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JAN 10 2017

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

PETITION TO AMEND
ARIZONA RULES OF CIVIL
PROCEDURE (ARCP) RULE
4.1(d)

NO.: R-17-0001

BACKGROUND OF PETITIONER

1. The Arizona Process Servers Association (APSA) is the most representative industry trade association for Process Servers throughout Arizona. APSA currently has over 100 process server members. The qualifications for regular membership in APSA include the requirement that each regular member be in current status as to his/her authority to serve legal process, as per Arizona Rules of Civil Procedure (ARCP) Rule 4(e), and other applicable authority.
2. The undersigned Officer has been authorized by the Board of Directors of APSA to submit this Petition.
3. Within the membership of APSA are several attorney service owners, who collectively employ or retain a substantial number of Certified Process Servers and additional related support personnel.

ARGUMENT IN FAVOR OF MODIFICATION OF ARCP RULE 4.1(d)

10. ARCP Rule 4.1(d) provides for service of a copy of the summons other legal process (unless Rule 4.1(c), (e), (f), or (g) applies) to an individual by: (1) delivering a copy of the summons and the pleading being served to that individual personally; (2) leaving a copy of each at that individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (3) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

11. Process Servers, Constables and Deputy Sheriffs who are engaged in the service of legal process have no special exemption under the law for access such planned communities. While Petitioner seeks to amend ARCP Rule 4.1(d), it does not seek modification of laws related to trespass.¹ The issue of access to HOA, privately patrolled, gate guarded, gated or other "planned community"(ies) is one in which the desire of the community for privacy and security are weighed against the need for access to serve legal process.

12. Rule changes to the ARCP (4.1(a) Territorial Limits of Effective Service. effective 1 Jan. 2017) state that "All process--including a summons--may be served anywhere within Arizona." The instant amendment sought would be consistent with such rule.

¹ In *Arizona v. Star* (LC-87-00135 (Maricopa County)), the Court (Gerber) opined that the process server was "...licensed"...(and)..."authorized" by the Court to the extent necessary to serve process...(and) also "privileged" just as much as a police officer, fireman, mail carrier or similar official. A process server is an arm of the court statutorily analogous to a sheriff. A process server has the same obligations and rights as a sheriff..." Further, the Court said, "Like a sheriff, a process server may serve process "anywhere" in the State..."

1 13. The purchase of a property within a planned HOA community is deeded to
2 the buyer in a "deed restricted"² manner. Such deed restrictions are
3 generally administered through a Home Owners Association (HOA), which
4 is authorized by such deed restrictions to develop policies and procedures to
5 allow or disallow access to the planned community by non-residents. The
6 HOA would necessarily engage the services of an employee or agent thereof
7 (security guard) who may execute the entry policy of such HOA.

8 14. Many HOA communities prohibit entry to the premises by Process Servers,
9 Constables and Deputy Sheriffs who approach the entry or gate the for the
10 service of legal process. Unfortunately, as experience has shown, in these
11 circumstances, under the current applicable Rules, the proper service of
12 process is not executed, and barring other means of service, the
13 administration of justice is rendered moot.

14 15. Accordingly, litigants and other persons in an HOA community enjoy a
15 special "island" of impunity with regard to service of process, especially that
16 requiring personal service due to issues of contempt or other statutory
17 requirement.³

18 16. In serving persons at their residence in non-HOA communities usually does
19 not result in access issues, access to a residence within an HOA community
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22 ² "Deed restricted" would necessarily include such property having a private
23 covenant as defined by ARS §38-440(C)(2), including "...any uniform or
24 nonuniform covenant, restriction or condition regarding real property that is
affecting real property."

25 ³ While ARCP Rule 4.1(k) provides for an Alternate Means of Service, the cost
26 and time factors involved in securing such Alternate Means are many times out
27 of the means of the litigant. This is especially true when dealing with the
28 issues of serving legal process which are time sensitive. In certain
instances, where the personal service of legal process is required, such as
Injunctions Against Harassment and Orders of Protection, service is
effectively barred by the denial of access.

1 may be severely limited by either resident dictates or other rule set forth by
2 the HOA. Accordingly, there is a need to address the concerns of access to
3 planned communities by Process Servers, Constables and Deputy Sheriffs
4 for the service of legal process to combat the perceived "service free zone"
5 created within such planned communities.

6 17. Property owners (residents) within an HOA community are members of that
7 association. As such, the HOA has the authority and privilege of
8 appointing the management of that community, resulting in the retention of
9 security personnel. Thus, while the security personnel at the entry of the
0 HOA community may be privately employed, that guard is one who
1 controls access to the residence and is thus authorized on behalf of the
2 property owner or resident to allow or disallow persons entry to the
3 property. Effectively, that person is appointed as agent to allow access to
4 the abode or property therein.

5 18. In maintaining a guard gated entry, the HOA has adopted a duty of care to
6 its association members in the retention of its security force. Accordingly,
7 such a person controlling access to the HOA community would be
8 considered a person of "...suitable age and discretion...". While not strictly
9 a member of the resident's household, the appointment of such a guard
0 would require that the individual exercises considerable tact, caution,
1 judgment, prudence, maturity and diplomacy in allowing access to the HOA
2 community. Similarly, that guard is an individual who by appointment has
3 become the "gatekeeper" of the residence, and thus effectively appointed to
4 maintain care and control over the property.

5 19. Petitioner submits that access to an HOA community is conducted by a
6 person who is specially appointed for controlling access to the community
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and thus to the residence or individual property within such community, thus either allowing or "protecting" a person from being served with legal process.

