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Subject: SLS & Berkeley Law Comments to Proposed Code & Rules Changes
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M. Elizabeth Magill, on behalf of Stanford Law School, and Erwin Chemerinsky, on behalf of University of California, Berkeley School of Law are submitting comments on the proposed amendments to the Code of Conduct for U.S. Judges and the Rules for Judicial-Conduct and Judicial-Disability Proceedings in the attached letter.

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Judicial Conference Committee on Codes of Conduct
Judicial Conference Committee on Judicial Conduct and Disability
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
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By Email to: CodeandConductRules@ao.uscourts.gov

To the Members of the Committees of Codes of Conduct and Judicial Conduct and Disability:

In December 2017, Chief Justice John G. Roberts, Jr., asked the Administrative Office of the United States Courts to form a working group to evaluate whether the Judiciary had adequate policies and procedures to protect court employees from inappropriate workplace conduct. The working group's report found that, "inappropriate conduct, although not pervasive in the Judiciary, is not limited to a few isolated instances."¹ The report also provided many recommendations on how to remediate harassment and abuse in the Judiciary, including suggesting revisions to the Code of Conduct and the Judicial Conduct and Disability Act.²

On September 13, 2018, the Judicial Conference Committee on Codes of Conduct and Committee on Judicial Conduct and Disability released proposed amendments for public comment. Stanford Law School ("SLS") and University of California, Berkeley School of Law ("Berkeley Law") applaud the steps the Judicial Conference and these committees have taken to address and remedy workplace misconduct in the federal judiciary. Our students and alumni highly value the opportunity to clerk for federal judges. It is frequently one of the most challenging and rewarding experiences of their careers, and the skills developed and connections made benefit them throughout their lives. No one should have to think twice about pursuing such an opportunity because they are worried about their workplace environment. The nature of these close work relationships with individuals in high-powered positions, however, is what makes clerks so vulnerable to harassment and other inappropriate workplace conduct. Without clearly stated rules and reporting mechanisms, clerks and other judicial employees will remain in a vulnerable position.

We strongly support the proposed amendments. At the same time, we urge the Judicial Conference to provide the additional details the courts and their employees need to clearly understand and apply the new rules. Our recommendations in this regard follow closely the recommendations of the Law Clerks for Workplace Accountability in their testimony before the Committees on October 30, 2018.³ We provide other comments and suggestions as well.

¹ Federal Judiciary Workplace Conduct Working Group Report (June 1, 2018) [hereinafter, Working Group Report], p.6-7, http://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf

² *Id.*, at 20-44.

³ *Proposed Changes to Code of Conduct for U.S. Judges and Rules for Judicial-Conduct and Judicial-Disability Proceedings: Hearing Before the Committee on Codes of Conduct of the Judicial Conference of the U.S. & the Committee on Judicial Conduct & Disability of the Judicial Conference of the U.S.*, 2:32:34-3:09:20 (Oct. 30, 2018), <https://www.youtube.com/watch?v=xqzk1k13SeA> (video recording) (statements of Jaime Santos & Kendall Turner, Founders, Law Clerks for Workplace Accountability),

A. Code of Conduct

The proposed amendments to the Code of Conduct set standards for our nation’s judiciary:

A judge should practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff. A judge should not engage in any form of harassment of court personnel. A judge should not engage in retaliation for reporting of allegations of such misconduct. A judge should seek to hold court personnel who are subject to the judge’s control to similar standards in their own dealings with other court personnel.⁴

First and foremost, it is an important step forward that “harassment” and “retaliation” are expressly prohibited.⁵ The amendment also rightly eliminates any distinction between how a judge should act in the courtroom and inside chambers: he or she should be patient, dignified, respectful, and courteous with court personnel and chambers staff at all times.⁶ Finally, the Canon now properly imposes this standard on court personnel and gives judges a new duty to oversee their behavior.⁷

