significant changes. One change is a licensure process that will allow nonlawyers, called "Legal Paraprofessionals" (LPs), to provide limited legal services to the public, including being able to go into court with their client. The other change is the elimination of the rule prohibiting fee sharing and prohibiting nonlawyers from having economic interests in law firms. With these modifications, Arizona is set to implement the most far-reaching changes to the regulation of the practice of law of any state thus far.

Referred to as "LLLPs" in the task force report, the first regulatory framework addresses the Legal Paraprofessional (LP) model that would authorize nonlawyers to directly provide limited legal representation to clients. In many ways, LPs would be the legal system's equivalent of a

nurse practitioner in the medical field. Those interested in becoming LPs would have to meet education and experience requirements, pass a professional abilities examination, and pass a character and fitness process. Successful candidates would be affiliate members of the state bar and would be subject to the same ethical rules and discipline process as lawyers.

The rule changes authorized by the Court have an effective date of January 1, 2021 and require the Administrative Office of the Courts to adopt a code section of the Arizona Code of Judicial Administration to implement the regulatory framework for the licensing of LPs.

Another significant rule change authorized by the Court was the elimination of ER 5.4, the rule barring nonlawyers from fee sharing and barring nonlawyers from having an economic interest in a law firm. The regulatory framework addressing this change requires businesses, called "Alternative Business Structures," to be licensed. This provision will also become effective on January 1, 2021.

In part, the innovation opportunities created by these changes are intended to improve access to justice and to make access to legal documents and legal representation available to more members of the public. A sentiment driving the task force responsible for proposing the rule changes was that lawyers have an ethical obligation to assure that legal services are available to the public and that if the rules stand in the way of making those services available, the rules should change. At the same time, the changes must maintain the professional independence of lawyers and protect the public from unethical and unprofessional conduct.

Other changes approved by the Court include those regulating lawyer advertising, most of which align with recent changes made to the American Bar Association's Model Rules. For information about Arizona's legal services innovations, the application processes that are in development for these new regulatory programs, links to the proposals, FAQs, the Task Force report, the Court's recent order and more, see the Access to Legal Services webpage at https://www.azcourts.gov/accesstolegalservices/.

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BRENNAN CENTER FOR JUSTICE

The Impact of Video Proceedings on Fairness and Access to Justice in Court

Increasing use of remote video technology poses challenges for fair judicial proceedings. Judges should adopt the technology with caution.

By Alicia Bannon and Janna Adelstein PUBLISHED SEPTEMBER 10, 2020

Brennan Center for Justice at New York University School of Law

Introduction

The Covid-19 pandemic has disrupted court operations across the country, prompting judges to postpone nonessential proceedings and conduct others through video or phone.[1] Even as courts have begun to reopen, many are also continuing or testing new ways to expand the use of remote technology.[2] At the same time, public health concerns are leading some legal services providers and other advocates to oppose the return to in-person proceedings.[3] Beyond the current moment, several court leaders have also suggested that expanded use of remote technology should become a permanent feature of our justice system.[4]

Remote technology has been a vital tool for courts in the midst of a public health crisis. But the use of remote technology — and its possible expansion — also raises critical questions about how litigants' rights and their access to justice may be impacted, either positively or negatively, and what courts and other stakeholders can do to mitigate any harms.

This paper collects and summarizes existing scholarship on the effects of video technology in court proceedings. Federal courts, immigration courts, and state courts have long used video technology for certain kinds of proceedings.[5] While the available scholarship on the use of video proceedings is limited, existing research suggests reason for caution in expanding the use of these practices, as well as the need for further research on their potential effects.

For Example:

- One study of criminal bail hearings found that defendants whose hearings were conducted over video had substantially higher bond amounts set than their in-person counterparts, with increases ranging from 54 to 90 percent, depending on the offense.[6]

- A study of immigration courts found that detained individuals were more likely to be deported when their hearings occurred over video conference rather than in person.[7]

- Several studies of remote witness testimony by children found that the children were perceived as less accurate, believable, consistent, and confident when appearing over video.[8]

- In three out of six surveyed immigration courts, judges identified instances where they had changed credibility assessments made during a video hearing after holding an in-person hearing.[9]

Research also suggests that the use of remote video proceedings can make attorney-client communications more difficult. For example, a 2010 survey by the National Center for State Courts found that 37 percent of courts using videoconferencing had no provisions to enable private communications between attorneys and their clients when they were in separate locations.[10] Remote proceedings can likewise make it harder for self-represented litigants to obtain representation and other forms of support by separating them from the physical courthouse. A study of immigration hearings found that detained immigrants who appeared in person were 35 percent more likely to obtain counsel than those who appeared remotely.[11]

At the same time, other research suggests that remote video proceedings may also enhance access to justice under some circumstances. For example, a Montana study found that the use of video hearings allowed legal aid organizations to reach previously underserved parts of the state.[12] Organizations such as the Conference of Chief Justices have called for the expanded use of video or telephone proceedings in civil cases, particularly for

self-represented and low-income litigants, as a way of reducing costs for those who, for example, may need to take time off work to travel to court.[13]

One challenge in interpreting this research is that court systems hear a wide range of cases, both civil and criminal, and the use of videoconferencing may pose widely disparate challenges and benefits for litigants in different types of cases. Courts are involved in adjudicating everything from evictions to traffic violations, from multimillion-dollar commercial disputes to felony cases. In some instances, litigants are detained in jails or detention centers. In others, they may be self-represented. Courts hold preliminary hearings, arraignments, settlement negotiations, scheduling conferences, arguments on legal motions, jury trials, and much more.

At its core, this review of existing scholarship underscores the need for broad stakeholder engagement in developing court policies involving remote proceedings, as well as the need for more research and evaluation as courts experiment with different systems.

