REVISED APPENDIX C

Rule Details

Revised Appendix C

Appendix C provides a detailed explanation of each proposed rule in Appendix A. Appendix C also includes frequent comparisons of proposed provisions with provisions in the current rules. Revised Appendix C indicates with red font the rule amendments described in the Task Force Reply and shown with strikethrough and underline in the mark-up version of Revised Appendix A. Revised Appendix C may also discuss various non-substantive restyling edits and corrections to certain cross-references that were mentioned in the Reply or shown in Revised Appendix A.

PART I. GENERAL PROVISIONS

As noted in the rule petition, the rules are in four parts. Part I, the general provisions, contains the first five rules.

Rule 1. Scope and Construction; Computing Time; Confidentiality

Proposed Rule 1 is new. Other recently restyled rule sets have an introductory rule. (See, for example, Civil Rule 1 ("scope and purpose"), Criminal Rule 1 ("scope, purpose, construction, and other general provisions"), Arizona Rules of Civil Appellate Procedure ("ARCAP") 1 ("title and application"), Family Law Rule 1 ("scope and applicability of these rules"), Probate Rule 1 ("scope, applicability, and construction"), and Juvenile Rule 101 ("scope and construction.") The current special action rules have no similar introductory rule. Proposed Rule 1 provides this introduction.

Proposed Rule 1 has four short sections: (a) "title," (b) "scope," (c) "construction," and (d) "computing time."

Proposed Rule 1(a) is similar to ARCAP 1(a) and simply provides that "a rule may be cited as RPSA 00."

Proposed Rule 1(b) is analogous to ARCAP 1(b), with qualifications. ARCAP 1(b) applies to "civil appeals in the Arizona Court of Appeals and the Arizona Supreme Court." By comparison, RPSA 1(b) applies to "all special actions," which could be any case type, e.g., civil, criminal, family, juvenile, etc. RPSA 1(b) further notes that these Rules apply to special actions in the Superior Court as well as to special actions in appellate courts.

The last phrase of proposed Rule 1(b) contains this express exception about the application of these Rules: "… except where these Rules specify that other rules or sets of rules apply." Subsequent rules include references to the ARCAP, the Rules of Civil Procedure, the Rules of Criminal Procedure, and the Superior Court Rules of Appellate Procedure—Civil, and in those circumstances, these other rules apply to a special action proceeding.

Proposed Rule 1(c) is patterned after ARCAP 1(c); ARCAP 1(c) requires those rules to be construed "to achieve the just, speedy, and inexpensive resolution of appeals." Proposed RPSA 1(c), by comparison, requires construing the rules "in a just manner that avoids unnecessary delay and expense." As noted above, the ARCAP applies only to civil appeals, while the RPSA includes other case types, and the Task Force concluded that it was appropriate to restate this rule of construction in consideration of those other case types.

Proposed Rule 1(d) ("computing time") is a verbatim replication of the text of ARCAP 5(a) ("computing time"). Like the ARCAP rule, this special action provision refers the reader to Civil Rules 6(a) and 6(c) for time computations. The Task Force added two words ("for" and "Rule") to improve the readability of this provision. Although it is no longer a verbatim replication of ARCAP 5(a), its substantive meaning remains the same.

Proposed Rule 1(e) ("confidentiality") addresses an omission in the earlier version concerning the filing of confidential documents in a special action proceeding. The Task Force recognized that confidential documents might be submitted to the court in various cases, particularly in juvenile and mental health cases but also in domestic relations cases, criminal cases, and other case types. The objective of this new provision is to assure that parties comply with the appropriate confidentiality requirements. The source of those requirements is broad, and this new provision does not specify them. Certain requirements, however, might be in Supreme Court Rule 123, while others, depending on the case type, might be in other Arizona rule sets or in state or federal law.

Rule 2. Special Actions Defined

Proposed Rule 2 roughly corresponds to current Rule 1 ("nature of the special action"), but it is significantly different from the current rule, beginning with a new title and continuing with stylistic and substantive changes.

Proposed Rule 2(a) ("generally") begins with a concise statement that "[s]pecial actions allow a party to obtain relief in a superior or appellate court from a decision of a body, officer, or person…." The Task Force considered modifying the phrase "a body, officer, or person," but the phrase has been used historically and changing the phrase could have unintended consequences, so it remains intact in the proposed rules. Section (a) continues to state the "grounds for relief." These grounds are also specified in Rule 4 ("grounds for bringing a special action"). The Task Force acknowledges this redundancy, but believes it is helpful because Rule 2 serves as a substantive overview of the rules that follow.

The current rules blend the procedures and nomenclature for special actions in the Superior Court and in appellate courts, which can be problematic. Proposed Rule 2(b) ("original special actions; appellate special actions") begins the process of distinguishing these proceedings. (Members occasionally referred to that distinction as "de-stranding" these processes.) Put simply, and as detailed in subparts (b)(1) ("original special actions") and (b)(2) ("appellate special actions"), an original special action, sometimes referred to as a special action "in the first instance," <u>begins a case in court</u>, whereas an appellate special action <u>requests review of an earlier decision of a lower court</u>. Procedures for each of these two types of special actions are detailed in Parts II and III of these Rules. As section (a) indicates, a party can seek either type of relief in the Superior Court or in an appellate court, although later rules explain that a party should first seek relief in a lower court when the relief is available at that level.

Proposed Rule 2(c) ("old writs now described as special actions") concerns special actions that arise under A.R.S. §§ 12-2001-2007 and A.R.S. §§ 12-2021-2030, respectively "certiorari" and "mandamus." Proposed section (c), which is analogous to current Rule 1(b), advises that when a party brings an action under one of these statutes—or an action for a writ or prohibition or for a common law writ—the action is a considered a special action under these Rules, and parties should no longer designate these proceedings as requests for writs. A provision in current Rule 1(a) to this effect is restated and restyled in proposed Rule 2(c). The proposed provision notes that these Rules "do not enlarge the scope of relief those writs formerly granted."

The proposed comment to Rule 2 further illuminates the distinction between original and appellate special actions and includes these two paragraphs:

> Most special actions are appellate special actions. They are governed by Rules 10 through 19. The Supreme Court has jurisdiction over appellate special actions under the Arizona Constitution, Article 6, Section 5, and A.R.S. §§ 12-2001 and 12-2021. The Court of Appeals has jurisdiction over appellate special actions under A.R.S. § 12-120.21. The Superior Court has jurisdiction over appellate special actions under A.R.S. § 12-122. Jurisdiction in appellate special actions is discretionary, except in the rare instances when a statute requires an appellate court to accept jurisdiction. See, for example, A.R.S. § 13-753(I).

> Unlike an appellate special action, a court's jurisdiction over an original special action is generally not discretionary, provided the special action complaint alleges the factual and legal basis required by a statute.

The Task Force received a stakeholder comment requesting that the proposed rules distinguish special actions filed in the Superior Court from those filed in appellate courts. While the proposed rules incorporate this distinction, they do so within the overarching context of distinguishing original and appellate special actions. Proposed Rule 2 is the foundation for this important distinction.

