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7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-17-

10 **PETITION TO AMEND THE**
11 **ARIZONA RULES OF CIVIL**
12 **PROCEDURE TO ADD RULE 5.4**
13 **REGARDING SEALING AND**
14 **UNSEALING OF DOCUMENTS**

PETITION

15 Pursuant to Rule 28, Rules of the Arizona Supreme Court, the State Bar of
16 Arizona (“State Bar”) respectfully petitions this Court to amend the Arizona Rules
17 of Civil Procedure, to add a Rule 5.4 concerning the sealing and unsealing of
18 documents, as proposed in the attached Appendix A.

19 **I. OVERVIEW AND SUMMARY OF PROPOSED CHANGES**

20 It is an oft-posed, perennial question in many Arizona law practices: how
21 does one properly file a document under seal with a trial court? Arizona lawyers
22 have the instinct that a motion-and-order process is likely involved, but beyond that,
23 the practical questions inherent there have remained unanswered by the Arizona
24 Rules of Civil Procedure.
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1 The State Bar proposes with this Petition to install an answer in the rules.
2 Questions about exactly what the court must find, how the document gets filed by
3 the clerk in a non-publicly-accessible manner in our open courts, how to reconcile
4 the sealing process with the Rule 26(c), Ariz. R. Civ. P., protective-order process,
5 and how even to proceed where a document need be unsealed, are all answered in
6 proposed Rule 5.4.
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8 The draft proposed rule, attached hereto as Appendix A, begins with the
9 general proposition in subsection (a), supported by substantive law, that “[u]nless
10 authorized by statute, rule, or court order, no document may be filed under seal in
11 an unsealed civil action.” With that narrowing prohibition in place, the proposed
12 rule continues on to:
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15 (b) define key terms,

16 (c) describe a proper written order containing findings that support
17 granting a request to file a document under seal and the court clerk’s
18 duties with respect to such an order,

19 (d) describe motions and stipulations to file documents under seal,

20 (e) prescribe the procedure for lodging and serving a document to be
21 filed under seal, including the secured-envelope procedure and
22 including the court clerk’s duties in those processes,
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1 (f) describe the procedures required when a motion or stipulated request
2 to file a document or documents under seal is completely or partially
3 denied,

4 (g) explain the procedures to be followed when a party seeks to file (or
5 disclose the contents of) a document produced by another person
6 pursuant to a Rule 26(c) or other protective order or a confidentiality
7 agreement, and finally,
8

9 (h) describe the procedures involved when there is a request or finding
10 that a document be unsealed.

11 Proposed Rule 5.4 comprehensively addresses both procedural and
12 substantive aspects of the law in this area, as there is no current statewide rule
13 addressing either.

14 **II. NO CURRENT RULE**

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16 The proper procedures for sealing and unsealing documents in cases before
17 the superior court present a perennial practice question in part because there is no
18 current rule in the Arizona Rules of Civil Procedure. Proposed Rule 5.4 seeks to fill
19 a long-noted gap in the procedural rules. As discussed below, Arizona has the
20 substantive law on point, but procedures bottomed on that law and translating it into
21 the civil rules have been lacking until now.
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1 **III. BACKGROUND OF THE PROPOSED RULE**

2 The State Bar provides in this Petition some of the research and background
3 considerations that went into the drafting of the proposed rule.
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5 Maricopa County, in its Superior Court Local Rules as revised in 2013,
6 adopted a brief procedural rule regarding the findings required before a document
7 might be sealed. Maricopa County Local Rule 2.19 provides:
8

9 **a. Request to Seal or Redact Court Records; Service.** Any person
10 may request that the court seal or allow the filing of a redacted court
11 record for a case that is subject to these rules by filing a written motion,
12 or the court may, upon its own motion, initiate proceedings to seal or
13 allow the filing of a redacted court record. A motion to seal or allow the
14 filing of a redacted court record must disclose in its title that sealing or
15 redaction is being sought. The motion must be served on all parties in
16 accordance with the applicable rules of service for the case type.

17 **b. Hearing.** The court may conduct a hearing on a motion to seal or
18 allow the filing of a redacted court record.

