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ARIZONA SUPREME COURT

In the matter of:)
)
PETITION TO AMEND SUPREME) Supreme Court No. 22-0037
COURT RULES 30 AND 123)
) REPLY
)
)
_____)

David K. Byers, Administrative Director, Administrative Office of the Courts, and Petitioner in this matter, hereby replies pursuant to Rule 28(e)(5), Rules of the Supreme Court of Arizona.

I. Procedural History

On July 20, 2022, Petitioner filed a petition to amend Rule 123 of the Supreme Court to implement the legislature’s enactment of A.R.S. § 36-509.01 through Senate Bill (SB) 1114 during the 2022 Second Regular Session of the Fifty-fifth Legislature related to the confidentiality of case records for proceedings brought under Title 36, Chapter 5, Article 4 or 5. Petitioner also petitioned this Court to amend Supreme Court Rule 30 so that it more closely reflects the legislative intent of the amendments to A.R.S. § 38-424 made by SB 1267 during the 2021 First

Regular Session of the Fifty-fifth Legislature as it relates to capturing the verbatim record of proceedings under Title 36, Chapter 5.

On August 29, 2022, this Court adopted on an emergency basis Petitioner’s proposed amendments to Supreme Court Rules 30 and 123. This Court will consider whether to adopt these amendments on a permanent basis at its December 2022 Rules agenda. This petition was open for comment until October 3, 2022, with any reply due by October 17, 2022.

II. Discussion of Comments

This petition received two comments. The first comment was from the Arizona Court Reporters Association regarding Petitioner’s proposed amendments to Supreme Court Rule 30. The second comment was from the Clerk of Court for the Superior Court in Maricopa County regarding Petitioner’s proposed amendments to Supreme Court Rule 123.

A. Supreme Court Rule 30 & SB 1267

The comment from the Arizona Court Reporters Association objects to Petitioner’s proposed amendment to Supreme Court Rule 30(b)(2)(b) as it relates to changing “Proceedings brought pursuant to A.R.S. Title 36, Chapter 5” to “As required by A.R.S. Title 36, Chapter 5.”

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.

The purpose of SB 1267 was to allow trial courts a level of flexibility by harnessing the available technology to ensure that cases can continue to move through the litigation process without delay in instances where a court reporter cannot be present. Specifically, the legislature amended A.R.S. § 38-424 to allow courts to use electronic recording in lieu of court reporters to capture the verbatim record in court proceedings, with exceptions, including “[e]xcept . . . as provided in . . . Title 36, Chapter 5 . . .” The pertinent portion of Title 36, Chapter 5 as it relates to the use of a court reporter 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.

Using a court reporter in lieu of electronic recording to capture the verbatim record in every Title 36, Chapter 5 proceeding was not contemplated by SB 1267,

nor is it contemplated by the current statutory scheme of Title 36, Chapter 5. As Petitioner noted in this petition, requiring the use of a court reporter in lieu of electronic recording to capture the verbatim record in every Title 36, Chapter 5 proceeding will have significant resource and budgetary impacts, as courts are already experiencing challenges with securing a court reporter for other proceedings.

The comment also raises concerns about the quality of electronic recording. However, using electronic recording in Title 36, Chapter 5 proceedings, absent a request for a court reporter under A.R.S. § 36-529(E), has been the day-to-day practice for years. As Petitioner noted in his June 1, 2020 and November 15, 2021 replies to the comments on petition R-20-0013, technology has advanced such that multiple channels can be used for electronic recording, allowing voices to be separated in playback of the recording. Additionally, technology is such that backup systems are put in place to ensure that the entire record is not lost in the event of an outage or malfunction.

Electronic recording has served as the primary method of capturing the verbatim record in Title 36, Chapter 5 proceedings for years and there is no reason to now suggest that it is inadequate. Therefore, Petitioner respectfully requests that the Court adopt on a permanent basis the proposed changes to Supreme Court Rule 30(b)(2)(b) as set forth in petition R-22-0037 filed on July 20, 2022.

B. Supreme Court Rule 123 & SB 1114

The comment from the Clerk of Court for the Superior Court in Maricopa County suggests changes to Rule 123(d)(6)(B) as follows:

1. Section (iv): limit proceedings to Arizona court proceedings. Petitioner agrees with this recommendation.
2. Section (v): remove “a person nominated, in a pending petition filed,” limit proceedings to Arizona court proceedings, and clarify that the attorney of record referenced is the guardian’s or conservator’s attorney. Petitioner agrees with this recommendation. Petitioner also recommends adding “current” before “attorney of record” and adding verbiage to clarify that the guardian’s or conservator’s current attorney of record must be in an Arizona court proceeding that is related to the subject person.
3. Sections (vi) and (vii): add “pending” to clarify that an investigator or medical professional as defined in Probate Rule 2 may have access to the case records only while a guardianship, conservatorship, or other protective proceeding is pending. Petitioner agrees with this recommendation.
4. Section (ix): remove. Petitioner agrees with this recommendation.
5. Section (x): amend to exclude mental health providers because the clerk is not in a position to be able to validate who or what constitutes a “mental health provider.” Petitioner proposes alternative verbiage as set forth in the Appendix to allow access to mental health proceeding records by a lawful

representative of a regional behavioral health authority or health care provider as defined in ARS § 36-501 and their respective attorneys through an electronic system established by the director of the Administrative Office of the Courts pursuant to A.R.S. § 36-540(S). This alleviates the need for the clerk to validate who or what constitutes a “mental health provider” since the records will be available to the appropriate individuals through the electronic system.

Petitioner has incorporated the recommendations above into the proposed amendments to Rule 123 as outlined in the Appendix. In addition to the above amendments, Petitioner recommends the following changes to Rule 123(d) and (g):

1. (d)(6)(B): amend “may be available to “are open” to clarify that the records must be provided to the requestor if he or she is an individual listed in (d)(6)(B)(i) through (ix).
2. (d)(6)(B)(i): remove, as Petitioner believes that Rule 123(c)(5) suffices to cover this provision.
3. (d)(6)(B)(iii): add “current” before attorney to clarify that the attorney of record in the mental health proceeding must be a current attorney of record.
4. (d)(6)(D): amend to include 123(d)(6)(C) to allow a judicial officer assigned to the proceeding, for good cause shown, to authorize the release of case

records and information in a mental health proceeding to an agency not listed in 123(d)(6)(C).

5. Create a new (d)(6)(D), and renumber the existing subsections that follow, to require that any request for case records or information relating to a mental health proceeding be referred to a judicial officer if the clerk cannot determine whether the requestor is an individual listed in (d)(6)(B) or an agency listed in (d)(6)(C).
6. (g)(1)(D)(i)(a): amend “mental health proceedings brought under ARS Title 36” to “mental health proceedings as defined in (d)(6)(A) of this rule” so that “mental health proceedings” as used in this subsection is not inadvertently interpreted to mean *any* Title 36 proceeding and to clarify that “mental health proceedings” as used in this subsection means a proceeding brought under A.R.S. Title 36, *Chapter 5, Article 4 or 5*.
7. (g)(1)(E)(ii): amend “mental health” to “mental health proceedings” to clarify that information that cannot be extracted from a case management system as it relates to mental health cases pertains only to proceedings brought under A.R.S. Title 36, Chapter 5, Article 4 or 5.

III. Request.

Petitioner appreciates the comments stakeholders submitted during the comment period and deems it important to file this Reply to address the concerns

reflected in the comments. Based on the foregoing responses, Petitioner respectfully requests that the Court permanently adopt the amendments to Supreme Court Rules 30 and 123(d)(1)(B), (g)(1)(E)(i), (h)(4)(A), and (j)(3) as set forth in its August 29, 2021 Order and permanently adopt the additional proposed amendments to Supreme Court Rule 123(d)(6), (g)(1)(D)(i)(a), and (g)(1)(E)(ii) as attached.

Respectfully submitted this 17th day of October, 2022.

By /s/
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APPENDIX

Rules of the Supreme Court of Arizona

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

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

(a) through (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) through (5) [No Change]

(6) *Mental Health Case Records.*

(A) [No Change]

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

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

(ii) the subject person, which means a person who is the subject of the mental health proceedings whose records or information are being sought;

(iii) ~~an~~ a current attorney of record in the mental health proceeding;

~~(iv-iii)~~ the subject person's current attorney of record in any other Arizona court proceeding;

(iv) 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 current attorney of record in any an Arizona court proceeding related to the subject person;

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

(viii) [No change]

~~(ix) the subject person's agent under a valid health care or mental care power of attorney;~~

~~(x-viii) the a lawful representative of a regional behavioral health authority or health care provider as defined in ARS § 36-501 and their respective attorneys through an electronic system as established by the director of the Administrative Office of the Courts; and~~

~~(xi-ix)~~ [No Change]

(C) [No Change]

(D) A request for case records or information relating to a mental health proceeding must be referred to a judicial officer if the clerk cannot determine whether the requestor is an individual listed in (d)(6)(B) or an agency listed in (d)(6)(C).

~~(D-E)~~ 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 or an agency not listed in (d)(6)(B) or (C). The court's finding of good cause must be in the order authorizing the release.

~~(E-F)~~ [No Change]

(e) and (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 under 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;
 - probate proceedings brought under ARS Title 14;
- or

- mental health proceedings ~~brought under ARS Title 36~~ as defined in (d)(6)(A) of this rule.

(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) [No Change]

(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 proceedings, 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)-(iv) [No Change]

(2) through (9) [No Change]

(h) through (j) [No Change]