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ARIZONA SUPREME COURT

In the matter of:)
)
PETITION TO AMEND SUPREME) Supreme Court No. 22-_____
COURT RULES 30 AND 123) (expedited consideration
) and emergency adoption
) requested)
)
_____)

Pursuant to Rule 28 of the Rules of the Supreme Court, Petitioner respectfully petitions that the Court amend Supreme Court Rule 123 as shown in Appendix A, to implement the legislature’s enactment of A.R.S. § 36-509.01 in Laws 2022 (2nd Reg. Sess.) Ch. 299, Senate Bill (SB) 1114 as more particularly described below. Petitioner also respectfully petitions this Court to amend Supreme Court Rule 30 as shown in Appendix A so that it more closely reflects the legislative intent of the amendments to A.R.S. § 38-424 made in Laws 2021 (1st Reg. Sess.) Ch. 346, SB 1267.

Petitioner seeks expedited consideration of this petition and emergency adoption of the proposed amendments due to the September 24, 2022 effective date

of SB 1114 and the resource and budgetary impacts of the current requirements of Supreme Court Rule 30.

I. Background and Grounds for Petition Approval.

A. SB 1114, Court-Ordered Treatment; Case Records; Confidentiality (Laws 2022, Ch. 299)

For purposes of this Petition, “mental health case” means a proceeding brought under A.R.S. Title 36, Chapter 5, Articles 4 or 5. Such proceedings frequently are referred to as “mental health” or “involuntary commitment” cases or proceedings. However, technically, they are proceedings for court-ordered mental health evaluation (“COE”) and court-ordered mental health treatment (“COT”) of adults whom are alleged to (1) have a mental disorder; (2) be a danger to self (“DTS”), a danger to others (“DTO”), persistently or acutely disabled (“PAD”), or gravely disabled; (3) be in need of mental health treatment; and (4) be unwilling or unable to accept voluntary treatment. *See generally* A.R.S. §§ 36-529 (COE) and -540 (COT). The phrases *mental disorder*, *danger to self*, *danger to others*, *persistent or acute disability*, and *grave disability* are all defined in A.R.S. § 36-501.

On June 14, 2022, Governor Ducey signed SB 1114, which will become effective on September 24, 2022. Section 2 of SB 1114 creates new A.R.S. § 36-509.01, which will govern public access to records and information in mental health cases. The purpose of this statute is to prohibit general public access to mental

health case records and information. Under subsection A of this statute, such case records and information will be closed to public access or inspection except as otherwise provided by law, court rule, or court order. Subsection C of this statute expressly authorizes the Supreme Court to “adopt appropriate rules” to govern the access to case records and case information relating to mental health cases.

Presently, Supreme Court Rule 123(d), which generally addresses public access to case records, is silent as to public access to mental health cases. Supreme Court Rule 123(g), which governs *remote electronic access* (as defined in Supreme Court Rule 123(b)) to *case records* (as defined in Supreme Court Rule 123(b)), differentiates between “General Public, Registered Users” in subpart (1)(D) and “General Public, Non-Registered Users” in subpart (1)(E). Although members of the general public who *are* registered users may not be provided remote electronic access to case records in mental health cases, members of the general public who are *not* general users may be provided with remote electronic access to the following data points for mental health cases:

- Party names,
- Case number,
- Judicial assignment, and
- Attorney names.

Compare Ariz. S. Ct. R. 123(g)(1)(D)(i)(a) with Ariz. S. Ct. R. 123(g)(1)(E)(i). Consequently, to comport with new A.R.S. § 36-509.01(A), Supreme Court Rule 123(g)(1)(E)(i) needs to be amended by striking the phrase “mental health.” In addition, the fourth bullet point in Supreme Court Rule 123(g)(1)(D)(i)(a), which currently reads, “Probate proceedings brought under ARS Titles 14 and 36,” should be amended to read, “Probate proceedings brought under ARS Title 14” because probate proceedings do not arise under Title 36, and a new, fifth bullet point that reads, “Mental health proceedings brought under ARS Title 36” should be added.