19 **c. Grounds to Seal or Redact; Written Findings Required.** The court
20 may order the court files and records, or any part thereof, to be sealed
21 or redacted, provided the court makes and enters written findings that
22 the specific sealing or redaction is justified by identified compelling
23 interests that outweigh the public interest in access to the court record.
24 The findings should include the following:

- 25
- (1) there exists a compelling interest that overcomes the right of public access to the record;
 - (2) the compelling interest supports sealing or redacting the record;
 - (3) a substantial probability exists that the compelling interest will be prejudiced if the record is not sealed or redacted;
 - (4) the proposed sealing or redaction is narrowly tailored; and
 - (5) no less restrictive means exist to achieve the compelling interest.

1 Maricopa County Local Rule 2.20 addresses unsealing court records and
2 provides:

3
4 **a. Access.** Court records that are sealed may be examined by judicial
5 officers. Access by the public to sealed records will only be allowed
6 after entry of a court order in accordance with this rule.

7 **b. Motion; Service.** A sealed court record shall be unsealed only upon
8 stipulation of all the parties, upon the court's own motion, or upon a
9 motion filed by a named party or another person. A motion to unseal a
10 court record must be served on all parties to the action in accordance
11 with the applicable rules of service for the case type. If the movant
12 cannot locate a party for service after making a good faith effort to do
13 so, the movant may file an affidavit setting forth the efforts to locate
14 the party and requesting that the court waive the service requirements
15 of this rule. The court may waive the service requirement if it finds that
16 further good faith efforts to locate the party are not likely to be
17 successful.

18
19 **c. Hearing.** Any party opposing the motion shall appear and show
20 cause why the motion should not be granted. The responding party must
21 show that compelling circumstances continue to exist or that other
22 grounds provide a sufficient legal or factual basis for keeping the record
23 sealed.

24 In addition, a subcommittee of the State Bar's Civil Practice and Procedure
25 Committee learned through research that Maricopa County Local Rule 2.19 is
substantively identical to both California Rule of Court 2.550(d)¹ and New Mexico

¹ Last substantively amended in 2004. The California Rule of Court memorializes that state's substantive law as set forth in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Ct.*, 980 P.2d 337 (Cal. 1999).

1 Rule of Criminal Procedure for the District Courts 5-123(G).² Research also
2 revealed other jurisdictions with sealed-documents rules of varying substance.³
3
4 None beyond California and New Mexico appear to employ the multi-part test used
5 in Maricopa County Local Rule 2.19.

6 The California and New Mexico rules use the word “overriding” instead of
7 “compelling” in their multi-part tests. After discussion, research, and consensus, the
8 State Bar proposes use of “overriding” in proposed Rule 5.4, to best substantively
9 communicate to trial courts and parties the necessity of a paramount interest to
10 overcome the general presumption of public access to the court and documents filed
11 in it.
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14 To meet the ‘overriding interest,’ or ‘compelling reasons,’ standard for each
15 particular document, a “party must articulate compelling reasons supported by
16 specific factual findings that outweigh the general history of access and the public
17 policies favoring disclosure.”⁴
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20 ² Adopted in 2010.

21 ³ The most substantive—or those that reference substantive law—are Okla. 7th Jud.
22 Dist. Ct. R. 10.1(C) (referencing 51 O.S. 2011, § 24A.29); So. Carolina R. Civ. P.
23 41.1(b); So. Dakota Cod. Laws § 15-15-11; Bus. Ct. R. Proc. for 9th Jud. Dist.
24 Circuit of Fla. 5.17; Tenn. 26th Dist. Local R. Prac. § 8.02; and Tenn. 20th Dist. Ct.
R. Prac. § 7.02.

25 ⁴ *DRK Photo v. McGraw-Hill Companies, Inc.*, No. CV 12-8093-PCT-PGR, 2014
WL 2584816, at *2 (D. Ariz. June 10, 2014) (quoting *Kamakana v. City & Cty. of*

1 Compelling reasons to seal generally exist when court records might become
2 “a vehicle for improper purposes, such as the use of records to gratify private spite,
3 promote public scandal, circulate libelous statements, or release trade secrets.”⁵
4

