TYPE 1 DIABETES
DEFENSE FOUNDATION

P.O. Box 10841
Eugene, Oregon 97440
p/f: 541.257.8878
info@t1df.org
www.t1df.org

October 30, 2018

The Honorable Anthony J. Scirica, Chair
Committee on Judicial Conduct and Disability and
The Honorable Ralph R. Erickson, Chair
Committee on Codes of Conduct
Judicial Conference of the United States
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Proposal to Change the Code of Conduct for U.S. Judges (Code) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings (JC&D Rules)
Oral Comment regarding Proposed Changes to JC&D Rules §3(c)(1)
from Charles Fournier, on behalf of the Type 1 Diabetes Defense Foundation

Judge Erickson, Judge Scirica, Members of the Committees,

My name is Charles Fournier, and I comment today on behalf of the Type 1 Diabetes Defense Foundation, an Oregon-based advocacy nonprofit. My comments narrowly concern procedural standing requirements and, more specifically, the definition of person in Rule 3(c)(1) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings. I'll refer to these rules as the Conduct Rules or JCD Rules. I am specifically requesting that the Committees clarify the definition of person as employed in the draft of the proposed rule.

This year the Type 1 Diabetes Defense Foundation became an accidental unrepresented consolidated plaintiff in three putative class actions pending in the District Court of New Jersey. These unusual circumstances have placed us in an adversarial relationship in regard to plaintiffs' counsel long familiar to that District Court, as well as in the unexpected status of unrepresented

corporate plaintiff litigating for its right to appear *pro se*. Should we believe that an emerging pattern of judicial harassment could merit the filing of a formal complaint under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64, we would thus confront not only the existing bias of the Bench against *pro se* complainants (many of whom are unsophisticated defendants in criminal proceedings as well as serial complainants), but also some residual ambiguity in the proposed Rule language, interpreted through the prism of local rules and legal precedents, regarding whether an unrepresented corporate plaintiff would be allowed to file such a complaint personally.

From our unusual, and possibly unique, perspective as an unrepresented nonprofit corporation currently awaiting a decision on a pending request to appear *pro se*, we would like to comment narrowly regarding those portions of the proposed Rule that refer to "persons." We believe that the Judicial Conference's reluctance to define "person" expressly and to address flawed procedural standing requirements in these rules and, more broadly, local rules of circuit courts, enables and perpetuates ongoing prudential discrimination against unrepresented (and underfunded) nonprofit rights advocacies that represent disfavored causes and oppressed minorities.

In light of U.S. Courts' ongoing refusal, despite evolving jurisprudence regarding corporations over the past 20 years, to apply the letter of the law governing procedural standing, it seems necessary that the Committees overseeing the current rulemaking process take all possible steps to adopt unified definitions of "person" (and related standing requirements) and to expressly recognize, in the Commentary section of the Rules for Judicial-Conduct and Judicial-Disability Proceedings, the right of an artificial entity to appear personally in the complaint process currently under review but also in all judicial proceedings that could have given rise to a complaint.

Judicial consideration of the extent and nature of the constitutional rights enjoyed by corporations has been sporadic and at times confusing. It is, however, well established that the United States Supreme Court has extended certain rights to corporations, including the right of access to the federal courts, in 1809, in the seminal case all law students study during their first semester of law school —*Bank of the United States v. Deveaux*. The Court also extended the protection of the due process and equal protection clauses of the Fourteenth Amendment to corporations in a series of railway cases between 1886 (*Santa Clara County v. Southern Pacific Railroad Co*.—equal protection) and 1893 (*Noble v. Union River Logging Railroad Co*.—due process protections). "That a corporation is a person, within the meaning of the Fourteenth Amendment, [was] no longer open to discussion" in 1910 (*S. Ry. Co. v. Greene*, 216 U.S. 400, 412 (1910)); the personhood of corporations became a statutory right with the enactment of the Dictionary Act of 1947. The Fourteenth Amendment rights of corporations have been reaffirmed in a series of opinions since, such that the Court in 1985 called the principle that corporations have Equal Protection Clause rights "well established" in *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985). But when you are an underfunded and unrepresented impact advocacy nonprofit, these rights only exist on paper—as you do not have access to judicial proceedings under prudential standing requirements set forth in all local rules of U.S. district courts.

