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8 **IN THE ARIZONA SUPREME COURT**

9 PETITION FOR CHANGE IN RULE  
10 7.1(E), ARIZONA RULES OF CIVIL  
11 PROCEDURE, REGARDING  
12 MOTIONS FOR  
13 RECONSIDERATION

Supreme Court No. R-06-\_\_\_\_\_

14 The State Bar of Arizona respectfully petitions this Court, pursuant to  
15 Rule 28, *Rules of the Arizona Supreme Court*, to amend Rule 7.1(e) of the  
16 Arizona Rules of Civil Procedure. The proposed amendment is intended to  
17 clarify the procedures relating to what are often called “horizontal appeals.”  
18 Such “appeals” are not true appeals, but are motions for reconsideration that  
19 are filed with a different Superior Court judge than the one who made the  
20 ruling. This can occur after the original judge has left the bench, but the  
21 situation arises more frequently when (as in Maricopa County) judges’  
22 assignments are changed.

23 The proposed amendments ensure that the judge who made the ruling, if  
24 still serving on the Superior Court bench, receives a copy of the motion for  
25 reconsideration. The assigned judge and the original judge may then confer to  
decide which of them should rule on the motion. This codifies existing good  
practice, as noted in *Hibbs v. Calcot, Ltd.*, 166 Ariz. 210, 214, 801 P.2d 445,  
449 (Ct. App. 1990) (“[M]otions for new trial or reconsideration are ordinarily  
routed to the original judge where, as here, the original judge has merely been

1 transferred to a new assignment on the same court. That practice should have  
2 been followed in this case. The contrary practice is wasteful of judicial  
3 resources and encourages ‘try again’ motion practice when a new judge gets a  
4 case.”).

5 The proposed amendments do not forbid all horizontal appeals, as there  
6 are instances when a motion for reconsideration is entirely proper, regardless of  
7 which judge is assigned to the matter. *See, e.g., Autonumerics, Inc. v. Bayer*  
8 *Industries, Inc.*, 144 Ariz. 181, 185, 696 P.2d 1330, 1334 (Ct. App. 1984)  
9 (“Given the long period of time between the filing of the motions, the extensive  
10 discovery conducted in the interim and the differences between the motions,  
11 the trial court did not err by ruling on the second motion.”). Additional  
12 instances of both proper and improper motions for reconsideration are listed in  
13 the proposed comment, so as to provide additional guidance to practitioners.

14 On the other hand, many horizontal appeals are little more than improper  
15 attempts to get a “second bite at the apple” with a new judge. Under the  
16 proposed amendments, litigants would have fewer opportunities to use a  
17 judicial rotation to avoid a judge who issued an unfavorable ruling. The  
18 proposed amendments do not require the original judge to rule on the motion  
19 for reconsideration, but merely ensures that the original judge will be informed  
20 of the motion and, if desired, discuss the matter with the assigned judge.

21 Finally, the proposed amendments divide the (current) final sentence of  
22 Rule 7.1(e) into two sentences. This change is not intended to be substantive,  
23 but is proposed solely for clarity.

24 The State Bar respectfully requests that the Supreme Court amend Rule  
25 7.1(e), *Arizona Rules of Civil Procedure*, as set forth in the attached exhibit.

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**RESPECTFULLY SUBMITTED** this \_\_\_\_ day of \_\_\_\_\_,  
2006.

**STATE BAR OF ARIZONA**

\_\_\_\_\_  
Robert B. Van Wyck  
Chief Bar Counsel

1                   **Appendix A: Red-lined version showing proposed amendments to**  
2                   **Rule 7.1(e), Arizona Rules of Civil Procedure**

3                   **Proposed amendment to Rule 7.1(e), Arizona Rules of Civil Procedure.**

4 (e) Motions for Reconsideration. A party seeking reconsideration of a ruling of  
5 the court may file a motion for reconsideration. All motions for  
6 reconsideration, however denominated, shall be submitted without oral  
7 argument and without response or reply, unless the court otherwise directs. No  
8 motion for reconsideration shall be granted, however, without the court  
9 providing an opportunity for response. ~~;~~ A motion authorized by this Rule  
10 may not be employed as a substitute for a motion pursuant to Rule 50(b), 52(b),  
11 59 or 60 of these Rules, and shall not operate to extend the time within which a  
12 notice of appeal must be filed. **IF THE ASSIGNED JUDGE DID NOT MAKE  
13 THE ORIGINAL RULING IN QUESTION, AND IF THE RULING JUDGE  
14 IS STILL SERVING ON THE SUPERIOR COURT, THE MOVING PARTY  
15 SHALL IDENTIFY THE RULING JUDGE IN THE CAPTION OF THE  
16 MOTION AND SHALL SERVE AN ADDITIONAL COPY OF THE  
17 MOTION ON THE RULING JUDGE**