Impact of Video Proceedings on Case Outcomes

A handful of studies have directly assessed whether replacing certain in-person proceedings with videoconferences impacted substantive outcomes in criminal, civil, or immigration proceedings. Several other studies have sought to evaluate the impact of using video on factors that are likely to affect substantive outcomes, such as credibility assessments by juries or other factfinders, and communication between attorneys and their clients.

Video Proceedings and Substantive Outcomes

One study by law and psychology professor Shari Seidman Diamond and coauthors, published in the *Journal of Criminal Law and Criminology*, looked at the impact of using closed-circuit television during bail hearings in Cook County, Illinois. The study found that judges imposed substantially higher bond amounts when proceedings occurred over video.[14]

In 1999, Cook County began using closed-circuit television for most felony cases, requiring defendants to remain at a remote location during bail hearings. A 2008 analysis of over 645,000 felony bond proceedings held between January 1, 1991 and December 31, 2007 found that after the closed-circuit television procedure was introduced, the average bond amount for impacted cases rose by 51 percent — and increased by as much as 90 percent for some offenses. By contrast, there were no statistically significant changes in bond amounts for those cases that continued to have live bail hearings.[15] These disparities persisted over time. The release of this study, which was prepared in connection with a class action lawsuit challenging Cook County's practices, caused the county to voluntarily return to live bail hearings.[16]

The authors theorized several explanations for the difference in bond amounts in Cook County. Among other things, they pointed to the picture quality and the video setup, which gave the appearance that the defendant was not making eye contact. In addition, they suggested that the defendant's remote location made it difficult for their attorney to gather information in advance of the hearing or consult with their client during the hearing. The authors also pointed out that the video was in black and white, and that litigants with darker skin were difficult to see on camera. Finally, they raised the question of whether some aspect of appearing in person affects a person's believability.[17]

Another study by law professor Ingrid Eagly looked at the use of video technology to adjudicate immigration proceedings remotely, finding that detained respondents were more likely to be deported when their proceedings occurred over videoconference.[18] Video hearings are now a common feature in immigration court, and have been used regularly since the 1990s.[19] The use of videoconferencing, even without the petitioner's consent, is specifically authorized by statute.[20] According to the Transactional Records Access Clearinghouse Immigration Center at Syracuse University, from October through December 2019, one out of every six final hearings deciding an immigrant's case was held by video.[21] Eagly examined outcomes for detained immigrants in immigration court, comparing those who participated via video to those who participated in person.[22] Eagly used a nationwide sample of nearly 154,000 cases, in which immigration judges reached a decision on the merits during fiscal years 2011 and 2012.[23]

Eagly found what she described as a "paradox": detained immigrants whose proceedings occurred over video were more likely to be deported, but *not* because judges denied their claims at higher rates. Rather, these respondents were less likely to take advantage of procedures that might help them. Detained individuals who

appeared in person were 90 percent more likely to apply for relief, 35 percent more likely to obtain counsel, and 6 percent more likely to apply only for voluntary departure, as compared to similarly situated individuals who appeared by video. These results were statistically significant, even when controlling for other factors that could influence case outcomes.[24]

At the same time, among those individuals who actually applied for various forms of relief, there was no statistically significant difference in outcome after controlling for other factors. However, because video participants were *less likely* to seek relief or retain counsel, video cases were still significantly more likely to end in removal.[25] Eagly argued that "[t]elevideo must therefore be understood as having an indirect relationship to overall substantive case outcomes—one linked to the disengagement of respondents who are separated from the traditional courtroom setting."[26]

Eagly relied on interviews and court observations to explore why video proceedings led to less engagement by respondents. She suggested that respondents may have been less likely to participate fully in video proceedings due to logistical hurdles requiring advanced preparation, such as the need to mail an application for relief in advance of the hearing, rather than bringing one to court and physically handing over a copy. She also highlighted the difficulties that video proceedings pose in allowing individuals to communicate effectively and confidentially with their attorney. Finally, she found that respondents often found it difficult to understand what was happening during video proceedings, and that many perceived a video appearance as unfair and not a real "day in court," an assertion which has also been made by the American Bar Association Commission on Immigration.[27]

A few studies have also examined the impact of video testimony on jury trials, with mixed results. One study by psychology professor Holly Orcutt and coauthors examined the impact of remote testimony by children in sexual abuse cases. The authors created a simulation involving a fake crime with children and an adult actor. The children then testified on their experiences within the experiment during a mock trial,[28] using actors and mock jurors. The child witnesses testified either in person or via one-way closed-circuit television.[29]

Orcutt found that when children testified via closed-circuit television, the mock jurors rated them as less honest, intelligent, and attractive, and concluded that their testimony was less accurate. Mock jurors were also less likely to vote to convict the defendant (accused by the child witness), when the child testified by closed-circuit television.[30] Thus, closed-circuit testimony "appeared to result in a more negative view of child witnesses as well as a small but significant decrease in the likelihood of conviction [of the defendant]."[31] However, after jurors deliberated, there was no statistically significant impact of video versus live testimony on the verdict.[32] It is possible that study participants had a specific skepticism about remote testimony by children in abuse cases due to assumptions about why a child might not testify in person. However, this study also raises the possibility that remote witness testimony is generally less likely to be seen as credible, disadvantaging litigants and raising fairness concerns in cases where testimony is likely to be critical to a party's case.

