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Task Force on Rules of Procedure for Special Actions
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SUPREME COURT OF ARIZONA

PETITION TO AMEND THE	)	Supreme Court No. R-23-0055
RULES OF PROCEDURE FOR	)	
SPECIAL ACTIONS	)	REPLY
	)	
_____	)	

1. Introduction. Undersigned is filing this Reply as staff for, and with the authority of, the Supreme Court’s Task Force on Rules of Procedure for Special Actions (“Task Force”).

Almost a dozen comments were posted on the Court Rules Forum in response to the February 22, 2024, Task Force rule petition. Some comments addressed a single subject, while others addressed multiple subjects. A few comments expressly supported the work of the Task Force, while others raised stakeholder concerns or suggested ways to improve the proposed rules. Most of the formal and informal feedback during the past few months acknowledged that the proposed rules significantly improve the current special action rules, first, by restyling, that is, by adopting clearer language and more user-friendly organization, and second, with

enhancements to the rules’ substantive functionality by including topics— such as factors in new Rule 11 for exercising discretion—that the current rules do not address.

This Reply responds to the Rules Forum comments by reference to particular rules. This Reply also identifies rule amendments that were proposed on the Task Force’s own initiative. Please also see Revised Appendix C for additional details of those amendments. And the Reply discusses suggested rule amendments that the Task Force declined to adopt.

The Task Force met on May 22, 2024, and June 21, 2024, to discuss these comments. Revised Appendix A shows with strikethrough and underline the Task Force’s suggested amendments to the rules proposed by its February petition. The Task Force is also filing with this Reply another version of Revised Appendix A that is “clean,” i.e., which has no strikethrough or underline. Revised Appendix B is a modified table correlating the current rules with the proposed rules; one version of Revised Appendix B shows the most recent Task Force amendments with underline, while a second version is clean and has no markup. And Revised Appendix C shows, by text in red font, explanations of the newly proposed amendments in Revised Appendix A.

2. Discussion. The proposed rules are organized into four Parts, which are identified by upper case roman numerals. This Reply also proposes an Appendix to the proposed rules.

- **PART I. GENERAL PROVISIONS**

Rule 1: “Scope and Construction; Computing Time.” The Task Force recognized that the rules proposed in February did not contain a provision concerning public access to confidential documents, such as those that might be filed in a special action proceeding arising from a juvenile or a mental health case. After discussion and on its own initiative, the Task Force added a new section (e) to Rule 1 that says,

Confidentiality. Parties must comply with the confidentiality requirements under applicable statutes, rules, or other provisions of law.

The proposed provision is broad because confidentiality is governed by a variety of authorities, such as Supreme Court Rule 123 and other Arizona or federal rules and statutes. The title of Rule 1 would be modified to include the word “confidentiality.”

A phrase concerning the unavailability of special action relief when there is a “plain, speedy, and adequate remedy by appeal” appears in the third sentence of current Rule 1 (“nature of the special action”). The Task Force intentionally omitted this phrase from the proposed rules, and the rule petition at pages 10-11 discussed the rationale for the omission. Comments from Judge Catlett, Mr. Nomkin, and the Attorney General’s Office (“Attorney General”) expressed concerns with that

omission, and the Task Force now recognizes those concerns. This Reply addresses the omission by a new proposed amendment to Rule 11, which is discussed in Part III below.

Rule 3: “Statutory Authority for Certain Special Actions.” A comment from Mr. Heade requested the Task Force to add in the comment to Rule 3 (“statutory authority for certain special actions”) a reference to A.R.S. § 36-546.01, which concerns special action challenges to court-ordered mental health treatment. The Task Force acknowledged that this statutory reference was inadvertently omitted from the comment, and it added the reference to the Reply version. In the first paragraph of the comment to Rule 3, the Task Force on its own initiative added the words “but are not limited to” to convey to readers that the enumerated statutory special actions are examples, but they are not an exhaustive list of those actions.

Rule 5: “Parties.” In Rule 5(a)(2) (“naming a defendant”), the Attorney General suggested that requiring an original special action to name as defendants “all other interested parties” was too broad. After discussing this suggestion, the Task Force changed that phrase to “all other parties in whose absence the court cannot afford complete relief.”

The Attorney General’s comment also raised an issue concerning Rule 5(b)(2) (“respondent defined”) that would require an appellate special action petition to name as respondents “all other parties in the case.” After discussion, the Task Force

made no changes to this phrase. Its reasoning was that there was no harm in the over-inclusion of parties, but under-inclusion could be problematic. And a named respondent who had no interest in the proceeding could easily file something analogous to a notice of non-participation.