Additional clarification on a judge’s reporting requirements and his or her ability to maintain confidentiality, however, is essential. Canon 3B(6) requires a judge to take action when there is reliable evidence that misconduct likely occurred. The commentary to Canon 3B(6) then gives judges the ability to “take into account any request for confidentiality made by a person complaining of or reporting misconduct.”⁸ It does not clearly state, however, that that promise of confidentiality is always limited by the reporting requirements of Rule 4(a)(6) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings.⁹ But if a judge takes action under Canon 3B(6), it is because misconduct is likely to have occurred, which is exactly the circumstance under which the reporting requirements of Rule 4(a)(6) are triggered. The commentary language should be modified to make clear that any time the judge takes action, he or she is also obligated to report the incident to the chief district judge and the chief circuit judge,¹⁰ and, that if the misconduct is serious or egregious, further disclosure of the incident and the

⁴ Draft Code of Conduct for U.S. Judges, Canon 3B(4) (Sept. 13, 2018), http://www.uscourts.gov/sites/default/files/code_of_conduct_for_u.s._judges_-_proposed_changes_-_9-13-2018.pdf

⁵ *Id.*

⁶ *Compare id.*, Canon 3A(3) and 3B(4).

⁷ *Id.*, Canon 3B(4).

⁸ *Id.*, Canon 3B(6).

⁹ Draft Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 4(a)(6) (Sept. 13, 2018), http://www.uscourts.gov/sites/default/files/jcd_rules_redline_-_proposed_changes_-_9.13.18_0.pdf. Rule 4(a)(6) states, in relevant part: “A judge who receives such information shall respect a request for confidentiality but shall disclose the information to the chief district judge and chief circuit judge, who shall also treat the information as confidential. Some information will be protected from disclosure by statute or rule. A judge’s promise of confidentiality may necessarily yield when there is information of misconduct that is serious or egregious and thus threatens the integrity and proper functioning of the judiciary. This duty to report is included within every judge’s obligation to assist in addressing allegations of misconduct or disability and to take appropriate corrective action as necessary.”

¹⁰ As currently written, Rule 4(a)(6) requires the reporting judge to inform both chief judges. We support the Honorable Lawrence J. O’Neill’s proposal, however, to make all references to the “chief district judge and chief circuit judge” disjunctive. *See* Section B., below.

complainant's identity might be necessary. It is important that judges fully understand their reporting obligations and that complainants understand the limitations of a judge's promise of confidentiality.

B. Judicial Conduct and Disability

SLS and Berkeley Law support all the proposed amendments to the Judicial Conduct and Disability ("JC&D") Rules, particularly the following modifications:

- Defining "Judicial Employee" as including judicial assistants, law clerks, and unpaid staff, such as externs and other volunteers.¹¹ Including unpaid staff in the definition provides some measure of protection for the least powerful court employees.
- Eliminating the traditional standing requirement to permit those who observe misconduct to file complaints, in addition to those who have been directly injured or aggrieved.¹²
- Expressly including harassment,¹³ discrimination,¹⁴ and retaliation¹⁵ in the definition of misconduct, and specifying that failure to call attention to misconduct is itself misconduct.¹⁶
- Clarifying that nothing in the Rules or Code of Conduct "concerning use or disclosure of confidential information received in the course of official duties prevents judicial employees from reporting or disclosing misconduct."¹⁷ The need for confidentiality ingrained in judicial employees – particularly chambers staff – might well have discouraged many reports of misconduct. This statement critically reiterates that reporting misconduct falls outside of those expectations.

We believe that two Rules, Rule 4(a)(6) and Rule 11, would benefit from further revisions:

Confidentiality. We believe it is essential for the Rules to clearly outline under what circumstances confidentiality is possible and when it cannot be preserved. Without a solid understanding of these boundaries, we fear that clerks and other judicial employees will not come forward with complaints. As currently worded, Rule 4(a)(6) creates more questions than it answers. Although our understanding of Rule 4(a)(6) is that judges are obligated to report to the chief judges any information of likely misconduct, the Rule's wording leaves room for doubt. In the same sentence, it both promises that a judge "shall respect a request for confidentiality," – which most would assume to mean not sharing the information with any other person – and obligates the judge to "disclose the information to the chief district judge and chief circuit judge."¹⁸ To eliminate the potential for confusion, we recommend that the Rule first state the obligation to report, and then indicate that the reporting judge together with the chief judges will respect a request for confidentiality.

