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SUPREME COURT OF ARIZONA

In the Matter of:

PETITION TO AMEND THE RULES
OF SPECIAL ACTION PROCEDURE

Supreme Court No. R-23-0055

**COMMENT ON PETITION TO
AMEND THE RULES OF
PROCEDURE FOR SPECIAL
ACTIONS**

Pursuant to Supreme Court Rule 28(e), the Arizona Attorney General's Office submits this comment on the Task Force's Petition to Amend the Rules of Procedure for Special Actions. While undersigned counsel helped marshal and distill the comment, it reflects input from multiple experienced appellate and trial court attorneys in the Office.

The Office echoes the laudatory feedback that the Task Force has heard from others and has therefore endeavored to provide feedback that aligns with the principles

and goals underlying the commendable work to this point. Our comment (1) addresses the most significant substantive concerns expressed within the Office; (2) offers additional substantive feedback more briefly; and then (3) makes a handful of stylistic suggestions for consideration.

I. Primary substantive concerns.

A. Omission of the threshold requirement that a special action is available only where there is no adequate remedy by appeal.

Under current Rule 1(a), “the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal.” The proposed rules omit this provision, as well as the similar language in Rule 8. The Office understands that this omission reflects the Task Force’s considered view that tangible guidance is generally more useful than language that is sometimes “merely a recital,” Pet. at 10, and we take the point that the terms “plain” and “equally . . . speedy” may have dubious value. However, we favor retaining at least the “adequate remedy” language as an umbrella standard for discretionary special actions.

We agree with Joel Nomkin (*see* 3/18/24 J. Nomkin comment) that the “equally plain, speedy, and adequate” standard has historically served an important limiting function, and that its total omission may expand special action availability, notwithstanding the avowal elsewhere that the “Rules do not enlarge

the scope of relief” under the old writs. *See* Proposed Rules of Procedure for Special Actions (“Rule”) 2(c).

While certain Rule 11 factors may indeed embed “the concept of speed and adequacy” (Pet. at 11), factor 11(c)(4) (“equally appropriate to address by appeal”) most closely parallels the venerable old standard. Replacing the concept of adequacy with the more generic term “appropriate”—and including this variation of the old standard as one of thirteen nonexclusive, nonbinding factors—will likely be understood by practitioners to have import. In particular, it will likely cause practitioners and courts to conclude that special action jurisdiction may be appropriate even when there *is* an equally adequate remedy by appeal.

Any expansion of special action relief to cases in which there is an adequate remedy by appeal may have significant adverse consequences. It could encourage marginal special actions that will cause delay, make litigation more expensive, and burden the courts. It could also cause our appellate courts to decide important issues on a fast track, rather than through the normal appellate process, which is structured to provide for careful decision on issues of lasting consequence. And it could cause our appellate courts to reach issues that would otherwise be productively resolved in the ordinary course of litigation.

Additionally, we are concerned that without an umbrella concept explaining when special action jurisdiction is appropriate, courts will be left without guidance

when a special action *seems* appropriate but does not qualify under any of the factors listed in Rule 11. It is important to have an overall concept of what makes a special action appropriate. That concept should be embedded in the rule.

We also note that statutory provisions that confer special action jurisdiction continue to retain “plain, speedy and adequate remedy” language (*see, e.g.*, A.R.S. §§ 12-2001, -2021), creating potential tension between Arizona’s statutory and rule-based special action authority. While there’s a reasonable argument for retaining this full phrase in the Rules for historical continuity, we feel most strongly about retaining the “adequate remedy” standard as umbrella guidance, as illustrated in the next section.

B. Multiplicity and redundancy of the nonexclusive Rule 11 factors.

We commend the Task Force’s incorporation of tangible guidance via the Rule 11 factors, but—recognizing the powerful sway that multifactor tests hold over practitioners—we question whether the factors could be slightly refined. In particular, we are concerned that inviting lawyers to argue about thirteen nonbinding factors—some of which are substantively redundant—may elicit strained factor-centric argument at the expense of more natural focus on the most relevant and important factors in a given case.

