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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-16-0022

COMMENTS ON PROPOSED RULE

INTRODUCTION

This is a *third* attempt by the State Bar and its Legal Services Committee[1] to add a provision allowing for peremptory changes of judge in eviction actions to the Rules of Procedure for Eviction Actions ("Eviction Rules" or "RPEA").[2]

In 2008, the original draft of these Rules allowed for a peremptory change of judge procedure. They were revised by this Court to delete that provision as to Justice Court evictions before being finalized. As footnote 1 to the Bar proposal states, RPEA 1 continues to allow peremptory changes of judge in Superior Court evictions. Since the Rules Subcommittee originally allowed them in both Superior

[1] The Committee appears to have no members with a significant residential landlord practice.

[2] *See* ARS § 12-3201 (E) (1) (f) including as "vexatious litigants" those engaging in certain conduct including "[r]epeated filing of documents or requests for relief that have been the subject of previous rulings by the court in the same litigation."

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and Justice Courts, and since the Justice Court rule was stricken, one wonders whether the peremptory challenge allowed in Superior Court remained there through an oversight.

In any event this proposal and its predecessors are limited to allowing peremptory changes of judge in Justice Court evictions.

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. In 2015, these same groups submitted essentially the same proposal under R-15-0015. Both of those proposals were denied. Now the Bar confronts us once more with this same proposal, again at the instance of the Legal Services Committee.

The language of the proposed rule filed January 8, 2016 is the same as the 2015 proposal (see pages 5-6 of 2015 proposal). It can be claimed to be different only in the sense that it recommends a one-year probationary period on this change if the Court has certain "concerns". Petition, p. 11, lines 15-16.

Much of what follows is lifted from my comments on the earlier proposals. I could have simply attached copies of them but it is more coherent to incorporate them into a single document.

WHO I AM

My practice has been concentrated on representing landlords for 39 years in Arizona. Since 1987, I have been legal counsel for the Manufactured Housing

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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 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 39 years I have represented landlords in an estimated 18,000 manufactured housing community eviction actions. My law firm now handles close to 10,000 evictions per year covering apartments and single-family houses as well as mobile home and RV parks.

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.

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The following comments represent my views and those of MHCA.

BACKGROUND

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 one revived here—the right to a peremptory change of judge in an eviction proceeding. The Subcommittee considered the same arguments as made in these repeated rule change proposals. While the Rules Subcommittee eventually decided by a split vote to include a rule similar to what is now proposed, this Court deleted it before the Rules were finalized.

DUE PROCESS MORPHS INTO "FAIRNESS"

In the past the Bar and the Legal Services Committee have made a due process argument in favor of the change. In apparent recognition that this was a red herring, the focus has now shifted to "fairness". But the change in words is not really a change in the substance of their reasoning.

The arguments of the Bar and the Legal Services Committee are hypothetical and speculative. Examples:

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"If a tenant or a landlord believes that he or she cannot get a fair trial before a justice, then they (*sic*) should be allowed as other litigants are, to request a change of judge." Petition, page 6, lines 1-3.

We learn of the fictional character involved in civil litigation in the Encanto Justice Court who has the right to change of judge under the Civil Rules, but unable to when defending an eviction in that court. Petition, page 6, lines 13-25. This passage concludes by claiming such "differential treatment is unfair and undercuts the public's confidence in our judicial system."

At page 7, lines 1-12 we see that since some landlord attorneys were at one time *pro tem* J.P.'s it is "unfair" for CLS attorneys to be required to try cases before them. Of course this has long been resolved by landlord attorney *pro tems* not handling eviction calendars.

Finally the fact that a party prevailing in an appeal of an eviction matter gets the case returned to the same judge is "unfair". It seems to follow that the federal system and the judicial systems of most states as well are equally unfair.

The due process or as it is now cast, "fairness" 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 or, for that matter, fairness. There is no such right in the federal system.

Opposing these contrived arguments are real considerations of the landlord's

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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.

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 proposal fails to mention this or the legislative policy it reflects.

Could the Bar's original January 9, 2015 proposal have nevertheless been right? Do considerations of due process or now, "fairness" 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.

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

Under the instant proposal each side would the right to request a change of judge. But what would be the rights of a party satisfied with the initial judge assignment but unhappy with the replacement after the other side makes the request? If that party loses his right because of the time deadlines, there is disparate treatment of that second party. Is that fair?

It would seem that if "fairness" requires a peremptory change of judge for one party, it requires both parties to have it. And the proposal does call for both parties to have the right. But that is 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).

The proposal seems to assume that these statutory mandates don't really mean anything so long as this Court's case processing standards are satisfied. See, generally, Proposal, pg. 9, line 15-pg. 11, line 7. Apparently the statutes are more in the way of suggestions despite being mandatory in wording.

OTHER SUBSTANTIVE CONSIDERATIONS

In the urban counties this rule would create logistical problems. In Maricopa County for example there are 26 Justice Courts. 17 of them share a building with

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another Court and the change would not slow the process down as much as elsewhere (though it most certainly would slow it down, likely beyond statutory deadlines). In urban courts not sharing facilities with other courts, and in the 13 rural counties, the logistics of changing a judge would slow the process of getting a case heard far beyond statutory deadlines.

The main concern of the original 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 into unfair bargains to avoid delay and regain possession of their property. That remains the case today. Absent anything approaching a fact-based argument on the merits supporting this change, it is easy to conclude that the real agenda is to create a device to delay evictions.

This proposal fails to address the point made in earlier filings about a landlord's attorney who may be unhappy with a Judge. The proposed rule opens individual Judges up to mass peremptory challenges by high volume eviction attorneys wanting to stay out of their Courts. This sort of thing is not speculative. As will be seen below it really happens.

