

1 Christina M. Phillis,
2 Arizona Bar Membership No. 014871
3 Arizona Public Defender Association
4 777 W. Southern Ave., Ste. 101
5 Mesa, Arizona 85210
6 Telephone (602) 372-2815
7 Fax (602) 372-8919
8 Email Juv-SE@mail.maricopa.gov

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

8
9 PETITION TO AMEND RULE 44,
10 ARIZONA RULES OF PROCEDURE FOR
11 THE JUVENILE COURT

Supreme Court No. R-15-0013

**Comment of the Arizona Public Defender
Association in Response to the Attorney
General's Request to Amend Rule 44**

12
13 Pursuant to Rule 28, Arizona Rules of the Supreme Court, the Arizona Public
14 Defender Association (APDA) submits its Comment regarding the Petition to Amend
15 Rule 44 of the Arizona Rules of Procedure for Juvenile Court filed by the Attorney
16 General, R-15-0013. The APDA is an Arizona non-profit corporation comprised of
17 public defense offices and programs throughout the State of Arizona. The primary
18 purposes of our organization include improving the quality of legal representation of
19 indigent people who face the loss of liberty or the right to parent and ensuring just
20 legal system. Our offices defend the overwhelming majority of individuals who are
21 involved in a Title 8 dependency or severance.
22
23

24 The proposed amendments to Rule 44, Rules of Procedure for Juvenile Court,
25 have been requested by the Attorney General's Office, the state agency responsible for
26

1 representing the Department of Child Safety (DCS), to ease the burden of timely
2 disclosure for DCS. The request to change Rule 44 of the Rules of Juvenile Court
3 should be denied. Rule 44 of the Rules of Juvenile Court requires the disclosure of all
4 evidence in a timely manner so that all parties are prepared for dependency and
5 severance proceedings that will impact the constitutional rights of parents to raise their
6 children. Through its petition for a rule change, DCS is requesting that it be relieved
7 of the burden of providing disclosure of documents and evidence that would
8 substantiate or possibly negate the need for the children to be placed in state custody.
9 The State is asking the Supreme Court to accept DCS case managers' reports as factual
10 without the need to provide the documentation the author relied upon. In essence DCS
11 is saying, "Just trust us."
12

13
14
15 The law has long recognized that justice cannot exist if one party, the State, has
16 all the power. To level the playing field, the Arizona Supreme Court has created rules
17 of procedure that require parties to disclose all materials that may be relevant to a case.
18 Thus, one party is not able to obtain a tactical advantage by possessing all information
19 and evidence and ambushing the other party in court. Disclosure of discovery allows
20 all parties to adequately prepare for the court proceeding so the trier of fact is provided
21 all relevant information upon which to base an informed decision.
22

23
24 The ability to parent one's children is a fundamental right to which we as
25 Americans and Arizonans enjoy. Before the State is permitted to interfere with one's
26 fundamental right to parent, parents are entitled to Due Process. Due Process requires

1 a fair and impartial hearing. A fair and impartial hearing occurs when the parents and
2 DCS have access to the same information. DCS has the right to make allegations and
3 the parent has a right to defend himself against the allegations, similar to the rights of a
4 defendant in a criminal trial. For many parents, the loss of their child is equivalent to
5 the death penalty being imposed on their family.
6

7 Here DCS asks to be excused from providing the necessary disclosure to the
8 parent because their computer system is antiquated and cumbersome, and DCS
9 employees are over worked. The answer to the issues plaguing DCS is not to destroy
10 the parent's right to Due Process, but for DCS to upgrade their computer system or
11 maintain their files in an access-friendly manner. A parent would not be permitted to
12 disregard their duty to disclose by claiming the rules are too difficult to follow. The
13 State should be held to the same standard.
14
15

16 DCS espouses its primary concern with Rule 44 is the mandating of unrealistic
17 timelines for disclosure, timelines that do not coincide with actual trial dates and the
18 inability to extract information from DCS's antiquated database (CHILDS). Further,
19 DCS implies that parents' and children's counsel do not attempt to resolve disclosure
20 disagreements prior to requesting court involvement. The premise for the DCS request
21 to amend Rule 44 is flawed.
22

