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SUPREME COURT OF ARIZONA

PETITION TO AMEND THE RULES OF PROCEDURE FOR SPECIAL ACTIONS	)	Supreme Court No. R-23-0055
	)	**PETITION**

1. Introduction. Undersigned is filing this petition as staff for, and with the authority of, the Supreme Court's Task Force on Rules of Procedure for Special Actions ("Task Force"). The Task Force submits this rule petition pursuant to Rule 28 of the Rules of the Arizona Supreme Court and the Court's Administrative Order No. 2023-128.

The above caption notwithstanding, this petition does not seek to amend the current Rules of Procedure for Special Actions ("RPSA" or "special action rules"). Rather, because of the scope and volume of proposed changes to the content and organization of the current rules, this petition requests the Court to abrogate the current special action rules and to replace those rules with the proposed new ones. Accordingly, this petition does not include a version that shows the current rules

with strikethrough and underline, as Supreme Court Rule 28(a)(4)(A)(iii) would otherwise require. Instead, Appendix A to this petition contains a clean version of the proposed text of the new rules, and Appendix B is a table correlating the current rules with the proposed rules. Appendix C contains a detailed, rule-by-rule explanation of the proposed new provisions, with frequent comparisons of a proposed rule and a current rule.

2. Background. The Court during the course of the past decade has established Task Forces to review, restyle, and occasionally make substantive changes to the Court's Rules of Procedure for Civil, Criminal, Family Law, Probate, and Juvenile proceedings. A notable exception was the Arizona Rules of Civil Appellate Procedure ("ARCAP"), which were restyled in 2014 without the creation of a formal Task Force. But the special action rules, which became effective on January 1, 1970 – more than 50 years ago – have not undergone a comparable review, and those rules are now substantively and stylistically outmoded.

The Court entered Administrative Order No. 2023-128 on August 4, 2023, to address the special action rules. The Order provided in pertinent part:

> The Task Force shall restyle the current Rules of Procedure for Special Actions using the styling conventions employed in other recent rule restyling projects. The Task Force shall pay particular attention to case law on special actions that has developed during the past fifty years. If it would help clarify the rules, then the Task Force should integrate applicable principles of those cases into the rules. The Task Force may also propose substantive changes to

the Rules of Procedure for Special Actions, including rules that would optimize the use of court resources for processing these actions.

Accordingly, the objectives of the Task Force included not only restyling, but also integration of case law principles, improvements that will enhance the use of court resources, and substantive refinements to the special action process.

3. Membership and Methodology. The Task Force is composed of distinguished members from five counties. A list of Task Force members appears on the last page of this petition. The members include judges from both Divisions of the Court of Appeals, Superior Court judges, clerks from the Supreme Court and Division One, and several public and private attorneys. The attorney members include the co-authors (Mr. Eric Fraser and Mr. Gaetano Testini, respectively) of Chapter 4 ("Interlocutory Review in the Appellate Courts (The Special Action)") and Chapter 17 ("Industrial Commission and Workers' Compensation Reviews") of the Arizona Appellate Handbook, which is published by the State Bar of Arizona. The Task Force was also informed by guests who routinely attended Task Force meetings, and who provided useful comments at and after those meetings.

At the initial Task Force meeting on September 8, 2023, the Chair divided members into three workgroups and assigned each workgroup the duty to review and discuss roughly equivalent portions of the rules. Between September 8, 2023, and the filing of this petition, those three workgroups, and a separate editorial group,

met 18 times. Outside of meetings, the workgroups researched law and edited draft rules. The workgroups presented proposed revisions to the full Task Force for further discussion and approval. The full Task Force met 7 times between September 2023 and February 2024. The proposed special action rules are the result of this process, which culminated in the Task Force members who attended the February 7, 2024, meeting voting unanimously in favor of filing this petition with the proposed special action rules.

4. Restyling, Reorganization, and Renumbering of the Proposed Special Action Rules. The proposed special action rules employ consistent formatting and nomenclature and generally follow the conventions used in previous rule restyling projects. A senior member of the Supreme Court's Staff Attorneys' Office provided an informational presentation concerning those conventions at the first Task Force meeting. (Several Task Force members participated in previous rule restyling projects and were familiar with these conventions.) A large component of restyling involves word choice and sentence structure. Restyling also includes organizational and structural changes, which collectively make restyled rules more understandable and user-friendly. The Task Force's restyling of the current special action rules included the following.

