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11 **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

12
13 AMENDED PETITION TO
14 AMEND ARIZONA RULES OF
15 CIVIL PROCEDURE (ARCP)
16 ARCP RULE 4.1(d); ARCP RULE
17 5(C);
18 RULES OF FAMILY LAW
19 PROCEDURE (RFLP) RFLP
20 RULE 41(C); RFLP RULE 41(D)

21
22 **NO.: R-12-0008**
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24 AMEND ARIZONA RULES OF
25 CIVIL PROCEDURE (ARCP)
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27 RULE 5(C);
28 RULES OF FAMILY LAW
PROCEDURE (RFLP) RFLP
RULE 41(C); RFLP RULE 41(D)

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30 **BACKGROUND AND AUTHORITY**

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1. The undersigned is the elected Secretary of the Board of Directors of the Arizona Process Servers Association. Pursuant to authorization issued by the

1 Board on January 4, 2012, on behalf of the Arizona Process Servers
2 Association, the undersigned submits this Amended Petition.

- 3 2. The Arizona Process Servers Association (APSA) has reviewed and considered
4 the objections and comments raised by the State Bar and other concerned
5 persons regarding the original Petition submitted.
- 6 3. Accordingly, APSA has drafted and now submits this Amended Petition. With
7 such submission, APSA prays that the Court consider the proposed changes,
8 and if so inclined, adopt all of them. Barring adoption of all of the changes
9 indicated on the Amended Petition, APSA requests that the Court consider and
10 adopt part(s) thereof, as APSA believes that the adoption of such proposed
11 changes are for the benefit of not only the whole of the judicial system within
12 Arizona, but all citizens and residents of Arizona who are affected by civil
13 litigation.
- 14 4. As disclosed in a previous response to comments, APSA is the most
15 representative industry trade association for Process Servers throughout
16 Arizona. APSA has, by last count, 143 Process Server members. Further,
17 APSA is the sole chartered state process server organization and recognized by
18 the National Association of Professional Process Servers (NAPPS). Within the
19 membership of APSA are several attorney service owners, who collectively
20 employ approximately 600 Arizonans, including Process Servers and a
21 substantial number of additional related support personnel. Accordingly,
22 APSA collectively represents the interests of a substantial number of active
23 Process Servers in Arizona.
- 24 5. The qualifications for regular membership in APSA include the requirement
25 that each regular member be in current status as to his/her authority to serve
26 legal process, as per Arizona Rules of Civil Procedure (ARCP) Rule 4(e), and
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1 other applicable authority. Associate membership qualifications are irrelevant
2 for purposes of this discussion.

- 3 6. Accordingly, each regular member is qualified to serve legal process within the
4 state of Arizona. As the largest and most established statewide association of
5 Process Servers, APSA represents the interests of its members and of Process
6 Servers, in general within Arizona.
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8 **ARGUMENT IN FAVOR OF RULES CHANGES**
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- 10 7. The Process Server is one of the most important and vital persons serving a
11 function within our justice system. The Process Server is tasked with giving
12 defendants, witnesses and other persons written notice of pending court
13 proceedings, or the results thereof. Without the efforts of Process Servers, the
14 proper service of civil legal process would essentially stop. Our system of
15 justice is reliant on the professional services of the Process Server to give
16 notice and due process thereof. Constables and Sheriffs are overloaded with
17 not only their law enforcement functions as peace officers, but civil legal
18 process to serve, and consequently our collective remedy to expedite the
19 service of legal process is through the use of the Process Server.

- 20 8. Petitioner believes it is imperative that service of process in Arizona be
21 performed in a consistent manner statewide, wherein the expectation(s) of all
22 participants in the civil litigation are addressed. Members of APSA have
23 reportedly experienced treatment of certain service of process issues by various
24 courts inconsistently. Accordingly, APSA believes the consistent and clear
25 communication in the standards and rules relating to service of process is an
26 issue of statewide importance.
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1 9. Ideally, the rules for service of process might be found in one source; however,
2 as they are in varied locales (ARCP, RFLP, RPEA, etc.), they must be
3 addressed separately.

4 10. The proposed rule changes address several shortcomings in the current
5 language for the rules for service of process, including (1) substitute service,
6 (2) defining a person of suitable age and discretion, (3) service where the
7 Process Server, Constable or Deputy Sheriff is not allowed access to private,
8 gated communities, and (4) contempt of court and the issuance of civil arrest
9 warrants.

