# Proposed Amendments to the Code of Conduct for United States Judges and Rules for Judicial-Conduct and Judicial-Disability Proceedings (September 2018 Drafts)

## Supplementary Statement of Arthur D. Hellman

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## Outline of Supplementary Statement

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Judge Erickson, Judge Scirica, and Members of the Committee on Codes of Conduct and the Committee on Judicial Conduct and Disability:

In September, your two Committees issued drafts of proposed amendments to the Code of Conduct for United States Judges[1] and to the Rules for Judicial-Conduct and Judicial-Disability Proceedings.[2] You invited public comment. On October 25, I submitted a detailed statement primarily addressing the proposed changes to the Rules, and on October 30 I testified at the hearing in Washington. This supplementary statement incorporates some of my remarks at the hearing; it also comments on some points made by other witnesses.[3]

Preliminarily, I note that Russell Wheeler of the Brookings Institution was unable to be at the hearing in person, but he submitted a statement for the hearing, and I agree with pretty much everything he said. He in turn read a close-to-final draft of my statement and expressed strong agreement with almost all of it. Mr. Wheeler also agrees with the suggestions in this supplementary statement.

## Introduction

Most of the substantive amendments in the September 2018 Drafts are designed to advance the goal stated in the Report of the Federal Judiciary Workplace Conduct Working Group: "to ensure an exemplary workplace for every judge and every court employee."[4] That is an important goal, but in considering amendments to the Rules, the Committee on Judicial Conduct and Disability should not lose sight of a point emphasized by the architects of the

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[1] Judicial Conference of the United States, Guide to Judiciary Policy (Draft – 9.13.2018), http://www.uscourts.gov/sites/default/files/code_of_conduct_for_u.s._judges_-_proposed_changes_-_9-13-2018.pdf [hereinafter Code Draft].

[2] Judicial Conference of the United States, Guide to Judiciary Policy (Draft – 9.13.2018), http://www.uscourts.gov/sites/default/files/jcd_rules_redline_-_proposed_changes_-_9.13.18_0.pdf [hereinafter Rules Draft].

[3] The hearing statement will be cited as "October Statement," with page numbers.

[4] Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States (June 1, 2018) at 31 [hereinafter Working Group Report].

misconduct system: the 1980 Act established "a *citizen* complaint procedure," and one purpose is "to maintain *public* confidence in the judiciary."

In this supplementary statement, I begin by addressing some issues that are particularly relevant to workplace conduct. These implicate both the Code and the Rules. Part II considers the problem of accountability for workplace conduct and elaborates on the suggestions in the October statement for designing a better reporting mechanism. Part III briefly discusses aspects of the Rules that are applicable to misconduct proceedings generally. The statement concludes by suggesting that reorganization and (in the case of the Rules) restyling can promote public confidence in the courts by enabling better understanding of the standards and processes for the regulation of ethics in the federal judiciary.

## I. Workplace Conduct: Proposed Amendments

At the hearing on October 30, there was discussion of several issues relating to workplace conduct. Some involved the proposed new elements of Article II; some focused on procedure; and one – the proposed reporting requirement – was both substantive and procedural.

### *A. Sexual Harassment as Misconduct*

As I discussed in my hearing statement, there has never been a question that sexual harassment falls with the ambit of the Act. The proposed amendments make this explicit, and I agree that that is a desirable change.[5]

In his statement for the hearing, Professor Geyh suggested codifying a fairly detailed definition of harassment. I think there is some merit to that suggestion as a general matter, because judges should be on notice of the conduct that can subject them to sanctions. I am troubled, though, by the breadth of the definition Professor Geyh proposes.

I recognize that the definition is taken from an ABA commission, but of course the Judiciary should independently consider how harassment should be defined for the judiciary workplace. I suggest that if either of your Committees, or both of them, pursues that approach, you should circulate the proposed definition for comment before incorporating it into the Code or the Rules.

[5] October Statement pp. 13-15.

*B. "Discrimination" as Misconduct*

Proposed Rule 4(a)(3) provides that cognizable misconduct "includes discrimination based on" race, sex, and several other characteristics or conditions. This provision has no counterpart in the current Rules, but in its basic thrust it codifies what chief judges and circuit councils have long assumed. To that extent, codification is appropriate.

