Mike Palmer
18402 N. 19th Ave., #109
Phoenix, AZ 85023
602-513-3738 (intermittent cell)
mikepalmer_arizona@fastmail.fm

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO REPEAL THE ARIZONA RULES OF PROTECTIVE ORDER PROCEDURE	Supreme Court No. R-13-_____

Pursuant to Rule 28, Rules of the Supreme Court, Mike Palmer, a member of the public deeply concerned about justice,[1] petitions this Court to repeal/unadopt the Arizona Rules of Protective Order Procedure (ARPOP) in their entirety. The ARPOP is an unconstitutional cancer that has already begun to metastasize within judicial officers of this Court, infecting the public as well. The existence of the ARPOP frustrates the public, and therefore undermines public confidence in the judiciary.

I. Background and Purpose of the Proposed Rule Amendment

The ARPOP is relatively new to the Court, adopted in September 2007, becoming effective in January 2008. According to the petition for adoption by the

1 Per Amos 5:15 in the Bible: "Hate evil, love good. Maintain justice in the courts."

Chair of the DVRC, the ARPOP was sold to the Court "to resolve the pervasive confusion and conflict over the applicability of other procedural rules in protective order cases."

Whether there actually was pervasive confusion, I can't say. Given the history, there shouldn't have been.

Before the ARPOP, there was the DV Benchbook. (Which, despite its name and the name of the Committee that spawned it, appropriated jurisdiction over civil Injunctions Against Harassment as well. As if criminal and civil matters were the same.[2])

The ARPOP grew out of the DV Benchbook, and you can still see the close resemblance today. (The ARPOP is organized better.) Since the DV Benchbook stated essentially the same things as the ARPOP at the time of adoption, it's difficult to understand how the ARPOP could have resolved confusion if the Benchbook hadn't.

If anything, things have gotten more confusing. The CIDVC chose to lump criminal DV matters (Orders of Protection) with civil Injunctions against Harassment (IAH) matters and used a "one form fits all" approach in petitions for

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2 While the CIDVC is incrementally working to make civil IAH's the same as criminal domestic violence OOP's, they are not the same.

OOP's and IAH's. And now judges and clerks throughout Arizona refer to these distinctly separate matters as one, referring to them indistinctly as "protective orders." Talk about confusion – a Phoenix police officer is fighting to keep his job because his Second Amendment right was unconstitutionally revoked in a civil injunction against workplace harassment[3] thanks to the CIDVC and the ARPOP.

If there had truly been any confusion over truly procedural rules in the DV Benchbook, the confusion could have been eliminated simply by stripping out the extra-legal propaganda in the Benchbook, splitting it up into a separate "DV Benchbook" and a "IAH Benchbook" and promoting the two guides as separate and distinct (perhaps different color covers) among judicial officers.

Which is exactly the solution for today. As a minimum, the ARPOP needs to be demoted back to a guide from which it came, split in two, and instead of calling itself a Rule of Procedure, call it a Benchbook like it used to be called. And judicial officers need to be reminded it is only a guide. That they should refer to the law for final authority.

We already have well tested rules of criminal and civil procedure (criminal for DV matters, civil for IAH's) to protect defendants' constitutional rights. There's

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3 The workplace was not his police department, but where his wife used to work. It's a long story about someone using an IAH to harass.

no need to promulgate a new "procedure" which doesn't.

Why do we need to do this? Well, let's start with the Court's statement from an earlier time in our history, *Marsin v. Udall*, 78 Ariz. 309, 312, 279 P.2d 721 (Ariz: Supreme Court 1955).

In considering the abuse of a judicial officer in denying a litigant a fundamental constitutional right (the right to a fair trial) this Court said,

> The right to a fair and impartial trial before a fair and impartial judge is a valuable substantive right originating in the common law and recognized by statute in both criminal and civil cases. **Neither this court nor the superior court can by rule of procedure deprive a party of the opportunity to exercise this right. Courts cannot enact substantive law. A court is limited to passing rules which prescribe procedure for exercising the right. Any rule of court that operates to lessen or eliminate the right is of no legal force.** It has even been held by the Supreme Court of the United States that under some circumstances a procedure that had such effect offended the due process clause of the Federal constitution.

Now, the ARPOP purports to exist under the Court's constitutional authority, per Article 6, Section 5 of the Arizona Constitution. ("The supreme court shall have the power to make rules relative to all procedural matters.") That is, the ARPOP purports to be procedural law.

Per *Marsin*, "[a] court is limited to passing rules which prescribe procedure for exercising [constitutional] right[s]." And, "[n]either this [supreme] court nor

the superior court can by rule of procedure deprive a party of the opportunity to exercise [a constitutional] right."

