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9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**

11 PETITION TO AMEND ARIZONA
12 RULE OF CIVIL PROCEDURE
13 4.1(i)

Supreme Court No. R-11-0031
**Comment of the State Bar of
Arizona Regarding Petition to
Amend Arizona Rule of Civil
Procedure 4.1(i)**

14 **I. INTRODUCTION.**

15 Lawyers Geoffrey Trachtenberg and David Abney have submitted a petition
16 to amend Arizona Rule of Civil Procedure 4.1(i), which relates to service of process
17 within Arizona on certain governmental entities. Under A.R.S. § 12-821.01, that
18 rule also governs service of notices of claims on those governmental entities; and
19 that aspect of service is the petition's focus. There has been some confusion among
20 lawyers and litigants regarding service on various public entities. Rule 4.1
21 currently provides three separate requirements, depending on whether the public
22 entity is the State [Rule 4.1(h)]; a county, municipal corporation, or other
23 governmental subdivision [Rule 4.1(i)]; or another governmental entity
24 [Rule 4.1(j)]. In addition to summonses and complaints, a claimant must initially
25 file a notice of their claims with the person or persons authorized to accept service
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1 for the public entity as set forth in the Rules of Civil Procedure.
2 A.R.S. § 12-821.01.

3 Some lawyers attempting to prosecute claims against public entities describe
4 the service requirements as a “trap for the unwary.” Similarly, some lawyers
5 representing claimants report extreme efforts to be certain that all appropriate
6 individuals are served, particularly when pursuing a claim against a county,
7 municipal corporation, or other governmental subdivision under Rule 4.1(i). The
8 petition seeks to amend only Rule 4.1(i), and raises valid concerns about certain
9 shortcomings in the current protocol. However, the State Bar recommends that the
10 Court take the opportunity to streamline and clarify the rules relating to service on
11 all public entities through an approach that differs from the petition’s proposal. The
12 State Bar’s proposed revisions to Rule 4.1 are shown in Appendix A.

13 **II. THE PETITION AND CURRENT METHODS OF SERVING**
14 **GOVERNMENTAL ENTITIES.**

15 **A. The Petition’s Concerns Regarding the Notice of Claims Process.**

16 The petition states that “claimant lawyers are often forced to track down,
17 stalk, or literally stake out high-level public-entity officials and executives to
18 accomplish basic service of a notice of claim on public entities.” This seems to
19 overstate the current issues surrounding the rule and A.R.S. § 12-821.01, and may
20 stem from a misunderstanding of the law and processes relating to notices of
21 claims, although it is understandable that such misunderstandings could arise under
22 the existing rule. The State Bar believes, however, that most claimants (whether
23 represented or appearing *pro se*) are able to properly serve public entities.

24 The *Falcon* case that the petition cites likely demonstrates one such
25 misunderstanding. Those claimants could have served the notice of claim on the
26 Clerk of the Board of Supervisors. *Falcon v. Maricopa County*, 213 Ariz. 525, 528

1 n.1, ¶ 17, 144 P.3d 1254, 1257 n.1 (2006). Nonetheless, it appears that the
2 claimants' original counsel from Texas was unfamiliar with the Arizona claim
3 statute and mailed a copy of the notice to one of the five Maricopa County
4 Supervisors. Because a Board of Supervisors acts as an entity, service on one
5 member was ineffective to accomplish service on the "chief executive officer." *Id.*
6 at 528 ¶ 17, 144 P.3d at 1257 n.1.

7 Thus, while potentially meritorious claims in *Falcon* failed due to the
8 claimants' failure to properly serve the notice of claim, that case did not present an
9 instance of an obscure or difficult-to-locate agent for service. Rather, it appears to
10 be the result of an out-of-state lawyer's failure to use fairly well-publicized
11 information to effect service by delivering the notice to the county clerk. The State
12 Bar agrees with the petition that the result is unfortunate but, as described below,
13 believes a different approach to amending Rule 4.1 may temper such results while
14 also avoiding some potential pitfalls.

15 **B. Current Methods to Serve Notices of Claims.**

16 A variety of methods exist to serve notices of claims on governmental
17 entities. Some allow straightforward service on certain entities. Others, however,
18 can be unnecessarily cumbersome or difficult to understand; these tend to pertain to
19 smaller, rural governmental entities, and this comment proposes a method to
20 eliminate those difficulties. The current methods for serving such notices include:

- 21 • Counties. Each county, by statute, has a Clerk of its Board of
22 Supervisors. The addresses of these Clerks are well-publicized on the
23 Internet websites for each of the fifteen Arizona counties. *See, e.g.*,
24 http://www.maricopa.gov/clk_board/pdf/Claimform_Notice.pdf. The
25 State Bar understands from communication with lawyers in the
26 Maricopa County Attorney's Office that Maricopa County receives
thousands of claims every year, the vast majority of which are filed by
non-lawyers.

