

**R-07-0023**

**PROPOSED NEW EVICTION RULES**

**Comments by C. Steven McMurry**

**November 14, 2008**

I served on the Committee that drafted the proposed new eviction rules. I wanted to comment on three changes that the Court itself, with no input from the Committee, made to the proposed rules. These changes, I fear, reveal a fundamental lack of understanding of the nature of the eviction process. I am also convinced that these Rules have a profoundly adverse impact upon tenants. I want to prevent such an adverse impact.

***Rule 5(a) – The Summons***

The Court would eliminate the specific requirement that the summons be a document separate from the complaint.

The single page summons and complaint is ubiquitous in current eviction practice. Far more than half of the evictions in Maricopa County use the single page summons and complaint. The summons is on the top part of the page, with the facsimile signature of the judge, and the complaint, with the attorney's signature, is the bottom part of the same page.

To the legal professional the form is innocuous. But to the untrained litigant (and who, indeed, is more likely to be an untrained litigant than a defendant in an eviction case?) the appearance is pernicious. The recipient of such a document has the impression that the judge and the plaintiff have already conferred and formed an opinion about the merits of the plaintiff's case.

Winning the agreement of Committee members that these documents should stand by themselves was an early victory in the drafting process for tenants. Having the Court take the victory away is a setback. The cynic might argue that the provision is now unnecessary for the practical reason that there are so many required provisions for summons and complaints that combining the documents would be impossible or impracticable.

This writer would prefer not to have to take the risk.

### ***Rule 8(e) – Payment of Rent Into Court***

The Court would eliminate the provision pursuant to which the trial court directed the tenant withholding rent to pay the rent into the trial court pending trial.

It is virtually impossible to discuss this issue without using an example. Assume that a tenant refused to pay September's rent because, for four days in August, his apartment was without air conditioning. The trial in that case produces a judgment that gives the tenant a pro rata credit for the four days in which his apartment was uninhabitable. It is an eviction judgment, nonetheless. It is an eviction judgment – with all the horrible attendant consequences for the tenant – because nothing in Arizona law justifies the withholding by the tenant of the 27 days of rent that were undisputed.

The provision was an effort to ameliorate such a harsh result by using the “safe harbor” provision of A.R.S. Section 33-1365(A). The trial court would have been able to give judgment to the landlord for 27 days of rent but leave the tenant in possession because the tenant has demonstrated his good faith.

This Court eliminates this option.

### ***Rule 17 (d) – Stays in Appeals from “Immediate and Irreparable” Cases***

The Court would eliminate the provision permitting a hearing to preserve the status quo while an appeal is being taken from a judgment of eviction for an “immediate and irreparable” breach

In the Committee it became clear that opposition to this provision was inextricably intertwined with a mistaken assumption about the law. The assumption was that, when an eviction proceeded under a theory of an “immediate and irreparable” breach, the issuance of a writ of restitution could be stayed by the posting of a rent bond.

That assumption does not withstand analysis. The rent bond provisions to stay a writ of restitution were adopted before the Legislature enacted the special detainer provisions permitting issuance of a writ of restitution within twelve to twenty-four hours of a judgment of evictions for an “immediate and irreparable” breach. Until then, no writ of restitution could issue until five days after the entry of the eviction judgment. The mistaken assumption was that the legislature, by its silence, intended the rent bond provisions to apply to these extraordinary evictions. The assumption, in other words, is that the legislature intended that a child molester who had misrepresented his criminal history, or a meth lab operator, whom the legislature wanted expelled in twelve hours, could remain in the

complex for another year (an appeal can easily take a year) simply by arranging to pay the rent.

The better analysis, reached by the Committee, was that with the addition of the last sentence of A.R.S. Section 12-1179(E) the Legislature intended to authorize an inquiry as to whether a writ of restitution should be stayed in “immediate and irreparable” cases.

This is not a problem in the case of the child molester or the meth lab operator. The problem arises from the fact that the extraordinary evictions have been used far more widely. They have been brought against the young man who (legally) wears his handgun in a holster while he goes around the complex knocking on doors and asking residents to turn down their music. The actions have been brought against the timid, law abiding elderly couple because their gang-banger grandson visited them and “tagged” the trashcan at the complex. The legal economics of complex management requires the initiation of “immediate and irreparable” evictions in these cases rather than facing the wrath of, and possible negligence claims from, the other tenants.

The provision would have permitted the young man to stay while he appealed as long as he agreed not to wear the handgun within the complex. The grandparents could stay as long as grandson stayed away. Chances are, during the appeal, a settlement could be reached that might involve a move but not an eviction judgment.

This Court’s action tends to reduce the availability of this option, and makes it more likely that the lifting of the stay will be routinely granted when requested in an “immediate and irreparable” case.

The Arizona Legislature has chosen to make the eviction process move very fast. The law provides only narrow avenues to defend against an action. This Court, perhaps unwittingly, has further stacked the deck against innocent tenants. This writer urges this Court to reverse its approach and restore these three deleted provisions.

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