

Roberta L. Voss, Chair
Commission on Judicial Performance Review
1501 W. Washington, Suite 221
Phoenix, AZ 85007-3222
(602) 452-3098
jpr@courts.az.gov

IN THE ARIZONA SUPREME COURT

PETITION TO AMEND RULES OF)
PROCEDURE FOR JUDICIAL) Supreme Court No.
PERFORMANCE REVIEW IN THE) R. 08-_____
STATE OF ARIZONA)
_____)

Pursuant to Rule 28 of the Rules of the Supreme Court, the Commission on Judicial Performance Review respectfully petitions this Court to amend the Rules of Procedure for Judicial Performance Review as set forth in the attached Appendix A.

On November 21, 2008 the Commission convened to review proposed rule changes drafted by subcommittees of the Commission charged with studying and offering proposals on issues identified by the Commission during the 2008 performance review cycle. The Commission believes it would benefit the review process and the public to amend certain rule provisions, as described in this petition.

Proposed Changes to Rule 4, Conference Teams

By unanimous vote, the Commission approved a proposal to amend Rules 4(b) and 4(d), and remove Rule 4(c), pertaining to JPR Conference Team organization and meetings. The current rules call for each team to select of a chairperson to preside at all Conference Team meetings and a secretary to keep a record of action taken at each

meeting. The Commission approved the proposal following a subcommittee's report that many teams for the past few cycles have in practice rotated those duties among team members to allow them to equalize the responsibilities of leading Conference Team meetings with judges and drafting the self-improvement plans for the judges assigned to the team. The proposed amendments would allow each team to organize as meets their needs in order to conference with the judges assigned to the team.

Proposed Changes to Rule 6, Review Process and Dissemination of Findings

By unanimous vote, the Commission approved a proposal to amend Rule 6(d), Public Comment and Hearings, to clarify that any person wishing to speak in favor of or in opposition to the retention of a judge or justice do so at the public hearings. The Commission approved the proposal following a subcommittee's report that studied the feasibility of allowing public comment at the meeting at which any judge or justice who receives a letter from the Commission may choose to appear. The Commission believes the review process is better served by soliciting public comment, positive and negative, about a judge or justice before the Commission drafts its letters to judges, rather than accepting oral comment at meetings that follow the Commission's notice to judges who are invited to respond pursuant to Rule 6(f)(2).

By unanimous vote, the Commission also approved a proposal to add new Rule 6(e), Judicial Discipline, and to amend Rule 6(f)(1), to allow the Commission to obtain all publicly-available records from the Commission on Judicial Conduct as to judges and justices being reviewed and to add "the disciplinary record" as a factor to be considered

by the Commission in formulating its findings as to whether a judge or justice “meets” or “does not meet” judicial performance standards.

Proposed Changes to Rule 7, Confidentiality and Disclosure of Records

By unanimous vote, the Commission approved a proposal to amend Rule 7, Confidentiality and Disclosure of Records, to provide that a judge or justice regarding whom there is a finding that he or she “does not meet” judicial performance standards shall have the right review duplicate, rather than original, survey forms. Further, the proposed amendment would exclude, rather than include, the narrative comments from the judge’s or justice’s review of the survey forms. The Commission approved the proposal following a subcommittee’s report that studied the question of judges’ access to review the original survey forms and narrative responses entered on those forms. Judges may want to review the original narrative comments to determine their accuracy versus the re-typed comments that are provided by the Data Center for the Conference Team process. The subcommittee’s response to this concern, subsequently adopted by the Commission, was that (1) the Commission does not have access to the narrative comments and, therefore, does not make its finding on the basis of the narrative comments and (2) the original narrative comments, if reviewed by a judge or justice, may compromise the anonymity of the survey process. Narrative comments are re-typed at the Data Center for distribution to judges so that potentially identifying references can be removed to protect the anonymity of survey respondents. No such redaction of potentially identifying information can occur under the current rule if a judge or justice asks to review the original survey forms, including narrative comments. The

Commission believes that assuring the anonymity of survey respondents, ratings and comments is paramount to the integrity and viability of the survey process, and therefore proposes the amendments to avoid any potential for identification or disclosure of a given survey respondent's ratings or comments.

