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7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9
10 In the Matter of:

11 **PETITION TO AMEND RULE**
12 **4.1(d) OF THE ARIZONA RULES**
13 **OF CIVIL PROCEDURE**

Supreme Court No. R-17-0001

14 **COMMENT OF**
15 **THE STATE BAR OF ARIZONA**

16 Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona (“State Bar”)
17 opposes the Arizona Process Servers Association’s Petition R-17-0001. Although
18 the State Bar understands that service on individuals in gated communities may
19 sometimes be difficult, the State Bar believes that it is unwise to amend Rule 4.1(d),
20 Ariz. R. Civ. P., as suggested in the Association’s Petition.

1 As discussed below, alternative service under existing Rule 4.1(j)¹ (formerly
2 Rule 4.1(m)) was specifically designed to allow the Court to address such access
3 problems. The State Bar believes that the flexible approach allowed by Rule 4.1(k)
4 is preferable to the proposal offered in the Petition, which seeks to amend Rule
5 4.1(d) to allow individuals living in gated communities to be served by delivery of
6 papers to the gate guard. This Court should reject this Petition, just as it rejected a
7 similar petition in 2012.
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10 DISCUSSION

11 I. Summary of the Petition

12 Petition 17-0001 seeks to amend Arizona Rule of Civil Procedure 4.1(d)(1)
13 to add a new subsection (4). This new subsection would permit an individual
14 residing in a gated community to be served by delivering the summons and pleading
15 to be served on the guard at the gate. Petitioner argues that service of process is
16 difficult on such individuals, because guards often do not allow process servers to
17 enter the gated communities to serve the individuals. Petitioner submits that
18 individuals should not be permitted to create a “service free zone” by living in a
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23 ¹ All references to rules in this Comment are to the *Arizona Rules of Civil Procedure*,
24 unless otherwise noted.
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1 gated community, Petition at 5, ¶ 16; and because the guard is an agent of the
2 residents within the gated community, delivery of legal papers to the guard is
3 appropriate service. Petition at 5, ¶¶ 17-18.
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5 In support of its requested amendment, Petitioner cites rules and statutes from
6 California, Florida, Georgia, and Nevada that either: (a) require guards of gated
7 communities to allow access for servicing process (California, Florida, and
8 Georgia); or (b) allow service on the guards (Nevada).
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10 **II. This Court Previously Rejected a Very Similar Proposed Amendment.**

11 In 2012, Petitioner filed Petition R-12-0008, which sought to amend a
12 number of rules relating to service of process. Among the changes proposed in the
13 prior petition was the same change to Rule 4.1(d) sought in the current Petition,
14 namely to allow service on gate guards for individuals residing in gated
15 communities. The proposed amendment to Rule 4.1(d) in this Petition was taken
16 word-for-word from Petition R-12-0008, with only three minor changes: the
17 addition of: (1) “Certified” to the phrase “Process Server”; (2) change of the date
18 that service is deemed complete from three days to ten days after delivery to the
19 guard; and (3) the addition of a final sentence that provides: “This Rule shall not
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1 affect any alternate means of service which may be ordered by the court under Rule
2 4.1(k).”

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4 This Court rejected Petition R-12-0008. As discussed briefly below, the State
5 Bar recommends that the Court once again reject the proposal to amend Rule 4.1(d).

6 **III. Existing Alternative Service Rules are Sufficient.**

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8 In response to Petition R-12-0008, the State Bar noted that Rule 4.1(m) (now
9 Rule 4.1(k)) – the rule allowing for alternative service – “was primarily addressed
10 to the situation where a third party, such as a residential security guard or office
11 receptionist, denies access to the person on whom service is sought.” Response at
12 4:9-15, quoting DANIEL J. MCAULIFFE & SHIRLEY J. MCAULIFFE, ARIZONA CIVIL
13 RULES HANDBOOK (2011 ed.) at 53.

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15 Petition R-17-0001 does acknowledge the availability of alternative service,
16 by footnoting that “the cost and time factors involved in securing such [a]lternate
17 [m]eans are many times out of the means of the litigant.” Petition at 4, n.3. The
18 footnote further asserts that there are “certain instances where the personal service
19 of legal process is required, such as Injunctions Against Harassment and Orders of
20 Protection,” and that service of such orders “is effectively barred by the denial of
21 access.” *Id.*

1 The State Bar believes that the cost and time factors involved with alternative
2 service under Rule 4.1(k) do not effectively bar service as the Petitioner suggests.
3 First, if a party shows specific facts that demonstrate that delivery to a gate guard
4 is likely to provide notice to a person to be served under the circumstances, then
5 such delivery might be permitted alternative service. But if no such facts are present
6 – or the gate has no guard, but rather an electronic entry system – then a different
7 means of service may be more appropriate.
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10 Second, Petitioner simply assumes that all means of alternative service are
11 necessarily time-consuming or expensive. This assumption is not justified. It is
12 easy to imagine many means of alternative service that are speedy and inexpensive,
13 such as email or delivery by those with access to gated communities, such as UPS
14 or Federal Express, that may be appropriate in particular cases.
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16 Third, Petitioner’s concern about items that it believes must be delivered by
17 “personal service” would not be alleviated by the rule change it seeks. By
18 definition, service on a gate guard would not be “personal” service on the individual
19 to be served, and it may not provide sufficient notice of such items.
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21 Finally, if alternative service proves to be expensive in a particular case, the
22 Rules provide a remedy. A plaintiff who seeks to serve a defendant who resides in
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1 a gated community can request that the defendant waive service under Rule 4.1(c)
2 (or for out-of-state defendants, under Rule 4.2(d)). If defendant does not return the
3 waiver within the time allowed, plaintiff can undertake alternative service and
4 thereafter recover its costs – including attorneys’ fees. Rule 4.1(c)(2); Rule
5 4.2(d)(2).
6

7 In sum, the State Bar believes that existing alternative service rules are
8 sufficient to address the problem identified in the Petition without imposing a “one
9 size fits all” approach to serving individuals in gated communities that may not be
10 consistent with due process in every possible set of circumstances.
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13 **IV. This Issue May be More Appropriate for Legislative Action.**

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15 As noted above, in three of the four jurisdictions cited, the Legislature has
16 required gated communities to allow access to residents for service of legal
17 documents. And in only one state– Nevada – was service on a gate guard permitted.
18 Additionally, in the states cited by Petitioner, the changes were made by legislation,
19 not by a judicial rule-making process.
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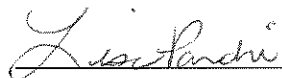
21 The State Bar believes that if the existing alternative service provisions in
22 Rule 4.1(k) are deemed insufficient, Petitioner may raise this matter with the
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1 Legislature. Determining the legal obligations of guards in gated communities is
2 intrinsically legislative. The Legislature is better equipped to weigh the conflicting
3 interests of process servers, residents of gated communities, homeowners
4 associations and other stakeholders.
5


6 **CONCLUSION**
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8 Existing Rule 4.1(k) allows a flexible approach to service of process on
9 residents of gated communities. Any attempt to impose specific legal duties on gate
10 guards is both unnecessary and beyond the scope of the rule-making process of this
11 Court. For these reasons, the State Bar respectfully recommends that the Court
12 reject Petition R-17-0001.
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14 RESPECTFULLY SUBMITTED this 22nd day of May, 2017.
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18 _____
19 Lisa M. Panahi
20 General Counsel

21 Electronic copy filed with the
22 Clerk of the Arizona Supreme Court
23 this 22nd day of May, 2017.

24 by: 
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