10 11. The proposed rule changes are consistent and explicit in further defining
11 methods of service of process in Arizona and where needed, to provide
12 additional means for actual notice to defending parties who are served with
13 legal process.

14 12. APSA believes the proposed rule changes are necessary for the public good,
15 the judiciary, the safety and security of the Process Server, and the expeditious
16 and proper service of process.

17 13. Accordingly, consistent with the public good in mind, and pursuant to Rule 28
18 of the Arizona Rules of the Supreme Court, APSA submits proposed rule
19 changes to ARCP Rule 4.1, et seq. and related Rule(s), where noted.
20

21 **SUBSTITUTE SERVICE**

22 14. Currently, ARCP Rule 4.1(d) provides for service of a copy of the summons
23 other legal process to an individual, by personal service or by leaving copies
24 with "...some person of suitable age and discretion then residing therein or by
25 delivering a copy of the summons and of the pleading to an agent authorized
26 by appointment or by law to receive service of process". This method of
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1 service is solely applicable to the residential (abode) address of the person
2 being served.

3 15. While personal service of legal process is the preferred method of service,
4 there are instances where substitute service (i.e.: "... leaving copies thereof at
5 that individual's dwelling house or usual place of abode with some person of
6 suitable age and discretion then residing therein...") is necessary due to the
7 defendant's lack of presence at the time of service.

8
9 16. Currently in Arizona there is no provision which defines a "...person of
10 suitable age and discretion...", which leaves a wide latitude and nebulous
11 meaning, resulting in an environment which creates an opportunity for errors
12 in judgment as to the actual suitable age and discretion of the person with
13 whom the legal process is left.

14 17. At the time of service, it may be the opinion of the Process Server, Constable
15 or Deputy Sheriff which substantially determines whether that person with
16 whom legal process is being left is a "...person of suitable age and
17 discretion...". However, the actual result may be substantially different. Often
18 times the person contacted who is apparently of such suitable age and
19 discretion is a minor child¹, who, while informed of the general nature of the
20 papers left with him or her, may not be sufficiently responsible or lack the
21 maturity to understand the gravity of the legal process served, and
22 consequently may fail to inform the defendant/respondent of the service of
23 process.
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26 ¹ As opposed to an "adult", as defined by ARS §8-201.3. The author's use of the term, "minor" would necessarily
27 include those person(s) defined by ARS 8-201.6, which includes, "'Child", "youth" or "juvenile" ...who is under the
28 age of eighteen years."

1 18. Under current Rule, while service of process may be deposited with a person
2 appearing of "...suitable age and discretion...", the party serving the papers
3 (Process Server, Constable or Deputy Sheriff), as well as the litigants, their
4 counsel, and the Court are dependent upon such a person to perform acts which
5 may have substantial consequence to the recipient party served.

6 19. Accordingly, Petitioner believes that a substantive definition of the person of
7 "...suitable age and discretion..." is vital and necessary to protect the interests
8 of the public and integrity of the courts.

9 20. The proposed rule changes seek to impose a common sense approach to
10 service of process upon a person by means of substituted service.

11 21. Current rule (ARCP Rule 4.1(e)) allows for service on a minor, and specifies
12 the age of the minor for both personal and substitute service.

13 22. Consistent with ARCP Rule 4.1(e), Petitioner believes that a concrete
14 definition of a person of "suitable age and discretion" should be defined as a
15 person *who stated or appeared that he or she was at least 16 years of age at*
16 *the time of service.* While the prior (original) petition indicated the age of 15
17 years, the Amended Petition retains more of a consistent nature with Rule
18 4.1(e), and thus remains consistent with other states' requirements for service
19 of process².

20 23. The proposed change in age is also consistent with certain states' consent to
21 marriage.
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25 ² A total of 19 other states have established hard and fast rules or statutes indicating what is considered the minimum
26 "suitable age" of a person (i.e.: California, Colorado, Idaho, Iowa, Pennsylvania: 18 years; Mississippi, Texas,
27 Virginia, West Virginia: 16 years; Florida, Missouri, New Mexico, New York, Oklahoma: 15 years; New Jersey,
28 Oregon, South Dakota, Wisconsin, Wyoming: 14 years; Illinois: 13 years. Texas does not allow a substitute service
without a court order.) Source: Spring, 2011 Membership Directory and Civil Rules Guide, National Association of
Professional Process Servers.

