

NEW CODE CIRCULATED FOR COMMENT

The Arizona Supreme Court is now circulating for comment the petition for a proposed new Code of Judicial Conduct prepared by the Commission on Judicial Conduct and the Judicial Ethics Advisory Committee. The Court reviewed the petition in late October and ordered circulation of the proposed code to chief judges, presiding judges and professional associations across the state. All judges are invited to examine the new code and to submit comments to the Clerk of the Supreme Court on or before March 10, 1993.

The proposed code is based on the American Bar Association's 1990 Model Code of Judicial Conduct which contains numerous revisions designed to make the code easier to understand and apply. Some of the more significant changes include a restructuring of the canons, a new section on terminology, a major provision prohibiting membership in discriminatory organizations, and a stronger section requiring judges to avoid bias and prejudice. The new code also uses gender-neutral language throughout the text and contains extensive commentary that will help judges in interpreting the code.

What about . . .

Disqualification?

This feature discusses questions judges ask about the rules and procedures of the Commission on Judicial Conduct. Readers are encouraged to submit questions that may be of interest to the judiciary as a whole. Questions about specific ethical issues will be referred to the Judicial Ethics Advisory Committee.

Question: Are judges automatically required to disqualify themselves when litigants in active cases file complaints against them?

Answer: The filing of a complaint against a judge by a litigant in a pending lawsuit does not automatically require disqualification of the judge. Canon 3C sets out the ethical requirements for disqualification; violation of these requirements may lead to judicial discipline. Canon 3C is not a substitute, however, for the statute and rules governing disqualification in civil and criminal cases. See A.R.S. §12-409; Rule 42(f), Ariz.R.Civ.P.; and Rule 10, Ariz.R.Crim.P. While the canon may be invoked after the fact to determine if a judge acted ethically, it should not be used during litigation as a way of trying to force a change of judge or a delay in legal proceedings.

The Commission on Judicial Conduct actively discourages litigants from filing complaints while lawsuits are pending, primarily because of the potential for abusing disciplinary proceedings. In fact, the commission's standard complaint form asks a complainant to indicate if

the complaint involves a pending lawsuit. If it does, the commission will determine the status of the case and may advise complainants that it will not process their complaints until the litigation is over.

A judge who is asked to respond to a complaint while a lawsuit is pending will have to determine if the filing of the complaint affects his or her ability to make a fair and impartial decision in the case. Since most complaints are dismissed by the commission after an initial contact with the judge, the mere filing of a complaint should not automatically give rise to disqualification. If a judge would prefer to respond to the complaint after the trial, the judge may ask the commission for permission to respond

Although the proposed code is similar to the ABA's Model Code, the draft that is now circulating for comment is not identical to the Model Code. Sponsors of the new code are quick to point out that many of the canons in the model code were modified specifically for Arizona. In order to understand these changes, judges will need to review both the Model Code and the existing code before commenting on the new version.

Judges and other court personnel who want to examine the proposed code should contact either the Clerk of the Supreme Court, a presiding superior court judge or an officer in their respective professional associations for further information. The Commission on Judicial Conduct also has a few copies of the proposed code available in its office, along with extra copies of the 1990 Model Code. Judges or court administrators who would like a personal copy of this helpful booklet, which was first distributed to judges at the seminar on the code during last year's judicial conference, should contact the Commission immediately. Copies are free while supplies last.

to the complaint after the trial is over.

For a more general treatment of the subject of disqualification, see Jeffrey M. Shaman, et al. *Judicial Conduct and Ethics* 99-147 (1990).

Advisory Opinion Modified

The Judicial Ethics Advisory Committee ruled in Advisory Opinion 90-6 (March 27, 1990) that part-time superior court commissioners and hearing officers should not practice law in the courts in which they serve. The opinion was consistent with the Compliance Section of the Code of Judicial Conduct as it then existed. In response to the opinion, several presiding superior court judges filed a petition with the Supreme Court seeking a change in the Code to permit part-time

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judges to appear as attorneys in divisions of the superior court in which they do not serve. The Court, in turn, issued an emergency order modifying Part B of the Compliance Section of the code for this purpose and then circulated the proposed amendment for comment.

