Background and Introduction

The proposed rules will help clarify and standardize eviction cases in Arizona and should be adopted. They represent literally thousands of hours of work. While there are many rules that can be attacked individually, when taken as a whole, the entire work represents sound policy and a great deal of compromise.[1] There is, however, a significant problem.

In an effort to make things better for tenants, landlords and judges, the subcommittee has proposed a set of rules that go well beyond the normal court rule making process and have crossed over into areas normally reserved for legislative action. In the current legislative session, this problem had the potential to be avoided until House Bill 2361 stalled. Now, we are faced with a set of proposed rules that alter the statutory requirements to the point where legal battles are almost guaranteed to erupt. As such, these proposed rules cannot be adopted absent some type of statutory change.

Arguments

I.

LEGISLATIVE ACTION IS REQUIRED PRIOR TO THE ADOPTION OF THE PROPOSED RULES BECAUSE THE RULES CLEARLY SET STANDARDS FOR THE SUBSTANCE OF PLEADINGS AND NOT JUST PROCEDURES SURROUNDING THEM.

There is not an easy way to distinguish between what is substance and what is procedure. A discussion of substance versus procedure not surprisingly begins with the *Erie* doctrine.[2] In what became known as the substance versus procedure test, the Supreme Court held that when a federal court heard a diversity suit, matters of substance would be governed by state law and matters of procedure would be governed by federal procedural law.[3] The next test in this area was that the difference between substance and procedure would be whether the outcome was determined by the choice.[4] In a case that discussed whether the outcome of a case could be depend on whether the case was tried to a judge or to a jury, the Supreme Court added another component to the analysis and held that courts should also balance the governmental interests behind the rules in question.[5] In that case, the Supreme Court held that the federal policy requiring a jury

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[1] For example, the requirement at Rule 5(b)(7) that every tenant be given a copy of the cure notice twice by also requiring that it be attached to the complaint, helps primarily, and perhaps only, attorneys who represent tenants. Those attorneys cannot always depend that their clients will have all of the documentation needed to prepare a possible defense at their first meeting and given the very short time frames involved in eviction cases, time is obviously of the essence. In contrast, the comment after Rule 7 encouraging answers to be in writing was a concession from tenants' rights attorneys.

[2] *Erie Railroad v. Thompkins*, 304 U.S. 64 (1938).

[3] *Id*.

[4] *Guaranty Trust v. Yor*, 326 U.S. 99 (1945).

[5] *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525 (1958).

trial was stronger than any state rule precluding one.[6] After that, the Supreme Court held that the *Erie* doctrine is not controlling when there is a federal procedural rule that conflicts with a state law policy.[7] There are additional cases but they are not especially helpful for the purposes of the analysis contained in this minority report.

All of these tests are somewhat imperfect. In the context of judicial caseflow management, perhaps procedure could be defined as a set of uniform methods for hearing cases. Also in this context, perhaps substance could be defined as the essential nature or gist of what is in dispute. If these are the standards, then requirements as to which documents must be served or filed and when, would be examples of procedure. In contrast, detailed requirements for what those documents must say would be an example of substance. While the line between substance and procedure may always remain somewhat unclear, it is perhaps much easier to agree on obvious examples that clearly cross it.

A key problem with the proposed eviction rules is that they specify both the timing as well as the content of a complaint. Court rules generally require that a complaint be filed but they do not specify what must be specifically stated within the complaint.[8] Some court rules also appropriately provide detailed format requirements.[9] The proposed eviction case rules are unique in that, in Rules 5(b) – 5(d), there are, depending upon how they are counted and the basis for the lawsuit, at least ***twenty-one*** separate and distinct requirements as to what must be in the complaint. In contrast, the detainer statute merely requires that the complaint be in writing, contain a description of the premises and state "the facts which entitle the plaintiff to possession and authorize the action."[10]

The proposed eviction rules reject anything similar to notice pleading and instead alter the minimum prerequisites for an eviction action to the point that they are in direct conflict with the actual language of the statute.[11] Landlords will argue that the statute trumps the court rules and tenants, who are usually unrepresented, may become confused and can correctly wonder why anyone would go to the trouble of writing uniform rules of practice for eviction cases if there is a chance that some or all of them might not apply. In other areas, the proposed rules invent new requirements that are not even contemplated by current statutes.

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[6] *Id*.

[7] *Hanna v. Plumer*, 380 U.S. 460 (1965).

[8] "There shall be a complaint and an answer . . ." Ariz.R.Civ.P. 7(a); "A complaint is a written statement of the essential facts constituting a public offense . . ." Ariz.R.Crim.P. 2.3. "A party shall commence the following actions by filing a verified petition with the clerk of the superior court: Annulment (A.R.S. § 25-301), Dissolution (A.R.S. § 25-312), . . ." Ariz. Rules of Family Law Procedure 24. Additional family court rules require that the complaint contain a jurisdictional statement, a short and plain statement for relief and a request for a decree. Ariz. Rules of Family Law Procedure 29(A). Juvenile court rules require the complaint to state a concise but detailed factual basis. Ariz. Rules of Procedure for The Juvenile Court 24 (Content of Petition).

[9] Ariz. Rules of Family Law Procedure 30 (Form of Pleading).

[10] A.R.S. § 12-1175 (2007)(Complaint and answer; service and return).

[11] The notice pleading analogy is imperfect because with a regular civil lawsuit, there are extensive opportunities both for discovery and for the passage of time.

