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TO: **Probate Rules Committee**

FR: **11th Hour Comments from the Field, Kate McMillan, Sole Practitioner**

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Change is a fact of life and promotes vitality. Greater confidentiality for wards and incapacitated persons is good. Providing tools for the ever increasing tide of laymen is laudable and can be accomplished without mandatory regulations. I am not as concerned about local variations in practice as the Rules Committee provided the uniformity of notice to interested persons is not compromised. Increased regulation does not result in an increase in value. It does increase costs for my clients. The real risk I sense if the detail and number of "rules" results in the triumph of form over substance. What we are trying to accomplish gets lost in the minutia of how.

The Rules are largely "desk driven" and do not reflect the market place I know. I have practiced in this area for more than 35 years in six counties in Arizona and three counties in Idaho, the first state to adopt the Uniform Probate Code. Besides private practice, I have served as probate law counsel, run a public fiduciary office, been certified as a private fiduciary and specialist in trust and estate laws. I have not reviewed the comments of others, but offer my insight because I have a deep and abiding passion for the law of trust and estates.

The test of the Rules is whether they promote the UPC values: simplicity, clarity, efficiency and speed. A.R.S. § 14-1102. I outline where the proposed Rules fall short.

Specifics in order of sequence, not importance:

1. Rule 2 Definitions

   (D) "Evidence"….why not simply refer to the Arizona Rules of Evidence?
   (G) "Guardian ad litem" and Court-appointed attorney over lap…unnecessarily introduced confusion
   (L) "Party" "Interested Person"….the effort to make bright line distinctions is without real value….

2. Rule 6 Probate Information Form

   Nothing to be really gained by having the form "verified"….and the request for a social security number of the nominated fiduciary and the ward/protected person violates federal law and is not required by state law.

3. Rule 7 Confidential Documents and Information

   Same concern about use of the social security number. Without intending any disrespect, the confidentiality protections that are spelled out is illusory.

4. Rule 9 Notice of Hearing.

   There is an inconsistency in requiring a written objection to be filed 5 days before a hearing yet allow oral objections at the hearing.

   Weird "rare circumstances" exception to requirement that notice of a hearing be accompanied by the petition or motion… " if sensitive information….".

   The statutes already address court's authority to vary notice in § 14-1401 (B). For due process, it is better not to include the exception in the rules…….lest the exception swallow the rule.

5. Rule 10 Duties owed to the Court

   The Supreme Court has chosen to highly regulate this area of law…and done so by passing the day to day matters to the lawyer. The shift goes beyond Fickett and Shano….the lawyer for the fiduciary is rapidly becoming the guarantor for the fiduciary. The malpractice bar will profit with detailed rules by which to measure standard of care.

   The only practical way to limit professional liability is by limiting The scope of representation in each case. Limited representation could become the rule, which would be an unintended consequence.

   The time constraints for filing new probate information sheets are unrealistic and the mandatory requirement that a final account be filed 90 days after death is often simply not possible. Required financial statements are Not available. Busy practice constraints don't allow a lawyer to drop everything to file an accounting. The term of 120 days is given to creditors to take action because it reflects a reasonable business timeframe. The same time allowance should be available to fiduciaries.

6. RULE 11. Telephonic Appearances and Testimony

The time constraints for motions to allow telephonic testimony are unrealistic and burdensome.. Why vary from the general rules of civil procedure?

7. RULE 12. Non-Appearance Hearing.

The proposed rule is truly Kafka esque….in providing for a contesting party to appear and testify at a "non-appearance" hearing….why are "Rules" used to address "extraordinary circumstances? Micromanagement without true value.

8. RULE 13 Accelerations, Emergencies and ex parte Motions and Petitions

The rule sounds in "shall" but the comments speak of discretion with respect to the proper filings in an emergency. Civil procedure allows pleaders latitude in framing their cases. Why prohibit the filing of any pleading? Better practices are to be promoted, but not mandated. The supposed distinction between motions and petitions is micromanagement without value. (Rules 17 and 18)

9. RULE 14 Consents, Waivers, Renunciations and Nominations

The rule requires an acknowledgment for consents, waivers, renunciations and nominations. It is odd that you can leave your entire estate by virtue of an unwitnessed, unacknowledged holographic instrument, but you can't renounce your right to serve as p.r. without an acknowledgement. Seems to cure a non-existent problem. The cumbersome requirement for certain cases with many renunciations coming from places where a notary is not available. In the name of protection, it adds a barrier to efficient administration.

10. Rule 15 Proposed Orders

In the real world, proposed forms of order often circulate after a hearing. The idea of requiring that the proposed form of order be lodge 5 days before the hearing will increase paper and process without value.

11. Rules 17 and 18, Petitions and Motions

A desk driven distinction….regulation without merit in a case….I forsee objections because of the choice of term.…

12. Rule 19, Appointment of Attorney, Medical Professional and Investigator

The 30 day requirement is "new law" and not in the statutes. It is inconsistent with other notice requirements.

13. Rule 20, Affidavit of Proposed Appointee

This disclosure is not required of banks or trust companies because it is costly and burdensome. What does it add? The information is already in the public record.

14. Rule 22 Bond and Bond Companies

Subsection A merely restates the law. What benefit is there?

15. Rule 30, Annual Conservatorship Plans, Accountings etc.

This practice is purely Maricopa and need not be expanded to other counties. It will lead to formula filings…not adding to the quality, just the production Costs.

Final accounts should be required in 120 days, not 90, see comment No. 5 to Rule 10 above.

16. Rule 33, Compensation for Fiduciaries and Attorneys' Fees

The additional information required might be appropriate if an objection is filed to a fee request. To require it in each and every case is burdensome. My paralegal has indicated that she refused to make her compensation public record.

Forms: As to the forms, thank you for making them optional.