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3 **(FIRM STATE BAR NO. 00032000)**

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9 **(STATE BAR NUMBER 011474)**

10 **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

11 **IN RE:**

R-16-0034

12 **PETITION TO AMEND RULE 5(a)**  
13 **OF THE ARIZONA RULES OF**  
14 **CIVIL APPELLATE PROCEDURE**

MARICOPA COUNTY ATTORNEY'S  
COMMENT TO PETITION TO AMEND RULE  
5(a), ARIZONA RULES OF CIVIL  
APPELLATE PROCEDURE

15 The Maricopa County Attorney hereby submits this comment to the Petition to  
16 Amend Rule 5(a) of the Arizona Rules of Civil Appellate Procedure ("Rules") and  
17 asks this Court to deny the Petition.

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19 The Petition asserts two reasons for the proposed change. First, the Petition  
20 states that, although the Supreme Court and Division One of the Court of Appeals  
21 follow Rule 5(a), Division Two has "suspended" the rule when a brief is served  
22 through that Division's electronic filing system. Petitioner observes that this creates  
23 an inconsistency within the divisions of the appellate courts that makes the rule's  
24 applicability depend on "the happenstance of geography. . . ." [Petition at 2].  
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27 Petitioner is further concerned that this disparity may mislead practitioners who are  
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1 following the rules and are unaware of Division Two's practice.

2         The Petition acknowledges that one solution "might include requiring Division  
3 Two to follow ARCAP Rule 5(a)." [Petition at 3]. The Maricopa County Attorney's  
4 Office ("MCAO") agrees with that solution.  
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6         Apparently Division Two's practice of disregarding Rule 5(a) was not widely  
7 known because on March 14, 2016, by Administrative Order No. 2016-19, this Court  
8 noted that it had only recently learned of this practice (presumably when the Petition  
9 was filed) and then the administrative order was issued to permit Division Two to  
10 continue to disregard Rule 5(a) while this Court considers the Petition. According to  
11 the Petition, Division Two previously cited Rule 3(a) of the Arizona Rules of Civil  
12 Appellate Procedure as justification for refusing to follow Rule 5(a). [Petition at 5,  
13 fn. 1].<sup>1</sup> But Rule 3(a) does not provide justification for the suspension of a rule of  
14 procedure in all cases. Indeed, such a power would give the appellate courts the  
15 power to use and ignore rules as they pleased which would effectively grant those  
16 lower courts the rulemaking power that is vested in this Court. *See* ARIZ. CONST. art.  
17 6, § 5 (granting the Supreme Court the "[p]ower to make rules relative to all  
18 procedural matters in any court."). Rule 3(a) allows a court to suspend a rule "in a  
19 particular case" to expedite its decision or for other good cause. ARIZ. R. CIV. APP. P.  
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26 <sup>1</sup> The reference to Rule 3(a) has since been removed from Division Two's website  
27 presumably because their permission to disregard Rule 5(a) now comes from the  
28 administrative order.

