Arizona Supreme Court

REPORT OF THE TASK FORCE ON THE CODE OF JUDICIAL CONDUCT

Proposal and Recommendations for a New Code of Judicial Conduct

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THE TASK FORCE ON THE CODE OF JUDICIAL CONDUCT

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REPORT OF THE TASK FORCE ON THE CODE OF JUDICIAL CONDUCT

The Arizona Code of Judicial Conduct is based on the American Bar Association's Model Code of Judicial Conduct. When the ABA adopted a new code in February 2007, the Arizona Supreme Court organized a Task Force on the Code of Judicial Conduct to study the new version and to prepare recommendations for revising the existing state code. This is the Task Force's report.

Background

For more than 80 years, the American Bar Association has played an instrumental role in establishing appropriate standards for judicial conduct. In response to increasing public and professional concern about the behavior of judges, the ABA promulgated the Canons of Judicial Ethics in 1924 containing 36 hortatory suggestions for judges that were distributed nationwide for courts to use in adopting state standards. Over the years, these basic ethical guidelines have gradually shifted from recommendations to mandatory standards governing all aspects of judicial conduct. The ABA changed the canons to the Model Code format in 1972 and revised the Model Code in 1990. Arizona followed the work of the ABA closely by adopting versions of the Model Codes in 1975 and 1993.

In September 2003, the ABA organized the Joint Commission to Evaluate the Model Code of Judicial Conduct under the direction of the ABA Standing Committee on Ethics and Professional Responsibility and the ABA Standing Committee on Judicial Independence. After more than three years of lengthy meetings, nationwide hearings and extensive drafting and editing, the joint commission presented a new code to the ABA House of Delegates at its February 2007 mid-year meeting. Following discussion and debate, the House adopted the new Model Code that the ABA published and then disseminated throughout the country.

Following adoption of the Model Code, the Arizona Supreme Court moved quickly to organize the Task Force to study the new code with a view toward updating the current (1993) code governing the conduct of all state and local judges. Administrative Order 2007-36 (April 26, 2007) established the membership of the Task Force and set out its primary goals. The staff of the court's Judicial Ethics Advisory Committee was enlisted to assist the Task Force in cooperation with the Commission on Judicial Conduct. The project was greatly assisted by the experience and knowledge of the Commission's executive director, E. Keith Stott, Jr. As the project got underway, Mark I. Harrison, a Phoenix attorney and chair of the ABA Joint Commission, also graciously volunteered to serve as an advisor to the Task Force. Mr. Harrison's contributions were many, especially his perspective on changes to the ABA code that were particularly applicable to Arizona. Last, but certainly not least, we acknowledge the significant contributions of Judge G. Murray Snow who served as the chair of the Task Force until he became a Federal judge in late 2008.

The Task Force met a total of 18 times following its organization in April 2007 through December 2008. In keeping with its mandate, the Task Force reviewed the new Model Code and compared each provision line-by-line with the existing Arizona code. Early in the process, when it became evident that the new Model Code retained the key elements of the existing code and would likely serve as a national model for the foreseeable future, the Task Force decided to recommend the adoption of the Model Code, with appropriate changes, rather than attempt to amend the existing code to incorporate changes from the Model Code. In the view of the Task Force, this approach will provide a more cohesive code that correlates with the codes adopted in other states and ongoing research to annotate the Model Code. The existing version of the state code, which has been modified slightly several times to meet the needs of the state judiciary,

served as one of the two fundamental source documents the Task Force used during its comparative study. The Task Force continued to refer to the existing code throughout its review and recommends retaining a number of its aspects. This is especially the case in Canon 4 and the Application section, which have been previously tailored to fit Arizona's particular needs and requirements.

Arizona was not the first state to complete its review of the Model Code, and during the course of its work, the Task Force was able to take advantage of the excellent work being done in other states. As new state codes were circulated for comment, the Task Force reviewed them for possible improvements to its own recommendations. The proposed codes examined by the Task Force included those from Arkansas, Hawaii, Indiana, Kansas, Minnesota, Montana, New Hampshire, Ohio, and Oklahoma. The Task Force also reviewed changes in the Code of Conduct for United States Judges prepared by the Judicial Conference of the United States, as well as resolutions for amending the Model Code adopted by the Conference of Chief Justices. In addition, the Task Force considered recommendations prepared by the American Judicature Society's Center for Judicial Ethics, which played a key role in analyzing draft recommendations of the ABA joint commission throughout the three-year project.

