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

10 PETITION TO AMEND RULES 13,
11 21 AND 23 OF THE ARIZONA
12 RULES OF CIVIL APPELLATE
13 PROCEDURE

Supreme Court No. R-12-_____

**Petition to Amend Rules 13, 21
and 23, Ariz. R. Civ. App. P.**

14 Pursuant to Rule 28, Rules of the Arizona Supreme Court, the State Bar
15 petitions the Court to amend Rules 13, 21 and 23 of the Arizona Rules of Civil
16 Appellate Procedure. These proposed amendments are designed to eliminate a trap
17 for the unwary with respect to claims for attorneys' fees on appeal. Under current
18 law and rules, a party's right to receive attorneys' fees on appeal can be lost by a
19 harmless failure to cite the specific authority for the fee request (*e.g.*, pursuant to a
20 contractual provision), even when all of the parties and the court are well aware of
21 that specific authority – and even if the parties *litigated* that exact claim for fees in
22 the trial court. *See, e.g., Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216,
23 273 P.3d 668 (App. 2012).

The proposed amendments are intended to remove this trap and allow for
more decisions on the merits of attorneys' fees claims. Appendix A provides a
redlined version of the relevant rules showing the proposed amendments.

1 Appendix B is a copy of the relevant rules incorporating the proposed
2 amendments.

3 **I. Background.**

4 Rule 21, Ariz. R. Civ. P., governs claims for attorneys' fees in Arizona's
5 appellate courts. *Ezell v. Quon*, 224 Ariz. 532, 539, ¶ 30, 233 P.3d 645, 652 (App.
6 2010). But "Rule 21(c)(1) is a procedural rule that does not provide a substantive
7 basis for an appellate court to consider an award of attorneys' fees." *Id.* at ¶ 31.
8 Instead, a party claiming attorneys' fees "must state the claimed basis for the
9 award." *Id.* This requirement stemmed from a long line of decisions interpreting
10 Rule 21(c)(1) as requiring specific identification of the "statute, decisional law or
11 contract" on which the claimant relied. *Ezell*, 224 Ariz. at 539 n.3, ¶ 31, 233 P.3d
12 at 652 n.3 (collecting numerous decisions). At the time *Ezell* was decided,
Rule 21(c)(1) read as follows:

13 When attorneys' fees are claimed *pursuant to statute, decisional law*
14 *or contract*, a request for allowance of attorneys' fees in connection
15 with the prosecution or defense of the appeal or the prosecution or
16 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.

17 Rule 21(c)(1), Arizona Rules of Civil Procedure (pre-2011 amendment)
18 (emphasis added). Because the plaintiff in *Ezell* did not identify the specific
19 authority for his request for fees, the request was denied. *Ezell*, 224 Ariz. at 539,
¶ 31, 233 P.3d at 652.

20 The dissent in *Ezell* argued that the majority's denial of plaintiff's request
21 for attorneys' fees was the result of a "mechanical approach" to Rule 21. *Id.* at
22 540, ¶ 36, 233 P.3d at 653. The dissent noted that "*Ezell* has consistently sought
23 attorneys' fees solely on the basis of § 12-341.01" and that "[o]n appeal, we also

1 focused on § 12-341.01” in deciding fees. The dissent argued that “[t]he language
2 of [Rule 21] *does not specifically require* that the basis for awarding fees must be
3 stated in the briefs or by motion prior to argument or submission of the appeal.”
4 *Id.* ¶ 40 (emphasis in original).

5 The dissent suggested in a footnote that a rule change would be appropriate
6 which would “set[] forth clearly any requirement that a party seeking fees on
7 appeal must state, in the party’s brief(s) or by motion, the statutory, contractual or
8 other basis entitling the party to fees.” *Id.* ¶ 40 n.4. The majority opinion
9 responded to the dissent’s arguments, stating, *inter alia*, that its interpretation of
10 Rule 21(c)(1) did not “create[] a trap for the unwary practitioner” because “we are
11 hard-pressed to think of any procedural requirement that is as well-publicized as
12 Rule 21(c)(1).” *Id.* at 539 ¶ 33, 233 P.3d at 652.

