

Ursula M. Johnston
2265 E. La Costa Place, Chandler, AZ 85249
(480) 993-3921
Bar Number: N/A
interiorsbyursula@cox.net

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:)

PETITION TO AMEND)

RULE 28,)
[Rules of the Supreme Court]

Supreme Court No. R-__-____
[Clerk's office will assign
number]

**Petition to Amend 17B A. R. S.
Arizona Rules Protective Order Procedure
Part VIII
Rule 38 and Rule 39)**

Pursuant to Rule 28, Rules of the Supreme Court, Ursula M. Johnston respectfully petitions this Court to adopt amendments to Rule 38 and Rule 39, Arizona Rules of Protective Order Procedure governing Contested Hearing Procedures, as proposed below.

I. Background, Problem and Purpose of the Proposed Rule Amendments

An overwhelming number of people (i.e., petitioners or plaintiffs) who petition and obtain a protective order do so honestly, in good faith, and with the primary motives of:

- Protecting their personal safety;

- Preventing an individual from further behaving in an unsafe, uncooperative or threatening manner toward the plaintiff; and
- Enabling law enforcement to be better informed of the situation so they can effectively protect and serve the parties involved.

Background. In Arizona, Orders of Protection (Orders) are costly and not easily obtained. People (i.e., petitioners or plaintiffs) undergo scrutiny and expense and must successfully convince courts that an Order is warranted. A judicial officer issues the Order after performing due diligence in accordance with Rule 38, Arizona Rules of Protective Procedure, including Arizona Rules of Family Law Procedure, where applicable. Then, to activate the Order, after legally obtaining it, plaintiffs must comply with all timelines, terms and conditions for having it served to the defendant.

For first-time filers in the state of Arizona, it can be a confusing, expensive and complicated process and an intimidating experience. There is no ombudsman. Individuals filing for a protective order will have a different experience depending upon the time, the day or the court where they file the petition. For example, someone may not be there to assist with completing the paperwork (which is unnecessarily complicated), or the person filing may be in an emotionally-weakened state of mind, unaware of the defendant's rights, or next steps.

The Committee on the Impact of Domestic Violence and the Courts (CIDCV) can and should be asked to provide insight into these dynamics from the perspective of judicial officers and individuals filing protective orders.

Problem. Most persons filing for an Order of Protection do so as self-litigants or without legal representation and because they truly fear for their safety. The brochures do not sufficiently inform individuals of what could potentially ensue regarding the defendant's appeal rights. For example, the brochures do not explain that should the defendant contest the Order, it is subject to revocation and quashing — and if quashed, the plaintiff must pay the defendant's attorney fees. Collectively, these dynamics create additional vulnerabilities and hardships for the person who already is vulnerable to the point of filing for the Order. The problem is exacerbated for people filing for a protective order for the first time; persons with limited English proficiency; those with limited education; or where the defendant's status in the community, income or financial resources exceed those of the plaintiff, or the defendant has legal representation but the plaintiff does not.

When a judicial officer issues an Order, obviously they do so within the confines of the law. In so doing, that judicial officer has deemed the plaintiff as meeting the standard of providing proof; and that judicial officer has considered such proof as sufficient evidence for issuing the Order. Therefore, should the defendant contest the Order, neither the plaintiff nor the judicial officer first issuing the Order should be subject to further scrutiny as to the soundness of issuing it in the first place.

The flaw in this law is the unbridled ability of a defendant to contest and quash a legally obtained Order. This can be particularly problematic when a civil

matter also exists (e.g., divorce, custody battle). Giving a defendant this ability creates an imbalance of power between the parties and compromises the integrity of this law. Rule 38, Arizona Rules of Protective Order Procedure governing Contested Hearing Procedures, as currently written, compromises safety and has the potential to bring harm to innocent persons who seek to prevent harm and protect themselves. This “legal loophole” clogs courts and sets the stage for retaliation and undue punishment against the plaintiff.

