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Clifford Sherr
Attorney at Law
8835 North 47th Place
Phoenix, AZ 85028-6133
480-483-6199
Attorney number 003854
e-mail Sherr1@cox.net
Attorney/Petitioner

IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF:)
)
PETITION TO AMEND) No. R-12-0036
)
RULE 7.6, ARIZONA RULES)
OF CRIMINAL PROCEDURE) REPLY TO COMMENT OF THE ARIZONA
) PROSECUTING ATTORNEYS' ADVISORY
) COUNCIL

I

YES, THERE ARE COMPETING POLICIES/PHILOSOPHIES HERE

It is not surprising to Petitioner that the first seven (7) pages of the Comment of the Arizona Prosecuting Attorneys' Advisory Council (Council) dealing with its policy/philosophy would be so vociferously negative concerning the Petition. As pointed out in the Petition, the amendments to Criminal Rule 7.6 if enacted, would have a (potentially substantially) negative impact on funds currently garnered by counties in this State through the forfeiture of bail bonds.

Further, the Council's Comment reveals the huge schism between how it views the role of a bondsman/surety and how the bonding community views itself and its role in the administration of justice. (See e.g., discussion contained in the Reply to the Comment to the Maricopa County Attorney

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pages 2-3, especially State v. Vang, 763 N.W.2d 355, 358:

"Another (purpose of a bail bond) is to encourage sureties to locate, arrest, and return defaulting defendants to the authorities to facilitate the timely administration of justice."

Additionally, and in undersigned counsel's vast experience(s) in this area, nowhere in Arizona has the forfeiture of bail bonds been "turned into an art form"

than in Yavapai County ~~County Attorney Sheila~~

Sullivan Pollor of the Coun

As evidencing the Council the Petitione discussed in, infra, Petiti Bai County have different ph the purpose off the necessitig bondsmen to surrender a -violation. Th philosophy wat into better Yavapai Couni Darrow, who cws in the case Dios, CR2011-80

entially takes this bond forfe ated as a matte ity. Once an a n requiring a c court proceedir entire bond sh the State, be d tends that it c d reality of fo that sureties v implement, befo

1 violation occurs, meaningful procedures
2 and steps intended to ensure that
3 defendants will fulfill their obligations
4 under the bond and to the court.
5 Apparently, the State does not recognize
6 any benefit, either to the court, the
7 prosecution, or the public in general,
8 deriving from a bondsman's efforts to
9 apprehend a fugitive. In essence, the
10 state contends that it would be virtually
11 always, if not always, within the sound
12 discretion of the court to order forfeiture of
13 entire bonds in situations where a violation
14 of the conditions of the bond occurs
15 before compliance with Rule 7.6(d)(2)."

16 Let us set aside for the moment that the Council's
17 position of "strict liability" and "you must punish by
18 forfeiting the entire amount of the bond" has been
19 specifically rejected in State v. Old West Bonding Company,
20 203 Ariz. 468, 56 P.3d 42 (Ct. of Appeals, Div. 1, 2002).
21 As explained in State v. Old West Bonding Company, 203
22 Ariz. at 474, 56 P.3d at 48:

23 "But if Rule 7.6(c)(2) were read
24 to mandate forfeiture whenever
25 a defendant violates a condition of
26 his or her appearance bond and the
27 surety is unable to establish
28 reasonable cause for the violation,
then Rule 7.6(d)(2) would be
rendered meaningless. Clearly a
'no discretion' interpretation
of Rule 7.6(c)(2) cannot coexist
with the discretionary standard
in Rule 7.6(d)(2) which contemplates
the possibility of a bond exoneration
if the surety surrenders a defendant
after violation." (emphasis in the
original).

29 More often than not State v. Old West Bonding Company
30 supra, has been rejected/ignored, (especially) in Yavapai

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3 County. (Remember, exoneration after surrender is
4 discretionary...)

5 And in those rare occasions where State v. Old West
6 Bonding Company, supra, is followed, you still end up with
7 tragically laughable results. Indeed, in the Comment
8 (page 10) it was represented that the bondsman was
9 "rewarded" in State v. Woodward Yavapai County Superior
10 Court cause CR2011-80098)--when, after a swift apprehension
11 and surrender (the Defendant being brought from Northern
12 California back to Yavapai County in less than one month
13 after the bench warrant was issued) the court "only"
14 forfeited \$12,500.00 of a \$20,000.00 bond. The Council
15 views that result as the glass being 1/3 full, and the
16 bonding community/Petitioner speaking on its behalf, views
17 the result as the glass being 2/3's empty. Under the
18 circumstances only a governmental entity (or a council made
19 up of prosecutors) which adhere(s) to the notion of "strict
20 liability" and requiring a bondsman to have "clairvoyance"
21 as to a defendant's failure to appear would treat the
22 result in Woodward, supra, as a "reward situation" when
23 clearly it was not.