1 24. Arizona statutes (ARS 28-3153((1)(c) and 28-3174) provide that with the
2 consent of the parent(s), a minor who is at least 16 years of age may obtain a
3 driver license. Accordingly, as a presumption exists in statute that such a
4 minor has the maturity and ability to accept responsibility to operate a motor
5 vehicle on Arizona roads, streets and highways, such a presumption would
6 likewise exist that a person who is at least 16 years of age would be a person of
7 “suitable age”.

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9 25. A reasonable inquiry into the age of the person with whom the legal process is
10 left is prudent. In the *Rules Forum*, the State Bar addressed concerns as to
11 determining the age of the person with whom legal process is left. The State
12 Bar’s citation of *Holmes & Company of Orlando v. Carlisle*, 658 S.E.2d 185
13 (Ga. Ct. App. 2008) further notes that Georgia statute mandates that the
14 suitable age for depositing legal process is 15 years of age.³ Thus, the State
15 Bar has cited opinion which supports a concrete definition of *age* within
16 “suitable age and discretion”.

17 26. From the public comments received, APSA believes that the *discretion* portion
18 of “suitable age and discretion” should also specifically be addressed as to a
19 person who, after due and reasonable inquiry, appeared to be of suitable
20 discretion⁴ to accept service of process. Accordingly, competency to accept
21 service of process is not merely based on age.
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24 ³ “An individual may be served by delivering a copy of the summons and complaint to him personally “or by
25 leaving copies thereof at the defendant’s dwelling house or usual place of abode with some person of suitable age
26 and discretion then residing therein.” OCGA § 9-11-4(e)(7). An individual who is at least 15 years old is of a
27 “suitable age” under this Code section. *Trammel v. Nat. Bank of Ga.*, 159 Ga.App. 850, 852(1), 285 S.E.2d 590
28 (1981).”

⁴ As opposed to “competent”, we retain the term, “suitable discretion” to remain consistent in appearing to have
sufficient “...capacity to distinguish between what is right and wrong...sufficiently to render one amenable and
responsible or his acts” and that “...which requires exercise in judgment and choice and involves what is just and

1 27.Necessary to any service of process is the communication between the Process
2 Server, Deputy Sheriff or Constable that service is being effected. The
3 requirement that *notice* be given in due proximity to the person served has
4 been well established.

5 28.Addressing the State Bar's concern (from their public comments) that "...the
6 proposed amendment requires the process server to engage in what might be
7 extensive and unwelcome communication with adolescent children regarding
8 'the general nature of the legal process,' setting the stage for a variety of
9 complaints or worse", APSA believes such concerns are unfounded. Further,
10 any concern the State Bar would have over the "nature and quality of the
11 instruction provided" is a non-issue. In order to effect service, there must be
12 clear communication given to the recipient⁵, so that he/she understands that
13 he/she is being served with legal process. The Proposed Amendment seeks
14 nothing further than such an understanding.
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16 29.Other states have varying degrees of requirements for substituted service, not
17 only of the age of the person of "...suitable age and discretion...", but as to
18 other factors and procedures. In particular, California (ref. California Code of
19 Civil Procedure (CCP) §415.20, et seq.) requires that in any event where a
20 substituted service is made, it shall be to a person "...apparently in charge..."
21 of the residence or business, who is at least 18 years of age. Unlike Arizona's
22 rule (ARCP Rule 4.1(d)), California does not require that the person with
23 whom the legal process is left be a resident of the abode.
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26 proper under the circumstances". (*Burgdorf v. Funder*, 246 Cal. App.2d 443, 54 Cal.Rptr.805, as cited in *Black's*
27 *Law Dictionary*, Sixth Ed.)

28 ⁵ *In re Ball*, (2 Cal.App.2d 578): "...when men are within easy speaking distance...", and other relevant case law
requiring that notice and proximity are required when serving legal process.

1 30. California (per CCP §415.20) and other states further require that legal process
2 served by substitute service be accompanied by a mailing of the legal process
3 to the person served, and that such service (in California) is deemed complete
4 10 days after mailing. Likewise, the Amended Petition seeks a mailing, as
5 well.⁶

6 31. While California and various other states address their manner and methods of
7 service of process in statute, Arizona rules for service of process are primarily
8 addressed in ARCP Rule 4, et seq., ARCP Rule 5, et seq., RPEA Rule 5, et
9 seq., and ARS §33-1377(B). The proposed changes seek to rectify what the
10 Petitioner believes are shortcomings of these Rules.
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12 32. While most emphasis has been placed on substitute service at an abode, or
13 residence, there are also issues where substitute service at a business address or
14 commercial mail receiving agency should be addressed.

