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5 IN THE SUPREME COURT OF THE STATE OF ARIZONA

6 **IN THE MATTER OF:**

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8 PETITION TO AMEND THE RULES 5(d),
and RULE 10(a) OF THE RULES OF
9 PROCEDURE FOR EVICTION ACTIONS

NO. R-19-0018

**COMMENT UPON AND OBJECTION
TO PROPOSED RULE AMENDMENTS**

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11 **INTRODUCTION AND BACKGROUND**

12 The State Bar of Arizona (hereinafter “State Bar”) filed this Petition to revise the Rules of
13 Procedure for Eviction Actions (hereinafter “RPEA”). They seek to amend the RPEA to now
14 require all landlords to attach to the Complaint a copy of any lease, all addendums, a written
15 accounting of all charges and payments for the previous six months if it is a non-payment of rent
16 case, and all documents and exhibits the plaintiff intends to represent or rely upon at trial. Pursuant
17 to Rule 28(D) of the Rules of the Supreme Court, attorney Denise Holliday respectfully submit this
18 Comment for the Court’s consideration. For the reasons set forth below, the proposed amendments
19 to the Rules of Procedure for Eviction Actions should not be adopted and this Petition should be
20 denied.

21 **BACKGROUND**

22 Denise Holliday is an attorney who regularly represent landlords and property owners in
23 eviction actions in both Justice and Superior Court since 1996 and is a partner in a law firm that has
24 focused its practice to representing landlords since 1978. She also serves as the President of the
25 Association of Landlord and Tenant Attorneys (hereinafter “ALTA”). Her opinions are based upon
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1 her experiences in all of the areas listed above.

2 In 2008, this Court approved the RPEA thereby creating appropriate rules for this unique
3 body of cases. The Rules have been amended over the past ten years but all in all, they have
4 continued to work very effectively. Currently, Rule 5 requires the landlord to attach to the
5 Complaint the breach notice that is the basis for the eviction action. Rule 10 requires that both
6 parties provide a list of witnesses and exhibits as well as a copy of the exhibits they intend to
7 introduce at trial if requested by the other party. This includes a copy of the lease and ledger. The
8 State Bar alleges that these Rules are not sufficient and that tenants are disadvantaged by not
9 requiring a landlord to provide all of these items prior to the initial appearance. This position is not
10 accurate and appears to be solely based on the claims held by a small group of attorneys that practice
11 in the free legal service agencies and perhaps other advocates that provide service to tenants but on
12 not any actual study or facts. Had the State Bar met or discussed these issues with the stake holders,
13 which is the typical way any substantial change to a rule or law is processed, they would have
14 discovered that these proposed rules will result in the disclosure of private information that can lead
15 to identity theft, that there are already laws and rules in place that address their concerns, that the
16 requirement to attach the proposed documents is unmanageable by either the trial courts or
17 landlords, and not a realistic solution to a perceived issue. For many of the same reasons articulated
18 by the Response filed by the Maricopa county Justice Courts, the Supreme Court is urged to deny
19 the Petition.

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21 **I. THE PROPOSED RULES WILL RESULT IN THE DISCLOSURE OF TENANTS’
PRIVATE INFORMATION**

22 The proposed Rules would require all trial exhibits to be served with the Complaint. While
23 this may sound in theory like a reasonable rule change, assuming the landlords could even predict
24 in advance what defenses the tenant would assert at the initial hearing that would warrant a trial, the
25 unintended consequence is something that the State Bar did not consider.

26 Leases, as well as other documents that would potentially now be attached to every eviction

1 Complaint, often contain private information that disclose a party's full previous and current name,
2 date of birth, social security number, names and ages of minor children living in that apartment and
3 a host of other private information. While it is true that the lease, application, and other documents
4 with private information are already routinely included as evidence in an eviction action, the court
5 staff redacts all private identification information as required by both state and federal law before it
6 is made part of the public record. However, if the Court decides to amend this Rule as proposed,
7 because the majority of eviction actions are served by post and mail service during the day when
8 the tenant may not be home, all of the documents containing this private information would now be
9 taped to the front door as required by A.R.S. §33-1377. The disclosure of that information in a
10 public setting would be harmful to the litigant and otherwise private information would be placed
11 in a manner that is ripe for identity theft.

