To the Court:

Thank you for allowing me to comment under Rule 28.

My name is Paul Bennett. I am a Clinical Professor of Law at the University of Arizona, James E. Rogers College of Law and Director of the College's Child and Family Law Clinic. For the past 25 years, I have been supervising law students who represent children in dependency proceedings in the Pima County Juvenile Court. Our clinic, occasionally, represents parents and grandparents as well.

Over the years, I have had a pretty fair opportunity to observe our child welfare system from the inside. My views are my own and do not necessarily reflect the views of the Law College, the University of Arizona, or the Supreme Court's Commission on Diversity, Equality and Justice of which I am a member.

First and foremost, I want to commend the Task Force for the massive and difficult undertaking of revising and reformatting the Rules of Procedure for the Juvenile Court. What a bear of a job! Thank you to Justice Berch and to all the members of the Committee for dedicating countless hours to this task and for producing a thoughtful and meaningful rules petition.

I submitted a number of comments to the Task Force and I want to thank the members for taking those comments seriously. I am submitting the comments below to focus on suggestions that were not adopted by the Task Force. My comments will focus on several items in the current and proposed rules that I perceive create systemic unfairness and that harm children and families.

From my perspective, systemic unfairness not only leads to disturbing results, but leads to feelings of discouragement that undermine hope and cause children and families to "give up." The end result is not pretty.

In a study published this month in the Proceedings of the National Academy of Sciences, researchers analyzed data from the twenty largest counties in the United States. I am attaching a copy of the study as well as the link here: Contact with Child Protective Services is pervasive but unequally distributed by race and ethnicity in large US counties | PNAS. Among other findings, two unfortunate conclusions for Maricopa County were a characterization that Maricopa has "extreme rates for foster placement and TPR" [referring to termination of parental rights] and the following:

> There is a great deal less consistency when it comes to later stage CPS contact. This was especially the case for TPR where some counties terminated parental rights at rates shockingly higher than those in other counties. This is especially the case for Maricopa, AZ, and Bexar, TX, both of which terminated parental rights at over 15 times the rate of the counties that did so the least.

My intention is not to single out Maricopa County. I doubt we are that much different in Pima and the rest of the state. Nor do I believe that changes in the rules can obviate complex issues of poverty, funding and racial disparities. However, every step towards fairness and away from even the perception of unfairness can help. So I offer the following:

1. **Eliminate barriers to full participation in Child and Family Team meetings [CFTs] and conferring with the Department of Child Safety**

    a. Attorneys and GALs for Children;

In current Rule 40.1(F), this Court recognizes the importance of children's attorneys and GALs attendance at Child and Family Team meetings. The proposed new rule 306(f) goes beyond that and mandates that kids' attorneys and GALs "must maintain appropriate contact and communications with . . . child safety investigators and workers". I totally applaud the change.

The difficulty is that attorneys and GALs cannot carry out those mandates when other rules and on-going DCS practices create effective barriers to participation. Under Rule 4.2 of the Rules of Professional Conduct, attorneys for children may not confer with case managers and investigators about anything to do with a case without the express permission of the Attorney General. [The AG also takes the position that the same constraint applies to GALs – even though they do not represent a client as required by Rule 4.2.]

That permission is rarely given and more often devolves into a complex email exchange where there is no direct communication between the child's attorney or GAL and the DCS worker. There is no sense in requiring communication when another rule of this Court prevents the same communication from taking place.

Those complex email exchanges operate more like the child's game of telephone than effective contact and communication. They are time consuming and awkward

– sometimes in situations where time matters. Often, what is the attorney or GAL or case manager says gets lost in translation. More significantly, a DCS misinterpretation of Rule 4.2, currently spills over into a major barrier to attorney and GAL participation in Child and Family Team Meetings.

Why is that important?

CFT's have become more and more significant as appellate courts place an increasing burden on parents and families to object to and offer alternatives to the case plans imposed by DCS. See *Shawanee S. v. AZ DES*, 34 Ariz. 174 (Div. 1, 2014) and, more recently, *Jessica P. v. Department Of Child Safety*, 249 Ariz. 461 (Div 1, 2020).

Most case plan decisions about services to children and families are made in Child and Family Team Meetings. Unfortunately, instead of being the cooperative dialogues implied in *Shawanee* and required by the JK settlement [and now the pending Tinsley settlement] CFTs are too often sessions in which children are bullied into accepting one-size-fits-all plans of DCS or into accepting what the "professionals" know what's "best for them" -- or are willing to pay for.

Children in CFTs need their lawyers at their side. It is not hard to imagine that a child of trauma with mental health or other problems is in no position to self-diagnose, recommend treatment alternatives, or, more frequently, stand up to the pressures of know-it-all professionals without the help of their attorney.

The fact is that many lawyers do not attend CFT's. They don't have the time or they feel that the constraints of Rule 4.2 make participation fruitless. Often children are not invited to be attend and be part of the "team" at all. And others – such as our clinic students – face barriers to attendance such as lack of notice, dates changed without notice, and being told they are not allowed to attend or may attend but cannot speak.

Somewhere in time, Rule 4.2 of the Rules of Professional Conduct – that attorneys cannot communicate directly with persons represented by counsel (such as DCS workers) – morphed into an unwritten rule that children's attorneys cannot participate at all in CFTs. No such rule exists. But the unwritten rule rears its ugly head now and again.

