April 1, 2016

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Co-Chairs
Task Force on the Arizona Rules of Civil Procedure

Gentlemen:

I enclose two proposed amendments to the civil default rules, Arizona Rules of Civil Procedure Rule 55. I present my proposals as a comment to your own work rather than as an independent rule change petition. I did this in part due to the broad mandate given to your Committee and the fact that your work is already well under way. But my remarks include plenty of genuine comment on Rule 55. I hope the Committee finds them useful. Thank you for considering my comments and for working so hard to enhance the administration of justice in Arizona.

John Doody, SBA 012995, Phoenix Arizona.

(1) PROPOSAL NO. 1 OF 2 - Amend Rule 55(b)(2) To Clarify That The Notice Of Application For Judgment In That Subsection Requires Notice Of The Date, Time, And Place Of Any Default Judgment Hearing.

Amend current Rule 55(b)(2) to add the words shown in bold type:

> If the party against whom judgment by default is sought has appeared in the action, that party or, if appearing by representative, that party's representative, shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. **The notice required by the preceding sentence shall include the date, time and place of any hearing where the final default judgment shall be submitted to the court for approval and entry**.

The quoted portion from current Rule 55(b)(2) is essentially unchanged in your First Draft of proposed Rule 55(b)(2)(C). That rule has been construed by case law to require notice of the exact date, time, and place of the hearing for the entry of a default judgment. Lawrence v. Burke, 6 Ariz.App. 228, 236, 431 P.2d 302, 310 (1967), overruled on other grounds per Hagen v. U.S. Fidelity & Guaranty Co., 138 Ariz. 521, 525, 675 P.2d 1340, 1344 (App. 1983). Accord, Gustafson v. McDade, 26 Ariz.App. 322, 548 P.2d 415 (App. 1976), and City of Phoenix v. Collar, Williams & White Engineering, Inc., 12 Ariz.App. 510, 472 P.2d 479 (1970), and Austin v. State

ex rel. Herman, 10 Ariz.App. 474, 450 P.2d 753 (1969). In their well-intentioned effort to be fair to defendants, courts have inadvertently created a trap for unwary plaintiffs.

Outside the relatively small circle of people who obtain default judgments on a regular basis, is unfair to expect people to comply with such detailed additional requirements unless those requirements are contained in the express words of the rule itself. Adopting this proposal would restore fairness to all parties.

(2) PROPOSAL NO. 2 OF 2 - Amend Rule 55(a) To Eliminate The Need To Mail The Application For Entry Of Default When It Must Be Mailed Outside The Limits Of Any U.S. Judicial District.

Amend current* Rule 55(a) as shown in bold type below:

(a) Application and Entry.

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these Rules, the clerk shall enter that party's default in accordance with the procedures set forth below. All requests for entry of default shall be by written application to the clerk of the court in which the matter is pending.

(1) Notice.

(i) To the Party. When the whereabouts of the party claimed to be in default are known by the party requesting the entry of default, a copy of the application for entry of default shall be mailed to the party claimed to be in default.

(ii) Represented Party. When a party claimed to be in default is known by the party requesting the entry of default to be represented by an attorney in the action in which default is sought or in a related matter, whether or not that attorney has formally appeared, a copy of the application shall also be sent to the attorney for the party claimed to be in default. Nothing herein shall be construed to create any obligation to undertake any affirmative effort to determine the existence or identity of counsel representing the party claimed to be in default.

(iii) Whereabouts of Unrepresented Party Unknown. If the whereabouts of a party claimed to be in default are unknown to the party requesting the entry of default and the identity of counsel for that party is also not known to the requesting party, the application for entry of default shall so state.

(iv) Other Parties. Nothing in this Rule relieves a party requesting entry of default from the requirements of Rule 5(a) as to service on other parties.

(2) *Entry of Default*. The acceptance by the clerk of the filing of the application for entry of default constitutes the entry of default.

(3) *Effective Date of Default*: A default entered by the clerk shall be effective ten (10) days after the filing of the application for entry of default.

(4) *Effect of Responsive Pleading*. A default shall not become effective if the party claimed to be in default pleads or otherwise defends as provided by these Rules prior to the expiration often (10) days from the filing of the application for entry of default.

(5) *Applicability*:

(i) The provisions of this rule requiring notice prior to the entry of default shall apply only to a default sought and entered pursuant to this rule.

(ii) The provisions of this rule requiring notice prior to the entry of default shall not apply to any notice that, but for this exception, would need to be mailed to any address outside the United States or any United States territory.

