

*Memo to RCiP.LJC: June 1, 2012*

To: Committee on Civil Rules of Procedure for Limited Jurisdiction Courts  
From: Committee staff  
Re: **Summary of comments received on R-12-0006 during the second comment period, and summary of other issues**  
Date: June 1, 2012

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**1. Background:** The Chair filed Rule petition R-12-0006 on January 6, 2012. The initial comment period closed on March 16, 2012. RCiP.LJC met on March 30 and April 13 to consider thirteen comments posted on the Rules Forum during the initial comment period. On April 26, the Chair timely filed an amended rule petition with a revised set of rules. The comment period for the amended rule petition closed on May 29. RCiP.LJC has an opportunity to file a reply in R-12-0006 before the June 29 deadline.

**2. State Bar comment:** The State Bar filed a formal comment<sup>1</sup> on May 18. The brief comment stated that the Bar “...now fully supports the Amended Rule Petition....”

Staff’s response: The Bar’s comment represents the near-unanimous consensus of the Board of Governors.

**WGK Comment:** No action is necessary. Kudos to Paul and Mark for successfully navigating the State Bar’s bureaucracy.

**3. Comments by Legal Services Committee:** Ellen Katz, chair of the Access Subcommittee of the State Bar’s Legal Services Committee, submitted a letter dated May 4, 2012 to Lisa Loo, Chair of the Rules Committee, which included the following comments:

a. Form of summons: Ms. Katz believed that a change to the summons is required to reflect that a written answer is not required in all cases. She noted A.R.S. § 22-215, which provides:

*“The pleadings in the justice of the peace court may be oral, except as otherwise provided by law, but a brief statement thereof shall be noted in the docket.”*

Staff response: The members discussed A.R.S. § 22-215 at the April 20, 2011 meeting. The minutes of this meeting show the following:

*“Certain statutes must also be taken into consideration in drafting new rules. For example, although A.R.S. § 22-215 allows oral pleadings, the rules of procedure and Rule 10 in particular appear to require that pleadings be written.”*

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<sup>1</sup> This and the other comments referred to in this memo are in the June 1 meeting materials. The State Bar’s comment is the only new comment posted on the Rules Forum during the second comment period.

Does RCiP.LJC need to reconsider its position concerning the implications of A.R.S. § 22-215?

**WGK comment:** Yes, the Rules must be consistent with legislation.

b. Information regarding a filing fee: Ms. Katz noted that while the JCRCP's "*Notice to Defendant*" mentions fee waivers and deferrals, there is no mention of a fee waiver or deferral in the summons (see A.R.S. § 12-302) and the summons is therefore incorrect and inadequate.

Staff response: Ariz. R. Civ. P. Rule 4(b) sets out requirements for a summons. There is no requirement in Rule 4(b), nor is there a requirement in A.R.S. § 12-302, that the summons advise of the opportunity to request a fee waiver or deferral. The domestic relations summons that is available on the Maricopa County Superior Court webpage contains no information about the availability of a fee waiver or deferral.

Rule 5 of the Rules of Procedure for Eviction Actions, which concerns the summons, also contains no requirement that the tenant be advised of fee waivers or deferrals. However, as with the proposed "*Notice to Defendant*" in the JCRCP (Form 2), this information is included in the Residential Eviction Information Sheet (REIS). Compare:

*REIS (RPEA): "If the tenant cannot afford to pay the answer fee, he or she may apply for a waiver or deferral of that fee."*

*Notice to Defendant (JCRCP): "You must pay a filing fee to the court when you file your answer. If you cannot afford to pay a filing fee, you may apply to the court for a fee waiver or deferral, but you must still file your answer on time."*

**WGK comment:** I have nothing to add on this issue, and trust in the judgment of the Committee.

c. Request for reasonable accommodation for persons with disabilities: The form of summons in the JCRCP (Form 1) contains this statement in boldface, capitalized type:

*"Request for reasonable accommodation for persons with disabilities must be made to the court by parties at least 3 working days in advance of a scheduled court proceeding."*

Ms. Katz' comment says that (1) this statement violates the ADA; (2) there is no authority that allows the courts to impose a 3 working day requirement on requests for reasonable accommodations; and (3) a litigant may not receive the court papers 3 working days prior to the hearing date.

Staff's response: The provision in the JCRCP summons is based on Ariz. R. Civil P. Rule 4(b), which provides in part:

*“The summons shall state that ‘requests for reasonable accommodation for persons with disabilities must be made to the court by parties at least 3 working days in advance of a scheduled court proceeding.’”*

Because the statement is included in a summons, which allows a party at least twenty days to answer, a party should have more than three working days in which to submit the request for reasonable accommodations. While Ms. Katz correctly notes that RPEA Rule 5(a)(5) requires that an evictions summons advise that a request must be made “as soon as possible” rather than the three-day requirement, evictions have a more compact procedural time line, and three days may be impractical in eviction cases.

