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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND RULES 54 AND 58 OF THE ARIZONA RULES OF CIVIL PROCEDURE AND RULE 9 OF THE ARIZONA RULES OF CIVIL APPELLATE PROCEDURE	Supreme Court No. R-13-_____ **Petition to Amend Rules 54 and 58, Ariz. R. Civ. P., and Rule 9, Ariz. R. Civ. App. P.**

The State Bar of Arizona, pursuant to Rule 28 of the Rules of the Arizona Supreme Court, respectfully petitions the Court to amend Rules 54 and 58 of the Arizona Rules of Civil Procedure and Rule 9 of the Arizona Rules of Civil Appellate Procedure in the manner reflected in Appendix A to this petition. The proposed changes are intended to simplify the procedures for perfecting an appeal and to avoid unnecessary risks of malpractice, unfair confusion of *pro per* litigants, and inefficient use of court resources through an approach modeled on that taken by the Federal Rules of Appellate Procedure.

I. BACKGROUND AND SUMMARY OF PROPOSED CHANGES.

Appellate jurisdiction is established by statute, but appeals are frequently dismissed for lack of "jurisdiction" due to technical noncompliance with rules interpreted by numerous judicial decisions that can be difficult to apply in practice. The purpose of the rules governing commencement of appeals seems simple: to

prescribe a time certain within which a party aggrieved by an appealable decision of a lower court may seek review. Yet as simple as this purpose may be to express in the abstract, practical implementation under the current rules has proven to be extremely difficult. As the case law has evolved, it can rightly be said that the rules no longer serve the goal of securing a clear path to decisions on the merits. All too often, the rules create unnecessary hurdles to review that serve neither the interests of the court nor those of the public.

A. The Current Arizona Approach.

Over the past three decades, the Arizona Supreme Court and Arizona Court of Appeals have, through case law, created a procedural doctrine that has proven difficult for even the most skilled practitioners to apply with predictable results. Although this body of case law, beginning with *Barassi v. Matison*, 130 Ariz. 418, 636 P.2d 1200 (1981), and culminating most recently with *Craig v. Craig*, 227 Ariz. 105, 253, P.3d 624 (2011), has been carefully reasoned and internally consistent, it has failed to preserve the core purpose of the rules: to permit diligent litigants to reliably secure appellate review. Both practitioners and courts have experienced tremendous frustration while performing the time-consuming exercise of applying this series of decisions to ambiguous procedural facts. The Court of Appeals has often been forced to dismiss, for purely technical reasons, carefully prosecuted appeals that failed to comport with the prevailing interpretation of the rules. These judicially imposed limitations on jurisdiction have evolved to the point where they no longer serve the interests of efficiency, clarity or justice. Instead, the current rules frequently generate extensive wasteful motion practice and consume significant court resources without serving the public interest.

Under *Baumann v. Tuton*, 180 Ariz. 370, 84 P.2d 256 (Ct. App 1994), an appeal filed while a time-extending motion is pending is considered a "nullity." A

very limited exception to this rule was created in *Barassi*, such that a notice of appeal filed after the ruling on a post-judgment motion but before formal entry of that ruling is valid. In *Smith v. Arizona Clean Elections Comm'n*, 212 Ariz. 407, 132 P.3d 1187 (2006), the Court held that the *Barassi* exception was strictly limited – a notice of appeal filed when any superior court action other than a purely ministerial act is pending remains a nullity. And recently, in *Craig,* the Court reaffirmed that "in all other cases, a notice of appeal filed in the absence of a final judgment, or while any party's time-extending motion is pending before the trial court, is 'ineffective.'" 227 Ariz at 107, 253 P.3d at 626.

Among the most common challenges that practitioners and courts face are: (1) ascertaining whether an order of a Superior Court is, or is intended to be, a final, appealable "judgment," (2) determining the extent to which a putative judgment resolves a case as to all claims and all parties, (3) curing jurisdictional defects arising from premature notices of appeal, and (4) addressing the timing complications caused by the filing of various post-judgment motions.

Several recurring scenarios continue to create difficulties. For example:

- Trial courts frequently sign orders that are not intended to resolve an entire case. Though a court often has independent reasons for signing its orders, it is difficult for practitioners to know whether to file a (potentially defective) notice of appeal and seek clarification of the trial court's order or to wait for the court to sign an unambiguous form of judgment.
- Trial courts sometimes sign successive orders, each of which may be intended to resolve the case, but which omit key provisions essential to an appealable judgment (such as resolving claims for attorneys' fees). Taken together, multiple signed orders may constitute a judgment; but the practitioner is left to guess when the appeal time starts to run.
- The situation frequently arises in which a trial court enters a judgment that appears to be final and lacks Rule 54(b)

certification, but which fails to expressly address claims against parties whose continued involvement in the action is questionable (for example, parties who were never served, fictitious parties, or parties against whom claims have been abandoned).

- Courts frequently encounter post-judgment motions filed in the alternative as motions for new trial/motions for reconsideration. The effect of the trial court's disposition of such a motion can create jurisdictional difficulties under current law because it is difficult to predict how the court will treat such a motion. To complicate matters, motions that are in substance time-extending motions are frequently mis-captioned. Often in family matters, *pro per* litigants may not appreciate the difference between a motion for new trial, a motion to amend the decree, and a motion for reconsideration. When such litigants fail to cite the proper rule in support of their motions, their appellate rights are jeopardized unnecessarily.
- Cases sometimes arise in which each party files its own post-judgment motion, and it is unclear whether the trial court's single ruling constitutes a ruling on both motions or only one motion. In such cases, application of the *Barassi* exception can be unpredictable.