(a) Adding and modifying titles. The current special action rules, even lengthy ones, have no titles for sections within a rule, with the exception of Rule 4.

(Rule 4 itself has the very unhelpful title of "Procedure." Isn't every rule in this set a rule of procedure?) The proposed rules correct these errors and omissions by adding informative titles to every section within a rule, and frequently to subparts, too, and by appropriately modifying the titles of the current rule titles. These titles make it easier for users to navigate the rules and to locate pertinent provisions.

(b) Dividing rules and sections. Current Rule 7 ("special appellate court provisions") is one of the lengthiest of the current rules and it has been reorganized into multiple, newly numbered rules. (Please see Appendix B.) Current Rule 7(e) is a prime example of the need for improved organization. Section 7(e) is untitled, leaving the reader with no hint of its subject matter. Moreover, this section is formatted in the 2024 volume of the Arizona Rules of Court as a single paragraph containing 465 words and more than 40 lines of text. That format, along with the absence of a section title, requires the reader to search through hundreds of words in current section 7(e) to locate a specific requirement. The Task Force addressed this and other unwieldly formats of the current rules by reorganizing a rule or a section into multiple rules or sections, or by dividing a section into subparts. This reorganization, in conjunction with the newly added section titles, should enhance the reader's experience and make that experience more efficient and informed.

(c) Adding new rules and renumbering. In addition to dividing some of the current rules, the Task Force is proposing several new rules, for example, a rule

on construction and application of these Rules, a rule on factors for accepting or declining jurisdiction in appellate special actions, and another rule on certification. The current rules, numbered 1 through 10, cannot easily accommodate these new rules within the present numbering scheme. Rather than using decimals after the current numbers (e.g., 1.1, 4.2, 7.4), the Task Force proposes whole numbers and designating the special action provisions as Rules 1 through 25, as shown in the Table of Contents on the first page of Appendix A.

(d) Organizing the rules into parts. The current special action rules are not at first glance differentiated by subject matter. By comparison, the proposed rules are structured into 4 parts as follows: Part I, "General Provisions," Part II, "Original Special Actions," Part III, "Appellate Special Actions," and Part IV, "Actions Involving Industrial Commission Awards." Structuring the rules under these part titles should also assist users in readily finding sought-after provisions.

Although these restyling changes are quite useful and important, they take a back seat to the substantive changes described in the next section.

5. Notable Substantive Changes. Appendix C provides a rule-by-rule explanation of the proposed changes, but some of the most significant substantive changes merit mention in the body of this petition.

(a) Distinguishing between original special actions and appellate special actions. There are many varieties of special actions, but in general, there are two

types: those that seek appellate review of a prior ruling of a lower court, and those that don't. The current rules do not express this distinction. The proposed rules, however, express the distinction early and repeatedly. The distinction is the most notable new feature of the proposed rules.

The distinction is first mentioned in Rule 2 ("special actions defined"), section (b) ("original special actions; appellate special actions"). Subpart (b)(1) clarifies that "an original special action begins a case," that is, it does not seek review of a prior court ruling, while subpart (b)(2) affirms that "an appellate special action requests review of an earlier decision of a lower court." Neither of these terms ("original special action" or "appellate special action") are used in the current rules. In addition to the preliminary explanation of this distinction in Rule 2, Part II of the proposed rule set is devoted to original special actions, while Part III focuses on appellate special actions.

The procedures for these two types of special actions are similar in some ways but are substantially different in others. For example, accepting jurisdiction of an appellate special action is generally discretionary; jurisdiction of an original special is usually not discretionary. The Task Force concluded that making this important distinction in the proposed rules will increase user understanding of the special action process and facilitate compliance with applicable procedures.

Although at least one stakeholder suggested that the most significant distinction regarding special actions is between actions filed in the Superior Court and actions filed in an appellate court, the Task Force respectfully disagrees, because original special actions as well as appellate special actions can be filed in either the Superior Court or an appellate court. The critical distinction is not the level of court where the action is filed, but rather, it is the nature of the special action proceeding, i.e., original or appellate.