20. Accordingly, Petitioner believes there is argument in favor of allowing substitute service on persons controlling access to guard-gated (HOA) communities.

DISCUSSION OF OTHER STATES' SOLUTIONS TO ACCESS TO GATED COMMUNITIES

21. Our neighboring states, California and Nevada, have both enacted statutes addressing such issues. Further, California has case law which addresses the issues, as well.

22. California Code of Civil Procedure (CCP) §415.21 (eff. 1 Jan 2017) states:

"(a) Notwithstanding any other law, any person shall be granted access to a gated community for a reasonable period of time for the sole purpose of performing lawful service of process or service of a subpoena, and upon displaying a current driver's license or other identification, and one of the following:

(1) A badge or other confirmation that the individual is acting in his or her capacity as a representative of a county sheriff or marshal.

(2) Evidence of current registration as a process server pursuant to Chapter 16 (commencing with Section 22350) of Division 8 of the Business and Professions Code or of licensure as a private investigator pursuant to Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code.

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(b) This section shall only apply to a gated community that is staffed at the time service of process is attempted by a guard or other security personnel assigned to control access to the community."

23. Nevada Revised Statute (NRS) §14.090 states:

"1. A person who resides at a location to which access is not reasonably available except through a gate may be lawfully served with any legal process in the manner provided in this section. If there is:

(a) A guard posted at the gate and the guard denies access to the residence for service of process, service of process is effective upon leaving a copy thereof with the guard.

(b) No guard posted at the gate and entry through the gate is not reasonably available, the court may, if it is satisfied by affidavit that those facts are true, allow service of process by mailing a copy thereof to the residence by certified or registered mail.

2. The manner of service authorized by this section is supplemental to and does not affect the validity of any other manner of service authorized by law."

24. Further, *Bein v. Brechtel-Jochim Group, Inc.* [(1992) 6 Cal.App.4th 1387, 8 Cal.Rptr.2d 351] addresses the issue (in California) with regard to service of process where the person controlling access to the private community does not permit entry for the service of process. In its decision, the Court said, "Litigants have the right to choose their abodes; they do not have the right to control who may sue or serve them by denying them physical access." We believe the same is true for litigants in Arizona, as well.

25. Further, the *Bein* Court stated,

1 "In *Khourie, Crew & Jaeger v. Sabek, Inc.* (1990) 220 Cal.App.3d 1009 [269
 2 Cal.Rptr. 687], where a corporation attempted to avoid service by refusing to
 3 unlock its door, the court determined a "defendant will not be permitted to
 4 defeat service by rendering physical service impossible." ... "The evident
 5 purpose of Code of Civil Procedure section 415.20 is to permit service to be
 6 completed upon a good faith attempt at physical service on a responsible
 7 person. ..." ... Service must be made upon a person whose "relationship with
 8 the person to be served makes it more likely than not that they will deliver
 9 process to the named party." (*50 Court St. Assoc. v. Mendelson et al.* (1991)
 10 151 Misc.2d 87 [572 N.Y.S.2d 997, 999].) Here, the gate guard's
 11 relationship with appellants [6 Cal.App.4th 1394] made it more likely than
 12 not that he would deliver process to appellants. We note they do not claim
 13 they failed to receive notice of service."

14 26. Georgia has addressed access to service of process within such planned
 15 communities through Official Code of Georgia, Annotated (OCGA) §9-11-
 16 4(f)(4), which states:

17 (4) *Service upon persons residing in gated and secured communities.*

18 (A) As used in this paragraph, the term "gated and secured communities"
 19 means multiple residential or commercial properties, such as houses,
 20 condominiums, offices, or apartments, where access to the multiple
 21 residential or commercial properties is restricted by a gate, security device,
 22 or security attendant that restricts public entrance onto the property;
 23 provided, however, that a single residence, farm, or commercial property
 24 with its own fence or gate shall not be included in this definition.

25 (B) Any person authorized to serve process shall be granted access to
 26 gated and secured communities for a reasonable period of time during
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THE PROPOSED RULE CHANGES

29. The issues presented here have statewide import and are relevant and appropriate in expediting the service of legal process in Arizona.

30. Accordingly, for good cause, the Petitioner prays that the Court will adopt the proposed rule changes.

31. I declare under penalty of perjury that the foregoing is true and correct. (ARCP R. 80(c)).

Date: 1-9-17

Signed: Patty Chlebanowski

PATTY CHLEBANOWSKI, Secretary

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TEXT OF THE PROPOSED AMENDED RULE 4.1(d):

1. The proposed rule under ARCP Rule 4.1(d), would state as follows
(proposed changes in *italics*):

(d) Serving an Individual. Unless Rule 4.1(c), (e), (f), or (g) applies, an individual may be served by:

(1) delivering a copy of the summons and the pleading being served to that individual personally;

(2) leaving a copy of each at that individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(3) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(4) If the dwelling house or usual place of abode lies within a planned community or other such location where access or entry to such planned community or other such location must be granted or is controlled by a guard this section shall apply. If after having identified himself or herself to the guard as a Certified Process Server, Constable or Deputy Sheriff having lawful business in serving legal process upon a person reasonably believed to be residing or located in such planned community or other such location, and entry to such planned community or other such location is denied, service of a copy of the summons, pleading and other documents being served may be performed by leaving a copy of the legal process with the guard, who shall be informed of the general nature of the legal process, and thereafter mailing a copy of the legal process by first-class mail, postage prepaid thereon to the person served at the individual's dwelling house or usual place of abode. Service of legal process in this manner is deemed complete on the 10th day

1 after the mailing. This Rule shall not affect any alternate means of service
2 which may be ordered by the court under Rule 4.1(k).
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