

# THE DISPOSITION OF CIVIL APPEALS IN THE SUPREME COURT

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The purpose of this article is to describe, essentially from the point of view of the Supreme Court, the procedures for the disposition of civil appeals in Arizona.<sup>1</sup> The topics discussed are dismissal of an appeal, extraordinary writs, procedures on the disposition of appeals, decision of the court, the motion for rehearing, costs on appeal, and the mandate.

## I. DISMISSAL OF AN APPEAL

### *Dismissal on Motion of Court*

Although Rule 7 of the Rules of the Supreme Court<sup>2</sup> provides that the Supreme Court may dismiss an appeal on its own motion, counsel should not rely on this inherent power of the Court. The very nature of appellate procedure makes it very difficult for the Court on its own to discover that clear and uncontrovertible grounds exist for

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<sup>1</sup> This article was originally delivered by the author as the sixth lecture on the program of the Arizona Law Institute on Civil Appellate Practice in December, 1962. The five preceding lectures, delivered by members of the State Bar of Arizona, dealt with responsibilities prior to appeal, perfecting the appeal and record on appeal, appellate brief, extraordinary writs, and oral arguments.

<sup>2</sup> ARIZ. SUP. CT. R. 7. Dismissal of Appeals:

7(a) Failure by appellant or appellee to file brief within time allowed; dismissal; submission for decision.

1. If the abstract of record, transcript of the evidence or appellant's opening brief is not filed within the time prescribed by these Rules or within such additional time as allowed by the court, whether pursuant to stipulation of counsel or otherwise, the appeal may be dismissed on motion upon notice given or on the court's own motion without prior notice to appellant. If the abstract, transcript of evidence or opening brief, though not filed within the time prescribed, is on file at the time such notice is given, that fact shall be sufficient ground to deny the motion.

2. If the appellee does not file an answering brief within the time prescribed by these Rules or within such additional time as allowed by the court, whether pursuant to stipulation of counsel or otherwise, the appeal may be submitted for decision on the motion of appellant upon notice to appellee, or on the court's own motion.

3. No stipulation of counsel shall be effective unless approved by an order of the court.

7(b) Attempted appeal after time allowed by law; dismissal. If an appeal is attempted to be taken after the time limited by law and papers are filed in the trial court pursuant to such attempt, such purported appeal may be dismissed on motion of the appellee supported by certificate or affidavits, or both, as provided in subdivision (c) of this Rule.

7(c) Motion to dismiss for failure to file record within prescribed time; certificate of clerk of superior court. On motion to dismiss an appeal for failure to file the record within the prescribed time there shall be presented

dismissing an appeal. The Court is responsible, however, for insuring that unreasonable delays do not occur in the prosecution of appeals. Recently, the Court gave notice to counsel in cases where the abstract of record or a brief had not been filed for more than one year after it was due, that the appeal would be dismissed or would be submitted for decision on the brief of appellant, unless the abstract or brief were filed within 20 days. Attention should be given to the statement of the Court that "where debatable issues were raised by the appeal, we will assume failure to file an answering brief is a confession on the part of the appellees of reversible error."<sup>3</sup>

The Court recognizes that there are existing long delays in the disposition of appeals because of the very large number of appeals. Nonetheless, it is unfairly prejudicial to parties to permit the appeal time to be unreasonably extended because of the failure of counsel to meet the time periods prescribed in the Rules. It is for that reason also that the Court does not permit an excessive number of stipulations extending time periods unreasonably.

#### *Formalities of Motions to Dismiss*

If counsel believes that grounds exist for dismissing an appeal, he should assume the affirmative burden of demonstrating that to the Court by motion. A motion to dismiss must be presented in writing.

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to this court the certificate of the clerk of the superior court, under seal certifying:

1. The amount or character of the judgment or order appealed from.
2. The date of its rendition.
3. The fact and date of filing the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which such service appears.
4. The fact and date of filing the bond or undertaking the costs on appeal, or affidavit in lieu thereof.
5. The fact that the bond, undertaking or affidavit is in proper form.
6. The fact and date of completion of the record, if one was completed.
7. The names of the attorneys, if any, for the respective parties.
8. The fact that the appellant has not requested the clerk to transmit the record to this court, or if he has made such request, that he had not paid the fees therefor if they have been demanded.

7(d) Motion to dismiss on grounds other than failure to file record within prescribed time; moving papers. On motion to dismiss the appeal on any ground other than failure to file the record within the prescribed time, the moving papers shall consist of a certificate of the clerk of the superior court as to the matters specified in subdivision (c) of this Rule, or both such certificate and affidavits.

7(e) Presentation of motion to dismiss; service. Motions to dismiss an appeal shall be presented under separate cover, and a copy thereof, together with copies of the moving papers, shall be served with the notice of the motion.

<sup>3</sup>Nelson v. Nelson, 91 Ariz. 215, 217, 370 P.2d 952 (1962) (and other cases cited therein).