12 There is other information contained in these documents, the public disclosure of which has
13 potentially unintended consequence. One example is the lease typically lists the reserved parking
14 space for that resident. This information is private and could result in harm to the tenant or their
15 vehicle if this became public information. Additionally, the lease typically contains emergency
16 contact information for the tenant. That information is private, and the emergency contact person
17 (a non-party to the lease) has not approved the public disclosure of their private information. It is
18 even possible that the information required of the proposed rule would disclose the location of
19 tenants whose location should be protected due to domestic violence or other acts of violence.¹

20 Other documents that would now be required to be attached to the Complaint also contain
21 private information that could result in unintended harm to the tenant. A ledger likely contains
22 private identifying information such as the tenant's checking account information and history of
23 financial hardship. Other lease documents such as an "In Case of Death Addendum" also includes
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25 ¹ Arizona's victim's rights protections afford crime victims some anonymity and privilege in certain circumstances.
26 Disclosing the information about their home (whether they are the tenant or a co-occupant) might run afoul of these
Arizona constitutional protections and the related statutes. See Arizona Constitution, Article 2, §2.1 and A.R.S. §13-
4401.

1 private information about the resident's next of kin. A parking addendum will allow other people
2 to ascertain information about the tenant's vehicle or vehicles. A co-signer addendum will identify
3 the name and contact information of co-signers, including private financial information, residence
4 and employment history. A medical marijuana addendum may indicate whether the tenant is a state
5 authorized medical marijuana user. A pet addendum may indicate if the tenant has any assistive
6 animals thereby identifying them as a person with a disability. These documents are contained in
7 an overwhelming majority of our many clients' lease packets.

8 There are reasons other than non-payment of rent that are the basis for the filing of an
9 eviction actions. If the eviction pertains to a material falsification of the lease application or the
10 landlord is otherwise somehow able to predict in advance that the application will be a piece of
11 evidence before the tenant has asserted a defense, the application will necessarily be attached to the
12 Complaint. If the lease itself does not already include it, a lease application will include full current
13 and previously used names of everyone that is going to live in that unit as well as their social security
14 numbers, previous and current work information, income information, previous rental history,
15 criminal history, phone numbers, email addresses, and next of kin information. This document
16 literally contains everything needed to steal the tenant's identity.

17 The proposed change to Rule 5 would mandate that a landlord put private information,
18 including information that is required to be protected by other state and federal laws, at large for
19 public consumption. It puts tenants at risk of having their identities stolen, or worse, at risk of
20 becoming a victim to other crimes including stalking and domestic violence. It puts landlords at
21 risk of violating the tenant's rights of privacy and in violation of other state and federal laws, such
22 as the Red Flag Rule that addresses protocol for the safe keeping, storing and dissemination of
23 protected information. A party charged with maintaining some level of privacy for its customers
24 does not lose that obligation merely because the parties become subject to a lawsuit. In short, the
25 proposed Rule failed to consider the unintended consequences of the disclosure of this private
26 information when mandating that the entire lease with all addenda, ledger, and any other documents

1 that may become an exhibit in an eviction action be attached to the Complaint.

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3 **II. THE PROPOSED RULES ARE NOT NECESSARY BECAUSE THERE ARE**
4 **STATUTES AND RULES ALREADY IN PLACE THAT ADDRESS THOSE**
5 **STATED CONCERNS**

6 The Petition alleges that although the Arizona Residential Landlord and Tenant Act requires
7 a landlord to give the tenant a copy of the lease, A.R.S. § 33-1321(C), legal services agencies report
8 that “many tenants do not receive, or maintain, a copy of their lease.” The claim, apparently based
9 on the legal services interaction with the small portion of Defendants who contact them, should not
10 be the basis for requiring all landlords to go to the expense of providing an additional copy of all
11 the documents executed by every tenant because some tenant fail to “maintain” their copy of the
12 lease. Rule 10 already provides the tenant with the right to request another copy if they want to
13 contest the claims made in the eviction action.

