Scott M. Clark, Esq. (Ariz. Bar No. 6759)
Paul A. Henderson, Esq. (Ariz. Bar No. 22891)
Judy Drickey-Prohow, Esq. (Ariz. Bar No. 5796)
Christopher R. Walker, Esq. (Ariz. Bar No. 28977)
LAW OFFICES OF SCOTT M. CLARK, P.C.
3008 N. 44th Street
Phoenix, Arizona 85018-7206
(602) 957-7877 [Tel] ▪ (602) 957-7876 [Fax]
www.scottclarklaw.com
Attorneys for Arizona Multihousing Association

IN THE STATE OF ARIZONA

IN AND FOR THE SUPREME COURT

In the Matter of:	Supreme Court No. **R-15-0015**
PETITION TO AMEND THE RULES OF PROCEDURE FOR EVICTION ACTIONS	**RESPONSE TO PETITION**

Pursuant to Rule 28, Arizona Rules of Supreme Court, the Arizona Multihousing Association respectfully comments in opposition to the Petition filed by the State Bar of Arizona to amend the Rules of Procedure for Eviction Actions. The petition seeks to again address an issue the Court has rejected twice previously.

I. STATEMENT OF INTEREST.

The Arizona Multihousing Association is a professional trade association representing over 2,200 members and 210,000 rental units in the State of Arizona. Its members include owners of large multi-family properties, property management companies, developers, individual rental owners and the vendors that serve this vital industry. The Association was formed in 1966 to promote industry professionalism,

create educational opportunities, and engage in government relations.

The undersigned has been counsel to and is currently a board member of the Arizona Multihousing Association. He has represented landlords and property owners for nearly thirty years. He was also one of the members of the State Bar Landlord/Tenant Task Force.

II. THE STATE BAR'S PROPOSAL DOES NOT SUBSTANTIALLY DIFFER FROM RULE 11(E) OF THE 2007 PROPOSED RULES OR THE 2013 PETITION FOR PROPOSED RULE 9.1.

In 2005, the State Bar of Arizona convened a task force for producing a draft set of rules of procedure for forcible detainer and special detainer lawsuits. That committee, the Landlord/Tenant Task Force, produced the proposed Rules of Procedure for Eviction Actions and filed the petition for its adoption with this Court on December 12, 2007.[1] Contained within the original proposal was Rule 11(e), which concerned the change of judge by right and for cause. The Court adopted a modified set of the proposed rules in December 2008,[2] which excluded the proposed Rule 11(e).

In 2013, the Legal Services Committee of the State Bar proposed the amendment of the Rules of Procedure for Eviction actions.[3] In the proposed Rule 9.1, that petitioner sought to reintroduce Rule 11(e) *verbatim*, except with slight hierarchical and

[1] "Petition for Rules of Procedure for Eviction Actions," Supreme Court No. R-07-0023.
[2] "Order Adopting Rules of Procedure for Eviction Actions," Supreme Court No. R-07-0023.
[3] "Petition to Adopt Rule 9.1, Rules of Procedure for Eviction Actions," Supreme Court No. R-13-0047.

formatting differences. The Court again rejected it.[4]

While the language for the first proposed rule has been changed (and significantly shortened), the introduction of proposed Rule 9(c) is functionally no different than the earlier, rejected language. The language proposed may be derived from Rule 133(d), JCRCP, but it contains most of the clauses that appeared in the rejected Rule 13(e). The second proposal, the inclusion of Rule 9.1 (not the 2013 Rule 9.1) instead of Rule 9(c), does not resolve crucial issues with its implementation. The petitioner's arguments acknowledge that "parties could argue about what constitutes 'readily available'" for "other judges." Petition, 7:5-6.

The Court rejected Rule 13(e) and its revival through 2013-proposed Rule 9.1. There is no fundamental difference introduced by 2015-proposed Rule 9(c) and 2015-proposed Rule 9.1 does not sufficiently resolve the issue of delay when the petitioner indicates that parties can argue over whether Rule 9.1 even applies to the request.

III. ARGUMENTS IN FAVOR OF THIS PETITION DO NOT DIFFER FROM THE ARGUMENTS IN SUPPORT OF THE 2013 PETITION.

The State Bar is now attempting a third bite at the apple on this subject. The petitioner's petition actually emphasizes that it is asking the Court for the same alterations the Court has previously rejected: "[b]ecause of the significance of this issue, the State Bar again presents this issue for the Court's consideration." Petition, 3:5-6.

[4] http://www.azcourts.gov/rulesimpactreport/2014TableofContents/RulePetitionsDeniedbytheCourt.aspx

The petitioner repeats the same arguments *verbatim* (compare 2015 petition 3:8-20 with 2013 petition 5:10-22) or nearly identically (compare 2015 petition 3:21-4:7 with 2013 petition 5:23-6:9) as to why there exists a need for the proposed rule.

The 2013 petition codified a strong potential for delay:

> The change of judge requests can be handled like other continuances for cause. As an example, the common practice in many justice courts is that if a tenant appears on the court date noted in the summons and has a defense, the case is continued to another date for a trial. [...] The same or similar practice could apply to a change of judge request.

2013 petition, 6:2-9. The 2015 petition repeats this argument (2015 petition, 3:25-4:7) and does nothing to address the delay potential inherent in the first iteration of the proposed rule. In fact, the arguments raised as to the "need" for such a rule describes how the accelerated nature of the eviction action "threatens [defendants'] only means of shelter." This does not equate to an access-to-justice issue and does not demonstrate how there is a "need" to change the sitting judge in the absence of a colorable defense. Trials are set only if the defendant advances a colorable defense to the eviction action. A by-right challenge to the judge advances nothing except the personal preference of the litigant (or the litigant's attorney) to not have the sitting jurist hear the case.