5 As discussed below, Arizona case law—while sparse—holds in line with the
6 compelling, or overriding, interest standard adopted from federal First Amendment
7 law.
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9 Procedural considerations underlying the new proposed rule were informed
10 by two local rules (“LRCiv”) of the United States District Court for the District of
11 Arizona—LRCiv 5.6 and 5.7. LRCiv 5.6 addresses the “Sealing of Court Records in
12 Unsealed Civil Actions,” while LRCiv 5.7 addresses the “Filing of Court Records in
13 Sealed Civil Actions.” The text of each rule, set forth below, helped inform the
14 procedural aspects of proposed Rule 5.4, particularly those regarding lodging of
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20 *Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006)). *Kamakana* establishes a dual
21 standard for requests to seal, meaning a ‘compelling reasons’ standard applies to
22 most judicial records, while a second, ‘good cause’ standard applies to discovery
23 materials and documents attached to non-dispositive motions. The State Bar does
24 not propose adopting such a dual standard in proposed Rule 5.4; rather, the
25 ‘overriding interest’ standard in the proposed rule would apply equally and without
distinction among types of documents sought to be filed under seal.

⁵ *Id.* (quoting *Kamakana*, 447 F.3d at 1179 (citing *Nixon v. Warner Commc’ns, Inc.*,
435 U.S. 589, 598 (1978))).

1 documents to be filed under seal and procedures to be followed when seeking to file
2 documents designated confidential by another party:

3
4 **LRCiv 5.6**

5 **SEALING OF COURT RECORDS IN UNSEALED CIVIL**
6 **ACTIONS**

7 **(a) Order Required.** No document may be filed under seal in an
8 unsealed civil action except pursuant to an order by the Court as set
9 forth in subpart (b) of this Rule. For the purposes of this Rule, the term
10 "document" means any exhibit, record, filing or other item to be filed
11 under seal with the Court.

12 **(b) Procedure for Obtaining an Order to File a Document Under**
13 **Seal.** The Court may order the sealing of any document pursuant to a
14 motion, stipulation, or the Court's own motion. The Court generally
15 will not enter an order that gives advance authorization to file
16 documents under seal that are designated for such treatment by parties
17 under a protective order or confidentiality agreement. Any motion or
18 stipulation to file a document under seal must set forth a clear statement
19 of the facts and legal authority justifying the filing of the document
20 under seal and must append (as a separate attachment) a proposed order
21 granting the motion. The document or documents that are the subject of
22 any such motion or stipulation must not be appended to the motion or
23 stipulation, and must be lodged with the Court separately consistent
24 with subpart (c) of this Rule.

25 **(c) Lodging of Documents to Be Filed Under Seal.**

(1) Lodging in Electronic Form. Generally, a document to be filed
under seal must be lodged with the Court in electronic form. The
Electronic Case Filing Administrative Policies and Procedures Manual
("the Administrative Manual") sets forth the circumstances in which
such documents must be lodged electronically and the instructions for
doing so.

(2) Exceptions; Lodging in Paper Form. A document to be submitted
under seal by a party or counsel who is exempt from the requirement to
file papers electronically must be lodged in paper form with a cover
sheet prominently displaying the notation "DOCUMENT
SUBMITTED UNDER SEAL" and clearly identifying:

1 (A) the document and the underlying motion to which it pertains;

2 (B) the number of pages submitted for lodging;

3 (C) the motion or stipulation seeking to have the document filed
4 under seal; and

5 (D) the case number and title of the action in which the document is
6 to be filed.

7 **(d) Filing a Document Designated Confidential by Another Party.**

8 Unless otherwise ordered by the Court, if a party wishes to file a
9 document that has been designated as confidential by another party
10 pursuant to a protective order or confidentiality agreement, or if a party
11 wishes to refer in a memorandum or other filing to information so
12 designated by another party, the submitting party must confer with the
13 designating party about the need to file the document (or proposed
14 filing) under seal and whether the parties can agree on a stipulation
15 seeking to have the document (or proposed filing) filed under seal. If
16 the parties are unable to agree on these issues, the submitting party must
17 lodge the document (or proposed filing) under seal and file and serve a
18 notice of lodging summarizing the parties' dispute and setting forth the
19 submitting party's position, accompanied by a certification that the
20 parties have conferred in good faith and were unable to agree about
21 whether the document (or proposed filing) should be filed under seal.
22 Within fourteen (14) days after service of the notice, the designating
23 party must file and serve either a notice withdrawing the confidentiality
24 designation or a motion to seal and a supporting memorandum that sets
25 forth the facts and legal authority justifying the filing of the document
(or proposed filing) under seal. If the designating party seeks to have
the document (or proposed filing) filed under seal, the motion must
append (as a separate attachment) a proposed order granting the motion
to seal. No response to the motion may be filed. If the designating party
does not file a motion or notice as required by this subsection, the Court
may enter an order making the document (or proposed filing) part of
the public record.