14 The average multifamily complex utilizes one of three nationally recognized leases. Those
15 lease packages are typically more than 20 pages in length and some are upwards of 30 pages. As
16 pointed out in the Response filed by the Maricopa County Justice of the Peace, even the Arizona
17 Association of Realtors lease (used by a majority of real estate agents for single family home rentals
18 in Arizona) is comprised of over 15 pages, and that does not include the addenda or handbooks that
19 contain the additional rules and regulations agreed to by the parties such as smoking in the premises,
20 HOA regulations, and vehicle parking rules.

21 The proposed rules would prohibit a landlord from using any exhibits not attached to the
22 Complaint. That would require all landlords to attach all potential documents since they have no
23 way of knowing what the tenant will contest. No other area of law in the State of Arizona requires
24 the Plaintiff to engage in full-fledged discovery or anticipated discovery issues prior to the
25 Defendant appearing, answering and raising specific concerns. By requiring landlords to attach all
26 the exhibits they may use at trial prior to even an initial appearance and answer, the Rules would be
requiring the landlord to somehow predict the defenses the tenants would be asserting at trial. Is the

1 tenant going to claim he is entitled to a rent offset because of maintenance issues? If so, then the
2 landlord must now pre-emptively attach all maintenance records and documentation to the
3 Complaint. Is the tenant going to claim the landlord is retaliating against him? If so, then perhaps
4 the landlord must pre-emptively attach all maintenance records and documentation pertaining to all
5 other residents in the community as well to prove that this tenant was not treated any differently. Is
6 the tenant going to file a counterclaim for the landlord's breach of an obligations under the contract?
7 If so, then perhaps the landlord should just attach every single document and e-mail in its file for
8 this tenant to the Complaint to ensure that they are not now prohibited from bringing forth relevant
9 evidence in that matter. To ask this of landlords turns Arizona's notice pleading standard on its head.
10 It has long been the law that Arizona follows a notice pleading standard, "to give the opponent fair
11 notice of the nature and basis of the claim and indicate generally the type of litigation involved."
12 *See Mackey v. Spangler*, 81 Ariz. 113, 115, 301 P.2d 1026, 1027-28 (1956). The eviction rules
13 already provide for a more specific form of pleading by including the Residential Eviction
14 Procedures Information Sheet. See Rule 5(a)(5), RPEA, Appendix A. Further, the Complaint must
15 contain specific language identifying the matter as an eviction as well as the type of eviction. See
16 Rule 5(b)(6) and (7), RPEA. The Rules further require specificity with regard to damages in both
17 amount, type, and calculation and in type. *Id.* at 5(c). The current rules already require more than
18 any other type of civil complaint.

19 Therefore, it is our position that there is a difference in the good faith foundation of facts
20 that every Plaintiff must have when initiating a lawsuit and the foundation of facts that a Plaintiff
21 must develop in order to take a matter to trial. Given that a Plaintiff cannot predict beforehand what
22 the nature of dispute will be without knowing the defenses alleged, a Plaintiff cannot predict
23 beforehand what exhibits will be necessary to address the Defendant's defenses. Eviction actions
24 are designed to be statutory summary proceedings. The proposed rule change usurps the statutory
25 intent and nature of the action itself by requiring Plaintiffs to prepare for a case with unknown scope
26 upon initiation.

1 **III. THE PROPOSED RULES WILL RESULT IN THE GENERATION OF LARGE**
2 **AMOUNTS OF DOCUMENTS AND TANGIBLE EXHIBITS WHICH SIMPLY IS**
3 **NOT MANAGEABLE**

4 The large number of documents that would need to be served and included in every single
5 eviction filed in the state, despite the small fraction of tenants that contest the allegations, is
6 disproportionately burdensome and unmanageable. This proposed rule does not take into account
7 some evidence that is routinely introduced at trial like video or audio evidence. Will the landlord
8 now be required to attach thumb drives of that evidence to the Complaint? If that is what the State
9 Bar intended, the Court should carefully consider the requirement to attach a thumb drive to the
10 copy posted to the front door, the copy sent certified mail and the one filed with the court.