- 1 • Cities and Towns. Like counties, towns and non-charter cities are
2 required by statute to have a Clerk. A.R.S. § 9-202(A). Charter
3 cities, such as Phoenix, also have Clerks by charter or ordinance.
- 4 • Other Entities. The remaining entities—*e.g.*, school districts and
5 special districts—present a greater challenge. These entities are not
6 currently subject to a uniform set of requirements for officers and
7 representatives.

7 **C. Potential Difficulties with the Petition’s Proposed Changes.**

8 The petition would add two provisions to Rule 4.1(i):

9 (a) Where service under this rule must be made upon a public entity’s
10 governing group, body, or board, service is complete when delivery is
11 made to any member of that group, body, or board; and

12 (b) To the extent that any person subject to service under this rule has
13 an administrative assistant or employee who opens mail or legal
14 documents for that person, signs for mail or legal documents for that
15 person, or is authorized to accept delivery of mail or legal documents
16 for that person, delivery to that administrative assistant or employee is
17 sufficient service on the person subject to service.

18 The State Bar understands and sympathizes with the desire to ensure that
19 meritorious claims are not extinguished due to failure to comply with service
20 requirements. It believes, however, that the petition’s recommendation could lead
21 to uncertainty and unintended consequences.

22 The first suggestion could be unworkable for rural counties and small entities
23 (*e.g.*, certain school districts, irrigation districts), some of which have volunteer
24 board members. For instance, the State Bar understands that Yuma County
25 Supervisors do not have offices at the county’s governmental building and that mail
26 addressed to supervisors other than the chairman often is not opened. The proposed
27 change also could lead to board members receiving notices of claims or service of
28 process at their homes, whether by mail or by process server.

1 The second suggestion likewise presents difficulties. Rather than a clearly-
2 identified agent, such as the Clerk of the Board of Supervisors or town clerk, a
3 claimant may address his or her notice of claim to an administrative assistant of a
4 governing board member. Such an employee could be on sick leave, retired, or
5 otherwise not on duty when the claim arrives. This open-ended provision could
6 lead to unintended consequences and unaccounted-for notices of claims, contrary to
7 the public policy stated in A.R.S. § 12-821.01 to give proper notice of claims in
8 order to resolve them prior to litigation.

9 The proposed changes also could hamper a public entity's ability to account
10 for properly served notices, defeating the purpose of Rule 4.1(i) and
11 A.R.S. § 12-821.01. The changes would eliminate the control processes that many
12 public entities currently use to track and monitor notices. For example, the Clerk of
13 the Maricopa County Board of Supervisors has well-established protocols for
14 receiving properly served notices. The individuals working for the Clerk
15 understand the significance of such documents and route them to decision makers
16 to fulfill the purpose of A.R.S. § 12-821.01. The State Bar understands this is true
17 for most counties and municipalities. The proposed changes also could lead to
18 difficulty in discerning whether an individual member of a "group, body, or board"
19 or his/her "administrative assistant or employee who opens mail or legal
20 documents" has received or been served with a copy or an original notice, further
21 eliminating the certainty that the current rules allow.

22 **III. THE STATE BAR'S PROPOSED CHANGES TO IMPROVE**
23 **THE PROCESS.**

24 As noted above, the State Bar agrees with the petition that appropriate
25 changes to the current version of Rule 4.1(i) could eliminate existing problems with
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1 that rule. Thus, the State Bar and the petition share a mutual goal of improving the
2 process. The only disagreement is the method of achieving that goal.

3 It is clear from the case law that practitioners often have difficulty with the
4 terms used in Rule 4.1(i). For example, one might ask whether the "Clerk" of a
5 county is the person who is elected as the "Clerk" or the Clerk of the Board of
6 Supervisors. Further, there are real concerns with current Rule 4.1(j), which
7 permits service of process on a single member of a governing body of a public
8 entity to be effective process on behalf of the entity as a whole.

9 To simplify service on public entities, the State Bar proposes the following
10 changes to Rules 4.1(h), (i), and (j):

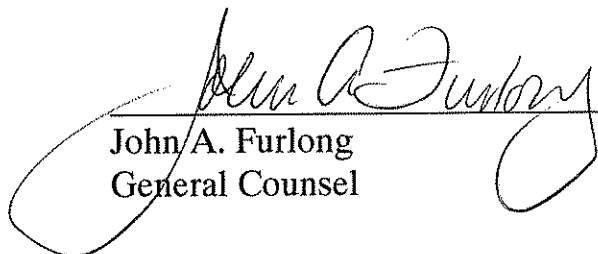
- 11 • Combining Rules 4.1(h), (i), and (j) into one rule titled "Service of
12 Summons Upon a Governmental Entity";
- 13 • Designating the Clerk of the Board of Supervisors as the
14 appropriate person to be served on behalf of a County;
- 15 • Designating the Clerk of a Municipal Corporation as the
16 appropriate person to be served on behalf of that Municipal
17 Corporation; and
- 18 • For other governmental entities, allowing for service by either
19 (a) serving as currently allowed by Rule 4.1(j); or (b), if the entity
20 does not have a designated recipient pursuant to statute, then
21 service on the chief executive officer, official secretary, clerk or
22 recording officer as established by law.

