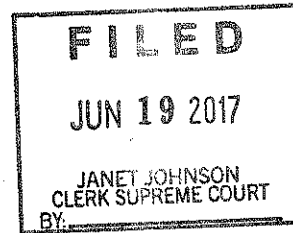


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CLERK SUPREME COURT



1 Arizona Process Servers Association
2 PO BOX 2233
3 Phoenix, AZ 85002
4 Phone: (602) 476-1737
5 Fax:(602) 256-9720

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

8 In the Matter of:

Supreme Court No. R-17-0001

9 **PETITION TO AMEND RULE**
10 **4.1(d) OF THE ARIZONA RULES**
11 **OF CIVIL PROCEDURE**

RESPONSE BY PETITIONER TO
COMMENT OF
THE STATE BAR OF ARIZONA

12
13
14 The Arizona Process Servers Association (APSA) responds to comments of
15 the State Bar of Arizona ("State Bar") regarding Petitioner's Petition, R-17-0001,
16 Pursuant to Rule 28, Ariz. R. Sup. Ct.

17
18 Petitioner, while appreciating that the State Bar expresses it understands
19 that service on individuals in gated communities may sometimes be difficult,
20 believes that opposition by the State Bar does a disservice to its members, litigants
21 and the courts in their hopes for expeditious service of legal process. APSA
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1 believes the reasons cited by the State Bar in its opposition to the proposed rule
2 change are misperceptions and flawed assumptions.

3
4 **DISCUSSION & RESPONSE**

5 **I. An Expeditious, Consistent Solution is Needed**

6 "Litigants have the right to choose their abodes; they do not have the right
7 to control who may sue or serve them by denying them physical access."¹
8 Unfortunately, in many areas of Arizona, planned communities, based on their
9 policies of denial of access to process servers, sheriffs and constables attempting
10 to serve legal process provide islands of "service free zones". Petitioner believes
11 that service of legal process should be made so that an interested party is
12 given "...notice of the proceedings and an opportunity to be heard...[in order that]
13 the traditional notions of fair play and substantial justice implicit in due process
14 are satisfied"² in an expeditious and as much of a low cost manner possible.
15
16

17 Arizona utilizes the Rules of Civil Procedure for governance of service of
18 process in civil matters, and other rules and statute, when appropriate for other
19 matters (i.e.: small claims, family law, etc.). Statutes from California, Florida,
20 Georgia, and Nevada either: (a) require guards of gated communities to allow
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22

23 ¹ *Bein v. Brechtel-Jockim Group* 6 Cal.App.4th 1387 (1992); 8 Cal. Rptr.2d 351

24 ² Excerpted from *Zirbes v. Stratton*, 187 Cal. App. 3d 1407

1 access for service of process (California, Florida, and Georgia); or (b) allow
2 service on the guards (Nevada) if access is denied ("...access is not reasonably
3 available...")³ were cited in the petition. Other states cited which utilize statutes
4 (i.e.: CA Code of Civil Procedure, etc.) do so when authorizing *any* method of
5 service. This is especially true (and appropriate) when community associations
6 are *compelled* to open their gates to allow entry for service of process. Petitioner
7 does not seek to compel entry unto private property, but to have an appropriate
8 and expeditious means consistent with ARCP Rule 4.1(c)(1), wherein a "... duty
9 to avoid unnecessary expense in serving the summons..." is stated.

12 Case law in several states supports service on a gate guard, as noted in the
13 following pages. Statute allowing service on a gate guard is consistent with
14 recognized case law. The guard, as an agent of the residents within the gated
15 community, controls entry and admittance past the point of arrested delivery (the
16 guard gate). In one noted case, the guard gate was determined to be an extension
17 of the abode: "... (T)he outer bounds of the actual dwelling place must be deemed
18 to extend to the location at which the process server's progress is arrested." (*F.I.*

23 ³ Nevada Revised Statutes §14.090 Service of process at residence accessible only through gate

1 *duPont, Glore Forgan & Co. v. Chen, supra*, 41 N.Y.2d 794, 797 [364 N.E.2d
2 1115, 1117])

3
4 Petitioner submits that within Arizona, delivery to the gate guard is, indeed
5 upon "...an agent authorized by appointment..."⁴ and should also be recognized as
6 appropriate service.