18                   **State Bar Committee Note**

19                   **2006 Amendment**

20 Arizona courts have repeatedly criticized the practice of “horizontal” or  
21 “lateral” appeals, where a party asks one superior court judge to overturn a  
22 decision by another superior court judge in the same case. *See, e.g., Union  
23 Rock & Materials Corp. v. Scottsdale Conference Center*, 139 Ariz. 268, 272,  
24 678 P.2d 453, 457 (Ct. App. 1983); *Mozes v. Daru*, 4 Ariz. App. 385, 389, 420  
25 P.2d 957, 961 (1966) (“Care must be taken to eliminate ‘horizontal appeal’ or  
the practice of bringing substantially the same motion before different superior  
court judges in the hope of eventually finding one who will make a favorable  
ruling. These are clear abuses and should not be tolerated.”); *Smoole v.  
Maricopa County*, 177 Ariz. 185, 186, 866 P.2d 167, 168 (Ariz. Tax 1993). “If  
no new circumstances have arisen, a second trial judge should not review the  
ruling of the first judge; such a practice wastes judicial resources and  
encourages ‘judge shopping.’” *State ex rel. Romley v. Superior Court*, 183  
Ariz. 139, 142, 901 P.2d 1169, 1172 (Ct. App. 1995).

Not all motions for reconsideration directed to another judge, however, are  
improper horizontal appeals. Intervening discovery, for example, can make  
reconsideration of prior rulings appropriate. *See, e.g., Donlann v. Macgurn*,  
203 Ariz. 380, 385, 55 P.3d 74, 79 (Ct. App. 2002) (“[T]he policy against  
horizontal appeals should not be applied when an error in the first decision  
renders it manifestly erroneous or unjust or when a substantial change occurs in  
essential facts or issues, in evidence, or in the applicable law.”) (internal  
quotation marks omitted); *Salt River Valley Water Users’ Ass’n v. Superior*

1 *Court*, 178 Ariz. 70, 74, 870 P.2d 1166, 1170 (Ct. App. 1993); *Autonumerics,*  
2 *Inc. v. Bayer Industries, Inc.*, 144 Ariz. 181, 185, 696 P.2d 1330, 1334 (Ct.  
3 App. 1984) (“Given the long period of time between the filing of the motions,  
4 the extensive discovery conducted in the interim and the differences between  
5 the motions, the trial court did not err by ruling on the second motion.”). Also,  
6 it may be appropriate for one judge to revisit the ruling of another superior  
7 court judge when, for example, a different burden of proof applied to the first  
8 ruling. *See, e.g., Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*,  
9 176 Ariz. 275, 281, 860 P.2d 1328, 1334 (Ct. App. 1993) (findings in  
10 preliminary injunction hearings not conclusive as to subsequent summary  
11 judgment proceedings; rejecting claim of improper horizontal appeal). Thus,  
12 this amendment does not bar horizontal appeals outright, but ensures that,  
13 whenever possible, the judge who made the original ruling is copied on the  
14 motion. The assigned judge and the ruling judge may confer to determine  
15 which judge should decide the motion. This rule is not intended to establish a  
16 preference as between the currently-assigned judge and the judge who  
17 originally ruled.

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The provision encouraging the routing of motions for reconsideration to the  
judge who made the ruling in question adopts the recommended practice set  
forth in *Hibbs v. Calcot, Ltd.*, 166 Ariz. 210, 214, 801 P.2d 445, 449 (Ct. App.  
1990) (“[M]otions for new trial or reconsideration are ordinarily routed to the  
original judge where, as here, the original judge has merely been transferred to  
a new assignment on the same court. That practice should have been followed  
in this case. The contrary practice is wasteful of judicial resources and  
encourages ‘try again’ motion practice when a new judge gets a case.”).

The requirement to identify and serve a copy of the motion on judges who are  
“still serving” on the Superior Court is intended to refer only to full-time  
Superior Court judges, not to *pro tem* judges or to retired judges who might be  
called to service for limited periods. On the other hand, nothing in this rule  
should be construed to limit the ability of the assigned judge to consult with a  
retired or *pro tem* judge who made the original ruling.