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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-20-____
PETITION FOR THE ADOPTION OF CLARIFYING AND TECHNICAL AMENDMENTS TO THE ARIZONA RULES OF CIVIL APPELLATE PROCEDURE, THE ARIZONA RULES OF CRIMINAL PROCEDURE, THE ARIZONA RULES OF PROCEDURE FOR SPECIAL ACTIONS, AND RULES OF THE ARIZONA SUPREME COURT	**PETITION**

Pursuant to Rule 28, Rules of the Arizona Supreme Court, the Staff Attorneys' Office of the Arizona Supreme Court petitions this Court to adopt certain clarifying and minor technical amendments to: (a) the Arizona Rules of Civil Appellate Procedure ("ARCAP"); (b) the Arizona Rules of Criminal Procedure ("the Criminal Procedure Rules"); (c) the Arizona Rules of Procedure for Special Actions ("the Special Action Rules"); and (d) the Rules of the Arizona Supreme Court ("the Arizona Supreme Court Rules").

Over the last few years, this Court has made extensive amendments to most of these rules. In some cases, court staff and practitioners have encountered minor ambiguities or omissions in the amended rules that require clarification in how they apply in appellate practice. In one other case, a set of the rule amendments governing the Supreme Court's rule-making procedures failed to update a cross-reference in another Supreme Court rule. This petition proposes changes to address both types of issues.

The proposed changes are set forth in Appendix A of this petition.

The Proposed Amendments

The Staff Attorneys' Office proposes the following amendments:

(a) ARCAP 11.1(d)(1). In 2015, this Court made an extensive set of amendments to ARCAP. Among other things, ARCAP 11(c)(2) provides that an appellant must order any additional transcripts within 10 days of the filing of a notice of appeal. ARCAP 11.1(d) further provides that "[w]ithin 5 days after receipt of a certified transcript, the ordering party must file it with the appellate clerk."

Practitioners have run into problems with this rule when the appellant receives the transcript before the Court of Appeals has assigned a case number to the appeal. Under ARCAP 12(a), a case number is not assigned until the superior court clerk has transmitted the record to the court under ARCAP 11.1(b). Without an appellate case number, the appellant cannot file the transcript with the Court of Appeals. That

gives appellants two options, neither of which complies with ARCAP 11.1(d): (1) if the appellant wants to comply with the 5-day deadline, the appellant can file the transcript with the superior court (which will presumably include it in the record of appeal); or (2) if the appellant wants to comply with the part of the rule requiring that the transcript be filed in the Court of Appeals, the appellant can ignore the 5-day deadline and file the transcript once the appeal has a case number.

To address this problem, the Staff Attorneys' Office proposes to amend ARCAP 11.1(d)(1) to provide "Within 5 days after receipt of a certified transcript or within 5 days after the appellate clerk assigns an appellate case number to the appeal (whichever is later), the ordering party must file it with the appellate clerk." (Addition shown by underscoring.) This change would authorize an appellant to wait until the clerk assigns an appellate case number to his or her appeal before being required to file the transcript.

(b) A New ARCAP 16(f). Before 2015, ARCAP 16(a) provided, among other things, that "[a]n amicus curiae may participate in the oral argument only by leave of the appellate court." When the rule was revised in the ARCAP 2015 amendments, this provision was left out. Instead, Rule 18, governing oral argument in the Court of Appeals, included a new subpart (c) providing that "[a]micus curiae may participate in the oral argument only on motion and with the Court of Appeals' permission." The amended rule, however, did not address

whether an amicus could participate in oral argument before the Supreme Court. Some attorneys have argued that this omission was intentional, and contend that their amicus clients have as much a right as parties to participate in oral argument before the Supreme Court.

To correct this oversight, the Staff Attorneys' Office proposes to add a new subpart (f) to Rule 16, entitled "Oral Argument," stating "[a]micus curiae may participate in oral argument only on motion and with the appellate court's permission." That language is similar to the language currently found in Arizona Rule of Criminal Procedure 31.15(e), which is part of the criminal rules' counterpart to ARCAP's amicus rule. The Staff Attorneys' Office also proposes to delete the current Rule 18(c), which would be unnecessary if the proposed new Rule 16(f) is adopted.