Following the completion of a proposed new code, the Arizona Supreme Court suggested that the Task Force schedule public hearings and solicit comments on its proposed code. Notice of the hearings and the materials concerning the tentative proposal were published on the court's ethics website, and notices were sent to judges, professional organizations with an interest in judicial ethics, and the public in general. During the hearings, participants were encouraged to submit any comments they wished to make to the Task Force. Two hearings were held: one on October 31 in Phoenix, and the other on November 7 in Tucson. The Task Force considered all

comments during its final meeting on December 5. Several changes were made to the proposal as a result of the comments received during and after the hearings.

The recommendations that follow were adopted by the members of the Task Force following careful study and extensive discussion. Each provision of the Model Code was compared with its corresponding provision of the Arizona code, and each section was voted upon by the members. The recommendations presented here were all adopted by majority vote; the few major differences are described in context.

This report consists of four parts: the report itself, which describes the background of the project and explains the major recommendations; the complete proposed code in its final form; a highlighted version showing all of the proposed changes from the ABA Model Code in traditional legislative format; and an overview report that describes the rationale for changes in the highlighted version.

Although these materials are designed for different audiences, they serve the same objectives. Judges and members of the public who want to read the proposed code in its entirety without the distraction of the traditional highlighting should use the version contained in Appendix A; those interested in comparing the proposed code with the Model Code can use the highlighted version in Appendix B. The overview in Appendix C contains brief explanations of the rationale behind each change.

Recommendations

The Task Force recommends the adoption of the new Code of Judicial Conduct contained in Appendix A.

Organization

The Task Force retained the overall organization of the Model Code, modifying it as needed to accommodate Arizona's particular needs. The approach taken by the ABA in drafting

the Model Code was to adopt the structure of the ABA's Model Rules of Professional Conduct governing the ethical responsibilities of lawyers. This is a new format for both the Model and the Arizona codes. It is markedly different in the way it organizes canons, rules, and comments. Canons, which were reduced from five to four in the new Model Code, still present overarching principles at the beginning of each section that govern the conduct of judges on and off the bench and in their political activities. After these broad aspirational statements, the new code shifts from canons to "rules" or sections governing specific conduct. Each rule may contain one or more comments that help explain the rule. In previous versions of the Model Code, all rules were referred to as "canons." This is no longer the usage employed by the Code.

It was the ABA's desire, in reorganizing the Model Code, to make it more logical and "user friendly." As explained in the overview of the approved version of the Model Code:

> Canon 1 and its Rules combine most of the subject matter of Canons 1 and 2 of the 1990 Code, addressing the obligations of judges to uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and its appearance, and to avoid abusing the prestige of judicial office. Canon 2 and its Rules address solely the judge's professional duties as a judge, which constituted most of Canon 3 in the 1990 Code. Canon 3 and its Rules address specific types of personal conduct, including involvement in extrajudicial activities and in business or financial activities; most of which had been addressed in Canon 4. Finally, Canon 4 and its Rules address, as did Canon 5 of the previous Code, acceptable political conduct of [a] judge and judicial candidates.

(*Overview of Model Code of Judicial Conduct as Adopted February 12, 2007,* 3.)

This change was not without controversy. The ABA Joint Commission restructured so many of the old canons that initially it may be difficult for judges to understand and track all of the changes. It is the opinion of the Task Force, however, that over time and with adequate training, judges will find it easier to work with the new code and understand its structure.

The last major change in the organization of the Model Code involved the comments. In the current Arizona code, each of the canons is followed by sections (also referred to as

"canons") that describe permissible and prohibited conduct, and commentary that provides guidance in interpreting and applying the rules. In the Model Code, each set of rules is followed by comments that "neither add to nor subtract substantively from the force of the Rules themselves." *Overview*, 3. The Task Force, however, concluded that there was (or should be) a stronger relationship between rules and comments and modified the code accordingly, as will be explained later.

