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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION TO AMEND RULE 42(f)(1)(D)(ii)(dd) OF THE RULES OF CIVIL PROCEDURE	Supreme Court No. R-13-0026 **Petitioner's Reply to Comment by Maricopa County Attorney's Office re: Petition to Amend Rule 42(f)(1)(D)(ii)(dd) of the Rules of Civil Procedure**

Mike Palmer, petitioner, replies to both the State Bar's and the Maricopa County Attorney's (Mr. Montgomery's) Comments.

But first, some housekeeping regarding Mr. Montgomery's Comment.

In his Comment, dated May 16, 2013, Mr. Montgomery refers to Rule 42(D)(ii)(cc) as applying to the situation I had presented in my petition.

However, Rule 42(D)(ii)(cc), titled "Application for Postponement: Grounds; Effect of Admission of Truth of Affidavit by Adverse Party," was renumbered as Rule 38.1(i) before Mr. Montgomery filed his Comment.

Maybe it's because I'm not a lawyer, but I do not understand how Rule 38.1(i) applies in this situation. For the purposes of this Reply, since nothing about Rule 42(D)(ii)(cc) makes sense in this context, I'm going to assume Mr. Montgomery meant to say Rule 42(f)(D)(ii)(cc).

On that assumption, I agree with Mr. Montgomery that, upon a careful and thoughtful reading of that particular Rule, Judge King erred when he refused a change of judge after an ex parte hearing. (Because an ex parte hearing is not a contested hearing and there was no waiver of right.)[1]

Even though this situation is covered by Rule 42(f)(1)(D)(ii)(cc), there is no harm in adding language to Rule 42(f)(1)(D)(ii)(dd) to restate/clarify.[2] Especially because there is nothing to point a judge from (ii)(dd) to (ii)(cc). Unless a judge likes to read trivia, he is not going to know about (ii)(cc).

And there is a legitimate need for this change. Litigants are harmed.

No offense, but by opposing this simple clarifying amendment, both the Bar and Mr. Montgomery sound calloused to the rights of ex parte litigants here.

Mr. Montgomery isn't certain how often this issue arises. But it doesn't

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[1] The Bar believes there is some ambiguity in Judge King's Minute Entry citing the timeliness of Mr. Roth's Notice. Even though we're not here to rule on Judge King, Mr. Roth's Notice for change of judge could not be "untimely" in the usual sense since Mr. Roth had filed his Notice within the requisite ten days. Therefore, it can only be that Judge King deemed Mr. Roth's Notice "untimely" because it wasn't filed BEFORE the ex parte hearing. That is, Judge King is saying that Mr. Roth had waived his right to a change of judge because Mr. Roth did not file his Notice before the ex parte hearing started. (Which, of course, is impossible to do when you're not invited to the parte.)

[2] The Bar's says that if the Court grants my petition, "the rules would be cluttered with unnecessary verbiage." That doesn't logically follow. That's like saying that if you give a bread crumb to a beggar, you're compelled to feed all the poor.

matter how often this issue arises. It happened once. The Court should strive to ensure it doesn't happen again. It's easy enough to fix.

As for appellate action as a remedy, that may be fine in theory and perhaps viable for a prosecutor with unlimited government resources who is not personally suffering sleepless nights, falsely accused in an ex parte matter. But an appeal is not realistic or practical for the rest of us.

First, most litigants in civil Injunctions against Harassment are unrepresented. As the Bar correctly notes, it would take a Special Action (naming the judge as the Defendant I presume) to challenge a judge who refuses to recuse on Notice. Also, as the Bar indirectly points out, a SA has to come first. A litigant can't appeal later, after waiting to see if the challenged judge sustains the Injunction. That would be waiving the right to a change of judge (because the "the party has agreed to the assignment"), making an appeal moot.

Even if one could find an attorney willing to take on a judge, that costs a lot of time and money. $5000? Most of us cannot afford that justice. And even if one could afford a bold attorney, an ethical attorney would tell a litigant it's simply not worth fighting.

Even if a litigant appeals pro se, it costs hundreds of (unrecoverable) dollars simply to file and serve a SA.

And even if a litigant got passed all this and filed a SA, it takes time for these things to work through the system. If the Injunction was filed in Superior Court, then a SA goes to the Court of Appeals. Given the COA's current schedule, it could take a year before a ruling. By that time, the Injunction will have expired making the appeal moot. But the damage will have been done. (One will not fare much better appealing in Superior Court.)

The Bar contends that there is harm by "stating the obvious in a Rule." Ignoring the fact that it's not so obvious (because you have to read another rule to apply), how can clarity in a Rule ever be harmful?

And who is harmed? The Court changes rules all the time. (E.g., the renumbering of Rule 42(D) to Rule 38.1(i), above.)

I agree that Mr. Montgomery's proposed text — "Setting a hearing for a TRO or injunctive relief on an ex parte basis does not constitute the commencement of a trial" — is better than the prosed text I offered. Adding these twenty-two words to the rule will help everyone.

The Court should add Mr. Montgomery's text.

Submitted this 1st day of July 2013.

By : /s/ Mike Palmer
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