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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:

PETITION TO AMEND RULE 123,)	
RULES OF THE SUPREME COURT)	Supreme Court Number
)	R-16-_____
_____)	

Petitioner Marcus Reinkensmeyer, chair of the ad hoc Committee on Time Periods for Electronic Display of Superior Court Case Records, and director of the Court Services Division, Administrative Office of Courts, respectfully petitions this Court to amend Rule 123, Rules of the Supreme Court, as shown in the appendix to this petition.

I. Background and Purpose of the Proposed Rule Amendments.

In December 2013, the Arizona Judicial Council approved the Final Report of the Supreme Court Advisory Committee to Develop Policies for Retention, Destruction, and Access to Electronic Court Records (ERR&D). That report recommended, among other things, that the length of time electronic case documents

and data are available online and at court facilities should be consistent from court to court. The report also recommended that records managers remove electronic records from online access consistent with applicable records retention schedules.

In advocating for statewide consistency, the ERR&D recommended that limited jurisdiction court records be removed from online access when the retention period established for the case file ends or, for some case types, removed from online access earlier than the end of retention. The ERR&D made additional recommendations regarding the adoption of separate schedules for retention of paper case records, records displayed on public access websites maintained by courts, and electronic records maintained in case management systems (CMS) and document management systems (EDMS).

Implementation of the ERR&D committee's recommendations was handed off to two subsequent committees that updated the records retention and disposition schedules for superior courts and limited jurisdiction courts, ACJA §§ 3-402 and 4-302 respectively. While the updated Limited Jurisdiction Courts Records Retention and Disposition Schedule now addresses how long the electronic case documents and case management system information are to be available to the public online, the revised Superior Court Records Retention and Disposition Schedule does not.

Thus, the Committee on Time Periods for Electronic Display of Superior Court Case Records was formed to make recommendations regarding the length of

time superior court case records should be displayed on court public access websites. The proposed amendment contained in this petition is intended to promote statewide consistency on courts' case lookup websites.

II. The Committee's Work Process.

The time periods committee, established by AO 2015-68, was asked to focus on case records held by the clerks of court—Records Series #1-18¹ of the Superior Court Records Retention and Disposition Schedule—and recommend how long information in these records should be available to the public through remote electronic access. Remote electronic access is possible today through a court's case lookup website and will be possible in the future through the AOC's e-Access project, which is in development. The committee's recommendations do not affect the length of time that the public can access court records at courthouses. Existing statutes and court rules regulate the public's access to records at court facilities.

In addition to the committee chair, members include two superior court judges; one superior court administrator, a county prosecutor, a public defender, an attorney who represents the media, an attorney nominated by the State Bar, two Clerks of Court, a professor from the University of Arizona Civil Rights Restoration Clinic, and a representative from the Arizona Attorney General's Office.

¹ Civil; family; Orders of Protection; mental health; probate; general stream adjudication; criminal; criminal capital; juvenile adoption, severance and dependency; juvenile delinquency; juvenile abortion; juvenile traffic cases filed in superior court, and lower court appeals.

The committee's charge was to evaluate permanent and non-permanent superior court records to determine whether they should be available by remote electronic access for the full period during which they are retained by the courts or whether a shorter length of time would be more appropriate. Permanent records are transferred to the Arizona State Library, Archives and Public Records (LAPR) at the end of the retention period with the court; non-permanent records are destroyed at the end of retention.

The committee met three times over the course of four months. To learn about transfers of court records to the state archives, the committee heard from Dr. Melanie Sturgeon, director of Archives and Records Management at LAPR. She explained that LAPR does not have the technology to accept electronic records today, but she expects LAPR to have that capability by the time the first electronic records could be transferred there many years from now.

For questions on costs and technology, the committee consulted with Stewart Bruner and Eric Ciminski from the AOC's technology staff. The committee learned that the ERR&D Committee thoroughly explored costs and that for online display, costs are not an issue. There are no cost savings for removing records from public access any sooner than the end of the retention period with the court. But courts could incur additional costs for *holding* records beyond the end of retention.