But consider Rule 5 of the ARPOP, titled "Rules of Evidence and Disclosure for Protective Order Hearings." Under A. Admissible Evidence, the rule of procedure claims:

> 1. All relevant evidence is admissible, except the court may exclude evidence if:
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> a. the probative value is outweighed by the danger of unfair prejudice;
> b. the evidence results in confusion of the issues;
> c. admitting the evidence may result in undue delay;
> d. a needless presentation of cumulative evidence would result, or
> e. the evidence lacks reliability.
>
> And,
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> 2. Any report, document, or standardized form required to be submitted to the court may be considered as evidence if either filed with the court or admitted into evidence by the court.

With the stroke of a pen, this rule of procedure wipes out a defendant's constitutional right to a fair and impartial trial. With the stroke of a pen, the ARPOP wipes out the constitutional protections embodied in the Arizona Rules of Evidence. It makes the Rules of Evidence totally arbitrary and capricious!

So then, any ordinarily inadmissible evidence can be admitted. Like hearsay—and that's a biggie in these ex parte actions. (A plaintiff/victim can lie

and lie and lie because there's no one there to confront them.)[4] Or fabricated or doctored "evidence" (computer edited voice mails). Almost anything can be admitted unchallenged into evidence by a plaintiff. And relying on a judicial officer's discretion is of no comfort since the judge already considers the plaintiff a "victim," as detailed later.

Further, Rule 5B of the ARPOP, titled "Disclosure" says,

> The disclosure requirements set forth in Rule 26.1, Arizona Rules of Civil Procedure, and Rules 49 and 50, Arizona Rules of Family Law Procedure, do not apply to hearings on Orders of Protection, Injunctions Against Harassment and Injunctions Against Workplace Harassment, unless otherwise specifically ordered by the court.

So once again, with a stroke of the procedural pen, the APROP wipes out a defendant's constitutional right to a fair trial, which was heretofore procedurally guaranteed in part by Rule 26.1. This isn't right. You can't defend yourself not knowing what you've been accused of or not knowing what evidence will be used against you at trial.

From *Marsin*, speaking about the right to an impartial and fair trial, "Neither this court nor the superior court can by rule of procedure deprive a party of the opportunity to exercise this right. . . . Any rule of court that operates to lessen or

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4 Also, the hearsay tends to be extremely inflammatory and prejudicial.

eliminate the right is of no legal force. **It has even been held by the Supreme Court of the United States that under some circumstances a procedure that had such effect offended the due process clause of the Federal constitution.**" The ARPOP offends the due process clause of the Constitution. Hence, the ARPOP is unconstitutional. It must be repealed. There's no need for it. The Court got along fine without it for years. The Court can get along fine without it now.

Further, as I alluded to above, the ARPOP calls plaintiffs "victims." From Rule 1(B)(1)(d), "**Victim.** As used in these rules, the term 'victim' is used interchangeably with 'plaintiff.'"

You can't get any more prejudicial than that. Especially since the other side hasn't been heard. We don't even know if there really is a victim. It goes against American jurisprudence.[5]

Marsin says "The right to a fair and impartial trial **before a fair and impartial judge** is a valuable substantive right originating in the common law and recognized by statute in both criminal and civil cases. **Neither this court nor the superior court can by rule of procedure deprive a party of the opportunity to exercise this right.**" But the Court, by this Rule, has constructively deprived

5 "The first to present his case seems right, till another comes forward and questions him." Proverbs 18:17

defendants of the right to an impartial trial! Why would any defendant go to a trial knowing a court already considers the plaintiff a "victim?"[6]

Next, the APROP is being (mis)used to make substantive law. This Court has acknowledged the obvious in *Marsin*, that "**Courts cannot enact substantive law. A court is limited to passing rules which prescribe procedure for exercising the right.** "

But consider ARPOP Rule 6(E)(4)(e)(2), which has been a topic in this forum for a few years now.[7] With a swipe of a pen, Rule 6(E)(4)(e)(2) tells judicial officers, absent any statutory authority, that they can revoke the Second Amendment constitutional right of a defendant in a civil IAH under A.R.S. §12-1809. [8]

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6 I argued against this Rule years ago in this forum. But my petition fell on deaf ears. (R-10-0014)

7 Use the search function in this forum to find R-09-0045 and R-12-0017.

8 This despite case law from the Arizona Court of Appeals that 1) "Our statutes do not authorize [orders concerning firearms] to discourage people from yelling or engaging in 'harassment' of the type proscribed by A.R.S. § 12-1809(R)," and 2) regarding A.R.S. § 12-1809, " . . . **we do not attribute to the legislature any intention to authorize unconstitutional injunctions.**" ¶ 20, *Mahar v. Acuna*, 2012 WL 5055125 (Ariz.App. Div. 2)) and FN7 in *LaFaro v. Cahill*, 56 P. 3d 56 - Ariz: Court of Appeals, 1st Div., Dept. B 2002, respectively. See also the constitutional safeguard in A.R.S 12-1810(K)(2), which, cleverly, the ARPOP does not cite.

