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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO ABROGATE RULE 38(d) OF THE ARIZONA RULES OF PROTECTIVE ORDER PROCEDURE	Supreme Court No. R-__-_____ **Petition to Abrogate ("Repeal") new Rule 38(d) of the Arizona Rules of Protective Order Procedure for lack of statutory authority and Due Process violation**

Pursuant to Rule 28 of the Supreme Court, Mike Palmer petitions you all to abrogate (more correctly, "repeal") new Rule 38(d) of the Rules of Protective Order Procedure because it's statutorily void and violates the Due Process rights of defendants.

I. Preface

Rule 38(d) was created out of nothing in 2021, under the RADAR via a Petition to Amend Rule 16 of the ARPOP. ("Under the RADAR" because the Petition did not call for making a new Rule 38(d). The idea of a creating a new Rule 38(d) came from the CIDVC later in a Comment.)

So I did not know about this new Rule until late last year when a plaintiff

(in an IAH) wanted to amend his Petition in court against a defendant.

II. Analysis/Purpose

New Rule 38(d) says in full:

Amended Petition. At a contested hearing, if a plaintiff seeks to testify or present evidence about relevant allegations that were not included in the petition, the court must:

(1) allow the plaintiff to amend the petition in writing on a form provided by the court, a copy of which the court must immediately provide to the defendant; and

(2) offer the defendant each of the following options:

(A) a continuance of the hearing, within the time frames specified by Rule 38(b), to allow the defendant the opportunity to prepare for the additional allegations; or

(B) a brief recess to allow the defendant the opportunity to review the amended petition and prepare for the additional allegations; or

(C) an explanation of the options above and an opportunity to waive them. If the defendant waives both the opportunity for a continuance or a brief recess, then the court must proceed with the contested hearing on the amended petition that includes the additional allegations.

There are so many things wrong with this Rule. Where do I start?

Let's start with the law.

a. The statute

A.R.S. §12-1809 is the only statute governing civil IAH's.

This law provides that "A person may file a verified petition with a [court]

for an injunction prohibiting harassment." (1809(A).)

Then "the court shall review the petition. ..." If certain conditions are met, "the court shall issue an injunction..." (1809(E).)

Then "At any time during the period during which the injunction is in effect, the defendant is entitled to one hearing on written request." (1809(H).)

There is nothing in the statute about amending the petition after the fact, after a Preliminary Injunction has been issued. (Use your browser's Search function to search for "amend.")

Even the petitioner for Rule 16 acknowledged that there is an "absence of language specific to amending a petition for a protective order..." (Although by "language" she was referring to the silence in the Rules of Procedure. She should have referred to the law/statute instead, which is also silent. And controlling.)

There is an absence of language specific to amending a petition because the Legislature never intended for plaintiff to amend their petitions after the fact. Because that would be patently unconstitutional.

b. Where did this come from?

Since the law doesn't allow amending petitions after the fact in the very one-side matter of civil Injunctions against Harassment (where the usual safeguards to prevent baseless injunctions have been removed (1809(E)), where did this idea

come from?

It came from the courts. Specifically, the petitioner cited *Savord v. Morton*. In *Savord*, the COA correctly affirmed that it is a violation of due process to allow a petitioner (in a protective order) to testify to events beyond the allegations in the initial petition. (As it would in any other matter, criminal or civil.)

But then the COA said, as dicta, "The better practice [i.e., "policy"] would be to ... allow Mother to amend her petition and reschedule the hearing, thereby giving Father the opportunity to appropriately prepare for the new allegations."

That is not "the better practice" because it is not due process on its face. (As below.) But even if it were due process, the way that you change policy/add to the law is by petitioning the legislature. You do NOT do an end run around the legislature to make policy willy-nilly by way of Rules of Procedure. So on its face, since the legislature has not changed the law, Rule 38(d) is an unlawful Rule of Procedure.

Bottom line, you made up new policy.