In principle, we appreciate that the Rule lists factors on both sides of the accept/decline ledger. But in practice, all (or nearly all) of the Rule 11(b) and Rule

11(c) factors can alternately be stated in either the positive or negative, and thereby framed as something that supports either acceptance or denial of jurisdiction. Rule 11 even expressly includes both sides of this framing for factors 11(b)(7) (“the resolution of which will materially advance the efficient management of the case . . .”) and (c)(5) (“the resolution of which will not materially advance the efficient management of the case . . .”). It is not clear why this particular factor (and not others) received this precise parallel treatment—for example, it seems as though factor 11(b)(4) (“of statewide importance”) could just as easily have a “not of statewide importance” reverse doppelganger in Rule 11(c).

We would address these consistency and redundancy issues by condensing the lists in some manner. With appropriate prefatory or concluding guidance, the factors might effectively be combined into a single list of about eight to ten factors; alternatively, the factors might be revised and condensed so as to leave eight to ten factors—each substantively distinct to the extent possible—split between two lists.

For example, combining the factors into a single list (and incorporating our suggestions in Sections I(A) and II(E)) might look as follows:

Factors That Bear On Support Accepting Jurisdiction. A special action is available only where there is no adequate remedy by appeal. In deciding whether to accept or decline jurisdiction, the court should consider, among other factors, whether the petition asks the court to resolve questions:

(1) certified for review under Rule 12;

(2) of privileges or immunities;

(3) of first impression;

(4) of law, not fact, and not clearly resolved by settled law;

(45) of statewide importance;

(56) tending to evade review, including questions that may become moot before an appeal;

(67) involving the welfare of children where the harm complained of can only be prevented by resolution before an appeal;

(78) the resolution of which will materially advance the efficient management of the case, other than issues presented by ordinary dispositive motion practice under Rules 12(b)(6), 12(c), or 56 of the Rules of Civil Procedure, or Rules 29(a)(6) or 79 of the Rules of Family Law Procedure;

(89) concerning a decision that cannot be justified under any rule of law.

~~These factors support but do not require accepting jurisdiction.~~

The presence of a particular factor supports but does not require accepting jurisdiction; the absence of a particular factor supports but does not require declining jurisdiction.

[Strike Rule 11(c)]

~~(1) of fact;~~ [incorporated above]

~~(2) resolved under Rules 12(b)(6) or 56 of the Rules of Civil Procedure, or Rules 29(a)(6) or 79 of the Rules of Family Law Procedure;~~ [incorporated above]

~~(3) clearly resolved by settled law;~~ [incorporated above]

~~(4) equally appropriate to address by appeal; or~~ [addressed by adding “adequate remedy” prefatory language.]

~~(5) the resolution of which will not materially advance the efficient management of the case.~~ [already addressed above]

To be clear, we have more substantive concern about the omission of the “adequate remedy” language and other issues presented in this comment than we do about the factors’ precise language, or whether they are presented as one or two lists. But with the expectation that these Rules will be in place for decades, we also wanted to foster discussion regarding whether the Rules’ presentation of the factors might be further optimized.

C. Overbreadth of proposed Rule 10(e)’s jurisdictional allowance.

The proposed Rule provides that “[i]f the reviewing court lacks jurisdiction over a direct appeal for reasons other than timeliness, the court may—on a party’s request or on its own initiative—treat the appeal as a special action and accept special action jurisdiction.” We question whether this is too broad, given that the court of appeals may lack jurisdiction over an appeal because a party failed to comply with a general requirement other than timeliness. For example, the court of appeals may lack jurisdiction over an appeal if the judgment or order from which the appeal is taken is not final because it is not signed or because it lacks Arizona Rule of Civil Procedure 54(b) or 54(c) language. Or a court may lack jurisdiction because a party has failed to exhaust administrative remedies. The rule should not encourage parties to think that they can disregard requirements like

these by asking that their ineffective appeals be treated as special actions. Rather, parties and courts need to have a clear understanding of the scope of a court's appellate jurisdiction and power. And if something falls outside that scope, then there should be a clear procedure and standard by which parties seek and courts grant special action relief when they otherwise would not have appellate jurisdiction.

We would favor limiting language that precludes or discourages such a construction. At a minimum, the Rule should provide that the reviewing court should generally give the parties notice and an opportunity to be heard before converting an appeal to a special action.