**WGK comment:** I have nothing to add on this issue, and trust in the judgment of the Committee.

d. Cost of preparing forms on AZ TurboCourt: Ms. Katz’ comment states that “*the summons informs the recipient that s/he can go to TurboCourt to get the answer form and file the answer electronically,*”<sup>2</sup> but that “*persons have to pay to download forms and there is no fee waiver or deferral on TurboCourt yet.*” The comment encourages the A.O.C. to “*expeditiously resolve the lack of a fee waiver and deferral process on TurboCourt.*”

Staff’s response: As indicated in the footnote, there is presently no functionality for electronically filing any documents, including applications for fee waivers and deferrals, in justice court civil cases.

E-filing is available in the Maricopa County Superior Court. Supreme Court Administrative Order 2011-140, entered on December 22, 2011, governs e-filing in that court. For background and context, certain provisions of A.O. 2011-140 concerning fee waivers and deferrals are noted.

Paragraph 2(a) of this Order requires attorneys to file post-initiation documents electronically. Paragraph 2(b) allows, but does not require, self-represented litigants to file documents electronically; and further specifies that a self-represented litigant who chooses to file through AZ TurboCourt “*...shall pay all applicable fees....*” Paragraph 3(a)(vi) allows an attorney to file an application for a fee waiver or deferral in paper form; and 3(f) exempts documents filed on behalf of litigants who have been granted a fee waiver or deferral from the e-filing requirement. Paragraph 3(g) further provides that an attorney who is an employee of an approved legal service organization and who is representing a litigant who is unable to pay the application fee for filing a document on AZ TurboCourt is exempt from e-filing. That attorney may file documents on paper; or the attorney may file through AZ TurboCourt after paying the application fee.

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<sup>2</sup> AZ TurboCourt does not currently accommodate “e-filing” of pleadings in justice courts. (However, a pilot program for e-filing in small claims cases is being conducted at this time.) AZ TurboCourt provides a web-based, inter-active intelligent form that, when completed, is printed by the user and filed in paper format in a justice court civil case. There is a \$15 cost for preparing an answer to a justice court complaint on AZ TurboCourt; see A.O. 2009-74.

In summary, there is no provision in Administrative Order 2011-140 that permits a self-represented or attorney-represented litigant who may be eligible for a fee waiver for applying for the waiver electronically, or for obtaining a waiver of the AZ TurboCourt application fee for subsequent e-filing. These litigants must utilize paper filing.

**WGK comment:** I have nothing to add on this issue, and trust in the judgment of the Committee.

**4. Comments by Judge Segal and Judge Ward:** Pima County Judges Segal and Ward submitted an undated letter to the Rules Committee. The letter is substantially similar to the comment provided by Judge Segal on the Court Rules Forum during the initial comment period.

Judge Segal will appear telephonically at the June 1 meeting to elaborate on these comments. In particular, Judge Segal will address RCiP.LJC about standardizing mandatory mediation procedures and forms. She believes that there are so many different methods of directing mediation throughout the State that uniformity is essential.

**WGK comment:** While I agree that statewide uniformity concerning the mediation procedures is a desirable objective, my recollection is that we received feedback from various JP's indicating that this is not achievable due to resource limitations. My cursory thoughts on the balance of the issues raised in the letter are as follows (identified by the letter's numbering):

1. The Chief Justice selected the Committee's members and, while all certainly shared a certain level of sophistication likely unrepresentative of most self-represented litigants, segments of the Committee advocated on behalf of self-represented litigants and that advocacy made its way into the final work product. However, without any specific criticism, it is difficult to respond to the offered observation.
2. We have debated the assigned debt collection issues as much as (if not more than) any other aspect of the proposed rules, and I stand behind the compromise we achieved. The assignability of debts and causes of action, and the legality of excessive interest rates are matters of substantive law, and not procedure. The admissibility of "robo signatures" attesting to aspects of an asserted debt has been, and will continue to be, governed by the Arizona Rules of Evidence.
3. My reaction to this comment is that the problems identified therein cannot and should not be addressed in procedural rules. I remain philosophically opposed to singling out any class of litigant for more onerous treatment than any other, and we have achieved an agreed-upon compromise between stakeholders representing the interests of the impacted groups. More generally, there is no way to uniformly proscribe what specific documents the judge should require before entering a default. The myriad of situations which might arise are simply too numerous to permit such an approach. However, if the matter has proceeded to default, the allegations in the complaint are deemed admitted. If the judge declines to enter judgment based upon an affidavit of

sum certain liability out of concern over one of the matters enumerated in the comment, the judge may require an evidentiary default hearing at which the evidence will be presented. Finally, the newly-enacted statutes included in our materials provide some guidance to judges faced with these issues.

