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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND ARIZONA RULE OF CIVIL PROCEDURE 4.1(i)	Supreme Court No. R-11-0031 **Comment from a Claimant's Perspective Regarding Petition to Amend Arizona Rule of Civil Procedure 4.1(i)**

I. INTRODUCTION

The petition to amend Arizona Rule of Civil Procedure 4.1(i) submitted by lawyers Geoffrey Trachtenberg and David Abney as it relates to service of process within Arizona on certain government entities brings to light some of the problems with the Notice of Claim Statute A.R.S. §12-821.01.

This Statute is the source of considerable litigation confusing claimants, legal professionals and even the courts. What should be a simple claim filing has become a challenging process that requires more time and expense than necessary.

Compliance is difficult as there are many conflicting court decision that make the related case law a moving target.

II. LEGISLATIVE INTENT

The original legislative intent of the 1984 Notice of Claim law declared that **"the public policy of this state [is] that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state."** (Act of Apr. 25, 1984, ch 285, 1984 Ariz. Sess. Laws 1091-1092.) The stated purpose for the statute is to allow the agency the opportunity to:

1. Investigate the merits of the claim and assess its potential for liability.
2. Settle the claim and avoid the litigation.
3. Establish an orderly procedure by which the governing body will be advised of claims when no provision has been made for payment.

The claimant is severely handicapped. The public entity is much more familiar with the claim process and knows how to effectively defeat legitimate claims using procedural deficiencies. The public entity has unlimited access to legal representation at taxpayer expense while the claimant is not allowed to charge anything for their time pursuing equitable resolution. When the claim for

damages is not an astronomical amount the public entity knows that the claimant's cost to pursue a claim may be considerably more than the value of the claim.

The claimant is required by the Notice of Claim Statute to investigate and prepare the claim within 180 days of the injury or a loss. The claimant will be focused on recovery and/or rehabilitation in the case of an injury. If the claim is for property damage the claimant will be dealing with repairs, restoration and limiting additional losses. This creates a considerable distraction making it even more likely that a claimant will make a procedural mistake with the notice filing that is a procedural minefield for an unrepresented claimant.

Many public entities provide claim forms that do not include comprehensive instructions. While some of these forms mention the Notice of Claim Statute and some allude to the potential need for legal representation the public entity has no obligation to notify the claimant of any deficiencies. Nor is there any time allowed to amend or correct any deficiencies after the 180 day filing period.

If the purpose of the Arizona Notice of Claim Statute is the dismissal of legitimate claims using obfuscation, legal expense and procedural deficiencies A.R.S. §12-821.01 would get high marks.

Legislative amendments to original Notice of Claim Statute and judicial decisions have increased restrictions, requirements and accelerated the filing deadline incrementally raising the bar for a claimant.

The legislature and court fail to recognize the constitutional conflict this procedural minefield creates, choosing instead to validate the statute based on hypothetical judicial economy and economic benefit to the "state".

But all State laws must flow from the Constitution. "This undisguised, self-proclaimed utilitarian analysis causes some individual constitutional rights to be unenforceable when government violates them. Such results are irreconcilable with constitutional supremacy" (Donald Doernberg, *Taking Supremacy Seriously: The Contrariety of Official Immunities*, 80 Fordham L. Rev. 443 (2011))

The legitimate objective of the Notice of Claim Statute is to settle the claims without litigation. To accomplish this, substantive requirements are met if the agency receives:

1. Notice within the 180 day period established by statute

2. Enough information to evaluate the claim

3. The specific amount for which claimants will settle the claim.

The "legislative intent" has been scuttled. When given the choice of negotiating a settlement, or dismissal of a claim for procedural deficiencies created the Notice Statute, it is not hard to guess the alternative the lawyers representing the public entity will choose.

The Notice of Claim statute obstructs rather than encourages settlement. The affirmative defense created by the current Arizona Notice of Claim Statute diminishes the likelihood of settlement and increases litigation. The number of cases related to the Notice of Claim Statute that have come before Arizona and Federal courts reflect the failure of the legislature and judicial system to implement laws that support the "legislative intent".

The elimination of substantial compliance has created a legal environment where the "state" and "state employees" obscure rather than clarify the Notice of Claim process obstructing settlement and justice. This is clearly demonstrated in Blauvelt v. County of Maricopa 160 Ariz. 77, 770 P.2d 381 (1988) when the "*deputy county attorney responded to Blauvelt by letter… stating that Blauvelt had failed to comply with the statute's requirements because he had served the demand letter upon the wrong party. The attorney indicated that he would recommend that the claim be denied even if properly filed, but he did not tell Blauvelt to whom a claim letter should be directed to comply with the statute".* The Court ruled on the County Attorneys' motion to dismiss that the state had not received sufficient notice of the claim.

