STATE OF MINNESOTA

IN SUPREME COURT

C4-97-1693

ORDER RESCHEDULING HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE JUVENILE PROTECTION RULES

IT IS HEREBY ORDERED that the hearing scheduled for 1:30 P.M. on June 14, 1999 in Courtroom 300 of the Minnesota Judicial Center to consider the recommendations of the Minnesota Supreme Court Advisory Committee on the Amendment of the Juvenile Protection Rules has been postponed.

IT IS FURTHER ORDERED that:

1. The Supreme Court will hold a hearing in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on August 25, 1999 at 1:30 P.M., to consider the recommendations of the Minnesota Supreme Court Advisory Committee on the Amendment of the Juvenile Protection Rules. A copy of the final report and proposed amendments is annexed to this order
2. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before August 2, 1999, and
3. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before August 2, 1999.

Dated: June 10, 1999

BY THE COURT:

Kathleen A. Blatz
Chief Justice

MINNESOTA SUPREME COURT

COURT SERVICES DIVISION
STATE COURT ADMINISTRATION
120 MINNESOTA JUDICIAL CENTER
25 CONSTITUTION AVE.
ST. PAUL, MN 55155
651-297-7581

JUDITH C. NORD
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PHONE: 651-282-3972
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judy.nord@courts.state.mn.us

August 2, 1999

Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Ave.
St. Paul, MN 55155

RE: Request to make Oral Presentation
Comments Regarding Juvenile Protection Rules
Appellate Court File: C4-97-1693

Dear Mr. Grittner:

On behalf of the Juvenile Protection Rules Committee, I am hereby requesting that Gail Baker, Rules Committee Co-Chair, be permitted to make an oral presentation at the hearing scheduled for August 25th. Pursuant to discussions with Justice Lancaster, Liaison to the Rules Committee, Ms. Baker should be allotted approximately 10 minutes to make her oral presentation.

Enclosed please find twelve copies of the comments to be made by Ms. Baker at the hearing.

Very truly yours,

Judith C. Nord

Judith C. Nord
Staff Attorney

Encs.

PROPOSED JUVENILE PROTECTION RULES
OVERVIEW

Key Objectives of Amending Rules:

To bring the rules into compliance with federal and state laws, especially federally mandated expedited timelines for achieving permanency for children. Achieving permanency for a child means first looking toward returning the child home through the provision of services that are adequate to meet the safety needs of the child, or when that is not possible or appropriate, timely decision-making that establishes another legally permanent home for the child.

To emphasize the objectives of child protection matters, especially the need to timely identify the child's need for protection or services, to review the provision of appropriate services which could allow children to safely return to the care of a parent, or when that is not possible, to establish another legally permanent home for the child in a fashion.

To establish uniform statewide practice and procedure reflecting best practices in the handling of juvenile protection cases as expressed in the *Resource Guidelines for Improving Court Practice in Child Abuse and Neglect Cases* published by the National Association of Family and Juvenile Court Judges.

Rules Highlights:

1. Comprehensive, self-contained rules that provide a roadmap to permanency:

A. Separate from Delinquency Rules: The juvenile protection rules are completely freestanding of the delinquency rules. This matches the recent adoption by the legislature of separate chapters for delinquency and juvenile protection. Along with the move to separate rules came the move away from delinquency terminology, such as "detention" (replaced with emergency protection care), "first appearance" (replaced with admit/deny), and "probable cause" (replaced with prima facie).

B. Self-contained: To the extent possible and appropriate, the juvenile protection rules are self-contained. Specifically, the rules provide that the Rules of Civil Procedure do not apply and to the extent certain procedures in the civil rules would pertain to juvenile protection matters, they are repeated and adapted in these rules. Special rules of evidence that are statutorily created (for instance, the admissibility of hearsay of children under 10) are repeated within the rules. The Rules of Evidence continue to apply to trials.

2. Timely Decision-making:

A. Permanency Timeline: The juvenile protection rules include a permanency timeline in compliance with state and federal law. There is a separate timeline set out in the advisory committee comments to help simplify the written language in the rules.

B. Scheduling Order: As a logical extension of the timing provision, the rules mandate issuance of a scheduling order at or within 5 days of the admit/deny hearing. The scheduling order is a tool to keep all parties, especially social services and parent, on track with important dates and the overall timeline. The order may be amended to provide necessary flexibility.

C. Streamlined procedures: The juvenile protection rules try to streamline procedures as much as possible while still providing sufficient protections of basic rights to parties involved in the system. The delineation between parties and participants, pre-trial hearing procedures, discovery procedures, the availability of interactive video hearings in appropriate circumstances, and the ability to serve and file by fax are all

examples where streamlined or technologically efficient procedures are utilized to help achieve timely decision-making.

3.Steps to Permanency in a Juvenile Protection Case:

A. Emergency Protective Care (EPC) Hearing: If a child has been removed from home, the court must hole an emergency protective care hearing (formerly "detention" hearing) within 72 hours of the child's removal if the child continues out of the care of the parent.
B. Admit/Deny Hearing: If the child is removed from the home by the court, the admit/deny (formerly "first appearing") hearing must be held within 10 days of the date of the EPC hearing. If the child is not removed, the admit/deny hearing is held no later than 20 days after service of the CHIPS petition. The admit/deny hearing may be combined with the EPC hearing.
C. Pretrial Conference: A pretrial conference may be held at any time after the admit/deny hearing, but not later than 10 days before the trial date.
D. Trial: If a denial is entered at the admit/deny hearing a trial (formerly "adjudicatory hearing") occurs within 60 days of the EPC hearing or the admit/deny hearing, whichever is earlier.
E. Findings/Adjudication: The court must issue findings and an order concerning adjudication within 15 days of the date the trial is completed.
F. Disposition: Whenever practicable, the court may order disposition at the same time as the adjudication. In the event disposition is not ordered at the same time as the adjudication, the court must include in the adjudication order a date for a disposition hearing which must occur no later than 10 days from the date the court issues its adjudicatory order.
G. Review of Legal Custody: When the disposition is an award of legal custody to the local social services agency, the court must review the disposition in court at least every 90 days.
H. Review of Protective Supervision: when the disposition is protective supervision, the court must review the disposition in court at least every 6 months from the date of the disposition.
I. If the child has not returned to the care of the parent, 30 days prior to the time set for the permanent placement hearing, pleadings must be filed to support permanent placement of the child away from the parent.
J. An admit/deny hearing must be held at least 20 days prior to the time set for the permanent placement hearing:

    i. If a termination of parental rights petition is filed, the matter must come to trial within 90 days of the admit/deny hearing; or
    ii. If other permanency pleadings are filed, trial must be held at the time set for the permanent placement hearing.

3. Discovery:

The rules committee considered permitted full, formal discovery. However, the committee concluded that allowing full, formal discovery in juvenile protection matters created the risk of significant delay without any corresponding improvement in decision-making and with little added benefit to the protection of the rights of the parties. The committee considered the general practice regarding discovery now which limited the court's role in the provision of information by the petitioner (usually the local social services agency) and other parties. The discovery rule clarifies that the petitioner should fully disclose all information, material and items in the petitioner's possession or control which relates to the case without a court order. The rule also provides that other parties disclose only documents, tangible objection, and the results of tests and examinations that the party intends to introduce into evidence at trial without a court order. Other items, not work product, may be obtained with a court order. The rule continues the previous rule's limits on depositions.

4. Parties and Participants:
Existing rules refer to "persons with the right to participate." To resolve confusion over this concept, the proposed rules specify who falls into the category of party and who falls into the category of participant. A party is, generally, a person with a real legal stake in the proceedings. A participant is, generally, a person who has an interest in the welfare of the child, but not legal ability to affect it. The rules specify the rights and obligations of parties and participants. The rules also specify how certain participants may intervene as a party either as of right or permissively.

A. Parties: Parties to a juvenile protection proceedings are:

i. the child, if age 12 or over or made a party by the court;
ii. the child's legal custodian;
iii. the child's guardian ad litem;
iv. the local social services agency;
v. any persons who intervene or who are joined

In truancy and runaway matters, parties also include the child regardless of age and the school may be joined as a party.

In termination of parental rights and permanent placement matters, parties also include the child's parents (including any noncustodial or presumed father).

B. Participants: Participants to juvenile protection proceedings are:

i. all parents of the child who are not parties (including noncustodial parents, and any alleged, adjudicated or presumed father); this class of participant may intervene as of right;
ii. the child's tribe; the child's tribe may intervene as of right;
iii. grandparents with whom the child has resided in the two years preceding the filing of the petition;
iv. relatives providing care for the child or relatives who ask to receive notice of the proceedings;
v. current foster parents;
vi. the child' spouse; and
vii. any other person the court deems important.

5. Guardians ad Litem and Representation by Counsel:
These interrelated issues were the most controversial issues discussed by the rules committee.

A. Appointment of GAL: In compliance with federal requirements, the rules provide that the court must appoint a GAL to advocate for the best interests of each child who is the subject of a juvenile protection matter, regardless of the child's age, except in cases where the sole allegation is that the child is a habitual truant or runaway. The court has discretion to appoint a GAL for a child alleged to be a truant or runaway and for the child's parent(s) if the parent is a party.
B. Representation by Counsel: The rules set forth the basic principle each litigant has a right to be represented by counsel. Each person, however, does not have the right to appointment of counsel.

i. Children: The court must appoint counsel for all children age 12 and over who cannot afford to retain counsel and for children alleged to be truants and runners regardless of age. The court has discretion to appoint counsel for a child under 12.

ii. Parents: The court must appoint counsel for the child's parent(s) who is a party if the parent cannot afford to retain counsel. If the sole allegation is that the child is a truant or a runaway, appointment of counsel for the parent occurs only if the statutory grounds have been provided.

iii. GALs: Upon request of the GAL, the court must appoint counsel for the GAL.

C. *At state expense:* Appointment of counsel is to be at "state" expense rather than at "public" expense.

6. Other Provisions:

A. Settlement: The settlement rule provides the opportunity for a "no contest" admission when it is agreed to by all parties and the court. This type of admission must be accompanied by agreement that the contents of the case plan are appropriate and give the court full authority to order the case plan and any disposition available under the statute. This rule will help to facilitate early settlement in appropriate cases.

B. Pretrials: Pretrial hearings are held at the discretion of the court. However, when this type of hearing is held, the rule provisions require that the parties and the court make a genuine effort to reach settlement, or if that is not possible, to narrow the issues which must be tried. This rule can be used to streamline trial procedures to that which is truly contested between the parties. This will serve the needs of the child and parent for timely decisions about services and permanency.

C. Interactive Video: The rule provides:

i. The court may hear motions and conduct conferences with counsel using telephone or interactive video conferencing equipment; and

ii. *By agreement of the parties,* or in exceptional circumstances upon motion of a party or the county attorney, the court may hold hearing and take testimony by telephone or interactive video conferencing equipment.

This rule is expected to expedite proceedings which might otherwise take an unacceptable length of time to schedule, particularly for judges in greater Minnesota. There is a protection in the rule that prohibits the use of this equipment from precluding a party from being present in person before the court at a hearing.

D. The rules define summons and notice and provide who gets either a summons or a notice, by what method of service and in what timeframe for all types of juvenile protection proceedings and incorporates the requirements of the UCCJA which had not been included in the former rules.

MINNESOTA SUPREME COURT

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MEMORANDUM

TO: Supreme Court Justices

FROM: Judith C. Nord

DATE: August 24, 1999

RE: Revised Overview of Proposed Juvenile Protection Rules

On behalf of the Juvenile Protection Rules Committee, attached please find a revised Overview of the Proposed Juvenile Protection Rules. This Overview is intended to replace the Overview filed on August 2, 1999, and was prepared by Gail Baker, Ann Ahlstrom, and Irene Opsahl, the Co-Chairs and Report of the Juvenile Protection Rules Committee.

cc: Fred Grittner, Clerk of Appellate Courts
Sue Dosal, State Court Administrator
Kay Pedretti, Director, Court Services Division
Janet Marshall, Director, Research & Planning

OVERVIEW
PROPOSED JUVENILE PROTECTION RULES

Prepared by Juvenile Protection Rules Committee Co-Chairs and Reporter
Gail Baker, Ann Ahlstrom, and Irene Opsahl

Key Objectives of Amending Rules

- To bring the rules into compliance with federal and state laws, especially federally mandated expedited timelines for permanency for children. Achieving permanency for a child means first looking toward returning the child home through the provision of services that are adequate to meet the safety needs of the child, or when that is not possible or appropriate, timely decision-making that establishes another legally permanent home for the child.

- To emphasize the objectives of child protection matters, especially the need to timely identify the child's need for protection or services, to review the provision of appropriate services which could allow children to safely return to the care of a parent, or when that is not possible, to establish another legally permanent home for the child.

- To establish uniform statewide practices and procedures reflecting best practices in the handling of juvenile protection cases as expressed in the *Resource Guidelines for Improving Court Practice in Child Abuse and Neglect Cases* published by the National Association of Family and Juvenile Court Judges.

Rule Highlights

1. **Comprehensive, self-contained rules that provide a roadmap to permanency**

   A. **Separate from Delinquency Rules:** The juvenile protection rules are completely freestanding of the delinquency rules. This matches the recent adoption by the legislature of separate chapters for delinquency and juvenile protection laws (260B and 260A respectively). Along with the move to separate the rules came the move away from delinquency terminology, such as "detention" (replaced with emergency protective care), "first appearance" (replaced with admit/deny), and "probable cause" (replaced with prima facie).

   B. **Self-contained:** To the extent possible and appropriate, the juvenile protection rules are self-contained. Specifically, the rules provide that the Rules of Civil Procedure do not apply and to the extent certain procedures in the civil rules would pertain to juvenile protection matters, they are repeated and adapted in these rules. Special rules of evidence that are statutorily created (for instance, the admissibility of hearsay of children under 10) are repeated within the rules. The Rules of Evidence continue to apply to trials.

2. **Rules that provide for timely decision-making**

A. **Permanency Timeline:** The juvenile protection rules include a permanency timeline in compliance with state and federal law. There is a separate timeline set out in the advisory committee comments to help simplify the written language in the rules. See attached.

B. **Scheduling Order:** As a logical extension of the timing provision, the rules mandate issuance of a scheduling order at or within 5 days of the admit/deny hearing. The scheduling order is a tool to keep all parties, especially social services and the parent(s), on track with important dates and the overall timeline. The order may be amended to provide necessary flexibility.

