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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	
	)	Supreme Court
PETITION TO ADOPT RULE 9.1	)	No. R-13-0047
RULES OF PROCEDURE FOR	)	COMMENTS ON
EVICTION ACTIONS	)	PROPOSED RULES

WHO I AM

My practice has been concentrated on representing landlords in landlord-tenant and fair housing matters for 37 years in Arizona. Since 1987, I have been legal counsel for the Manufactured Housing Communities of Arizona (MHCA), the association representing that industry. MHCA is composed of manufactured housing community operators in every county of the state. It represents the interests of landlords in rural counties as well as urban counties.

My work includes evictions for mobile home park landlords; legislative drafting involving the three chapters of Title 33, ARS covering residential landlord tenant matters and the forcible detainer statutes in Title 12; and considerable teaching on behalf of professional organizations for management staffs of residential properties and attorneys in these areas.

It is noteworthy that I (and other members of my firm) handle evictions in justice courts all across the state including the most rural of counties where precincts are huge and distances between courts are great.

In the last 37 years I estimate I have represented landlords in about 18,000 mobile home park eviction actions. My law firm handles about 5,000 evictions per year covering apartments and single family houses as well as manufactured housing communities.

From 1998 until 2005 I served as a Justice of the Peace *pro tem*. I heard civil (but not eviction) cases, two afternoons a month. I became familiar with the workload, administrative procedures and problems faced by Maricopa County Justice Courts.

I served on the State Bar Landlord Tenant Task Force and was an active member of the subcommittee that drafted these proposed rules. Many of them originated with me.

The comments in this submission represent my views and those of the MHCA.

BACKGROUND and COMMENTS ON RULE

The Rules Subcommittee was composed of lawyers, judges, a process server and a court constable. They shared (for the most part) in-depth experience in justice and superior court evictions. Like most committees, compromises were reached on a variety of matters and nobody was completely happy with the final result. But the rules have worked well since then.

One proposal that was extensively debated was the proposal now re-opened in this matter—the creation of a right to have a peremptory change of judge in an eviction proceeding. The same arguments were considered by the subcommittee as are expressed in the rule change proposal. While the subcommittee eventually decided by a split vote to include a rule similar to what is now proposed, it was deleted before the rules were finalized.

The "Due Process" argument can be quickly disposed of by reviewing the federal and other state rules on peremptory changes of judge. To my knowledge, no authoritative court has ever found that a right to a peremptory change in judge is essential to ensuring due process.

On the other side of the coin are considerations of the landlord's property rights—the right to recover possession promptly of real property held by a tenant under a rental agreement that has been breached.

Apparently in recognition of these competing interests the legislature acted many years ago in passing ARS § 12-1177 (C) (part of the forcible detainer statutes) that states:

> C. For good cause shown, supported by affidavit, the trial may be postponed for a time not to exceed three calendar days in a justice court or ten calendar days in the superior court.

The ability to continue cases is strictly limited by statute and the current rule allowing judges to continue cases in justice court not to exceed three days is derived from that statute. Neither the proposed rule nor the Bar proposal mentions that statute.

Logistically a peremptory change of judge procedure might be able to work in a court facility with several judges in it. But in justice courts in the 13 counties not containing urban areas, it cannot work consistent with the time constraints of the statute.

Even in the urban counties there are logistical problems (Gila Bend in Maricopa County, for example). But when you get to the Duncan, San Luis, Parker, Snowflake, or Colorado City Justice Courts, a peremptory change of judge filing is going to be impossible to deal with in three days and will trigger a violation of a statute—a violation mandated by a judicial rule.

These considerations were thrashed out in great detail over the course of many subcommittee and Task Force meetings. The final decision of the Supreme Court was that the eviction rules were not an appropriate place for such a provision. Any due process concerns are adequately covered by the expedited appeal rights in these cases.

One concern dwelled on by the subcommittee members opposed to this rule was the likelihood of use of peremptory challenges as a delaying tactic or as a tactic by tenants to force landlords to unfair bargains to avoid the delay and get their property restored to them.

In 2013 Wyoming eliminated altogether its right to a peremptory challenge to judges in criminal and juvenile court proceedings. In so doing the Wyoming Supreme Court stated:

> The blanket use of the disqualification rules negatively affects the orderly administration of justice. Judicial dockets are interrupted, replacement judges must be recruited, sometimes including their court reporters, and unnecessary travel expenses are incurred. Peremptory disqualifications of assigned judges affect not only the specific cases at issue, but also the caseload of judges and the cases of other litigants whose cases are pending before the removed judge and the replacement judge at the same time. Where replacement judges are from other judicial districts, the cost and efficient utilization of judicial resources is greatly impacted. These costs cause financial burdens upon district courts budgets. Each district court has a limited budget for outside judges brought in to preside over cases in which challenges have been utilized. Criminal and juvenile cases comprise a significant portion of the cases on a district court's docket and, consequently, multiple disqualifications in those types of cases have a severe impact on the operation of the district court.
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> **Allowing unfettered peremptory challenges of judges encourages judge shopping. In practice, it permits parties to strike a judge who is perceived to be unfavorable because of prior rulings in a particular type of case rather than partiality in the case in question. Disqualifying a judge because of his or her judicial rulings opens the door for manipulation of outcomes. Such undermines the reputation of the judiciary and enhances the public's perception that justice varies according to the judge. It also seriously undercuts the principle of judicial independence and distorts the appearance, if not the reality, of fairness in the delivery of justice.**

(Emphasis added).

Order Repealing Rule 21.1(A) of The Wyoming Rules of Criminal Procedure and Order Amending Rule 40.1 of The Wyoming Rules of Civil Procedure. Available at: http://www.courts.state.wy.us/CourtRules/Orders/PeremptoryDisqualificationOrder-Rev-20131126.pdf

I am certainly not suggesting such a draconian measure. But Wyoming is a large rural state, similar to 13 of the 15 Arizona counties. The Wyoming concerns certainly apply in those 13 Arizona counties. And they apply in ***every*** justice court precinct when the time sensitive, statutorily mandated fast track nature of eviction cases is concerned.

Wyoming's Supreme Court did not seem particularly concerned over the loss of due process rights resulting from elimination of the peremptory right to a change of judge.

CONCLUSION

Eviction cases are statutory summary procedings that can consider only limiterd issues—possession of the premises, amounts of rent due, and an award of court costs and legal fees. At least 95% of cases are for non payment of rent, an issue that would seem to present no legitimate basis for changing a judge without cause.

Eviction cases move at the speed of light through the legal system, something necessary to protect landlord property rights, mandated by statute, and made possible by the limited issues involved. They are unique and not at all comparable to the other kinds of civil actions alluded to in the Bar proposal. There are many procedures available in other civil actions not available in evictions for exactly those reasons—extensive discovery and endless motion practice to name two.

The idea of the Eviction Rules is to give effect to the statutes controlling eviction actions with streamlined, effective rules affording true due process to tenants while protecting landlord property rights and honoring the requirements of the controllinbg statutes.

It is notable that the proposed rule consists of 13 paragraphs and 455 words. That would make it one of the longest rules in the Eviction Rules.

One of the principal goals of those rules is to minimize this sort of procedural bloat and have a set of streamlined rules that are understandable to a lay person.

DATED: May 20, 2014

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A copy of this comment has been e-mailed this 20th day of May 2014 to:

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