On the other hand, a series of studies from the 1970s and 1980s based on reenacted trials generally found that videotaped trials had no impact on outcomes. For example, in a reenacted trial involving an automobile personal injury case, staffed by actors, there was no statistically significant difference in the mean amount awarded by the jury, or in the jury's retention of information, between the in-person and videotaped trials.[33] However, several caveats apply. First, these studies did not address the use of remote jurors, or jurors who interacted with each other over video.[34] Also relevant is that the technologies available to conduct remote proceedings today are vastly different than those used in studies in the 1970s and 80s. Finally, another limitation of these studies is that they do not address how less than ideal technological conditions may impact

court dynamics. For example, a study of immigration courts by Booz Allen Hamilton for the Department of Justice determined that technological glitches had disrupted cases to such an extent that due process concerns may arise.[35]

Lastly, the Administrative Conference of the United States has studied the use of video teleconferencing by federal executive agencies in administrative hearings. According to an analysis by the Bureau of Veteran Affairs, there was no evidence that video proceedings for veterans benefits adjudications had an impact on outcomes: "the difference in grants [for veterans' benefits claims] between video hearings and in-person hearings has been within one percent" over the five-year period preceding the 2011 report.[36] The study also found that these hearings had increased productivity for Veterans Law Judges and supporting counsel by eliminating the need for travel to and from hearings.

Other Effects on Litigants

Video and Perceptions of Credibility

In addition to studies that directly assess the relationship between video proceedings and outcomes, such as conviction or deportation rates, other research has looked at whether video testimony by a witness has an impact on how they are perceived by factfinders. Because credibility determinations are often central to case outcomes, the effect of video appearance on credibility has important implications for the overall fairness of remote proceedings.

In addition to the Orcutt study discussed previously, several other studies have looked at the impact of video testimony by children on their perceived credibility in the context of sexual abuse cases, finding that video testimony had an impact on jurors' perceptions of the child's believability. For example, an analysis involving mock trials with actors where a child testified either in-person or via closed-circuit television found that testimony over video lowered jurors' perception of a child's accuracy and believability.[37] Similarly, in a Swedish simulation where different jurors watched the child testimony either live or via video, jurors perceived the live testimony in more positive terms and rated the children's statements as more convincing than the video testimony. Live observers also had a better memory of the children's statements.[38]

Other research suggests that technological limitations may affect immigration judges' ability to assess credibility in video proceedings. For example, in a 2017 U.S. Government Accountability Office report on immigration courts, judges in three of the six surveyed courts identified instances where they had changed credibility assessments made during a video hearing after holding a subsequent in-person hearing:

> For example, one immigration judge described making the initial assessment to deny the respondent's asylum application during a [video teleconference] hearing in which it was difficult to understand the respondent due to the poor audio quality of the [video teleconference]. However, after holding an in-person hearing with the respondent in which the audio and resulting interpretation challenges were resolved, the judge clarified the facts of the case, and as a result, decided to grant the respondent asylum. Another immigration judge reported being unable to identify a respondent's cognitive disability over [video teleconference], but that the disability was clearly evident when the respondent appeared in person at a subsequent hearing, which affected the judge's interpretation of the respondent's credibility.[39]

Psychology research also provides theoretical support for the concern that individuals who appear by video may face disadvantages. For example, psychology professor Sara Landstrom, who studied video testimony by children, has described the "vividness effect," whereby testimony that is more emotionally interesting and proximate in a sensory, temporal, or spatial way is generally perceived by observers as more credible and is better remembered. Landstrom notes, "it can be argued that live testimonies, due to face-to-face immediacy, are perceived [by jurors] as more vivid than, for example, video-based testimonies, and in-turn are perceived more favourably, considered more credible and are more memorable."[40]

Similarly, drawing from communications and social psychology research, law professor Anne Bowen Poulin argued, "[s]tudies reveal that people evaluate those with whom they work face-to-face more positively than those with whom they work over a video connection. When decisionmakers interact with the defendant through the barrier of technology, they are likely to be less sensitive to the impact of negative decisions on the defendant." [41]

Technology choices may also have unintended consequences. For example, research by G. Daniel Lassiter and coauthors have documented a camera perspective bias in the context of videotaped confessions, finding that observers were more likely to believe a confession was voluntary when the camera was focused only on the defendant during a videotaped interrogation.[42] Poulin has also noted that space constraints may necessitate the use of close-up shots during some video hearings, which can exaggerate features, obfuscate the perception of a person's size and age, and obscure body language.[43]

Effects on Attorney-Client Communications and Relationship

Another question raised by the use of video proceedings is whether they impact communication and other aspects of the relationship between attorneys and their clients, who are frequently separated during remote proceedings. For example, in a 2010 survey by the National Center for State Courts, 37 percent of courts that used video proceedings reported that they had no provisions to enable private communications between an attorney and client when they were in separate locations.[44] Poulin also noted that even when a secure phone line for private attorney-client communication is provided, nonverbal communication is likely to be difficult, and it may be hard for a client to catch their attorney's attention with a question or to provide relevant information.[45]

Similarly, Diamond's Cook County study on the impact of video proceedings on bail observed that separating attorneys and clients made it harder for them to quickly confer during a bail hearing. She noted that such a communication challenge could be consequential in a bail hearing: a defendant may be able to provide "mitigating details regarding past convictions that will greatly assist counsel… Obviously, such communications must occur immediately if counsel is to be able to make use of his client's information during a fast-paced bail hearing."[46]

A study by the advocacy organization Transform Justice surveyed lawyers, magistrates, probation officers, intermediaries, and other officials about the use of remote proceedings in the United Kingdom. Fifty-eight percent of respondents thought that video hearings had a negative impact on defendants' ability to participate in hearings, and 72 percent thought that video hearings had a negative impact on defendants' ability to communicate with practitioners and judges.[47] Survey respondents indicated that they believed the following groups were the most negatively impacted by video hearings: defendants with limited English proficiency, unrepresented defendants, and children under 18.[48]

These findings were echoed in Florida's experience with remote video proceedings for juvenile detention hearings. In 2001, the Florida Supreme Court repealed an interim rule that had been in effect from 1999 through 2001 that authorized remote juvenile hearings.[49] In repealing the rule, the Court detailed public defenders' concerns that "there was no proper opportunity for meaningful, private communications between the child and the parents or guardians, between the parents or guardians and the public defender at the detention center, and between a public defender at the detention center and a public defender in the courtroom."[50] The court observed that "[a]t the conclusion of far too many hearings, the child had no comprehension as to what had occurred and was forced to ask the public defender whether he or she was being released or detained."[51]

Additional Access to Justice Considerations

Another question raised by remote video proceedings is how their use impacts the public's access to justice in civil cases, where there is generally no right to counsel and where other safeguards for litigants are weaker than in criminal cases.