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:

> The blanket use of the disqualification rules negatively affects the orderly administration of justice. Judicial dockets are interrupted,

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> 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 or "unfairness" resulting from elimination of the peremptory right to a change of judge.

THE 1981 FEDERAL STUDY

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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

Retired 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

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> 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 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

POSSIBLE UNINTENDED CONSEQUENCES OF ADOPTING RULE

Peremptory challenges to judges are unnecessary. If a judge is biased, a party may move for a change of judge for cause. That protection affords litigants a fair and unbiased judge.

At one time the ABA Standards of Judicial Administration, Standards Relating to Trial Courts had such a provision. The *1976 version* stated at § 2.32(b):

> A party should be permitted a peremptory challenge of the judge to whom a matter has been assigned, subject to the following restrictions: (1) a party may have only one such challenge in a case; (2) the challenge must be asserted immediately upon the matter's having been assigned to the judge against whom the challenge is made and before he has made any decision regarding it; and (3) the party must be ready to proceed in the matter without delay upon its reassignment to another

judge.

This provision was deleted from the standards decades ago and no longer appears in them.

Peremptory challenges create opportunities for delay and disruption of case management. The practice is ripe for abuse by both parties, and it allows parties to remove a judge for any reason, including the judge's substantive views. That could jeopardize judicial independence.

Peremptory challenge procedures have been proposed for the federal courts, but have never been adopted. Moreover, a majority of states have no provision for a peremptory challenge to a judge. Most require a showing of cause before a judge is removed from a case. That is the case at present with the Eviction Rules.

Peremptory challenge rates could be used in judicial election campaigns. Here is a memorandum from The Alaska Judicial Council analyzing peremptory challenge rates of judges up for retention election, obviously intended for voter consideration. http://www.ajc.state.ak.us/retention/retent2014/perempt14.pdf

Peremptory challenges have long been allowed in California but have likewise become a subject of abuse when used by institutional litigants on a mass basis:

> Under California law, litigants are given a single opportunity to remove a trial judge from a case without offering any reason or explanation. This device, like a similar opportunity to remove jurors, is called a peremptory challenge.

In the context of ordinary litigation, where a single judge rules on all

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> the legal issues, the peremptory challenge of judges serves a valid purpose. It's often impossible to prove the actual bias of a judge, so giving a litigant one opportunity to veto the judge assigned to the case without such proof enhances the appearance of fairness. This rationale frequently breaks down, however, when the blackball is placed in the hands of litigants such as district attorneys, public defenders and major corporations and insurance companies. By the sheer number of their cases, such "institutional" litigants can reduce a judge to permanent unemployment by blanketing him or her with peremptory challenges in every case.

Shopping for Judges, California Style, Los Angeles Times, September 30, 1986, Gerald F. Uelmen, Dean, Santa Clara University School of Law. Available at http://articles.latimes.com/1986-09-30/local/me-10101_1_peremptory-challenge

Mass eviction case peremptory challenges will probably happen in Arizona given the relatively few lawyers handling most of the 80,000 or so evictions that flow through the system each year. One should assume that the lawyers' beliefs in the best interests of their clients and not personal animosities would motivate them in doing so.

Here is an extract from a publication analyzing Clark County, Nevada Family Law Court Judges who must periodically stand for election, obviously intended to be used by voters in considering who to vote for:

> It can be seen that departments E (Judge Hoskin), F (Judge Gonzalez), H (Judge Ritchie), Q (Judge Duckworth) and R (Judge Henderson) have the most stable peremption rates for each year. These stable rates suggest that attorneys believe these judges are competent or at least consistent in their rulings. Departments I (Judge Moss) and S (Judge Ochoa) have had a minor increase every year.
>
> Departments J (Judge Pollock) and P (Judge Pomrenze) have had

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> relatively significant increases in being peremptory challenges every year suggesting growing dissatisfaction, for whatever reason, with these judges.
>
> Although Department T (Judge Nathan) was the most frequently perempted judicial department in the 33 month period, her peremptory rate has actually shown a significant decrease each year. This decrease suggests that attorneys are slowly becoming more comfortable with the rulings and case management of the Judge Nathan. A new judge, such as Judge Nathan, sometimes requires time to "shake off" the reputation she may have had as an attorney. Just because a judge represents a certain demographic, or promotes a certain position as a lawyer, does not mean that will carryover into their decisions from the bench. The statistics suggest that Judge Nathan is being perceived as a better judge over time.

Who Are The Best Clark County Family Court Judges? Available at http://www.pecoslawgroup.com/2014/01/29/who-are-the-best-clark-county-family-court-judges/

Anyone who thinks the prospect that Arizona Justices of the Peace will not be aware of this potential if they are frequently the subjects of peremptory notices is not being realistic. Human nature is to try and please those who can do the most damage. Here that will be the institutions--landlord attorneys--and as a result this rule will backfire on the proponents.

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.

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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.

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.

In addition to legitimizing judge shopping and delaying the eviction process, this proposed rule will backfire on its proponents by creating a friendly environment for landlord attorneys in Courts where the Judge is worried about the next election. While Judges may not cave into that pressure, the temptation will be there even if it is subconscious.

This Court should advise the State Bar to cease its repeated filings year after

year of the same proposal. Such filings require industry associations to devote scarce resources to repeatedly responding to them out of a fear that if one proposal gets by them, they may well have been deemed to have consented by not objecting.

DATED: May 20, 2016

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(Electronically Signed)
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A copy of this comment has been e-mailed this 20th day of May 2016 to:

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