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

9 In the Matter of:

Supreme Court No. R-21-0021

10 **PETITION TO AMEND RULES 4.1**  
11 **AND 4.2 OF THE ARIZONA**  
12 **RULES OF CIVIL PROCEDURE**

**REPLY OF THE**  
**STATE BAR OF ARIZONA**

13 Pursuant to Rule 28(e)(5) of this Court’s Rules, the State Bar of Arizona (the  
14 “State Bar”) replies in support of its Petition to amend Arizona Rules of Civil  
15 Procedure (the “Ariz. R. Civ. P.”) 4.1(l) and 4.2(f).

16 The well taken and considered comment of the Judges of the Mohave County  
17 Superior Court, filed April 30, 2021, unanimously supports adoption of the Petition’s  
18 proposed changes without modification and notes that a vast majority of other  
19 jurisdictions already have similar rules. The Mohave County Superior Court Judges  
20 also correctly note that the Petition’s proposed amendments further not only due  
21 process but also judicial economy. This is true for all types of cases subject to the  
22 civil rules on service. This Reply, then, addresses the concerns raised by counsel for  
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1 the Department of Child Safety (“DCS” or “Commenter”) in the Department’s  
2 comment also filed April 30, 2021.

3 While the State Bar appreciates the concerns expressed in that comment and  
4 its diligent discussion of the statutory framework for juvenile cases, the  
5 Commenter’s objection seems to stem from a fundamental misunderstanding of the  
6 Petitioner’s proposed changes, including as to how they would apply in juvenile  
7 dependency, termination, and guardianship proceedings.  
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10 **I. THE PROPOSED AMENDMENTS TO RULE 4.1 AND RULE 4.2 DO NOT**  
11 **ALTER CURRENT OR FUTURE JUVENILE COURT PRACTICE ON**  
12 **SERVICE BY PUBLICATION AND OCCASION NO DELAY.**

13 With due respect to the Commenter, the State Bar *did* consider any potential  
14 effects on current and future proceedings in juvenile court in proposing its changes  
15 to the civil rules regarding service. For example, the State Bar was aware at the time  
16 this Petition was filed of the modifications the Rules of Procedure for the Juvenile  
17 Court make to the procedures for service provided in Ariz. R. Civ. P. 4.1 and 4.2.  
18 *See* Ariz. R. P. Juv. Ct. 48(E)(1)-(4) (the DCS Comment erroneously cites to Ariz.  
19 R. P. Juv. Ct. 48(D) on its page 5).  
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22 The State Bar was also aware that juvenile court judicial officers only accept  
23 or approve service by publication after submission of an affidavit showing diligent  
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1 efforts to locate the party to be served that have proven unsuccessful.<sup>1</sup> This process  
2 is described in practice, even on appeal, as DCS filing an affidavit “before resorting  
3 to service by publication.” See *Onyx T. v. DCS*, No. 1 CA-JV 20-0095, 2020 WL  
4 5640800, at \*\*3–4 (Ariz. App. September 22, 2020) (mem.) (finding service by  
5 publication proper and sufficient and quoting *Sprang v. Petersen Lumber, Inc.*, 165  
6 Ariz. 257, 261 (App. 1990) for proposition that “[b]efore resorting to service by  
7 publication, a party must file an affidavit [of diligent search and unknown  
8 residence]”); *Jesus L. v. DCS*, No. 2 CA-JV 2014-0095, 2015 WL 512799, at \*\*1–  
9 3 (Ariz. App. February 6, 2015) (mem.) (same) (each of the foregoing are cited for  
10 persuasive value only pursuant to Ariz. R. Supreme Ct. 111(c)(1)(C)).  
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14 The Commenter does point out the semantics involved: DCS, or another  
15 serving party in juvenile dependency, termination, and guardianship proceedings,  
16 generally first moves the juvenile court to set a publication hearing ninety to 100  
17 days in the future,<sup>2</sup> and then later files the required affidavit into the record of that  
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20 <sup>1</sup> Conversely, if the affidavit is not submitted, the juvenile court will not make a  
21 finding that service by publication is proper and complete. Instead, the motion to  
22 serve by publication would be denied due to defective or missing affidavit of diligent  
23 search and unknown residence, and the serving party would need to re-urge the  
24 motion with a corrected affidavit or find another permissible method of service that  
25 comports with due process.

<sup>2</sup> The State Bar notes that the motion to set a publication hearing must be made in  
advance of DCS, or any other serving party, actually initiating service by  
publication, as otherwise the serving party would not have a hearing date and time

1 publication hearing to allow the juvenile court to fully accept or permit or approve  
2 publication service. (*Cf.* DCS Cmt., at 10) (“Thus the crucial consideration in  
3 juvenile matters is whether DCS (or any other petitioner or movant) can show  
4 diligent efforts to locate the party at the time the court *accepts* the service [by  
5 publication . . . .”). The Commenter asserts that the State Bar’s proposals could delay  
6 permanency for children in DCS care and “be exceptionally problematic” in juvenile  
7 court cases (DCS Cmt., at 1, 9) without explaining why it believes that to be the  
8 case.  
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11         In any event, the State Bar’s proposed amendments require the serving party  
12 to seek court approval by motion, and support the motion with an affidavit, outlining  
13 the steps taken prior to seeking approval of service by publication. These  
14 amendments alter the current practice in many types of civil cases of a serving party  
15 being able to solely make the determination to serve by publication. Importantly, as  
16 discussed above, the serving party in juvenile dependency, termination, and  
17 guardianship proceedings *may not presently* make a unilateral determination to serve  
18 by publication. Thus, the proposed changes do not alter the current practice in  
19 juvenile court cases.  
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24 to place in the publication notice. *See* Ariz. R.P. Juv. Ct. 48(E)(4); *see also* Juvenile  
25 [Rules Task Force proposed Rule 329\(b\)\(3\) \(available at R-20-0044 Arizona Rules of Procedure for the Juvenile Court - \(azcourts.gov\).\)](#)

