

## BOOK REVIEW

ARIZONA APPELLATE HANDBOOK. By the State Bar of Arizona, 1978. \$35.00.

*The Arizona Appellate Handbook* could be subtitled "Everything You Ought to Know About Appeals But Never Thought to Ask." It is an extraordinarily thorough compilation of materials relating to all aspects of the Arizona appellate process.

The heart of the book for day to day reference purposes is found in the chapters on each type of appeal: civil, criminal, juvenile and workmen's compensation. Each of these chapters contains a well organized text followed by forms for each step of the appeal and an extremely useful outline of procedural steps and time requirements; no one will get lost. There are even flow charts for those who prefer conceptualizations in that form. There are also chapters on related subjects including the operation of our appellate courts, techniques of advocacy, and tips on how practitioners within their offices can manage their own appellate dockets.

The undertaking may have begun with the notion of producing a simple checklist of procedural requirements, but it has become a full sized looseleaf volume of several hundred pages. More than a handbook, this volume borders on being a treatise, yet it is organized so that those simply wishing to find forms or survey procedural steps can do so without having to pick through lengthy textual discussions.

One measure of any comprehensive reference work is whether the information is findable. In this respect, the book succeeds admirably. The triple-spaced index is excellent, and the table of contents alone could well serve as a thorough introduction to the appellate field. I personally have tested the manual on several problems involving both routine and unusual procedural questions. I not only found needed information, but found it quickly. Informal conversations with others confirm my experience. In short, this is a job well done.

The wonder is that it was accomplished by a committee. Urged on by co-chairmen, Honorable L. Ray Haire of the Arizona Court of Appeals and Paul G. Ulrich, a practitioner with a particular interest in

the appellate field, the committee included persons with expertise in all of the legal subjects covered, as well as in court administration. The project was undertaken by the Arizona State Bar under the sponsorship of an American Bar Association program to encourage the production of handbooks in each jurisdiction. Arizona stands in the forefront of this venture, since to date only a handful of jurisdictions have produced handbooks and Arizona's is by far the most ambitious.

The most important single contribution of the manual is in the area of civil appeals. This is because the handbook's publication in early 1978 coincided with the implementation of the Arizona Rules of Civil Appellate Procedure [ARCAP] which abrogated the prior Arizona Rules of Civil Procedure relating to appeals. The rules are new, we are not used to them, and they make some important changes.

The handbook provides instant annotations for the new civil rules. It endeavors to explain what is now required and to interpret the new provisions. In the absence of actual experience and concrete judicial rulings on problems arising under the new rules, the handbook is a real boon for both the novice and the experienced lawyer, as well as to court personnel.

However, the handbook's authors are not clairvoyant, and their guidance should not be taken as gospel. As they themselves point out in the beginning of the chapter on civil appeals, the discussion has had to depend to some extent on decisions made under rules now abrogated, and must therefore be viewed with caution.

One significant change under the new rules is that the time for appeal is reduced from sixty days after the entry of an appealable judgment or order to thirty days. Types of appealable judgments and orders, governed by section 12-2101 of the Arizona Revised Statutes Annotated, are not affected, nor are the provisions of Rule 58(a) requiring all judgments to be in writing and signed by a judge.<sup>1</sup> A problem which arose under the old rules was that an appeal from a minute order prior to the entry of a signed judgment was invalid, and if the new notice of appeal was not filed in a timely fashion after the entry of signed judgment, appeal rights were lost.<sup>2</sup> This was known as the premature appeal. The handbook, pointing out that under ARCAP 9(a) the appeal must be filed "not later than" thirty days from entry of judgment, concludes in section 3.3.1.1 that a notice of appeal from a minute order and prior to the entry of judgment "is now timely and prevents a judgement from becoming conclusive."<sup>3</sup> If the handbook proves cor-

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1. ARIZ. R. CIV. P. 58(a).

2. *Thomas v. Western Savings and Loan Ass'n*, 6 Ariz. App. 511, 513, 433 P.2d 1003, 1005 (1967).

