Michael A. Parham
Arizona Bar No. 4853
5333 N. 7th Street
Suite B-213
Phoenix, AZ 85014

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	
	)	Supreme Court
PETITION FOR	)	No. R-07-0023
PROCEDURE FOR	)	COMMENTS ON
EVICTION ACTION	)	PROPOSED RULES

WHO I AM

I am a sole practitioner who has concentrated on representing landlords in landlord-tenant and fair housing matters for 30 years in Arizona. Since 1987, I have been legal counsel for the Manufactured Housing Communities of Arizona, the association representing that industry. I have also represented the Arizona Multi-housing Association in a variety of matters over the past 15 years.

My work includes evictions for mobile home park landlords; legislative drafting involving the three chapters of Title 33, ARS covering residential landlord tenant matters and the forcible detainer statutes in Title 12; and considerable teaching on behalf of professional organizations for management staffs of residential properties and attorneys in these areas.

In the last 30 years I estimate I have represented landlords in about 15,000 mobile home park eviction actions.

From 1998 until 2005 I served as a Justice of the Peace *pro tem*. I heard civil (but not eviction) cases, two afternoons a month. I became familiar with the workload, administrative procedures and problems faced by Maricopa County Justice Courts.

I served on the State Bar Landlord Tenant Task Force and was an active member of the subcommittee that drafted these proposed rules. Many of them originated with me.

The comments in this submission represent only my views. I do not purport to speak for anyone else.

BACKGROUND and INTRODUCTION

The "Morris Report".

The State Bar's Landlord Tenant Task force was formed in large part because of the concerns raised in a report titled, "Injustice in No Time: The Experience of Tenants in Maricopa County Justice Courts**".**

The Morris Report was based on the observations of 626 cases over a ten-week period in the summer of 2004 in 14 Maricopa County Justice Courts. The observers prepared a form developed by the Institute covering various aspects of how each case was resolved. Thereafter, "detailed file reviews" were conducted on 123 files covering the observed cases plus an additional five case files. Another Institute developed form was prepared on each file indicating whether certain information appeared in each and how each file indicated the case was resolved.

Finally, informal interviews were held with five unidentified judges, one unidentified landlord attorney and one unidentified tenant attorney, all of whom "thought the preliminary findings were indicative of the general practices in eviction court". *Morris Report, pp. 6-7.*

The study was primarily conducted by two public interest law interns from two out-of-state law schools. *Morris Report, p. 1.*

The Morris Report was widely reported in the media as a sweeping indictment of the eviction process in Maricopa County and, by implication throughout Arizona. The State Bar upon receiving the Report formed a Landlord Tenant Task Force that ultimately produced the rules now under consideration.

Industry Reaction to the Morris Report.

The rental housing industry, represented by the Arizona Multi-housing Association (AMA) and the Manufactured Housing Communities of Arizona (MHCA) upon reviewing the Morris Report, concluded that it was based on anecdotal incidents, observed by untrained and inexperienced eyes, and was prepared by an advocacy organization that frequently does battle with those organizations on a wide variety of issues each year at the legislature. The industry in essence viewed it as a "hit piece."

When the State Bar Task Force was formed, it had three "landlord attorneys" on it, two of whom wound up on the subcommittee that prepared these rules. Although they were greatly outnumbered by persons currently or recently affiliated with the Morris Institute or Community Legal Services, the rental housing industry associations were hopeful that their interests would be considered in the drafting of court rules and policies that were so obviously targeted at their industry.

Initial Industry Reaction to the Proposed Rules.

Once the proposed rules were released for comment, the rental housing industry associations concluded that many of the proposed provisions, in their view, will add greatly to the time and expense of evictions without serving any worthwhile purpose justifying their cost.

Before simply criticizing the proposed rules, however, the associations decided to commission a professional study of the eviction process using qualified organizations and statistically valid methods.

The "Pollack Report" Findings.