Professor Adam Steinman and Professor Fred Smith, formerly a clerk with Justice Sotomayor, have reminded us that:

> *Access to courts is crucial for making substantive rights that exist on paper real and enforceable in the real world. And access to federal courts requires having "standing" to assert those rights. For all practical purposes, standing is the key to the courthouse door.*

In September 2018, 209 years after *Bank of the United States v. Deveaux*, the Judicial Conference committees on Codes of Conduct and Judicial Conduct and Disability released for

public comment proposed changes to the Code of Conduct for U.S. Judges and the Rules for Judicial-Conduct and Judicial-Disability Proceedings. These proposed changes reportedly respond to recommendations provided in the June 1, 2018 Report of the Federal Judiciary Workplace Conduct Working Group. The Working Group acknowledged in passim that they looked beyond sexual harassment and considered inclusivity and "power disparities," but in practice they limited these concepts to the workplace context, not the procedural standing requirements that underpin the Conduct Rules. "Due process" is mentioned only once, in an attachment that addresses whistleblower protections. The term "Person" is mentioned in 30 of the 45 pages of this report, but primarily to refer to 'in-person' interviews rather than to address procedural standing requirements.

The Report notes on page 28 that the Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 351-364) states, "**Any person** alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct."

Any person?

The standing requirements of the Judicial Conduct and Disability Act of 1980 were codified as JCD Rule 3(c)(1). The Act stated "any person" and only "any person" without qualification. But standing and thus appearance under the current version of Conduct Rule 3(c)(1) is much more restrictive than the Act: it is limited to a natural person acting *pro se* and a small subset of corporations represented by a natural person.

The first clarifying amendments to the Conduct Rules recommended by the Working Group concerned this rule. But the Working Group there was exclusively concerned about a possible

misunderstanding regarding substantive standing, not about the definition of 'person' and related procedural standing requirements. The Working Group only required that a clarification be added to explain that "traditional standing requirements" do not apply to judicial conduct and disability proceedings. The Working Group's purpose was solely to help complainants understand that they need not themselves be the subject of the alleged misconduct.

By "traditional standing requirements," the Working Group seems exclusively to mean "substantive standing requirements," i.e. the complainant's injury being of a certain character relative to the alleged wrong, forum, process and remedy. A complaint process addressing any form of harassment can only be deemed to be effective if, at a bare minimum, all potentially injured parties have standing. Logically, the Working Group should thus have turned its focus to the prudential standing requirements artificially embedded in the Conduct Rule but not the Act. They did not.

The Working Group did not even gloss over the prudential impairment of standing included in Conduct Rule 3(c)(1) when compared to the Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 351-364). The Report of the Working Group merely quoted from existing JCD Rule 3(c)(1) verbatim, without requesting that it be changed or amended in any manner. The Working Group's apparent imperviousness to the discriminatory intent of the procedural standing requirement of Rule 3(c)(1) as currently drafted is indicative of a deep-seated prejudice, so engrained in the fabric of our judicial and legal establishment as to blind a distinguished group of legal scholars and learned professionals.

The Act does not define person. It only defines "judge" and "complainant." In the absence of an intra-statute definition or other unambiguous contextual information, the term "Person" has the general meaning stipulated by the Dictionary Act of 1947, codified at 1 U.S.C. § 1 in 2012. The added prudential restraint on standing embedded in the current JCD Rule 3(c)(1) is thus a

typical case of "procedural rights" injury—one in which a federal statute creates a right to have the government follow a particular procedure, but fails to follow that procedure.

The Working Group missed this critical prudential standing issue. The Committees, however, did not. Sometime prior to issuing the proposed change, the Committees apparently amended the proposed change to JCD Rule 3(c)(1) to address this procedural injury. Unfortunately, the Committees have done so without any written explanation, commentary or even explicit acknowledgment of the rule change.

This silence is not inconsequential.

Throughout the Circuits, local rules of U.S. District Courts have institutionalized prudential discrimination against a specific type of person — a weak unrepresented impact advocacy nonprofit that defends the rights of disfavored causes and minorities. When you are a nonprofit corporation, standing is subject to pay-to-play demands that could in other contexts be deemed, when stripped of the disguise of legalese, either unsavory or outright unlawful. This injustice may be best illustrated by the dystopian situation that the Type 1 Diabetes Defense Foundation currently faces in the District Court of New Jersey.