15 33. Often, as Process Servers, we see service of process directed to an individual
16 or entity at a business location. Where the business entity is a stand-alone
17 (brick and mortar) location, there usually is no issue as to locating a person
18 authorized to accept service of process on behalf of the entity. However, when
19 serving an individual, and either a) the residence location is unknown, but the
20 business (or employment) address of the person to be served is known, or b)
21 the person to be served utilizes a commercial mail receiving agency, the
22 method for service required is personal service, or, in the alternative, service
23 under Rule 4.1(m).
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27 ⁶ Consistent with ARS 33-1377(B), the proposed rule would cause service to be complete "...three days after the
28 summons is mailed...".

1 34. As discussed further, service under Rule 4.1(m) is sometimes prohibitive to the
2 litigant. Additionally, there is no mandate that an order granting service under
3 Rule 4.1(m) be issued.

4 35. Accordingly, the Amended Petition addresses these issues, as well, by
5 proposing, consistent with what other states have done, to allow substitute
6 service at a business entity (the employment location) or at a commercial mail
7 receiving agency.
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9 36. Commercial mail receiving agencies (CMRA's) are most commonly known as
10 business entities (ie: The UPS Store, Mailboxes Etc., Postnet, Postal Annex,
11 and Pakmail, etc.) which house Private Mail Boxes (PMB's) and serve as
12 locations where persons and entities receive mail and other deliveries (ie: UPS,
13 Fedex, messenger, etc.).

14 37. The United States Postal Service specifically defines CMRA's as: "...a private
15 business that accepts mail from the Postal Service for others (recipients),
16 retains it for collection (in most cases a private mailbox "PMB") or re-mails it
17 to another location with payment of new postage." CMRA's may be non-
18 traditional entities, as well, such as "Corporate Executive Centers (CECs) that
19 generally offer customers a small suite or private office space, as well as
20 shared office services such as mail receipt and re-mailing, message centers, fax
21 systems, secretarial services, conference rooms, etc.", or "Storage businesses
22 that offer their customer's storage space and private mailbox services", or
23 "Businesses that offer mail forwarding and message services to customers that
24 live and travel in recreational vehicles (RVs)".⁷
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26 ⁷ U.S. Postal Service website:

27 [http://faq.usps.com/eCustomer/iq/usps/request.do?create=kb:USPSFAQ&view%28%29=c\[c_usps0729\]](http://faq.usps.com/eCustomer/iq/usps/request.do?create=kb:USPSFAQ&view%28%29=c[c_usps0729])

1 38. Accordingly, due to their popularity in usage by persons who, intentional or
2 not, avoid service of process, there is a need to address service at such
3 locations.

4 5 ACCESS TO GATED COMMUNITIES

6 39. The issue of access to HOA, privately patrolled, gate guarded, gated or other
7 "planned community"(ies) is one in which the needs of the community for
8 privacy and security are balanced against the need for access to serve legal
9 process. Process Servers, Constables and Deputy Sheriffs who are engaged in
10 the service of legal process have no special exemption for access such planned
11 communities. Access to the planned community is at times vital and necessary
12 to enable the service of legal process; however, the mandated entry of such for
13 service of process is a property issue best left to legislative solution. The
14 proposed rule seeks not to mandate entry, but where entry is denied, to
15 circumvent the effective "service free zone" illusion created by such policy.

16
17 40. Many planned communities prohibit entry to the premises by Process Servers,
18 Constables and Deputy Sheriffs who approach the entry or gate for the service
19 of legal process, and thus an expedient means of serving person(s) who reside
20 within such protected "islands" in Arizona is necessary.

21 41. The purchase of a property within such a planned community is deeded to the
22 buyer in a "deed restricted"⁸ manner. Such deed restrictions are generally
23 administered through a Home Owners Association (HOA), which is authorized
24 by such deed restrictions to develop policies and procedures to allow or
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27 ⁸ "Deed restricted" would necessarily include such property having a private covenant as defined by ARS §38-
28 440(C)(2), including "...any uniform or nonuniform covenant, restriction or condition regarding real property that is
contained in any deed, contract, agreement or other recorded instrument affecting real property."