Rule 5(b)(2) also provides that “the court may allow other persons to respond” to an appellate special action. A comment from the State Bar of Arizona (“State Bar”) requested additional guidance concerning the intended meaning of “other persons.” The Task Force observed that Rule 5(c) (“other persons: intervenors, joinder, amicus curiae”) also refers to “other persons.” The Task Force intended the reference to “other persons” in subpart (b)(2) as a bridge to the “other persons” in section (c). To clarify the reference, the Task Force amended the second sentence of subpart (b)(2) to say, “The court may allow other persons to respond, as set forth in Rule 5(c).”

- **PART II. ORIGINAL SPECIAL ACTIONS**

Rule 6: “Where to File Original Special Actions.” The Attorney General’s comment noted “potentially conflicting venue provisions” in Rule 6(a) (“original special actions brought in the Superior Court”). To eliminate the potential conflict, the Task Force revised and reorganized Rule 6(a). The reorganized section has three subparts: (a)(1) (“public bodies generally”), (a)(2) (“State of Arizona”), and (a)(3) (“private entity”).

Rule 7: “Procedures in Original Special Actions.” The Attorney General’s comment noted an ambiguity in Rule 7(f) (“scheduling and management”), specifically whether the 30-day time limit referred to the time for scheduling a hearing or to the time for conducting the hearing. The Task Force agreed that the provision merited clarification, and it made these edits to section (f):

The court must hold a speedy return hearing ~~As soon as practicable, but no later than 30 days after any defendant files an answer or other appropriate response to the complaint. At the hearing, the court must schedule a speedy hearing date to~~ determine the course of further proceedings, including what briefing, discovery, evidentiary proceedings, or hearings are needed, and ~~to~~ schedule them.

The Attorney General’s comment contended that Rule 7(g) (“discovery generally prohibited”) “goes too far in discouraging discovery,” and that there are “countless instances in which discovery is appropriate in [original] special actions.” The comment requested modifying this section to allow discovery “upon a showing of good cause.” The Task Force discussed this comment in conjunction with a comment from the Goldwater Institute, which contended that the proposed language in Rule 7(g) “would impair the administration of justice in special action cases that require factual development.”

Case law cited in the proposed comment to Rule 7 limits discovery in original special actions to “rare instances,” and the Task Force accordingly opposed adding the “good cause” standard. The Task Force also observed that permitting more

liberal discovery might result in delays in processing special actions, contrary to the expedited nature of these proceedings.

The Attorney General’s comment contended that the title of Rule 7(g) — “discovery generally prohibited” — was “too strong,” and that if an issue requires discovery, discovery should not be prohibited. The Task Force agreed with this contention and shortened the title of the section to simply “discovery.”

The State Bar comment also raised an issue with section (g). Specifically, the State Bar proposed to add the words “and disclosure” to the final sentence of the section (i.e., “the court may issue special orders concerning discovery and disclosure”). Members noted that under Rule 7(b), the court may order any party or person to file with the court any records they possess, which is akin to disclosure; and further, the court can enter other appropriate orders under Rule 7(f) (“scheduling and management”). The Task Force accordingly declined the State Bar’s suggested change to Rule 7(g).

Rule XX: “Filing Fees; Filing of Documents; Clerk’s Distribution of Documents.” The Clerk of the Superior Court in Maricopa County (“Maricopa Clerk”) maintained that “...it is likely prudent to address [in these rules] the filing of documents and pleadings [including the payment of filing fees] and the distribution obligations of the clerk in original special actions,” much like the Part III rules do for appellate special actions. Appended to the Maricopa Clerk’s

comment was a proposed Part II rule (“Rule XX”), which was more than a page in length and provided those details. The rationale for the Maricopa Clerk’s proposed rule was sensible, although depending on its location within the rule set, adding it would require renumbering of every subsequent rule as well as renumbering multiple cross-references throughout these rules. More significantly, adding an entirely new and lengthy rule at this time, after the public comment period in R-23-0055 had closed, would deprive the public of an opportunity to provide feedback concerning these new provisions. The Task Force therefore declined to add the Maricopa Clerk’s proposed new rule at this particular stage of the rule petition process.

