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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 5, 9, AND 10

Supreme Court No. R-25-_____

Rule 28 Petition

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 5, 9, and 10 as set forth in the attached Appendix A.

I. Purpose of the Proposed Rule Amendments.

On August 24, 2023, this Court abrogated the then-existing JPR Rules and adopted a new set of JPR Rules effective October 1, 2023. The Commission on Judicial Performance Review (“Commission”) has now had the opportunity to work with the new JPR Rules through the 2024 judicial performance review process.

Based on that experience, the Commission voted on November 15, 2024, to petition this Court for the changes proposed in Appendix A as described below.

II. The Substance of the Proposed Rule Changes.

A. Amend Rule 5 to Allow More Effective Use of Other Evaluation Tools.

Under Rule 3(b)(2), any Commission member may request that the Commission invite a judge to attend an executive session and articulate a reason for doing so. The only information available to the Commission members at this time is the Rule 5(c) data report for each judge that identifies the judge only by a randomly assigned number.

Effective October 1, 2023, Rule 5(b)(5) allowed the Commission to consider more than surveys and public comment with respect to those judges who are invited to meet with the Commission in executive session. Rule 5(b)(5) recognizes that the Commission may need additional, reliable information about whether such a judge meets the performance standards and provides that the Commission may also 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. The Commission's ability to do so depends on identifying the judge by name. Historically, the Commission has not known the identity of the judge invited to meet with the

Commission until the judge appears at the executive session. As a result, the Commission did not avail itself of any of the Rule 5(b)(5) information before the executive session.

Although Rule 5(c)(1) provides that the data report prepared on each judge includes “any information obtained under Rule 5(b)(4) using the other evaluation tools,” it does not clearly state *when* those tools may be used to supplement the data report. If the Commission is to make meaningful use of this additional information about judges who are invited to meet in executive session, the Commission should collect the information relevant to the reasons the judge received the executive session invitation and share it with the judge so that both the judge and the Commission have the opportunity to address it during the executive session.

Accordingly, the Commission proposes to amend Rule 5(b)(5) to clarify that “the Commission should, to the greatest extent possible, obtain this additional information and share it with the judge before the executive session at which the judge has been invited to attend.” Doing so will afford the Commission and the judge the benefit of considering these additional sources of information to compare and contrast with survey data. **And, to the extent necessary to use these additional tools, the amendment clarifies that the Commission members may learn the identity of a judge after the judge has been invited to the executive session.**

B. Amend Rule 9 to Clarify the Participation of Judicial Members of the Commission.

Rule 9 focuses on ensuring that the Commission members remain impartial and objective by prohibiting outside influence and requiring a member's recusal under specified circumstances. Additionally, Rule 9(b) addresses the conflicts inherent when a judicial member of the Commission is undergoing performance review or has received an invitation under Rule 4(b)(2) to meet with the Commission in executive session.

Under Rule 9(b)(1), “[a] judicial member of the Commission is not eligible to participate in any matter concerning the judge’s own performance.” The Commission proposes to amend this provision to clarify that such a judicial member is not prohibited from participating in their self-evaluation and the Rule 8 conference team requirements.

Rule 9(b)(2) currently provides that “[a] judicial member of the Commission who receives an invitation under Rule 4(b)(2) is prohibited from participating as a Commission member for the balance of the then-current cycle.” The Commission’s proposed amendment to this provision would limit this prohibition against judicial member participation to the judicial performance review process and not to other Commission business or participation as a conference team member.

C. Amend Rule 10(a) to Clarify a Judge’s Responsibility to Cooperate With the JPR Process.

Rule 6(d) provides that “[t]he Commission must determine whether any judge substantially failed to cooperate with the judicial performance review process and identify the conduct resulting in that determination.”

Currently, Rule 10(a) provides that judges are “expected to cooperate with and respond to communications from the Commission and the Conference Team.” The Commission proposes to amend Rule 10(a) to clarify that “cooperation with the Commission and the judicial performance review and conference team processes under Rules 5 and 8, including timely responding to communications from the Commission and Conference Team[,]” is expected.

This proposed amendment to Rule 10 will better inform judges of the Commission’s expectations and will enable the Commission to make a Rule 6(d) determination should that become necessary.

D. Amend Rule 10(d) to More Accurately Address the Data Used by the Commission.

Rule 10(d) currently requires the Commission to make certain determinations before publishing data:

(d) Data Validity. To the extent possible, 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) 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 prominently disclose these facts and the reasons the data or other information is flawed in its report under Rule 5(c)(1) and in any dissemination under Rule 7(b). The Commission may not publish statistical data about a judge that does not have an appropriate confidence level.

During the 2024 cycle, the Commission grappled with what it means to “have an appropriate confidence level” and how to comply with Rule 10(d) when very few survey responses were received about a judge which could then result in a single negative survey response having an outsized impact on the results.

The Commission received expert opinion from its data and survey consultants that a particular “confidence level” is not relevant in this context because the Commission does not engage in the random sampling of a population in which a confidence level is calculated to represent the level of certainty of an estimate. Instead of conducting a random sample, the Commission is conducting more of a census in which all responses received from an identified population are counted. Confidence interval calculations assume a genuine random sample of a given population. The size of a confidence interval for a given confidence level depends on sample size, the percentage of the sample choosing a particular response, and population size. Without a genuine random sample, it is not possible to rely on a confidence interval and this portion of Rule 10(d) is without meaning.

Accordingly, the Commission proposes the deletion of the last sentence of Rule 10(d) (“The Commission may not publish statistical data about a judge that does not have an appropriate confidence level.”). Instead of Rule 10(d)’s misplaced reference to an appropriate confidence level, the Commission further proposes amending Rule 10(d) to emphasize the Commission’s responsibility to call out or not publish data obtained or compiled in a manner that it deems unduly prejudicial or otherwise unreliable.

III. Similar Petitions Filed Within the Previous Five Years.

Within the previous 5 years, there have been two other petitions filed concerning the JPR Rules. Most recently, Petition R-23-0036 abrogated the prior JPR Rules and, effective October 1, 2023, adopted the new set of rules that are the subject of this petition. Before that, 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. Conclusion.

For the foregoing reasons, Petitioner respectfully requests that the Court adopt the amendments to the Rules of Procedure for Judicial Performance Review (“JPR”) in the State of Arizona 5, 9, and 10 as proposed in the attached Appendix A.

RESPECTFULLY SUBMITTED this 9th day of January, 2025.

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