1 disallow access to the planned community by non-residents. Control over the
2 HOA and thus policies thereto are under the direction and control of the
3 residents within such HOA. The HOA is not an autonomous entity, but rather
4 one which takes direction from the residents through a Board of Directors,
5 which establish policy and procedures consistent with their residents' needs,
6 wants and desires. At such gated communities, the HOA would necessarily
7 engage the services of an employee or agent thereof (security guard) who may
8 execute the entry policy of such HOA.
9

10 42. Unfortunately, as experience has shown, in several instances, where service of
11 process is intended to be made, access to the planned community by the Process
12 Server, Constable or Deputy Sheriff is disallowed by such security guard.
13 Under these circumstances, under the current applicable Rules, the proper
14 service of process is not executed, and barring other means of service, the
15 administration of justice is rendered moot.

16 43. Accordingly, there is a need to address the concerns of access to planned
17 communities by Process Servers, Constables and Deputy Sheriffs for the
18 service of legal process to combat the perceived "service free zone" created
19 within such planned communities.

20 44. While ARCP Rule 4.1(m) provides for an Alternate Means of Service, the cost
21 and time factors involved in securing such Alternate Means are many times out
22 of the means of the litigant, specifically with reference to parties in pro per, or
23 who must pay counsel additional fees to handle such motion(s). This is
24 especially true when dealing with the issues of serving legal process which are
25 time sensitive.
26

27 45. Further, each party has a duty to save costs, and the proposed rule is consistent
28 with such principle.

1 46. Respecting the State Bar's concern in their Rules Forum comments, "...it
2 appears that Rule 4.1(m), enacted in 1989, was drafted specifically to address
3 service difficulties presented by gated communities. (See Daniel J.
4 MCAULIFFE & Shirley J. MCAULIFFE, ARIZONA CIVIL RULES
5 HANDBOOK (2011 ed.) at 53, stating '[w]hile Rule 4.1(m) was primarily
6 addressed to the situation where a third party, such as a residential security
7 guard or office receptionist, denies access to the person on whom service is
8 sought, it is not limited in its application to such situations.')", the lack of
9 expediency and cost to the litigant with which such orders pursuant to Rule
10 4.1(m) are issued sometimes creates an impediment to service of process, rather
11 than an aid thereto.
12

13 47. Our neighboring states, California and Nevada, have both enacted statutes
14 addressing such issues. Further, California has case law which addresses the
15 issues, as well.

16 48. California Code of Civil Procedure (CCP) §415.21 states:

17 "(a) Notwithstanding any other provision of law, any person shall be granted
18 access to a gated community for a reasonable period of time for the purpose of
19 performing lawful service of process or service of a subpoena, upon identifying
20 to the guard the person or persons to be served, and upon displaying a current
21 driver's license or other identification, and one of the following:

22 (1) A badge or other confirmation that the individual is acting in his or her
23 capacity as a representative of a county sheriff or marshal.

24 (2) Evidence of current registration as a Process Server pursuant to Chapter
25 16 (commencing with Section 22350) of Division 8 of the Business and
26 Professions Code.
27
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1 (b) This section shall only apply to a gated community that is staffed at the
2 time service of process is attempted by a guard or other security personnel
3 assigned to control access to the community."

4 49. Nevada Revised Statute (NRS) §14.090 states:

5 "1. A person who resides at a location to which access is not reasonably
6 available except through a gate may be lawfully served with any legal process
7 in the manner provided in this section. If there is:

8 (a) A guard posted at the gate and the guard denies access to the residence for
9 service of process, service of process is effective upon leaving a copy thereof
10 with the guard.

11 (b) No guard posted at the gate and entry through the gate is not reasonably
12 available, the court may, if it is satisfied by affidavit that those facts are true,
13 allow service of process by mailing a copy thereof to the residence by certified
14 or registered mail.

15 2. The manner of service authorized by this section is supplemental to and does
16 not affect the validity of any other manner of service authorized by law."

17 50. Further, *Bein v. Brechtel-Jochim Group, Inc.* [(1992) 6 Cal.App.4th 1387, 8
18 Cal.Rptr.2d 351] addresses the issue (in California) with regard to service of
19 process where the person controlling access to the private community does not
20 permit entry for the service of process. In its decision, the Court said,
21 "Litigants have the right to choose their abodes; they do not have the right to
22 control who may sue or serve them by denying them physical access." We
23 believe the same is true for litigants in Arizona, as well.

