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6 IN THE SUPREME COURT OF THE STATE OF ARIZONA
7

8 In the Matter of:

No. R-07-0023

9
10 Petition for Procedure for

Comments on Proposed Rules

11 Eviction Action Rules
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16 INFORMATION ABOUT AUTHORS

17 The undersigned attorneys, Scott E. Williams and
18 Mark B. Zinman, regularly represent landlords in
19 eviction actions throughout Arizona. In regards to
20 evictions, the firm represents residential landlords,
21 commercial landlords, mobile home park owners and
22 certain governmental agencies. Mr. Williams has been
23 regularly representing landlords in eviction actions
24 since 1988 and has been involved in over 100,000 court
25 eviction actions. Mr. Williams has been a pro tem
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1 justice of the peace for over 10 years and is familiar
2 with the operation of the justice courts where the
3 great majority of eviction actions are filed. Mr.
4 Zinman's practice has been the same as Mr. Williams
5 since being admitted to the bar in 2005. In addition
6 to said representation, undersigned counsel represent
7 landlords in fair housing complaints and other civil
8 litigation.

11 Undersigned counsel both regularly represent
12 landlords before Justice and Superior Courts in
13 numerous counties in Arizona.

15 The comments in this submission represent only our
16 views. We do not purport to speak for anyone else,
17 client or otherwise.

19 **GENERAL ANALYSIS OF THE PROPOSED RULES**

21 As in any litigation, uniform rules can often
22 assist litigants in protecting their rights while
23 maximizing judicial resources. While the consistent
24 application of reasonable rules throughout the courts
25 will ensure a level playing field, the current
26 proposed rules overstep judiciary powers, ignore the
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1 financial impact on low cost housing, and fail to
2 account for basic practical considerations.

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4 The problem that permeates the rules is that they
5 ignore policy concerns in an attempt to ensure
6 tenant's rights - rights that are ensured at the
7 financial expense of the landlord, and ultimately
8 borne by the tenant. The undeniable repercussion of
9 the proposed changes would be an increase in rental
10 amounts and/or a landlord's refusal to accept specific
11 tenants (See below, re: Sec 8 housing).

12
13 While informing litigants of their rights is an
14 important undertaking, it must be balanced with the
15 burdensome costs involved. It is noteworthy that such
16 a balancing is constitutionally left to the
17 legislature, and not the judiciary. The members of
18 the task force focused their investigation on the
19 practical steps within eviction actions and the
20 members wholly failed to address the crucial public
21 policy concerns and practical repercussions. The
22 proposed procedures can not be implemented without a

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1 thorough analysis of the time and monetary concerns of
2 such sweeping changes.

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4 The most blatant example of the task force's
5 failure to analyze practical and policy concerns,
6 relates to proposed Rule 5(a)(5), which requires that
7 **landlords** attach an informational sheet to the summons
8 and complaint. While informing tenants of the legal
9 rights appears to be a commendable practice, this
10 requires the landlord to pay additional expenses to
11 counsel adversaries in litigation of their legal
12 rights. There is no precedent for such a legal
13 obligation - there is no analogous requirement in any
14 other civil action. If such a change is to be made,
15 it is best left to the legislature.
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20 It is important to note that any increase in costs
21 imposed upon the landlord will result in higher rental
22 amounts for the tenants. Therefore, while the
23 landlords will initially suffer additional expenses,
24 these will ultimately be paid by the tenants.
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SPECIFIC ANALYSIS OF THE PROPOSED RULES

1. **Rule 4(e)**

Objection: No other area of law requires covering attorneys to formally appear.

Recommendation: Add the following statement to the rule: “[C]ounsel may make an oral association limited solely to the scheduled hearing at which counsel appears, and responsibility of the matter shall remain with counsel of record.”

Analysis:

Due to the number of courts (23 in Maricopa County, soon to be 24), the distance between the courts, and the scheduling of forcible detainers, it is often necessary for attorneys to have other counsel “cover” their cases. It is counsels’ experience that attorneys in many areas of practice (criminal and civil) regularly “cover” for other attorneys when on vacation and for schedule conflicts.

All that is required of the “covering” attorney is to handle default hearings and set matters for trial if there is a contested issue. As in all matters, if

1 the court were to require formal appearances of
2 covering attorneys, there would be added motions to
3 continue for vacations, and scheduling conflicts, as
4 well as, notices of appearance simultaneously filed
5 with a motion to withdraw.
6

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8 As a result, this rule would have the effect of
9 greatly increasing the pleading practice in all
10 courts. In addition, it follows that if formal
11 notices of appearance are required of covering
12 attorneys in eviction matters, then covering attorneys
13 in all matters should be similarly mandated.
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15 If "covering" were impermissible, additional
16 attorneys would be required thereby increasing the
17 costs to the landlord and, as a result, the tenant.
18 In conjunction with Rule 4(e)(1), a covering attorney
19 would be responsible in the event an appeal is filed.
20 To limit such unnecessary liability, attorneys will
21 avoid covering for others, thereby requiring firms to
22 employ additional attorneys and increasing costs for
23 their clients.
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1 It is also unclear as to the prospective benefits
2 to be gained by requiring "covering" attorneys to
3 enter a formal appearance when there is an attorney of
4 record fully responsible for the litigation.
5

