

ARIZONA JUDICIAL COUNCIL

Request for Council Action

Date Action Requested:

December 14, 2023

Type of Action Requested:

Formal Action/Request
 Information Only
 Other

Subject:

Draft Rule Change Petition (seeking a change to Arizona Code of Judicial Administration 2.6) **and** update on Plan B Workgroup and Arizona Commission on Access to Justice

FROM:

COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup (aka Plan B Workgroup) and Arizona Commission on Access to Justice

DISCUSSION:

Petition to Amend Arizona Code of Judicial Conduct Rule 2.6, Arizona Supreme Court Rule 81 (submitted for formal action)

And

Update on Arizona Commission on Access to Justice's recent activities

RECOMMENDED ACTION:

Consider and hopefully take action to support Petition to Amend Arizona Code of Judicial Conduct Rule 2.6, Arizona Supreme Court Rule 81.

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DRAFT 11/29/2023

**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of) Arizona Supreme Court No. R-24-____
)
ARIZONA SUPREME COURT) **PETITION TO AMEND ARIZONA**
RULE 81 (ARIZONA CODE OF) **CODE OF JUDICIAL CONDUCT**
JUDICIAL CONDUCT) **RULE 2.6 (ENSURING THE RIGHT**
_____) **TO BE HEARD)**

**PETITION TO AMEND ARIZONA CODE OF JUDICIAL CONDUCT
RULE 2.6, ARIZONA SUPREME COURT RULE 81**

Pursuant to Arizona Supreme Court Rule 28, Petitioner, **in his individual capacity**, petitions the Court to amend Arizona Code of Judicial Conduct Rule 2.6, as reflected in the attachment, effective January 1, 2025. The requested change is to add a comment to Rule 2.6 to provide appropriate examples of actions judges may properly take in ensuring a self-represented litigant’s right to be heard. This change, which is patterned on identical text adopted by the Colorado Supreme Court more than a decade ago, is both an appropriate measure to help provide clarity in enhancing access to justice in Arizona Courts and also to avoid any uncertainty about what is allowed under the Arizona Code of Judicial Conduct.

BACKGROUND AND THE REQUESTED CHANGE

The Arizona Code of Judicial Conduct (Code), set forth in Arizona Supreme Court Rule 81, “provide[s] guidance and assist[s] judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.” Code PREAMBLE. The Code has components: (1) Canons (“overarching principles of judicial ethics that all judges must observe”); (2) Rules (a violation of which may subject a judge to discipline) and (3) Comments (which “provide guidance regarding the purpose, meaning, and proper application of the rules” and “identify aspirational goals for judges”). *See* Code SCOPE.

This Petition seeks to add a new Comment to Rule 2.6 to help enhance access to justice for all involved in litigation, with particular focus on self-represented litigants. Rule 2.6 (“Ensuring the Right to Be Heard”) states:

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute, but shall not coerce any party into settlement.

Rule 2.6 currently has three Comments. The first states that “[t]he right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.” Code Rule 2.6 Comment 1. The second and third Comments address the

important role that judges play “in overseeing the settlement of disputes,” cautioning that judicial settlement efforts “do not undermine any party’s right to be heard” and that settlement efforts do not compromise, and are not perceived as compromising, judicial objectivity and impartiality. Code Rule 2.6 Comments 2 & 3.

This Petition seeks to add the following additional Comment to Rule 2.6, to be placed between current Rule 2.6 Comment 1 and Comments 2 & 3, as indicated in the attachment:

The steps that are permissible in ensuring a self-represented litigant’s right to be heard according to law include but are not limited to liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; attempting to make legal concepts understandable; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case. Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.

REASONS FOR THE REQUESTED CHANGE

An extraordinary number of self-represented litigants are involved in civil litigation. Nationwide, estimates indicate that “more than 70 percent of civil and family cases involve at least one self-represented party. Many of these litigants encounter great difficulty in understanding what to do and when to do it.” Thumma & Marzocca, *The Self-Represented Party The Most Unique Party of Them All*, 59 Arizona Attorney 24, 27 (June 2023) (citation omitted).