13 The following year, Rule 21 was amended in response to the concerns
14 expressed in the dissent; and now Rule 21(c)(1) reads as follows:

15 A claim for allowance of attorneys' fees shall be made in the briefs on
16 appeal or by written motion filed and served before oral argument or
17 submission of the appeal. If a petition or cross-petition for review is
18 filed, a claim for allowance of attorneys' fees shall be made in the
19 petition or cross-petition for review or the response thereto. ***All***
claims for attorneys' fees must specifically state the statute, rule,
decisional law, contract, or other provision authorizing an award of
attorneys' fees. 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).

20 Rule 21(c) (emphasis added).

21 For the reasons stated below, the State Bar believes that this recent
22 amendment, while helpful, does not solve the problem. Notably, parties on appeal
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1 are often still not following Rule 21(c)(1), despite the fact that it is a very “well-
2 publicized” procedural requirement, *Ezell*, 224 Ariz. at 539, 233 P.3d at 652, and
3 thereby forfeiting claims for attorneys’ fees. The State Bar believes that a large
4 proportion of appeals are prosecuted by attorneys who ordinarily do not practice
5 in appellate courts, such that they are not familiar with “well-publicized”
6 appellate procedural rules. Instead, they rely upon the rules to guide them as to
7 what is required in their appellate briefs.

8 The State Bar therefore asks that the Arizona Rules of Appellate Procedure
9 be amended (a) to include references in Rules 13 and 23 to the requirement in
10 Rule 21 that a claim for fees must be made in the briefs or before oral argument;
11 (b) to clarify in Rule 21 exactly when notice of a claim for fees must be made; and
12 (c) to give the appellate court discretion to waive the Rule 21 notice requirement
13 if notice was provided in the trial court of a claim for fees, so long as there is no
14 prejudice to the parties.

15 The specific proposed changes are discussed below.

16 **II. Amending Rules 13 and 23 will alert practitioners to
17 the need to make claims for attorneys’ fees in their
18 briefs (Rule 13) and petitions for review (Rule 23).**

19 The State Bar believes that one of the reasons that practitioners so often fail
20 to request attorneys’ fees in their briefs is that the provisions regarding attorneys’
21 fees are contained in Rule 21 while virtually all of the other substantive
22 requirements for briefs are set forth in Rule 13. Practitioners, especially those
23 who do not regularly do appellate work, are likely to look to Rule 13 for what
24 items must be included in their briefs, and may assume that claims for attorneys’
fees need not be addressed until after a decision on the merits.

1 The structure of the appellate rules supports this intuitive, but incorrect,
2 conclusion. The rules address each stage of an appeal, beginning with its filing,
3 and working through to post-decision matters:

- 4 • Rules 1 through 5 discuss definitions and timing;
- 5 • Rule 6 deals with motions;
- 6 • Rule 7 addresses trial court procedures (*e.g.*, stays);
- 7 • Rules 8, 8.1 and 9 relate to notice and timing of taking an appeal;
- 8 • Rules 10, 11 and 12 set forth prerequisites for prosecuting an appeal;
- 9 • Rules 13 through 17 set the requirements for briefs and citations;
- 10 • Rule 18 relates to oral argument after briefing;
- 11 • Rule 19 discusses transfer to the Supreme Court;
- 12 • Rule 20 relates to notices of appellate decisions;
- 13 • Rules 21 through 24 discuss post-decision filings (fees, petitions
14 for review); and
- 15 • Rules 25 through 31 address miscellaneous matters.

16 It is not surprising, therefore, that practitioners may not consult Rule 21 to
17 determine what matters must be briefed, instead looking to Rule 13 for that
18 information.

19 The State Bar therefore suggests a minor addition to Rule 13 to make clear
20 that the issue of attorneys' fees should be addressed in the briefing:
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Rule 13. Briefs

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(a)(7) A short conclusion stating the precise relief sought, including, if applicable, a notice pursuant to Rule 21(a) that the party intends to claim attorneys' fees.

