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8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**

10 In the Matter of:

Supreme Court No. R-16-0034

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

COMMENT OF
THE STATE BAR OF ARIZONA

14 The State Bar of Arizona (“State Bar”) opposes the Petition of the Supreme
15 Court Staff Attorneys’ Office (“Petitioner”) to amend Rule 5(a) of the Arizona Rules
16 of Civil Appellate Procedure (“ARCAP”). Rule 5(a) incorporates Rule 6(e) of the
17 Arizona Rules of Civil Procedure, which permits a party to add five days when
18 calculating the deadline for filing a response to a brief, motion, or other filing served
19 by mail or electronic transmission. If the proposed amendment is adopted, this
20 additional five-day period would no longer apply to the deadline for responding to
21 electronically filed documents. No need exists, however, to amend the Rule or
22 eliminate the five-day period.
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1 **I. BACKGROUND**

2 Recently, Division Two of the Court of Appeals, under ARCAP 3(a),
3 suspended the application of Rule 6(e), as incorporated in ARCAP 5(a), to
4 electronically filed documents. The suspension has resulted in a non-uniform
5 application of Rule 5(a) between Division Two, on the one hand, and the Supreme
6 Court and Division One of the Court of Appeals, on the other. Specifically, in
7 Division Two, the response to a brief filed electronically is due five days earlier than
8 a brief filed at the same time and in the same manner in the Supreme Court or
9 Division One. On March 14, 2016, the Supreme Court issued Administrative Order
10 No. 2016-19, modifying Rule 5(a) to provide that the reference to Rule 6(e) does not
11 apply to documents served electronically through Division Two's "e-filer" system,
12 pending further order.
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16 Resolution of the non-uniform approach to the application of Rule 5(a)
17 between Divisions One and Two is desirable. As the Petition points out, this conflict
18 may result in litigants erroneously submitting late-filed briefs in Division Two.
19 However, adoption of Division Two's approach to resolve the conflict, as the
20 Petition promotes, is not necessary. Rule 5(a) has been working fine—applying the
21 five-day period to the deadline for responding to electronically-filed documents does
22 not prejudice litigants or adversely affect Court dockets or administration. Changing
23 Rule 5(a) to conform to the practice in Division Two, however, while resolving the
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1 conflict with the Supreme Court and Division One, will merely create a new conflict
2 between the appellate courts and the trial courts.

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4 **II. ANALYSIS**

5 The central thesis supporting the direction of the Petition is that “times have
6 changed.” When former Supreme Court Rule 124(g)—the first rule to provide that
7 electronic service be considered “service by mail” for purposes of computing time
8 under procedural rules—was adopted in 2000, concern existed that “like mail,
9 electronic transmission was sometimes faulty.” *See* Report of the Civil Rules
10 Advisory Committee at 11, (May 1, 2000). In 2006, when ARCP 6(e) supplanted
11 Rule 124(g), the concept of treating electronically served documents the same as
12 those served by mail followed. Petitioner reasons that since 2000, “[t]ransmission
13 error is now rare, and courts and practitioners no longer find electronic service to be
14 novel or unreliable.” Pet. at 4. Accordingly, Petitioner concludes that no need exists
15 for continuing to apply the five-day rule to electronically served documents.
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19 No need exists, however, for eliminating the five-day rule merely because its
20 original purpose may no longer exist. The Rule, as stated, is neither ambiguous nor
21 difficult to understand. Petitioner does not indicate that application of the five-day
22 rule to electronically served documents has created any problems for the appellate
23 courts. The brief delay occasioned by the additional five days does not have a
24 dramatic impact on the administration of justice. Certainly, affording the additional
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1 time to respond to documents does not prejudice practitioners or their clients.
2 Absent evidence that application of the five-day rule to electronically filed
3 documents has wrought harm on the appellate system, the proposed amendment
4 appears to recommend change simply for the sake of change.
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6 The Petition notes that applying the five-day rule to electronically filed
7 documents is not necessary to maintain consistency between Arizona's rules and the
8 federal rules:
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10 The U.S. Supreme Court is currently considering a proposed
11 amendment to each set of the federal procedural rules – including the
12 Federal Rules of Appellate Procedure – providing that the “three-day
13 mailing rule” would no longer apply to electronically served documents
14 . . . Based on the relative lack of opposition to these proposed
15 amendments, the Court is likely to approve them later this spring.
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18 The likely (but not guaranteed) elimination of a single potential justification for
19 keeping Rule 5(a) in its current form does not warrant adopting the proposed
20 amendment. Indeed, as important as conforming Arizona's rules to the federal rules
21 may be, maintaining consistency among the various sets of Arizona rules—
22 particularly from the standpoint of a practitioner who will be handling the appeal of
23 a case from Superior Court—is more critical.
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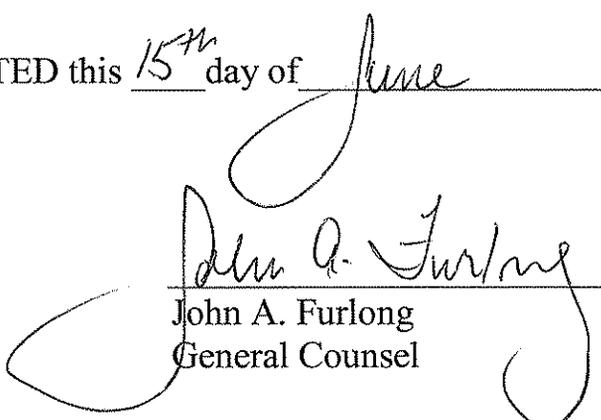
1 The State Bar's opposition to the Petition is informed by the opposition of
2 both its Civil Practice and Procedure Committee and its Appellate Section.

3 **III. CONCLUSION**

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5 The State Bar respectfully suggests that amending a Rule that is clearly
6 written, does not interfere with the prompt administration of justice or create traps
7 for the unwary practitioner, and is consistent with other sets of Arizona's procedural
8 rules is both unnecessary and undesirable, particularly when the proposed
9 amendment will not serve some greater purpose, such as appreciably increasing
10 judicial efficiency. The State Bar does not oppose future efforts to reform time
11 periods, particularly across more sets of rules, and encourages further deliberation
12 and consultation with the various interested parties, such as the CPPC and Appellate
13 Section, in that regard.
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16 For the foregoing reasons, the State Bar opposes the Petition.

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18 RESPECTFULLY SUBMITTED this 15th day of June, 2016.

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23 John A. Furlong
24 General Counsel
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Electronic copy filed with the
Clerk of the Arizona Supreme Court
this 15th day of June, 2016.

by: 