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RE: COMMENTS ON THE LEGAL SERVICES RECOMMENDATION

BACKGROUND:

The Legal Services Committee recommends that the proposed Justice Court Rules of Civil Procedure Rule 140 include a new subsection which requires justices of the peace to find that documentary evidence offered under the "business records exception to Rule 803 of the Rules of Evidence" can only be established by statements of an employee of the company creating the records in consumer debt collection cases. (*See*, Letter of Ellen Sue Katz dated February 1, 2012, pp. 2-3, reprinted as part of Appendix C to Comment of the State Bar of Arizona on Petition to Adopt Justice Court Rules of Civil Procedure).

At the Rules Committee meeting on February 10, 2012, which both Ms. Katz and I attended, I specifically recall her withdrawing this particular section of her February 1, 2012 letter. If the Rules Committee would review the tapes or the transcript, after introducing herself, this was her first order of business that she proffered. I urge the Rules Committee to review the transcript and if indeed, this is correct, ask the Legal Services withdraw this particular provision from its February 1, 2012, letter.

This being said, and recognizing that the proposed language has been submitted, allow me to comment on this complete change in the Rules of Evidence suggested by Legal Services.

ARGUMENT:

This recommendation impinges upon the Arizona Rules of Evidence in two key ways. First, the recommendation would force the justice of the peace to consider excluding evidence without an objection. Second, the recommendation limits the methods for laying foundation for the application of the business records exception to something other than the "testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11)." Ariz. R. Evid. 803(6)(e). These changes to the law of evidence create needless and complicated variations between the justice and superior courts of this state. The Justice Court Rules of Procedure were intended to be easier to understand than the Arizona Rules of Civil Procedure; this recommendation is not. As a substantive matter, these changes require the judge to stand in the shoes of an absent defendant, and then abrogate what is perhaps the most important role of the court – to use its discretion in weighing the validity and reliability of the evidence.

The Arizona Rules of Evidence assume a participatory system where one party offers evidence and the other may interpose an objection which the judge then resolves. This concept is made apparent in the rule addressing the right to appeal an evidentiary ruling. A party may only predicate error on rulings excluding evidence when "a substantial right of the party [is] affected" and that party must make the "substance of the evidence . . . known to the court by offer [unless the substance] was apparent from the context within which questions were asked." Ariz. R. Evid. 103(a)(2). Indeed, one party's failure to timely object to the admission of evidence operates as a waiver of the objection. *See*, *State v. McDaniel*, 136 Ariz. 188, 196, 665 P.2d 70, 78 (1983) ("It has long been the law in Arizona that failure to object to an offer of evidence is a waiver of any ground of complaint against its admission.") Defaulting defendants in consumer debt collection cases have notice and an opportunity to present a defense, just like any other defaulting defendant. Forcing the justice of the peace to interpose a hearsay objection to all of the documents offered by a plaintiff seeking to collect a debt ignores the duty of the defending party to participate in his, her, or its defense. This proposed rule makes the judge a stand-in for the defendant and the referee of a particular subset of plaintiffs and their evidence.

Moreover, questions concerning the admissibility of evidence are generally within the sound discretion of the trial court. *See*, *State v. McGill*, 231 Ariz. 147, 154, ¶30, 140 P.3d 930, 937 (2006) (en banc). The proposed change to the rule restricts that discretion without case law or statute ever addressing the issue. The proposed change presumes that plaintiffs suing to collect consumer debt cannot lay a "proper foundation" for their "documentary evidence and that all affidavits or declarations are [not] based on personal knowledge" because it requires the court to make affirmative findings that this evidence is admissible before issuing a default judgment. (*See*, Letter of Ellen Sue Katz dated February 1, 2012, pp. 2-3, reprinted as part of Appendix C to Comment of the State Bar of Arizona on Petition to Adopt Justice Court Rules of Civil Procedure). The recommendation inverts the presumption that evidence is admissible unless challenged. This inversion is egregious because defendants who participate in the legal process may waive their objections while those who fail to participate have objections raised for them. Under the recommendation's rule, those who appear in court and contest their opponent's claims may be disadvantaged compared to those who do not.

