

## ***PROPOSED RULES CIRCULATED FOR COMMENT***

The Arizona Supreme Court is now circulating for comment a proposed draft of a new set of procedural rules for the Commission on Judicial Conduct prepared by the Advisory Committee on the Rules of Judicial Conduct, an 18-member panel selected by the Chief Justice in February of this year to study rules changes. Judges are encouraged to examine the proposed rules and may submit comments to the Clerk of the Supreme Court on or before January 12, 2001.

### **Key Provisions of Proposed Rules**

The existing commission is modeled after the unitary or "one-panel" system used in most states. In Arizona, all commission members have an equal voice in the consideration and resolution of every disciplinary case. The members consist of two judges of the court of appeals, two judges of the superior court, one justice of the peace, one municipal court judge, two members of the state bar and three citizens (who can neither be judges nor members of the bar). This eleven-member composition is mandated in Article 6.1 of the Arizona Constitution.

The proposed rules are loosely based on the 1994 ABA Model Rules for Judicial Disciplinary Enforcement and contemplate use of a new "two-panel" system for resolution of judicial complaints. This system, if approved, will divide the eleven-member commission into a three-member investigative panel for each case and an eight-member formal hearing panel that would only act in the event that formal charges are instituted. Because few cases "go formal," the three-member panels will have broad authority to dismiss complaints, impose informal discipline or file formal charges against a judge.

Historically, roughly 99 percent of all complaints are either dismissed or resolved through informal discipline by advisory letter or private reprimand. The remaining one percent (about three cases a year) result in recommendations to the Arizona Supreme Court to censure, suspend, remove, or retire a judge following a formal commission hearing. Under the proposed rules, this one percent will be the only cases heard by a majority of the commission. The other 99 percent of the cases will be decided by three-member panels composed of one judge, one attorney and one public member, effectively eliminating the established ratio of judges, attorneys and public members.

### **Pros and Cons of Two-Panel System**

Proponents of the two-panel system argue that segregating out three commission members for the investigative process will assure that the remaining eight

members will be kept "untainted" by pre-hearing reports and will thus be able to mete out formal discipline more objectively. This model, they argue, is more in keeping with principles of due process and fairness in our adversarial justice system.

Opponents argue that the informal discipline process will be disadvantaged by the loss of judicial perspectives, particularly when the three-member panel does not include a judge with experience in the respondent judge's type of court. Further, any "appearance of unfairness" is mitigated by the fact that most of the members of the commission are judges and outweighed by the benefits of added judicial experience, philosophical diversity and consistency in decision making when all members take part in the disciplinary process. The American Judicature Society made similar observations in its evaluation of two-panel systems, maintaining:

[H]aving an investigative panel with rotating membership almost ensures that commission decisions, particularly on what conduct warrants the filing of formal charges, will become inconsistent. If different sets of three members are reviewing complaints, it is possible that one month a complaint against one judge will be dismissed as not serious enough to merit formal charges while a month later (or six months later, depending on the rotation schedule), an investigative panel with different membership may decide to file formal charges against a second judge based on similar facts. With a three-member investigative panel, even a change in one member can change the outcome of the decision whether to file formal charges. Such inconsistency would be unfair to judges and the public.

AJS Memorandum, October 12, 1999.

Although one-panel systems have consistently been upheld as constitutionally sound and fully compatible with the due process rights of judges (the investigative "taint" being considered no more than that which a typical judge is exposed to daily in his or her courtroom), five states have adopted two-panel systems, amending their constitutions or statutes as necessary to accommodate the change. The system contemplated in the proposed rules, however, does not provide for such amendment.

### **Other Provisions**

The proposed rules include many other notable provisions. Under the new rules, judges will be able to appeal informal disciplinary decisions to a formal hear-

ing panel and then to the supreme court. It is unclear whether complainants will be able to do this as well. There are also expanded discovery rules which may result in additional "litigation" and protracted disciplinary proceedings.

The proposed rules require the immediate publication of the formal statement of charges against a judge. Under the existing rules, judges have 15 days to respond to formal charges before they are made public and the judge's response is published at the same time as the charges.

The proposed rules also call for the appointment of permanent disciplinary counsel to conduct all preliminary investigations as well as prosecute formal cases. Because of the small number of formal cases in this state, the commission currently uses its staff attorney for this purpose and retains outside disciplinary counsel only as needed.

Lastly, the text of the proposed rules appears to be an assortment of model rules, existing rules, and rules taken from other state commissions. As a result, the rules lack internal coherence, and there is no accompanying analysis explaining the rationale for many of the changes. For example, under the proposed rules, the formal hearing panel will rule on stipulated disciplinary agreements. But if negotiations fail or an agreement is rejected, the panel may be "tainted" for the purpose of subsequent hearings in the matter, thereby invalidating the essential purpose behind the two-panel system.

### Conclusion

In sum, the court's advisory committee has proposed numerous amendments to the commission's rules that, if adopted, will significantly alter the disciplinary process and the manner in which commission members participate in official deliberations and resolve complaints. The commission is concerned that the proposed rules, while creating a vehicle by which some desirable changes may be realized, may also generate unintended consequences without adequately addressing important policy and organizational issues.

### Additional Information

The proposed rules have been distributed for comment to the Arizona Judicial Council, the state bar, judges associations, and superior court presiding judges, among others. Those who wish to examine the text of the proposed rules may obtain a copy from the Clerk of the Supreme Court or the Commission on Judicial Conduct. Questions and answers about the background and development of the proposed rules and a comparison of existing and proposed rules prepared by the commission may be obtained by calling the commission's office at (602) 542-5200 or accessing its website at [www.supreme.state.az.us/cjc](http://www.supreme.state.az.us/cjc).

## New Advisory Opinions

The Judicial Ethics Advisory Committee issued eight opinions in 2000, summaries of which appear below. The full text of the opinions has been sent to chief and presiding judges, and will be distributed to all judges in the near future. New index tabs for the judicial ethics manual are being mailed to judges with this issue of the *Bulletin*.

### Opinion 00-01 (April 7, 2000)

The presiding judge of the criminal division in which his son appears as a prosecutor may continue to act as the presiding judge and as a criminal trial judge, except for cases involving his son under circumstances described in the opinion.

### Opinion 00-02 (April 9, 2000)

Judges may participate, within limits, in seminars or educational programs funded by businesses, foundations, or other non-governmental entities.

### Opinion 00-03 (May 3, 2000)

An appellate law clerk may not accept payment of bar dues from a law firm for which the law clerk will work when the clerkship is completed.

### Opinion 00-04 (August 24, 2000)

A judge may participate in evaluating the performance of attorneys who appear regularly before that judge without the evaluation being disclosed to the attorney being evaluated.

### Opinion 00-05 (December 14, 2000)

Judges may continue to participate in volunteer work with the Boy Scouts of America.

### Opinion 00-06 (December 18, 2000)

This omnibus opinion analyzes numerous issues relating to judicial participation in fund-raising activities that have previously been addressed only on an informal basis.

### Opinion 00-07 (December 20, 2000)

This opinion explores the immediate ethical issues that arise when a person becomes a full-time judge.

### Opinion 00-08 (December 21, 2000)

A judge or a court may not be listed in the Yellow Pages of a telephone directory as a way of advertising availability to perform weddings.

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The *Bulletin* is published periodically by the Commission on Judicial Conduct and the Judicial Ethics Advisory Committee as a service to the Arizona Judiciary. For more information write the commission or committee staff at 1501 W. Washington Street, Suite 229, Phoenix, Arizona 85007; or call (602) 542-5200

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