

1 Honorable Norman J. Davis  
2 Presiding Judge  
3 Superior Court of Arizona, Maricopa County  
4 125 W. Washington St.  
Phoenix, AZ 85003  
(602) 506-5262

5 IN THE SUPREME COURT OF THE STATE OF ARIZONA

6  
7 In the Matter of:

} Supreme Court No. R-11-\_\_\_\_\_

8  
9 PETITION TO AMEND RULE 55  
10 OF ARIZONA RULES OF CIVIL  
11 PROCEDURE AND RULE 44 OF  
12 THE ARIZONA RULES OF  
FAMILY LAW PROCEDURE

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14 Pursuant to Rule 28, Rules of the Supreme Court of Arizona, the Presiding  
15 Judge of the Superior Court of Arizona in Maricopa County, respectfully  
16 petitions this Court to adopt the attached proposed clarifying amendments to  
17 Rule 55 of the Arizona Rules of Civil Procedure and Rule 44 of the Arizona  
18 Rules of Family Law Procedure.

19 **I. Entry of Default**

20 In the Superior Court in Maricopa County, more than 10,000 civil cases  
21 and more than 10,000 family court cases resolve by default judgment each year.  
22 Under the current practice, which has been the practice since 1994, and is  
23 currently implemented by Superior Court in Maricopa County Administrative  
24 Order 2001-041, the Clerk of Court accepts the filing of the Application for  
25 Default and the Entry of Default that is typically attached to or incorporated into  
26 the Application of Default. These records are filed into the court case. After the  
27 requisite ten days have passed with no action, the default is deemed entered. The  
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1 Clerk of Court does not sign or seal the Entry of Default. This is the process that  
2 has been utilized in the Superior Courts in Maricopa, Apache, La Paz, and  
3 Yavapai counties.

4       Entering a default is a ministerial task for the Clerk of Court. If the Clerk  
5 of Court were required to wait ten days, locate each file, and then sign and seal  
6 each of the over 20,000 cases in which default is entered in Maricopa County, it  
7 would require a significant amount of time and additional staff. In addition, the  
8 signature and seal only indicate that ten days have passed.

9       Division One of the Court of Appeals on October 4, 2011 issued a  
10 memorandum decision in *MJG Enterprises, Inc. v. Wayne Radford Moon*  
11 (1 CA-CV 10-0767), which questioned the lack of a separate “entry of default”  
12 on the docket, thereby implicitly calling into question the process used by the  
13 Clerk of the Superior Court in Maricopa County, as well as three other counties.  
14 In this case, the Clerk of Court used the process established by Superior Court in  
15 Maricopa County Administrative Order 2001-041 and did not sign or seal the  
16 default judgment. The Court of Appeals interpreted this as a failure to “enter” the  
17 default and basically concluded that the default process was incomplete. The  
18 memorandum decision states:

19       An entry of default, as the name suggests, is premised on the actual  
20 entry of a default in the court record.

21       ...

22       As an initial matter, the clerk never entered Defendants’ default,  
23 although the superior court and MJG acted as though this had  
24 happened. Because the clerk never entered Defendant’s default, the  
25 necessary prerequisite to a default judgment was missing.

26 *Id.* at ¶¶ 7, 9. The Court of Appeals issued a new memorandum decision in this  
27 case on December 13, 2011 which did not address the default issue.

28       Although the memorandum decision no longer raises issues about the  
29 default process in Maricopa County, the Superior Court seeks these rule changes

1 to clarify that the process currently used in the majority of cases is permitted.  
2 Doing so will avoid calling into question the more than 20,000 default judgments  
3 entered each year in Maricopa County.

## 4 **II. Rule 55 of the Arizona Rules of Civil Procedure**

5 The current version of Rule 55 of the Arizona Rules of Civil Procedure  
6 fails to specify any particular process for how the clerk enters default judgments.  
7 The rule simply provides information about the pleadings, notice and timeframe.  
8 The Superior Court proposes adding a paragraph to the rule to clarify that the  
9 process for entering a default that has been used is permitted under the rule:

10 (2) *Entry of Default.* The acceptance by the clerk of the filing of the  
11 Application and Affidavit of Default constitutes the entry of default.

12 See Exhibit A. This addition to the rule would clarify the process for the clerks of  
13 court statewide.

## 14 **III. Rule 44 of the Arizona Rules of Family Law Procedure**

15 For the same reasons, Rule 44 of the Arizona Rules of Family Law  
16 Procedure should make clear that the process for entering a default that has been  
17 used is permitted under the rule:

18 2. *Entry of Default.* The acceptance by the clerk of the filing of the  
19 Application and Affidavit of Default constitutes the entry of default.

20 See Exhibit B.

## 21 **IV. Conclusion**

22 The Superior Court in Maricopa County resolves more than 20,000 cases  
23 by default judgment each year. If the validity of these judgments can be  
24 questioned, the Superior Court and Court of Appeals could be inundated with  
25 new filings and appeals on default judgments in older cases which should be  
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1 considered final. As a result, the Superior Court in Maricopa County  
2 respectfully requests adoption of these proposed amendments.

