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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of

PETITION TO AMEND RULES  
OF PROCEDURE FOR JUDICIAL  
PERFORMANCE REVIEW IN THE  
STATE OF ARIZONA (ALL)

Supreme Court No. R-23-\_\_\_\_\_

Rule 28 Petition; Request to Modify  
Comment Period; Request for  
Effective Date of October 1, 2023

Pursuant to Rule 28, Rules of the Supreme Court of Arizona, Petitioner respectfully petitions this Court to amend the Rules of Procedure for Judicial Performance Review (“JPR”) in the State of Arizona as recommended by the JPR Task Force established by Administrative Order 2023-24. In addition to amendments to the JPR process, the Task Force proposal restyles and reorganizes all of the current JPR Rules. Given the nature and extent of the revisions, this petition proposes the abrogation of the current rules and their replacement with a new set of JPR Rules rather than proposing individual rule amendments. Accordingly, Appendix A contains a clean version of the proposed rule amendments. Available in Appendix B

is a “Disposition Table” identifying where the substance of the current rules may be found in the proposed rules.

**I. Purpose of the Proposed Rule Amendments.**

**A. To implement Task Force recommendations.**

At the 1992 general election, Article 6, Section 42, of the Arizona Constitution was approved by the voters. It requires the supreme court to adopt and administer a process, established by court rules, for evaluating judicial performance of all justices and judges who stand for retention (*i.e.*, all merit-selected judges and justices) that must:

- Include written performance standards;
- Include performance reviews that survey the opinions of those with knowledge of the justice’s or judge’s performance; and
- Afford the public a full and fair opportunity for participation in the evaluation process through public hearings, dissemination of evaluation reports to voters, and any other methods as the court deems advisable.

Ariz. Const. art. 6, § 42.

In 1993, this Court adopted JPR Rules and established the Commission on Judicial Performance Review (“Commission”) to “assist voters in evaluating the performance of judges standing for retention; facilitate self-improvement of all judges subject to retention; 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.”

At the recent 2022 retention election, there appeared to be voter confusion about the information the JPR commission presented, particularly about what abstention votes indicated. Additionally, the number of surveys being returned to the JPR commission has continued to diminish. As a result, the Court established a JPR Task Force consisting of Commission members, judges, attorneys, and public members to review and update the JPR process and propose possible rule amendments.

The 20-member Task Force, chaired by the Chief Justice, met on February 21–22, 2023 to review the current process and recommend any changes necessary to:

- Ensure the appropriate amount of data is available to and considered by the Commission;
- Elicit more meaningful information from survey questionnaires;
- Improve the survey response rate;
- Broaden the categories of individuals surveyed about a judge’s performance;
- Make the Commission’s reporting of information more accurate and useful to voters;

- Make voters less susceptible to disinformation campaigns against judges that are motivated by something other than judicial performance; and
- Ensure that judges are fairly evaluated for their work as judges.

The Task Force reviewed research from the Institute for the Advancement of the American Legal System, University of Denver (“IAALS”) and the National Center for State Courts on best practices for judicial performance evaluation processes. After discussions in work groups and in the full Task Force, areas of consensus emerged that formed the basis of draft rule amendments.

The Task Force considered and revised draft JPR rule amendments on March 13 and March 24, 2023. The proposed amendments, as finalized on behalf of the Task Force, are attached as Appendix A.

**B. To make stylistic revisions.**

The proposed amendments revise the current JPR Rules in an effort to make stylistic changes consistent with the principles in Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* (1996), including: making generous use of subparts and subheadings; simplifying sentences; avoiding ambiguous terms such as “shall”; avoiding redundant and archaic terms; preferring simpler words and proper word choice; minimizing the use of “of” phrases; and using the active voice. These Garner principles have been followed in stylistic revisions of the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the Arizona Rules of Civil

Procedure. It is expected that further stylistic improvements will be identified during the comment period.

In addition, the current rules were reorganized to enhance clarity and eliminate repetition. Appendix B shows the proposed location of the current rule provisions.