(c) ARCAP 21(b)(1). Before 2015, ARCAP 21(a) provided that "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." The 2015 ARCAP amendments included a new ARCAP 21(b)(1) providing that "[w]ithin 10 days after the appellate clerk has given notice of a decision or order that grants a claim for fees, a party claiming attorneys' fees or costs must file in the appellate court an itemized and verified statement of attorneys' fees and costs on appeal or review."

The problem with the amended rule is that it does not say when a cost statement is due if the prevailing party is not seeking fees or if the court has denied a fee request. To correct that oversight, the Staff Attorneys' Office proposes adding another sentence to this subsection that incorporates the old rule's 10-day deadline: "If a party is entitled to costs but does not seek fees or the court has denied the party's fee request, the party must file a statement of costs in the appellate court within 10 days after the appellate clerk gives notice of the court's decision or order."

(d) A New Criminal Procedure Rule 31.6(e). Since ARCAP's adoption in the late 1970s, the civil appellate rules have had a specific rule governing motions filed in an appellate court, ARCAP 6. Among other things, the rule provides: (1) response and reply periods; (2) a warning that a "motion for a procedural order" is generally decided by a single judge or by the clerk's office, and that the court may rule on such a motion without waiting for a response; (3) a requirement that a movant seeking a procedural order disclose whether the other parties to the appeal consent to or oppose the motion; and (4) a procedure for seeking to vacate a ruling on a "motion for procedural order."

ARCAP 6, however, applies to civil appeals and not criminal appeals, which are governed by Criminal Procedure Rules 31.1 through 31.24. Significantly, the criminal appellate rules do not include a specific provision governing motions filed in an appellate court.

As a technical matter, an appellate court motion arising out of a criminal matter is governed by Criminal Procedure Rule 1.9, which deals generally with motions in criminal matters. But as a matter of practice, appellate clerks and staff generally follow ARCAP 6's procedures and processes in criminal appeals, and not those of Rule 1.9. Moreover, Rule 1.9 is tailored for motion practice in a trial court rather than in an appellate court. For example, Rule1.9(e) sets forth a procedure for requesting oral argument, but it is rare for an appellate court to hear oral argument on a motion. Additionally, the rule requires parties to submit a proposed order, but appellate courts generally prepare their own. The rule also offers no guidance about "motions for a procedural order."

To fill a hole in the criminal appellate rules and to conform the rules with existing practice, the Staff Attorneys' Office proposes the adoption of a new Criminal Procedure Rule 31.6(e):

> **(e) Motions.** Rule 1.9 does not apply to motions filed in an appellate court. A party filing a motion, response, or reply in an appellate court must comply with ARCAP 6(a)(2) and (3). A party filing a motion for a procedural order must comply with ARCAP 6(b) and an appellate court will process and decide such a motion consistent with that rule's provisions.

The rule's first sentence clarifies that the general criminal rule on motions—Criminal Procedure Rule 1.9—does not apply to motions filed in an appellate court.

The second sentence of the rule would incorporate ARCAP 6(a)'s provisions regarding the periods for filing a response or reply to a motion (ten days and five

days, respectively). It also would include ARCAP 6(a)(3)'s requirement that if a motion states facts not in the record or for which judicial notice cannot be taken, the movant must submit a declaration or other evidence supporting those facts. The other parts of ARCAP 6(a)—form and content, and service requirements—would not be incorporated because they are already covered in Criminal Procedure Rules 31.6(b) and (c).

The third sentence would incorporate ARCAP 6(b)'s provisions governing motions for procedural orders, including a description of how the appellate courts handle and decide such motions and the requirement that the movant disclose the other parties' positions with respect to the movant's requested relief.

The title to the Rule 31.6 also would be amended to include the word "Motions" at the title's end.

