

Mike Baumstark, Chair
Advisory Committee on
Supreme Court Rules 123 and 125
Administrative Office of the Courts
1501 W. Washington, Suite 410
Phoenix, Arizona 85007
(602) 452-3305

IN THE SUPREME COURT STATE OF ARIZONA

In the Matter of:)
)
PETITION TO AMEND) Supreme Court No. R-13-____
RULE 123, RULES OF THE)
SUPREME COURT OF ARIZONA)
_____)

**PETITION TO AMEND RULES
RELATING TO ACCESS TO PUBLIC RECORDS**

Pursuant to Arizona Supreme Court Rule 28, Mike Baumstark, Chair of the Advisory Committee on Supreme Court Rules 123 and 125, respectfully petitions this Court to adopt amendments to Rule 123, Rules of the Supreme Court of Arizona, as set forth in Appendix A, attached hereto. The primary purpose of the proposed amendments is to identify those minute entries and orders in family law cases that can be published online and those that can be made available only at the courthouse.

I. Background

In May 2012, at the request of the Arizona Judicial Council, the Chief Justice established, by Administrative Order 2012-41, the Advisory Committee on Supreme Court Rules 123 and 125 (hereinafter Rule 123 and Rule 125, respectively) to examine and make recommendations on whether revisions to these rules are necessary to effectuate a policy to identify those minute

entries and orders in family law and probate cases that can be published online and those that can be made available only at the courthouse. The committee consisted of representatives from the general jurisdiction court bench; clerks of court; court administrators; attorneys, including an attorney who regularly represents media clients; the State Bar, and the general public. It was chaired by Mike Baumstark, deputy administrative director, Administrative Office of the Courts.

II. Issues

To answer its charge, the committee found it necessary to address the following individual issues: a) whether family law minute entries that include protective order information could be published online; b) whether the names of minors or adults in guardianship, conservatorship, estate, trust, and mental health cases should be permitted to be published online as currently allowed by Rule 123; c) whether additional data elements or case information in guardianship, conservatorship, estate, trust, and mental health cases should be added to the four data elements currently permitted to be published online under Rule 123; d) whether minute entries in mental health cases should be added to the four data elements currently permitted to be published online under Rule 123; e) whether case records, in addition to minute entries, in guardianship, conservatorship, estate, trust, and mental health cases should be permitted to be published online, and f) certain additional clarifying revisions to Rule 123. While not specifically charged with addressing access to mental health case data, the committee found it important to discuss such access because of the similar nature of probate and mental health cases.

III. Analysis

The issues addressed by the committee do not impact the availability of case records at a courthouse. This accessibility is already governed by many statutes and rules that go well beyond Rule 123. Instead, the issues addressed by the committee are generally confined to weighing the public interest served by making case information readily available online versus

the personal privacy interest that should be protected by not posting certain case records in family law, probate, and mental health cases online. Rule 123 has long acknowledged the need to balance the competing interests of the public's right to access case records with the privacy rights of the individuals identified in those records. Specifically, Rule 123 provides, "the records in all courts . . . are *presumed* to be open. However ... public access to some court records *may be restricted*" for reasons of privacy, confidentiality, or in the state's best interests.

The question of balancing the interests of the public's right to know and individual privacy interests dominated the committee's deliberations. At the first meeting, the committee heard from a state representative who provided a real-life example of why records that are "public" at the courthouse should not be "published" online and available for all to see. The representative relayed a story of a constituent who was appalled to learn that very private details of the mental and physical health of a 13-year-old girl were published online as part of a minute entry order awarding custody in a dissolution case. It is important to understand that in a contested custody case, state law requires the court to "make specific findings on the record and the reasons for which the decision is in the best interests of the child." The committee recognized the impact that online access in this situation could have on this child's relationship with schoolmates, family, friends, and even potential future employers. This example of why certain public records should not be published online helped guide a great deal of the committee's discussion and its recommendations.

In carrying out its work, the committee reviewed state and federal statutes and court rules that govern access to court records, family law and protective orders, probate law, and mental health law. The committee also considered current practices throughout the state for preparing, publishing, and distributing minute entries and in posting party names, case number, judicial

assignment, attorney names, and dockets online in probate and mental health cases.

The attached Appendix primarily addresses the issue presented to the committee during its first meeting: family law minute entries. The existing provisions of Rule 123 are being revised to clarify those minute entries that may and may not be made available online. In summary, minute entries prepared for hearings conducted in open court may be published online; minute entries prepared for matters taken under advisement may not be published online. No revisions to Rule 125 are proposed. This clarification to Rule 123 eliminates the need for any revision to Rule 125.