Preamble and Scope

The preamble in the Model Code explains the purpose of the code and how the rules are designed to operate. The existing Arizona code contains a straightforward preamble that sets forth fundamental principles and describes how canons, rules, and commentary interact. In the Model Code, the preamble is divided into two parts: a new Preamble stating the general purpose of the code, and a longer Scope section explaining how the rules operate and the relationship between the rules and the comments. The term "commentary" is no longer used in the code.

The Task Force recommends the adoption of the Preamble and Scope section with few changes. Most of the concepts were drawn from the existing preamble, and the changes in the new code are generally helpful in explaining how to interpret and apply the rules. The only significant change that the Task Force recommends is found in the third and fourth paragraphs of the Scope section. As written, these paragraphs give the impression that comments only provide general guidance for applying the code. For example, the third paragraph of the Scope section in the Model Code states that: "Comments neither add to nor subtract from the binding obligations set forth in the Rule. Therefore, when a Comment contains the term 'must,' it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue." The Task Force, however, deleted these two

sentences because, as drafted, a number of comments in the Model Code provide substantive exceptions to the scope of the associated rules that are both desirable and not otherwise evident from the text of the code. By deleting the sentences, exceptions to the rules that are currently embedded only in the comments may be given operative force. The resulting language is less confusing and more direct. The other minor changes in the Scope section merely replace the Model Code references with references to the Arizona code.

Terminology

Overall, the Task Force eliminated the use of asterisks throughout the text and the references to specific rules in the Terminology section. These tools were helpful in studying the Model Code for possible adoption in Arizona, but they are unnecessary in the final version of the code. The Task Force made several modifications in the definitions themselves and recommends approval of the numerous changes contained in the Model Code Terminology section which are fully explained in the reporter's explanation of change. *See* Appendix B of the *Model Code of Judicial Conduct*, 2d ed. The following changes are singled out for comment.

Aggregate

The definition of the term "aggregate" should be removed because the Task Force deleted the only two rules in which the term appears, making the definition superfluous.

Candidate

This definition was re-titled as "judicial candidate" to be more consistent with its usage within the code and moved to its appropriate alphabetical location in the terminology section.

De minimis

This definition from the Model Code was omitted in the 1993 Arizona code but was reinserted in the proposed code. See discussion of "economic interest."

Domestic partner

The ABA added this definition and the Task Force recommends its inclusion. It is used in evaluating potential conflicts of interest on the theory that "non-traditional relationships that exist outside marriage are deserving of treatment equal to that afforded marital relationships." The Task Force realizes that such relationships may be controversial but nonetheless must be taken into account when determining when a judge must be disqualified from hearing certain cases.

Economic interest

The Task Force recommends keeping the definition of the term "economic interest" as defined by the Model Code. Arizona did not adopt the Model Code definition in 1990. Although the Model Code definition is closely related to the Arizona statute that defines "substantial economic interest," the two definitions are not in conflict. Yet, operation of the code and the statute may occasionally produce separate obligations, particularly when a judge has diverse economic investments. Rather than restructure the operation of the code to exactly align with the statutory requirements, the Task Force opted to use the practical (and, frankly, more simple) guidance provided by the Model Code, yet also alert judges to a separate statutory duty that may, in certain circumstances, produce additional legal obligations. The Task Force thus added a specific reference to the term "substantial interest" as defined in the statute governing conflicts of interest of public officers and employees.

Judge

The Task Force recommends that the definition of "judge" be moved here from the Application section because the term is used throughout the code.

Application

The Application section of the Arizona code was completely rewritten by the supreme court in 1993. The Task Force thus decided to preserve the basic provisions in the current code while accommodating to the extent possible the overall structure and some of the language in the Model Code. For example, the comments to Part D pertaining to pro tempore part-time judges are unique to our state and were retained in their original form with only a minor modification to make a reference to a specific town more generic. The Task Force further added an explanation in the comment that, consistent with the present requirements of Arizona law, the code does not apply to quasi-judicial officers who are employees of the executive branch.

