Hearing on Proposed Amendments to the Rules for Judicial-Conduct and Judicial-Disability Proceedings and the Code of Judicial Conduct

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Statement of Charles G. Geyh

My name is Charles G. Geyh. I hold the John F. Kimberling Chair in Law at the Indiana University Maurer School of Law. I am the author of JUDICIAL CONDUCT AND ETHICS (5th ed. Lexis Law Publishing 2013) (with Alfini, Lubet & Shaman); LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION (With Sisk, Henderson, Cruse, Fortney, Hamilton, Johnson, Pepper & Weresh) (West Academic Publishing, 1st Ed., 2018); JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW (Federal Judicial Center 2d ed. 2011), and over seventy other publications on judicial ethics, impartiality, independence, accountability, administration, and selection. I have served as an expert witness in the Senate impeachment trial of Federal District Judge G. Thomas Porteous; director of and consultant to the ABA Judicial Disqualification Project; co-reporter to the ABA Commission to Evaluate the Model Code of Judicial Conduct; Assistant special counsel to the Pennsylvania House of Representatives on the impeachment and removal of Pennsylvania Supreme Court Justice Rolf Larsen; Consultant to the National Commission on Judicial Discipline & Removal; and Counsel to the House Judiciary Committee.

I am pleased to testify this morning on proposed amendments to the Rules for Judicial-Conduct and Judicial-Disability Proceedings, and the Code of Conduct for

United States Judges. I applaud the Committee for its work, and believe that the draft makes important improvements—particularly in its proposed changes to better regulate harassment and bias. I have devoted my testimony to changes that the Committee may wish to consider, but that focus should not detract from my overall assessment that this draft makes innumerable important and salutary changes.

Proposed Amendments to Rules for Judicial-Conduct and Judicial-Disability Proceedings

Draft Rule 1(b) (p.3):

The Committee should consider taking this opportunity to clarify the rule for the purpose of addressing jurisdictional issues presented by the recent elevation of Justice Kavanaugh. Who is a "covered judge" subject to the Act is clear enough. When a judge must be a "covered judge" to be subject to discipline under the Act is not. A uniform rule would avoid inconsistent interpretations of judicial council authority under the Act, and would spare chief judges and judicial councils unwarranted criticism for declining to process complaints that are outside their jurisdictional authority or are otherwise properly dismissed.

The rule might logically make two points that revolve round the general proposition that proceedings under the Act should be terminated when a subject judge ceases to be a "covered judge" subject to the Act. First, when a covered judge

becomes a judge who is no longer covered—when, for example, the judge is elevated to the Supreme Court—the judicial councils lack jurisdiction to proceed. To conclude otherwise would enable circuit judicial councils to discipline judges who are explicitly beyond the reach of the Act.. Second, when a covered judge resigns (or retires) after a complaint is filed, pending complaints are properly dismissed because resignation is an "appropriate corrective action" (particularly when the resignation was negotiated in response to the complaint) or an "intervening event" that makes further action on the complaint "no longer necessary."

Article 2, Rule 4:

The Role of the Code of Conduct

The Judicial Conference has long been reluctant to tether judicial council interpretations of misconduct cognizable under the Act to violations of the Code of Judicial Conduct. Such reluctance has never made much sense to me. Commentary accompanying Canon 1 of the Code declares that, "Violation of this Code diminishes public confidence in the judiciary and injures our system of government under law." I am hard-pressed to identify many circumstances in which conduct that diminishes public confidence in the courts and injures our system of government, would *not* constitute conduct "prejudicial to the effective and expeditious administration of the business of the courts" cognizable under the Act. Indeed, I have yet to encounter any misconduct deemed cognizable under the Act that did not violate the Code of Conduct.

The Committee's position on the Code in relation to the Act has softened over the years. I commend the committee for its proposed deletion of unfortunate commentary to rule 4, which questioned use of the Code as a basis for discipline under the Act because the canons were "highly general," when those canons are manifestly less general and more specific than the terse turn of phrase the Act employs to describe cognizable misconduct.

That said, the Committee continues the Judicial Conference's time honored tradition of marginalizing the Code as an interpretive tool in disciplinary proceedings, describing its role with a comment that begins "While the Code's Canons are informative…" In my view, the coherence and credibility of the disciplinary process would be aided by an interpretive default, recognizing that non-trivial violations of the Code of Conduct, are cognizable under the Act. As a "default," it can and should be disregarded as circumstances warrant. For example, failure to abide by mandatory reporting requirements to which the draft alludes on p. 15, lines 10-16, may be a technical violation of Canon 2A, which admonishes judges to "comply with the law," but when such violations are "trivial" or "inadvertent," they are fairly characterized as non-cognizable. Moreover, many non-trivial but lesser Code violations, which are incompatible with the effective administration of court business, are well-suited for remediation via informal corrective action contemplated by Section 252(b) of the Act. Hence, I have no reason to anticipate that the default I propose would result in an increase in formal sanctions imposed under the Act.

The default would, however, serve two important purposes: First, it would link—in both the public and regulatory mind—discipline under the Act to unethical conduct under the Code, which has been time-tested in state systems across the country to salutary effect. That linkage assure all concerned that conduct the Judicial Conference deems unethical in its Code of Conduct will not be deemed conduct unworthy of judicial council attention under the Act, without good reason. Second, it would provide greater clarity to public and subject judges alike by offering a more comprehensive guide to conduct cognizable under the Act, which is preferable to a short, non-exhaustive list of examples in Rule 4(a)(1) accompanied by commentary declaring that the scope of conduct problematic enough to warrant discipline is left to the vagaries of judicial council discretion.