(As an aside, there is an elitism manifest here that friends of the judiciary (here a law professor at the University of Arizona Domestic Violence Law Clinic) can get their way by getting their friends in the judiciary to "fix" things for them.)

c. Due Process in the Real World

In its Comment proposing new 38(d), the CIDVC said it "also recognizes the defendant's due process rights."

That's not true. The CIDVC proposed that when a defendant is suddenly presented with a never-before-seen new list of allegations (and perhaps evidence) at the contested hearing, then, so as to "ensure" a defendant's due process rights, a defendant could (paraphrasing) 1) request a continuance, 2) ask for a brief recess to think, or 3) waive his/her right to due process and proceed with the contested hearing facing the new allegations.

Yeah, that might work in your imaginary world of Make Believe. It does not work in the Real World.

In the Real World, defendants might have had to schedule a vacation day from their job in order to appear at a contested hearing and might not be able to schedule another. (Factory workers cannot just take a day off. Professionals cannot just move clients/meetings around.) Or they might have had to arrange for and/or pay a babysitter. Who pays the second time for the babysitter? And if the defendant hired a lawyer, who pays for the lawyer to appear a second time just because a plaintiff dropped new allegations on a hapless defendant? (Assuming the lawyer's schedule allows for a timely appearance. Which it won't.) And suppose the defendant has arranged witnesses to testify? It's not realistic to

reschedule witnesses willy-nilly. Let alone schedule new witnesses to deal with the new allegations. Etc.

So in the Real World, no defendant has the luxury of requesting a continuance.

Nor in the Real World does a "brief recess" provide time to gather new evidence (video, audio, etc.), call new witnesses, research the law, etc. Really you've put the defendant under duress to waive his/her due process right.

And by allowing a plaintiff to amend his/her petition at the contested hearing, you are violating the legislature's stated intent, that a defendant be able to clear his/her name within 10 days of the issuance of an Injunction. (See -1809(H), which somewhat parallels the spirit of Rule 65(b) procedure for Temporary Injunctions.) As even the CIDVC admitted above, the legislature did not provide that plaintiff's action could delay the clearing of a defendant's name.

And even if a defendant requested a continuance, that's still not just. The defendant wanted to have his/her "day in court," to clear his/her name that day. But now there is continued harm from a continuance because the injunction unduly remains in force.

d. No Judge/Gatekeeper

Furthermore, as it goes to Due Process, there is no Gatekeeper.

When the plaintiff swore out their ex parte petition in front of a judge, it was in front of a judge.

That means that allegations from hearsay were ruled inadmissible. (Presumably.) Or events that happened more than a year before the petition weren't allowed. (Presumably.) Or any other wild & crazy things that plaintiffs claim in their petitions that ex parte judges disallow. When all is said and done, the judge enters into the record only acts that justified the Injunction. Which the defendant, having been given fair notice, has to defend against.

But now with Rule 38(d), a plaintiff can add ANYTHING they want after the fact to a petition without the supervision of a judge. According to Rule 38(d), all a plaintiff has to do is add "additional information that you did not include in your original petition," and swear under penalty of perjury "that they are true to the best of my knowledge."[1]

Yeah, that'll stop frivolous amendments. This like ex-ex parte. And so now the hapless defendant must defend /object to all sorts of new, wild & crazy allegations.

I know that Life isn't fair. But the judicial system is supposed to be.

e. No Escape

[11]They are supposed to fill out their new allegations on AOC form DVPO21F-010122. But they don't even do that!

And worse is the inescapable logic (credit to Judge Kelley of the La Paz Superior Court) from Rule 38(d) that "one way or another, what the Plaintiff wants to add to his Petition will be added."

That's not right on its face. It blatantly assumes that all allegations added by a plaintiff are admissible.

f. Not even normal court procedure

Civil IAH's are a severely crippled subset of Superior Court Rule 65 *Injunction and Restraining Orders*. (See A.R.S. §12-1809(E).) And since civil IAH's are usually issued ex parte, they should parallel Rule 65(b), *Temporary Restraining Order Without Notice*.