1           Instead, as the Commenter acknowledges, “from the outset, the juvenile court  
2 is directly involved in service by publication.” (DCS Cmt., at 5.) The intent of the  
3 State Bar’s proposed changes is that this attention to due process be made true for  
4 all case types subject to the civil rules on service. In juvenile cases, again, it is the  
5 serving party—often DCS itself—that moves the juvenile court to set a publication  
6 hearing in cases where “a parent’s identity or location is unknown” (*id.*); DCS often  
7 makes such motion orally at a Preliminary Protective Hearing or an Initial  
8 Dependency Hearing or in writing thereafter if the awareness of the need to serve by  
9 publication arises later. *See, e.g.*, Ariz. R.P. Juv. Ct. 50, 52; Juvenile Rules Task  
10 Force (“JRTF”) proposed rules 332, 334.

11           The Commenter unfortunately misreads this Petition’s proposals to require  
12 that “a party *file* a motion to” serve by publication (DCS Cmt., at 9, 11) (emphasis  
13 added)), but nowhere do this Petition’s proposed amendments impart a written filing  
14 requirement. Instead, just as they may in all case types, motions in juvenile court  
15 may be made orally if authorized (Ariz. R.P. Juv. Ct. 46(A), JRTF proposed rule  
16 316(a)), and motions to set publication hearings are routinely granted when made  
17 orally in open court—the court simply sets the hearing. The Petition’s proposals do  
18 nothing to alter that practice and would do nothing to alter it if the proposed changes  
19 are adopted by this Court.

1           Instead, the serving party in a juvenile dependency, termination, or  
2 guardianship case may in the future—just as it does presently—move the juvenile  
3 court to set a publication hearing (proposed Ariz. R. Civ. P. 4.1(*l*)(1), 4.2(f)(1)) and  
4 then follow up at the publication hearing by submitting an “affidavit that sets forth  
5 the service party’s reasonably diligent efforts to serve the person.” (proposed Ariz.  
6 R. Civ. P. 4.1(*l*)(1)(C), 4.2(f)(1)(C).) Particularly when this Petition’s proposed rule  
7 changes include the preface that “[t]he court may permit service by publication, in  
8 such manner and form as the court may direct,” there is built-in flexibility to allow  
9 for the juvenile court to approve or accept (to use the Commenter’s term) publication  
10 service based on an affidavit submitted at the publication hearing.  
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13           Put differently, the juvenile court can conditionally grant DCS’s or the serving  
14 party’s motion to serve by publication by setting a publication hearing, with actual  
15 acceptance of service by publication conditioned upon submission of the 4.1(*l*)(1)(C)  
16 and/or 4.2(f)(1)(C) affidavit at that publication hearing. Or, setting a publication  
17 hearing may instead be viewed as deferring ruling on a motion to permit service by  
18 publication until the affidavit is submitted at the publication hearing. Either way, as  
19 the State Bar’s Petition counseled, the purpose of the affidavit requirement is to  
20 “allow the court to more quickly ascertain and decide whether to approve service by  
21 publication.” (Pet’n, at 8.) This is true in juvenile court cases today, and the  
22 Petition’s changes would not alter that.  
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1 **II. THE COMMENTER’S PROPOSED AMENDMENTS SHOULD**  
2 **INSTEAD BE REFERRED TO THE JUVENILE RULES TASK**  
3 **FORCE FOR CONSIDERATION.**

4 The Commenter makes no reference to it, but this Court appointed a Task  
5 Force to restyle the Rules of Procedure for the Juvenile Court on July 1, 2019, and  
6 the Juvenile Rules Task Force filed its restyling petition on April 28, 2021, after  
7 having more than fifteen public meetings. The Comment does not reference the  
8 Juvenile Rules Task Force’s work.  
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11 The Commenter requests that this Court deny the R-21-0021 Petition outright  
12 or proposes as an alternative somewhat lengthy additions to two civil rules—  
13 additions that pertain only to juvenile court matters. Respectfully, any additions like  
14 that belong in the Rules of Procedure for the Juvenile Court, if this Court deems  
15 them necessary. Given the work of the Juvenile Rules Task Force, particularly in its  
16 proposed Rules 329(b), (c), and (e) (on other methods of service, including  
17 references to the methods in Ariz. R. Civ. P. 4.1(*l*) and 4.2(f)); 334(b)(2) (providing  
18 that the juvenile court may set an initial dependency hearing to allow time for  
19 complete publication service plus ten days); and 349(d)(1)(B)(i) (referencing Ariz.  
20 R. Civ. P. 4.1 and 4.2 regarding service of petitions to terminate parent-child  
21 relationships), the Commenter’s proposed additions may be superfluous. But the  
22 State Bar believes that the Commenter, should it wish to do so, must raise its  
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1 proposed additions to that Task Force, as the Juvenile rule set would be the  
2 appropriate location for them. The State Bar notes that the Commenter has until July  
3 23, 2021, to so raise its proposals, per this Court's Order of May 3, 2021, opening  
4 R-20-0044 for comment.  
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6 For all of the foregoing reasons, the State Bar respectfully requests that this  
7 Petition's proposed changes be adopted without modification and that DCS be  
8 referred to the Juvenile Rules Task Force for any further relief sought.  
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10 RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of May, 2021.

11  
12 *Lisa M. Panahi*

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14 Lisa M. Panahi  
15 General Counsel

16  
17 Electronic copy filed with the  
18 Clerk of the Supreme Court of Arizona  
19 this 27<sup>th</sup> day of May, 2021.

20 by: *PSequin*  
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