It is also unclear from whom the judges are keeping this information confidential: the Administrative Office, the Office of Judicial Integrity, the subject judge, or all of the above? Is this language concerned with a promise not to disclose a complainant's identity to the subject judge or employee, even as they

¹¹ *Id.*, Rule 3(f).

¹² *Id.*, Rule 3(c)(1).

¹³ *Id.*, Rule 4(a)(2).

¹⁴ *Id.*, Rule 4(a)(3).

¹⁵ *Id.*, Rule 4(a)(4).

¹⁶ *Id.*, Rule 4(a)(6).

¹⁷ *Id.*, Rule 4, cmt.

¹⁸ *Id.*, Rule 4(a)(6).

may and must reveal the content of the allegations? Or is it a broader promise not to discuss the incident with any court employees? Without further clarification, the judge and the complainant may have very different expectations regarding disclosure.

Another question raised by Rule 4(a)(6) is whether a promise of confidentiality in any way limits the action that can be taken. For instance, if the alleged misconduct was only witnessed by one individual, could the incident be fully investigated without informing the subject judge (or subject employee) of the complaint and, thus, the identity of the complainant? Could the subject be formally reprimanded or cautioned without first learning the complainant's identity? If the chief judges will not be able to investigate misconduct allegations while preserving confidentiality, the complainant should be aware of this at the outset. If an incident can only be fully investigated and action taken against the subject if confidentiality is waived, then the Rule as currently worded creates a dangerously false expectation of anonymity for complainants.

The Rule seems to imply that only under the most extreme circumstances will the identity of the complainant become known: "A judge's promise of confidentiality may necessarily yield when there is information of misconduct that is serious or egregious and thus threatens the integrity and proper functioning of the judiciary."¹⁹ Is the Committee attempting to indicate that, unless the behavior is "serious or egregious," it will be left up to the complainant as to whether action is taken, if taking action necessarily requires his or her identity to be revealed? If that is the case, we would argue that "serious or egregious" is too high a threshold. Surely less extreme misconduct would warrant a formal inquiry, especially because the cumulative effects of smaller incidents over time can also threaten the judiciary's integrity.

Central Repository. We are concerned that the Administrative Office or the newly-formed Office of Judicial Integrity are not included in the mandatory reporting requirements. A central repository of all incidents would enable the judiciary to identify patterns of behavior and to assess progress and areas for improvement. National oversight of chief judges' resolutions of misconduct allegations would also help to restore public confidence in the judiciary's ability to appropriately address these issues.

A Two-Tiered Review System. We agree with the Honorable Lawrence J. O'Neill, who urged the Committees in his oral testimony on October 30, 2018,²⁰ to edit the text of Rule 4(a)(6) to make all references to "chief district judge and chief circuit judge" disjunctive. Subject to our comments above regarding confidentiality, we believe the rule should read:

Cognizable misconduct includes failing to call to the attention of the relevant chief district judge or chief circuit judge information reasonably likely to constitute judicial misconduct or disability. A judge who receives such information shall respect a request for confidentiality but shall disclose the information to the chief district judge or the chief circuit judge, who shall also treat the information as confidential.

¹⁹ *Id.*

²⁰ *Proposed Changes to Code of Conduct for U.S. Judges and Rules for Judicial-Conduct and Judicial-Disability Proceedings: Hearing Before the Committee on Codes of Conduct of the Judicial Conference of the U.S. & the Committee on Judicial Conduct & Disability of the Judicial Conference of the U.S.*, 00:12:20-00:34:14 (Oct. 30, 2018), <https://www.youtube.com/watch?v=xqzk1k13SeA> (video recording) (statement of the Hon. Lawrence J. O'Neill, C.J., United States District Court, Eastern District of California).

We also endorse the two exceptions that Chief Judge O’Neill suggested: 1) the chief judge who received the complaint may involve the other chief judge whenever he or she believes it is appropriate to share with the next level; and 2) the matter should be escalated to the next level if at any point the complainant wishes it to be.²¹ Allowing the chief judge of the complainant’s court to address the misconduct allegations in the first instance preserves local discretion and ensures that the chief with the best knowledge of the parties involved handles the situation first. Creating a second tier ensures that complainants have the opportunity to seek help from a second chief judge if they are dissatisfied with the resolution or have any concerns about the process.