Although new A.R.S. § 36-509.01(A) establishes a presumption that mental health records and information are not open to the public, the statute recognizes that certain categories of persons will need, or should be entitled, to access mental health case records (e.g., the patient, the patient’s attorney, the court and court staff, etc.). Thus, A.R.S. § 36-509.01(C) defers to this Court to create a rule that permits certain categories of persons to access mental health case records and information.

Therefore, Petitioner proposes amending Supreme Court Rule 123 as follows:

- Add to Supreme Court Rule 123(d) a new subsection (6)(A) that reads as follows: (6) *Mental Health Case Records*. Except as otherwise provided by this rule or law, the case records and information of mental health proceedings are closed to public access or inspection.

“Mental health proceeding” means a proceeding brought pursuant to ARS Title 36, Chapter 5, Article 4 or 5.

- Add to Supreme Court Rule 123(d) a new subsection (6)(B) that delineates the persons who may be granted access to a person’s mental health case records and information.
- Add to Supreme Court Rule 123(d) a new subsection (6)(C) that delineates the persons who may be granted limited access to certain mental health case records and information under certain circumstances.
- Add to Supreme Court Rule 123(d) a new subsection (6)(D) that allows a judicial officer for good cause to grant a request for access to mental health case records and information by an individual not listed in section (d)(6)(B).
- Add to Supreme Court Rule 123(d) a new subsection (6)(E) that applies the provisions of the new subsection (d)(6) to the Court of Appeals and Supreme Court, except any opinions or memorandum decisions issued.
- Amend the fourth bullet of Supreme Court Rule 123(g)(1)(D)(i)(a) to read, “Probate proceedings brought under ARS Titles 14 ~~and 36~~; or”

and add a fifth bullet point that reads, “Mental proceedings brought under ARS Title 36.”

- Amend Supreme Court Rule 123(g)(1)(E)(i) to strike the phrase “mental health.”
- Amend Supreme Court Rule 123(g)(1)(E)(ii) to add the phrase “except mental health” before “civil” to clarify that case information may be extracted from case management systems in civil cases identified in (g)(1)(D)(i)(a) through (d), except mental health cases.
- Amend Supreme Court Rule 123(h)(4) to allow “records or information that are not subject to public inspection pursuant to law, rule, or court order” in databases and electronic records that are otherwise open to public inspection to be closed.
- Amend Supreme Court Rule 123(j)(3) to prohibit the name, address, date of birth, and last four digits of the social security number or driver license number of a subject person (defined) in a mental health proceeding to be included in a bulk or compiled data dissemination.

A proposed amendment to Rule 123(d)(1)(B) also makes a technical change to reflect the renumbering of Juvenile Rule 47.3 to 327.

Due to the September 24, 2022 effective date of SB 1114, Petitioner believes that expedited consideration and emergency adoption of the above proposed rule

changes are necessary to provide clarity regarding public access and inspection of mental health case records and information in light of SB 1114 and the current requirements of Supreme Court Rule 123.

B. SB 1267, Record of Proceedings; Electronic Recording (Laws 2021, Ch. 346)

SB 1267, effective on September 29, 2021, was enacted during the 2021 First Regular Session of the 55th Legislature and made several changes to A.R.S. § 38-424 regarding the use of electronic recording to create the court record. These changes resulted in a need to amend Supreme Court Rule 30 to conform to and implement the statutory amendments. Accordingly, on June 3, 2021 Petitioner sought to amend then-pending rule petition R-20-0013 regarding Supreme Court Rule 30 to implement the requirements of A.R.S. § 38-424 as amended.

