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IN THE ARIZONA SUPREME COURT

PETITION TO AMEND RULES 35.1 AND 35.4, ARIZONA RULES CRIMINAL PROCEDURE	NO. R-09-_____

RICHARD D. COFFINGER, an active member of the State Bar of Arizona hereby petitions the Court, pursuant to Rule 28, Ariz.R, Sup.Ct, to amend Rules 35.1 and 35.4, Ariz.R.Crim.P.

Introduction

The purpose of this petition is to amend the rules of criminal procedure to (1) include a specific rule regarding an enlargement of time to file a motion, response or reply; and (2) clarify the effect of a party's failure to file a timely response to a motion. The current criminal rules do not include a provision regarding the former and are unclear as to the effect of the latter. This petition proposes (1) the addition of a criminal rule regarding enlargement of time that incorporates, by reference, Rule 6(b), Ariz.R.Civ.P., the civil rule relating to enlargement of time, and (2) amending the criminal rule to more closely parallel the civil rule's provision relating to the effect of a party's failure to file a timely response to a motion.

Discussion

Rule 35.1, Ariz.R.Crim.P. entitled, "Motions: Form, content and rights of reply," states:

> a. Unless otherwise specified in these rules, all motions shall be typewritten, double-spaced on 8.5 x 11 inch paper and shall contain a short, concise statement of the precise nature of the relief requested, shall be accompanied by a brief memorandum stating the specific factual grounds therefor and indicating the precise legal points, statutes, and authorities relied upon, and shall be served to all other parties. Each party may within 10 days file and serve a response and the moving party may within 3 additional days file and serve a reply which shall be directed only to matters raised in a response. Responses and replies shall be in the form required for motions. If no response is filed, the motion shall be deemed submitted on the record before the court.
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> b. Unless otherwise permitted by the court, a motion, including its supporting memorandum, and the response, including its supporting memorandum, shall not exceed 10 pages, exclusive of attachments. Unless otherwise permitted by the court, a reply, including its supporting memorandum, shall not exceed 5 pages, exclusive of attachments. [Emphasis supplied]

The current Arizona criminal rules do not include an enlargement of time provision as does Rule 6(b), Ariz.R.Civ. P. entitled, "Enlargement [of Time]"[1] which states:

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[1]The Arizona civil enlargement of time rule is similar to Rule 6(b), Fed.R.Civ.P., also entitled, "Enlargement," which states:

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion

(1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or

(2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(d), (g) and (l), and 60(c), except to the extent and under the conditions stated in them, unless the court finds (a) that a party entitled to notice of the entry of judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and (b) that no party would be prejudiced, in which case the court may, upon motion filed within thirty days after the expiration of the period originally prescribed or within 7 days of receipt of such notice, whichever is earlier, extend the time for taking such action for a period of 10 days from the date of entry of the order extending the time for taking such action. [Emphasis supplied]

Due to the lack of a criminal rule relating to enlargement of time, judges in criminal cases, have no standard or direction when presented with this issue. The Arizona criminal trial bench and bar have found the issue of enlargement of time in criminal motion practice, not only when requested by a party, but also when ordered by the court *sua sponte*, particularly troublesome. In the absence of a rule, there is no distinction between a party's request for enlargement made before the expiration of the applicable time limit from one made thereafter. The absence of a specific rule has resulted in inconsistent and conflicting rulings by the criminal trial bench. This

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action under Rules 50 (b) and (c)(2), 52 (b), 59 (b), (d) and (e), and 60 (b), except to the extent and under the conditions stated in them.

result conflicts with the purpose of the Rules of Criminal Procedure stated in Rule 1.2, Ariz.R.Crim.P., entitled "Purpose and construction":

> These rules are intended to provide for the just, speedy determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public welfare. [Emphasis supplied]

If the proposed rule change is adopted, Rule 35.1, Ariz.R.Crim.P. would incorporate the current civil rule,[2] and specifically include a requirement that a party

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[2]The civil motion practice counter part to Rule 35.1, Ariz.R.Crim.P., is Rule 7.1, Ariz.R.Civ.P., entitled, "Civil Motion Practice," which states in part:

> **a) Formal Requirements.** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of a writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.
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> All motions made before or after trial shall be accompanied by a memorandum indicating, as a minimum, the precise legal points, statutes and authorities relied on, citing the specific portions or pages thereof, and shall be served on the opposing parties. Unless otherwise ordered by the court, affidavits supporting the motion shall be filed and served together with the motion. Each opposing party shall within ten days thereafter serve and file any answering memorandum. Within five days thereafter the moving party may serve and file a memorandum in reply, which shall be directed only to matters raised in the answering memorandum. Affidavits submitted in support of any answering memorandum or memorandum in reply shall be filed and served together with that memorandum, unless the court permits them to be filed and served at some other time. The trial court may in its discretion waive these requirements as to motions made in open court.
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> The time and manner of service shall be noted on all such filings, and shall be governed by Rule 6 of these Rules. If the precise manner in which service has actually been made is not noted on any such filing, it will be conclusively presumed that the filing was served by mail, and the provisions of Rule 6(e) of these Rules shall apply. This conclusive presumption shall only apply if service in some form has actually been made. The time periods specified in this paragraph shall not apply where specific times for motions, affidavits or memoranda are otherwise provided

requesting an enlargement made after the expiration of applicable time limit show not only (1) good cause for the enlargement, but also (2) excusable neglect for failing to file the request prior to the expiration of the period.

Also, unlike Rule 7.1, Ariz.R.Civ. P., Rule 35.1, Ariz.R.Crim.P. does not specifically state that a party's failure to file a timely response to a motion "may be deemed a consent to the... granting of the motion," or that the court may rule on the motion "summarily," rather it states "the motion shall be deemed submitted on the record before the court." Another distinction between the civil and criminal rules relating to motions, is that the former imposes upon each non-moving party a mandatory duty to file a response, stating, "[e]ach opposing party **shall** within ten days thereafter serve and file any answering memorandum..." [emphasis supplied], while the latter imposes a directive, stating, "each party **may** within ten days file and

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by statute, the Rules of Civil Procedure, or order of court.

The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by this Rule, and all such motions and other papers shall be signed in accordance with Rule 11.

(b) **Effect of Non-Compliance**. If a motion does not conform in all substantial respects with the requirements of this rule, or <u>if the opposing party does not serve and file the required answering memorandum</u>, or if counsel for any moving or opposing party fails to appear at the time and place assigned for oral argument, <u>such non-compliance may be deemed a consent to the</u> denial or <u>granting of the motion, and the court may dispose of the motion summarily.</u> [Emphasis supplied]

serve a response...." [emphasis supplied].[3]

Numerous reported Arizona appellate court opinions have established criteria for the proper construction of the terms "shall" and "may" in a statute, rule or other writing. These opinions are instructive in determining the Arizona Supreme Court's intent when it used these terms both in 2000, when it adopted Rule 7.1,

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[3]Numerous reported Arizona appellate court opinions have construed the terms "shall" and "may" in statutes, rules or other writings. *Department of Revenue v. Southern Union Gas Co.*, 119 Ariz. 512, 582 P.2d 158 (1978); *Arizona Downs v. Arizona Horsemen's Foundation*, 130 Ariz. 550, 637 P.2d 1053 (1981). In *Woodworth v. Woodworth*, 202 Ariz. 179, 42 P.3d 610 (App. Div. 1 2002) the court held that the ordinary meaning of "shall" in a statute, rule or other writing is to impose a mandatory provision. Accord: *State v. Seyrafi*, 201 Ariz. 147, 32 P.3d 430 (App.Div. 1 2001).

In *Haas v. Colosi*, 202 Ariz. 56, 40 P.3d 1249 (App. Div.2 2002), rev. den., the court held that while the term "may" usually implies some degree of discretion, a court looks at the entire statutory context to determine the intent of the language.

In *Forino v. Arizona Dept. of Transp.*, 191 Ariz. 77, 952 P.2d 315 (App.Div. 1 1997) rev. den., the court held the use of the word "shall" does not automatically render the statute mandatory, as "shall" may indicate desirability, preference or permission.