The study involved gathering data from all Maricopa County Justice Courts except Gila Bend. A strictly random sample of 500 cases from those courts was taken of residential evictions. Every file was scrutinized to determine what occurred in the case. It was determined that 96% of filings were for non-payment of rent. The study found that almost all files were documented with evidence that pre-eviction notices had been given tenants; that service of necessary papers had been confirmed; and that the amounts of rent claimed were verified.

Based on the data gathered, Elliott D. Pollack & Company conducted an economic analysis of the effect of the proposed rules on the rental housing industry. While the Pollack Report speaks for itself, the message throughout is that many of these rules will add costs to the eviction process and those additional costs will filter down to consumers, the rental housing tenants, in the form of increased rents. Since the data gathered indicates that many of the rules will not serve any meaningful real world purpose, the added expense of some of the proposed rules is detrimental to the consumers for whom the rules (procedures) are aimed at benefiting.

The data gathering and analysis in the Pollack Report was conducted by the Behavioral Research Center, an independent Phoenix-based firm providing marketing and public opinion research to public and private sector clients.

This study and report was not designed to rebut or really to even respond to the Morris Report. Instead it was intended to independently determine if there are significant problems in the way evictions are now processed that should be of concern to the courts and the industry. Secondly it was designed to identify whether any significant financial impact would result from adoption of the proposed rules.

Simply put, the Pollack Report indicates the current problems within the eviction procedures are minimal but the unnecessary expense of some of the proposed procedural rules will be substantial, and ultimately will be borne by the consumers.

UNIQUE NATURE OF THESE PARTICULAR RULES

This Court has consistently stated that forcible detainer was created by our legislature to provide "a summary, speedy and adequate remedy for obtaining possession of the premises." *Olds Bros. Lumber Co. v. Rushing,* 64 Ariz. 199, 204, 167 P.2d 394, 397 (1946). It has also been long established by case law that the procedural elements of the forcible detainer statutes are an integral part of the remedy. Until now the Court has deferred to the legislature to establish whatever court rules are appropriate to accommodate the eviction process.

Proposed Rules are Industry Specific.

In adopting its own eviction rules, the Court will be going beyond the normal process of adopting procedures applicable to a wide variety of litigants—rules of general application. These rules will be limited to one kind of procedure, evictions, and targeted at one specific industry—rental communities, almost exclusively residential rental housing providers.

Given the 80,000 to 100,000 eviction cases that move through the courts each year, any rule that adds expense to a case will have a major overall financial impact on the target industry.

Public Policy Considerations.

Since the Court is entering into an area that has traditionally been left to the legislative process, and since only one industry is affected by whatever the outcome will be, it is appropriate and important that this Court consider certain matters of public policy that a legislative body would be expected to consider, prior to making sweeping changes across an industry, but that might not enter into the consideration of the Court in other kinds of non-specialized Court rules.

The Pollack Report reveals the size of the rental housing industry, and it makes clear the fact that some of the proposed rules are going to come with a cost to landlords that will filter down to tenants in the form of rent increases. It also makes the point that the majority of evictions, and the majority of properties that will be most affected by cost increases involve low-income residents of low-rent properties.

Indeed, the rule with the greatest financial impact is one requiring lawyers to independently verify that their Section 8 and other low income housing program clients have complied with federal regulations applicable to those programs. It has been estimated that the cost of the lawyer independently ensuring this compliance will *triple* the cost of an eviction to that landlord. These are the landlords whose tenants can least afford rent increases.

It is appropriate, using this as an example, that this Court in weighing adoption of such a rule consider such public policy matters as whether the rule imposes an appropriate burden on an attorney; whether there will be a

substantial cost of compliance; whether the increased costs of evictions for these kinds of properties will help drive rents up beyond the tenants' ability to pay; whether the effect on rents will be such that landlords can no longer afford to participate in section 8 and similar programs; and whether the ultimate effect of the rule will be a significant loss of affordable housing stock to persons most in need.