C. **Streamlined Procedures:** The juvenile protection rules attempt to streamline procedures as much as possible while still providing sufficient protections of basic rights for all parties involved in the system. The delineation between parties and participants, pre-trial hearing procedures, discovery procedures, the availability of interactive video hearings in appropriate circumstances, and the ability to serve and file by fax are all examples where streamlined or technologically efficient procedures are utilized to help achieve timely decision-making.

3. **Steps to Permanency in a Juvenile Protection Case:**

A. **Emergency Protective Care (EPC) Hearing:** If a child is removed from home and is to continue out of the care of the parent an emergency protective care hearing (formerly "detention" hearing) must be held within 72 hours of the child's removal.

B. **Admit/Deny Hearing:** If the child is removed from the home by the court, the admit/deny (formerly "first appearance") hearing must be held within 10 days of the date of the EPC hearing. If the child is not removed, the admit/deny hearing is held no later than 20 days after service of the CHIPS petition. The admit/deny hearing may be combined with the EPC hearing.

C. **Pretrial Conference:** A pretrial conference may be held at any time after the admit/deny hearing, but not later than 10 days before the trial date.

D. **Trial:** If a denial is entered at the admit/deny hearing a trial (formerly "adjudicatory hearing") occurs within 60 days of the EPC hearing or the admit/deny hearing, whichever is earlier.

E. **Findings/Adjudication:** The court must issue findings and an adjudicatory order within 15 days of the date the trial is completed.

F. **Disposition:** Whenever practicable, the court is encouraged to order disposition at the same time as the adjudication. In the event disposition is not ordered at the same time as the adjudication, the court must include in the adjudication order a date for a disposition hearing which must occur no later than 10 days from the date the court issues its adjudicatory order.

G. **Review of Legal Custody:** When the disposition is an award of legal custody to the local social services agency, the court must review the disposition in court at least every 90 days.

H. **Review of Protective Supervision:** When the disposition is protective supervision, the court must review the disposition in court at least every 6 months from the date of the disposition.

I. **Permanency Hearing:** If the child is not to be returned to the care of the parent within the applicable time limit (generally 12 months, except see note below), 30 days prior to the time set for the permanent placement hearing, pleadings must be filed to support permanent placement (legal custody to a relative, termination of parental rights or permanent foster care for children age 12 or over) of the child away from the parent.

Note about 6 month permanency hearing for children under 8: The statute requires a permanency hearing be conducted at 6 months for children under 8 when the CHIPS petition was filed. The plain language of the statute requires the court to "review the progress of the case and the case plan, including the provision of services." Minn. Stat. § 260.191 subd. 3b(c)

The Department of Human Services' policy advice to county social service agencies is that this statute means that if the court determines at that hearing that parent is making progress on the case plan and visiting the child, no further action toward permanency need be taken *at that time*. The court has the options of continuing the child in foster care until no later than the 12-month hearing. Of course, in appropriate cases, the court may return the child home.

If the parent is not making progress on the case plan or visiting the child, the court may order the local social services agency to show cause why a termination of parental rights petition should not be filed. The statute provides cause can include that there are not grounds to terminate parental rights or that the permanent plan for the child is placement with a relative.

Rule 41 reflects the requirements of this law by requiring a permanency review hearing be held at 6 months. The procedures for pleadings required in anticipation of the hearing reflect the Department of Human Service's policy advice, keep the filing requirement for pleadings to a minimum, and appear consistent with the spirit of the law.

1. The proposed rule does not require the filing of permanency pleadings 30 days before the six month hearing unless the agency has determined to proceed with a petition to terminate parental rights or to transfer permanent legal and physical custody to a relative. Instead, the rule requires that the local social services agency file notice together with an affidavit supporting the agency's determination that the parent is making progress on the case plan and visiting the child. This minimum requirement gives notice to the court and the parties of the agency's position regarding the case without imposing a requirement for filing pleadings that would be burdensome and unnecessary.

2. If the court determines the agency's determination regarding the parent's progress on the case plan is correct, the hearing can be used to document the parent's progress and/or give further direction about actions either the agency or the parent needs to take. If the court finds the agency's determination about the parent's progress on the case plan is insufficient or incorrect, the court can order the agency to provide additional or different services, file a termination of parental rights petition or petition for the transfer of permanent legal and physical custody to a relative. 1999 amendments to Minn. Stat. 260.191 subd. 3b require that when it is determined that the appropriate permanency plan for the child is transfer of permanent legal and physical custody to a relative, a petition for such transfer be filed within 30 days of the 6 month review and the trial held within 60 days of the six month review.

3. Proposed Rule 41 needs some further, minor changes to be consistent with the 1999 legislation referenced above.

An admit/deny hearing in the permanent placement matter must be held at least 20 days prior to the time set for the permanent placement hearing:

i. If a termination of parental rights petition is filed, the matter must come to trial within 90 days of the admit/deny hearing; or

ii. If other permanency pleadings are filed, trial must be held at the time set for the permanent placement hearing.

4. Discovery

The rules committee considered permitting full, formal discovery. However, the committee concluded that allowing full, formal discovery in juvenile protection matters created the risk of significant delay without any corresponding improvement in decision-making and with little added benefit to the protection of the rights of the parties. The committee considered the general practice and current rule regarding discovery that provides for a very limited role for the court in the discovery process. The proposed discovery rule clarifies that the petitioner must fully

disclose all information, material and items in the petitioner's possession or control that relates to the case without a court order. The rule also provides that other parties disclose only documents, tangible objects, and the results of tests and examinations that the party intends to introduce into evidence at trial without a court order. Other items, not work product, may be obtained with a court order. The rule continues the previous rule's limits on depositions.

5. Parties and Participants

Existing rules refer to "persons with the right to participate." To resolve confusion over this concept, the proposed rules specify who falls into the category of party and who falls into the category of participant. A party is, generally, a person with a legal stake in the proceedings. A participant is, generally, a person who has an interest in the welfare of the child, but no current legal ability to affect it. The rules specify the rights and obligations of parties and participants. The rules also specify how certain participants may intervene as a party either as of right or permissively.

A. Parties: Parties to a juvenile protection proceedings are:

i. the child, if age 12 or over or made a party by the court;
ii. the child's legal custodian;
iii. the child's guardian ad litem;
iv. the local social services agency;
v. any persons who intervene or who are joined

In truancy and runaway matters, parties also include the child regardless of age and the school may be joined as a party.

In termination of parental rights and permanent placement matters, parties also include the child's parents (including any noncustodial or presumed father).

B. Participants: Participants to juvenile protection proceedings are:

i. all parents of the child who are not parties (including noncustodial parents, and any alleged, adjudicated or presumed fathers); this class of participant may intervene as of right;
ii. in the case of an Indian child governed by the Indian Child Welfare Act, the child's tribe; the child's tribe may intervene as of right;
iii. grandparents with whom the child has resided in the two years preceding the filing of the petition; this class of participant may intervene as of right;
iv. relatives providing care for the child or relatives who ask to receive notice of the proceedings;
v. current foster parents;
vi. the child' spouse; and
vii. any other person the court deems important.

6. Guardians ad Litem and Representation by Counsel

These interrelated issues were among the most controversial issues discussed by the rules committee.

A. Appointment of Guardian ad Litem: In compliance with federal requirements, the rules provide that the court must appoint a guardian ad litem to advocate for the best interests of each child who is the subject of a juvenile protection matter, regardless of the child's age, except in cases where the sole allegation is that the child is a habitual truant or runaway. The court has discretion to appoint a guardian ad litem for a child alleged to be a truant or runaway and for the child's parent(s) if the parent is a party.

B. Representation by Counsel: The rules set forth the basic principle that each litigant has a right to be represented by counsel. Each person, however, does not have the right to appointment of counsel. Appointment of counsel is determined as follows:

1. **Children:** The court must appoint counsel for all children age 12 and over who cannot afford to retain counsel and for children alleged to be a truant or runaway regardless of age. The court has discretion to appoint counsel for a child under 12.
2. **Parents:** The court must appoint counsel for the child's parent(s) who is a party if the parent cannot afford to retain counsel. If the sole allegation is that the child is a truant or runaway, appointment of counsel for the parent occurs only if the statutory grounds have been proved.
3. **Guardians ad Litem:** Upon request of the guardian ad litem, the court must appoint counsel for the guardian.

C. Appointment "at State Expense": Appointment of counsel is to be at "state" expense rather than at "public" expense. In committee deliberations and to a lesser degree in the comments submitted, there was much passion about:

1. who represents children (the guardian ad litem, attorney or both);
2. what age children should have lawyers;
3. their parents (including the very real concern that the resources of State Public Defender's system not be stretched any further without additional allocation of money by the legislature);
4. practical implications of the requirement of appointment of a guardian ad litem for every child for certain judicial districts (most notably, the Fourth District);
5. the already complicated nature of these proceedings and the relative added value between the appointment of a guardian ad litem, an attorney or both for a child; and
6. the fiscal implications for any appointment recommendations the committee makes.

Ultimately, a majority of the committee believed that the rules as proposed balance federal requirements for appointment of guardians ad litem for all children with the fiscal reality that prohibited proposing appointment of lawyers for all children. The proposed rule on appointed counsel for children is not a change from the existing rule. The

committee also recognized the paramount role guardians ad litem play in representing the best interests of the child and determined guardians should have legal representation when they ask for it.
Finally, the committee used the phrase "at state expense" recognizing that some stakeholders view that phrase as requiring additional representation by the Office of the State Public Defender. That is NOT what the committee meant by the phrase. Rather, the committee meant that the state should fund representation for all parties entitled to appointed counsel in these proceedings to ensure uniformity of practice across the state. Which administrative structure, existing or new, should receive additional funding to do so was not addressed by the committee except to say it was recommended that the existing resources of the system for representing children and indigent parents not be further encumbered.

7. Other General Provisions

A. Settlement: The settlement and admission rules (Rules 19 and 36 respectively) provide the opportunity for a "no contest" admission when it is agreed to by all parties and the court. This type of admission must be accompanied by an agreement that the contents of the case plan are appropriate and give the court full authority to order the case plan and any disposition available under the statute. This rule is to help to facilitate early settlement in appropriate cases.

B. Pretrials: Pretrial hearings are to be held at the discretion of the court. However, when this type of hearing is held, the rule provisions require that the parties and the court make a genuine effort to reach settlement, or if that is not possible, to narrow the issues which must be tried. This rule in conjunction with the discovery rule (Rules 37 and 17 respectively) can be used to streamline trial procedures to what is truly contested between the parties which will serve the needs of the child and parent for timely decisions about services and permanency.

C. Interactive Video: The rule provides:

1. The court may hear motions and conduct conferences with counsel using telephone or interactive video conferencing equipment; and

2. *Only by agreement of the parties,* or *in exceptional circumstances* upon motion of a party or the county attorney, may the court hold a hearing and/or take testimony by telephone or interactive video conferencing equipment.

This rule is expected to expedite proceedings that might otherwise take an unacceptable length of time to schedule, particularly for judges in greater Minnesota. There is a protection in the rule that prohibits the use of this equipment from precluding a party from being present in person at a hearing.

D. Summons and Notice: The rules define summons and notice, who gets either a summons or notice, by what method of service and in what timeframe they must receive them for all types of juvenile protection proceedings and incorporates the requirements of the UCCJA which had not been included in the former rules.

8. Controversial Issues and Issues with Potential Fiscal Impact:

A. Parties and participants/right to counsel. As explained above, there was controversy around the appointment of counsel. There was also controversy over:

1. Denominating only "legal custodians" as parties, not all parents. Attorneys who represent non-custodial fathers in family matters articulated the most concern. There was concern that the lack of automatic party status would have a negative effect on settlement of custody matters. The committee considered the comments received and declined to change its recommendation that parties be limited to "legal custodians." The committee's reasoning was that a "legal custodian" is the only individual in a position to legally affect the child's status as in need of protection or service, absent authorization from the court. The committee felt that a non-custodial parent's interests would be sufficiently protected by:

a. the rule on notice which requires all parents be notified of proceedings; and

b. the rule on intervention, which provides that any mother or adjudicated father, may intervene as of right.

2. Making guardians ad litem parties. There was controversy within the committee about the function that guardians ad litem serve in juvenile protection proceedings. The issue was whether guardians had full party status or whether guardians were "advisors" to the court who should not have all the rights of parties. Ultimately, a strong majority of the committee decided that the entity representing best interests of the child should have party status and all of the attendant rights that go along with that status.

B. Interactive video and telephone hearings: After the first proposed draft of the rules was made public, there was concern expressed about having hearings by interactive video or telephone conference. The committee considered the comments and made sure the proposed Rule 12 had sufficient protections to ensure that this method of conducting hearings would not be used to deprive a party of the right to be present at a hearing. Rule 12.03 provides this assurance. However, the committee recognized that the timelines set in these rules and required by state and federal law mandate that some hearings take advantage of technology to facilitate moving the court's decision-making forward. Three scenarios were determined to be most appropriate for the use of available technology:

i. more routine procedural matters (Rule 12.01);
ii. where the parties agree (Rule 12.02); and
iii. in exceptional circumstances (Rules 12.03), such as taking testimony from an out-of-state tribal expert in a matter covered by the Indian Child Welfare Act.

Secure detention for children alleged or adjudicated in need of protection or services:

After analyzing state and federal law, the committee determined that public policy generally prohibits the placement of any child alleged or found to be in need or protection or services in a locked facility. The rules reflect that general prohibition. The committee understood there are some jurisdictions in the state that place abused and neglected children in locked juvenile detention facilities. The committee concluded that this practice is contrary to law and public policy and wanted the rules to be clear about this prohibition. The committee recommended extending the general prohibition to all children alleged or found to be in need of protection or services. Law and public policy is not as clear for children alleged or found to be truants or runaways. The committee discussed whether truants and runaways should be placed in secure detention, but was unable to resolve a clear policy under state and federal law. The committee did not debate or consider the issue of truants or runaways who endanger themselves by their failure to follow court orders or who fail to appear in court after personal service of an order to do so. The committee leadership, therefore, defers to the Court to clarify these issues.

C. **Time for appeal:** The committee rule on post-trial motions and appeal tried to clarify and improve practice regarding post-trial motions and provide shortened time lines for appeal. Old Rule 60.03 provided for a post-trial motion for new trial to be heard within 30 days of the finding that the allegations of the petition are proved. Old Rule 63 provided the time for appeal ran 30 days from the filing of the order. Because of the very short, identical timelines, these rules were pragmatically problematic for practitioners. The committee version of the rule proposes to set out a time frame and set of procedures for post-trial motions consistent with general civil practice. The committee also wanted to maintain, as much as possible, the shortened appeal time provided under the old rules and current statute. The committee also wanted to have the rule involving appellate times reflect the order for expedited briefing now generally issued by the Court of Appeals.