In *HCZ Const., Inc. v. First Franklin Financial Corp.*, 199 Ariz. 361, 18 P.3d 155 (App. Div. 1 2001), Div. 1 of the Arizona Court of Appeals held that when "shall" is used in the directory sense, it may indicate desirability, preference, or permission. The essential difference between a mandatory and a directory provision does not invalidate the proceeding to which is relates, while failure to follow a mandatory provision does. The ordinary meaning of "shall" in a statute, rule or other writing is to impose a mandatory provision, however, the word "shall" may be deemed directory when the legislative purpose can best be carried out by such construction.

The use of the word "may" in a statute, rule or other writing, generally indicates permissive intent, while "shall" generally indicates a mandatory provision. If a statute, rule or other writing employs both mandatory and discretionary terms, the court may infer that the drafter intended each term to carry its ordinary meaning. *Walter v. Wilkinson*, 198 Ariz. 431, 10 P.3d 1218 (App.Div.1 2000), rev. den.

The fact that a statute, rule or other writing employs the term "shall" does not render it mandatory, for such term may be defined as "must" or "may" depending on the context of the provision and intent of the drafters. *State v. Sanchez*, 119 Ariz. 64, 579 P.2d 568 (App.Div.2 1978).

Ariz.R.Civ.P.[4], and in 1975, when it adopted Rule 35.1, Ariz.R.Crim.P. The civil rule states that "each opposing party **shall...** file any answering memorandum," and further provides that, in the event of a party's failure to file a timely response, it "... **may** be deemed a consent to the... granting of the motion,[5] and further that the court **may**

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[4] Rule 7.1, Ariz.R.Civ.P. includes the following State Bar Committee Note relating to the 2000 Amendment.

> Rule 7.1 was promulgated in 2000 as part of the process of consolidating formerly separate sets of procedural rules into either the Arizona Civil Rules of Civil Procedure or the Rules of the Arizona Supreme Court, and represents an effort to incorporate into a single Rule the provisions of several prior rules that applied generally to civil motion practice and procedure. Rule 7.1(a) combines the provisions of former Rule 7(b) of the Arizona Rules of Civil Procedure and the provisions of former Rule IV(a) of the Uniform Rules of Practice of the Superior Court. It also incorporates a modified version of the provision in former Rule 6(c), which was abrogated, dealing with the time for service and filing of any affidavits submitted in support of, or in opposition to, a civil motions, Rules 7.1(b), (d), and (e) contain the provisions formerly set forth in Rules IV(b), (d), and (h) of the Uniform Rules of Practice of the Superior Court. Rule 7.1(c) is what was formerly Rule 78 of the Arizona Rules of Civil Procedure. The retention of former Rule IV(e) of the Uniform Rules of Practice of the Superior Court, which authorized the scheduling of a special pretrial conference for the hearing of repeated or multiple motions, was deemed unnecessary, and potentially confusing, in light of the expanded permissible scope of pretrial conferences scheduled pursuant to Rule 16 of the Arizona Rules of Civil Procedure. [Emphasis supplied]

[5]Rule 7.1, Ariz.R.Civ.P.'s provision that a party's failure to file a response to another party's motion may be deemed a consent to the granting of the motion, is consistent with numerous Arizona appellate court cases establishing the same principles.

In *Schuldes v. National Sur. Corp.,* 27 Ariz.App. 611, 557 P.2d 543 (App.Div. 1 1976), Div. 1 of the Arizona Court of Appeals held that, when a party fails to file a response to a motion for summary judgment, as required by Rule 56(e), Ariz.R.Civil Pro., for the purpose of the motion, its allegations were treated as judicial admissions by the non-responding party. The court stated:

> A written response is required, however, whenever any motion is filed in the superior court. *See* Rule IV, Uniform Rules of Practice of the Superior Court, 17A A.R.S. [replaced by Rule 7.1, Ariz.R.Civil Pro. added October 10, 2000, effective December 1, 2000] 27 Ariz.App. at 617

dispose of the motion summarily." [Emphasis supplied] In contrast, the criminal rule states that "each party **may...** file and serve a response," and if no response is filed, "the motion **shall** be deemed submitted on the record before the court." [Emphasis supplied]