23 The State Bar understands that there currently is no statutory requirement for
24 governmental entities to designate a person to receive service of process but
25 believes this would be the best solution for entities that Rule 4.1(j) presently
26 covers. This required designation would eliminate uncertainty for the entities being
served, because those entities must select a person who would understand that
he/she could receive service of process. It would also eliminate uncertainty for
parties with claims against those entities, who would know exactly whom to serve.

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The State Bar's proposed rule changes, which are attached as Appendix A, are written to be useful even without a statutory change. Without a statutory change, the proposal would retain the same means of service on certain governmental entities covered under Rule 4.1(j) as exist currently. The proposed rule change, however, also accommodates, but does not require, what would be a useful statutory amendment allowing for governmental agencies to designate a person to receive service of process, preferably in the same manner as corporate entities are required to do with the Arizona Corporation Commission. This would provide an easily accessible, centralized location to locate statutory agents for governmental entities, in the same place where parties now look for such information as to corporate entities.

RESPECTFULLY SUBMITTED this 7th day of May, 2012.



John A. Furlong
General Counsel

Electronic copy filed with the Clerk of the Supreme Court of Arizona this _____ day of _____, 2012,

by: _____

APPENDIX A

Text of Proposed Amendment to Rule 4.1:

(a) Territorial Limits of Effective Service. All process may be served anywhere within the territorial limits of the state.

(b) Summons; Service With Complaint. The summons and pleading being served shall be served together. The party procuring service is responsible for service of a summons and the pleading being served within the time allowed under Rule 4(i) of these Rules and shall furnish the person effecting service with the necessary copies of the pleading to be served.

(c) Waiver of Service; Duty to Save Costs of Service; Request to Waive.

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of such defendant.

(2) An individual, governmental entity, corporation, partnership or unincorporated association that is subject to service under paragraph (d), ~~(h)(1)-(4)(A)~~, ~~(i)~~ or ~~(k)~~ of this Rule 4.1 and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request:

State Bar's Proposed Changes to Rule 4.1 of the Arizona Rules of Civil Procedure *(proposed additions are shown by underscoring and deletions are indicated by "strike-through")*

- (A) shall be in writing and shall be addressed directly to the defendant in accordance with paragraph (d), (h) ~~(i)(1)-(4)(A)~~, or ~~(k)~~(i) of this Rule 4.1, as applicable;
- (B) shall be dispatched through first-class mail or other reliable means;
- (C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;
- (D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;
- (E) shall set forth the date on which the request is sent;
- (F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent; and
- (G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs

subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

- (3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent.
- (4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and the complaint had been served at the time of filing the waiver, and no proof of service shall be required.
- (5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under paragraph (d), (h), ~~(i)~~ or ~~(k)~~ of this Rule 4.1, together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(d) Service of Summons Upon Individuals. Service upon an individual from whom a waiver has not been obtained and filed, other than those specified in paragraphs (e), (f) and (g) of this Rule 4.1, shall be effected by delivering a copy of the summons and of the pleading to that individual personally or by leaving

copies thereof at that individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the pleading to an agent authorized by appointment or by law to receive service of process.

(e) Service of Summons Upon Minors. Service upon a minor under the age of sixteen years shall be effected by service in the manner set forth in paragraph (d) of this Rule 4.1 upon the minor and upon the minor's father, mother or guardian, within this state, or if none is found therein, then upon any person having the care and control of such minor, or with whom the minor resides.

(f) Service of Summons Upon A Minor With Guardian or Conservator.

Service upon a minor for whom a guardian or conservator has been appointed in this state shall be effected by service in the manner set forth in paragraph (d) of this Rule 4.1 upon such guardian or conservator and minor.

(g) Service of Summons Upon Incompetent Persons. Service upon a person who has been judicially declared to be insane, gravely disabled, incapacitated or mentally incompetent to manage that person's property and for whom a guardian or conservator has been appointed in this state shall be effected by service in the manner set forth in paragraph (d) of this Rule 4.1 upon such person and also upon that person's guardian or conservator, or if no guardian or conservator has been appointed, upon such person as the court designates.

~~(h) Service of Summons Upon the State.~~ If a waiver has not been obtained and filed, service upon the state shall be effected by delivering a copy of the summons and of the pleading to the attorney general.

