

Aaron Nash, Chair (Bar No. 024492)
 Arizona Supreme Court Task Force on Countering Disinformation
 1501 W. Washington St., Ste. 410
 Phoenix, Arizona 85007
 (602) 452-3656
anash@courts.az.gov

IN THE SUPREME COURT STATE OF ARIZONA

In the Matter of:)	
)	
PETITION TO AMEND RULE)	
81, RULES OF THE SUPREME)	Supreme Court
COURT, ARIZONA CODE OF)	No. R-_____
JUDICIAL CONDUCT, RULES)	
1.2 AND 2.10)	
)	Petition to Amend Rule 81, Rules
)	of the Supreme Court, Arizona
)	Code of Judicial Conduct, Rules 1.2
)	and 2.10
_____)	

INTRODUCTION

Under Rule 28 of the Rules of the Supreme Court, the Arizona Supreme Court Task Force on Countering Disinformation (Task Force) respectfully petitions the Arizona Supreme Court to amend Rules 1.2 and 2.10 of Judicial Ethics Canons 1 and 2, respectively, clarifying actions that judges may take while performing the duties of their office impartially, competently, and diligently. The changes reflect an appropriate approach to

targeted campaigns against judges, based on a year of Task Force research and study into misinformation and disinformation in Arizona and nationally.

The Task Force's work included discussion of the rule change amendments in this petition with the Director of the Arizona Commission on Judicial Conduct (CJC). That is to describe the Task Force's due diligence in reviewing the issues and not an endorsement of the CJC. A similar petition has not been filed within the previous five years.

On October 22, 2020, the rule change proposal for Rule 2.10 was presented to the Arizona Judicial Council (AJC) within the Task Force's Report and Recommendations and the AJC unanimously supported the Report and Recommendations.

At a Task Force meeting in December 2020, the Task Force approved filing the petition to amend Rule 2.10 and authorized the Task Force Chair to edit the petition as needed to reflect the Task Force's intent. In preparing the petition, the Chair added an amendment to Rule 1.2, *Promoting Confidence in the Judiciary*, to incorporate the Task Force's intent of giving judicial officers guidance on responding to general attacks on the reputation of judges or courts. The Task Force seeks clarity in the rules that its proposed amendments to Rule 2.10 are not intended to limit judicial officers' responses to decisions made in particular cases.

The Task Force was continued into 2021 and will discuss recommending conforming changes to Rule 1.2, *Promoting Confidence in the Judiciary*, of the Arizona Code of Judicial Administration (ACJA) as it applies to Clerks of the Superior Court (ACJA § 1-308) and Judicial Employees (ACJA § 1-303) through the process for modifying ACJA sections.

BACKGROUND

The Task Force determined that disinformation against judges and the judicial branch were part of a larger tactic by foreign and domestic actors to reduce the trust and confidence in American institutions. In addition to broader, anti-democratic efforts, judges can become targets of disinformation when a party or outside interest sees a strategic advantage to doing so, whether for personal reasons, political gain, or otherwise. Similar harm can arise from misinformation, which is the statement or spreading of inaccuracies or dubious claims without the intent or knowledge that the information is inaccurate.

Judges have historically demonstrated restraint and patience when responding to characterizations of their conduct and performance. The amendments proposed here do not change that approach or alter the ethical rules under which judges perform. Rather, the proposals in this petition

clarify that judges need not accept abuse and bluster when they can ethically respond with accurate information, regardless of whether they are in the process of an election or retention campaign.

The ability to respond to allegations is important, as the Task Force intends that responses to misinformation and disinformation should not be limited to cases before the court. To that end, the Task Force supports including its recommended language in other rule and code sections beyond Rules 1.2 and 2.10, as described in this petition's Introduction. In addition, the Task Force supports the creation of a new section of the rules and codes to clarify its intent is not limited to pending and impending cases, should the Court choose that direction.