Rules 4<sup>4</sup> and 7<sup>5</sup> of the Rules of the Supreme Court prescribe in detail the form of the motion, the number of copies, the notation of service, the time for the response, as well as the other formal requirements. These requirements should be followed explicitly. They insure that the parties have a full opportunity to present to the Court, and that the Court has before it, all applicable facts and arguments. A motion which has such final and serious consequences as one to dismiss an appeal should not be presented or decided perfunctorily.

### *Affidavits, Certificates and Memoranda*

There is no need to comment further on the formal requirements except to highlight the affidavits, clerk's certificate and memoranda of law. In perhaps most of the cases in which a motion to dismiss is filed, the relevant facts already appear from the record on file with the Supreme Court. Nonetheless, situations do occur where the record is deficient and additional facts must be presented. Rule 4(c)<sup>6</sup> provides that motions dependent on facts not apparent in the record and of which the Supreme Court cannot take judicial notice shall be supported by affidavit or other satisfactory evidence.

It may not be prejudicial, except to burden the record, to present argument in an affidavit. It is, however, improper and of no effect to rely on matters of facts asserted only in the memoranda. There are instances on record in the Supreme Court where counsel has included

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#### <sup>4</sup> Motions:

4(a) Form; service; filing. Motions relating to informalities in the manner of bringing an action into this court and motions to dismiss for want of jurisdiction of this court or for defects which defeat the jurisdiction in the particular appeal and which cannot be waived, shall be made in writing. The original and five copies thereof shall be filed in this court and at least one copy shall be served on opposing counsel. An acknowledgment or affidavit of service on opposing counsel shall be endorsed on or annexed to the original motion which shall then be filed with the clerk.

4(b) Objection or reply. Opposing counsel shall have five days after such service upon him to file an objection or reply to the motion. The original and five copies of the objection or reply shall be filed in this court and one copy thereof served upon the appellant or his attorney, and proof of such service made as provided in subdivision (a) of this Rule.

4(c) Motions requiring supporting affidavits or other evidence; objection or reply. 1. Motions dependent on facts not apparent in the record, and of which this court cannot take judicial notice, shall be supported by affidavit or other satisfactory evidence, a copy of which shall be served on the opposing counsel at or before the time the motion is filed. Five copies, when possible, of such affidavit or other satisfactory evidence shall be filed in this court with the motion.

2. Objections or reply made to any such motion shall be in writing, and a copy of any affidavit or other evidence filed therewith, and the original objection or reply and five copies thereof shall be filed in this court.

4(d) Oral argument on motions. Oral arguments will not be heard on any motion except as the court directs.

<sup>5</sup> See note 2 *supra*.

<sup>6</sup> See note 4 *supra*.

in a memorandum statements of fact which are not otherwise supported. The Court should not and does not accept such factual assertions any more than it accepts unsupported factual statements made in oral argument. Where additional facts are required they should be contained in an affidavit sworn to by the person having knowledge of them.

In one particular, even an affidavit is not sufficient. Rule 7(c)<sup>7</sup> provides in certain circumstances for a certificate of the clerk of the superior court, under seal, certifying the relevant facts and dates relating to the judgment, the notice of appeal, the bond, and other matters. This Rule insures that where a motion to dismiss is based on a failure to comply with certain requirements in the superior court, the facts will be certified by the clerk of that court, rather than by counsel or a party.

A memorandum of law should be considered an indispensable requirement on all motions to dismiss. It should specify the nature and grounds of the motion, summarize the relevant facts, with supporting references to the record and affidavits, and outline the legal argument, with citations to section or page of the authorities. If the memoranda are properly prepared, the Court should be able from them alone to determine whether the motion should be granted or denied. The Court will check the record or affidavits to see if they support the assertions made in the memorandum, and will read the authorities to see if they support the legal propositions urged, but it is an imposition on the Court as well as an admission of weakness of position not to submit a full and concise memorandum. If the motion is worth urging or opposing at all, it is worth doing so well.

### *Response to Motion*

Everything that has been written with respect to the motion to dismiss applies with equal force to the response to the motion. The burden on the respondent is even greater. If the motion to dismiss is denied, the moving party at least has the opportunity to prevail on the merits. If it is granted, the appeal is dismissed and the matter is forever closed.

One point may be added on the formalities of the response to a motion. Opposing counsel is allowed 5 days after service of the motion to file an objection or reply. Under Rule 10(a)<sup>8</sup> of the Rules of the

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<sup>7</sup> See note 2 *supra*.

<sup>8</sup> ARIZ. SUP. CT. R. 10(a):

Person to be served; manner of service; return. Service of papers in all instances shall be made upon the attorney of record of a party, if there is an attorney of record, unless the place of business or residence of such attorney is unknown, in which event service may be made upon the party.

Supreme Court, service by mail is complete on the date of deposit in the post office. No additional time is allowed, such as is provided in the Rules of Civil Procedure,<sup>9</sup> where service is made by mail rather than personally.

Nor is there any provision in the Supreme Court Rules for a further reply by the moving party. There are circumstances where a moving party has filed an additional memorandum and the Court has considered it, but such practice is rare, and should be used only when necessary to meet a significant new point raised in the response.

