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IN THE SUPREME COURT STATE OF ARIZONA

In the Matter of:)
)
)
PETITION TO AMEND RULE)
81, RULES OF THE SUPREME) Supreme Court
COURT, ARIZONA CODE OF) No. R-_____
JUDICIAL CONDUCT, RULE)
2.10)
)
) Petition to Amend Rule 81, Rules
) of the Supreme Court, Arizona
) Code of Judicial Conduct, Rule
) 2.10
_____)

INTRODUCTION

Under Rule 28 of the Rules of the Supreme Court, the Arizona Supreme Court Task Force on Countering Disinformation (Task Force) respectfully petitions the Arizona Supreme Court to amend Rule 2.10 of Judicial Ethics Canon 2, clarifying actions that judges may take while performing the duties of their office impartially, competently, and diligently. The changes reflect an appropriate approach to targeted campaigns against judges, based on a year of Task Force research and study into

misinformation and disinformation in Arizona and nationally. The Task Force's work included discussion of the rule change amendments in this petition with the Director of the Arizona Commission on Judicial Conduct (CJC). That is to describe the Task Force's due diligence in reviewing the issues and not an endorsement of the CJC.

On October 22, 2020, these rule change proposals were presented to the Arizona Judicial Council (AJC) within the Task Force's Report and Recommendations and the AJC unanimously supported the Report and Recommendations.

BACKGROUND

The Task Force determined that disinformation against judges and the judicial branch were part of a larger tactic by foreign and domestic actors to reduce the trust and confidence in American institutions. In addition to broader, anti-democratic efforts, judges can become targets of disinformation when a party or outside interest sees a strategic advantage to doing so, whether for personal reasons, political gain, or otherwise. Similar harm can arise from misinformation, which is the statement or spreading of inaccuracies or dubious claims without the intent or knowledge that the information is inaccurate.

Judges have historically demonstrated restraint and patience when

responding to characterizations of their conduct and performance. The amendments proposed here do not change that approach or alter the ethical rules under which judges perform. Rather, the proposals in this petition clarify that judges need not accept abuse and bluster when they can ethically respond with accurate information, regardless of whether they are in the process of an election or retention campaign.

The Task Force Report and Recommendations explained the situation this way, which is incorporated into the proposed amendments:

The ACJC should be amended to affirmatively state that a judge, whether elected or appointed, or the judge's designee, may respond to attacks on the judge's actions, character, or reputation from whatever source in writing, via social or broadcast media or otherwise, so long as the response otherwise complies with the Code's requirements. This recommendation conforms to ACJC Rule 4.1, where Comment 9 specifies that during a campaign for judicial office, candidates may respond directly to false, misleading, or unfair allegations made against him or her during a campaign. Likewise, Comment 3 to Rule 4.3 specifically authorizes judicial candidates during a campaign to make a factually accurate response to false or misleading allegations. The most likely place for this addition is to ACJC Rule 2.10 and the comment following it.

The proposed amendments do not mandate how or when judges should respond to statements, or whether they should respond at all. Judges retain their discretion on individual responses and have clarification that

claims against them are not limited to the timing of election and retention campaigns, while clarifying that the source of misinformation or disinformation can originate from several sources or formats and that the format of allegations (in person, physical, digital) could change over time.

SUMMARY OF PROPOSED CHANGES

Current Ethics Rule 2.10 allows judges to directly, or through a third party, respond to allegations concerning the judge's conduct in a matter. The proposed changes add language to reflect the understanding that allegations against judges are not always limited to matters before them. The Task Force identified baseless allegations from often unnamed sources attacking judges' character and personal lives. For example, alleging that judges are involved in illegal or unethical conduct, such as child trafficking, bribery, or favoritism.

Judges oversee litigation and matters that involve the parties' intense personal and emotional investment. As a result, judges anticipate criticism over their decisions. And while the public should expect that actual impropriety will be revealed and addressed, baseless attacks on a judge's reputation do immediate and sustained harm to the public's confidence in judges and the judicial branch. The proposed amendments reflect those realities and allow judges to more directly address and respond to what can

be characterized as attacks on the public’s confidence in judges and the judiciary.

CONCLUSION

For the reasons stated in this petition, the Task Force on Countering Disinformation respectfully requests that the Court amend Rule 2.10 of the Arizona Judicial Code and the Comment following it.

Changes in the accompanying Appendix are reflected in legislative mark-up where deleted language appears in ~~strikeout~~ and new language appears in underline.

DATED this _____ day of __[month]_____, [year].

/s/ *draft* _____, **Chair**
Arizona Supreme Court Task Force
on Countering Disinformation

APPENDIX A. TEXT OF PROPOSED RULE CHANGES

Rule 81, Rules of the Supreme Court, Arizona Code of Judicial Conduct, Canon 2, Rule 2.10

Rule 2.10. Judicial Statements on Pending and Impending Cases

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter or to false, misleading, or unsubstantiated allegations or attacks upon the judge's reputation from whatever source in writing, via social media or broadcast media or otherwise.

...

Comment 3:

Depending upon the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connections with allegations concerning the judge's conduct in

a matter or to false, misleading, or unsubstantiated allegations or attacks upon the judge's reputation. Consistent with Rules 4.1 and 4.3 regarding judicial campaigns, a judge's response or statement at any time that counters attacks on the judge's actions, character, or reputation may serve to restore or maintain public confidence in the judiciary, subject to the requirements of paragraph (A).

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