Access to Counsel and Other Resources in Civil Cases

One critical issue is the extent to which videoconferencing increases or diminishes burdens for self-represented litigants in arenas like housing or family court. Understanding the relationship between video proceedings and access to justice can inform courts' use of video both now and in the future, and help identify areas where courts should invest in additional resources or support for litigants.

The Conference of Chief Justices has encouraged judges to "promote the use of remote audio and video services for case hearings and case management meetings" in civil cases as part of a broader set of reforms to promote access to justice.[52] The Conference cites, among other things, that video proceedings can help mitigate the costs borne by litigants who might have to travel far distances or take time off from work to attend in-person court proceedings.[53] Notably, the Conference of Chief Justices' proposal calls for combining video proceedings with enhanced services for self-represented litigants, including internet portals and stand-alone kiosks to facilitate access to court services, simplified court forms, and real-time court assistances services over the internet and phone.

A report by the Self-Represented Litigation Network similarly observed that videoconferencing technology can reduce the time and expenses associated with traveling, transportation, childcare, and other day-to-day costs that individuals incur when they go to court. The report also noted the potential costs of such technology, including the possibility that remote appearances may lessen the accuracy of factfinding and reduce early opportunities to settle cases.[54]

There is only limited research on the benefits and harms of video proceedings with respect to access to the courts. Eagly's study of immigration court hearings found that detained immigrants who appeared in person were 35 percent more likely to obtain counsel than those who appeared remotely, highlighting the role that courthouses often play in connecting self-represented individuals with resources, including representation.[55]

On the other hand, a 2007 study on the use of videoconference technology in Montana, which included interviews and court observations, found that the use of video court appearances in both civil and criminal hearings enabled legal aid organizations to serve previously underserved parts of the state.[56] Montana, one of the largest and least populated states, had only 84 lawyers in the entire eastern portion of the state in 2004.[57] The study concluded that introducing video hearings means that "legal aid has a presence in counties from which they would be absent if video were not there as an option."[58] Video proceedings also opened up greater opportunities for pro bono representation. The report endorsed the use of the video technology in Montana, while urging caution in ensuring that the technology was "used with sensitivity to overall access to justice goals," including recognizing that there are cases that may not be appropriate for video appearances, such as those involving lengthy proceedings.[59] The study also acknowledged that there are still unanswered questions about how to properly cross-examine a witness over video and that the potential issues with such examinations could be more significant when dealing with an individual's credibility or integrity.[60]

Beyond the use of videoconferencing, another study looked at an online case resolution system for minor civil infractions and misdemeanors. This online system did not use video; rather, individuals had the option to use an online portal to communicate with judges, prosecutors, and law enforcement at any time of day. The study found that the system saved time, significantly reduced case duration, and reduced default rates (where individuals lose cases by not contesting their claims).[61] The author highlighted the costs associated with going to court for relatively low-stakes proceedings: "Physically going to court costs money, takes time, creates fear and confusion, and presents both real and perceived risks."[62] To the extent that video proceedings may similarly reduce some of the costs of going to the courthouse, this study suggests that in lower-stakes proceedings, the use of video can save time compared to attending in-person proceedings, and can enable more individuals to engage with the system rather than defaulting their claims. However, it also highlights that videoconferencing is not the only way to conduct proceedings remotely, and that in some contexts online systems and other technologies have functioned well.[63]

Additional Consideration for Marginalized Communities

Other research raises potential equity concerns about the broad use of video proceedings, particularly for marginalized communities and in cases where individuals are required to participate by video. These concerns underscore the need for additional research and evaluation as courts experiment with remote systems, as well as the need for courts to consult with a wide array of stakeholders when developing policies for video proceedings.

For instance, there is a substantial digital divide associated with access to the internet and communication technology. One critical unanswered question is whether and how video proceedings may exacerbate existing inequalities. According to studies by the Pew Research Center, there are substantial disparities in access to internet broadband and computers according to income and race.[64] Americans who live in rural communities are also less likely to have access to broadband internet.[65] The same is true for people with disabilities, who may also require special technology in order to engage in online activities such as remote court proceedings.[66]

Technology disparities potentially pose significant hurdles to the widespread use of video court proceedings for marginalized communities, particularly when Covid-19 has led to the closure of many offices and libraries. The pandemic has also caused a massive spike in unemployment, which may hinder litigants' abilities to pay their phone and internet bills.[67] Because there is currently a dearth of research on how the digital divide impacts access to video proceedings, courts and other stakeholders should conduct their own studies before committing to the use of video hearings in the long term.

Other research has identified challenges that self-represented litigants face in navigating the legal system, including the need for training and support offered in multiple languages.[68] In some states, as many as 80 to 90 percent of litigants are unrepresented.[69] Another critical research question is the extent to which courts are able to provide adequate support remotely, particularly in jurisdictions where courthouses have been the principal place where individuals going to court connect with resources.

A final question is how remote technology affects access to justice for individuals who do not speak English or have limited English proficiency. This is a particular concern in the judicial context because research suggests that dense court language can be difficult to communicate via translation to non-English speakers.[70]

Research related to the use of remote translation in areas such as telemedicine has been mixed as to whether remote translation impacts quality and satisfaction.[71] And while there is limited research on remote translation in courts, a study by the Legal Assistance Foundation of Metropolitan Chicago and the Chicago Appleseed Fund for Justice found that approximately 30 percent of litigants in immigration court who used an interpreter appeared to misunderstand what was happening, either due to misinterpretation or inadequate interpretation.[72] The study lacked a control group, making it difficult to assess the role that remote video immigration proceedings played in translation difficulties, but the report's authors suggested that, based on their observation of these proceedings, videoconferences exacerbated translation difficulties.[73]

Conclusion

Though video conferencing technology has been a valuable tool during the Covid-19 pandemic, existing scholarship suggests reasons to be cautious about the expansion or long-term adoption of remote court proceedings. More research is necessary, both about the potential impact of remote technology on outcomes in a diverse range of cases, as well as the advantages and disadvantages with respect to access to justice. In the meantime, as courts develop policies for remote proceedings, they should consult with a broad set of stakeholders, including public defenders and prosecutors, legal services providers, victim and disability advocates, community leaders, and legal scholars.