As currently drafted, however, the Rule is too broad. Professor Geyh suggested qualifying the noun with an adjective such as "invidious." Judge O'Neill suggested "intentional." I agree that some kind of qualifying or clarifying language is in order.

My larger concern, though, is that the provision should be limited to conduct in the performance of official duties, which of course would include workplace-related conduct. As I emphasized in my statement, discrimination outside the performance of official duties could still constitute cognizable misconduct, but only under the circumstances delineated in Draft Rule 4(a)(7), the general Rule dealing with a judge's personal life.

There are several reasons for distinguishing between discrimination in official duties and discrimination in private life.[6] I will not repeat the discussion in my hearing statement, but I'll note an additional point: if the Rule on "discrimination" equates the judicial and the private spheres, there may be a temptation to water down the definition for the judicial sphere, where it should remain robust. So the preferable course is make clear, either in the Rule itself or in the Commentary, that discrimination outside the performance of official duties is governed by 4(a)(7), the general rule on extra-official conduct.

*C. Failure to Report as Misconduct*

The most significant addition to the catalogue of behavior that constitutes cognizable misconduct is contained in proposed Rule 4(a)(6), with the heading "Failure to Report or Disclose." That provision – implementing a recommendation of the Working Group – states that cognizable misconduct includes "failing to call to the attention of the relevant chief district judge and chief circuit judge information reasonably likely to constitute judicial misconduct or disability."

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[6] See October Statement pp. 15-17.

In my statement, I pointed to numerous issues raised by this proposal.[7] Judge O'Neill, speaking on behalf of the Ninth Circuit Judicial Council, provided cogent critiques both in his written statement and in his oral testimony. Some of the problems that Judge O'Neill and I identified could be mitigated by redrafting the reporting requirement to narrow its scope. But the ultimate goal articulated by the Working Group is accountability for workplace conduct, and in my view that goal can be better accomplished through other means – specifically, by removing barriers to reporting by those directly affected. That point will be addressed in Part II of this statement.

As I suggested in my October statement, different considerations often will apply to issues of disability. Unlike the typical workplace conduct situations that the Working Group addressed, there will not necessarily be an individual who has been directly affected and who could provide a first-hand report. Thus, if a judge becomes aware that another judge has a physical or mental condition that appears to seriously compromise that judge's ability to carry out his or her judicial responsibilities, there is good reason to require the judge to share that information with the chief circuit judge or the chief district judge so that any necessary action can be taken to prevent harm.[8] In cases of serious mental disability or decline, it may also be desirable to require a retrospective investigation to determine when the impairment began and what should be done about the cases the judge handled after that point.[9]

*D. Disqualification of Judges in Misconduct Proceedings*

In opting for a system of judicial self-regulation, Congress decided that, as a general matter, federal judges can be trusted to investigate allegations of misconduct by their fellow judges and to impose discipline where appropriate. Plainly, however, there are some situations in which, because of past or current

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[7] October Statement pp. 17-22.

[8] The discussion here is limited to the circumstances in which reporting would be *required* by the Rules. The Commentary might note that it will often be *desirable* for a judge to report aberrant behavior by a colleague that might suggest a present or incipient disability. The Commentary might also call attention to measures that may head off problems of mental impairment – for example, "wellness committees" and training for chief judges on cognitive impairment issues. See Aaron Kase, When Is a Judge Too Old to Judge? Vice, July 20, 2017, https://www.vice.com/en_us/article/vbmn39/when-is-a-judge-too-old-to-judge.

[9] My purpose here is only to outline some of the difficulties that the judiciary must confront in cases of possible disability. The Working Group did not address the subject, and your two Committees might consider whether to seek additional counsel or investigation.

relationships, particular judges should not participate in particular misconduct proceedings. Concerns about impartiality – and the appearance of impartiality – may be especially acute when allegations involve workplace misconduct.

Rule 25 sets forth the standards that govern disqualification in proceedings under the 1980 Act. Also relevant is Rule 26, which authorizes transfer to another judicial circuit; some of the circumstances that would warrant transfer overlap with those that implicate the recusal rules. Statements and testimony at the October 30 hearing point to three aspects of these Rules that warrant attention.