~~(i) Service of Summons Upon a County, Municipal Corporation or Other Governmental Subdivision.~~ a Governmental Entity. Service upon a county or a municipal corporation or other governmental subdivision of the state entity subject to suit, and from which a waiver has not been obtained and filed, shall be effected by delivering a copy of the summons and of the pleading to the chief executive officer, the secretary, clerk, or recording officer thereof.

following individuals:

- (1) For service upon the State, the Attorney General;
- (2) For service upon a County, the Clerk of the Board of Supervisors thereof;
- (3) For service upon a Municipal Corporation, the Clerk thereof; and
- (4) For service upon any other governmental entity:
 - (A) The individual designated by the entity pursuant to statute to receive service of process; or

~~(j) Service of Summons Upon Other Governmental Entities.~~

~~Service upon any governmental entity not listed above shall be effected by serving (B) If the entity has not pursuant to statute~~

designated a person to receive service of process, then the chief executive officer(s), or, alternatively, the official secretary, clerk, or recording officer of the entity as established by law.~~shall be sufficient.~~

(k) Service of Summons Upon Corporations, Partnerships or Other

Unincorporated Associations. Service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit in a common name, and from which a waiver has not been obtained and filed, shall be effected by delivering a copy of the summons and of the pleading to a partner, an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party on whose behalf the agent accepted or received service.

(l) Service of Summons Upon a Domestic Corporation If Authorized Officer

or Agent Not Found Within the State. When a domestic corporation does not have an officer or agent in this state upon whom legal service of process can be made, service upon such domestic corporation shall be effected by depositing two copies of the summons and of the pleading being served in the office of the Corporation Commission, which shall be deemed personal service on such corporation. The return of the sheriff of the county in which the action or

proceeding is brought that after diligent search or inquiry the sheriff has been unable to find any officer or agent of such corporation upon whom process may be served, shall be prima facie evidence that the corporation does not have such an officer or agent in this state. The Corporation Commission shall file one of the copies in its office and immediately mail the other copy, postage prepaid, to the office of the corporation, or to the president, secretary or any director or officer of such corporation as appears or is ascertained by the Corporation Commission from the articles of incorporation or other papers on file in its office, or otherwise.

(mk) Alternative or Substituted Service. If service by one of the means set forth in the preceding paragraphs of this Rule 4.1 proves impracticable, then service may be accomplished in such manner, other than by publication, as the court, upon motion and without notice, may direct. Whenever the court allows an alternate or substitute form of service pursuant to this subpart, reasonable efforts shall be undertaken by the party making service to assure that actual notice of the commencement of the action is provided to the person to be served and, in any event, the summons and the pleading to be served, as well as any order of the court authorizing an alternative method of service, shall be mailed to the last known business or residence address of the person to be served. Service by publication may be employed only under the circumstances, and in accordance

with the procedures, specified in Rules 4.1(~~n~~), 4.1(~~m~~), 4.2(f) and 4.2(g) of these Rules.

(n) Service by Publication; Return. Where the person to be served is one whose residence is unknown to the party seeking service but whose last known residence address was within the state, or has avoided service of process, and service by publication is the best means practicable under the circumstances for providing notice of the institution of the action, then service may be made by publication in accordance with the requirements of this subpart. Such service shall be made by publication of the summons, and of a statement as to the manner in which a copy of the pleading being served may be obtained, at least once a week for four successive weeks (1) in a newspaper published in the county where the action is pending, and (2) in a newspaper published in the county of the last known residence of the person to be served if different from the county where the action is pending. If no newspaper is published in any such county, then the required publications shall be made in a newspaper published in an adjoining county. The service shall be complete thirty days after the first publication. When the residence of the person to be served is known, the party or officer making service shall also, on or before the date of the first publication, mail the summons and a copy of the pleading being served, postage prepaid, to that person at that person's place of residence. Service by publication and the return thereof may be made by the party

procuring service or that party's attorney in the same manner as though made by an officer. The party or officer making service shall file an affidavit showing the manner and dates of the publication and mailing, and the circumstances warranting the utilization of the procedure authorized by this subpart, which shall be prima facie evidence of compliance herewith. A printed copy of the publication shall accompany the affidavit. If the residence of the party being served is unknown, and for that reason no mailing was made, the affidavit shall so state.

(~~o~~m) Service by Publication; Unknown Heirs in Real Property Actions. When in an action for the foreclosure of a mortgage on real property or in any action involving title to real property, it is necessary for a complete determination of the action that the unknown heirs of a deceased person be made parties, they may be sued as the unknown heirs of the decedent, and service of a summons may be made on them by publication in the county where the action is pending, as provided in subpart (~~n~~l) of this Rule 4.1.