11 Additionally, the cost to create a copy of each document and add them to the multiple copies
12 of the Complaint is also substantial and will be passed on to the tenant as part of the litigation costs.
13 Consider a law firm that files 500 evictions a month. Of those 500 evictions, the law firm then must
14 attach conservatively 50 pages of documentation of exhibits that would include a copy of the entire
15 lease, all addenda, the multiple page ledger and breach notice, before even considering any evidence
16 that might be needed in an attempt to predict the defenses a tenant might assert at trial in order to
17 comply with the proposed rule. That generates by itself 25,000 sheets of paper. However, there
18 must be multiple copies of the Complaint, at least one for the Defendants if personally served, one
19 for posting, one for the certified mailing, one for the landlord or their attorney, and one filed with
20 the Court. The 25,000 sheets of paper are now 125,000 sheets of paper in total that have been
21 generated. This scenario doesn't even take into account the other types of evidence that is relevant
22 and admissible such as video or audio or other tangible evidence.

23 Let's estimate that there are 5,000 evictions filed each month in Maricopa County alone, a
24 number much less than the actual count in 2018 where there were over 43,000 evictions in the state.
25 Each of those 5,000 evictions will now necessarily contain the Summons, Complaint and every page
26 of the lease and addenda, the multiple page ledger and breach notice. Those 5000 evictions would
now be increased to an estimated 50 pages each, totaling 250,000 individual sheets of paper. Since

1 there are 12 months in a year, we are now looking at 9,000,000 sheets of paper generated annually
2 under the new rule.

3 If one is environmentally concerned, maybe he would consider how many trees in the
4 Amazon were cut down to comply with the new rule. If one tree generates 10,000 sheets of paper,
5 then this Rule just cut down 900 trees or roughly clear cut around five acres per year just for
6 Maricopa County. Is that really the legacy that the Rule makers are seeking? And for what? 30%-
7 40% of the evictions are frequently dismissed before the initial hearing because they are for non-
8 payment of rent and the tenant is able to pay and reinstate their lease. Of the remaining 60% to
9 70%, the vast majority will not show up to Court to dispute the eviction because they are non-
10 payment of rent cases, and unfortunately for everyone, the tenant lacks the necessary monetary
11 resources to pay the amount owed, even prior to the increased litigation costs. It has been estimated
12 that less than 5% of cases warrant a trial and actual in-depth assessment of additional documentation.

13 Transactional costs are real. Transactional costs are those costs that go into a transaction or
14 a dispute. When approximately 90% of the time the matter is for non-payment of rent, that issue is
15 relatively easy to determine. Arizona has traditionally had lower rents because we have kept
16 unnecessary costs and overburdensome regulations to a minimum. We have done this while still
17 ensuring that parties are provided due process. The additional paper, the processing, and the storage
18 required by this rule will increase the costs a landlord is required to expend to turn a unit and fill it
19 with a paying tenant, not to mention the additional Court fees likely necessary to deal with the influx
20 of paper. Those costs will be factored into the transaction and born by renters and landlords alike.
21 Rent will increase as a result. Even if we don't consider the long-term effects of rent increase, what
22 will this do to the costs of each individual case filed? If the Courts increase their filing fees an
23 additional \$10 per case to handle the large quantity of new paperwork, attorney's increase their fees
24 an additional \$25 per case to review and print the large volume of paperwork, process servers
25 increase their fees \$10 per case just to deal with the increased document handling, and the certified
26 mailing costs now triple to \$15 per case because of the number of pages that must be mailed, that

1 \$60 is now passed onto each tenant may already be struggling to come up with rent money before
2 the initial appearance. Does the 30%-40% of tenants who are able to pay and maintain their
3 residences drop to 25%-35%? Using the scenario of 5,000 eviction cases files each month, that 5%
4 drop representing 250 additional families each month or 3,0000 each year evicted. Arizonans do
5 not need this rule change and the State Bar simply did not consider the unintended consequences of
6 this proposed rule change. These facts could have been raised had they chosen to discuss these
7 issues with the stake holders, including the members of the bar who most often represent landlords
8 and tenants.