References to Other Civil Rules. The Goldwater Institute’s comment also proposed adding a rule in Part II that incorporated by reference portions of the Civil Rules. The comment contended that doing so would parallel proposed Rule 10(a) (“other rules applicable”) in Part III, which refers to the ARCAP and SCRAP rules, and that this new Part II rule would fill gaps in original special action procedures in the Superior Court. The Task Force declined to adopt this proposal.

- **PART III. APPELLATE SPECIAL ACTIONS**

Rule 10: “General Provisions for Appellate Special Actions.” The Attorney General questioned a provision in Rule 10(e) (“exercising special action jurisdiction in a direct appeal”) that allows the court to treat an appeal as a special action. The Attorney General suggested adding language that would provide “a clear

procedure and standard” for doing so. As an acknowledgment of the Attorney General’s concern, the Task Force added to Rule 10(e) that if the court on its own initiative treats an appeal as a special action, it may do so only “with notice to the parties.” This presumably will allow a party to object to the court’s exercise of special action jurisdiction, although the added provision would not require the appellate court to order additional briefing on the issue.

As a further refinement, the Task Force on its own initiative modified Rule 10(e) by adding that the court may treat the appeal as a special action and accept special action jurisdiction “consistent with Rule 11.” This would require the appellate court’s acceptance of special action jurisdiction of the appeal to be compatible with the Rule 11 factors. Notwithstanding these modifications to Rule 10(e), the underlying statutory provision (A.R.S. § 12-120.21(A)(4)) will continue to be foundational.

Rule 11: “Factors for Accepting or Declining Jurisdiction of Appellate Special Actions.” The comments from Mr. Nomkin and Judge Catlett, and a portion of the Attorney General’s comment, raised a similar concern. The concern focused on the omission from the proposed rules of the phrase “plain, speedy, and adequate remedy by appeal,” which appears in current Rules 1(a) and 8(b). Judge Catlett’s comment contained an extensive analysis of this requirement, including a history of

equitable writs in Arizona. All three comments argued for the necessity of including this omitted phrase (or at least including “adequate remedy by appeal”).

The Task Force acknowledged the merit of these comments and the need to address this concern. The Task Force now proposes to do so by adding the following underlined sentence to Rule 11, section (a) (“discretion”):

Whether to accept jurisdiction of an appellate special action is within the court’s discretion, unless a statute or an order requires the court to accept jurisdiction. In accepting or declining jurisdiction, the court is determining whether remedy by appeal is equally plain, speedy, and adequate.

In conjunction with the foregoing amendment to section (a), the Task Force proposes to add the following new comment to Rule 11:

The special action rules codify how to exercise the rights described in Arizona’s Constitution and elaborated in statute. Ariz. Const. Art. 6, §§ 5, 18; A.R.S. §§ 2101, -2201. Two of these statutes expressly describe the power of the court to issue writs as arising where there is no “plain, adequate and speedy remedy” at law. *Id.* From their inception in 1970, the original Rules of Procedure for Special Action recited that special actions were available when there was no ‘plain, adequate and speedy remedy’ without explaining what that meant, or when that circumstance was present. *See* Rules Proc. Special Action 1(a) (West 2024). The 2025 Rules provide the criteria that developed over the past 55 years as appellate courts applied these rules to supply a clear statement of many of the factors courts use in exercising their discretion to determine whether there is no ‘plain, adequate and speedy remedy.’ The list of factors is not exhaustive.

The comments from the State Bar and the Attorney General raised additional concerns regarding Rule 11.

In section (b) (“factors that support accepting jurisdiction”), subpart (b)(2), the State Bar, for “clarity and precision,” recommended replacing the proposed

phrase “of privileges or immunities” with the phrase “of legal or evidentiary privileges, or of immunity from suit.” The Task Force agreed with the State Bar’s proposal.

Another factor in subpart (b)(7) concerns an issue “which will materially advance the efficient management of the case, other than issues presented by ordinary dispositive motion practice.” The State Bar’s comment contended that “the language pertaining to dispositive motion practice may unreasonably deter litigants from seeking special action review of rulings resulting from such practice even where appropriate.” (A key case on Rule 56 summary judgment jurisprudence, *Orme School v. Reeves*, 166 Ariz. 301 (1990), went before the Arizona Supreme Court as a special action.) For this reason, the State Bar recommended deleting from proposed subpart (b)(7) the phrase “other than issues presented by ordinary motion practice,” as well deletion of a corresponding factor in section (c) (“factors that support declining jurisdiction”), subpart (c)(2). The Task Force, in recognition of the appellate court’s exercise of discretion, declined these suggested changes.