4. (There was no 4).

5. The ability of HOA's to collect prospective assessments is a matter of substantive law which should not be addressed in the Justice Court Rules.

6. We studied the West Virginia Rules as an exemplar of an approach that could be taken, and considered a Committee member's suggestion for a "bare bones" approach. The Committee rejected the same.

7. Comment 7 appears to be a matter of judicial education and regulation beyond the scope of our charge from the Chief Justice.

Rule 111. A plaintiff may assert in a single suit as many claims as it has against a defendant, regardless of whether they are factually connected. This is existing Arizona and federal law. *See* Ariz. R. Civ. P. Rule 18(a) (amended in 1966); F.R.C.P. 18(a) (same). Rule 111 was not "specifically designed" for the purpose suggested in the comment, but rather to serve the interests advanced by Rule 18(a) which are to avoid piecemeal and premature judgments, encourage the disposition of all claims in a single action, and alleviate problems associated with distinct available legal and equitable remedies. *See* MCAULLIFFE & MCAULIFFE, ARIZONA CIVIL RULES HANDBOOK (2011 Ed.) at 311.

Rule 129. (A). The notice is not the Rule, and the Rule specifies what must be submitted in opposition to a motion for summary judgment. However, it might be appropriate to reference Rule 129(c) in the notice.

(B). It is not an absolute truism that an attorney may not testify in their own case. Indeed, attorneys often file affidavits in many different contexts in connection with motions or responses they have filed. The issue of attorney affidavits filed in the summary judgment context (other than those filed in support of a Rule 56(f) application) is typically that the attorney lacks personal knowledge of the matters asserted, rendering the affidavit inadmissible for lack of foundation. Accordingly, it cannot be considered by the court. More fundamentally, I'm not sure I see the problem here. If an attorney files such an affidavit and an opposing pro se litigant does not object to it, the judge should still decline to consider it based upon its discretion under proposed Rule 129(c) (last paragraph) and the direction given in Rule 129(d).

(C). This issue is one of admissibility properly governed by the Arizona Rules of Evidence, and not the Justice Court Rules. The affidavits must be admissible, and business records must be authenticated unless self-authenticating under the Arizona Rules of Evidence.

**Rule 140.** See my comments above regarding assigned consumer debt cases. No change is required.

**5. Memo from Anne Ronan:** Anne Ronan is the chair of the Justice Court Rules subcommittee of the State Bar's Civil Practice and Procedure Committee. She submitted an undated letter to the Rules Committee, which staff is providing for review and possible discussion.

**WGK comment:** No action or discussion is necessary. This memorandum was prepared by the State Bar Civil Practice and Procedure Committee's Justice Court Rules subcommittee at the request of the Board of Governors ("BOG") Rules Committee to guide it in making a recommendation to the BOG concerning the Amended Petition. The memorandum was approved by formal vote of the CPPC and presented to the BOG Rules Committee. As reflected by the State Bar's comment to the Amended Petition (*see* item no. 2 above), the Bar officially supports the Amended Petition notwithstanding the substance of the CPPC memorandum.

**6. HB 2664:** HB 2664, relating to credit card agreements, was approved by the Governor on May 9, 2012. Staff sent an e-mail to RCiP.LJC members on May 15 with a link to the chaptered version of this legislation. On May 16, Mr. Jones sent an e-mail to staff that stated in part:

*"I'd like to comment that I don't think any action is needed in response to this new law. I don't think it changes anything. It says that in a contested case the judge is to weigh the evidence as they otherwise would, meaning for example that the creditor is free to use a billing statement and the debtor is free to argue some reason that such a statement is not persuasive. With respect to contested actions, it just doesn't seem to change anything.*

*"It also talks about establishing acceptance by conduct of using the card, which was already quite common. The issue tends to arise when there is a material change to the agreement and the card wasn't used following the change. I don't see any reason this law would foreclose such arguments. So again, no change there.*

*"Furthermore, nothing in the law addresses establishing standing/ownership of the debt, so that also is left to existing law. And our rules do nothing about either question. They merely make certain disclosure obligations. As we have hashed out many times, nothing in our rules can or should require anyone to prove their case in any particular way; they merely require disclosure of certain relevant information if it exists. What evidence is ultimately admissible and how much weight it gets is for rules of evidence and trial judges to decide, not the civil rules. I think our rules were drafted with this fact in mind. Accordingly, I don't think our rules conflict with this law in any way that I can see and I wanted to share that comment. If it's appropriate to forward this thought around please do so, but I'm replying just to you and not to the whole list due to the open meeting requirements."*

Staff's response: Do RCiP.LJC members agree with Mr. Jones' analysis?

