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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-16-0040 COMMENTS ON PROPOSED RULE Notice of Intent to File Response to Petitioners "Reply"

INTRODUCTION

This proposal covers two kinds of forms: notice forms provided by landlords to tenants as required by pertinent landlord tenant statutes as a predicate for filing an eviction action; and pleading forms filed with the Court in the eviction action.

It fails to identify the legal authority for the Supreme Court to dictate what notice forms private landlords must use to notify tenants of defaults.

The proposal states "the ACAJ worked with justice court managers, judicial staff, and tenant ***and landlord attorneys*** . . . to create forms for use statewide". But no landlord attorneys were consulted on this proposal in ***any meaningful way***.

WHO WE ARE

Michael Parham has represented landlords for 39 years and from 1987-2016 was legal counsel for the Manufactured Housing Communities of Arizona ("MHCA"). His work includes evictions and legislative drafting involving the residential landlord tenant matters and the Title 12 forcible detainer statutes. He is a Registered Authorized Lobbyist for MHCA.

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He has prepared publications for MHCA including forms books containing notice forms tailored to each kind of tenancy. These are considered Arizona standards for these tenancies. He served on the State Bar Landlord Tenant Task Force and on the Subcommittee that drafted the Eviction Rules. Many of them originated with him. He is the primary author of these comments.

Melissa Parham was named legal counsel for MHCA in June 2016. She was an Assistant Attorney General in Criminal Appeals for over four years. Using skills developed in that position she researched most of the legal issues for these comments. She currently authors the MHCA forms publications.

BACKGROUND

There are four residential landlord tenant laws in Arizona: The Residential Act applies to the rental of landlord owned dwelling units (ARS § 33-1301 *et seq*.); the Mobile Home Parks Act applies to the rental of a mobile home space in a mobile home park (ARS § 33-1401 *et seq*.); the Long Term RV Rental Space Act applies to the rental of spaces for RV's under rental agreements over of 180 days (ARS § 33-2101 *et seq*.); and the general landlord tenant laws ("the Innkeeper Laws") apply to the rental of RV spaces for short terms as well as any residential tenancies not otherwise covered by the preceding three laws (ARS § 33-301 *et seq*.).

Each requires unique forms for terminating tenancies and notifying tenants of default and each has different provisions for what constitutes a default.

APPLICABLE LAW

Article 6, Section 5 (5) of the Arizona Constitution grants the Supreme Court the "power to make rules relative to all procedural matters in any court". ARS § 12-109 (A) authorizes the Supreme Court to adopt rules of procedure:

> A. The supreme court, by rules promulgated from time to time, shall regulate pleading, practice and procedure in judicial proceedings in all courts of the state for the purpose of simplifying such pleading, practice and procedure and promoting speedy determination of litigation upon its merits. ***The rules shall not abridge, enlarge or modify substantive rights of a litigant.***

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The Court analyzed substantive rights and procedural matters in *Daou v. Harris*, 678 P.2d 934 (Ariz. 1984). ***Substantive rights*** created by statute cannot be enlarged or diminished by court rules. The power to govern ***procedural matters*** for all courts, however, is vested exclusively with the court. The substantive law is that part of the law which creates and defines rights. The procedural law prescribes the method by which a substantive law is enforced or made effective. *Id*.

This proposal violates these restrictions. It abridges, enlarges and modifies substantive rights derived from the landlord tenant acts identified above.

Nothing in ARS § 12-109(A) can even remotely be interpreted to authorize (1) the Supreme Court to dictate to landlords the forms of default notices given to their customers--their tenants; and (2) to require inclusion of information in Court mandated forms not required by relevant statutes. This is all the more egregious when one considers that of the default notices given, probably fewer than ten percent wind up in court. In the overwhelming number of cases, tenants come into compliance with the notice long before the time to file an eviction rolls around.

In addition ARS § 41-2752 provides as follows:

> A. A state agency shall not engage in the manufacturing, processing, sale, offering for sale, rental, leasing, delivery, dispensing, distributing or advertising of goods or services to the public that are also offered by private enterprise unless specifically authorized by law other than administrative law and executive orders.
>
> B. A state agency shall not offer or provide goods or services to the public for or through another state agency or a local agency, including by intergovernmental or interagency agreement, in violation of this section or section 41-2753.

The proposal violates the policy of this statute by pre-empting to the government (the courts) the publication of landlord tenant notice forms now published and sold by trade associations, private publishers and law firms.