The deputy county attorney understood that Blauvelt was making a claim. The deputy county attorney knew who need to receive Blauvelt's letter and withheld that information. This clearly illustrates the duplicity of the public entity

which was endorsed by the subsequent judicial decision. The current legal environment rewards the public entity for obfuscating rather than clarifying the process for the citizen claimant.

> If a statute continues to lead to the dismissal of state law claims, years after its enactment and with a growing number of relevant court pronouncements, the inevitable conclusions are that the statute itself has confounded litigants and that existing guidance from the courts has been insufficient, as a whole, to bring claimants within the limits of the statute's mandate.
>
> Accordingly, it is in the interests of the Arizona justice system to implement a notice of claim statute that satisfies the legislative goals of the original statute, while giving plaintiffs a meaningful opportunity to press their claims to the merits stage. This new statute must reflect not only each of the statutory purposes of the original statute, but also reflect the political situation within which the notice operates as well as the courts' treatment of the existing requirements. This new statute must contain clear language that will render compliance easier and less subject to ambiguity, uncertainty, and interpretive battles in motions to dismiss. (Dawinder Sidhu, *Arizona's Notice of Claim Statute: Guidance on Clearing this Procedural Hurdle and Suggestions for its Improvement*, 3 PHOENIX L. REV. 229 (2010))

III. UNCONSTITUTIONAL

The court's invitation to the legislature in *Ryan v. State of Arizona* 134 Ariz. at 311, 656 P.2d 597 (1982) limited court endorsed government immunity "as a defense only when its application is necessary to avoid a severe hampering of a governmental function or thwarting of established public policy. Otherwise, the state and its agents will be subject to the same tort law as private citizens".

The Notice of claim act provides the "state and its agents" special protection and affirmative defenses unavailable to private citizens.

Recent judicial decisions related to Sovereign Immunity and the Notice of Claim Statute promote the interests of the government, by the government and for the government at the expense of the citizen's constitutional rights. These rulings cannot be harmonized with the Arizona or U.S. Constitutions.

"A statute is unconstitutionally vague if it does not give persons of ordinary intelligence a reasonable opportunity to learn what it prohibits and does not provide explicit instructions for those who will apply it." (*State of Ariz. v McMahon* 201 Ariz. 548, 38 P.3d 1213 (App. 2002))

A.R.S.12-821.01 requires that claims are filed with the person(s) authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure. Previous versions of the Arizona Notice of Claim Statute referred to a specific rule. The current Statute does not.

Rule 4.1 specifically applies to "Commencement of an Action". An "Action" as defined by Black's law dictionary is "a suit brought in a court". Rule 4.1(d) through 4.1(j) describes the requirements for service of a Summons. Black's law dictionary defines a Summons as "Instrument used to commence a civil action or special proceeding and is a means of acquiring jurisdiction over a party". The

Notice of Claim is a pre-litigation requirement to an Action and therefore Rule 4.1 does not apply. This is confusing and ambiguous.

Currently service upon an authorized agent is also problematic as there is no requirement that the relationship be disclosed publicly. In some instances the agent relationship is established solely by a claim form without authorization from the individual the agent purportedly represents.

The Claim form used by Maricopa County states that, "claims against Maricopa County, the County Manager, the Deputy County Manager, the individual members of the Board of Supervisors, and any other Special District where the Board Members serve as the Board of Directors for the individual District, e.g., the Flood Control District, the Stadium District, the Library District, etc." are to be served to the Clerk of the Board of Supervisors. (http://www.maricopa.gov/clk_board/pdf/Claimform_Notice.pdf)

The Clerk of the Maricopa Board of Supervisors, the Maricopa County Risk Management Department and the Maricopa County Attorney in answer to separate public records requests have been unable to provide any evidence that these County employees have authorized the Clerk to serve as their agent.

This following statement from *Backus v. State of Arizona* 220 Ariz. 101, 203 P.3d 499 (2009) typifies additional vagaries of the Notice of Claim statute as characterized by the court.

