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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-23-0036

Petitioner's Reply in Support of
Rule Petition

Petitioner respectfully submits this reply in support of the petition to abrogate and replace the Rules of Procedure for Judicial Performance Review in the State of Arizona.

I. Final Submission.

Attached to this reply are the following appendices for the Court's consideration:

A. Appendix 1 shows Petitioner's changes to the proposed rule amendments since filing the petition on April 5, 2023. These changes are shown by underlining the text to be added and striking through the text to be deleted.

B. **Appendix 2** is a “clean” version incorporating the changes shown in Appendix A.

II. Changes to the Petition.

Petitioner received oral comment from Mike Hellon, Chair of the Commission on Judicial Performance Review (“Commission”), noting that the current practice of appointing Commission members to terms beginning January 1 and ending December 31 results in some new members joining the Commission on January 1 of even-numbered (election) years just as the Commission is beginning its work using the surveys conducted in the immediately preceding odd-numbered year. The proposed change (shown in Appendix A) is a technical amendment that would require that all 4-year terms begin on July 1 and end on June 30. Beginning terms on July 1 would allow sufficient time to orient new members to the work of the Commission, regardless of whether those terms begin in odd or even-numbered years.

An additional technical change was made to correct the internal citation in proposed Rule 5(b)(1)(D)(vii).

III. Response to Public Comment.

The only comments submitted on the Court Rules Forum were authored by Kathryn Townsend, who is a member of the JPR Task Force and also serves as a member of the Commission on Appellate Court Appointments. She proposed two

sets of amendments to the petition’s proposed JPR rules: one primarily addressing her objections to the proposed judicial performance standards (Townsend’s Appendix A) and the other primarily addressing her concerns that the proposed rules do not address “non-response bias” (Townsend’s Appendix B). There are three proposed amendments common to both proposals.

After carefully considering Ms. Townsend’s proposals, Petitioner respectfully makes no corresponding changes to the petition. Ms. Townsend was a valuable member of the JPR Task Force and made many substantive contributions throughout the process. The proposals she offers in response to the petition submitted on behalf of the JPR Task Force are matters that were either rejected by vote of the Task Force or not considered by the Task Force. Accordingly, Petitioner declines to make the proposed changes in this reply. Rather, Petitioner offers comments on each of Ms. Townsend’s proposed amendments and leaves their treatment to the sound judgment of the Court.

To avoid confusion with Petition Appendices A and B, Ms. Townsend’s Appendices A and B will be referred to here as “Proposal A” and “Proposal B.”

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A. Amendments common to both Townsend proposals.

1. ***Amend Proposed Rule 3(d) to require that the Commission’s survey instrument be approved by the supreme court. The Commission would approve the self-evaluation form.***

If the Court determines that it should approve the survey forms used by the JPR Commission, Petitioner recommends that the Court retain the petition’s proposed language requiring the Commission to approve “any other forms it deems necessary to conduct its business” instead of merely adopting Townsend’s proposed amendment.

2. ***Amend Proposed Rule 4(g) to not count abstentions or report them in the minutes or to the public via the Commission website or in the publicity pamphlet.***

Townsend comments that the petition’s proposed rules do not adequately address the voter confusion caused by Commission member abstentions. Petitioner clarifies that abstentions are not recusals (which must be recorded). The petition’s proposed rules already exclude abstentions when computing the number constituting a majority vote. This fact, combined with not including vote totals in the Commission’s report and in the publicity pamphlet, should be sufficient to avoid voter confusion as a result of abstentions.

[Intentionally left blank]

3. ***Replace the Proposed Rule 5(a) attributes with measurable performance standards such as those found in Utah Code Jud. Admin. 3-101. Leave conduct issues to be addressed by the Commission on Judicial Conduct.***

Townsend contends that the proposed Rule 5(a) employs judicial performance standards that are simply desired attributes that cannot be measured and that incorrectly conflate “conduct” with “performance.” She argues that the constitution requires written *performance* standards. But Ariz. Const. art. 6, § 42 requires that the JPR Rules “include written performance standards and performance reviews which survey opinions of persons who have knowledge of the justice’s or judge’s performance.” By requiring the survey of “opinions” about performance under the specified performance standards, the constitution recognizes that evaluating performance will include an opinion-based evaluation of behavior and not simply measure data points. The constitution appears to recognize that a judge’s work is not easily boiled down to measurable standards.

Townsend proposes using only 3 “measurable” standards to evaluate judges: (1) how long cases are under advisement; (2) judicial education hours; and (3) physical and mental competence. There will be little to differentiate superior court judges with respect to how long cases are under advisement. Under A.R.S. § 12-128.01, superior court judges are not paid unless they certify each pay period that they have no matter under advisement for more than 60 days or that they have been

excused by the chief justice for temporary physical disability or for good cause associated with a specified, pending matter.

Appellate judges are not individually able to control when decisions or opinions are issued or even when they will be ready to circulate an authored opinion. Court of appeals judges decide matters with two other judges. An individual supreme court justice is but one member of a 7-member court. The length of time associated with drafting, circulating, and issuing appellate opinions depends on a variety of factors, most having little to do with the diligence of the single member of the court authoring the opinion. Accordingly, there is no hard and fast deadline for issuing appellate opinions and no sound basis for judging individual appellate judges and justices on this basis.