These are policy matters, but then these rules if adopted are going to have public policy implications.

The Bar task force and the rules committee was composed mostly of judges and lawyers, concerned over the things lawyers and judges are concerned over. It was *not* concerned with economics or public policy matters like this. That is not meant to be critical. We are not elected officials; we are not in the legislative arena; and we are not disciplined to take these matters into full account in determining how to fairly move cases through our courts. But here the possible unintended consequence of adopting what may look like fair rules can be the loss of affordable housing in this state.

This cost, on a rule-to-rule basis, needs to be weighed against the benefit the proposed rule will produce.

COMMENTS ON SPECIFIC PROPOSED RULES

Introduction.

These comments will deal both with legal and policy implications of individual proposed rules as well as possible adverse economic consequences. In fairness, some of those I comment on are rules I actually proposed and argued for during subcommittee sessions. I will explain these seeming inconsistencies in my comments.

In considering the magnitude of cost impacts to landlords, bear in mind that total attorneys' fees in a typical eviction case from cradle to grave runs around $90.00. Total court costs are about another $100.

Rule 1.

The Application of the Rules of Civil Procedure to Eviction Actions has always been problematic; Rule 1 is the essential starting point for a comprehensive set of specific rules.

The last sentence of Rule 1 specifically provides that the rules of civil procedure do not apply except as specifically incorporated. In present practice, with no specifically tailored rules, many practitioners and a few judges will try to apply those rules even though many tend to slow the eviction process down resulting in violations of the short fuse deadlines created in the forcible and special detainer statutes. While there is some old case law to the effect that those rules are not applicable insofar as they delay the process, to many practitioners used to normal civil litigation, this is hard to accept.

Applying the civil rules is especially problematic in the areas of motion practice and discovery. The time periods in those rules almost invariably are inconsistent with those in the relevant eviction statutes.

This is perhaps the most important rule in the bunch if these proposed rules are adopted.

Rule 4(e).

I did not oppose this Rule. Nevertheless it will have an economic impact on landlords and this should be taken into account.

In the world of evictions, landlords under present Arizona Supreme Court policies *must* be represented by counsel unless they are representing themselves. Since most evictions are default cases for non-payment of rent, landlords in the past tended to believe that the extra cost of engaging counsel instead of having the property manager handle the case (as was the practice many years ago) simply added an unnecessary expense to the process.

To mitigate this expense, several small law firms have evolved to handle evictions in large volumes at extremely low rates. These low rates resulted from automating the process as much as possible; employing a minimal number of attorneys, and having large numbers of initial appearances set at the same time. The small firms would then be

periodically "shopped" by large landlords who would move business to the lowest cost, competent firm. The attorneys in these firms have developed an extremely high level of expertise in the field enabling them to minimize time devoted to cases and thus legal fees.

To keep costs low, these firms developed an informal practice, as in many other areas of legal practice, to some extent based on professional courtesy, of "covering" for one another. If one lawyer could not make it to a scheduled calendar, another attorney with cases on that calendar would step in for him and obtain default judgments when tenants failed to appear, and if the tenant appeared and the matter could not amicably settled, then the lawyer would request that the contested matter be set for trial on a continued date.

The attorney "covering" would not enter a formal appearance leaving the attorney filing the case as the sole attorney of record.

Over time another practice evolved in which firms would enter into relationships with one another to cover each other's cases under a pre-arranged schedule. For example firm A would cover firm B's cases in Court 1, while firm B would cover firm A's cases in court 2. Once again the firm filing the case was the only attorney of record, with the one covering not entering its appearance.

In most instances there is a formalized "of counsel" relationship among these firms which appear on one another's letterheads in that capacity.

I did not propose this rule that will require all attorneys "covering" to enter their appearances unless they are on the filing attorney's letterhead. But I did not oppose it either. I do not participate in these arrangements, but only because of the unique and highly specialized nature of my practice.