> "We conclude, as did the court of appeals, that the statutory language imposing the supporting-facts requirement is not clear and unequivocal. Because the statute is susceptible to more than one reasonable interpretation, as reflected by the various interpretations urged by the State and by these claimants, as well as the interpretations adopted by various panels of the court of appeals, we must consider other factors to reach the interpretation that best furthers the intent of the legislature. (*Backus v. State of AZ*)

The Arizona Supreme Court vacated the opinion of the court of appeals and the judgment of the superior court with its decisions in *Backus*.

The courts frequently interpreted the statute quite differently. The court of appeals perpetuated the *Hollingsworth* reasonableness standard (*Hollingsworth v. City of Phoenix,* 164 Ariz. 462,793 P.2d 1129, (1990)) in *Young v. Scottsdale,* 193 Ariz. 110, 970 P.2d 942 (1998). The Superior Court concurred in *Deer Valley v. Houser,* 214 Ariz. 293, 152 P. 3d 490, (2007). The Supreme Court reversed the Superior Court and "concludes that the 1994 amendment repeals, rather than codifies, the *Hollingsworth* standard". This "instruction" is not found in the statute and can only be recognized after an exhaustive examination of the ever changing case law.

In *Simon v. Maricopa Medical Center,* 225 Ariz. 55 (2010) the Court of Appeals reverses the dismissal of the Phoenix Police Department by the Superior Court. In *Falcon v. Sandoval*, 212 Ariz. 148, 128 P.3d 771the Supreme Court

vacated the opinion of the Court of Appeals and affirms the Superior Court Judgment.

Many "agencies" provide "Notice of Claim" forms. Rarely do the forms indicate that individual service is required on "state employees". There is a disclaimer on many of the forms alluding to the need for legal counsel to comply with A.R.S. § 12-821.01(A) requirements, but for a non represented claimant, or in a case where the amount of the claim does not justify the cost of representation, the form creates a trap for the unwary. The following statement from *Simon v. Maricopa Medical Center* illustrates a complete lack of understanding by the court of the imbalance between a pro se litigant and the agencies Legal Department and Risk Management Division that craft these forms that mislead claimants.

> ¶ 27 In a related argument, Simon contends that A.R.S. § 12-821 .01(A) is unconstitutionally vague because a person of ordinary intelligence would not know what is required by the statute. The statute is specific enough that Simon successfully complied with it with respect to the District and the City. He does not state the basis for his argument that the statute is ambiguous. Therefore we reject Simon's contention that the statute is unduly vague. *Simon v. Maricopa Medical Center*

Many "persons of ordinary intelligence" have no legal training. Court interpretation of A.R.S. § 12-821.01(A) is in a constant state of flux. Many Notice of Claim decisions by the courts have been reversed. This statute and the associated case law are unconstitutionally vague.

> …the statute, straightforward as it is, has resulted in the dismissal of a number of state law claims. What is worse, the courts themselves have issued divergent opinions on what the notice of claim statute requires. As a result, the claimants are in the difficult position of trying to comply with the statute in reliance on previous, inconsistent court orders as indications of what their particular notices of claim must contain. Put another way, they are faced with a moving target that the courts have been unable to render stationary. Though compliance with the statute is possible, the statute may still not be worth saving. Due to the uncertain nature of the current statute's requirements and the devastating consequences of noncompliance dismissal of state-law claims without consideration on the merits the statute should be replaced." **(**Dawinder S. Sidhu, *Arizona's Notice of Claim Statute: Guidance on Clearing the Procedural Hurdle and Suggestions for its Improvement* 3 PHOENIX L. REV. 229 (2010))

IV. CONCLUSION

This Statute does create a "trap for the unwary" that is being used by government entities as a procedural obstacle to legitimate claims. As suggested by the petition to Amend the Rule and in many of the comments including those of John A. Furlong it would serve both justice and judicial economy to "streamline and clarify the rules relating to service" of a Notice of Claim.

The unsubstantiated belief of the State Bar "that most claimants (whether represented or appearing *pro se*) are able to properly serve public entities" is refuted by the numerous cases that have come before the court. It is likely that there are significantly more claims that never make it to court. More importantly,

all claimants have a right to a Notice of Claim process that is equitable and efficient.