After losing counsel midway through a complex action (when the counsel through whom we initiated our action chose to pursue a competing fact pattern), T1DF de facto ceased to exist in the eyes of the Court, chambers and counsel. We were not allowed ECF registration. We received no service by mail. Patently flawed allegations by counsel that we had withdrawn as a plaintiff were accepted by the Court at face value. When we reached out to the Court to seek clarification, our papers were intercepted by the Court Clerk rather than filed and entered in the case docket. Based on allegations of Rule 26 inadvertent discovery disclosure—advanced by our former counsel when discovery had not begun—our communications with chambers were embargoed and the docket sealed. Our attempts to complain to the Court regarding an obviously

unlawful seal of the docket itself were then met with allegations against T1DF officers, by their former counsel, of Unauthorized Practice of Law (UPL)— a criminal statute in NJ. For a period of several months, T1DF's officers faced allegations of UPL for the very act of attempting to communicate with Chambers, while unrepresented by counsel, regarding our inability to find replacement counsel.

In the absence of explicit clarification from the Committees regarding whether a corporate person unrepresented by legal counsel can act as a complainant, the officers of T1DF have reason to fear that any attempt to file, similarly unrepresented, a complaint regarding "conduct prejudicial to the effective and expeditious administration of the business of the courts" would similarly face prudential discrimination. The procedural injury caused by the prudential discrimination currently embedded in Conduct Rule 3(c)(1) and local rules of the U.S. District Courts is thus not inconsequential. If these Committees are to address this injury, they must do so expressly and must communicate, to the U.S. Courts, the basis for their amendment of the Conduct Rule in no uncertain terms. Procedural and sexual harassment have one point in common: the first and most important line of defense is normative.

Until the U.S. Courts convey in an unambiguous manner that procedural harassment and prudential discrimination will not be tolerated, the Courts will de facto be condoning the resulting injury caused to impact advocacy nonprofits that don't have the funds for pay-to-play. The Judicial Conference must therefore use this opportunity to remind the Councils that Courts are "obligated to be open and accessible to anyone who . . . is drawn into federal litigation, including litigants, lawyers, jurors, and witnesses" and unrepresented rights advocacy nonprofits.

In conclusion,

Over two centuries ago, the United States Supreme Court recognized that, under the protection of the due process clause of the fourteenth amendment, "persons" for the purpose of

the rules of procedures includes artificial entities such as nonprofit corporations. The proposed revision to the definition of "complaints," and thus "persons," in JCD Rule 3(c)(1) finally brings the Conduct Rules into compliance with current jurisprudence; the proposed amendment does not, however, go far enough.

The suggested correction of JCD Rule 3(c)(1) is a step in the right direction. The prior wording reflected the long-held belief that Courts had the prudential authority to discriminate between corporations. The proposed revision does not, however, expressly correct the definition of person; it does so implicitly. Without explicit definition and further clarification in the Commentary section of the Conduct Rules, the proposed language would allow long-held discriminatory biases to persist unaddressed. The Judicial Conference should instead expressly state that discrimination between artificial entities for the purpose of standing and other procedural matters addressed in the courts' Local Rules is now barred as the result of rulings in *Janus* and *Hobby Lobby.*

More specifically:

1. The Conduct Rules should expressly clarify that, for the purpose of the rules, the words "person" (and thus "complainant") have the meaning given them by the Dictionary Act 1 U.S.C. § 1, i.e. that they include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as natural persons.

2. The Commentary on that section should also explain the reason for the revision and summarize the Court's evolving jurisprudence on the rights of artificial entities that led to that revision; and

3. Finally, the Judicial Conference should appoint a Working Group for the purpose of coordinating the Judicial Councils' rulemaking (and harmonizing local rules) on the

definition of "person" and related procedural matters, e.g. *pro se* appearance, ECF registration, unbundled legal representation, legal assistance (without representation). The general rules of practice and procedure issued pursuant to 28 U.S.C. § 2072(a) and the courts' rules issued pursuant to 28 U.S.C. § 2071(a) should also be brought up to date with current jurisprudence. Adding a definition of "person" and, in the Commentary on JCD Rule 3(c)(1), adding a detailed explanation of the reasons and basis for the proposed change would encourage the Judicial Councils to act.

Thank you.