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What Litigants in Arizona Need To Know About the New JRAD Rules

BY GREG HARRIS & PATRICIA SEGUIN

Effective January 1, 2018, the Supreme Court of Arizona adopted changes to the Judicial Review of Administration Decisions Rules (the "JRAD Rules"). The changes approved by the Court simplify the rules and are intended to enable all litigants to better understand the process and promote the expeditious resolution of proceedings on the merits. The revised JRAD Rules and accompanying forms stem from the Court's initiative to promote access to justice. At the same time, the revised rules allow parties—regardless of their familiarity with the administrative and administrative appeals process—to engage on the merits and seek a substantive resolution of the proceedings.

The initial experience with the rules suggests that the revisions have achieved their intended results and, as discussed in the final section, also reveal the need for added changes to further the effort.



Background

The Court approved changes to the rules in response to a petition filed by the State Bar of Arizona. Before filing its petition, the Bar appointed a Study Group:

to review and propose amendments to the JRAD rules first adopted in 1992. The Bar directed the study group to: (i) revise the language to make it consistent with statutory provisions, more clear and concise, (ii) address procedural issues that could be resolved by straight forward changes to the rules, (iii) highlight that under the amended statutes from 2012, an administrative review continues to be an appellate process, and (iv) address any additional issues identified by the Study Group.

In addressing the Bar's petition, the Court considered revisions to provide procedural guidance and clarity to participants about the steps to be taken to perfect and pursue an appeal of an agency's final de-

cision. Primarily, the changes adopted by the Court updated the prior JRAD Rules to conform the Legislature's direction that the Court adopt supplementary procedural rules, with an emphasis on clarity and direction with respect to numerous important issues, including:

1. How to commence the appeal
2. How to request a stay
3. How to secure a briefing schedule
4. How to file the record and request corrections to the record
5. The length of briefs
6. When and how to request additional time to make a filing or to file longer briefs
7. How to request a *trial de novo* in the instances in which *trial de novo* is permitted
8. How to request the introduction of additional evidence under the statutory framework for that request to be granted
9. How to request oral argument
10. How to request reconsideration

11. How to secure a final order that is itself subject to appeal to the Court of Appeals or Supreme Court

Removing Traps in the JRAD Appeal Process

The fundamental changes approved by the Supreme Court included both revisions to the rules and the development of forms to guide litigants—including those who are not represented by counsel—to initiate this category of appellate judicial review. By way of background, changes made by the Legislature in 2012 changed the name of the statutory instrument used to initiate an administrative appeal to a "Notice of Appeal." That development framed the revisions to the rules and the development of the forms as part of a comprehensive effort to further streamline the appellate process and do so in a way intended to save litigants from the traps and errors that have historically plagued JRAD appeals.

Most notably, these potential traps arose at the inception of the judicial review pro-



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cess, largely stemming from uncertainty over the parties to be “named” in the action. Therefore, the rule changes reinforce the Legislature’s rebranding of the document that initiates the JRAD process as a “Notice of Appeal.”

The revised rules also continue the theme of JRAD actions as appellate proceedings in other fundamental ways. For instance, the Court approved changes to the rule describing the notice to be given announcing the commencement of the JRAD action and contemporaneously prepared a form to be used to provide a statutory mandated notice that an appeal had been commenced. The rules also provide guidance concerning the context and delivery of a copy of the Notice of Appeal to all parties of record in the action.

Tips for JRAD Litigants

In approving these rule changes, the Supreme Court demonstrated its commitment to the resolution of appeals on the merits by establishing procedures designed to reduce the risk of a JRAD appeal being dismissed

due to avoidable procedural or jurisdictional errors. As such, JRAD litigants should take note of the following significant points to most clearly understand the new rules.

The time frame within which an appeal of an agency decision must be taken.

The new rules reflect the reality that while most JRAD appeals are governed by the 35-day time limit specified in A.R.S. § 12-904, that statute does not apply to all appeals brought under A.R.S. § 12-901. Practitioners need to be aware of the specific time limits that govern appeals. *Compare* A.R.S. §§ 12-904 (35 days), 40-254 (30 days) and 16-957 (14 days). Indeed, the Supreme Court already considered and addressed this question in early 2018 and ruled that when a party files an appeal of an agency decision under a statute that specifies a time limit shorter than the time permitted under §12-904, the shorter time controls. Because of this standard, the Court concluded that the superior court lacked jurisdiction to consider any questions concerning jurisdiction or

any other substantive matter because the appeal was untimely.¹

The law governing service of process for the initiation of a JRAD appeal.