Both the rule change petition that resulted in the supreme court's adoption of Rule 7.1, Ariz.R.Civ.P., and the State Bar of Arizona's (SBA) Committee Note to the 2000 Amendment were drafted by the SBA's Civil Practice and Procedure Committee (CPPC) . This committee is comprise of distinguished Arizona civil practitioners from both the plaintiff and defense bar, which thoroughly vetted the proposed amendment prior to its submission to and approval by, initially the SBA

Numerous reported Arizona appellate court decisions have held that, in civil cases, if a party fails to file a timely response to an opposing party's timely filed request for relief that presents a debatable issue, the court will assume that the opposing party's failure to file a response was a confession by the opposing party that the motion was meritorious. *State v. Superior Court of Maricopa County and Blendu (RPI)*, 174 Ariz. 450, 850 P.2d 688 (App.1993); *Barrett v. Hiney,* 94 Ariz. 133, 382 P.2d 240 (1963); *Schreyer v. Schreyer,* 82 Ariz. 333, 313 P.2d 402 (1957).

This rule has also been held applicable in criminal cases. In *Burgen v. State,* 32 Ariz. 111, 256 P. 111 (1927), the Arizona Supreme Court stated,"notwithstanding that we might consider [the State's failure to file a response] as a confession of error and reverse the case for that reason alone, we have considered the appeal on its merits." [Emphasis supplied] 32 Ariz. 113

In *Blendu, supra,* Division I, Department B of the Arizona Court of Appeals held that in a superior court appeal on the record, involving a civil traffic violation, if the appellee fails to file an appellee's memorandum, it is a confession of error if appellant's memorandum raised any debatable legal issue. Webster's Collegiate Dictionary defines "debatable" as "open to question, disputed, undecided." A debatable legal issue is simply the opposite of a frivolous or groundless claim that is not made in good faith. *State v. Richey,* 160 Ariz. 564, 774 P.2d 1354 (1989); *Reed v. Mitchell and Timbanard,* 183 Ariz. 313 and 320, 903 P.2d 621 (App.1995) rev.den.

Board of Governors, and ultimately the Arizona Supreme Court. When compared to the applicable text of Rule 35.1, Ariz.R.Crim.P., the drafters of Rule 7.1, Ariz.R.Civ.P., achieved a more precise and well-reasoned text.

There appears to be no good reason why the drafters of Rule 35.1, Ariz.R.Crim.P., used the directive "may," rather than the mandatory, "shall," relating to an opposing party's obligation to file a response to a motion. The CPPC's duel consequences of a party's failure to file a timely response, that the court may (1) deem such failure as a consent of granting the motion, and (2) rule on the motion "summarily," included in Rule 7.1, Ariz.R.Civ.P., should be included in Rule 35.1, Ariz.R.Crim.P.

Numerous other provisions in the Rules of Criminal Procedure expressly incorporate by reference a similar provision in Rules of Civil Procedure, including Rule 1.3[6], Rule 35.5[7], Rule 35.7[8] and Rule 41[9].

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[6]"...Whenever a party has the right or is required to take some action within a prescribed period after service of a notice or other paper and the notice or paper is served by a method authorized by Rule 5(c)(2)(C), (D), or (E), Arizona Rules of Civil Procedure, five calendar days shall be added to the prescribed period. Mailing pursuant to Arizona Rule of Civil Procedure 5(c)(2)(C) includes every type of service except same day hand delivery."

[7]"Unless otherwise specified in these rules, the manner and sufficiency of service and filing of motions, requests, petitions, applications, and all other pleadings and documents shall be governed by Rule 5 of the Rules of Civil Procedure."

[8]"...The proposed order shall be prepared in accordance with this subsection and Rules 5(j)(2) and 10(d) of the Rules of Civil Procedure...."

[9]"... All forms shall comply with the formatting requirements of Rule 10 Rules of Civil Procedure."

For the reasons set forth above, Petitioner respectfully petitions this Court to amend Rules 35.1 and 35.4, Ariz.R.Crim.P., as set forth in the attached exhibit.

RESPECTFULLY SUBMITTED this 10th day of December, 2009.

/s/ Richard D. Coffinger
RICHARD D. COFFINGER

ORIGINAL e-filed with the Clerk of the Arizona
Supreme Court this 10th day of December, 2009.

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