Philip Beatty in *The Deer Valley Aftermath: Manufactured Digits Thwart Original Purpose of Arizona's Claims-Notice Statute*, 40 Ariz. St. L.J. 1031 (2008) states:

> Without change, Arizonans will continue to lose on several fronts: claims will be inflated and less likely to be settled up front; the claims process will be more costly due to increased litigation; legitimately injured plaintiffs will be denied recovery due to minor procedural missteps, and more legal malpractice cases will find their way in an overcrowded court system. Thus, statutory or judicial changes that allow for a good faith estimate of damages or a doctrine of substantial compliance would fulfill the needs of public entities while simultaneously protecting injured plaintiffs.

The courts, judges and lawyers are divided on many issues. The lawyers that profit litigating these claims have little incentive to challenge the legality of notice of claim requirements. The complexity creates the need for legal representation.

The "agencies" are quite happy with the affirmative defense provided by the intricacies Notice of Claim statute. Legitimate claims are defeated with increasingly strict procedural hurdles that increase delays and expense for claimants. People of "average intelligence" without legal training, are misled by agency crafted Notice of Claim forms that do not explain the filing requirements comprehensively.

Meritorious claims are being extinguished with the complicity of the judicial system. The notice required by the Notice of Claim Statute is unjust, time consuming, expensive, unnecessary and unconstitutional.

Article 2 Section 2 of the Arizona Constitution declares that, "**governments...are established to protect and maintain individual rights".**

A.R.S. Rules of Civil Procedure, Rule #1 states;

These rules govern the procedure in the superior courts of Arizona in all suits of a civil nature whether cognizable as cases at law or in equity. They **shall be construed to secure the just, speedy, and inexpensive determination of every action.**

Just, speedy, and inexpensive are not words anyone would use to describe litigation related to the Notice of Claim Statute. It should also be noted that "Just" comes first, ahead of "speedy", and "inexpensive determination". Recent court decisions do reflect an economic bias toward the interests of the "state" but this is a false economy that obstructs the legislative intent, settlement. Judicial expediency serving only the "state" ultimately increases litigation and judicial expense.

The U.S. Supremel Court has recognized the inequity of the State Notice of Claim rules.

> "In enacting § 1983, Congress entitled those deprived of their civil rights to recover full compensation from the governmental officials responsible for those deprivations. A state law that conditions that

> right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law. Principles of federalism, as well as the Supremacy Clause, dictate that such a state law must give way to vindication of the federal right when that right is asserted in state court." *U.S. Supreme Court Justice Brennan*
> *Felder V. Casey* 487 U.S. 131 (1988)

The number of Federal §1983 claims against the "State", which are not subject to the Arizona Notice of Claim requirements, and also allow punitive damages will continue to increase.

The Petition to amend the Rule offers the court a chance to change course. The current Notice of Claim Statute will continue to confuse all parties involved, leading to more litigation and injustice.

Andrew Becke in *Two Steps Forward, One Step Back: Arizona's Notice of Claim Requirements and Statute of Limitations Since the Abrogation of State Sovereign Immunity,* 39 Ariz. St. L.J. 247 (2005) offers one solution.

> There are three purposes behind the notice statutes described in State v. Brooks: opportunity to investigate, opportunity to settle, and notification of the legislature. Arizona's statutory scheme fails to serve any of these purposes. First, the State is given ample time opportunity to investigate its liability after a lawsuit is filed. There is no practical reason for this process to occur so quickly, as both sides will be conducting discovery well into the foreseeable future. Second, the statute offers no opportunity for the State to settle the claim which would not be available after the filing of a complaint. In fact, the notice of claim requirement makes a settlement less likely since the Hernandez decision, as attorneys will be encouraged to demand sky-

> high amounts of money, lest a low figure demand be used against them in court. Third, the legislature will be advised of claims when the lawsuit is filed. It is improbable to think that the legislature has the time or the inclination to take action on every claim the State is presented with in so short a period of time.
>
> In the words of Justice Lockwood in the 1963 Stone decision that started the government immunity debate, "when the reason for a certain rule no longer exists, the rule itself should be abandoned." This is certainly even more true when that rule leads to unjust outcomes for the citizens of Arizona.

Vacating the Notice of Claim Statute makes sense but would face considerable opposition from the legislature and the legal proffession.

A simple, more acceptable solution would be to adopt a new Rule similar to RCW 4.96.020 in the Revised Code of Washington. RCW 4.96.020 requires each government entity to appoint one agent that can receive claims for the entity, the entity's officers, employees, and volunteers… The failure of the agency to appoint an agent precludes a notice deficiency claim.