Now, in a Rule 65(b) Injunction, a movant/plaintiff cannot sneak in more allegations to a Complaint after a judge has granted the Temporary Injunction. At best, the movant would have to amend their Complaint before the judge. Then, if granted, the movant has to serve the Amended Complaint on the opposing party, resetting the time to challenge. But Rule 38(d) says that in a civil IAH, a plaintiff can add allegations willy-nilly and serve them on the defendant at the last minute, without advance notice!

g. Considering issues raised for the first time on Appeal

A contested hearing (some judges call it a "challenge" hearing) is much like

an appeal. A defendant is appealing the finding of the ex parte judge.

Now you all know that appellate courts can't hear issues raised for the first time on appeal. But Rule 38(d) says a plaintiff can raise new issues (and evidence) on the appeal of a challenge hearing.

h. It's not normal jurisprudence

Similarly, consider the most minor civil action we have, a civil "Infraction." A traffic cop stops you because your tail light is out. He is both a plaintiff and an ex parte judge, who makes both an allegation against you and grants it by giving you a ticket, a summons to appear in court for your contested/challenge hearing.

At the hearing, the cop can't suddenly add a new allegation that you were speeding too. But in a civil IAH, you say they can?

And while not apples to oranges, an ex parte Order in a civil IAH is like a grand jury indictment in a criminal matter. Both are one-sided ex parte affairs which almost always result in the indictment of a ham sandwich.

But once you've been indicted by a grand jury, the prosecutor can't suddenly trump up charges to the indictment after the fact. But Rule 38(d) says a plaintiff in a civil IAH can?

i. No Due Process right to amend

The stated purpose of needing a way to amend petitions was wrong on its

face.

Professor Katirai said that "our clients are often denied the **right** to amend their petitions. This significantly limits their **due process rights** ..."

Ah, Hello? There is no statutory right to amend a petition in a civil IAH, as shown above.

The professor's citing of Rule 2 to say that Rules of Family Law Procedure apply to Protective Order Procedure is a construct of the court. NOT of the legislature. Rule 2 cannot supplant the statute.

Ironically, it is you all who are denying defendants their Due Process right!

j. There is already a way to amend a Petition

There is no need for Rule 38(d) because you already have outlined the proper course of action in ARPOP Rule 41.

Namely, the plaintiff goes to court and files a Motion to dismiss. The IAH is vacated. While at court (which is required by Rule 41, since the plaintiff has to be interviewed by the judge) the plaintiff can re-petition before the judge with his/her new allegations. If the new allegations are meritorious, then the judge will add them to the list of allegations served on the defendant anew.

III. Conclusion

New Rule 38(d) must be repealed. Immediately. As it stands now, in

addition to violating the Due Process rights of defendants in civil IAH's, you're giving every favorable advantage to plaintiffs, but none to defendants. Which is inherently prejudicial, a violation of the Code of Judicial Conduct.

IV. Content of Proposed Rule Change

Delete all.

~~**Amended Petition**. At a contested hearing, if a plaintiff seeks to testify or present evidence about relevant allegations that were not included in the petition, the court must:~~

~~(1) allow the plaintiff to amend the petition in writing on a form provided by the court, a copy of which the court must immediately provide to the defendant; and~~

~~(2) offer the defendant each of the following options:~~

~~(A) a continuance of the hearing, within the time frames specified by Rule 38(b), to allow the defendant the opportunity to prepare for the additional allegations; or~~

~~(B) a brief recess to allow the defendant the opportunity to review the amended petition and prepare for the additional allegations; or~~

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V. Disclosure

To the best of my knowledge, no one has filed a similar petition within the previous five years.

SUBMITTED this 10th day of January 2024.

By /s/ Mike Palmer