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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND THE ARIZONA RULES OF CIVIL APPELLATE PROCEDURE	)	Supreme Court No. R-14-0017
	)	Amended Petition

Petitioner files this Amended Petition pursuant to this Court's prior order authorizing a modified comment period. Included with this Amended Petition is a revised set of proposed amendments to the Arizona Rules of Civil Appellate Procedure ("ARCAP"). The Amended Petition includes the following appendices:

Appendix 1: This appendix shows the proposed amended rules as filed on March 21, 2014 (the "March 21 version") with deletions and additions made after the filing date.

Appendix 2: This appendix shows the Amended Petition's "new proposed amended rules" without markup.

Appendix 3: These are proposed conforming amendments to other Arizona rules of procedure, which update cross-references in those other rules to the proposed, new ARCAP provisions.

Introduction. The Rules Forum reflects the filing of only one brief comment to this petition during the first comment period, which ended on April 28, 2014. Since the filing date of the petition, however, Petitioner has received a large number of informal comments from appellate judges, appellate clerks and staff attorneys, and appellate practitioners.

As shown in Appendix 1, this informal comment process resulted in revisions to every one of the rules proposed in the March 21 version. Some of these revisions were minor or stylistic, and others affected substantive elements of the rules. This Amended Petition discusses a number of notable changes in the proposed rules.

Rule 2: Definitions. There are significant changes to two definitions. The definition of an "appeal" is shortened so that it no longer characterizes an appeal as a case in the appellate court "which challenges a judgment of the superior court." The deleted phrase is inapplicable to appeals from determinations by state commissions, and its use might have the unintended consequence of excluding petitions for review. There is also a modified definition of "judgment." This modified definition includes a second sentence stating that "entry" of a judgment

occurs when the superior court clerk files it. That provision is consistent with Rule 58(a) of the Arizona Rules of Civil Procedure, and it is important because several of the ARCAP deadlines begin with the "entry" of a judgment (with "judgment" being further defined in the proposed rules as "an appealable order.")

Rule 4(b): Document Format. The current appellate rules refer variously to parties filing documents that are handwritten (e.g., current Rule 22(d)), that are printed or typewritten (current Rule 29(c)), or that are prepared in a monospaced[1] or proportionately spaced font (current Rule 6(e)). The March 21 version omitted any reference to "printed" documents, contained a requirement for proportional typeface, and allowed handwritten documents. These provisions generated a number of comments (especially from judges), which resulted in three significant modifications to proposed Rule 4(b):

> (1) Proposed amended Rule 4(b)(2) ["type and font size"] now requires typed documents to use an "easily readable" font, and expresses a preference for "proportionally spaced serif fonts."
>
> (2) Rule 4(b)(3) ["handwritten documents"] now states that "Appellate courts strongly encourage parties to file documents that are typed and

[1] The March 21 rule petition, at page 10, characterized monospaced typeface as "almost as anachronistic as quill pens." This simile was inaccurate. Although proportional typeface is more common, some filers still use and prefer monospaced fonts.

prepared on a computer," and requires that handwritten documents be "printed and legible."

(3) Form 2, the "certificate of compliance," now refers only to "word" limits and deletes the reference to "page" limits, which was previously included as an accommodation for handwritten filings or documents in monospaced type.

Rule 4(d): Filing with an Appellate Clerk. The March 21 version included a provision, which is retained in the appended version, providing that an appellate clerk may not refuse to accept a document because it does not comply with the appellate rules. The March 21 version of Rule 4(d) provided that a non-compliant filing would nonetheless be subject to a court order requiring corrective action or imposing a sanction. The new proposed Rule 4(d) provides that a non-compliant document also may be subject to an order striking the document. In addition, and in recognition of actual e-filing practices, the proposed amended rule provides that an appellate clerk may refuse to file a document if a required fee is not paid, or if the document "fails to meet the requirements of an appellate court's electronic filing system." The latter contingency covers situations in which a filer attempts to e-file a document without completing all of the required fields; or when a filer completes those fields inaccurately, such as by entering an incorrect case number or other erroneous information. These types of omissions and errors

prevent an appellate clerk from accurately identifying the case in which the clerk is required to file the document.

Rule 4(i): Formerly, "Service by the Clerk;" now, "Distribution by the Clerk." The new proposed amended Rule 4(i) no longer provides that appellate clerks "serve" court documents. Rather, the provision states that clerks "distribute" those documents, either by mail or electronically. This change helps clarify that the added 5-day period for mail or electronic service does not apply to the distribution of court-generated documents, such as notices from the clerk or judicial orders. References to the appellate clerks' "distribution" of court-generated documents appear throughout this set of proposed amendments.

