

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 92-10
(September 1, 1992)

**Effect of Persistent Failure to
Enforce Rules of Procedure**

Issue

Does a judge who regularly and continually fails to enforce certain rules of procedure violate the Code of Judicial Conduct.

Answer: Yes, depending on the circumstances.

Discussion

In answering this question, the Advisory Committee is mindful that "mere" legal error does not necessarily create judicial misconduct. Neither does an honest difference of opinion over what constitutes "good cause," "substantial compliance," "excusable neglect," and so on. With this in mind, however, we do conclude that legal error may be subject to discipline when certain criteria are applied.

We base this conclusion on the language in the state constitution and the Code of Judicial Conduct. The Arizona Constitution allows for the removal of a judge for willful and persistent failure to perform duties. This provision is reinforced by Canon 3A(1) that requires a judge to be faithful to the law and maintain professional competence in it. Taken together, these provisions make it clear that a judge has an ethical as well as legal obligation to apply the law—including the court's rules of procedure—fairly and consistently. A judge has no authority to apply the rules capriciously.

The literature and case law [cited below] suggest that there are four criteria which should be used to determine whether there is mere legal error or if judicial misconduct is exhibited. First, there should be a repeated pattern of disregarding procedures and the law. Second, the degree of egregiousness of the error is taken into consideration. If there is an utter disregard of the law and of established rules of practice over a protracted period of time, a judge would be subject to discipline. Third, the motive of the judge in disregarding the law or procedure is considered. Judges are not permitted to substitute their own concept of what the law ought to be for what the law actually is. Finally, the availability of appeal may be a mitigating factor although it will not necessarily save a judge from judicial discipline. It has been said that judicial independence encompasses making mistakes and committing error, but does not afford protection to judges who repeatedly ignore the law.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canon 3A(1) (1985).

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Other References

Arizona Constitution, Art. 6.1, § 4.

In Re Inquiry Concerning a Judge, 357 So.2d 172 (Fla. 1978).

In Re Reeves, 469 N.E.2d 1321 (N.Y. 1984).

In Re Scoll, 386 N.E.2d 218 (Mass. 1979).

Gerald Stern, *Is Judicial Discipline in New York a Threat to Judicial Independence?*
Pace Law Review 291 (1987).

Jeffrey M. Shaman et al., *Judicial Conduct and Ethics* 20-22 (1990).