Likewise, the revised rules consider the fact that while most JRAD appeals are governed by the service requirements specified in A.R.S. § 12-904, this statute may not apply to all appeals brought under A.R.S. § 12-901. Accordingly, parties must familiarize themselves with specific requirements for services that apply to particular agencies and proceedings.

When and how the JRAD appeal must be commenced.

The Supreme Court’s revisions to the JRAD process explain the steps to be followed to commence the action, the contents of that filing, and where to commence the action. As straightforward as this might appear, even experienced practitioners are sure to benefit from the clarifications contained in the revised rules. For example, the Court of Appeals recently considered



the question of where a party must file its appeal to timely commence the action.² In *Johnson v. Arizona Registrar of Contractors*, the appellant filed its appeal with the agency. In response, the court ruled that to perfect an appeal under the JRAD statutes, the aggrieved party must file the Notice of Appeal with the Clerk of the Superior Court for the court to have jurisdiction over the appeal.

Similarly, litigants should remain familiar with the need to identify the act that constitutes the final administrative decision to be certain to timely perfect the appeal. For instance, agency staff may make changes to an order to correct a mistake in an agency's decision. However, the staff revision may not transform the subsequent decision into a new "final decision" for purposes of calculating the appeal period only when it materially changes the substance of a previous decision.³

Clarification of the proper venue for a JRAD appeal to be filed.

With few exceptions, most JRAD appeals are governed by the venue requirements specified in A.R.S. § 12-905. However, that statute does not apply to all appeals brought under A.R.S. § 12-901. When venue is subject to § 12-905, the action may be commenced in any of the courts identified in that statute. Accordingly, JRAD litigants should carefully consider which superior court is the correct court in which to file the appeal.

Service of the Notice of Appeal and other court filings.

Section 12-906 requires that Rule 4 of the Rules of Civil Procedure governs service of the Notice of Appeal. The rules explicitly incorporate Rule 5 of the Rules of Civil Procedure, governing the service of all other filings made in a JRAD appeal. Nevertheless, litigants should study the agency's laws carefully as that specific law could provide a procedure for service that differs from the rules.

Clarification of the process to prepare, file and amend the record.

Typically, the agency or Office of Administrative Hearings (OAH) prepares the record, which in turn means that in most cases, the parties do not need to devote time

or resources to corrections of the record. In view of this process, the rules also recognize that instances may arise when revisions to the record may be requested or required. As such, litigants should be aware that the Supreme Court provides a framework for parties to make or request corrections to the record.

Confidential treatment of items in the record.

Many categories of OAH proceedings include no confidential materials, while many others do, with some proceedings being entirely confidential.⁴ The prior version of the JRAD Rules did not address the handling and treatment of these materials by the superior court. To address this shortcoming, litigants should know that the Supreme Court's revisions provide that the confidential status of records automatically continues when the matter moves to the appellate process under the JRAD statutes. The Court's approach allows the parties to ask the superior court to maintain or modify the confidential treatment of items contained in the record. The change serves to prevent the inadvertent disclosure of records made confidential by law and saves the parties from the need to seek immediate relief when the superior court's jurisdiction begins.

The preparation of the record.

The Supreme Court evaluated whether a printed or electronic transcript should be included in the record, and who should bear the burden of transcribing the proceeding. The Court determined that the party initiating the appeal generally should have the burden to supply the transcript.

The applicability of rules other than the JRAD Rules to JRAD appeals.

The Supreme Court also evaluated the applicability of other rules to JRAD appeals, including the Rules of Civil Procedure, local rules of procedure, and the ARCAP rules. The Court concluded that the Rules of Civil Procedure generally do not apply to

The JRAD Rule Petition

To view the changes that led to the new rules in effect on January 1, 2018, visit the Supreme Court's Rules Form page at:

<http://www.azCourts.gov/Rules-Forum/aft/660>.