Among other things, SB 1267 added verbiage to A.R.S. § 38-424(A) to allow, with some exceptions, courts to use electronic recording in lieu of court reporters to capture the verbatim record in court proceedings. One such exception is “as provided in . . . Title 36, Chapter 5 . . .” which governs mental health services. The pertinent portion of Title 36, Chapter 5 as it relates to the court’s ability to use electronic recording is contained in A.R.S. § 36-539(E) and states:

A verbatim record of all proceedings under this section shall be made by stenographic means by a court reporter if a written request for a court reporter is made by any party to the proceedings at least twenty-four hours in advance of such proceedings. If stenographic means are not requested in the manner provided by this subsection, electronic

means shall be directed by the presiding judge. The stenographic notes or electronic tape shall be retained as provided by statute.

Although A.R.S. § 36-539(E) requires the use of a court reporter only when a written request is made at least 24 hours before the hearing, the verbiage in Supreme Court Rule 30(b)(2) requires a court reporter in “Proceedings brought pursuant to A.R.S. Title 36, Chapter 5.” The verbiage “[p]roceedings brought pursuant to” greatly expands the requirement to use court reporters in mental health proceedings, which is contrary to the purpose of SB 1267 and the corresponding amendments to Supreme Court Rule 30. Petitioner believes that the use of the verbiage “[p]roceedings brought pursuant to” was unintentional, and believes the verbiage should instead read “*As required by A.R.S. Title 36, Chapter 5*” as this more closely aligns with the intent of SB 1267 and current statutory requirements.

Moreover, using a court reporter in lieu of electronic recording to capture the verbatim record in every Title 36, Chapter 5 proceeding is not currently required under the Arizona Revised Statutes and was not previously required under the Arizona Revised Statutes or court rule before the enactment of SB 1267. Requiring the use of a court reporter in lieu of electronic recording to capture the verbatim record in every Title 36, Chapter 5 proceeding absent a timely request will have significant budgetary and resource impacts, as courts are already experiencing challenges with securing a court reporter for other proceedings due to the shortage.

Therefore, Petitioner respectfully requests that this Court adopt on an emergency basis the proposed changes to Supreme Rule 30(b)(2)(b) as set forth in Appendix A.

II. Pre-filing Vetting.

Prior to filing this Petition, input was sought from a number of stakeholders regarding the changes to Rule 123, including the following:

- Honorable Jay Polk, presiding judge of the Probate and Mental Health Department in the Superior Court of Maricopa County, who largely authored the proposed changes to Rule 123 and consulted and vetted the proposed changes with stakeholders;
- Office of the Maricopa County Attorney, which represents the petitioner in nearly all COT petitions and hearings filed in Maricopa County (but not the renewals);
- Maricopa County Office of Public Advocate, which represents the vast majority of patients in COE and COT proceedings in Maricopa County;
- ValleyWise Behavioral Health, which is the petitioner in nearly all of the Maricopa County COT petitions;
- Private attorney John H. Barron, III, who has more than 30 years of experience practicing in the area of mental health cases and, as a

former deputy county attorney, handled mental health cases for Maricopa, Pima, La Paz, Yuma, and Pinal Counties;

- Private attorney Steve Wiggs, who represents many of the outpatient providers in Maricopa County (and, thus, is involved in a majority of the COT renewal proceedings);
- Retired Judge James McDougall, who practices in the area of mental health cases and helped author SB 1114; and
- Jessica Fotinos, General Counsel for the Maricopa County Clerk of Court.

Of those who responded, nearly all supported the proposed changes. One stakeholder, however, strongly believed that the general public should have access to certain information for all mental health cases in which a COT petition was filed.

III. Request for Expedited Consideration and Emergency Adoption.

Pursuant to Supreme Court Rule 28(h), Petitioner believes that expedited consideration and emergency adoption of the proposed amendments to Supreme Court Rules 30 and 123 are warranted in this matter because of the September 24, 2022 effective date of SB 1114, and the resource constraints and budgetary impacts of the current requirements of Supreme Court Rule 30.

Therefore, as permitted by Supreme Court Rule 28(h), Petitioner respectfully requests that this Court open this petition for comment, expedite its consideration of

this petition for inclusion on the August 2022 Rules Agenda, consider its adoption on an emergency basis at that Agenda, and consider adopting these amendments on a permanent basis at the December 2022 Rules Agenda.

