ELLEN SUE KATZ, AZ Bar. No. 012214
WILLIAM E. MORRIS INSTITUTE FOR JUSTICE
202 E. McDowell Rd., Suite 257
Phoenix, AZ 85004
(602) 252-3432
eskatz@qwestoffice.net

IN THE SUPREME COURT

STATE OF ARIZONA

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| IN THE MATTER OF PETITION FOR RULES OF PROCEDURE FOR EVICTION ACTIONS | Supreme Court No. R-07-0023 |
| | **Supplemental Comments** |

Pursuant to Rule 28 of the Rules of the Supreme Court, and the Court's September 2008, order allowing for supplemental comments to address the changes the Court's draft rules made to the rules proposed in the petition filed on December 12, 2007, the William E. Morris Institute for Justice submits these supplemental comments to the Arizona Supreme Court, on its own behalf and on behalf of the three legal services programs in Arizona.

**Statement of Interest**

The William E. Morris Institute for Justice ("Institute") is a non-profit program established to advocate, litigate and lobby on behalf of the interests of low-income Arizonans. We work closely with the federally funded legal services programs and community groups. One substantive area the Institute has worked on is housing. In the summer of 2005, the Institute published its report "Injustice In No Time: The Experience of Tenants in Maricopa County Justice Courts" ("Institute's Report"). The report documented the numerous ways the eviction court proceedings were conducted to favor landlords and deny tenants their constitutional and statutory rights.

Community Legal Services, DNA People's Legal Services and Southern Arizona Legal Aid are the three legal services programs in Arizona federally funded to provide

civil legal services to poor Arizonans. Attorneys in all three programs represent tenants in eviction cases throughout the state. They are the few attorneys in the state available to represent tenants at no charge and are experts in landlord and tenant law.

As explained in the Institute's initial comments to the proposed rules, the importance and magnitude of eviction cases cannot be overstated. There are over 82,000 evictions filed in Maricopa County each year. In these cases, over 85% of the landlords are represented and fewer than 200 tenants each year are represented. Eviction actions have very short time frames. As an example, summonses are typically served only two days before trial, A.R.S. §§ 33-1377(B), 12-1175(C), and writs of possession are awarded five days after trial. A.R.S. §§ 33-1377(A) and 12-1178(C). Significantly, eviction actions affect housing. Legal services advocates note that evicted persons often become homeless and lose their property as a result of these actions.

The Institute and the three legal services programs support the proposed draft rules. While we recognize that the proposed rules, if followed, will be a substantial step toward providing due process for tenants, we request that the Court reconsider the changes noted below.

Those advocating on behalf of landlords submitted several comments to the original proposed rules. The current eviction court system has worked to the overwhelming benefit of landlords. In evaluating these draft rules, we ask the Court to consider the due process rights of tenants.

**I. Rule 5(a). Summons and Complaint.**

The proposed rule required the summons be a separate document from the complaint. The Court removed this requirement.

**Response:** Currently, the summons and complaint are on a one page pleading. The proposed Rule 5(a) initially was suggested by a Justice because he thought the current form used by most landlord attorneys was very confusing to tenants.. This change was supported by legal services attorneys. The advocates continually hear from tenants who think the complaint is from the court. Two examples of the conjoined

summons and complaint are attached as Exhibit 1 to this Supplemental Comments with the tenants' names, apartment numbers and the last two digits of the case numbers redacted. A separate summons is used in all other civil cases and should be required in eviction cases. The cost of one extra page is inconsequential to ensuring that tenants understand who is serving them with process.

**II. Rule 5(g). Failure to Obtain Service.**

The proposed rule provided that if the complaint was not properly served, the complaint "shall" be dismissed. The Court changed the word to "may."

**Response:** In the overwhelming majority of eviction cases, tenants do not appear in court. While there are disputes over why this occurs, legal services attorneys firmly believe it is often because the tenant was not properly served. This problem was highlighted in the Institute's Report at pages 18-19. From the report and legal services attorneys' experiences, because the justices do not appear to check for service, there is little incentive for landlords to consistently properly serve tenants. This was the reason Rule 5(g) was drafted to require a dismissal. Continuances in eviction cases are limited to three days and this timeframe often will not allow for proper service.

While in the typical civil case, the plaintiff does not bring the matter before the court until there is service, the quick timeframes in eviction cases mean a case is set for trial before the plaintiff knows if there was proper service. The quick timeframes are for the landlords' benefit, not for the benefit of the tenants. The Institute and legal services attorneys strongly request this Court revert to the original proposed rule that if there is not proper service, the case "shall" be dismissed.

**III. Rule 5(b)(8). Notice of Subsidized Housing.**

This rule required a landlord leasing a unit under a subsidized state or federal program to state in the complaint that a proper notice pursuant to applicable regulations was given to the tenant. The proposed rule was deleted by the Court. The Court added a new section "j" under Rule 4, Duties of Parties and Attorneys that requires: "The parties shall comply with all federal and state laws and regulations governing subsidized rent."