Each of the above scenarios poses undue risk to appellants, because the current Arizona approach requires a notice of appeal to be filed at precisely the correct juncture. In contrast, the federal rules preserve appeals in most cases when a litigant files a notice of appeal within thirty days after learning of the court's decision – a much more straightforward, predictable, and elegant approach.

B. Comparison to the Federal Rule.

Under the Federal Rules of Appellate Procedure, most of these questions simply do not arise – the federal rules have solved most of the problems that the Arizona cases have sought to address by simply eliminating the potential for prejudice from many technical defects. The federal rules provide straightforward

procedures by which technical defects can be cured, either through corrective measures taken by litigants or by operation of law.

Under FRAP 4(a)(2), "a notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry." This language, which is carried into the proposed amendments to ARCAP 9, encourages parties to notice appeals promptly after becoming aware of the court's decision, without imposing the risk that the appeal may become defective based upon subsequent procedural events.

Under FRAP 4(a)(4), a notice of appeal filed during the pendency of a post-judgment motion is not a "nullity" but rather is a valid notice that becomes effective upon decision of the motion. (Of course, to the extent that the appellant wishes to appeal a decision contained in the disposition of a post-judgment motion, an amended notice of appeal is required). The federal approach, though arguably more lenient than the current Arizona approach, is more consistent with the policy expressed in Ariz. R. Civ. P. 1 and ARCAP 1, that the rules "be construed to secure the just, speedy, and inexpensive determination of every action." The proposed amendment to ARCAP 9 contains language substantially similar to that of FRAP 4(a)(4).

The federal rules are not a perfect fit for Arizona. Unlike the Arizona rules, the Federal Rules of Civil Procedure have adopted a strict, uniform approach to entries of judgments which requires a judgment to be set forth on a separate document. Fed. R. Civ. P. 58(a). In Arizona, of course, the frequent practice is to enter judgment in the form of a signed minute entry. Because minute entries commonly refer to matters that are not necessary to constitute a judgment (and, through clerical oversight, minute entries intended to constitute judgments sometimes are entered without a judge's signature), different practical

considerations apply in the Arizona courts. For this reason, proposed Rule 54(c) has been included to require courts to certify when judgments are intended to dispose of an entire case. While in theory such certification may seem superfluous, experience has demonstrated that ambiguities in judgments – and consequent risks to appellate jurisdiction – would be reduced by unambiguous expressions of the trial court's intent.

C. Proposed Rule Amendments.

The State Bar believes that Arizona should adopt rules substantially mirroring the federal approach to perfection of appeals. In preparing these proposed rule changes, the State Bar, through its Civil Practice and Procedure Committee, consulted with the Court of Appeals and received positive feedback and suggestions that ultimately culminated in the proposed amendments attached as Exhibit A.

II. CONCLUSION

The State Bar respectfully submits that the Court should adopt the proposed amendments to Ariz. R. Civ. P. 54 and 58 and ARCAP 9.

RESPECTFULLY SUBMITTED this 8th day of January, 2013.

John A. Furlong
General Counsel

Electronic copy filed with the Clerk
of the Supreme Court of Arizona this
9th day of January, 2013.

By: Kathleen A. Lundgren

APPENDIX A

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

[New] Rule 54(c). Judgment Upon All Claims and Parties

When the court intends to direct entry of judgment as to all claims and parties in an action such that no further matters remain pending, the judgment shall state that it is entered pursuant to Rule 54(c).

Rule 58(a). Service of Form of Judgment; Entry
Proposed forms of judgment shall be served upon all parties and counsel. Except as provided in Rule 54(b), a party seeking attorneys' fees shall provide in the form of judgment for an award of attorneys' fees in an amount to be entered by the court. Except as provided in subsection (f) of this rule, all judgments shall be in writing and signed by a judge or a court commissioner duly authorized to do so. The filing with the clerk of the judgment constitutes entry of such judgment, and the judgment is not effective before such entry, except that in such circumstances and on such notice as justice may require, the court may direct the entry of a judgment nunc pro tunc, and the reasons for such direction shall be entered of record. The entry of the judgment shall not be delayed for taxing costs.

ARCAP 9. Appeal—When Taken
(b) Extension of Appeal Time. When any of the following motions are timely filed by any party, the time for appeal for all parties is extended, and the times set forth in Rule 9(a) shall be computed from the entry of any of the following orders:

(1) Granting or denying a motion for judgment as a matter of law pursuant to Ariz.Rules.Civ.Proc. 50(b);

(2) Granting or denying a motion to amend or make additional findings of fact pursuant to Ariz. Rules Civ. Proc. 52(b) or Ariz. Rules Fam. L. Proc. 82(B), whether or not granting the motion would alter the judgment;

(3) Granting or denying a motion to alter or amend the judgment pursuant to Ariz. Rules Civ. Proc. 59(1) or Ariz. Rules Fam. L. Proc. 84;

(4) Denying a motion for new trial pursuant to Ariz. Rules Civ. Proc. 59(a) or Ariz. Rules Fam. L. Proc. 83(A).

If more than one of the foregoing motions is timely filed, the expiration of the time for appeal is to be computed from the entry of the order which disposes of the last remaining motion. When a motion to amend or make additional findings of fact is granted, the time does not start to run until the amendment or addition has been accomplished by court order. The same applies also to the granting of a motion to alter or amend the judgment. For the purposes of this subdivision, entry of an order occurs when a signed written order is filed with the clerk of the superior court. A notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry of the judgment or order. If a notice of appeal is filed before the timely filing of one of the foregoing motions or during the pendency of such a motion, the appellant shall notify the appellate court and the appeal shall be suspended until the motion is decided. The appellant shall notify the appellate court when all such motions have been decided, and notice of appeal shall be reinstated as of the date of the decision of the last remaining motion. A party intending to appeal a decision made by the lower court after the filing of a notice of appeal shall file an amended notice of appeal.