Rule 13(a), Arizona Rules of Civil Appellate Procedure (proposed new material underlined). The State Bar proposes a similar amendment to Rule 23, which sets forth requirements for petitions for review. This proposed amendment would add a separate section as follows:

Rule 23. Petition for Review

...

(c)(4) Whether the petitioner claims entitlement to attorneys' fees, and, if so, the information required by Rule 21(a).

Rule 23(c), Arizona Rules of Civil Appellate Procedure (proposed new material underlined).

These proposed amendments will focus practitioners on the need to comply with Rule 21 when they are preparing their briefs. The State Bar believes that these two amendments will go far in reducing inadvertent waivers of claims for attorneys' fees on appeal.

III. Restructuring Rule 21 will clarify that Rule 21 is not a substantive basis for an award of fees.

The State Bar believes that the current structure of Rule 21 is somewhat confusing, in that it addresses costs in subsections (a) and (b), attorneys' fees in subsection (c), and costs again in subsections (d) and (e). Further, the critical requirement (the subject of this petition) that a party "specifically state" the

1 substantive basis for an award of fees is buried in the middle of subsection (c)(1)
2 where, as experience has shown, it is often missed.

3 The State Bar therefore proposes a structural reorganization of Rule 21, as
4 set forth in Appendix A. (A red-lined comparison to the current Rule 21 is
5 attached as Appendix B). The proposed restructuring would first re-title Rule 21
6 as "Procedures for Claiming Costs and Attorneys' Fees" from its current title of
7 "Costs and Attorneys' Fees." This change emphasizes that Rule 21 only relates to
8 the procedures for claiming fees and does not create a substantive basis for an
9 award of fees.

10 The proposed revision would move current subsection (c) to the beginning
11 of the rule, so that Rule 21 discusses the timing of making claims for attorneys'
12 fees and costs in subsections (a) and (b), the method of establishing costs in
13 section (b), the method of establishing fees in subsection (c), and procedures for
14 making and responding to objections to claims for costs and fees in subsections
15 (d) and (e).

16 The revision would also divide former Rule 21(c)(1) into four subsections,
17 which would then be numbered Rules 21(a)(1) through (4). These subsections
18 would deal with the following subjects:

- 19 • Rule 21(a)(1).....requires that a party provide prior notice of a
20 claim for fees.
- 21 • Rule 21(a)(2).....establishes deadlines for providing prior notice
22 of a fee claim.
- 23 • Rule 21(a)(3).....lists what a party must include in its notice of
24 claim for fees.

1 appropriate award of attorneys' fees under A.R.S. § 12-341.01(A). *Id.* at 219, ¶ 1,
2 273 P.3d at 671. The Court of Appeals discussed this statute at length, and
3 ultimately concluded that "Assyia's claim is based on and arises under the
4 insurance contract," *id.* at 221, ¶ 14, 273 P.3d at 673, the action was "contested,"
5 *id.* at ¶ 18, that "attorneys' fees that are specifically authorized by law" for
6 Assyia, *id.* at 222, ¶ 21, 273 P.3d at 674, and the amounts awarded were
7 reasonable. *Id.* at 223, ¶ 30, 273 P.3d at 675.

8 After this lengthy discussion confirming that Assyia's claim arose out of a
9 contract and that she was entitled to attorneys' fees under A.R.S. § 12-341.01(A),
10 the Court of Appeals summarily rejected her claim for fees on appeal, citing *Ezell*,
11 because she had only cited Rule 21 in her appeal.

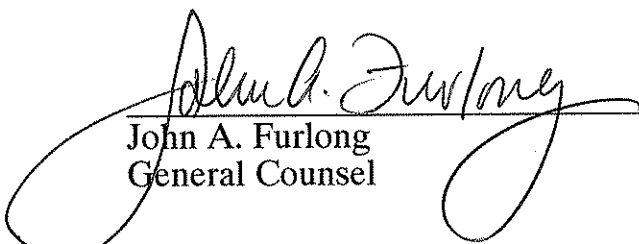
12 Assyia requests attorneys' fees and costs incurred on appeal, citing
13 only ARCAP 21, which does not provide a substantive basis for a fee
14 award. We therefore deny her request. *See Ezell v. Quon*, 224 Ariz.
15 532, 539, ¶ 31, 233 P.3d 645, 652 (App. 2010). As the prevailing
party, though, Assyia is awarded her appellate costs upon compliance
with ARCAP 21.

