

SUPREME COURT OF ARIZONA

In the Matter of) Arizona Supreme Court
) No. R-17-0007
RULE 5.4, ARIZONA RULES OF)
CIVIL PROCEDURE) **FILED 08/31/2017**
)
)
_____)

ORDER
ADOPTING NEW RULE 5.4,
ARIZONA RULES OF CIVIL PROCEDURE

A petition having been filed proposing to adopt a new Rule 5.4 of the Arizona Rules of Civil Procedure and no comments having been received, upon consideration,

IT IS ORDERED that Rule 5.4 of the Arizona Rules of Civil Procedure is adopted as set forth in the attachment to this Order, effective January 1, 2018.

DATED this 31st day of August, 2017.

_____/S/_____
SCOTT BALES
Chief Justice

TO:

Lisa M. Panahi

Rule 28 Distribution List

ATTACHMENT
ARIZONA RULES OF CIVIL PROCEDURE

Rule 5.4. Sealing and Unsealing Court Records

(a) Generally. Unless authorized by statute, rule, or court order, no document may be filed under seal in an unsealed civil action.

(b) Definitions. For this rule's purposes:

- (1)** "document" means any filing, exhibit, record, or other documentary material to be filed or lodged with the court;
- (2)** "lodged document" means a document that is temporarily deposited with the court but is not filed or made available for public access;
- (3)** "public access" means the inspection or copying of a document by a member of the public; and
- (4)** "sealed document" means a document filed or lodged with the court for which public access is prohibited by statute, rule, or court order.

(c) Order Permitting a Document to Be Filed Under Seal.

- (1) Generally.** On motion, stipulation or on its own, a court may order a document to be filed under seal if this rule's requirements are met. Unless the court determines that an entire category or type of document meets this rule's requirements, a court may not enter an order that gives advance authorization to file such documents under seal.
- (2) Requirements.** Unless a statute, rule, or prior court order authorizes a document to be filed under seal, a court may order that a document may be filed under seal only if it finds in a written order that:
 - (A)** an overriding interest exists that supports filing the document under seal and overcomes the right of public access to it;
 - (B)** a substantial probability exists that the person seeking to file the document under seal (or another person) would be prejudiced if it is not filed under seal;
 - (C)** the proposed restriction on public access to the document is no greater than necessary to preserve the confidentiality of the information subject to the overriding interest; and
 - (D)** no reasonable, less restrictive alternative exists to preserve the confidentiality of the information subject to the overriding interest.

(3) Order's Contents.

- (A) *If All of a Document Is Protected.*** If the court finds that the requirements for filing a document under seal are met and the entire document meets those requirements, it must order the clerk to file the document under seal.
- (B) *If Only Part of a Document Is Protected.*** If the court finds only certain pages or portions of pages of a document contain information that merit being placed under seal, it must order:
- (i)** the submitting person, if he or she has not already done so, to file a publicly accessible version of the document that redacts only those portions of the document; and
 - (ii)** the clerk to file under seal the unredacted version of the document lodged under Rule 5.4(e).
- (C) *Advance Authorization.*** If the court determines that an entire category or type of document meets this rule's requirements, it may enter an order:
- (i)** authorizing one or more designated parties or persons to file under seal any document that falls within a designated document category or type; and
 - (ii)** directing the clerk to file under seal any document submitted by a designated party or person if the clerk is presented with a copy of the court's order.

- (4) *The Clerk's Duties.*** If the court orders the sealing of a document, the clerk must file the order to seal, file the document under seal as directed in the court's order, and secure the sealed document from public access. Unless the court orders otherwise, the date of the sealed document's filing is the date the document was lodged with the clerk. The clerk must maintain the document under seal until further order of the court. Nothing in this rule is intended to affect the clerk's normal records disposition policy.

(5) Record on Appeal.

- (A) *Generally.*** Unless the appellate court orders otherwise, a document that is filed under seal remains sealed when transmitted to an appellate court as part of the record on appeal.
- (B) *Denial of a Motion or Stipulation to Seal.*** If a request is made under Rule 5.4(f)(2)(A) that the clerk retain a lodged document for the purpose of transmitting it to an appellate court in connection with a challenge to a complete denial of a motion or stipulation to file the document under seal, the

clerk must transmit the document to the appellate court under seal. Upon transmittal, the appellate clerk must maintain the document under seal unless the appellate court orders otherwise.

- (6) **Sanctions.** A court may issue monetary sanctions against any person who discloses any document, or any protected portion of a document, the person knows 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.

(d) Motion or Stipulation to File a Document Under Seal.

- (1) **Generally.** Any person may file a motion or join in a stipulation to file a document under seal.
- (2) **Contents.** Any motion or stipulation to file a document under seal must set forth a clear statement of the facts and legal authority justifying the filing of the document under seal, including, if applicable, why the request satisfies the requirements of Rule 5.4(c)(2). It also must state whether any party opposes the request, and, if no party opposes it, the submitting person also must insert the phrase “Not Opposed” below the title of the motion or stipulation.
- (3) **Good Faith Consultation.** If the request is made by a motion or by a stipulation joined by fewer than all the parties, the motion or stipulation must be accompanied by a Rule 7.1(h) good faith consultation certificate.
- (4) **Proposed Order.** A proposed order complying with Rule 5.1(d) must accompany a motion or stipulation to file a document under seal.
- (5) **Public Version.** Unless the motion or stipulation seeks to file under seal all of a document’s contents, the submitting person must file a publicly accessible version of the document that redacts the portions of the document subject to the motion or stipulation. If a person files a document under seal under an order providing advance authorization to do so and if only part of the document falls within the category or type protected from disclosure under the order, the submitting person must file a publicly accessible version of the document that redacts only the protected portions of the document.