Action against Retired/Resigned Judges. The amended commentary to Rule 11 recognizes that “[w]hile concluding a complaint proceeding precludes remedial action under the Act and these Rules as to the subject judge, the Judicial Conference and the judicial councils have ample authority to assess potential institutional issues related to the complaint,” including examining “what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence.”²² We agree that the judiciary retains this authority and support its motivation to prevent the reoccurrence of misconduct. That said, unless more specific guidelines are provided about when such a post-dismissal investigation is appropriate or could be requested and how it is to be conducted, we are skeptical one would ever come to fruition.

We strongly suggest that such an investigation – post-dismissal where no remedial action can be taken due to a judge’s retirement or resignation – can be requested by the complainant, the judge who received the report, or the chief judges involved. It seems like the Judicial Integrity Officer would be in the best position to launch the analysis described in the Rule 11 commentary.

C. Other Recommendations of the Federal Judiciary Workplace Conduct Working Group and Miscellaneous Recommendations

SLS and Berkeley Law wish to note three remaining issues raised by the Federal Judiciary Workplace Conduct Working Group,²³ but not addressed by the amendments:

First, the Working Group recognized the “pressing need to develop responsive informal processes to counsel employees and rectify inappropriate behavior.”²⁴ We support the Working Group’s suggestions for more accessible means of resolving communication gaps and lower level problems among judicial employees. Employees are often reluctant to come forward if a formal proceeding is the only mechanism available to resolve issues. It should be made clear, however, under what circumstances a formal proceeding would automatically be triggered, even over the employee’s request to resolve the matter informally.

Second, we wish to underscore that the infrastructure suggested by the Working Group – the Office of Judicial Integrity at the national level, with workplace advisers at the circuit level, and local resources at the court level²⁵ – is critical to ensure that employees are knowledgeable about their rights, are empowered to report, and feel supported by the judiciary. Relatedly, uniform training programs about

²¹ *Id.*,

²² Rule 11, cmt.

²³ *See* Working Group Report.

²⁴ *Id.*, at 28.

²⁵ *Id.*, at 37-38.

harassment, discrimination, and retaliation should be provided across the courts so that no judges or judicial employees miss the message.

Third, the Working Group recommendations suggested “protection programs,” which would provide alternative or transfer work assignments for employees who had complained about their supervisor’s or judge’s conduct.²⁶ No such provisions are mentioned in the amendments, but we believe it is important that they are included. Unless complainants are assured that such accommodations will be made – and at what stage of the process – we believe they are less likely to report. Codifying these accommodations also ensures that they are not left to individual discretion, but instead are provided upon request.

Finally, we raise two issues not addressed by the Working Group or the amendments:

First, we believe strongly that there needs to be a national reporting mechanism by which clerkship applicants, law clerks, externs, interns, and judicial employees can anonymously report misconduct directly to the Judicial Integrity Officer. It is true that what the Judicial Integrity Officer can do with such reports may be limited, but such an outlet is often used by employers to gather information and also, when warranted by the reports, initiate further inquiries. Perhaps this is something already contemplated by the Administrative Office or the Judicial Conference, and, if so, we urge one or both entities to establish clear procedures for such reporting. We stand ready to assist in the process and advise our students and alumni about such procedures.

Second, we also urge the judiciary to hire external consultants to conduct a climate survey of current employees and employees who have left the system within the past five years. The goal of such a survey would be to evaluate the extent and nature of the misconduct present in the judiciary. The Fourth Circuit has taken this step of hiring an external consultant to conduct a survey. We believe a similar national survey should be developed, which would aim to: 1) bring to light the prevalence of misconduct in recent years; 2) establish a reference point to gauge the effectiveness of new reporting rules and education programs; and 3) help restore public confidence in the judiciary. Relatedly, we would like all exit surveys to be reviewed by the Office of Judicial Integrity, so any misconduct or inappropriate behavior that employees note in these surveys can be promptly addressed.

SLS and Berkeley Law appreciate this opportunity to submit comments in response to the proposed amendments to the Rules. We applaud the Judicial Conference for its ongoing work to improve the federal judicial workplace.

Sincerely,



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²⁶ *Id.*, at 38-39.