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6
7 IN THE SUPREME COURT

8 STATE OF ARIZONA

9 IN THE MATTER OF:

R09-0035

10 PETITION TO AMEND RULES 45
AND 84, ARIZONA RULES OF CIVIL
11 PROCEDURE

**MARICOPA COUNTY ATTORNEY'S
OFFICE'S RESPONSE TO
12 PETITION TO AMEND RULES 45
AND 84, ARIZONA RULES OF
13 CIVIL PROCEDURE**

14 The Maricopa County Attorney's Office hereby comments on the proposed
15 amendment to Rules 45 and 84 of the Arizona Rules of Civil Procedure. The proposed
16 amendment would clarify the obligations of persons responding to subpoenas, including
17 subpoenas duces tecum. In this respect, the proposed amendments would benefit both
18 subpoena recipients and parties who request the issuance of subpoenas.

19 The Maricopa County Attorney's Office, however, shares some of the concerns
20 expressed by Casey Cullings of the Attorney General's Office regarding the potential
21 burden on subpoena recipients. County employees sometimes receive subpoenas, both for
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1 testimony and for documents, with little advance notice.

2 Proposed Rule 45(b)(5) would largely incorporate the rule adopted by the Arizona
3 Supreme Court in *Jolly v. Superior Court*, 112 Ariz. 186, 540 P.2d 658 (1975). The *Jolly*
4 opinion noted that permitting a subpoenaed person to be relieved of the responsibility of
5 complying with a properly issued subpoena based solely on its filing of a motion for a
6 protective order could have a deleterious effect on the discovery process and open the door
7 for witnesses to avoid proper discovery. 112 Ariz. at 189, 540 P.2d at 661.

8 The Cullings comment, however, raises legitimate concerns about subpoenas
9 directed to employees of institutional entities, both government and private. As the
10 Cullings comment notes, a third party, who has no stake in the litigation, may have less time
11 to respond to a deposition subpoena or a subpoena duces tecum than a party to the lawsuit
12 would have to a deposition notice or request for production of documents.

13 The Maricopa County Attorney's Office, like the Attorney General's Office,
14 represents both parties subject to subpoenas and parties on whose behalf subpoenas are
15 issued. As such, we would be concerned with a proposal that would undermine the
16 discovery process by giving a subpoena recipient the unilateral power to stop discovery
17 through the expedient of sending a written objection to the party that issued the subpoena.
18 We are equally concerned, however, with the increasingly frequent practice of last-minute
19 subpoenas that make it difficult or impossible to respond on a timely basis.

1 In this spirit, the Maricopa County Attorney's Office proposes the following
2 alternative options for the Supreme Court's consideration:

3 (1) Adopt the modification to the proposed rule suggested by the Cullings comment;

4 (2) Further modify the proposed rule suggested by the Cullings comment by
5 providing that where a subpoena for testimony is served less than five days before the time
6 specified for compliance, a motion to quash (but not an objection) filed before the time
7 specified for compliance would relieve the party from appearing to testify until after the
8 court rules on the motion to quash. This modification would eliminate the ability of a
9 subpoena recipient to impede necessary testimony by the simple expedient of serving a
10 written objection; or

11 (3) Remand this Petition for further study by the Committee on Civil Practice and
12 Procedure. There are manifestly some delicate issues involving fairness to litigants and
13 third parties that should be carefully examined.

14 RESPECTFULLY SUBMITTED this 19th day of May, 2010.

15 RICHARD M. ROMLEY
16 MARICOPA COUNTY ATTORNEY

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18 BY: 

19 Paul W. Ahler
20 Chief Deputy County Attorney
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