3. ARIZONA APPELLATE HANDBOOK § 3.3.1.1 at 3-6 (1978) [hereinafter *HANDBOOK*].

rect, the rule change may prevent some serious injustices in the future.<sup>4</sup>

Cross-appeals are required by the new rules to be filed within twenty days of the filing of the notice of appeal.<sup>5</sup> The authors' perceptiveness is illustrated in section 3.3.1.1 where they note a problem which might arise when the notice of appeal is filed less than ten days after entry of judgment. The rule on its face would appear to require the cross-appellee to file within twenty days of that date, and would thus give the cross-appellant in such situations fewer than thirty days to file his notice of cross-appeal, a time frame smaller than the basic appeal period.

Another important departure from the old rules is that the timely filing of a cost bond is no longer jurisdictional.<sup>6</sup> The court is thus not automatically required to dismiss an appeal on the ground of untimely filing. However, the rule goes on to state that failures in this regard are subject to sanctions, including dismissal of the appeal.<sup>7</sup> The standards to be used in applying sanctions, and frequency with which they will be invoked have yet to be determined; the handbook understandably could give us no guidance in this regard.

One area in which the law is bound to expand is the matter of attorney's fees. ARCAP 25 expressly permits the imposition of attorney's fees as a sanction for appeals for motions which are frivolous or filed solely for purposes of delay. ARCAP 21(c) also contains a new provision that when attorney's fees are recoverable by statute or contract, the claim for fees may be included in the statement of costs in the appellate court. We have as yet little experience on the scope of that provision, and how it should be implemented. The handbook wisely advises that while the appellate court may choose to remand the matter for factual determinations by the trial court as to the reasonableness of the fees claimed, counsel should always support its claim in the appellate court with affidavits. However, more emphasis on these changes, particularly as they relate to the statutory provisions for attorney's fees, might have been useful.

Another major departure of the new rules is the abandonment of the abstract of record. Under the old rules a separate volume, entitled the abstract of record, was prepared by the appellant containing the pleadings, judgment appealed from, all minute entries, and other matters which the appellant wished to have before the judges. The new rules do away with this and instead provide that the superior court

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4. Division One of the Arizona Court of Appeals has, by unpublished interlocutory order, denied motions to dismiss raising the issue of prematurity under ARCAP.

5. ARIZ. R. CIV. APP. P. 9(a).

6. *Id.* at 8(a).

7. *Id.*

clerk shall forward the record to the appellate court and prepare indexes. The appellant, while responsible for seeing that a transcript is prepared if desired, no longer has to make copies of portions of the record in the form of an abstract. Although the abstract itself was often cumbersome and expensive, it did serve the purpose of providing each judge on the court with copies of important portions of the record. Under the new rules, since there is only one copy of the record filed with the appellate court, the only way to insure that each judge has a copy of matters which the parties deem particularly relevant is through the use of appendices to the briefs. The handbook gives valuable suggestions as to the key matters which should be included in appendices.

One sometimes bewildering pocket of the law is the problem of when to appeal in default situations. The handbook, in discussing types of appealable judgments and orders, gives as an example of an appealable post judgment order one which sets aside or refuses to set aside a default judgment. The handbook also points out that orders setting aside or refusing to set aside entries of default and default judgments themselves are not appealable. The handbook does not explain the underlying rationale and a separate discussion on default orders and judgments might allay some confusion.

It is regrettable that the committee, perhaps because of space and cost pressures, did not include copies of the actual rules themselves in the handbook. The experienced lawyer, dealing with a criminal or workman's compensation appeal, might not find the inconvenience oppressive because of longstanding familiarity with the rules. However, almost everyone dealing with ARCAP will be inconvenienced by having to refer back and forth between different sources.

Any reference work of this sort will become obsolete unless it is updated from time to time, and obsolescence, if not rigor mortis, may set in quickly in the civil area. It is devoutly to be hoped that the committee members will persevere with the diligence shown in compiling the original handbook and provide us with regular supplements.

While the handbook's timing makes its civil chapter invaluable, the book's contribution to a better general understanding of special actions may also prove to be substantial. As the handbook points out, the special action procedures "were promulgated largely in response to dissatisfaction with the cumbersome and sometimes incomprehensible procedures under the former writ practice."<sup>8</sup> Nevertheless, despite the simplified procedures, special actions remain battlefields on which many opportunities are lost and from which many lawyers have retreated in some disarray. The handbook provides needed procedural

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8. HANDBOOK, *supra* note 3, § 7.1.2 at 7-1.

explanation and valuable forms, but wisely shies away from the technicalities which surrounded previous writ practice. It places a healthy emphasis on the importance of persuasive advocacy to convince the court that the extraordinary relief requested is, or in the case of the respondent, is not, necessary in the particular case.