(e) Amending Criminal Procedure Rule 31.21(k). Currently, ARCAP 23(i) provides that when a petition for review is filed, the Court of Appeals must make available to the Supreme Court the briefs the parties filed in the Court of Appeals. The rule also provides that "[t]he Court of Appeals clerk also must make available other portions of the record requested by the Supreme Court or its staff attorneys."

The criminal appellate rules, however, lack a provision similar to this rule. Instead, Criminal Procedure Rule 31.21(k) does not impose an obligation to make

the Court of Appeals' record available until after a petition for review is granted. This can cause problems for the Supreme Court's staff attorneys, especially in evaluating a petition for review arising out of a request for post-conviction relief under Criminal Procedure Rule 32. In Division One, the Court of Appeals' record is not always available electronically and the court's decisions often do not reflect much about the procedural history of the case. To get around that problem, the staff attorneys frequently need to use various databases to gain direct access to the superior court docket, which is time-consuming and is technically not part of the record on appeal.

To address this issue, the Staff Attorneys' Office proposes a minor modification of Criminal Procedure Rule 31.21(k) to direct the Court of Appeals clerk, after a petition for review is filed, to make available portions of the record requested by the Supreme Court or a staff attorney:

> **(k) Availability of the ~~Remaining~~ Record.** The Court of Appeals clerk must make the remaining record available to the Supreme Court clerk upon notification that the that the Supreme Court has granted a petition or cross-petition for review. After a petition for review is filed, the Court of Appeals clerk must make available portions of the record requested by the Supreme Court or its staff attorneys.

(Addition shown by underscoring; deletions by strike-through.)

(f) Special Action Rule 8, State Bar Committee Note. Before 2011, Special Action Rule 8(b) provided that a party wishing to challenge the Court of Appeals' grant or denial of special action relief, including a refusal to take

jurisdiction, could either file a petition for review in the Supreme Court or, if extraordinary circumstances existed, file a new special action in the Supreme Court. This Court amended the rule in 2011 to eliminate the option of filing a special action in the Supreme Court. Unfortunately, it did not delete the part of a State Bar Committee Note describing that option:

> (b) Remedies after denial of a writ by a Court of Appeals are, as prescribed by this Rule, in the alternative, they may be either a petition for review *or a new application in the Supreme Court* in appropriate cases. For discussion, see Gamet v. Glenn, No. 9588 and No. 9595, June 16, 1969, Arizona Supreme Court.

(Emphasis added.)

Although the comment's language is squarely contrary to the rule's text, parties occasionally have attempted to seek review of a Court of Appeals' special action decision (or the decision to decline jurisdiction) by filing a special action in the Supreme Court. By doing so, parties can evade the word limits on the length of petitions for review as well as avoid the "abuse of discretion" standard of review applicable to a Court of Appeals' decision to decline special action jurisdiction.

To bring the comment in line with the rule, the Staff Attorneys' Office proposes amending the comment as follows:

State Bar Committee Note <u>(as amended in 2020)</u>

* * *

> (b) <u>The</u> r~~R~~emedy<u>~~ies~~</u> after denial of a writ by a Court of Appeals <u>is</u> ~~are~~, as prescribed by this Rule, <u>by</u> ~~in the alternative, they may be either~~ a petition for review~~ or a new application in the Supreme Court in~~

~~appropriate cases. For discussion, see Gamet v. Glenn, No. 9588 and No. 9595, June 16, 1969, Arizona Supreme Court.~~

(Additions shown by underscoring; deletions shown by strike-through.)

(g) Supreme Court Rule 28.1(d). Supreme Court Rule 28.1(d) currently provides that before submitting a proposed local rule amendment to the Supreme Court, the presiding judge must post the proposed rule or amendment on the court's website. It further provides that "[w]hen the proposal is posted, the presiding judge must concurrently request the Supreme Court clerk to circulate the proposal to the distribution list in *Supreme Court Rule 28(C)* along with an invitation for the submission of comments on the website for the presiding judge's court." (Emphasis added.) Unfortunately, the cross-reference to Rule 28(C) is no longer accurate. The Court extensively amended Rule 28 in 2019, and the provision governing the distribution list is now found in Supreme Court Rule 28(d). The Staff Attorneys' Office proposes amending Rule 28.1(d) to update the cross-reference.

