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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:)	Supreme Court
)	No. R-
)	
PETITION TO AMEND)	
RULE 9, RULES OF THE)	Petition to
COMMISSION ON)	Amend Rule 9
JUDICIAL CONDUCT)	
)	

The Maricopa County Attorney, through the undersigned, petitions the Court to amend Rule 9, Rules of the Commission on Judicial Conduct, as set forth in Exhibit A, pursuant to Rule 28, Arizona Rules of the Supreme Court. The petition seeks to give the complainant access to a judge's response so that the complainant may file a reply.

SUMMARY OF PROPOSED CHANGES

The current rules provide that the commission has discretion to disclose the complaint and the judge's response. "The commission may disclose a complaint to a judge and a judge's response to a complainant at any time." Rule 9(c). "As part of the preliminary investigation, commission staff may notify the judge of the substance of the complaint and afford the judge a reasonable opportunity to respond." Rule 22(b).

The Maricopa County Attorney's Office has filed complaints against judges from time to time. After a complaint was filed this year, the respondent judge provided MCAO with an e-mailed "courtesy copy" of his response. However, when the commission staff was asked for a copy of the judge's actual response, MCAO was advised that the commission generally does not forward the response to the complainant. MCAO was told that it was welcome to submit a reply based on the judge's courtesy copy. This appeared to be a different procedure from that followed by the commission in the past. For example, when complaints were filed against two judges in 2002, the commission staff did forward copies of the judges' responses to MCAO.

When filing a complaint against a judge, the complainant to some extent has the burden of proof. Judges are presumed to act appropriately, and the complain-

ant must provide sufficient evidence that the judge engaged in misconduct. The judge in his or her response may downplay the significance of an incident, dispute certain facts, or raise new issues. Therefore, the complainant should receive a copy of the judge's response and have an opportunity to reply. This would give the commission any additional information necessary for a fair evaluation of the complaint.

When a complaint is filed against a lawyer, the Arizona State Bar provides the complainant with a copy of the lawyer's response. This is required by Supreme Court Rule 52(b)(1): "A copy of respondent's initial response to the charge, if any, except those portions subject to a protective order, will be provided to the complainant." The Bar gives the complainant 15 days to reply and comment on the lawyer's explanation of the incident. A similar procedure would be appropriate when a complaint against a judge is filed with the commission.

Rule 9 was recently amended to provide for greater public disclosure of judicial disciplinary records. However, when MCAO proposed that rule change, the Office was unaware of the need to also amend the rule to allow a complainant access to the judge's response. Although Rule 9(c) provides for "discretionary disclosure," the commission in the past had disclosed the responses. It is now

apparent that a rule change is necessary to give the complainant a right to receive the response and submit a reply.

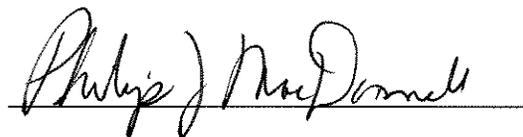
If the Court does not find a formal rule change appropriate at this time, the commission should adopt a policy pursuant to Rule 9(c) whereby the commission in most cases will disclose a complaint to a judge and a judge's response to a complainant. Clearly in situations where the judge receives the complaint and responds, the complainant should have a right to see the response for purposes of filing a reply. Nondisclosure of the complaint and response should be the exception rather than the rule.

The proposed change to Rule 9 adds a new subsection (e), "Right to Reply." If the commission discloses a complaint to a judge, and the judge responds, the commission will provide a copy of the response to the complainant, excluding any portions subject to a protective order. The complainant may file a reply with the commission but will not disclose the judge's response except upon conclusion of the proceedings or under certain other circumstances. Rule 9(b) is also amended to state that after an order of dismissal, a judge's response will be public with identifying information redacted. The latter change will create a more fair and complete public record.

For the foregoing reasons, the Rules of the Commission on Judicial Conduct should be amended to give the complainant access to a judge's response so that the complainant may file a reply.

RESPECTFULLY SUBMITTED this 18th day of November, 2005.

ANDREW P. THOMAS
MARICOPA COUNTY ATTORNEY

A handwritten signature in cursive script, reading "Philip J. MacDonnell", is written over a horizontal line.

PHILIP J. MACDONNELL
CHIEF DEPUTY

EXHIBIT A — TEXT OF PROPOSED RULE CHANGE

Rule 9. Public Access and Confidentiality

[Text of rule effective January 1, 2006]

(a) Public access. The record in informal proceedings shall be public after the complainant and the judge are notified of the outcome of the proceedings and the time provided for further commission review has expired. The record in formal proceedings shall be public after the filing of the judge's response to formal charges or the expiration of the time provided for such a response, the entry of an order approving an agreement for discipline by consent, or the waiver of confidentiality by the judge.

(b) Confidential matters. All other commission correspondence, draft documents, computer records, investigative reports, attorney work product, commission deliberations, and records in dismissed cases are confidential; provided that, following entry of an order of dismissal, the complaint, the judge's response, and the order of dismissal shall be made public but with all identifying information regarding any person or court redacted and the judge and complainant designated only by number.

(c) Discretionary disclosure. The commission may disclose a complaint to a judge and a judge's response to a complainant at any time. It may also disclose

confidential information to confirm a pending investigation in a case in which an investigation has become public or to clarify proceedings in such a case; to protect individuals, the public, or the administration of justice; and to comply with official requests from agencies and other organizations involved in criminal prosecutions, bar discipline investigations, or judicial nomination, selection, and retention proceedings. Unless otherwise ordered by the commission, complainants, respondent judges and witnesses are not prohibited from disclosing the existence of proceedings or from disclosing any documents or correspondence served on or provided to those persons.

(d) Protective orders. Upon motion by a party or by a person from whom the information was obtained, and for good cause shown, the commission, an investigative panel, a hearing panel or a hearing officer may make an order sealing a portion of the record. Sealed materials shall be opened and viewed only by the commission or one of its corresponding panels, a hearing officer, disciplinary counsel or the supreme court. The information shall not otherwise be disclosed unless the parties and the person providing the information are given notice and an opportunity to be heard.

(e) Right to Reply. If the commission discloses the complaint to a judge, and the judge responds, the commission shall provide a copy of the response to the

complainant, except those portions subject to a protective order. The complainant may file a reply with the commission, but will not disclose the judge's response unless the record becomes public pursuant to Rule 9(a), the case is dismissed, the judge discloses the response or consents to disclosure, or the response is disclosed by a third party.