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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND RULE 4.1(i), ARIZONA RULES OF CIVIL PROCEDURE.	No. R–11-_____

Introduction

In accordance with Arizona Supreme Court Rule 28, Petitioners respectfully ask the Court to amend Arizona Rule of Civil Procedure 4.1(i) ("Service of process within Arizona") as it applies to service of a "notice of claim" under A.R.S. § 12-821.01(A).

Under caselaw and Rule 4.1(i)'s current version, service of a notice of claim on a public entity has turned into such a trap for the unwary that lawyers representing claimants must use extreme, unprofessional, unfair, and

unnecessarily costly methods to ensure compliance and avoid malpractice. To be sure, because of the standard of practice and caselaw interpreting Rule 4.1(i), claimant lawyers are often forced to track down, stalk, or literally stake out high-level public-entity officials and executives to accomplish basic service of a notice of claim on public entities. Aside from adding major, non-recoverable expense to the claim process, that procedure does nothing to advance any legitimate purpose and is, quite simply, unreasonable.

The proposed amendment seeks to clarify Rule 4.1(i) to bring it into closer harmony with Rule 4.1(j). The amendment will eliminate unnecessary and unreasonable methods for complying with the service requirement, and (a) permit service on a public entity's chief executive officer's administrative assistant or other functionary authorized to accept delivery and (b) when service must be made on a public entity's governing group, body, or board, make service complete once the claimant has served any member of that public entity's governing group, body, or board.

Discussion

In relevant part, A.R.S. § 12-821.01(A) provides that those "who have claims against a public entity or a public employee shall file claims with the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure within one

hundred eighty days after the cause of action accrues." This Court, however, adopted the civil-procedure service rules to facilitate civil litigation based on serving summonses, pleadings, and other court documents. This Court did not adopt the civil-procedure service rules with any pre-litigation administrative-claim statute in mind. After all, the Legislature did not even create the notice-of-claim system until decades after this Court had adopted the Arizona Rules of Civil Procedure.

Because of the creaky, makeshift fit between the civil-procedure rules and the notice of claim statutes, the first issue facing any practitioner who must serve a notice of claim under A.R.S. § 12-821.01(A) is to decide which rule of service applies. As this Court held in *Falcon ex. rel. Sandoval v. Maricopa County*, 213 Ariz. 525, 529 ¶ 23, 144 P.3d 1254, 1258 ¶ 23 (2006):

> Three subsections of Rule 4.1 address the proper method for service upon government entities. Rule 4.1(h) governs service upon the state. Rule 4.1(i) describes the method of service on counties, municipal corporations, or other governmental subdivisions. Rule 4.1(j) directs the method of service on governmental entities not listed in either subsection (h) or (i).

(This Petition seeks amendment of Rule 4.1(i), but similar problems arise in Rule 4.1(h) and Rule 4.1(j).[1])

[1] Perhaps 90% of the issues that arise in practice concern Rule 4.1(i) and, therefore, Petitioners hope to cure 90% of the problem through the proposed amendment. Petitioners submit, however, that similar amendments could and should end similar problems with Rules 4.1(h) and (j).

Once a practitioner has identified the correct service rule, such as Rule 4.1(i), the next hurdle is identifying the proper party or parties "authorized to accept service." Rule 4.1(i) presently states that service "upon a county or a municipal corporation or other governmental subdivision of the state 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."

Sometimes, it's easy to determine the "chief executive officer, the secretary, clerk, or recording officer." But quite often the process is treacherous or impossible. *E.g., Falcon*, 213 Ariz. at 527 ¶ 13, 144 P.3d at 1256 (noting that some "governmental subdivisions, such as counties and school boards . . . do not specifically identify the chief executive officer"); *Dana v. City of Yuma*, 2011 WL 3586430 *2 ¶ 6 (Ariz. App. Aug. 16, 2011) (Memorandum Decision) (Court of Appeals noting that the "Yuma City Charter declares the Mayor as its chief executive officer and provides for a Clerk; Yuma does not have a secretary or recording officer.").

That was the case in *Falcon*, where this Court held that when serving a county, the county's *entire* board of supervisors—and not one board member or the county manager—is the county's "chief executive officer." That interpretation of Rule 4.1(i) requires costly, time-consuming service on the

entire board, and not just on one of its members. *Falcon*, 213 Ariz. at 526 ¶ 2, 144 P.3d at 1255 ¶ 2 (in *Falcon*, that interpretation also prevented any adjudication of the merits of an apparently meritorious claim).

The Court of Appeals extended *Falcon*'s holding in *Batty v. Glendale Union High School District No. 205,* 221 Ariz. 592, 595 ¶ 11, 212 P.3d 930, 933 ¶ 11 (App. 2009), which held that, where a school district is the defendant, the party to be served is the entire governing board. Thus, service on the school superintendent was not sufficient compliance with the statute.

As a result of the caselaw interpreting that part of Rule 4.1(i), service on many public entities can be an extreme, expensive proposition. Maricopa County, for example, has five supervisors from five different county districts and Phoenix Union High School District, for another example, has seven members. In a case involving both public entities, the hapless claimant would have to pin down and serve 12 different public officials

One part of the proposed amendment seeks to rectify the result from *Falcon* and its progeny by making Rule 4.1(i) consistent with Rule 4.1(j). That is, Rule 4.1(j), which "directs the method of service on governmental entities not listed in either subsection (h) or (i)," expressly states that "[s]ervice upon any person who is a member of [a] 'group' or 'body' responsible for the administration of the entity shall be sufficient."

