From: Jane Smith
To: AO Code and Conduct Rules
Subject: Comments on Proposed Changes to JC&D Rules
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Attached please see comments submitted by Jane Smith on the proposed changes to the Rules for Judicial-Conduct and Judicial-Disability Proceedings published for public comment on September 13, 2018.

Comments on Proposed Amendments to the
Rules for Judicial-Conduct and Judicial-Disability Proceedings

Coverage of Judiciary Employees

As currently drafted, the definition of "judicial employee" in Rule 3(f) appears to encompass only court employees, since judicial assistants and law clerks are both employed at the court level, and the catchall included ("other court employees") contemplates only other court-level employees. As a result, the definition of "abusive or harassing behavior" in Rule 4(a)(2)(B)-(C) (including "treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner; or creating a hostile work environment for judicial employees"), reaches only such misconduct as directed toward court-level employees.

However, the judiciary employs many individuals at the national level (for example, at the Administrative Office of the U.S. Courts and the Federal Judicial Center), many of whom come into regular contact with judges as well, and all of whom deserve equally to be protected from potential harassment or abuse by judges. Because judges should be held accountable for any inappropriate conduct directed toward judiciary employees as a whole, drafters should consider revising the definition in Rule 3 (p. 6) to read as follows:

> Judicial Employee. "Judicial Employee" includes judicial assistants, law clerks, and other ~~court~~ judiciary employees, including unpaid staff, such as interns, externs, and other volunteer employees.

Corrective and Remedial Actions

The proposed amendments focus predominantly on reporting (to the chief district and chief circuit judges) as the means of fulfilling a judge's duty to "take appropriate action" in response to reliable evidence of likely misconduct. However, equally – if not more – important to the "overarching goal of such action to prevent harm to those affected by the misconduct and to prevent recurrence" are concrete corrective and remedial actions taken to address the misconduct, either concurrent with or as a result of the reporting. Indeed, reporting can be viewed only as the means to the ultimate end of addressing misconduct when the individual reporting the allegations does not himself or herself possess adequate authority to impose corrective or remedial action. The rules and commentary are very light on guidance and examples with respect to potential corrective and remedial actions that judges should consider undertaking. The commentary to Rule 4, for example, states only that appropriate action toward the overarching goal above "depends on the circumstances," and that a judge's duty to report information to the chief district judge and chief circuit judge is "included within every judge's obligation to assist in addressing allegations of misconduct or disability and to take appropriate corrective action as necessary" (see paragraph 8 of commentary, at p. 16).

The importance of providing guidance on potential informal corrective and remedial actions is especially great given that the commentary to Rule 4 encourages resolution through informal corrective action rather than formal complaint wherever practicable (see paragraph 10, at p. 16). In addition, even if an individual reports an allegation to a chief judge, Rule 5(a) permits a chief judge to identify a complaint only "if no informal resolution is achieved or feasible," and the commentary to Rule 5 (see paragraph 3, at p. 20) encourages chief judges to make "attempts at swift remedial action before a formal complaint is filed" and states that an informal resolution reached before a complaint is filed will generally cause a subsequent complaint alleging identical conduct to be concluded. In practice, therefore, the application of

informal remedies is likely to be much more meaningful than the prospect of formal remedies in deterring and addressing judge misconduct.

Because "corrective action must be voluntary action taken by the subject judge" – according to the commentary to Rule 11 (paragraph 16, at p. 31) – one can easily imagine that fellow judges of the subject judge who are below the level of the chief judge (and who therefore do not have authority to unilaterally impose a *remedial* action upon the subject judge) may have difficulty arranging an informal corrective action for the errant judge that would be sufficiently robust or punitive. Such judges could perhaps particularly benefit from practical suggestions as to potential types of meaningful corrective actions they could discuss or consider with the errant judge. Yet the current list of corrective action examples provided in the commentary to Rule 11 (paragraph 17, at pp. 31-32) is sparse and woefully weak, including, for example "a pledge to refrain from similar conduct in the future." Such corrective action is emphatically inadequate, as the judge would already have been under a requirement to refrain from misconduct at the time he/she committed the violation, resulting in no change of circumstances for either subject or victim that would either serve to better protect the victim against future recurrence or to penalize the subject for the violation. The rules or commentary might encourage judges to consider as an alternative example, for instance, the subject's participation in training designed to address the misconduct.

Similar examples of potential remedial actions that chief judges or appellate courts could consider directing for a subject judge – ranging in spectrum from less to more severe depending on the nature of the infraction – should be provided in either the text of or commentary to Rule 5, which currently offer no suggestions.

Finally, the list of examples in Rule 20(b) of formal remedial actions that judicial councils may take following the conclusion of a formal complaint process should be expanded to include more meaningful and realistic options. The current list appears to offer only examples that either ring hollow and insignificant (e.g., private censure of the subject judge), or that may represent extremely drastic measures (e.g., request for voluntary retirement, or referral of judge to Judicial Conference for impeachment recommendation). Most judiciary employees realistically understand that the chances of any judge's impeachment, removal, or certification as unable to perform the duties of the office in response to a complaint are slim. However, current and former law clerks have stressed that a primary reason many victims of workplace misconduct do not come forward is that they have no faith that anything will in fact be done. To that extent, it is important that a range of more intermediate, realistic options for remedies and penalties be offered by the rules and pursued as appropriate. As the commentary to Rule 20 notes, the list in Rule 20(b)(1)(D) recites the remedial actions enumerated in 28 U.S.C. § 354(a)(2), but is not intended to be exhaustive. Additional remedies that should be added to the list at Rule 20(b)(1)(D) include: (a) imposing mandatory training or counseling designed to address the misconduct; (b) ordering the payment of financial penalties; and (c) ordering a reduction in salary or (in the case of a judge who resigns or retires following the allegation) retirement annuities. To the extent the judiciary may not currently possess the authority to reduce salary or retirement payments to certain judges, it should consider seeking such authority from Congress in order to better hold its judges accountable for serious misconduct.