(e) Denial of Request to File a Document Under Seal. If a request to
file under seal is denied in part or in full, the lodged document will not
be filed. If the request is denied in full, the submitting party may, within
five (5) days of the entry of the order denying the request, resubmit the
document for filing in the public record. If the

1 request is denied in part and granted in part, the party may resubmit the
2 document in a manner that conforms to the Court’s order and this Rule.

3 **(f) Effect of Sealing.** If the Court orders the sealing of any document,
4 the Clerk shall file the order to seal and secure the sealed document
5 from public access.

6 **LRCiv 5.7**

7 **FILING OF COURT RECORDS IN SEALED CIVIL ACTIONS**

8 Every document to be filed in a sealed action must be submitted to the
9 Court in paper form with a cover sheet prominently displaying the
10 notation “DOCUMENT SUBMITTED UNDER SEAL” and clearly
11 identifying the document, the number of pages submitted, and the case
12 number and title of the action in which the document is to be filed.

13 **IV. SECTION-BY-SECTION DISCUSSION OF PROPOSED RULE 5.4**

14 Proposed Rule 5.4 was developed with the intent of marrying the interests and
15 responsibilities of a diverse group of stakeholders in documents filed in Arizona’s
16 Superior Court. The court, parties, court clerk, counsel, press, and public all have
17 interests—and to some extent, rights—in a rule-based process for the sealing and
18 unsealing of court documents that adheres to substantive, constitutional law and
19 existing rules and best practices. With that preface, this Petition sets forth a section-
20 by-section description of the sections of proposed Rule 5.4. The lettering of the
21 subsections below corresponds to that of the sections of proposed Rule 5.4.
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1 **A. General Rule**

2 The simple and general rule, set forth in section (a), is that no document may
3 be filed under seal in an unsealed civil action, absent authorization by a statute, rule,
4 or court order.
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6 **B. Definitions**

7 Section (b) of proposed Rule 5.4 defines four key terms: “document,” “lodged
8 document,” “public access,” and “sealed document.” Importantly, a lodged
9 document is one that is “temporarily deposited with the court but is not filed or made
10 available for public access.” (Public access, under the proposed Rule, includes
11 inspection or copying of a document, which is “any filing, exhibit, record, or other
12 documentary material to be filed or lodged with the court.”) A sealed document,
13 then, is one “filed or lodged with the court for which public access is prohibited by
14 statute, rule, or court order.”
15

16 **C. Order and Contents**

17 If the requirements in proposed Rule 5.4 are met, the court may enter an order
18 that a document be filed under seal. Consistent with substantive law, however, the
19 court may not enter an order giving advance authorization to file an entire category
20 of documents under seal, unless the court has previously found that the entire
21 category or type of documents meets the substantive-findings aspect of the proposed
22 rule. Those mandatory written findings, set forth in section 5.4(c)(2) include:
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1 (A) an overriding interest exists that supports filing the document under
2 seal and overcomes the right of public access to it;

3 (B) a substantial probability exists that the person seeking to file the
4 document under seal (or another person) would be prejudiced if it is not
5 filed under seal;

6 (C) the proposed restriction on public access to the document is no
7 greater than necessary to preserve the confidentiality of the information
8 subject to the overriding interest; and

9 (D) no reasonable, less restrictive alternative exists to preserve the
10 confidentiality of the information subject to the overriding interest.

11 Under proposed 5.4(c)(1), the court's analysis is most often a document-by-
12 document consideration of the above factors set forth in proposed 5.4(c)(2).

13 Proposed Rule 5.4(c)(3) prescribes for the court the contents of its orders in three
14 situations: (1) if all of a document is to be protected; (2) if only part of a document
15 is to be protected; and (3) if the court determines an entire category or type of
16 document meets the 5.4(c)(2) requirements and enters an order authorizing in
17 advance the filing under seal of any document of that category or type.

18 Proposed Rule 5.4(c)(4) sets out the clerk's duties in the event of an order to
19 file under seal and provides that the date of the sealed document's filing is the date
20 the document was lodged with the clerk.

