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

10 PETITION TO AMEND
11 ARIZONA RULES OF CIVIL
12 PROCEDURE 4.1(d) AND 5(c)
13 AND RULES OF FAMILY LAW
14 PROCEDURE 41(C) AND 43(C)

Supreme Court No. R-12-0008

**Comment of the State Bar of Arizona
on Petition to Amend Arizona Rules of
Civil Procedure 4.1(d) and 5(c) and
Rules of Family Law Procedure 41(C)
and 43(C)**

15 **INTRODUCTION**

16 The Arizona Process Servers Association, an association representing
17 approximately ninety process servers throughout the State of Arizona, has
18 submitted a petition to amend several procedural rules, including Arizona Rules of
19 Civil Procedure 4.1(d) and 5(c).¹ The proposed amendments to Rules 4.1(d) and
20 5(c) would change the rules in three significant ways.

21 First, they would redefine the competency requirements of a person who may
22 accept service at the residence of an individual to be served under Rules 4.1(d) and
23 5(c)(2)(B)(ii) from “a person of suitable age and discretion” to a person “who stated
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25 ¹ The discussion and analysis of Rules 4.1(d) and 5(c) provided herein apply equally
26 to their counterparts also sought to be amended, Arizona Rules of Family Law Procedure
41(C) and 43(C).

1 or appeared that he or she was at least 15 years of age.” Second, they would permit
2 service to be made under Rule 4.1(d) by leaving a summons and pleading either:
3 (1) with the guard of a gated community in which the person to be served resides;
4 or (2) at the usual place of business of the person to be served or that person’s
5 “usual mailing address.” Third, the amendments would require that service of a
6 document compelling certain conduct be made pursuant to Rule 4.1(d) where the
7 failure to comply with the terms of the document may result in the issuance of a
8 civil arrest warrant or a finding of contempt.

9 The State Bar of Arizona understands that service of process is not always an
10 easy task. However, as set forth below, some of the proposed amendments are
11 redundant in view of procedural mechanisms already provided for by the rules. The
12 other proposed amendments may make service of an initial pleading easier under
13 some circumstances, but the State Bar believes they are unnecessarily vague and
14 may unconstitutionally deprive individuals of proper notice, violating their rights to
15 due process. Accordingly, the State Bar recommends that the petition be denied.

16 **I. “A PERSON OF SUITABLE AGE AND DISCRETION”**
17 **VERSUS A PERSON “WHO STATED OR APPEARED THAT**
18 **HE OR SHE WAS AT LEAST 15 YEARS OF AGE”**

19 Rules 4.1(d) and 5(c)(2)(B)(ii) permit service to be made on a “person of
20 suitable age and discretion” residing with the individual to be served. While a
21 determination of whether someone is of “suitable age and discretion” is a patently
22 subjective analysis, this language has been examined and interpreted in numerous
23 state and federal cases. *See, e.g., Holmes & Company of Orlando v. Carlisle*, 658
24 S.E.2d 185 (Ga. Ct. App. 2008). The State Bar believes that this substantial body
25 of case law has adequately clarified what “suitable age and discretion” means in the
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1 context of service because disputes about competency to accept service do not
2 appear to be a significant problem currently faced by Arizona practitioners.

3 The proposed amendment would permit documents to be served by leaving
4 them at the residence of the individual to be served in the presence of a person
5 “who stated or appeared that he or she was at least 15 years of age.” On its face,
6 this proposed amendment does not provide a more objective standard for
7 determining whether someone is competent to accept service than the language of
8 the current rule does. Therefore, since the proposed language has not been the
9 subject of judicial scrutiny, rather than clarify Rules 4.1(d) and 5(c)(2)(B)(ii), it
10 muddies the waters, invites litigation over their meaning, and deprives practitioners
11 of the guidance provided by an established body of case law.

12 The proposed amendment also makes age the sole criterion for determining
13 competency to accept service. Apparent or stated age is very subjective and is not
14 always a good indicator of competency or an adequate guaranty that notice is likely
15 to reach the individual to be served. For example, a child who is or appears to be
16 fifteen years old (or even someone much older) may suffer from developmental
17 disabilities, whether apparent or not, calling into question their competency to
18 appreciate the significance of service. Yet, under the proposed amendment, service
19 upon such a person would be valid.

20 Finally, the proposed amendment requires the process server to engage in
21 what might be extensive and unwelcome communication with adolescent children
22 regarding “the general nature of the legal process,” setting the stage for a variety of
23 complaints or worse. This untested language might also result in substantial
24 litigation over the nature and quality of the instruction provided about “the legal
25 process,” in much the same way as the requirement of Miranda warnings has in
26 criminal cases.

1 **II. SUBSTITUTE SERVICE**

2 **A. Service upon Individuals Residing in Gated Communities**

3 The petition proposes expanding Rule 4(d) to permit service on an individual
4 residing within a guard-gated community where the guard does not allow the
5 process server to enter by leaving the summons and pleading with the guard,
6 instructing the guard about “the general nature of the legal process,” and mailing a
7 copy to the resident’s address within the community. This amendment seems
8 unnecessary in view of the methods of alternative service already authorized by
9 Arizona Rule of Civil Procedure 4.1(m). Indeed, it appears that Rule 4.1(m),
10 enacted in 1989, was drafted specifically to address service difficulties presented by
11 gated communities. (See DANIEL J. MCAULIFFE & SHIRLEY J. MCAULIFFE,
12 ARIZONA CIVIL RULES HANDBOOK (2011 ed.) at 53, stating “[w]hile Rule 4.1(m)
13 was primarily addressed to the situation where a third party, such as a residential
14 security guard or office receptionist, denies access to the person on whom service is
15 sought, it is not limited in its application to such situations.”)

