

1 Lisa M. Panahi, Bar No. 023421  
2 General Counsel  
3 State Bar of Arizona  
4 4201 N. 24th Street, Suite 100  
5 Phoenix, AZ 85016-6288  
6 (602) 340-7236

7 **IN THE SUPREME COURT**  
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-24-

10 **PETITION TO AMEND RULE 2**  
11 **OF THE ARIZONA RULES OF**  
12 **FAMILY LAW PROCEDURE**

**PETITION**

13 Pursuant to Rule 28(a) of the Arizona Rules of Supreme Court, the State Bar  
14 of Arizona (the “State Bar”) hereby petitions the Court to amend Rule 2 of the  
15 Arizona Rules of Family Law Procedure (the “Family Rules”). This proposed  
16 amendment will clarify when and how certain Rules of Evidence, which do not  
17 normally apply in Family Court, may be enforced in family court matters.

18 Rule 2 of the Family Rules is titled “Applicability of the Rules of Evidence.”  
19 The rule provides that unless a party specifically files a notice, Rules of Evidence  
20 602, 801-807, 901-903, and 1002-1005 do not apply in family court. The rule does,  
21 however, provide a method to notify the Court and the other party that a party wishes  
22 to have these Rules of Evidence apply in a specific case. This is often referred to  
23 colloquially as “invoking the strict rules.”  
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1           While Rule 2 provides for the timing of a notice that all the Rules of Evidence  
2 shall apply in a family court case, it does not address how such a notice affects some  
3 of the unique features of family law cases. For example, in other civil litigation, a  
4 complaint is filed, a trial may be held, and once there is a final judgment/appeal, the  
5 case is closed. If the same parties have another dispute later, they are required to file  
6 a new complaint, which is assigned a new case number. In contrast, family law cases  
7 can remain open for years, until all the children involved have been emancipated.  
8 Although the parties may have fully and finally resolved an initial petition for  
9 dissolution or to establish parenting time, they may later desire to modify those  
10 orders, or a new dispute may arise in this same matter. When that occurs, the new  
11 petition is filed under the *same* case number. The current rule does not specify  
12 whether a notice requiring compliance with the Rules of Evidence applies only to  
13 the pending matter or whether it requires such compliance until all the children have  
14 been emancipated. Moreover, as the judges and attorneys often change over the  
15 course of a case, they often may not know if a notice was filed many years and/or  
16 petitions ago.

21           The proposed addition provides a party with two options. The first option  
22 allows a party to file the notice and the notice will apply for all pending matters until  
23 their conclusion but will not apply to future modifications or enforcement hearings.  
24 Thus, if the parties later seek a modification or a new dispute arises, and a party  
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1 wishes for the Rules of Evidence to apply, they will need to file a new notice.  
2 Alternatively, the proposed amendment to the rule provides parties with a second  
3 option to have the notice apply only to a specific hearing. The current version of  
4 Rule 2 does not specify whether the notice applies to all hearings in a pending matter  
5 or only to an upcoming hearing, which creates uncertainty.  
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7       Next, while some attorneys file a notice as a matter of practice, they may later  
8 find that the application of all the Rules of Evidence will not best serve the best  
9 interests of the children or a full presentation of the case. Often, attorneys for both  
10 sides agree that such rules should not apply despite a notice having been filed. While  
11 they have the option to agree not to object, without any written agreement, it is  
12 impossible to prepare for trial without knowing whether, in fact, such objections will  
13 arise. Under the current rule, there is no provision for a circumstance in which  
14 neither party wants all the Rules of Evidence to apply but a notice has been filed.  
15 The proposed amendment allows a notice to be withdrawn, but only upon written  
16 stipulation of both parties.  
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18       Finally, unique considerations pertaining to a type of hearsay—statements by  
19 children who are not permitted to testify in court—creates a complication in family  
20 court. Family Court is *required* to consider all evidence which is relevant to the  
21 children’s best interest. If the children at issue are of suitable age and maturity, then  
22 the court is also required by statute to consider their wishes. The court is also  
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1 statutorily required to consider the children’s relationship with each parent, their  
2 siblings, and other significant individuals in their lives. Evidence regarding this  
3 information, however, generally constitutes hearsay and, under the current rule,  
4 cannot be used as evidence if a notice is filed. Thus, a parent against whom  
5 allegations of abuse or neglect are made will often file a notice as a strategic matter  
6 to prevent the court from hearing the children’s disclosures of such abuse or neglect,  
7 which is central to the case and to the children’s welfare. While options for a Child  
8 Interview (for children generally over 10 years) are available as are third-party  
9 reporters (at a cost), children will often not be open with strangers, particularly in a  
10 single meeting, about these issues. The children may have other evidence, such as  
11 e-mails or social media messages with or about their parents or concerns of safety  
12 with one of the parents or in their home. As written, the rule would exclude this  
13 evidence despite its importance in determining the best interests of the children. The  
14 court, therefore, is not able to fulfill its mandate to consider all relevant evidence.  
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19 A similar modification to admissible evidence regarding hearsay statements  
20 is found in the Rules of Procedure for the Juvenile Court. Rule 104 provides that  
21 “[i]n all adoption, dependency, termination, and Title 8 guardianship proceedings,  
22 evidence of a child's out-of-court statement or nonverbal conduct regarding acts of  
23 abuse or neglect perpetrated on the child is admissible if the time, content, and  
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1 circumstances of the statement or conduct provide sufficient indicia of its  
2 reliability.”