Rule 4.2(d) ["Bookmarks"] and Rule 4.2(e) ["Hyperlinks"]. At the suggestion of several judges, these two proposed provisions now explicitly encourage parties to use bookmarks and hyperlinks in electronically filed documents.

Rule 6(b): Motions for Procedural Orders. The March 21 version deleted a provision in the current rules that requires a supporting affidavit on a motion for a procedural order, describing why the motion is procedural in nature and why the party presents it as a motion rather than as a stipulation. In response to comments from a number of judges, the new proposed amended Rule 6(b) requires the moving party to state "whether the other parties consent to, or object to, the entry

of the order that is sought…." The new proposed rule also allows an appellate court to authorize the appellate clerk or other court personnel (such as staff attorneys) to act on specified types of motions for procedural orders.

Rule 7: Stay of Proceedings to Enforce a Judgment. Proposed Rule 7(a) ["supersedeas bond"] now provides that although the filing of a motion for supersedeas bond stays enforcement of a judgment, a party may record the judgment until the supersedeas bond is filed. The proposed rule also requires an appellant to serve a copy of the bond on other parties 5 days before appellant files the bond with the superior court clerk. Because the bond becomes effective upon filing, pre-filing service of a copy of the bond will allow parties to timely object to any defects or deficiencies in the bond. Additionally, proposed Rule 7(c) now clarifies that an appellate court not only may enter a stay, but also may enter an injunction or similar order to preserve the status quo pending an appeal.

Rule 11: The Record on Appeal. Proposed Rule 11(c) [formerly "Appellant's Duty to Order Transcripts," now "Appellant's Duty to Order Transcripts and Other Parties' Transcript Designations"] is reorganized as well as revised. The proposed rule requires the appellant to order transcripts of any superior court proceedings "the appellant deems necessary for proper consideration of the issues on appeal." The appellant must order transcripts within 10 days after filing the notice of appeal. Additionally, within 15 days after filing that notice, the

appellant must file and serve a notice that states whether appellant ordered a complete transcript of proceedings (which is a defined term), a partial transcript, or no transcript. If the appellant has ordered anything other than a complete transcript, the appellant also must serve all other parties with a statement of the issues the appellant intends to raise on appeal. The intent of this statement is to give other parties sufficient information about the basis for the appeal to allow them to make an informed decision about whether to designate additional transcripts. The proposed Rule also includes a procedural mechanism if the appellant disagrees with any additional designations made by other parties.

Rule 11.1: Transmitting the Record to the Appellate Court. Some counties transmit trial exhibits in paper, electronic, or photographic form to the Court of Appeals; other counties do not. The new version accommodates this difference by requiring the superior court to transmit these exhibits "unless relieved by the appellate court of an obligation to do so." An appellate court could provide this relief on a case-by-case basis, or by a general administrative order from the appropriate division of the Court of Appeals.

Rule 12: Notice Regarding Filing Fee and Deadlines; Case Management Statement in Division One. Division One utilizes a case management statement (currently known as a "docketing statement"), and requires the appellant in every civil case to file a statement. Division Two does not require such a statement. The

revised title to Rule 12 and the text of the proposed Rule now reflects this difference in the two Divisions' practices.

Rule 13: Contents of Briefs. Rule 13 of the March 21 version included sections entitled "references to parties" and "references to case law." A newly added section (Rule 13(d), entitled "References to the Record") provides details for how parties must refer to the record. This proposed rule also includes a requirement that if a party refers to a video or audio recording, the party must provide a specific time-coded reference to the cited portion of that recording.

Rule 16: Amicus Curiae. Rule 16(a) of the March 21 version specified, as stated in the comment to the current rule, that an "amicus curiae's brief should not advocate a particular party's case." The new proposed Rule 16(a) deletes that provision, because as a practical matter, amicus curiae may endorse the position of a party to an appeal. In its place are provisions that amicus curiae "must be independent of any party to the appeal" and that "counsel for a party may not author an amicus curiae brief in whole or in part." The latter provision is also derived from the current comment in Rule 16.

Rule 18: Oral Argument in the Court of Appeals. Modifications to the title and text of this proposed Rule make the Rule specifically applicable to oral arguments in the Court of Appeals. As in the current rules, Rule 23 governs oral arguments in civil cases before the Supreme Court.