Endnotes

[1] Brennan Center for Justice, *Courts' Responses to the Covid-19 Crisis*, last updated September 10, 2020, https://www.brennancenter.org/our-work/research-reports/courts-responses-covid-19-crisis.

[2] Daniel Siegel, "Miami, Orlando Headline Fla. Courts' Remote Trial Experiment," *Law360*, June 4, 2020, https://www.law360.com/articles/1279653/miami-orlando-headline-fla-courts-remote-trial-experiment; and

Jake Bleiberg, "Texas Court Holds First US Jury Trial via Videoconferencing," *Associated Press*, May 22, 2020, https://abcnews.go.com/Health/wireStory/texas-court-holds-us-jury-trial-videoconferencing-70825080.

[3] Rocco Parascandola and Molly Crane-Newman, "Lawyers Fear Sudden Return to NYC Courthouses Next Week will Spread Coronavirus," *Daily News*, July 8, 2020, https://www.nydailynews.com/new-york/nyc-crime/ny-courts-reopening-early-outrage-lawyers-advocates-20200708-42rpmgyhyjc2jphrqohwdsyy6q-story.html.

[4] Lyle Moran, "How Hosting a National Pandemic Summit Aided the Nebraska Courts System with its Covid-10 Response," *Legal Rebels Podcast*, May 13, 2020, https://www.abajournal.com/legalrebels/article/rebels_podcast_episode_052; and Katelyn Kivel, "How the Coronavirus Revolutionized Michigan's Courts," *The Gander Newsroom*, July 14, 2020, https://gandernewsroom.com/2020/07/14/coronavirus-revolutionized-courts/.

[5] Shari Seidman Diamond et al., "Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions," *Journal of Criminal Law and Criminology* 100 (2010): 877-878, 900; Ingrid V. Eagly, "Remote Adjudication in Immigration," *Northwestern University Law Review* 109 (2015): 934; and Mike L. Bridenback, *Study of State Trial Courts Use of Remote Technology,* National Association for Presiding Judges and Court Executive Officers, 2016, 12, http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf.

[6] Diamond et al., "Efficiency and Cost," 893.

[7] Eagly, "Remote Adjudication," 966; and Frank M. Walsh and Edward M. Walsh, "Effective Processing or Assembly-Line Justice - The Use of Videoconferenceing in Asylum Removal Hearings," *Georgetown Immigration Law Journal* 22 (2008): 271-72.

[8] Holly K. Orcutt et al., "Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials," *Law and Human Behavior* 25 (2001): 357-8, 366. However, it is important to note that these studies are simulated experiments and not observations of actual court proceedings, so outcomes might have differed if video proceedings were used and examined in an actual court hearing. Also worth noting is that the judge, bailiff, and attorneys questioning the children were in the room with the children testifying; the children only appeared by CCTV to the mock jurors.

[9] Government Accountability Office, *Actions Needed to Reduce Case Backlog and Address Long-Standing Management and Operational Challenges*, 2017, 55, https://www.gao.gov/assets/690/685022.pdf.

[10] Eric Bellone, "Private Attorney- Client Communications and the Effect of Videoconferencing in the Courtroom," *Journal of International Commercial Law and Technology* 8 (2013): 44-45.

[11] Eagly, "Remote Adjudication," 938.

[12] Richard Zorza, *Video Conferencing for Access to Justice: An Evaluation of the Montana Experiment*, Legal Services Corporation, 2007, 1, 3, https://docplayer.net/3126017-Video-conferencing-for-access-to-justice-an-evaluation-of-the-montana-experiment-final-report.html.

[13] National Center for State Courts, *Call to Action: Achieving Civil Justice for All,* 2016, 37-38 https://iaals.du.edu/publications/call-action-achieving-civil-justice-all.

[14] Diamond et al., "Efficiency and Cost," 897.

[15] Diamond et al., "Efficiency and Cost," 896.

[16] Diamond et al., "Efficiency and Cost," 870.

[17] Diamond et al., "Efficiency and Cost," 884-85, 898-900.

[18] An earlier analysis by Frank and Edward Walsh in the *Georgetown Immigration Law Journal* likewise found disparities in outcomes in asylum cases. The study, which looked at fiscal years 2005 and 2006, found that "the grant rate for asylum applicants whose cases were held in person is roughly double the grant rate for the applicants whose cases were heard via [video]." Walsh and Walsh, "Effective

Processing," 271. These differences were statistically significant, and the authors found similar and statistically significant differences when controlling for whether the applicant was represented by counsel. However, according to Eagly, most immigration hearings were not coded for whether they were conducted in person or by video prior to 2007, undercutting the reliability of the findings. Eagly, 946. Nor did the study identify the basis by which some asylum applicants were designated for video conference, suggesting the possibility of confounding variables. Nevertheless, the striking difference in asylum rates highlights the need for further research.

[19] "Video Hearings in Immigration Court FOIA," American Immigration Council, last modified August 11, 2016, accessed May 14, 2020, https://www.americanimmigrationcouncil.org/content/video-hearings-immigration-court-foia.

[20] *See* 8 U.S.C. § 1229a(b)(2)(A)(iii); *see also* 8 C.F.R. § 1003.25(c) ("An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person.").