The committee deliberations recognized that the systems involved with cases involving children in foster care are all operating under general mandates to shorten the timeframes within which the system operates and makes decisions. The committee recommended that general principle should apply in the operation of appellate rules governing these cases.

D. **Discovery:** The discovery rule caused much debate in the committee. Two general principles competed:

1. Full discovery is appropriate given the gravity of the decisions the court has to make and the important rights of the parties implicated in these cases; or

2. The overriding policy consideration of achieving timely decision-making for children. Timely decision-making from the child's perspective prohibits the

luxury of full discovery and, further, in most cases, it is not necessary to protect the rights of the parties.

The second principle won the day with the heavy majority of committee members. Simplified procedures that allow for access to all information in control of social services and necessary information in the control of other parties are provided for in the rule. The discovery rule and the pretrial rule can work together to allow for narrowing the fact and legal issues involved in these cases and that will also help expedite decision-making.

E. "State expense" versus "public expense:" There has been great debate about the phrase chosen by the committee to reflect its intent that certain expenses be borne at the state, not local, level. Some practitioners are interpreting the phrase "state expense" differently that the committee did. For this reason, this phrase has become controversial. The committee meant the phrase to mean an expense borne at the state, not county or judicial district level. The committee did NOT intend to attach the phrase to any existing state administrative structure, for instance the State Board of Public Defense or the state public defender system. The committee also recognized that, to the extent the current rules provide for representation at public expense and the proposed rules provide for representation at state expense, there will be a fiscal impact to the state.

F. Fiscal impact: The committee anticipates the following recommendations will increase funding required by the state if the rules were adopted as proposed:

1. mandatory appointment of Guardians ad litem for ALL children
2. mandatory representation for guardians ad litem who request counsel;
3. mandatory representation for all children over 12;
4. discretionary appointment of attorneys for children under 12;
5. the expedited timelines for permanency, from scheduling orders to the quicker hearing, trial, decision, dispositional and other required dates;
6. need for more court personnel to effectuate the new rules;
7. interactive video and telephone hearings; and
8. need for more computer hardware and software to effect the new rules and timelines.

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July 28, 1999

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Comments Regarding the Proposed Juvenile Protection Rules

Dear Mr. Grittner:

Following are my comments regarding the proposed Juvenile Protection Rules. I do not desire to make an oral presentation.

1. **Change:** Rule 7.03 Advisory Committee Comment be amended as follows: ". . . If a judge is assigned to hear a matter after a party has objected to ~~any~~ a particular referee hearing the matter, the party may not seek removal of the judge as a matter of right but may only seek removal of a subsequent judge for cause."

Reasoning: A party should not lose the right to file on a judge as a matter of right merely because the party elects to have a judge preside over the case instead of a referee. There are a number of reasons a party would prefer a judge to a referee. For example, a party might not want to risk re-litigating every decision of the referee, having to argue first before a referee and then before a judge by memorandum upon review. Rule 7.05. Second, the proposed rule has essentially abolished the parties' statutory right to a hearing before a judge upon request for review of a referee's order. Rule 7.05, subd. 5 and Minn. Stat. Sec. 260.031, subd. 4. Finally, a party typically wants to know the identify of the final decision maker. This knowledge is unavailable if the referee's decisions are reviewed by one or more unidentified judges. These are legitimate reasons for objecting to a referee hearing the case. There is no reason to treat child protection cases differently from any other civil case in terms of removal of judges as a matter of right. The rights at stake in these cases – custodial and parental rights to our children – are so important that the protections afforded in any other civil case should be available.

2. **Change:** Rule 15.05 be amended as follows: "Any party or the county attorney may bring a motion to strike pleadings or portions of pleadings ~~not authorized by statutes or these rules~~."

Reasoning: The phrase "not authorized by statutes or these rules" is unduly restrictive. Child protection pleadings are struck for lack of probable cause, irrelevant information and incorrect information. In these cases, it is not clear that the pleadings are in violation of statute or court rule. The pleadings, nonetheless, are appropriately stricken. Arguably, the court could not strike these pleadings under Rule 15.05. Given the open hearings pilot project, the court's ability to strike irrelevant and inaccurate information should not be unduly restricted.

3. **Change:** Rule 17.04, subd. 4 (a) be deleted and the language be incorporated in Rules 17.01(c) and 17.02 (c).

Reasoning: The committee incorporated the civil discovery rule regarding experts in the proposed chips rules. The language in Rule 17.04, subd. 4(a) is from Minnesota Rules of Civil Procedure 26.02(d)(1)(B). However, the language is incomplete and out of context within Rule 17.04, subd. 4(a). The civil rule sets out a procedure by which a party may obtain additional discovery of information held by experts expected to be called at trial. Rules 17.01(c) and 17.02 (c) regard discovery of information held by expert witnesses expected to be called at trial. The information in Rule 17.04, subd. 4(a) belongs in Rules 17.01(c) and 17.02(c), not in Rule 17.04, subd. 4(a).

4. **Change:** Rule 25.02 be amended as follows:

Subdivision 1. ~~Mandatory Appointment for~~ Right of Child Age 12 or Over to Counsel. The court shall appoint counsel at state expense for a child who cannot afford to retain counsel if the child is age 12 or older and requests counsel.

Subd. 2. ~~Mandatory Appointment for~~ Right of Child Alleged to be a Habitual Truant, a Runaway or Engaged in Prostitution to Counsel. The court shall appoint counsel at state expense for a child who cannot afford to retain counsel if the child, regardless of age, is the subject of a petition based solely on the statutory grounds that the child is a habitual truant, a runaway, or engaged in prostitution and the child requests counsel.

Subd. 4. ~~Mandatory Appointment~~ Right to Counsel – Generally. When the child's parent who is a party, the legal custodian, or, in the case of an Indian child, the child's Indian custodian cannot afford to retain counsel, the court shall appoint counsel at state expense upon such person's request. . .

Reasoning: Rule 25 can be interpreted as requiring the appointment of counsel at state expense for eligible recipients whether or not the recipient desires counsel. The court should not appoint a state funded attorney unless the eligible recipient wants an attorney. This is especially true in juvenile protection cases where there is no constitutional right to counsel.

5. **Change:** Amend Rule 25.02, subd. 4 (b) as follows: " . . .The court has discretion to appoint counsel to represent the parent or legal custodian at state expense if the parent or legal custodian is financially unable to obtain counsel ~~and in any other case in which the court finds such appointment desirable~~."

Reasoning: The rule allows the court to appoint counsel at state expense even if the recipient can afford counsel. This is inconsistent with the rest of Rule 25 which requires an inability to afford counsel. This is also inconsistent with Minn. Stat. Sec. 260.155, subd. 2 (c) which makes inability to afford counsel a prerequisite to the appointment of counsel. The court should not appoint a state funded attorney to represent an individual who can afford to hire an attorney. This is especially true for parents of habitual truants and runaways. Typically, these parents have less at stake then parents in other child protection, termination of parental rights and permanency cases.

6. **Change:** Rule 27.03 be amended as follows: " . . . If a person other than counsel ~~or the guardian ad litem~~ engages in conduct which disrupts the court, the person may be excluded from the courtroom."

Reasoning: There is no reason to allow a disruptive guardian ad litem to remain in the courtroom. Nor should a hearing be delayed because a guardian ad litem refuses to cease disruptive behavior. If a guardian ad litem engages in conduct which disrupts the court, the guardian should be excluded so the court can proceed with the hearing. The guardian ad litem should not be treated differently than any other party.

7. **Change:** Rule 33.02, subd. 4 (a)(1) be amended as follows: "(1) a copy of the petition, court order, motion, affidavit or other legal documents not previously provided; these items shall not be contained in or attached to the summons if the court has authorized service of the summons by publication pursuant to Rule 33.02, subd. 3 (a);"

Reasoning: The court may authorize service of the summons by publication. Rule 33.02, subd. (a). The summons must contain a copy of the petition. Rule 33.02, subd. 4 (a)(1). Thus, the proposed rules seem to require publication of the petition with the summons. There is no need to publish the petition. If the amendment is adopted, the following will be published: a statement of the time and place of the hearing; a statement describing the purpose of the hearing; a statement that failure to appear may result in a finding of contempt or the issuance of an arrest warrant or both; and a statement explaining the right to counsel. This information provides sufficient notice.

8. **Change:** Rule 34 be amended to add a new subpart regarding service as follows: Service. The petition shall be personally served in all juvenile protection matters. The court may waive personal service if the court finds that efforts to locate the party to be served have been unsuccessful.

Reasoning: Rule 34 is silent on the type of service required. This change clarifies that a juvenile protection matter petition must be personally served. A juvenile protection matter is commenced when a petition is filed. Rule 33.01. A summons is used to order the parties to appear regarding the petition. Rule 33.02, subd. 1. A summons must be personally served unless the court authorizes service by publication. Rule 33.02, subd. 3(a). The summons must contain a copy of the petition. Rule 33.02, subd. 4 (a)(1). Thus, Rule 33 seems to require personal service of the petition. The proposed amendment clarifies that personal service is required. The court should be allowed to waive personal service when the court authorizes service of the summons by publication, consistent with the proposed change to Rule 33.02, subd. 4 (a)(1) at line 7.

9. **Change:** Rule 34.04, subd. 2 be amended as follows: "~~Upon receipt of approval from the court,~~ tThe petitioner shall provide notice of the proposed amendment to all parties and participants."

Reasoning: Rule 34.04, subd. 2 implies the court may grant leave to amend a petition ex parte. The request for amendment and leave to amend should not occur ex parte. Under the rule, the court cannot authorize amendment unless the amendment does not prejudice a party and all parties are given sufficient time to respond. Rule 34.03, subd. 2 (b) and (c). The parties should have an opportunity to be heard on these factors before the court decides whether or not to allow amendment during trial.

10. **Change:** Rule 35.03, subd. 3 be amended as follows: "In each termination of parental rights matter, after completing the initial inquiries set forth in subdivision 1 the court shall determine whether the petition states ~~and~~ prima facie case in support of termination of parental rights. If the court determines that the petition states a prima facie case in support of termination of parental rights, the court shall proceed pursuant to Rule 36. If the court determines that the petition fails to state a prima facie case in support of termination of parental rights, the court shall dismiss the petition. ~~: (a) return the child to the care of the parent or legal custodian; (b) give the petitioner ten (10) days to file an amended petition or supplementary information if the petitioner represents there are additional facts which, if presented tot he court, would establish a prima facie case in support of termination of parental rights; or (c) give the petitioner ten (10) days to file a child in need of protection or services petition.~~

Reasoning: If a termination of parental rights petition fails to state a prima facie case in support of termination, the petition should be dismissed. Additional action by petitioner, if any, should be governed by the rules without regard to the dismissed petition. As written, Rule 35.03, subd. 3 is confusing. It is not clear what happens to the children who are the subject of a dismissed petition while a new petition is drafted. Given that returning the children is the alternative to allowing ten days for a new petition, it appears the children remain out of home waiting for the new petition. If the children remain out of home, the ten day timeline allows petitioner to subvert Rules 30.01, 31.01, 31.08 and 34.02, subd. 2 (c), which require a petition based upon a prima facie case and an emergency protective care hearing within seventy-two hours of a child being taken into emergency protective care. If a petition is dismissed for lack of a prima facie case and petitioner decides to a file new petition and seek emergency protective care, petitioner's actions are adequately governed by the existing rules. The procedure set out in Rule 35.03, subd. 3 will lead to the removal of children from their homes, without adequate evidence, for ten days as opposed to seventy-two hours as contemplated in the proposed rules.

11. **Change:** Rule 35.03, subd. 4 be amended as follows: "In each permanent placement matter, after completing the initial inquiries set forth in subdivision 1, the court shall ~~review the facts set forth in the petition, consider such argument as the parties may make, and~~ determine whether the petition states a prima facie case in support of one or more of the permanent placement option(s) requested. If the court determines that the petition states a prima facie case, the court shall proceed pursuant to Rule 36. If the court determines that the petition fails to state a prima facie case, the court shall dismiss the petition. ~~may: (a) return the child to the care of the parent; or (b) give the petitioner ten (10) days to file an amended petition or supplementary information if the petitioner represents there are additional facts which, if presented to the court would establish a prima facie case.~~"

Reasoning: The change to the first line simplifies the language, making the language consistent with subdivision 3 of the same rule. The reason for deleting the last portion of the rule is the same as offered at line 10.

12. **Change:** Rule 36.01,subd. 1 be amended as follows: "(a) **Generally**. Unless the child's parent or legal custodian is the petitioner, only a parent who is a party, or a legal custodian, shall admit or deny the statutory grounds set forth in the petition or remain silent. . .(c) **Termination of Parental Rights Matters.** In a termination of parental rights matter, only the parents of the child ~~are required to~~ shall admit or deny the petition. . . (d) **Permanent Placement Matters.** In a permanent placement matter: (1) only the legal custodian of the child ~~is required to~~ shall admit or deny the petition. . ."

Reasoning: The proposed language clarifies that it is only the legal custodian who may lose custody or the parent who may lose parental rights who may admit a juvenile protection petition. Without this language there is a question whether a party other than a parent or legal custodian (e.g., guardian ad litem or child) may admit the petition and thereby deprive a parent or legal custodian of a trial.

13. **Change:** Rule 39.02, subd. 2 be amended as follows: (a) dismiss the matter without an adjudication if both the child and the child's ~~parent or~~ legal custodian have complied with the terms of the continuance; or (b) adjudicate the child in need of protection or services if either the child or the child's ~~parent or~~ legal custodian has not complied . . ."

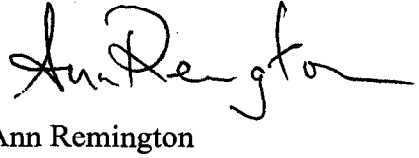
Reasoning: In a child protection case, it is the child's legal custodian who faces custody loss. The child's parent may or may not be the child's legal custodian. If the child is reunified, the child is reunified with the legal custodian. The child would not be reunified with a non-custodial parent absent an order transferring legal custody to the parent. Given this framework, it is not fair to condition a stay of adjudication on a non-custodial parent's cooperation. The child and the child's legal custodian should be afforded the benefit of a stay of adjudication regardless that a non-custodial parent fails to cooperate with conditions of the stay.