<u>Rule 3. Statutory Authority for Certain Special Actions</u>

Proposed Rule 3 describes special actions authorized by statute, <u>other than</u> the statutes noted in proposed Rule 2(c). Rule 3 special actions are called "statutory special actions," which is a term that has specific meaning under the current special action rules. The first sentence of current Rule 1(b) provides:

> Where a statute expressly authorizes proceedings under certiorari, mandamus, or prohibition, the proceedings shall be known as a statutory special action, as distinguished from those applications for writs of certiorari, mandamus, or prohibition, originating under A.R.S. §§ 12-2001, 12-2021 or the common law, which are special actions.

The Task Force endeavored to clarify this provision without substantively changing its intended meaning. The Task Force did so first by referring in proposed Rule 2(c) to special actions under the specified Title 12 statutes — which by definition are not statutory special actions, notwithstanding their statutory source— and then by providing in Rule 3 this explanation:

> If any statute, <u>other than those listed in Rule 2(c)</u>, authorizes filing a special action, or an action for a writ of certiorari, mandamus, or prohibition, that action is a special action. These special actions, known as statutory special actions, may be either original or appellate special actions. They are governed by these Rules unless the statute authorizing a particular special action contains specific procedures supplementing or contradicting these Rules. [Emphasis added.]

The proposed 2025 Comment to Rule 3 further explains to readers that "[m]ost original special actions are statutory special actions filed in the Superior Court." The comment clarifies that "[s]tatutory special actions are sometimes referred to in their enabling legislation by the terms certiorari or mandamus." The comment to proposed Rule 3 provides a compilation of statutes that authorize the form of proceeding known as a "statutory special action." The Task Force has added a reference in this comment to A.R.S. § 36-546.01, which concerns special action challenges to court-ordered mental health treatment.

Upon reviewing proposed Rules 2 and 3, readers should know, among other things, that (1) there are two types of special actions (original and appellate); (2) statutory special actions are usually, but not exclusively, original (i.e., case-initiating) special actions filed in the Superior Court; (3) appellate special actions can be brought in the Superior Court or in an appellate court and seek review of a lower court's decision; and (4) jurisdiction of an appellate special action, unlike jurisdiction of an original special action, is usually discretionary. By proposing Rules 2 and 3, the Task Force has endeavored to clearly explain to readers these fundamental concepts of special action proceedings.

Rule 4. Grounds for Bringing a Special Action.

The title of the corresponding current rule is "questions raised," which begins by stating, "The only questions that may be raised in a special action are: (1) … (2) … (3) …." Judge Jacobs' August 29, 2023, memo proposed, and the Task Force agreed, to make the title more descriptive by referring to "grounds" for a special action. Judge Jacobs' memo also proposed restating (1), (2), and (3) as affirmative grounds. He noted that "rules do not conventionally pose questions, there is no meaning lost in converting the questions to statements, and we believe direct phrasing communicates most clearly." The proposed rule, including the title, incorporates these suggestions. The substance of the rule is otherwise similar to the substance of the current rule.

The third ground includes the phrase, "which can include a legal error." A legal error is an abuse of discretion and can be a ground for seeking special action relief. *See Shinn v. Arizona Board of Executive Clemency*, 254 Ariz. 255, 259 ¶ 13 (2022) (citing other authority for the proposition that "[a]n error of law constitutes an abuse of discretion").

Rule 5. Parties

While current Rule 2 ("parties") precedes current Rule 3 ("questions raised"), the Task Force concluded that it was more logical for its restyled version to reverse the sequence of these two rules. Therefore, in the proposed rules, Rule 4 concerning the grounds for special action precedes Rule 5 regarding the parties.

The title of proposed Rule 5 is identical to the title of current Rule 2; however, the substance of these Rules differs in several respects.

First, proposed Rule 5 differentiates parties in original special actions, which is covered by section (a) of the proposed rule, from parties in appellate special actions, which is addressed by section (b). There is no comparable distinction between these two types of special actions in the current rule on parties. The phrase "[a]ny person aggrieved by" in proposed sections (a) and (b) is also used in ARCAP 1(d) ("who may appeal"). The reference in current Rule 2(a) to "a writ of mandamus, prohibition, or certiorari" has been eliminated in the proposed rule, consistent with the fundamental concepts expressed in proposed Rule 2.

Proposed Rule 5(a) describes "who may be a plaintiff" in an original special action, and "naming a defendant" in that action, while proposed section (b) uses parallel subparts on "petitioner defined" and "respondent defined" in an appellate special action. Proposed Rule 5(a)(2) requires an original special action complaint to name as a defendant "the body, officer, or person whose decision is being challenged" as well as "all other interested parties." The Task Force subsequently determined that "all other interested parties" was too broad. It replaced that phrase with "all other parties in whose absence the court cannot afford complete relief," which is modeled on the language in Civil Rule 19(a)(1)(A).

Proposed Rule 5(b)(1)(B) ("victim as petitioner") is a restyled version of current Rule 2(a)(2) ("victims").

The first sentence of proposed Rule 5(b)(2) ("respondent defined") requires an appellate special action petition to name as respondents "all other parties in the case." In recognition of an appellate court's discretion, the second sentence says, "[t]he court may allow other persons to respond," although this admittedly overlaps with the court's discretion under proposed Rule 5(c), which is discussed in the next paragraph of this summary. Upon further consideration, the Task Force modified the preceding phrase by linking it to Rule 5(c) as follows: "The court may allow other persons to respond, <u>as set forth in Rule 5(c).</u>" The third sentence further provides, "The judge whose decision is being challenged is not a respondent." Hence, the judge's name is no longer required in the caption of an appellate special action. See further the comment to proposed Rule 13 and the discussion of this issue in the Task Force rule petition.

Proposed Rule 5(c) ("other persons: intervenors, joinder, amicus curiae"), like current Rule 2(b) ("other persons"), authorizes the court to "direct that notice of a special action by given to any person." The proposed section, like the current one, also gives the court discretion to permit a person to intervene pursuant to Civil Rule 24, to order joinder of other persons as parties, and to allow other persons to participate as amicus curiae. Proposed Rule 5 permits the participation of amicus curiae in original special actions and appellate special actions.

PART II. ORIGINAL SPECIAL ACTIONS

As indicated by the title of Part II, these provisions apply to original special actions, i.e., special actions that begin a case in court. Original special actions are predominantly initiated in the Superior Court, but in exceptional instances, such as a matter with significant statewide importance or urgency, an original special action could begin in the Court of Appeals or the Supreme Court.

Rule 6. Where to File Original Special Actions

Proposed Rule 6 imports some of the substance of current Rule 4 ("procedure"), but the substance of the rule is restyled, reorganized, and supplemented.

Current Rule 4(a) ("special action") provides, "An action under this Rule shall be known as a special action and in a proper case may be brought in the Supreme Court, the Court of Appeals, or the Superior Court." Some of this language is recited elsewhere in the proposed rules, e.g., proposed Rules 1(b) and 2(a), and it is not repeated verbatim in proposed Rule 6. The concept, however, is expanded in proposed Rule 6, sections (a), (b), and (c), which are discussed below.