Canon 1

The Task Force reviewed Canon 1 and recommends its adoption with few changes. The Task Force added a comment to Rule 1.1 as a cross-reference to a related comment in Rule 2.2, and it expanded Comment 5 in Rule 1.2 to clarify that an appearance of impropriety does not exist merely because a judge has previously rendered a decision involving a similar issue or that a judge may have personal views that are not in harmony with the views of the parties in a lawsuit. Moreover, a judge's personal and family circumstances are generally not appropriate considerations on which to presume an appearance of impropriety. This additional language puts potential complainants on notice that an appearance of impropriety requires something more than simple allegations about a judge's beliefs or personal situation.

Consistent with the merit selection and advisory committee models of judicial appointment used in some Arizona jurisdictions, the Task Force also recommends additional language to Rule 1.3, Comment 3, to clarify that judges may recommend candidates for judicial office and may volunteer information about the qualifications of candidates to appointing authorities and screening committees.

Canon 2

The Task Force reviewed Canon 2 and recommends its adoption with several major and minor changes. In Rule 2.2, Comment 3, the Task Force added language from the current code to emphasize that even though a good faith error of fact or law is not judicial misconduct, a pattern of legal error or an intentional disregard of the law may constitute misconduct.

In Rule 2.5(A), the Task Force added the word "promptly" to emphasize that, under the Arizona Constitution and implementing law, all cases must be heard and resolved as quickly as possible after a matter is at issue. This standard exists in the current code as Canon 3B(8). Comment 5 was added to this rule to draw attention to the constitutional provisions and statutes governing delay and to Advisory Opinion 06-02.

In addition, Rule 2.5(C) was added to retain from the current Arizona code the mandatory nature of continuing judicial education.

Rule 2.8(C) was modified to make it clear that judges may express appreciation to jurors for their service, and Comment 2 to the rule was modified to provide a cross-reference to a useful advisory opinion on this subject. After making these changes, the Task Force concluded that Comment 3 in this section was unnecessary.

Some significant changes were made in Rule 2.9 governing ex parte communications. Although the ABA's joint commission preferred an absolute standard requiring notice when a judge consults with a disinterested expert on the law, the Task Force saw no need to require independent notice to both parties when a judge conducts additional research as to the law. It thus concluded that the existing standard was more appropriate and modified Rule 2.9(A)(2) to permit a judge to obtain such advice without giving notice. The rule was also modified to allow judges to consult with court personnel or other judges at any time on legal (as opposed to

factual) issues. This second change, however, was opposed by several members of the Task Force.

In the comments implementing Rule 2.9, Comment 1 was amended to put judges on notice that they may direct staff to screen written ex parte communications and take appropriate action without the necessity of notifying all parties and their lawyers of the receipt by their staff of such information. Comment 4 was replaced with language specifying the circumstances in which judges may engage in ex parte communications in problem-solving courts.

Several new comments were added to Rule 2.9. Comment 8 suggests that judges obtain the views of disinterested legal experts by having the experts file amicus curiae briefs with the court. Comment 9 clarifies that requesting a party or parties to submit proposed findings of fact and conclusions of law does not constitute an ex parte communication. Comment 10 explains how communications should occur if at all between a trial court and an appellate court concerning a matter on appeal.

Rule 2.10, Comment 2, was modified to clarify that judges may comment publicly on the merits of a case when the judge is a litigant in an administrative capacity. In a case in which the judge is a litigant in a nominal capacity, such as a special action, the judge is prohibited from commenting publicly.