14. **Change:** Rule 40.05, subd. 2(a)(3) be amended as follows: "in the case of a child who needs special treatment and care for reasons of physical or mental health when the child's parent or legal custodian is unable to provide the treatment or care, order the ~~child placed for care and treatment~~ treatment and care provided; or"

Reasoning: Rule 40.05, subd. 2(a)(3) requires that the child be placed out of home to receive necessary treatment and care. The rule does not allow for the provision of treatment and care in the child's home. This is inconsistent with Minn. Stat. 260.191, subd. 1(a) (3), after which the rule is patterned. The suggested language mirrors the statutory language and allows for the provision of treatment and care in or out of home.

Thank you for your consideration of these comments.

Respectfully submitted,



Ann Remington
Hennepin County Public Defender
(612)348-8255

Minnesota Department of **Human Services**

June 7, 1999

Fred Grittner
Clerk of Appellate Courts
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: Comments for Public Hearing for Rules of Juvenile Procedures
File C4-97-1693

Dear Mr. Grittner:

Forwarded for filing are an orginal and 12 copies of comments submitted in regard to the Proposed Rules of Juvenile Procedure.

Sincerely,

Ann Stiehm Ahlstrom

Ann Stiehm Ahlstrom
Permanency Attorney
Family and Children's Services Division
651-215-9517
fax: 651-2971949

Comments on Proposed Rules
Submitted by Ann Ahlstrom
Juvenile Protection Rules Advisory Committee Co-chair

I respectfully submit the following comments regarding the proposed Rules of Juvenile Protection:

1. Permanent Placement Matters: The legislature made a number of changes to the permanent placement hearing procedures which should be incorporated in the rules:

   A. The legislature changed the availability of foster care for a specified period of time from a specific set of listed cases to cases involving an adjudication based solely on the child's behavior.

      Recommendation: Rule 34.02 subdivision 4. (a) (3) be changed to read: "A request for foster care for a specified period of time for a child adjudicated in need of protection or services on the sole basis of the child's behavior shall be entitled "Juvenile Protection Petition for Foster Care for a Specific Period of Time."

   B. The legislature modified the procedures for establishing when reasonable efforts are not required to include when the court makes certain prima facie determinations.

      Recommendation: Rule 35. Subd.3, the end of the first sentence in the paragraph should be amended to add the phrase "under the statutory grounds stated in the petition."

   C. The legislature changed the requirement for certain cases to be filed from the time of the child's placement due to egregious harm to the time the local social services agency determined the child had been subjected to egregious harm.

      Recommendation: Rule 34.01 Subd. 3 (b) be amended to read:

      "The county attorney shall file a termination of parental rights petition within thirty (30) days of the responsible social services agency determining that a child ...[rest of paragraph remains the same].

2. Alternative Permanency Pleadings:

Rule 34.02 subd. 4. (b) talks about permanency pleadings seeking alternative permanency orders for children.

Recommendation: The following sentence should be added at the end of the paragraph to clarify that termination of parental rights procedures apply if one of the alternatives sought is termination of parental rights:

"If a termination of parental rights order is sought, a termination of parental rights petition must be filed and termination of parental rights procedures filed.

3. Rule 37 Pretrial Conference.

The committee had a lot of discussion about discovery and reached a compromise reflected in Rule 17 (Discovery) and Rule 37 (Pretrial Conference). The committee recognized the duty on the petitioner to fully disclose information in its knowledge and control. The committee compromised on certain other discovery issues proposed to streamline the necessity of preparing for a full-blown evidentiary hearing on all allegations contained in the petition when a respondent

party may very well admit part or all of the petition on the day of trial. Accordingly, the discovery rule requires that the petitioner turn over all materials in its possession or control, which pertain to the matter without a court order. The idea was to facilitate the respondent parties' getting all of the information in the petitioner's knowledge as soon as possible. The committee rejected any similar duty on the part of the respondent to identify and turn over any and all information that might pertain to the case in the respondent's possession. The committee, in its deliberations, recognized that there might be items within the respondent's knowledge and control that it would be appropriate for the court to order released to the petitioner. All of this is reflect in Rule 17.

During its discussion about the scope and methods of discovery, the committee recognized the duty of the respondent to truthfully answer questions and recognized the concept that the petitioner should not have to go to the time and expense of preparing evidence for matters which the respondent would admit at trial. The committee rejected the idea of "Requests for Admissions," and substituted the concepts contained in the current draft of Rule 37. However, the current draft Rule 37 does not adequately reflect the committee's intent to require that a respondent party specifically answer each allegation in the petition in a time and fashion that would meet petitioner's need to identify truly contested issues and respondent's duty to provide the requested information. The committee specifically talked about resolving as many of these issues as possible at the pretrial.

Recommendation:

Delete the first sentence of the second full paragraph in Rule 37 and substitute the following:

> Upon the request of the county attorney or the petitioner, any party required to answer the petition must be sworn and answer the allegations of the petition upon examination by the county attorney or petitioner. The parties may agree to another procedure for the respondent party to specifically admit or deny the factual allegations and the statutory grounds under oath and on the record.

STATE OF MINNESOTA
DISTRICT COURT OF MINNESOTA
FOURTH JUDICIAL DISTRICT

GUARDIAN AD LITEM PROGRAM
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(612) 348-6824 FAX: 348-4154

June 7, 1999

The Honorable Justices of the
Minnesota Supreme Court
25 Constitution Avenue
St. Paul, Minnesota

Written Testimony in Response to the Minnesota Supreme Court Advisory Committee on the Amendment of the Juvenile Protection Rules

Specifically:
Comments on the Proposed Rule for **GUARDIANS AD LITEM, (RULE 26)**

May It Please the Court:

The proposed rule for guardians ad litem mandates the appointment of a guardian ad litem for every child alleged to be in need of protection or services except when the sole allegation is that the child is a runaway or habitual truant. The current discretion of the court to waive such appointments in certain circumstances is abolished.

As the court is no doubt aware, guardian ad litem programs in many jurisdictions are already struggling with caseloads and administrative requirements beyond their current capacities. In jurisdictions where the guardians ad litem are paid, the challenge is to keep caseloads at a reasonable level in order to comply with the responsibilities set forth in the Rules for Guardians ad Litem. In jurisdictions where volunteers are appointed, inability to recruit and retain sufficient volunteers is leading to hiring guardians ad litem and/or prioritizing appointments. Triage systems have been put in place, giving lowest priority for guardian ad litem appointments to situations where the child's placement does not present a risk to the child and the child's interests are otherwise represented (e.g. by a tribal representative, by a caretaker relative, by an attorney).

If the court is going to adopt the rule on guardians ad litem as proposed, programs will need additional resources to carry out this mandate. In Hennepin County for example, the Juvenile Court Guardian ad Litem Program has consistently fallen behind in appointments. Annually some 30% of cases do not receive appointment of a guardian ad litem. On an average day, our volunteer guardians ad litem are working on some 550 child protection cases. There will be about 175 cases awaiting assignment of a guardian ad litem. Approximately 50 of these cases will fall under the Indian Child Welfare Act,

requiring a guardian ad litem with special qualifications (under the Guardian ad Litem Rules) and approximately 100 will be lower priority because the children have been returned home under protective supervision, are living with with a relative or are teenagers with their own attorney. We are also responding to other initiatives such as the state mandated disposition review of state wards (nearly 700 children who must have their status reviewed by the court every 90 days) and a new pilot project mandating the appointment of a guardian ad litem in orders for protection when the respondent is a juvenile. Guardians ad litem are being appointed for incompetent teenagers involved in delinquent behavior and a variety of other unique matters which come to the attention of the court. Despite the best efforts of the 200 volunteer guardians ad litem working with us on any given day, we have not been able to meet the demand.

As a result, the Juvenile Division of the Hennepin County Guardian ad Litem Program is hiring its first paid staff to carry a guardian ad litem caseload this summer. The Hennepin County Human Resources Department approved this position at a classification of "Legal Services Specialist" with a pay range of $15.47 to $26.68 per hour. As welcome as this new FTE is, it is probably not enough to meet the mandate. Although the appropriate caseload for a guardian ad litem is yet to be determined, guesstimates are somewhere between 30 and 50 cases for a full time person. The general rule used throughout most programs in the state is that the average Juvenile Court case takes 7 hours a month (for a caseload of 23); the average Family Court case takes 10 hours a month (for a caseload of 16). Therefore, to meet the guardian ad litem mandate in the Juvenile Court, the Hennepin County Program may need an additional 3 to 4 FTEs (an additional $130,000 to $170,000 per year at mid salary range).

Of major concern is that without adequate resources, the Juvenile Court Division of the Hennepin County Guardian ad Litem Program will find itself in the same situation as the Family Court Guardians ad Litem in Hennepin County. In the Family Court, an independent contract system has been in place whereby annual contracts have been awarded in the amount of $56,000 (for 20 hours per week) to 4 attorneys. They have each carried between 100-200 cases, worked far in excess of 20 hours per week, and have found it impossible to meet the expectations set forth in the (new) Guardian ad Litem Rules with this level of caseload.

If the guardian ad litem system is to have integrity, there must be adequate resources provided in conjunction with the mandates. The impending state financing of the guardian ad litem system will provide a crucial opportunity to insure that the necessary funding and resources are provided.

With all due respect,

Susanne Karin Smith
Hennepin County Guardian ad Litem Program

THE MINNESOTA
COUNTY ATTORNEYS
ASSOCIATION

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651/641-1600

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June 4, 1999

Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: Request to Make Oral Presentation on Proposed Amendments to the Juvenile Protection Rules

Dear Mr. Grittner:

On behalf of the Minnesota County Attorneys Association Juvenile Law Committee, I would like to request that a member of our committee be given time to make an oral presentation consistent with the written statements attached.

Sincerely,

William Jeronimus
MCAA Staff Attorney

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June 4, 1999

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Comments Regarding Proposed Juvenile Protection Rules

Dear Mr. Grittner:

The Minnesota County Attorneys Association (MCAA) Juvenile Law Committee has reviewed the Proposed Juvenile Protection Rules and hereby submits the following comments:

1. **Change:** Rule 2.01 (g) be amended to provide that "**'Juvenile Protection Case Records'** means all records of the juvenile court regarding a particular case or controversy...."

   Reasoning: Without this change, the Rule could be read to include files of the parties, including the county attorney and attorney for parent(s).

2. **Change:** Rule 3.02, subd. 3, be deleted or, in the alternative, amended to mirror the language of Rule 201(b) of the Minnesota Rules of Evidence.

   Reasoning: In its current form, Rule 3.02, subd. 3 is more restrictive than Rule 201(b) of the Minnesota Rules of Evidence which allows the trial court to take judicial notice of "adjudicative facts". This has routinely been interpreted to include pleadings, reports, motions and other relevant facts of a case which have not been reduced to a finding of fact or court order.

3. **Change:** Rule 13.08, subd. 2, be amended to accurately cite to Rule 13.05, rather than Rule 13.05, subd. 2.

   Reasoning: As there is no Rule 13.05, subd. 2., this correction is simply clerical.

4. **Change:** Amend Rule 13.09 to delete the last sentence of the Rule and, in its place, insert the following sentence: "Nothing in this Rule shall be interpreted to limit the inherent power of the court to enforce its own orders."

   Reasoning: See discussion regarding Habitual Truants and Runaways.

5. **Change:** Rule 17.03 be amended to read as follows: "The following information shall not be discoverable by any party or the county attorney ~~with or~~ without a court order:
   (a) documents containing privileged information between an attorney and client; legal research, records...."

   Reasoning: In some circumstances the information listed in this Rule falls within the Rules of Evidence as discoverable if ordered by the court. Judicial review of the discovery request should suffice to safeguard the interests of the parties and justice. Furthermore, inclusion of information covered by attorney client privilege is necessary for clarity of the Rule.

6. **Change:** Rule 17.04, subd. 4(b) be amended to cite the correct Juvenile Rule. It currently cites Rule 35.02, which is a Rule of Civil Procedure.

   Reasoning: Clerical correction.

7. **Change:** Rule 30.01, subd. 2(a) be amended to read as follows: " (a) **Release Required.** A child taken into emergency protective care without a court order shall be released unless an emergency protective care hearing pursuant to Rule 31 has commenced within seventy-two (72) hours of the time the child was removed from the home pursuant to the timing provisions set forth in Rule 4 and the court has ordered continued protective care.

   Reasoning: The added language mirrors the provisions of Rule 30.01, subd. 1, thereby making the timing provisions of these two subdivisions consistent and uniform.

8. **Change:** The first sentence of Rule 30.01, subd. 2(b) be amended to allow for peace officers to authorize a child's release.

   Reasoning: This is apparently an oversight as the Rule allows for a child to be released by an officer's supervisor or county attorney, but not by the detaining officer. That this is an oversight is supported by the fact that the second sentence of the Rule refers to "[t]he peace officer, the peace officer's supervisor, or county attorney who releases the child..."

9. **Change:** Rule 31.09, subd. 1 be amended to add a clause (i) to read as follows:
   "(i) that presentation of evidence regarding one or more of the above factors could not be made because an emergency situation existed."

   Reasoning: There will be times when, in an emergency placement situation, the social

services agency and/or county attorney will be unable to obtain all of the information listed in clauses (a) through (h) within 72 hours. The additional finding will allow the court to continue a child's placement when it is necessary to do so for the safety of the child.

10. **Change:** Rule 31.09, subd. 2 be amended to read as follows: "The court may determine at the emergency protective care hearing, or at any time prior to adjudication in a child in need of protection or services matter, that reasonable efforts are not required because the facts, if proved, demonstrate that the parent has subjected a ~~the~~ child to egregious harm as defined in Minnesota Statutes §260.015, subd. 29, or the parental rights of the parent to ~~a sibling of the~~ another child have been terminated involuntarily, or the child is an abandoned infant as described in Minnesota Statutes §260.221, subd. 1a(a)(2).

    Reasoning: This change is simply to bring the rule in compliance with the language set forth in Minnesota Statutes §260.012 (a) as amended by the Minnesota Legislature during the 1999 session.

11. **Change:** Rule 36.03, subd. 3(b)(1) be amended as provide that notification regarding termination of parental rights need not be given in truancy, runaway or prostitution matters where termination is unlikely.

    Reasoning: It is the experience of the Juvenile Law Committee that termination of parental rights proceedings are rarely, if ever, commenced solely from a truancy, runaway or prostitution matter. Therefore, this language is inaccurate, unnecessary and alarming to the parents and child in these proceedings.