JRAD appeals except as specifically proposed to be applicable by the Court on a case-by-case basis. The JRAD Rules also make the local rules of practice generally applicable.

In contrast, the Court directed that ARCAP would not apply, except as ordered. Nevertheless, the Court followed the ARCAP model in its development of several rules, including those dealing with the contents of the Brief (Rule 7) and the length of briefs. Thus, practitioners familiar with the existing appellate rules will see that the Court developed its changes to the JRAD Rules in a manner to make the JRAD Rules more consistent with ARCAP.

Whether the JRAD Rules apply to special actions.

The Court's revisions to the JRAD Rules make it clear that those rules apply only to agency appeals proceedings brought under the JRAD statutes. Thus, the rules do not apply to other proceedings such as special actions.

Word count for pleadings.

The Supreme Court's recent changes to the ARCAP Rules established a word-length measure for briefs rather than a page-length measure. Like revisions to ARCAP, the Court adopted limits based on the number of words in a JRAD filing rather than based on its page length, recognizing the ease with which technology has enabled the simple manipulation of text to fill a page.

Timing and content of requests for the admission of new evidence or for a new trial.

The Supreme Court's revised rules consider both the statutory framework for the determination of matters brought before the Court in JRAD matters and the case law governing the admission and consideration of new evidence. Significantly, the Court based its approval of the proposed rules on input from judges participating in the Study Group and who have heard a significant number of JRAD matters. Thus, the Court was made aware in the Bar's Petition of the

procedural challenges associated with the filing of the requests as well as the state of the law governing the hearing and resolution of these matters. Equipped with this level of expertise, the Supreme Court's revised rules took a particularly practical approach.

First, the rules make clear that the mere filing of a request for new trial or for new evidence does not change the time frame for the appellate briefs to be filed, unless specifically requested and allowed by the Court. Moreover, to guide litigants considering whether to file a request for a new trial or for new evidence, the JRAD Rules now provide direction about the necessary points to be established in the filing. The rubric outlined in the final JRAD Rules, together with the related forms approved by the Court for these filings, establishes the baseline for courts and litigants alike to address and explain these requests.

Discovery.

Those familiar with the JRAD process will note that the JRAD Rules do not address requests for discovery or for the introduction of new evidence. This was not an oversight. The Supreme Court concluded that because JRAD appeals are an appellate process, a need did not exist for the rules to include an express reference to discovery. Nevertheless, the Court recognized that while the JRAD statutes make no reference to discovery, the statutes do not prohibit discovery requests from being made or granted. However, because the presumption under the JRAD statutes and the Court's JRAD Rules assumes that the appeal will be considered on the record with no new evidence admitted, that a new trial will not be granted, and that discovery will not be conducted, the proposed rules are intentionally silent on the topic of discovery.

Therefore, in those instances in which the court grants a new trial or permits the introduction of new evidence, the JRAD Rules permit the court to exercise its discretion to permit discovery to be conducted.

Stay of the Agency's Decision.

The Study Group evaluated the standard to obtain a stay under A.R.S. § 12-911 considering opinions by the Arizona Supreme Court and the Court of Appeals.⁵ The Study Group's proposed language with respect to

stays tracks the Court's holding for the issuance of a stay. In addition, the rule and form provide guidance to litigants intended to address considerations of importance to the superior court as it determines whether to grant the equitable relief of entering a stay.

The JRAD Rules One Year Later

Legislative changes to the administrative hearing and administrative appeals statutes since the adoption of the JRAD Rules in 1993 made it necessary for revisions to the JRAD. Even in the period since the Jan. 1, 2018 effective date of the new rules, the rulings in several cases have further clarified the intentional purpose of various nuances of the new rules. It can be expected that further clarification will come with additional cases.

For instance, the rulings in the *Johnson, Legacy Foundation*, and *Arizona Electric Power Cooperative* cases make clear that attention to venue and the time for commencing an action must be evaluated carefully in light of the statutes under which the appeal is brought, in addition to reviewing the applicable statute in the JRAD law. At the same time, other developments suggest that further revisions of either court rule or practice may be required to address a number of procedural issues.

