

Commission on Judicial Conduct  
1501 W. Washington Street, Suite 229  
Phoenix, Arizona 85007  
Telephone: (602) 542-5200

**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

In the Matter of:	)	No. R-05-0027
	)	
PETITION TO AMEND RULE 9,	)	<b>COMMENT ON PROPOSED</b>
RULES OF THE COMMISSION ON	)	<b>AMENDMENTS</b>
JUDICIAL CONDUCT	)	
	)	

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The Arizona Commission on Judicial Conduct respectfully submits its comments on the Petition to Amend Rule 9 of the Rules of the Commission on Judicial Conduct that was circulated by the Arizona Supreme Court on January 18, 2006. The commission continues to advocate beneficial changes in its rules and supports more open proceedings. However, the commission urges the court to reject the proposed amendment for the reasons set forth in the attached memorandum.

RESPECTFULLY SUBMITTED this 22nd day of May, 2006.

**COMMISSION ON JUDICIAL CONDUCT**



Hon. J. William Brammer, Jr.  
Commission Chairman

## MEMORANDUM

The Commission on Judicial Conduct evaluates complaints against judges, investigates potential violations of the Code of Judicial Conduct, conducts hearings, and submits recommendations for formal discipline, where warranted, to the Arizona Supreme Court. The commission may also issue reprimands to judges in cases that merit informal discipline but do not rise to the level of a formal censure, suspension or removal. Complaints that are frivolous, outside the commission's jurisdiction, unsupported by the evidence or that do not involve misconduct are dismissed.

Under the recently-amended rules of the commission, the complaint and final dispositional order in every case are made public. In cases that are dismissed, the complaint and the order are disclosed after the personal information about the complainant and the judge are redacted. In cases involving informal sanctions, e.g., a reprimand, the complaint, the judge's response and the dispositional order are made public after the case is closed. In cases that result in formal sanctions, e.g., censure, suspension or removal, all documents are made public after formal charges are filed. In all cases, the decision to provide a judge's response to a complainant and allow for a reply is discretionary with the commission during the investigation of a complaint. The judge's response must always be released in cases involving a finding of misconduct.

The petition filed by the Maricopa County Attorney's Office would require the commission to provide a complainant with a judge's response (assuming one was requested and submitted) and to give the complainant an opportunity to file a reply during the investigation. The proposed amendment, which would add a new subsection (e) to Rule 9, states:

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.

This amendment is ill-advised and unnecessary. It would alter the nature of commission investigations, reduce the commission's ability to structure its own investigations, change the role of a complainant in disciplinary proceedings, and create more adversarial relationships between the commission and complainants or judges.

**1. The proposed amendment would change the nature of commission proceedings.**

The commission performs various roles in carrying out its constitutional duties. It serves as a forum for citizens to complain about the conduct of judges, and it acts as an interpreter of ethical standards adopted by the court. The commission investigates complaints and may file charges of judicial misconduct. It may impose informal sanctions for minor misconduct or file recommendations with the supreme court as the final arbiter in cases involving egregious misconduct. Additionally, the commission provides training, helps design judicial education programs and staffs the Judicial Ethics Advisory Committee. In carrying out these various roles, the commission strives to maintain neutrality and objectivity.

Although anyone may file a complaint against a judge, a complainant does not become a "party" to the investigation or any subsequent proceedings. Complainants bring allegations of misconduct to the attention of the commission, but the commission does not represent them or file

charges on their behalf. During investigations, the commission does not presume that allegations of misconduct are true, and before it can bring charges against a judge, it must first find reasonable cause to file such charges, and then prove the charges, once filed, by clear and convincing evidence.

To facilitate fact-finding during an investigation, the commission may ask a judge to respond to a complaint, and it encourages judges to respond candidly and thoroughly. When asked to respond, judges are usually cooperative and willing to help resolve problems in an atmosphere of confidence and trust. If judges are informed that everything they tell the commission will be scrutinized by complainants and distributed to the public in general, they may be reluctant to respond as easily or quickly, and will be much more likely to seek the assistance of counsel in preparing responses. Most complaints, however, do not result in a finding of judicial misconduct, and those that do frequently involve minor misconduct that can be resolved efficiently in a way that keeps a judge's behavior in proper perspective. As the court has stated, "the purpose of judicial discipline is not to punish the individual judge, but to maintain the high standards of the judiciary and the proper administration of justice." *In Re Haddad*, 128 Ariz. 490, 492, 627 P.2d 221 (1981).

Judges need to be able to communicate openly with the commission without fear of having their comments, or selected excerpts from them, released to the public surreptitiously or in other ways by complainants without consequences. The mandatory disclosure of responses may have a chilling effect on a judge's willingness to respond candidly and to acknowledge possible mistakes in his or her conduct. In many instances, all that is needed to solve a minor problem is to draw a judge's attention to a particular issue. If a judge cannot freely communicate with the commission, this avenue of correction will be effectively foreclosed. Judges are frequently encouraged or advised

to make minor behavioral changes and to cooperate with the commission. This kind of advice has historically been effective precisely because it is confidential and private.

**2. The commission's ability to manage the scope of investigations would be reduced.**

The primary purpose of an investigation is to determine if misconduct has occurred and whether there are grounds for informal or formal discipline. The commission does this by narrowing the issues and focusing on individual conduct and behavior. Complainants frequently try to expand the issues by broadly interpreting everything a judge said or did as judicial misconduct. Many complainants believe that a judge has committed misconduct by ruling against them because they feel their cause is just, and they see the commission as an alternative means of appeal. They are convinced that a commission investigation will not only reveal where the judge went wrong, but will also result in a favorable outcome in their legal matter.

