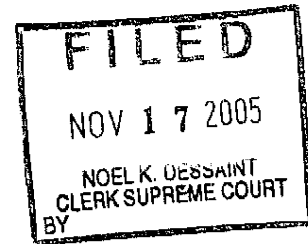


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R-05-0026

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

**PETITION TO AMEND THE RULES OF THE
COMMISSION ON JUDICIAL CONDUCT**

The Arizona Commission on Judicial Conduct (“commission”) petitions the Arizona Supreme Court, pursuant to Rule 28(G) of the Rules of the Supreme Court and Art. 6.1, § 5 of the Arizona Constitution, to amend the Rules of the Commission on Judicial Conduct (“new rules”) the court adopted on June 9, 2005, before they become effective on January 1, 2006. The commission believes that the amendments proposed herein are essentially technical or housekeeping in nature and urges the court to approve them on an emergency basis.

The proposed amendments are modest in scope and purpose. They contain no structural changes, and most of the amendments are designed to clarify procedures or simplify the text of the new rules before they go into effect at the beginning of the year. To facilitate the court’s review of the petition, the proposed amendments are described in Attachment A and highlighted in context in Attachment B. A copy of the new rules without any changes is contained in Attachment C for the court’s convenience in reviewing the proposed amendments.

RESPECTFULLY SUBMITTED, this 17th day of November, 2005.

COMMISSION ON JUDICIAL CONDUCT

A handwritten signature in cursive script, appearing to read "J. William Brammer, Jr.", written over a horizontal line.

J. William Brammer, Jr.
Commission Chair

ATTACHMENT A

PROPOSED AMENDMENTS TO THE NEW RULES

This attachment describes the amendments proposed by the Commission on Judicial Conduct in its petition. The changes are essentially technical in nature and, with one exception, are primarily designed to correct minor deficiencies in the new rules that become effective on January 1, 2006. The most significant change is contained in Rule 23 where the commission proposes to simplify an existing rule that has proven troublesome since the Supreme Court last amended the rules on June 8, 2004. The specific language of the proposed amendments is shown in Attachment B.

Description of Proposed Amendments

1. In the terminology section, the definition of “record” refers to a “final dispositional letter” in a case involving informal proceedings. Rule 9(b) contemplates the use of “orders” instead of “letters,” and therefore in the definition of “record,” the word “letter” should be changed to “order.”
2. In Rule 4(c), the phrase “shall perform any other services required by the commission” relating to the duties of disciplinary counsel should be changed to “perform other duties as directed by the commission,” to be consistent with the language pertaining to the executive director’s duties in the preceding paragraph.
3. Rule 9(d) governs the use of protective orders, a new feature in the rules, and provides that the commission may make an order “[u]pon motion by a party or by a person from whom the information was obtained.” Motions for protective orders may be filed by judges, complainants or witnesses who provide confidential information, or by disciplinary counsel, but not by a party, as such. Therefore, the wording in this rule should be changed to, “Upon motion by a judge, by a person from whom the information was obtained or by disciplinary counsel”

4. In Rule 13(b), the permissive language should be mandatory. The rule should read: “Upon proper application, the superior court in any county in which the attendance of a witness or production of documents is required shall enforce the attendance and testimony of any witnesses and production of any documents subpoenaed.” This is consistent with the mandatory language contained in bar discipline rules. *See, e.g.*, Rule 47(h)(4) in the Rules of the Supreme Court.

5. In Rule 14, the word “such” is unnecessary and should be eliminated each time it appears in the first sentence.

6. In Rule 16(b), the references to “continuing judicial education” and “mentoring by other judges” are unnecessarily limiting because not all judicial education is “continuing” and judges may not perform all mentoring. The words should be changed simply to “judicial education” and “mentoring.”

7. In Rule 17(a), the word “that” introduces two parallel clauses that should not be separated with a comma. Eliminating the comma would solve this minor problem.

8. In Rule 19(c), the possessive personal pronouns are unnecessary. The rule should simply read “in the judge’s official capacity or private life.”

9. In Rule 21, the order of the words “further investigation” and “investigation” should be reversed. The executive director first determines if a complaint warrants “investigation” and may then refer the matter to disciplinary counsel for “further investigation.”

10. In Rule 22(a), the words “disciplinary remedies” should be stricken. There are no such remedies under the new rules.

11. In Rule 22(b), the first sentence is wordy and awkward. It should be changed to read: “As part of the preliminary investigation, the judge may be notified of the substance of the complaint and afforded a reasonable opportunity to respond.”

12. Rule 22(c) requires the executive director to report the appointment of an investigative panel to the full commission. (Under another rule, the appointment of a panel must first be authorized by the commission chair.) Since the overarching intent of the rules is to keep members who may be required to serve on a hearing panel “untainted” by the work of the investigative panel, the executive director should not be required to inform other members of the appointment of an investigative panel during the preliminary and confidential phase of an investigation. A period should be inserted after the reference to Rule 3(f) and the remainder of the sentence should be deleted.