16 *Assyia*, 229 Ariz. at 224, ¶ 34, 273 P.3d at 676.

17 Of course, Assyia obviously cited and discussed at length A.R.S.
18 § 12 341.01(A) in her briefs, and *successfully* argued that she was entitled to
19 attorneys' fees under that statute. But, because Assyia had not included an
20 explicit reference to the statute in her request for appellate fees, the Court of
21 Appeals apparently felt compelled to deny her request under the current version of
22 Rule 21, as well as the extensive pre-amendment case law, such as *Ezell*.

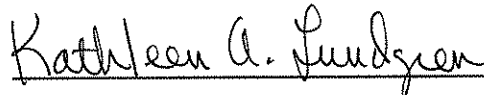
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RESPECTFULLY SUBMITTED this 20th day of December, 2012.



John A. Furlong
General Counsel

Electronic copy filed with the Clerk
of the Supreme Court of Arizona this
20th day of December, 2012.



Appendix A

Proposed Rule Changes

Rule 13. Briefs

(a) (7) A short conclusion stating the precise relief sought, including, if applicable, a notice pursuant to Rule 21(a) that the party intends to claim attorneys' fees.

Rule 21. Procedures for Claiming Costs and Attorneys' Fees

(a) Timing and Content of Notice.

(1) A party intending to make a claim for attorneys' fees incurred on appeal must give notice of such intention during the briefing of the appeal, in the time and manner set forth in this Rule.

(2) Notice that a party intends to make a claim for attorneys' fees shall be made in the briefs on appeal or by written motion filed and served before oral argument or submission of the appeal. If a petition or cross-petition for review is filed, any party intending to claim an allowance of attorneys' fees shall give notice of such claim in the petition or cross-petition for review or the response thereto.

(3) A party giving notice under this Rule must specifically state in the party's notice the statute, rule, decisional law, contract, or other provision authorizing an award of attorneys' fees. If a party fails to comply with this subsection, the appellate court may decline to award fees on that basis. This Rule only establishes the procedure for claiming attorneys' fees. It does not create any substantive right to attorneys' fees.

(4) The appellate court may consider a notice of a claim for attorneys' fees made in the superior court as satisfying the notice requirements of this rule, so long as no party is prejudiced thereby.

(b) Timing of Making Claims for Costs and Attorneys' Fees. A party entitled to costs or attorneys' fees may, within 10 days after the clerk has given notice that a decision has been rendered, file in the appellate court a verified itemized statement of costs or attorneys' fees on appeal.

(c) Method of Establishing Claim for Attorneys' Fees. The statement of the amount claimed for attorneys' fees shall set forth any factors counsel consider

relevant to the determination of a reasonable fee. In addition, counsel shall also attach and submit an affidavit containing an itemized statement of hours, indicating the following:

- (1) The date on which the service was performed;
- (2) The time expended on such date;
- (3) The nature of the service; and
- (4) The identity of the persons performing the service.

(d) Objections to Claims for Costs and Attorneys' Fees; Procedure if No Objection. An adverse party may file objections to a statement of costs or attorneys' fees within 5 days after service of such statement. If no objections are filed, the clerk may tax the costs or attorneys' fees in accordance with these rules.

(e) Procedure if Objections are Filed. If objections are filed to a statement of costs or attorneys' fees, the party entitled to costs or attorneys' fees may reply within 5 days after service of the objections. The amount of costs or attorneys' fees to be taxed may then be determined by the clerk, or by a member of the appellate court's legal staff designated by administrative order of the appellate court. A party aggrieved by such determination may apply to the appellate court for relief by motion, filed within ten days from the date of the order setting forth such determination, requesting the court to review the statement of costs, the objections thereto, and the reply to the objections. The appellate court shall then determine de novo the amount of costs or attorneys' fees to be taxed, without further hearing or argument.