RCW 4.96.020 also codifies substantial compliance. Compliance would require the successful notification of the "party in interest" against whom the claims are made. This would meet the legislative objective, solve the problems identified in the "Petition to Amend Rule 4.1(i), Ariz. R. Civ. P.", streamline and clarify the rules relating to service as well as promote settlement. *(RCW 4.96.020 attached as Appendix A)*

Requiring that all filing requirement be clearly presented on Claim Forms provided by public entities covered by the Notice of Claim Statute would also promote settlement.

This solution also addresses the concerns raised by Eileen Gilbride, of Jones, Skelton and Hoculi, those set forth by Joni Hoffman of the Arizona League of Cities and Towns, and those of Jeffrey T. Murray on behalf of the Arizona Municipal Risk Retention Pool and Valley Metro – RPTA in that the public entity can identify any person they want as the agent. The appointed agent can be trained to recognize and process the notices so that the public entity has every opportunity to settle rather than litigate.

This is not rocket science. It is a glorified damage claim. It should not require a lawyer, a comprehensive study of current Arizona case law, or even a process server to comply with the Notice of Claim Statute. The legislative intent is settlement not obfuscation or obstruction. *(The four flow charts attached as Appendix B illustrate the simplicity of RCW 4.96.020 in comparison to the current rule and the proposals for amendment.)*

There are roughly 22,000 lawyers in Arizona. There are approximately 6,262,000 citizens that are not lawyers. Recognizing that claimant's interests are underrepresented in the legislative and judicial process it is hoped that the Court takes these suggestions seriously even if they come from a lay person.

The Court has an opportunity to make changes that will reduce litigation, reduce judicial expense, promote settlement, and serve justice.

RESPECTFULLY SUBMITTED this 11th day of May, 2012.

_____
Kevin Greif
Unwary Claimant

Electronic copy filed with the Clerk
of the Supreme Court of Arizona this
_____day of May, 2012

by: Kevin Greif

Appendix A

Washington State - RCW 4.96.020

Tortious conduct of local governmental entities and their agents — Claims — Presentment and filing — Contents.

(1) The provisions of this section apply to claims for damages against all local governmental entities and their officers, employees, or volunteers, acting in such capacity, except that claims involving injuries from health care are governed solely by the procedures set forth in chapter 7.70 RCW and are exempt from this chapter.

(2) The governing body of each local governmental entity shall appoint an agent to receive any claim for damages made under this chapter. The identity of the agent and the address where he or she may be reached during the normal business hours of the local governmental entity are public records and shall be recorded with the auditor of the county in which the entity is located. All claims for damages against a local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, shall be presented to the agent within the applicable period of limitations within which an action must be commenced. A claim is deemed presented when the claim form is delivered in person or is received by the agent by regular mail, registered mail, or certified mail, with return receipt requested, to the agent or other person designated to accept delivery at the agent's office. The failure of a local governmental entity to comply with the requirements of this section precludes that local governmental entity from raising a defense under this chapter.
(3) For claims for damages presented after July 26, 2009, all claims for damages must be presented on the standard tort claim form that is maintained by the risk management division of the office of financial management, except as allowed under (c) of this subsection. The standard tort claim form must be posted on the office of financial management's web site.

(a) The standard tort claim form must, at a minimum, require the following information:

(i) The claimant's name, date of birth, and contact information;

(ii) A description of the conduct and the circumstances that brought about the injury or damage;

(iii) A description of the injury or damage;

(iv) A statement of the time and place that the injury or damage occurred;

(v) A listing of the names of all persons involved and contact information, if known;

(vi) A statement of the amount of damages claimed; and

(vii) A statement of the actual residence of the claimant at the time of presenting the claim and at the time the claim arose.

(b) The standard tort claim form must be signed either:

(i) By the claimant, verifying the claim;

(ii) Pursuant to a written power of attorney, by the attorney in fact for the claimant;

(iii) By an attorney admitted to practice in Washington state on the claimant's behalf; or

(iv) By a court-approved guardian or guardian ad litem on behalf of the claimant.

(c) Local governmental entities shall make available the standard tort claim form described in this section with instructions on how the form is to be presented and the name, address, and business hours of the agent of the local governmental entity. If a local governmental entity chooses to also make available its own tort claim form in lieu of the standard tort claim form, the form:

(i) May require additional information beyond what is specified under this section, but the local governmental entity may not deny a claim because of the claimant's failure to provide that additional

information;

(ii) Must not require the claimant's social security number; and

(iii) Must include instructions on how the form is to be presented and the name, address, and business hours of the agent of the local governmental entity appointed to receive the claim.