Even though they represent good ideas, some of the concepts in the proposed eviction rules lack any supporting authority. Perhaps the best example of this problem is in proposed Rule 17(d). To solve the problems associated with violent criminals remaining in the leased premises during the pendency of an appeal, after a hearing, a court could impose additional conditions on the tenant (e.g. avoid in person contact with victims and witnesses). Given that limited jurisdiction courts have no inherent authority, there is no statutory basis for a justice of the peace to order these types of conditions.[12] We just put it the proposed rules as part of a compromise and because we wanted to.

II.

SPECIFIC AUTHORIZING LEGISLATION MUST BE ENACTED PRIOR TO MAKING SIGNIFICANT CHANGES IN EVICTION CASE PROCEEDINGS, BECAUSE OF THE UNIQUE STATUTORY STRUCTURE OF EVICTION CASES AND BECAUSE THE COURT RULE MAKING PROCESS CANNOT BE USED TO "AMEND" STATUTES.

Many of us were taught in junior high civics classes that the legislative branch, not the judicial branch, "makes the law." As we obtained additional education, we learned that there are some areas where courts clearly "make law." Whether courts have gone too far in this area is a both political and philosophical question. In an honest but perhaps unintended definition of judicial activism, Supreme Court Justice Thurgood Marshall described his judicial philosophy by saying, "You do what you think is right and let the law catch up."[13] Whether you agree or disagree with that statement, you will likely concede that our system of government is not designed to have courts, through rule making procedures, change the plain meaning of statutes. In the proposed eviction rules, there are three clear examples of this problem.

The detainer statutes are unique in part because they set up a complete procedural structure via statute. The statutes have names with headings like "complaint and answer," "service and return," "demand for jury," "trial procedure," "postponement of trial" and "judgment."[14] Normally these types of issues are reserved for court rules.

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[12] House Bill 2361 amends A.R.S. § 12-1179, contains specific authorizing language for this area and states as follows:

G. If the judgment appealed from has a finding of a material and irreparable breach by the tenant of a dwelling unit or a tenant in a mobile home park or recreational vehicle park, the court may decide not to permit rents to be deposited and may allow a writ of restitution to be enforced notwithstanding the appeal or the court may impose such conditions in addition to the deposit of rents as it deems appropriate in the interests of safety. If the court determines that personal injury or serious property damage is unlikely to occur while the appeal is pending or that serious criminal conduct is unlikely to take place on the premises, the court shall permit rents to be deposited. If rent payments are not kept current pursuant to subsection D of this section or if additional prohibited acts of conduct by the appellant occur, a motion to lift the stay may be filed. The court shall treat a motion to lift the stay of execution of the writ of restitution as an emergency matter and conduct a hearing within three days. If the third day is a Saturday, Sunday or other legal holiday the hearing shall be held on the next court day.

[13] M. Levin, Men in Black: How the Supreme Court is Destroying America, 17 (2005).

[14] A.R.S. §§ 12-1175 – 12-1178.

However, given that they are specifically enumerated in statue, to change those areas we must first change the statues. The first example has been previously discussed in this report.

There is no better example of adding requirements to the statutes via court rules than the micromanaging number of details that are required to be in a summons and in a complaint in proposed rules 5(a) – 5(d). House Bill 2361 would have solved this problem by amending A.R.S. § 12-1175 to read as follows.

> The summons shall set forth specific information prescribed by court rule to enable the defendant to determine the location and telephone number of the court, the date and time set for trial and the consequences of failing to appear. The complaint shall clearly identify the plaintiff, the location of the property at issue, the nature and consequences of the proceeding, the specific relief being sought and the reasons for the relief sought.

However, without the requisite authorizing legislation, if these eviction rules are adopted, they would be inappropriately attempting to amend a statute through judicial fiat.

The second example clarifies counterclaims.[15] Proposed Rule 8(a) was put in at my request to help correct what I perceived as a pro-tenant bias in the first draft set of these rules. It provides two requirements that state a tenant would have to allege a factual basis for a counterclaim. However, there is no statutory authority for Proposed Rule 8(a) and there is therefore an identical problem. House Bill 2361 would have solved this problem as well and created a new statute, A.R.S. § 12-1175.01, which would have read in part, "A counterclaim may be filed only pursuant to statute in a special detainer action or forcible detainer action as prescribed by court rule."

In the third example, the rules invent a new time standard for writs of restitution. The current statute requires that the writ cannot be issued in most cases until five days after the judgment and "shall be enforced as promptly and expeditiously as possible."[16] However, the statute is silent on how long a successful landlord has to apply for a writ after the judgment has been signed. This gap is exactly the type of problem that court rules should address. Proposed Rule 14 solves this and other problems associated with writs and creates a set of substantive and procedural standards to deal with potentially problematic writs. However, once again, there is no statutory authority do to so. House Bill 2361 would have amended A.R.S. § 12-1178 to read as follows.

> If a party applies for a writ of restitution more than forty-five days after the date of judgment, the party shall explain the reason for the delay in making the application and shall certify that the tenancy has not been

[15] A complete discussion of the statutory authority for counterclaims in landlord and tenant cases is omitted in part because it is complex and in part because the members appointed to the State Bar Task Force are familiar with the applicable statutes.
[16] A.R.S. § 12-1178(C).

reinstated since the date of the judgment. The court shall determine whether to issue the writ pursuant to court rule.

Conclusion

My objections to imposing the eviction rules without first working to change the existing statutes go well beyond letters to the editor notions of what governmental systems are doing correctly and incorrectly. If the state legislature and the governor adopt a law with which a large segment of the public disagrees, then the citizens can meet with their elected representatives, organize opposition groups and even vote people out of office. In contrast, if a high court relies on something other than a constitution to declare something unconstitutional or issues a rule knowing it conflicts with a statue, there is very little that can be done and representative government suffers. If these rules are to go forward perhaps the State Bar, as well as other organizations that opposed House Bill 2361, should reconsider their position.