9 There have been other options proposed and suggested to alleviate the concerns above, but
10 even those options are not workable. For example, it has been proposed that the landlord only attach
11 those pages to the lease that are relevant to the eviction. However, as discussed, what is relevant is
12 going to be based on what claims and defenses a tenant makes at the initial appearance or in a written
13 answer. There is no way of predicting what is relevant before that.

14 It has also been proposed that Landlords simply redact all private information from the
15 paperwork. So, for the firm generating 500 evictions a month with 25,000 separate sheets of
16 information, that firm must now employ a full-time junior attorney simply to perform document
17 review. What if the law firm is actually generating 1000 evictions a month? Should filing an
18 eviction action really require a law firm to have a team of document review attorneys? The cost of
19 the additional legal fees is a transactional cost that will be passed down to the parties in the
20 transaction, the landlord and the tenant. This will again ultimately affect the rates of rent for all
21 Arizonans and the amounts the tenants will need to pay to reinstate their lease and avoid the eviction.
22 There has also been a proposal that the landlords just provide a separate summary page of major
23 terms of the lease. Again, the law firms in this practice area will have to employ full-time junior
24 level attorneys to write out a separate lease summary document. The next question becomes whether
25 this summary sheet is really evidence or just an abstract? Is the junior attorney now a witness in
26 each of those 500 cases because he generated the summary sheet?

1 The goal with the eviction rules was to ensure that due process was afforded to all parties.
2 Due process requires notice and a reasonable opportunity to be heard. Under the current version of
3 the rules, Defendants in eviction actions have due process. Due process itself is always a balance
4 between providing an efficient and fair remedy and bogging the process down in minutia and
5 bureaucracy to the extent that it is untenable.

6 The proposed rule leans towards creating an unfunctional system of the latter. The proposed
7 rule puts private information out into the public, increasing the risk of identity theft. The proposed
8 rule potentially violates victims' rights in cases of domestic violence. The proposed rule is an
9 environmental disaster and is unmanageable. The proposed rule increases transactional costs. It
10 will put more tenants onto the street in the short term, and it will raise rents for all Arizonans in the
11 long run.

12 13 **IV. SUMMARY**

14 Given the issues discussed above, we believe that the current proposal is overly burdensome,
15 contrary to existing law, a significant cost concern, and is not safe for tenants. However, possible
16 changes to the rules could be made to better put tenants on notice of the eviction matter raised against
17 them.

18 First, the REIS notice included with all Complaints could be amended to include Rule 10
19 disclosure information. It should be noted, however, that some of the proponents of the new rule
20 have actually indicated that the REIS notice itself (currently a one page form) is too difficult for
21 many Defendants to read, though this itself begs the question of why they think Defendants are
22 going to thoroughly review all of the additional documents attached to the Complaint as proposed
23 by these new rules. Further, the Complaint itself could be updated so that it contained a statement:
24 YOU MAY CONTACT YOUR LANDLORD DIRECTLY FOR A COPY OF YOUR LEASE AND
25 LEDGER OF PAYMENTS PRIOR TO THE INTIAL APPEARANCE. Those Defendants who
26 then wish to contest the matter may contact their Landlords directly cutting out the attorneys and

1 the Courts and minimizing the transaction. In summary, the proposed rules changes have not been
2 properly vetted by all stake holders and the State Bar, not being completely familiar with this unique
3 litigation, has proposed rules without understanding the unintended consequences to the very group
4 of litigants they propose need to be better protected by the rules that govern eviction actions. For
5 the reasons articulated above, the Court is urged to not adopt the proposed rule changes.

6 **RESPECTFULLY SUBMITTED** 1st day of May, 2019,

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8 By */s/ Denise Holliday*
9 **DENISE M. HOLLIDAY**
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