

JUSTICE STANLEY G. FELDMAN, A COMMON LAW JUDGE

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An objective discussion of the role of any Justice of the Arizona Supreme Court in Arizona society ought to be prefaced by a review of controlling principles. The public and even lawyers and judges sometimes seem to forget these basics which underlie Arizona common law.

Arizona's Constitution, after designating the boundaries of the State in Article I, contains a lengthy Declaration of Rights in Article II. Its first two sections state:

§ 1. A frequent recurrence to fundamental principles is essential to the *security of individual rights* and the perpetuity of free government.

§ 2. All political power is inherent in the people, and governments derive their just powers from the *consent of the governed, and are established to protect and maintain individual rights.*¹

Article III briefly declares:

The powers of the government of the State of Arizona shall be divided into three *separate* departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be *separate and distinct, and no one of such departments* shall exercise the powers properly belonging to *either of the others.*²

In prohibiting one branch from exercising the powers belonging to either of the others, Article III envisioned that tensions would arise, and indeed they have. During Justice Feldman's tenure, the Supreme Court, often speaking through him, steadfastly has upheld the "division of powers" Article and judicial

1. ARIZ. CONST. art. II (emphasis added). Note the striking similarity to the Declaration of Independence: "[T]hat to secure *these rights* [Life, Liberty and the pursuit of Happiness], Governments are instituted among men, deriving their just power from the *consent of the governed....*" THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

2. ARIZ. CONST. art. III.

independence.³

Consistent with the precedent first announced in 1803,⁴ Justice Feldman has spoken out against legislative actions that were deemed to be repugnant to the Constitution.⁵ He also has perpetuated the common law's fine line between timely and necessary changes and the doctrine of *stare decisis*.⁶

Justice Feldman sometimes is criticized as being an "activist" or "too liberal." I reject such labels and suggest that Arizona's judicial history will record that Justice Feldman was a champion for the "individual rights" mentioned above; that he was a scholarly and prodigious worker who strived to preserve and advance the common law;⁷ and that he well and honorably defended Article VI of our Constitution and the judicial branch against executive and legislative onslaughts and public "clamor."

Until recently and because judges are not "wholly free to defend themselves," members of the bar were duty-bound to support judges "against unjust criticism and clamor."⁸ Except for their Preamble, the present Rules of Professional Conduct, in effect in Arizona and most states, are virtually devoid of this and other professional aspirations and goals expressed in the prior Canons and Rules. The present Rules, with few exceptions, define minimum acceptable *conduct* rather than professional *responsibilities* and public duties. They are cast in terms of what lawyers "shall" or "shall not" do, not what lawyers "should" do for the good of the profession and the justice system.⁹

This defense against criticism and clamor is impelled by deference to prior Canons and Rules. I decry the tenor of the present Rules and submit that the changes just noted are symptomatic of other adverse changes and developments¹⁰

3. See, e.g., *Mecham v. Gordon*, 156 Ariz. 297, 751 P.2d 957 (1988). See also *Rios v. Symington*, 172 Ariz. 3, 833 P.2d 20 (1992) and *Fairness and Accountability in Ins. Reform v. Greene*, 180 Ariz. 582, 886 P.2d 1338 (1994). Cf. *State v. Osborn*, 16 Ariz. 247, 143 P. 117 (1914).

4. *Marbury v. Madison*, 5 U.S. (1Cranch) 137 (1803).

5. See *Bryant v. Continental Conveyor & Equip. Co., Inc.*, 156 Ariz. 193, 751 P.2d 509 (1988) (Feldman, J., dissenting).

6. See and compare *In re Rights to Use Water in Gila River*, 175 Ariz. 382, 857 P.2d 1236 (1993) and *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (1983). See also *Hageman v. Vanderdoes*, 15 Ariz. 312, 320-21, 138 P. 1053, 1056 (1914).

7. See, for example, opinion and supplemental opinion in *Law v. Superior Court*, 157 Ariz. 147, 755 P.2d 1135 (1988).

8. CANONS OF PROFESSIONAL ETHICS Canon 1 (1908-1970); MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 8, EC 8-6, (1970-1983).

9. In adopting the present Model Rules in 1983, the American Bar Association scrapped 140 Ethical Considerations which stated in detail what lawyers "should" do and why.

10. Examples are: The determination that the law is a trade or business and that legal services may be marketed like fungible goods (*Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)); the allowance of self-promotion, advertising and client solicitation (*Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988)); and the degradation of the justice

that have occurred in recent decades. These changes, some of which are self-inflicted,¹¹ have demeaned the profession, invited harsh criticism and made more difficult the duty of Justice Feldman and other judges to preserve the independence of the judiciary.¹²

system by televising sensational fragments of trials that bear little resemblance to everyday proceedings in thousands of courtrooms.

11. For example, the profession's recent penchant for money seeking.

12. These changes and developments also are endangering the justice system and the "genuine profession." See *Shapero*, 486 U.S. at 491 (O'Connor, J., dissenting).

