

Arizona Supreme Court Staff Attorneys' Office
John W. Rogers
Staff Attorney
1501 W. Washington, Suite 445
Phoenix, AZ 85007-3231
SACrtDocs@courts.az.gov
Bar No. 006439

IN THE SUPREME COURT OF ARIZONA

In the Matter of)	
)	Arizona Supreme Court No. R-16-00__
PETITION TO AMEND)	
RULE 5(a) OF THE ARIZONA)	Petition to Amend
RULES OF CIVIL APPELLATE)	Rule 5(a) of the Arizona Rules
PROCEDURE)	of Civil Appellate Procedure
)	—and—
)	Request for Permission to
)	File the Petition Outside the
)	Rule 28 Timeline
_____)	

Pursuant to Rule 28(B) of the Rules of the Supreme Court, the Supreme Court Staff Attorneys' Office ("Petitioner") petitions this Court to amend Rule 5(a) of the Arizona Rules of Civil Appellate Procedure ("ARCAP"). Petitioner specifically proposes the elimination of the provision in Rule 5(a) allowing a party to add five calendar days when calculating the deadline for responding to an appellate filing that is served electronically. The text of the proposed amendment appears in the

attachment to this petition. Petitioner also requests permission to file this petition outside the Rule 28 timelines to allow the Court to consider this proposal at its August 2016 Rules Agenda, and to open the proposed amendment for public comment until June 15, 2016.

Discussion

Currently, ARCAP 5(a) incorporates Rule 6(e) of the Arizona Rules of Civil Procedure, which permits a party to add five calendar days when calculating the deadline for filing a response to a brief, motion, or other filing that is served electronically. The Supreme Court and Division One of the Court of Appeals follow this rule, permitting parties to add five days in calculating their response times to electronically served appellate filings. Division Two does not follow this rule, however, and instead has “suspended” its application if a brief is served through the court’s electronic “e-filer” system.¹

This difference in practice has created an inconsistency in ARCAP’s application, making the rule’s applicability depend on the happenstance of geography and potentially misleading practitioners who are not aware of Division

¹ Division Two’s website states the following, under the drop-down for “E-Filing”: “Briefs electronically filed and electronically served by the e-Filer system will not have five days added to responsive brief due dates. Although Ariz. R. Civ. P. 6(e) allows for the addition of five days for ‘mailing,’ the Court has exercised its discretion under ARCAP 3(a) to omit the additional days after briefs are electronically served.” <https://www.appeals2.az.gov/e-filer/welcome.cfm>.

Two's policy. Possible solutions might include requiring Division Two to follow the rule or amending Rule 5(a) to exempt Division Two, which would at least alert practitioners about Division Two's "suspension" of the rule. It might be time, however, to reconsider whether five calendar days should be added to the response time if responding to an electronically served appellate filing.

Rule 6(e) of the Arizona Rules of Civil Procedure, which ARCAP 5(a) incorporates by reference, was amended in 2006 to extend Arizona's "five-day mailing rule" to electronically served documents. The amendment supplanted former Supreme Court Rule 124(g), which was adopted in 2000 and provided generally that electronic service "shall be considered service by mail for the purpose of computing time under any rule of procedure."

When Rule 124(g) was under consideration, one justification for its adoption was to conform Arizona's "five-day mailing rule" to the federal "three-day mailing rule," which was about to be amended to extend that rule to electronically served documents. Fed. R. Civ. P. 6(d) advisory committee's note (2001 amendment). Proponents also argued that it was prudent to treat electronically served filings like filings served by mail because, like mail, electronic transmission was sometimes faulty. *See* Report of the Civil Rules Advisory Committee at 11 (May 1, 2000) ("Electronic transmission is not always instantaneous, and may fail for any of a number of reasons."). Some also argued that extending the rule to electronically

served filings would encourage the use of electronic service, as a responding party would not be “penalized” by losing the additional response time if a filing was served electronically rather than by mail. *See id.* (“Providing added time to respond will not discourage people from asking for consent to electronic transmission”).

But much has changed since 2000, largely eroding the case for applying the “five-day mailing rule” to electronically served documents. Transmission error is now rare, and courts and practitioners no longer find electronic service to be novel or unreliable. Moreover, it is no longer possible to justify continued use of the rule merely to conform Arizona’s rules to the federal rules. The U.S. Supreme Court is currently considering a proposed amendment to each set of the federal procedural rules—including the Federal Rules of Appellate Procedure—providing that the “three-day mailing rule” would no longer apply to electronically served documents. *See generally* Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure at 7 & 21-22 (Sept. 2015) (discussing amendments). Based on the relative lack of opposition to these proposed amendments, the Court is likely to approve them later this spring. If so, they would go into effect next December.

In Petitioner’s opinion, it is time to join the federal rulemakers and no longer use the “five-day mailing rule” in calculating the deadline for responding to an appellate filing that is served electronically. To implement this proposal, Petitioner

proposes inserting the words “except for electronically served documents” in ARCAP 5(a) before its reference to Rule 6(e) so the rule would read: “Rules 6(a) and, except for electronically served documents, 6(e) of the Arizona Rules of Civil Procedure govern the computation of any time period set by these Rules, a court order, or an applicable statute.”

Conclusion

Petitioner requests the Court adopt the amendment to ARCAP 5(a) shown in the attachment to this petition. It also requests that the Court permit the late-filing of this petition, and that it open the proposed amendment for public comment until June 15, 2016.

DATED this __th day of March, 2016.

Arizona Supreme Court Staff Attorneys’ Office

By _____
John W. Rogers

ATTACHMENT*

**ARIZONA RULES OF
CIVIL APPELLATE PROCEDURE**

Rule 5. Computing and Modifying Deadlines

(a) Computing Time. Rules 6(a) and, except for electronically served documents, 6(e) of the Arizona Rules of Civil Procedure govern the computation of any time period set by these Rules, a court order, or an applicable statute.

* * *

* Additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.