(f) Costs of Briefs; Appendices. The allowance for the cost of the necessary copies of briefs and appendices shall be the amount actually and necessarily expended therefor. However, if the original of a brief or appendix is typed and the copies are either carbon copies or are prepared by a duplicating or copying process, then the sum of two dollars per page shall be presumed to be the maximum cost of typing and preparing one page of the original and all copies of the brief or appendix.

(g) Ruling on Statement of Costs While Petition for Review is Pending. Notwithstanding the filing of a petition for review, the Court of Appeals shall retain jurisdiction to rule on a timely filed statement of costs including attorneys' fees.

When the Court of Appeals awards costs or attorneys' fees against a party after the filing of a petition for review, such party may, by motion filed with the clerk of the Supreme Court, request that the Supreme Court review the parties' objections to the awarding of such costs or fees as a part of the pending petition for review proceeding. Any such motion shall include a copy of the order of the Court of Appeals granting costs or fees. The party in whose favor costs or attorneys' fees have been awarded may file a response within ten days after service of such a motion.

(h) Clerk to Insert Costs in Mandate. The clerk shall include in the mandate an itemized statement of any attorneys' fees allowed and costs taxed on appeal pursuant to Rules 21(a), 21(c) and 21(f).

(i) Award of Costs and Attorneys' Fees Upon Vacation, Reversal or Modification of Court of Appeals' Decision. If the Supreme Court vacates, reverses or modifies the Court of Appeals' decision on the merits, a party entitled to costs and/or attorneys' fees may, pursuant to Rules 21(a) and 21(c), file with the Supreme Court a statement of costs and a claim for attorneys' fees incurred in the Court of Appeals. The parties may then file a response and reply thereto pursuant to Rules 21(a) and 21(c). The Clerk of the Supreme Court or the Supreme Court may either tax such costs and rule on such request or remand the case to the Court of Appeals for such a determination.

...

Rule 23. Petition for Review

(c)(4) Whether the petitioner claims entitlement to attorneys' fees, and, if so, the information required by Rule 21(a).

Appendix B

Proposed Rule Changes

(Petitioner's proposed changes shown with additions identified by underscoring and deletions identified by "strike-through").

Rule 13. Briefs

(a) (7) A short conclusion stating the precise relief sought, including, if applicable, a notice pursuant to Rule 21(a) that the party intends to claim attorneys' fees.

[No other changes are proposed to Rule 13.]

Rule 21. Procedures for Claiming Costs and Attorneys' Fees

(a) ~~Statement~~ Timing and Content of Notice.

(1) A party intending to make a claim for attorneys' fees incurred on appeal must give notice of such intention during the briefing of the appeal, in the time and manner set forth in this Rule.

(2) Notice that a party intends to make a claim for attorneys' fees shall be made in the briefs on appeal or by written motion filed and served before oral argument or submission of the appeal. If a petition or cross-petition for review is filed, any party intending to claim an allowance of attorneys' fees shall give notice of such claim in the petition or cross-petition for review or the response thereto.

(3) A party giving notice under this Rule must specifically state in the party's notice the statute, rule, decisional law, contract, or other provision authorizing an award of attorneys' fees. If a party fails to comply with this subsection, the appellate court may decline to award fees on that basis. This Rule only establishes the procedure for claiming attorneys' fees. It does not create any substantive right to attorneys' fees.

(4) The appellate court may consider a notice of a claim for attorneys' fees made in the superior court as satisfying the notice requirements of this rule, so long as no party is prejudiced thereby.

(b) Timing of Making Claims for Costs; ~~Objections~~ and Attorneys' Fees. A party entitled to costs or attorneys' fees may, within 10 days after the clerk has

given notice that a decision has been rendered, file in the appellate court a verified itemized statement of costs or attorneys' fees on appeal.