6 **2. Rule 5(a)**

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8 **Objection:** This rule infers that the Summons shall
9 be on a separate page from the complaint thereby
10 doubling the paperwork processed by the courts, and
11 the parties.
12

13 **Recommendation:** Strike separate language: "The
14 summons in an eviction action ~~shall be a document~~
15 ~~separate from the complaint...~~" Continue the current
16 practice which was developed by the justice courts as
17 a method of reducing court paperwork.
18

19 **Analysis:**

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21 This section infers that a Summons and Complaint
22 be two separate and distinct documents. This, among
23 other requirements imposed upon landlords (discussed
24 below), will be unduly burdensome. Due to the high
25 number of evictions filed in Arizona (an estimated
26 80,000 to 100,000 in Maricopa alone), the costs of
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1 adding additional documents needed to be served will
2 significantly raise the costs of evictions. Not only
3 will landlords have to pay for the creation and
4 preparation of such documents, they will have to pay
5 extra costs to the process servers to serve the
6 additional copies.
7

8
9 Currently, pursuant to A.R.S. § 33-1377, to
10 effectuate service a process server may "post and
11 mail" a Summons and Complaint when they are unable to
12 complete service otherwise. This only requires that
13 the process server have two documents (two copies of
14 the combined Summons and Complaint.) Pursuant to the
15 proposed rules, the process server would have, at the
16 very least, two of each of the following: summons,
17 complaint, notice, informational sheet (now 2 sheets
18 become 8 sheets). This would create a financial
19 burden for the landlords and would require additional
20 court staff to handle the increase in paperwork.
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25 3. Rule 5(a)(5)

26 **Objection:** Rule increases the paperwork required
27 to be served upon the Tenant, and places the Plaintiff
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1 in the position of providing legal advice to the
2 Defendant.

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4 **Recommendation:** Strike Rule 5(a)(5).

5 **Analysis:**

6 As analyzed above, this rule will require a
7 landlord to serve a tenant with an informational
8 sheet, when serving the Summons and Complaint. This
9 will require extra copying costs, administrative
10 preparation costs and additional process serving fees.
11 All of this, which could be avoided by posting said
12 information on the court's website and/or making a
13 copy available at the court.

14 If there exists a public concern regarding the
15 need to inform tenant's of their rights, such costs
16 should be born by the public, not the landlords.

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21 **4. Rule 5(b)(7)**

22 **Objection:** Rule increases the paperwork required
23 to be served upon the Tenant.

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25 **Recommendation:** Strike Rule 5(b)(7).

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1 **Analysis:**

2 As the cost issue has been raised above, it will
3 not be reiterated herein. We will only note that to
4 require the notice to be attached to the complaint
5 serves no meaningful benefit. As the complaint
6 contains the amounts due and owing in non-payment
7 cases, the notice is superfluous. Additionally, as
8 proper service of the notice is a prerequisite to
9 judgment, there is no benefit to re-serving the notice
10 - either the case will be dismissed for failing to
11 properly serve the notice or the tenant has already
12 been put on notice as to the allegations contained
13 therein.
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18 **5. Rule 5(b)(8).**

19 **Objection:** Rule requires attorney and the court
20 to investigate whether the subsidized housing provider
21 has complied with all federal rules.
22

23 **Recommendation:** Strike Rule 5(b)(8).
24

25 **Analysis:**

26 Coupled with rule 13(a)(1) the attorney and later
27 the court is placed in the predicament of
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1 investigating whether the housing provider, which
2 often times is a governmental entity, has complied
3 with a myriad of internal and external federal rules.
4

5 There is no basis for such a requirement in the
6 Arizona statutes dealing with landlord tenant law or
7 evictions. This is creating a new substantive
8 requirement for Arizona litigants.
9

10 There is no purpose to be served in requiring a
11 landlord attorney to ensure compliance with federal
12 law. Nor is there any purpose to require judges to
13 become proficient with the applicable federal
14 regulations to independently verify compliance in each
15 case.
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18 Undersigned counsel regularly represents
19 institutional clients which provide governmental
20 housing as well as private clients who provide Section
21 8 housing. If the rule is implemented as proposed,
22 counsel would be forced to triple the current rate for
23 eviction actions. In that governmental providers are
24 constrained by financial budgets, increase in costs
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1 necessarily requires a decrease in the housing
2 available.

3
4 This rule would harm the very people it is
5 intended to help because it would provide a powerful
6 incentive for landlords to never accept Section 8
7 tenants and may limit the available low income
8 housing.
9

10 6. Rule 5(g)

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12 **Objection:** Rule is contrary to judicial
13 efficiency and the parties' duty to mitigate costs.

14 **Recommendation:** Strike Rule 5(g).

