

Hon. Jeff Fine
Clerk of the Superior Court for Maricopa County
620 West Jackson Street, Suite 3052
Phoenix, AZ 85023
Jessica.Fotinos@Maricopa.Gov
602-506-2309

IN THE SUPREME COURT STATE OF ARIZONA

IN THE MATTER OF)	Supreme Court No. R-22-0037
PETITION TO AMEND)	
SUPREME COURT RULES 30)	
AND 123)	COMMENT
)	

BACKGROUND

On July 20, 2022, David K. Byers, Administrative Director of the Administrative Office of the Courts (“AOC”), filed a rule petition on AOC’s behalf. The petition proposes to amend Rules 30 and 123 of the Rules of Supreme Court of Arizona to implement statutes enacted in the 2021 and 2022 legislative sessions. As noted by the Arizona Supreme Court in its July 25, 2022 Order, most of the proposed amendments are to Rule 123, and reflect the new statutory requirements for the handling of mental health records mandated in Senate Bill 1114, which was enacted in June of 2022, and went into effect on September 24, 2022.

On August 29, 2022, the Arizona Supreme Court ordered, pursuant to Rule 28(h)(2) of the Rules of the Supreme Court of Arizona, that Rules 30 and 123 of the Rules of the Supreme Court be amended on an emergency basis, effective September 24, 2022. But consistent with the Court’s July 25th Order, the Court would consider whether to adopt these rule amendments on a permanent basis during its December 2022 Rules Agenda.

The Clerk of the Superior Court for Maricopa County (“the Clerk’s Office”) does not

have any objection to the amendments to Rule 30, nor does it fundamentally object to the amendments to Rules 123, and strongly supports the inclusion of language in the Rules that addresses access to mental health care information and records, as well a presumption that both are not open to the public. However, in reviewing proposed Rule 123(d)(6), the Clerk's Office suggests that changes be made so as to ensure that the Clerk's Office, the custodian of mental health case information and records, is able to verify or validate those individuals/entities who are allowed access, absent a court order.

In submitting this comment, the Clerk's Office is mindful of the intent behind the proposed amendments to Rule 123 to allow certain persons/entities access mental health case records and information absent a court order. However, in fulfilling its duties under proposed Rule 123, the Clerk's Office wants to ensure that it has sufficient guidance as to who it can release case records and information absent a court order, and that written guidance can be provided to Clerk's Office employees who work in the area of case records management, as to the verification of such individuals and/or entities. As the Supreme Court knows, mental health proceedings and the associated case records and information contain highly personal information that has historically been intended to be not subject to public access, and the Clerk's Office wants to ensure that it has best practices in place for reviewing and fulfilling requests to obtain mental health records.

The Clerk's Office is aware that Senate Bill 1114 was not enacted until June of 2022, and that such did not allow for the requisite amount of time for the AOC to form a formal task force or workgroup to study the proposed amendments to the Rules. The Clerk's Office, through its General Counsel, was able to provide some input to the AOC prior to the submission of the petition, and greatly appreciated such opportunity, but even at the time of the submission, noted

that it would likely be filing a comment to address some areas in which the Clerk's Office believes further clarification is warranted.

OBJCTIONS TO AMENDMENTS TO SUPREME COURT RULE 123

- **Rule 123(6)(B)(iv)**

The Clerk's Office would like additional language to be included limiting "any other court proceeding" to a proceeding that is before an Arizona court. The Clerk's Office believes it has sufficient internal controls to be able to verify a current attorney of record in another Arizona court proceeding, i.e., using online public access docketing tools for Arizona cases; contacting other clerk's offices around the State and ensuring that the attorney requesting information or case records is the attorney of record in a case, and has not withdrawn, etc. However, the Clerk's Office does not believe it would be able to confirm such with regard to attorneys of record in matters not in Arizona. Such would be incredibly time consuming, if even possible, and the Clerk's Office would not be comfortable relying on an attorney providing a copy of a Notice of Appearance in a case outside of Arizona as justification for it to provide access to mental health information or records, especially when it is unknown to the Clerk's Office if the attorney is a current attorney of record. The Clerk's Office has established relationships with the other elected clerks around the State, so as to allow for an ease of communications and verification of attorneys of record, but does not have those relationships with the courts outside of Arizona.

- **Rule 123(6)(B)(v)**

As noted above, the Clerk's Office would want language to be included limiting "in any court proceeding" to those proceedings specific to an Arizona court, for the reasons set forth above. Perhaps such is done through reference to ARS Title 14, Chapter 5, but the

limitation is not clear to the Clerk's Office.

