

Samuel A. Thumma  
Chair, Arizona Commission on Access to Justice  
Judge, Arizona Court of Appeals  
Division One  
State Courts Building  
1501 West Washington  
Phoenix, Arizona 85007  
Telephone: (602) 452-6700

**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of ) Arizona Supreme Court No. R-24-006  
)  
ARIZONA SUPREME COURT ) **REPLY IN SUPPORT OF PETITION**  
RULE 81 (ARIZONA CODE OF ) **TO AMEND ARIZONA CODE OF**  
JUDICIAL CONDUCT) **JUDICIAL CONDUCT RULE 2.6**  
) **(ENSURING THE RIGHT TO BE**  
\_\_\_\_\_ ) **HEARD)**

This Petition, filed by the Arizona Commission on Access to Justice, proposes amending Arizona Code of Judicial Conduct (Code) Rule 2.6 to add a comment providing specific examples of actions judicial officers properly may take in ensuring a self-represented litigant’s right to be heard consistent with their ethical obligations. The requested change uses text adopted by the Colorado Supreme Court in 2010 and is designed to provide further clarity in enhancing access to justice in Arizona Courts and to avoid uncertainty about what ethically is permissible under the Code. The Arizona Superior Court Presiding Judges unanimously supported the requested change as did the Arizona Judicial Council, albeit with an additional sentence.

Of the six Comments to the Petition that were filed, four Comments (representing seven groups) support the Petition:

- The Justices of the Peace on the Maricopa County Justice Courts, where the vast majority of cases involve at least one self-represented party;
- The Arizona Commission on Judicial Conduct, noting the proposal is consistent with access to justice, follows best practices on judicial ethics, and will provide judicial officers with needed guidance;
- The Arizona Judicial Ethics Advisory Committee, albeit with a suggestion that the examples are illustrative, not mandatory; and
- A joint Comment filed by (1) The William E. Morris Institute for Justice; (2) Community Legal Services; (3) DNA People’s Legal Services; and (4) Southern Arizona Legal Aid, noting the proposal will provide guidance to judicial officers and help guarantee that all litigants are afforded the opportunity to be heard.

The Arizona Prosecuting Attorneys’ Advisory Council (APAAC) and the Arizona Attorney General’s Office (AGO) also filed Comments. APAAC opposes the change, while AGO [at 5] asks “that criminal post-conviction relief proceedings be exempted from the policy of liberal construction or that the comment be modified for clarity.” The Commission appreciates the interest of APAAC and the AGO in the Petition and, in this Reply, responds to their Comments. At a special meeting on

May 23, 2024, the Commission unanimously passed a motion approving the filing of this Reply in further support of the Petition.

Both APAAC and the AGO focus on criminal cases. In criminal cases, defendants facing incarceration are entitled to a court-appointed attorney if they cannot afford one. Such indigent criminal defendants also are entitled to a court-appointed attorney on appeal, Ariz. R. Crim. P. 31.5, and in “timely first” post-conviction relief proceedings, Ariz. R. Crim. P. 32.5 (following trial or contested probation violation hearings); Ariz. R. Crim. P. 33.5 (following guilty plea). Recognizing not all misdemeanor defendants or subsequent post-conviction petitioners are entitled to appointed counsel, to the extent the concerns expressed by APAAC and the AGO address criminal cases where the defendant is represented by counsel, the change requested in the Petition -- addressing self-represented parties - - would not apply. Instead, the Petition seeks a change to the Code addressing actions judicial officers ethically may take when dealing with self-represented parties, especially in civil, family, probate, juvenile, and other matters where litigants asserting their rights are unable to afford an attorney.

Turning to the specific issues raised in the Comments, APAAC [at 2] states that permitting “trial courts to liberally construe pleadings” of self-represented litigants is “potentially contrary to Arizona law,” citing concerns about liberally construing motions, appellate briefs and case law addressing waiver on appeal. None

of the filings APAAC cites, however, is a pleading as defined in the Arizona Rules of Civil Procedure. *See* Ariz. R. Civ. P. 7 (“Only these pleadings are allowed: a complaint; an answer to a complaint; a counterclaim; an answer to a counterclaim designated as a counterclaim; an answer to a crossclaim; a third-party complaint; an answer to a third-party complaint; and, if the court orders one, a reply to an answer.”). Nor is a document initiating a criminal case included in this definition.