Just two weeks ago, we attended a CFT for one of our kids. We were told by the facilitator that the DCS worker said that we could not attend. We replied (for what seems like the 1001th time) that DCS workers don't make the rules and that no such rule exists. We were then told that the DCS worker said that we could not attend if the AG was not present. While we would love it if the AG were present, we replied the AG's schedule does not preclude us from being the voice for and advisor to our child-client. We were then told that the DCS worker said that we could attend but we could not speak.

On it goes. If this sounds exactly like my comments from last March, it is – but from an entirely different incident. We ended up attending the CFT. I sent one more email [of many] to the AG to document. And we addressed all of our comments and insights to the facilitator and not to the DCS worker or parents. That said, this dance needs to stop. The culture of exclusion from these immensely important meetings has to end.

Simply put, it is not fair to children and families to navigate rehabilitative services without the assistance of their lawyers. DCS has access to professionals. Children, by definition, have limited capacities. At the very least, their lawyers should be able to speak for them at these critical junctures in a dependency. The new rules need to encourage CFT participation.

I proposed a revision to the Task Force that would increase attorney-DCS communication without bumping against other ethics rules. It would put some burden on the AG's office to be supportive of that communication that Rule 306 requires.

Here is a comment to add a section h to proposed rule 306:

(h) In order for attorneys and GALs to meet the obligations of informed representation above:

(1) Attorneys or GALs for a child are not subject to Rule 4.2 of the Rules of Professional Conduct for the limited purpose of communicating with child safety workers in CFTs or otherwise. Such communications may be initiated by the attorney or GAL for a child without the permission of the Assistant Attorney General assigned to the dependency action.

(2) The Assistant Attorney General assigned to the dependency action shall make reasonable efforts to:

(i) Inform attorneys or GALs for a child of scheduling and contact information for child and family team meetings and how to provide input to DCS staffings;

(ii) Inform DCS child safety workers that attorneys or GALs for a child may and are encouraged to fully participate in child and family team meetings and to provide input to DCS staffings;

(iii) Assure that DCS provides timely disclosure as required by these rules.

I can hear the DCS objections in my head. I'm sure there were instances of inappropriate behavior by some lawyers in the past. However, if an attorney abuses the privilege, there are other mechanisms to deal with that. The benefits of attorney or GAL participation far outweighs the risk of attorney misbehavior.

b. Parents' attorneys:

The same rules should also be apply to parents' attorneys. Parents can be just as bullied or confused or discouraged at a CFT as their child. It does not help children and families for parents to participate in these essential meetings without the help of their attorneys. It does not help children and families that the silence or acquiescence of a confused or overwhelmed parent at a CFT can somehow constitute a waiver of DCS's essential obligation to provide reasonable reunification efforts when those parents do not have the full assistance of counsel.

We are fooling ourselves if we believe that the same parents who have been determined to lack capacity are able to negotiate what goes into their case plans without the active help of their attorneys. It is not a fair process if their attorneys cannot fully participate.

2. DCS Court Reports

I cannot think of another area of law where one party can present evidence to the Court – including otherwise inadmissible evidence -- and the other parties cannot. The Court Report rule is inherently unfair and one-sided. Imagine: "Attached is the State's expert's report which DCS place into evidence but you can't." We don't

need to imagine. It happens every day. There is no equivalency available to any other party.

Reports are important. The court needs timely information – especially to make short term decisions. I also realize that judges are smart people who can sort things out. And yet, when only on party can provide advance information to the court, and only one party can take advantage of significant hearsay, and where, under some circumstances, DCS reports can become written in stone if there is a termination hearing, this rule is fundamentally unfair.

I commend the new rule that no longer requires a judge to admit Court Reports into evidence. However, why not allow – not mandate – that any other party may submit a timely report that must be reviewed by the judge and may be admitted as well? Maybe parties will offer those reports and maybe they won't. But what is the downside to allowing parents and children the same ability to communicate to the court that the government has? The upside is that the judge will have more information at the onset of the hearing that can enable a more informed decision and save court time. And the opportunity to be heard would be equal.

A second issue is whether these reports, once admitted, remain admitted for all subsequent hearings including severance trials. The current and proposed rules are not very clear. If a report has been introduced at a prior hearing – e.g., a preliminary protective hearing or dependency review – DCS takes the position that it now admitted (past tense) for all subsequent hearings including severance trials.

I hope this rule has changed that. But it seems unclear. The difficulty is that these reports serve several purposes. For preliminary protective hearings and dependency reviews, they give the Judge necessary information to make short term decisions. The standard of proof is different. Hearsay is allowed at a preliminary protective hearing and a review -- not in a severance trial.

However, when the same report is deemed already admitted in the severance trial, the report is being utilized entirely for evidentiary purposes. Early and permanent admission of a DCS report becomes a hearsay loophole that undermines the procedural protection of what should be the most constitutionally protected proceeding – the government permanently taking a child from a family.

The current DCS position is remarkably unfair to the other parties who, at the time the report was initially admitted, may have had no issue or nothing was being contested. But later on, when termination is at stake, with different factual issues

and a different burden of proof, DCS argues that it is too late to object. That is why I would favor an explicit rule that specifies that all DCS reports and attachments must be reintroduced at any termination or guardianship hearing.

Thank you for your attention to these comments.

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