

1 Hon. Sara J. Agne
2 Chair, Rule 5.4 Working Group
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6 **IN THE SUPREME COURT**
7 **STATE OF ARIZONA**

8 In the Matter of:

Supreme Court No. R-19-0003

9 **PETITION TO AMEND RULE 5.4**
10 **OF THE ARIZONA RULES OF**
11 **CIVIL PROCEDURE**

REPLY IN SUPPORT OF
PETITION

12 Pursuant to Rule 28(e)(5), Rules of the Arizona Supreme Court, the Rule 5.4
13 Working Group (“Petitioner”)—a statewide body comprised of county court clerks,
14 lawyers, judges, and court operations and administrative professionals¹—
15 respectfully replies in support of its Petition. If granted by this Court, the Petition
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19 ¹ Rule 5.4 Working Group members include the Hon. Peter B. Swann, Vice Chief
20 Judge of Division One of the Arizona Court of Appeals; the Hon. Cynthia T. Kuhn,
21 Judge of the Pima County Superior Court; Hon. Donna McQuality, Clerk of the
22 Yavapai County Superior Court; John W. Rogers, Staff Attorney, Arizona
23 Supreme Court; Jessica J. Fotinos, General Counsel and Public Information Officer
24 for the Clerk of the Maricopa County Superior Court; Donna Hall, Public Records
25 Manager for the Clerk of the Maricopa County Superior Court; Chris Driscoll,
Operations Project Manager for the Clerk of the Maricopa County Superior Court;
James Bowen, Assistant Arizona Attorney General; George H. King, Partner at
Lang & Klain, PC; Keith Kaplan, Civil Court Administrator for the Maricopa
County Superior Court; and the undersigned.

1 would modestly amend Rule 5.4 of the Arizona Rules of Civil Procedure, with a new
2 definition and a new subsection (i) to govern the procedure for placing a case-
3 initiating document, such as a complaint, under seal. Two timely comments were
4 filed supporting the Petition, and in this Reply, Petitioner² addresses those
5 comments.
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7 **I. REPLY TO COMMENT OF THE ARIZONA ASSOCIATION OF**
8 **SUPERIOR COURT CLERKS.**

9 The comment of the Arizona Association of Superior Court Clerks (“the
10 Association”), filed by the Association’s President, the Honorable Valerie Wyant,
11 Clerk of the Superior Court for Coconino County, acknowledges the growing trend
12 among parties to seek to file even case-initiating documents under seal. This is
13 occurring statewide and is found both in cases with all parties represented by
14 counsel, as well as those with self-represented litigants. Rule 5.4 as now in force
15 does not specifically address requests to seal case-initiating documents—though the
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21 ² In the interest of full disclosure, certain of Petitioner’s members are also members
22 of the State Bar of Arizona and the Arizona Association of Superior Court
23 Clerks—those entities were the two commenters on the Petition.

24 The Rule 5.4 Working Group was also established by the State Bar’s Civil
25 Practice and Procedure Committee, after representatives of the Arizona
Association of Superior Court Clerks approached the Committee in Fall 2018 and
identified a number of implementation challenges experienced by superior court
clerks.

1 upward trend in those filings does pose unique challenges for clerks and court
2 administration, as the Association’s comment discusses.

3 Petitioner greatly appreciates the Association’s considered comment and its
4 discussion of practical issues that would be eliminated by the adoption of the
5 Petition’s proposals. While the Association did differ in its comment with the
6 proposed language suggested by the State Bar of Arizona (“State Bar”), Petitioner
7 believes that further discussions have eliminated the concerns that initially arose
8 about the State Bar’s proposal.
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11 The Association did not support the State Bar’s proposed modification in its
12 comment “because ‘promptly’ is a vague term, and the Clerks believe that an
13 affirmative deadline along with a reference to Rule 41 better allows Clerks to
14 manage the lodged documents” (Association Cmt., filed May 1, 2019, at 2-3.)
15 The State Bar’s proposal does maintain the reference to Rule 41 in proposed Rule
16 5.4(i), and, as further discussed below, superior court clerks do still maintain their
17 existing options under Rule 5.4(f)—whether or not the lodged document is a case-
18 initiating document. To avoid any conflict with the present language of Rule 41, and
19 to still encourage prompt action if a filer determines they no longer wish to pursue a
20 civil action if a request to file a case-initiating document under seal is completely or
21 partially denied, Petitioner respectfully supports the State Bar proposal discussed
22 below.
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1 **II. REPLY TO COMMENT OF THE STATE BAR OF ARIZONA.**