Rule 4(a) pp.12-14

A technical point: Rule 4(a) may create unnecessary confusion by stating that cognizable misconduct "includes but is not limited to" seven discrete categories of misconduct, and then omitting "but is not limited to" to the subsets of misconduct that each of the seven categories "includes"—which raises the question of whether the listed sub-forms of misconduct within each category are limited to those enumerated. It seems clear that this is NOT what the Committee intended (for example, the commentary on Rule 4(a)(3) notes that the listed grounds for discrimination are "not intended to be exhaustive"). The problem can be avoided by substituting "includes but is not limited to" for "includes" in subparts 1-7 of Rule 4(a), when intended and appropriate.

Rules Governing Harassment

I am in enthusiastic support of new Rules 4(a)2-5. I likewise support new Rule 4(a)(6) and accompanying commentary concerning confidentiality, which addresses issues that arose in the course of the Kozinski matter. In his statement, Professor Hellman underscores the importance of transparency, and makes suggestions that I support, for reasons of special importance here. If the Committee is serious about establishing rules to promote a harassment-free environment, the success of the effort depends on preserving the perception and reality that the rules exist for the protection of the mistreated, and not for the purpose of providing the judiciary with cover.

With respect to Rule 4(a)(2), governing harassment, I would encourage the Committee to consider adding commentary that elaborates on the ways in which sexual harassment can be manifested. As co-reporter to the ABA Commission that drafted the 2007 Model Code of Judicial Conduct, testimony taken from around the country showed that sexual harassment remains a persistent problem across state systems, and is often attributable to oblivious or awkward judges who lack the sensitivity to "get it," who purport to be surprised that their conduct constituted harassment, and who would benefit from more explicit guidance. The ABA Commission on Women in the Profession has published *Zero-Tolerance: Best Practices for Combating Sex-Based Harassment in the Legal Profession,* notes that "key elements of an effective anti-harassment policy" include "a clearly articulated definition of harassment, with examples of inappropriate behavior." The Commission offers the following examples, that the Committee should consider

including in its commentary: "A variety of abusive behaviors that are directed at individuals on the basis of sex may constitute sex-based harassment. Examples include unwanted touching, groping, or sexual advances; quid pro quo requests for sexual favors; or demeaning, condescending, or sexualized comments or jokes."[1]

Rule 4(a)(3) and its commentary do not define or qualify "discrimination." The Committee may wish to consider modifying "discrimination" with "invidious," to avoid confusion when, for example, discrimination is in the nature of an accommodation for pregnancy or disability, or a reasonable dress code (not all are) that draws distinctions between male and female attire.

In regard to Rule 4(a)(6), governing the responsibility of judges who receive information about judicial misconduct, and the extent to which they may and may not keep such reports confidential, I offer a recommendation that may not be within the jurisdiction of this Committee to address, but which strikes me as important. The ABA Commission on Women in the Profession, which, as noted earlier has offered several "key elements" of an effective anti-harassment policy, includes an element implicated but not addressed by Rule 4(a)(6): that there should be "multiple avenues for filing a complaint, some of which are outside of the reporting line of the complaining employee." The Act dictates one avenue for filing a formal complaint. But sexual harassment falls on a continuum, and for clerks and staff who work in a small office with the subject judge, filing a formal complaint may not be a route they wish to pursue for any number of reasons: they may not regard the

[1] ABA COMMISSION ON WOMEN IN THE PROFESSION, ZERO-TOLERANCE: BEST PRACTICES FOR COMBATING SEX-BASED HARASSMENT IN THE LEGAL PROFESSION 16 (2018).

conduct as egregious enough to warrant formal action; they may wish to preserve a constructive working relationship with the judge; or they may not wish to embarrass or alienate a judge upon whom they depend for job references. In such a context, it would be helpful for each circuit to make a designated employee available to consult with clerks and staff on an informal and confidential basis to the end of facilitating amicable and informal resolution of harassment-related concerns. Clerks and staff would, of course, remain free to lodge formal complaints, but for those who are loath to do so, or who are intimidated by the prospect approaching unfamiliar Article III judges about sexual misconduct concerning the judge's colleague, a less formal, alternative arrangement may be desirable.

Proposed Amendments to the Code of Conduct for United States Judges

Canon 3 has been amended to provide that judges should not "engage in conduct that is harassing, abusive, prejudiced, or biased." This is a worthy and important addition, because it reaches the conduct of judges in relation to parties, lawyers, witnesses and jurors, who fall outside the scope of employees protected by sexual harassment policies. My concern is that this new addition to the canon is unadorned by commentary, as a consequence of which, the importance of this new language may be lost or obscured. Model Code of Judicial Conduct Rule 2.3 covers comparable terrain, but includes the following comments that the Committee should consider including:

> [1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute

> [2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

As a separate, and more general matter, the Judicial Conference promulgated its Code in 1973, which closely tracked the 1972 Model Code of Judicial Conduct. In the 46 years since, amendments to the Code have been limited to occasional tweaks. In the meantime, the ABA has made substantial revisions to its Model Code in 1990 and again in 2007, that the vast majority of state judicial systems have reviewed and adopted, with exceptions and variations tailored to meet the needs of their respective judiciaries. I would urge the Committee and the Judicial Conference to undertake a more comprehensive review of its Code, to the end of reaffirming its commitment to an ethical judiciary, and modernizing its code for the 21st Century.