Finally, ARS § 41-1001.01 provides in part as follows:

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> A. To ensure fair and open regulation by state agencies, a person:
>
> . . .
>
> 7. Is entitled to have an agency not base a licensing decision in whole or in part on licensing conditions or requirements that are not specifically authorized by statute, rule or state tribal gaming compact as provided in section 41-1030, subsection B.

While not directly on point, the Consumer Bill of Rights of which this is a part expresses a strong state policy that agencies act strictly within the limits of their statutory authority.

THE PROCESS UNDER WHICH THESE FORMS EVOLVED

Why is this important? The proposal claims these forms were developed in a collaborative effort that included knowledgeable landlord attorneys. This is a misleading statement as an examination of the background of the proposal reveals.

In 2014 a Workgroup on Eviction Forms and Instructions was created. Members included at least four legal aid attorneys or affiliates and alumni of legal aid. There were no landlord attorneys on this Workgroup.

Subsequently a decision was made to reach out and include two "guest members", Denise Holliday and Paul Henderson. These are senior attorneys with the two largest eviction firms in the state, probably accounting for more than 50% of all evictions filed. Each of them has described to the undersigned their involvement. Denise Holliday reported:

> Paul Henderson and I were on this task force and we were outvoted at every turn by the 4 tenant advocates. In fact the very last day, they passed several changes over Paul's objection and I could not be there because they notified me 24 hours in advance of the meeting.
>
> Here is the first and most important point. When we strongly objected to language on the forms, we were shut down by assurances that these forms would never be used by lawyers. The head of the committee was Judge Rachel Carrillo. She can verify this absolute promise.

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> Now the tenant advocates are falsely claiming everyone on the committee agreed, that we agreed these forms should be mandatory for everyone, and are not even disclosing that they outnumbered landlord representatives 2 to 1.[1]

Paul Henderson reported:

> The absolute promise was made that these forms would never become mandatory for the court system, and that the attorneys for landlords (and the landlords themselves) would be free to draw up their own forms for use in landlord-tenant matters. Had this assurance not been given, Denise and I would have walked out at that moment.
>
> There was never any balance and every time we thought we had some sort of agreement on a moderate, voluntary-use form notice, CLS would come back and demand additional changes. The end-product you see attached to the petition is the point by which there was no compromise, only a victory by CLS and its advocates.[2]

Rachel Carrillo was the Chair of the Workgroup. She is familiar with the RPEA having served on the original task force that developed them.[3]

Judge Carrillo attended meetings from April 2014 through November 2015 to work on developing the forms. During that time it was her understanding that use of the forms was **not** going to be mandatory. The idea was that the forms would be based in part on input from a number of knowledgeable landlord attorneys; that landlord attorneys "were always involved in this process (emphasis in original)." But she also acknowledges "I asked several landlord attorneys to be in this committee only got (2) who would agree" (sic).[4]

When Denise Holliday and Paul Henderson became involved in the project they became frustrated since they were outnumbered four to two by legal aid affiliated attorneys. Judge Carrillo states that she encouraged the landlord attorneys to stay involved since the forms would be subject to a further review process.[5]

[1] E-mail dated August 12, 2016 from Denise Holliday to Michael A. Parham.
[2] Two e-mails dated August 12, 2016 from Paul Henderson to Michael A. Parham.
[2] Two e-mails dated August 12, 2016 from Paul Henderson to Michael A. Parham.
[3] E-mail dated August 15, 2016 from Rachel Carrillo to Michael A. Parham.
[4] E-mail from Rachel Carrillo to Michael A. Parham summarizing telephone discussion of August 16, 2016 ("Carrillo Summary").
[5] Carrillo Summary.

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In May 2016 a policy change was announced. The forms had to be finalized as quickly as possible by the ACAJ and than transmitted to the AOC. At this time Judge Carrillo continued to believe that use of the forms would not be mandatory.[6]

A vote was taken on submission of the forms to the AOC. At this time Judge Carrillo learned that use of the forms was to be mandatory. It is her recollection that she did not vote in favor of the proposal to make the forms mandatory.[7] Judge Carrillo understands that the forms are now with the AOC; their use is to be mandatory; the ACAJ role in revising them has ended; and that once the forms went to the AOC, they assumed responsibility.[8]