**Note: The highlighted language proposes to amend the current text of the rule, not the First Draft of the Rule proposed by the Committee. My main goal is to present the substantive idea to the attention of the Committee. If the Committee finds merit in the idea, the wording of this proposal can be adjusted to harmonize with the final text of the rule as amended*.

This proposal is intended to bring the Arizona Rules of Civil Procedure into alignment with other U.S. jurisdictions whenever service must be accomplished under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters done at The Hague November 15, 1965, commonly known as the Hague Service Convention. The text of the treaty, links to information regarding individual member states ("Authorities"), and other supporting materials may be downloaded from the official website of the Hague Conference On Private International Law (Permanent Bureau): http://www.hcch.net. Follow the link to "Service Convention" or similar link to the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

In particular, this proposal is designed to remove barriers to help Arizona plaintiffs comply with the treaty while also preserving the essential due process rights of defendants who must be served abroad. Although the catalyst for submitting this proposal is to facilitate compliance with the Hague Service Convention, the proposal is not limited to cases when notice must be mailed to a Hague Service Convention member country. For simplicity and consistency, the

proposed amendment would apply whenever a Rule 55 application for entry of default must be mailed abroad.

The Hague Service Convention is self-executing in the sense that it requires no post-ratification legislation to bring it into force. And because the Hague Service Convention is a treaty duly ratified by the U.S. Senate, it constitutes the supreme law of the land in the United States. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698 (1988).

By its own terms, the treaty is mandatory and exclusive when it applies. Volkswagenwerk Aktiengesellschaft v. Schlunk, supra, 486 U.S. 694, 699, citing Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 534, n. 15 (1987). See also Cardona v. Kreamer, 225 Ariz. 143, 147, ¶15, 225 P.3d 1026, 1030 (2010), citing Schlunk, supra, and Kadota v. Hosogai, 125 Ariz. 131, 134, 608 P.2d 68, 71 (App. 1980). In particular, the treaty preempts inconsistent forum state service rules and replaces them with the various methods (channels) of service provided in the treaty itself. Volkswagenwerk Aktiengesellschaft v. Schlunk, supra, 486 U.S. 694, 698-699.

Although the treaty is mandatory and exclusive, it is important to recognize that the treaty does not purport to displace forum state rules designating what documents must be served before a default judgment can be entered. That determination - the designation/identification of documents that must be served to support entry of a default judgment - is a question that must be answered solely under forum state law, not the treaty. Volkswagenwerk Aktiengesellschaft v. Schlunk, supra, 486 U.S. 694, 700-704.

But once those documents are identified under forum state law, the treaty provides the exclusive rules for serving them upon a party in a member country destination state. Volkswagenwerk Aktiengesellschaft v. Schlunk, supra, 486 U.S. 694, 706.

The mandatory and exclusive nature of the treaty is enforced by treaty rules barring forum state courts from entering a default judgment against a destination state defendant or respondent without first confirming that service was either accomplished - or excused - in a manner required or authorized by the treaty. Id., 486 U.S. 694, 699, citing Hague Service

Convention Articles 15 and 16. In other words, although the treaty does not purport to completely displace forum state procedures for obtaining a default judgment, the treaty does impose supplemental limits on those procedures in order to enforce compliance with the rules governing service and to create uniform protections for defaulted defendants whenever the treaty applies.

Beyond the division of rule-making authority described above, the primary innovation of the treaty is to require all member states to establish a "central authority" to receive requests for service of documents originating in forum state countries. Volkswagenwerk Aktiengesellschaft v. Schlunk, supra, 486 U.S. 694, 698. Central authority service is also referred to as "main channel" service - the two terms are used interchangeably in the Practical Handbook published by the Permanent Bureau (available for purchase from the link shown above).

To be sure, the treaty affirmatively authorizes several alternative channels of service, for example, service by mail, service by acceptance, or direct service by process servers or other local government agents. See, e.g., Article 10 of the treaty. But unlike main channel/central authority service, which member states must provide, member states have no obligation to provide or accept any of the alternative methods of service authorized by the treaty. So long as they do so publicly, member states are free to object to any or all of the alternative methods of service provided in the treaty. Cardona v. Kreamer, supra, 225 Ariz. 143, 145, ¶10, 225 P.3d 1026, 1028 (Mexico).

In fact, several member countries have elected to object to all alternative methods of service under the treaty, including such major U.S. trading partners as Mexico, Germany, Norway, the Russian Federation, the People's Republic of China (mainland China), the Republic of Korea (South Korea) and India. For a complete list, please refer to the Hague Convention website identified above.