23 Due process requires that parties be given adequate time to prepare their case
24 against DCS allegations that impact their constitutional right to parent their children.
25 Rule 44, Rules of Juvenile Procedure, was created to ensure that all parties would have
26

1 access to all information prior to any hearing that could impact a parent's ability to
2 care for their children. The first opportunity for a parent to contest the removal of
3 their child is the Preliminary Protective Hearing. At the Preliminary Protective
4 Hearing, a parent may request a Temporary Custody Hearing. The Preliminary
5 Protective Hearing occurs a minimum of eight days after DCS has taken the children,
6 five days after the filing of the dependency petition. Prior to the filing of the petition,
7 DCS has allegedly conducted an investigation and held a Team Decision Meeting
8 (TDM) at which DCS obtained additional information. Thus, at the time of filing of
9 the dependency petition, DCS has already obtained documents upon which to base
10 their allegations. Disclosing the information within twenty-four hours of the
11 Preliminary Protective Hearing, five days after the filing of the petition, is not a
12 hardship. The documentation is the "probable cause" for the removal of the children.
13 Without the disclosure provided to the parent, the parent is disadvantaged at the
14 evidentiary hearing to contest "probable cause" determination.
15
16
17

18 A parent's ability to contest the need for out of home care continues throughout
19 the case. At each periodic Report and Review Hearing, the court has the ability to
20 order the child home and the petition dismissed. In order for the parent to argue for
21 the return of the child the parents need documents that support their position or refute
22 DCS objection. Requiring continued disclosure throughout the case ensures that all
23 parties have access to exculpatory information, balancing the scales of justice.
24
25

26 Rule 45, Rules of Juvenile Procedure, establishes the timelines for adjudication

1 hearings. Although court calendars may require hearings to be set outside of the
2 timelines, the goal of the court system is to adhere to Rule 45. Parents need to be
3 prepared to defend themselves against DCS. In order to competently prepare, the
4 parent's attorney will need sufficient time to review the information, investigate and
5 possibly hire expert witnesses. Requiring DCS to provide all disclosure within sixty
6 days of the Preliminary Protective Hearing (or service of the dependency petition on
7 the parents) allows the parent to begin preparing their defense, regardless of when the
8 adjudication is set. The ongoing requirement to provide disclosure within five days of
9 receipt ensures that the parties will have adequate time to prepare. Further, through
10 disclosure, the parties may be able to resolve the matter prior to adjudication.
11
12

13 DCS alleges that the disclosure process is too cumbersome based upon DCS
14 antiquated database (CHILDS) and the need to redact personal information. DCS is
15 responsible for the database they have chosen to employ. If the database does not
16 meet DCS 's needs, DCS is responsible for finding a solution. DCS solution cannot be
17 to deny parties access to timely disclosure. This is akin to a doctor involved in a
18 medical malpractice suit stating that all of his records are strewn about the file room.
19 The records are available, but he does not have time to locate them. Further, DCS
20 should be held to the same standard as police departments and prosecutor offices that
21 must redact police reports prior to disclosing them. A prosecutor in a criminal matter
22 cannot forego timely disclosure because it is too cumbersome. We should expect no
23 less of the child welfare system.
24
25
26

1 **Substantive Changes to Rule 44**

2 **Introductory statement**

3 The proposed introductory statement limits the information that the parties are
4 required to disclose. The proposed Rule would require parties to only disclose
5 information that is potentially relevant to the pending action. However, this allows
6 parties to determine what is relevant for the opposing parties. One party may believe
7 the information is not relevant because it does not further their case, while another
8 party believes it is necessary to support an allegation or defense. Disclosure of all
9 material allows parties to determine what information supports their theory of the case.
10 The ultimate determination of relevance is for the court, not the parties.
11

