

SUPREME COURT OF ARIZONA

In the Matter of ) Arizona Supreme Court  
 ) No. R-19-0039  
RULES OF PROCEDURE FOR )  
JUDICIAL PERFORMANCE REVIEW )  
 )  
 ) **FILED 08/27/2019**  
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\_\_\_\_\_ )

**O R D E R**  
**CONCERNING RULES OF PROCEDURE FOR JUDICIAL**  
**PERFORMANCE REVIEW**

Jennifer A. Greene filed a petition in this case pursuant to Rule 28(a), Rules of the Arizona Supreme Court. Petitioner has also requested expedited consideration and emergency adoption of the amendments proposed in the petition, attached to this Order. Upon due consideration,

**IT IS ORDERED** that the Rules of Procedure for Judicial Performance Review be amended on an emergency basis pursuant to Rule 28(g), Rules of the Supreme Court, in accordance with the attachment to this order, effective September 1, 2019.

**IT IS FURTHER ORDERED** opening this matter for public comment in accordance with Rule 28(h)(2), Rules of the Supreme Court. Comments are due October 7, 2019, and any reply due October 18, 2019.

DATED this 27th day of August, 2019.

\_\_\_\_\_/s/\_\_\_\_\_  
ROBERT BRUTINEL  
Chief Justice

Arizona Supreme Court

No. R-19-0039

Page 2 of 11

TO:

Jennifer A Greene

Rule 28 Distribution List

## APPENDIX A

(language to be removed is shown in strikethrough, new language is underlined)

### **Rules of Procedure for Judicial Performance Review in the State of Arizona**

#### **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 (hereinafter referred to as “judges”) 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, and judges. The majority of the members of the Commission shall be members of the public who are not attorneys or judges, and there shall be no more than 7 judges and 6 attorneys on the Commission.

**(b) Chairperson.** The Chief Justice of Arizona shall select either an attorney member or a public member as the Chairperson of the Commission. The Chairperson shall preside at all meetings of the Commission. The Chairperson shall select either an attorney member or a public member as Vice Chairperson. If the Chairperson is an attorney member, the Vice Chairperson must be a public member. The Vice Chairperson shall preside at all meetings in the Chairperson's absence.

**(c) Terms.** Each 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.

**(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.

## **Judicial Performance Standards**

### Introduction

Once judges take the bench, the public expects them to be good judges. The Commission on Judicial Performance Review has the duty of providing meaningful and accurate information to the public for its use in reaching decisions regarding retention. Thus, a carefully designed method of disseminating clear and accurate information about each judge to the voting public is needed. As an initial step, a workable description of trial and appellate judge standards must be considered when reviewing a judge's performance.

### Performance Standards for Trial and Appellate Judges

The judge shall administer justice fairly, ethically, uniformly, promptly, and efficiently. The judge shall be free from personal bias in decision making, shall decide cases based on proper application of law and procedure to the facts, and shall issue prompt, clear rulings and decisions that demonstrate competent legal analysis. The judge shall act with dignity, courtesy, and patience. The judge shall effectively manage the courtroom and discharge the administrative responsibilities of the office.

### Factors to be Considered by the Commission on Judicial Performance Review

The Commission on Judicial Performance Review shall carefully consider:

- (1) statistical reports of the survey results;
- (2) comments from public hearings, Rule 6 (d);
- (3) written comments from the public, Rule 6 (d);
- (4) written or oral comment to the Commission submitted by the judge ~~or justice~~ being reviewed, Rule 6 (e);
- (5) its own factual report relating to a judge ~~or justice~~, Rule 6 (e);
- (6) the information obtained from the Commission on Judicial Conduct;
- (7) the assignment of the judge (civil, criminal, domestic relations, juvenile, administrative, probate, special assignment, etc.); and
- (8) a comparison of the judge's scores with the mean scores of all judges ~~or justices~~ reviewed, Rule 6 (e).

**Rule 3. [no changes]**

**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) Organization.** The Conference Team members shall organize themselves as meets their needs in order to conference with the judge(s) assigned to that team.

**(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.

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

**(e) 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.

**(f) 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.

**(g) 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) To preserve impartiality:

(a) When a Commissioner or Conference Team member cannot perform his or her duties in an impartial, objective manner due to a ~~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, the member shall inform the Commission or Conference Team of the need to recuse himself or herself from participating in the consideration of the judge.

(b) A Commissioner or Conference Team ~~The~~ member is disqualified from taking any action with respect to a judge who is a family member within the third degree of consanguinity.

(c) 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 with respect to the judge's own performance.~~

(d) The voter information pamphlet shall ~~reference~~ identify 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 judge member who receives an Invitation to Respond under Rule(6)(f)(3) shall not participate in the Commission for the balance of the then-current cycle.

~~(3)~~(4) A Commissioner or Conference Team member shall not be influenced ~~other than~~ by facts or opinions ~~which are relevant to the judicial performance of~~ regarding the reviewed judge ~~or justice other than those that were presented to the Commission or Conference Team during the review process. 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)~~(5) 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 challenges 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's ~~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) Consideration of Prior Performance Reviews. In addition to current survey data regarding each judge, the Commission will also review all past surveys and evaluations for any judge whose performance score or rating falls below the threshold standard established by the Commission.

~~(3) Written Notice Invitation to Respond.~~ 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.

(a) The Chair shall invite any judge who is reviewed under subsection (f)(2) to respond regarding his or her survey scores.

(b) Regardless of the judge's scores or ratings, by a majority vote the Commission may ask the Commission Chair to invite the judge to answer questions regarding his or her survey scores or ratings, public comments received, or other performance-related questions.

(4) Confidentiality of Responses and Impact on Members' Eligibility to Vote. The judge or justice who chooses to respond to the invitation shall have the right to submit confidential written comments ~~thereon~~ to the Commission and to appear and be heard in executive session by the Commission at a date and time set by the Commission prior to the public vote, pursuant to Rule 2(e). Any member who fails to attend the executive session at which the judge appears shall not vote on that judge.

~~(3)~~(5) 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)~~(6) Report of the Commission. In each election year, the Commission shall compile a 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 no 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.

### **Court Comment [Rule 6 (C)]**

This subsection resolves a tension between two competing goals. Narrative comments should be anonymous in order to encourage candor. Nevertheless, the opportunity to comment anonymously may also encourage irresponsible and inaccurate comments by persons having a motive to discredit a judge ~~or justice~~. Yet, if comments are not anonymous, candor may be compromised.

This subsection, we believe, strikes an appropriate compromise. Narrative comments will remain anonymous and will be used solely for the self-improvement component of judicial performance review. The public, however, will retain the right to make public narrative comments, as is made clear by the last sentence of (c) above.

We believe this compromise furthers the legitimate interest of the public in having access to information concerning judges ~~and justices~~, as well as the legitimate interest of the judge ~~or justice~~ in not being the target of malicious or irresponsible anonymous comments.

### **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 duplicate survey forms 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.

### **Rules 8 and 9 [no changes]**