24 This "philosophical difference" is also highlighted in
25 State v. Donohoe, 220 Ariz. 126, 203 P.3d 1186 (App. Div.
26 1, 2009), cited in the Comment, page 3. Setting aside for
27 the moment that Donahoe had absolutely nothing to do
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3 with any member of the bonding community posting an
4 appearance bond (more about that, infra,) the Council, by
5 citing Donahoe among its other arguments, evidences its
6 embrace of the philosophy that bail is indeed "a source of
7 revenue and/or a method to punish sureties"--(compare
8 discussion in the Petition, pages 9 and 10 which cites
9 cases evidencing a completely opposite philosophy).

10 Turning now to a discussion of Donahoe, supra, the
11 Court should understand (and as mentioned previously) this
12 was not a bond forfeiture dispute. Indeed, this was not
13 even a case which involved a bondsman or surety. The
14 appeal involved whether or not a superior court judge had
15 the authority to inquire into the source of \$100,000.00 in
16 cash which the defendant (who was being charged with
17 conspiracy to possess and transport marijuana, money
18 laundering and conducting an illegal enterprise) desired to
19 post with the jail in order to be released pending trial.
20 The jail refused to accept the sum, which was presented to
21 the jail in small bills bundled in duct tape. At a
22 hearing, the trial judge determined that he did not have
23 the authority to conduct a future hearing as to the
24 legitimacy or legality of the cash funds desired to be used
25 to post bail. The State appealed. The Court of Appeals
26 reversed the trial judge's decision. After the discussion
27 cited by the Council in its Comment the Court goes on to

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say in Donohoe, 220 Ariz. at 130, 203 P.3d at 1190:

"According to the State, when the pledge property or cash comes from an illegal activity such as drug trafficking, it does not, in fact ensure the defendant's future appearance because: (1) the defendant 'has no legal right to the money and losing it will be of no consequence;" and (2) its forfeiture may simply be viewed as an acceptable cost of doing business.

We are persuaded that, in assessing whether defendant poses a flight risk if released on bail, the source of his or her posted security may be relevant."

As this Court can see, this case had nothing to do with "whether or in what amount to forfeit a bond" State v. Old West Bonding Company, supra, or anything to do with whether or not adopted the proposed rule changes is a good idea or not.

The Council's ends the philosophical facet of its Comment by claiming that by accepting the Rule change, e.g. fixing the amount forfeited when there has been a timely apprehension and surrender, "failures to appear will increase and the very purpose of posting an appearance bond will be thwarted." Petitioner absolutely disagrees with that representation. As indicated in the Petition, the Rule change tracks what has been the practice in Maricopa County since State v. Old West Bonding Company,

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2 supra, was decided in 2002. It has worked well for and in
3 Maricopa County, for both the County and the bonding
4 community, and there is no reason to believe a statewide
5 adoption would be anything but helpful for the
6 administration of justice, even in Yavapai County.

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8 II
9 THE PORTION OF THE COMMENT
10 CONCERNING PROPOSED RULE 7.6(c)(1)
11 ENTIRELY MISSES THE MARK

12 The next facet of the Council's Comment, pages 7-11,
13 concerns the Council's opposition to the proposed changes
14 of Arizona Rule of Criminal Procedure, Rule 7.6(c)(1).
15 The Council spends very little time in the Comment carping
16 about why setting the bond forfeiture hearing at the same
17 time as the issuance of the warrant--so, consequently,
18 Petitioner will not spend much time in its Reply rebutting
19 same. Suffice to say that pursuant to State v. Bail Bonds
20 USA, 223 Ariz. 394, 397, 224 P.3d 210, 213 (App. 2009)
21 (c.f. Petition for Rule Change, pages 14 and 15) adoption
22 of the proposed Rule change would be in keeping with a
23 holding in that case.

24 The Council then spends the majority of its argument
25 concerning Rule 7.6(c)(1) (pages 8-11 in the Comment)
26 complaining as to why requiring a minimum of time between
27 the issuance of the warrant and the initial setting of a
28 bond forfeiture hearing--would be contrary to "an expedient
and effective criminal justice system." (Comment page 8).