## **II. The Substance of the Proposed Rule Changes.**

The key, substantive differences between the current and proposed rules fall into the categories discussed below. Note that proposed Rule 1(a) provides that “[f]or purposes of these rules, ‘judges’ means all justices and judges who are in merit selection jurisdictions and subject to retention elections.” When the term “judges” is used in this petition, it has the same meaning as in proposed Rule 1(a). All rule citations in this petition are to the proposed rules in Appendix A unless otherwise identified.

### **A. The Commission Determination of “Meets” or “Does Not Meet” Judicial Performance Standards.**

The Task Force proposes in Rule 3(b)(3) that the Commission determine whether a judge “meets” or “does not meet” judicial performance standards in two contexts:

1. Retention (whether the judge is fit for office) and
2. Improvement (whether the judge needs to improve in some respects but is still fit for office).

Accordingly, the proposed Rule 6(c)(6) provides that the question before the Commission at the Rule 4(b)(3) “public vote meeting” be “whether the judge’s record of performance meets the Rule 5(a) judicial performance standards and demonstrates the judge’s fitness for retention in office.” Thus, a Commission member who determines that a judge has room for improvement in one or more areas but is fit for office, should find that a judge meets the performance standards for retention.

The proposed Rule 5(a) borrows judicial performance standards from *The O’Connor Judicial Selection Plan*, a 2014 collaboration between an Advisory Committee chaired by U.S. Supreme Court Justice Sandra Day O’Connor (Ret.) and Arizona Chief Justice Ruth V. McGregor (Ret.) and the IAALS *Quality Judges Initiative*. In her June 2014 letter of introduction, Justice O’Connor describes the O’Connor Plan as “a step toward developing systems that prioritize the qualifications and impartiality of judges, while still building tools for accountability through an informed election process.” The O’Connor Plan offers best practices for judicial performance evaluations “based on criteria generally understood to be characteristics of a good judge.” The judicial performance standards in proposed Rule 5(a) are clear, distinct from each other, and mirror those recommended in the O’Connor Plan. They are:

- Impartiality and freedom from bias.

- Command of relevant substantive law and procedural rules.
- Clarity of oral and written communications.
- Judicial temperament and professionalism upholding public confidence in the legal system and demonstrating appropriate respect for everyone.
- Possession of the administrative and management skills and work ethic necessary to be productive and efficient.

**B. Providing Judges the Opportunity to Meet With the Commission In Executive Session.**

Under proposed Rule 10(c)(1), a judge would have the right to meet with the Commission in executive session before any Commission member may vote that the judge does not meet the judicial performance standards sufficient for retention in office. Accordingly, proposed Rule 4(b)(2) provides that a judge must receive an invitation to meet on the request of any Commission member.

An invitation to the executive session becomes a right afforded to a judge to address the concern of any Commission member instead of a stigmatizing event triggered by a judge's performance evaluation score falling below the threshold standard established by the Commission as is the current practice. No judge should be blindsided under the proposed rules.

The Task Force underscored the importance of full Commission participation at this executive session by providing in proposed Rule 4(d)(2)(B) that a member who does not attend the executive session is ineligible to vote on any judge at the following public vote meeting.

### **C. Public Vote Meeting; Commission Voting Procedures.**

During the first 5 months of every even-numbered year, the Commission holds a public vote meeting to determine whether each judge eligible for retention “meets” or “does not meet” the judicial performance standards sufficient for retention. Proposed Rule 4(b)(3).

Proposed Rule 6 codifies the Commission’s current practice of preparing a consent agenda listing judges identified only by a number assigned by Commission staff. Under proposed Rule 6(c)(5), recusals would be stated on the record before voting and the vote taken on the consent agenda would be deemed to exclude those votes. The Commission would then vote on the consent agenda by a voice vote under proposed Rule 6(c)(4), and approval of the consent agenda will mean that all judges on the consent agenda are determined to meet the judicial performance standards for retention by a vote of all Commissioners present and eligible to vote.

A judge may be removed from the consent agenda on the request of any Commission member under the proposed Rule 6(c)(2). A recorded vote is taken on each judge removed from the consent agenda.