24 51. The Bein Court further stated,

25 "In *Khourie, Crew & Jaeger v. Sabek, Inc.* (1990) 220 Cal.App.3d 1009 [269
26 Cal.Rptr. 687], where a corporation attempted to avoid service by refusing to
27
28

1 unlock its door, the court determined a "defendant will not be permitted to
2 defeat service by rendering physical service impossible." ... "The evident
3 purpose of Code of Civil Procedure section 415.20 is to permit service to be
4 completed upon a good faith attempt at physical service on a responsible
5 person. ..." ...Service must be made upon a person whose "relationship with the
6 person to be served makes it more likely than not that they will deliver process
7 to the named party." (*50 Court St. Assoc. v. Mendelson et al.* (1991) 151
8 Misc.2d 87 [572 N.Y.S.2d 997, 999].) Here, the gate guard's relationship with
9 appellants [6 Cal.App.4th 1394] made it more likely than not that he would
10 deliver process to appellants. We note they do not claim they failed to receive
11 notice of service."
12

13 52. Georgia has addressed access to service of process within such planned
14 communities through Official Code of Georgia, Annotated (OCGA) §9-11-
15 4(f)(4), which states:

16 (4) *Service upon persons residing in gated and secured communities.*

17 (A) As used in this paragraph, the term "gated and secured communities"
18 means multiple residential or commercial properties, such as houses,
19 condominiums, offices, or apartments, where access to the multiple residential
20 or commercial properties is restricted by a gate, security device, or security
21 attendant that restricts public entrance onto the property; provided, however,
22 that a single residence, farm, or commercial property with its own fence or gate
23 shall not be included in this definition.

24 (B) Any person authorized to serve process shall be granted access to gated
25 and secured communities for a reasonable period of time during reasonable
26 hours for the purpose of performing lawful service of process upon:

27 (i) Identifying to the guard or managing agent the person, persons, entity,
28

1 or entities to be served;

2 (ii) Displaying a current driver's license or other government issued
3 identification which contains a photograph; and

4 (iii) Displaying evidence of current appointment as a Process Server
5 pursuant to this Code section.

6 (C) Any person authorized to serve process shall promptly leave gated and
7 secured communities upon perfecting service of process or upon a
8 determination that process cannot be effected at that time."

9
10 53. Florida goes further in its address the issue of service of process at a planned
11 community through Florida Statutes §48.031(7), which states:

12 "A gated residential community, including a condominium association or a
13 cooperative, shall grant unannounced entry into the community, including its
14 common areas and common elements, to a person who is attempting to serve
15 process on a defendant or witness who resides within or is known to be within
16 the community."

17 54. While the issue is addressed and resolved in at least two neighboring states, and
18 at least two other states, the opportunity exists for Arizona to resolve issue and
19 remove what amounts to a "special exemption" allowing homeowners or
20 occupants within such planned communities to avoid service of process.

21 55. While Petitioner recognizes that the states cited have enacted legislation to
22 enable service upon a guard, such states not coincidentally harbor their rules for
23 service of process in statute, rather than in rules set forth by their Supreme
24 Court(s). Thus, it is well within the authority of the Arizona Supreme Court to
25 authorize a rule enabling service upon a person within a gated community by
26 delivery to the guard, who acts as the gatekeeper to the residential community.
27

1 56. Such a proposed rule would have no detrimental effect upon the recipient's
2 (defendant's) due process rights. The net effect under the proposed (amended)
3 rule would be akin to service made under ARCP Rule 4.1(m), wherein the
4 motion for such an order is made *ex parte*. The effective difference would be
5 that the legal process would be handed to the guard, rather than posted on a gate
6 or other structure. The document would still be mailed to the defendant, as
7 required under ARCP Rule 4.1(m).⁹

8
9 57. The proposed rule change is the least cumbersome and most expedient method
10 of enabling service of process while respecting the rights of the homeowner to
11 determine who enters their property and when.

12 **DISCUSSION OF THE IMPACT OF PROPOSED CHANGE(S)**

13
14 58. While the proposed rule changes are written to clarify and explicitly state the
15 manner and methods for certain types of service of process, such do not inhibit
16 or otherwise alter the existing rules pertaining to Alternate Means of Service.
17 The proposed rule changes do not diminish the necessity for, nor effectiveness
18 of ARCP Rule 4.1(m), nor RFLP Rule 41(L), but seek to clarify and further
19 state the need for a uniform set of circumstances under which service of process
20 may be made under the proposed rules. The impact and language of these rules
21 remain intact and are unaffected.

22 59. Rules of Procedure for Eviction Actions (RPEA) Service of Special Detainer &
23 Forcible Detainer Action, Rule 5(f) remains intact and is unaffected.

