

1 Hon. Lawrence F. Winthrop
2 1501 W. Washington, Suite 410
3 Phoenix, Arizona 85007

4 **IN THE SUPREME COURT**

5 **STATE OF ARIZONA**

6 PETITION TO AMEND RULES
7 5(a), 5(b)(6), 5(b)(7) AND ADD RULES
8 13(h) AND 20, OF THE RULES OF
9 PROCEDURE FOR EVICTION
10 ACTIONS

Supreme Court No. R-16-0040

**Reply to Comments to Petition to
Amend Rules 5(a), 5(b)(6), 5(b)(7)
and add Rules 13(h) and 20 of the
Rules of Procedure for Eviction
Actions**

11 Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, the Arizona Commission
12 on Access to Justice (Commission), submits this second reply to comments filed in response to
13 the petition to amend Rules 5(a), 5(b)(6), 5(b)(7), and to add Rules 13(h) and 20, of the Arizona
14 Rules of Procedure for Eviction Actions. If adopted, these rules would require landlords and
15 litigants to use court-approved eviction action forms and notices, and authorize the
16 Administrative Director of the Administrative Office of the Courts (AOC) to approve and
17 modify eviction action forms in response to changes in state laws or procedures, to make other
18 necessary amendments or technical corrections, and to add or delete eviction action forms as
19 may be appropriate. For ease of reference, comments received in the first comment period are
reiterated and also addressed here.

20 The first comment period ended on September 23, 2016. The Commission filed its reply
21 on November 10, 2016. A motion for leave to file additional comments was filed by Commenter
22 Michael Parham on November 14, 2016. The Supreme Court ordered the rule petition be
23 continued with any additional comments due February 17, 2017. The Commission continued to
24 meet informally with interested stakeholders to discuss the proposed rule changes, the objections
25 and the potential for resolution; accordingly, the Commission requested and received a brief
26 extension to March 22, 2017 to submit this second reply.

27 First Round of Comments

28 There were a total of nine comments submitted, three in full support and six
objections. The commenters that fully support R-16-0040 were the Arizona Community

1 Action Association (ACAA), Community Legal Services (CLS), and the William E.
2 Morris Institute for Justice (Institute). Objections to the petition came from professional
3 trade organizations, Realtor/investor associations, a landlord/tenant attorney association,
4 law firms specializing in representing landlords and residential owners, and a justice of
5 the peace.¹

6 Second Round of Comments

7 There were a total of five new (but substantially the same) comments submitted in
8 objection. Objections to the Commission's first reply again came from law firms
9 specializing in representing landlords and residential owners, private tenant attorneys,
10 and a justice of the peace.²

11 The objections to the Commission's proposed rules and notice/form changes focus on
12 several areas, and erroneously assert that:

- 13 1. The proposed rule exceeds the authority of the Supreme Court under the Arizona
14 Constitution and applicable statutes.
- 15 2. Mandating the use of notices and forms deprives Arizona Realtors and their clients of the
16 right to use established and proven forms.
- 17 3. Landlords using legally sufficient and substantially similar forms would face dismissal of
18 cases if mandatory forms were not used.
- 19 4. The Commission's statements in its petition and reply that all parties to the working
20 group fully participated in the drafting of the notices and other forms is a falsehood, and
21 the now-complaining landlord representative participants of the working group contend
22 they were disadvantaged by what they now characterize as an unfair process.
- 23 5. The Commission's reply and changes made to the forms were inconsistent with the Rule
24 28 process.
- 25 6. The proposed notices and forms are legally deficient, confusing, and misleading.

26 In support of the petition, the Commission replies as follows:

27 ¹ Judge Gerald Williams; Law Offices of Scott M. Clark, P.C.; Hull, Holliday & Holliday, PLC; Arizona Association of
28 REALTORS®; Arizona Multihousing Association; Manufactured Housing Communities of Arizona and Michael A. Parham; and
Arizona Real Estate Investors Association.

² Judge Gerald Williams; Williams, Zinman & Parham P.C.; Law Offices of Mark Hyatt Tynan, Law Offices of Mark A. Tucker,
and Cook & Price PLC; Hull, Holliday & Holliday; Law Offices of Scott M. Clark, P.C.