For the foregoing reasons, the Commission respectfully requests that the Court amend the Rules of Procedure for Judicial Performance Review in the State of Arizona, as set forth in the attached Appendix A.

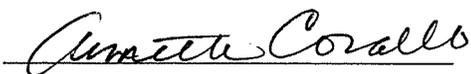
Respectfully submitted this 18th day of December, 2008.

Commission on Judicial Performance Review



Roberta L. Voss, Chair
Commission on Judicial Performance Review
1501 W. Washington, Suite 221
Phoenix, AZ 85007-3222
(602) 452-3098
jpr@courts.az.gov

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 18th day of December, 2008.

by: 

APPENDIX A

(new language is underlined, deletions are ~~stricken~~)

Rule 1. Purpose

Ariz. Const. Art. 6, § 42, which was adopted by the voters at the November 1992 general election, requires the Court to adopt, and administer for all judges and justices who stand for retention, a process for evaluating judicial performance. These rules are intended to implement Art. 6, § 42 through adoption of a judicial performance review process which will assist voters in evaluating the performance of judges and justices standing for retention; facilitate self-improvement of all judges and justices subject to retention; promote appropriate judicial assignments; assist in identifying needed judicial education programs; and otherwise generally promote the goals of judicial performance review, which are to protect judicial independence while fostering public accountability of the judiciary.

Rule 2. Commission on Judicial Performance Review

A system of periodic review of the performance of each judge and justice subject to retention shall be administered by the Commission on Judicial Performance Review. The activities and operations of the Commission shall be governed by the following provisions:

(a) Composition of the Commission. The Commission shall be composed of not more than 34 members appointed by the Supreme Court. The Commission shall be composed of members of the public, attorneys, judges and legislators. No more than two legislative members may be from the same political party. Legislators shall serve as advisory non-voting members and may otherwise fully participate in all commission activities. The majority of the members of the Commission shall be members of the public who are not attorneys, judges, or legislators, and there shall be no more than 6 judges and 6 attorneys among the non-public, non-legislative members.

(b) Chairperson. The Chief Justice of Arizona shall select the Chairperson of the Commission. The Chairperson shall preside at all meetings of the Commission. The Chairperson shall select a Vice Chairperson who shall not be from the same member group (public, judge, or attorney) as the Chairperson.

(c) Terms. Each non-legislative member of the Commission shall serve for a term of four years and be eligible for reappointment. In the case of a vacancy which occurs before expiration of a term, the member appointed to fill such vacancy shall serve for the duration of the unexpired term. Legislative advisory members shall be appointed for a term to coincide with their term of legislative office and may be reappointed if still eligible.

(d) Meetings; Quorum; Majority. The Commission shall meet at the call of the Chairperson not less than two times each year and shall conduct no business except upon the attendance of a quorum of the commission members. A quorum is constituted by 1/2+1 of the total commission membership in office at the time of the meeting and eligible to vote. Members shall be permitted to attend and participate in meetings by telephone or video-conference. All meetings shall be open to the public except as provided in paragraph (e) below. Except as otherwise provided by these rules and Rule 6(e)(3), all actions shall require a majority vote of 1/2+1 of those present and eligible to vote.

(e) Executive Session. The Commission shall meet in executive session with respect to any agenda item which would involve disclosure of matters made confidential by these rules, any other court rules, or by law. In addition, in order to promote open and frank discussion and accuracy in the performance evaluation process, the Commission shall meet in executive session at the time of: (1) discussion (not including voting) of the Commission's finding as to whether a judge or justice "meets" or "does not meet" judicial performance standards; (2) presentation and discussion of a judge's or justice's written comment submitted in response to a finding that the judge or justice "does not meet" judicial performance standards; and (3) a judge's or justice's appearance before the Commission, provided, however, that an executive session in which a judge or justice appears shall be held prior to the public vote meeting. The Commission may meet in executive session at any other time upon a majority vote of the Commission members then in attendance. The substance of deliberations in executive session shall not be disclosed. All voting shall be in public session.