Judge Carrillo is unhappy that use of the forms was made mandatory. She didn't know the reason and knew the landlord attorneys would be upset about the mandatory forms or would believe they had no voice regarding the changes in the forms. It was Judge Carrillo's understanding that immediate responsibility for AOC processing of these forms was to be with Paul Julien, Judicial Education Officer of the AOC.[9]

Mr. Julien confirmed the forms had been referred to AOC, and advised that the Court Services Division would likely be responsible for them as it is with other Court forms. He advised that he was not aware that anyone in the Division has any knowledge or expertise in landlord tenant matters.[10]

Asked if consideration was given to the effect this proposal would have on private businesses that publish these forms, the response was that they were developed on the assumption that notice forms were prepared by attorneys for clients. The ACAJ does not seem to have been aware that private enterprise such as trade associations and private publishing companies had substantial investments in development and sale of landlord tenant notice forms.[11]

Finally it was confirmed that a cost benefit analysis had not been conducted on the effect of this proposal on the residential landlord industry. It appears that ACAJ was not aware that there could be substantial costs to landlords.

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[6] Carrillo Summary.
[7] Carrillo Summary; E-mail dated August 15, 2016 from Rachel Carrillo to Michael A. Parham.
[8] Carrillo Summary.
[9] Carrillo Summary.
[10] Telephone call between Michael A. Parham and Paul Julien, 8/25/26
[11] Telephone call between Michael A. Parham and Paul Julien, 8/25/26

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It does not seem to have known that (1) major landlords had their notice forms cooked into their proprietary software systems or into a variety of off the shelf systems available to landlords in which five-day notice forms are auto populated with rents, late fees and other charges due and the notice is produced for service or that the proposed forms would require changes in the software at considerable cost; (2) Trade associations have spent large sums developing and updating notice forms libraries and these can often be completed on line with a copy printed out by a landlord. Pre-emption by the courts means that investment is lost; (3) Some law firms use sophisticated software systems for landlords to process evictions and notices. Changing notice forms and summons and complaint forms will require extensive re-programming of the system at a very large expense; (4) private forms publishers that cater to small mom and pop operators will be put out of the notice forms business.

At the conclusion of a one hour phone call, Mr. Julien, remarked, "you are bringing up issues not considered" by the ACAJ or the Working Group. [12]

Mr. Julien advised that in a couple of days Judge Winthrop and he would be meeting with the Committee on Limited Jurisdiction Courts to review the proposal. He asked for the then existing draft of these comments so he could review them with Judge Winthrop in the expectation that the presentation would contain criticisms not in the original proposal. This was provided but at that presentation no mention was made of any of these objections. Nevertheless the LJCC did not approve the proposal but instead voted to adopt the forms as optional, not mandatory, for similar reasons to those presented here.[13]

Counterpart forms in California are optional, not mandatory. [14] A review of the California optional counterpart forms reveals that they are professional and prepared by people who are competent, a sharp contrast with what is presented in the instant proposal. California law however is quite different and Arizona cannot simply plagiarize its forms.

FAILURE TO CONDUCT COST BENEFIT ANALYSIS

A cost benefit analysis is used to evaluate the total anticipated cost of a project compared to the total expected benefits in order to determine whether the proposed implementation is worthwhile for a company or project team. If the results of this comparative evaluation method suggest that the overall benefits of a proposed action

[12] Telephone call between Michael A. Parham and Paul Julien, 8/25/26
[13] E mail from participant in LJCC briefing, 9/1/16
[14] http://www.courts.ca.gov/forms.htm?filter=UD

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outweigh the incurred costs, then a business or project manager will most likely choose to follow through with the implementation.

Generally speaking, a cost-benefit analysis has three parts. First, all potential costs that will be incurred by implementing a proposed action must be identified. Second, one must record all anticipated benefits associated with the potential action. And finally, subtract all identified costs from the expected benefits to determine whether the positive benefits outweigh the negative costs.

The cost of this proposal to landlords and landlord attorneys are self-evident. They include (1) the cost of reprogramming management information systems for those that include preparation of notices in the system. The replacement of a form in such a system entails reprogramming the system to complete the new form and that is a substantial expense; (2) the lost investment costs to trade associations in the business of developing and publishing notice forms when the government (Courts) pre-empts that private business; (3) the costs that will be incurred by eviction law firms in reprogramming their computer based eviction systems to replace forms designed into them and ultimately passed on to landlords; (4) training costs incurred by landlords as they train their thousands of employees in the completion and use of the new forms.; and (5) costs to be incurred by small mom and pop landlords facing dismissal of cases and ultimately loss of their properties due to failure to use correct forms (see *infra* for explanation). Undersigned estimates these costs alone to be in the millions of dollars.