Note that when a proposed rule or provision refers to the Superior Court, the Court of Appeals, or the Supreme Court, the Task Force adopted a convention of identifying the lower court first in this hierarchy. The Superior Court is, therefore, the first court mentioned in Rule 6, followed by the Court of Appeals, and finally, the Supreme Court.

Proposed Rules 6(a) ("original special actions brought in the Superior Court"), 6(b) ("original special actions filed in the Court of Appeals"), and 6(c) ("original special actions filed in the Supreme Court") reorganize the content of current Rules 4(a) and 4(b). The proposed reorganization includes the use of subparts in proposed Rule 6(a). The subparts are titled "generally," "State of Arizona," and "other public officer or body; private entity." The third subpart uses "private entity" rather than "private corporation," which is used in current Rule 4(b), to encompass other private organizations such as limited liability companies and partnerships. This reorganization of the rule follows the conventions established by previous restyling task forces and should assist the reader in identifying pertinent provisions more readily.

A comment from the Attorney General's Office observed that proposed Rule 6(a) had "potentially conflicting venue provisions." The Task Force agreed, and it addressed the issue by eliminating language in proposed subpart (a)(3) relating to a public officer or body. Provisions regarding public bodies are now contained in subpart (a)(1), which has been retitled "public bodies generally." Subpart (a)(1) contains an exception for officers or bodies of the State of Arizona, which are governed by subpart (a)(2). The title of subpart (a)(2), "State of Arizona," is unchanged, but the phrase "may be filed" in this subpart has been changed to "must be filed." ("Must" is also used in subparts (a)(1) and (a)(3).) The new title of subpart (a)(3) is "private entity," and as noted above, this subpart no longer applies to public officers or public bodies.

The content of current Rules 4(c) ("time for service of complaint and answer"), 4(d) ("pleadings"), and 4(g) ("costs and attorneys' fees") has been relocated to proposed Rule 7 ("procedures for original special actions"). For the reasons described in the rule petition and elsewhere in Appendix C, and unlike current Rule 4(e), the proposed rules no longer require naming a judicial officer in the caption of a pleading. Please see again proposed Rule 5(b)(2) as well as the comment to proposed Rule 13.

Proposed Rules 6(b) and 6(c) concern original special actions filed in the Court of Appeals and in the Supreme Court, respectively. Both of these sections require the filer to allege the county where the action could have been filed in the Superior Court in the event the appellate court deems it appropriate to transfer the matter to a lower court. Proposed Rule 6(b) also confirms the statutory authority of the Court of Appeals to transfer an original special action to that Court's other division.

Proposed Rule 6(d) ("transfer or dismissal for improperly filing in appellate court") is based on current Rule 7 ("special appellate court provisions"), section (b). Current Rule 7(b) provides that if a special action is brought in an appellate court, and it might have been initiated in a lower court, the petition must explain why it was brought in the appellate court, and if the reasons are insufficient, the appellate court will dismiss the petition. This principle is reiterated in proposed Rule 10(c) ("improper forum") for an appellate special action. The principle also applies to original special actions, and it is therefore codified in new Rule 6(d). Rule 6(d) allows the appellate court in this circumstance to dismiss an original special action complaint without prejudice.

Proposed Rule 6(e) ("transfer to resolve fact issue") rephrases current Rule 4(f) ("trial"), but the proposed provision begins with this new explanatory sentence: "The Court of Appeals and the Supreme Court do not conduct trials in original special actions." The first sentence of current Rule 4(f), which refers to trial of a fact issue "subject to special orders of discovery" is not included in proposed Rule 6(e). A provision on discovery in original special actions is now contained in proposed Rule 7(g) ("discovery generally prohibited"). The second sentence of proposed Rule 6(e) incorporates the content of the second sentence of current Rule 4(f) about designating a master or transmitting the matter to the Superior Court for trial. The third sentence of current Rule 4(f), which concerns advisory juries, has been relocated as proposed Rule 7(h) (“trial”).

Rule 7. Procedures for Original Special Actions

Proposed Rule 7 contains many of the nuts-and-bolts procedures of an original special action.

Proposed Rule 7(a) (“pleadings”) is the analog of current Rule 4(d) (“pleadings”), but there are notable differences. The most obvious difference is that the proposed section is organized into two subparts: (1) complaint and (2) answer or response. This subpart also requires a filer in the Superior Court to submit to the clerk with the complaint “a cover sheet using a form designated by the court.” This is a new requirement. The information on the cover sheet facilitates the clerk’s entry of the case into the court’s case management system. It is comparable to the requirement in Civil Rule 8(g) (“civil cover sheets”).

Current Rule 4(c) specifies that when a show cause procedure is used, the court “shall set a speedy return date.” When a show cause procedure is not used, current Rule 4(c) provides, “the usual time periods [for serving a response to a complaint] established by the Rules of Civil Procedure shall apply....” Proposed Rule 7(a)(2), by comparison, requires a defendant to file an answer or other appropriate response “in the time allowed under Rule 12(a) of the Rules of Civil Procedure [‘time to file and serve a responsive pleading’],” unless the court orders otherwise.

The first sentence of proposed Rule 7(b) (“evidence supporting pleadings”) is analogous to current Rule 4(d), which permits the complaint to be “accompanied by affidavits or other written proof.” The proposed rule uses the phrase “verifications, affidavits, or other evidence.” The second sentence of Rule 7(b), which concerns an order to a party or person to file records, also derives from current Rule 4(d).

Proposed Rule 7(c) (“order to show cause”) has its origins in a provision in current Rule 4(c). That current provision requires the court to set “a speedy return date.” The proposed new provision requires the court to set “an expedited response date.” The Task Force declined to specify a specific number of days for the return because the interval could depend on the circumstances. Yet “speedy” implied “hurriedly” or “in a rush,” which was not its intent. The Task Force considered “earlier practical time” or “promptly” as alternatives, but it selected “expedited,” which conveys promptness yet not hurried. Rule 7(c) includes a cross-reference to Civil Rule 7.3 (“orders to show cause”). A provision in current Rule 4(c) that allows the court in cases not involving an order to show cause to modify times “to achieve expeditious determination of the cause” was not included in the proposed rules because that authority is inherent in the nature of special actions.

Proposed Rule 7(d) ("summons and service") includes a new provision, perhaps not always obvious, which requires the plaintiff filing in the Superior Court to present a summons to the clerk for issuance. Although the Task Force intended that the summons in an original special action in the Superior Court be presented in the manner provided in Civil Rules 4(a) through 4(c), it did not believe this specificity was necessary. The proposed section, however, requires the plaintiff in the Superior Court, as in current Rule 4(c), to serve the summons, the special action complaint, and any order to show cause, as provided in Civil Rules 4, 4.1, and 4.2. A plaintiff may also request a defendant to waive service by using Form 1 of the Civil Rules, and the defendant may do so by using Form 2 of the Civil Rules. Alternatively, a defendant may accept service, as provided in Civil Rule 4. In an original special action filed in an appellate court, the plaintiff does not serve a summons. Instead, upon the filing of a special action complaint, the appellate court will issue a scheduling order that contains the information in Civil Rule 4(b)(1) and directs the plaintiff to serve the special action complaint and scheduling order. This would eliminate the need for the formality of a clerk-issued summons.