24 60. The effect of statutes enacted by the legislature are recognized, and are beyond
25 the scope of the proposed rule changes.
26

27 ⁹ The original petition had the mailing under the proposed rule by first class mail. The Amended Petition seeks to
28 direct that such mailing be made via certified mail, return receipt requested.

1
2 **PETITIONER’S ARGUMENT AS TO CONTEMPT OF COURT &**
3 **CIVIL ARREST WARRANTS**

4 61. Comment has been put forth by the State Bar and other person(s), wherein the
5 concept of *actual notice* and *constructive notice* have been discussed. The
6 specific changes proposed to ARCP Rule 4.1(d) states, “Any order of the court
7 in such pleading which may result in the issuance of a civil arrest warrant, as
8 defined in ARCP Rule 64.1(a) or a finding of contempt must be *personally*
9 *served* upon the individual, or, in the alternative, served by an order of the court
10 in accordance with ARCP Rule 4.1(m).” (*emphasis added*)

11
12 62. The core terms which differentiate *personal service* and *substitute service* are
13 *actual notice* and *constructive notice*. Such core terms of differentiation provide
14 the substantive difference between a person having actual, first-hand knowledge
15 of legal process being served upon them (personal service) and the dependency
16 of the courts and litigants upon a (presumably unrelated) third party delivering
17 the legal process to the named defendant or judgment debtor (substitute
18 service).

19 63. Where the defendant, judgment debtor or other person personally served with
20 legal process inarguably has received *actual notice* of the pending court
21 proceeding, the lack of personal knowledge (actual notice) of a person who was
22 served by substitute service is a point of contention.

23 64. The expediency which some legal process requires to be served under the
24 current rules allows for substitute service upon a party. However, the lack of
25 actual notice to such party, especially compounded when a person with whom
26 the legal process is left is ignorant of the importance of such document(s)
27 deprives the intended recipient of their due process rights.
28

1 65. APSA does not seek to modify or change Rule 64.1, et seq., but seeks to
2 provide a consistent means of direction as to service of such legal process.

3 66. Contempt of court and civil arrest warrants are issues which the Petitioner
4 believes should be attended to in part through proposed changes to Rule 4.1(d).
5 No changes to Rule 64.1, et seq. is sought; the changes are merely to clarify that
6 *personal service* of the legal process is required to effect punishment, or in the
7 alternative (when a person to be served is found by the court to be purposely
8 avoiding service), service under Rule 4.1(m).
9

10 67. The impact on the individual served with an order punishable by contempt of
11 court is substantial, and service requirements should be clearly spelled out in
12 appropriate Rule(s). The proposed rule changes include language that, "*Any*
13 *order of the court in such pleading which may result in the issuance of a civil*
14 *arrest warrant, as defined in ARCP Rule 64.1(a) or a finding of contempt must*
15 *be personally served upon the individual, or, in the alternative, served by an*
16 *order of the court in accordance with ARCP Rule 4.1(m)*". Where there is
17 vagueness in the existing language, the proposed change in language is meant to
18 explicitly state the procedure for serving an individual to give actual knowledge
19 of the legal process punishable by contempt of court, which may result in a civil
20 arrest warrant issued by the court.
21

22 HOUSEKEEPING MATTERS

23 68. The changes proposed in ARCP Rule 5(c) and RFLP Rule 41(C) and 43(C) are
24 consistent with the proposed ARCP Rule 4.1(d), defining "someone of suitable
25 age and discretion". Further, the changes sought in ARCP Rule 5(c) look to
26 correct the typographical error in the spelling of "judgement" to "*judgment*".
27
28

1 **THE PROPOSED RULE CHANGES**

2 69. Accordingly, the issues presented here in this Petition allow for clarity and
3 explicitly specify the circumstances and requirements for (1) substitute service,
4 (2) defining a person of suitable age and discretion, (3) service where the
5 Process Server, Constable or Deputy Sheriff is not allowed access to private,
6 gated communities, and (4) contempt of court and the issuance of civil arrest
7 warrants. These issues are addressed for both relevancy and appropriateness in
8 expediting the service of legal process in Arizona.
9

10 70. Accordingly, for good cause, the Petitioner prays that the Court will adopt the
11 proposed rule changes.

12 71. I declare under penalty of perjury that the foregoing is true and correct.
13 (ARCP R. 80(i)).