There are other costs of implementing these forms. The costs to the courts in training staff in their use. The costs to the AOC of staffing up to undertake a new line of work. The costs to lower courts of filing multi-page forms instead of the current single page forms now in use.

But what of the benefits expected from implementation of this proposal? No monetary figure was attached to this in the proposal and nothing in the proposal even hints at how anyone would financially benefit from it. If one were to believe that tenants would benefit from it, nothing appears that can serve as the basis for assigning a dollar value to it. And no such reason is expressed anyway.

The obligation to perform a meaningful cost benefit analysis before imposing requirements of this sort has worked its way into our case law. For example in *Chamber of Commerce v. SEC*, 412 F.3d 133 (D.C. Cir. 2005) the D.C. Circuit held that the SEC acted arbitrarily and capriciously for failing to undertake some effort to quantify the costs of the mutual fund governance rule changes it had adopted.

FAILURE TO CONSIDER EFFECTS ON PRIVATE BUSINESS

ARS § 41-2753 prohibits the government from engaging in a business when

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private enterprise is already engaged in it. A review of all minutes on line from committees and subcommittees involved in this proposal fails to reveal that this subject was ever discussed, and Mr. Julien confirmed that it had not been.

In fact discussions with him indicated that no one was even aware that the notice forms were already being published and distributed by trade associations, private publication publishers, and by several private law firms.

NOTICE FORMS

1. Legal Authority

As pointed out above, Article 6, Section 5 (5) of the Arizona Constitution grants the Supreme Court the "power to make rules relative to all procedural matters in any court", and ARS § 12-109 (A) limits the Supreme Court's authority to adopt rules of procedure.

2. General

The proposal requires, *initially*, the use of the following forms by Attorneys representing landlords and landlords filing *pro per:*

5-Day Notice to Move - Health and Safety Violation;
5-Day Notice to Move - Failure to Pay Rent;
10-Day Notice to Move - Material Breach;
10-Day Notice to Move - Repeat Material or Health and Safety Breach;
Immediate Notice to Move - Material and Irreparable Breach

These forms are appropriate for use only in evictions brought under the Residential Landlord Tenant Act. The footers on the forms identify them as Residential Landlord Tenant Act forms, but the use of legal jargon is not likely to inform *pro per* landlords that they should be using something else.

Each form is designated as a "Notice to Move." That is incorrect. Each is a notice of termination of tenancy with a cure period (with limited exceptions). Indeed the most commonly used forms, the non payment of rent form and the five and ten day violation forms have specific cure periods meaning tenants do ***not*** need to move if they timely cure the violation.

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While the bodies of the forms do identify a cure privilege, one reading no further than the title (a common occurrence) will simply think he needs to vacate.

3. The Five Day Non-Payment of Rent Notice

(a) Form Exceeds Statutory Requirements.

ARS § 33-1368 (B) (the non payment of rent provision in the Residential Landlord Tenant Act) states:

> If rent is unpaid when due and the tenant fails to pay rent ***within five days after written notice by the landlord of nonpayment and the landlord's intention to terminate the rental agreement if the rent is not paid within that period of time***, the landlord may terminate the rental agreement by filing a special detainer action pursuant to section 33-1377. Before the filing of a special detainer action the rental agreement shall be reinstated if the tenant tenders all past due and unpaid periodic rent and a reasonable late fee set forth in a written rental agreement.

The emphasized statutory language is clear what this form is required to say. But the architects of this form have gone beyond the statutory requirements and added some extra requirements:

1. An explanation of how late fees may increase if rent is not paid;
2. An explanation of other fees due under the rental agreement;
3. Advice that the keys must be returned to the landlord when the property is vacated;
4. Advice on contacting the landlord to settle the matter.

These may be informative things and many landlords already use forms that cover them. But relevant statutes do not mandate them. And they have substantive effect since failure to include the information will result in dismissal of the action.

The ACAJ would effectively use forms to legislate requirements for these notices far beyond what the law requires with a prohibition on the use of forms that do not meet these standards. A landlord filing an eviction with a notice form meeting the legal requirements but not of these rules would have that eviction action rejected and be told to start all over again with the use of a court sanctioned form.