13. In Rule 22(f), the reference to “disciplinary remedies” should be deleted. There are no such remedies in the new rules.

14. Rule 23 contains three parts, each of which should be revised to clarify the meaning of the rule. Part (a) should be amended to reflect the fact that complaints are resolved and informal sanctions are imposed by an *order* of the commission rather than by a letter, as in the past. The commission may also continue an investigation but need not issue an order for this purpose. Part (b) should be amended so that a response to a motion for reconsideration is an option and not a requirement. As now written, the rule requires the commission to serve a motion for reconsideration on the “opposing party,” (presumably the judge or the complainant) who may then respond. Experience has shown that most of these motions are frivolous and do not require responses. Moreover, a complainant is not an opposing party in the traditional sense, just as a victim is not the opposing party in a criminal case. The rule should be changed so that the commission *may* invite a judge or complainant to respond to a motion for reconsideration. This will avoid the problem of asking a judge or a complainant to respond to a frivolous motion. Part (c) should be amended to clarify that the hearing contemplated under these rules is not the *formal* hearing described later in the rules. Again, experience has shown that some judges would like to appear before the commission in an informal setting, without all the trappings of

a formal, public hearing. Eliminating the word “formal” in this rule will make it clear that something less than a full-blown formal hearing is possible at this stage of the process.

15. In Rule 26(a), the last sentence is unnecessary. The parties in judicial discipline cases are expected to follow the Rules of Civil Procedure in conducting depositions, and this sentence is superfluous.

16. In Rule 26(b), the word “formal” should be omitted for the reason discussed in Item 14, regarding Rule 23(c).

17. In Rule 26(c), the word “formal” should be omitted for the same reason and the word “disciplinary” inserted for clarity.

18. In Rule 27(c), the parenthetical example is unnecessary and should be deleted.

19. In Rules 27(f) and (h), the word “formal” should be deleted. As described above in Item 14, the rules contemplate the possibility of other, less formal types of hearings before the commission. In addition, the reference to “tape recorded” in part (f)(9) should be changed to “electronically recorded” because hearings may be recorded on other forms of media.

20. In Rule 28(c), the use of the word “final” when referring to the recommendations of the commission is confusing. Since there is no provision for a preliminary recommendation, the word “final” should be omitted and the rule revised to clarify that a recommendation for a formal sanction is submitted to the supreme court for review while a recommendation for an informal sanction is submitted to the commission.

21. Rule 31, which governs interim reassignment of a judge under investigation, makes no provision for filing the commission’s recommendation with the court. The rule should specify that a copy of the commission’s recommendation to the court should be filed with the clerk of the supreme court.

ATTACHMENT B

HIGHLIGHTED VERSION OF PROPOSED AMENDMENTS

This attachment highlights the amendments to the new rules proposed by the Commission on Judicial Conduct in its petition. Additions to the text of the new rules are underlined; deletions are indicated with ~~strikeovers~~. For the sake of clarity, some of the headings in the rules have been omitted in this document.

RULES OF THE COMMISSION ON JUDICIAL CONDUCT

Preamble [No change.]

Terminology

“Censure” through **“Recommendations”** [No change.]

“Record” means the complaint, the judge's response, the commission's findings, if any, and the final dispositional ~~letter~~ order in a case involving informal proceedings, and all documents filed in a case involving formal proceedings beginning with the notice and statement of formal charges, including the transcript of the hearing if recommendations are filed with the supreme court.

“Reprimand” through **“Supreme court”** [No change.]

SECTION A. ORGANIZATION AND STRUCTURE

Rules 1 through 3. [No change.]

Rule 4. Administration

(a) through (b). [No change.]

(c) Duties of disciplinary counsel. Disciplinary counsel shall conduct preliminary investigations and perform the functions of a prosecutor in proceedings before investigative panels, hearing panels or hearing officers, and the supreme court. Disciplinary counsel shall file formal charges when directed to do so by the commission or an investigative panel, and shall perform ~~any other services required by the commission~~ other duties as directed by the commission.

(d) [No change.]

SECTION B. GENERAL PROVISIONS

Rules 5 through 8. [No change.]

Rule 9. Public Access and Confidentiality

(a) through (c). [No change.]

(d) **Protective orders.** Upon motion by a party, ~~or~~ by a person from whom the information was obtained, or by disciplinary counsel, and for good cause shown, the commission, an investigative panel, a hearing panel or a hearing officer may make an order sealing a portion of the record. Sealed materials shall be opened and viewed only by the commission or one of its corresponding panels, a hearing officer, disciplinary counsel or the supreme court. The information shall not otherwise be disclosed unless the parties and the person providing the information are given notice and an opportunity to be heard.