3 Respectfully submitted this 16th day of December, 2011.  
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5  
6 Hon. Norman J. Davis  
7 Presiding Judge  
8 Superior Court of Arizona, Maricopa County

9 Original and six (6) copies delivered this  
10 16th day of December, 2011 to:

11 Clerk of the Arizona Supreme Court  
12 1501 W. Washington, Suite 402  
13 Phoenix, AZ 85007

14 Copy mailed this  
15 16th day of December, 2011 to:

16 David K. Byers, Director  
17 Administrative Office of the Courts  
18 1501 W. Washington St.  
19 Phoenix, Arizona 85007  
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1 Exhibit A

2 **Arizona Rules of Civil Procedure for the Superior Courts of Arizona**

3 **Rule 55(a). Application and entry**

4 When a party against whom a judgment for affirmative relief is sought has failed  
5 to plead or otherwise defend as provided by these Rules, the clerk shall enter that  
6 party's default in accordance with the procedures set forth below. All requests for  
7 entry of default shall be by written application to the clerk of the court in which  
8 the matter is pending.

9 (1) *Notice.*

10 (i) To the Party. When the whereabouts of the party claimed to be in default are  
11 known by the party requesting the entry of default, a copy of the application for  
12 entry of default shall be mailed to the party claimed to be in default.

13 (ii) Represented Party. When a party claimed to be in default is known by the  
14 party requesting the entry of default to be represented by an attorney, whether or  
15 not that attorney has formally appeared, a copy of the application shall also be  
16 sent to the attorney for the party claimed to be in default. Nothing herein shall be  
17 construed to create any obligation to undertake any affirmative effort to determine  
18 the existence or identity of counsel representing the party claimed to be in default.

19 (iii) Whereabouts of Unrepresented Party Unknown. If the whereabouts of a party  
20 claimed to be in default are unknown to the party requesting the entry of default  
21 and the identity of counsel for that party is also not known to the requesting party,  
22 the application for entry of default shall so state.

(iv) Other Parties. Nothing in this Rule relieves a party requesting entry of default  
from the requirements of Rule 5(a) as to service on other parties.

23 (2) *Entry of Default. The acceptance by the clerk of the filing of the Application*  
24 *and Affidavit of Default constitutes the entry of default*

25 ~~(23)~~ *Effective Date of Default.* A default entered by the clerk shall be effective ten  
26 (10) days after the filing of the application for entry of default.

27 ~~(34)~~ *Effect of Responsive Pleading.* A default shall not become effective if the  
28 party claimed to be in default pleads or otherwise defends as provided by these

1 Rules prior to the expiration of ten (10) days from the filing of the application for  
2 entry of default.

3 ~~(45)~~ *Applicability.* The provisions of this rule requiring notice prior to the entry of  
4 default shall apply only to a default sought and entered pursuant to this rule.

5 **PROPOSED COMMENT**

6 **Rule 55(a)(2):** This clarifying provision was added to make clear that the  
7 existing practice concerning entry of default used by a number of counties  
8 complies with Rule 55.  
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1 Exhibit B

2 **Arizona Rules of Family Law Procedure**

3 **Rule 44. Default Decree**

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5 **A. Application and Entry.** When a party against whom a judgment for  
6 affirmative relief is sought has failed to respond or otherwise defend as provided  
7 by these rules, the clerk shall enter that party's default in accordance with the  
8 procedures set forth below. All requests for entry of default shall be by written  
9 application to the clerk of the court in which the matter is pending.

10 1. *Notice.*

11 a. *To the Party.* When the whereabouts of the party claimed to be in default are  
12 known by the party requesting the entry of default, a copy of the application for  
13 entry of default shall be mailed to the party claimed to be in default.

14 b. *Represented Party.* When a party claimed to be in default is known by the party  
15 requesting the entry of default to be represented by an attorney, whether or not  
16 that attorney has formally appeared, a copy of the application shall also be sent to  
17 the attorney for the party claimed to be in default. Nothing herein shall be  
18 construed to create any obligation to undertake any affirmative effort to determine  
19 the existence or identity of counsel representing the party claimed to be in default.

20 c. *Whereabouts of Unrepresented Party Unknown.* If the whereabouts of a party  
21 claimed to be in default are unknown to the party requesting the entry of default  
22 and the identity of counsel for that party is also not known to the requesting party,  
23 the application for entry of default shall so state and shall be mailed to the  
24 unrepresented party's last known address.

25 2. *Entry of Default.* The acceptance by the clerk of the filing of the Application  
26 and Affidavit of Default constitutes the entry of default

27 23. *Effective Date of Default.* A default entered by the clerk shall be effective ten  
28 (10) days after the filing of the application for entry of default.

34. *Effect of Responsive Pleading.* A default shall not become effective if the  
party claimed to be in default pleads or otherwise defends as provided by these

1 rules prior to the expiration of ten (10) days from the filing of the application for  
2 entry of default.

3 45. Applicability. The provisions of this rule requiring notice prior to the entry of  
4 default shall apply only to a default sought and entered pursuant to this rule.

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6 **PROPOSED COMMENT**

7 **Rule 4(a)(2): This clarifying provision was added to make clear that the**  
8 **existing practice concerning entry of default used by a number of counties**  
9 **complies with Rule 4.**