7
8 **II. State Bar's Argument Citing Prior Submission(s) is Irrelevant.**

9 The State Bar brings its first argument against the current proposed rule
10 change amendment by citing a 2012 effort by the petitioner. Plainly, this is an
11 irrelevant argument in that the instant petition addresses only one method of
12 service, and is not a re-visitation of a prior petition. We ask that the Court
13 disregard State Bar's argument referencing any prior efforts.
14

15 **III. Existing Alternative Service Rules are Insufficient to Address Many**
16 **Litigants' Needs.**

17 While the State Bar, with substantial resources, is in a position to assume
18 that the rules are sufficient, Petitioner, based upon collective experience of its
19 practicing professionals, disagrees.
20

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⁴ ARCP Rule 4.1(d)(3)

1 State Bar notes, "...if a party shows specific facts that demonstrate that
2 delivery to a gate guard is likely to provide notice to a person to be served under
3 the circumstances, then such delivery *might be* permitted alternative service"
4 (*emphasis added*). It is the "...*might be*..." which is most concerning to
5 Petitioner, especially when the litigant is a party without an attorney.
6

7 When the majority of litigants in propria personam do not have access to
8 resources such as McAuliffe, et al, (quoted by the State Bar)⁵ and have not
9 attended law school, reference to such a work is irrelevant for them. Process
10 servers in Arizona are prohibited from dispensing legal advice and preparing legal
11 documents. Courts are prohibited from dispensing legal advice. Free legal aid is
12 overburdened, understaffed and inadequate for many inquiries. Consequently,
13 most individual litigants are left to their own resources and knowledge to navigate
14 the legal waters. Those who can afford an attorney may consult one, but in many
15 circumstances, the affordability of private legal counsel is out of reach. Similarly,
16 many attorneys do not have sufficient experience and knowledge about the rules
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22 ⁵ Nor is it believed that the majority of litigants would pay or have the capacity to pay the \$386 purchase price
23 charged by the publisher for this one book. (ref. <http://legalsolutions.thomsonreuters.com/law-products/Practice-Materials/Arizona-Civil-Rules-Handbook-2017-ed-Vol-2B-Arizona-Practice-Series/p/104631898>)
24
25

1 and methods of service of legal process, and rely upon their process server for
2 guidance.

3
4 Petitioner does not believe that all means of alternative *service* are
5 necessarily time-consuming or expensive. It is the *process of obtaining the order*
6 and having it issued which may be time-consuming or expensive. This is
7 especially true if the court hits delays, or requires that the movant appear for
8 personal testimony about their motion for alternate means of service. Petitioner
9 knows from business practice that the actual service of legal process in the field
10 may be expeditious, but any delay in obtaining an order from the courts may
11 hamper service within the appropriate time limits⁶.

12
13 While rules provide for the prevailing party in civil litigation to recover
14 costs, Petitioner believes its assertion that “the cost and time factors involved in
15 securing such [a]lternate [m]eans are many times out of the means of the litigant”
16 holds true. Expenses, such as attorney fees, may have to be immediately
17 expended, and the result may be a diminution of assets harmful to the well-being
18 of the litigant pursuing their claim and damages, especially to those with meager
19 means.
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23 ⁶ Ref. ARCP Rule 4(i)

1 Where legal process requiring personal service (i.e.: actual notice of
2 subpoenas, Injunctions Against Harassment, Orders of Protection and other legal
3 process with contempt attached) is concerned, petitioner understands and makes
4 no claim that a change in the subject rule would alleviate such a requirement.
5

6 **IV. Petition is Not a Demand for Entry or Trespass.**

7 Arizona trespass laws are structured that a denial of permission to enter is
8 akin to a decline of license, privilege and authorization to be present on property.
9 Petitioner agrees that decisions as to mandated entry should be left to the
10 legislature. Petitioner does not seek a means to enter or remain unlawfully on
11 premises, but simply to serve legal process in the most expeditious, reasonable
12 means necessary so that the defendant or other interested person is given notice
13 and costs are kept low⁷.
14
15

16 State Bar notes that in three of the four jurisdictions cited, those states'
17 Legislatures have required gated communities to allow access to residents for
18 service of legal documents. Phrases in Arizona trespass statutes such as "entering
19 and remaining unlawfully", or "...without the express permission of the owner of
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23 ⁷ ARCP Rule 4.1.(c)(1)

1 the property"⁸, or "...entering or remaining unlawfully on any real property after a
2 reasonable request to leave by...the owner or any other person having lawful
3 control over such property, or reasonable notice prohibiting entry"⁹ are used to
4 distinguish between lawful entry and those there without permission. Petitioner
5 seeks no demand for entry. Rather, Petitioner seeks to have a rule change
6 consistent with best practices, respect for private property, and case law
7 recognized by other courts. Petitioner does not seek a means to circumvent
8 statute.
9
10