(b) Explaining statutory authority. In conjunction with distinguishing original and appellate special actions, proposed Rule 3 ("statutory authority for certain special actions"), clarifies the nature of a statutory special action. Current Rule 1(b) similarly attempts to explain the nature of a "statutory special action" (and expressly refers to a special action by that name), but the Task Force believes that proposed Rule 3 significantly improves upon the explanation of that concept. A proposed comment to Rule 3 further explains that most original special actions are statutory special actions—that is, they are authorized by an Arizona statute—and are filed in the Superior Court.

(c) Elaborating grounds for accepting jurisdiction of appellate special actions. An appellate court typically has jurisdiction of an appeal, and an appeal customarily concludes with a decision on the merits of a case. This is not so with appellate special actions, where acceptance of jurisdiction by the reviewing court is

generally discretionary. The current rules do not explicitly state the principle of discretion. Instead, the current rules relegate this important principle to a State Bar Committee Note to Rule 3:

> The special action requests extraordinary relief, and acceptance of jurisdiction of a special action is highly discretionary with the court to which the application is made. A plaintiff, in addition to the showing required in all lawsuits that he has standing and that the matter is subject to judicial review, must always carry the burden of persuasion as to discretionary factors. This Rule thus codifies existing practice in Arizona.

The Task Force believes that the principle of discretion is essential to appellate special actions (although not to original special actions) and merits prominence in a rule. Proposed Rule 11 ("factors for accepting or declining jurisdiction of appellate special actions"), section (a) ("discretion"), clearly expresses the principle:

> **(a) Discretion.** Whether to accept jurisdiction of an appellate special action is within the court's discretion, unless a statute or an order requires the court to accept jurisdiction.

Furthermore, the State Bar Committee Note to Rule 3 refers to "discretionary factors," but neither the note nor any other provision in the current rules succinctly identifies those factors. The proposed rules, however, do so. Rule 11(b) lists 8 factors, primarily derived from case law, that support a reviewing court accepting jurisdiction of an appellate special action. (Judge Andrew Jacobs, a Task Force member, provided an August 29, 2023, memo with case citations that recognize most of these factors.) And for completeness, Rule 11(c) lists 5 factors that support

declining jurisdiction. An additional factor in declining jurisdiction, which is specified in the body of section (c) rather than in the list of factors, is that "the petitioner unreasonably delayed in filing the petition." The Task Force was generally opposed to providing a specific time, such as 30 days, that would constitute unreasonable delay, but this proposed provision nonetheless permits a reviewing court to consider the petitioner's delay as a factor in declining jurisdiction.

Current Rule 1 ("nature of the special action"), section (a), says in part, "… the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal…." Current Rule 8 ("appeals"), section (a), further says, "Where there is no equally plain, speedy, and adequate remedy by appeal, a judgment in a special action in a Superior Court may be reviewed by a special action directed against the original defendants."

The Task Force recognizes that it omitted the phrase "no plain, speedy, and adequate remedy by appeal" from the Rule 11 factors. The Task Force determined, however, that sometimes the phrase is merely a recital and is not tethered to specific circumstances. By comparison, the factors in Rule 11 are more tangible for guiding the exercise of special action discretion. For example, one factor asks the court, in deciding whether to accept jurisdiction, to consider questions "tending to evade review, including questions that may become moot before an appeal." Another factor contemplates accepting jurisdiction of a question "involving the welfare of

children where the harm complained of can only be prevented by resolution before an appeal." Hence, the concept of speed and adequacy of a remedy by appeal are embedded in these factors. On the other hand, the court can consider whether the special action raises a question of fact, or that is resolved on a motion to dismiss or motion for summary judgment, or that is "equally appropriate to address by appeal," as factors that support declining jurisdiction. The Task Force submits that its formulation is an improvement over the "plain, speedy, and adequate" concept because the proposed factors are well-reasoned, tangible, and pertinent.