One of those states – Mexico – also is the destination state for service in many hundreds of Arizona family court dissolution, custody, and paternity cases every year. Granted, the focus of this Committee is on the Rules of Civil Procedure, and the Arizona Rules of Family Law Procedure were removed from the civil rules and launched as an independent body of law in

2006. Nevertheless, a great deal of similarity continues to exist between civil and family law rules in many subject areas, especially in the area of defaults. Indeed, the family court default rules were taken almost word for word from their civil rule counterparts, and the large body of case law applicable to default judgments survived division of the two subject areas virtually intact. Likewise, most civil and family law cases proceed by default, not litigation. For these reasons, the experience of family court litigants illustrates the experience of civil plaintiffs to some degree, just as the amendments to the civil rules may influence the work of a future family rules committee.

In Mexico and other "blanket objection" states, central authority/main channel service is the only authorized method of service for foreign legal documents. Id. at ¶10.

The restrictions reserved by other member countries are only slightly less onerous. For example, Japan puts "local law" conditions on the ability of litigants to accomplish service of process by postal channels and flatly objects to service through the use of process servers or other local authorities.

As might be expected, the time delays for central authority/main channel service vary greatly from country to country and even – at various times - within the same country.

Article 16 of the treaty attempts to smooth those differences out and to strike a balance between, on the one hand, giving the destination state central authority a reasonable time within which to accomplish service and, on the other hand, the right of a diligent litigant to obtain a default judgment in forum state courts within a reasonable time.

Under Article 16, forum state courts must wait a minimum of six months for the destination state central authority to return a certificate of service or non-service before a default judgment can be entered. Article 16 stipulates that no default judgment can be entered before the expiration of that six month timeframe.

With this Hague Service Convention background in place, the focus now shifts to the question of what documents must be served before a default judgment can be entered. As already discussed, that determination is made exclusively by the law of the forum state - not the treaty.

Most American jurisdictions require only two documents to be served before a default judgment can be entered: a summons and complaint. For that reason, most U.S. plaintiffs need wait only six months from the date of transmission of the summons and complaint to the destination state central authority before a default judgment can be entered.

Unfortunately, the potential time-delay burden for Arizona litigants is twice as long.

No default judgment can be entered in Arizona based solely on service of a summons and complaint. Beginning in 1986 and continuing to the present day, Arizona law requires plaintiffs to file and mail a Rule 55(a) application for entry of default before a default judgment can be entered. It is precisely this rule that exposes Arizona litigants to an additional six-month delay before a default judgment can be entered, at least when service must be accomplished in a Hague Service Convention member state, like Mexico, whose government has designated central authority/main channel service as the exclusive channel for serving foreign legal documents.

There is no reason to believe that the authors of the 1986 amendment to Rule 55 considered the interaction of the new rule with the Hague Service Convention. For that matter, there is no reason to believe that this problem was considered when Family Rule 44 was adopted almost word for word from Civil Rule 55 in 2006. Given the fact that Mexico objects to all alternative methods of service under the Hague Service Convention, Arizona's unique two-step default procedure makes it unreasonably difficult for Arizona litigants who need to serve process in "blanket objection" states like Mexico. This is especially true of family court litigants whose families lie broken on both sides of the U.S-Mexican border.

The burden is difficult to justify given the questionable benefit provided by our unique two-step default process.

The avowed purpose of creating the two step default process in the 1986 was to "virtually eliminate the claim of lack of notice as the basis for setting aside a default." General Electric Capital Corp. v. Osterkamp, 172 Ariz. 185, 189-190, 836 P.2d 398, 402-403 (App. 1992):

> The prior rule did not require that a defendant be given notice that default was to be entered, and consequently, lack of notice was frequently a basis for motions to set aside the entry of default. Having no notice other than the summons itself that a default was to be entered, a defendant could readily establish the mistake, inadvertence, surprise or excusable neglect necessary for setting aside such an order. . . .
>
> Because the amended rule gives the defaulting party an automatic second chance, if that party fails to take advantage of the opportunity to prevent the default from becoming effective, it is only logical that the party will have a greater burden in establishing a basis for setting aside the default than before the rule was amended. The amended rule virtually eliminates any claim of lack of notice as a basis for setting aside a default.

I am not aware of any data showing how often amended Rule 55 has saved diligent litigants from going into default. But the rule does not appear to have achieved its goal of making it difficult or impossible for defendants to claim lack of notice as a basis for setting aside defaults or default judgments. That's because compliance with Rule 55(a) is a blanket condition precedent to the entry of a default judgment. The protections of Rule 55(a) are not just reserved for the benefit of "deserving" litigants. Even dilatory litigants have the right to set aside a default judgment by asserting violations of Rule 55(a), even when they acknowledge being served with the original summons and complaint. If anything, the adoption of Rule 55(a) has created a new avenue for undeserving parties to set aside defaults and default judgments.

