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

9 **In the Matter of: PETITION**
10 **TO AMEND RULE 113 of the**
11 **JUSTICE COURTS RULES**
12 **OF CIVIL PROCEDURE**

SUPREME COURT No.:
R-23-0049

COMMENT

13 The Arizona Process Servers Association (APSA) pursuant to Rule 28,
14 Ariz. R. Sup. Ct., submits the following comments to the instant Petition. The
15 Petition proposes amend Rule 113 of the Justice Courts Rules of Civil
16 Procedure.

17 After consideration, research and debate, the Arizona Process Servers
18 Association (APSA) objects to the proposed rule change.

19 The Arizona Process Servers Association (APSA) provides continuing
20 education and advocacy for its members and others on the rules, regulations,
21 statutes, and case law affecting service of legal process within and outside of
22 Arizona. Electronic service of process is always less preferred than traditional
23 in-person service.

24 Under ARCP Rule 4(d), "Service of process must be made by a sheriff, a
25 sheriff's deputy, a constable, a constable's deputy, a private process server
certified under the Arizona Code of Judicial Administration § 7-204 and Rule

1 4(e), or any other person specially appointed by the court. Service of process
2 may also be made by a party or that party's attorney if expressly authorized by
3 these rules.” Similarly, under JCRCP Rule 113(a), service must be performed
4 “...by a constable or by a certified private process server who is certified under
5 Arizona law...”.

6 While the existing subsection (a) states that legal process must be served
7 “...by a constable or by a certified private process server who is certified under
8 Arizona law...”, that legal process is not limited to a paper-in-hand document. The
9 proposed language modifying JCRCP Rule 113(a) to add paragraph (2) is unclear
10 in continuing to mandate e-mail service by a constable or by a certified private
11 process server (ref. (2)(ii), “the defendant received a communication utilizing
12 electronic means with the summons and complaint and opened it”).

13 Service must be done by a disinterested third party such as a Process Server,
14 Constable or Sheriff. We find that attorneys and plaintiffs are sometimes insistent
15 on making or having already made service by (certified or first class) mail (for
16 special detainer cases, writs of garnishment, and in alternative means of service
17 instances) themselves, thus depriving the integrity of service by a disinterested
18 third party and violating ARCP Rule 4(d) and JCRCP Rule 113(a) without
19 consequence. We have yet to see a certificate of service rejected by the courts
20 where service by mail was not done by a process server, constable or sheriff.

21 While service by mail is either the complete method of service [i.e.: ARS
22 §12-1577(B)¹] or otherwise satisfies the remaining requirements for giving notice
23

24 ¹ ARS §12-1577(B): Notwithstanding subsection A of this section, service of a writ of garnishment on any banking
25 corporation or association, savings bank, savings and loan association or credit union may also be made by certified
mail, return receipt requested, at the garnishee's regular place of business, or to the garnishee's statutory agent or at a

1 [i.e.: alternative means of service under ARCP Rule 4.1(k); wage garnishments
2 under ARS §12-1598.04(D); special detainer actions under ARS §3-1377(B)], we
3 find courts routinely accept certificates of service where service by mail was
4 served by an employee or clerk working directly for a law firm, or the Plaintiff or
5 the Plaintiff's Attorney. This is in conflict with ARCP Rule 4(d), as well as
6 JCRCP Rule 113(a) (service must be done by a "...constable or by a certified
7 private process server who is certified under Arizona law.). We foresee the same
8 thing occurring if specific language mandating e-mail service by a constable or by
9 a certified private process server is not included in the proposed language.

10 Process servers in Arizona are regulated by the Arizona Code of Judicial
11 Administration. ACJA §7-204(H)(2)(j)(5) requires a process server to "...retain
12 client or customer records for a period of three years unless law or rule allows for a
13 different retention period". There is no mandate or direction for storage of the
14 electronic records in the proposed language.

15 The use of a platform that stores these electronic details securely for a
16 specified amount of time, to ensure those details are available and unassailable
17 during any attempt to quash the service or otherwise motion for relief from a
18 judgment or order is necessary. A motion for relief of a judgment may be filed
19 later than the mandated retention period described in ACJA §7-204(H)(2)(j)(5),
20 especially in instances of fraud. If such records have been destroyed or discarded,
21 either party dependent on those records may be deprived of their due process and
22 evidence. [ref. JCRCP Rule 141(c); ARCP Rule 60(c)] While such evidence

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24 location that is designated by the garnishee. If served by certified mail, the effective date of service is the date of
25 receipt by the garnishee or the garnishee's statutory agent.