The attorneys and firms involved in these kinds of relationships in the aggregate probably account for the filing of perhaps ⅔ of all evictions filed in Maricopa County. Any extra cost associated with requiring formal appearances will thus be substantial to the landlord industry.

Filing a formal notice of appearance in an eviction case by an unaffiliated attorney will have a cost impact. The fact that subsequent

pleadings can then be served on that attorney in what is really someone else's case will discourage many from doing so. Many who now do it *gratis* will begin seeking compensation since the formal appearance creates both responsibilities and liability on their part.

There is a well-founded fear that this requirement will curtail or end the custom of attorneys "covering" for one another. This will have the effect of either (1) increasing the cost of evictions as these firms hire additional attorneys to cover all courts themselves; or (2) try to cover all courts with current personnel meaning they will be skipping calendars in some courts to appear in others, filing more cases on fewer calendars in each court, and in the process slowing the process down. In most cases that will result in additional unpaid rent being written off.

In my practice I choose the latter. I cover cases in 23 Maricopa County Justice Courts plus Apache Junction. I must frequently delay filing cases until I can fit an appearance in on my calendar, sometimes for ten or more days.

Either way, the extra attorney costs or alternatively the delays in filing resulting from this rule will add significantly to the landlords' costs. It is hard to quantify at this point but a 25% to 33% increase in legal costs is probably a good "guesstimate."

Rule 5(a).

Most attorneys filing evictions use multiple-copy "NCR" paper, and consolidate the summons and complaint on one page. Thus the top third of the page is the summons and the bottom portion is the complaint. The form is printed out in the attorney's office, given to a process server, and filed with the trial court which enters a case number, stamps the appropriate signature on the summons portion, and then breaks the form apart, keeping the top original for the court file and returning the service and attorney copies to the process server.

This largely automated process and the use of the single page form enables landlord attorneys to minimize preparation and production time and thus expense.

This is not my practice. I use conventional court pleadings on pleading paper with the summons on a separate page from the complaint. Essentially the proposed rule reflects my practice.

I charge about three times as much to handle an eviction as most landlord attorneys. The way I survive is by limiting my practice to mobile home parks, in which evictions are far more complex and more frequently contested than run of the mill apartment evictions.

The rule requiring the summons to be on a separate page from the complaint results from the concern of some judges that by sharing the same page, and considering the signature of the Justice of the Peace appears on the summons, the document looks like *the Court* is siding with the landlord and *the Court* is evicting the tenant. That is a legitimate concern given the lack of sophistication of many tenants.

On the other hand there is going to be a significant increase in costs to landlords of requiring two pieces of paper to be prepared. Administrative expenses of landlord attorneys will increase. Since process servers charge for each document served, their charges will likely be increased as well.

I estimate a $10 per case cost increase to landlords, *as a minimum* will result from adoption of this rule alone.

Justice Court staff time requirements will be increased as well, if they are the ones who wind up breaking the two sets of documents apart in each case and stapling the summons and complaint together. It is not at all unusual for a process server to file 100 eviction cases at a time in a single Justice Court. If that job winds up with the attorney or process server, the extra costs will wind up with the landlords.

Rule 5(a)(5).

This Rule requires an information sheet be served on the tenant with the summons and complaint. The information sheet (an appendix to the rules) explains the process, what some of the tenant's rights are, and where to turn for help. It can be on the back of the summons or a separate document.

A minority on the committee believed this is an inappropriate document to be served. First the requirement appears nowhere is the relevant landlord tenant laws or eviction statutes; it would be created by court rules. Second, except for garnishment statutes (prepared as a result of a federal court decision many years ago), no other kind of civil proceeding requires any such information sheet be served. Third, printing it on the back of the summons gives the impression that *the Court* is providing legal advice to a litigant. Fourth, the expense of printing the sheet and of serving it on the tenant is placed on the landlord, and that expense will be significant, especially if it appears on a separate sheet (as it will in my practice) that the process server charges for serving; this is an inappropriate expense to place on an adverse party—advising the opponent of his or her rights. Fifth, no one seriously thinks anybody is going to read this form. Finally, if there is a need deemed by the court system or society in general for defendants in certain kinds of cases to be informed of their rights, the cost of doing so should be borne by it.