(d) Eliminating a judicial officer in the caption of an appellate special action; certification of an issue. ARCAP Rule 4(a) and ARCAP Forms 3 and 4 prescribe the caption for documents that are filed in an appeal. No ARCAP rule or form requires the appellate case caption to include the name of the judicial officer who entered the order or judgment that is the subject of the appeal.

The captions in current appellate special actions are dissimilar. Current Special Action Rule 4(e) expressly provides:

> In any special action filed against a Superior Court Judge, Court of Appeals Judge or other officer in a Court of Appeals or in the Supreme Court and in any petition for review filed pursuant to Rule 8(b) of these rules, the caption shall state the name of the judge or officer followed by the person's official title, e.g., "[Name of Petitioner], Petitioner v. Hon. [Name of Judge], Judge of the Superior Court of the State of Arizona, in and for the County of [Name of County], Respondent and [Name of Real Party in Interest], Real Party in Interest."

The Task Force concluded that naming a judicial officer in a special action caption can create procedural confusion. It can also have other undesirable effects. By inserting a judge's name in the caption, the judge is postured as a participant in an adversarial process, that is, it places the judge in an antagonistic dynamic (i.e., on an opposing side of the "versus") with a party.

The proposed rules do two things to address this perception. First, the rules no longer require that the judge be identified in the caption. This change to current practice is sufficiently significant that the proposed rules mention it twice. Proposed Rule 5 ("parties"), subpart (b)(2) ("respondent defined") expressly states "The judge whose decision is being challenged is not a respondent." The realignment of parties is further explained in a proposed comment to Rule 13 ("petition, response, and reply"). This comment provides:

> Beginning with the 2025 revisions to these Rules, a respondent in an appellate special action is no longer referred to as a real party in interest. In addition, the judge whose decision is being challenged is no longer a respondent in an appellate special action. Consistent with that change, Rule 12(a) provides that a judge whose decision is being challenged may certify a question or issue within any decision he or she has made as one that should be reviewed by special action.

The proposed rules, however, continue to require service of appellate special action filings on the lower court judge.

Second, and as noted in the above comment, a new rule (Rule 12) would permit the lower court judge to certify a question within a decision as one that is

appropriate for special action review. Doing so has multiple benefits. It provides the trial judge an opportunity to convey to the appellate court a particular issue that the judge believes that court should review and address. It affords what Judge Jacobs characterized in his memo as a "three-dimensional space" for case management, which is shared by the trial and the appellate courts to identify significant legal issues. And it allies, rather than antagonizes, the judge and the parties in their mutual quest for a just result in the matter in accordance with applicable law.

The Task Force recognized there was a recent addition of 6 judges to the Arizona Court of Appeals. This presented an opportunity to consider methods to make the special action process more streamlined and efficient and to clarify the acceptance of jurisdiction of appropriately certified cases. Note that Rule 12 ("certification") requires the trial court to not only state the question certified for review, but also state the reasons special action review is needed, "including any of the grounds listed in Rule 11(b) ['factors that support accepting jurisdiction']."

(e) Other substantive changes. The Task Force provides a detailed explanation of many other substantive changes in Appendix C to this petition, but here is a sampling:

- Rule 10(e) ("exercising special action jurisdiction in a direct appeal") codifies pertinent statutory and case law authority allowing an appellate court, under

certain circumstances other than untimeliness, to review a matter under its special action jurisdiction, notwithstanding a lack of appellate jurisdiction.

- Rule 17 ("disposition of appellate special actions") resolves a difference in practices between the two divisions of the Court of Appeals and requires that "If the court accepts special action jurisdiction, orders granting or denying relief must be in writing and state the grounds for the decision." Hence, once the court accepts jurisdiction, its decision will become part of the law of the case.

- Rule 21(e) ("restricted access") codifies in a rule the confidentiality of the Industrial Commission of Arizona record "as provided by law." That record, which the Industrial Commission transmits to the Court of Appeals pursuant to these Rules, may contain a worker's confidential medical information.

6. Comments in the proposed rules. The Task Force was mindful of two generally acknowledged principles regarding comments to court rules that developed during previous restyling projects. First, matters of substance usually belong in the body of a rule rather than in a comment to the rule. Second, if the rule requires a comment to understand the rule, then the rule is probably not clearly written.