1 **I. The proposed rule does not exceed the authority of the Supreme Court under the**
2 **Arizona Constitution and applicable statutes.**

3 **A. Arizona Revised Statutes § 33-1301 *et seq.* (Arizona Residential Landlord and**
4 **Tenant Act) have not been abridged, enlarged or modified in whole or in part.**

5 First Round of Comments

6 Commenter Michael A. Parham, page 3, claims “Nothing in ARS § 12-109(A)
7 can even remotely be interpreted to authorize (1) the Supreme Court to dictate to
8 landlords the forms of default notices given to their customers—their tenants; and (2) to
9 require inclusion of information in Court mandated forms not required by relevant
10 statutes.”

11 Second Round of Comments

12 Commenter Parham, page 5, notes “There may be those who believe that meeting
13 the minimum requirements of the statute does not give the tenant enough information and
14 that fairness and justice requires that more information be given. Many landlords agree
15 and use forms that include some of this information. They do so willingly, not because
16 the law mandates it. But when a Court rule adds requirements going beyond what the
17 controlling statute requires, it is legislating from the bench.”

18 Commission Reply

19 Ensuring due process concerning the quality and content of notice to a tenant
20 facing eviction is squarely within the authority of the judicial branch. The Supreme
21 Court is authorized to “...regulate the pleadings, practice and procedures in judicial
22 proceedings in all courts of the state for the purposes of simplifying...and promoting
23 speedy determinations of litigation...” See ARS § 12-109 (A). In that regard, direction to
24 a potential or actual litigant in an eviction action is procedural in nature and falls within
25 Article 6 Section 5(5) of the Arizona Constitution, which gives the Supreme Court the
26 “power to make rules relative to all procedural matters in any court.” The procedural law
27 prescribes the method by which a substantive law is enforced or made effective. Here,
28 substantive rights created by statute, specifically, ARS § 33-1301 *et seq.* (Arizona
Residential Landlord and Tenant Act) have not been abridged, enlarged or modified in
whole or in part. A litigant-landlord, in this instance, is instructed to use and provided a
form of default notice that discloses to the tenant, in plain language, the basis for the

1 eviction action, the tenant’s available options, and that decisions need to be made in a
2 timely manner to preserve or exercise their rights.

3 **II. Mandating the use of default notices and forms advances litigants’ rights and**
4 **enhances due process by delivering critical information in an easy to understand**
5 **format.**

6 **A. The court has not engaged and does not intend to engage in the business of**
7 **manufacturing, processing, publishing, distributing, and selling proprietary-type**
8 **forms.**

8 First Round of Comments

9 Commenter Parham, page 8, asserts the proposal violates ARS § 41-2752 (A) and
10 (B) by pre-empting to the government (the courts) the publication of landlord tenant
11 notice forms now published and sold by trade associations, private publishers and law
12 firms.

13 Second Round of Comments

14 Commenter Parham, page 3, notes that the RPEA does not prescribe any specific
15 forms for litigants to use in these cases and cited RPEA 2: “All eviction actions are
16 statutory summary proceedings and the statutes establishing them govern their scope and
17 procedure.”

18 Commenters Denise Holliday and Paul Henderson, page 3, claim that making the
19 forms available on self-help centers does not change the fact that by creating **mandatory**
20 forms, the Court is engaged in the business of manufacturing, processing, publishing and
21 distributing proprietary-type forms.”

21 Commission Reply

22 Through self-help centers and, most recently, virtual (on-line) resource centers
23 and webpages, see, e.g., <http://azcourthelp.org/> courts have for decades provided a wide
24 range of legal forms, instructions, and entire form packages to assist self-represented
25 litigants navigate through family law cases, probate matters, civil matters, small claims,
26 and even eviction actions.

27 Courts now provide these services to make accessible to every litigant accurate,
28 complete, and informative notices and forms. Nothing in the rule prohibits for-profit
businesses from continuing to market and sell their own notices and forms, provided the

1 forms use the language approved by the Supreme Court. See Appendix B.