On December 16, 1992, the Supreme Court ordered the adoption of the amendment in final form and vacated Advisory Opinion 90-6 to the extent it is inconsistent with the amended rules. The Court's action does not require any change in the Compliance Section of the code as it now appears in the current edition of A.R.S. 17A, the 1992 and 1993 editions of West's *Arizona Rules of Court*, and the current edition of the *Judicial Conduct and Ethics Manual*. The change was anticipated by the publishers and the Court's order merely adopts the language of the emergency order.

New Advisory Opinions

The Judicial Ethics Advisory Committee issued 17 advisory opinions in 1992. Summaries of the first nine opinions were published in the last issue of the *Bulletin*. The remaining opinions are summarized below. Advance copies of individual opinions can be obtained by calling or writing the committee's office.

Opinion 92-10

The regular and continual failure on the part of a judge to enforce certain rules of procedure may, depending on the circumstances, constitute a violation of the Code of

Judicial Conduct. Issued: September 1, 1992.

Opinion 92-11

A judge who is represented by an attorney in a lawsuit may, with qualifications, preside over an unrelated case in which a member of the attorney's law firm represents one of the parties. Issued: September 9, 1992.

Opinion 92-12

Although a court may cooperate in the publication of a descriptive brochure about a court-related software program, neither judges nor members of their staff may knowingly permit their pictures to appear in a brochure that endorses, indirectly or otherwise, a particular manufacturer's equipment and services. Issued: September 11, 1992.

Opinion 92-13

Court employees may run for public office if they resign from their positions. Persons seeking employment with a court must resign their elected public offices before accepting jobs with the court. Issued: September 11, 1992.

Opinion 92-14

While superior court judges are constitutionally prohibited from receiving compensation for any other public employment, there are no ethical constraints on part-time superior court commissioners who desire to teach community college courses, with or without compensation, on a regular basis. Issued: September 11, 1992.

Opinion 92-15

From an ethical standpoint, the reporting of suspected violations of the law is within a judge's sound discretion and a judge may report violations as his or her judgment and conscience dictate. Although a judge may not be required to report a litigant who testifies in court that he or she has failed to pay income taxes, a judge may notify an appropriate government agency when a litigant repeatedly violates the Landlord-Tenant Act and various building codes. Because of a judge's duty to uphold the integrity of the judiciary and promote public confidence in it, the sound exercise of this discretion may require a judge to report serious criminal wrongdoing that surfaces in court. Issued: December 15, 1992.

Opinion 92-16

A part-time, pro tempore municipal judge may not practice law in the same court in which he or she serves as a judge. This opinion does not affect the exceptions provided for part-time, pro tempore superior court judges as noted in Part B of the Compliance Section of the Code of Judicial Conduct, as amended. (For a related article about these exceptions, see "Advisory Opinion Modified" on the front page of this *Bulletin*.) Issued: December 8, 1992.

Opinion 92-17

Judges cannot ethically co-sponsor professional associations with law enforcement officials. They can, however, belong to professional associations that accept members of other professions who meet the criteria for membership, e.g., bar associations. Issued: December 29, 1992.

All judges should have copies of the loose-leaf ethics manual. Judges of newly created courts or new court divisions that do not have manuals or that may not be on the committee's mailing list should contact the committee staff as soon as possible.

The *Bulletin* is published periodically by the Commission on Judicial Conduct and the Judicial Ethics Advisory Committee as a service to the Arizona Judiciary. For more information write the commission or committee staff at 1501 W. Washington Street, Suite 229, Phoenix, Arizona 85007; or call (602) 542-5200.

Distribution of 1992 Opinions

The Judicial Ethics Advisory Committee will distribute a complete set of last year's advisory opinions to all judges in February 1993. The opinions will update the *Judicial Conduct and Ethics Manual* sent to judges at the beginning of last year. The Advisory Committee is also distributing a revised index that covers all of its published opinions.