The Task Force recommends deleting Rule 2.11(A)(4) in the Model Code, which requires judges to disqualify themselves when they know or learn by means of a timely motion that a party or a party's lawyer has contributed to a judge's campaign for judicial office. While in a separate comment the Task Force makes it clear that campaign donations may constitute a basis for disqualification, the Task Force does not believe that automatic disqualification is advisable, especially in some of Arizona's more rural counties. The provision, which first appeared in the

1990 Model Code and again in the 2007 Code, has not been adopted in any state. Its inclusion in Arizona would pose problems in rural counties because a contribution by any lawyer to a judicial campaign in that county could then, arguably, prevent the lawyer from ever appearing before a judge in counties where judges are elected. These same counties generally have very few judges. Thus, such a prohibition could severely limit the ability to practically and efficiently administer justice. Similarly, the Task Force recommends deleting Rule 2.13(B), which prohibits judges from appointing lawyers to judicial or administrative positions if they have contributed to those judges' campaigns. The Task Force concluded, as have other states, that this practice has not been a problem under the existing code. It also would cause considerable difficulties in small counties, in which these issues have not presented problems in the past. The language in the related comment was also modified.

Rule 2.11(A) requires judges to disqualify themselves in cases involving lawyers with whom they were formerly associated. This is not a new provision, but the Model Code requires states to insert a reasonable period during which the rule is applicable. The Task Force believes that four years is an adequate time and amended the rule accordingly. The Task Force also added a new section (D) to this rule expressly clarifying that judges do not have to disqualify themselves because of having received information during training programs or from experience.

The Task Force made several changes in the comments relating to Rule 2.11, the most significant of which appears in Comment 6 regarding the definition of "economic interest." As explained in the definition section above, the Model Code definition is closely related to the Arizona statute that defines "substantial economic interest," yet the two definitions are not in conflict. However, operation of the code and the statute may occasionally produce separate obligations, particularly when a judge has diverse economic investments. The code's definition

is more clearly set forth than the statutory scheme and in most instances compliance with the code will, it appears, satisfy the statute. Rather than restructure the operation of the code to exactly align with the statutory requirements, however, the Task Force opted to use the practical guidance provided by the Model Code, yet also alert judges to their separate statutory duty, which may, in certain circumstances, produce additional legal obligations. By following the definition used in the Model Code, the applicable standard will be easier for judges to interpret and apply.

Rule 2.12 governs the supervisory duties of judges. The Task Force added section (C), consistent with the existing code, to underscore the duty that judges have to ensure that court staff and others subject to their direction comply with the Code of Conduct for Judicial Employees.

The Task Force added a new section (E) to Rule 2.15 to protect judges who are required or permitted to report judicial misconduct from being sued. Rule 2.16, Comment 2, was added to put judges on notice that judicial employees have a right to cooperate or communicate with the Commission on Judicial Conduct without fear of retaliation.

In addition to these changes, the Task Force made a number of minor changes to improve the grammar or wording of the canon (e.g., replacing the phrase "duties of judicial office, as described by law" with the more concise phrase "judicial duties"), to simplify wordy paragraphs, and to supplement comments with references to court orders (e.g., the court's administrative order concerning sexual harassment) or advisory opinions. The addition of a Comment 5 to Rule 2.5 is an example of a cross-reference to an important advisory opinion concerning the rules on delay in decision making. To encourage public understanding of the code, several Latin terms were replaced with their English equivalents (e.g., substituting "self-represented" for "pro se").

Canon 3

Canon 3 of the Model Code concerns the extrajudicial activities of a judge. The Task Force reviewed the canon and recommends its adoption with the following changes.

The ABA joint commission inserted the word "personal" in the previous version of Canon 3, making it applicable to all of a judge's "personal and extrajudicial" activities. The Task Force concluded that personal matters are by nature "extrajudicial," thus placing "personal" in the language in Canon 3 suggested that no personal emergency or circumstance could justify postponing judicial duties. Because it was the view of the Task Force that some personal circumstances could justify reasonably postponing judicial duties and that judges are entitled to a modicum of privacy in their personal lives, it recommends deleting this word.

Rule 3.1(C) prohibits a judge from participating in extrajudicial activities that undermine the judge's independence, integrity, or impartiality. The Task Force added the words "or demean the judicial office" to this standard to conform to the existing code. Section (E) of this rule prohibits judges from using court equipment for personal purposes. The Task Force added Comment 5 to this rule to put judges on notice that the Arizona judiciary has a specific policy governing the use of electronic equipment.

The title to Rule 3.3 was amended by replacing the word "testifying" with the word "acting." Judges may be called upon to serve as a character witness in more than just adjudicatory proceedings.