(f) Membership on Conference Teams. Any member of the Commission may be a member of a Conference Team as described in Rule 4 below.

(g) Powers and Duties of the Commission. The powers and duties of the Commission shall be as follows subject to approval by the Supreme Court:

(1)(a) To develop, review and recommend amendments on written performance standards, to be approved by the Supreme Court and made available to the public, by which judicial performance is to be evaluated; (b) to formulate policies and procedures for collecting information and conducting reviews; and (c) to create and supervise a program of periodic review of the performance of each judge and justice who is subject to the merit selection system. The Commission shall directly review the performance of justices of the Supreme Court, judges of the Court of Appeals, and judges of the Superior Court subject to retention. Before retention elections, the Commission shall publicly announce whether each judge or justice standing for retention "meets" or "does not meet" judicial performance standards, in accordance with the provisions of Rule 6 below.

(2) To identify key areas where improvement is needed and work with the Committee on Judicial Education and Training to prioritize areas and offer required courses to meet educational needs.

(3) To request public comment and hold public hearings on the performance of all judges and justices subject to retention at announced times prior to the public vote meeting. Public comment by anyone other than a member of the Commission regarding a judge or justice under review shall be prohibited at the public vote meeting.

(h) Minutes/Correspondence. The Chairperson shall assure that minutes are kept and approved at each subsequent meeting. Minutes of meetings of the Commission shall be made available to the public. Either the Chairperson or Vice Chairperson at the direction of the Chairperson shall sign all correspondence for the Commission.

(i) Spokesperson. The Chairperson of the Commission may select a member of the Commission to serve as a spokesperson to speak for the Commission in any of its contacts with the media concerning actions it has taken regarding reviewed judges or justices.

(j) Failure to Attend Meetings. Any member who fails to attend fifty per cent (50%) of the scheduled meetings during a calendar year may be removed from the Commission on recommendation of the Chairperson at the discretion of the Chief Justice.

Rule 3. Subcommittees

The Commission may create as many subcommittees from its members as needed to meet its responsibilities and accomplish its purpose.

Rule 4. Conference Teams

During each mid-term and retention election performance review period of a judge or justice, the Commission shall arrange for a conference between each judge or justice and a Conference Team. The purpose of this conference shall be to assist in identifying aspects of the judge's or justice's performance that may need improvement and to help the judge or justice to develop plans for self-improvement. The activities and operations of the Conference Teams shall be governed by the following provisions:

(a) Composition. Each Conference Team shall be appointed by the Chairperson of the Commission or his or her designee and shall be composed of a member of the public, an attorney who is a member of the State Bar of Arizona, and a judge or justice (active or retired). No more than one member of a Conference Team may be a member of the Commission.

(b) Chairperson. Organization. ~~A member selected by the Conference Team shall serve as Conference Team Chairperson and shall preside at all meetings. The Conference Team members shall organize themselves as meets their needs in order to conference with the judge(s) assigned to that team.~~

~~**(c) Secretary.** A member selected by the Conference Team shall serve as secretary and prepare and keep a record of the action taken at each meeting. Either the Conference Team Chairperson or the Secretary at the direction of the Chairperson shall sign all correspondence for the applicable Conference Team.~~

(d-c) Terms. A Conference Team may review more than one judge or justice during any review period. Conference Team members shall be recruited to serve for each judicial review cycle and service will terminate at the end of the specific review cycle.

(ed) Meetings. Meetings shall be at the call of the Conference Team Chairperson. All meetings shall be confidential. No meeting shall take place unless all three (3) members are present.