D. Rule 7(g)'s unduly negative cast on discovery.

We believe the statement that “[d]iscovery is not routinely permitted in special actions” goes too far in discouraging discovery, and we question why a matter of such importance should be stated in the negative. There are countless instances in which discovery is appropriate in special actions—for example, in a public records dispute, a party may need to depose a custodian regarding the existence of records. And discovery is often necessary in standing disputes. The Rule can establish that discovery is not available by right without unduly restrictive language. For example,

“Discovery Available Based on Good Cause~~Generally Prohibited.~~
~~Discovery is not routinely permitted in special actions.~~ If a special action raises a

material issue of fact, the court may issue special orders ~~concerning~~ allowing discovery upon a showing of good cause.”

E. Rule 15’s inconsistent language regarding a stay’s scope.

Rules 15(a) and (b) refer to a “stay [of] *the decision* challenged by special action.” (Emphasis added.) Rule 15(d), however, provides that “[t]he reviewing court may issue a stay on its own initiative,” without the limiting reference to the “decision” being challenged. While this limitation may be implied contextually, a party could try to exploit this Rule by asking the reviewing court to stay all proceedings before the lower court. We would foreclose this by revising as follows: “The reviewing court may issue a stay of the decision challenged by special action on its own initiative.” Alternatively (or additionally), the Rules could provide this clarifying guidance in a comment to Rule 15.

Similarly, Rule 15(h) could be read to contemplate that if a reviewing court issues a stay, it entirely divests the lower court of jurisdiction. We would revise it to reflect that in special actions, stays will usually be partial stays, as follows:

“Continued Jurisdiction. Unless the reviewing court issues a stay, the court from which special action relief is sought retains jurisdiction over the case, including those matters as to which relief is sought. If the reviewing court issues a stay, the lower court is generally divested of jurisdiction only with respect to those matters for which the special action seeks relief.”

II. Additional substantive comments.

A. Rule 5(a)(2)

Proposed Rule 5(a)(2) provides that the plaintiff must name “as defendants all other interested parties.” We question whether the term “interested” is too broad here, insofar as it seems much broader than an Arizona Rule of Civil Procedure 19 required party. Incorporating Arizona Rule of Civil Procedure 19’s standard—i.e., stating that the complaint “must also name as defendants all other interested parties in whose absence the court cannot afford complete relief”—would address this.

B. Rule 5(b)(2)

Proposed Rule 5(b)(2) provides that the “petition in an appellate special action must name as respondents all other parties in the case.” A petitioner should certainly provide notice to all parties, but naming nonadverse parties as respondents is bound to introduce senseless confusion. For example, why should a defendant need to name a codefendant as a respondent? Or if a defendant and codefendant become adverse on an issue, why should the defendant need to name the plaintiff? We would revise this along the following lines: “The petitioner in an appellate special action must provide notice of the special action to all parties and name as respondents all ~~other~~ parties who are adverse with respect to the matter subject to the special action ~~in the~~ ~~ease.~~”

C. Rule 6(a)'s potentially conflicting venue provisions.

Rule 6(a)(1) provides that “[a]n original special action in the Superior Court must be brought in *the county where the body, officer, or person has decided, or should have decided, the matter that is the subject of the special action.*” (Emphasis added.) Rule 6(a)(2) establishes a slightly different rule for State officers and bodies. Rule 6(a)(3) then provides in part that “[a]n original special action involving any public officer or body other than a state officer or body, or a special action involving a private entity, must be filed in *the county of the principal place of business of such officer, body, or entity.*” (Emphasis added.)

Our concern is that the rule does not make clear where venue is supposed to lie when two or more of these provisions apply. For example, if a public body decided a matter in Cochise County, but its principal place of business is in Pima County, the venue provisions of Rules 6(a)(1) and 6(a)(3) would conflict.¹ Such conflicts may be rare (and may exist under current Rule 4), but they are still worth avoiding.

One option would be to state (1) the general venue rule in Rule 6(a)(1); (2) the rule for State officers or bodies in Rule 6(a)(2); and (3) the rule for actions involving a private entity in Rule 6(a)(3).