Rule 3.6, governing affiliation with discriminatory organizations, was of particular interest to the Task Force. While the Task Force believes that the ethical standards in this rule are essential to a fair and impartial judiciary, members were concerned that "invidious discrimination," which is undefined in the Code, might be broadly interpreted to bar a judge's

membership in religious or other organizations engaged in "expressive association" from which a judge could not be excluded consistent with the state or federal constitutions. To prevent such a broad interpretation of the term and to reinforce what appears to be the intent of the Model Code, the Task Force modified Comment 2 to include the American Judicature Society's proposed commentary on "invidious discrimination" and elevated Comment 4, dealing with a judge's right to practice his or her religion or engage in other constitutionally-protected associations, to be new section (C) of the rule.

The Task Force accepted the suggestion of the Conference of Chief Justices to add Rule 3.7(C), which clarifies that a judge may provide leadership in programs relating to equal access to the justice system, developing public education programs, and engaging in activities to promote the fair administration of justice. Judges may convene, participate or assist in advisory committees relating to the improvement of the law, the legal system, the provision of services, or the administration of justice, and may endorse projects and programs directly relating to the law, the legal system or the administration of justice. Comment 1 to this rule was revised to clarify that law-related organizations mentioned in the rule include accredited for-profit and nonprofit institutions of legal education. Comment 6, which the supreme court added to the existing code, was added to the Model Code to continue the exception that permits judges to speak at fund-raising events benefitting indigent representation and accredited institutions of legal education. The comment was amended, however, to permit activities organized to raise scholarships for law students.

The rules governing the transition from lawyer to judge are essentially the same in the new code. Rule 3.10, Comment 2, was added to put retired, part-time and pro tempore judges on notice that they may be exempt from this rule. Comment 3 was added to alert judges to the

advisory opinion relating to winding up the practice of law after appointment to the bench. Comment 4 was added to clarify that the rule does not prohibit judges from practicing law during military service.

Rule 3.11 governs financial investments and remunerative activities. The Task Force added Comment 3 to expressly permit a judge's uncompensated participation as an officer, director or advisor of an organization concerned with the law, the legal system, or the administration of justice, and it added Comment 4 to permit judges to teach in educational institutions not otherwise prohibited by the rule.

Rule 3.13, in conjunction with Rules 3.14 and 3.15, governs the acceptance and reporting of gifts and other things of value. In light of the complexity of these rules and existing Arizona law, which in most respects is more exacting than the reporting requirements, the Task Force recommends simplifying this rule and the administrative requirements that would result.

To simplify what is already a complex rule, the Task Force combined Rules 3.13(B) and 3.13(C). It also deleted model Rule 3.13(C)(3) which was, in the opinion of the Task Force, too permissive. Comment 3 was added to underscore the fact that the receipt of ordinary social hospitality is not likely to undermine the integrity of the judiciary except in situations in which an attorney or party has or is likely to come before the judge.

Rule 3.14 governs those circumstances in which a judge receives reimbursement of expenses and waivers of fees or charges, for example, when a judge attends or participates in a private seminar. The Task Force did not change the substance of this rule.

The Task Force significantly simplified Rule 3.15, relating to the reporting requirements for gifts, because public officials in this state, including most judges, are subject to extensive reporting in statutes, *see, e.g.*, A.R.S. § 38-542, governing the conduct of all public officials. The

terms of the statutes, as extended by a supreme court order, make the annual financial disclosure requirements applicable to supreme court justices and court of appeals judges, superior court judges and court commissioners, and justices of the peace. Although the state law arguably requires municipalities to require similar disclosure from municipal magistrates, most municipalities do not require such disclosure. Rather, municipalities typically require a confidential credit check be submitted to a municipal judicial advisory board prior to appointment or re-appointment.