12. **Change:** Rule 41.01 (a) be amended as follows: "(a) **Requirement of Six (6) Month Hearing for Child Under Eight (8) Years of Age.** For a child under eight (8) years of age at the time a petition is filed alleging the child to be in need of protection or services, unless a termination of parental rights petition has been filed, the court shall conduct a hearing to determine the permanent status of a child not later than six (6) months after the child is place out of the home of the parent. ~~If a termination of parental rights petition is not filed, the county attorney must file a notice that the local social services agency does not intend to file a termination of parental rights petition, together with an affidavit from the local social services agency that the parent or legal custodian is making progress on the case plan or that the permanency plan for the child is transfer of permanent legal and physical custody to a relative. Upon receipt of such a notice,~~ The court may order the local social services agency to show cause why it should not file a termination of parental rights petition...."

    Reasoning: The stricken language is more expansive than the statute. The Rule as currently proposed creates a notice requirement that does not exist in the current statute. In striking the sentence, the Rule will be consistent with the statute.

13. **Change:** Rule 44.01, subd. 2 be amended to delete the last sentence of the paragraph and in its

place add the following: "In no event shall the time for filing a post-trial motion extend beyond 90 days from the date of filing of the order by the court."

Reasoning: The current version of Rule 44.01, subd. 2, can be read to allow a party to file a post-trial motion within 15 days of service of the notice of the order even if the service has been accomplished more than 90 days after the order has been filed. The suggested change simply clarifies that in no event may a post-trial motion be brought after the expiration of the 90-day period.

14. **Change:** Rule 46.02, be amended to delete the last sentence of the paragraph and in its place add the following: "In no event shall the time for filing an appeal extend beyond 90 days from the date of filing of the order by the court."

Reasoning: As with Rule 44.01, subd. 2, Rule 46.02 can be read to allow a party to file an appeal within 30 days after service of the order even if the service has been accomplished after the expiration of the 90-day period. The suggested change simply clarifies that in no event may an appeal be brought after the expiration of the 90-day period.

15. **Changes relating to Habitual Truants and Runaways:**

a) Rule 2.01 (m): Delete in its entirety. Insert the definitional scheme of Minn. Stat. §260.015, which provides as follows:

(m) "Secure detention facility" means a physically restricting facility, including but not limited to a jail, a hospital, a state institution, a residential treatment center, or a detention home used for the temporary care of a child pending court action.

(n) "Shelter care facility" means a physically unrestricting facility, such as but not limited to, a hospital, a group home or a licensed facility for foster care, used for the temporary care of a child pending court action.

Reasoning: The definition **"placement facility"** does not exist in any section of Minn. Stat. §260.015. Instead, the statute defines **"secure detention facility"** in Minn. Stat. §260.015, subd. 16 and **"shelter care facility"** in subd. 17. It is unnecessary and in fact, misleading, to use a new term of art in the definitional section of the rules.

b) Committee Comment Regarding Rule 2 be amended to accurately state the current status of the law.

c) Rule 13.09: be amended to delete the last sentence prohibiting placement in secure detention or, in the alternative, provide that habitual truants and runaways are exempt from the prohibition against placement in a secure facility.

d) Rule 14.04, subd 4: be amended to delete the last sentence prohibiting placement in

secure detention or, in the alternative, provide that habitual truants and runaways are exempt from the prohibition against placement in a secure facility.

Reasoning for paragraphs (b) through (d):

The Committee comment on secure detention facilities erroneously states: *"Habitual truant and runaway cases were previously considered status offenses and were covered by the Juvenile Delinquency Rules until those rules were amended in 1997."*

In fact, truants and runaways have not been classified as delinquents since 1982, when the legislature removed them from the delinquency code and classified them as juvenile petty offenders. See 1982 Minn. Laws ch. 544 §§ 1, 2 and in re Welfare of B.K.J., 451 N.W.2d 241 (Minn. App. 1990) (contains a thorough analysis of the impact of the Chips legislation on the legal definition of truancy).

The 1997 amendment specifically lists truancy and runaways under the scope of the protection rules; however this was a clarification rather than a substantive change. Truants and runaways have been covered by the Juvenile Protection Rules since 1988, when the Minnesota Legislature created the Children in Need of Protection or Services (CHIPS) legislation and defined truants and runaways as CHIPS. See Minn. R. Juv. P. 37.01 (1996) ("Rules 37 through 65 govern the procedure for all juvenile protection matters in the juvenile court of the State of Minnesota.").

The proposed rules would prohibit Juvenile Courts from detaining truants and runaways in a secure facility *ever, under any circumstances, and for any length of time.* This is a sweeping change from the existing statutory framework.

Federal law in effect in 1978 allowed non-adjudicated status offenders and non-offenders to be held in secure detention for up to 24 hours, exclusive of weekends and holidays. After a series of panel discussions with juvenile justice professionals across the county, the federal regulations were expanded in 1996 to allow for an additional 24-hour detention following the initial court appearance. 28 CFR §31.303(f)(2).

Minnesota law governing secure detention of truants and runaways was passed in 1978 in response to federal regulations. Although the current statutory scheme is somewhat confusing, a number of jurisdictions in Minnesota have interpreted state law to allow the detention of truants and runaways for up to 24 hours after being taken into custody on a warrant. Statutes, rules and Federal Regulations support this interpretation.

Clarification of Minnesota's statutory scheme with respect to truants and runaways is properly raised in the legislative arena, where the community can engage in a policy discussion about whether, and under what circumstances, truants and runaways could be placed in a secure facility. The case examples set forth below illustrate the egregiously high-

risk situations that youth place themselves in while on run. The limited use of secure detention in these cases is an issue that deserves public debate. The practical effect of the proposed rules, if adopted, is to substitute the judgement of the Committee for a public debate on this issue, and to abrogate the authority of the court to enforce its own orders.

e) Rule 14.04: be amended to add a subdivision 5 that reads as follows: "Nothing in the Rule shall be interpreted to limit the inherent authority of the court to enforce its own order.

Reasoning: In State ex rel. L.E.A. v. Hammergren, 294 N.W.2d (1980), the Minnesota Supreme Court held that the juvenile court may still use its contempt authority to detain status offenders in a secure facility, provided that appropriate due process safeguards are followed. Hammergren is still good law in this state. See also; In Interest of J.S.W., 817 P.2d 508, 509 (Colo. 1991) (state law which precluded juvenile court from detaining a juvenile in a secure facility as a sanction for contempt in a truancy case was unconstitutional by "impermissibly abrogating the judiciary's power to incarcerate juveniles for contempt of court orders."); 28 CFR §31.303(f) (nondelinquent juvenile offenders may be held in secure detention if they are in violation of a valid court order).

f) Comment to Rule 29.02: Be amended to accurately state the law as it relates to habitual truants and runaways.

Reasoning: The Committee comment cites only two of the provisions of chapter 260 pertaining to this issue, resulting in one interpretation of the legality of short term use of secure detention. Some courts in the state, including those in Hennepin and Ramsey Counties, interpret §260.173, Subd. 3, cited by the Committee, as applying after the first 24 hours. Minn. Stat. §260.173, Subd. 1 and 2, read together allow secure detention for the first 24 hours if it is the least restrictive setting consistent with the child's health and welfare and in the closest proximity to the child's family as possible. The child must have been taken into custody pursuant to an order issued under Minn. Stat. §260.165.

The Committee has chosen one interpretation of state law over another and proposed to prohibit courts from an alternative reasonable interpretation that also protects children. Again, this extreme change should be made by the legislature after debate. The Juvenile Law Committee recommends that the rules maintain the ability for juvenile courts to interpret this law as they see fit until such time as the legislature makes clear which interpretation is this state's policy.

Postscript: Case Examples

Our day-to-day experience with truants and runaway youth have highlighted the need to exercise caution when promulgating new rules which would prevent the juvenile court from exercising the

judicious use of time-limited, appropriate, secure detention that is attentive to both the due process and safety needs of these youth. Generally, youth that are detained after execution of a warrant have repeatedly violated court orders, and the court has attempted many interventions. While we do not suggest that the use of short-term detention is a panacea, the ability to place in a secure facility, even for just 24 hours, freezes the situation long enough to stabilize the child's medical and emotional condition. It allows professionals time to arrange for appropriate non-secure placements and sometimes serves to impress upon the child the need to comply with court orders.

The following are several examples from Hennepin and Ramsey Counties. They illustrate the extreme safety risks presented by youth that are on the run and living on the streets.

Case #1. Numerous warrants were issued over a 17-month period based on this runaway's failure to appear in court because she was on the run. The arresting peace officer brought this 14-year old female to the detention center in January 1998. While in detention (for less than 24 hours), the child was taken to the medical center because she had gone into insulin shock.

Her risk factors: juvenile diabetes, obesity, chemical abuse issues, and long-standing parent-child conflict. This child's medical condition had become life threatening on several occasions when she was on run and did not take her insulin.

Case #2. Five young girls between the ages of 12 and 14 were gang-raped by 9 juvenile males and one adult male. All of these girls had run away from home, most of them numerous times, staying away for days if not weeks. The parents tried everything they could to stop the girls from running away. The end result was tragic for all the girls. Without the ability to keep the girls safe and stable for at least 24 hours in a secure facility, the girls were brutally victimized.

Case #3. Five girls, ages 12-15, were gang-raped by 9 juvenile males and one adult male. The girls had been running away from home for extended periods of time. Conventional interventions to stop them from running away were unsuccessful. Even following the gang rape, the girls continued to run away fearing rejection from their families. Placement in non-secure foster care was futile, as the girls would run away from these placements whenever things became stressful.

Case #4. The parents of an adolescent male used every law enforcement, school-based and social service intervention available. Nevertheless, he continued to run away from home repeatedly, often gone for three or four days at a time. A truancy petition was filed. The parents appeared at the initial hearing and reported that their son had run away that morning because he knew about court. A warrant for the child's arrest was issued, authorizing placement in secure detention pursuant to the Juvenile Code. The next time the child returned home, the parents notified the police. The child was picked up and placed in a secure facility overnight. A hearing was held the next morning and the child was released to his parents on condition he stop running away from home and attend school. Since that

time, the child has not run from the home, has improved his attendance and has remained safe.

Case #5. Numerous runaway reports received on a young girl starting when she was 12 years old. Over the next two years, there were numerous attempts to intervene and she was placed in foster homes and shelter care. Late in 1998, at the age of 14, this girl ran from a group home placement. While on the run she was raped by 4 men. These 4 men, fearing she would recognize them, murdered her.

These examples, extreme though they may be, highlight the need to use secure detention in limited circumstances where the child has disobeyed a previous order of the court and is engaging in dangerous behaviors. The vast majority of these children will not fall within the commitment statutes, as they are not "mentally ill" as defined by law. Furthermore, civil commitment is not a preferable alternative to CHIPS proceedings. It is the position of the MCAA Juvenile Law Committee that trial courts properly exercise their current authority to detain truants and runaways. If this authority is to be curtailed, it should be done only after legislative review.

The MCAA Juvenile Law Committee respectfully recommends that the Rules of Juvenile Procedure preserve the current law on the subject of the use of secure detention for truants and runaways.

Respectfully submitted,

James P. Backstrom
Dakota County Attorney
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Co-Chair

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APPENDIX

28 CFR § 31.303(f)(2) For the purpose of monitoring for compliance with § 223(a)(12)(A) of the [Juvenile Justice] Act, a secure detention or correctional facility is any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or nonoffenders, or used for the lawful custody of accused or convicted adult criminal offenders. Accused status offenders or nonoffenders in lawful custody can be held exclusive of weekends and holidays, prior to an initial court appearance and for an additional twenty-four hours, exclusive of weekends and holidays, following an initial court appearance.

28 CFR § 31.303(f)(3)(i-vii) ***Valid court order.*** For the purpose of determining whether a valid court order exists and a juvenile has been found to be in violation of that valid order all of the following conditions must be present prior to secure incarceration:

The juvenile must have been brought into a court of competent jurisdiction and made subject to an order issued pursuant to proper authority. . . .

- The court *must have entered a judgment* and/or remedy in accord with established legal principles based on the facts after a hearing, which observes proper procedures.
- The juvenile in question must have received adequate and fair warning of the consequences of violation of the order at the time it was issued and such warning must be provided to the juvenile and to the juvenile's attorney and/or legal guardian in writing and be reflected in the court record and proceedings.
- All judicial proceedings related to an alleged violation of a valid court order must be held before a court of competent jurisdiction. *A juvenile accused of violating a valid court order may be held in secure detention beyond the twenty-four hour grace period* permitted for a noncriminal juvenile offender under OJJDP monitoring policy, for protective purposes as prescribed by State law, or to assure the juvenile's appearance at the violating hearing, as provided by State law, if there has been a judicial determination based on a hearing during the twenty-four hour grace period that there is probable cause to believe the juvenile violated the court order. In such case the juvenile may be held pending a violation hearing for such period of time as is provided by State law, but in no event should detention prior to a violation hearing exceed 72 hours exclusive of nonjudicial days. A juvenile alleged or found in a violation hearing to have violated a valid court order may be held only in a secure juvenile detention or correctional facility, and not in an adult jail or lockup.
- Prior to and during the violation hearing the following full due process rights must be provided: (A) the right to have the charges against the juvenile in writing served upon him a reasonable time before the hearing; (B) The right to a hearing before a court; (C) The right to an explanation of the nature and consequences of the proceeding; (D) The right to legal counsel, and the right to have such counsel appointed by the court if indigent; (D) The right to confront witnesses; (F) The right to present witnesses; (G) The right to have a transcript or record of the proceedings; and (H) The right of appeal to an appropriate court.
- In entering any order that directs or authorizes the placement of a status offender in a secure facility, the judge presiding over an initial probable cause hearing or violating hearing must determine that all the elements of a valid court order . . . were afforded the juvenile and, in

the case of a violating hearing, the judge must obtain and review a written report that: reviews the behavior of the juvenile and the circumstances under which the juvenile was brought before the court and made subject to such order; determines the reasons for the juvenile's behavior; and determines whether all dispositions other than secure confinement have been exhausted or are clearly inappropriate. This report must be prepared and submitted by an appropriate public agency (other than a court or law enforcement agency).

- A nonoffender such as a dependent or neglected juvenile cannot be placed in secure detention or correctional facilities for violating a valid court order.

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July 30, 1999

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Comments Regarding the Proposed Juvenile Protection Rules

Dear Mr. Grittner:

Following are my comments regarding the proposed Juvenile Protection Rules. I do not request an oral presentation. As a committee member, I appreciate that the proposed rules are the result of many hours of consideration, debate and compromise. Therefore, I intend these comments to be non-substantive.

1. **Change:** Rule 13.08, subd. 2, be amended to accurately cite Rule 13.05, rather than Rule 13.05, subd. 2.