Proposed Rule 7(e) ("service after the complaint") has a rough equivalent in current Rule 7 ("special appellate court provisions"), section (d), which requires service of a special action petition filed in an appellate court. But current Rule 7(d) seemingly does not apply to original special actions in the Superior Court; hence, the Task Force added new Rule 7(e). The new section requires every party and amicus curiae who files a document in an original special action to serve a copy on all other parties, including any amicus curiae, as provided by Civil Rule 5(c)(2) ("service generally"), and to provide a certificate of service as provided by Civil Rule 5(c)(3) ("certificate of service").

Proposed Rule 7(f) ("scheduling and management") answers the question, for which there is no clear answer in the current rules, about what happens after the response to an original special action is filed. Proposed Rule 7(f) requires the court to 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." After considering a comment to the rule petition regarding the timing of events, the Task Force agreed that Rule 7(f) warranted modification. As modified, this section now provides:

> 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.

Proposed Rule 7(g) is titled "discovery generally prohibited." The section provides in part, "[d]iscovery is not routinely permitted in special actions," but it then qualifies this general principle by stating that the court may issue special orders concerning discovery "[i]f a special action raises a material issue of fact." The section is explained in greater detail in a comment to Rule 7, which includes case law citations. As noted in the comment, discovery is allowed "in those rare instances when it is necessary." Based on a comment that the title of section (g) was "too strong," the Reply proposes to shorten the title to simply "discovery."

The content of proposed Rule 7(h) ("trial") derives from current Rule 4(f). Proposed Rule 7(i) ("costs and attorney fees") is an abbreviated portion of current Rule 4(g) ("costs and attorneys' fees") because the Task Force has relocated to Rule 16 in Part III that portion of the current rule that pertains to claims and awards of attorney fees and costs in appellate special actions.

Rule 8. Stays in Original Special Actions

Proposed Rule 8 is roughly based on current Rule 5 ("interlocutory orders and stays; ex parte orders"), but there are differences. Most obviously, the proposed rule reorganizes the single paragraph of the current rule into three sections: (a) no automatic stays, (b) when stays are issued, and (c) stay pending appeal. Proposed Rule 8 abandons the nomenclature in the first sentence of the current rule that refers to "alternative and peremptory writs."

Proposed Rule 8(a) reiterates a principle in the second sentence of the current rule by saying that filing an original special action complaint "does not automatically stay" any action or proceeding of a body, officer, or person. Proposed Rule 8(b), like the current rule, allows the court to stay an action or proceeding, with or without notice, as provided in Civil Rule 65. The last sentence of the current rule permits the trial court to stay a matter on appeal as provided in Civil Rule 62(c). Proposed Rule 8(c) similarly permits the court that issued the challenged decision to grant an injunction but changes the cross-reference to Civil Rule 62(e).

Rule 9. Decisions and Judgments in Original Special Actions.

Proposed Rule 9 is analogous to current Rule 6 ("judgment"). The current rule is a single paragraph consisting of three sentences. By comparison, proposed Rule 9 has two sections: (a) decisions, which has four subparts, and (b) judgments. The proposed rule incorporates portions of the current rule but modifies other portions. For example, the current rule allows the court to "dismiss the action either on the merits or without prejudice." The proposed rule permits the court to "dismiss a special action with or without prejudice." A dismissal on the merits is presumably a dismissal with prejudice.

Under proposed Rule 9(b), judgments in original special actions "are the same as judgments in any civil action …" [a concept expressed in the current rule] "…and must comply with [Civil] Rules 54 and 58" [which is newly added].

PART III. APPELLATE SPECIAL ACTIONS

Part III applies to appellate special actions. Appellate special actions can be initiated in the Superior Court and seek review of a decision rendered in a justice court, municipal court, or other tribunal as allowed by law. An appellate special action also can begin in the Court of Appeals and seek review of a decision of the Superior Court, an administrative law judge, tribunal, or public body as allowed by law (or can begin in the Supreme Court and seek review of a decision of any other court.) See further the discussion below of proposed Rule 10(b).

Rule 10. General Provisions for Appellate Special Actions.

Proposed Rule 10 is derived in part from current Rule 7 ("special appellate court provisions"). Rule 7 is the lengthiest of the current rules, and the Task Force has extensively reorganized its content. The proposed rule also excludes certain provisions in the current rule, notably current section (b) concerning proceedings when the court is in recess, which no longer has practical application; and current section (c), which concerns the process for setting a hearing that is now largely governed by administrative orders and other appellate court policies. (Proposed Rule 15(g), however, contains provisions for setting a stay conference.) Proposed Rule 10 also includes several new provisions that are described below.

Proposed Rule 10(a) ("other rules applicable") expands on the provision in proposed Rule 1(b) concerning the application of other sets of rules. As noted above, a party may file an appellate special action in the Court of Appeals or the Supreme Court, or the party may file the action in the Superior Court seeking review of a decision of a limited jurisdiction court. Rule 10(a) accordingly provides that "[t]o the extent they are consistent with these Rules," the ARCAP applies in special actions in the Court of Appeals or the Supreme Court, and the Superior Court Rules of Appellate Procedure – Civil apply in appellate special actions in the Superior Court. (Note that the proposed rule uses the phrase "[t]o the extent they are consistent." By comparison, current Rule 7(i) provides that the ARCAP applies to special actions "to the extent they are not inconsistent with these Rules," i.e., with a confusing double negative.) The reference to the Superior Court Rules of Appellate Procedure — Civil is new.

Proposed Rule 10(b) ("forum") expands on where a party may file an appellate special action. Note that an appellate special action in the Superior Court may seek review of a decision of a justice or municipal court, "or other tribunal as allowed by law," while an appellate special action in the Court of Appeals may seek review of a decision of the Superior Court, or "an administrative law judge, tribunal, or public body as allowed by law." An appellate special action filed in the Supreme Court may seek review "of a decision of any other court."

Proposed Rule 10(c) ("improper forum") is analogous to Rule 6(d) ("dismissal for filing in appellate court") discussed above. Rule 10(c) requires a party who files a special action in the Court of Appeals or Supreme Court, and who might have properly initiated that special action in a lower court, to explain the reasons for not doing so. If the appellate court deems the reasons insufficient, it will dismiss the petition.

Proposed Rule 10(d) ("jurisdiction") is somewhat related to a provision in current Rule 7(g) that provides, "If in a special action brought in the Supreme Court or a Court of Appeals relief is denied, the decision of the Court may be by order, and no written opinion is required." By comparison, proposed Rule 10(d) permits the court to "decline special action jurisdiction at any time and without oral argument. If the court accepts jurisdiction, it must render a decision on the merits." See further the discussion below of proposed Rule 17 ("disposition of appellate special actions").

Proposed Rule 10(e) ("exercising special action jurisdiction in a direct appeal") is new. This section provides that if a reviewing court "lacks jurisdiction over a direct appeal for reasons other than timeliness," on its own initiative or on a party's request, the court may "treat the appeal as a special action and accept special action jurisdiction." The provision is rooted in A.R.S. § 12-120.21, as well as in case law and current practices in both divisions of the Court of Appeals. Note, however, that an appellate court may not assume special action jurisdiction of an untimely appeal; that is, it may not accept special action jurisdiction when it had no jurisdiction over the appeal in the first instance because the appeal was untimely. 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. The Task Force further modified Rule 10(e) by adding that the court may treat an 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 in a case that was filed as an appeal to be compatible with the Rule 11 factors discussed below.