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(b) Form Precludes Provisions Required by Other Laws.

The proposal requires the use of these forms by lawyers as well as landlords. A lawyer for example filing an eviction action based on a five-day non-payment of rent notice who does not use the court approved form faces having that eviction rejected until the correct form is used. But use of that form could violate the federal Fair Debt Collection Practices Act (FDCPA).

The FDCPA may treat lawyers seeking to collect consumer debts for clients as "debt collectors". *See* 15 U.S.C. § 1692 *et seq*. The FDCPA requires at 15 U.S.C. § 1692g that debt collectors include validation notices in their debt collection letters. The FDCPA also applies to some other third party debt collectors. Depending on circumstances, these debt collector and landlord attorney notices may need to contain FDCPA validation notices. But the proposed five-day non-payment of rent notice fails to include one.

Under this proposal an Attorney filing an eviction using a form containing the FDCPA validation notice faces having it rejected because it varies from the Court prescribed form this proposal would mandate.

4. The Rest of the Notice Forms

They too suffer from similar defects, in particular the proclivities of the drafters to add things not required by the statues creating the need for the form. With respect to all of them, a plaintiff filing an eviction action using a notice form fully complying with the requirements of the statute but not on the form called for in this proposal would face having it rejected. As with the five-day notice, this has substantive effect since failure to include the information will result in dismissal of the eviction action.

PLEADING AND PRACTICE FORMS

1. General

The Supreme Court can adopt rules and forms related to pleading and practice. But the restrictions in ARS § 12-109 (A) apply to such forms.

The proposed forms violate those restrictions since they too abridge, enlarge and modify substantive rights derived from the landlord tenant acts identified above.

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In addition they are contradictory and confusing.

2. The Complaint

(a) Form Exceeds Statutory Requirements.

High volume eviction landlord attorneys prepare eviction filings by the use of technology. Cases are processed and legal costs are held to a minimum that not only pleases their clients but saves money for tenants.

Most eviction filings result in tenants reinstating their tenancies and the case either being dismissed or judgment satisfied after entry. To reinstate, however a tenant must reimburse the landlord's legal fees. Every extra dollar resulting from changes in court rules ultimately comes out of the pocket of the tenant.

Under the heading "COMPLAINT (*Eviction Action*)" there are four boxes to be checked, including "Mobile Home" and "Commercial." This is confusing since mobile home park and commercial evictions are supposedly not covered by this proposal.

ARS § 12-1175 (B) sets forth the statutory requirements for the contents of an eviction complaint:

> B. The complaint shall contain a description of the premises of which possession is claimed in sufficient detail to identify them and shall also state the facts which entitle the plaintiff to possession and authorize the action.

This form exceeds what the law requires. Section 5 starting with the second line calls for information concerning whether this is subsidized housing.

The "Notice" provision in section 5 consists of advice to a tenant on how to reinstate the tenancy. That goes far beyond the statutory requirement. That information is already in the second paragraph of the Residential Eviction Information Sheet that is served with the Complaint. All of this has substantive effect since failure to include the information will result in dismissal of the eviction action.

3. The Summons

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(a) Form Contains Wrong Information About Counterclaims.

Section 4 says, "If you want to file a counterclaim, it must be in writing."

Rule 8(a), RPEA, states:

> Basis. ***Unless specifically provided for by statute, no counterclaims, cross claims, or third party claims may be filed in eviction actions. Any counterclaim filed without a statutory basis shall be stricken and dismissed without prejudice.*** All counterclaims must be filed in writing and served upon the opposing party.

Arizona courts have repeatedly held that the object of a forcible detainer action is "to afford a ***summary, speedy and adequate remedy for obtaining possession of the premises*** withheld by a tenant in violation of the covenants of his tenancy or lease, or otherwise withheld within the meaning of the statute defining forcible entry and detainer." *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 203, 167 P.2d 394, 397 (1946). For that reason, "***counterclaims, offsets and cross complaints are not available either as a defense or for affirmative relief in such an action, as indicated by our statutes and the statutes of most states***." *Olds Bros.*, 64 Ariz. at 205, 167 P.2d at 397.

