January 5, 2024

Task Force on Rules of Procedure for Special Actions
Arizona State Courts Building
1501 West Washington
Phoenix, AZ 85007-3231
vgonzales@courts.az.gov

Re: Additional Comment for the Task Force on Rules of Procedure for Special Actions

Justice King and members of the Task Force,

Thank you once again for your efforts thus far to update the Arizona Rules of Procedure for Special Actions.

I write regarding four aspects of the current draft rules and certain stakeholder comments regarding: 1) statutory special actions; 2) amicus participation; 3) discovery; and 4) use of the Arizona Rules of Civil Procedure in original special actions.

The comment to draft Rule 2 regarding statutory special actions is helpful.

The comment recently added to draft Rule 2 is a welcome addition, as it clarifies that "[s]tatutory special actions … are generally not discretionary"[1] and summarizes the current statutes authorizing such actions. This comment parallels State Bar Committee Note (b) to current Rule 1. Because of the important information it contains for both practitioners and judges, the new comment should be retained.

It also addresses, at least in part, the concern raised by Mr. Joshua Smith in his comment to the Task Force that "[t]he rules … don't clarify whether a court's jurisdiction to hear an original special action is discretionary or mandatory."[2] The answer, of course, in the case of statutory special actions is that jurisdiction is typically mandatory. This is because statutory special actions are, by definition, *the* statutorily prescribed form of action for such claims. This means litigants have no other avenue to bring claims arising under statutes such as Arizona's Public Records Law[3] as they might in the context of a regular special action.

[1] Meeting Packet pp. 27–29.
[2] Meeting Packet p. 87.
[3] A.R.S. § 39-121.02.

Any additional efforts to further clarify the procedural distinctions between statutory special actions and other special actions would be welcome.

The substance of draft Rule 4(c) regarding amicus participation should be preserved.

The Goldwater Institute strongly suggests retaining the current language of draft Rule 4(c)[4] as it pertains to participation of other persons as amicus curiae.

Mr. Klain's memorandum[5] on behalf of the Arizona State Bar Civil Practice and Procedure Committee Subcommittee on Rules of Procedure for Special Actions suggests limiting amicus participation to appellate courts only, effectively banning amicus briefs in special actions brought in Superior Court. This suggestion should be rejected for several reasons.

First, there is no pressing need to ban amicus briefs in Superior Court special actions because they are exceedingly rare anyway.

Second, trial judges have—and should retain—total discretion to decide whether to grant or deny an amicus leave to participate. If amicus participation is unwarranted in a particular matter, judges are free to deny it. Conversely, in rare instances where amicus participation would be helpful, judges should be free to allow it.

Third, amicus briefs can be quite helpful to judges even under normal circumstances, but they may provide even more value in accelerated proceedings where there is not a lot of time for factfinding (indeed, as discussed below, the current draft rules seek to further curtail discovery). Amici, in an appropriate case, could provide valuable information to a trial judge regarding a host of factual and legal issues that might otherwise be impractical for the parties to do on a truncated timeline.

Fourth, if amicus briefs are banned, interested parties who otherwise would have appeared as amici will instead have a greater incentive to file intervention motions, which would complicate and elongate the proceedings, which is the opposite of what the special action rules are designed to do.

Fifth, amicus support may occasionally be warranted in certain original special actions—including statutory special actions—where there is a strong likelihood that the outcome will affect third parties. Public interest cases come to mind, and the Institute can envision circumstances where appearing as an amicus or soliciting amicus support might be helpful in special actions involving public records, elections, or unique constitutional questions. Moreover, the Superior Court might in some instances be the only practical opportunity to do so.

The current rules have granted superior court judges discretion to allow amicus participation for decades. There is no reason to limit their discretion in that area now.

[4] Meeting Packet p. 31.
[5] Meeting Packet p. 61.

Draft Rule 6(f) should not discourage discovery in original special actions.

The first sentence of draft Rule 6(f)[6] states that "[g]enerally, discovery is not permitted in special actions." This sentence should be deleted and the heading shortened to "Discovery."