12 Parties should be required to provide opponents copies of all documents. In the
13 age of computers, electronic disclosure is an inexpensive vehicle for disclosing written
14 and audio material. Requiring parties to only allow inspection of the materials places
15 the burden on the receiving party to arrange a time to view the material. With DCS
16 case managers and attorneys frequently away from their offices, this creates a daunting
17 task on an already clogged court system. Further, experts require copies of reports to
18 either perform an evaluation, provide an opinion or both. Copies of disclosure must be
19 provided to all parties to ensure justice.
20
21

22 **Subsection A – Scope of Disclosure**

23 Subsection A sets out a clear list of items and documents that must be
24 disclosed. In addition to the items listed under 2, “transcripts of interviews of any
25
26

1 party or witness,” the phrase “or testimony” from the current Rule 44 should be
2 retained. A party must disclose all discovery in their possession, including prior
3 statements made during an interview or testimony.
4

5 **Subsection B – Initial Disclosure in Dependency Proceedings**

6 Proposed Subsection B violates a parent’s right to Due Process. As already
7 discussed in this comment, the Preliminary Protection Hearing is the parent’s first
8 opportunity to dispute the need for out of home care. In order for the parent to
9 properly prepare for the hearing, the parent must have timely access to all information
10 that DCS has amassed. Receiving limited disclosure *at* the Preliminary Protective
11 Hearing thwarts the parent’s ability to prepare for the hearing. The parent will be
12 denied Due Process, being ambushed with documents and allegations during the
13 hearing.
14
15

16 Also, the parent will not be able to meaningfully participate in the discussion
17 regarding family-reunification services. The parent will not be aware of what services
18 are being requested or the basis for the request, in advance. Further, the parent will
19 not be able to consult with their counsel regarding the disclosure prior to the hearing.
20 Parents will be left to advocate on their own behalf against DCS, because their counsel
21 will be unable to competently represent them without timely disclosure.
22

23 Further, ongoing disclosure is crucial in dependency matters. By law, children
24 must be returned home once the parents are “minimally adequate.” Parties are able to
25 request return of the children any time after the Preliminary Protective Hearing. In
26

1 order for a party to request the children returned to the care of their parents,
2 information from the family-reunification service providers is necessary. Many of the
3 service providers will not provide the parents with a copy of the providers' records
4 because DCS contracted for the services. Thus, if the DCS is only required to provide
5 disclosure every 30-45 days, depending on whether information needs to be redacted,
6 children will remain out of the home longer than is necessary.
7

8 Allowing DCS to merely provide a summary of disclosure in their court reports
9 does not provide the parent with Due Process. DCS opines that the court will be
10 provided the necessary information it requires to make informed decisions in
11 dependency actions based upon the information provided by DCS. However, the
12 parent does not have the ability to contest the information being provided by DCS
13 because DCS is the only party in possession of the actual reports. The court is only
14 provided one perspective of the case since the parent is unable to challenge the
15 assumptions and conclusions of the Department without the reports the information is
16 based upon.
17
18

19 Disclosure rules were created to ensure justice for all parties. When one party,
20 in this case DCS, has custody of the children and possesses the information that may
21 allow them to be reunited with their family, it is unconstitutional and unconscionable
22 to request a rule change for convenience. The government cannot remove children
23 from the parents and then dictate what will be disclosed and when, this smacks of
24 inequity and Due Process. A parent's right to parent trumps the inconvenience of
25
26

1 timely disclosure.

2 **Subsection C – Disclosure Statement Prior to Dependency Adjudication Hearing.**

3
4 Rule 55, Rules of Juvenile Procedure, establishes the timelines for
5 adjudication hearings. Although court calendars may require hearings to be set outside
6 of the timelines, the goal of the court system is to adhere to Rule 55. Parents need to
7 be prepared to defend themselves against DCS. In order to competently prepare, the
8 parent’s attorney will need sufficient time to review the information, investigate and
9 possibly hire expert witnesses. Requiring DCS to provide all disclosure and witnesses
10 within sixty days of the Preliminary Protective Hearing (or service of the dependency
11 petition on the parents) allows the parent to begin preparing their defense, regardless
12 of when the adjudication is set. The ongoing requirement to provide disclosure within
13 five days ensures that the parties will have adequate time to prepare. Further, through
14 disclosure and witness interviews, the parties may be able to resolve the matter prior to
15 adjudication.
16
17