[21] TRAC Immigration, "Use of Video in Place of In-Person Immigration Court Hearings," January 28, 2020, https://trac.syr.edu/immigration/reports/593/.

[22] Eagly, "Remote Adjudication," 933.

[23] Eagly, "Remote Adjudication," 960.

[24] Among other things, Eagly controlled for the type of proceeding and charge, the respondent's nationality, whether they are represented by counsel, their judge, and the year the proceedings took place. Eagly, "Remote Adjudication," 938.

[25] Eagly looked at two samples, a national sample and a subset of locations that she called the Active Base Sample. She found that "in the National Sample, 80 percent of in-person respondents were ordered removed, compared to 83 percent of televideo respondents. In the Active Base City Sample, 83 percent of in-person respondents were ordered removed, compared to 88 percent of televideo respondents." The disparities in outcomes were statistically significant. Eagly, "Remote Adjudication," 966.

[26] Eagly, "Remote Adjudication," 938.

[27] Eagly, "Remote Adjudication," 978, 984, 989. A 2019 report from the American Bar Association, which issued recommendations for reforming the immigration system, argued that based on its 2010 findings, the use of video conferencing technology can undermine the fairness of proceedings by making it more difficult to establish credibility and thus argue one's case. The report goes on to suggest limiting the use of video to nonsubstantive hearings. *See* American Bar Association Commission on Immigration, *2019 Update Report: Reforming the Immigration System*, 2019, 18, https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf.

[28] Some children experienced the fake crime and some did not. In addition, some children were asked to modify their testimony to falsely indicate that a crime had taken place. Orcutt et al., "Detecting Deception in Children's Testimony," 343.

[29] Orcutt et al., "Detecting Deception in Children's Testimony," 339-372.

[30] Orcutt et al., "Detecting Deception in Children's Testimony," 357, 363.

[31] Orcutt et al., "Detecting Deception in Children's Testimony," 366.

[32] Orcutt et al., "Detecting Deception in Children's Testimony," 358.

[33] Gerald Miller, "Televised Trials: How Do Juries React," *Judicature* 58 (December 1974): 242-246. The jurors in Miller's study thought they were rendering a verdict in an actual trial. A similar study likewise found no statistically significant difference in juror attributions of negligence or the amount awarded by jurors in simulated video and in-person trials. The mode of presenting expert witnesses did affect pre-deliberation award, information retention, and source credibility, but not in a straightforward manner. The plaintiff's witness was more effective in obtaining favorable awards when he appeared live, while the defendant's witness was more effective in reducing the award (advantaging the defendant) when he appeared on videotape. The study suggested that "The most plausible explanation for this difference could be the variations in the communication skills of the two witnesses across presentational modes." Gerald R. Miller, Norman E. Fontes, and Gordon L. Dahnke, "Using Videotape in the Courtroom: A Four-Year Test Pattern," *University of Detroit Journal of Urban Law* 55 (Spring 1978): 668. *See also* Gerald R. Miller, Norman E. Fontes, and Arthur Konopka, *The Effects of Videotaped Court Materials on Juror Response* (East Lansing: Michigan State University Press, 1978).

[34] For additional research on simulated trials, see David F. Ross et al., "The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse," *Law and Human Behavior,* 18, (1994): 553-566; and Tania E. Eaton et al., "Child-Witness and Defendant Credibility: Child Evidence Presentation Mode and Judicial Instructions," *Journal of Applied Social Psychology*, 31 (2001): 1845-1858. However, in these studies, mock jurors watched videotapes of trials involving either live or videotaped testimony, so their findings are of limited utility for comparing videotaped and live trials.

[35] Booz Allen Hamilton, *Legal Case Study: Summary Report*, 2017, 23, https://www.aila.org/casestudy.

[36] Funmi E. Olorunnipa, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, Administrative Conference of the United States, 2011, 24, https://perma.cc/B3VS-FQAY.

[37] Gail S. Goodman et al., "Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions," *Law and Human Behavior* 22 (1998): 195-96.

[38] Sara Landstrom, "Children's Live and Videotaped Testimonies: How Presentation Mode Affects Observers' Perception, Assessment and Memory," *Legal and Criminological Psychology* 12 (2007): 344-45.

[39] Government Accountability Office, *Actions Needed to Reduce Case Backlog,* 55.

[40] Landstrom, "Children's Live and Videotaped Testimonies," 335. *See also* Richard E. Nisbett and Lee Ross, L. Human Inference: Strategies and Shortcomings of Social Judgment. (Englewood Cliffs, NJ: Prentice-Hall, 1980).

[41] Anne Bowen Poulin, "Criminal Justice and Videoconferencing Technology: The Remote Defendant," *Tulane Law Review* 78 (2004): 1118.

[42] G. Daniel Lassiter et al., "Videotaped Confessions: Panacea or Pandora's Box?" *Law and Policy* 28 (2006): 195-201.

[43] Poulin, "Criminal Justice and Videoconferencing," 1121-1122.

[44] Bellone, "Client Communications and the Effect of Videoconferencing," 44-45.

[45] Poulin, "Criminal Justice and Videoconferencing," 1130.

[46] Diamond et al., "Efficiency and Cost," 881-882.

[47] Penelope Gibbs, *Defendants on video — conveyor belt justice or a revolution in access?,* Transform Justice, 2017, 16, http://www.transformjustice.org.uk/wp-content/uploads/2017/10/TJ_Disconnected.pdf.

[48] Gibbs, *Defendants on video,* 10, 26.

[49] Due to the Covid-19 pandemic, the Florida Supreme Court temporarily authorized video proceedings for juvenile delinquency proceedings (including juvenile detention hearings). *See* Florida Supreme Court, "Chief Justice Issues Emergency Order Expanding Remote Hearings and Suspending Jury Trials into Early July Statewide," May 4, 2020, https://www.floridasupremecourt.org/News-Media/Court-News/Chief-Justice-issues-emergency-order-expanding-remote-hearings-and-suspending-jury-trials-into-early-July-statewide.

