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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of: )  
 )  
Petition to Amend Rule 38, )  
Rules of Protective Order Procedure ) Supreme Court No. R-20-\_\_\_\_\_  
\_\_\_\_\_ )

Pursuant to Arizona Supreme Court Rule 28, Wendy A. Million, chair of the Committee on the Impact of Domestic Violence and the Courts, respectfully petitions this Court to amend Rule 38, Rules of Protective Order Procedure, as reflected in the accompanying Appendix to add clarity regarding requests for contested hearings, appearances, and procedures for conducting contested protective order hearings.

**DISCUSSION**

There is uncertainty surrounding the appearance or non-appearance of plaintiffs and defendants at contested protective order hearings. This is not a new issue, but recent discussion of it—and the resulting myriad of opinions—has brought it to the forefront. CIDVC is filing this petition with the goal of bringing resolution and clarity to the procedures for contested protective order<sup>1</sup> hearings.

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<sup>1</sup> For purposes of this petition, “protective order” means an Order of Protection (A.R.S. § 13-3602), an Injunction Against Harassment (A.R.S. § 12-1809), or an Injunction Against Workplace Harassment (A.R.S. § 12-1810). The

Judge Bruce Cohen, presiding judge of the Family Department, Superior Court in Maricopa County, recently conducted an informal survey of family court judges in Maricopa and Pima counties to ascertain their practices when both the plaintiff and the defendant fail to appear at a contested protective order hearing that the defendant formally requested. Arizona statutes authorize contested protective order hearings<sup>2</sup>, but the court rules lack specificity on the procedures to be followed when one or both parties fail to appear.

The responses to Judge Cohen's informal survey showed a lack of uniformity in procedures being followed when a party fails to appear at a contested protective order hearing. Opinions from a sampling of the responses are summarized as follows:

- If neither party appears, vacate the hearing and leave the order in effect.
- If neither party appears, dismiss the protective order.
- If the defendant appears but the plaintiff does not, dismiss the protective order.
- If the plaintiff appears but the defendant does not, require the plaintiff to prove, by a preponderance of the evidence, that the protective order should remain in effect, even though the plaintiff has already carried the burden of proof for issuance of the order at an *ex parte* hearing.
- If the defendant fails to appear, affirm the protective order but allow the defendant a second chance to ask for another contested hearing.

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procedures for requesting a contested hearing are the same, regardless of the type of protective order. See Part VIII. Contested Protective Order Hearings, Rules of Protective Order Procedure.

<sup>2</sup> See A.R.S. §§ 13-3602(L), 12-1809(H), and 12-1810(G).

- The court rules do not require the defendant to attend the hearing that the defendant requested.

Because of the divided opinions and the disparate treatment that parties may be experiencing in these two counties, Judge Cohen shared the survey results with Judge Million, in her capacity as CIDVC chair, and Judge Paul McMurdie, chair of the Family Court Improvement Committee.

CIDVC proposes revisions to Rule 38 to resolve the conflicting opinions, ensuring that contested hearing procedures are applied uniformly statewide.

**Requesting a Hearing.** The proposed amendment to Rule 38(a) resolves the question of whether the defendant is entitled to request a second contested hearing if the defendant voluntarily fails to appear at the first requested contested hearing. It gives a person of ordinary intelligence a reasonable opportunity to know what the consequence will be if a defendant's failure to appear is voluntary and without good cause shown.

**Appearance at the Contested Hearing.** The proposed addition of Rule 38(e) clarifies the actions the court is to take when either the plaintiff, the defendant, or both fail to appear at a contested hearing.

**Procedure.** Rule 38(f), as reorganized, instructs on the procedures that are to be followed if both parties appear and the contested hearing goes forward.

To resolve this issue expediently, Judge Million sought consent from CIDVC members to file this petition on the committee's behalf. A quorum of CIDVC members met by conference call on January 6, 2020, and unanimously authorized the filing of the attached proposal. By these revisions, the committee is attempting to clarify Rule 38, so

the parties understand the importance of attending contested hearings and the consequences for failure to attend. This plain language supports the purpose of the protective order laws, which is to make sure that the plaintiff remains safe and the defendant gets access to a full contested hearing. It also supports the public policy of requiring the plaintiff to be present at court for only one contested hearing and that the *ex parte* order remains in place in the absence of a contested hearing.

### **CONCLUSION**

For the reasons stated above, CIDVC respectfully asks the Court to adopt the proposed amendments to Rule 38, Rules of Protective Order Procedure, as set forth in the Appendix.

Respectfully submitted this seventh day of January, 2020.

/s/  
Honorable Wendy A. Million  
Magistrate, Tucson City Court

## APPENDIX

Additions are shown by underline; deletions are shown by ~~striketrough~~.

### RULES OF PROTECTIVE ORDER PROCEDURE

#### 38. Contested hearing procedures

- (a) **Requesting a Hearing.** At any time while a protective order or a modified protective order is in effect, a defendant ~~may request~~ is entitled to only one hearing, which must be requested in writing. A defendant waives the right to contest the protective order if the defendant fails to appear at the requested hearing, unless it can be shown that the defendant did not have actual notice of the requested hearing or for other good cause shown. 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) **Appearance at the Contested Hearing.**

- (1) Defendant fails to appear. If the plaintiff appears for the contested hearing and the defendant fails to appear, and the defendant received actual notice of the hearing, the protective order will remain in effect.
- (2) Plaintiff fails to appear. If the defendant appears for the contested hearing and the plaintiff fails to appear, and the plaintiff received actual notice of the hearing, the protective order will be dismissed.
- (3) Neither party appears. If neither party appears for the contested hearing, and each party received actual notice, the hearing will be vacated, and the protective order will remain in effect.
- (f) **Procedure.** If both parties appear and a contested hearing is conducted, the following rules apply:
- (e) (1) 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) (2) Oath or Affirmation. The court must administer an oath or affirmation to all parties and witnesses at all hearings.
- (g) (3) Standard of Proof. For 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) (4) 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.
- (i) (5) Service of Modified Protective Order. ~~The plaintiff or the court must arrange for service of a~~ A modified protective order must be served on the defendant. the judicial officer should assist this process by asking the defendant to sign an acceptance of service form in the courtroom Procedures for serving a defendant who is present in the courtroom are set forth in Rule 31(f)-(g).