Reasoning: This is a clerical correction. There is no Rule 13.05, subd. 2.

2. **Change:** Rule 14.04, subd. 4 be deleted and incorporated elsewhere.

Reasoning: Rule 14.04 concerns contempt sentencing. Subdivision 4 lists the court's remedies when a person fails to respond to a summons or subpoena (i.e., contempt proceeding and/or warrant). Since subdivision 4 does not regard contempt sentencing, the information in subdivision 4 is misplaced. The information regarding failure to respond to a subpoena is already in Rule 13.09. I suggest the committee delete subdivision 4 and create a new rule regarding the court's remedies for failure to respond to a summons. The new rule should be contained in Rule 33 (Summons and Notice). The new rule should duplicate Rule 13.09.

3. **Change:** Rule17.04, subd. 2 (a) be amended as follows: "A deposition may be taken upon agreement of the parties~~, or if ordered by the court, pursuant to subdivision 2 (b)~~."

Reasoning: Rule 17.04, subd. 2 (a) regards depositions by agreement of the parties. The deleted language regards depositions by court order. The deleted language is misplaced and redundant given Rule 17.04, subd. 2 (b) (depositions by court order).

4. **Change:** Rule 17.04, subd. 4 (b) be amended to delete the reference to Rule 35.02.

Reasoning: The committee incorporated Minnesota Rules of Civil Procedure 26.02(d)(2) in Rule 17.04, subd. 4 (b). The language is identical. The reference to Rule 35.02 is to Minnesota Rules of Civil Procedure 35.02. The reference to Rule 35.02 can be deleted. It is not necessary to cite to a juvenile protection rule in place of Rule 35.02. Rule 35.02 of the Minnesota Rules of Civil Procedure governs the provision of reports resulting from court ordered examinations, as well as reports from previous examinations. There is no corresponding juvenile protection rule. Instead, the proposed rules require a party who obtains a court ordered examination to automatically provide a copy of the examination report to all parties. Rule 17.04, subd. 1(b). Reports of previous examinations may be obtained by court order pursuant to Rule 17.04, subd. 3.

5. **Change:** Rule 17.06, subd. 4 (c) be amended as follows: "an order striking the petition or parts of the petition, ~~answer, or parts of an answer, denials or certain denials to requests for admission,~~ dismissing the proceeding . . ."

Reasoning: The proposed rules do not provide for answers or requests for admissions.

6. **Change:** Amend Rule 26.01, subd. 1 as follows: "The court shall appoint a guardian ad litem to advocate for the best interests of each child who is the subject of a juvenile protection matter, except in cases where the sole allegation is that the child is a habitual truant or a runaway. . ."

Reasoning: The words "the child is" are obviously missing from this sentence.

7. **Change:** Rule 26.03 be amended as follows: "The court shall sua sponte or upon the written or on-the-record request of a party or participant appoint a guardian ad litem for a parent who is a party, or the legal custodian, ~~who is a party to the juvenile protection proceeding~~ if the court determines that the parent who is a party, or the legal . . . '

Reasoning: Rule 26.03 provides for the appointment of a guardian ad litem to speak on behalf of a parent or legal custodian who is unable to competently participate in the court proceeding. The rule should apply only to those who have party status and are therefore expected to participate in the court proceeding. Not all parents are parties. Furthermore, any legal custodian is a party by definition. The suggested language clarifies that a guardian ad litem may be appointed for any parent who is a party and any legal custodian.

8. **Change:** Rule 28.01be amended as follows: " . . . Rule ~~22~~ 21 . . . Rule ~~23~~ 22 . . ."

Reasoning: The citations in the proposed rule are incorrect.

9. **Change:** Rule 31.01, subd. 2(a) be amended as follows: " Rule ~~30~~ 29.02 . . ."

Reasoning: The citation in the proposed rule is incorrect.

10. **Change:** Rule 31.05(g) be amended as follows: "that failure to appear at future hearings could result in a finding that the petition has been proved and an order ~~adjudicating the child in need of protection or services~~ transferring legal custody of the child to another . . ."

Reasoning: The average person does not know what a child in need of protection or services adjudication is. It is more informative to advise of the possible custody loss. The advisory recipient will better understand what is at stake.

11. **Change:** Rules 32, 33 and 34 be moved to the General Operating Rules section of the proposed rules.

Reasoning: Rules 32, 33, and 34 regard methods of filing and service, summons and notice, and petitions. These rules seem more logically grouped with the "General Operating Rules" than the "Course of Case" rules. As a practitioner, I would look to the general operating rules for information regarding service, notice, summons and petition format rather than the rules regarding the type and sequence of hearings within a case.

12. **Change:** The Advisory Committee Comment to Rule 33.02 be deleted.

Reasoning: The same comment appears after Rules 33.03 and 33.05. Should not the comment appear at the end of the rule?

13. **Change:** The Advisory Committee Comment to Rule 33.03 be deleted.

Reasoning: The same comment appears after Rules 33.02 and 33.05. Should not the comment appear at the end of the rule?

14. **Change:** Rule 34.02, subd. 2(c)(1) be amended as follows: "In addition to the content requirements of subdivisions 1 and 2(b), a petition establishing a prima facie case that a child in need of protection or services matter exists and that the child is the subject of that matter shall be filed . . ."

Reasoning: As written, the rule fails to state the required finding. The amendment states the required finding as found in Rule 34.02, subd. 2(c)(2).

15. **Change:** Rule 34.02, subd. 3 (b) be amended as follows: " . . .~~In answering a petition that seeks alternative permanent placement relief, a party shall identify on the record the permanent placement option the party believes is in the best interests of the child.~~"

Reasoning: The proposed rules do not provide for answers.

16. **Change:** Rule 34.02, subd. 4 (b) be amended as follows: " . . .~~In answering a petition that seeks alternative permanent placement relief, a party shall identify on the record the permanent placement option the party believes is in the best interests of the child.~~"

Reasoning: The proposed rules do not provide for answers.

17. **Change:** Rule 34.02, subd. 6 be amended as follows: "If there is reason to believe that an individual may be endangered by disclosure of an address required to be provided pursuant to this ~~subdivision~~ rule, . . ."

Reasoning: Rule 34.02, subd. 6 does not require address disclosure. Rule 34.02, subd. 1 (b), (c), (d) and (e) require address disclosure. The citation should be to "this rule" rather than "this subdivision."

18. **Change:** Rule 36.03, subd. 7 (a) be amended as follows: "If the court makes a finding that the admission is accepted and the statutory grounds admitted are proved, or that the admission is conditionally accepted pending the court's approval of a settlement agreement pursuant to Rule 19, the court shall ~~enter an adjudication and proceed to disposition~~ proceed pursuant to Rule 39. . ."

Reasoning: Rule 36.03, subd. 7 (a) is in conflict with Rule 39.02. Rule 36.03, subd. 7 (a) mandates adjudication upon acceptance of an admission. Rule 39.02 allows the court to withhold adjudication. The proposed change clarifies the court's ability to withhold adjudication pursuant to Rule 39.02.

19. **Change:** Rule 38.02, subd. 1 (b) be amended to make the rule consistent with Rule 4.03, subd. 2 (a).

Reasoning: Rule 38.02, subd. 1 (b) states the permanency trial must commence within seven months of out-of-home placement. Rule 4.03, subd. 2 (a) states the permanency trial must commence within six months of out-of-home placement. The rules are inconsistent. Clarification is needed.

20. **Change:** Rule 38.03, subd. 2 (x) be amended as follows: "if written argument is to be submitted, it shall be submitted within fifteen (15) days of the conclusion of testimony. The trial is not considered completed until written arguments are submitted."

Reasoning: The additional language is from Rule 38.05, subd. 2, regarding the court's decision after a child protection trial. The language belongs in the rule on trial conduct and procedure rather than in the rule on court decision making.

21. **Change:** Rule 38.05, subd. 2 be amended as follows: "The court shall issue its findings ~~and order concerning adjudication~~ within fifteen (15) days of the date the trial is completed. ~~If written argument is to be submitted, such argument must be submitted within fifteen (15) days of the conclusion of testimony. The trial is not considered completed until written arguments, if any, are submitted.~~ If the court makes a finding that the statutory grounds set forth in the petition have been proved, the court shall ~~schedule the matter for further~~ proceed~~ings~~ pursuant to Rule 39."

Reasoning: Rule 38.05, subd. 2 regards the court's trial findings (i.e., whether or not the case is proven). The court's decision whether or not to adjudicate is a separate one, governed by Rule 39. Any time limit on the court's decision whether or not to adjudicate should be contained in Rule 39. The information regarding time limits for written arguments is already contained in Rule 38.03, subd. 2 (x) (trial conduct and procedure). The information regarding completion of trial upon submission of written arguments should be moved to Rule 38.03, subd. 2 (x), for the reasons provided at line 20.

22. **Change:** Rule 38.05, subd. 3 (a) be amended as follows: " . . . pursuant to Rule ~~35~~ 39. . ."

Reasoning: The reference to Rule 35 is incorrect. Rule 35 governs the admit/deny hearing. If the court finds that a child is in need of protection or services as the result of a termination of parental rights trial, the court proceeds to adjudication pursuant to Rule 39.

23. **Change:** Rule 39.01 be amended as follows: "If the court makes a finding that the statutory grounds set forth in a petition alleging a child to be in need of protection or services are proved~~, or if the court accepts a no contest admission pursuant to Rule 36,~~ the court shall: . . ."

Reasoning: A no contest admission requires the admission of "some or all of the statutory grounds set forth in the petition." Rule 36.03, subd. 4 (c). Thus, the court does make a finding that the statutory grounds set forth in a petition are proved when the court accepts a no contest admission. There is no need, therefore, to reference no contest admissions separately. To do so, may cause confusion regarding the type of finding that results from a no contest admission.

24. **Change:** Rule 39.02, subd. 1 be amended as follows: ". . . ninety (90) days from the finding that the statutory grounds set forth in the petition have been proved ~~or the court approves a no contest admission~~. . ."

Reasoning: A no contest admission requires the admission of "some or all of the statutory grounds set forth in the petition." Rule 36.03, subd. 4 (c). Thus, the court does make a finding that the statutory grounds set forth in a petition are proved when the court accepts a no contest admission. There is no need, therefore, to reference no contest admissions separately. To do so, may cause confusion regarding the type of finding that results from a no contest admission.

25. **Change:** Rule 40.02 be amended as follows: "To the extent practicable, the court shall conduct a disposition hearing and enter a disposition order the same day it makes a finding that the ~~child is in need of protection or services~~ statutory grounds set forth in the petition have been proved. The disposition order must be issued within ten (10) days from the date ~~of entry of adjudication~~ the court finds the statutory grounds set forth in the petition have been proved.

Reasoning: The disposition should be timed from the date the petition is admitted or proven, not from the date of adjudication. The court may stay adjudication pursuant to Rule 39.02. If adjudication is stayed, Rule 40.02's timing mechanism is not triggered.

26. **Change:** Rule 40.03, subd. 1 be amended as follows: ". . .~~or~~ order a pre-disposition report . . ."

Reasoning: This is a clerical correction.

27. **Change:** Rule 40.03, subd. 5 be amended as follows: " (b) upon the written or on-the-record motion of ~~by~~ a party. . ."

Reasoning: This is a clerical correction.

28. **Change:** Rule 40.05, subd. 1 be amended as follows: "The disposition order ~~made by the court~~ shall contain. . ."

Reasoning: The deleted language is redundant.

29. **Change:** Rule 40.05, subd. 1 (c)(9) be amended as follows: "a brief description of the ~~preventive and reunification~~ efforts made to prevent or eliminate the need for removal of the child from the home. . ."

Reasoning: The deleted language is redundant.

30. **Change:** Rule 43.02, subd. 2 (f) be amended as follows: " . . . agreement is signed, the date the court approves the placement . . ."

Reasoning: This is a clerical correction.

31. **Change:** Rule 43.02, subd. 3 (d) be amended as follows: "When the court determines the child is in need of protection or services . . ."

Reasoning: This is a clerical correction.

Thank you for your consideration of these comments.

Respectfully submitted,

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HENNEPIN COUNTY - FOURTH JUDICIAL DISTRICT
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July 30, 1999

Mr. Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Re: In re 1999 Proposed Juvenile Protection Rules
Appellate Court Case No. C4-97-1693

Dear Mr. Grittner:

Enclosed are the comments and a request to participate of the Statewide Public Defender Task Force on Child Protection Procedures.

Sincerely,

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Assistant Public Defender
(612) 348-6618

PWG/vh
enc.

C4-97-1693

STATE OF MINNESOTA

IN SUPREME COURT

In re 1999 Proposed

Juvenile Protection Rules

COMMENTS OF THE STATEWIDE PUBLIC DEFENDER TASK FORCE ON CHILD PROTECTION PROCEDURES

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA

A. Introduction And Request To Participate

The Statewide Public Defender Task Force on Child Protection Procedures requests leave of the Court to offer written comments and limited oral testimony on the April 19, 1999 Final Report of the Court's Advisory Committee on the Amendment of the Juvenile Protection Rules.

The Statewide Public Defender Task Force on Child Protection Procedures began meeting in 1997, after this Court appointed its Advisory Committee and directed that committee to propose amendments to the 1983 Minnesota Rules of Juvenile Procedure, Rules 37-65. The Conference of Chief Public Defenders approved the formation of this Task Force. It is composed of the Minnesota State Public Defender, John M. Stuart, and district public defenders from all ten judicial districts, who have met periodically over the nearly two years since the Court appointed the Advisory Committee. About thirty district public defenders have participated in these meetings, which became more frequent once the Advisory Committee began releasing drafts of proposed amendments to the rules.

The Task Force requests that the Court permit oral testimony from:

1) John M. Stuart, Minnesota State Public Defender, concerning Proposed Rules 3.02, 25, and 29.02;

2) Dick Scherman, Administrator of the State Board of Public Defense, concerning financing of Rule-25 court-appointed lawyers;

3) Candace Rasmussen, Chief Public Defender, Third District, concerning Proposed Rules 17, 22 and 36.01;

4) Fred Friedman, Chief Public Defender, Sixth District, concerning Proposed Rule 12;

5) Jenny Walker, Chief Public Defender, Tenth District, concerning the implementation in the tenth district of 1983 Minn. R. Juv. P. 40.01, subd. 1, Minn. Stat. § 260.155, subd. 2(e), and Proposed Rule 25.02, subd. 3;

6) Susan St. Clair, Assistant Public Defender, Ninth District, or Karen Garvin, Assistant Public Defender, Second District, concerning Proposed Rule 7;

7) Lisa McNaughton, Assistant Public Defender, Fourth District, concerning Proposed Rules 26.03 and 35.03; and

8) Peter W. Gorman, Assistant Public Defender, Fourth District, concerning Proposed Rules 33, 34.04, 44 and 46.