III. Analysis.

In managing access to court records through the Internet, the intent is to promote statewide consistency at multiple court levels. Rule 123, Rules of the Supreme Court, currently is permissive, allowing removal of records at the end of retention and also permitting clerks to remove records with lengthy retention periods after 25 years of online access, even though the court may retain these records for many more years. But the rule, in its current form, works against the goal of statewide consistency in handling of this information.

The balance between the public's right to know and the privacy interests of individuals named in court records dominated the committee's deliberations. Rule 123 long ago acknowledged the need to balance these competing interests. Specifically, Rule 123(c)(1) provides that "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.

In carrying out its work, the committee first reviewed state and federal statutes and court rules that govern access to court records. Rule 123(g) serves as the primary filter through which case records pass before they reach court public access websites. The committee reviewed the case types in Records Series #1-18 in relation to the rules or statutes that govern access to the information contained in them.

For each case type, the superior court schedule establishes two retention periods—a retention period that identifies how long the records are kept at the clerk’s office and a subsequent retention period, if any, at LAPR. The majority² of superior court case records are retained permanently at LAPR after some retention period with the courts. Non-permanent records³ are held by the clerk of the court for a specified period of time and then are destroyed at the end of the retention with the court. The revised superior court schedule, adopted by the Court in 2014, requires clerks to delete CMS and EDMS records for case types *not* designated for permanent retention, but the schedule does not identify a retention period for online access to superior court case records (either permanent or non-permanent) by the public. The current policy that addresses how long these records should be kept on a court’s public access website, Rule 123(g)(5)(A)-(B), provides for discretionary removal of the records.

After reviewing relevant rules and statutes, the committee moved on to public policy issues. In addition to considering the public’s right to know and individual privacy interests, the committee learned about the “right to be forgotten.” The concept that individuals have the right—under certain conditions—to ask search engines such as Google to remove links with personal information about them has

² Civil, family, mental health, probate, criminal, criminal capital, general stream adjudication, and juvenile adoption, severance and dependency.

³ Orders of Protection, juvenile delinquency, juvenile traffic cases filed in superior court, juvenile abortions, and lower court appeals.

been embraced in the European Union. No such “right” has been recognized in the United States. The committee also discussed intentional inconvenience and practical obscurity— notions that private information in public records is effectively protected from disclosure as the result of practical barriers to access. For example, removing case information from the Internet and requiring the public to travel to the courthouse to view it creates an intentional inconvenience. The information is still available, but it requires greater effort to get it.

The committee discussed these concepts as they apply to each of the case types in Records Series #1-18. While there was consensus on most case types, criminal cases generated the most discussion. It was noted that the existence of a criminal record impacts a defendant’s life, long after a sentence has been served. A criminal case record is retained by the court for 50 years from the date it was filed. For an adult, 50 years is most of that person’s lifetime. The existence of a criminal conviction will impact an offender’s life in many ways beyond a court sentence. For example, people with criminal convictions may face discrimination in employment and housing because information about the conviction is so readily available. But at the same time, a property owner or an employer can quickly screen an applicant with a simple online search of court records.

At its final 2015 meeting, the committee reviewed each case type separately. Ultimately, after thoughtful debate and careful deliberation, the committee could

find no reason to require removal of records from court websites any earlier than the time the records are either transferred to LAPR permanently or destroyed. Except for criminal cases, with one dissenting vote, the committee unanimously agreed that case information should remain online for the full retention period with the courts. The committee's recommendation accomplishes the goal of statewide continuity and consistency, makes court information accessible to the public in accord with the Judiciary's open records policy, and honors past policy decisions on public access to court records.

Concurrent with the filing of this Rule 28 petition, the committee will file a petition to amend ACJA § 3-402, Superior Court Records Retention and Disposition Schedule. The committee will propose adding a column to the schedule to indicate when each case type in Records Series #1-18 must be removed from public access websites. The column heading will mirror the column heading in the limited jurisdiction schedule.

