UNIVERSITY of HOUSTON

Law Center
4604 Calhoun Road · Houston, TX 77204-6060
Phone: 517.802.8188 · rknake@uh.edu · www.law.uh.edu

Renee Knake
Professor of Law &
Doherty Chair in Legal Ethics

November 13, 2018

The Honorable Ralph R. Erickson
Chair of the Committee on Codes of Conduct

The Honorable Anthony J. Scirica
Chair of the Committee on Judicial Conduct and Disability

Dear Chairs and Committee Members,

I write with a brief supplement to my testimony offered during the public hearing on October 30, 2018. As with my prior testimony, I offer this in my personal capacity and not on behalf of my employer or other organizations with which I am affiliated.

I am grateful for the opportunity to testify about much-needed reforms to address sexual harassment and other workplace misconduct in the federal judiciary. I was impressed by the thoughtfulness and deliberation evidenced by your Committees during the public hearing. I do believe that workplace sexual misconduct is more prevalent in the judiciary and legal profession than we may realize. Indeed, as just one example, after my testimony before your Committees, an employee of the Administrative Office of the U.S. Courts approached me to share her own story of workplace sexual assault which she reported but no investigation followed. My hope is that the reforms you implement will not only address reporting concerns like these but also create a culture where sexual misconduct does not occur at all.

Thank you again for the opportunity to provide input. Please let me know if I can be of additional assistance.

Best,

Renee N. Knake
Professor of Law &
Doherty Chair in Legal Ethics

Testimony of

Renee Newman Knake
Doherty Chair in Legal Ethics and
Professor of Law
University of Houston Law Center

Before the

Committee on Codes of Conduct (The Honorable Ralph R. Erickson, Chair)
and
Committee on Judicial Conduct and Disability (The Honorable Anthony J. Scirica, Chair)

Comments on the Proposed Changes to the Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules

October 30, 2018

I would like to thank the Committee on Codes of Conduct and the Committee on Judicial Conduct and Disability for the opportunity to comment on the proposed changes to the federal Code of Conduct for U.S. Judges and the Rules for Judicial Conduct and Disability Proceedings regarding harassment and other inappropriate workplace behavior.

Background

My name is Renee Newman Knake. I hold the Doherty Chair in Legal Ethics and I am a Professor of Law at the University of Houston Law Center. In the course of my research, publication, teaching and public service, I have for more than a decade studied judicial ethics and its intersection with the first amendment.

I am an author of two casebooks published by leading legal academic presses which cover the ethical obligations of the judiciary, (1) *Professional Responsibility: A Contemporary Approach* (West Academic 3rd Edition 2017) and (2) *Legal Ethics for the Real World: Building Skills Through Case Study* (Foundation Press 2018), as well as a forthcoming casebook, *Gender, Power, Law and Leadership* (West Academic) and a forthcoming book *Shortlisted: Women, Diversity & the Supreme Court* (NYU Press), which profiles nine women shortlisted for the Court before Sandra Day O'Connor became the first female justice. I have written numerous scholarly articles on lawyer and judicial ethics, the first amendment, and gender inequality in the legal profession. I have testified on behalf of judges facing discipline before the Texas Supreme Court, including a judge who challenged certain rules of the Texas Code of Judicial Conduct on first amendment grounds.

Currently, I teach the courses *Professional Responsibility* and *Constitutional Law* as well as a seminar on *Gender, Power, Law and Leadership*. I previously taught a seminar on the *First Amendment and Lawyer/Judicial Speech*. I served as a reporter for the American Bar Association's Commission on the Future of Legal Services, and I am an elected member of the American Law Institute. I am a graduate of the University of Chicago Law School.

I share all of this background because it directly informs the testimony I will provide today.

Support for the Proposed Changes to the Code of Conduct for U.S. Judges and the Rules for Judicial Conduct and Disability Proceedings

I am here today in support of the proposed changes to the Code of Conduct for U.S. Judges and the Rules for Judicial Conduct and Disability Proceedings. I am also here to offer recommendations that, if adopted, would greatly strengthen these proposals and their purposes.

I commend the Committees for their work. Your proposed reforms are a necessary first step. But, I believe you can and should go further. All professions and industries have experienced their own #MeToo reckoning regarding the mistreatment of women. No one should expect that the judiciary is immune. To give just one example that occurs to this day, when I contemplated applying for a judicial clerkship as a second year law student in 1998, I was warned to avoid a

certain judge on the Ninth Circuit because he was known to mistreat female clerks. I wish the reforms we are considering today had been in place 20 years ago. No one should have to endure sexual harassment as a rite of passage in the legal profession. The Committees' careful and responsive work has the potential to spare such indignities, purge the federal judiciary of sexual misconduct, and thereby strengthen the rule of law.

