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ARIZONA SUPREME COURT

In the matter of:)	
)	
PETITION TO AMEND SUPREME)	Supreme Court No. 23-0029
COURT RULE 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 and this Court’s Order dated January 17, 2023.

I. Procedural History

On January 10, 2023, Petitioner filed a petition to amend Supreme Court Rule 123 to establish provisions for public access to court records in cases filed under A.R.S. Title 36, Chapter 37 to determine sexually violent person status. This Court opened the petition for public comment until May 1, 2023, with any reply due by June 1, 2023. This petition received one comment, and Petitioner files this reply to address that comment.

II. Discussion

The comment received on this petition was submitted by the Honorable Jay M. Polk, Presiding Judge of the Probate and Mental Health Department of the Superior Court in Maricopa County, on behalf of several individuals with whom he consulted on the matter (“the workgroup”). The comment supports the petition but proposes modifications to include records access exceptions for certain individuals and to modify how confidential documents must be provided to the court. Specifically, the workgroup proposes the following amendments to Supreme Court Rule 123(d)(7) originally proposed by Petitioner (deletions shown with strikethrough and new language underlined):

(7) Sexually Violent Person Case Records.

(A) Except as otherwise provided by this rule or law, in cases filed under ARS Title 36, Chapter 37, Any document that is closed under (d)(2)(A) or is listed in ARS § 36-3702(D)(2)(a), (b), or (3) through (9) is closed to the public.

(B) Documents described in 7(A) that are filed in an ARS Title 36, Chapter 37 case are open to the following:

(i) the county attorney who is entitled to initiate the case under ARS § 36-3704(A),

(ii) the Arizona attorney general,

(iii) the respondent,

(iv) the respondent’s attorney,

(v) a lawful representative of the Arizona state hospital or of a licensed facility under the supervision of the superintendent of the Arizona state hospital that provides treatment under ARS Title 36, Chapter 37,

(vi) a lawful representative of a service provider designated by the court to provide inpatient or outpatient treatment or to monitor or supervise any other terms and conditions of a person’s

placement in a less restrictive alternative under ARS § 36-3710, and (vii) upon a showing of good cause and after notice to the parties to the case, any other person the judge presiding over the case has authorized to access the document.

~~(B)~~(C) A party filing a document that is closed under this section must ~~separate and~~ identify the document as “confidential,” by placing it in an envelope or box marked with the case name, the case number, the name of the document being filed, the name of the party filing the document, and the words “Confidential Document.” A confidential document referenced in a pleading or motion as an exhibit, attachment, or appendix must state on the envelope or box the title of that pleading or motion and identify the exhibit, attachment, or appendix number. A party must place all confidential documents in one or more envelopes or boxes that conceal the contents ~~use a separate envelope for each confidential document~~. The clerk is not required to review a document to determine whether it is a confidential document.

~~(C)~~(D) All other documents in ARS Title 36, Chapter 37 case files maintained by the clerk of the court are open to the public, unless prohibited by law or sealed by court order.

Petitioner has no objection to the workgroup’s proposed amendments. However, after consultation with and at the recommendation of the workgroup members, Petitioner proposes additional verbiage in subparagraphs (B)(i) and (ii) to allow access by a deputy county attorney who has been assigned to the case or an assistant attorney general who has been assigned to represent either the Arizona state hospital or a licensed facility under the supervision of the superintendent of the Arizona state hospital that provides treatment under ARS Title 36, Chapter 37, to clarify that the records are open only to certain individuals within these offices and are not open to all individuals within each office. Petitioner also recommends specifying that subsection C applies to “paper” filings.

The entirety of the proposed rule is set out in the Appendix, which is intended to replace the Appendix of the January 10, 2023 petition.

III. Request

Petitioner appreciates the comment submitted during the comment period, and Petitioner supports the workgroup's proposed rule amendments. Therefore, Petitioner respectfully requests that this Court adopt the rule amendments as set forth in the Appendix.

Respectfully submitted this 23rd day of May, 2023.

By /s/David K. Byers
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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) [No change]

(b) Definitions

(1) through (13) [No change]

(14) Mental Health Proceeding. “Mental health proceeding” means a proceeding brought under ARS Title 36, Chapter 5, Article 4 or 5.

~~(14)-(15)~~ [No change in text]

~~(15)-(16)~~ [No change in text]

~~(16)-(17)~~ [No change in text]

~~(17)-(18)~~ [No change in text]

~~(18)-(19)~~ [No change in text]

~~(19)-(20)~~ [No change in text]

~~(20)-(21)~~ [No change in text]

(c) [No Change]

(d) Access to Case Records. [No change in text]

(1) 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 under ARS Title 36, Chapter 5, Article 4 or 5.~~

(B) through (F) [No change]

(7) Sexually Violent Person Case Records.

(A) Except as otherwise provided by this rule or law, in cases filed under ARS Title 36, Chapter 37, any document that is closed under (d)(2)(A) or is listed in ARS § 36-3702(D)(2)(a), (b), or (3) through (9) is closed to the public.

(B) Documents described in 7(A) that are filed in an ARS Title 36, Chapter 37 case are open to the following:

(i) the county attorney who is entitled to initiate the case under ARS § 36-3704(A) and any deputy county attorney in that office who is assigned to the case;

(ii) the Arizona attorney general and any assistant attorney general who is assigned to represent either the Arizona state

hospital or a licensed facility under the supervision of the superintendent of the Arizona state hospital that provides treatment under ARS Title 36, Chapter 37;

(iii) the respondent;

(iv) the respondent's attorney;

(v) a lawful representative of the Arizona state hospital or of a licensed facility under the supervision of the superintendent of the Arizona state hospital that provides treatment under ARS Title 36, Chapter 37;

(vi) a lawful representative of a service provider designated by the court to provide inpatient or outpatient treatment or to monitor or supervise any other terms and conditions of a person's placement in a less restrictive alternative under ARS § 36-3710; and

(vii) upon a showing of good cause and after notice to the parties to the case, any other person the judge presiding over the case has authorized to access the document.

(C) A party filing a paper document that is closed under this section must identify the document as confidential by placing it in an envelope or box marked with the case name, the case number, the name of the document being filed, the name of the party filing the document, and the words "Confidential Document." A confidential document referenced in a pleading or motion as an exhibit, attachment, or appendix must state on the envelope or box the title of that pleading or motion and identify the exhibit, attachment, or appendix number. A party must place all confidential documents in one or more envelopes or boxes that conceal the contents. The clerk is not required to review a document to determine whether it is a confidential document.

(D) All other documents in ARS Title 36, Chapter 37 case files maintained by the clerk of the court are open to the public, unless prohibited by law or sealed by court order.

(e) through (j) [No change]