Although there is often a fine line between judicial discretion and misconduct, the vast majority of judicial misconduct complaints are dismissed by the commission because they involve legal or other issues that are outside the commission's jurisdiction. Complainants often disagree with the commission's decision to dismiss their complaints and frequently file motions for reconsideration, requiring the commission to review closed cases. Since the beginning of 2006, the commission has experienced a significant increase in such motions by complainants who argue repeatedly, and in some cases incessantly, with the commission's findings.

The petitioner's recommendation that complainants be given a "right" to reply to a judge's response during an investigation is unrealistic. Every complaint is unique and requires a different approach. During an investigation the commission may contact court employees, attorneys and others who observed the judge's conduct. In many instances, witnesses will contradict what the complainant

has alleged, and it is not unusual for an attorney to contradict a complainant-client's observations. Does this mean that a complainant should have a "right" to reply to the statements of all the witnesses interviewed during an investigation? Clearly, the answer is "no." There is no more reason to allow a reply to a judge's response than there is to permit a complainant to comment on any other statements that may be obtained in the course of an investigation. Giving such a "right" to a complainant may well prolong the investigative process, with little corresponding benefit to the public or the judiciary.

### **3. The judge's response could be made public prior to the case being closed.**

Proposed Rule 9(c) states, in part, "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." This proposal overlooks the last sentence in existing Rule 9(c) which states that "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." This means that a judge's response, if released to the complainant, could be in the newspaper or in the hands of the judge's political opponent long before the commission has made significant progress in its investigation of the complaint. The fact that the proposed amendment would prohibit disclosure under certain conditions is of little comfort or protection when experience shows complainants routinely ignore such directives.

The proposed rule gives the complainant the opportunity to furnish the judge's response to a brother, sister, the press—anyone—who can reveal the response publicly. The court should be

aware that many complaints, especially those involving domestic relations, probate, and detention issues, pertain to active court cases, where the public release of a judge's response could mandate the disqualification of the judge. This would provide disgruntled litigants and their counsel with a simple means to effect a change of judge. The alternative would be to delay investigating a complaint involving an active legal matter until the case ends, leaving complaints open for months or even years. Even if this sentence were amended to delete the "third party" and to limit disclosure until a case is closed by the commission, there is no provision for any consequence to a complainant who chooses to make the response public. On the other hand, again based on experience, there is every reason to expect that a complainant would make a judge's response public, directly or indirectly, through a third party.

#### **4. The judicial discipline process differs from the attorney discipline process.**

The argument that the court should adopt the bar model for judicial discipline is not persuasive. There is no evidence that the public feels more confident about lawyers because they can see every complaint filed against them. The general public has little interest in the discipline of individual attorneys. In contrast, the press, the public, other media, and a judge's political opponents are all extremely interested in uncovering allegations of misbehavior, even allegations that have been properly investigated and dismissed.

Attorneys are hired to perform certain services. They need not obtain the support of the electorate to continue providing their professional services. Dissatisfied clients can discharge their lawyers and sue them for errors and omissions. A judge is not in an employment relationship with a complainant, and complainants are not "parties" in judicial discipline proceedings. A complainant, in fact, is a witness or a victim, but never a party. Because they are not parties, they do not have a

right to “reply” to a judge’s response. The commission is not a court, and it is not a mirror of the state bar.

#### **5. The judge’s identity in dismissed cases could be disclosed.**

In the 2006 amendments to the commission’s rules, the court provided protection for judicial reputations by allowing judges accused of judicial misconduct to remain anonymous if complaints against them are dismissed. The complaints and dispositional orders relating to those complaints are only made available with all identifying information redacted. Again, the proposed amendment would not prevent a complainant from releasing the judge’s response to the press, publishing it on the Internet, providing it to a judge’s political opponent, or giving it to a third party. Even if a complainant complies with the provision prohibiting disclosure (and there is no incentive for him or her to do so), a third party could disclose the information at any time.

In 2005, the commission received 334 complaints against judges of which 319 were dismissed because there was no evidence of misconduct. The commission required responses from judges in 64 of these cases because the complaints were so convoluted and confusing that the commission needed to review a court file or access a judge’s memory to determine the basis of the complaint. The change proposed by the petitioner will add an additional and, we believe, unnecessary step in investigations. Typically, if any evidence is discovered during an investigation by the commission, including from a judge’s response, that warrants a reply from the complainant in order to fully investigate the facts, such a reply is requested. This can be accomplished without giving a judge’s response to complainants in every case.

#### **Conclusions**

The commission continues to adjust to the changes in disclosure requirements made by the court effective just five months ago. All complaints and orders are published on the Internet after

redacting personal identifying information. The proposed amendment would provide further disclosure without any corresponding benefit to the public and with an increased risk to the reputations of individual judges and the judiciary itself.

The commission believes that the petitioner's proposed amendment would substantially alter the manner in which it conducts investigations. As an independent constitutional entity, the commission must be able to determine the nature and scope of its own investigations. The commission agrees that complainants should be provided with copies of the judge's response in appropriate cases, but petitioner's proposal is overbroad. A better approach would be to allow the commission to continue exercising its discretion on when to provide a response to a complainant, but to adopt an internal policy that would encourage the release of more information when the likelihood of abuse is minimal or non-existent. The commission is considering such a policy.

Lastly, petitioner admits that in every case it has filed over the last two years, it has had access to the judges' responses, either because the commission disclosed them, or because the judges provided a copy to the petitioner. The petitioner's experience with the commission suggests the rule change is completely unnecessary and certainly is not sufficient to justify the proposed change. To change the rules to address one case out of the hundreds that are filed and investigated each year is imprudent and would result in negative consequences in the processing of judicial complaints.