Also, it is the Clerk's Office understanding that the intent of this subsection is to allow access to case records and information to a person who is nominated in a pending petition filed under ARS Title 14, Chapter 5. But the Clerk's Office has concerns as to how it could ensure that the person seeking the records was nominated, but ultimately not appointed by the court. If the person was nominated, but not appointed, one would assume that such person should not have access to mental health care information or records for the subject person, absent a court order. Further, Rule 8(b) of the Rules of Probate Procedure, *Confidential Documents and Information*, limits access to confidential Probate documents to "an attorney or a guardian ad litem appointed by the court to represent the subject person of a guardianship or protective proceedings in which the comment has been filed." (emphasis added). It would seem that if appointment is required in a Probate case, to access confidential documents, appointment should be required to access mental health case information and records.

- **Rule 123(6)(B)(vi)**

It would seem appropriate to limit access to an investigator appointed under ARS Title 14, Chapter 5 to "pending" protective proceedings. Because the investigator is required to be appointed under ARS Title 14, Chapter 5, the Clerk's Office assumes such access would be limited to an investigator in proceedings before an Arizona court.

- **Rule 123(6)(B)(vii)**

It would seem appropriate to limit access to a medical professional as defined in Rule 2, Arizona Rules of Probate Procedure, appointed under ARS Title 14, Chapter 5, to "pending" protective proceedings. Because the medical professional is required to be

appointed under ARS Title 14, Chapter 5, the Clerk's Office assumes such access would be limited to medical professionals in proceedings before an Arizona court.

- **Rule 123(6)(B)(x)**¹

The Clerk's Office does not believe it is in a position to determine what constitutes a "valid healthcare or mental [health]care power of attorney." A determination as to the validity of such document would best be determined by the court.

- **Rule 123(6)(B)(ix)**²

The Clerk's Office likely would be able to appropriately validate the regional behavioral health authority, or a health care provider as defined in ARS § 36-501³, if such were limited to a health care institution as defined in ARS 36-401 that is licensed as behavioral health provider pursuant to department rules, but it would not be in a position to validate or verify who/what constitutes a "mental health provider" as set forth in ARS § 36-401.

For those categories of individuals or entities whom the Clerk's Office believes it is unable to verify in its primary course of business, the Clerk's Office suggests that the requesting party comply with Rule 123(d)(6)(D) and submit a written request with the judicial officer assigned to the proceeding, and then if the judicial officer, after allowing the subject person an opportunity to respond, authorizes the release of mental health case records and information, the Clerk's Office would provide access in accordance with the court's order.

¹ It appears that this should actually be Subsection ix, and not x, as the numbering is currently out of order based upon the document attached to the Court's August 29, 2022 Order.

² It appears that this should actually be Subsection x, not ix, as the numbering is currently out of order based upon the document attached to the Court's August 29, 2022 Order.

³ ARS § 36-501(19) provides that a health care provider "means a health care institution as defined in section 36-401 that is licensed as a behavioral health provider pursuant to department rules or a mental health provider."

CONCLUSION

The Clerk's Office is appreciative of the time spent on developing the emergency modifications to Rule 123, and understands that a modified Rule 123 is necessary so as to restrict general public access to mental health case information and records in accordance with the provisions of SB 1114, yet at the same time ensure that individuals and entities who need such information in their scope of their duties, do not have to motion the court and obtain a court order, unnecessarily expending judicial resources and time. However, the Clerk's Office, as the custodian of record for the court, wants to ensure that it can comply with the Rule and do its best to ensure that mental health records are not inadvertently released to a person who likely has no valid or legitimate purpose in obtaining them.

DATED this 3rd day of October 2022.

/s/ Jeff Fine
Clerk
Superior Court for Maricopa County⁴

This comment has been filed via electronic filing of in accordance with deadlines set forth in the Supreme Court's July 25, 2022 Order.

A copy of this comment has been e-mailed to the Petitioner at the following:

David K. Byers
Administrative Director
Administrative Office of the Courts
1501 West Washington, Suite 411
Phoenix, AZ 85007-3327
Projects2@courts.az.gov

⁴ General Counsel for the Clerk's Office assisted in the drafting of this comment.

APPENDIX A

Rule 123. Access to Judicial Records of the State of Arizona⁵

(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.

⁵ Modifications to the text of Rule 123 are shown by underscoring in red font and deletions are shown by ~~strike through~~ in red font.

- (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 **in Arizona**;
 - (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 guardian’s or conservator’s~~ attorney of record in any **other** court proceeding **in Arizona**;
 - (vi) An investigator, appointed pursuant to ARS Title 14, Chapter 5 in a guardianship, conservatorship, or other **pending** 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 **pending** 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 institution as defined in ARS § 36-401 and is licensed as a behavioral health provider pursuant to department rules** ~~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.