[50] *Amendment to Fla. Rule of Juvenile Procedure 8.100(A)*, 796 So. 2d 470, 473 (Fla. 2001).

[51] *Amendment to Fla. Rule of Juvenile Procedure 8.100(A)*, 796 So. 2d 470, 473 (Fla. 2001).

[52] National Center for State Courts, *Call to Action*, 37.

[53] National Center for State Courts, *Call to Action*, 37-38.

[54] John Greacen, *Remote Appearances of Parties, Attorneys, and Witnesses*, Self-Represented Litigation Network, 2017, 3-4; and *see also* Camille Gourdet et al., *Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness While Leveraging New Technology*, RAND Corporation, 2020, 4-5, https://www.rand.org/pubs/research_reports/RR3222.html (discussing advantages and disadvantages of remote proceedings in criminal cases).

[55] Eagly, "Remote Adjudication," 960.

[56] Zorza, *Video Conferencing for Access to Justice*.

[57] Zorza, *Video Conferencing for Access to Justice*. For context, the overall population in this 47,500 square mile region was between 10 to 14 percent of the state's total in 2004. *See* Larry Swanson, "Montana is One State with Three Changing Regions," *Belgrade News*, February 28, 2019, http://www.belgrade-news.com/news/feature/montana-is-one-state-with-three-changing-regions/article_cc6ccb66-3b82-11e9-881c-8f20afd84778.html#:~:text=The%20Central%20Front%20region%20has,of%20the%20total%20in%201990.

[58] Zorza, *Video Conferencing for Access to Justice,* 12.

[59] Zorza, *Video Conferencing for Access to Justice,* 13.

[60] Zorza, *Video Conferencing for Access to Justice,* 18.

[61] J.J. Prescott, "Improving Access to Justice in State Courts with Platform Technology," *Vanderbilt Law Review* 70 (2017): 2028-2034.

[62] Prescott, "Improving Access to Justice," 1996.

[63] See also Maximilian A. Bulinski and J.J. Prescott, "Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency," *Michigan Journal of Race and Law* 21 (2016). OCR systems involve transitioning some everyday court proceedings, such as civil infraction citations, outstanding failure-to-pay or failure-to-appear warrants, and some misdemeanors to be settled online, sometimes via videoconference.

[64] 29 percent of adults with household incomes below $30,000 did not own a smartphone, 44 percent did not have home broadband services, and 46 percent did not own a traditional computer. Households with incomes of $100,000 almost universally had access to these technologies. Monica Anderson and Madhumitha Kumar, "Digital Divide Persist Even as Lower-Income Americans Make Gains in Tech Adoption," *Pew Research Center*, May 7, 2019, https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/. Only 66 percent and 61 percent of Black and Latino Americans respectively have access to a home broadband compared to 79 percent of white Americans. Andrew Perrin and Erica Turner, *"*Smartphones Help Blacks, Hispanics Bridge Some — But Not All — Digital Gaps with Whites*," Pew Research Center*, August 20, 2019, https://www.pewresearch.org/fact-tank/2019/08/20/smartphones-help-blacks-hispanics-bridge-some-but-not-all-digital-gaps-with-whites/.

[65] Andrew Perrin, "Digital Gap Between Rural and Nonrural America Persists," *Pew Research Center*, May 31, 2019, https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/.

[66] Disabled Americans are about 20 percentage points less likely than those without a disability to say that they have access to home broadband internet or own a computer, smartphone, or tablet. Monica Anderson and Andrew Perrin, "Disabled Americans are Less Likely to Use Technology," *Pew Research Center*, April 7, 2017, https://www.pewresearch.org/fact-tank/2017/04/07/disabled-americans-are-less-likely-to-use-technology/.

[67] Rachel Dissell and Jordyn Grzelewski, "Phone, Internet Providers Extend Service Yet Some Still Disconnected from Lifelines During Coronavirus Pandemic," *Cleveland.com*, April 8, 2020, https://www.cleveland.com/coronavirus/2020/04/phone-internet-providers-extend-service-yet-some-still-disconnected-from-lifelines-during-coronavirus-pandemic.html. *See also* NORC at the University of Chicago, "Most Working Americans Would Face Economic Hardship If They Missed More than One Paycheck," press release, May 16, 2019, https://www.norc.org/NewsEventsPublications/PressReleases/Pages/most-working-americans-would-face-economic-hardship-if-they-missed-more-than-one-paycheck.aspx.

[68] Phil Malone et al., *Best Practices in the Use of Technology to Facilitate Access to Justice Initiatives: Preliminary Report,* Berkman Center for Internet and Society at Harvard University, 2010, 6-7, 14-19, Appendix A, https://cyber.harvard.edu/sites/cyber.harvard.edu/files/A2J_Report_Final_073010.pdf.

[69] Jessica Steinberg, "Demand Side Reform in the Poor People's Court," *Connecticut Law Review*, 47 (2015): 741.

[70] Charles M. Grabau and Llewellyn Joseph Gibbons, "Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation," *New England Law Review* 30 (1996): 237-244, 255—60. *See also* Ashton Sappington, "Implied Consent and Non-English Speakers," *John Marshall Law Journal* 5 (2012): 638.

[71] Ann Chen Wu et al., "The Interpreter as Cultural Educator of Residents: Improving Communication for Latino Parents," *Archives of Pediatrics and Adolescent Medicine* 160 (2006): 1145-50; C. Jack, "Language, Cultural Brokerage and Informed consent — Will Technological Terms Impede Telemedicine Use?" *South African Journal of Bioethics and Law* 7 (2014): 14, 16-17; and Imo S. Momoh, *Cultural Competence Plan*, Contra Costa County Mental Health Services, 2010, 78, 101-108, 114, https://cchealth.org/mentalhealth/pdf/2010_cultural_competence_plan.pdf.

