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In the Matter of:	)	
	)	SUPREME COURT NO. R-__-__
PETITION TO AMEND RULE 3.E.,	)	
[UNIFORM RULES OF	)	Petition to Amend Rule 3.e.,
PROCEDURE FOR COMMISSIONS	)	Uniform Rules of Procedure for
ON APPELLATE AND TRIAL	)	Commissions on Appellate and
COURT APPOINTMENTS]	)	Trial Court Appointments
	)	
_____	)	

Pursuant to Rule 28, Rules of the Supreme Court, Kathryn Townsend, member of the Commission on Appellate Court Appointments, respectfully petitions this Court to Adopt amendments to Rule 3.e. of the Uniform Rules of Procedure for Commissions on Appellate and Trial Court Appointments.

I. Background of the Proposed Rule Amendments

The rules outlined in the Uniform Rules of Procedure for Commissions on Appellate and Trial Court Appointments govern the conduct of commissioners as well as the conduct of the commissions themselves. The rules are intended to ensure that each applicant for the Arizona judiciary is treated fairly. In a well-meaning, but misplaced, attempt to ensure that there is no appearance of

partiality, Rule 3.e. constrains commissioners and applicants from communicating with one another verbally or in writing from the time an applicant submits his application until the application is no longer under consideration. This constraint interferes with commissioners effectively and efficiently executing their duty to promote excellence in Arizona's judiciary, puts certain applicants at a disadvantage, and ultimately does not achieve the rule's goal of promoting an appearance of impartiality. A review of the minutes of the Rules Agendas from December 16, 2014 through December 6, 2022 did not find a review of Rule 3.e. of the Uniform Rules of Procedure for Commissions on Appellate and Trial Court Appointments and it does not seem this rule has been reviewed in the last five years.

II. Purpose of the Proposed Rule Amendments

The purpose of the proposed rule amendments is to address the ways in which Rule 3.e. hampers the merit selection process for judges rather than enhancing it.

III. Need for the Proposed Rule Amendment

In order for commissioners to do their jobs properly they must carefully examine applications, consider letters of recommendation, evaluate conversations with references, recognize the import of public comment, and scrutinize due diligence findings. Unfortunately, each of these elements in the

nomination process is of limited scope. Commissions hope to fill in missing pieces during the interview process, but the nature of the way interviews are conducted is sufficiently impersonal that it is difficult to believe a full picture of an applicant has emerged by the time commissions vote on which names to forward to the governor. When each applicant is asked the same set of questions without regard to that applicant's professional background, area(s) of expertise, life experience, or community service it is unlikely the applicant will have been afforded an opportunity to fully make the case as to why he or she is the best choice in the applicant pool. The current rule forbidding contact between applicants and commissioners once the applications are submitted thwarts commissioners' ability to treat each applicant as a unique individual and wholly understand all the nuance contained in that individual's application. There are also elements of the current rule that are unclear and make the process both less fair and less humane than it ought to be.

Currently, applicants are free to call or email commissioners regarding their intention to apply for vacancies on the various courts, meet with commissioners, introduce themselves, outline their education and experience, and ask for input and advice regarding the process as long as those calls or emails happen prior to the applicant submitting an application. During those phone calls or meetings, or in response to those emails, commissioners can ask questions about the

applicant's qualifications, judicial philosophy, and character. However, a commissioner's ability to ask intelligent, thoughtful, personalized questions of the applicants is constrained by whatever knowledge the commissioner may or may not have about an applicant at the time of the conversation with that applicant.

Once the applicant has submitted the application, the commissioners are no longer allowed to communicate with the applicant until the applicant is either no longer under consideration or the applicant is being interviewed. Questions asked during the interview process are typically impersonal and every applicant is asked the same set of questions. In general, the only time an applicant is asked a question that every other interviewee is not asked is if due diligence revealed information that might cause a commission to believe there is an issue with an applicant that would preclude including that applicant's name in the list of names forwarded to the governor. Unfortunately, it is sometimes true that an applicant is blindsided by questions arising out of due diligence and it is always true that those questions could be more fully answered if the applicant were given ample time to respond in a non-interview setting and the commission had the ability to more fully investigate an applicant's response prior to interviews.

Occasionally there will be information in an application that is unclear or concerning to a commissioner. Under the current rules, when a commissioner needs clarification, it is improper for the commissioner to ask the applicant

directly for that clarification. It is possible to engage in a game of “telephone” where a commissioner makes a request of staff to seek clarification, staff seeks permission from the chair of the commission to ask the applicant the commissioner’s question, the chair of the commission determines if permission will be given, if permission is received, staff contacts the applicant and asks the question, and finally, if all works smoothly, the commissioner may receive an answer. If the answer triggers a follow up question, the entire cumbersome process has to be restarted. It would be far more straightforward for a commissioner to call the applicant directly.

It also happens that an application will touch on something of interest to a commissioner but not fully develop that area of interest. This is significant because there is no way for an applicant to know who else is in the applicant pool prior to the close of applications and therefore applicants can’t anticipate with certainty which elements of their application will make them stand out from others. Commissioners, however, see those distinctions when reviewing the applications and may identify something in an application that is a distinctive attribute inadequately developed. In the current process there is no way to provide an applicant time to expand on something that might impact a commissioner’s decision to support an applicant’s name being sent to the governor without infringing on someone else’s interview time and forcing the interviews to run

behind schedule. If communication from a commissioner to an applicant were allowed, commissioners would be able to better understand applicants' qualifications and identify applicants whom they support with greater confidence. Commissioners would be able to report back to the commission regarding their findings during the time set aside for due diligence or discussion of the applicants without impinging on time for interviews.

