

RE: R-16-0034 Rule 5(a), Arizona Rules of Civil Appellate Procedure

Although attempts to align our state procedural rules with the federal rules are generally helpful and beneficial, in this case, there are important reasons for "doing things differently" in Arizona.

In the federal e-filing system, the risk of error and resulting failure of delivery of filed documents is much smaller than in our state system. Each party to a federal case that is eligible for e-filing enters his or her own email address for service of filed documents when the party first appears in the case. This ensures that the address entered is the current and preferred email address for receiving service of documents. Moreover, presumably that party will take care to ensure that the email address does not contain typographical errors. Each party can even enter more than one person or email address for service, thus ensuring that everyone who needs a copy of filed documents (e.g., co-counsel, associates, secretaries, or paralegals) will receive one.

Then, when a document is filed, each party is automatically served at the email address(es) that *he or she designated* for service. Thus, there is absolutely no risk that the filing/serving party will type or enter the email address incorrectly. If a party has entered his or her own email address(es) correctly, then he or she will instantly receive notice of all filings. If the party has entered his or her own email address incorrectly, then any service errors are correctly attributed to that party and not to the filing/serving party. Under these circumstances, email service on all parties to the case is in fact instantaneous and the risk of misdelivery or failure of service is practically nil. The federal courts have thus reasonably concluded that additional days for delivery time are not needed, and it is reasonable to change the Federal Rules to eliminate the additional days for service.

In Arizona, by contrast, the five days for service remains necessary given the limitations of the current e-filing system, TurboCourt, that is used by Division One and the Supreme Court. Because the TurboCourt system requires the filing party to enter opposing counsel's current email address correctly (i.e., without typographical error) and in the correct place (i.e., on the service list page, not in the "courtesy copy" page) each time a document is filed, the risk of human error remains too high to allow us to rely on the "instant service" that email otherwise promises. There are several common situations that can and do lead to a failure or delay in service.

1. Typographical errors.

With U.S. Mail service, a typographical error in an address such as transposing letters or mistyping, adding, or deleting a letter might delay delivery by a day or two (if the zip code is mistyped, for example), but likely will not prevent delivery altogether and may not even result in a delay (if a letter is left out of a person's name, for example). But in TurboCourt, if a party inadvertently types opposing counsel's email address incorrectly, no matter how minor the error is, the email simply will not be delivered to that person. TurboCourt does not notify you if an email was not delivered. Thus, the filing party may be unaware that the item was not delivered, and even an extremely diligent opposing party who checks the Court of Appeals and Supreme Court dockets

every day may not learn that a document has been filed in her case until days later when the Court docketed the item--and then may not be able to obtain a copy of the document for another day or more.

2. Using an old/expired email address.

If a party uses an old email address that opposing counsel no longer uses (perhaps one that he or she found on an old prior pleading or located online through a potentially unreliable source), the document may be delivered to the old address but not actually received because the account is no longer monitored daily, or it may be rejected by the email provider if the account was closed. In this case, neither party will be aware that this occurred and, again, even a very diligent practitioner may not learn that a document has been filed until several days later and may not be able to obtain a copy of it until after that time.

3. Entering the email address in the wrong place in TurboCourt.

If a party types opposing counsel's email address in the "courtesy notification" spot in TurboCourt instead of in the correct "parties to serve" spot, then opposing counsel will receive a notice that a document has been filed in a given case but will not receive a link to the document itself, and it may take time--hours or days, depending on the circumstances--to obtain a copy of the document that was filed. The delay is likely to be longest in cases such as juvenile cases, because it is not possible to view or obtain the document from TurboCourt and the served party will have to contact opposing counsel or the court to obtain a copy, which is typically not possible after hours or on a weekend or if opposing counsel is out sick or on vacation. Thus, even if the "mail time" is going to be eliminated for other types of cases, it should be retained for juvenile cases and any other cases for which documents cannot be viewed and downloaded from TurboCourt.

4. Mailing instead of emailing.

Some practitioners, particularly those who do not routinely handle appeals, either have not learned or have disregarded the rule that they are both allowed and required to provide and accept service by email instead of by U.S. Mail when filing through TurboCourt. But TurboCourt does not automatically serve all parties associated with the case; it requires the filing party to enter the email addresses for service. If the filing party does not enter the email address but instead mails the document, then of course the additional time for mailing is still needed.

5. Centralized processing of email for delivery to attorneys at large organizations.

For attorneys working in agencies or other large organizations, often the preferred email address for service is a central email address that is checked daily to ensure that nothing is missed and that items are entered into a computer system. Alternatively, the filing party may not know what address to use to send the document to the specific attorney but may find or know the organization's general email address. In these situations, it may take two to three days for documents emailed to this central address to reach the attorney, just as it would take time if the documents were sent via regular U.S. Mail.

I have personally experienced each of these reasons for delay within the past few years.

Under these circumstances, the "extra time" for delivery remains necessary to ensure that parties have the full response time to evaluate and respond to appellate filings. The rule allowing five extra days for "mailing" (i.e., delivery) of documents should remain in place.

Thank you for your time in considering my comments.

(Please note that the opinions expressed herein are my own and may not represent the formal opinion(s) of my employer.)