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

10 PETITION TO AMEND RULE 12,
11 ARIZONA RULES OF FAMILY LAW
12 PROCEDURE

Supreme Court No. R-

**Petition to Amend Rule 12, Ariz. R.
Fam. L. P.**

13 Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar
14 of Arizona hereby petitions this Court to amend Rule 12, Arizona Rules of Family
15 Law Procedure.

16 Family Law Rule 12 governs the process by which children are interviewed in
17 a family law case. Concerns have arisen that confidential interviews of children,
18 when used to award legal decision-making or parenting time, violate due process
19 when parents are excluded from the interviews or from records of the interviews and
20 receive no opportunity for a meaningful response or further investigation. The current
21 language of Rule 12 implies – by its silence – that the court may seal the record of
22 the interview even from the parties themselves. Inappropriate application of the Rule
23 potentially runs afoul of federal case law recognizing parents’ twin constitutionally
24 protected rights to due process and to exercise custody and care of their own
25 children. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000) (striking down as
violative of substantive due process a statute that empowered court to order visitation
rights for any person when visitation may serve best interest of child); *Santosky v.*

1 *Kramer*, 455 U.S. 745 (1981) (due process requires clear and convincing evidence of
2 unfitness before state may terminate parental rights); *Stanley v. Illinois*, 405 U.S. 645
3 (1972) (recognizing a fundamental liberty interest in parenting one's own child
4 protected by the Fourteenth Amendment). Additionally, the family law bench and bar
5 seek to ensure that judicial interviews remain an effective investigative tool for the
6 courts, and do not overwhelm children because of excessive formality, or their
7 immaturity, embarrassment, fear, or lack of understanding about the interview's
8 function or limited confidentiality.

9 In an attempt to balance the competing interests implicated by confidential
10 interviews of children in disputed custody cases, the proposed Rule change first
11 clarifies that any request for an *in camera* child interview must be submitted by
12 written motion. Second, the court may seal the interview from public access if doing
13 so will serve the child's best interests. Third, the parties may stipulate to shield the
14 results of the interview from their own review, but a record must be made of the
15 interview nonetheless. Fourth, the court must make this record available to the parties
16 at least 14 days before the hearing in which the child's comments will be considered,
17 unless it adopts a different deadline for good cause.

18 New Subsection (B) cautions an interviewing judge in several respects. The
19 court must 'take special care to protect the child from embarrassment,' avoid
20 repetitive or age-inappropriate questions, and honestly disclose the limits on
21 confidentiality. The court must also allow the child to express a point of view, but not
22 require one, and reassure the child that any opinion he or she does offer will not
23 actually decide the case.

24 The revisions themselves (underlined below) read as follows:

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1 **Rule 12. Court Interviews of Children**

2 **A. General.**

3 On written motion of any party filed pursuant to Rule 35,
4 or its own motion, the court may, ~~in its discretion,~~
5 conduct an *in camera* interview with a minor child who is
6 the subject of a eustody legal decision-making or
7 parenting time dispute to ascertain the child's wishes as
8 to the child's custodian and as to parenting time both. The
9 interview ~~may be conducted at any stage of the~~
10 proceeding and The interview must shall be recorded by a
11 court reporter or any electronic medium that is retrievable
12 in perceivable form. The record of the interview may be
13 sealed from the public, in whole or in part, based upon
14 good cause and after considering the best interests of the
15 child. The parties may stipulate that the record of the
16 interview will shall not be provided to the parties or that
17 the interview ~~may be conducted off the record~~. The
18 record of the interview must be made available to the
19 parties, unless they have stipulated otherwise, not less
20 than 14 days prior to the hearing at which the interview
21 may be considered by the court unless the court finds
22 good cause for a different time frame.

23 **B. Special Precautions.**

24 In conducting an *in camera* interview with a child, the
25 court must take special care to protect the child from
 embarrassment and restrict the unnecessary repetition of
 questions. The court must also take special care to ensure
 that questions are stated in a form that is appropriate to
 the child's age and intellectual capacity. The court must
 inform the child in an age-appropriate manner about the
 limitations on confidentiality, that the information
 provided to the court will be on the record, that the
 information provided to the court will be provided to the
 parties in the case unless the parties have stipulated
 otherwise, and that whatever the child says will be
 considered but will not alone be determinative of the
 issues of legal decision-making and parenting time. In the
 process of listening to and inviting the child's input, the
 court must allow but not require the child to state a
 preference regarding legal decision-making and parenting
 time and should, in an age-appropriate manner, provide

1 information about the process by which the court will
2 make a decision.

3 **C. Definition.**

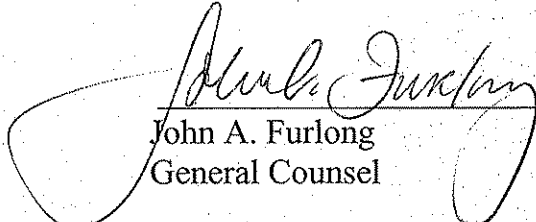
4 As used in this Rule, 'court' includes any Conciliation
5 Services department, agency or other third-party
6 professional ordered by the assigned judge to conduct a
7 child interview pursuant to ARIZ. REV. STAT. § 25-405 or
8 the Arizona Rules of Family Law Procedure.

9 **COMMENT TO THE 2015 AMENDMENT**

10 Generally, the court should not conduct an *in camera*
11 interview of a child under this rule unless it finds that the
12 child is of sufficient age and intellectual capacity to
13 reason and form an intelligent preference as to legal
14 decision-making and parenting time. The court is strongly
15 encouraged to utilize other resources, where available and
16 appropriate, to ascertain that preference. In particular, a
17 court should proceed with caution when interviewing a
18 child in any case in which a party has alleged "domestic
19 violence" as defined in ARIZ. REV. STAT. §§ 13-3601(A)
20 and 25-403.03(D), or "abuse" as defined in ARIZ. REV.
21 STAT. § 8-201(2).

22 IN CONCLUSION, the State Bar of Arizona respectfully requests amendment
23 of ARIZ. R. FAM. L. P. 12 as set forth above.

24 RESPECTFULLY SUBMITTED this 13th day of December,
25 2013.


John A. Furlong
General Counsel

Electronic copy filed with the Clerk
of the Supreme Court of Arizona this
13th day of December, 2013.

By: Kathleen A. Lundgren