There is no statutory basis for a counterclaim in an eviction action with one very limited exception in the Residential Landlord Tenant Act. Under ARS § 33-1365, ***in a Residential Act non-payment of rent case only***, a tenant may counterclaim for damages resulting from the landlord's breach of the lease or violation of the Act. There are no comparable provisions in any of the other landlord tenant statutes. Section 4 thus gives misleading legal advice by saying you can file "if you want" and can be expected to result in the filing of many wrongful counterclaims.

Section 5 is gratuitous advice and goes beyond statutory requirements. The same information already appears in the Residential Eviction Information Sheet.

4. The Judgment

This should be a one-page form. It has metastasized into two pages as the result of the inclusion of misleading and extraneous verbiage. The legal insufficiencies of this form include:

(a) Form Contains Wrong Information On Partial Payments.

This form states: "If a partial rent payment was accepted, [ ] a non-waiver was

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produced [ ] a non-waiver was NOT produced". The requirement of a non-waiver agreement appears only in the Residential Act. A similar requirement was repealed from the Mobile Home Parks Act in 1987 (*see* former ARS § 33-1479) and the requirement has never appeared in any of the other Acts. Rule 13(a) (4), RPEA, states:

> (4) If it appears that a landlord has accepted a partial payment in a case claiming non-payment of rent ***under the Arizona Residential Landlord and Tenant Act***, the court shall inquire whether the landlord accepted the partial payment, and if so, can produce a partial payment agreement and waiver signed by the defendant as required by the statute. If the landlord is unable to prove that the waiver was signed, the court shall dismiss the action.

The judgment is thus inconsistent with both the law and the eviction rules.

(b) Form Is Too Long.

Judgments are generally issued with an original that goes into the court file and three copies (one for tenant, one for landlord, one for landlord attorney). The standard for high volume eviction attorneys is to use color coded multi copy forms where the judge signs the original and the copies are automatically conformed since the copies are embedded with ink that makes a copy of the signature.

This will not work with a two-page form meaning all copies will need to be manually conformed by court staff. This will slow down eviction calendars and require a clerk to be in the courtroom.

The biggest problem with this form is not the substantive content, but with how that content is set forth. There is no need for two pages, especially in light of the extra expense to Courts, landlords and ultimately tenants of making it more time consuming for attorneys to prepare these cases. And the form is simply muddled. It is not clear and straightforward.

(c) Form Omits Provisions Required by RPEA.

Finally, this form omits a key requirement of the RPEA. A majority of cases in which tenants show up at court are really uncontested. They acknowledge owing the rent claimed or whatever other default is the basis for the action.

In these cases the standard of practice is for the landlord attorney to review what is claimed and if there is no disagreement, to obtain a stipulation. This economizes on judicial resources by avoiding appearances where the court reviews

these same matters with the tenant. Overall it helps to minimize landlord legal fees.

RPEA 13 (b) (4) contains the following provision:

> (4) Stipulated Judgments. The court may accept a stipulated judgment, but only if the court determines that the conditions of Rule 13(a)(1)-(2) have been satisfied and the form to which the defendant stipulated contains the following warning:
>
> **Read carefully! By signing below, you are consenting to the terms of a judgment against you. You may be evicted as a result of this judgment, the judgment may appear on your credit report, and you may NOT stay at the rental property, even if the amount of the judgment is paid in full, without your landlord's express consent.**

LOGISTICAL PROBLEMS

1. Major Landlords

Many landlords have the notice forms already built into their software systems. These systems automatically identify rental delinquencies and trigger termination notices at the earliest possible time. This gives tenants the opportunity to bring rental accounts current before late fees, court costs and attorney fees can accumulate to unaffordable balances. The requirement to undergo extensive re-programming of information and management systems for no good reason simply increases the cost of management to landlords and will ultimately be passed on to tenants.

In addition there will be down time to reprogram these systems during which balances will need to be hand calculated at considerable expense, one that is ultimately borne by tenants. Additional training on how to complete irrational forms will be necessary both for IT personnel making system design changes and management staff will add to this expense.

2. Mom and Pop Landlords

Access to justice commissions across the country focus entirely on tenants. It is almost unheard of for one to pay any attention to the problems of the unrepresented small landlord. In 2007, however the District of Columbia Bar made note of these problems:

> Unrepresented landlords, who usually own a single dwelling or a small number of units, also face difficulties in court, specifically on technical matters such as filling out a complaint form correctly or not understanding

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their obligations under the District's rental housing statutes and regulations, said King.[15]

The Boston Bar Association has stated:

The Task Force also recognized that a landlord might be vulnerable and included a proposal for representation for landlords for whom shelter was at stake and where the tenant was represented.[16]

There are tens of thousands of individuals in Arizona who have invested in small rental operations--perhaps a fourplex or maybe a single-family house rental. A morning at a Justice Court *pro per* calendar reveals how many fall into this category.

