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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	No. R-11-0031
PETITION TO AMEND RULE 4.1(i), ARIZONA RULES OF CIVIL PROCEDURE.	**Comment to Petition to Amend Rule 4.1(i), Arizona Rules of Civil Procedure**

Pursuant to Rule 28(D), Rules of the Supreme Court, Eileen Dennis GilBride submits this Comment to the proposed changes to Rule 4.1(i). Undersigned believes the proposal undermines not only the purposes of the notice of claim statute, but also the constitutional due process to which a defendant entity is entitled from the service of a complaint.

I. REASONS THE PROPOSED RULE AMENDMENT SHOULD NOT BE ADOPTED

A. Allowing service on a single member hampers the entity's ability to account for and respond to notices of claim.

The purposes behind the notice of claim requirements are "to allow the public entity to investigate and assess liability, to permit the possibility of settlement prior to litigation, and to assist the public entity in financial planning and budgeting." *Falcon v. Maricopa Cnty.*, 213 Ariz. 525, 527, ¶ 9, 144 P.3d 1254, 1256 (2006) (quoting *Martineau v. Maricopa Cnty.*, 207 Ariz. 332, 335-36, ¶ 19, 86 P.3d 912, 915-16 (App. 2004)). The Proposal, which would (1) allow service of a notice of claim on a single board or council member, and (2) allow service on the

"administrative assistant or employee" of any single board member, council member, or other person subject to service under the Rule, undermines the purposes behind the notice of claim requirements.

First, notices of claim are considered "filed" upon placement in the mail. *See Lee v. State*, 218 Ariz. 235, 237, ¶ 7, 182 P.3d 1169, 1171 (2008) ("Lee was free to use regular mail to accomplish the filing."). Allowing a claimant to mail a notice of claim to a single board member significantly decreases the chances that such a notice will reach the appropriate decision-making channels timely or at all. There are countless boards, councils and districts in Arizona, many of which are made up of volunteer or part time members. Coupled with the fact that "mailing" a notice of claim is considered to be "filing" it under the case law, this means that allowing service on one member of any board or council magnifies the risk that notices of claim will fall through the cracks and go unaccounted-for by the entity. For example, many school board members are part-timers, volunteers, and non-business people, most of whom are not aware of the legal significance of receiving a notice of claim letter, are not expecting to receive such service, especially in the mail, and are unaware that such items must reach the school board administrator quickly. When someone like this receives a piece of paper in the mail, the significance of which is not readily understood or expected, that piece of paper is more likely to be thrown away than handled appropriately within the statutory framework of the notice of claim process. The board member might think it is an FYI copy or duplicate original from other governmental departments, or from staff, and which are often read for information and then discarded.

Second, part-time board members often have personal or other work business that causes a delay in receiving their board-related mail, causes them to miss board meetings, or causes them to otherwise be out of contact with the clerk or secretary of the board for several weeks at a time.

Third, a notice of claim that is mailed to a single board member is also not

likely to be logged in, date-stamped, time-punched, or otherwise formally noted. This has the potential of creating litigation over whether the notice of claim was timely filed.

Finally, mailing lists might be outdated; and if mail is received for a former board member, it might be forwarded or simply returned to sender. If the mail contains a notice of claim, the purpose of the notice of claim statute – to inform the decision-makers of the existence of a claim and to afford them an opportunity to address it before litigation commences – would never be served.

The proposed rule change affects county boards of supervisors as well. Although these are considered full-time positions, most of the supervisors do not spend much time in their county offices. Most have home offices or other offices in their own districts, and spend a significant amount of time conducting business throughout their districts. For example, Coconino County encompasses more than 18,000 square miles divided into five supervisorial districts. It is the second largest county in the country, and one of the least populated, making it possible for a claimant to send the only claim letter to a remote location where it will not be promptly received. In Yuma County, undersigned believes that supervisors do not have individual offices, and as such, in-coming mail for them can sit unopened for weeks at a time until they are able to be present at the County administration office. Undersigned believes that in Yuma County, only the chairman's incoming mail is opened. Other supervisors' mail is placed in their respective in-house mail bins, unopened, unless otherwise instructed.

When we add to the foregoing the prospect that notices of claim may be addressed to a single board member's administrative assistant, the likelihood that the notice will not be properly documented, timely received, or reach the person or persons authorized to do something about the notice increases even more. This serves only to add another degree of separation between the notice of claim and the actual decision-makers of local government.

B. <u>The proposed rule change will undermine constitutional due process in the service of complaints.</u>

The Proposal seeks to amend Rule 4.1(i), Ariz. R. Civ. P. This rule is not limited to service of notices of claim, but applies to all service of process on municipal entities – including complaints. The purpose of requiring a complaint to be served is to fulfill the guarantees of due process – "to give the party actual notice of the proceedings against him and that he is answerable to the claim of the plaintiff." *Marks v. La Berge*, 146 Ariz. 12, 15, 703 P.2d 559, 562 (App. 1985) (citing *Scott v. G.A.C. Finance Corp.*, 107 Ariz. 304, 486 P.2d 786 (1971)). The Proposal, which waters down the personal service requirement and allows service on an "employee who is authorized to accept delivery of mail" for the served person (would an employee of MailBoxes R Us suffice?) undermines the guarantees of constitutional due process because it is not reasonably calculated to ensure "actual notice" to the defendant entity. *Dixon v. Picopa Constr. Co*., 160 Ariz. 251, 261, 772 P.2d 1104, 1114 (1989) (Notice is sufficient for due process purposes if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" or claims).

The untoward consequences of the Proposal are magnified considering the fact that a defendant entity can be defaulted if it does not respond to the complaint within 20 days of service. *See* Rule 12, Ariz. R. Civ. P.

<u>CONCLUSION</u>

For the foregoing reasons, undersigned opposes the proposed rule change.

RESPECTFULLY SUBMITTED this 1st day of March, 2012.

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By /s/Eileen Dennis GilBride

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