On its face, this rule of procedure deprives a party of the opportunity to exercise a constitutional right. Which *Marsin* says a procedural rule cannot do. Therefore, the Court is making substantive law. Which *Marsin*, the Arizona Constitution's Article III Distribution of Powers, and common sense say it cannot do.[9]

But even as of this writing, this continues to make substantive law by way of the ARPOP, even petitioning in this forum to morph civil injunction "law" into criminal law via Rule 6(E)(4)(e)(2). (See comment of Michael Roth, dated 11/07/12 under R-12-0007 under "Arizona Rules of Protective Order" in this forum.

As I said earlier, this cancer has already metastasized. Consider a recent ex parte civil injunction, where a judicial officer unconstitutionally deprived a citizen his Second Amendment constitutional right.

The litigant petitioned the court to rescind the constitutional deprivation, as he had successfully done years ago when this first happened to him. But the cancer has spread since then.

In his Order denying, Mr. Paul Julien, a staffer of the Supreme Court, acting

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9 As such, per *Marsin*, an Order from a court prohibiting firearms in a civil injunction is of no legal force.

as a pro tem judge in this particular matter, denied the petition. In his Order he wrote "The Court had authority under Arizona law **and rules** to impose such a restriction. See Arizona Rules of Protective Order Procedure 6(E)(4)(4)(2)."[10]

In citing the "rules" as authority, he is equating the ARPOP to statutory law! And this guy teaches other judicial officers throughout Arizona! Things will only get worse unless this cancer is eradicated.

And as mentioned earlier, a Phoenix police officer is fighting to keep his Second Amendment gun rights—and consequently his job—because a judge revoked his right in an injunction due to the ARPOP. How many more peace officers must suffer?

Last, the mere existence of the ARPOP hurts the public. There's a mindset in the courts not shared by outsiders. A quote from a CIDVC meeting minutes makes the point. "Consensus among workgroup members was that the Arizona Rules of Protective Order Procedure (ARPOP) be amended, rather than Rule 123, Rules of the Supreme Court. The rationale was that a person looking for information about protective order records would be more likely to look in ARPOP than in the Rules of the Supreme Court."

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10 *Thomas-Morgan v. Palmer*, 20110410J in the Prescott "Justice" court, Order dated August 29, 2012, Paul D. Julien.

Wrong. This is "Court-think" from those who live in Ivory Towers. For the rest of us unwashed masses (the vast majority of these injunctions are pro se against pro se), when we're hit with an Injunction (or OOP) and want to learn about the law to challenge it, we don't look in the ARPOP. We don't even know the ARPOP exists![11] We go to the law and read A.R.S. §12-1809. And we expect the courts to follow that law and the constitution. But as I've shown, the ARPOP substitutes itself for law in the mind of the courts. This frustrates the public to no end.

In conclusion, the ARPOP is not law. It cannot be law per *Marsin* because this rule of procedure eliminates constitutional rights. Still, it purports to give judicial officers the authority to deprive litigants of those rights. And judicial officers believe it!

The ARPOP must be repealed. Immediately.

End note

If the Justices won't repeal the ARPOP (and given what they've telegraphed to date, they won't), it seems the only remedy for redress of an unconstitutional injunction is a civil action in federal court.

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11 Indeed, I only tripped across the ARPOP on the Internet by accident a year and half after suffering through my first civil IAH, trying to figure out how such a thing could happen in the United States of America.

It would be silly to take an unconstitutional Injunction to the Arizona Supreme Court. (If you could get such a Special Action.) For one, if the Justices won't repeal the ARPOP in this forum, it's not likely the Justices would repeal it in court. Second, they would be their own judges. So I submit the federal court is the only path for justice. One would have to sue the Justices of the Arizona Supreme Court, seeking declaratory and injunctive relief to declare the ARPOP (on an individual Rule therein) unconstitutional. By petitioning in this forum without success, the administrative and state remedies will have been exhausted. So the way should be open to go federal. See http://suingforjustice.blogspot.com

II. Contents of the Proposed Rule Amendment

~~17B A.R.S. Rules Protect.Ord. Proc.~~ DELETED

SUBMITTED this 10th day of January, 2013

By /s/ Mike Palmer
Mike Palmer
18402 N. 19th Ave., #109
Phoenix, AZ 85023