SUMMARY COMMENTS
ON
PROPOSED RULES OF PROCEDURE
FOR
EVICTION ACTIONS

By

Charles E. Jones
5022 E. Calle del Norte
Phoenix, Arizona 85018

Tel. 602-952-0993
e-mail: cjoneslaw@cox.net
State Bar of Arizona No. 1593

GENERAL CONSIDERATIONS

The following comments were prepared independently at the request of Arizona's rental housing industry consisting of the Arizona Association of Realtors, the Arizona Multi-Housing Association, the Manufactured Housing Communities of Arizona and the National Apartment Association, and are intended to highlight what I see as problem areas in the proposed Rules of Procedure for Eviction Actions. The Rules contain many positive features which would serve the system well and on which I see no specific need to comment except as comparisons may be drawn with the negatives. In the interest of brevity, these comments are focused primarily on problem areas.

It is generally accurate to state that the newly proposed Rules will necessarily result in a substantial addition of paperwork and filings in the day-to-day prosecution of eviction claims. A further result will be that the cost to prosecute from beginning to end will increase significantly in every case. It can be predicted that Justice Courts handling a large volume of eviction suits will require added funding simply to pay the increased cost of an added layer of judicial administration. These increases become virtually automatic as we attempt to deal with the increased amount of research required by landlords and the added documentation required for filing, service and case processing under the Proposed Rules. This economic burden will necessarily impact rental rates, lawyer fees and will result in higher administrative costs.

A report prepared by Elliot D. Pollack & Company for Arizona's rental housing industry reaches a well-documented and statistically sound conclusion -- probably a confirmation of the obvious, but nevertheless a necessary confirmation. It is that the newly proposed rules will not achieve their desired objective for the reason that the defendants, in the vast majority of residential tenant eviction actions, choose not to appear and defend either in person or through representative counsel. Tenants, in large numbers and by a wide margin, simply choose to let the eviction claim go by default.

The proposed Rules, in my opinion, do not address that problem, nor am I persuaded that it can ever really be addressed through changes in the court's Rules. This problem is societal, not judicial. Pollack concludes correctly that a cost/benefit analysis is called for because the additional notice and pleading requirements will result in greater cost in every case, and will add to the duration of each case. Because of this circumstance, Pollack states:

> "Since the results of the survey . . indicate that there is no clear relationship between some forms of policy and tenant appearance at a hearing, policymakers must also acknowledge that some of the proposed rules may not ultimately result in a desired change."

I reviewed a 2005 "study" titled "Injustice in No Time" prepared by the Morris Institute for Justice, a Tucson group (not to be confused with ASU's Morrison Institute). The study was confined to Maricopa County. Their report displayed a severe bias in favor of Tenants and against Landlords in eviction litigation. The Morris study did not use a scientifically sound and unbiased approach to the analysis. Therefore, I assess the Morris results as having little or no credibility. Apparently the Proposed Rules were developed by a State Bar Committee as a result of the Morris Institute report.

Reading the proposed Rules, certain provisions create the impression that Justices of the Peace who preside in these eviction cases must also serve as advocates for the Tenant whose eviction is sought. See e.g., Rule 13 a., where the judge, before the action can proceed, is required, on behalf of the Tenant, to ascertain from the Landlord, successful compliance with several items including proper and timely service of process, adequacy of notice, the right to possession, and partial payment of rent. In our adversary system, defects in these areas are normally called to the attention of the court by motion or pleading, filed by an adverse party, leaving the Justice free simply to rule on the existence or non-existence of the defect. The Rule places the onus on the Justice to assemble the evidence and then ascertain compliance with the Rules, rather than allowing the adverse party to do it. Too much of this may have the undesirable effect of converting a judicial proceeding before a judicial officer into a quasi-administrative proceeding before an administrative officer.

I have read the State Bar's "Petition for Rules of Procedure for Eviction Actions" as well as the "Minority Report" by Justice of the Peace Gerald A. Williams. Justice Williams correctly points out that the proposed Rules may intrude inappropriately into the substantive law making arena, leaving inconsistencies between Landlord/Tenant statutes and the set of Proposed Rules. Rule 17 d. is an example. In that Rule, a holdover Tenant desiring to remain in possession of the rented premises pending an appeal may, by giving notice to the court, require the court, among other things, to "balance the interests" of (a) the breaching Tenant, (b) the Landlord and (c) the public at large, and then in the balancing process, "consider whether the writ can and should be stayed or superseded." This may be a statement of substantive law, or, at the very least a declaration of public policy by Rule. It is probably at odds with existing law, and does not resonate as a clearly drafted Rule of Procedure. Statements like those in Proposed Rule of Procedure 17 d.

appear more substantive than procedural and would require clearly defined consistency with legislative enactments already on the books.