(d) If any claim form provided by the local governmental entity fails to require the information specified in this section, or incorrectly lists the agent with whom the claim is to be filed, the local governmental entity is deemed to have waived any defense related to the failure to provide that specific information or to present the claim to the proper designated agent.

(e) Presenting either the standard tort claim form or the local government tort claim form satisfies the requirements of this chapter.

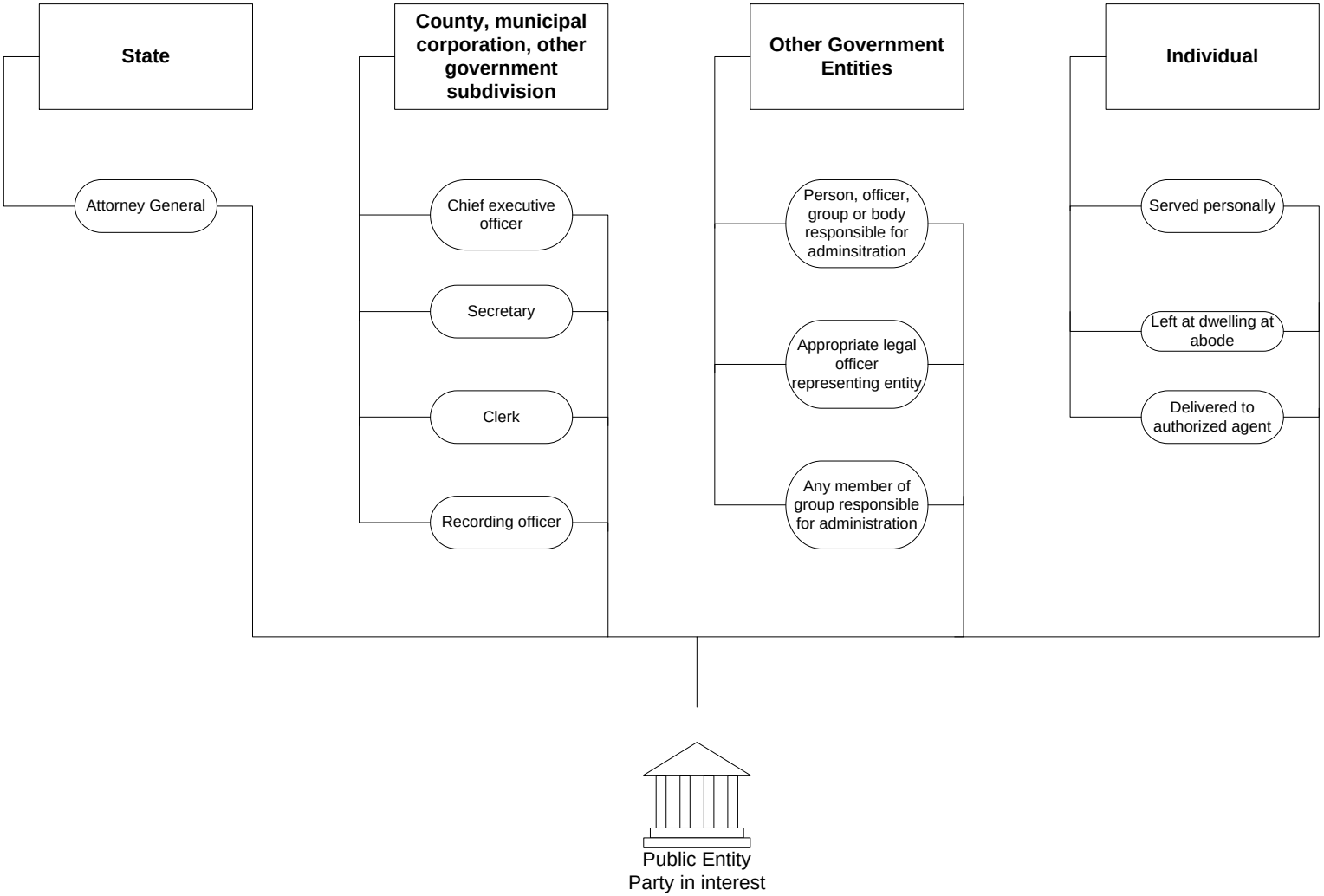
(f) The amount of damages stated on the claim form is not admissible at trial.

