Williams, Zinman & Parham P.C.
Attorneys at Law
7701 East Indian School Road, Suite J
Scottsdale, Arizona 85251
(480) 994-4732
Michael A. Parham, #004853
clerkofcourt@wzplegal.com
Attorneys for Commenting Parties Manufactured Housing Communities of Arizona and Michael A. Parham

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND THE RULES OF PROCEDURE FOR EVICTION ACTIONS

Supreme Court
No. R-15-0015
COMMENTS ON PROPOSED RULES

INTRODUCTION

This is a second attempt by the State Bar and its Legal Services Committee to add a provision allowing for peremptory changes of judge by parties in eviction actions to the Rules of Procedure for Eviction Actions ("Eviction Rules" or "RPEA").

In 2008, the original draft of these Rules allowed for such a procedure. They were revised by the Court to delete the peremptory change of judge rule before being finalized. In 2013, at the instance of the Legal Services Committee, the State Bar submitted a proposed change of judge rule under No. R-13-0047.

That proposal was denied. We are confronted a year later with another such proposal (styled "Proposal One" in the Petition), once again at the instance of the

Williams, Zinman & Parham P.C.
7701 E. Indian School Road, Suite J
Scottsdale, AZ 85251
(480) 994-4732

Legal Services Committee.

The new proposal filed January 9, 2015 is mainly a cut and paste version of the 2013 proposal with one new wrinkle. An "alternate proposal" (styled "Proposal Two") of Maricopa County Presiding Justice of the Peace Steven McMurry is also included.

In a filing dated May 5, 2015 *but actually posted May 18, 2015*, some two days before the comment period ends, the State Bar with input from its Civil Practice and Procedure Committee, proposed a modification to the two proposals--the addition of language to each requiring that the motion for change of judge be granted "if the change of judge will not prevent the hearing from occurring consistent with ARS §33-1377(B) and ARS §12-1177(C)." We are not told who will decide that or how. This modification will be separately discussed below.

WHO I AM

My practice has been concentrated on representing landlords for 38 years in Arizona. Since 1987, I have been legal counsel for the Manufactured Housing Communities of Arizona ("MHCA"). MHCA is composed of rental manufactured housing community and RV park operators in every county of the state. It represents the interests of landlords in rural counties as well as urban counties.

My work has included evictions for mobile home park and other 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

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considerable teaching on behalf of professional organizations for management staffs of residential properties and legal professionals in these areas.

It is noteworthy that 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 38 years I have represented landlords in an estimated 18,000 mobile home park eviction actions. My law firm now handles about 7,000 evictions per year covering apartments and single-family houses as well as manufactured housing communities.

From 1998 until 2005 I was a Justice of the Peace *pro tem*. I heard civil cases and 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 Rules Subcommittee that drafted the Eviction Rules. Many of them originated with me.

The following comments represent my views and those of MHCA.

BACKGROUND AND COMMENTS ON RULE

The original Rules Subcommittee was composed of lawyers, judges, a process server and a court constable. They generally shared experience in Justice and Superior Court evictions. Like most committees, compromises were reached on many issues and nobody was completely happy with the final result. But the Rules have worked well.

One proposal that was extensively debated was the proposal revived here—the right to a peremptory change of judge in an eviction proceeding. The Subcommittee considered the same arguments as made in the rule change proposal. While the Rules 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.

"DUE PROCESS"

Do due process requirements mandate that parties have a right to a peremptory change of judge?

The "due process" argument can be disposed of by reviewing 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. There is no such right in the federal system.

Opposing this contrived due process argument are real considerations of the landlord's property rights—the right to recover possession promptly of property held by a tenant under a breached rental agreement—considerations written into the statutes governing evictions.

In recognition of the paramount interest in *promptly* restoring possession of premises to the landlord following a tenant default, the legislature has included ARS § 12-1177(C) in the forcible detainer statutes stating:

> 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.

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The ability to continue cases is thus limited and the current provision of the Eviction Rules allowing judges to continue cases in Justice Court *not to exceed* three days is derived from that statute. The original State Bar proposal fails to mention this or the legislative policy it reflects.