(fe) Self-Evaluation Form. Prior to meeting with the Conference Team, each judge or justice shall complete a self-evaluation form approved by the Commission reflecting his or her perception of his or her performance as to each judicial performance criterion. The completed self-evaluation form is confidential and plays no role in the evaluation/retention process. It shall be furnished only to the Conference Team before its meeting with the judge or justice, and then to his or her Presiding Judge or Chief Judge, and to the Chief Justice, along with the self-improvement plan described in Paragraph (h) below.

(gf) Peremptory Challenge. Each reviewed judge or justice shall have the right to peremptorily challenge one member of the Conference Team. The peremptory challenge shall be filed with the office of the Commission within 5 days of actual notice to the judge or justice of the members of the Conference Team. Where necessary, the Chairperson of the Commission shall rule upon any questions under this subparagraph.

(hg) Conference Team Report. A written plan for self-improvement shall be developed at the conference and, after being put into final form, signed by the judge or justice and the Conference Team members. In connection with development of the self-improvement plan, the judge or justice and the Conference Team shall consider previous and current survey results and narrative comments, the previous self-improvement plan, and objective data which demonstrate completion of the previous plan. The self-improvement plan shall be distributed only to the judge or justice being reviewed, to his or her presiding judge or chief judge, and to the Chief Justice. In addition, the self-improvement plan, with the name of the judge or justice redacted, may be distributed to the Administrative Office of the Courts for use in development of judicial education programs. Neither the Conference Team Report nor the self-improvement plan shall be distributed to the Commission or used in the Commission's deliberations as to whether a judge or justice "meets" or "does not meet" judicial performance standards.

Rule 5. General Provisions

The following general provisions shall govern the activities and operations of the Commission and the Conference Teams:

(a) Diversity. The Supreme Court shall solicit recommendations from the public to assist it in appointing persons to the Commission. The Chairperson of the Commission shall solicit recommendations from the public to assist in appointing persons to the Conference Teams. These persons shall have outstanding competence and reputation and shall also be sensitive to the needs of and held in high esteem by the communities they will serve. The persons appointed shall reflect, to the extent possible, the geographic, ethnic, racial and gender diversity of those communities. Competence and diversity among the members will enhance fairness and public confidence in the judicial performance review process.

(b) Reimbursement for Expenses. Members of the Commission or any Conference Team shall receive no compensation for services but shall be reimbursed for their travel expenses in accordance with applicable statutes.

(c) Impartiality.

(1) A Commissioner or Conference Team member shall perform his or her duties in an impartial, objective manner.

(2) A Commissioner or Conference Team member shall disclose to the Commission any relationship with a reviewed judge or justice (business, personal, attorney-client) or any other cause for conflict of interest, bias or prejudice. A Commissioner or Conference Team member is disqualified from taking any action with respect to a judge who is a family member within the third degree of consanguinity. A judge member of the Commission shall not be eligible to vote in the determination of whether the judge member meets or does not meet judicial performance standards. The voter information pamphlet shall reference when a judge member was ineligible to vote with respect to the judge's own performance or that of a family member within the third degree of consanguinity.

(3) A Commissioner or Conference Team member shall not be influenced other than by facts or opinions which are relevant to the judicial performance of the reviewed judge or justice. A Commissioner or Conference Team member shall promptly report to the Commission Chairperson any attempt by any person or organization to influence him or her other than by fact or opinion.

(4) Each reviewed judge or justice shall have the right to challenge for cause any Commissioner or Conference Team member as to whom the reviewed judge or justice alleges that there is a cause for conflict of interest, bias or prejudice. Any such challenge to a Commissioner shall be in writing and filed with the office of the Commission at least 60 days before the Commission's public vote during the year in which the reviewed judge or justice is standing for retention. Any such challenge to a Conference Team member shall be filed with the office of the Commission within 5 days of actual notice to the judge or justice of the Conference Team members. The Supreme Court, or a justice designated by the Court to do so, shall rule upon such challenge for cause, on the written challenge, and the written response thereto, if any.