Proposed Rule 10(f) ("order pending further proceedings") permits a court to "issue any order during the course of a special action to facilitate or expedite consideration of the case." Proposed Rule 10(g) allows the court, for good cause, to suspend or accelerate any procedure for an appellate special action. These provisions are based in part on ARCAP 3 ("suspension of rules") and in part on the last sentence of current Rule 7(d), which provides that "for cause shown, the appellate court may waive or order acceleration of any or all of the foregoing procedures." The provision is also consistent with the inherent authority of the reviewing court to construe the rules as specified in proposed Rule 1(c), as well as with current Rule 8 ("appeals"), section (a).

Proposed Rule 10(h) ("sanctions") provides, "The court may impose any sanction consistent with ARCAP 25." When discussing this provision, the Task Force considered Juvenile Rule 602(i)(15), which precludes the imposition of sanctions under ARCAP 25 against an appellant or cross-appellant, or their attorney, who files a frivolous appeal from a final order in a delinquency or transfer matter. Accordingly, the imposition of a sanction on counsel under those circumstances in a special action would also be precluded.

Rule 11. Factors for Accepting or Declining Jurisdiction of Appellate Special Actions

The content of Rule 11 is new.

Proposed Rule 11(a) ("discretion") is a single sentence that provides, "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." This is a fundamental principle of special actions, but the current rules do not state it as explicitly and concisely as it is now proposed. The Task Force received several comments concerning its omission of the phrase "no plain, speedy, and adequate remedy by appeal" contained in current Rules 1 and 8. In response to these comments, the Task Force proposes to add the following new second sentence to Rule 11(a): "In accepting or declining jurisdiction, the court is determining whether remedy by appeal is equally plain, speedy, and adequate." A new comment to Rule 11 provides additional background concerning the significance of this sentence.

Moreover, the current rules provide no guidance on how the reviewing court should exercise that discretion. That guidance is provided primarily by case law. These proposed rules accordingly include two new sections that reflect that case law and reflect discretionary considerations that inform the exercise of courts' judgments concerning appellate special actions: section (b) ("factors that support accepting jurisdiction") and section (c) ("factors that support declining jurisdiction").

Proposed Rule 11(b) directs the court to consider "among other factors," whether a special action petition asks the court to resolve questions under eight specified topics. Rule 11(b) concludes that "[t]hese factors support but do not require accepting jurisdiction." Proposed Rule 11(c), by comparison, identifies five factors—once again, "among other factors"—that the court should consider, as well as "whether the petitioner unreasonably delayed in filing the petition." Rule 11(c) concludes, "[t]hese factors support but do not require declining jurisdiction." See the rule petition for a further discussion of Rule 11.

The Task Force is now proposing two changes to the factors in Rule 11. In section (b) ("factors that support accepting jurisdiction"), the Task Force proposes to replace the phrase "of privileges and immunities" with the clearer and more focused phrase, "of legal or evidentiary privileges or immunity from suit." And in section (c) ("factors that support declining jurisdiction"), the Task Force would add a reference to Civil Rule 12(c) (a motion for judgment on the pleadings), so the provision would say "resolved under Rules 12(b)(6), 12(c), or 56 of the Rules of Civil Procedure…."

Rule 12. Certification

The content of proposed Rule 12 is also new. One of the factors that the court may consider under proposed Rule 11(b) is a question that is "certified for review under Rule 12." Proposed Rule 12(a) allows a court to "certify a question arising from any decision it has made as one it believes should be reviewed by special action." Although a similar certification process has been used in other jurisdictions, the certification process is new in Arizona. As Judge Jacobs noted at page 4 of his August 29, 2023, memorandum to the Task Force, "Reviewing questions a trial court certifies for review is almost by definition an efficient use of judicial resources….Our trial judges are closer to their cases than reviewing courts. In the likely infrequent instances when they want to bring a reviewing court in to examine their work, they are clearly doing so to advance the overall management of the case."

Proposed Rule 12(b) ("form") provides three options for certification: including the certification in the court's written decision; including it in a transcript of a proceeding; or including it in a separate writing submitted by a party and approved by the court. For additional clarity, the Task Force revised Rule 12(b) as follows: "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." Proposed Rule 12(c) requires a party seeking review of a certified question to include the certification in the appendix to the petition.

Rule 13. Petition, Response, and Reply

Proposed Rule 13(a) ("generally") corresponds in part to current Rule 7(e). An original special action is initiated by a complaint (see proposed Rule 7(a)), but as provided in Rule 13(a), an appellate special action is initiated by a petition. Objections to the requested relief must be in the form of a written response. The petition, the response, and any reply, "regardless of whether the special action arises from a civil or criminal proceeding," must comply with the filing, formatting, and service requirements of ARCAP 4(a) through (h), 4.1, and 4.2. The Reply changed the reference to "ARCAP 4(a) through (h)" to "ARCAP 4(b) through (h)." ARCAP 4(a) concerns the caption of briefs and other documents filed in an appeal, which are not applicable and are contrary to the forms of caption now proposed in the Appendix.

Proposed Rule 13(b) ("cover sheet") is new. It requires a special action petition to be accompanied by a cover sheet using a form designated by the court. As with the cover sheet in original special actions (see proposed Rule 7(a)(1)), use of a cover sheet in appellate special actions assists clerks with case and document management.

Proposed Rule 13(c) ("contents of a petition") includes requirements similar to those in current Rule 7(e). Proposed Rule 13(c)(5), however, also requires the petition to include "the case name and number of any other appeal, special action, or petition for review known to the petitioner that is related to this special action through the same parties, events, issues, or transactions giving rise to this action."

Proposed Rule 13(d) ("response") is unlike current Rule 7(e) because it provides additional information, in three subparts, concerning a response to an appellate special action petition. Subpart (d)(1) provides, "A respondent may file a response only if the court orders one, but the court will not grant relief without ordering a response." Pursuant to subpart (d)(2), "The response must be filed within the time ordered by the court, which is presumptively 7 days after entry of the court's order." Subpart (d)(3) ("content") provides that the response "should include a statement of any facts that are not contained in the petition, and the respondent's contentions and reasoning with respect to the issues presented." Upon consideration of a comment to the rule petition, and to further the intent of this provision, the Task Force added the word "material," i.e., the response "should include a statement of any material facts that are not contained in the petition…."

Proposed Rule 13(e) ("appendices") is grounded in current Rule 7(e) and ARCAP 13.1. The proposed rule contains separate subparts for the petitioner's appendix and for the respondent's appendix. Under subpart (e)(1), the petitioner's appendix must include a copy of the challenged decision and "copies of all documents from the trial court's record the reviewing court will need to decide the issues the petition raises." The subpart also requires that references in the petition to a document in the record be supported by a document in the appendix and identify its location in the appendix by page number. The Task Force made restyling changes to subpart (e)(1) to clarify its meaning. Under subpart (e)(2), the respondent's appendix is optional ("may file"), but it should not include any documents that are already included in the petitioner's appendix. Subpart (e)(3) provides that both appendices must comply with specified provisions in ARCAP 13.1. Subpart (e)(3) contains references to ARCAP 13.1(c), 13.1(d), and 13.1(e). A revision limits the first reference to ARCAP 13.1(c)(2). ARCAP 13.1(c)(1) deals with the location of a document in the record on appeal, and because there is no such record in an appellate special action, subpart (c)(1) is inapplicable.