The Task Force Report and Recommendations explained the situation this way, which is incorporated into the proposed amendments:

The ACJC should be amended to affirmatively state that a judge, whether elected or appointed, or the judge's designee, may respond to attacks on the judge's actions, character, or reputation from whatever source in writing, via social or broadcast media or otherwise, so long as the response otherwise complies with the Code's requirements. This recommendation conforms to ACJC Rule 4.1, where Comment 9 specifies that during a campaign for judicial office, candidates may respond directly to false, misleading, or unfair allegations made against him or her during a campaign. Likewise, Comment 3 to Rule 4.3 specifically authorizes judicial candidates during a campaign to make a factually accurate response to false or misleading allegations. The most likely place for this addition is to ACJC Rule 2.10 and the comment following it.

The proposed amendments do not mandate how or when judges should respond to statements, or whether they should respond at all. Judges retain their discretion on individual responses and have clarification that claims against them are not limited to the timing of election and retention campaigns, while clarifying that the source of misinformation or disinformation can originate from several sources or formats and that the format of allegations (in person, physical, digital) could change over time.

SUMMARY OF PROPOSED CHANGES

Current Ethics Rule 2.10 allows judges to directly, or through a third party, respond to allegations concerning the judge's conduct in a matter. The proposed changes add language to reflect the understanding that allegations against judges are not always limited to cases before them. The Task Force identified baseless allegations from sources (often anonymous or using pseudonyms) attacking judges' character and personal lives. For example, alleging that judges are involved in illegal or unethical conduct, such as child trafficking, bribery, or favoritism.

Judges oversee litigation and cases that involve the parties' intense personal and emotional investment. As a result, judges anticipate criticism regarding their decisions. And while the public should expect that actual impropriety will be revealed and addressed, baseless attacks on a judge's

reputation do immediate and sustained harm to the public's confidence in judges and the judicial branch. The proposed amendments reflect those realities and allow judges to more directly address and respond to what can be characterized as attacks on the public's confidence in judges and the judiciary.

The language in current Ethics Rule 1.2 applies to the issues raised here and this petition proposes a new comment provision specifically covering responses to disinformation and misinformation.

CONCLUSION

For the reasons stated in this petition, the Task Force on Countering Disinformation respectfully requests that the Court amend Rules 1.2 and 2.10 of the Arizona Judicial Code and the Comments following them. To the extent that similar language could be incorporated into other rules, or if a new section would clarify that this guidance applies beyond campaigns and pending and impending cases, the Task Force supports other approaches that would achieve those goals.

Changes in the accompanying Appendix are reflected in legislative mark-up where deleted language appears in ~~strikeout~~ and new language appears in underline.

DATED this __31st__ day of __December__, 2020.

_/s/ ___Aaron Nash___, **Chair**
Arizona Supreme Court Task Force
on Countering Disinformation

APPENDIX A. TEXT OF PROPOSED RULE CHANGES

Rule 81, Rules of the Supreme Court, Arizona Code of Judicial Conduct, Canon 1, Rule 1.2

Rule 1.2. Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

Comment

[1. – 6.: No Changes.]

7. A judge may respond to or issue statements in connection with allegations concerning the judge's conduct in a matter or to false, misleading, or unsubstantiated allegations or attacks upon the judge's reputation. Consistent with Rules 4.1 and 4.3 regarding judicial campaigns, a judge's response or statement at any time that counters attacks on the judge's actions, character, or reputation may serve to restore or maintain public confidence in the judiciary, subject to the requirements of Rule 2.10, paragraph (A).

**Rule 81, Rules of the Supreme Court, Arizona Code of Judicial
Conduct, Canon 2, Rule 2.10**

Rule 2.10. Judicial Statements on Pending and Impending Cases

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party in writing, via social media or broadcast media or otherwise to allegations in the media or elsewhere concerning the judge's conduct in a matter or to false, misleading, or unsubstantiated allegations or attacks upon the judge's reputation.

...

Comment 3:

Depending upon the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connections with allegations concerning the judge's conduct in a matter or to false, misleading, or unsubstantiated allegations or attacks upon the judge's reputation. Consistent with Rules 4.1 and 4.3 regarding judicial campaigns, a judge's response or statement at any time that counters attacks on the judge's actions, character, or reputation may serve to restore

or maintain public confidence in the judiciary, subject to the requirements of paragraph (A).