(d) Background Checks. Background checks pursuant to A.R.S. § 41- 1750(G)(2) may be required of all Commissioners and Conference Team members.

Rule 6. Review Process; Dissemination of Findings

The review process administered by the Commission, with the assistance of the Conference Teams, shall consist of the following:

(a) Data Center. The Court shall employ a qualified contractor or an in-house unit, hereinafter referred to as the Data Center, whose duty it shall be to prepare the survey forms referred to in paragraph (b) below, process the survey responses, and compile the statistical reports of the survey results in a manner designed to ensure the confidentiality and accuracy of the process.

(b) Survey Forms. Mid-way through the judge or justice's term and again no less than 9 months prior to his or her retention election, anonymous survey forms eliciting performance evaluations shall be distributed to attorneys, litigants, witnesses, jurors, other judges and justices and other persons who have been in direct contact with each judge or justice surveyed and who have first-hand knowledge of his or her judicial performance during the evaluation period. The survey forms shall seek evaluations of the judge or justice in accordance with the written performance standards of judicial performance approved by the Supreme Court, such as knowledge of the law and procedure, integrity, impartiality, judicial temperament, administrative skill, punctuality and communication skills, and shall elicit narrative comments regarding the judge's or justice's performance. The survey forms shall be processed in a manner to assure confidentiality.

(c) Anonymous Narrative Comments. The narrative comments contained in the survey forms, which shall be anonymous, shall be extracted and provided to the judge or justice, to his or her Conference Team for the purpose of self-improvement, to his or her presiding judge or chief judge, and to the Chief Justice. In addition, such anonymous narrative comments, with the name of the judge or justice redacted, may be distributed to the Administrative Office of the Courts for use in development of judicial education programs. Narrative comments shall not be accessible to the public, shall be confidential, and shall be used only in connection with the preparation of a plan of self-improvement of the judge or justice by the Conference Team. The submission of a survey form containing an anonymous narrative comment does not preclude the attorney, litigant, witness, juror, judge or other person surveyed from submitting a public comment, whether in writing or at public hearing pursuant to Rule 6(d), or otherwise.

(d) Public Comment and Hearings. In each election year prior to the public vote meeting, the Commission shall request written public comments and hold public hearings with respect to judges or justices standing for retention. Any person wishing to speak in favor of or in opposition to the retention of a judge or justice being reviewed may do so at the public hearings. The public hearings

shall be recorded. The names and addresses of the speakers shall be required in order to speak. Written comments will not be considered unless legible and unless the name and address of the author is included. Telephone numbers, day and evening, are requested. Comments of the public shall be considered by the Commission in formulating its findings as to whether the judge or justice meets judicial performance standards.

(e) Judicial Discipline. The Commission shall obtain from the Arizona Commission on Judicial Conduct information as to whether discipline has been imposed on any justice or judge being reviewed. If discipline has been imposed on any judge being reviewed, the Commission shall obtain the Arizona Commission on Judicial Conduct's file regarding such discipline to the extent allowed by the rules of the Arizona Commission on Judicial Conduct.

(f) Reports.

(1) ***Data Report.*** In April of each election year, Commission staff shall disseminate a compiled data report (including confidential comments made on the survey forms), together with any public comments, to the judge or justice being reviewed, his or her presiding judge or chief judge, and the Chief Justice. The data reports (excluding the confidential comments made on survey forms), and any public comments, encoded by judge number, will be made available to the Commission members for review. In formulating its findings as to whether a justice or judge "meets" or "does not meet" judicial performance standards, the members of the Commission shall consider and weigh carefully the evaluation data developed in the survey process, the disciplinary record, public hearings, and written public comment. While statistical summaries of evaluation data regarding a judge's or justice's performance may be compared to the performance of comparable judges or justices, that comparison shall not be given dispositive effect in arriving at a conclusion. In all aspects of the Commission's reporting, to the fullest extent practicable, generally accepted statistical methods and techniques shall be utilized. If it is impracticable for the Commission to utilize generally accepted statistical methods and techniques in any aspect of its reporting, the Commission shall so disclose.