When an Order of Protection is contested, the governing rules regarding the hearing procedures are too stringent for plaintiffs and too lax for defendants. The court gives no deference to the due-process decision made by the judge who first granted the Order. There is no formal process for making every effort to include that judge as a witness at the contested hearing or to assign the same judicial officer as the contested hearing’s presiding judge. Essentially excluding the judicial officer who first issued the Order from the contested hearing procedures creates a greater imbalance of power – in the defendant’s favor.

When a contested hearing is underway, a plaintiff is subject to undue scrutiny in the form of satisfying the Standard of Proof described in Rule 38(g). Satisfying this standard is highly subjective when the nature of a plaintiff’s complaint against a defendant is verbal, emotional, not apparent, or a defendant’s demeanor toward others or communication with a plaintiff is covert or duplicitous. In such cases, it is next to impossible for a plaintiff to supply evidence that would satisfy the Standard of Proof described in Rule 38(g). Most troubling is this: When

a plaintiff is truthful and obedient and supplies evidence to the court — such as proof of perjury committed during a contested hearing — the presiding judge has the leeway to ignore evidence, revoke the Order and assess attorney fees against plaintiffs. These procedural loopholes can, and have caused financial harm, trauma, serious injury or death to untold numbers of plaintiffs in Arizona.

In matters of harassment, stalking, verbal or emotional abuse, having witnesses or obtaining evidence of a defendant's behavior can be daunting and traumatizing for plaintiffs, particularly those for whom this is a first-time Order of Protection. Helping a judge to understand why one has become fearful of another and how that fear constitutes "a preponderance of the evidence" is even more daunting and becomes even more traumatizing to first-time-filing plaintiffs whose abuser has more money or legal representation and who uses subtle manipulation and cunning tactics that many judicial officers do not comprehend.

Purpose. Because an Order of Protection is a civil matter where a defendant is neither declared guilty or innocent nor subject to legal action or punishment if they comply with the Order, there is no hardship imposed upon defendants by virtue of the existence of the Order. Likewise, amending the existing Rules as proposed herein will not impose hardship on the defendant; but will document and send the message that the Court values the plaintiff's safety and makes every effort to ensure both parties' safety via the intact Order.

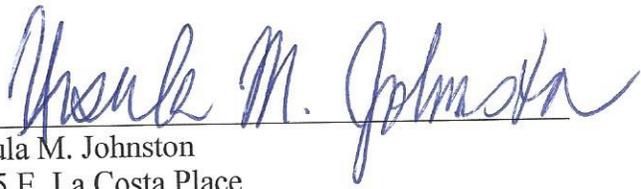
Proposal. When it comes to protective orders, there is a learning curve for both the litigants and judges presiding at contested hearings. This petition seeks to

amend Rule 38 to give the benefit of the doubt to both plaintiff and defendant when it is a first-time Order of Protection for the plaintiff. This would mean that in such cases the presiding judge at a contested hearing cannot revoke, shorten, quash or dismiss an Order *in its entirety* when it is the plaintiff's first time filing for and obtaining an Order of Protection from a court in the state of Arizona. Further, this would mean neither party is required to provide evidence at the contested hearing and any evidence provided will be taken into consideration solely for the purpose of modifying an Order to the plaintiff's explicit satisfaction.

II. Contents of the Proposed Rule Amendment

In the Appendix attached hereto, the proposed new language has been added using underscoring. The proposed new language to be taken into consideration would amend Part VIII of A.R.S. Rules of Protective Order Procedure, Rule 38. Contested Hearing Procedures; and Rule 39. Costs and Attorney Fees. No deletions are proposed.

RESPECTFULLY SUBMITTED this 5th day of December 2019.

By 
Ursula M. Johnston
2265 E. La Costa Place
Chandler, AZ 85249
(480) 993-3921
interiorsbyursula@cox.net

Appendix

17B A.R.S. Rules Protect.Ord. Proc., Rule 38
Formerly cited as AZ ST RPOP Rule 8

Rule 38. Contested Hearing Procedures

Currentness

(a) Requesting a Hearing. At any time while a protective order or a modified protective order is in effect, a defendant may request one hearing in writing. See A.R.S. §§ 13-3602(I), 12-1809(H), 12-1810(G).