(e) Lodging and Serving a Document to Be Filed Under Seal.

- (1) **Generally.** Unless the court orders otherwise or the motion or stipulation seeks advance authorization to file under seal a specific category or type of documents, the submitting person must:
- (A) separately lodge with the court the entire document subject to the motion or stipulation; and

(B) serve a copy of the entire document on all parties to the action and provide a courtesy copy to the assigned judge.

(2) **Submission.** Unless the clerk has a procedure allowing such documents to be lodged electronically, the person filing the motion or stipulation must submit the document or documents to the clerk in paper form in a secured envelope. A cover sheet must be affixed to the envelope prominently displaying the notation “DOCUMENT(S) PROPOSED FOR FILING UNDER SEAL” and clearly identifying:

(A) the case number and title of the action in which the document or documents are to be filed;

(B) the motion or stipulation seeking to have the document or documents filed under seal;

(C) the underlying motion to which the document or documents pertain; and

(D) each document contained in the envelope with sufficient detail so the court can readily identify it, and the number of pages in each document.

(3) **The Clerk’s Duties.**

(A) **Retention.** If a document is lodged with the court under this rule, the clerk must retain but not file the document unless the court orders it filed. The clerk may scan the document and retain it electronically. If it does so, it may destroy the paper copy of the document or return it to the submitting person.

(B) **Public Access.** Until the court decides whether to permit the document to be filed under seal, the clerk must not allow public access to the document. If the court denies the motion or stipulation to file the document under seal, the clerk must continue to restrict public access to the document until it may destroy, delete, or return it as provided in Rule 5.4(f) or as the court orders otherwise.

(C) **Documents Already in the Public File.** If a copy of a lodged document is already in the public file when the motion or stipulation is filed and if the person files a separate written request specifically directed to the clerk asking for such relief (entitled “Request to Clerk to Disallow Public Access to a Document Pending Judicial Review”), the clerk must discontinue allowing public access to the document pending the court’s decision whether to permit the document to be filed under seal.

(f) Procedures if a Request to File a Document Under Seal Is Completely or Partly Denied.

(1) ***The Submitting Person's Duties.*** If the court completely or partially denies a motion or stipulation to file a document under seal, the submitting person must file within 7 days of the order's entry:

- (A) a publicly accessible version of the entire document that conforms to the court's order;
- (B) a notice stating that the person no longer wants to file the document; or
- (C) an unredacted copy of the document.

(2) ***The Clerk's Duties.***

(A) ***If Completely Denied.*** If the court denies in full a motion or stipulation to file a document under seal, the clerk must retain the lodged document for at least 7 days after the entry of the order. After that period of time, the clerk may destroy or delete the lodged document or return it to the submitting person unless the submitting person files a written request specifically directed to the clerk (and entitled "Request to Clerk to Retain Lodged Document for Appellate Review") asking the clerk to retain the lodged document to allow the person to seek appellate review of the denial. If such a request is made, the clerk must maintain the lodged document under seal until the person withdraws the request, the superior court or the appellate court orders otherwise, or the time for appeal expires, at which time the clerk may destroy or delete the lodged document or return it to the submitting person.

(B) ***If Partly Denied.*** If the court partly denies a motion or stipulation to file a document under seal and the submitting person files a notice stating that the person no longer wants to file the document, the clerk may destroy or delete the lodged document or return it to the submitting person.

(g) Documents Produced by Others that Are Governed by a Protective Order or Confidentiality Agreement.

(1) ***Scope.*** Unless the court orders otherwise, this rule governs the procedure a party should follow if it seeks to file (or disclose the contents of) a document produced by another person and if a protective order or confidentiality agreement requires the party to ask the court to file the document (or the portion of a brief or affidavit disclosing its contents) under seal.

(2) ***Good Faith Consultation.*** Before filing anything with the court, the party seeking to file the document or disclose its contents must first attempt to resolve the matter by good faith consultation, as provided in Rule 7.1(h), with the person who

produced the document. Among other things, they must confer about whether the document (or a proposed filing describing its contents) meets Rule 5.4(c)(2)'s requirements.

- (3) *Notice of Lodging.*** If the issue is not resolved, the party seeking to file the document or disclose its contents must lodge and serve the document (or the proposed filing) under seal under Rule 5.4(e) and file and serve a notice of lodging on all other parties, and, if applicable, on any nonparty who produced the document at issue. The notice must summarize the dispute and set forth the submitting party's position. It also must be accompanied by a Rule 7.1(h) good faith consultation certificate.
- (4) *Response to Notice.*** Within 14 days after the notice is served, the person who produced the document must file and serve either:

 - (A)** a notice withdrawing its confidentiality designation or waiving any other right to require a party to ask the court to file the document (or the portion of a filing quoting its contents) under seal; or
 - (B)** a motion to seal and a supporting memorandum meeting the requirements of Rule 5.4(d). No response to the motion may be filed unless the court authorizes it.
- (5) *If the Producing Person Does Not Respond.*** If the producing person does not file a notice or a motion as required by Rule 5.4(g)(4), the court may enter an order making the document (or the portion of a filing quoting its contents) part of the public record.
- (h) *Unsealing a Document.*** On motion by any person or on its own after providing reasonable notice to the parties, the court may order that a document be unsealed based on the standards of Rule 5.4(c)(2). The court's order must state the reasons for unsealing the document or, if the order denies a motion to unseal the document, the reasons for denying it.