By comparison, the Model Code requires judges to periodically disclose certain financial information, including gifts above a threshold to be chosen by the supreme court, with a repository to be designated by the supreme court. The disclosure period required by the Model Code can be as often as every thirty days depending upon the nature of the gift. (Such a disclosure period, for example, is required for fee waivers or reimbursements for seminar attendance.) The Task Force saw no need to report such waivers or reimbursements more often than the reporting period required by the statute, which is at least annually. Because Arizona law requires in most respects more extensive disclosure than the reporting required by the code, the Task Force elected to incorporate the statutory requirements as part of the code to avoid repetitive and overlapping requirements designed to serve the same purpose. However, because municipal magistrates are not presently bound by statute, if the supreme court believes that existing disclosure requirements imposed by municipalities on magistrates are inadequate, it may need to take action by court order or otherwise require substantial compliance with the statute in municipal courts. Such an approach was deemed preferable to requiring a dual disclosure obligation when most judges are already bound by the statute.

Rule 3.16 (governing weddings) is unique to Arizona and was added to the Model Code provisions from the existing code. Although there may be better ways to regulate the performance of wedding ceremonies by judges, the potential abuse of this authority mandates continuation of this provision.

In addition to these changes, the Task Force made several minor changes relating to word usage and phrasing. To a large extent, these changes reflect personal preferences that simplify or clarify Model Code provisions. In some instances, wording was added to emphasize a particular provision, for example, Rule 3.7(A), which now begins with a specific prohibition rather than an exception).

Canon 4

The Task Force faced significant challenges in adapting Canon 4 of the Model Code governing political activities. The Task Force devoted several meetings to this canon, both at the beginning of its work and again at the end. The Task Force adopted the approach used by the committee that drafted the language in the 1993 code. At that time, Arizona departed from the format adopted by the Model Code, which generally prohibits broad classes of political activity in Rule 4.1, and then, depending upon the method of a judge's selection, overrides Rule 4.1 in either Model Code Rule 4.2 (elected judges) or 4.3 (appointed judges) to allow a judge to engage in increasing levels of political activity. The Task Force believed this approach too confusing and, in light of the success Arizona has had with its existing canons, unnecessary. Arizona's current approach treats all judges the same, regardless of how they reach the bench. All judges, whether they are appointed to office through merit selection, elected directly or are hired under fixed-term contracts by city and town councils, are required to follow essentially the same standards. Thus, while substantially keeping in place Model Code Rule 4.1, with some important deletions and rearranging, the Task Force deleted significant parts of Rule 4.2 and 4.3.

Under Rule 4.1(A)(4), the Task Force decided to maintain the prohibition on a judge's direct solicitation of funds, only permitting a judge to solicit campaign contributions through a campaign committee. However, there was substantial discussion and disagreement about whether a judge should be able to contribute to the campaigns of other candidates and whether such a prohibition is consistent with the First Amendment. The majority of Task Force members felt that the ability to contribute was a basic right of speech and citizenship and could be a necessary component in maintaining an independent Arizona judiciary. A minority of the Task Force was of the view that any ability to make political contributions was unethical. Among the majority there was an additional disagreement about whether the court could constitutionally limit a judge by ethical rule to contributing less than the amount other citizens are allowed to contribute under current law.

The current ethical rules allow a judge to contribute a maximum of $250 a year to other candidates. At the time this amount was specified, $250 was the maximum contribution permissible by any citizen, and it has not been adjusted over time. Presently, state law allows a person to contribute various maximums per race depending upon whether the race is for a state, county, or local office. Also, there is a cumulative maximum total that any person can contribute to all campaigns in any election cycle. After much discussion, the Task Force narrowly passed a provision that allows a judge to contribute up to the maximum amount in any particular race, but limits a judge to contributing only fifty percent of the cumulative total allowed by law. The Task Force intentionally drafted this provision so that by making minor adjustments the supreme court can revise the proposed rule to allow judges to make political contributions to the same extent as other citizens, completely prohibit them, or permit some percentage of them.

Rule 4.1(a)(5) was moved to the new subsection of the rule established as part (C), which lists specific political activities that are permitted by judges under some circumstances. Along

with purchasing tickets, the new subsection specifically authorizes a judge to participate in activities designed to improve the law, the legal system or the administration of justice. Both of these provisions are retained from the existing canons.