14
15 Date: 6-29-12

Signed: Patty Chlebanowski

16 Patty Chlebanowski, Secretary

17 For the Board of Directors of the Arizona Process Servers Association, Inc.
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APPENDIX A:
DRAFT TEXT OF AMENDED PROPOSED CHANGES TO
ARCP RULE 4.1(d)

1. The proposed rule under ARCP Rule 4.1(d), would state as follows (proposed changes in *italics*):

Service of Summons Upon Individuals. Service upon an individual from whom a waiver has not been obtained and filed, other than those specified in paragraphs (e), (f) and (g) of this Rule 4.1, shall be effected by *one of the following methods*:

(1) *(Personal Service): Delivering a copy of the summons, pleading and other documents being served to that individual personally. Any order of the court in such pleading which may result in the issuance of a civil arrest warrant, as defined in ARCP Rule 64.1(a) or a finding of contempt must be personally served upon the individual, or, in the alternative, served by an order of the court in accordance with ARCP Rule 4.1(m).*

(2) *(Substitute Service at a Residence): Leaving a copy of the summons, pleading and other documents being served at that individual's dwelling house or usual place of abode in the presence of a member of the household or a person apparently in charge therein, who stated or appeared that he or she was at least 16 years of age at the time of service, and after due and reasonable inquiry, appeared to be of suitable discretion to accept service of process, who shall be informed of the general nature of the legal process. A copy of the legal process served shall be mailed by certified mail, return receipt requested, postage prepaid thereon to the person served. Service shall be deemed complete three days after mailing.*

1 (3) *(Substitute Service at a Planned Community): If the dwelling house or usual*
2 *place of abode lies within a planned community or other such location where*
3 *access or entry to such planned community or other such location must be*
4 *granted or is controlled by a guard this section shall apply. If after having*
5 *identified himself or herself to the guard as a Process Server, Constable or*
6 *Deputy Sheriff having lawful business in serving legal process upon a person*
7 *reasonably believed to be residing or located in such planned community or*
8 *other such location, and entry to such planned community or other such*
9 *location is denied, service of a copy of the summons, pleading and other*
10 *documents being served may be performed by leaving a copy of the legal*
11 *process with the guard, who shall be informed of the general nature of the legal*
12 *process, and thereafter mailing a copy of the legal process by certified mail,*
13 *return receipt requested, postage prepaid thereon to the person served at the*
14 *individual's dwelling house or usual place of abode. Service of legal process in*
15 *this manner is deemed complete three days after the mailing.*

17 (2) *(Substitute Service at a Business): Leaving a copy of the summons, pleading*
18 *and other documents being served at that individual's usual place of business,*
19 *or at a commercial mail receiving agency, in the presence of a person*
20 *apparently in charge therein, who shall be informed of the general nature of the*
21 *legal process and thereafter mailing a copy of the legal process by first-class*
22 *mail, postage prepaid thereon to the person served at the location where*
23 *service was made. Service of legal process in this manner is deemed complete*
24 *three days after the mailing.*

26 (4) *This Rule shall not affect any alternate means of service which may be*
27 *ordered by the court under Rule 4.1(m).*

1 presumed that the paper was served by mail. This conclusive presumption shall
2 only apply if service in some form has actually been made.

3 (4) Service After Judgment. After the time for appeal from a judgment has
4 expired or a judgment has become final after appeal, the service of a motion,
5 petition, complaint or other pleading required to be served and requesting
6 modification, vacation or enforcement of that judgment, shall be served
7 pursuant to Rules 4, 4.1 or 4.2, as applicable, of these rules as if serving a
8 summons and complaint.
9

1 b. that such papers were in fact received by the party as evidenced by the
2 receipt, or copy of the signature confirmation containing the signature of the
3 party served and cash register receipt or package label, a copy of which shall be
4 attached to the affidavit; and

5 c. the date of receipt by the party being served and the date of the return of the
6 receipt or signature confirmation to the sender.
7

8 This affidavit shall be prima facie evidence of personal service of the summons,
9 the pleading and other documents to be served. Service shall be deemed
10 complete and time shall begin to run for the purposes of Rule 32(A) from the
11 date of receipt by the party being served, provided that no default may be had
12 on such service until the required affidavit has been filed.
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1 presumed that the paper was served by mail. This conclusive presumption shall
2 only apply if service in some form has actually been made.

3 4. Service After Judgment. After the time for appeal from a judgment has
4 expired or a judgment has become final after appeal, the service of a motion,
5 petition, or other pleading required to be served and requests for modification,
6 vacation, or enforcement of that judgment, shall be served pursuant to Rule 40,
7 41 or 42, as applicable, as if serving a summons and petition.
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