11 While a lower court ruled¹⁰ that a process server is privileged to enter and
12 remain on private property when serving legal process¹¹, Petitioner believes that
13 most process servers are respectful when encountering posted "no trespassing"
14 areas. That court further commented, "Process can be served by entry to any
15 property except the actual dwelling house itself", citing 62 Am Jur 2d 58. This
16 appears on its face to be consistent with ARCP Rule 4.1(a), wherein, "All process
17 - including a summons - may be served anywhere within Arizona".
18
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21 ⁸ ARS §13-1504(5)

⁹ ARS §13-1502(A)(1)

¹⁰ *State v. Star* LC 87-00135, Maricopa County Superior Court (06-11-1987, Gerber)

¹¹ ARS §13-1501(2): "Enter or remain unlawfully" means an act of a person who enters or remains on premises when the person's intent for so entering or remaining is not licensed, authorized or otherwise privileged except when the entry is to commit theft of merchandise displayed for sale during normal business hours, when the premises are open to the public and when the person does not enter any unauthorized areas of the premises.

1 However, where some persons have established "service free zones" in
2 accordance with their community association policies and procedures, Petitioner
3 believes it is incumbent to make service upon a person whose "...relationship with
4 the person to be served makes it more likely than not that they will deliver process
5 to the named party."¹² That person is the gate guard, the appointed agent and
6 person in charge of access to the abode. Petitioner seeks have the means to effect
7 service of process upon making a good faith attempt at a gated community when
8 other persons are denying physical access.
9

10
11 **V. Petition is Supported by Case Law**

12 When State Bar responded that, "...in only one state – Nevada – was
13 service on a gate guard permitted...", it failed to note that service on the gate
14 guard is supported in the phrase used in its statute, "...access is not reasonably
15 available..." and not *mandated* on the gate guard. Case law in which substituted
16 service is allowed upon a gate guard is substantial as follows.¹³
17

18
19 In *Bein v. Brechtel-Jockim Group*, the court found that a "...gate
20 guard...must be considered a competent member of the household and the person
21

22

¹² *50 Court St. Assoc. v. Mendelson et al.* (1991) 151 Misc.2d 87 [572 N.Y.S.2d 997, 999]

23 ¹³ See *Bein v. Brechtel-Jockim Group* 6 Cal.App.4th 1387 (1992); 8 Cal. Rptr.2d 351; *F.I. duPont, Glore Forgan &*
24 *Co. v. Chen* (1977) 41 N.Y.2d 794 [396 N.Y.S.2d 343, 364 N.E.2d 1115];
25

1 apparently in charge. Appellants authorized the guard to control access to them
2 and their residence. We therefore assume the relationship between appellants and
3 the guard ensures delivery of process." (*Bein v. Brechtel-Jockim Group* 6
4 Cal.App.4th 1387 (1992); 8 Cal. Rptr.2d 351)

6 The *Bein* court wrote (quoting *50 Court St. Assoc. v. Mendelson et al*¹⁴),
7 that service on the gate guard is consistent in that it is "...made upon a person
8 whose 'relationship with the person to be served makes it more likely than not that
9 they will deliver process to the named party.' "

11 Further, "While the defendant may control the acceptance of mail by his [or
12 her] household, he [or she] may not thereby negate the effectiveness of service
13 otherwise effective under the law." (*Bossuk v. Steinberg* (1982) 88 A.D.2d 358
14 [453 N.Y.S.2d 687, 689-690].)

16 Similarly, in *Khourie*, the court wrote that a "defendant will not be
17 permitted to defeat service by rendering physical service impossible."¹⁵ Substitute
18 service upon a gate guard who denies entry to a planned community is a means to
19 overcome those who seek to circumvent and thwart jurisdiction of the courts.
20

23 ¹⁴ *50 Court St. Assoc. v. Mendelson et al.* (1991) 151 Misc.2d 87 [572 N.Y.S.2d 997, 999]

24 ¹⁵ *Khourie, Crew & Jaeger v. Sabek, Inc.* (1990) 220 Cal. App.3d 1009 [269 Cal. Rptr. 687]

1 delay and increases the workload of court staff and judges in managing
2 documents, motions and hearings related to delayed service.

3
4 Petitioner believes that the proposed rule change is consistent with other
5 rules, statutes and case law, in that the gate guard at a planned community is
6 appointed as the person who allows or disallows access to the premises, and thus a
7 person of suitable age and discretion at the extension of the abode.
8
9

10 RESPECTFULLY SUBMITTED this 19th day of June,
11 2017.

14 Patty Chlebanowski
15 Patty Chlebanowski
16 Secretary

17 Electronic copy filed with the
18 Clerk of the Arizona Supreme Court
19 this 19th day of June, 2017.

20 by: Patty Chlebanowski