In addition, appeals from final decisions entered by the court pursuant to the JRAD statutes are, by virtue of the revised JRAD rules, no longer governed by the Rules of Civil Procedure.⁶ The JRAD rules do not include a specific rule to be cited to establish that "no further matters remain pending."⁷ Consideration may need to be given to either expressly making Rule 54(c) applicable to judicial review actions or for the adoption of a rule under the JRAD Rules that mirrors Rule 54(c) to allow an order to be entered to signal to the parties and to the reviewing court of the superior court's entry of the order necessary to confer further appellate jurisdiction.⁸

The revised JRAD Rules and accompanying forms stem from the Court's initiative to promote access to justice.

Second, the Supreme Court currently is considering a proposal that would make the rules of civil appellate procedure applicable to all final decisions of the Superior Court.⁹ The Rule 13 Petition in part directs that appeals be filed with the Court of Appeals in the first instance, rather than with the Supreme Court. In part, this Petition notes the intent for the Rules to "inform[] the public or litigants that an appeal from the Superior Court's decision in an administrative appeal should be to the Court of Appeals."¹⁰

Regardless, the JRAD rules, together with the 2012 changes to the JRA statutes, have had the intended effect of transforming the nature of the filing necessary to commence the appeal from a costly, comprehensive and often cumbersome complaint to a simpler, straightforward notice that an appeal has been brought. Parties and practitioners have adjusted to the revised paradigm for these filings from lengthy complaints to short notice documents drafted and filed without fear of the jurisdictional traps associated with having to identify and name the correct parties to appeal an already pending matter.¹¹

Furthermore, the clerk's office has adjusted to the changes made under JRAD Rule 5 for the confidential treatment of records. The revision to this rule expressly provides that records treated as confidential during the administrative proceedings would retain this status during the appeal process before the superior court. This step serves to safeguard privacy interests of litigants and witnesses, while easing the administrative guesswork for court staff and



litigants concerning the continuation of protections for these documents.

An additional consideration concerns transcripts. The JRA appeal process no longer mandates that the appellant include the transcript in the administrative record. This procedural adjustment will allow parties to pursue an appeal without having to bear the cost of securing a transcript. Particularly in cases that involve only legal issues, the ability to pursue the challenge without having to bear the expense of a transcript may make the appeal process more accessible to litigants.

E-filing continues to be a goal for administrative appeals. However, e-filing has not yet arrived, and thus parties should recall the need to ensure that the judge receives a copy of each filing made with the clerk. This is particularly true in the case of a motion, because motions filed, including any permitted to be filed electronically, will not necessarily reach the judge in a JRA action.

Conclusion

It seems clear that the Court's approval of the State Bar's petition to revise the JRAD

Rules improves the process by enabling litigants to participate meaningfully and in a way that promotes the expeditious res-

olution of proceedings on the merits. But even with these improvements, other work remains. **AF**

endnotes

1. *Legacy Foundation Action Fund v. Citizens Clean Election Comm'n*, 408 P. 3d 828 ¶19 (Ariz. 2018).
2. *Johnson v. Arizona Registrar of Contractors*, 396 P.3d 645 (Ariz. Ct. App. 2017).
3. *Arizona Elec. Power Coop. v. State*, 405 P. 3d 238 ¶18 (Ariz. Ct. App. 2017).
4. *See, e.g.*, A.R.S. §20-2504 (D) (requiring confidential treatment of patient information in health care appeals matters).
5. *See Smith v. Arizona Citizens Clean Elections Comm'n*, 132 P.3d 1187 (Ariz. 2006); *P&P Mehta LLC v. Jones*, 123 P.3d 1142, 1122 (Ariz. Ct. App. 2005).
6. JRAD Rule 1(b).
7. *See* Rule 54(c), ARCAP.
8. *See* A.R.S. § 12-913 (providing that "The final decision, order, judgment or decree of the superior court entered in an action to review a decision of an administrative agency may be appealed to the supreme court.").
9. *See* R-18-0011 Petition to Adopt Rule 13, Rules of Procedure for Judicial Review of Administrative Decisions, at <https://www.azcourts.gov/Rules-Forum/aft/827>.
10. *Id.*, Rule 13 Petition at 2.
11. *See Burrows v. Taylor*, 630 P.2d 35 (Ariz. Ct. App. 1981) (dismissing a JRA action in which the appellant failed to name an indispensable party as a defendant in the complaint seeking judicial review).