In Arizona, the percentages may be even higher. For Maricopa County Superior Court cases closed during the 12 months ending June 30, 2021 (FY 2021), more than 90 percent of family court cases had at least one self-represented party, and more than 70 percent of the cases involved both parties being self-represented. In only 8.4 percent (less than 1 in 10) of these cases were both parties represented by an attorney. In civil proceedings broadly, nearly 85 percent of cases terminated during FY 2021 had one self-represented party. In Arizona's Justice and Municipal Courts, the percentages may be even higher.

Id. (citations omitted). “Collectively, there are easily hundreds of thousands, and perhaps more than a million, self-represented parties in cases filed in Arizona courts every year.” *Id.* at 28.

Given that most self-represented parties are not trained in the law, lawyers have an ethical obligation to treat them differently than they would parties represented by an attorney. See Thumma & Marzocca, *The Self-Represented Party The Most Unique Party of Them All*, 59 Arizona Attorney 24, 31-32 (June 2023) (discussing Arizona Supreme Court Rule 42, Ethical Rule (ER) 4.3, titled “Dealing with Unrepresented Person”). Judges also have specific ethical directives on how to deal with self-represented litigants. In discharging their obligation of “Impartiality and Fairness,” comment 4 to Code Rule 2.2 directs that Judges may, without violating that rule, “make reasonable accommodations to ensure pro se [self-represented] litigants the opportunity to have their matters fairly heard.” Thumma &

Marzocca, *The Self-Represented Party The Most Unique Party of Them All*, 59 Arizona Attorney 24, 30 (June 2023) (citations omitted).

Code Rule 2.6 directs that Judges have a duty of “Ensuring the Right to be Heard.” Unlike the Comments to the Impartiality and Fairness obligation in Rule 2.2, however, Rule 2.6 lacks specific guidance on what Judges properly may do to ensure that self-represented litigants are afforded their right to be heard. The proposed change requested in this Petition would add a Comment to Rule 2.6 to make clear what is permissible – not required, but permissible – when a Judge deals with a self-represented party.

As noted in the attachment, the addition of the comment proposed in this Petition would make clear that appropriate measures could include:

- liberally construing pleadings;
- providing brief information about the proceeding and evidentiary and foundational requirements;
- modifying the traditional order of taking evidence;
- attempting to make legal concepts understandable;
- explaining the basis for a ruling; and
- making referrals to any resources available to assist the litigant in preparation of the case.

Significantly, this proposed Comment would make clear that “Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.”

The addition of this proposed Comment is an important next step in ensuring access to justice for all. There is significant need for this change, and significant reasons for it.

First, in 2010, the Colorado Supreme Court amended its Code of Judicial Conduct to include an identical comment to “assist[]the bench in dealing with” the “explosion of” self-represented parties involved in litigation in Colorado’s state courts. McDonald, *The Critical Role of Mediation in Bridging the Access to Justice Gap*, 43 Colorado Lawyer 69, 70 (September 2014). More than a decade after enacting this Comment, Federal and State Judges in Colorado, and leadership in the Institute for the Advancement of the American Legal System, wrote that it has provided further guidance for judges to “help parties--whether self-represented or not--have confidence in the court and feel that justice has been achieved.” Wang, Espinosa, Southerland & Houlberg, *Judicial Officers and Self-Represented Litigants Tools for Working Together*, 50 Colorado Lawyer 14, 15, 17 (April 2021).

Second, adding the Comment furthers Goal 1 – “Promoting Access to Justice” – of the Arizona Judiciary’s Strategic Plan: *Justice for the Future Planning for*

Excellence 2019 – 2024. A key focus of that Goal is “Self-Represented Litigants,” including to “continue to make the justice system more accessible for individuals who cannot or choose not to obtain legal representation” and to “improve accessibility by developing simpler ways to obtain information about court processes and procedures.” *Justice for the Future Planning for Excellence 2019 – 2024* at 3. Adding the Comment would further this Goal.