In fact until its last minute filing on May 18, 2015, the State Bar seemed unconcerned with the fact that it is the forcible detainer *statutes* that impose the short time requirements the rules implement. The original Petition spends a paragraph discussing case management considerations, and in other sections explaining that different judicial proceedings contain change of judge features. But until May 18, 2015 it did not address the fact that it is a series of *statutory requirements* that dictate the short timeframes applicable to eviction actions.

Could the Bar's original January 9, 2015 proposal have nevertheless been right? Do considerations of due process trump the time mandates of the statutes?

Clearly they do not. *Lindsey v. Normet*, 405 U.S. 56 (1972) analyzed Oregon's forcible detainer statutes under due process standards and upheld them despite the fact that they move so swiftly. The Court stated:

> Due process requires that there be an opportunity to present every available defense. *(Citations omitted)*. Appellants do not deny, however, that there are available procedures to litigate any claims against the landlord cognizable in Oregon. *Id*. at 66.

The logic of *Lindsey* leads to the conclusion that meaningful opportunity to be heard does not translate under due process requirements to a meaningful opportunity to be heard *by a judge of one's choice*.

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Due process requirements are the *raison d'être* for the State Bar's proposal. The Bar seems to assert (without actually saying it) that due process *requires* that a party have a right to a peremptory change of judge. Petition, "*Need for Proposed Rule*", pp. 3-4

But in the case of Judge McMurry's alternative proposal, it seems that due process does not really require that after all since under it, the peremptory challenge is available only in certain courts. Under this approach, due process requires a change of judge mechanism *only when it is convenient for the Courts to honor the request*.

It would seem that if due process requires a peremptory change of judge in some Courts, due process requires it everywhere. The Bar's due process argument seems eviscerated by its willingness to accept Judge McMurry's alternative.

OTHER SUBSTANTIVE CONSIDERATIONS

Even in the urban counties for which Judge McMurry's alternative appears to be proposed, there are logistical problems. In Maricopa County for example there are 26 Justice Courts. 17 of them share a building with another Court and would clearly be under the alternative. So defendants *and plaintiffs* with a case in front of a Judge they don't like in one of those facilities would have a right not afforded elsewhere (except in Pima County) to get a change of judge.

But the Judge McMurry alternative does not limit change of judge rights to cases where they are in the same building. The proposal says the change will be

granted when "other judges are *readily available*." The Bar proposal acknowledges that "parties could argue about" what that means. Of course they could since it really means nothing. These arguments will also slow the process down.

The Eviction Rules are designed to be simple, fair, clear, and to enable cases to move quickly consistent with eviction statutes. To sabotage them with a rule acknowledged as vague and contentious by the entity proposing it contradicts an important purpose of the Rules. Are we really going to adopt a rule knowing it is so unclear that "parties could argue about what constitutes 'readily available'?"

When one gets to the more remote Maricopa County Justice Courts or to the Duncan, San Luis, Parker, Snowflake, or Colorado City Justice Courts, a peremptory change of judge filing under the State Bar's primary proposal would be impossible to deal with in three days and would trigger a violation of a statute—a violation is this case mandated by a judicial rule.

It would be nice to believe the Judge McMurry proposal would not apply in those places. But who knows? Could a tenant in Colorado City argue that he should get a change of judge because another judge in Kingman is "readily available?"

These considerations were thrashed out in great detail over the course of many Rules 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.

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The main concern of the Rules 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 delay and get possession of their property restored to them.

A concern that did not get vetted, however involves a landlord's attorney unhappy with something about a particular Judge. The Judge may move too slowly for the attorney's tastes. He or she may ask too many difficult questions. The Judge may just have a personality that is abrasive to the landlord attorney. For whatever reason the attorney may believe his clients' interests would be better served by disqualifying a particular judge. Either of the proposed rules opens individual Judges up to mass peremptory challenges by high volume eviction attorneys wanting to stay out of their Courts.