Besides spawning litigation over technical issues, such as whether or not a plaintiff needs to serve a Rule 55 application for entry of default upon an attorney, the amended rule also fosters confusion and litigation over the fundamental legal effect of failing to comply with Rule 55(a). Is a judgment entered in violation of Rule 55(a) voidable or void? Is the failure to comply with Rule 55(a) merely an error of law, or is it jurisdictional?

Decisions of the Arizona Courts of Appeal are currently in conflict. One line of cases holds that compliance is jurisdictional and that any judgments entered without complying with the rule are void. However, the most recent published case on the issue holds that judgments entered in violation of the rule are voidable but not void. Compare Ruiz v. Lopez, 225 Ariz. 217 (App. 2010) (void) and Smith v. Smith, 235 Ariz. 181 (App. 2014) (voidable).

The shift away from the bright line rule in Ruiz (2010) to the more nuanced approach in Smith (2014) may have begun in 2011, when the Arizona Supreme Court decided to de-publish a court of appeals opinion that expressly followed the jurisdictional approach in Ruiz. See Neeme Systems Solutions v. Spectrum Aeronautical, --- P.3d ---, 2011 WL 3963588 (Mem).

The reasons for the de-publication decision are hard to pinpoint because of multiple issues raised in the Neeme case and because the decision to de-publish was announced without explanation. But some insight might be inferred by the Supreme Court's express refusal to reinstate the default judgment that had been set aside by the trial court and the court of appeals. In other words, the Supreme Court appears to have affirmed the result reached by the trial court and the court of appeals while vacating the appeals court's rationale.

A brief review of the facts in Neeme illustrates some of the difficulties raised by the 1986 amendment to Rule 55(a). Neeme developed computer software in Arizona for use by a California-based company - Spectrum - at Spectrum's facilities in Utah. After Spectrum became dissatisfied with Neeme's work, Spectrum withheld payment and filed a declaratory judgment action against Neeme in Utah. Shortly after Spectrum's state court filing in Utah, Neeme filed its own complaint against Spectrum in the Arizona Superior Court alleging breach of contract and damages. Spectrum was represented by counsel in the Utah case but not in the Arizona case. After Spectrum failed to respond to the Arizona summons and complaint within 30 days, Neeme filed a Rule 55(a) application for entry of default and mailed a copy of the application to Spectrum at several locations including its statutory agent. However, Neeme chose not to send a copy of the application for entry of default to Spectrum's Utah attorney, even though Neeme knew that Spectrum was represented by counsel in the Utah case. Neeme obtained a default judgment against Spectrum for $750,000 in damages, but the trial court set aside the judgment upon Spectrum's motion, finding both that the judgment was void within the meaning of ARCP Rule 60(c)(4). The trial court also expressly accepted Spectrum's showing of excusable neglect within the meaning of ARCP Rule 60(c)(1). Neeme appealed and Spectrum filed a cross-appeal.

The court of appeals affirmed the trial court's ruling that, among other things, Rule 55(a) required the plaintiff to mail a copy of the application to counsel in Utah, at least on the narrow

facts of that case, where the Utah case involved the same facts and transactions being litigated in the Arizona case. Neeme Systems Solutions v. Spectrum Aeronautical, Court of Appeals of Arizona Division 1, Department C, No. 1 CA-CV 10-0149, decided March 24, 2011, par. 10-17. Unlike the trial court, the court of appeals expressly declined to reach the merits of Spectrum's Rule 60(c)(1) excusable neglect argument. Citing Ruiz and Corbet v. Superior Court, 165 Ariz. 245, 248, 798 P.2d 383, 386 (App. 1990), the court of appeals held that Neeme's failure to comply with Rule 55(a) rendered the judgment void. Id., par. 18.

Shortly after the Neeme case was de-published, a case note in the Arizona Law Review suggested that the the void/voidable issue was the most probable reason why the Supreme Court decided to de-publish Neeme. See Grant Wille, Valid, Voidable, Or Void? Default Judgments And Attorney Notification Under Rule 55(a) Of The Arizona Rules Of Civil Procedure, 53 Ariz. L. Rev. 1363 (2011). Alternatively, the note argues that the decision to de-publish Neeme reflected a mere order of preference decision on the part of the Supreme Court. Under that scenario, the court of appeals could and should have affirmed the trial court by first reviewing and evaluating the court's discretionary decision to accept Spectrum's showing of excusable neglect before reaching more fundamental questions about the validity of the judgment and the jurisdictional nature of Rule 55(a).