1 Proposed Rule 5.4(c)(5) and (6) deal, respectively, with procedures in the
2 event of an appeal of a court’s decision on a sealing request and monetary sanctions.⁶
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4 **D. Motion or Stipulation**

5 The general rule is that any person may file or join a motion or stipulation to
6 file a document under seal, and there are four specific requirements related to those
7 written requests to file documents under seal set forth in proposed Rule 5.4(d). First,
8 the motion or stipulation must contain a clear statement of the facts and legal
9 authority supporting it, including—if applicable—why the request satisfies the
10 proposed Rule 5.4(c)(2) factors that the court will need to analyze in its ruling. (It
11 also must state whether any party opposes the request, and, if not, then the motion
12 or stipulation must bear the phrase “Not Opposed” below its title.) Second, effective
13 January 1, 2017, any motion or stipulation to file under seal joined by fewer than all
14 the parties must include a Rule 7.1(h) good faith consultation certificate.⁷ Third, a
15 Rule 5.1(d)-compliant proposed order must accompany the request. And, finally, if
16 the motion or stipulation doesn’t seek to file under seal *all* of the document’s
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21 ⁶ Specifically, a “court may issue monetary sanctions against any person who
22 discloses any document, or any protected portion of a document, the person knows
23 or should know is sealed or lodged under this rule. A court may also issue monetary
sanctions against any person who knowingly violates any provision of this rule.”

24 ⁷ The requirements for proposed orders referenced in proposed Rule 5.4(d)(4) are
25 set forth in Rule 5.1(d) of the Arizona Rules of Civil Procedure, as modified effective
January 1, 2017.

1 contents, then the submitting person must file a publicly accessible, redacted version
2 of the document.⁸

3
4 **E. Lodging and Serving a Document to be Filed Under Seal**

5 The procedures in section (e) of the proposed rule may be the most familiar
6 part of the proposed rule to those who have previously sought to file documents
7 under seal in superior, or even federal, court. This section of the rule references the
8 traditional sealed-envelope procedure for lodging a document to be filed under seal
9 and uses terminology similar to that of LRCiv 5.6 of the United States District Court
10 for the District of Arizona.
11

12 Specifically, unless the clerk of the court has developed a procedure allowing
13 for electronic lodging, the person filing the motion or stipulation to file under seal
14 “must submit the document or documents to the clerk in paper form in a secured
15 envelope.” The envelope must bear a coversheet “prominently displaying the
16 notation ‘DOCUMENT(S) PROPOSED FOR FILING UNDER SEAL’ and clearly
17 identifying” four things:
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- 20 • case number and title of the action
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23 ⁸ The same procedure applies if a person is filing a document under seal under an
24 order providing advance authorization to do so and only part of the document
25 contains information to which the sealing order is applicable. *See* Appendix A, at
proposed Rule 5.4(d)(5).

- 1 • motion or stipulation seeking to have the document filed under seal
- 2 • underlying motion to which the document pertains, and
- 3 • each document contained in the envelope, in a manner allowing the
- 4 court to readily identify it, and the number of pages in each document.

5 The clerk has three duties with respect to lodging. First, upon lodging, the
6 clerk must retain but not file a lodged document unless the court orders it filed.
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8 Second, the clerk must not allow public access to the document until the court has
9 made a decision on the request to file under seal. Third, in the event a document that
10 is the subject of a request to seal is already in the public file—and the requesting
11 person files a separate request⁹ asking the clerk to discontinue public access to the
12 document—the clerk must do so as requested until the court decides.

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15 **F. Procedures in Case of Complete or Partial Denial**

16 Proposed Rule 5.4(f) prescribes the process to follow in the event of the
17 court’s complete or partial denial of a motion or stipulation to file under seal. The
18 submitting person has three choices in that event, and must choose among them and
19 file within seven days either: (A) a publicly accessible version of the document
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24 ⁹ Entitled “Request to Clerk to Disallow Public Access to a Document Pending
25 Judicial Review.”