There is no good cause justifiable under the Rules of Procedure for Eviction Actions to continue the hearing beyond the date upon which it had been previously set if dislike for the jurist is the sole reason for that continuance.

IV. THE RURAL COURTS ARE NOT THE ONLY COURTS THAT WILL EXPERIENCE THE EFFECTS OF BY-RIGHT CHANGE OF JUDGE DELAY.

A. Eviction actions are unique types of hearings.

The petitioner is the same party as that which assembled the Task Force and promulgated the proposed Rules of Procedure for Eviction Actions. That Task Force specifically elected to draft a rule that excluded eviction actions from the purview of the Rules of Civil Procedure except where specifically referenced. *See* Rule 1, RPEA. The petitioner obtained rules of that nature, and this Court specifically introduced a Rule that made Rule 42(f), Ariz.R.Civ.P. applicable to proceedings in the Superior Courts. *Ibid.* The Task Force could have left the Rules of Civil Procedure effective, akin to the Arizona Rules of Protective Order Procedure, but it did not.

Contrary to the petitioner's arguments, eviction actions and protective orders are dissimilar. The hearing upon a protective order is granted to any respondent who challenges the order. *See*, e.g., A.R.S. § 13-3602(I). The hearing may be set simply because the respondent opposes an *ex parte*-issued order. While there are mandatory timeframes within which the hearing must be held (five or ten days, depending on the order's nature (*see* Rule 8(A), Ariz.R.Protect.Ord.Proc.)) in protective order cases, protective order hearings are triggered by the respondent's otherwise-unsubstantiated request for the hearing.

Eviction action hearings are set within strict timeframes relating to the date of

filing of the eviction action. A.R.S. § 33-1377(B) ("which shall be not more than six nor less than three days from the date of the summons"). Adjudication of the specific case not at the time it is called on the trial court's calendar occurs only for good cause, such as a colorable defense. Changing the time, and potentially the date, of disposition materially affects the parties' rights to possession of the rental property.

Petitioner emphasizes why a peremptory change of judge is detrimental to the adjudication of an eviction action: "the exercise of a peremptory challenge to a judicial office can delay a request for injunctive relief under Rule 65, Ariz.R.Civ.P. particularly in rural counties with limited benches." Petition, 5:1-3. By petitioner's own admission, peremptory challenges cause delay. Delays for the purpose of delay are directly contrary the nature of the summary eviction proceeding: to "provide a summary, speedy and adequate means for obtaining possession of premises by one entitled to actual possession." *Heywood v. Ziol*, 91 Ariz. 309, 311, 372 P.2d 200, 201 (1962).

B. <u>The ninety-eight percent disposition goal of the justice courts should not be used as justification for a rule that violates the statutory timeframe in which the eviction case must be adjudicated.</u>

There may be a goal of the justice courts to resolve eviction actions within ten days of filing, but the eviction case must be adjudicated within nine days unless the parties agree to continue beyond that timeframe. A "relatively small"[5] impact is still an

[5] Petition, 5:7-8.

impact that directly contradicts the requirements of statute for this nine-day period. A.R.S. §§ 33-1377(B) and (C).

The adoption of a rule that violates these statutory timeframes should not be contemplated. Proposed Rule 9(c), therefore, does not comply with statutory restrictions, and proposed Rule 9.1 does not sufficiently guarantee compliance not only with statute but also Rule 11(c), RPEA.

V. THE PETITIONER'S "THIRD OPTION" DOES NOT RESOLVE THE DELAYING NATURE OF A CHANGE-OF-JUDGE REQUEST THAT IS NOT SUPPORTED BY A DEFENSE.

The petitioner continues to ignore the requirement that eviction action proceedings may be continued only upon a demonstration of good cause.

The language for the "third option" presented by the petitioner in its comment only allows for the change of judge "if the change of judge will not prevent the hearing from occurring consistent with [the statutes]." Comment, 2:1-2. A change of judge request that is not accompanied by a colorable defense may keep the action within the absolute timeframe required by statutes, but it does not keep it within the requirement that good cause accompany the delay.

Petitioner's proposals inherently incorporate delay into the process. Delaying the adjudication of an action that could cost the defendant his/her residence has been demonstrated as the "need" for this change-of-judge rule ("inability to find other

housing on short notice" and "monetary judgments" and "consequences of eviction cases;" Petition, 3:15-18).

VI. CONCLUSION

The peremptory challenge is unnecessary and will potentially only lead to delays in the eviction proceedings. Litigants who have good cause reasons to challenge the sitting Justice of the Peace or the assigned Judge Pro Tempore have the opportunity to file a for-cause challenge to that jurist. By-right challenges are unnecessary in these proceedings.

Respectfully submitted this day, the 20th of May 2015,

LAW OFFICES OF SCOTT M. CLARK, P.C.

By _____
Scott M. Clark, P.C.

An electronic copy of this Comment in two formats was filed with the Clerk of the Supreme Court of Arizona.

A copy was mailed and emailed to the following individual(s):

- John A. Furlong, Esq.
  General Counsel
  State Bar of Arizona
  4201 North 24th Street, Suite 100
  Phoenix, Arizona 85016
  John.Furlong@staff.azbar.org

By _____ on May 20, 2015.