Be that as it may, the note reasonably characterizes the issue as a struggle to balance competing policies: One is the policy favoring the decision of cases on the merits. The other is the policy of respecting the finality of judgments.

The decision in Smith suggests movement in the court of appeals to soften the bright line formulations in Corbin and Ruiz. The stakes are high. Although Smith confirms that Rule 55 must be obeyed as a condition precedent to the entry of any default judgment, characterizing judgments entered in violation of Rule 55(a) as voidable rather than void promotes the stability of judgments by subjecting them to the six month statute of limitations in Rule 60(c)(1)-(3). By contrast, characterizing such judgments as void in cases like Ruiz tilts the policy scale in favor of deciding cases on the merits rather than by default. That's because under Rule 60(c)(4), a void judgment can be set aside or collaterally attacked at any time.

Against this background, one might question whether the 1985 amendments to Rule 55 have really achieved their purpose to all but eliminate the lack of notice as a ground to set aside default judgments, or whether they instead have largely fostered additional litigation by people who were properly served in the first place. Rule 60(c)(1) still allows any judgment to be set aside based on the moving party's mistake, inadvertence or excusable neglect, even after the filing and mailing of a Rule 55 application for entry of default. Indeed, one might argue that, in many cases, the post-1985 Rule 55 has morphed from a shield erected for the benefit of diligent persons who were never properly served to become a sword in the hands of those who clearly were served with the summons and complaint - even by acceptance - but who, for their own reasons, failed to respond within the initial 20 or 30 day time deadline clearly stated in the summons.

Of course, it is hard to accept the view that Rule 55 is jurisdictional if the court obtains jurisdiction over the person by proper service of the summons and complaint. The differences of approach in Ruiz and Smith are reminiscent of a long-running argument on the "internal validity" of proceedings and nature of jurisdictional error. Compare the majority opinion in Lamb v. Superior Court, 127 Ariz. 400, 403, fn. 2, 621 P.2d 906, 909 (Ariz. 1981), quoting Caruso v. Superior Court, 100 Ariz. 167, 171, 412 P.2d 463, 465 (1966) ("Acts in excess of jurisdiction include acts exceeding the power of the court as defined by constitution, statute or court rules...") with the special concurrence lodged by Justices Gordon and Hayes ("The existence of subject matter jurisdiction does not depend on the correctness of a court's decision…the power to determine and decide a case includes the power to decide it wrong as well as to decide it right"). Id., 127 Ariz. 400, 404, 621 P.2d 906, 910 (special concurring opinion by Justice Gordon) (internal punctuation and quotations omitted).

But whatever its faults, the "jurisdictional" (Ruiz) interpretation of Rule 55 undoubtedly encourages a higher level of compliance than would be likely to occur under a lesser standard. The question is whether the benefits of the post-1985 Rule 55 are worth the extra complexity and opportunities for gamesmanship that followed adoption of the rule.

One thing seems to be clear above all else: Arizona's unique two-step default process is not essential to minimum due process within the meaning of the U.S. Constitution. If it were, the U.S. Supreme Court and Congress presumably would have included a similar process into Rule 55 of the Federal Rules of Civil Procedure. The fact that they did not supports the argument that the extra protections provided by Arizona law go above and beyond minimum constitutional protections and can be safely modified or removed if the Arizona Supreme Court decides to do so as part of this rule change process.

Arizona law already provides different methods for serving process inside of Arizona or outside the boundaries of our State. For example, service by mail is not authorized when service must be made inside Arizona, but service by mail can be used when service is accomplished outside of Arizona. Compare ARCP Rule 4.1 (inside Arizona) and 4.2 (outside Arizona).

Against that background, removal of the additional six month delay for Arizona litigants who must accomplish service under the Hague Service Convention constitutes a rational basis for legitimately discriminating between defendants who must be served in the U.S. and defendants who must be served abroad. While the proposed rule admittedly discriminates between Arizona litigants depending upon the location of the defendant, the discrimination rationally simplifies and improves the administration of justice by leveling the playing field for Arizona litigants who must comply with main channel service under the Hague Service Convention.

Given the problems experienced with amended Rule 55(a) to date, the Committee may wish to consider whether the current "two-step" procedure enhances – or degrades – the administration of justice in Arizona for all litigants, not just those whose cases involve trans-national service issues. But the specific proposal offered in this comment is limited to the latter class of cases, where the need for reform is most acute.