SPECIFIC ITEMS OF CONCERN

"Counsel of Record"

Proposed Rule 4 e. is a clear example of a cost vs. benefit issue. This proposal would prohibit any attorney from appearing in an eviction action without first entering an appearance as "counsel of record," and notifying all parties and the court of the attorney's appearance, substitution or association in the case. This is a requirement generally imposed by Courts, and it reflects sound judicial policy. But the current practice, using "sub-contractors" in this substitution role in eviction cases, is described in the Pollack report, stating that as many as 25 percent of all eviction cases are handled in this manner. Accordingly, the proposed Rule will result in a substantial increase in the cost of prosecution. These "sub-contractors" are, as far as we can tell, other attorneys who earn a living hiring out to perform the service. While the attorney-client relationship may be tenuous in these cases, it should be noted that sub-contractor/attorneys are nonetheless officers of the court, subject to the court's jurisdiction, and subject to the Supreme Court's ethical canons for all lawyers practicing in this State. Again, the question is whether the landlord/tenant eviction arena would derive sufficient benefit by eliminating the use of "sub-contractors," or would it simply add another significant element to the cost of processing cases.

Summons and Complaint as Separate Documents

Proposed Rule 5 a., requires that the Summons and Complaint be submitted and served as separate documents. The proposal makes sense, but as in the case of other proposed Rules, will add to the cost and duration of each proceeding. It makes sense, to separate the Summons from the Complaint and to provide the other information referenced in Proposed Rule 5, subsections (1) through (5). These requirements touch directly on notice as a requirement due process. There will be a cost increase, but the proposal would result in clearing up any misunderstanding as between allegations in the complaint and requirements of the court contained in the summons. The increase in cost is probably justified.

Filing of Eviction Complaints and Other Papers

Proposed Rule 6 a. (3) suggests that the time may have come to examine the possibility of electronic filing of eviction complaints and other papers, rather than continuing to use the more antiquated system of mailing to the court by prepaid, first class mail. Proposed Rule 6 c. would permit the parties, by agreement, to receive service

of Pleadings, Other Papers and Orders by facsimile transmission. Electronic service is a mere step away – and it works

Filing a Response to a Motion

Proposed Rule 9 is silent as to the number of days permitted to file a Response to a Motion. The Rule simply indicates that the court should not rule on the motion until the opposing party shall have had "a reasonable opportunity to respond." This is of particular importance in the case of post trial motions where the matter of "finality" is vital. The proposed Rule says only that the filing of Motions, Responses and Replies shall not delay the proceeding beyond the times set by statute except for continuances duly granted. I would set specific time frames by Rule. This area easily becomes murky, and points up another reason why statutes and the Rules should conform to each other.

Disclosures

Proposed Rule 10 requires the disclosure of information at the request of the adverse party. It is a good Rule, but I would omit item No. 2 from Rule 10 a. (a list of witnesses and exhibits). In these high volume, fast moving cases, prior identification of witnesses and exhibits poses an undue burden on the parties that accomplishes little in an eviction case. It creates one more basis for delay and added cost. Eviction cases can be tried equitably without prior disclosure of witness names and exhibits.

Courts of Record?

Proposed Rule 11 is replete with requirements that will add significant cost. Mandating a recording or transcript of all proceedings in all eviction cases is onerous. The main reason Justice of the Peace Courts are not defined as "courts of record" is that historically, they did not maintain complete records and there were no transcripts of proceedings. A complete record was deemed unnecessary by reason of the limited jurisdiction granted these courts. I would eliminate the requirement, as to all cases adjudicated within the jurisdictional dollar amount applicable to Justice Courts.

Change of Judge

Under Proposed Rule 11 e (1), allowing both parties a one-time Change of Judge as a Matter of Right would be a mistake. Change as a matter of right is costly and time consuming. It is a practice that has developed in the culture of Arizona's courts and should be discontinued. Arizona's Judges are placed in office either by direct vote of the people, as in the case of Justices of the Peace, or by merit, after thorough screening by one of our nominating commissions as in the case of Superior Court Judges in Pima and Maricopa Counties and the State's appellate judges and supreme court justices state-wide.