Respectfully submitted this 20th day of July, 2022.

By /s/ _____
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APPENDIX A

Arizona Rules of Criminal Procedure

(deletions shown with ~~strikethrough~~, new language is underlined)

Rule 30. Verbatim Recording of Judicial Proceedings

(a) [No Change]

(b) Use of Court Reporting Resources.

1. [No Change]

2. *When a certified reporter is required.* The court must use a certified reporter to make the record, and not solely electronic means, as follows:

a. [No Change]

b. ~~Proceedings brought pursuant to~~ As required by A.R.S. Title 36, Chapter 5;

c. [No Change]

d. [No Change]

e. [No Change]

3. [No Change]

Rule 123. Access to Judicial Records of the State of Arizona

(a) [No Change]

(b) [No Change]

(c) [No Change]

(d) **Access to Case Records.** All case records are open to the public except as may be closed by law or as provided in this rule. The court must state the reason for closing any record and include a reference to any statute, case, rule or administrative order on which the court relied.

(1) *Juvenile Records.*

(A) [No Change]

(B) All records of proceedings under Rule ~~47.3-327~~, Rules of Procedure for the Juvenile Court, dependency, guardianship under ARS §§ 8-871 through 8-874, termination of parental rights, adoption, and other related proceedings are confidential and must be withheld from public inspection unless authorized by law, rule, or court order.

(C) [No Change]

(2) through (5) [No Change]

(6) Mental Health Case Records.

(A) Except as otherwise provided by this rule or law, the case records and information of mental health proceedings are closed to public access or inspection. “Mental health proceeding” means a proceeding brought pursuant to ARS Title 36, Chapter 5, Article 4 or 5.

(B) Case records and information may be available to the following:

(i) A superior court judicial officer, court administrator, clerk of court, and staff;

(ii) The subject person. “Subject person” means a person who is the subject of the mental health proceedings whose records or information are being sought;

(iii) An attorney of record in the mental health proceeding;

(iv) The subject person’s current attorney of record in any other court proceeding;

(v) The subject person’s court-appointed guardian or conservator, or a person nominated, in a pending petition filed under ARS Title 14, Chapter 5, to serve as the subject person’s guardian and conservator, and that person’s attorney of record in any court proceeding;

(vi) An investigator, appointed pursuant to ARS Title 14, Chapter 5 in a guardianship, conservatorship, or other protective proceeding for the subject person;

(vii) A medical professional as defined in Rule 2, Arizona Rules of Probate Procedure, appointed pursuant to ARS Title 14, Chapter 5 in a guardianship, conservatorship, or other protective proceeding for the subject person;

(viii) The subject person’s representative appointed pursuant to ARS § 14-10302 or guardian ad litem, and their respective attorneys;

(x) The subject person’s agent under a valid health care or mental care power of attorney;

(ix) The regional behavioral health authority or health care provider as defined in ARS § 36-501 and their respective attorneys; and

(xi) The Arizona Department of Corrections if the subject person is confined to a state prison and is a patient in the Arizona State Hospital on an authorized transfer either by voluntary admission or by court order.

(C) Limited release of case record and information.

(i) The Arizona Department of Public Safety may be provided the information described in A.R.S. § 36-540(O) and a certified copy of the court's order or minute entry requiring the subject person to undergo mental health treatment.

(ii) A law enforcement or prosecuting agency that is investigating or prosecuting a prohibited possessor as defined in A.R.S. § 13-3101 may be provided with a certified copy of the court's order or minute entry requiring the subject person to undergo mental health treatment and a certified copy of any order or minute entry renewing or terminating such treatment.

(iii) A federal law enforcement agency that is investigating or prosecuting a violation of 18 U.S.C. § 922(g) may be provided with a certified copy of any detention orders entered with respect to the subject person, a certified copy of the court's order or minute entry requiring the subject person to undergo mental health treatment, and a certified copy of any order or minute entry renewing or terminating such treatment.