B. Task Force Comments on Proposed Juvenile Protection Rules

1) Proposed Rules 2.01(m), 13.09 and 14.04, subd. 4

Change: No changes should be made.

Reasoning: The Task Force opposes the changes proposed by the County Attorneys Association in its June 7, 1999 filing which would permit the use of secure detention for truants, runaways, and children involved in child-protection proceedings. The rules should make clear that secure detention, including jails, is not an appropriate placement for children facing these proceedings.

In its definition in Proposed Rule 2.01(m), the Advisory Committee used the definition of shelter-care facility, and expanded that definition to make clear that it applies to licensed foster-care provisions in the statutes, and to make clear that it excludes secure detention.

In Minn. Stat. § 260.173, the legislature has made clear that secure detention is inappropriate for status offenders and children involved in child-protection proceedings, and has required placement in the least-restrictive setting appropriate, shelter care. This Court, too, took a dim view of confinement of status offenders in secure detention facilities. State *ex. rel.* L.E.A. v. Hammergren, 294 N.W.2d 705 (Minn. 1980).

The current rule, Minn. R. Juv. P. 51.02, follows the statute, and requires placement in the least-restrictive facility appropriate.

In many non-metropolitan counties, children are detained in adult jails for the first 24 or 48 hours, and weekends are sometimes excluded. These children are often held in solitary confinement because they must be kept separate from adults. This happens to young girls who run away from violent and sexually-abusive homes; adoption of the County Attorneys Association's proposal would disproportionately incarcerate young women. Effectively, they would be confined in solitary confinement for trying to protect themselves.

Shelter care facilities and foster care homes are available alternatives. It is bad enough to confine children in this fashion when they are accused of crime—it is not only illegal, but is also simply wrong to confine children who we are purporting to protect. We shouldn't lock children up to protect them, and current law precludes that. These rules should not change that law. We do not protect children by jailing them.

2) Proposed Rule 3.02, subd. 3

Change: Delete Proposed Rule 3.02, subd. 3 and replace with: "Judicial Notice shall be governed by Minn. R. Evid. 201(b) and the decisions of the Minnesota appellate courts."

Reasoning: We disagree with the County Attorneys Association in its June 7, 1999 filing in which it says that the proposed rule is more restrictive than Minn. R. Evid. 201(b). Indeed, the proposed rule would actually permit a court to judicially notice far more materials than presently permitted by rule and case law. The proposed rule would permit the court to take judicial notice of "any" finding of fact, "any" court order in "any" proceeding" in "any" other court concerning the child, its

parent or its custodian. Neither Minn. R. Evid. 201(b) nor any reported Minnesota case supports such breadth.

We also disagree with the County Attorneys Association's suggestion that Minn. R. Evid. 201(b) "has routinely been interpreted to include pleadings, reports, motions and other relevant facts of a case which have not been reduced to a finding of fact or a court order." That this is simply not the case is demonstrated by reviewing Welfare of D.J.N., 568 N.W.2d 170 (Minn. Ct. App. 1997) and *In re* Zemple, 489 N.W.2d 818 (Minn. Ct. App. 1992).

Judicial notice may only be taken of matters which are generally known within the jurisdiction or which are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Thus, allegations contained in documents filed in the court's file which could reasonably be the subject of dispute are not judicially noticeable. Juvenile court files often contain reports on the family's progress under supervision to which are attached evaluative reports of service providers. But the contents of these reports *could* reasonably be disputed.

Juvenile judges should not be permitted to try child-protection cases based on the contents of the family's file. Those cases should be tried based upon live testimony and documents admissible under the rules of evidence. Documents which contain evaluative judgments, the conclusions of which could reasonably be disputed, cannot be judicially noticed, just as documents which contain evaluative judgments are not business records. Welfare of L.Z., 396 N.W.2d 214, 220-21 (Minn. 1986).

3) *Proposed Rule 7*

Change: Delete second sentence of Advisory Committee Comment to Proposed Rule 7.03.

Reasoning: This sentence is a mistake. It is not the law that a party who removes a referee from a proceeding may not thereafter remove a judge as of right.

Change: Rule 7.07, subd. 2 should be changed to read: "No judge shall preside . . . the matter. No judge who has presided over a contested or adjudicatory hearing in a C.H.I.P.S. or permanency proceeding may preside over the trial of a termination of parental rights proceeding involving the same children and parents. If there is . . . ."

Reasoning: In the last two years, Hennepin County juvenile judges have followed a policy of blocking individual families to one judge, and that judge then hears all child-protection proceedings involving that family. In large parts of greater Minnesota, this practice results from the small number of judges chambered in particular judicial districts. Regardless of the venue, it is said that this practice fosters both judicial economy and consistency of decisions concerning the same family.

Parents have a due-process right in juvenile court to an impartial fact-finder. *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970). This right rests upon simple concepts of fair play, particularly when the judiciary intervenes in family life and makes irrevocable decisions which can include breaking the parent-child bond. Few things in life are more sacred than a parent's bond with one's child. A parent is certain to question the process that she has been accorded when she appears for a termination trial and faces the same judge who has previously made C.H.I.P.S., permanency or emergency protective-care decisions concerning her family. Such a parent might well assume that extra-judicial familiarity with her family is the norm, not the exception. Those whose lives are forever changed by these decisions must perceive the process as just. If they don't then the process fails its public.

This due-process expectation we are speaking of is not an illusory one. Judges must, under Canon 3 of the Canons of Judicial Conduct, perform judicial duties without bias or prejudice, and should disqualify themselves if their partiality might reasonably be questioned. Judges can become biased toward a litigant or the litigant's lawyer as a result of previous proceedings. It is easy to see how this could happen, especially in greater Minnesota, in which the same lawyers appear before the same very-few judges. This is why notices to remove as of right have long existed in Minnesota law. And the evidence in these child-protection hearings is often not particularly pleasant.

A judge who presides at a contested termination of parental rights trial after previously presiding over a C.H.I.P.S., permanency or emergency-removal hearing will often remember the evidence offered at those prior proceedings, including evidence the judge ruled inadmissible, regardless of the admissibility or the relevance of that evidence. Welfare of A.R.W., 268 N.W.2d 414, 417-18 (Minn.), *cert. denied*, 439 U.S. 989 (1978). Judges are human, and can't be expected to purge from their minds inadmissible or prejudicial evidence from a prior proceeding. *See* Welfare of J.M.G., 360 N.W.2d 403, 410 (Minn. Ct. App. 1985) (Crippen, J., concurring). That is why adjudicatory hearings in delinquency cases are not heard by the judge who granted a suppression motion in the pretrial evidentiary hearing. Welfare of A.B.L., 358 N.W.2d 417, 422 (Minn. Ct. App. 1984).

Those who say that economy and consistency are served by having one judge hear both C.H.I.P.S. and termination hearings forget that the focus of those proceedings differs. In C.H.I.P.S. cases, the goal is to reunite the family; the judge frequently reviews progress reports on case plans, and, at hearings, often becomes a mentor to the parent. By contrast, a termination petition is filed when the agency concludes that the family can't be reunited, and the relationship between the parent and the agency then goes from rehabilitative to adversarial. The judge's role as a coach is over.

A party in a child-protection proceeding should not be precluded from removing a judge from a contested hearing merely because that judge presided over a prior preliminary proceeding which was not contested. This is the rule in adult criminal court.

4) *Proposed Rules 12.01 and 12.02*

Change: "The court may hear motions on non-substantive matters and conduct . . . conference."

Change: "By agreement . . . the court may hold hearings and take testimony on non-substantive matters by telephone . . . conference."

Reasoning: This Court has indicated many times how important child protection matters are to parents, to children and to care providers. The decisions trial judges make in these matters are far too important to be done by telephone or by interactive video conferencing. These decisions should be made while looking people in the eye, assessing their appearance and demeanor, and should be made in the courtrooms of our courthouses as was always intended.

We recognize that it may be inconvenient for judges in rural districts to go from one courthouse to another to hear a matter, but this inconvenience is nothing compared to the inconvenience of moving children around or compared to the permanence of some of these difficult decisions.

We are afraid that judges will pressure parents and lawyers to agree to a telephonic or interactive video hearing; parents will be afraid to require a judge to drive to a rural courthouse where a matter is venued if the judge prefers to conduct the hearing electronically, especially if that judge controls the placement of their children. Parties and lawyers should not be placed in this situation.

Evidentiary hearings, testimonial hearings and emergency-protective care hearings should occur with everyone present in the same courtroom. None of us would want our future or our children's future decided by an electronic hearing presided over by a judge in a distant city. Our clients don't, either. This Court doesn't hear arguments in this fashion. The placement of children should not be heard this way, either.

5) *Proposed Rule 17.03*

Change: No change should be made.

Reasoning: This rule should be adopted without amendment. The change proposed by the County Attorneys Association in its June 7, 1999 filing would erode the attorney-client privilege by allowing discovery of privileged information and work product with a court order. And the protection accorded by judicial review of the discovery issue, as argued by the County Attorneys Association, is illusory if the trial judge is the same judge who presided over the discovery issue. The rule as proposed reflects existing law: privileged information and work product

is not discoverable. The Advisory Committee's deliberations on Proposed Rule 17 reflect a thoughtful and fair analysis of the burdens of proof and the difficulty of going forward with extensive civil-type discovery in fast-paced child-protection proceedings. The proposed rule is a reasonable compromise.

6) *Proposed Rule 22.02, subd. 2*

Change: "Notwithstanding subdivision 1 . . . regarding the child[,] other than the trial."

Reasoning: At trial, the rules of evidence apply, and the protections of the fact-finding process provided by the rules of evidence would be meaningless if foster parents or relatives can say whatever they wish as part of an "opportunity to be heard." On occasion, foster parents and relatives will make surprising allegations which should be subject to the same kind of factual testing, including discovery and cross-examination, that is available for other information offered into evidence.

Change: "Any other relative . . . to be heard. Any party may respond to any presentation made by a relative or foster parent. This subdivision . . . ."

Reasoning: It is not fair to allow a foster parent or relative to present information which may be considered by the court in making important decisions with no notice to the other parties. If the court is going to consider that information in making its decision, it should grant the parties time to respond to information from the foster parent or relative, and should allow cross-examination of the foster parent or relative.

7) *Proposed Rule 25.02*

Change: Appointments of counsel for children over 12 under Proposed Rule 25.02, subd. 1 should not be mandatory.

Reasoning: A child over the age of 12 who is not a respondent to the proceeding should be able to waive counsel, like adults charged with misdemeanors under Minn. R. Crim. P. 5.02, subd. 2. The child's interests are protected by the guardian-ad-litem, counsel for the guardian and the petitioner. If a child has a particular interest in some issue before the court, the child

may request counsel.

Change: Appointments of counsel under Proposed Rule 25.02, subd. 2 for truants, runaways and those accused of prostitution, regardless of age, should not be mandatory.

Reasoning: Children responding to these allegations should be able to waive counsel. Appointment of counsel should become mandatory if the child, as a result of the proceeding, would be placed out of the home. *See* Minn. Stat. § 260.155, subds. 2(a), 2(b)(2); Minn. R. Juv. P. 3.02, subds. 2-3.

Change: Proposed Rule 25.02, subd. 3 should be amended to require that the court, before appointing counsel for a child under 12, first determine that the child is mature enough to work with the lawyer in making decisions about the case.

Reasoning: This issue is current being debated in a number of forums, and different practices have been implemented among the judicial districts and indeed among judges in the same district. Public defenders provide advocacy and client counseling, both of which functions depend upon the ability of the client to be part of a dialogue. The juvenile court must be given standards for appointing counsel for children so young so that the appointment decisions may be reviewed. Under Proposed Rule 25.02, subd. 3 as written, some judges will never appoint counsel for children under 12, while other judges will always do so, regardless of the child's age and maturity.

Change: Proposed Rule 25.02, subd. 5 should be amended to read: "Upon request of the guardian ad litem, the court ~~shall~~ may appoint counsel for the guardian ad litem ~~at state expense.~~"

Reasoning: The State Board of Public Defense is not responsible for providing counsel for guardians ad litem. *See* Minn. Stat. § 611.14(d) and Minn. Stat. § 260.155, subd. 2.

Proposed Rule 25.02 makes several references to the provision of counsel "at state expense." While there are admirable policy arguments which support broad provision of counsel in child-protection cases, there is no federal constitutional right to counsel in these cases, and the issue thus becomes one of financing, the province of the legislature. To date, the legislature has not provided sufficient financing for public defenders in the child-protection cases for which we are

presently responsible, and we should not be expected to provide more services in this area without additional financing. The public-defense system presently has far less staff and resources than state and national caseload standards require.

Attachment A to this brief is an October 6, 1998 letter from Administrator Dick Scherman of the State Board of Public Defense concerning the use of the term "at state expense."

8) Proposed Rule 26.03

Change: "The court ~~shall~~ may sua sponte . . . ."

Reasoning: This appointment should not be mandatory. There are several problems with this rule. First, it requires the court to make a determination about competency, but that may be the ultimate issue in the child-protection matter. Second, the party is most likely represented by counsel, and there may be no need for a guardian in addition to an attorney.

9) Proposed Rule 27.03

Change: Proposed Rule 27.03 should be amended as follows:
"If a person other than counsel ~~or guardian ad litem~~ engages in conduct which disrupts the court, the person may be excluded from the courtroom."

Reasoning: There is no reason to allow a hearing to be delayed because a guardian ad litem refuses to cease disruptive behavior. In this respect, the guardian ad litem should not be treated differently than any other party.

10) Proposed Rule 33.02, subd. 3(a)

Change: "The summons shall . . . pursuant to Rule 32.02, subd. 3. In proceedings governed by the Indian Child Welfare Act, service by publication is not permitted."

Reasoning: The Indian Child Welfare Act requires serviced by registered mail upon the parent, custodian and tribe. 25 U.S.C. § 1912(a) (1994). Service by publication is not permitted, and some jurisdictions have specifically so held. Matter of L.A.M., 727 P.2d 1057 (Alaska 1986); Smith v. Tisdal, 484 N.E.2d 42 (Ind. Ct. App. 1985). A child-protection adjudication can be invalidated because of a defect in service. 25 U.S.C. § 1914 (1994). If the petitioner is not able to locate the respondent parent or custodian by registered mail, substituted service is permitted upon the United States Secretary of the Interior. The Interior Department's guidelines for implementation of the Act additionally permit personal service, as it is superior to mailed service. 44 Fed. Reg. 67583, 67588-89 [§ B.5.(e)]. The availability of these substituted-service devices ensures that a child-protection proceeding will not be stalled because of an inability to locate the parent.