#### *Procedure on Motions*

All motions in which the response has been filed, or in which the time to file the response has expired, during any week, are submitted to the Court on the regular conference calendar on Tuesday of the following week. This means that not fewer than one, and not more than five, full court days will intervene between the time a motion is at issue and the time it is submitted. Additional memoranda, if submitted at all, must be filed within those days.

At the Tuesday conference, each submitted motion is considered by the Court, without oral argument; is decided; a minute order is entered; and notice is sent to all counsel. There is thus no opportunity or need for counsel to appear in person before the Court in connection with the motion. In rare circumstances, upon special request of counsel, permission may be granted for oral argument, but this practice is discouraged.

#### *Grounds of Motion to Dismiss*

In a sense, all motions to dismiss are based on the same general ground: that one or more of the rules or statutes relating to appellate practice and procedure have been violated. This means that if counsel comply with all the requirements such as those that relate to the perfecting of the appeal, the record on appeal, and the briefs, a motion to dismiss will not be successful. A motion to dismiss does not reach the merits of the appeal, although if granted it forecloses a decision on the merits.

Under our law, appeals, where applicable, are of right and not a matter of discretion. Even a frivolous appeal cannot be dismissed on that ground alone. If the rules governing appeals are not complied

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Service may be made by mail when the person making the service and the person upon whom such service is to be made reside in different places between which there is a regular communication by mail, in which event postage shall be prepaid, and the time shall begin to run from the date of deposit in the post office. Proof of such service shall be made by written acknowledgment of the party served or by an affidavit of the person making the service, which shall be filed with the clerk of this court.

<sup>9</sup> ARIZ. R. CIVIL P. 6(c).

with, an appeal characterized as frivolous may be dismissed where in another case such non-compliance may be excused, and a frivolous appeal may subject the losing appellant to special damages.<sup>10</sup> Nonetheless, the point remains that a dismissal rests not on lack of merit but on a violation of a procedural rule. Further, some grounds, if sustained, compel dismissal, while others seek dismissal in the discretion of the Court.

When a motion to dismiss is based on the ground that the Court lacks jurisdiction of the appeal, and that ground is upheld, dismissal of the appeal is mandatory. Thus, if a purported appeal is taken from a judgment of the superior court following an appeal from a justice court, where the action does not involve the validity of a tax, impost, assessment, toll, statute or municipal ordinance,<sup>11</sup> the appeal will be dismissed. Similarly, where an appeal is taken from an order which in accordance with Section 12-2101 of the Arizona Revised Statutes is not an appealable order, a motion to dismiss the purported appeal will be granted.

Another ground is that the appeal was not perfected within the sixty-day period required by Rule 73(b) of the Rules of Civil Procedure.<sup>12</sup> There is a significant body of Arizona case law, both when the 60-day rule was a statutory requirement and since it became a rule of civil procedure, that the 60-day requirement is jurisdictional, and accordingly that such a ground for dismissal is mandatory. Under the 1960 revision of the Judicial Article of the Constitution, the Supreme Court has the power, under Article 6, Section 5, to make rules relative to all procedural matters in any court, and, consequently, has the power to amend the 60-day rule. Nonetheless, the Court has not done so; and in no civil case has the 60-day requirement been waived or

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<sup>10</sup> ARIZ. REV. STAT. ANN. § 12-2106 (1956).

<sup>11</sup> ARIZ. CONST. art. 6, § 5.

<sup>12</sup> ARIZ. R. CIVIL P. 73(b):

Notice of appeal; bond for costs on appeal; time; computation.

1. When an appeal is permitted by law to the supreme court, it shall be taken by notice filed with the superior court within sixty days from the entry of the judgment or order appealed from, unless a different time is provided by law, and by filing within such time a bond for costs on appeal.

2. The time for appeal is extended by a timely motion made pursuant to any of the Rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such Rules:

(i) Granting or denying a motion for judgment under Rule 50(b).

(ii) Granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted.

(iii) Granting or denying a motion under Rule 59(1) to alter or amend the judgment.

(iv) Denying a motion for a new trial under Rule 59.

excused. Thus that ground should still be considered mandatory.

### *Discretionary Grounds for Dismissal*

The other grounds for dismissal on appeal are essentially discretionary. The first of these grounds is that one or more of the time requirements for filing the record, transcript, or briefs have been violated. There are five basic factors which should be considered by counsel, in the light of the special circumstances of the case, because these factors are weighed by the Court.

First, the time requirements set forth in the Rules of Civil Procedure and the Rules of the Supreme Court are precise, detailed and are intended to provide for an orderly and prompt disposition of cases on appeal. In the ordinary case, the times are reasonable and adequate. Where special circumstances exist, there are provisions for obtaining extensions of time on stipulation or motion, in the superior court or Supreme Court. To disregard these requirements is to delay the time between appeal and decision and to permit cases to become stale. The motion to dismiss is essentially the only procedural device whereby counsel and the court can insure that these reasonable time requirements are fulfilled.

