



Arizona's Appealing New Rules The Overhaul of the Arizona Rules of Civil Appellate Procedure

The Arizona Rules of Civil Appellate Procedure (aka ARCAP) have been completely rewritten—and the changes are not merely stylistic. They also include some fairly significant substantive changes. In some cases, even the numbering has changed.

Scary, right? Not to worry. These changes dramatically improve Arizona's appellate rules. They are easier to read, easier to use, and will improve the experience of those involved with Arizona's appellate courts—judges, attorneys, and the pro se litigants who must navigate these courts on their own.

In what follows, we provide an overview of the changes, and tell you what you need to know about the rules. We begin with a brief overview of the process, highlight some of the stylistic improvements, and then discuss the substantive changes and what they mean going forward.

Background

Why tinker with ARCAP at all? The impetus came from our Supreme Court, which realized the recent restyling of the federal rules proved beneficial. Late last year, as a first step toward restyling Arizona's rules, Chief Justice Bales asked Mark Meltzer, a policy analyst with the Administrative Office of the Courts, and John Rogers, a Supreme Court staff attorney, to prepare a set of proposed amendments to ARCAP.

In connection with preparing the new rules, the drafters met with judges, practitioners and others, and also participated in extensive meetings of an ad hoc committee formed by the State Bar Civil Practice and Procedure Committee. The schedule was tight; the drafters had less than a year to do a complete rewrite and get the rules approved. Although some were skeptical whether ARCAP could be revised on such an aggressive schedule, they did it. The Supreme Court adopted the new rules in August, and they become effective January 1, 2015.

ERIC M. FRASER, THOMAS L. HUDSON & **JOSEPH N. ROTH** are attorneys at Osborn Maledon where their practices include a focus on appellate practice. Mr. Hudson chaired a subcommittee of the Arizona State Bar Civil Practice and Procedure Committee that provided extensive input on the new appellate rules.

Style, Organization: Goodbye Legalese

When you first crack the new set of ARCAP rules, the most striking change is ARCAP's new user-friendly style. The revisions make wholesale changes to the way each rule is drafted. Keeping pace with the recent revisions to the Federal Rules, ARCAP's revisions aim for clarity and easy navigation. Lawyers who practice in both state and federal courts will appreciate that many rules (e.g., ARCAP 3, 26, and 27) follow the format and text of the comparable Federal Rules of Appellate Procedure.

With these changes, we no longer have the long, unbroken paragraphs packed with multiple requirements. Instead, we now have numbered subparagraphs with descriptive headings and subheadings. This move from long paragraphs to shorter, numbered subparagraphs makes it much easier to find the various requirements for filing briefs.

For example, under the old rules, the word limits for briefs to the Court of

Appeals were buried in the middle of a multi-sentence paragraph in Rule 14(b), including different rules for monospaced and

proportionately spaced typeface. The new rule has separate subsections that state the word limits directly and with no caveats: "Opening Briefs and Answering Briefs must not exceed 14,000 words." Separate subsections clearly state the limits for reply briefs and amicus briefs.

Beyond an improved layout, the amended ARCAP also attempts to eliminate unnecessary jargon and legalese in favor of plain English. Like the Federal Rules, ARCAP now follows the style conventions recommended in Bryan Garner's Guidelines for Drafting and Editing Court Rules (1996). Consequently, throughout the rules, readers will notice that the biblical (and sometimes ambiguous) "shall" is gone. Lawyers who do not regularly handle appeals also will appreciate other clarifying changes, such as the rewrite of Rule 7, which deals with the use of supersedeas bonds to stay enforcement of a judgment. Aside from editing out words like "forthwith" and "thereto," the new rule now tells the reader what a "supersedeas bond" is, spells out when a stay is effective, and explains in clearer language the procedure for determining the amount of the bond in the superior court.

A side-by-side comparison of old and new Rule 31 shows how much clearer the new rules are:

OLD RULE 31:

Notice of Settlement

It shall be the duty of counsel or any party if unrepresented by counsel to give the Clerk of the appellate court prompt notice of the settlement of any case or matter filed in the Court. In the event of any unreasonable delay in the giving of such notice, the Court may impose sanctions against counsel or the parties to insure future compliance with this rule.

NEW RULE 31:

Notice of Settlement

The attorney for a party and any self-represented party must give the appellate clerk prompt notice of the settlement of any pending appeal or other matter. An appellate court may impose sanctions against an attorney or a party for any unreasonable delay in giving such notice to the appellate clerk.

Rule Changes To Know

Beyond the style and organizational improvements, the Supreme Court adopted several substantive rule changes as well. These changes also improve ARCAP and bring the practice of filing and serving briefs into the modern age.

For starters, the new rules recognize the reality of the digital age. Most briefs must be filed electronically—and in many cases must be served electronically as well.

Although we had rules governing these topics in various administrative orders, ARCAP 4, 4.1, and 5 now detail these rules for the appellate courts. The new rules call for textsearchable documents in native digital format when possible, rather than scanned copies (ARCAP 4.2(c)). They also encourage parties to embed electronic navigation tools to help the judges, including bookmarking and hyperlinking the brief and record (ARCAP 4.2(d)). Because most judges now read briefs on screens, appellate

lawyers should take advantage of these tools to make their briefs user-friendly for screen reading.

Citations to cases and to the record will look different as well. After nearly a decade of debate,¹ briefs in certain circumstances may finally include citations to memorandum decisions and unpublished decisions from other jurisdictions (ARCAP 28(f), ARIZ.R.S.CT. 111(c)). Parallel citations to the Pacific Reporter are no longer required for Arizona cases, but citations to paragraph numbers of decisions should be included (ARCAP 13(f)). Parties in

Division One may include an appendix containing portions of the record; the appendix should have a table of contents and be sequentially numbered to match the PDF electronic numbering and have internal bookmarking (ARCAP 13.1).