### **D. Public Comment.**

Under the proposed rules, receiving public comment remains a prominent part of the JPR process. The proposed rules seek to enhance opportunities for meaningful public comment.



First, the proposed Rule 4(c)(2) provides an exception to the quorum requirement for conducting Commission business by allowing the Commission to split into smaller units to hold meetings outside of Maricopa County exclusively for the purpose of receiving public comment.

Second, proposed Rule 4(b)(1)(C) would authorize Commission members to ask follow-up questions of individuals providing public comment as necessary to obtain additional information, clarification, or context. This change would allow the Commission to receive more relevant and useful public comment and to identify comments that are not based on actual knowledge of the judge's performance.

#### **E. Surveys.**

The Task Force was united in its desire to improve the survey instruments for collecting data from those with knowledge of a judge's performance by using well-designed judicial performance surveys (*i.e.*, emphasizing frequency-based responses; respondent recall of concrete, observable behaviors relevant to each performance standard; and techniques to reduce the potential impact of implicit bias). Proposed Rule 5(b)(1)(F) would require the development of survey instruments according to the best practices in survey design and administration in the area of performance evaluations.

Proposed Rule 5(b)(1)(D) both codifies existing Commission practice and expands the categories of individuals to be surveyed to include: attorneys having a

wider variety of contacts with a judge during the evaluation period; jurors; parties; witnesses; victims in criminal cases who testify, attend proceedings, or on disposition of any charge against the defendant; court employees, including clerks and the judge's staff; and other judicial officers. Proposed Rule 5(b)(1)(B)(iv) and (D) gives the Commission the discretion to determine the method and frequency of survey distribution and to extend the length of any survey period.

#### **F. Other Evaluation Tools.**

In addition to using surveys and public comment to obtain information on judicial performance, the Task Force determined that the Commission may need additional, reliable information about whether a judge meets the performance standards if the judge is invited to meet with the Commission in executive session. In this event, proposed Rule 5(b)(4), allows the Commission to consider courtroom observation, including a review of audio and video recordings; the number of notices of change of judge filed; a review of the judge's written opinions or orders; or the judge's case management statistics.

#### **G. The Commission Report; Voter Information.**

As under the current rules, proposed Rule 7(a)(1) requires the Commission to prepare a report on the judicial performance of each judge eligible for retention that is transmitted to the secretary of state for inclusion in the general election publicity pamphlet. The proposed rule would report the Commission's finding as to whether

the judge “meets” or “does not meet” the judicial performance standards for retention; the court on which the judges serves; any current assignment and the number of years of service on that court; and whether the judge has failed to cooperate with the JPR process. Under proposed Rule 7(a)(1), the reported information consists of objective facts, uniformly applicable to all judges, and information that is not susceptible to misinterpretation or distortion. The objective approach embraced by the proposed Rule 7(a)(1) is fair and impartial and eliminates the more subjective summaries of survey results and summaries of public comments and biographical data “the Commission deems pertinent” included in the current Rule 6(f)(6).

Proposed Rule 7(b)(2) incorporates the existing A.R.S. §§ 12-120.07 and 19-124.01 requirements for publication of additional biographical information about the judge and the judge’s decisions on the Commission and secretary of state websites. The proposed rules make two significant additions to these requirements.

1. Proposed Rule 7(b)(2)(A)(i) states: “[t]o maximize the information available to voters, no later than 60 days before the regular general election, the Commission must publish on its website any publicly available judicial performance evaluation information about judges eligible for retention.”

2. Proposed Rule 7(b)(3) provides that the Commission, by the means it deems necessary “to provide the voters with easy access to meaningful and accurate information about judicial performance,” may disseminate other information such as information made public by court rules, about the judges eligible for retention and whether those judges meet the judicial performance standards for retention, and information to educate voters about the role of judges and the JPR process itself. Voters who understand the role of judges and the expectations courts and judges have for their own performance will make better-informed retention decisions.