(4) No action subject to the claim filing requirements of this section shall be commenced against any local governmental entity, or against any local governmental entity's officers, employees, or volunteers, acting in such capacity, for damages arising out of tortious conduct until sixty calendar days have elapsed after the claim has first been presented to the agent of the governing body thereof. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty calendar day period. For the purposes of the applicable period of limitations, an action commenced within five court days after the sixty calendar day period has elapsed is deemed to have been presented on the first day after the sixty calendar day period elapsed.

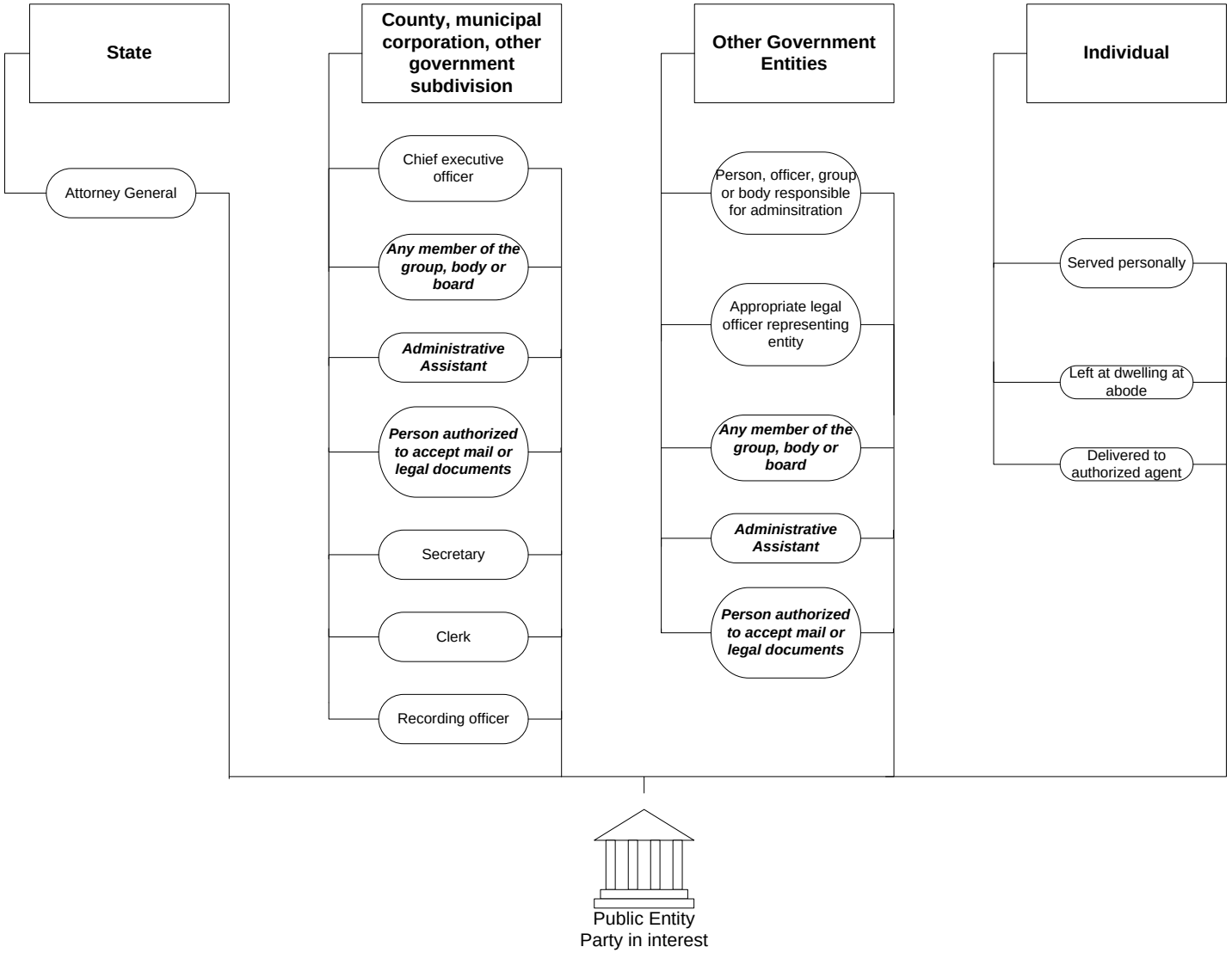
(5) With respect to the content of claims under this section and all procedural requirements in this section, this section must be liberally construed so that substantial compliance will be deemed satisfactory.