2 Requiring the use of specific forms, worksheets, associated schedules, and
3 instructions is not without precedence. In 2012, the Supreme Court issued Administrative
4 Order No. 2012-62, which implemented amendments to Rule 38, Arizona Rules of
5 Probate Procedure. The administrative order approved amendments to existing forms and
6 adoption of new forms to be used by conservators. As noted in the preamble of the
7 Arizona Rules of Probate Procedure:

8 “These rules apply to probate proceedings brought under Arizona Revised
9 Statutes (“A.R.S.”) Title 14 and to proceedings to challenge or enforce the
10 decision of one authorized to make health care decisions for a patient.
11 *They are designed to establish uniform practice and statewide standards
12 for such proceedings in the superior court, to promote the prompt,
13 efficient, and fair administration of such proceedings, and to
14 supplement the statutes and rules of civil procedure, not to replace them.*
(Emphasis in italics and bold added.) Thus, practitioners and
unrepresented persons should be able to participate in probate proceedings
in any part of the state by referencing these rules, the applicable statutes,
and the rules of civil procedure, without having to tailor procedures and
forms to comply with differing local probate practices or rules.”

15 **B. The ACAJ was directed by Administrative Order No. 2014-83 to make**
16 **recommendations on assisting self-represented litigants and revising court rules**
17 **and practices to facilitate access and the efficient processing of eviction cases.**

18 Approximately 7,000 eviction actions are filed *monthly* in Arizona, and most, if
19 not all tenants, are self-represented. Some landlords are also self-represented; however,
20 the vast majority are represented by legal counsel. Currently, prospective tenant-litigants
21 may receive conflicting legal notices that are replete with legalese and often confusing
22 terminology. Many tenants do not understand that landlords have the right to make
23 unilateral demands based on the tenant’s non-compliance. Further, the currently-used
24 notices and forms are generally not in a plain and readable format, so tenants often fail to
25 realize that they are required by law to respond or to comply in a timely manner. All
26 members of the Commission workgroup, including some of those who filed objections,
27 agreed at the outset that these notices and forms could be substantially improved to the
28 collective benefit of all litigants.

The Commission’s work is in furtherance of the Supreme Court’s Strategic
Agenda, “*Advancing Justice Together*,” Goal 1, which states: “Arizonans look to our
courts to protect their rights and to resolve disputes fairly and efficiently. To serve these

1 ends, Arizona’s judicial branch must work to ensure that all individuals have effective
2 access to justice. This goal is advanced not only by examining legal representation for
3 moderate and low-income persons, but also **by helping self-represented litigants and**
4 **others navigate the judicial process.”** (Emphasis added.)

5 Some commenters, however, appear more concerned that mandating these notices
6 and forms will decrease the need for and use of attorneys. Commenter Scott Drucker,
7 Arizona Association of Realtors® (AAR), page 3, states “AAR is concerned that the
8 formation and required use of a standard eviction action complaint and summons will
9 decrease the use of attorneys.” This hypothetical result is certainly not our specific intent,
10 nor is it a legitimate concern.

11 Ensuring equal and meaningful access to justice supports mandating uniformity in
12 these specific legal notices and forms not only assists litigants in understanding and have
13 the opportunity to participate in the judicial process, and also promotes greater judicial
14 efficiencies. Evictions can be a life-changing event — the loss of housing for the
15 litigant’s family, which may in turn affect employment, accessing educational
16 opportunities and even the availability of health care — and could also possibly lead to
17 transient or even chronic homelessness. Requiring the use of notices and forms that are
18 readable, understandable, and provide meaningful access to information about the legal
19 process far outweighs the illusory potential that fewer attorneys will be needed or used.

20 **III. Commenters claim that landlords using legally sufficient and substantially similar**
21 **forms would face dismissal of cases if mandatory forms were not used. This is not**
22 **true.**

23 First Round of Comments

24 Some of the first comments raised this concern. In response to such concerns, and
25 as set forth in the Commission’s initial reply and suggested revisions, the proposed Rule
26 20 was changed so that a court, “upon a showing of good cause and in the interest of
27 justice in a particular case,” may permit use of a form other than the approved form if the
28 court finds the alternative form to be consistent with the law and procedural requirements
as outlined in the ultimately-approved form.

