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Committee on Judicial Conduct and Disability
Judicial Conference of the United States

Sent via email to: JudicialConductRules@ao.uscourts.gov

Re: Comment on Draft Rule Amendments

To whom it may concern:

I write today to offer several comments on the current draft amendments to the Rules for Judicial Conduct and Judicial Disability Proceedings. Specifically, I will focus my comments upon the proposed amendments to the commentary to Rule 13. I understand the proposed amendment as an attempt to make it explicit that a special committee has the right to seek out and utilize private medical information of an Article III judge in a disability proceeding. I believe the proposed amendment is fraught with perils based upon what it leaves unaddressed.

First, I am concerned that rules never define disability beyond an "impairment of cognitive abilities that renders the judge unable to function effectively." With such a nebulous definition of disability, it places a subject judge in almost impossible position to defend against accusations of a disability. Moreover, it will certainly lead to divergent results across the Circuits when special committees are given no guidance or any set of standards to apply to determine whether there is sufficient need to seek out an examination.

My primary concern, however, is that the provisions discussing both an examination and the provision of medical records provide no avenue for ensuring that the subject judge's rights are fully protected. To begin, as noted above, there is no readily-discernible standard that must

be satisfied before a special committee may seek out such an examination. Even if a standard could be pulled from the broad definition of disability within the rules, nothing requires that the special committee provide any specific notice including the underlying evidence of its basis for seeking an examination, thereby falling well short of the process that should be afforded an Article III Judge of the United States.

Next, there are no rights given to the subject judge in the event that such an examination is ordered. For example, the rules do not provide the subject judge with the right to even provide information to the chosen doctor, nor do the current rules allow the subject judge to seek to restrict the dissemination of the results of the examination. Instead, the current amendments give the special committee exclusively the discretion to enter into an agreement with the subject judge regarding the use of the results.

Additionally, a subject judge is given no avenue for immediate relief from any decision by the special committee. In fact, the commentary instead acts in a coercive manner, making it explicit that a subject judge can be disciplined for a failure to cooperate if an examination is declined. As a result, a subject judge is faced with Morton's Fork. The subject judge may forego his right to privacy in his medical records and be subjected to an intrusive examination or he may defend his privacy rights and be subject to discipline for doing so. I believe that, at a minimum, if the Judicial Conference is inclined to allow these types of examinations to occur, safeguards such as the ability to take an interlocutory appeal to the Council, must also be made a part of the rules.

Furthermore, the proposed amendments place no limitations upon either the scope of the examination that may be ordered or even a temporal limitation upon the records that may be compelled to be produced. While common sense may dictate that the examination and/or

records request should be narrowly tailored to the facts before the committee, there is nothing in the rules that require such a narrowly tailored request. More importantly, there is no recourse for any subject judge that believes that a suggested examination or records request has been requested without due cause, is unduly intrusive or is overly broad. Instead, the subject judge is once again faced with absolute acceptance of the committee's proposed course of action or the risk of sanction for failure to cooperate.

I also believe that any amendment that will expressly permit the review of medical records and compel examinations must also set forth precise requirements for ensuring that those matters remain confidential to the extent possible. I do not believe that the broader rules discussing the confidentiality of the process as a whole are sufficient to protect the rights of a judge subject to such an intrusive investigative technique. Rather, I believe the Conference would need to promulgate confidentiality provisions specific to these issues to ensure that any judge that willingly consents to such an examination or records request can do so without reservation.

Prior to accepting these amendments, I am hopeful the Conference will take a long, hard look at whether there are sufficient protections and limitations in place to 1) protect the rights of a subject judge and 2) ensure that the process is used in as narrow a manner as possible any time in which it is utilized. Thank you for your review and consideration of my comments on the draft amendments. Should you desire any additional information or comments, please feel free to contact me.

Very truly yours,

/s/ John R. Adams

Judge John R. Adams