¹ There are also possible conflicts between Rules 6(a)(1) and 6(a)(2), although these could probably be readily resolved by relying on the more specific rule, 6(a)(2).

D. Rule 7(f)

The requirement that a court must schedule a “speedy hearing date” “[a]s soon as practicable, but no later than 30 days after any defendant files an answer or other” response is arguably ambiguous as to whether the 30-day limit applies to the *setting* of a hearing or to the hearing itself. If the Task Force intended the latter, this sentence can be rewritten to eliminate ambiguity (e.g., “The court must hold a hearing as soon as practicable, but no later than 30 days after any defendant files an answer . . .”); if it intended the former, it can also be revised for clarity.

Additionally, the Task Force explained (Appendix C at 9) that it replaced the phrase “speedy return date” with “expedited response date” to avoid a connotation of “hurriedly” or “in a rush.” The phrase “speedy hearing date” has a similar connotation, and it may also be superfluous if the 30-day requirement applies to the hearing itself.

E. Rule 11(c)(2)

While motions under Arizona Rule of Civil Procedure 12(c) might be less common than other dispositive motions, we don’t see a reasoned basis to omit it here. We would therefore reference Arizona Rule of Civil Procedure 12(c), alongside 12(b)(6) and 56. (We’ve incorporated this suggestion into revised Rule 11(b)(8) in our illustrative revision above.)

F. Rule 12(b)

The reference to a “writing submitted by a party . . .” seems extraneous. We would revise as follows: “The certification may be in the court’s written decision, a transcript of a proceeding, or a separate ~~writing submitted by a party and approved~~ order issued by the court. Alternatively, this Rule might be simplified further by simply stating: “The Court certification must be on the record, whether in a written decision, order, or transcript.”

G. Rule 13(d)(3)

The proposed rule states that “[a] response should include a statement of any facts that are not contained in the petition.” We would qualify the reference to “any facts” to discourage the inclusion of immaterial and extraneous facts—i.e., “A response should include a statement of any [necessary/material] facts that are not contained in the petition . . .”

H. Rule 13(i)

This rule appears to address only amicus briefs concerning the petition, with no allowance for later amicus briefs. To the extent the Task Force’s intent is not to preclude later amicus briefs (which we would not favor), we believe that the rule should provide further guidance on amicus procedure. For example,

“Amicus curiae briefs must be filed as expeditiously as possible after the petition for special action or other brief is filed, or as otherwise ordered by the court.”

III. Comments pertaining to clarity and stylistic matters.

A. Rule 1(d)

Improve awkward phrasing:

“Rules 6(a) and, except with respect to electronically served documents, 6(c) of the Rules of Civil Procedure govern the computation of any time period set by these Rules, a court order, or an applicable statute.”

B. Rule 2(c)

With the current special action rules having been in place for fifty years, does the immediacy suggested by “*no longer* be designated . . .” add anything of value? Consider:

“The writs of certiorari, mandamus, or prohibition by which parties formerly obtained relief in proceedings are now called special actions. Special action proceedings should ~~no longer~~ not be designated as proceedings for certiorari, mandamus, or prohibition.”

C. Rule 3

Consider revising for brevity and to eliminate awkward phrasing:

“If ~~any~~ statute, ~~other than those~~ that is not listed in Rule 2(c), authorizes filing a special action, or an action for a writ of certiorari, mandamus, or prohibition, that action is [known as] a statutory special action. ~~These special actions, known as~~ sStatutory special actions, may be either original or appellate special actions.”

D. Rule 13(g)(1)

Fix subject-verb agreement:

“petitions and responses must not exceed 10,500 words excluding ~~its~~ their cover pagess, captionss, date and signature blocks, table of contents and citations, and certificates of service and compliance . . .”

E. Rule 18(a)(1)

Per a Westlaw search, Arizona statutes and court rules appear to alternate between the formulations “request [a/the] court to . . .” and “request that [a/the] court . . .” in roughly equal proportion. We find the latter more natural and approachable:

“A motion for reconsideration requests that the court ~~to~~ consider whether its decision . . .”

Respectfully submitted this 17th day of May 2024.

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