While discovery would not be warranted in appellate special actions, any concerns in that context should be resolved by draft Rule 5(e), which expressly states that appellate courts "do not conduct trials of special actions." But factual issues frequently arise in original special actions—and particularly in statutory special actions where it is the only method for bringing a claim. Judges should retain the discretion to allow discovery where warranted without being discouraged from doing so.

The old State Bar Committee Note (e) to current Rule 4 contains softer and more appropriate language:

> Discovery in special action proceedings may be necessary in particular circumstances, though it will certainly not be routinely required, and will never be used in an appellate court since no trials will occur there. The Rule gives necessary latitude to allow discovery in those rare instances when it is necessary.

In short, the draft language goes too far in its efforts to curtail discovery.

Relatedly, the Institute has concerns with altering the word "triable" to "material" regarding the issues of fact that can be subject to special orders concerning discovery. While "material" may be more familiar to judges and practitioners, it risks importing summary judgment caselaw that may not be appropriate for special actions. Conversely, this change risks undermining caselaw that has discussed "triable issue[s] of fact" in the special action context. *See, e.g., Cranmer v. State*, 204 Ariz. 299, 302 –03 ¶ 12 (App. 2003) (discussing Rule 4(f) and clarifying that "a special action proceeding is not a trial de novo," at least for non-statutory special actions); *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 347, 350 ¶¶ 8, 27 & n.4 (App. 2001) (characterizing "the impact of disclosure" as a "disputed fact" in a public records statutory special action where expert witnesses were deposed); *King v. Neely*, 143 Ariz. 329, 330 (App. 1984) (citing predecessor to Rule 4(f) and finding that it did not allow a deposition under the circumstances).

To address these concerns, we suggest that Rule 6(f) read as follows: **"If a triable issue of fact is raised in an original special action brought in the Superior Court, the court may issue special orders concerning discovery."**

We also suggest that the current State Bar Committee Note or substantially similar language be retained as a comment to the rule.

[6] Meeting Packet p. 34.

The Rules of Civil Procedure should apply in original special actions brought in the Superior Court where they do not conflict with the special action rules.

As mentioned in my September 8, 2023 comment to the Task Force, the Institute has experienced difficulty and confusion during litigation regarding the applicability of the Arizona Rules of Civil Procedure in original special actions—particularly in statutory special actions brought in Superior Court.

These questions include the timeline for the filing of an answer or another appropriate response, what other responsive pleadings might be filed in lieu of an answer, and the availability of preliminary relief in special actions, none of which are addressed in the current rules.

Draft Rule 6(a)(2)[7] solves the first problem by importing the timeline of Rule 12(a) of the Rules of Civil Procedure for the filing of an answer. The draft rule also flags for discussion the second problem regarding "another appropriate response."[8] No draft rule directly discusses the availability of preliminary relief aside from stays in draft Rule 7.[9]

Rather than continue to import the Rules of Civil Procedure piecemeal into the special action rules, we reiterate our proposal that the Task Force add an express provision in the rules stating that the Arizona Rules of Civil Procedure apply where the special action rules are silent and a judge has not ordered otherwise.

Specifically, we suggest adding a rule to Part II that parallels draft Rule 9 in Part III regarding the use of ARCAP in appellate special actions. We propose that it read substantially as follows: **"To the extent that they are consistent with these rules, the Rules of Civil Procedure apply to original special actions brought in the Superior Court."**

This rule could be a standalone rule inserted prior to draft Rule 5, or it could be incorporated into either draft Rule 5 or 6. We believe that a blanket reference to the Civil Procedure Rules will fill in these and other potential gaps in the special action rules, which again, are designed to expedite proceedings, not necessarily supplant every procedural rule used in a typical case.

Thank you again for your service on the Task Force and your consideration of these issues. Please feel free to reach out to me at pjackson@goldwaterinstitute.org if I can be of further assistance to the Task Force in any way.

[7] Meeting Packet p. 33.
[8] *Id.*
[9] Meeting Packet pp. 34–35.

Sincerely,

Parker Jackson
Staff Attorney
Scharf-Norton Center for
Constitutional Litigation at the
Goldwater Institute