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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-21-0001
JUDICIAL CONDUCT, RULES)	
1.2 AND 2.10)	
)	REPLY
_____)	

The Arizona Supreme Court Task Force on Countering Disinformation (Task Force) petitioned the Arizona Supreme Court to amend Rules 1.2 and 2.10 of Judicial Ethics Canons 1 and 2, respectively. The petition intends to clarify actions that judges may take while performing the duties of their office impartially, competently, and diligently, giving judicial officers guidance on responding to attacks on the reputation of judges or courts.

The proposal came from the Task Force’s Report and Recommendations and reflects an appropriate approach to targeted

campaigns against judges and courts. One comment was filed, which this Reply addresses.

The Arizona Commission on Judicial Conduct (CJC) filed a comment supporting the petition with one suggested amendment. The CJC would replace “unsubstantiated allegations” with “unfair allegations” in the proposed modifications. The CJC’s reasoning was that “unfair” would conform to that word’s usage in other parts of the Arizona Code of Judicial Conduct (Code).

In considering the CJC comment on two occasions, the Task Force discussed its intentional phrasing of “unsubstantiated” as a higher and more objective standard of review before a judicial officer would respond to an allegation. On further discussion, the Task Force agreed to modify its proposal from “unsubstantiated” to “unfair” because, in addition to the advantages of internal consistency in the Code, “unfair” gives the judicial officer more discretion in weighing whether to respond to an allegation and addresses situations where an allegation may be substantiated, but unfair in context. For example, the Task Force considered that a judicial officer may have made a comment decades earlier that might have been inappropriate for a judge to say, but was appropriate for their age, profession, or role at the time. The comment could be substantiated, but its use as an allegation of a

judicial officer's current conduct or approach would be unfair in context. The Appendix with this Reply reflects the change from "unsubstantiated" to "unfair" for the reasons stated above.

Additionally, in reviewing the original petition, the Task Force at its May 2021 meeting voted to replace the phrase "counters attacks" with the phrase "addresses attacks" as a matter of preference and in recognition of scenarios where a statement or allegation does not require being "countered" but would benefit from being "addressed." That modification is reflected in this Reply.

CONCLUSION

For the reasons stated in the original petition, as modified in this Reply, the Task Force on Countering Disinformation respectfully requests that the Court amend Rules 1.2 and 2.10 of the Arizona Code of Judicial Conduct 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.

The Task Force will seek to conform the proposed rule changes in the Arizona Code of Judicial Administration (ACJA) as it applies to Clerks of

the Superior Court (ACJA § 1-308, Rule 1.2) and to Judicial Branch employees (ACJA § 1-303, Rule 1.2) through the process for modifying ACJA sections.

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 __21st__ day of __May__, 2021.

 /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 unfair 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 addresses 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 unfair 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 unfair 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 addresses 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).