Additionally, because the rule is clear regarding when applicants may not talk to commissioners, but vague regarding when they may, applicants who are familiar with the process, have political connections, or know judges well enough to ask about how the process works have a distinct advantage over applicants who do not know and have no straightforward way of finding out, that it is permissible to reach out to commissioners prior to submitting an application. It is typical to discover during disclosure and disqualification reports that commissioners have spoken with some, but not all, of the applicants on the list. Even commissioners who are willing to speak with anyone who calls them are unlikely to report they spoke with everyone on the list. A review of the last two years of minutes from the Commission on Appellate Court Appointments indicates not a single instance of any commissioner reporting communication regarding the application process with every applicant. The appearance of impartiality, which is the stated goal of all the elements of Rule 3 is not achieved when it looks like some of the

applicants had the opportunity to make contact with the commissioners and others did not. From an ethical standpoint, there is no substantive difference between speaking with an applicant prior to seeing their application and speaking with that applicant after seeing their application other than the rules allow the former and forbid the later. Allowing post submission one-on-one communication would allow commissioners to ask better, more intelligent, more insightful questions with the aid of the information contained in the application than can be asked in the one-on-one conversations that happen prior to an application being submitted.

The rule also is unclear when the period of enforced silence ends. This matters because applicants report that follow up communication from commissioners after an application cycle is helpful to them. As it is now, commissioners have limited guidance regarding when they are allowed to renew communication with applicants. The lack of availability of prompt feedback to applicants makes the process more opaque and more emotionally difficult for applicants than is necessary.

The rule currently states that no communication is to take place until after the individual's application is no longer under consideration, but it does not say consideration by whom. Does the rule mean under consideration by the commission or under consideration by the governor? Common sense would indicate that since the handbook deals with decisions under the control of the

commission, and the commission does not control the governor's decisions, once the application is forwarded to the governor's office it is outside the commission's authority and Rule 3.e. is no longer in effect. But there are those who have argued that because some commissioners lobby the governor, until the governor makes a decision, the application is still under consideration within the meaning of the rule. However, when individual commissioners engage in lobbying activity, they are not doing so on behalf of the commission on which they serve. They are lobbying on their own behalf as private citizens. Those commissioners' private lobbying activities ought not mean that the application is still under consideration within the meaning of Rule 3.e. since as soon as a nomination list is finalized and forwarded to the governor no commission, or commissioner, has the ability to change the list of applicants under consideration by the governor. Clarification of when communication may occur within the rules would be helpful.

IV. How Rule 3.e. of the Uniform Rules of Procedure for Commissions on Appellate and Trial Court Appointments Needs to be Changed

All of these issues can be addressed with two changes to Rule 3.e. First, the rule should be clarified so that it explicitly states when applicants may initiate communication with commissioners. That way, applicants new to the process will not be concerned that if they reach out to commissioners, they will be doing

something that will harm their chances of receiving an interview or an appointment. Second, the rule should be changed so that commissioners can reach out to applicants at any time. This will allow commissioners to more fully understand each application and explore the elements of the application that are of particular interest to them. It also allows any issues raised on due diligence to be addressed with the applicant in a non-public forum in a way that is much less stressful than being confronted with supposed wrongdoing during a high stakes interview and, more importantly, is much more likely to provide the commission with the insight required to make good decisions. There is no reason to think that these issues will not still be raised by commissioners in their due diligence reports, but the clarification obtained by speaking directly with the applicant during due diligence will allow those reports to be more complete. By requiring post submission communication to originate with commissioners, volunteers serving on the commission do not need to be worried they will be inundated with calls from applicants while they are also trying to do due diligence and receive public input. As long as communication about the process is allowed prior to application submission, communication should also be allowed after the application has been submitted.

V. Current Rule 3.e. of the Uniform Rules of Procedure for Commissions on Appellate and Trial Court Appointments

Rule 3.e. currently states: “A Commissioner shall not communicate verbally or in writing with an applicant about the application or the nomination process from the time the application is submitted until the individual’s application is no longer under consideration. Commissioners may communicate with individuals whose applications rolled over from a previous vacancy from the date the application was released from consideration in the previous vacancy until the date the new application period closes.”

VI. Proposed Language of revised Rule 3.e. of the Uniform Rules of Procedure for Commissions on Appellate and Trial Court Appointments

Prior to submitting an application, potential applicants may initiate verbal or written communication with commissioners regarding the application or the nomination process. Applicants may not initiate verbal or written communication with a commissioner regarding the application or nomination process from the time they submit their application until the commission has sent a list of nominated applicants to the governor’s office. A Commissioner shall not communicate verbally or in writing with an applicant about the application or the nomination process from the time the application is submitted

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vacancy until the date the new application period closes. Commissioners may
initiate verbal or written communication with an applicant, or potential
applicant, regarding that applicant's application or the nomination process at any
time.

VII. Conclusion

For the foregoing reasons, in order to better serve the commissions, the
commissioners, the judiciary, the applicants, and most importantly, the people of
Arizona, Petitioner respectfully requests the Court amend Rule 3.e. of the Uniform
Rules of Procedure for Commissions on Appellate and Trial Court Appointments
as described in section VI of this petition.

RESPECTFULLY SUBMITTED this 9th day of January, 2023.

By Kathryn Townsend
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Appointments