**WGK comment:** I have reviewed the legislation and agree with Mr. Jones's analysis. The statutes merely specify the manner in which acceptance of the terms of a credit card (including the interest rate) may be proven and, in *uncontested actions*, describes evidence sufficient to establish the amount of the debt. Indeed, as many have asserted during our discussions of consumer debt collection matters, the courts are directed to weight the evidence as to amount of the debt in contested actions, just as they are required to do under existing law applicable to any debt. I do not believe that this legislation gives rise to any need to refine the Amended Petition.

**7. Orders to Show Cause:** On May 15, Ms. Blanco noted for staff a possible oversight in omitting within the JCRCP a correlate to Ariz. R. Civ. P. 6(d) regarding the issuance and service of an order to show cause.<sup>3</sup> Ms. Blanco indicated that for years her court had been utilizing the procedures provided by this rule. Staff then inquired of the JP members of RCiP.LJC if they were also using Rule 6(d).

Judge Dickerson: *"We never do OSCs in civil cases.... I don't think the new rules need a special rule concerning OSCs."*

Judge Felix: *"Going by the 20/80 rule, I would say this goes in the '20' category. I agree with Judge Dickerson as in our court, the usual procedure for enforcement is garnishment and in extreme cases, a civil warrant. I have not seen a request for an OSC. However, I think our rules should at least mention OSC's...."*

Judge Davis: *"I concur."*

Judge Williams: *"I like Mary's idea and she has a valid point. In Maricopa County, we have a standardized justice court form called, 'Petition for Order to Show Cause Regarding Garnishee's Default (Earnings)' and another called, 'Order to Show Cause Regarding Garnishee's Default.' The second one sets a hearing date."*

Judge Dickerson: *"Aren't the garnishment OSCs covered by the garnishment statutes?"*

**Staff's response:** The garnishment statutes (A.R.S. § 12-1593 [contempt proceedings] in the case of garnishment of money or property, and A.R.S. § 12-1598.13 [contempt proceedings] for garnishment of earnings) have an identical paragraph A that provides in part:

*"If the judgment creditor fails to comply with any duty imposed upon him by this article, the court shall, upon petition of any party to the proceedings affected by such failure and*

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<sup>3</sup> Ariz. R. Civ. P. Rule 6(d) provides: *"A judge of the superior court, upon application supported by affidavit showing cause therefor, may issue an order requiring a party to show cause why the party applying for the order should not have the relief therein requested, and may make the order returnable at such time as the judge designates. Any such order to show cause shall be served in accordance with the requirements of Rules 4, 4.1 or 4.2, as applicable, of these rules or, if the party to whom the order is directed has entered an appearance in the action, in accordance with the requirements of Rule 5 of these rules, within such time as the judge shall direct."*

*after notice, hold a hearing to determine whether such failure to comply, if any, was occasioned by mistake, inadvertence or excusable neglect.”*

Rule 6(d) provides a procedural mechanism for these proceedings.

JCRCP Rule 147 has the title, “*Enforcement of a judgment or order.*” Staff proposes a new Rule 147(d), modeled on Rule 6(d), as follows:

*d. Orders to show cause. A party may file an application, which must include an affidavit stating good reasons, asking a judge to issue an order to show cause why the party should not have the relief requested by the party. The judge may issue the order, set a date for a hearing on the request for relief, and specify the time for service of the order. The party requesting the order must serve it as required by Rule 113, unless it will be served on a party who has already appeared in the lawsuit, in which case the order must be served as required by Rule 120.*

**WGK comment:** I agree with the Staff’s proposal, although I have some concern that unsophisticated litigants may confuse “the relief requested by the party” which would properly be the subject of an application for an OSC with any other relief they are seeking in the case (i.e. what is requested in the prayer for relief of their pleading). While these two classes of relief are not necessarily mutually exclusive, they most likely will differ to a large degree. I am unsure how to make this distinction clear, but think that the Committee should consider the issue.

**Staff’s response to WGK comment:** Deleting the last three words of the first sentence of proposed rule 147(d) and reversing the order of two words might be helpful, as follows:

*d. Orders to show cause. A party may file an application, which must include an affidavit stating good reasons, asking a judge to issue an order to show cause why the party should not have the requested relief ~~requested by the party~~. The judge may issue the order, set a date for a hearing on the request for relief, and specify the time for service of the order. The party requesting the order must serve it as required by Rule 113, unless it will be served on a party who has already appeared in the lawsuit, in which case the order must be served as required by Rule 120.*

**8. Word and Phrases Defined or Explained in the JCRCP – Default:** For the word “*default*”, this table refers the user to Rule 140(a). Rule 140(a) is entitled, “*When a default judgment may be entered.*”

**Recommended change:** Staff believes that for the word “*default,*” in addition to Rule 140(a), there should also be a reference in the table to Rule 114(d), entitled “*failure to respond; default.*”

**WGK comment:** I agree.