After much discussion, the committee decided no changes to Rule 123 were needed regarding access to probate and mental health cases. Although some committee members raised concerns about protecting the privacy of individuals who are the subject of a guardianship or mental health case, the majority believed publishing the minimal data elements of party name, case number, judicial assignment, and attorney name, as currently permitted under Rule 123, is important to allow interested persons who are not parties to the case to monitor specific cases.

The specific recommendations of the committee are set forth more fully below.

IV. Proposed Amendments

123(g)(1)(C)(i): This proposed revision clarifies that general public, registered user access may be expanded beyond those persons who hold an Arizona driver license. It will allow access to the identified records by individuals outside of Arizona who register following protocols to be established as part of the electronic documents access project currently under way and set forth in ACJA § 1-604.

123(g)(1)(D)(i): By removing three words, this proposed revision eliminates the confusion caused by use of the term “closed,” which, in Rule 123, is equivalent by definition to

the term “confidential.” This proposed revision further eliminates the misstatement that suggests that juvenile delinquency, mental health, probate, and criminal cases in which a juvenile is alleged to be a victim are confidential cases. In fact, certain elements of these cases are sometimes confidential, while other elements are not.

123(g)(1)(D)(ii): This proposed revision breaks out the list of items constituting “case information” from the main rule, improving readability. In addition, it closely mirrors language in federal statute that restricts the Internet publication of certain protective order case information to safeguard the identity and location of protected persons.

123(g)(1)(D)(iii): This proposed revision separates family law minute entries and rulings, decisions, or orders – both temporary and final – from case information. It also breaks out the list of items constituting “case information” from the main rule, improving readability, and reduces the list to those items that are applicable to family law cases. Finally, it includes language from federal statute restricting Internet publication of certain information about protective order cases for the safety of the protected person.

V. Public Comment Period

The court community, the public, the media, and other users of court records all have a great interest in Rule 123. Additionally, multiple changes have been made to this complex rule as recently as January 1, 2013, with an approved pending rule change effective September 1, 2013. Therefore, Petitioner requests the petition be circulated for public comment on a modified schedule as follows:

- April 1** Initial comments to the petition due.
- May 8** The committee may modify the rule petition by filing an amended petition.
- June 5** Second round of comments to any amended petition due.

July 3 The committee's reply to comments due.

VI. Conclusion

For the foregoing reasons, the undersigned respectfully petitions this Court to amend Rule 123, Rules of the Supreme Court of Arizona as set forth in Appendix A.

RESPECTFULLY SUBMITTED this 8th day of January, 2013.

By _____
Mike Baumstark, Chair

APPENDIX A

Rules of the Supreme Court of Arizona¹

Rule 123. Access to the Judicial Records of the State of Arizona²

(a) – (f) [No change]

(g) Remote Electronic Access to Case Records.

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

(A) – (B) [No change]

(C) *General Public, Registered Users.*

(i) Members of the public ~~who hold an Arizona driver license or nonoperating identification license~~ may be provided remote electronic access, ~~upon registering and paying any established fee 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) – (d) [No change]

(ii) [No change]

(D) *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 ~~closed cases, including~~ 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)(C)(ii)(h) above:

- party names,
- case number,
- judicial assignment, and
- attorney names

(ii) except as provided in paragraph (g)(1)(C)(ii)(h) above, individual case information

¹ Revisions to Rule 123 that become effective on September 1, 2013, pursuant to R-12-0004 have been incorporated into the text set forth in Appendix A.

² Additions to text are indicated by underscoring; deletions by ~~striketrough~~.

extracted from a case management system in all civil, criminal, and civil traffic cases identified in paragraphs (g)(1)(C)(i)(a) through (d), ~~and family law cases, including~~. 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) Case information may be provided for family law matters, with minute entries limited only to those issued during hearings conducted in open court or in chambers when one or more parties or their counsel are present. For purposes of this subsection, 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)~~ (iv) court of appeals and supreme court opinions and decisions in all case types, except that any appendix in criminal cases in which a defendant is charged with any 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)(c)(ii)(h) above, shall not be provided by remote electronic access.

(2) – (8) [No change]

(h)-(j) [No change]

[2013] COURT COMMENT TO PARAGRAPH (G)(1)(d)(3)

Courts and clerks of court should clearly and prominently display a cautionary note on their document access website advising users that not all documents in a case might be posted to the website and that additional or subsequent documents or orders may be available from the court or clerk of court.