Proposed Rule 13(f) ("reply") permits the petitioner to file a reply "only if the court orders one."

The length of an opening and answering brief under ARCAP 14(a) is 14,000 words. By comparison, under proposed Rule 13(g) ("length of petition, response, and reply") the limit for a special action petition or response is 10,500 words, which is the same length provided by current Special Action Rule 7(e) for proportional typeface. Current Rule 7(e) also permits a 30-page filing if it is prepared in monospace typeface, or 36 pages if it is typewritten. With the almost ubiquitous use of proportional typeface, those latter distinctions have been eliminated in the proposed rule. The length of a reply (5,250 words) is unchanged.

The requirement in proposed Rule 13(h) ("certificate of compliance") is based on current Rule 7(e).

Proposed Rule 13(i) ("amicus curiae") is derived from current Rule 7(f). The current rule requires an amicus brief to conform to ARCAP 16, as does this proposed rule. The current rule, however, does not refer to ARCAP 14(a)(4), which allows an amicus brief of 12,000 words, i.e., more words than permitted in proposed Rule 13(g) for a special action petition or response. Accordingly, proposed Rule 13(i) specifies the limit of an amicus brief is 8,500 words. The proposed provision also requires that amicus briefs be filed "as expeditiously as possible after the petition for special action is filed." The Task Force agreed with a comment that this time requirement was unduly strict. It accordingly modified the provision as follows: "Amicus curiae briefs must be filed as expeditiously as possible after the petition for special action <u>or other brief</u> is filed, <u>or as otherwise ordered by the court</u>."

The Task Force added a notable comment to Rule 13. The comment clarifies that "Beginning with the 2025 revisions to these Rules, a respondent in an appellate special action is no longer referred to as a real party in interest." The comment further provides, "In addition, the judge whose decision is being challenged is no longer a respondent in an appellate special action," although the judge under proposed Rule 12 may certify a question as one that should be reviewed by special action.

Rule 14. Filing Fees; Service of Documents; Clerk's Distribution of Documents; Request for Oral Argument

Proposed Rule 14(a) is new. The rule informs inexperienced filers that a petition and response must be accompanied by the statutorily required filing fee or by an application for a fee waiver or deferral, unless the filing party is exempt.

A comment to Rule 14 elaborates on filing fees. Although criminal defendants who are represented by court-appointed lawyers are usually exempt from paying a filing fee, a clerk might ask a privately retained attorney for a criminal defendant, or a self-represented criminal defendant, to pay the fee. Also, a filer may have questions about the application of filing fees in the context of a special action proceeding. The comment accordingly refers the reader to the Arizona Code of Judicial Administration § 5-206, which provides information on fee waivers and deferrals, and to Article 2, Section 24, of the Arizona Constitution ("rights of accused in criminal prosecutions"), which provides in part that "in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed." The comment further informs readers that "fees may be deferred or waived where filers are eligible by reason of the receipt of certain benefits or insufficiency of income or other factors provided in the Arizona Code of Judicial Administration § 5-206."

Proposed Rule 14(b) ("special provisions regarding filing documents") has two subparts. Subpart (b)(1) ("filing documents by mail") is derived from current Rule 7(j), which permits filing by mail, but the filing is not timely unless the clerk receives it within the permitted time. Subpart (b)(2) ("filing by an incarcerated party") codifies in the special action rules the so-called "prison mailbox rule" for incarcerated parties, which is found in Criminal Rule 1.7(b)(4).

Proposed Rule 14(c) ("service of all documents required; manner of service") is the Part III equivalent of Rule 7(e) ("service after the complaint") in Part II.

Proposed Rule 14(d) ("distribution") is new. The provision requires the reviewing court's clerk to distribute all orders and decisions in an appellate special action to all parties and any amicus curiae in the case, as well as to the judge identified in the petition whose decision is being challenged.

Proposed Rule 14(e) ("oral argument") codifies an appellate court practice. Although an appellate court currently may order oral argument on its own initiative or on a party's request, the current special action rules do not address this practice. See further ARCAP 18 ("oral argument in the Court of Appeals"). Proposed Rule 14(e) accordingly provides that a party may file a separate request for oral argument with the petition or the response.

Rule 15. Procedure for Stay Requests in Appellate Special Actions

Proposed Rule 8 addresses stay requests in original special actions. Proposed Rule 15 concerns stay requests in appellate special actions. Both rules have antecedents in current Rule 5 ("interlocutory orders and stays; ex parte orders").

Proposed Rule 15(a) ("generally") is introductory and states, "A petitioner may move a reviewing court to stay the decision challenged by special action, subject to the provisions of this rule."

Proposed Rule 15(b) ("motion in court that issued challenged decision") provides that before seeking a stay of the challenged decision in a reviewing court, the petitioner should first move for a stay in the court that issued the decision. Section (b) expressly states, "Except as provided in section (c), a reviewing court has good cause to summarily deny a motion for stay if the petitioner did not first move for a stay in the lower court."

Proposed Rule 15(c) ("exceptions") has two exceptions to the requirement in section (b). Both exceptions cite to impracticability, either the impracticability in moving for a stay in the lower court, or having moved for a stay, the impracticability of waiting for an order on the motion.

Proposed Rule 15(d) ("stay on the court's initiative") permits the reviewing court to issue a stay on its own initiative. A proposed amendment would clarify that the reviewing court's stay would not affect the entirety of a case, but rather, it would concern only the decision challenged by special action and other related matters as necessary to provide effective relief, i.e., "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."

Proposed Rule 15(e) ("separate stay filing in Superior Court and Court of Appeals") requires that a stay request be filed as a separate document from the petition and appendix. The section further provides that "[a]bsent extraordinary circumstances," the stay request should be filed concurrently with the petition and appendix.

Under proposed Rule 15(f) ("stay in the Supreme Court"), a party filing a petition for review under proposed Rule 19 may file a motion requesting the Supreme Court to enter a stay.

Proposed Rule 15(g) ("stay conference in reviewing court") has three subparts (for the Superior Court, the Court of Appeals, and the Supreme Court) dealing with the process for arranging a stay conference in the respective courts. In practice, the process may be specified by court policies, forms, or administrative orders.

Proposed Rule 15(h) ("continued jurisdiction") confirms that "[u]nless 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." This provision recognizes the principle that the mere filing of an appellate special action does not divest the lower court of its jurisdiction in the matter.

Rule 16. Costs and Attorney Fees

Current Rule 4(g) ("costs and attorneys' fees") appears to apply to any special action. In conjunction with the overall reorganization of the special action rules, the Task Force has separated the process for applying for costs and attorney fees into proposed Rule 7(i) ("costs and attorney fees") for original special actions, and proposed Rule 16, for appellate special actions. The provisions in proposed Rule 16 are based in part on ARCAP 21 ("attorneys' fees and costs"). (Notwithstanding the apostrophe in that title, the Task Force convention uses "attorney fees," i.e., "attorney" in the singular with no apostrophe.)