*1. The general standard for disqualification*

In their statement for the October 30 hearing, two representatives of the Law Clerks for Workplace Accountability (LCWA) argued that the Rules do not provide adequate guidance for judges – particularly circuit chief judges – to determine when they must recuse themselves from misconduct proceedings.[10] I share this concern, and in my own statement I suggested that Rule 25(a) should be amended to incorporate the standards for disqualification in litigation contained in 28 U.S.C. § 455.[11] I called attention to the disqualification standard proposed by Chief Judge Browning and his colleagues in the draft of the first set of Illustrative Rules circulated in 1985:

> A judge will disqualify himself or herself from participating in any consideration of a complaint in the same circumstances in which disqualification would be appropriate in any other matter under 28 U.S.C. § 455 or other ethical precepts. No waiver of any ground for disqualification may be accepted.[12]

Upon further reflection, however, I think it would be preferable to use the *language* of § 455(a) rather than to incorporate § 455 as was proposed in the 1985 draft. The full panoply of decisions applying § 455 may not be appropriate for the system that Congress established in the 1980 Act – a system in which judges are passing judgment on other judges who are part of the same circuit and who often will have interacted professionally. Thus, I would rewrite Rule 25(a)

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[10] Testimony of Kendall Turner & Jaime A. Santos at 11 [hereinafter LCWA Statement]. The statement focuses on disqualification of the chief judge.

[11] October Statement pp. 40-42.

[12] Model Rules Covering Complaints of Judicial Misconduct and Disability, Draft of 12/2/85, at 75 (on file with the author).

along these lines: "Any judge is disqualified from participating in any proceeding under these Rules if the judge's impartiality might reasonably be questioned." As with § 455(a), this standard would adopt "the objective standard of a reasonable observer" who is "fully informed of the underlying facts."[13] That perspective would take into account the context – the system of self-regulation established by Congress.

Adoption of this standard would address the concerns of the LCWA representatives. The LCWA statement references, in particular, situations where "allegations involve the Chief, or [where] the Chief's impartiality could reasonably be questioned due to familial or close personal relationships with the subject of a complaint." A familial or "close personal relationship" would require recusal under any version of the "reasonable observer" test.

*2. Application to informal proceedings*

In my statement, I emphasized the importance of informal inquiry by a chief judge who has received information about possible misconduct or disability.[14] This kind of informal inquiry may be followed by formal proceedings, but in some instances the results of the informal inquiry will obviate the need to invoke the statutory complaint process. Whatever the outcome, concerns about impartiality – and the appearance of impartiality – are no less compelling than they are for proceedings under the Act.

I suggest, therefore, that the basic disqualification should govern in that setting also. This could be done by amending Rule 25(a) so that it would apply to "any proceeding under or <u>relating to</u> these Rules." Addition of the underscored language would make clear that informal proceedings such as those contemplated by the first sentence of Rule 5(a) would be covered.

*3. Complaints and reports involving circuit judges*

As I noted in my statement, in recent years chief judges have consistently followed the practice of requesting transfer to another circuit under Rule 26 when serious allegations have been raised about a judge of the court of appeals. I suggested codifying that practice in the Rules or the Commentary.[15] I reiterate that suggestion here. But all of the recent cases have involved complaints that

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[13] United States v. Bayless, 201 F.3d 116, 126 (2nd Cir. 2000).

[14] October Statement pp. 43-45.

[15] October Statement p. 49.

raised issues of law or obviously required appointment of a special committee. Transfer to another circuit is not really practical for informal inquiry, because in such an inquiry the chief judge typically draws on personal relationships to take soundings and follow leads, and those relationships are not likely to be available to a chief judge in a different circuit.

One possible approach would be to ask a district judge to undertake the informal inquiry. But perhaps that is not necessary. The standard for recusal is not the standard for transfer. Unless the chief judge has a "close personal relationship" with the subject judge such that recusal would be required, a chief judge should be able to carry out an informal inquiry about a colleague, with the understanding that if a formal proceeding ensues, the matter would ordinarily be transferred to another circuit council.

## II. Promoting Accountability: Designing a Better Reporting Mechanism

The Working Group wrote: "The most significant challenge for accountability … arises from the reluctance of *victims* to report misconduct."[16] The proposed amendments to the Code and the Rules address this problem primarily by imposing a mandatory requirement upon *judges* to report misconduct by other judges – a requirement that would be enforced through the disciplinary mechanism of the 1980 Act. At the October 30 hearing, some witnesses argued that the reporting requirement should be made even stricter.