2 Petitioner also greatly appreciates the State Bar’s endorsement of the Petition,
3 as well as its suggestion of the modest revision to avoid the potential inconsistency
4 with Rule 41. Instead of using the language “no later than 7 days after the order’s
5 entry” in proposed Rule 5.4(i)(2)(C), the State Bar suggests that the proposed rule
6 instead “require the submitting party to *promptly* file a notice, stipulation, or motion
7 for dismissal under Rule 41 if the submitting party no longer wishes to prosecute the
8 action due to the court’s denial” of the submitting party’s sealing request. (State Bar
9 Cmt., filed May 1, 2019, at 2) (emphasis added).
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12 The State Bar presents a valid concern about a potential inconsistency with
13 Rule 41, Ariz. R. Civ. P., as the Petition language as initially proposed would impose
14 a shorter deadline on a filing party than Rule 41 presently permits.
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16 Moreover, superior court clerks still retain those options already permitted
17 them in Rule 5.4(f)(2). Specifically, whether a lodged document is a case-initiating
18 document or not, the rule requires only that the clerk retain it for at least seven days
19 after entry of the order completely or partially denying filing under seal. *See Ariz.*
20 *R. Civ. P. 5.4(f)(2)*. After that, “the clerk may destroy or delete the lodged document
21 or return it to the submitting person” in the clerk’s exercise of discretion. *See id.* at
22 (A), (B). Maintaining the same approach for lodged case-initiating documents as
23 other lodged documents is both consistent for filing parties and fair to the decision-
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1 making abilities of clerks, as clerks are in the best position to determine the proper
2 administration of lodged document queues.

3 The State Bar’s suggestion is a valid improvement on Petitioner’s language
4 that maintains consistency with Rule 41 and does not adversely impact the clerks’
5 abilities to clear or purge lodged documents after the appropriate time period allotted
6 by rule has expired.
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8 Petitioner also points out that Rule 5.4(c)(6) contains a sanctions provision
9 regarding “monetary sanctions against any person who knowingly violates any
10 provision of this rule.” It accords, therefore, to avoid inconsistent timelines for action
11 by filing parties in the civil rules, particularly where a violation of a timeline in Rule
12 5.4 may result in monetary sanctions for the violator. The State Bar’s proposed
13 language prevents that inconsistency, while still encouraging filing parties to take
14 prompt action to dismiss if they no longer wish to pursue an action in light of a
15 court’s complete or partial denial of their request to seal a case-initiating document.
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19 **III. CONCLUSION**

20 The combined experiences of Petitioner’s membership—as well as the
21 combined experiences of the commenters (court clerks as well as practitioners)—
22 evince the necessity of adoption of the modest amendments proposed. Petitioner is
23 grateful for the supportive and thoughtful comments received, and, having addressed
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1 them herein, respectfully urges this Court to adopt the changes, including as
2 modified by the comment of the State Bar of Arizona.

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4 RESPECTFULLY SUBMITTED this __24th__ day of ____May____, 2019.

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7 */s/ Sara J. Agne*

8 Hon. Sara J. Agne
9 Chair, Rule 5.4 Working Group

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11 Electronic copy filed with the
12 Clerk of the Arizona Supreme Court
13 this __24th__ day of ____May____, 2019.

14 by: ____*/s/ Sara J. Agne*____