Proposed Rule 16(a) requires a party to include a claim for fees in the petition or response. The claim must cite the authority for the award of fees "with the specificity required by ARCAP 21(a)(2)." (The referenced ARCAP subpart says, "… specifically state the statute, rule, decisional law, contract, or other authority for an award of attorneys' fees."). Proposed Rule 16(b) ("opposing a claim for attorney fees") conforms to a recent amendment to ARCAP 21. (Those ARCAP amendments are contained in the Court's Order in R-22-0041.) Although proposed Rule 16(b) ("opposing a claim for attorney fees") includes a reference to taking action after receiving "the notice," neither section (b) nor Rule 16 included a further reference to, or a description of, any such notice. The provision was accordingly restated as follows: "… no later than 10 days after the ~~notice~~ <u>response containing a claim for attorney fees</u> is served." The Task Force also made a minor restyling edit to this provision by changing "either to" to "to either." Proposed Rule 16(c) ("statement of costs and attorney fees; objections") specifies the process for a party to file a statement of costs and fees after the court has entered an order declining jurisdiction or has rendered a decision on the merits; Rule 16(c) also provides a mechanism for the opposing party to object to the statement.

Rule 17. Disposition of Appellate Special Actions

The rule provides two alternative dispositions for appellate special actions. One of those dispositions declines special action jurisdiction, and the other disposition occurs following the acceptance of jurisdiction.

Proposed Rule 17(a) ("declining jurisdiction") requires an order declining jurisdiction to be in writing, but the writing need not state reasons for the decision.

Proposed Rule 17(b) ("jurisdiction accepted"), by comparison, provides that if the court accepts special action jurisdiction, an order granting or denying relief must be in writing and state the grounds for the decision. Hence, the decision become the law of the case. See further proposed Rule 10(d) ("jurisdiction"), which provides, "If the court accepts jurisdiction, it must render a decision on the merits." Compare current Rule 7(g): "… the order granting relief shall take such form as the court directs, but in every such case the decision of the court shall be given in writing and the grounds of the decision shall be stated. If in a special action brought in the Supreme Court or the Court of Appeals relief is denied, the decision of the Court may be made by order, and no written opinion shall be required." Under the current rule, in a case where jurisdiction was accepted but relief was denied, a decision would not be required. Under this proposed rule, a decision would be required in that circumstance. See further the analysis in paragraph (d) of the State Bar Committee Note to current Rule 7.

Although a lower court does not lose jurisdiction after a party has filed an appellate special action—and hence the reviewing court does not need to re-vest jurisdiction at the conclusion of the special action—the Task Force determined that the appellate court's issuance of a mandate or termination letter was still appropriate. (Division One uses a termination letter rather than a mandate, but for purposes of these Rules they are functionally equivalent.) In essence, a mandate or termination letter informs the lower court and the parties that the special action has concluded. Proposed Rule 17(c) accordingly states that a decision becomes effective when the court issues the mandate or termination letter unless the decision states that it is effective immediately.

Rule 18. Motions for Reconsideration in Appellate Special Actions

A provision regarding a motion for reconsideration is contained in current Rule 9 ("rehearing; Supreme Court"), section (1). However, the current provision appears to apply only to motions for reconsideration of a Supreme Court decision. Proposed

Rule 18(a)(1) also applies to the common scenario of filing such a motion in the Court of Appeals and Superior Court.

Proposed Rule 18(a)(1), which is like ARCAP 22 (“motion for reconsideration”) but is unlike current Rule 9(1), explains that the motion requests the court to consider whether its decision contained an erroneous determination of material fact or law. Proposed Rule 18(a)(1) also specifies when a party is required to file the motion.

The current rules do not provide for a motion for publication. Proposed Rule 18(a)(2) (“motion for publication”) does; the new provision corresponds to ARCAP 28(g), which has the same title as the proposed provision.

Proposed Rule 18(a)(3) (“response”) is the analog of ARCAP 22(d).

Proposed Rule 18(b) (“when motions for reconsideration are not permitted”) specifies two circumstances when a party may not file a motion for reconsideration. The first is when the court has declined to accept jurisdiction of the petition. The second is when the appellate court’s decision states that it is effective immediately, or that the clerk will immediately issue the mandate or termination letter. The first circumstance is new; the second circumstance is contained in current Rule 9(2).

<u>Rule 19. Petition for Review to the Supreme Court</u>

Proposed Rule 19 generally corresponds to current Rule 8 (“appeals”), but it is unlike the current rule because the proposed rule specifically addresses a party filing in the Supreme Court a petition for review of a special action decision of the Court of Appeals.

Proposed Rule 19(a) (“from a decision of the Court of Appeals”) reiterates what is above but adds that a petition for review may ask the Supreme Court to review a special action decision of the Court of Appeals that declines jurisdiction or grants or denies relief. This content is the equivalent of current Rule 8(b), although the current rule is limited to a civil matter, whereas the proposed rule is not similarly limited.

Proposed Rule 19(b) (“filing fees”) again informs readers of the need to pay a filing fee. However, unlike Rule 14(a) discussed above, proposed Rule 19(b) expressly provides that the Supreme Court clerk may not assess a filing fee for petitions arising out of a criminal action.

Proposed Rule 19(c) (“caption”), which is similar to current Rule 8(e), specifies that a petition for review must be filed with the Supreme Court clerk and contain the title, “Petition for Review of a Special Action Decision of the Court of Appeals.”

Proposed Rule 19(d) (“time for filing a petition or cross-petition for review”) and proposed Rule 19(e) (“supplemental briefs; oral argument”), are new provisions in the special action rules. These new sections approximate provisions in ARCAP 23 ("petitions for review"), subparts (b)(2) ("timing") and (k)(3) ("supplemental briefs and oral argument").

Note that current Rule 8(c) contains a reference to Rule 31.21 of the Criminal Rule of Procedure, which provides for petitions for review arising in a criminal action. The Task Force determined that it would be appropriate to retain a reference in proposed Rule 19(f) to Criminal Rule 31.21 ("petition for review") because Rule 19 addresses petitions for review.

PART IV. ACTIONS INVOLVING INDUSTRIAL COMMISSION AWARDS

Provisions for special action review by the Court of Appeals of Industrial Commission of Arizona ("Commission") awards are currently aggregated into a single, lengthy Rule 10. The Task Force separated the provisions of current Rule 10 into the six proposed rules described below.

Rule 20. Review of Industrial Commission Awards by the Court of Appeals

Current Rule 10(a) addresses review by the Court of Appeals of a Commission award "in workmen's compensation, occupational disease, and other matters entertained by the Industrial Commission…." Proposed Rule 20(a) ("award defined") specifies those "other matters" and provides their respective statutory basis, all of which are considered an "award" under these Rules.