In my view, this approach is misguided. Second- or third-hand information can never be as efficient in promoting accountability as first-hand information. Moreover, the rigid reporting requirements in the September 2018 Draft, made enforceable though proceedings under the 1980 Act, could turn the Judiciary into a workplace of informers. As stated by Judge O'Neill on behalf of the Ninth Circuit Judicial Council, the proposed Rule "has the potential to turn what has been a collegial body working cordially with one another into a body of workplace informers, who feel obliged to report on one another concerning any perceived misstep that could conceivably fall under an elastic definition of 'misconduct.'"

I believe that the "significant challenge" identified by the Working Group is best addressed by removing barriers to reporting by the individuals directly affected. In my statement, I offered some proposals along those lines. Here I

[16] Working Group Report, supra note 4, at 12 (emphasis added).

renew those suggestions, with some elaboration prompted by comments from other witnesses and members of the Committees at the hearing.

*A. "Leadership from the Top": Elements*

In outlining measures for "ensuring an exemplary workplace" for court employees, the Working Group emphasized that "leadership must come from the very top of the organization." That idea fits perfectly with the system created by the 1980 Act. The "organization" is the circuit, and at the very top is the circuit chief judge. The Act contemplates that the chief judge of the circuit will play the central role in ensuring adherence to ethical norms by all judges within the circuit.

In my statement, I suggest several steps that can be taken to strengthen the role of the chief judge – steps that are particularly relevant to identifying and remedying misconduct in the workplace.

> First, Rule 5 of the Rules for Judicial-Conduct and Judicial-Disability Proceedings should be amended to make clear that under specified circumstances a chief judge *must* conduct an informal inquiry or *must* identify a complaint.
>
> Second, the Judicial Conference and your two Committees should consider encouraging the circuits to establish intracircuit Web portals that would enable court employees to inform the circuit chief judge about possible misconduct or disability without filing a formal complaint.
>
> Finally, chief judges should make a visible and emphatic public commitment to addressing legitimate complaints and protecting complainants from reprisal.

I have discussed the proposed amendments to Rule 5 in my statement and will not repeat all of that discussion here.[17] One point, however, deserves reiteration and emphasis. Rule 5(a) should be divided into two separate paragraphs, one dealing with the informal inquiry, the other with the identification of a complaint. Indeed, perhaps the two should be treated in separate Rules. The LCWA statement shows how easy it is to confuse the two processes.[18]

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[17] See October Statement pp. 43-45.

[18] The authors of the LCWA statement believe that "identified" complaints are treated differently from "filed" complaints. See LCWA Statement, supra note 18, at 8 ("In short, the

*B. An Alternative Channel for Reports of Workplace Misconduct*

The July 2018 Working Group Report recommended that "the Judiciary should develop additional, less formal alternatives [to the procedures under the 1980 Act] for addressing inappropriate workplace behavior."[19] The Report noted the "need for the Judiciary to develop multiple informal mechanisms that can provide a broad range of advice, intervention, and support to employees."[20]

I agree with the idea of developing new mechanisms, separate from those established by the 1980 Act, for providing advice and support to employees. But when it comes to investigating and redressing misconduct by judges – whether in the workplace or elsewhere – new channels should be integrated into the procedures established by the 1980 Act. And they should respect what Congressman Robert W. Kastenmeier – the principal sponsor of the Act – called "the historic functions of the [circuit] chief judge to respond to problems."[21]

*1. Elements of the Web portal*

One way of doing this would be for each circuit to establish an interactive Web page or portal that would permit court employees to file reports of possible workplace misconduct by a judge. The reports would be similar in form and content to a complaint, but they would not be docketed as complaints. At the same time, because the reports would go to the chief judge, there would be no duplication of, or interference with, the procedures established by the 1980 Act. That is quite important, because while I understand the desire for "less formal alternatives,"[22] the formal and informal channels should be coordinated. Certainly it would not be desirable to have two people or two entities investigating the same allegations at the same time, or duplicating work that someone else has already done.

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chief judge has an enormous amount of discretion in handling identified complaints that he or she does not have in handling filed complaints."). It appears that the authors confuse the discretion accorded chief judges in conducting an informal inquiry with the rules applicable to identified complaints.