Second, the Court is well aware of the ordinary delays that exist between the time an appeal is perfected and the time of decision. This is an unfortunate consequence of the recent heavy increase in the workload of the Court. The Court is meeting the problem as best it can by writing more opinions, sitting in panels and using research assistants, and by urging creation of an intermediate appellate court. Nonetheless, delays do exist in the ordinary civil case of approximately two years from the time a case is at issue until the time it is heard. This factor of delay works two ways. On the one hand a thirty-day delay in filing a brief seems small in terms of the overall time lag. On the other hand, the Court should not expend time on appeals, when there are so many, if counsel do not conform to reasonable time limits.

Third, it is unfortunate but true that many members of the bar have been lax in fulfilling the requirements as to time. It thus becomes difficult for the Court, in a particular case or at one fell swoop, to enforce strict compliance with rules which have been violated generally for a good many years. A practice of laxity does not excuse noncompliance, but it presents a factor that the Court must and does consider. Nonetheless, as these rules do promote the prompt and orderly disposition of appeals, and as these goals become increasingly more important it may be expected that the Court will insist upon stricter compliance, especially where one party complies with the rules and the other engages in a series of delays.

Fourth, of great significance is the nature of the prejudice that may have resulted to one party by reason of the other's failure to

comply with one or more of the rules. This is clearly an important consideration, dependent upon the particular facts in each case.

Fifth, by virtue of its finality an order granting a motion to dismiss is entered very cautiously by the Court because it does prevent review of the appeal on the merits. At times, to meet this problem, the Court has entered what may be called a conditional order; that is, the appeal will be dismissed unless counsel completes the required act within a certain prescribed time.

All five factors are taken into consideration by the Court and, therefore, must be taken into consideration by counsel in urging the granting or denial of the motion.

The second discretionary ground is that the form of the briefs, especially as to the assignments of error, does not meet the requirements of the rules. Where these requirements are not fulfilled, counsel takes a serious risk, as is indicated by the many cases on this point, that his case will be dismissed.<sup>13</sup> Here again, the Court weighs, and counsel must therefor consider, several factors: the inability of opposing counsel to respond to a brief which does not comply with the rules, the added burden of the Court in deciphering issues which are unclearly presented, and the finality of dismissal. The rules governing the form and content of a brief are calculated to lead to a full disclosure of all applicable facts and law and to a sound decision by the Court; and the existing case load hardly disposes the Court to do the work that should have been done by counsel, at a cost of delay to other cases on the docket. For these reasons the Court has dismissed and will dismiss appeals on this ground.

The third discretionary ground for dismissal is that the appeal has become moot. Clearly, if a case is settled by stipulation of the parties, either or both parties are entitled to have the case dismissed and counsel should request an order of dismissal. There are other situations which render an appeal moot after it is perfected; and generally this will be sufficient ground for dismissing the appeal,<sup>14</sup> although there is authority upholding the discretion of the Court, if the matter is of sufficient public import or general interest, especially where the briefs have been completed or the argument concluded, to rule on the case nonetheless.<sup>15</sup>

## II. EXTRAORDINARY WRITS

A few special comments should be added with respect to the procedure and requirements applicable to extraordinary writs, from

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<sup>13</sup> See, *e.g.*, *Schaefer v. Duhamel*, 65 Ariz. 385, 181 P.2d 628 (1947); *Davis v. Kleindienst*, 64 Ariz. 67, 165 P.2d 995 (1947).

<sup>14</sup> See *State v. Kerby*, 32 Ariz. 118, 256 Pac. 113 (1927).

<sup>15</sup> See *Board of Examiners v. Marchese*, 49 Ariz. 350, 66 P.2d 1035 (1937).

the point of view of the Court.

The first step in extraordinary writs is to file with the Clerk of the Supreme Court, for submission to the Chief Justice, a proposed order to set a day and hour, generally Tuesday at 10:00 A.M., for hearing the application for the writ. Before the hearing date, the application and response, and all supporting papers, should be filed with the Court, in ample time to permit thorough study.

The application is argued orally before the Court. The hearing procedure is informal, with the justices sitting, without robes, around the conference table, and counsel arguing before the portable podium. There is no prescribed time limit, but the Court encourages a short and concise argument. The court room is then cleared, and the Court confers on the application and generally ~~either denies the~~ application, in which event an order is entered in the minutes of the Court without opinion, or grants the alternative writ. In the latter case, if counsel requests time to file additional briefs, the Court may permit additional time. The matter is thereupon submitted, and in due course a written opinion is filed either quashing the alternative writ or making the alternative writ permanent. In rare cases, the Court may at the informal hearing issue the writ peremptorily, rather than alternatively, and subsequently file a written decision. Notice of all decisions is mailed to all counsel.

One point should be noted particularly. Extraordinary writs have a special and very limited application. Apart from the merits, counsel should direct themselves, both in their papers and on oral argument, to the preliminary question of the appropriateness of the writ. In general, writs are appropriate only to review errors which go to the jurisdiction of a court, judge or administrative board. There is an extensive body of case law as well as statutory material on what errors are classified as jurisdictional and may be corrected by writ. This should be researched and analyzed, and the jurisdictional issue argued first to the Court.

Sometimes counsel apply for a writ to avoid the delays inherent in an appeal, and hope that the importance of the question presented will induce the Court to consider an otherwise inappropriate writ. The Court is concerned with the requirements of the particular writ, and does not consider a writ as a substitute for appeal. Many applications have been denied not because the Court felt there was no merit to the position urged, but because the question could not properly be answered by writ.