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3 It then uses a very curious argument/ example to
4 demonstrate why the rule change should be rejected. As
5 indicated in the Comment, page 8:

6 "Consider this example: a defendant
7 appears for court on June 1. At
8 that hearing, after discussion
9 the court sets the case for a
10 change of plea approximately
11 45 days later. The defendant,
12 knowing that his change of plea
13 will likely result in a sentence
14 of prison, decides to abscond
15 on June 2nd."

16 Yes, under the scenario outlined in the Comment,
17 the Defendant already has a "44 day head start."
18 However, the problem isn't that the bondsman shouldn't be
19 given adequate time to find the Defendant, as the proposed
20 rule change would ensure, it is that the Court, pursuant
21 to Arizona Rule of Criminal Procedure, Rule 7.2(c)(1),
22 should have never put the bondsman in the position of
23 having to look for this defendant in the first instance.
24 Criminal Rule 7.2(c)(1) states in relevant part:

25 "After a person has been convicted
26 for an offense for which the person
27 in all reasonable probability
28 suffer a sentence of imprisonment,
the person shall not be released
on bail."

The Court, under the example advanced by the Council,
should have accepted the guilty plea at the June 1st
hearing and locked the defendant up, pursuant to Rule
7.2(c)(1). It should not have "gambled with the money of

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3 the bondsman" by creating the incentive for the "I'm-going
4 -to-prison-anyway-defendant" to abscond. Should the Court
5 (or any of the Council members) wish a more thorough
6 discussion on this issue it should read the Opening and
7 Reply Briefs filed in the pending Court of Appeals case
8 1-CA-CV-12-0213, State v. Liberty Bail Bonds and Banker's
9 Insurance Company and State v. Ameri-Bail Bonds and
10 Lexington National Insurance Company (Consolidated). If the
11 Council wanted an effective example to discredit the
12 proposed Rule, the example on page 8 wasn't it.

13 Before leaving this facet of the Reply, Petitioner
14 wishes to speak direct to footnote 2 on the bottom of page
15 9 of the Comment. The Council insinuates that since a
16 bondsman obtains a premium for the bond and endeavors to
17 fully collateralize from an indemnitor his potential loss:

18 "Little economic incentive remains
19 for the surety to incur out-of
20 pocket expenses to locate and
21 surrender a defendant to avoid
a loss which ultimately will be
borne by someone other than the
surety."

22 Comment, footnote 2, page 9. What the Council either
23 negligently or intentionally fails to realize is that
24 an appearance bond is a "contract between the principal
25 (indemnitor) and the surety on the one hand, and (the
26 surety and) the State on the other." State of Kansas v.
27 Sedam, 34 Kan.App.2d 624, 629, 122 P.3d 826, 831 (App.

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3 2006). Notwithstanding any collateral which the bondsman
4 may or may not take (or the ultimate quality of the
5 collateral which is another issue entirely), the bondsman
6 has a "contractual obligation" both to the indemnitor and
7 to the State. His obligation to the indemnitor includes
8 his obligation to "mitigate his damages" by locating and
9 surrendering the absconding defendant, and the bondsman
10 also serves his obligation to the State pursuant to the
11 bond through his efforts to "locate, arrest, and return
12 defaulting defendants to the authorities to facilitate the
13 timely administration of justice." State v. Vang, supra,
14 763 N.W.2d at 358.

15 It is insulting to every decent, hard working bondsman
16 to say that since he obtains collateral he doesn't care if
17 the defendant absconds. What the Council is really saying
18 is please do not change the Rule, because right now the
19 deck is stacked against the bondsman if a defendant
20 absconds. This is so because we (the members of the
21 Council) will endeavor to continue to forfeit all of the
22 bond by arguing to give him as little time as possible to
23 locate the defendant and (as discussed both supra and
24 infra,) even if he does locate and surrender the defendant
25 we will argue that the bondsman "should have been
26 clairvoyant" and anticipated the failure of the defendant
27 to appear and therefore the entire bond ought to be

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2 forfeited, anyway. As Petitioner has repeatedly indicated
3 in the Petition and all of the Replies to the Comments
4 filed, the bonding community is simply trying to "level the
5 playing field."

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7 III
8 PROPOSED RULE 7.6(d)(2)(a)
9 SHOULD BE ADOPTED

10 The Comment then turns to a short discussion as to
11 why proposed Rule 7.6(d)(2)(a) should not be adopted (c.f.
12 Comment, pages 11 and 12.