**Response:** The statutes and regulations for subsidized housing require different notices and different time periods to terminate a tenancy than required under the Arizona Residential Landlord and Tenant Act ("ARLTA"). Currently, unless the landlord informs the court that the unit is subsidized, there is no way for the court to know. In a private eviction, the tenant loses possession of the residential unit. In marked contrast, in a public tenancy eviction, the tenant loses not just possession of the residential unit but loses her right to the subsidized housing. An evicted tenant loses her Section 8 voucher, a certificate that allows the tenant to rent housing at a significantly subsidized cost. *See, e. g.*, 24 C.F.R. § 982.552(b)(2) (tenant terminated from Section 8 program if evicted); 24 C.F.R. § 982.552(c)(1)(ii) (housing assistance denied to family member evicted from federally assisted housing lease within 5 years of application). Or the tenant may lose her right to return to public housing. *See, e.g.*, 24 C.F.R. §§ 960.203-204. Thus, an eviction from a subsidized housing unit means a poor tenant may lose her most valuable public benefit. Legal services programs continually receive calls from tenants improperly evicted from public and subsidized housing.

It is a specious argument for landlords to claim the rules concerning subsidized housing are too complicated for them to give proper notice. When landlords decide to accept the federal payments for subsidized housing they agree to follow the law governing those programs. Proposed Rule 5(b)(8) only pertains to the termination of tenancy notice and is critical for tenants. Landlords with subsidized housing units are required to comply with the federal requirements on terminating a subsidized tenancy. Because landlords fail to plead that the housing is subsidized, and the justices fail to inquire, there is no way for the court to know if the eviction is proper. *See* Institute's Report at page 50, footnote 153.

Adding draft rule 4(j) does not address this serious problem. Unless the landlords plead a proper notice was given to the tenants and the justices check for these enhanced notice requirements, poor tenants improperly will lose their housing subsidies. The

Institute and the three legal services programs request the Court revert back to proposed Rule 5(b)(8).

**IV. Rule 11(e). Change of judge as a matter of right and for cause.**

Rule 11(e) concerned the change of judge. The proposed rule was deleted by the Court. Under the Court's draft of Rule 1, the Court added that Rule 42(f) of the Arizona Rules of Civil Procedure shall apply to eviction cases in superior court.

**Response:** The current practice in eviction cases is to allow for motions to change judge. During the committee deliberations, the only concern raised was in counties where there was only one justice. Certainly in larger counties, the current practice has not caused significant problems. The proposed rules were intended to provide guidance on the current process. By deleting Rule 11(e), the Court is changing current practice and restricting a party's right to file a motion when the party believes the justice is biased or prejudiced. The effect will be to deny a party the right to have her case heard by a judge a party considers fair and impartial. Another reason this rule is important is because many of the justices are not attorneys. Proposed Rule 11(e) should be re-inserted. The Institute and legal services advocates believe this provision is necessary to ensure fundamental fairness in the eviction process.

**V. Rule 13(b)(4). Stipulated Judgments.**

The proposed rule concerning stipulated judgments included the following sentence: "The Court shall not enter a stipulated judgment that contains a waiver of post judgment motions or appeals." The Court deleted this sentence.

**Response:** The use of stipulated judgments by landlord attorneys was explained fully in the Institute's Report at pages 28-29. Many landlord attorneys include waivers of post-judgment motions and appeals in their stipulations. Thus, tenants who enter into these stipulations are worse off than tenants who do not come to court at all or do not appear before the judge. The Institute and legal services attorneys seriously doubt that the landlord attorneys adequately explain the effect of these waiver provisions. As the Institute's Report documents and legal services staff experiences show, these

"stipulations" rarely provide any relief to the tenant, such as a reduced judgment or more time to move. Overwhelmingly, these are form stipulations prepared ahead of time by the landlords' attorneys and given to unrepresented tenants.

The parties do not have equal bargaining power. As noted in the Institute's Report, in some courts the court call was stopped so that landlord attorneys could meet with the tenants. In a process so fraught with overreaching, not allowing these waivers is required. If the Court does not prohibit these waivers, then we request that the Court modify the rule to only allow for the insertion of such a waiver in a stipulated judgment when both parties appear before the court. This will provide the court the opportunity to inquire about the tenant's understanding of the provisions in the stipulation.

**Conclusion**

The William E. Morris Institute for Justice, Community Legal Services, DNA People's Legal Services and Southern Arizona Legal Aid request that the draft Proposed Rules of Procedure for Eviction Actions be adopted with the above modifications to promote public laws and policies that enhance the profession and support the administration of justice.

Respectfully submitted this 14th day of November 2008.

WILLIAM E. MORRIS INSTITUTE FOR JUSTICE

By /s/ Ellen Sue Katz

Ellen Sue Katz
William E. Morris Institute for Justice
202 E. McDowell Road, Suite 257
Phoenix, Arizona 85004

Original and six copies of this Supplemental Comment, with Exhibit and CD Rom in Microsoft Word personally filed with the Clerk of the Supreme Court of Arizona this 14th day of November 2008

COPY of the foregoing served by mail this 14th day of November 2008, to:

Petitioner, Robert B. Van Wyck
Chief Bar Counsel
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, Arizona 85016-6289

By: /s/ Ellen Katz