Concerns and Recommendations

Judicial codes of conduct typically focus on fairness, impartiality and public confidence in the integrity of the judiciary. These are important, but the goals should be expanded. A workplace free from harassment will enhance the public's confidence in the integrity of the judiciary, serve as a model for the legal and other professions, and expand the pool of talented lawyers willing to devote their early years promoting excellent work product in the judicial branch, which is so vital to our rights and liberties. You are obviously well-familiar with the proposed changes, so I won't take the time to repeat them here. Instead, I want to focus on my concerns and provide recommendations.

If the ultimate objective here is to curb sexual harassment and misconduct, your proposed changes may fall short. Worse, they may prove unenforceable. I am especially concerned about judicial clerks who serve for one or two years before the clerkship becomes a stepping stone to higher-level clerkships, prestigious law practice, judicial office, or tenured professorships like the one that I hold. Unlike many places of employment, a judge's chambers is highly intimate. Judicial clerks are few in number and rely heavily upon the recommendation from their judge for the next step in their career path. In many ways, the relationship is more similar to that of a professor and a student than a traditional employment relationship. The pressure to endure harassment silently is fierce; indeed, a decision to report can ruin future prospects in the profession, even with the protections against retaliation and assurances of confidentiality contained in your proposed amendments to the Code and Rules. An unfavorable reference letter, or even the judge's refusal to write one, can compromise or destroy career aspirations. The proposed reporting process you are contemplating assumes that harassment inevitably will occur and places the burden upon the victim to address it. This process, alone, is unlikely to prevent the conduct your reforms aspire to remedy, especially in instances where harassment takes a subtle or insidious form.

We must appreciate why a victim may feel compelled to remain silent, and consider options that reduce adverse consequences to sounding an alarm. We should put in place enforceable rules that will promote a culture free of sexual harassment *in addition* to a process for uncovering prior bad conduct.

Here are my recommendations.

First, in addition to prohibiting "unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault" as contemplated by the new Rule 4(a)(2), the Committee should consider a separate provision banning even consensual romantic or sexual relationships between

judges and their clerks and other employees. A prohibition like this exists in many academic institutions today. The University of Houston, where I teach, prohibits "any consensual dating, intimate, romantic, and/or sexual relationship between an employee and an individual that the employee has responsibility to teach, instruct, supervise, advise, counsel, oversee, grade, coach, train, treat or evaluate in any way." This prohibition, intended to avoid "conflicts of interest, favoritism, and exploitation," also promotes a workplace culture free from sexual overtures. Such overtures may be viewed as consensual by the more powerful person and at the same time unwanted by the target who acquiesces only because of the power differential or because she soon will be moving on to another job. The prohibition need not remove all human autonomy. For example, Houston's policy contains an exception to the prohibition if granted by the Assistant Vice Chancellor/Vice President for Equal Opportunity. A provision like this for the federal judiciary would help curtail sexual overtures that may feel consensual on the part of the instigator but harassing on the part of the target. It also removes the potential for a "he said – she said" dynamic where a victim bears the burden of showing that sexual conduct is unwelcome.

Second, the Rules should mandate an annual, anonymous survey regarding sexual harassment and other misconduct. The survey should be administered by an independent third party, and sent to all former clerks, even if they previously declined to complete it. The results should be publicly available. A transparent survey of this nature would indicate that the judiciary values the reporting of misconduct and create an environment more favorable to reporting. It would also provide the judiciary information about the pervasiveness of harassment and other misconduct as well as the effectiveness of the reforms proposed here.

Third, we must also take care that the proposals, when adopted, can be enforced. The American Bar Association amended its Model Rule 8.4 in 2016 to include a provision banning "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." While Vermont quickly adopted a similar rule, several other states affirmatively rejected it. Indeed, the attorney general of Texas issued an opinion challenging its validity on first amendment grounds. As far as I am aware, no court has yet to rule upon such a challenge. I raise this issue not to say that similar provisions should not be included among your reforms, but as a caution. Your proposed reforms to the Code address sexual harassment but also "civility" (proposed revision to Canon 3.B.4) and "other inappropriate workplace behavior" (proposed revision to Canon 2.A). I recommend that the provisions on sexual misconduct be handled separately from the other behavior addressed.

I hope that the Committee will consider these recommendations. Thank you the opportunity to appear before you today. I would be pleased to answer any questions.