1 conforming to the court’s order; (B) a notice stating that the person no longer wants
2 to file the document; or (C) an unredacted copy of the document.¹⁰

3
4 Meanwhile, the clerk of the court has two sets of duties prescribed by this
5 section of the proposed rule: one set in the event of a complete court denial of a
6 motion or stipulation to file under seal, and another, in the event of a partial denial.
7 In the first case, the clerk must retain the lodged document for at least seven days
8 after entry of the order completely denying the request to file under seal. After that
9 time has elapsed, the clerk may destroy or delete the lodged document or return it to
10 the submitting person. This is unless the submitting person elects to seek special
11 action review of the court’s order, in which case the submitting person must file a
12 written request specifically directed to the clerk¹¹ that asks the clerk to retain the
13 lodged document to allow the person to appeal the court’s denial.
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16 If such a written request is filed, the clerk’s duty then is to maintain the lodged
17 document under seal until: (a) the person withdraws the request; (b) the superior
18 court or appellate court orders otherwise; or (c) the time for appeal expires. After
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23 ¹⁰ Choices (A) and (C) may, in some cases, be the same, as the court’s order may in
24 fact require an unredacted copy of the document.

25 ¹¹ And specifically entitled “Request to Clerk to Retain Lodged Document for
Appellate Review.”

1 one of those three things has occurred, the clerk may destroy or delete the lodged
2 document or return it to the submitting person.

3
4 In the event of a partial court denial of a motion or stipulation to file a
5 document under seal, then—*and* if the submitting person files a notice that the
6 person no longer wants to file the document—the clerk is authorized by rule to
7 destroy or delete the lodged document or return it to the submitting person.

8
9 **G. Documents Produced by Others that are Governed by a Protective**
10 **Order or Confidentiality Agreement**

11 Proposed Rule 5.4(g) provides a three-step process parties should follow when
12 they seek to file (or disclose the contents of) a document produced by another person
13 and subject to a protective order or confidentiality agreement—either from the
14 litigation at hand or from another matter. Prior to filing anything, the party seeking
15 file or disclose the document must first attempt Rule 7.1(h) good faith consultation
16 with the producing person. Among other things, the conferees must discuss about
17 whether the document to be filed or disclosed meets Rule 5.4(c)(2)'s requirements.
18 If good faith consultation doesn't do the trick, the party seeking to file the document
19 or disclose its contents must lodge and serve the document (or the proposed filing
20 that discloses its contents) under the proposed Rule 5.4(e) procedure and file and
21 serve a notice of lodging on all other parties and, if applicable, the non-party
22 producing the document. In addition to summarizing the dispute about the document
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1 and setting forth the filing party's position, the notice of lodging must be
2 accompanied by a Rule 7.1(h) good faith consultation certificate.

3
4 Then, within 14 days after the notice is served, the person who produced the
5 document must file and serve either (A) a notice withdrawing the confidentiality
6 designation or waiving any other right to require a party to ask the court to file the
7 document under seal, or (B) a motion to seal and supporting memorandum per the
8 requirements of proposed Rule 5.4(d). Because the party seeking to file the
9 document or disclose its contents already had its say in the notice of lodging, no
10 response to the motion may be filed unless the court authorizes it.

11
12 Finally, if the producing person does not file a notice or motion as required above,
13 proposed Rule 5.4(g)(5) gives the court discretion to enter an order making the
14 document, or the filing disclosing its contents, part of the public court record.
15

16 **H. Unsealing**

17 The final section of the proposed rule addresses the unsealing process, and
18 provides that—on motion or *sua sponte*—the court may order the unsealing of a
19 document by undertaking the same analysis used for sealing a document, under the
20 factors in proposed Rule 5.4(c)(2). As with an order sealing a document, the “court’s
21 order must state the reasons for unsealing the document or, if the order denies a
22 motion to unseal the document, the reasons for denying it.”
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1 **V. RATIONALE FOR THE PROPOSED RULE**

2 **A. Uniform Sealing and Unsealing Procedures Are Needed.**

3 With no uniform, statewide procedure set forth in the Arizona Rules of Civil
4 Procedure regarding how to move for the sealing of a document or how to move for
5 the unsealing of the same, trial courts, clerks, and parties are burdened with
6 attempting to answer the practical questions that arise on their own and anew, many
7 times over. With the substantive law close at hand, this is unnecessary and the
8 Arizona Rules of Civil Procedure should be amended to remedy that gap.
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11 **B. The Proposed Rule Adheres to State and Federal Substantive Law**
12 **on this Topic.**