(c) Method of Establishing Claim for Attorneys' Fees. The statement of the amount claimed for attorneys' fees shall set forth any factors counsel consider relevant to the determination of a reasonable fee. In addition, counsel shall also attach and submit an affidavit containing an itemized statement of hours, indicating the following:

(1) The date on which the service was performed;

(2) The time expended on such date;

(3) The nature of the service; and

(4) The identity of the persons performing the service.

(d) Objections to Claims for Costs and Attorneys' Fees; Procedure if No Objection. An adverse party may file objections thereto to a statement of costs or attorneys' fees within 5 days after service of such statement. If no objections are filed, the clerk may tax the costs or attorneys' fees in accordance with these rules.

(e) Procedure if Objections are Filed. If objections are filed to a statement of costs or attorneys' fees, the party entitled to costs or attorneys' fees may reply within 5 days after service of the objections. The amount of costs or attorneys' fees to be taxed may then be determined by the clerk, or by a member of the appellate court's legal staff designated by administrative order of the appellate court. A party aggrieved by such determination may apply to the appellate court for relief by motion, filed within ten days from the date of the order setting forth such determination, requesting the court to review the statement of costs, the objections thereto, and the reply to the objections. The appellate court shall then determine de novo the amount of costs or attorneys' fees to be taxed, without further hearing or argument.

(f) Costs of Briefs; Appendices. The allowance for the cost of the necessary copies of briefs and appendices shall be the amount actually and necessarily expended therefor. However, if the original of a brief or appendix is typed and the copies are either carbon copies or are prepared by a duplicating or copying process, then the sum of two dollars per page shall be presumed to be the maximum cost of

typing and preparing one page of the original and all copies of the brief or appendix.

~~(e) Claim for Attorneys' Fees. (1) A claim for allowance of attorneys' fees shall be made in the briefs on appeal or by written motion filed and served before oral argument or submission of the appeal. If a petition or cross-petition for review is filed, a claim for allowance of attorneys' fees shall be made in the petition or cross-petition for review or the response thereto. All claims for attorneys' fees must specifically state the statute, rule, decisional law, contract, or other provision authorizing an award of attorneys' fees. 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).~~

~~(2) The statement of the amount claimed for attorneys' fees shall set forth any factors counsel consider relevant to the determination of a reasonable fee. Counsel shall also attach and submit an affidavit containing an itemized statement of hours, indicating the following:~~

~~(a) The date on which the service was performed;~~

~~(b) The time expended on such date;~~

~~(c) The nature of the service; and~~

~~(d) The identity of the persons performing the service.~~

(d)(g) Ruling on Statement of Costs While Petition for Review is Pending.

Notwithstanding the filing of a petition for review, the Court of Appeals shall retain jurisdiction to rule on a timely filed statement of costs including attorneys' fees. When the Court of Appeals awards costs or attorneys' fees against a party after the filing of a petition for review, such party may, by motion filed with the clerk of the Supreme Court, request that the Supreme Court review the parties' objections to the awarding of such costs or fees as a part of the pending petition for review proceeding. Any such motion shall include a copy of the order of the Court of Appeals granting costs or fees. The party in whose favor costs or attorneys' fees have been awarded may file a response within ten days after service of such a motion.

(eh) Clerk to Insert Costs in Mandate. The clerk shall include in the mandate an itemized statement of any attorneys' fees allowed and costs taxed on appeal pursuant to Rules 21(a), 21(c) and 21(f).

(fi) Award of Costs and Attorneys' Fees Upon Vacation, Reversal or Modification of Court of Appeals' Decision. If the Supreme Court vacates, reverses or modifies the Court of Appeals' decision on the merits, a party entitled to costs and/or attorneys' fees may, pursuant to Rules 21(a) and 21(c), file with the Supreme Court a statement of costs and a claim for attorneys' fees incurred in the Court of Appeals. The parties may then file a response and reply thereto pursuant to Rules 21(a) and 21(c). The Clerk of the Supreme Court or the Supreme Court may either tax such costs and rule on such request or remand the case to the Court of Appeals for such a determination.

Rule 23. Petition for Review

(c)(4) Whether the petitioner claims entitlement to attorneys' fees, and, if so, the information required by Rule 21(a).

[No other changes are proposed to Rule 23.]