1 3(a). Thus, Rule 3(a) gives a lower court the flexibility to suspend a rule only when it  
2 is necessary to achieve a just result in an individual case. Suspending a rule of  
3 procedure for all cases is hardly the type of case-by-case analysis Rule 3(a)  
4 contemplates. The issuance of Administrative Order No. 2016-19 is proof that Rule  
5 3(a) does not grant an intermediate appellate court the power to ignore the Rules  
6 because if it did there would have been no need for the administrative order.  
7 Requiring Division Two to follow the Rules is the best solution to this issue.  
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10 The Petition also suggests an alternative to uniform enforcement of the Rules  
11 by amending Rule 5(a) to exempt Division Two to “alert practitioners about Division  
12 Two’s ‘suspension’ of the rule.” [Petition at 3]. This suggestion does not solve the  
13 problem, however, it exacerbates it. First, such an alert in Rule 5 would sanctify two  
14 different rules for each division of the Court of Appeals in contradiction of the Rules  
15 themselves which claim to “govern procedures in civil appeals to the Arizona Court  
16 of Appeals and the Arizona Supreme Court. . .” ARIZ. R. CIV. APP. P. 1(b). Second,  
17 the change would more likely confuse practitioners rather than help them because  
18 lawyers frequently practice in both divisions and having separate rules for each is a  
19 sure way to prevent lawyers from following the right rule in the right court. Common  
20 sense and efficiency both dictate that the procedural rules for appeals should be the  
21 same in both divisions of the Court of Appeals. Changing the rule to expressly  
22 acquiesce to Division Two’s practice solves nothing.  
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1 The Petition then turns to a discussion about this being a time to reconsider  
2 whether five days should be added if responding to an electronically served filing,  
3 noting that the federal rules might be changed to do away with its three day rule for  
4 electronically served documents. Although changes to the federal rules may be  
5 coming, the time to take that into consideration is when those changes have been  
6 made, not while they are only being considered. Additionally, there is no reason to  
7 “copy” the federal rules in this matter. The federal rule (3 days) and our rule (five  
8 days) have always been different and it has not caused any complications or problems  
9 that the MCAO is aware of nor are any cited in the Petition. Why do those rules  
10 suddenly need to be the same?  
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12 The MCAO is highly doubtful that the appellate court or their respective staff  
13 (even in Division Two) really cares whether a party gets an additional five days to  
14 respond to an electronic filing, but it is beneficial to practitioners. Even with e-filed  
15 documents, there are good reasons for giving practitioners five extra days. In large  
16 agencies such as the MCAO and presumably other agencies like the Attorney  
17 General’s Office, it may take several days after an e-filing for the document to get to  
18 the right attorney within the office. The additional five days does little to hamper  
19 court operations but losing it could have a significant impact on practitioners.  
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21 Finally, if a change in Rule 5(a) is to be made, the MCAO suggests that a  
22 complete and self-contained rewrite of the entire rule is a better approach instead of  
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1 attempting a patchwork revision of an incorporated-by-reference rule that appears in a  
2 different set of rules. A discussion of whether the five day extension is warranted for  
3 e-filed documents should be part of a larger discussion that includes the Rules of  
4 Criminal Procedure and the Rules of Civil Procedure. It is possible that the time has  
5 come to reconsider the timing rules, but the best answer might be setting one time  
6 limit regardless of how service or filing is accomplished.<sup>2</sup> For example, it may be  
7 time to write all the rules to give parties 15 days to respond to a motion with no  
8 “extra days” for any particular service or filing method. Such a bright line, consistent  
9 rule would be easy to apply for courts and practitioners and would still allow for the  
10 delays that can happen with most of the service or filing methods. Nevertheless,  
11 these discussions should happen within the context of looking at all of the applicable  
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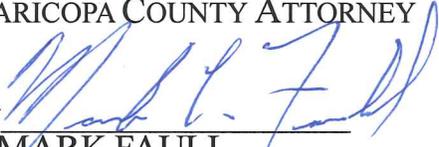
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24 <sup>2</sup> Interestingly, the petition that is currently pending before this Court to re-write all  
25 of the Rules of Civil Procedure does not suggest changing the additional five days  
26 that is given when a document is filed electronically. This fact shows why it is not  
27 a good idea to make changes in rules that are cross referenced in a piecemeal fashion.  
28 There is no logical reason why e-filed documents should be treated differently in the  
appellate courts and the lower courts.

1 rules at one time, not by singling out the Rules of Civil Appellate Procedure simply  
2 because Division Two does not wish to follow this Court's rules.  
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4 Respectfully submitted this 26 day of May, 2016.

5 WILLIAM G. MONTGOMERY  
6 MARICOPA COUNTY ATTORNEY

7 By   
8 MARK FAULL  
9 CHIEF DEPUTY