<u>BUSINESS RECORD EXCEPTION:</u>

Ignoring this affront to the Arizona Rules of Evidence and deciding that every justice of the peace should impose a hearsay objection on every piece of evidence proffered by those seeking to collect on consumer debts does not avoid the problems created by the Legal Service Committee's recommendation. The purpose of the business records exception to the rule against hearsay is to bring the "realities of business and professional practice into the courtroom and [the rule] should not be interpreted narrowly to destroy its obvious usefulness." *Merrick, v. United States Rubber Co.*,7 Ariz. App. 433, 436, 440 P.2d 314, 317 (Ct. App. 1968) (interpreting the predecessor to Arizona's Rules of Evidence). Furthermore, the "principal precondition of documents as business records" under the analogous Federal Rule of Evidence, "is that the records have sufficient indicia of trustworthiness to be considered reliable." *Saks Int'l, Inc. v. M/V "Export Champion"*, 817 F.2d 1011, 1013 (2d Cir.1987). In the consumer collection industry, it is common practice for the original creditor to supply its business records to an assignee that incorporates them into its own business records and relies upon them. Limiting the

"custodian or other qualified witness" to the original creditor's employee limits the business records rule's obvious usefulness to the courts and parties in reliably finding, litigating, and resolving issues of fact. Ariz. R. Evid. 803(6)(e). Limitations on access to reliable information increase the probability of determinations based on factual errors. Therefore, any new or additional limitation in a party's ability to offer evidence to support its case must be carefully scrutinized.

Several courts in other states have considered the issue of whether one who incorporates another's business records into its own business records is a competent and qualified witness under Rule 803(6) and answered it affirmatively. *See, Simien v. Unifund CCR Partners*, No. 01-08-00593-CV, Tex. App., First District, April 15, 2010; *Jaramillo v. Portfolio Acquisitions, LLC*, No. 14-08-00939-CV, Tex. App., Fourteenth District, March 30, 2010; *Calvary Portfolio Servs., LLC v. Kimbaris*, A-2062-10, Super. Ct. App. Div. N.J. (Dec. 7, 2011). These states are in accord with the federal courts that have considered the issue. The courts have held that "that a record created by a third party and integrated into another entity's records is admissible as the record of the custodian entity, so long as the custodian entity relied upon the accuracy of the record and the other requirements of Rule 803(6) are satisfied." *Brawner v. Allstate Indem. Co*., 591 F.3d 984, 987 (8th Cir. 2010); *see also, United States v. Childs*, 5 F.3d 1328, 1333-1334 (9th Cir. 1993) (summarizing the positions of the circuit courts).

OTHER HERESAY EXCEPTIONS:

The recommendation also ignores the possibility that some of the debt collection plaintiffs will present documentary evidence that is admissible under other exceptions to the rule against hearsay. The recommendation is that the court determine "whether a proper foundation was provided for . . . the documentary evidence and that all affidavits or declarations are based on personal knowledge" or "whether any affiant or declarant provided sufficient foundation to establish the business records exception to Rule 803 of the Rules of Evidence but only for records of the company for which the affiant or declarant is employed." (*See*, Letter of Ellen Sue Katz dated February 1, 2012, pp. 2-3, reprinted as part of Appendix C to Comment of the State Bar of Arizona on Petition to Adopt Justice Court Rules of Civil Procedure). By its terms, the recommendation appears to limit the Court's consideration of records to those possessing a sufficient foundation to apply the business records exception to the rule against hearsay for the affiant's employer's records. The exceptions to the rule against hearsay are numerous and varied. Suppose that the affiant establishes that the records relied upon are not business records but are instead public records, records of documents effecting an interest in property, ancient documents, or market reports. *See*, Ariz. R. Evid. 803(8) (public records); 803(14) (records of documents effecting an interest in property); 803(16) (ancient documents); 803(17) (market reports). Despite being recognized exceptions to the rule against hearsay, the recommendation might exclude them because they are not business records. The recommendation leads to an absurd result.

If a timely hearsay objection to a document is raised, Arizona's Rules of Evidence require a "custodian or other qualified witness" or a "certification" under Rule 902(11) to lay the foundation for the application of the business records exception to the rule against hearsay. Ariz. R. Evid. 803(6)(e). The Rules of Evidence do not define who a "qualified witness" is because

that determination is left to the trial court's discretion based on the facts presented to it. In our system of justice, determinations of fact are best made when both parties with access to the facts are before the court and participate. The Legal Services Committee seeks to upend the participatory requirement of American justice by making the judge both a skeptical participant and the ultimate decision maker. The recommended change also restrictively redefines who can be a "custodian or other qualified witness" in justice courts deciding consumer collection cases. This recommendation selectively targets a particular class of plaintiffs in a particular type of court while leaving the business records exception alone for other justice court cases and cases pending in every other court in Arizona. The radical change to the role of the court and the admissibility of evidence in specific situations is ill-advised and incorrect.

CONCLUSION:

Finally, the recommendation strays far outside the Arizona Supreme Court's mandate that the Justice Court Rules of Civil Procedure simplify the process of litigating cases in the justice courts to encourage participation in those courts. By altering the rules of evidence to transform the judge's role and limiting the court's access to reliable evidence, the recommendation fails to simplify the procedures of the justice courts. Instead, the variation from the rules governing other courts will complicate the adjudication of these cases and could confuse the general public. Therefore, this recommendation should be rejected.

Respectfully,

David E. Hameroff