Counsel are frequently concerned with the problem of securing a stay of proceedings scheduled in the lower court while action on a writ is pending in the Supreme Court. It is not the practice of the Supreme Court to issue a formal stay of lower-court proceedings, but trial judges will usually grant a continuance of the case in their

court until the merits of the writ can be argued in the Supreme Court.

### III. PROCEDURE ON THE DISPOSITION OF APPEALS

Consideration of the disposition of appeals includes both the procedures for submitting the appeal to the Court for its decision, and the process of the Court in reaching a decision and writing an opinion.

Under the Supreme Court Rules, the appellant has twenty days after the filing of the appellee's answering brief in which he may file a reply brief.<sup>16</sup> At the time the reply brief is filed, or at the expiration of the twenty-day period if no reply is filed, the case is considered to be "at issue" and is entered in a chronological list of "at issue" cases in the records of the clerk. The term "at issue" should not be confused with the term "submitted for decision" which is explained below. A case becomes "at issue" as an automatic and routine matter upon the expiration of the time for filing the reply brief.<sup>17</sup> No notice is sent to counsel at the time a case becomes "at issue".

The order in which cases come at issue, not the order in which they were originally filed, establishes the sequence in which they will come before the Court for decision. Up to the time a case becomes "at issue" counsel are in control, and many cases are delayed during this time by multiple stipulations for additional time in filing briefs. After the case is at issue the procedure of the Court governs its progress toward final disposition.

The "at issue" date is important for an additional reason. Rule 25 requires that a written request for oral argument must be filed within 10 days after the case becomes "at issue."<sup>18</sup> In practice, because of the long delay—presently approximately two years—between the time a case is "at issue" and the time it can be heard on oral argument, the Court has granted requests for oral argument filed within a reasonable time after the case comes at issue. To insure that a case will be orally

<sup>16</sup> ARIZ. SUP. CT. R. 5(f)(3):

"Within twenty days after service of appellee's brief, the appellant may file a reply brief and shall serve at least two copies thereof upon counsel for the adverse party. No further briefs shall be filed or served without leave of the court."

<sup>17</sup> ARIZ. SUP. CT. R. 23: Calendar of oral arguments:

". . . appeals in which the time for filing briefs has expired shall be deemed at issue . . ."

<sup>18</sup> *Ibid.* Calendar of oral arguments:

Sessions of the court to hear oral arguments of appeals shall be held at such times as the court fixes. At least twenty days prior to such sessions the clerk shall prepare a list of cases for hearing from the cases then pending before the court which are at issue. Appeals in which the time for filing briefs has expired shall be deemed at issue. No appeal shall be assigned for argument unless written request is made by separate instrument for such argument by counsel within ten days after the appeal is at issue. No stipulation to continue an appeal or to change the date set for hearing will be recognized by the court except by order of the court upon good cause shown. Notice of the date of oral argument shall be mailed by the clerk to the attorneys of record twenty days prior thereto.

heard, however, the request should be submitted within the time set by Rule 25.

#### *Submission Without Oral Argument*

When no request for oral argument is received, the case will go on the list of cases submitted for decision about the same time that cases near it on the "at issue" list are orally argued. This practice insures that cases will not receive preferential treatment because they are not heard on oral argument, and that civil cases coming "at issue" at the same time will be decided about the same time. When a case on which no argument is requested is taken from the "at issue" list and placed on the list of cases submitted for decision, no notice is given to counsel, as no action is required of them. Information may be obtained from the Clerk of the Court concerning the status of any case on the docket.

#### *Preference or Advancement*

Certain types of cases are advanced toward final disposition as a result of the rules of the Court. By Rule 16,<sup>19</sup> criminal appeals are given precedence over all civil matters, and by Rule 2,<sup>20</sup> Industrial Commission cases are automatically given precedence over most other types of civil cases. Rule 2 further indicates that civil cases of general public interest, election cases and those involving or affecting the Corporation Commission are to be given preference. Cases in these last-mentioned categories are not automatically placed at the head of the list, however, but are given precedence only upon motion of counsel. Such motions are considered and decided at the regular Tuesday conferences, and oral arguments on these motions are not generally permitted. The decision as to whether a particular case is of general public interest is based upon a showing that the decision will affect the interests of a substantial segment of our citizens. Occasionally a case will be advanced when circumstances of unusual hardship resulting from delay are shown.

#### *Oral Calendar*

The Court hears oral arguments for a period of one week to ten days several times during the year. When the number of cases on the submitted-for-decision list becomes small, the Court will schedule for oral argument a sufficient number of cases to provide the Court with

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<sup>19</sup> ARIZ. SUP. CT. R. 16. "Precedence of criminal appeals:

"Appeals in criminal cases shall have precedence over other appeals and shall be placed first upon the calendar for hearing. Appeals in actions in which a sentence of death has been imposed shall have precedence over all other appeals."