Rules 10 through 12. [No change.]

Rule 13. Subpoena Power

(a) **Subpoenas.** [No change.]

(b) **Enforcement.** Upon proper application, the superior court in any county in which the attendance of a witness or production of documents is required ~~may~~ shall enforce the attendance and testimony of any witnesses and the production of any documents subpoenaed.

(c) **Witness fees.** [No change.]

Rule 14. Prohibition Against Retaliation

A judge against whom a complaint is filed shall not directly or indirectly engage in any act of retaliation against any person who files ~~such~~ a complaint, cooperates in the investigation of ~~such~~

a complaint, or acts as a witness in any proceeding brought against the judge. “Retaliation” includes, but is not limited to, the act of dismissing or procuring the dismissal, without reasonable cause, of a member of the judge’s staff or other person subject to the judge’s direction and control, creating a hostile or offensive working environment for such person, or filing a frivolous bar complaint against an attorney who is a complainant or witness. The commission or disciplinary counsel may, at any time, file a petition with the supreme court for an order prohibiting, at the risk of sanctions for contempt, conduct of a judge that is or appears to be retaliatory in nature.

Rule 15. [No change.]

SECTION C. DISPOSITIONS AND SANCTIONS

Rule 16. Dispositions in General

(a) Dismissal. [No change.]

(b) Additional forms of discipline. If the commission finds an act of judicial misconduct, in addition to any other sanction or sanctions imposed, the commission may direct a judge to participate in professional counseling, ~~continuing~~ judicial education, mentoring ~~by other judges~~, or other similar activities.

(c) Consultation. [No change.]

(d) Discipline by contracting authority. [No change.]

Rule 17. Informal Sanctions

(a) Reprimand. The commission may reprimand a judge without a formal hearing for conduct that is unacceptable under one of the grounds for judicial discipline; but that is not so serious as to warrant formal proceedings or further discipline by the supreme court.

(b) Other informal sanctions. [No change.]

Rule 18. [No change.]

Rule 19. Mitigating and Aggravating Factors

(a) through (b). [No change.]

(c) whether the conduct occurred in the judge's official capacity or ~~in his or her~~ private life;

(d) through (j). [No change.]

SECTION D. DISCIPLINARY PROCEEDINGS

Rule 20. [No change.]

Rule 21. Initial Screening

The executive director shall conduct an initial screening to determine whether a complaint warrants ~~further~~ investigation and evaluation. A complaint that is frivolous, unfounded, solely appellate in nature, or outside the jurisdiction of the commission shall be dismissed subject to review by the commission at its next scheduled meeting. A complaint that is not dismissed shall be referred to disciplinary counsel for further investigation.

Rule 22. Investigation

(a) **Preliminary investigation.** Disciplinary counsel shall conduct a preliminary investigation of a complaint that is not dismissed during initial screening. If, after preliminary investigation of a complaint, disciplinary counsel recommends dismissal or imposition of ~~disciplinary remedies~~ ~~or~~ informal sanctions, the investigative findings and recommendation shall be reported to the commission.

(b) **Request for response from judge.** As part of the preliminary investigation, ~~commission staff may notify~~ the judge may be notified of the substance of the complaint and afforded ~~the judge~~ a reasonable opportunity to respond. The commission shall not impose informal sanctions or initiate formal proceedings without first having provided such notice and opportunity.

(c) Appointment of investigative panel. If, after consultation with the executive director, disciplinary counsel determines that a full investigation may be required to resolve a complaint or that sufficient evidence may already exist to support formal charges against a judge, a three-member investigative panel shall be appointed as provided in Rule 3(f) ~~and the executive director shall report only the fact of the appointment to the commission.~~

(d) through (e). [No change.]

(f) Finding of reasonable cause. At the conclusion of a full investigation, the investigative panel may instruct disciplinary counsel to prepare formal charges if it finds reasonable cause to believe that one or more grounds for discipline of a judge exists that cannot be resolved through dismissal ~~, disciplinary remedies,~~ or informal sanctions. In all other cases, the investigative panel shall refer the matter to the full commission for final disposition.

Rule 23. Commission Review

(a) Disposition. After reviewing a complaint, the report of the executive director or disciplinary counsel, or the recommendation of an investigative panel, the commission may dismiss the complaint, ~~order further investigation,~~ or impose an informal sanction by entering an order consistent with these rules and mailing a copy to the judge and complainant. The commission may also continue the matter for further investigation.