Rule 21: Attorneys' Fees and Costs. Rule 21 currently allows a party to request attorneys' fees in a brief or in a motion filed prior to submission of an appeal. Rule 21(a) of the March 21 version adopted a similar process. The new proposed Rule 21(a) deletes the provision allowing a party to make such a claim by motion, and instead requires a party to make an attorneys' fees claim in the party's opening brief or answering brief. Appellate litigants appear to make attorneys' fee claims more commonly in briefs than by motion, and several practitioners and judges noted that it would be more efficient to have the parties raise and discuss their fee claims as part of their briefs. In addition, new proposed Rule 21(d) allows a party to request attorneys' fees not only if the Supreme Court "vacates, reverses, or modifies" a Court of Appeals decision (as the current rule allows), but also if the Court "affirms" the decision.

Rule 23: Petition for Review. Proposed Rule 23(k) includes a provision stating that when the Supreme Court grants review, its order must not only specify the issues on which it grants review, but also whether the Supreme Court "will consider issues raised in, but not decided by, the Court of Appeals." Practitioners also expressed concerns about not having enough time in which to prepare for oral argument when the Supreme Court grants review. Accordingly, this section now states that unless otherwise ordered, the Court may not schedule oral argument less

than 30 days after the clerk issues a notice setting oral argument, or less than 30 days after the deadline for filing a supplemental brief, whichever is later.

Rule 24: Appellate Court Mandate. The term "mandate" is not defined in the current ARCAP. It is a term of art, and it appears that the definition set forth in the March 21 version was inadequate and imprecise. New proposed Rule 24(a) provides a different definition that better describes the term and its effect on an appellate court's jurisdiction: "The mandate is the final order of the appellate court, which may command another appellate court, superior court or agency to take further proceedings or to enter a certain disposition of a case. An appellate court retains jurisdiction of an appeal until it issues the mandate."

Proposed Rule 24(b) was revised by deleting as unnecessary the reference to a motion for reconsideration as an event for calculating when the mandate issues. The deadline for a party to file a petition for review is longer than the deadline for a party to file a motion for reconsideration (30 days versus 15 days); and the time for filing a petition for review does not begin until a motion for reconsideration is resolved. Therefore, the dispositive event for issuing the mandate will always be the deadline for filing a petition for review, or the date when the Supreme Court disposes of an appeal after a party files a petition for review.

Rule 25: Sanctions. Rule 25 of the March 21 version, like the existing Rule 25, allows an appellate court to impose a sanction for an "unreasonable violation"

of these Rules. The new version deletes the word "unreasonable" because it is vague and superfluous.

Rule 28: Decision; Publication of Opinions. The new proposed Rule 28 reorganizes the general provisions of this Rule. The most notable change to the proposed amended rule is the correction of a glaring omission in the March 21 version concerning depublication. This omission inadvertently allowed for depublication of any opinion of the Court of Appeals, even if no party had filed a petition for review and the Supreme Court had not otherwise asserted jurisdiction over the case. Proposed amended Rule 28(e) now provides (like the current rule) that the Supreme Court may depublish all or part of a Court of Appeals opinion only if the case is before the Supreme Court on a petition or cross-petition for review.

Revisions to Rule 28(g) allow appellate courts to treat a motion for publication of a memorandum decision as a motion for reconsideration, and any motion for publication must comply with the requirements of Rule 22.

Rule 30: Arizona Appellate Settlement Conference Program. To avoid confusion, the new proposed Rule 30(a) includes a provision from the current rule detailing case types that are ineligible for the program. It also adds a "catch-all" provision for "any other case the appellate court determines to be inappropriate for the program."

Rule 32: Websites and Forms. Because of the fluidity of events concerning appellate court electronic filing portals, the new proposed Rule 32 omits all references to electronic addresses for those portals.

Request to Amend Other Rules. In the March 21 rule petition, Petitioner noted that several sets of Arizona procedural rules – including the Rules of the Arizona Supreme Court, the Arizona Rules of Procedure for Special Actions, and procedural rules governing civil, criminal, family law, and juvenile actions – refer to ARCAP rules or subparts of those rules. Appendix 3 shows the specific provisions of those other rules that may require conforming amendments. Petitioner asks that if the Court adopts Petitioner's proposed amendments to the ARCAP, it also amend these other rules to assure accurate cross-references to the ARCAP.[2]

Conclusion. Petitioner believes that the new proposed amended rules shown in Appendices 1 and 2 substantially improve the March 21 version. Petitioner welcomes additional comments on these proposed rules through the second comment period.

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[2] Appendix 3 does not seek to amend any of the Rules of Criminal Procedure. While there are references to the appellate rules in comments to Criminal Rules 31.13 and 31.18, the rules themselves contain no references to the ARCAP, and Petitioner does not request amendment of those comments.

RESPECTFULLY SUBMITTED this 20th day of May, 2014

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20th day of May 2014 to:

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