Another objection is that the rules are silent as to the consequences of failing to serve the information sheet if it is overlooked.

Rule 5(b)(7).

This Rule requires a copy of the termination notice to be attached to the complaint. This is my current practice and I actually supported the rule. Nevertheless there are serious financial downsides to it.

Most (but not all) eviction cases are based on a proper termination of a pre-existing landlord tenant relationship. The action is filed to recover possession of leased premises that the tenant failed to surrender following the landlord's termination of the tenancy. A necessary prerequisite of the eviction filing is that a proper termination of tenancy notice was given and the applicable cure period expired without the breaches being remedied.

None of the relevant statutes require that a termination notice be *re-served* on tenants when they are served with an eviction summons and complaint.

The theory of the proposed rule is that the tenant typically does not understand why he or she is being evicted, that the complaint is so abbreviated that it doesn't really convey the reason, and that attaching the

termination notice that was previously given will clarify it. In my practice that is the case and is why I have routinely attached notices to complaints for 30 years. Only about half of my cases are for non-payment of rent.

But I charge three times or more what others charge and only handle a relatively small volume of mobile home park evictions. Landlords have a legitimate concern over whether the benefits of attaching notices to the huge volume of complaints in routine residential evictions can in any way justify the significant costs involved.

To comply with this, the landlord's attorney will need to obtain a copy of the termination notice and match each notice to the corresponding eviction file. As each complaint is printed out, a staff member will need to break apart each multi-copy complaint, reproduce a sufficient number of copies of the notice, and then staple notice copies to complaint copies, ensuring the right notice in all cases is attached to the right complaint. Since a single property may produce 50 or more cases in a month, this can be a major undertaking.

Then each package will need to have copies of the summons matched up with and stapled to copies of the corresponding complaint (assuming the separate summons rule is adopted), and the packages will need to be given to the process server for filing. The process server will need to have mechanisms in place to guard against mixing up copies between cases.

This is going to result in a major cost increase to the lawyers handling these cases and will appreciably slow the process down. Considerable extra staff will need to be hired by the attorneys to handle this new paper work.

It is a pure guess but I estimate many cases will be delayed in filing for several days, meaning additional lost rents, and the average legal bill for this change alone will be *at least* $10 per case.

The Pollack Report indicates that 96% of filings are for non-payment of rent. Other rules will require complaints to be specific as to the rents due. Certainly in those cases, little purpose is to be served by requiring copies of the notices be attached to the complaints, especially considering the extra costs that will ultimately be borne by tenants.

The courts will experience significantly increased workload. Instead of stamping in a single multi-copy form as is done at present, clerks will need to number and stamp multiple copies. A process server presenting 100 cases now for processing will, in effect be presenting 500 from the court clerk's perspective under the proposed rule.

I do not believe this rule can be justified given the cost.

Rule 5(b)(8).

This is perhaps the most objectionable of the proposed rules. It will require attorneys representing landlords of Section 8 and other federally subsidized housing for economically distressed tenants to independently verify compliance with federal regulations concerning termination of tenancies under the programs.

There is no basis for such a requirement in the Arizona statutes dealing with landlord tenant law or evictions. There is, to my knowledge, no such requirement in applicable federal law.

There are a number of these federal programs in existence. Landlords operating properties covered by such programs employ in-house staff specializing in compliance with federal regulations that develop close working relationships with their counterparts in the government agencies. Part of their job is to ensure compliance before referring cases for eviction

There is no purpose to be served in requiring a landlord attorney to separately review the program contract between the agency and landlord, to become proficient with the applicable federal regulations, to then review the documentation of the landlord to independently verify compliance in each case, and finally state in a verified complaint that all requirements were met in order to file a routine state court eviction action.