<sup>20</sup> ARIZ. SUP. CT. R. 2. "Certiorari to Industrial Commission; submission of issues to court:

". . . the [Industrial Commission] matter . . . shall take precedence over all civil cases except matters of general public interest, election cases, and those involving or affecting the Corporation Commission."

work for a period of six weeks to two months. This is usually about twenty-four cases. Cases are selected for the oral calendar from four lists: first, criminal cases becoming at issue since the last oral arguments are placed on the calendar; second, civil cases in which motions to advance have been granted; third, Industrial Commission cases; and, finally, regular civil cases from the "at issue" list are added to make up the number desired. In accordance with Rule 25, notice of setting for oral argument is sent to counsel twenty days prior to the calendar date.<sup>21</sup> Following oral argument a case is placed on the submitted-for-decision list.

### *Assignment to Divisions*

By the 1960 Modern Courts Amendment, the Supreme Court was authorized to hear cases in divisions of not less than three justices, with the proviso that no law can be declared unconstitutional unless the Court is sitting en banc.<sup>22</sup> In practice today, about one-half of all civil cases are heard and decided by divisions of three justices. At the time the oral calendar is being prepared, cases which are to be placed on the calendar are assigned to one of the Court's research assistants for preliminary research. A memorandum of the issues as they appear in the briefs is prepared and circulated to the members of the Court. The decision is then made to assign the case to a three-judge division or to the full court.

Cases involving the constitutionality of a statute are, of course, assigned to the Court en banc. Cases of first impression in this state, and cases where far-reaching principles of law are at issue are likewise reserved for the full Court. Cases which turn principally upon a review of the facts, or which involve well-settled principles of law are usually assigned to three-judge divisions. Under the power of administrative supervision vested in the Chief Justice, superior-court judges are at times called to sit with two justices of the Supreme Court in these three judge panels. Frequently the superior-court judge will write the opinion of the Court after the panel has reached its decision. If, and this has happened rarely, the three members of the division are unable to reach a unanimous judgment in a case, it will be reassigned for the consideration of the full court.

### *Oral Argument*

A few brief comments may be noted about the presentation of oral argument.

Oral argument is an excellent opportunity for an attorney to bring his case to the undivided attention of the Court. It is a time when both he and the Court can assure themselves that the issues

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<sup>21</sup> See note 18 *supra*.

<sup>22</sup> ARIZ. CONST. art. 6, § 2.

of the case are thoroughly understood by the Court. Anything that can help to bring the issues into sharp focus, such as visual aids, photographs and charts, should be used. As a general or perhaps universal rule, counsel should not submit a case for decision without oral argument, and deprive himself of this opportunity to state his position before the Court.

When the Court sits to hear arguments, the justices have read the briefs on the case. Oral argument should not be used to read the briefs to the Court. If the Court is confused about the case, it is probably due to the way the brief was written; consequently, counsel should try on oral argument to express his position in different terms. If the Court indicates its understanding of one point, counsel should not belabor it, but should go on to the next point.

Nor does the Court appreciate the reading of lengthy quotations from the reports. The justices will read all the cited cases before they reach a decision; so it is sufficient during the argument to state the rule of the case and point out why it should control the decision on the particular facts.

Rule 6 grants to the appellant 50 minutes for oral argument and to the appellee 40 minutes.<sup>23</sup> As only the most complex cases require this length of argument, the Court will often advise counsel in advance that a shorter period of time will be allotted for argument. In any event, counsel should limit their arguments to the time needed, and should not feel obliged to utilize all the time permitted.

When there are multiple appellants or appellees, counsel must arrange among themselves for an equitable division of the time. The maximum time for all arguments on the appellants' side is 50 minutes, on the appellees' 40 minutes, regardless of the number of counsel appearing.

It may be of interest that the Court records all formal oral arguments by means of a tape recorder. The tapes are then available for the justices and law clerks to replay during the research and writing of the opinion on the case.

### *Court Conference*

As previously noted, a case is placed on the submitted list following oral argument. Cases on this list are assigned to members

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<sup>23</sup> ARIZ. SUP. CT. R. 6. Oral argument:

After the service and filing of briefs as authorized by these rules, either party, upon timely request as provided by Rule 25, will be heard orally. The appellant will be heard for not more than fifty minutes and the appellee for not more than forty minutes, unless for special reason additional time is granted by the court. Counsel appearing as amici curiae shall not be heard except when permitted by the court, and then for such time only as the court prescribes.

of the Court as the individual justices dispose of cases on which they are working and are ready for new matters. The justice to whom the case is assigned will then conduct a thorough research of the issues contained in the case and isolated by the briefs and argument. In this research he will utilize the services of his law clerk or one of the Court's research assistants. He then prepares an initial draft of the opinion of the Court along the lines indicated by his research. This "proposed opinion" is circulated to the other members of the Court, who may do independent research prior to the Court's regular conference.

On Tuesday mornings the Court meets in conference; here the opinions proposed by the individual justices are dissected and reconstructed until they meet with the approval of at least a majority of the Court. If full agreement is not reached, the case is continued on the conference agenda until drafts of dissenting or concurring opinions are prepared. Opinions are then put into final form and released on Wednesdays or Thursdays.