[19] Working Group Report, supra note 4, at 17.

[20] Id. at 36.

[21] Robert W. Kastenmeier & Michael J. Remington, Judicial Discipline: A Legislative Perspective, 76 Ky. L.J. 763, 782 (1987-88).

[22] Working Group Report, supra note 4, at 17.

Text on the portal page would educate employees about the operation of the portal and the differences between it and the complaint procedure. Six points in particular should be emphasized:

- All reports will be reviewed by the circuit chief judge (or, if the chief judge is disqualified, by another circuit judge), and the chief judge will conduct an informal inquiry under Rule 5(a).[23]
- An employee who files a report on the portal may not simultaneously file a complaint under the Act relating to the same allegations. The text should explain that the formal procedures required by the Act and the Rules would often thwart the informal process.
- If the matter can be resolved to the satisfaction of the reporting employee, the subject judge, and the chief judge, no complaint will be identified and no order will be issued under Rule 24.
- As Rule 5 now provides, if the chief judge finds clear and convincing evidence of misconduct and no informal resolution has been reached, the chief judge must identify a complaint and initiate a formal proceeding under the Act.
- Whatever the views of the chief judge, if the reporting employee is not satisfied with the chief judge's resolution after an informal inquiry, the employee would have an absolute right to file a formal complaint and initiate a proceeding under the Act.
- If a formal proceeding is initiated (whether by the chief judge or by the reporting employee), and relevant issues are reasonably in dispute, the chief judge must appoint a special committee.

One other point might be added to the portal page text. If Rule 25(a) is amended in accordance with the suggestions above, the text might include a reference to the rule governing disqualification. This would make clear to employees that if the circuit chief judge has any kind of "close personal relationships" with the judge who is the subject of the employee's report, the

[23] I am assuming that Rule 5(a) will be amended in accordance with the suggestion noted above. See October Statement pp. 43-45. But even that amendment would not require the chief judge to follow up on *every* allegation. This point is discussed further infra section II-B-2.

chief judge must recuse, and the report will be considered by another circuit judge.

*2. Possible limitations*

Two important questions have been raised about this proposal. Should employees be permitted to submit reports anonymously? And should the chief judge commit to carrying out an inquiry about *every* report submitted on the portal?

First, there is the question whether to allow employees to submit reports anonymously. The Working Group Report notes the concerns of law clerks in particular about the possibility of retaliation, embarrassment, or other undesirable consequences.[24] But it will be difficult for the circuit chief judge to carry out a productive inquiry without knowing who has made the report, at least where the reporting employee is also the alleged victim. Nevertheless, it may be desirable to allow the option of an anonymous report, with a cautionary note to the employee about the resulting limits on the chief judge's inquiry.

The second question is whether the chief judge should commit to undertaking an inquiry about *every* report submitted on the portal. If Rule 5(a) is amended in accordance with my suggestion, it would provide: "When a chief judge has information constituting *reasonable grounds for inquiry* into whether a covered judge has engaged in misconduct or has a disability, the chief judge *must* conduct an inquiry, as he or she deems appropriate, into the accuracy of the information even if no related complaint has been filed."

This formulation leaves it open to the chief judge to decline to follow up on allegations that are trivial or implausible. But when the allegations come from court employees and concern workplace conduct by judges, perhaps chief judges should be willing to commit to following up in some way on *all* reports.[25] It seems unlikely that employees would inundate chief judges with allegations that do not warrant some kind of inquiry. And a commitment without qualification would reassure employees who might be concerned that the chief judge will be dismissive of conduct that they view as serious.

One final point. In my statement I suggested that the Conduct Committee consider asking a few circuits to establish portals as pilot projects. If this is done,

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[24] Working Group Report, supra note 4, at 12-13.

[25] As noted above, if anonymous complaints are allowed, the absence of identifying information will necessarily limit what the chief judge can do.

the circuits may develop their own variations that would help identify components that work and those that do not.

*C. A Visible, Emphatic Commitment by the Chief Judge*

No matter how well designed an alternative channel might be, it will not serve to overcome "the reluctance of victims to report misconduct" unless the employees have some credible assurance that their reports will be considered by someone in authority and that there will be no retaliation. That assurance must come from the circuit chief judge, and it must be conveyed in a way that it will be believed.