(b) Motion for reconsideration. ~~When the commission dismisses a complaint or imposes an informal sanction, it shall notify the judge, the complainant, and disciplinary counsel of the outcome. Within fifteen days of the date of mailing notice of disposition, the judge or the complainant may file a motion for reconsideration, which may include a request to appear before the commission. The commission shall serve the motion for reconsideration on the opposing party, who~~

~~may respond within fifteen days from the date of mailing. If the request to appear is granted, the commission shall notify the parties and disciplinary counsel of the time and place of the appearance. The commission shall provide written notification of its decision on the motion within fifteen days after the time for a response to the motion has expired, or if a request to appear was granted, within fifteen days after the appearance. Within fifteen days of the mailing of an order, the judge or the complainant may file a motion for reconsideration, which may include a request to appear before the commission. No response to the motion is required unless requested by the commission. The commission shall promptly notify the judge and the complainant of its decision.~~

(c) Request for formal hearing. In addition or as an alternative to filing a motion for reconsideration ~~described in paragraph (b), the judge may, within fifteen days following the date of mailing of a notice of disposition or ten days after the date of mailing of a decision on a motion for reconsideration, request a formal hearing. The de novo hearing shall be governed by these rules. of the mailing of an order, file a request for a hearing conducted pursuant to Rule 27(f).~~

Rules 24 through 25. [No change.]

Rule 26. Discovery

(a) Witnesses. Within twenty days of the filing of a response, disciplinary counsel and the judge shall exchange the names and addresses of all persons known to have knowledge of the relevant facts, designating those persons the parties intend to call at the hearing. A party may withhold such information only with permission of the presiding member of the hearing panel (or his or her designee) or the hearing officer, and only for good cause shown. Review of the withholding request shall be in camera, but the requesting party shall advise the other party of the existence of the request. ~~The parties may take depositions only of potential witnesses, including material witnesses who are unavailable to testify at the hearing.~~

(b) Other evidence. The parties shall exchange evidence relevant to the ~~formal~~ charges that is not otherwise confidential. Confidential information may be discoverable only upon good cause shown.

(c) Exculpatory evidence. Disciplinary counsel shall provide the judge with exculpatory evidence relevant to the ~~formal~~ charges that directly negates the allegations. Exculpatory evidence, for the purposes of ~~formal~~ disciplinary proceedings, is not evidence of otherwise expected judicial conduct.

(d) through (g). [No change.]

Rule 27. Hearings

(a) through (b). [No change.]

(c) Use of hearing officer. If a hearing panel is unable to function within the intent of these rules (~~for example, when a judge subject to informal sanctions requests a formal hearing or when the full commission has received information through reports from either commission staff or an investigative panel regarding an investigation~~), the commission shall appoint a hearing officer or a panel of three hearing officers to perform the functions of the hearing panel as set forth in these rules. If a panel of hearing officers is appointed, the composition of the panel shall, if feasible, reflect the membership categories of the commission.

(d) through (e). [No change.]

(f) Conduct of hearing. The following rules shall apply to ~~formal~~ hearings:

(1) [No change.]

(2) The Arizona Rules of Evidence shall apply as far as practicable in all ~~formal~~ commission proceedings, and Rule 122 of the Rules of the Supreme Court shall apply to all requests for electronic and photographic coverage of such proceedings.

(3) through (8). [No change.]

(9) The hearing shall be transcribed by a court reporter or ~~tape~~ electronically recorded for use by the supreme court, and a transcript shall be filed with the commission's recommendations. Any party may obtain a copy of the transcript at his or her own expense.

(g) Ex parte communications. [No change.]

(h) Failure to appear. If the judge fails to appear at the ~~formal~~ hearing, either in person or through counsel, he or she shall be deemed to have admitted the factual allegations that were to be the subject of such appearance and to have conceded the merits of any motion or recommendations to be considered at such appearance. Absent good cause, the proceedings shall not be continued or delayed based on the judge's failure to appear.

Rule 28. Recommendations

(a) through (b). [No change.]

(c) Filing and notice to judge. ~~Final~~ Recommendations ~~imposing~~ for formal sanctions shall be filed with the clerk of the supreme court and are subject to review in accordance with Rule 29. ~~Final~~ Recommendations ~~imposing~~ for informal sanctions ~~are final~~ shall be filed with the commission and are not subject to review by the supreme court. In either case, a copy of the recommendations and notice of the filing shall be promptly served upon the judge and the complainant.

Rules 29 through 30. [No change.]

SECTION E. SPECIAL PROCEEDINGS

Rule 31. Interim Reassignment

At any time after the institution of a preliminary investigation, when it appears that a judge poses a substantial threat of serious harm to the public or the administration of justice, the investigative panel may recommend to the chief justice of the supreme court that the judge be

reassigned pending a final determination of any proceeding under these rules. The panel's recommendation shall be filed with the clerk of the court and served on the judge who ~~The judge~~ may file objections to the recommendation ~~of interim reassignment~~. The chief justice's ruling on the recommendation shall continue in effect until final disposition of all pending proceedings against the judge, unless earlier vacated or modified.

Rule 32 through 34. [No change.]