Including a performance standard for judicial education is also unlikely to yield meaningful data. All full-time judges in Arizona, including all judges and justices subject to retention, must complete 16 credit hours of judicial education (“COJET”) each year or face discipline. All judges must attend the annual Judicial Conference, which satisfies most, if not all, of a judge’s COJET requirements. Using a judicial education metric would not assist voters in differentiating the performance of judges.

Townsend’s proposed “physical and mental competence performance standard” would allow the Commission to request a physician’s statement

determining competence if there is a concern about a judge's physical or mental ability to perform judicial duties. Steering the JPR process into areas involving judges' personal, medical information should only be considered after an in-depth study of its ramifications. The issue was not discussed by the Task Force.

B. Proposal A (judicial performance standards).

1. *Amend Proposed Rule 5 to add (d) so that the Commission receives only a report from court personnel on how long cases are under advisement; a report from the judge stating his education hours; and a physician's statement attesting to the judge's mental and physical competence if requested by the Commission.*

This proposal really eliminates surveys. The Commission would simply receive a report on cases under advisement and the judge would submit statements of compliance with education hours and physical/mental health. Under this proposal, the attorneys, litigants, witnesses, jurors, colleagues, etc. who interact with the judge would have no meaningful input on a judge's compliance with any performance standards.

2. *Amend Proposed Rule 5(b)(4) to eliminate the use of other evaluation tools.*

Proposed Rule 5(b)(4) allows the Commission to obtain additional information about a judge who is invited to its executive session by considering video and audio recordings of court proceedings or in person courtroom observation; the number of notices of change of judge; review of written opinions or orders; or

case management statistics. At least two of these items involve measurable data (notices of change of judge and case management statistics). Townsend’s rationale for striking this provision is unclear.

3. ***Amend Proposed Rule 6(a)(7) to eliminate Commission consideration of past survey results.***

This proposed amendment appears to eliminate consideration of past survey results to be consistent with Townsend’s proposal to eliminate attribute-based surveys.

4. ***Amend Proposed Rule 6(c) to require a Commission member voting “does not meet standards” to explain their vote.***

A draft set of rules containing such a provision was considered by the Task Force on March 13, 2023. Draft Rule 6(c)(7) read:

Explanation of Negative Votes. If any “nay” votes are cast on a judge removed from the consent agenda, each Commission member voting in that manner must state the reason for that vote, including identification of the standard or standards not met and how they were not met.

By its vote of 14 – 4, the Task Force approved a motion to eliminate this provision.

C. Proposal B (non-response bias)

1. ***Delete Proposed Rule 6(d) and 7(a)(1)(c), which requires the Commission to determine whether a judge “substantially failed to cooperate with the judicial performance review process and identify the conduct in that determination.”***

Under current Rule 6(f), “whether the judge has failed to cooperate with the judicial performance review process” is included in the Commission’s report. This

provision is retained in the proposed Rules 6(d) and 7(a)(1)(c). Townsend expresses concern that having the Commission determine and report whether a judge is cooperative serves no purpose other than to provide another way to penalize a judge who chooses not to appear in executive session.

But the Task Force also included a provision in proposed Rule 10(c)(2) that a judge's decision to submit a written statement instead of attending the Commission's executive session cannot be used against the judge. Thus, it could not be deemed to be a lack of cooperation. But other types of failure to cooperate would be subject to inclusion in the Commission's report. For example, interfering with survey distribution, refusing to meet with the Conference Team, or not responding to any communications from the Commission might be determined to be a failure to cooperate and included in the report.

2. ***Amend Proposed Rule 7(b)(2)(A)(i) to limit the information available on the Commission web site to what is provided in the publicity pamphlet.***

Townsend advocates that the information provided to the public should be consistent between its report in the publicity pamphlet and the Commission's web site. The proposed rules, recognizing that the publicity pamphlet will contain more limited information, provide balance by making all public information available on the Commission's web site. A version of Townsend's proposal was debated at length at the Task Force meeting of March 24, 2023. The Task Force vote was

overwhelmingly opposed to restricting the information available to voters.

Townsend's proposal is inconsistent with the Task Force decision.

3. *Amend Proposed Rule 10(d) to address the issue of nonresponses by counting nonresponses as positive responses based on the assertion that unhappy people are more likely to respond to a survey than happy people.*

Townsend criticizes the failure to “acknowledge that the lack of statistical significance resulting from the failure to overcome a non-response bias consequently misleads the public regarding the import of the survey results.” However, proposed Rule 10(d) addresses the issue of data validity:

Data Validity. The Commission is expected to use generally accepted statistical methods and techniques. 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).

Under proposed Rule 10(d), judges have a right to this disclosure.

Townsend provides no data to validate her assumption that nonresponses are the same as positive responses. And her proposal could be difficult to implement. If a positive response could be recorded as “good” or “very good,” it is unclear which positive response would be recorded.

4. *Amend Proposed Rule 12(c) to change the reasons the Commission can release information for disciplinary purposes.*

Townsend argues that, since the purpose of the JPR Commission is to provide a check on the merit selection process, the Commission should report a judge discovered to have temperament or competence issues to the Commission on Judicial Conduct. The proposed rules continue the existing practice of separating the roles of the Commission on Judicial Performance Review and the Commission on Judicial Conduct except as required by law.

IV. Conclusion.

Petitioner respectfully asks the Court to 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 with the technical modification included in the attached Appendix A. Petitioner further requests the Court to order that the proposed rules become effective October 1, 2023.

RESPECTFULLY SUBMITTED this 22nd day of June, 2023.

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