1 Second Round of Comments

2 In response to the proposed revised language, Justice of the Peace Gerald
3 Williams, page 4, suggests that “if these mandatory forms are adopted, then a landlord
4 could comply with every statutory requirement in the applicable landlord and tenant act,
5 could also comply with every current requirement of the RPEA, and still have his or her
6 case dismissed merely because he or she used the wrong form. The mandatory notice
7 forms will create a new set of procedural due process rights and judges will be required to
8 dismiss eviction actions merely because a mandated form was not used.”

9 Commenter Parham, page 1, commented that “Landlords using forms consistent
10 with the statutes would face dismissal of cases if court forms containing extra
11 information were not used.”

12 Commission Reply

13 Because these comments suggest some apparent continued confusion over the
14 Commission’s revised language of Rule 20, and as to the Commission’s willingness to
15 allow for flexibility and eliminate the concern of the use of notices or other forms that are
16 otherwise consistent with existing law, the language in Rule was further revised to
17 address the comments.

18 New Rule 20 Language: “Attorneys representing landlords, landlords filing *pro*
19 *per*, and judges and court staff must use, as appropriate, the eviction forms approved by
20 the Administrative Director of the Administrative Office of the Courts, listed in
21 subsection (b) and made available at www.azcourts.gov. Additional notice or pleading
22 language may be included on the form if required by federal or state law, local ordinance,
23 or contractually. The Administrative Director of the Administrative Office of the Courts
24 is authorized to modify these forms in response to changes in state laws or procedures, to
25 make other necessary administrative amendments or technical corrections, or to add or
26 delete forms as may be appropriate. Upon a showing of good cause and in the interest of
27 justice in a particular case, the court may permit use of another form if the court finds the
28 form meets the notice or pleading provisions required by law or rules of this court.”

IV. Commenters claim that “full participation” by all parties to the working group is a falsehood and the participants of the working group were disadvantaged by an unfair process. This claim is unfounded.

1 The petition (R-16-0040 Pages 2-3) outlines the background and purpose of the
2 proposed rule amendment, and identifies the workgroup members, which included both
3 tenant and landlord attorneys, as well as judges and court administrators. These
4 participants all have extensive expertise in landlord-tenant matters, and were an entirely
5 appropriate group to create forms for use on a statewide basis. This was, without
6 question, an inclusive process, seeking input and suggestions from both legal aid
7 providers and from the housing industry. Those representatives had equal numbers in the
8 work group. As previously noted, all sides agreed the existing notices and forms could be
improved, and the final result was fairly negotiated, drafted and voted on.

9 The issue of whether to make the use of these notices and forms mandatory was
10 not specifically voted on during the work group meetings. However, recognizing that
11 during the next year another 84,000 eviction actions would likely be filed, at the May 18,
12 2016 full Commission meeting, a motion was made and unanimously passed by the entire
13 Commission to approve the filing of a rule change petition asking the Supreme Court to
14 require the use of Supreme Court approved forms and notices for eviction actions.³

15 The Commission believes that in order to insure the delivery of correct and
16 meaningful information to both the landlord and the tenant, and to fully implement
17 procedural due process and effective access to our judicial system, the use of these
18 notices and forms, as jointly drafted and negotiated by both sides, should be mandatory.

19 **V. The Commission’s reply and changes made to the forms were consistent with the
20 Rule 28 process.**

21 Commenter Parham in his motion for leave to file additional comments and
22 additional comments, page 4, claims that “The ACAJ Reply is not really a reply but is a
23 new proposed rule change that does not comply with Rule 28. The Reply includes
24 revisions to the forms originally submitted with the initial proposed rule change. The
25 forms now being championed by the ACAJ are effectively new forms.”

26 Commission Reply

27 The changes made to the forms after the first round of comments were not

28 ³ During the vetting process, the Committee on Limited Jurisdiction Courts (LJC) discussed this issue. The LJC committee unanimously approved the forms, and suggested that the Court consider adopting these as “model” forms, to be used for a year before deciding to mandate their use.