There are many forums in which this commitment can be communicated; a good place to start is the circuit website. Currently, if you go to the "judicial conduct and disability" page of most (perhaps all) circuit websites, you will find a series of sentences emphasizing, in different ways, that "complaints about judges' decisions and complaints with no evidence to support them must be dismissed." That is an important point to make, but it should not stand alone. The page should also feature a personal statement from the circuit chief judge telling court employees – and everyone else – that if there is evidence of misconduct or disability, the chief judge really wants to hear about it and will take steps to address it, including protecting complainants against retaliation.

Second, if the courts in the circuit have an internal website that employees regularly access, the chief judge can post a personal statement addressed directly to them and expressing the same commitment. The statement should also appear on the portal page.

Third, the circuit chief judge should address the point as part of his or her presentation at the law clerk orientation at the start of the court year. The chief judge can find, or create, other opportunities to speak to other groups of employees.

One other point deserves mention here. In my statement, I suggested that the Conduct Committee should supplement the A.O's statistical report on the administration of the Act with a narrative report that includes discussion of particular noteworthy complaints and their resolution.[26] That report could also include accounts (without identifying information) of informal resolution of allegations, particularly those arising in the workplace. The report could be

[26] October Statement pp. 49-50.

posted on the Web portals of the circuits, perhaps with additional material specific to the circuit. Concrete examples of how workplace concerns have been successfully resolved would go far to assure employees that the system works.

*D. Advantages of Direct Reporting*

In our hearing statements, both Judge O'Neill and I talked about the difficulties inherent in a mandatory reporting system such as the one contemplated in the September 2018 Drafts. Even if some of those difficulties could be mitigated by narrowing the scope of the requirement, there is a more fundamental objection to the proposal: the goal is accountability, and direct reporting is much more likely to promote accountability than reporting by judges whose information is second- or third-hand. This is so for several reasons.

First, it is unlikely that a chief judge (or anyone else) could undertake an effective investigation without communicating with the individual who has first-hand knowledge. Interposing another judge between the reporting employee and the chief judge introduces complications into the process of ascertaining the facts, and it delays the ultimate resolution.

Second, as discussed in the colloquy between Judge O'Neill and Judge Barker, the intermediation role is one that some judges may not be well suited for. But it would not be difficult for any judge to tell an employee about the Web portal, communicate the chief judge's commitment, and encourage the employee to submit a report.

Third, in small divisional courthouses there will likely be only one resident Article III judge, and if that judge engages in improper behavior toward employees, there will be no one to whom the employees can turn. Almost ten years ago, the Task Force on Judicial Impeachment of the House Judiciary Committee heard wrenching testimony by two employees of the federal court in Galveston, Texas, who were subjected to abusive treatment by District Judge Samuel B. Kent. I participated in the hearing to discuss the law of impeachment, and I sat at the witness table with the two women. What stood out to me was that the women felt helpless, in large part because Judge Kent was the only Article III judge in the courthouse. A mandatory reporting requirement for judges would not have helped them – but a well-publicized informal channel for employee reports might have.[27]

[27] I believe that Judge Walter Smith, who resigned after an investigation of abusive conduct toward a court employee, was also the only Article III judge in his courthouse.

In making these points, I do not for a moment minimize the value of consultation with, and intervention by, other judges. If the employee happens to know another judge in the same courthouse or the same city, a face-to-face conversation might be a lot easier – and more effective – than any Web portal. Moreover, chief district judges traditionally play an important role in following up on reports of misconduct by district judges, magistrate judges, and bankruptcy judges within the district. As the Working Group Report stated, "multiple informal mechanisms" are desirable, and voluntary interactions of the kind described here (and by Judge O'Neill) should be encouraged. But these ad hoc processes are better supplemented, not by a mandatory reporting requirement, but by an informal channel that brings reports directly to the attention of the chief circuit judge in accordance with "the historic functions" of that office recognized in the 1980 Act.

## III. Issues Relating to the Rules Generally

Although the proposed amendments to the Rules are designed primarily to respond to concerns about workplace conduct, the September Draft also reflects the Conduct Committee's interest in changes that would improve the operation of the misconduct system generally. The topics that deserve attention fall into three broad categories: coverage, transparency and disclosure, and procedural regularity. I have treated these topics in some detail in my October statement; here I will just emphasize a few points.