The book's principal failing lies in the area of juvenile appeals. This is not the fault of its authors. The differences between the Rules of Procedure for the Juvenile Court [RPJC] with respect to appeals and the provisions of the rules applicable to general civil appeals were long a source of confusion if not consternation.<sup>9</sup> The handbook's chapter on juvenile appeals was written on the assumption that the juvenile rules applied to all appeals from juvenile matters. However, just before the book went to press, the Arizona Supreme Court held that appeals from juvenile adoption proceedings are governed by AR-CAP.<sup>10</sup> The handbook, at the conclusion of chapter eight, contains an addendum citing to the case and concluding that its reasoning is probably applicable to appeals from termination of parental rights. Thus, much of the utility of that chapter is gone, and those who rely on only limited sections of the chapter without reading through to the addendum may be affirmatively misled. The need for updating the handbook in the juvenile appeals field is already urgent.

In the areas of criminal appeals and workmen's compensation review, the handbook principally sets forth materials which, though available from other sources such as statutes, rules and annotations, are nowhere presented in such highly organized and accessible fashion. In the criminal chapter, chapter four, the explanation of post-conviction relief procedures under Rule 32 of the Arizona Rules of Criminal Procedure may prove illuminating to many, and the same may be said of the related discussion on habeas corpus. In the area of workmen's compensation review, the handbook provides a much needed compendium of the various statutes, rules, and decisions governing the nature and scope of appellate review.

Apart from the materials relating to specific types of appeals, the handbook has a number of more general chapters presenting information which is not available elsewhere. No judge can resist the impulse to recommend that all lawyers read the chapter on appellate advocacy. It contains valuable advice on the art of persuasion within the context of Arizona procedures. Many points are readily transferable to the trial court motions practice as well.

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9. See *In re Appeal in Maricopa County Juvenile Action No. JS-834*, 26 Ariz. App. 485, 549 P.2d 580 (1976).

10. *Clark v. Curran*, 118 Ariz. 111, 114, 575 P.2d 310, 313 (1978).

The first chapter's title, "The Arizona Appellate Courts," should not deceive the reader into thinking that it is merely a dry restatement of statutory and constitutional provisions on the composition of the appellate system. In fact, it contains the first comprehensive explanation of how our appellate courts operate, including the process by which cases actually are decided, and the functions performed by extrajudicial court personnel such as staff attorneys. The handbook reveals that staff attorneys do a heavy amount of work on procedural matters, including motions. In this area, they refer frequently to the handbook.

No matter how potentially valuable a reference book may be, it serves no purpose if it simply accumulates dust on the shelf. A major test for judging the merits of a book of this sort is whether or not it is being used. To get some measure of this, with no pretensions of scientific accuracy, I did a mini-survey of lawyers in Phoenix actively engaged in appellate work. Not surprisingly, in view of the recent promulgation of ARCAP, the results suggested that lawyers with civil appeals are using the handbook regularly. The results also suggest, on the other hand, that lawyers with extensive criminal or workmen's compensation practices use the handbook less frequently. Unfortunately, many lawyers remain wholly unaware of its existence.

The book's greatest potential can be achieved only if it is widely used, particularly by the many lawyers who do not regularly appear in the appellate courts, and by lawyers who, even though expert in one field, must venture outside that field to handle a different type of appeal. Justice is best served when appeals are well presented. The truth is that the failure to present appeals in the proper fashion can result in barring many issues, and many entire appeals, from reaching the court at all. A few years ago the then chief staff attorney for Division One of the Arizona Court of Appeals studied civil appeals filed in over one year and came forth with the dismal statistic that in approximately seventeen percent the court lacked jurisdiction.<sup>11</sup> Many litigants simply lost access to the appellate courts because of procedural defects.

In providing a ready, comprehensive, and clear manual, the State Bar has taken a major step toward improving the quality of appellate practice. This book simply and clearly explains how things ought to be done. In summing up the handbook's achievement in this regard, I adopt as my own the informal comment of a knowledgeable observer of the Arizona appellate scene, Justice Frank Gordon of the Arizona

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11. Sticht, *Civil Appeals in Arizona*, 1975 ARIZ. ST. L.J. 275.

Supreme Court: "With this book, only an orangutan could mess up an appeal." Let us hope that it is widely used and regularly updated.

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