Third, adding the Comment will allow Arizona’s judicial system, and Arizona’s judges, to continue to identify and implement innovations in how courts are providing access to justice, including with self-represented parties. As one example, Arizona Supreme Court Administrative Order 2022-159 authorized, on a trial basis through December 2024, an Informal Family Law Trial Pilot in Graham, Maricopa and Pima Counties. For parties that voluntarily participate in that Pilot, the court will determine whether non-parties may testify at trial; the court itself is a key participant in asking questions, given that “the traditional format used to question witnesses at trial does not apply” and “the court may admit any relevant and material evidence, even though such evidence might be inadmissible under formal rules of evidence.” A.O. 2022-159 at Attachment A. Adding the Comment would further facilitate the trial judge’s involvement in this Pilot, as well as other creative attempts to ensure enhanced access to justice in Arizona’s courts.

Fourth, adding the Comment is consistent with applicable substantive and procedural law in Arizona’s courts, including courtroom management, *see* Ariz. R. Evid. 611; findings requirements, *see, e.g.*, Arizona Revised Statute (A.R.S.) §§ 25-403 & 403.01 (findings required for legal decision-making and parenting time); procedural requirements in addressing and resolving motions, *see, e.g.*, Arizona Rule of Civil Procedure 56(a) (“The court should state on the record the reasons for granting or denying” a motion for summary judgment); and the United States Supreme Court’s directive that courts should be vigilant of “substitute procedural safeguards” to help “ensure the ‘fundamental fairness’ of the proceeding even where the State does not pay for counsel for an indigent” litigant, *Turner v. Rogers*, 564 U.S. 431, 447-48 (2011).

Fifth, adding the Comment is consistent with how many Arizona judges are already treating self-represented litigants. *See generally* Thumma & Marzocca, ***The Self-Represented Party The Most Unique Party of Them All***, 59 Arizona Attorney 24 (June 2023). Encouraging judges to explain the basis of their rulings is also consistent with best practices to ensure compliance with decisions, even for a party who does not prevail.

Petitioner has sought input on this Petition from (1) Arizona Superior Court Presiding Judges; (2) the Arizona Judicial Council; (3) the Arizona Judicial Ethics

Advisory Committee and (4) the Arizona Commission on Access to Justice.

[INSERT OUTCOME OF THOSE REQUESTS]

CONCLUSION

Adding this Comment to Rule 2.6 of the Code of Judicial Conduct is both an appropriate measure to help provide clarity in enhancing access to justice in Arizona Courts and also to avoid any uncertainty about what is allowed under the Arizona Code of Judicial Conduct.

Petitioner respectfully requests that the Court consider this Petition at its earliest convenience. Petitioner also requests that the Petition be circulated for public comment and that the Court adopt the proposed changes, either as requested or as modified in light of comments received from the public, with an effective date of January 1, 2025.

DATED this XX day of January 2024.

Samuel A. Thumma

ATTACHMENT¹

RULE 2.6. Ensuring the Right to Be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute, but shall not coerce any party into settlement.

Comment

1. The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

2. THE STEPS THAT ARE PERMISSIBLE IN ENSURING A SELF-REPRESENTED LITIGANT'S RIGHT TO BE HEARD ACCORDING TO LAW INCLUDE BUT ARE NOT LIMITED TO LIBERALLY CONSTRUING PLEADINGS; PROVIDING BRIEF INFORMATION ABOUT THE PROCEEDING AND EVIDENTIARY AND FOUNDATIONAL REQUIREMENTS; MODIFYING THE TRADITIONAL ORDER OF TAKING EVIDENCE; ATTEMPTING TO MAKE LEGAL CONCEPTS UNDERSTANDABLE; EXPLAINING THE BASIS FOR A RULING; AND MAKING REFERRALS TO ANY RESOURCES AVAILABLE TO ASSIST THE LITIGANT IN PREPARATION OF THE CASE. SELF-REPRESENTED LITIGANTS ARE STILL REQUIRED TO COMPLY WITH THE SAME SUBSTANTIVE LAW AND PROCEDURAL REQUIREMENTS AS REPRESENTED LITIGANTS.

~~2.3.~~ The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are

¹ Changes or additions in rule text are shown by capitalized text and deletions from text are shown by strikeouts.

unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, or is on appellate review, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, (6) whether the matter is civil or criminal, and (7) whether the judge involved in the settlement discussions will also be involved in the decision on the merits.

3. 4. Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision-making during trial or on appeal and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11(A)(1)