(2) ***Written Notice.*** A written notice shall be submitted to any judge or justice standing for retention who has a score in any category designated by the Commission that does not meet the threshold standard adopted by the Commission. The judge or justice shall have the right to submit written comments thereon to the Commission and to appear and be heard by the Commission at a date and time set by the Commission prior to the public vote, pursuant to Rule 2(e).

(3) ***Public Vote.*** Except as otherwise provided by these rules and Rule 2(d), in each election year, the Commission shall vote in a public meeting on whether a judge or justice who is standing for retention "meets" or "does not meet" judicial performance standards. A Commissioner may vote in person, by telephone, by video-conference, or by written ballot.

(4) ***Factual Report.*** In each election year, the Commission shall compile a factual report on the judicial performance of each judge or justice standing for retention, which shall include: a summary of the results of the survey forms as to the judge or justice; a summary of any written or oral public comments received by the Commission pursuant to Rule 2(g)(3) that the Commission deems pertinent; any biographical or other data on such judge or justice which are deemed pertinent by the Commission; the Commission's finding as to whether the judge or justice has failed to cooperate with the judicial performance review process; and the Commission's finding as to whether the judge or justice "meets" or "does not meet" judicial performance standards. The report shall be formatted in such a manner that judges whom the commission determines "do not meet" judicial performance standards shall be segregated and listed before those that "do meet" standards. Should the

Commission find that a judge or justice has failed to cooperate during the judicial performance review process, the report shall identify the conduct upon which the finding is based. The Commission shall disseminate its report and, except as provided in Rule 7, any other information which the Commission deems relevant to the retention decision, to the public and the judge or justice being reviewed not earlier than the public vote and not later than the earliest date for receipt by registered voters of any requested early ballots for the general election pursuant to A.R.S. §16-542(a). The Commission's report shall be distributed to the public by publication in the secretary of state's voter information pamphlet pursuant to A.R.S. § 19-123(5), through the judicial performance review website, and by other means deemed necessary to reach voters in the state.

Rule 7. Confidentiality and Disclosure of Records

All information, survey forms, letters, notes, memoranda, and other data obtained and used in the course of any judicial performance evaluation shall be strictly confidential and shall not be disclosed except as provided herein and in accordance with court rules relating to public dissemination of such information. All survey forms and other evaluation information shall be anonymous. The identity of the judge being reviewed shall be coded and encrypted until the Commission has completed its public vote. However, any judge or justice regarding whom there is a finding that he or she "does not meet" judicial performance standards shall have the right to review the original duplicate survey forms including excluding the narrative comments.

Under no circumstances shall the data collected or the results of the evaluation be used to discipline an individual judge or justice or be disclosed to authorities charged with disciplinary responsibility, unless required by law or by the Code of Judicial Conduct.

Notwithstanding the foregoing, information disclosing a criminal act may be provided to law enforcement authorities at the direction of the Arizona Supreme Court. Requests for such information in the possession of the Commission shall be made by written petition setting forth with particularity the need for such information. All information and data provided to law enforcement authorities pursuant to this paragraph shall no longer be deemed confidential.

Rule 8. Admissibility as Evidence

Except as disclosed as provided herein, or in connection with an action under Rule 9 below, all information, survey forms, notes, memoranda or other data declared to be confidential hereby shall not be admissible as evidence, and shall not be discoverable in any action of any kind in any court or before any tribunal, board, agency or person.

Rule 9. Immunity

No person participating in the judicial performance review process in any capacity should be held to answer for any actions taken or statements of fact made during the process except for statements of fact known to be false when made.