16 The proposed amendment is also problematic for several reasons. First, it
17 fails to adequately ensure the due process rights of residents of such communities.
18 For example, it is unclear whether a guard-gated community will have adequate
19 mechanisms in place for a guard to transmit documents to a resident upon whom
20 service is sought when, for example, the resident is out of town for a substantial
21 period of time. Second, it is questionable whether it is constitutional for the
22 Supreme Court to require guards to accept service on behalf of the private citizens
23 whom they are guarding. The jurisdictions cited by the petition which have
24 adopted such rules have done so legislatively. To the extent such a rule might be
25 constitutional, its enactment seems more appropriately a legislative function.

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1 Finally, requiring process servers to instruct guards on “the general nature of the
2 legal process” is undesirable for the same reasons set forth in Section I above.

3 **B. Service upon an Individual at the Individual’s Usual Place**
4 **of Business or Usual Mailing Address**

5 The petition proposes expanding Rule 4.1(d) to permit service to be made by
6 leaving the documents to be served at the individual’s usual place of business. The
7 amendment mirrors the basic language of Rule 5(c)(2)(B)(i), which governs service
8 after an appearance has been made, but again adds language requiring the process
9 server to inform the recipient of the general nature of the legal process and to mail a
10 copy to the individual being served at the business’s address. The service
11 requirements under Rule 4.1(d) are different from those under Rule 5(c) to ensure
12 notice and due process. Once an individual appears in a case, those concerns
13 become less acute. While service at a business is appropriate after a party has
14 appeared, for all of the reasons set forth in Section II(A) above, this proposed
15 amendment fails to adequately protect the due process rights of the person to be
16 served.

17 Permitting service to be made upon someone at their “usual mailing address”
18 in the same fashion as a business is an equally bad idea. This undefined term has
19 not been subject to judicial scrutiny in the context of service, and, unlike service at
20 a business, has no counterpart in the current rules once a party has appeared. The
21 proposed amendment would likewise create significant ambiguities in the rule and
22 create even greater and unnecessary due process concerns. Again, to the extent that
23 true problems are encountered in getting an individual served, Rule 4.1(m) already
24 sets forth a procedure for employing alternative methods of service.

1 **III. SERVICE OF DOCUMENTS COMPELLING CONDUCT**
2 **WHERE THE FAILURE TO COMPLY MAY SUBJECT AN**
3 **INDIVIDUAL TO A CIVIL ARREST WARRANT OR**
4 **CONTEMPT OF COURT**

5 The petition seeks to require that certain documents, such as an order or
6 subpoena where failure to comply may cause a court to issue an arrest warrant, or
7 an order to show cause where the court may issue an order of contempt, be served
8 on an individual pursuant to Rule 4.1(d). The current rules, however, already
9 ensure that a party receives actual notice of potential court action before a civil
10 arrest warrant or an order of contempt may issue.

11 Rule 64.1 governs civil arrest warrants. Rule 64.1(b) provides:

12 The court may, on motion of a party or on its own motion,
13 issue a civil arrest warrant if it finds that the person for
14 whom the warrant is sought:

15 (1) Having been ordered by the court to appear personally
16 at a specific time and location, and **having received actual
17 notice of such order**, including a warning that failure to
18 appear may result in the issuance of a civil arrest warrant, has
19 failed to appear as ordered; or

20 (2) **Having been served personally** with a subpoena to
21 appear in person, at a specific time and location, which
22 contains a warning that failure to appear may result in the
23 issuance of a civil arrest warrant, has failed to appear.

24 (Emphasis added). Because a court may only issue a civil arrest warrant after
25 actual notice of a court order to appear has been received or personal service of a
26 subpoena has been made, the proposed amendment is redundant. Similarly,
Arizona Rule of Civil Procedure 6(d) requires that orders to show cause be served
in accordance with the requirements of Rules 4, 4.1 and 4.2, unless the party has
entered an appearance, in which case service may be made pursuant to Rule 5. The
petition offers no reason why this current procedure should be changed and service

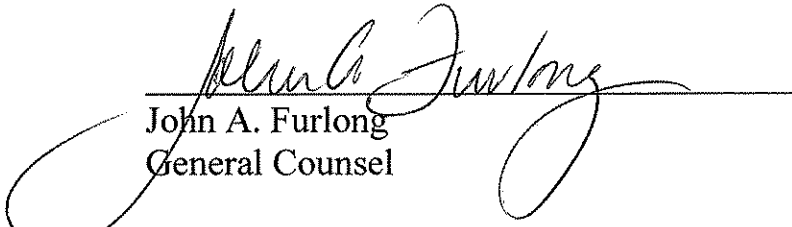
1 under Rule 4.1(d) be required for all orders to show cause. Moreover, the State Bar
2 is not aware of problems with lack of notice when orders of contempt or civil arrest
3 warrants are issued.

4 **CONCLUSION**

5 For all of the foregoing reasons, the State Bar recommends that the petition
6 be denied.

7 RESPECTFULLY SUBMITTED this 14th day of May, 2012.

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Electronic copy filed with the Clerk
of the Supreme Court of Arizona this
14th day of May, 2012,

by: Kathleen A. Lundgren