These are often retirees who have invested their life savings in rental properties looking for the returns no longer available from bonds or other securities to finance their retirements. Among other things they cannot afford attorneys to handle their evictions since their margins are so narrow.

In their files are old notice forms they have been using for years that still meet the basic requirements of what the law provides. But the new forms will impact them also. They face having their cases dismissed for failure to use the correct form. And if that form is one of those proposed here, it is counter intuitive and irrational. Many will face having their cases repeatedly dismissed over technical failures having to do with correct form completion. Meanwhile tenants will be able to continue living in their properties rent-free thanks to these technical changes.

It will take years to cycle old but still legally sufficient notice forms out of these property owner files and replace them with new ones. How many of these folks face the loss of their properties and much of their retirements due to this exercise?

The summons and complaint forms call for a great deal of information not required by statute. One of the supposed goals of the ACAJ was to simplify the forms down to a fifth grade reading level. But that goal has been abandoned. Imagine the confusion of the *pro per* landlord having to complete the section of the Complaint dealing with subsidized housing. Typically he will not have a clue what the form is referring to. And most courts will not give advice on how to complete the form.

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15 Justice to All: The Continuing Work of the Access to Justice Commission, *Washington Lawyer, April 2007*

16 *The Importance of Representation in Eviction Cases and Homelessness Prevention*, Boston Bar Association, March 2012, page 10:

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Also imagine her trying to figure out how to complete section 6 detailing what he is owed. What is a "Concession"? What is a "reimbursable" court cost? Does she fill out the entire form or is she alert enough to catch the fact that she only checks and completes the parts that apply? Many will not be able to figure this out.

In a Court that requires plaintiffs to complete the judgment form, a *pro per* landlord is going to be completely bewildered. Even if the Court completes the form and the landlord prevails, the judgment will make no sense to many and they will not know what they have accomplished.

3. Private Forms Publishers

There are a number of professional form publishers that prepare and distribute notice forms. This includes organizations like MHCA; the Arizona Multihousing Association; and the Arizona Association of Realtors.

Commercial forms publishers also participate in the Arizona market. Firms like U.S. legal Forms; EZ Landlord Forms; Rental Lease.net; and Alpha Publications. These forms all satisfy statutory requirements but do not contain the information called for in this proposal. They have been prepared by professionals at considerable expense and marketed to *pro per* landlords for many years.

Finally, most major eviction firms have a stable of notice forms they make available to clients. Many clients keep using them after their relationship with the firm has ended. The forms still meet statutory requirements but will not meet the requirements of the forms proposed for use in this proposal.

4. Eviction Law Firms

Eviction attorneys operate on narrow margins, keeping costs and fees to a minimum through technology. Many charge major clients as low as $75 in legal fees for a routine eviction. How is this done? Undersigned's law firm is an example.

After serving the termination notice the client will refer the case for eviction. Upon receipt the responsible legal assistant will review the submission and determine if all necessary paperwork has been received; and that the proper notice was given. Then the case is entered into the eviction processing system resulting in the printing of a one-page summons and a one-page complaint after the notice has matured. Multiple copies of each on different colored pages are printed.

All information is auto-populated in the forms from information supplied by the

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client. At the time this is done the system also prints out process server instructions. After a final review by one of the firm attorneys and a senior legal assistant, the package is picked up by the process server for filing and service.

One page forms keep expenses to a minimum by eliminating as much manual processing of the case as is possible. Simplicity minimizes process server expense (generally process server expense runs $36.00 plus $10.00 per page in Maricopa County).

If the tenant fails to reinstate the tenancy, the day before the initial court appearance a similar process is followed in preparing the judgment, with a single page form consisting of multiple copies in different colors being printed. This too is auto-populated with information in the system.

Expanding these forms to two pages will result in the need for system reprogramming; in additional manual processing since now two pages will need to be collated with the attachments; and in a more diligent review process to ensure both pages are accurate and matched up. This will add to the expense to eviction attorneys and ultimately the costs to landlords (and tenants). A rough estimate of the cost to our firm of necessary system modifications is $50,000 to $100,000.