Appendix B

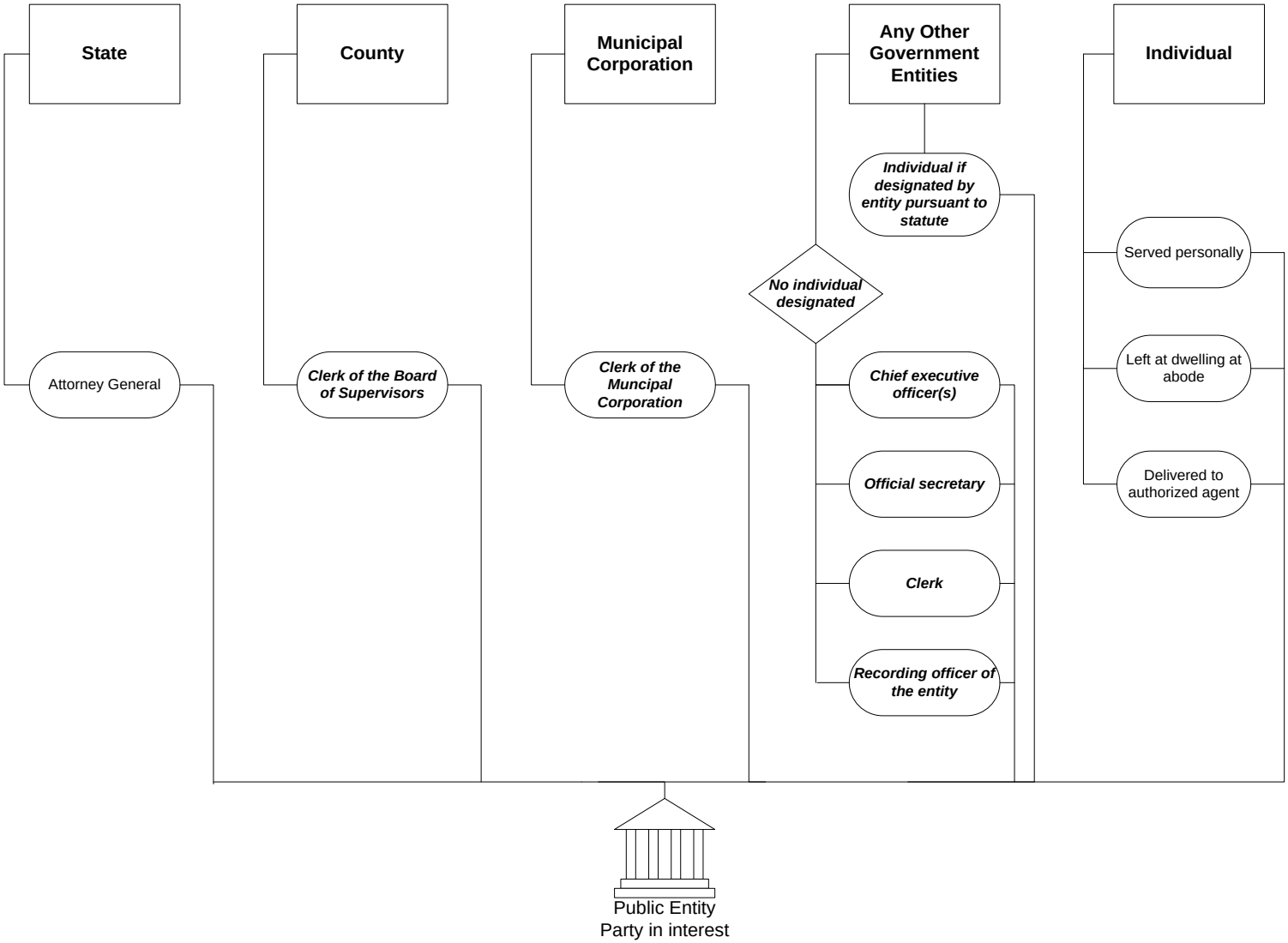
Current Law


State
Attorney General
County, municipal corporation, other government subdivision
Chief executive officer
Secretary
Clerk
Recording officer
Other Government Entities
Person, officer, group or body responsible for adminsitration
Appropriate legal officer representing entity
Any member of group responsible for administration
Individual
Served personally
Left at dwelling at abode
Delivered to authorized agent
Public Entity
Party in interest

Proposed Law Revision - Trachtenberg & Abney



Proposed Law Revision - State Bar - John Furlong



Washington State - RCW 4.96.020