13 It is federal First Amendment law, primarily in *Nixon v. Warner Commc'ns,*
14 *Inc.*, 435 U.S. 589, 598 (1978), that yields the principles underlying procedural rules
15 regarding sealed documents. Particularly, because the First Amendment grants the
16 public, and the press, a right of access to information about court proceedings, rules
17 permitting and cabining sealing are themselves cabined by the freedoms guaranteed
18 by the First Amendment to the United States Constitution.¹² In trials and related
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23 ¹² *KPNX Broadcasting v. Superior Ct.*, 139 Ariz. 246, 256 (1984) (“The First
24 Amendment generally grants the press no right to information about a trial superior
25 U.S. at 609).”) (internal punctuation omitted) (quoting *Nixon*, 435
U.S. at 609).

1 proceedings, this may take the form of non-disclosure orders or even a ‘sealed
2 courtroom’ for a trial involving particularly sensitive matter.

3
4 In Arizona’s *State v. Tucker*, for example, the appellate court applied similar
5 substantive law to an analysis of the constitutional propriety of the closure of a
6 criminal court proceeding. “A four-part test determines whether closure of a
7 criminal proceeding is constitutional: [1] the party seeking to close the hearing must
8 advance an overriding interest that is likely to be prejudiced, [2] the closure must be
9 no broader than necessary to protect that interest, [3] the trial court must consider
10 reasonable alternatives to closing the proceeding, and [4] it must make findings
11 adequate to support the closure.”¹³ It is this four-part test that is substantively
12 memorialized in proposed Rule 5.4(c).
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18 ¹³ ARIZ. PRAC., TRIAL HANDBOOK FOR ARIZ. LAWYERS, § 2:20 (“Public access to
19 judicial proceedings”) (quoting *State v. Tucker*, 231 Ariz. 125, 131 (App. 2012))
20 (internal punctuation omitted). *Phoenix Newspapers, Inc. v. Superior Ct.*, 140 Ariz.
21 30 (App. 1983) (“*PNI I*”), and *Phoenix Newspapers, Inc. v. Superior Ct.*, 180 Ariz.
22 159 (App. 1993) (“*PNI II*”), respectively address the related issues of whether a
23 sentence modification hearing should be closed to the public if it would jeopardize
24 an ongoing investigation and whether search warrants and affidavits had to be made
25 accessible to the public after warrants were served. Both decisions apply the same
balancing test, requiring “the trial court to balance the presumption that information
received by it is to be open to the public against the need for the state to keep
confidential that information which will jeopardize ongoing criminal
investigations.” *PNI I*, 140 Ariz. at 36.

1 **C. Practical Considerations Make a Procedural Rule on Sealing and**
2 **Unsealing Ripe for Adoption.**

3 Anecdotally at least, the practice of seeking to file documents under seal—
4 along with the related practice of seeking stipulated protective orders in advance—
5 appears to be growing. Without judgment as to whether or not such growth is
6 appropriate, the State Bar notes that it would call for a uniform, substantively proper,
7 procedural rule to assist courts, clerks, and parties in dealing with these recurring
8 issues.
9

10 Furthermore, anecdotally, just as they seem to have been of late with respect
11 to overbroad, boilerplate discovery objections, more judges seem to be overtly
12 skeptical of broad sealing requests or at least to strictly hold the requesting party or
13 parties to the standard, even upon stipulated requests. Proposed Rule 5.4 would help
14 courts set forth the standard and would help parties adhere to it.
15
16

17 **VI. CONCLUSION**

18 Adoption of proposed Rule 5.4 would answer the sometimes vexing practical
19 questions confronting those seeking to file documents under seal or to unseal
20 documents that already have been filed under seal. Moreover, it would incorporate
21 substantive First Amendment law already in effect in Arizona into those important
22 procedures.
23
24
25

1 The language of the proposed rule is designed to address in advance any
2 concerns regarding uncalibrated public access, undue burden, or workload for courts
3 and parties. For the foregoing reasons, the State Bar respectfully petitions this Court
4 to amend the Arizona Rules of Civil Procedure to add Rule 5.4.
5

6 RESPECTFULLY SUBMITTED this 4th day of January, 2017.
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10 _____
11 Lisa M. Panahi
12 Acting General Counsel

13
14 Electronic copy filed with the
15 Clerk of the Arizona Supreme Court
16 this 1st day of January, 2017.

17 by: _____
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