Had this provision been written into Rule 4.1(i), surely the result in *Falcon* would have been different. *See Falcon*, 213 Ariz. at 528 ¶ 23, 144 P.3d at 1258 ("By its plain language, Rule 4.1(j) does not apply here. Because the requirements for serving a county are specifically set forth in Rule 4.1(i)."). There is no reason why such a group-service provision is acceptable under Rule 4.1(j), but not acceptable under Rule 4.1(i). Indeed, it appears the only reason this provision was not included in Rule 4.1(i) is because no one expected any of the seemingly singular parties identified in Rule 4.1(i) to be regarded as "collective chief executive officers" requiring service on each member of the governing group, body, or board.

And this leads to the third and final issue confronting lawyers seeking to comply with service requirements for claims under A.R.S. § 12-821.01(A). That issue is whether actual personal service is required or whether parties can satisfy Rule 4.1(i) by serving "administrative assistants" or other persons who routinely accept mail and other important documents for the public entity or public employee. These persons also typically act as "gatekeepers," limiting access to parties subject to service under Rule 4.1(i) and routinely impede service upon these individuals.

This issue recently surfaced in *Sandpiper Resorts Development Corp. v. La Paz County*, 2011 WL 2737811 *6 ¶ 28 (Ariz. App. July 14, 2011)

(Memorandum Decision). That decision held that "indirect filing with persons not listed in Rule 4.1(i) who might then send the notice to the authorized person is insufficient filing for purposes of the notice of claim statute."

But what makes *Sandpiper* so disconcerting is that the case involved service of a notice of claim on a county administrator in the county clerk's office who actually testified that he "had authority 'to accept *delivery'*" of the notice of claim and did not understand a distinction between "accepting delivery" of something and "accepting service" of something.[2] He also admitted forwarding the notice of claim to an "administrative assistant" to the county clerk.

And yet, despite holding that service on the county administrator was insufficient, the Court of Appeals qualified itself by saying in a footnote:

> This does not mean that mailing or delivery to the office of a person listed in Rule 4.1(i) is insufficient unless the notice was physically given to the person listed in that rule. Obviously, the persons listed in Rule 4.1(i) might have administrative assistants or deputies who open the mail or actually sign for mail. *Delivery to such a person in the office of the person listed in Rule 4.1(i) is sufficient.*

[2] The *Sandpiper* court repeatedly used the term "filing" and "service" in connection with a notice of claim governed by Rule 4.1(i), perhaps because those terms appear in A.R.S. § 12-821.01(A). Rule 4.1(i), however, does not expressly require "service," but merely "delivery." *Compare* Rule 4.1(h) and (i), which provide that "service" is accomplished by "delivering" *with* Rule 4.1(j), which provides that "service" is accomplished by "serving."

Setting aside concerns about the result in *Sandpiper*, the Court of Appeals' statement that "[d]elivery to [an administrative assistant] in the office of the person listed in Rule 4.1(i) is sufficient" is important.

Rule 4.1(i) does *not* say such delivery is sufficient service–but it *should*. Notwithstanding the Court of Appeals' unpublished dictum, to avoid any chance of malpractice many attorneys now hire process servers to literally stalk and stake out the homes and businesses of busy or reluctant persons subject to service under Rule 4.1(i). Attorneys go to that costly extreme rather than risk serving the person's administrative assistant and having that service deemed insufficient. And rather than mollify these concerns, the unfair result in *Sandpiper* leaves them magnified.

Conclusion

The present rule, as interpreted by case law, snares the unwary and defeats valid claims. Duly cautious lawyers seeking to make global service on all members of public-entity groups, bodies, and boards must now track them down, stalk, or harass them to effect timely service. That not only wastes the claimants' money, it delays proceedings and can interfere with the orderly working of public entities such as school boards, irrigation districts, and boards of supervisors. Those unfortunate tactics are the price for protecting a client's legitimate rights—and avoiding legal malpractice. It's all

unnecessary. It adds expense, aggravation, and delay to a notice-of-claim and litigation gauntlet that is already too expensive, too aggravating, and too slow. It forces lawyers representing claimants to engage in conduct that is perilously close to unprofessional to accomplish service on reluctant or elusive members of a public entity's governing group, body, or board.

For these reasons, Petitioners respectfully ask the Court to amend Arizona Rule of Civil Procedure 4.1(i). Attached as Exhibit 1 is a redlined version of Rule 4.1(i) reflecting the proposed changes.

DATED this 23rd day of September, 2011.

LEVENBAUM & COHEN

/s/ Geoffrey M. Trachtenberg, Esq.
Geoffrey M. Trachtenberg
Co-Petitioner

KNAPP & ROBERTS, P.C.

/s/ David L. Abney, Esq.
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Certificate of Service

On the above date, counsel electronically filed the original of this document in Word and pdf formats with the Clerk of the Court, Arizona Supreme Court.

Exhibit 1

Proposed Amendment to Rule 4.1(i), Arizona Rules of Civil Procedure

(Additions are shown underlined and deletions are shown ~~stricken~~.)

Service upon a county or a municipal corporation or other governmental subdivision of the state 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. Where service under this rule must be made upon a public entity's governing group, body, or board, service is complete when delivery is made to any member of that group, body, or board. To the extent that any person subject to service under this rule has an administrative assistant or employee who opens mail or legal documents for that person, signs for mail or legal documents for that person, or is authorized to accept delivery of mail or legal documents for that person, delivery to that administrative assistant or employee is sufficient service on the person subject to service.