1 substantive in nature, but instead reflect the Commission’s continued efforts to improve
2 the work product based on the feedback received, which is part of and a goal of the
3 standard rule process.

4 **VI. Commenters claim the proposed notices and forms are legally deficient, confusing,**
5 **and misleading. During both comment periods, the ACAJ continued to solicit input**
6 **from the industry and individuals to further improve the notices and forms and**
7 **ensure they provide accurate and useful information.**

8 The Commission carefully reviewed and considered all comments received in
9 response to the petition. Based on that feedback, the Commission is recommending
10 further changes to the forms and rules. The additional changes are recommended to
11 provide clarification and more information as recommended or requested in the
12 comments. Below is a summary of additional changes resulting from the second
13 comment period that were recommended by the Self-Represented Litigants in Limited
14 Jurisdiction Workgroup to the Commission Chair. (See Appendix A and B for
15 amendments to the proposed rules and forms.)

16 **A. Summons Form**

- 17 1. No changes.

18 **B. Complaint Form**

- 19 1. Included “Fax/Email” in the top caption. Law firms can use their own letterhead
20 and add the contact information.
- 21 2. Included “Case Number: _____” on the second page header.
- 22 3. Section 5 was modified to include “if applicable” because subsequent individual
23 violations do not need to be documented with non-compliance notices.
- 24 4. Section 6 was clarified in the accounting breakdown to include “accrued since
25 filing” in the “Rent (current and prior months) totaling.”
- 26 5. Section 6 was modified in the accounting breakdown by removing the first
27 “damages” to differentiate between “Other fees and charges” and “Other
28 allegations of damages.”
- 6. Section 6 was modified to give the option to “add more lines for specific fees and
charges” like notice fees and utilities.
- 7. Included “Attorney for Plaintiff” on the signature line.

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C. Judgment Form

- 1. Moved “Defendant has filed a counterclaim” to the next line because a counterclaim is not a plea option.
- 2. Added “[] Parties have stipulated” and the stipulated judgment warning language from Rule 13 as mandated by the RPEA.
- 3. Included “Case Number: _____” on the second page header.
- 4. Removed “8. Other _____” and replaced “Damages” with “Other damages” in the accounting breakdown to differentiate between categories.

D. 5-Day Notice to Pay Rent

- 1. Replaced “Prior month” with “Prior balance” because there could be more than one month.
- 2. Section A.3. was modified by adding “Add additional lines if needed for other charges listed in the rental agreement.”
- 3. Added the following notice language to make it clearer that the lease will be reinstated if the tenant pays all damages, attorney fees, and court costs before the judgment is signed: “**Notice:** The lease must be reinstated if you offer to pay all the rent due, plus late fees, court costs and attorney’s fees before the judgment is signed.”
- 4. Replaced the “lease” with “rental agreement” because many tenants do not have a lease but are under month-to-month renewals.
- 5. In the gray box, “legally” was added to clarify that the judge does not have the authority to extend the lease beyond the writ of restitution date.

E. 5-Day Notice to Comply (Fix or Correct Problem)

- 1. The gray box was modified by removing the sentence “After an eviction [...] court costs.” to provide clarification based on comments.
- 2. In the gray box, “legally” was added to clarify that the judge does not have the authority to extend the lease beyond the writ of restitution date.
- 3. The gray box was modified to conform to statutory requirements by adding “you may be required to pay damages, attorney fees, and court costs.” after “If a judgment is entered against you,”.

1 Administrative Office of the Courts to approve and modify eviction action forms in response to
2 changes in state laws or procedures, or to make other necessary amendments or technical
3 corrections, and to add or delete eviction action forms as needed.

4 RESPECTFULLY SUBMITTED this 21st day of March, 2017.

5 Arizona Commission on Access to Justice

6
7 By /s/Lawrence F. Winthrop
8 Lawrence F. Winthrop
Chair of the Arizona Commission on Access to Justice

9 Electronic copy filed with the Clerk
10 of the Supreme Court of Arizona this
21st day of March 2017

11 By: /s/Kathy Sekardi

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