IV. Proposed Amendment.

Appendix A to this petition presents the proposed amendments to Rule 123. The revised rule will change from permissive to mandatory the provision that courts or clerks must remove records from online access as provided in their respective records retention schedules. As noted, the limited jurisdiction schedule already provides for removal of records from online access, but the superior court schedule

does not. Therefore, a petition to amend ACJA § 3-402, the superior court schedule, will be filed as well.

Rule 123(g)(5)(B)—a permissive rule that allows clerks to remove records with 25 or more years of retention after 25 years of display—will be deleted. In its current form, the rule also requires a court or a clerk to display an online notice that directs a viewer to contact the court for access to the record. With the deletion of Rule 123(g)(5)(B), this additional rule language cannot stand as the court will no longer have the record in its keeping. Instead, the proposed rule amendment, in a new subparagraph (5), will require courts or clerks to post a disclaimer on their case lookup websites explaining the limitations of the information to be found there. Current case management systems are not programmed to post individual responses when a specific record is queried. Therefore, the courts must post the disclaimer.

V. Request for a Modified Comment Period.

The court community, the public, the media, and other users of court records all have a great interest in Rule 123. Because the proposed amendments to Rule 123 were developed in an ad hoc committee that did not complete its work until December 2015, Petitioner acknowledges that the amendments have not been fully vetted. The proposal was presented to the superior court presiding judges and the Arizona Judicial Council at their respective December meetings. Members of both groups were apprised of both the majority and minority views of committee

members, particularly with respect to criminal felony cases. After hearing the committee's report, each group unanimously voted to support this petition and a petition to modify ACJA § 3-402.

Nevertheless, the opportunity for comment from the public comment may address items that this petition overlooks or may suggest other changes that improve the proposed rule. Petitioner therefore requests that the Court allow a modified comment period to accommodate the filing of an amended petition after an initial round of public comments. Petitioner suggests the following dates:

- April 20, 2016: First round of comments due
- May 20, 2016: Amended petition due
- June 15, 2016: Second round of comments due
- July 13, 2016: Reply due

VI. Conclusion. Petitioner requests that the Court open this petition for comments during the modified periods described above. Petitioner additionally requests that if the Court adopts the proposed rule, either as filed or as modified after comments, with an effective date of January 1, 2017.

RESPECTFULLY SUBMITTED this _____ day of January, 2016.

By _____
Marcus Reinkensmeyer, Chair
Committee on Time Periods for Electronic Display
of Superior Court Case Records

Appendix A

(language to be removed is shown in ~~strikethrough~~; new language is underlined)

Rule 123, Rules of the Supreme Court

(a) through (f) [no changes]

(g) Remote Electronic Access to Case Records

(1) through (4) [no changes]

(5) The public access website through which a court publishes case management system data and case records must include a prominent disclaimer on the limitations of the case information displayed.

(6) ~~Removing case records from online access.~~

~~(A) Courts or clerks of court may~~ must remove case management system data and case records from online display as provided in ~~once~~ the applicable records retention schedule ~~period is met.~~

~~(B) For cases scheduled to be retained more than 25 years, courts or clerks of court may remove case management system data and case records from online display after 25 years, provided the data and records are then retained through an electronically preserved method. In place of the records, the court or clerk of court shall display a notice online which directs the viewer to contact the court or clerk for access to the case record.~~

~~(6)~~ (7) The clerk of the court, court, court agency, or their employees shall be immune from suit for any conduct relating to the electronic posting of case documents in accordance with this rule.

~~(7)~~ (8) Data or information that would disclose that a user of a remote electronic access system has accessed a particular court record is closed. Record access information shall be accessible by the public only on a showing of good cause pursuant to the process set forth in paragraph (f) of this rule.

~~(8)~~ (9) This paragraph (g) shall not limit the public's right of access to records, whether in paper or electronic format, at a court-designated facility.

(h) through (j) [no changes]