18 Supplemental Disclosure Statements require minimal expense and time. The
19 parties’ Due Process right to timely prepare for adjudication outweighs any additional
20 time or expense spent on a supplemental disclosure statement. By receiving the
21 Disclosure Statement within sixty days of the Preliminary Protective Hearing (or
22 service of the dependency petition on the parents) allows the parties adequate time to
23 prepare the case, regardless of whether it takes place in 30 or 90 days.
24
25

26 Curiously, DCS does not call attention to its addition to section Rule

1 44(C)(2)(d) ,“Witnesses whose testimony will be offered in the form of a deposition *or*
2 *affidavit* shall be noted.” In a dependency, guardianship or severance hearing, parties
3 have a Due Process right to confront and cross-exam the witnesses. Testimony by
4 affidavit is not permitted because it cannot be cross-examined. When a party’s
5 children are at stake, the right to Due Process requires the ability to challenge the
6 State’s witnesses.
7

8 APDA concurs with amending Rule 44, Rules of Juvenile Court, to include
9 providing the e-mail addresses of witnesses. E-mail may be a more efficient way to
10 communicate with witnesses.
11

12 **Subsection D and E – Disclosure Statement Prior to Guardianship and**
13 **Severance adjudication Hearing.**
14

15 Guardianship and severance adjudications are final dispositions of a case. The
16 hearings determine if the parent and child will ever be reunited. For the parents, the
17 stakes are high. Timely disclosure of witnesses and evidence is required in order for
18 the parents to adequately prepare for the adjudication hearing. The amount of
19 information the parties must sift through is voluminous, especially if the parents have
20 been participating in family-reunification services for at least a year. There are parent
21 aide reports, psychologicals, medical records, counseling reports, drug counseling
22 reports, drug tests, children’s services and other documents to scour. In order to
23 adequately prepare by interviewing witnesses and hiring experts, parties need more
24 than thirty days before trial to review the information. The continual disclosure of
25
26

1 information within five days of receipt will allow all parties to adequately prepared at
2 the time of adjudication.

3 Severing a parent's right to care for their child is akin to the death penalty; one
4 ends a family, the other a life. With the stakes so high, Due Process must be adhered to
5 at every step. Thus, parents must have adequate time to present their case and
6 challenge the DCS's evidence and present their case. Allowing DCS to supply the list
7 of witnesses and evidence a mere thirty days before a termination or guardianship
8 hearing is tantamount to ambushing parties on the eve of trial. Witness interviews
9 usually take weeks to arrange. Depending on statements by witnesses, parties may
10 need to hire experts or call additional witnesses. By requiring Disclosure statements a
11 mere 30 days before the adjudication hearing, the adjudication hearings are likely to be
12 continued.
13
14
15

16 **G. Subsection G- Conclusion of Pretrial Disclosure**

17 Proposed Rule 44(G), Conclusion of Pretrial Disclosure, creates a reduction of
18 time between final disclosure statement and day of trial that denies opposing parties a
19 fair opportunity to prepare for adjudication. DCS is requesting the ability to amend a
20 disclosure statement within a week of trial. The addition of new documents or
21 witnesses will require opposing counsel to review the materials or interview new
22 witnesses. The new disclosure may require opposing counsel to consult an expert or
23 locate additional witnesses or evidence. Five days would not be sufficient time to
24 prepare to address the new information at trial. To be effective, opposing counsel
25
26

1 would need to request a continuance to adequately prepare. According to Rule 44,
2 failure to complete timely disclosure does not constitute good cause or extraordinary
3 circumstance for obtaining a continuance. Thus, opposing counsel would be forced to
4 proceed ill prepared to meet the newly disclosed evidence, denying the parent Due
5 Process and creating an appealable issue.
6