The Attorney General raised a concern regarding the “multiplicity and redundancy of the non-exclusive Rule 11 factors.” The Attorney General’s comment proposed to rectify the issue by combining the Rule 11(b) and Rule 11(c) factors into a single list, or alternatively, to retain both sections but to make each of these two sections “substantively distinct to the extent possible.” The Task Force concluded

that the Attorney General’s alternatives did not substantively change what is already contained in these two sections. Further, although proposed sections (b) and (c) might be somewhat repetitive, that repetition might actually be helpful to parties and judicial officers. The Task Force declined to adopt either of the Attorney General’s suggested options. The Task Force, however, agreed with the Attorney General’s suggestion to add a reference to Civil Rule 12(c) (a motion for judgment on the pleadings) in subpart (c)(2), i.e., “resolved under Rules 12(b)(6), 12(c), or 56 of the Rules of Civil Procedure...”

Rule 12: “Certification.” An Attorney General recommendation concerning purportedly ambiguous language in Rule 12(b) (“form”) resulted in members making the following modifications to that section:

The certification may be in the court’s written decision, a transcript of a proceeding, or a proposed certification ~~separate writing submitted by a party and approved by the court.~~

Rule 13: “Petition, Response, and Reply.” The Attorney General’s comment had two suggestions regarding Rule 13.

Rule 13(d)(3) concerns the content of a response to an appellate special action. The Attorney General’s first suggestion was to add the word “material.” The Task Force agreed that this addition furthered the intent of the provision, and the subpart as revised by the Task Force now provides, “A response should include a statement of any material facts not contained in the petition....”

The Attorney General’s second suggestion would permit a later filing of amicus briefs. The Task Force acknowledged that the timing of the proposed provision was too restrictive, and it modified the second sentence of Rule 13(i) (“amicus briefs”) as follows: “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.”

Rule 15: “Procedure for Stay Requests in Appellate Special Actions.”

The Attorney General’s comment contended that the stay provisions of this rule appeared to be inconsistent. The Attorney General recommended adding to Rule 15(h) (“continued jurisdiction”) a sentence to clarify that if a reviewing court issued a stay, “... the lower court is generally divested of jurisdiction only with respect to matters for which the special action seeks relief.” The Task Force declined to adopt the Attorney General’s recommendation, but it instead modified Rule 15(d) (“stay on the court’s initiative”) by adding the following underlined words, which have a similar effect: “The reviewing court, on its own initiative, may issue a stay of the decision challenged by special action and other related matters as necessary to provide effective relief ~~on its own initiative.~~”

Rule 16: “Costs and Attorney Fees.” A comment from Ms. Victoria Katz of Aderant correctly noted that proposed Rule 16(b) (“opposing a claim for attorney fees”) includes a reference to taking action after receiving “the notice,” yet neither

section (b) nor Rule 16 includes a further reference to, or a description of, any such notice. The comment proposed an amendment to section (b), and the Task Force agreed with it, albeit with a modification. The modified language would be as follows: “... no later than 10 days after the ~~notice~~ response containing a claim for attorney fees is served.”

Rule 17: “Disposition of Appellate Special Actions.” Mandates are mentioned in proposed Rules 17(c) (“effectiveness of decision”) and 18(b) (“when motions for reconsideration are not permitted”), subpart (b)(2). Judge Metcalf’s comment suggested that mandates are unnecessary in appellate special actions. Although Division One uses “termination letters” rather than mandates to formalize the conclusion of a special action proceeding, the Task Force discussed that the proposed language in these two proposed provisions accurately reflects current practices in Arizona appellate courts. Regardless of the nomenclature, those courts recognize that a lower court does not lose jurisdiction of the matter and can take further action while an appellate special action is pending in the reviewing court, unless a stay provides otherwise. A lower court is not required to refrain from acting in the matter until an appellate mandate (or termination letter) has been entered. After discussion, the Task Force decided against making changes to these rules in response to Judge Metcalf’s comment, or in response to another comment on the subject of Rule 17 from the State Bar.

Rule 18: “Motions for Reconsideration in Appellate Special Actions.”