(D) Upon a written request and after the subject person has had an opportunity to respond, the judicial officer assigned to the proceeding, for good cause shown, may authorize the release of case records and information in a mental health proceeding to an individual not listed in (d)(6)(B). The court's finding of good cause must be in the order authorizing the release.

(E) This section does not include opinions or memorandum decisions issued by the Supreme Court or Court of Appeals, but does include appellate briefs, the record on appeal, and appellate case records.

(e) [No change]

(f) [No change]

(g) Remote Electronic Access to Case Records.

(1) A court may provide remote electronic access to case records as follows:

(A) through (C) [No Change]

(D) General Public, Registered Users.

(i) Members of the public may be provided remote electronic access pursuant to ACJA § 1-604 to all of the following categories of case records unless sealed or otherwise made confidential by rule or law:

(a) Civil case records in any action brought to enforce, redress, or protect a private or civil right but not:

- Juvenile matters brought under ARS Title 8;

- Family law, paternity, or other matters arising out of ARS Title 25;
- Orders of protection, injunctions against harassment and all proceedings, judgments or decrees related to the establishment, modification or enforcement of such orders, including contempt; ~~or~~
- Probate proceedings brought under ARS Titles 14 ~~and 36~~; or
- Mental health proceedings brought under ARS Title 36.

(b) through (d) [No Change]

(ii) [No Change]

(E) General Public, Non-Registered Users. Unless otherwise provided by rule or law, members of the public may be provided remote electronic access, without registering, to:

(i) the following data elements in juvenile delinquency, ~~mental health~~, probate, and criminal cases in which a defendant is charged with an offense listed in A.R.S. Title 13, chapters 14, 32, 35 or 35.1 or in which the victim was a juvenile at the time of the offense as provided in paragraph (g)(1)(D)(ii)(h) above:

- party names,
- case number,
- judicial assignment,
- attorney names, and
- in the above-described criminal cases only, the docket or register of actions, but not remote electronic access to other documents, so long as the names of victims do not appear in the docket or the register of actions.

(ii) except as provided in paragraph (g)(1)(D)(ii)(h) above, individual case information extracted from a case management system in all civil except mental health, criminal, and civil traffic cases identified in paragraphs (g)(1)(D)(i)(a) through (d). Case information includes a list of documents filed, events, dates, calendars, party names, month and year of birth, residential city, state and zip code, case number, judicial assignment, attorneys, charges filed or claims made, interim rulings, and case outcomes, including sentence, fines, payment history, minute entries, and notices. Case information does not include any information regarding the registration, filing of a petition for, or issuance of an order of protection or an injunction against harassment, if such

publication would be likely to reveal to the general public the identity or location of the party protected under such order.

(iii) and (iv) [No change]

(2) through (9) [No Change]

(h) Access to Audiotape, Videotape, Microfilm, Computer or Electronic Based Records.

(1) *through (3) [No change]*

(4) *Databases, Operating Systems and Network Programs.*

(A) Databases and electronic records containing case and administrative records are open to the public. However, databases and electronic records containing confidential information that may not be entirely redacted, or records or information that are not subject to public inspection pursuant to law, rule, or court order, may be closed in accordance with the provisions of paragraph (f)(4).

(B) and (C) [No Change]

(5) *[No Change]*

(i) [No Change]

(j) Bulk or Compiled Data Dissemination in Bulk.

(1) *and (2) [No Change]*

(3) *Personal identifiers available in bulk court data.* The custodian of bulk data may release data that contains the following personal identifying information about a petitioner, plaintiff, respondent, or defendant other than a petitioner seeking an order of protection or the subject person in a mental health proceeding:

(A) name,

(B) address,

(C) date of birth, and

(D) last four digits of the social security or driver license number.

(4) Dissemination of bulk or compiled data is not permitted except as provided in this rule or as permitted by court order.