Conclusion

For the reasons stated in this petition, the Court should adopt the proposed technical and clarifying amendments set forth in Appendix A.

January 8, 2020.

ARIZONA SUPREME COURT
STAFF ATTORNEYS' OFFICE

/s/

John W. Rogers
Staff Attorney

Appendix A

APPENDIX A[1]

ARIZONA RULES OF CIVIL APPELLATE PROCEDURE

Rule 11.1. Transmitting the Record to the Appellate Court

* * *

(d) Delivery and Filing of Transcripts.

(1) *Delivery and Filing.* If the ordering party has made payment, within 30 days after the date of a party's order the court reporter or authorized transcriber must provide the ordering party with a certified electronic transcript, or with a certified paper transcript if one was requested by the ordering party. Within 5 days after receipt of a certified transcript or within 5 days after the appellate clerk assigns an appellate case number to the appeal (whichever is later), the ordering party must file it with the appellate clerk.

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Rule 16. Amicus Curiae

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(f) Oral Argument. Amicus curiae may participate in oral argument only on motion and with the appellate court's permission.

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Rule 18. Oral Argument in the Court of Appeals

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~~**(c) Amicus Curiae.** Amicus curiae may participate in the oral argument only on motion and with the Court of Appeals' permission.~~

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Rule 21. Attorneys' Fees and Costs.

* * *

(b) Statement of Attorneys' Fees and Costs; Timing; Objections.

(1) *Timing.* Within 10 days after the appellate clerk has given notice of a decision or order that grants a claim for fees, a party claiming attorneys' fees or costs must file in the appellate court an itemized and verified statement of attorneys' fees and costs on appeal or review. If a party is entitled to costs but does not seek fees or the court has denied the

[1] Additions to the text of the rule are shown by underscoring and deletions of text are shown by ~~strike-through~~.

party's fee request, the party must file a statement of costs in the appellate court within 10 days after the appellate clerk gives notice of the court's decision or order.

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ARIZONA RULES OF CRIMINAL PROCEDURE

Rule 31.6. Filing Documents with an Appellate Court; Document Format; Service and Proof of Service; Motions

* * *

(e) Motions. Rule 1.9 does not apply to motions filed in an appellate court. A party filing a motion, response, or reply in an appellate court must comply with ARCAP 6(a)(2) and (3). A party filing a motion for a procedural order must comply with ARCAP 6(b) and an appellate court will process and decide such a motion consistent with that rule's provisions.

* * *

Rule 31.21. Petition for Review

* * *

(k) Availability of the ~~Remaining~~ Record. The Court of Appeals clerk must make the remaining record available to the Supreme Court clerk upon notification that the that the Supreme Court has granted a petition or cross-petition for review. After a petition for review is filed, the Court of Appeals clerk must make available portions of the record requested by the Supreme Court or its staff attorneys.

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RULES OF PROCEDURE FOR SPECIAL ACTIONS

Rule 8. Appeals

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State Bar Committee Note (as amended in 2020)

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(b) The r~~R~~emedy~~ies~~ after denial of a writ by a Court of Appeals is ~~are~~, as prescribed by this Rule, by ~~in the alternative, they may be either~~ a petition for review ~~or a new application in the Supreme Court in appropriate cases~~. ~~For discussion, see Gamet v. Glenn, No. 9588 and No. 9595, June 16, 1969, Arizona Supreme Court.~~

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RULES OF THE ARIZONA SUPREME COURT

Rule 28.1 Procedure for Requesting Approval of Local Rules

* * *

(d) Presubmission Comments. Before submitting a proposed new or amended local rule for Supreme Court approval, the presiding judge must post the proposal for at least 30 days on the website for the judge's court along with an invitation for the submission of comments. When the proposal is posted, the presiding judge must concurrently request the Supreme Court clerk to circulate the proposal to the distribution list in Supreme Court Rule 28(d) ~~28(C)~~ along with an invitation for the submission of comments on the website for the presiding judge's court.