[72] The Legal Assistance Foundation of Metropolitan Chicago and the Chicago Appleseed Fund for Justice, *Videoconferencing in Removal Hearings: A Case Study of the Chicago Immigration Court*, 2005, 8, http://chicagoappleseed.org/wp-content/uploads/2012/08/videoconfreport_080205.pdf.

[73] The Legal Assist. Found. of Metropolitan Chicago and the Chicago Appleseed Fund for Justice, *Videoconferencing in Removal Hearings,* 13.

WHAT BUSINESS VALUATION EXPERTS ARE BEING ADVISED TO SAY ABOUT THE IMPACT OF THE PANDEMIC ON THE RELIABILITY OF THEIR REPORT

Projections have always attracted scrutiny, but the pandemic has intensified this attention. Here's a question you are likely to get that seems innocuous enough but could invite trouble, especially if asked in a deposition or on the witness stand: "Are the projections in your valuation analysis less reliable now than they were before the pandemic?"

Be careful: Many people would think the answer is naturally "yes" because of today's unprecedented and highly uncertain times. But that answer could explode into a barrage of follow-up questions designed to attack the reliability of your entire report. Therefore, the answer should be this: "**The projections are more difficult to do now, but they are just as reliable as before." Valuation analysts strive to make sure projections are as reliable as possible regardless of the environment or nature of the economy. The problem now is not different from, for example, valuing early-stage companies whose future performance is not predictable. During volatile times, the analyst will spend more time gathering and analyzing company- and industry-specific data, so the projections should be equally as reliable as before the pandemic.**

This was one of the many interesting points covered during a session at the AAML/BVR Virtual Divorce Conference in a session titled Creative Settlements When Working With Distressed Businesses and Catastrophic Losses.

BVWireIssue #216-2

TIPS FOR VIDEO TESTIMONY

There's a lot more to making a good appearance in court when you have to testify virtually. Not only is this true for court testimony, but in any virtual setting, be it a meeting or when you are conducting a video webinar or conference session.

Adjust your surroundings so that you give the best appearance possible on camera. All too often, we see bad camera angles and terrible lighting that can make anybody on camera look very bad. Set yourself up so that your background has very simple (organized) décor or a blank wall. He also suggested that you position the camera so it is above you, not below you, with the light coming from the front. We agree with this but make the following additional points:

If you have the camera above you, don't put it too high—and it's OK to have it directly at eye level; Your eyes should be one-third of the way down from the top of the frame (we often see the camera tilted too high so that the presenters look like they're sitting in a hole); Lighting from the front is the way to go, but that can create bad shadows, so try to have some "fill" light from different angles to reduce the shadows;

If you're wearing a jacket, sit on the end of it so it doesn't ride up your neck (an old trick TV newscasters use).

Taken from the AAML/BVR DIVORCE CONFERENCE:
New Reality: 2020 and the Life-Changing Impact on Attorneys, Financial Experts and Our Clients, during the AAML/BVR Virtual Divorce Conference. Ken Pia. BVWireIssue #216-2

From: Steve Everts <she@udallshumway.com>
Sent: Wednesday, September 16, 2020 2:09 PM
To: Kathleen McCarthy <Kathleen@kathleenmccarthylaw.com>
Subject: RE: Tip on using a big screen in addition to lap top screens

OK Kathleen: I've talked to our tech, so I will tell you what he said to say and then what I do. ??

He said: 3 steps

1. We use land line for audio

2. We are wired to the internet for the video

3. The laptop is connected by wire to a projector so the laptop screen is displayed either on the pull-down screen that covers the whole wall in our main conference room, or on a large TV monitor on the wall in the smaller conference rooms.

What I do:

1. Set up my laptop between me and the client and connect it to the internet.

2. Pull down the large wall screen.

3. I turn the volume down on my laptop so there is no feedback and log in to the hearing on GoToMeeting or whatever.

4. I dial into the hearing on the conference pod phone (not thru the laptop) so everyone in the room can hear and be heard at all times. I confirm this with the court when we start and have never had a problem. I have also been told multiple times by the judges that they can hear me and the client very well. It also is better heard when we get the FTR of the hearing. Unfortunately, when you use audio thru the laptop with more than one person you tend to lose volume by being too far away or not speaking directly into the laptop and the voice may tend to cut out.

   The pod phone is better than a speaker phone because the speaker phone will not transmit if two people are talking at the same time or talking close to each other.

   There is also a mute button on the pod so that the client and I can talk without being heard by others. This comes in handy a lot.

5. When I do direct I turn the laptop to the client and tell the court I will be off screen

but can be heard. When I do cross I turn the laptop to me and not on the client. When opposing counsel does cross on my client I turn the laptop to the client. When I do cross of the opposing witnesses I turn the laptop to me. When the court is talking I turn the laptop so both my client and I can be seen in one laptop together. I use the wall monitor so that regardless of whether somebody is on the laptop they can still see everything that is happening.

6. The client and I use one set of Exhibits between us just like I would be doing by handing them to him/her in the courtroom. I put them in a notebook with numbered tabs to make it impossible to make a mistake and just flip from one to the next or whatever. This eliminates multiple sets of Exhibits at multiple locations (e.g. his/her home or separate conference rooms) and lessens the risk of not being on the same page or wasting valuable time trying to find exhibits. In one large case with 5 six-inch notebooks of nearly 200 Exhibits I had my paralegal in the room with me to be sure we pulled the notebooks as we needed them. She also reminds me to make sure that I move to admit all of them by keeping and checking off her separate list.

7. With non-client witnesses I have them appear from their location and send them any exhibits they are going to use ahead of time and go over them with them so there is no confusion when they testify.

480.461.5320 Direct
480.461.5300 Main
480.833.9392 Fax Steven H. Everts
State Bar Certified Family Law Specialist
Fellow of the American Academy of Matrimonial Lawyers