11) Proposed Rule 33.02, subd. 4(a)(1)

Change: "a copy of the petition, . . . not previously provided; these items shall not be contained in or attached to the summons if the court has authorized service of the summons by publication pursuant to Rule 33.02, subd. 3(a);

Reasoning: The court may authorize service of the summons by publication. The summons must contain a copy of the petition. But there is no need to publish the petition. If the amendment is adopted, the following will be published: a statement of the time and place of the hearing; a statement describing the purpose of the hearing; a statement that failure to appear may result in a finding of contempt or the issuance of an arrest warrant or both; and a statement explaining the right to counsel. This information provides sufficient notice. The contents of the petition would embarrass many respondents if they appeared in the public press.

12) Proposed Rule 34.01

Change: Add a new Rule 34.01, subd. 5 which states: "Except as provided by Rule 33.02, subd. 3(a) [as amended in accord with the recommendation above], the petition shall be personally served."

Reasoning: Rule 34 is silent on the type of service required. This change clarifies that a juvenile protection petition must be personally served. With certain exceptions, a summons must be personally served, and it must contain a copy of the petition.

13) *Proposed Rule 34.04, subd. 2*

Change: Amend Proposed Rule 34.04, subd. 2 as follows: "~~Upon receipt of approval from the court,~~ ~~t~~The petitioner shall provide notice of the proposed amendment to all parties and participants [,] before seeking approval from the court."

Reasoning: The Proposed Rule 34.04, subd. 2 implies the court may grant leave to amend a petition *ex parte*. A request for amendment and leave to amend should not occur *ex parte*. Under the rule, the court cannot authorize amendment unless no party is prejudiced and all parties are given sufficient time to respond. The parties should have an opportunity to be heard before the court decides whether or not to allow amendment during trial. Mid-trial amendments can severely prejudice respondents who did not prepare to defend upon the amended theory, and this Court has upheld trial courts' discretionary decisions not to permit late or mid-trial amendments.

14) *Proposed Rule 35.03, subd. 3*

Change: Amend as follows: "In each termination . . . whether the petition states a~~nd~~ prima facie case . . . parental rights. If . . . the petition states a prima facie case . . . Rule 36. If . . . the petition fails to state a prima facie case in support of termination of parental rights, the court shall dismiss the petition.

Reasoning: If, at the admit/deny hearing, a termination of parental rights petition fails to state a prima facie case in support of termination, the petition should be dismissed. Whatever steps the petitioner then takes should be taken without regard to the dismissed petition. As written, Proposed Rule 35.03, subd. 3 is confusing. It is not clear what happens to the children who are the subject of a dismissed petition while a new petition, if any, is drafted, but it appears that they remain out of the home. But if that is the case, the ten days allowed to amend or to file a C.H.I.P.S. petition subverts the much-shorter time

periods for emergency protective care contained in Rules 30.01, 31.01, 31.08 and 34.02, subd. 2(c). If a petition is dismissed for lack of a prima facie case and the petitioner decides to file a new petition and seek emergency protective care, other rules govern. Thus, Proposed Rule 35.03, subd. 3 could lead to the removal of children from their homes, without adequate evidence, for ten additional days instead of three.

15) Proposed Rule 35.03, subd. 4

Change: Amend as follows: "In each permanent placement matter . . . subdivision 1, the court shall ~~review the facts set forth in the petition, consider such argument as the parties may make, and~~ determine whether the petition states a prima facie case in support of one or more of the permanent placement option(s) requested. If . . . the petition states a prima facie case, the court . . . Rule 36. If . . . the petition fails to state a prima facie case, the court ~~may~~ shall dismiss the petition."

Reasoning: The change to the first line simplifies the language, making the language consistent with subdivision 3 of the same rule. The reason for deleting the last portion of the rule is the same as offered concerning Proposed Rule 35.03, subd. 3.

16) Proposed Rule 36.01, subds. 1(a,c,d)

Change: Rule 36.01, subd. 1 should be amended as follows: "(a) Generally. Unless . . . petitioner, only a parent who is a party, or a legal custodian, shall admit or deny the petition or . . . . (c) Termination of Parental Rights Matters. In a termination of parental rights matter, only the parents of the child ~~are required to~~ shall admit or deny the petition . . . . (d) Permanent Placement Matters. In a permanent placement matter: (1) only the legal custodian of the child ~~is required to~~ shall admit or deny the petition . . . ."

Reasoning: The proposed language clarifies that it is only the legal custodian who may lose custody or the parent who may lose parental rights who may admit a juvenile protection petition. Without this language there is a question whether a party other than a parent or legal custodian (e.g., guardian ad litem or child) may admit the petition and thereby deprive a parent or legal custodian of a trial.

17) *Proposed Rule 38.05, subd. 1*

Change: Add this sentence at the end of subdivision 1: "The findings and orders shall be filed with the court administrator who shall promptly serve the findings and orders upon the parties and the county attorney within fifteen days."

Reasoning: In the last three years, a number of parents in Hennepin County termination matters have not been served with or notified of the findings, conclusions and orders until after the time for taking an appeal under Minn. Stat. § 260.291 expired. The staffs of the various judges follow different procedures, some serving the orders, some not. The Hennepin County Attorney decided in 1998 to decline to serve these, despite doing so for many years. In some of these cases, parents had to obtain permission to appeal from the Supreme Court. If the court administrator serves the parties and counsel within fifteen days, fifteen more days still remain for preparation of an appeal.

18) *Proposed Rule 38.05, subd. 4*

Change: Delete the third sentence: "The findings . . . attorney."

Reasoning: This is unnecessary if the proposed change to Rule 38.05, subd. 1 is adopted.

19) *Proposed Rule 44.01, subd. 2*

Change: In the first sentence, amend "after first service upon a party by any party . . . of written notice of the order . . . ." to read "after service by any party of written notice of the filing of the order."

Reasoning: The primary reason for the change in wording is that the amended language is the same as that used in Minn. R. Civ. App. P. 104.01, subd. 1, and, since new-trial practice and appellate practice are interrelated, the time-line language should be the same. Besides being difficult to read, the proposed language is unclear as to whether the service must be of the actual filed order, or of notice that the order exists, regardless of filing, while the amended language is explicit in that the required

notice is notice of the filing of the order. Proposed Rule 46.02, subd. 2, on appellate practice, explicitly refers to notice of the filing of the order in question.

20) Proposed Rule 46.02

Change: In the first sentence, amend "after first service upon a party by any party . . . of written notice of the filing of the order[.]" to read "after service by any party of written notice of the filing of the order."

Change: Add a sentence at the end of the rule which states: "Unless otherwise provided by law, if any party serves and files a proper and timely motion under Rule 44, the time for appeal of the order or judgment which is the subject of that motion runs for all parties from service by any party of written notice of the filing of the order disposing of the last Rule 44 motion."

Change: Add a sentence to the Advisory Committee Comment which follows Proposed Rule 46.02: "Counsel are directed to Minn. Stat. § 260.291."

Change: Amend Proposed Rule 46.05 to read: ". . . the estimated completion date . . . shall not exceed sixty (60) ~~thirty (30)~~ days."

Change: Amend Proposed Rule 46.06 to read: "All decisions . . . shall be issued . . . within ninety (90) ~~thirty (30)~~ days . . ."

Reasoning: The proposal to amend the wording of the time for taking an appeal is consistent with Minn. R. Civ. App. P. 104.01, subd. 1, which governs the time for taking a civil appeal, and with the Proposed Amended Rule 44.01, subd. 2, governing the time for a new-trial motion.

The proposed addition to Rule 46.02 also seeks to make this rule consistent with Minn. R. Civ. App. P. 104.01, subd. 2. This language appeared in the September 18, 1998 second draft of the Proposed Juvenile Protection Rules (Proposed Rule 38).

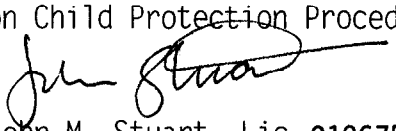
Until the Supreme Court rules otherwise, it is likely that the appellate time line contained in Minn. Stat. § 260.291 will control over this proposed rule. The time for taking an appeal from juvenile court is jurisdictional, counsel should be advised

Proposed Rule 46.05's provision that child-protection transcripts be completed in thirty days conflicts with Minn. R. Civ. App. P. 110.02, subd. 2, and, in the case of lengthy trials, is probably impossible to meet.

That portion of Proposed Rule 46.06 which requires the Court of Appeals to issue its decisions within thirty days of submission conflicts with Minn. Stat. § 480A.08, subd. 3(a).

Respectfully submitted,

On behalf of the Statewide Public Defender Task Force on Child Protection Procedures



John M. Stuart, Lic. 0106756
Minnesota State Public Defender

July 30, 1999

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May 15, 1998

Mr. Frederick K. Grittner
Clerk of the Appellate Courts
25 Constitution Avenue
St. Paul, MN 55155

Re: Comments concerning Proposed Rule on Public Access to Records Relating to Open Juvenile Protection Proceedings
Court File No. C2-95-1476

Dear Mr. Grittner:

Enclosed are 12 copies of my comments. Thank you for your assistance.

Yours truly,

Mark R. Anfinson

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May 15, 1998

Supreme Court of the State of Minnesota
Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Comments concerning Proposed Rule on Public Access to Records Relating to Open Juvenile Protection Proceedings

Dear Members of the Court:

I act as attorney for the Minnesota Newspaper Association, and am submitting these comments in order to convey MNA's views about the proposal to allow public access to juvenile protection (CHIPS) proceedings. The Minnesota Newspaper Association is a voluntary association of all of the general-interest newspapers and most of the special-interest newspapers in the state. It is the principal representative of the organized press in Minnesota. MNA thus presents the cumulative experience of nearly 400 newspapers throughout the state, from the smallest to the largest.

I should also note that I was a member of this Court's Open CHIPS Proceedings Subcommittee, and of the Court's Advisory Committee on Open Juvenile Protection Hearings. The latter group, of course, drafted the proposed rules now under consideration by the Court.

MNA and its member newspapers strongly favor the open proceedings experiment, believing that long experience demonstrates the value of openness. Almost invariably, public access promotes the maximum possible degree of accountability, efficiency, and effectiveness. At the same time, however, MNA respects the views of those who oppose the experiment. Plainly they are motivated by the same desire to protect and help children.

Nonetheless, from the many arguments that have been offered in favor of open proceedings, there are two that transcend the details of the debate and, from MNA's perspective, amply

justify going ahead with the experiment. The first is based on the fact that proceedings have been open for several years in Michigan, the second on the mechanism by which additional funding might be obtained for the CHIPS system in Minnesota.

Michigan's child protection proceedings have been publicly accessible for nearly ten years. Yet there is no documentation suggesting that harm has been inflicted on children in Michigan as a result of the public access. Indeed, it is difficult to find anyone who works within the child protection system there—judges, guardians, attorneys, social workers—who sees public access as other than a positive feature of the system. This concrete experience must be weighed against the sincere, but almost exclusively hypothetical and anecdotal, arguments put forth by the opponents of the extensive public access allowed under the proposed rules. Particularly since Minnesota and Michigan are demographically similar, it is not very plausible to believe that Minnesota's experience will diverge materially from Michigan's.

In addition, it is virtually certain that without some distinctly different approach, there is little prospect of real reforms to the CHIPS system in Minnesota, because reforms take money. Whatever differences separate the various participants on the issue of public access, agreement appears to be universal that the CHIPS system is bursting at the seams and in need of significant improvement. There seems similarly broad agreement that only funding increases will make it possible to truly remedy these problems.

But at this point, there seems little possibility of persuading the Legislature to increase funding. However, if the Legislature and its constituents (i.e., the general public) become better informed about just how stressed the CHIPS system is, and how bad the problems are that it deals with—an outcome that is nearly impossible in the current atmosphere of complete secrecy—then there is at least a chance that a "critical mass" will be created politically, and a chain reaction leading to increased funding will be triggered. While this outcome is by no means certain (and MNA does not represent otherwise), what *is* certain is that without greater public awareness of the problems, and support for changes in the system, there is little prospect of real reform. In other words, public access to CHIPS proceedings may not increase public awareness, and consequent pressure on the Legislature, sufficiently to make funding for CHIPS increase substantially, but there is some chance this will happen. Without such access, there is no chance.

None of the participants deliberating about public access to CHIPS proceedings is cavalier about the harm that access may cause to some children. On the other hand, thousands of faceless children, now and in the future, need a far more effective procedure than the one currently in place. The experiment ordered by the Court will allow us to determine in Minnesota if public access can promote this change. With a system involving such complex

issues, savants are hardly available to tell us with certainty what will work. Thus only experimentation creates a real possibility of improvement.

Respectfully submitted,

Mark R. Anfinson

pc: Hon. Heidi S. Schellhas
Linda Falkman, Minnesota Newspaper Association

letters\c\supcourt.chp

STATE OF MINNESOTA
FOURTH JUDICIAL DISTRICT COURT

JUDGE JOHN M. STANOCH
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May 26, 1998

Clerk of Appellate Courts
25 Constitution Avenue
St. Paul, MN 55155

Dear Clerk:

I am writing in support of the Proposed Rule on Public Access to Records Relating to Open Juvenile Protection Hearings currently pending before the Supreme Court.

The judges of the Hennepin County Juvenile Court have unanimously agreed to participate in the three year "open CHIPS" pilot project and we look forward to this historic opportunity to improve the public dialogue regarding the protection of abused and neglected children as well as improving the child protection system in Hennepin County.

The Minnesota Supreme Court Advisory Committee on Open Hearings in Juvenile Protection Matters, chaired by our colleague, Judge Heidi S. Schellhas, performed admirably and balanced competing, difficult, and important public policy issues relating to child protection records. I believe that the proposed rule submitted to the Supreme Court is a fair package that will allow for meaningful public access to child protection records in Hennepin County while preserving confidentiality as appropriate for the abused and neglected children we see in our court.

On behalf of the Hennepin County Juvenile Court, we support the "open CHIPS" pilot project and Proposed Rules on Public Access.

Please feel free to contact me if you would like any further information or comment.

Respectfully yours,

John M. Stanoch
Presiding Judge
Hennepin County Juvenile Court

JMS/lmc