(b) Scheduling the Hearing. A judicial officer must hold the hearing at the earliest possible time.

(1) If an Order of Protection grants exclusive use of the residence, a judicial officer must hold a hearing within five court business days of the request.

(2) For all other protective orders, a judicial officer must hold a hearing within 10 court business days of the request unless the judicial officer finds good cause to continue the hearing for a longer period of time.

(c) Notice of Hearing. The court must notify the plaintiff of the hearing. There is no statutory requirement for personal service of the hearing notice.

(d) Court Security Measures. The court must take reasonable measures to ensure that the parties and any witnesses at the hearing are not subject to harassment or intimidation in the courthouse or on adjoining property. For each hearing, the judicial officer must determine whether there is a need to have a law enforcement officer or a security officer present to help ensure the hearing is orderly or to provide escort for either party. The court may direct the defendant to remain in the courtroom for a period of time after the plaintiff is excused.

(e) Parties' Right to Be Heard. The judicial officer must ensure that both parties have an opportunity to be heard, to present evidence, and to call and examine and cross-examine witnesses.

(f) Oath or Affirmation. The court must administer an oath or affirmation to all parties and witnesses at all hearings.

(g) Standard of Proof. Except in cases where it is the plaintiff's first time filing for and obtaining the Order of Protection, fFor a protective order to remain in effect as originally issued or as modified at a hearing, the plaintiff must prove the case by a preponderance of the evidence.

(h) Basis for Continuing, Modifying, or Revoking Protective Orders. At the conclusion of the hearing, the judicial officer must state the basis for continuing, modifying, or revoking the protective order. If it is the plaintiff's first Order of Protection filed in a court in the state of Arizona, the court and judicial officer:

(1) shall not discontinue, revoke or dismiss the protective order in its entirety;

(2) shall engage both plaintiff and defendant in agreeing to any terms or conditions for modifying the protective order;

(3) shall consider evidence and the lack thereof with impunity in determining protective order modification.

(i) Service of Modified Protective Order. The plaintiff or the court must arrange for service of a modified protective order on the defendant. A judicial officer should assist this process by asking the defendant to sign an acceptance of service form in the courtroom.

Credits

Formerly Rule 8, added Sept. 5, 2007, effective Jan. 1, 2008. Renumbered Rule 38 and amended Aug. 27, 2015, effective Jan. 1, 2016.

17B A. R. S. Rules Protective Order Proc., Rule 38, AZ ST RPOP Rule 38
Current with amendments received through 05/1/19

17B A.R.S. Rules Protect.Ord. Proc., Rule 39
Formerly cited as AZ ST RPOP Rule 2

Rule 39. Costs and Attorney Fees

Currentness

(a) Award. After a hearing with notice to the affected party, a judicial officer may order any party to pay the costs of the action, including reasonable attorneys' fees, if any. See A.R.S. §§ 13-3602(P), 12-1809(O), and 12-1810(O).

(b) Considerations. In determining whether to award costs or attorney fees, the judicial officer may consider:

- (1) the merits of the claim or the defense asserted by the unsuccessful party;
- (2) whether the award will pose an extreme hardship on the unsuccessful party; and
- (3) whether the award may deter others from making valid claims;

(4) dismissing any claims for attorney fees or attorney fee awards for either party when it is the plaintiff's first time filing for and obtaining the Order of Protection.

Credits

Formerly Rule 2 in part, added Sept. 5, 2007, effective Jan. 1, 2008. Amended Sept. 16, 2008, effective Sept. 26, 2008. Adopted on a permanent basis effective Sept. 3, 2009. Renumbered Rule 39 and amended Aug. 27, 2015, effective Jan. 1, 2016.

17B A. R. S. Rules Protective Order Proc., Rule 39, AZ ST RPOP Rule 39
Current with amendments received through 05/1/19 1