15 **Analysis:**

16 Rule 5(g) does not serve any useful purpose.
17
18 Proper Service is always required. However, due to
19 the short time limits imposed by statutes, in many
20 cases the process server is unable to locate the
21 Defendant for personal service, and the court simply
22 continues the case for additional attempts and/or
23 alternative service. In Superior Court, where the
24 filing fee is \$230.00, this rule will significantly
25 burden plaintiffs.
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1 7. Rule 8(d)

2 **Objection:** Rule is contrary to A.R.S. 33-1365.

3 **Recommendation:** Add to rule: "SUBJECT TO
4 SUBSECTION (A) ABOVE, if a residential landlord is
5 not in compliance..."

6 **Analysis:**

7 Rule 8(d) can be interpreted as authorizing
8 counterclaims in excess of those allowed by statute
9 and proposed rule 8(a). Subsection (g) just needs
10 clarification.

11 8. Rule 9(h)

12 **Objection:** This rule allows a court to rule on a
13 tenant's motion if there has been no response. As is
14 often the case, pro per litigants do not mail to the
15 opposing party or their attorneys the motion before
16 the court.

17 **Analysis:** Before a motion is granted, the pro per
18 litigant should have to sufficiently demonstrate that
19 service of the motion was properly effected upon
20 counsel or the party, whichever is applicable
21 depending on the time period when the motion is filed.

1 9. Rule 10(b)

2 **Objection:** Rule creates discovery where the case
3
4 law has consistently held that discovery is not
5 available in eviction actions.

6 **Recommendation:** Require good cause be shown prior
7
8 to any such order. Addition to rule: "[T]he court may
9 order, UPON GOOD CAUSE SHOWN THAT EXTRAORDINARY
10 CIRCUMSTANCES EXIST, the taking of depositions,
11 inspection of the premises, or the production of other
12 pertinent documents in a manner that will not delay
13 the times set by statute ..."

14
15 **Analysis:** The Court of Appeals has stated in
16 *United Effort Plan Trust v. Holm*, 209 Ariz. 347, 101
17 P.3d 641, (App. 2004) that

18
19 A real dispute regarding a
20 landlord-tenant relationship
21 must be tried in an "ordinary
22 civil action, in which time
23 periods are not accelerated,
24 counter- and cross claims are
25 allowed, and **there is an
opportunity for discovery.**"
RREEF Mgmt. Co., 190 Ariz. at
79, 945 P.2d at 390.
[emphasis added]

26 This quote was also cited in *Colonial Tri-City*
27 *Ltd. Partnership v. Ben Franklin*, 179 Ariz. 428, 880
28

1 P.2d 648, (App. 1993) where the court approved the
2 trial court's denial of witness disclosure or any
3 other discovery.
4

5 The court in *Colonial* stated:

6 Here, defendant was denied
7 its right to discover the
8 identities of plaintiff's
9 potential witnesses, to
10 depose those witnesses, to
11 obtain answers to
12 interrogatories, and to
13 utilize any other discovery
14 methods provided under the
15 Arizona Rules of Civil
16 Procedure.

17 ...
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19 The policy behind our holding
20 is obvious; the summary
21 proceedings authorized by
22 section 33-361 and the
23 forcible entry and detainer
24 statutes do not furnish all
25 of the procedural safeguards
26 provided in a general civil
27 action. "In order to provide
28 an expeditious means of
recovering possession, the
[forcible entry and detainer]
statutes provide for
streamlined procedures." 2
Richard R. Powell, *Powell On
Real Property* § 246[3]
(1993). "Notice periods are
short, pleadings are
restricted, triable issues
are limited, discovery is

1 generally unavailable, and
2 the judgment is promptly
3 operative." Id.[emphasis
4 added].

5 *Id.* It is clear that Arizona precedent requires
6 extraordinary circumstances to exist prior to
7 requiring the parties to engage in the discovery
8 proscribed in proposed rule 10(b).
9

10 10. Rule 13(b)(4)

11 **Objection:** Rule is contrary to case law.

12 **Recommendation:** Strike last sentence: "~~The court~~
13 ~~shall not enter a stipulated judgment that contains a~~
14 ~~waiver of post judgment motions or appeals."~~
15
16

17 **Analysis:**

18 The Court of Appeals has held that it is well
19 settled law that ordinary a consent judgment is not
20 subject to appellate review. *Cofield v. Sanders*, 9
21 Ariz.App. 240, 451 P.2d 320 (App. 1969). The parties
22 should be free to negotiate the terms of a stipulated
23 judgment as in all other civil matters.
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26 Stipulated judgments serve the judicial interests
27 of bringing finality to litigation and reducing
28

1 judicial resources on unwarranted post judgment
2 motions and appeals.

3
4 **CONCLUSION**

5 Undersigned counsel commends the task force the
6 detailed work that was put into these proposed rules.
7 Unfortunately, we believe that certain aspects of the
8 rules violates the separation of powers and requires
9 this Court to engage in balancing of public policy and
10 financial interest of industry and citizens.
11 Counsels' recommendations herein generally request
12 this Court to strike the provisions relating to
13 increased production of paperwork and the resulting
14 judicial resources.

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1 It is important to recall that the purpose of the
2 task force was to create a procedure for forcible
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RESPECTFULLY SUBMITTED this 19th day of May, 2008.

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