Proposed Rule 18(a)(1) (“motion for reconsideration”) provides in part, “An additional 5 days will be added for any party to whom the decision is sent only by U.S. Mail.” A comment from Ms. Katz of Aderant asserted that it is not clear how this additional time would be added, and it proposed alternative remedies. The Task Force discussed practical considerations of computing time when service is made by mail. It concluded that this issue should be part of a future and larger discussion that encompasses other sets of procedural rules permitting service by postal mail. The Task Force declined to make any changes to this provision.

• PART IV. ACTIONS INVOLVING INDUSTRIAL COMMISSION AWARDS

There were no formal comments concerning the rules in Part IV (Rule 20 through Rule 25), but the Task Force on its own initiative proposes changes to two rules.

First, the Task Force proposes to bifurcate Rule 22(b) (“distribution of the writ of review”) so that the two steps of the process contained in that provision are stated separately. To implement this change, the second sentence of Rule 22(b) has been relocated as a new Rule 22(c) with the title “notice of receipt of record.” The revisions include the renumbering of former section (c), which is now section (d), and renumbering cross-references to Rule 22 sections in other Part IV rules to conform those references to these changes.

Second, Rule 24 in the original Appendix A required service of answering and reply briefs pursuant to ARCAP 15(a). ARCAP 15(a) was an incorrect reference, and the Task Force has changed it to Civil Rule 5(c), which is consistent with the service requirement in Rule 22(d). And the service requirement in Rule 24 should apply to an opening brief, too, so the references to “answering” and “reply” were removed.

- **APPENDIX: FORMS**

Although the Task Force had previously discussed forms for special action proceedings, forms were not included with the February rule petition. A comment from Ms. Ward and Ms. Weaver, however, proposed the adoption of Forms 1, 2, and 3 for the respective captions in original, appellate, and Industrial Commission special actions. The caption of appellate special actions in particular would be significantly different if the Court adopts the proposed rules. Notably, opposing parties in an appellate special action would be respondents rather than real parties in interest, and a judicial officer would no longer be named as a respondent. The Task Force agrees that these forms of caption would be useful to filers, and the Task Force supports their adoption.

Because the proposed forms would be contained in an appendix to the special action rules (there is no appendix to the current rules), the Task Force added a provision in a preface to the appendix authorizing the Administrative Director of the

Administrative Office of the Courts to make necessary changes to the forms by Administrative Directive.

Form 2 is designated as a form of caption for an appellate special action in the Court of Appeals. The Task Force considered whether a fourth form should be developed for appellate special actions in the Superior Court, and it now proposes the adoption of such a form. In addition to the adoption of an appendix containing these four forms, the Task Force suggests amendments to the following rules:

- Rule 7 (“procedures for original special actions”), section (a) (“pleadings), subpart (a)(1) (“complaint”), by adding a reference to the appendix, Form 1, for original special actions,
- Rule 13 (“petition, response, and reply”), section (a) (“generally”), by adding a reference to the appendix, Forms 2 and 3, which are respectively for appellate special actions in the Court of Appeals and in the Superior Court, and
- Rule 21 (“petitions for special action review of Industrial Commission matters”), section (b) (“caption”), for special actions under Part IV of the proposed rules.

Although Form 4 shows the employee in an Industrial Commission special action as the petitioner and the employer and the carrier as respondents, the party alignment in a recent Division One decision ([1 CA-IC 23-0025](#)) was the opposite,

i.e., the employee was the respondent, and the employer and the carrier were the petitioners. The Task Force acknowledges that these and similar variations might occur in any type of special action. It nevertheless concluded that these four forms in their current configuration should provide sufficient guidance to litigants, and that litigants would be capable of modifying any of the forms to fit the parties' alignment in individual cases. The preface to the appendix informs parties that the forms have this flexibility.

3. Conclusion. The Task Force requests the Court to (1) abrogate the current Rules of Procedure for Special Actions, including the comments and State Bar Committee Notes, (2) adopt the proposed new rules, comments, and forms contained in the clean version of Revised Appendix A to this Reply, and (3) approve for publication with the new rules the correlation table contained in the clean version of Revised Appendix B. The Task Force requests that this correlation table be published with the proposed special action rules in a manner similar to the publication of the ARCAP Correlation Table in the Arizona Rules of Civil Appellate Procedure, that is, after the Table of Contents and before Rule 1.

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The Task Force appreciates the opportunity to propose improvements to these special action rules, and to advance the Court’s Strategic Agenda of “Justice for the Future.”

RESPECTFULLY SUBMITTED this 27th day of June 2024.

By /s/ Mark Meltzer

Mark Meltzer

on behalf of the Task Force

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