All of this should make briefs and appendices easier to read and easier to use. It also means, however, that lawyers need to plan ahead, because these requirements add steps to the process of finalizing a brief.

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Deadlines also have changed substantially. The time from filing a notice of appeal to the opening brief deadline increased from 80 days to about 100 days, and the procedures for calculating the deadline have changed (*see* ARCAP 11.1(b), 12, 15(a)(1)). Amicus briefs in the Court of Appeals finally have a specific deadline: 21 days after a reply brief (ARCAP 16(c)). As in federal court, a Rule 60 motion now tolls the deadline for filing a notice of appeal if filed within 15 days of the judgment (ARCAP 9(e)(1) (E)). And reflecting current practice, a

request for attorneys' fees must be made in an opening or answering brief rather than in a separate motion (ARCAP 21(a)(1)).

Finally, the rules contain some changes concerning bonds. Notably, cost bonds have been eliminated. By rule, a motion for a supersedeas bond in the superior court now automatically stays enforcement of the judgment (ARCAP 7(a)(2)).

There are many other substantive changes as well. Although there is no sub-

stitute for reviewing the new rules, the list (see p. 54) highlights what you need to know.

Conclusion

Although lawyers often complain about rule changes—who wants to learn new rules after becoming an expert with the old rules?—the new ARCAP rules bring welcome changes. They also provide a precursor of what we can expect to see with our other procedural rules. As always, new rule petitions may be found in the Arizona Court Rules Forum where anyone

may propose a rule change or comment on pending rule proposals. The forum is accessible through the Arizona Supreme Court's website at www.azcourts.gov/rules/Home.aspx.

—see rule highlights sidebar on next page.

endnote

1. Compare Thomas L. Hudson, Proposed:
Make Memorandum Decisions Available
Online and Allow Them to Be Cited as
Persuasive Authority, 14 ARIZ. ATT'Y 16
(June 2006), with Hon. Donn Kessler,
Citation and Access Are a Dangerous
Precedent, 14 ARIZ. ATT'Y 15 (June 2006).



Highlights of Changes to Arizona Rules of Civil Appellate Procedure

- Definition of entry of judgment (Rule 2). Adds some clarifying definitions to Rule 2, including that the "entry" of a "judgment" occurs "when it is filed by the superior court clerk," rather than when the judge signs the judgment or order. This clarifies certain deadlines that run from the date of entry of judgment (e.g., the notice of appeal filing deadline under Rule 9(a)).
- Filing and service (Rule 4). Updates filing and service rules with an emphasis on electronic filing and service. In particular, it requires parties to file documents with the court electronically in most cases. It also incorporates the service rules from the Arizona Rules of Civil Procedure. Any electronic document filed with the court that contains hyperlinks or bookmarks must be served on other parties in the same format.
- Electronic filing (Rule 4.2).
 Contains requirements and suggestions about the format of electronically filed documents. In particular, it requires most electronic documents to be text-searchable. It also encourages bookmarking briefs (to easily navigate within a document) and hyperlinking briefs (to link to cases and other parts of the document). Filing native electronic documents with these modern tools helps the judges.
- Supersedeas bond (Rule 7). Updates procedures for staying execution of judgment. Notably, when a party files a motion in the superior court for a supersedeas bond, the updated rule automatically stays enforcement of the judgment until the court has either set the bond amount and deadline for posting the bond or denied the motion.

Parallel citations are no longer required, but case law citations must include a paragraph number if available.

In addition, the rule codifies a recent case holding that when determining the amount of the bond, the appellant must prove net worth by a preponderance of the evidence.

- Time for filing notice of appeal (Rule 9). Now clarifies that a timely motion under Arizona Rule of Civil Procedure 60 tolls the deadline for filing a notice of appeal.
- Cost bond (Rule 10 (old)). The old requirement to post a cost bond has been eliminated. Rule 10 now addresses expedited election matters.
- Record on appeal (Rule 11). Changes the procedures and deadlines for ordering transcripts. Also allows limited submission of video or audio recordings with court permission.
- Notice of briefing deadlines (Rule 12). Changes the procedures for setting initial case deadlines and other preliminary matters. Deadlines are now triggered from when the appellate court

- assigns the case number, which in turn is based on when the superior court transmits the electronic record.
- Brief contents and style (Rule 13). Specifies new requirements for citations to the record and case law. Parallel citations are no longer required, but case law citations must include a paragraph number if available.

The new rule also expressly permits introductions to briefs.

- Appendix to brief (Rule 13.1). This new rule allows for an appendix in the Supreme Court and Division One containing portions of the record cited in a brief. The appendix must have a table of contents, internal bookmarks for navigation, and sequential page numbering that matches the electronic PDF page numbering.
- Briefing deadlines (Rule 15).
 Contains new deadlines for filing briefs.
 Opening briefs are now due 60 days after the clerk issues the notice of deadlines.
 Total time from notice of cross appeal to opening brief deadline increases from about 80 days to about 100 days.
- Amicus briefs (Rule 16). Sets a deadline for filing amicus briefs in the Court of Appeals: 21 days after the deadline for a reply brief.
- Attorneys' fees request (Rule 21). Codifies the current practice of
 - requesting attorneys' fees in an opening or answering brief rather than by separate motion.
 - Citation of unpublished decisions (ARIZ.S.CT.R. 111). Allows citation of unpublished decisions issued after January 1, 2015 for persuasive value. The citation must indicate that the decision is a memorandum disposition and a copy of the decision or a free link must be included. Cases from other jurisdictions may be cited as permitted by those courts.