#### IV. DECISION OF THE COURT

In its decision the Court may affirm the judgment of the lower court. It may reverse and remand for a new trial on all or some of the issues. It may reverse and itself enter the judgment that should have been entered in the lower court, if the proper judgment is clearly indicated, or it may reverse and direct the lower court to enter the judgment deemed proper by the Supreme Court. It may modify the ruling of the lower court in any particular. It may order restitution of property or rights lost by an erroneous order of the lower court and, in a proper case, the Court may make its affirmance conditional upon the filing of an additur or remittitur of damages by the party below.

In 1962, there were terminated by the Supreme Court 169 cases with opinion and 156 cases without opinion, for a total of 325, with the following results:<sup>24</sup>

Of the civil appeals terminated with opinion, 52 were affirmed, 41 were reversed, 2 were affirmed as modified, and 1 was dismissed; 68 civil appeals were dismissed without opinion. Of the criminal appeals terminated with opinion, 25 were affirmed, 6 were reversed, 2 were affirmed as modified, and 1 certified question was answered; 7 criminal appeals were dismissed without opinion. Of the Industrial Commission cases terminated with opinion, 10 awards were set aside, 12 were affirmed, and 1 was affirmed as supplemented; the writs in 2 such cases were dismissed or quashed without opinion. Thirty-four original writs of habeas corpus were denied, only one

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<sup>24</sup> See SECOND REPORT OF THE ADMINISTRATIVE DIRECTOR OF THE SUPREME COURT OF ARIZONA [Jan. 1 - Dec. 31, 1962] Tables A - H (1963).

with opinion. Of the original writs other than habeas corpus, twelve were granted with opinion; 51 were denied or quashed, of which 6 were by opinion; and 2 were remanded, one by opinion. In one state-bar disciplinary proceeding, one applicant was reinstated by opinion.

A supplemental point is that in any decision of the Court at least three justices must concur; and in cases declaring any law unconstitutional, the Court must sit en banc, though here again the decision of a majority of three will control. As indicated earlier, the full Court will participate in the decision of any case where the opinion is split and a dissent is to be filed.

#### V. MOTION FOR REHEARING

Rule 9 of the Supreme Court Rules permits either party to an appeal to file a motion for rehearing within fifteen days after notice that a decision has been rendered by the Court.<sup>25</sup> No argument is permitted on these motions, which are decided during the Court's regular Tuesday conference. The percentage of these motions which are granted is very small; in 1962 only three of a total of forty-six motions filed were granted.<sup>26</sup>

Proper grounds for a motion for rehearing include a showing that the decision reached by the Court is based on a mistake or misapprehension as to some matter of record,<sup>27</sup> or that there was a clear mistake of law, as where the original opinion overlooks some precedent from this Court, or where the Court apparently failed to realize the full effect of the ruling it had handed down.<sup>28</sup>

It is not proper to move for a rehearing so that the same positions previously urged can be reargued. Nor is it proper to make a new argument on rehearing for the first time. Rehearings are designed to correct mistakes made by the Court, not mistakes made by counsel in the original presentation of the appeal.

As it is a rare case in which the Court can be convinced that its decision is founded on error, it is a doubly rare case in which it can be convinced that its opinion on rehearing is likewise erroneous.

<sup>25</sup> ARIZ. SUP. CT. R. 9(a):

Filing; service; amendment. Any party desiring a rehearing may, within fifteen days after the clerk has given the notice provided by Rule 8 that a decision has been rendered by this court, file a motion in writing for a rehearing specifying the particular grounds for rehearing. A copy of such motion shall be served upon the adverse party or his attorney. A motion for rehearing shall not be amended except by leave of court.

<sup>26</sup> See SECOND REPORT OF THE ADMINISTRATIVE DIRECTOR OF THE SUPREME COURT OF ARIZONA [Jan. 1 - Dec. 31, 1962] Table A (1963).

<sup>27</sup> See, e.g., *Coyner Crop Dusters v. Marsh*, 91 Ariz. 371, 375, 372 P.2d 708 (1962) (compliance with Rule of Civil Procedure overlooked).

<sup>28</sup> See, e.g., *Merryweather v. Pendleton*, 91 Ariz. 334, 337, 372 P.2d 335 (1962) (original decision "beclouded the legal principles . . . and was contrary to fundamental justice.")

This has happened in at least one case; and theoretically, there is no limit to the number of rehearings that can be had. As a practical matter, however, counsel should consider themselves very successful if they obtain the first one.

## VI. COSTS ON APPEAL

Effective November 1, 1962, Rule 13 of the Rules of the Supreme Court relating to costs was amended.<sup>29</sup> The new rule does not change who is entitled to costs, or the amount or items of cost, which are governed by statute, but rather the procedure for claiming or objecting to costs.

The statement of costs must be verified. The Clerk of the Supreme Court has available printed forms. The statement of costs must be filed with the Court and served upon each adverse party, within ten days after the Clerk has mailed notice of the decision of the Court. The adverse party has five days thereafter to serve written objections to the statement of costs. Thus all papers relating to costs will have been filed with the Court within 15 days after mailing notice of the decision, at which time the mandate issues unless a motion for rehearing was filed. These time limits insure that the mandate will not be delayed for the taxing of costs and will include all costs.