Before doing so, I will comment briefly on one point made by Professor Geyh: the relationship between the Code of Conduct and the Rules for Judicial-Conduct and Judicial-Disability Proceedings. Professor Geyh speaks of the Judicial Conference's "marginalizing the Code as an interpretive tool in disciplinary proceedings." As I said in my testimony at the hearing, I do not think that is an accurate characterization.

It is true that the Commentary to the Rules describes the Canons as "informative," not dispositive.[28] And chief judges and circuit councils have frequently characterized the Code as "aspirational."[29] Nevertheless, if you look at

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[28] See Rules Draft, supra note 2, at 15.

[29] See, e.g., In re Charges of Judicial Misconduct, 769 F.3d 762, 766 (D.C. Cir. Judicial Council 2014) (quoting Rules Commentary); In re Complaint of Judicial Misconduct, 575 F.3d 279, 282 (3rd Cir. Judicial Council 2009) (same); In re Charge of Judicial Misconduct, 62 F.3d 320, 322 (9th Cir. Judicial Council 1995) (Wallace, C.J.).

what chief judges and circuit councils actually *do*, they regularly and routinely look at the Code to help them determine whether a judge's actions constitute misconduct. And when they find minor or "inadvertent" violations, they do not impose sanctions, often because the subject judge "has taken appropriate voluntary corrective action."[30]

In short, the chief judges and circuit councils are basically doing just about what Professor Geyh thinks they ought to be doing. And I would leave the Commentary as it is, or even strengthen it, as Russell Wheeler and I have both suggested.[31]

*A. Coverage*

There are three issues of coverage that warrant attention. Two of them have come up in recent high-profile complaints.

First, pre-appointment conduct.[32] As the Tenth Circuit Judicial Council noted last year, all of the chief judges and judicial councils to consider the question have concluded that the Act does not cover pre-appointment conduct. I think the time has come to codify that proposition in the Rules.

Second, the effect of resignation or retirement by the subject judge.[33] Professor Geyh and I are in agreement on this point. As he puts it, proceedings under the Act should be terminated when a subject judge ceases to be a "covered judge" subject to the Act. I also agree with Russell Wheeler's suggestion in his statement that Rules provide explicitly that circuit councils may disclose to prosecuting and other authorities alleged misconduct by former judges that that may constitute criminal or civil violations.

Finally, there is the question of conduct outside the performance of official duties.[34] As noted in my statement, there is a very good discussion of the subject in an opinion by Chief Judge Dennis Jacobs of the Second Circuit.[35] The Committee might consider borrowing from that for the Commentary.

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[30] See Rules Draft, supra note 2, at 27 (Rule 11(d)(2) (unchanged from current Rules).

[31] See October Statement pp. 11-12.

[32] See October Statement pp. 25-26.

[33] See October Statement pp. 38-39.

[34] See October Statement pp. 22-25.

[35] In re Charge of Judicial Misconduct, No. 06-9056-jm at 12 (2nd Cir. Judicial Council Dec. 14, 2007) (Jacobs, C.J.), http://www.ca2.uscourts.gov/Docs/CE/06-9056-jm.pdf.

*B. Transparency and Disclosure*

When the legislation that became the 1980 Act was under consideration, very little thought was given to questions of what the public should be told about misconduct proceedings, and when. Today, however, when all institutions, including courts, must struggle to maintain public trust, the questions are central. The amendments in the September Draft address three elements that are of particular importance:

- interim disclosures,
- identification of the judge who is the subject of an order, and
- the manner in which orders are made public.

I have addressed these subjects in detail in my statement; here I will summarize two points that I think are central.

*1. Enhanced transparency when allegations become public*

First, I call your attention to an idea that is relevant to all three elements, which is this: more disclosure, and greater transparency, are required when allegations about possible misconduct, or about the underlying events, have become the subject of public reports. In that circumstance, transparency not only promotes public confidence in the judiciary; it also helps the judge, who is in the glare of publicity but has limited means of responding to public criticism.

For these purposes, a report is "public" if it is published or posted in a print or electronic source in a way that could reasonably be expected to influence public perceptions of the regulation of ethics by the federal judiciary. Articles in mainstream news media and postings on widely read websites would be "public reports" in this sense. Allegations on a website operated by an individual pursuing a vendetta against a particular judge generally would not be.