After noting that the requested change would allow a court dealing with a self-represented party to modify the “traditional order of taking evidence,” APAAC [at 3] states such a change could have a “potential impact to a party’s burden of proof in both civil and criminal cases.” The Arizona Rules of Evidence, however, direct that judicial officers “should exercise reasonable control over the mode and order of examining witnesses and presenting evidence” to meet specified objectives, including to “make those procedures effective for determining the truth.” Ariz. R. Evid. 611(a)(1). The change requested in the Petition would make clear that the Code, from a judicial ethics perspective, is consistent with this Arizona Rules of Evidence directive.

Turning to equal application of the law, APAAC [at 3] states that the proposed change “does not reconcile the potentially conflicting proposition that judges must ethically treat self-represented litigants differently than represented parties, with Arizona law that has long required courts to hold all persons representing themselves

to the same standard as a licensed attorney.” The proposed change, however, would not direct what judicial officers “must” or are “required” to do. Instead, the proposed change provides examples of “steps that are permissible in ensuring a self-represented litigant’s right to be heard” consistent with the Code. Moreover, notwithstanding conflicting dicta about treating self-represented parties as lawyers, in substance, the current judicial practice typically is quite different. *See generally* Thumma & Marzocca, *The Self-Represented Party The Most Unique Party of Them All*, 59 Ariz. Att’y 24 (2023) (copy attached for convenient reference; citing and discussing many ways Arizona courts, and Arizona attorneys, do not treat self-represented parties as attorneys).

Stating that the change “is both unnecessary and potentially contrary to Arizona law,” APAAC correctly notes the Petition states *both* that “[t]here is significant need for this change, and significant reasons for it” [at 6] *and* [at 8] that the change “is consistent with how many Arizona judges are already treating self-represented litigants.” The change, however, seeks to enhance equal application of the law by expressly providing examples of actions judicial officers may take consistent with the Code when dealing with self-represented litigants. By including this express guidance, the change will make clear what all judicial officers may do, consistent with their ethical obligations, when dealing with self-represented litigants.

As with APAAC, the AGO’s Comment [at 3] notes a need for “strict compliance and application of our state procedural rules,” adding [at 4] a concern about “[a] potential relaxation of our state procedural rules.” The change requested, however, addresses compliance with a judicial officer’s ethical obligations, not substantive or procedural law. The Petition leaves unchanged the need to honor and comply with preexisting substantive and procedural law. The final sentence in the proposal removes any doubt: “Self-Represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.” [Pet’n at 11.] The Petition seeks no change to Arizona’s substantive law or procedural rules.

The AGO’s Comment also focuses on post-conviction relief proceedings in criminal matters, expressing concern [at 3] about “inconsistent application of [Arizona’s] procedural rules” and potential unequal treatment of self-represented parties, noting [at 2] that “one judicial officer may liberally construe a self-represented litigant’s notice of post-conviction relief and allow the petition to move forward where another may summarily dismiss the petition as deficient.” But such unequal treatment may be occurring now, if the substantive law and procedural rules give judicial officers discretion in deciding how to construe such notices. The Petition seeks to enhance equal application of the law by expressly providing

examples of actions judicial officers may take consistent with the Code when dealing with self-represented litigants.

## CONCLUSION

The Petition seeks the change as an appropriate measure to help provide clarity in enhancing access to justice in Arizona Courts *and also* to avoid uncertainty about what ethically is allowed under the Code. Expressly doing so, by building on what many (but not all) Arizona judicial officers are already doing, presents an experience-based opportunity to enhance access to justice through the change requested in the Petition.

As noted in the Petition, the requested change would help further implement Goal 1 of the Arizona Judiciary’s Strategic Plan, *Justice for the Future Planning for Excellence 2019 – 2024*. The requested change also furthers the United States Supreme Court’s directive that courts should be vigilant of “substitute procedural safeguards” to help “ensure the ‘fundamental fairness’ of the proceeding even where the State does not pay for counsel for an indigent” litigant. *Turner v. Rogers*, 564 U.S. 431, 447-48 (2011). An identical provision in place in Colorado since 2010 has helped provide further guidance for judges to “help parties -- whether self-represented or not -- have confidence in the court and feel that justice has been achieved.” Wang, Espinosa, Southerland & Houlberg, *Judicial Officers and Self-Represented Litigants Tools for Working Together*, 50 Colo. Law. 14, 17 (2021).

For the reasons set forth in the Petition, the Comments supporting the Petition, and this Reply, Petitioner respectfully requests that the Court adopt the proposed change requested in the Petition effective January 1, 2025.

DATED this 30<sup>th</sup> day of May, 2024.

/s/  
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Samuel A. Thumma