Neither Model Rule 4.1(a)(6) nor (7) exists under the current code, and the Task Force does not recommend including either in the proposed code. The Task Force's proposed deletion of Rule 4.1(a)(6) allows a judicial candidate to identify himself or herself as a candidate of a political organization (party), and the proposed deletion of Rule 4.1(A)(7) allows a candidate to seek the endorsement of a political organization. Under Arizona law, either is currently permissible. It is, of course, necessary in a contested election to obtain the nomination of a candidate's party to appear on the general election ballot. Further, a candidate's ability to identify his or her party has not been a problem to date in retention elections. There was a desire by a significant minority of Task Force members to preserve these prohibitions in retention elections unless the retention candidate could demonstrate opposition to their candidacy. Ultimately, however, in light of the fact that these prohibitions do not currently exist in the Arizona code, the fact that they have not presented a problem in the past, and the increasing possibility, as illustrated by past campaigns, that particular judges up for retention will be targeted by groups interested in judicial elections, the committee decided against recommending the inclusion of such new prohibitions on political activity even as to judges subject to retention elections.

Rule 4.1(a)(11) and its associated comments 7 and 8 were moved to new Rule 4.3. Rule 4.1, Comment 2, was modified to clarify when the code applies to judicial candidates and which rules apply to misconduct involving lawyers who are unsuccessful in their campaigns for judicial office.

Rule 4.1, Comment 5, retains the comment from the current code that allows a judge to privately express his or her view on judicial or other candidates.

As indicated, Model Rules 4.2 and 4.3 were extensively edited to eliminate the ethical distinctions created by the code between judges who are elected and judges who are appointed.

The Task Force added a major new section (Rule 4.3) to the proposed code when it followed Ohio's example in adding a rule providing for specific campaign standards. Judicial campaigns in Arizona are becoming more complex and expensive, and it is becoming increasingly difficult to educate judicial candidates about campaign behavior that may be clearly prohibited by advisory opinions interpreting the applicable ethical standards but only generally prohibited in the code itself. Both the Commission on Judicial Conduct and the Judicial Ethics Advisory Committee report recurring problems with campaign signs and other forms of communication. Accordingly, Rule 4.3 was added to the proposed code, and various comments in Rule 4.1 were amended or relocated to the new rule to clarify the ethical standards governing judicial elections in specific situations that frequently recur in this and other states.

In recommending the adoption of this rule, the Task Force acknowledged that some provisions may be difficult to enforce against judicial candidates who are not already judges. Although the Application section makes it clear that Canon 4 applies to all judges and judicial candidates (as is the case under the existing code), no entity has the authority to investigate the conduct of judicial candidates unless they are actually elected. This creates an uneven playing field for incumbents who may be disciplined immediately for campaign misconduct, and the court may wish to consider creating a mechanism for dealing with violations of the code as they occur during campaigns for judicial office.

Lastly, the Task Force modified Rule 4.4 and its proposed comments governing campaign committees to incorporate standards set forth by state law in governing contributions and reporting.

Index

The Task Force proposes that a comprehensive index be included in the proposed code to facilitate education about the code and make it easier to find specific subjects. The index should not be included as part of the official, published code but should be regularly maintained by the Commission on Judicial Conduct and the Judicial Ethics Advisory Committee as a flexible tool that can be easily modified without going through the rule-making process.

Recommendations

The Task Force recommends the adoption of the proposed code for the reasons described in this report and the accompanying recommendations. The new code will benefit the public and the judiciary of this state and continue the state judiciary's long tradition of being proactive in demanding high ethical standards of its judges.

References

American Bar Association, *Model Code of Judicial Conduct*, 2007 ed.

American Bar Association, Joint Commission to Evaluate the Model Code of Judicial Conduct, *Overview of Model Code of Judicial Conduct as Adopted February 12, 2007*, 3.

Arizona Supreme Court, *Arizona Code of Judicial Conduct*, 1993, as amended through June 8, 2004.

Cynthia Gray, "The 2007 ABA Model Code: Taking Judicial Ethics Standards to the Next Level," *Judicature*, Vol. 90, No. 6, May-June 2007, 284.