Under the proposed rule, many landlord attorneys (including me) would refuse to accept cases involving those programs. Those who took them would need to devote *attorney* time to the due diligence necessary to satisfy the rule at substantial expense.

One attorney who handles many such cases estimated that it would triple his legal fees in these cases. He also pointed out that the landlords

under these programs have fixed budgets and narrow operating margins, and that the unavoidable consequence of increasing fees would be a decrease in benefits available to tenants now eligible for assistance.

Section 8 and similar programs already have plenty of problems attracting landlords into their programs. A fairly sizeable number of evictions in these properties is a fact of life. Adding a substantial gratuitous and unnecessary legal expense to the costs for these landlords is going to drive some participants out, dissuade others from participating in the future, and reduce benefits for beneficiaries of whatever participants remain.

This is a terrible and ill-advised proposal. It would harm the very people it is intended to help because it would provide a powerful incentive for landlords to never accept Section 8 tenants.

Rule 5(g).

This Rule requires a complaint to be dismissed at the initial appearance if service was not timely made. The subcommittee on a split vote decided to call for dismissal in all such cases and not permit a continuance.

Clearly if service has not been timely made, judgment cannot be entered. And in most cases, where post and mail service is provided for, timely service prior to the hearing is not a problem.

But there is one class of cases where timely service may be a virtual impossibility. In cases of "material and irreparable breach" (i.e., for violent or drug related conduct), in ARS § 33-1377, the combination of requirements in subsections (A) and (E) has the effect, if the time periods are strictly honored, of making it impossible to accomplish post and mail service before the initial appearance.

Mandating dismissal instead of continuance to make service when timely service is impossible due to an anomaly in the law is absurd. The relevant statutes allow continuances at the discretion of the court for short periods of time for good cause. That same standard should be allowed in this rule when service has not been completed prior to the initial appearance.

Dismissals and re-filing will double the costs of these cases to landlords for no purpose.

Rule 13(B)(3)(C).

This rule imposes on the Landlord's attorney the cost of mailing a copy of a default judgment to the defendant. Of course since the defendant has just been evicted most will be returned to the sender (my experience is that very few leave forwarding addresses with the post office).

This is not the current practice of most landlord attorneys. I do it but then again my charges are much higher that the norm.

A 42¢ stamp plus administrative costs of copying, envelope preparation, etc. probably produces a $1.00 landlord cost per default judgment. Trivial for one case but given 60,000 or so defaults per year it grows to a $60,000 per year landlord expense. And it serves no purpose.

During subcommittee debate it was proposed that the courts send the default judgments out if the need was there. This was rejected because the courts lack funds to pay for it. So it was merely shifted to the landlords (and thus the tenants living there).

CONCLUSION

Frankly, the Pollack Report indicates that the system as it is presently structured works pretty well considering the few complaints and the volume of cases that flow through it each year. A good case could be made that no rules at all are necessary and that the value to society of saving the trees used to print them would exceed any value of promulgating them.

Nevertheless, new practitioners in particular will benefit from simple to understand streamlined rules. Right now it takes actual experience over a period of time to learn how the system works, and many of the accepted practices are simply the evolution of custom and usage.

The proposed rules largely represent an effort to give some formal structure to the practices that have evolved over the past century, weaving together a fair amount of case law and the statutes with those practices. In

the main they are probably worthwhile, *provided* that they are tweaked to eliminate marginal or unnecessary requirements that produce additional costs to landlords.

The Court should be mindful of the fact that the people least able to afford increased costs—the people most in need of relief, will in the end shoulder the extra landlord costs. The Pollack Report makes it clear who they are. They are the occupants of low income and, in many cases, government subsidized housing.

DATED: May 20, 2008

_____
Michael A. Parham

A copy of this comment has been mailed this 20th day of May 2008 to:

Robert B. Van Wyck, Esq.
Chief Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016