Proposed Rule 20(b) ("process for review") advises that the process of reviewing an award is not by a writ of certiorari but rather is "in accordance with the procedures of Rules 20 through 25 of these Rules." The proposed section, like the current section, gives appellate review of an award precedence over all civil cases except matters of general public interest, election cases, and matters involving or affecting the Arizona Corporation Commission.

Proposed Rule 20(c) ("ARCAP") is analogous to current Rule 10(k) and applies the ARCAP to appellate review of these awards, except as otherwise provided in Rules 20 through 25.

Rule 21. Petitions for Special Action Review of Industrial Commission Matters

Proposed Rules 21(a) ("title and signature") and 21(b) ("caption") generally conform to the provisions in current Rule 10(b). Among other things, proposed Rule 21(a) instructs that appellate review of an award is initiated by filing a petition designated as a "Special Action – Industrial Commission." Proposed Rule 21(b) contains specific requirements for the caption that include naming each party to the award and, similar to the current rule, "an appropriate designation of the interest of each party."

Under current Rule 10(b), the clerk, upon the filing of the petition, is required to issue a "writ of review" directed to the Commission and that requires the Commission to "certify its records, proceedings, and evidence to the Court of Appeals." Proposed Rule 21(c) ("content"), by comparison, provides that the writ of review directs the Commission to "certify the record," which these proposed rules refer to as "the Commission record."

The current rule does not refer to a filing fee. Accordingly, proposed Rule 21(d) ("payment of filing fee"), like other proposed special action rules discussed above, requires the payment of a statutorily required filing fee unless it is waived or deferred, or the filer is exempt.

Finally, Rule 21(e) ("restricted access") requires the clerk and the parties to maintain the confidentiality of the Commission record as provided by law. Although this practice of maintaining confidentiality already exists, the codification of the practice in the special action rules is new. The practice exists because the Commission record typically includes confidential information, such as a worker's medical records.

Rule 22. Service and Distribution of Documents in Industrial Commission Matters

Proposed Rule 22 generally follows the content of current Rules 10(c) and 10(d). A provision in current Rule 10(d) provides that "the petition and the writ shall not be served until after the petition has been filed with the Court of Appeals and the writ issued." The provision has not been duplicated in Rule 22 because other parts of the proposed rule provide for the issuance and service of the writ.

Proposed Rule 22(b) ("distribution of the writ of review") requires the Court of Appeals clerk to distribute the writ of review to all parties, including the Commission chief counsel, and to notify the parties of the date the Commission submitted its record to the Court of Appeals. These actions by the clerk serve as the starting point for other deadlines, such as filing a notice of appearance or a brief, which are discussed below. On its own initiative, the Task Force bifurcated Rule 22(b).

Proposed section (b) continues to deal with the clerk's distribution of the writ. But a new section (c), titled "notice of receipt of record," separately requires the clerk to notify the parties that the clerk has received the Commission's record. This bifurcation required the renumbering of subsequent references to certain Rule 22 subsections to conform to the new subsection designations in Rule 22.

Proposed Rule 22~~(c)~~(d) ("service of other documents") contains the service requirement for Part IV. Proposed Rule 22~~(c)~~(d) is similar to the service requirement in Parts II and III, except the proposed rule, like the current rule, specifies that service on the Commission rather than its chief counsel "does not comply with this rule." The proposed rule omits a provision in current Rule 10(e) requiring service on the State Compensation Fund because it is no longer applicable.

<u>Rule 23. Notice of Appearance; Respondent's Request for Affirmative Relief in Industrial Commission Matters</u>

Proposed Rule 23(a) ("time for filing"), like current Rule 10(f), requires a party who intends to participate in the Court of Appeals' review to file a notice of appearance within 10 days after distribution of the writ of review under Rule 22(b). That party must also serve the notice of appearance on all other parties.

Proposed Rule 23(b) ("effect of not filing and serving a notice of appearance") provides that the petitioner and other parties are not required to serve filed documents on a party that does not file a notice of appearance, nor is the clerk required to distribute orders or decisions to that party. However, the proposed rule further provides that a party that failed to file a notice of appearance "may move for leave to participate." This is similar to a provision contained in current Rule 10(f).

Like current Rule 10(f), proposed Rule 23(c) ("request for affirmative relief") requires a party other than the petitioner who intends to request affirmative relief to include a statement of that intent in the party's notice of appearance, including the factual and legal basis of the request.

<u>Rule 24. Briefs in Industrial Commission Matters</u>

Proposed Rule 24 requires that petitioner's opening brief be filed with the clerk and served on the other parties within 60 days after the clerk's notice of receipt of the Commission record. (The Reply version changes the word "within" to "no later than.") The 60-day limit conforms to an amendment to current Rule 10(h) in R-22-0023. The proposed rule, like current Rule 10(h), requires that answering and reply briefs be filed and served as provided in the ARCAP, although the proposed provision—unlike the current one—refers specifically to ARCAP 15(a) ("time for filing a brief"). The Task Force recently observed that the reference to ARCAP 15(a) for service was imprecise and not appropriate. Further, while the last sentence of the proposed rule had requirements concerning the filing and service of answering and reply briefs, it did not include similar requirements for the opening brief. To encompass opening briefs, it made the following changes to that sentence: "~~Answering and reply briefs~~ Briefs must be filed as provided in ARCAP 15(c) and served as provided in ~~ARCAP 15(a)~~ Rule 5(c) of the Rules of Civil Procedure." The corrected reference to Rule 5(c) of the Rules of Civil Procedure harmonizes this provision with proposed Rule 22(d).

Rule 25. Action by the Court of Appeals in Industrial Commission Matters

Proposed Rule 25(a) ("disposition") derives from current Rule 10(g) and 10(i). Proposed Rule 25(b) ("scope of review") is derived from A.R.S. § 23-951(b). The proposed rule provision, like the statute, limits the Court of Appeals' review "to determining whether the Commission acted without or in excess of its power and, if findings of fact were made, whether such findings of fact support the award." Proposed Rule 25(c) ("costs against the Commission") is based on current Rule 10(j).

Appendix: Forms.

The Task Force petition did not include forms, but the Reply requests the Court to adopt an Appendix containing Forms 1, 2, 3, and 4 as templates for the respective captions in (1) original, (2) appellate (Court of Appeals), (3) appellate (Superior Court), and (4) Industrial Commission special actions. The Task Force believes that litigants would particularly benefit from Forms 2 and 3 because under the proposed rules, and unlike the current rules, opposing parties in an appellate special action would be respondents rather than real parties in interest, and a judicial officer would no longer be a respondent.

The Task Force acknowledges that variations in the alignment of the parties will likely occur. But these four forms in their current configuration should provide sufficient guidance to litigants. A preface to the appendix expressly allows litigants to modify any of the forms to fit the parties' alignment in individual cases. For example, although Rule 10(b) refers to appellate special actions from a decision of a tribunal, as allowed by law, the forms, particularly Form 3, omit references to a tribunal. The Task Force believes that litigants in an appellate special action seeking review of a tribunal's decision will modify the caption form as necessary and appropriate.

The preface to the Appendix also authorizes the Administrative Director of the Administrative Office of the Courts to modify these forms as may be necessary by Administrative Directive. And the preface provides that Arizona courts may modify the format of these forms to implement electronic versions.

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