THE LAST MINUTE BAR AMENDMENT TO ITS PROPOSAL

In a last minute effort to address objections that these procedures will delay evictions resulting in statutory time limit violations, the Bar on May 18, 2015 recommended adding language to both proposals limiting the right to cases where granting the change will " not prevent the hearing from occurring consistent with ARS §33-1377(B) and ARS §12-1177(C)." For some reason the new addition neglects ARS §33-1485 that covers evictions from mobile home and RV parks.

This supplemental proposal assumes that the extent of delay will be known at the time the request is made. That may or may not be true. It fails to identify who

will make that determination and how it is to be made. Does the Judge or the *pro tem* Judge presiding at the initial hearing decide? How is he or she supposed to know if a delay will result? Is the case immediately to be calendared for another hearing within three days before another Judge?

Moreover under Proposal One each side has the right to request a change of judge. If the May 18, 2015 revision is adopted, what are the rights of a party satisfied with the initial judge assignment but unhappy with the new judge the case is assigned to after the other side makes the request? If that party loses his right because of the time deadlines under this suggested revision, there is disparate treatment of that second party. Using whatever definition the State Bar is using, is that party deprived of “due process?"

As stated above, it would seem that if due process requires a peremptory change of judge in some Courts, due process requires it everywhere. It would also seem to follow that if due process requires one party to have the right, it requires both parties to have it. But that appears to be impossible while at the same time meeting the time restrictions of ARS §33-1377(B), ARS §12-1177(C), ARS §33-1485 and RPEA 11 (c).

In the real world, the May 18, 2015 State Bar suggestion will work as follows. When the complaint is filed and the summons is issued, an initial hearing date will be set. RPEA 5 (a) (2). It is at that hearing that the defendant (normally the tenant) can be expected to request the change of judge. The new language will

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7701 E. Indian School Road, Suite J
Scottsdale, AZ 85251
(480) 994-4732

require the change to be granted if it will " not prevent the hearing from occurring consistent with ARS §33-1377(B) and ARS §12-1177(C)."

But this alone will consume the three-day continuance limit set forth in ARS §33-1377(B), ARS §12-1177(C), ARS §33-1485, and RPEA 11 (c). Thus when the case finally gets before the newly assigned judge, no more continuances under the statutes will be available absent agreement of all parties. The other side will not be able to request a change of judge no matter how unhappy it is with the new assignment. And if parties are sick, witnesses are unavailable, time is needed to prepare to defend a counterclaim filed in a case where it is allowed, or any of the other reasons that gave rise to the statute exist, the one-time three-day continuance available under ARS §33-1377(B), ARS §12-1177(C), ARS §33-1485, and RPEA 11 (c) will have been exhausted.

To what purpose? No one has even hinted at the real reason for such a rule other than flawed references to "due process." The fact is that there is no purpose other than Judge shopping. Disqualification for cause is already allowed under the Eviction Rules. The only conceivable reasons for this proposal are a desire to get a different judge on a case where a change for cause cannot be obtained, or to delay a case that the eviction statutes intend to move promptly through the system.

THE WYOMING EXPERIENCE

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

Williams, Zinman & Parham P.C.
7701 E. Indian School Road, Suite J
Scottsdale, AZ 85251
(480) 994-4732

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7701 E. Indian School Road, Suite J
Scottsdale, AZ 85251
(480) 994-4732

> 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.
> . . .
> 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.

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. https://www.courts.state.wy.us/Documents/CourtRules/Orders%5Cmult%5Cmult_2013112600.pdf

Wyoming is a large rural state and the Wyoming concerns certainly apply in the 13 rural Arizona counties. And they apply in ***every*** justice court precinct when the time sensitive, *statutorily mandated* fast track nature of these cases is concerned.

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

THE 1981 FEDERAL STUDY

Federal court practitioners have made these sorts of proposals over the years. A 1981 study has one comment worth noting. In discussing the need for

independent judges even when they were required to render unpopular decisions, the study observed:

> The strength and the independence of the judiciary require it to arrive at decisions that may indeed be unpopular and unacceptable to the parties or the populace. But, as Judge Hoffman stated in his remarks to the Drinan subcommittee:
>
> > We wonder how many Watergate cases would have been tried by Judge John Sirica had the peremptory challenge system been in effect. How many civil rights and related cases would Judge Frank M. Johnson of Montgomery, Alabama, have tried while serving as a district judge? If other school desegregation cases in Massachusetts come before the federal court, is it likely that Judge Arthur Garrity would be permitted to proceed unchallenged?