#### **H. Judicial Improvement.**

The proposed rules recognize that even judges who are fit for retention may benefit from self-improvement. Likewise, mere need for self-improvement is not grounds for removal from office. To ensure that judges have the opportunity to address areas for self-improvement, Proposed Rule 3(b)(2) requires the Commission to notify a judge’s assigned Conference Team if the Commission has identified suggestions for improvement. Similarly, under proposed Rule 3(e), the Commission should inform the judge and the assigned Conference Team of additional education or training it believes may be of benefit.

## **I. Commission Member Responsibilities.**

The current JPR Rules require Commission members to perform their duties in an impartial, objective manner. To further preserve impartiality, the proposed Rule 9(a)(2) elaborates on the circumstances that may interfere with a member's duty to act in an impartial, objective manner by specific reference to a member's sentiments concerning the judge's appointment and political considerations as grounds for recusal in addition to the usual factors such as personal relationships, conflict of interest, bias, or prejudice. Proposed Rule 9(c) further provides that Commission members must not be influenced by these irrelevant sentiments or considerations.

## **J. Judge's Rights & Responsibilities.**

The judge's rights and responsibilities under the JPR process are addressed in the proposed Rule 10. Judges are expected to cooperate with the JPR process. They are entitled to receive fair and impartial treatment, including enforcement of the rules safeguarding the process from improper influence and protecting confidentiality. Judges have the right to be heard by the Commission before any Commission member may find that the judge does not meet the performance standards for retention. Judges may be heard in person in executive session and by submitting written comments. If a judge chooses to submit written comments rather than attend the executive session, that fact should not be considered in determining whether the

judge has cooperated with the JPR process or whether the judge meets the performance standards for retention. The Task Force recognizes that most judges will derive a benefit from meeting with the Commission in executive session that may not be achieved by submitting written comments, but it agrees that the choice itself should not be considered.

**K. Data Validity.**

The Commission is expected to use generally accepted statistical methods and techniques, but the insufficient amount of survey data available on judges has long been a concern. The current rules require the Commission to disclose if it is unable to use generally accepted statistical methods and techniques in any aspect of its reporting. Proposed Rule 10(d) strengthens this requirement: “If any information the Commission receives about a judge under Rule 5(c) includes data that is not within a generally accepted confidence level; was obtained or compiled in a manner inconsistent with generally accepted statistical methods and techniques; or the Commission deems it unduly prejudicial or otherwise unreliable, the Commission must disclose these facts and the reasons the data or other information is flawed in its report under Rule 5(c)(2) and in any dissemination under Rule 7(b).”

**III. Similar Petitions Filed Within the Previous Five Years.**

Within the previous 5 years, there appears to have been only one other petition filed concerning the JPR Rules. Petition R-19-0039 proposed amendments

representing the consensus of a Task Force that were primarily intended to codify then-current operating policies and procedures of the Commission on Judicial Performance Review. The Court granted emergency adoption of the amendments effective September 1, 2019, and ordered their permanent adoption on December 12, 2019.

#### **IV. Procedural Requests.**

##### **A. Request to modify comment period.**

Petitioner respectfully requests that this Court enter an order modifying the dates specified in Rule 28(e)(2) and (5) to allow this rule petition, comments, and replies to comments to be considered at the Court’s annual rule agenda, as follows:

1. Setting June 7, 2023, as the deadline for filing comments.
2. Setting June 21, 2023, as the deadline for filing any replies to comments.

The Commission is scheduled to consider this rule petition on April 21, 2023. The above schedule affords the Commission and its members sufficient time in which to file comments.

##### **B. Request for effective date of October 1, 2023.**

Given that JPR events scheduled during the last quarter of 2023 concern the judicial performance evaluation process for the 2024 retention election, Petitioner respectfully requests that—following consideration of this petition at its annual rules

agenda and under Rule 28(f)(2)—this Court order that the proposed rules become effective October 1, 2023.

#### **IV. Conclusion.**

For the foregoing reasons, Petitioner respectfully requests that the Court abrogate the current Rules of Procedure for Judicial Performance Review in the State of Arizona and replace them with the new set of JPR Rules recommended by the JPR Task Force established by Administrative Order 2023-24 and proposed in the attached Appendix A.

RESPECTFULLY SUBMITTED this 5th day of April, 2023.

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