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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:)	Supreme Court No. R-10-
)	
PETITION TO AMEND RULE)	Petition to Amend Rule
21(c)(1) ARIZONA RULES OF)	21(c)(1), Arizona Rules
CIVIL APPELLATE PROCEDURE)	of Civil Appellate Procedure
)	
_____)	

In accordance with Rule 28, Rules of the Supreme Court, Judges John C. Gemmill, Patricia K. Norris, Diane M. Johnsen, and Michael J. Brown respectfully petition this Court to adopt an amendment to Rule 21(c)(1), Arizona Rules of Civil Appellate Procedure (ARCAP), to make it clear on the face of the rule that applicants for attorneys' fees must specifically cite -- at the time of a fee request on appeal -- the statute, rule, decisional law, contractual basis, or other authority authorizing an award of fees.

ARCAP 21(c)(1) currently provides:

(c) Claim for Attorneys' Fees. (1) When attorneys' fees are claimed pursuant to statute, decisional law or contract, a request for allowance of attorneys' fees in connection with the prosecution or defense of the appeal or the prosecution or defense of the case in the superior court shall be made in the briefs on appeal, or by written motion filed and served prior to oral argument or submission of the appeal. If a petition or cross-petition for review is filed, a request for allowance of attorneys' fees shall be made in the petition or cross-petition for review or response thereto. If recovery of attorneys' fees is allowed by the court in its decision or order, a statement of the amount claimed for such fees may be included in the statement of costs prescribed by Rule 21(a).

Our proposed amendment consists of the addition of two sentences, so that the revised ARCAP 21(c)(1) would provide as follows (the proposed additions are all caps and bold print):

(c) Claim for Attorneys' Fees. (1) When attorneys' fees are claimed pursuant to statute, decisional law or contract, a request for allowance of attorneys' fees in connection with the prosecution or defense of the appeal or the prosecution or defense of the case in the superior court shall be made in the briefs on appeal, or by written motion filed and served prior to oral argument or submission of the appeal. **ALL REQUESTS FOR ATTORNEYS' FEES SHALL SPECIFICALLY STATE THE STATUTE, RULE, DECISIONAL LAW, CONTRACTUAL BASIS, OR OTHER AUTHORITY AUTHORIZING AN AWARD OF FEES. CITATION TO THIS RULE 21 IS NOT, BY ITSELF, SUFFICIENT.** If a petition or cross-petition for review is filed, a request for allowance of attorneys' fees shall be made in the petition or cross-petition for review or

response thereto. If recovery of attorneys' fees is allowed by the court in its decision or order, a statement of the amount claimed for such fees may be included in the statement of costs prescribed by Rule 21(a).

For many years, the Arizona Court of Appeals has repeatedly stated that requests for attorneys' fees that do not specify the substantive basis for an award of fees will not be granted. See *Ezell v. Quon*, ___ Ariz. ___, ___ n. 3, ¶ 31, 233 P.3d 645, 652 n. 3 (App. 2010) (collecting cases). In addition to the 13 published opinions cited in *Ezell*, there are numerous memorandum decisions from the court of appeals that apply the same judge-made rule. The Supreme Court, in *dicta*, appears to have expressed agreement. See *Roubos v. Miller*, 214 Ariz. 416, 420, ¶ 21, 153 P.3d 1045, 1049 (2007).

This judicially created requirement purports to be based on the language of ARCAP 21(c)(1). But the actual words of this rule do not require this interpretation. The current language of ARCAP 21(c)(1) does not alert a practitioner that the request for attorneys' fees must not only be timely asserted on appeal but must also include the authority for an award of fees. See *Ezell*, ___ Ariz. at ___, ¶¶ 39-43, 233 P.3d at 653-54 (J. Gemmill, dissenting).

The court of appeals' interpretation of ARCAP 21(c)(1) creates an unnecessary trap for an unwary attorney or party. There are many attorneys who handle occasional appeals and

attempt to follow the language of the rules, but who may not be aware that the court of appeals has placed an additional requirement -- not clearly stated in the rule -- on a request of attorneys' fees on appeal. Our proposed amendment of the rule to add an additional sentence would codify this additional requirement, thereby achieving greater clarity and fairness.

For these reasons, we respectfully submit that our proposed amendment to ARCAP 21(c)(1) -- or some similar amendment -- should be adopted.

RESPECTFULLY SUBMITTED this 29th day of October, 2010.

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