7 Under current Rule 44(F), final disclosure statements are due not less than ten
8 days before the adjudication hearing. Ten days is a more reasonable time frame to
9 review documents, contact witnesses and consult experts. Currently, parties are
10 required to disclose information within five days of receipt, thus there should be very
11 little need to supplement final disclosure statements immediately before trial. All
12 parties must be familiar with the evidence and potential witnesses, allowing for a fair
13 trial rather than trial by ambush.
14
15

16 **Subsection H – Supplemental Disclosure and Continuing Duty to Disclose**

17 Proposed Rule 44(H), Supplemental Disclosure and Continuing Duty to
18 Disclose, denies parents' and children's attorney fair access to information created and
19 obtained by DCS. DCS is the agency requiring the parents to participate in specified
20 services in order to be reunited with their families. The service providers send all
21 information and reports exclusively to DCS. Although the information pertains to the
22 parents or children, the only way for the parties to obtain the information is through
23 continuous disclosure by DCS. Untimely disclosure, thirty to forty-five days as
24 opposed to five, creates an unacceptable risk of failure to address a serious problem for
25
26

1 forty-five to sixty days. For example, a therapist may opine that the child needs
2 additional therapeutic interventions. A parent who has their child's best interest at
3 heart or a Guardian Ad Litem who represents the child's best interest would be unable
4 to quickly address the issue due to a delay in disclosure.
5

6 The DCS's position that disclosure within five days is too cumbersome is not a
7 valid reason to deny parties timely disclosure. As previously stated, the answer to the
8 DCS's technology problem is not to delay access to information at the parent's
9 expense, but for DCS to utilize a more efficient method of storing and retrieving
10 documents.
11

12 DCS's request for an additional fifteen days if redaction is required is another
13 red herring. The court would show no sympathy for a private practitioner who claimed
14 he was short staffed and therefore should not be expected to meet the deadlines
15 outlined in the Rules for Juvenile Court. DCS with multitudes of employees, should
16 be held to the same standard. Simply stated, the answer to the issues raised by DCS in
17 the proposed rule change is for DCS to get its affairs in order. DCS mandates timely
18 disclosure regardless of the internal issues with DCS processes.
19
20

21 Moreover, proposed Rule 44(H), Rules of Juvenile Court, is not consistent
22 with Rule 45(C)(2) which states, "Prior to, any dependency hearing, the court may
23 review reports prepared by the child safety worker and shall admit those reports into
24 evidence if the worker who prepared the report is available for cross-examination and
25 the report was disclosed to the parties no later than: Ten (10) days prior to any other
26

1 hearing” and Rule 58(C) which states “[t]he petitioner shall provide a report to the
2 court and the parties at least fifteen (15) days prior to the hearing which shall address:
3 (1) the placement of the child; (2) the services being provided to the child and family;
4 (3) the progress the parties have made in achieving the case plan goals; and (4)
5 whether the child continues to be dependent.” Rule 45(C) and Rule 58(C), Rules of
6 Procedure for Juvenile Court, recognizes parents’ and children’s need to obtain reports
7 timely to enable parties to adequately prepare. Justice can only exist when all parties
8 have advance access to information in order to present information to the court or
9 challenge the credibility of opponents’ evidence.
10
11

12 **Proposed Subsection I – Motion to Compel Disclosure and Sanctions**

13 Proposed Subsection I – Motion to Compel Disclosure and Sanctions, should
14 not be adopted. Before a party moves to compel disclosure or request sanctions, they
15 must attempt to expeditiously obtain the information by contacting the other party.
16 Having a matter resolved by the court takes time. Dependency matters can move very
17 quickly, and having to wait for the court to order discovery can be costly to a party’s
18 case. However, when a party fails to respond to inquiries and requests, action must be
19 taken. Requiring an affidavit attesting that after personal consultation an agreement
20 could not be reached requires the moving party to be held hostage by one party’s
21 refusal to respond. Unlike family court and other civil matters, dependency matters
22 move quickly. Attorneys should correspond with one another timely to resolve
23 matters, but if one party makes itself unavailable, court intervention is needed.
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26