13 The Council complains that adopting the fixed \$150.00
14 forfeiture amount after apprehension and surrender,
15 "hardly produces an incentive for a defendant to timely
16 appear..." (Comment, page 12.) As indicated in the
17 Petition, this system has worked well in Maricopa County
18 and there is no reason to believe it would not work well
19 for the remainder of the State.

20 The Council concludes its Comments by indicating that
21 the proposed changes to the "surrender affidavit" (filing
22 it with the court instead of the sheriff) would be wrong
23 for two (2) reasons. The first is that if one files the
24 affidavit with the sheriff the sheriff can place the
25 "hold" on the defendant. Even assuming such to be true,
26 notifying the court--which can then notify the sheriff,
27 doesn't harm the process. Further, the second reason,
28 allowing the sheriff to "verify the veracity of the

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3 affidavit" will, of necessity, be accomplished at the
4 same time as the "hold" is placed. This Court should
5 understand that Petitioner would not have suggested
6 this change to the rule if what actually occurred in
7 Maricopa County tracked with the rule as currently
8 written. It does not. The suggested rule change was,
9 in the opinion of the Petitioner, the best option to
10 actually notify the court of a defendant's incarcerated
11 whereabouts out-of-county.

12 IV
13 PROPOSED RULE 7.6(d)(2)(b)
14 SHOULD BE ADOPTED

15 Other than a short conclusion on page 15 of its
16 Comment, the Council spends the last two (2) plus pages
17 (pages 12-14) arguing against the adoption of proposed
18 Rule 7.6(d)(2)(b). This change, if adopted, would require
19 the court to ascertain the extradition and transportation
20 costs of an absconding defendant who is incarcerated in
21 another state [c.f. State v. Amador, 98 N.M. 270, 648 P.2d
22 309. (S.Ct. N.M. 1982)] and exonerate the remainder after
23 deposit with the court of the ascertained sum.

24 Given that this situation has generated substantial
25 sums for the employers of the members of the Council in the
26 past, it is no wonder that the proposed change is so
27 roundly being criticized in the Comment.

28 Curiously, its main criticism(s) deal with how the

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3 costs would be calculated and how the various counties
4 will be able to resolve the "accounting problems" which
5 may result if the proposed Rule change is enacted.

6 Such arguments are a mystery to Petitioner. As this
7 Court is aware bond "[f]orfeiture proceedings ... are
8 simply a streamlined substitute for a civil suit resulting
9 from a breach of contract." In re Bond in Amount of
10 \$75,000, 225 Ariz. 401, 404, 238 P.3d 1275, 1278 (App.
11 Div. 2 2010). As such, superior courts in Arizona are
12 called upon virtually daily to ascertain the proper measure
13 of damages for a "breach of contract." It would be no
14 different here, and the surety/bondsman would still have
15 the burden of proof. State v. Eazy Bail Bonds, 224 Ariz.
16 227, 229 P.3d 239 (App. Div. 1, 2010).

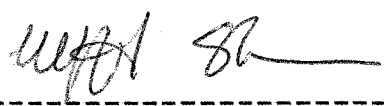
17 The "accounting problems" are even a bigger "red
18 herring." The funds still flow into the court, as they do
19 now. That facet of the process would not change. How
20 that, therefore, would cause new "accounting problems"
21 borders on the incredible.

22 Finally, the Council laments that even with the
23 prepayment of costs as proposed, there is no guarantee
24 that a defendant will "ever actually be extradited from
25 such a jurisdiction." (Comment, page 14). However true
26 that may or may not be, the same scenario would be true
27 under the present rule. The only difference is the amount

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of the bond "forfeited." As we have indicated in the
Petition, the purpose of the proposed change is to change
what has happened in the past, so that the State gets
either the Defendant or the money, but not both, as is
currently the case. The bonding community wants to put a
stop to the practice, currently so prevalent that "[Bail
is not a source of revenue for the state." State v. Amador
supra, 98 N.M. at 273, 648 P.2d at 312.

Respectfully submitted this 31st day of May, 2013.



Clifford Sherr
Attorney at Law
Petitioner

Copy of the foregoing
mailed this
31st day of May, 2013, to

Sheila Sullivan Polk
Elizabeth Ortiz
Arizona Prosecuting Attorneys' Advisory Council
Suite 202
1951 West Camelback Road
Phoenix, AZ 85015



Clifford Sherr