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4 The proposed amendments will provide clarity regarding the scope of a notice  
5 requiring compliance with the Rules of Evidence and will also ensure that even when  
6 such Rules do apply, the court is not deprived of critical evidence which it is required  
7 to consider.

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9 **CONCLUSION**

10 The State Bar of Arizona respectfully requests that the Court modify Rule 2  
11 of the Arizona Rules of Family Law Procedure as set forth in the attached  
12 Appendix.

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14 RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of January, 2024.

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17 Lisa M. Panahi  
18 General Counsel

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20 Electronic copy filed with the  
21 Clerk of the Supreme Court of Arizona  
22 this 10<sup>th</sup> day of January, 2024.

23 by: PSeguin  
24  
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## Appendix

*(Please note: deletions are reflected by ~~strikethrough~~ and additions are reflected by underline.)*

### **Rule 2. Applicability of the Arizona Rules of Evidence**

**(a) Effect of a Rule 2(a) Notice; Time for Filing.** Any party may file a notice to require compliance with the Arizona Rules of Evidence at a hearing or trial. A party must file the notice at least 45 days before the hearing or trial, or by another date set by the court. If a hearing or trial is set fewer than 60 days in advance, the notice is deemed timely if a party files it within a reasonable time after the party is notified of the hearing or trial date.

(1) A notice requiring compliance with the Arizona Rules of Evidence shall apply in all evidentiary hearings until a final order on the pending petitions and motions. A new notice will need to be filed, if compliance with the Rules of Evidence is desired, for any future modification or enforcement hearings.

(2) Alternatively, a party may file a notice to require compliance with the Arizona Rules of Evidence for a specific evidentiary hearing by specifying the hearing to which the notice applies within the notice.

**(b) Effect of No Notice.** If no party files a timely notice under (a),

(1) Arizona Rules of Evidence 602, 801-807, 901-903, and 1002-1005 do not apply; and

(2) the other Rules of Evidence, including Rule 403, still apply, except as provided in sections (c) and (d).

**(c) Revocation of Notice.** A notice requiring compliance with the Arizona Rules of Evidence may only be revoked in writing, signed by both parties, and filed with the court.

**(ed) Records of Regularly Conducted Activity.** Regardless of whether a notice was filed, a record of regularly conducted activity as defined in Rule 803(6) of the Arizona Rules of Evidence or reports prepared pursuant to Rules 68 or 73 may be admitted into evidence without testimony of a custodian or other qualified witness regarding its authenticity if the record is relevant, reliable, and was timely disclosed.

**(e) Hearsay.** When a notice requiring compliance with the Arizona Rules of Evidence is filed, statements by the children at issue in the matter regarding their wishes for parenting time or legal decision-making authority, alleged abuse, alleged neglect, their relationship with the parties, their siblings, or any other significant

person in their life, or any concerns about any individual in either party's home or family shall not be subject to Rule of Evidence 802.

**(df) Affidavits of Financial Information.** Any Affidavit of Financial Information required to be filed or served may be considered as evidence if offered as evidence by a party and admitted into evidence by the court.