1 presented may be considered self-authenticating, there is no standard for electronic
2 retention as to platform or security.

3 While the individual process server may be required to maintain records
4 under ACJA §7-204(H)(2)(j)(5), often these individual process servers work for or
5 act as independent contractors for large (out of state) attorney service firms who
6 centralize records in-house. However, as Arizona has no licensing or certification
7 requirements for attorney service firms, the onus of responsibility is left with the
8 process server who may not be equipped to keep electronic records in a secured
9 fashion, or because of proprietary or other reasons may not have access to
10 electronically stored records of the attorney service firm. This is common when
11 the process server no longer works for that attorney service firm, or when the firm,
12 itself has gone out of business.

13 Attorney service firms have no obligation nor responsibility to respond to
14 the courts as an individual certified process server does. Again, Arizona has no
15 licensing or certification requirements for attorney service firms.

16 Although an email may have been “received” by a party, the petition sets no
17 standard on how to verify “...the defendant received a communication utilizing
18 electronic means with the summons and complaint and opened it” [paragraph (ii)].
19 It would be akin to a process server knocking at the door, observing window blinds
20 move, assuming the defendant was inside and within easy speaking distance and so
21 submits a proof of service stating service was done on an evasive defendant he or
22 she never saw nor spoke with (as opposed to “spoke to”). It may have been the
23 family cat who moved the window blinds.
24
25

1 The same would be true in circumstances where multiple family members or
2 co-workers use the same email address. There is no assurance that the defendant
3 nor other person targeted is the person who opened or read the email.

4 Additionally, the language in paragraph (ii) alludes to service having already
5 been completed (“the defendant *received...*”) before the motion is granted. We see
6 this as a convenient excuse for a plaintiff or attorney to seek the order for
7 alternative means of service ex post facto, having already emailed a copy of the
8 summons and complaint, obviating the need for proper service of process by a
9 constable or process server.

10 Safeguards are important, especially when service is to be done on an
11 electronic platform. From, Illinois Supreme Court Rule 102(f)(1)(B):

12 “Service by e-mail. Service by e-mail shall be made by (i) sending an
13 e-mail to the defendant/respondent at his or her current e-mail address;
14 (ii) attaching a copy of the summons, complaint/petition, and any other
15 required documents to the e-mail; (iii) stating in the subject line of the
16 e-mail message : "Important information-You are being sued"; and (iv)
17 stating in the body of the e-mail: "You have been sued. Read all of the
18 documents attached to this e-mail. To participate in the case, you must
19 follow the instructions listed in the attached summons. If you do not,
20 the court may decide the case without hearing from you, and you could
21 lose the case."

22 No such safeguards are in the proposed language of the rule change.

23 As stated, foregoing, there is an issue of the recipient and actual receipt of
24 the e-mail. Questions arise as to if the email was received by the correct person or
25 by a person at all; if the email was delivered to the correct person, versus another
individual with access to that account (i.e.: multiple family members or co-workers
using the same email address); if the email was considered a “real” communication
versus discarded/ignored as spam by automated or user-generated filters. Our

1 sister association in Florida noted that "...email is a "store and forward" "best
2 efforts" communication system. A very large percentage of all email is considered
3 spam and not delivered at all". We agree.

4 As the recipient has not previously consented to receiving service via email,
5 service by email should have stringent technical requirements to follow in
6 gathering information regarding when, where, and how the electronic documents
7 were received, viewed, and accepted, including:

- 8 • Date and time the recipient logged into the electronic service
9 platform;
- 10 • Date and time the recipient viewed or downloaded the documents;
- 11 • Date and time the actual documents were delivered;
- 12 • The IP address of the person being served;
- 13 • Verification of the identity of the person being served.

14 Unlike situations where a party consents to service electronically, this
15 proposed language has no such requirements or safeguards to determine when,
16 where, and how the electronic documents were received, viewed, and accepted.

17 Service by email, like service by publication, is an unreliable means to
18 positively identify that the defendant for whom the service is intended has actually
19 received it.

20 The Arizona Process Servers Association accordingly objects to this rule
21 change proposal for the several reasons stated above.

22 Respectfully submitted,

23 **Arizona Process Servers Association**

24 /S/

25 **Barry R. Goldman**

Administrator, Secretary/Treasurer

- 1 Larry J. Ratcliff, President
- 2 John Osborn, Vice President
- 3 Barry R. Goldman, Administrator, Secretary/Treasurer
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