Several special points may be noted. First, as discussed above, there is no provision in the rules for adding time if the statement of costs is served by mail. The five-day period runs from the date of personal service or mailing.

Second, there is no provision in the rules for seeking costs on a motion for rehearing. The statement of costs must be filed within the ten-day period, whether or not a motion for rehearing is filed; and, accordingly, the statement will not include costs incurred on the motion for rehearing. In the usual instance, no such costs are allowed. If counsel believes that special circumstances warrant such costs, he should request them with his motion or response on rehearing, and the Court will tax such costs if it deems them appropriate.

Third, by statute, the prevailing party is entitled to the cost of printing or typing the abstract of record and briefs. Where the

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<sup>29</sup> ARIZ. SUP. CT. R. 13. Costs:

13(a) Statement of costs; objections. A party entitled to costs may, within 10 days after the clerk has given the notice provided by Rule 8 that a decision has been rendered by this court, file and serve upon each adverse party or his attorney a verified statement of costs. An adverse party may file and serve written objection to the statement of costs within five days after service of such statement upon him.

13(b) Allowance for costs of briefs and abstracts. The allowance for the cost of briefs and abstracts of record shall be the amount actually and necessarily expended therefor. The sum of one dollar shall be presumed to be the maximum cost of typing one page of the abstract of record or any brief.

abstract or brief is printed, the amount of costs is definite. Where the abstract or brief is typewritten, there is no invoice or bill to support a precise claim. As a matter of practice, counsel have generally been claiming, and the Court has generally allowed, one dollar per page. This is now set forth in Rule 13(b) as the presumptive maximum cost, and should be followed unless special circumstances warrant a higher or lower figure.

Fourth, Section 12-2106 of the Arizona Revised Statutes provides that when the Supreme Court is of the opinion that an appeal has been taken for delay and that there was no sufficient ground for taking an appeal, it may include in its judgment an additional amount not exceeding 10% of the judgment appealed from if the judgment is for the recovery of money, and not exceeding \$500 in other cases, as damages for a frivolous appeal. A claim for such damages should be filed with the statement of costs by special motion.

Fifth, Section 12-2105 requires that when the Supreme Court affirms a judgment or order appealed from, it shall give judgment against appellant and the surety upon the bond for costs on appeal and upon any supersedeas bond.<sup>30</sup> As a matter of practice, the mandate only itemizes the costs and does not contain a special provision for payment. If counsel desire that the mandate designate the surety to pay costs, or provide for the application of money deposited in lieu of bond for that purpose, a special provision should be requested when the statement of costs is filed.

#### THE MANDATE

The written decision issued by the Court does not constitute the judgment. The judgment is contained in the mandate which is issued by the Clerk of the Supreme Court and forwarded to the trial court, in accordance with Rule 14(a).<sup>31</sup> The mandate is issued fifteen days

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<sup>30</sup> ARIZ. REV. STAT. ANN. § 12-2105 (1956):

Extent of judgment against surety on bond for costs on appeal or supersedeas bond; direction when money deposited in lieu of bond.

A. When the supreme court affirms the judgment or order appealed from, it shall give judgment against appellant and the surety upon the bond for costs on appeal for costs of the supreme court and the court below.

B. When a supersedeas bond has been given, and the appeal is from a judgment for the recovery of money, the supreme court shall give judgment against appellant and the surety upon such bond for the amount of the judgment with interest from the date of its rendition.

C. If money has been deposited in lieu of bond, the supreme court shall direct that the costs and the amount of the judgment be paid from the money deposited.

<sup>31</sup> ARIZ. SUP. CT. R. 14(a):

Issuance of mandate to trial court. Fifteen days after giving notice of the filing of an opinion by this court, the clerk shall issue a mandate and forward it to the trial court. If a motion for rehearing has been filed the mandate shall not issue until the motion is disposed of. For good cause shown the court may, in its discretion, direct the mandate to issue before

after notice of the opinion filed by the Court, or, when a motion for rehearing has been made, when the motion is determined. The mandate may issue earlier upon direction of the Court, if good cause is shown.

The mandate does not always terminate the case. When a judgment is reversed and remanded for a new trial, counsel must take appropriate steps in the superior court, in accordance with the local rules, to set the case for trial. Sometimes the judgment is reversed or modified by the Supreme Court with directions for the lower court to enter judgment. Counsel must then see that proper steps are taken in the superior court to have such judgment entered.

#### CONCLUSION

This article has sought to explain various aspects of civil appellate practice from the point of view of the Supreme Court so that appellate counsel may be better able to represent their clients on appeal.

Other problems may arise. The chambers of the justices of the Supreme Court have always been open to permit counsel to discuss special procedural problems or situations not dealing with the merits of an appeal which may require prompt attention. Counsel may be assured that to promote the administration of justice, these doors will always be open.

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the expiration of fifteen days. The mandate shall contain the judgment of this court and its directions respecting further proceedings. The original papers transmitted by the clerk of the superior court to this court shall be returned with the mandate to the clerk of the superior court.