If allegations about possible misconduct become the subject of public reports, the chief judge should be required to identify a complaint if one has not been filed, and interim orders should generally be made public. In addition, final dispositions should be posted separately on circuit websites.

*2. Greater accessibility for precedential and other non-routine orders*

This last suggestion implicates my second general point. It is certainly a good thing that all final orders in misconduct cases are now posted on circuit websites. Comprehensive posting has one drawback, however: orders of general public interest (for example, those that interpret the Rules or the Code of

Conduct or resolve a high-visibility complaint) are buried among the routine ones. That is a serious impediment to transparency.

At a minimum, the circuits should be required to post orders of general public interest on a separate page or under a separate heading. Beyond that, there should be an indexed compendium of non-routine misconduct decisions, and it should be available on the Federal Judiciary website.[36] This last step would implement, at long last, the recommendation of Kastenmeier Committee, 25 years ago, that judiciary develop "a body of interpretative precedents" that would guide judges in administering the Act and also enhance "judicial and public education about judicial discipline and judicial ethics."[37]

*C. Procedural Regularity*

Misconduct proceedings are in many ways sui generis, but they are government proceedings with high stakes, so there can be little doubt that they should be conducted with procedural regularity. By this I mean promoting a process that *is* fair and also *appears* to be fair. In my statement, I address three aspects of the Rules that fall within this rubric.

First, Rule 16, dealing with the rights of the complainant in a special committee investigation. The September Draft deletes language saying that in deciding what rights the complainant gets, "the special committee may take into account the degree of the complainant's cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge." There is no explanation for the deletion, so I do not know what the Committee's thinking was. But confidentiality is obviously important, and I think the current provision embodies a reasonable measure for preserving it. I therefore encourage the Committee to reconsider the amendment.[38]

Second, Rule 25(a) on disqualification of judges in misconduct proceedings. I have discussed this provision in Part I in the context of workplace misconduct, but the suggestions made there are equally applicable to misconduct proceedings generally.

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[36] For discussion of how the decisions might be indexed, see October Statement p. 36.

[37] Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265, 344 (1993).

[38] See October Statement pp. 39-40.

Third, Rule 26 on transferring proceedings to another circuit. I have already mentioned the idea of codifying the practice, which chief judges have consistently followed in recent years, of requesting a transfer when serious allegations have been raised about a judge of the court of appeals. In addition, I would drop the reference to "exceptional circumstances."

## IV. The Public and the Judiciary

In the Introduction to the 1986 Illustrative Rules, Judge Browning and his colleagues emphasized that "the basic statutory mechanism is a *citizen* complaint procedure," and that the Rules should serve the goal of providing "a reasonable response to *citizens* who invoke it."[39] The Commentary to Canon 1 of the Code of Conduct for United States Judges notes at the outset that "[d]eference to the judgments and rulings of courts depends on *public* confidence in the integrity and independence of judges."

Although the Rules and the Code will be consulted most frequently by judges, their audience also includes members of the press and the public who are interested in judicial ethics generally or have concerns about the integrity or impartiality of a particular judge. In my statement, I offered some suggestions for making the Rules more user-friendly through reorganization and restyling.[40] The Code is less problematic from the perspective of style, but some reorganization might be helpful there also. For example, some extrajudicial activities are treated in commentary to Canon 2; others, in commentary to Canon 4. The Committee on Codes of Conduct might consider reorganizing the Code so that all provisions related to "the duties of office" are in one section and all provisions related to extrajudicial activities are in another section.

This leads to a more general point. In his statement, Russell Wheeler noted some examples of misunderstanding by commentators of the relationship between the Code and the Rules. Other misunderstandings abound, such as the confusion in the LCWA hearing statement, discussed earlier, about "identified" complaints.[41] The regulation of ethics in the federal judiciary is a complex system, and it will never be possible to prevent all misunderstandings. But reorganizing the Rules and the Code could help by making it easier to find provisions

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[39] J. Browning, C. Seitz & C. Clark, *Illustrative Rules Governing Complaints of Judicial Misconduct and Disability* at ix (Federal Judicial Center 1986).

[40] October Statement pp. 8-10.

[41] See supra note 18 and accompanying text.

applicable to particular situations and by providing separate treatment of each distinct topic, particularly those that look similar but are different.