Current one page forms contain all information required by statute and the RPEA. Process server fees will increase since process servers charge by the page and since they will need to verify the correct copies are attached to the correct forms. This expense will also be borne by landlords and ultimately tenants.

The institutional burden on the Courts of suddenly doubling the size of eviction files would seem self-evident.

CONCLUSION

Why is all this necessary? The current practices work well considering the high volume of cases being processed through our Justice Courts. No reason for the proposal is given in the Petition other than this:

> At its May 18, 2016 meeting, ACAJ concluded the forms should be mandated rather than optional ***to better promote improved readability of and consistency in forms used by attorneys, landlords and judges; and to allow for standardized and timely updating.*** These benefits are all in keeping with the Supreme Court's access to justice initiative.

That verbiage is vacuous and meaningless. The current practices work well.

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The system operates efficiently and at minimum expense. The upheavals created by this exercise will slow the process down, and will be difficult and time consuming to implement, both for landlords and the Courts themselves.

No problems are identified that this dislocation will remedy. About the only thing the proposal will accomplish is to temporarily turn the eviction process chaotic, and this benefits only tenants who wish to eke out a few more weeks of rent free living by delaying cases due to violations of new technicalities created by it.

The forms disregard legal restrictions imposed on the Supreme Court limiting what is appropriate for rules and forms and pre-empting private business. They do not appear to have been prepared by anyone with an understanding of landlord tenant and eviction laws. The two landlord attorneys who could have remedied some of these problems were ignored.

The proposal is deeply flawed. In part that is probably the result of a conscious decision to exclude landlord attorneys from any ***meaningful*** participation in this exercise. The ACAJ has no one on it even remotely familiar with landlord business operations. Right now decisions are made on the basis of one point of view, that of legal aid attorneys. That needs to change.

The LCJC and the landlord attorneys live in the real world of evictions. Despite stereotypes, landlord attorneys are held to the same standards and ethics as other members of the Bar. The stereotypes are offensive and insulting. Landlord attorneys are committed to representing their clients but in an honest and ethical manner. They oppose this for these simple reasons:

1. It is unlawful;
2. It simply takes a private businesses' source of income away by seizing the right to create notice forms without compensating it;
3. The Court system lacks the expertise and ability to do the job;
4. The forms themselves do not satisfy statutory requirement;
5. The proposal was made with no consideration of costs or benefit and is arbitrary and capricious;
6. And finally, it arises out of uninformed stereotypes of the eviction process and landlord attorneys.

The two groups with front line experience in this area, landlord lawyers and lower court judges, object to this proposal. To substitute their experience and knowledge with that of a Committee composed of people who know nothing of this

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area and people hostile to landlords may serve someone's idea of justice, but certainly does not serve justice in any sense of the word in the American legal system.

The Star Chamber was an English court of law that sat from the late 15th century to the mid-17th century. In modern usage, legal or administrative bodies with strict, arbitrary rulings and secretive proceedings are sometimes called, metaphorically or poetically, Star Chambers.

Star Chamber proceedings so grossly violated standards of "due process" because a party was denied a fair hearing. The unfair predetermined judgments that sent the accused to The Tower of London or to the chopping block made "Star Chamber" synonymous with unfairness from the bench.

This is not mere hyperbole. A review of the history of this proposal reveals more than a few characteristics of Star Chamber practices. Essentially an industry facing an unauthorized regulatory take over by the Supreme Court has been excluded from all proceedings leading to the proposal being recommended. The proposal was created by the ACAJ that is composed in equal portions of members who are ignorant in landlord tenant matters, and those who as legal aid attorneys or tenant/consumer advocates are implacably hostile to the interests of landlords.

Landlords were given no meaningful opportunity to appear, give their views and attempt to rebut the stereotypes of them by hostile ACAJ members that ultimately resulted in this proposal. At least the Star Chamber allowed the accused to appear.

RESERVATION OF RIGHT TO FILE REPLY

Because this proposal is so flawed, undersigned envisions that unless it is abandoned, the Petitioner in its Reply due November 4, 2016 will try and create a complete revision of it. In that event undersigned reserves the right to file a response to any such new proposal.

DATED: September 23, 2016

Williams Zinman & Parham, P.C.

/S/ *Michael A. Parham*

By: Michael A. Parham
Melissa A. Parham

A copy of this comment has been e-mailed
this 23rd day of September 2016 to:
Hon. Lawrence Winthrop