Disqualification Of Federal Judges By Peremptory Challenge, Alan J. Chaset, Federal Judicial Center, February 1981, available at http://www.fjc.gov/public/pdf.nsf/lookup/disqfjud.pdf/$file/disqfjud.pdf

CHIEF JUSTICE JONES' COMMENTS

Former Arizona Chief Justice Charles E. Jones provided comments on the original proposed Eviction Rules in 2008. The peremptory challenge rule was Rule 11 (e) (1). Justice Jones was critical of that rule and the entire idea of peremptory changes of judge. He stated:

> Under proposed Rule 11 e (1), allowing both parties a one-time Change of Judge as a Matter of Right would be a mistake. Change as a matter of right is costly and time consuming. It is a practice that has developed in the culture of Arizona's courts and should be discontinued. Arizona's Judges are placed in office either by direct vote of the people, as in the case of Justices of the Peace, or by merit, after thorough screening by one of our nominating commissions as in the case of Superior Court Judges in Pima and Maricopa Counties and the State's appellate judges and Supreme Court Justices state-wide. Screening is followed by recommendation and gubernatorial

Williams, Zinman & Parham P.C.
7701 E. Indian School Road, Suite J
Scottsdale, AZ 85251
(480) 994-4732

> appointment. Judges are presumed competent to do the people's work. Whether appointed or elected, judges should be permitted to do the work they are charged to do. They should not be subject to peremptory removal from the case.

Summary Comments on Proposed Rules of Procedure for Eviction Actions, Charles E. Jones, May 17, 2008, submitted by Nathan Slovin, President, Arizona Multihousing Association. May 22, 2008, pp. 4-5, available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/152311133954.pdf

CONCLUSION

Eviction cases are statutory summary proceedings that consider only limited issues—possession of the premises, amounts of rent due, and 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 quickly 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 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 these Rules is to give effect to the statutes controlling eviction actions with streamlined, effective procedures affording true due process to tenants while protecting landlord property rights and honoring the requirements of the controlling statutes.

Williams, Zinman & Parham P.C.
7701 E. Indian School Road, Suite J
Scottsdale, AZ 85251
(480) 994-4732

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Williams, Zinman & Parham P.C.
7701 E. Indian School Road, Suite J
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(480) 994-4732

Justices of the Peace already need to stand for election every four years. Allowing them to be subject to peremptory challenge can be expected to make at least some more sensitive to pressures by litigants to please them and avoid being excessively challenged. Large numbers of challenges could be expected to become ammunition for opponents in the next election.

RPEA 9 now has 406 words and deals with *all* motions in eviction cases. The original proposed Proposal One of the State Bar would add 266 words. Tacking on the new language now proposed by the State Bar would increase it to 295 words. It would become one of the longest and difficult to understand of the Eviction Rules. One of the goals of those rules is to minimize this sort of verbosity and have a set of streamlined rules that are understandable to a layperson.

Neither of the two proposals of the State Bar either as originally submitted for comment or as modified by it on May 18, 2015 will do anything other than legitimize judge shopping and slow the eviction process down. Neither is a legitimate purpose nor a desirable outcome.

DATED: May 20, 2015

Williams, Zinman & Parham, P.C.

(Electronically Signed)
Michael A. Parham
By: ______________________________
Michael A. Parham

A copy of this comment has been e-mailed this 20th day of May 2015 to:

John A. Furlong, Esq.
General Counsel
State Bar of Arizona
4201 North 24th Street, Suite 00
Phoenix, AZ 85016
John.Furlong@staff.azbar.org

Williams, Zinman & Parham P.C.
7701 E. Indian School Road, Suite J
Scottsdale, AZ 85251
(480) 994-4732