In the current set of special action rules, 8 of the 10 rules contain a "State Bar Comment Note." Some of these notes are lengthier than the underlying rule. Current

Rule 2 also contains a "Comment to 1991 Amendment," and Rule 9 contains a "Comment" and a "Court Comment [2000 Amendment]." The Task Force extracted information in these various comments it deemed useful and relocated that information in its draft rules. Based on previous restyling projects, the Task Force anticipates that the publisher will not include these various current comments in the restyled version of the rules. Admittedly, the omission of these comments might have some effect on researchers seeking historical information. However, even now, some published versions of the Arizona Rules of Court – including the version that is publicly available on the Arizona Judicial Branch website – do not include any comments.

The proposed new set of 25 rules includes comments to only 5 of those rules. These comments are informative rather than substantive. A comment to proposed Rule 2 elaborates on the nature of original and appellate special actions, and a comment to Rule 3 specifically addresses statutory special actions and includes a compilation of statutes authorizing a special action. A comment to Rule 7 concerns discovery in original special actions – specifically, Rule 7(g) titled "Discovery Generally Prohibited." (The comment begins, "Rule 7(g) gives the court in original special actions the latitude to allow discovery in those rare instances when it is necessary.") A comment to Rule 13 is pertinent to the proposed change that would no longer require naming a judicial officer in an appellate special action. Finally, a

comment to Rule 14 cites provisions of the Arizona Constitution, statutes, and the Arizona Code of Judicial Administration regarding the payment of filing fees, which might be of interest to criminal defendants or self-represented civil litigants when filing a special action.

7. Stakeholder comments concerning the proposed rules. After its fourth meeting, the Task Force distributed its then-current draft of the proposed rules (draft version 12.04.2023) to two State Bar committees and two State Bar sections: the Civil Practice and Procedure Committee, the Criminal Practice and Procedure Committee, the Appellate Practice Section, and the Workers' Compensation Section. The draft was also provided to the Arizona Chapter of the American Academy of Appellate Lawyers. The Task Force requested input on the draft and advised these groups and their individual members that the Task Force would consider any suggestions they might provide as informal, i.e., that those comments would not detract from their opportunity to provide official comments during the public comment period on this rule petition.

The Task Force received a significant number of comments in response to this request, which the Task Force considered at its fifth meeting and subsequent meetings of the workgroups and full Task Force. Although the Task Force did not adopt all of the submitted comments, the comments were useful for improving the proposed rules. Some of the comments concerned the conceptual framework of the

draft rules, particularly the distinction between original and appellate special actions. The Task Force believes those comments might have resulted from the submission of the draft without accompanying materials that explained the rationale for these changes. In any event, the Task Force appreciates all comments received, as the comments assisted the Task Force in preparing, and submitting to the Court, a better set of proposed rules.

8. Correlation Table. Appendix B contains a table correlating the current rules with the proposed rules. The Task Force believes the table could be useful to practitioners and judicial officers in correlating the 10 current rules with the 25 proposed rules. The Task Force requests that if the Court adopts the proposed rules, that its promulgation order provide that the correlation table be published with the new rules—similar to the publication of the 2015 ARCAP Correlation Table in the Arizona Rules of Civil Appellate Procedure, which appears after the ARCAP Table of Contents but before ARCAP 1.

9. Conclusion. The Task Force requests that the Court (1) abrogate the current Rules of Procedure for Special Actions, and (2) adopt the proposed new rules contained in Appendix A to this petition, subject to any modifications to those rules that the Task Force might propose in its reply. The Task Force further requests that the Court approve for publication with the new rules the correlation table in Appendix B, as described above.

The Task Force filed a Motion to Suspend Rule 28(a)(2) on December 13, 2023. Pursuant to the Court's December 26, 2023, Order granting that motion, Petitioner requests that the Court open this petition for public comments until May 17, 2024, and allow the Task Force to file its Reply on or before June 17, 2024.

RESPECTFULLY SUBMITTED this 22nd day of February 2024.

By /s/ Mark Meltzer
Mark Meltzer
on behalf of the Task Force

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