Screening is followed by recommendation and gubernatorial appointment. Judges are presumed competent to do the people's work. Whether appointed or elected, judges should be permitted to do the work they are charged to do. They should not be subject to peremptory removal from the case.

"Change for cause" is a different matter and raises questions of bias and prejudice which any party should have the right to correct by written motion for change.

Public Policy is Within the Legislative Province

Returning to an earlier theme, I view proposed Rules 14, 16, and 17 as containing substantive declarations of public policy, much of which should be embodied in statute and enacted by the legislature rather than in a rule of court. For example, Rule 14 grants the judge, the justice of the peace, or the clerk of the Superior Court, authority to issue the writ of restitution "if it appears that a judgment granting possession has been entered in favor of the party filing the writ and the action has not been stayed." Eviction cases fall under a strict statutory scheme. A writ of restitution in an eviction case often involves the use of law enforcement personnel who in turn may use force to return the premises in question to the party entitled. It would represent a serious "stretch" for the courts, acting unilaterally, to assert such control in these cases. The legislature should speak first.

Case Transfer to Superior Court – a Policy Matter

Proposed Rule 16 is similar, declaring when justice court cases may be transferred to the Superior Court. There are policy and budget reasons why the legislature should determine which eviction cases may be transferable and which may not.

Standards and Qualifications in the Appellate Process

Proposed Rule 17 which addresses Appeals in eviction cases contains statements of policy that should be left to the legislature. Sub-sections b. (1), (2) and (3) on posting bonds are examples. Another is sub-section d. which involves findings of "Material and Irreparable Breach" in fixing the qualifications required for the execution of a writ of restitution including "violent conduct, crimes against children, criminal activity involving serious property damage or drug-related criminal activity. . . ." These are policy declarations which the Courts should not presume to manage without involvement by the legislature. Such proposed Rules should either be reviewed and revis in light of existing statutes, or, if necessary, statutes yet to be amended or enacted.

Conclusions and Recommendation

Having reviewed all pertinent material, I have two significant concerns. First, even assuming the proposed Rules contain much that is positive and useful, (which I believe they do), many provisions will nevertheless increase the cost to prosecute the growing volume of eviction cases filed in Arizona, will contribute added delay in case disposition and, importantly, will fail to address the real problem that roughly 80 percent of defendants simply fail to appear in court. In the end, when any costly or burdensome procedure is adopted, access to the justice system by the parties is often impaired and the opportunity to achieve justice is reduced.

Second, the proposed Rules, in many areas tend to manage eviction litigation under newly stated public policy. Detailed policy statements as contained in the proposed Rules are, I believe, at odds with current legislative will. As indicated, there are numerous examples wherein the court, through its rule-making authority, appears to assert control over public policy matters better left to the legislative process, at least in the first instance.

I recommend that the Proposed Rules be placed on long-term hold until a committee of individuals or the existing committee can be reassembled to take into account comments and concerns expressed to date by various interests, in particular the minority report of the State Bar which, for some reason, was apparently never forwarded to the Supreme Court until Justice Williams submitted it himself. The Pollack report is similarly relevant and should be addressed. The committee would be responsible to revise the language of the Proposed Rules and at some point, conform them to the statutory scheme, an exercise that ultimately will involve the legislature. This is an area in which the two branches of government should come together to create a workable system that will allow substantive law-making authority to issue from the legislature and rules of procedure from the courts. (See A.R.S. 12-109 A, stating: "The rules [of court] shall not abridge, enlarge or modify substantive rights of a litigant.") This process becomes necessary because the legislature has heretofore determined that it will adopt and control the statutory scheme in the area of landlord-tenant disputes and eviction litigation.

The objective would be to create a more efficient and perhaps less costly method by which to process the growing volume of eviction cases in a rapidly expanding urban population. Only after the first phase of work is done by the committee should new Rules be considered and adopted, and then only <u>after</u> reaching an accord with the legislature.

In brief, I believe the conclusions which I have reached are in accord with the conclusions reached by the State Bar's Minority Report authored by Justice of the Peace, Gerald A. Williams. I also believe economist Elliot Pollack has given us an accurate account of the prospective economic impact and delays that are to be expected, should we move, without legislative involvement, in the direction of the Rules as now proposed.

Dated this 17th day of May, 2008

Charles E. Jones
State Bar No. 1593