From:	Russell Wheeler
To:	AO Code and Conduct Rules
Cc:	Anthony Scirica; Hellman, Arthur
Subject:	Russell Wheeler, for himself only, Statement re Rules only re Oct 30 hearings
Date:	Tuesday, October 23, 2018 12:33:57 PM
Attachments:	RWheeler statement 1.0 re JCDA 10.18 amnts.docx

Attached is a statement I would have submitted in connection with the October 30 hearings. As I told Judge Scirica and as indicated in the statement, surgery scheduled some months ago precludes my testifying at those hearings.
Thank you.

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October 23, 2018

Statement of Russell R. Wheeler
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For October 30, 2018 Hearing
on
September 2018 Proposed Changes to Judicial Conference Rules for
Judicial-Conduct and Judicial-Disability Proceedings

Judge Scirica and members of the Judicial Conference Committee on Judicial Conduct and Disability:

Thank you for your invitation to present my comments on the proposed rule amendments. I regret that previously scheduled surgery precludes my participation in the Hearing itself.

By way of background, I served as Deputy Director of the Federal Judicial Center from 1991 until 2005, when I moved to my present positions. While at the Center and continuing after I moved, I served as the overall staff coordinator for the Judicial Conduct and Disability Act Study Committee, better known as the "Breyer Committee." I have since commented in various fora on aspects of the Act and the rules implementing it, including my 2014 article, "A Primer on Regulating Federal Judicial Ethics."[1]

I commend the Committee for posting these proposed amendments expeditiously in the wake of the Working Group's report, and I find much in the draft with which I agree. Rather than dwell on those parts, in this statement I suggest possible changes to several rules or commentary that the September 2018 draft proposes to amend and to other rules that I believe merit examination in light of the Working Group Report. I then offer suggestions regarding word usage, mostly in proposed rules or commentary.

I should say at the outset that I have read a close-to-final draft of Professor Arthur Hellman's statement and am in strong agreement with almost all of it.

POSSIBLE SUBSTANTIVE CHANGES TO RULES AND COMMENTARY

Rule 4 (a) (6)

Proposed rule 4 (a) (6) at 13:29-30 essentially directs a judge with information about likely misconduct to "disclose [it] to the chief district judge and chief circuit judge." I agree with Professor Hellman that a judge needs some discretion or flexibility as to whom s/he reports. Whether a judge should disclose information to a chief circuit judge, a chief district judge, or both, will depend on the nature of the conduct in question.

As it stands, however, the current proposed language means that a judge who does not report alleged misconduct of a circuit judge to "the" or "a" chief district judge has him/herself committed misconduct, even though chief district judges have no role in investigating circuit judges unless they are special committee or judicial council members. Also, by not anticipating a judge's reporting alleged misconduct to the chief circuit judge alone, the wording may leave the

[1] 56 Ariz. L. Rev. 479 (2014), available at http://arizonalawreview.org/wheeler-3/

unintended inference that the Committee believes that no circuit judge would commit misconduct.

Line 25's reference to the "relevant chief district judge" does not solve the problem, because, by its terms, it requires reporting to *a* chief district judge. Consider instead "call to the attention of the relevant chief circuit judge, and, as to district, bankruptcy and magistrate judges, also to the relevant chief district judge . . .". The language at 13:29-30 might revised as follows: "to the chief circuit judge, and in circumstances referenced above, to the chief district judge . . . ."

Commentary to Rule 4 Regarding the Code of Conduct for United States Judges

The proposed revision to the Rule 4 Commentary at 14:36-15:9 strikes the description of the Code of Conduct as possibly "informative [even though] its main precepts are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules." It retains the language stating that the Act and the rules as interpreted by the councils ultimately define "misconduct."

I suggest, as does Professor Hellman, that the Committee retain some version of the struck language. It is an easily referenced and authoritative explanation of the often-misunderstood relationship between the Code and the misconduct process. That relationship has generated extensive confusion among journalists and other commentators. They understand that the Judicial Conference has promulgated a code of conduct that "applies" to the judges named (See Code "Introduction" at paragraph 2). But they draw the incorrect inference that "applies" means "binds" –i.e., that the Code is equivalent to a statute or its implementing regulations.

They assume, further, that if judges must obey the Code, there must be an enforcement mechanism and that the mechanism is the Act's complaint process. This misunderstanding leads not only to incorrect descriptions of the ethics regime for lower court judges; it also contributes to incorrect characterizations of Supreme Court justices' ethics regime. If, so goes the thinking, the Code (including Canon 3) doesn't apply to the justices, they are not bound by any recusal obligations. Unawareness of 28 U.S.C. § 455 fortifies this misunderstanding for some and the overlap between Canon 3 and §455 confuses others.

Easily referenced Commentary language that explains the actual relationship between the Code, the statute, and what in fact constitutes actionable misconduct can be very helpful as an antidote to this confusion. Accordingly, I suggest the Committee consider retaining the now-struck language at 15:1-7 (Although . . . Ultimately . . ."), and perhaps adding at line 9, after "Rules" "and explained in published opinions of chief judges and judicial councils pursuant to Rule 24."

The proposed Commentary at 15:10-11 has a misleading reference to "when specific, mandatory rules exist [in the Code]—for example, governing the receipt of gifts by judges, outside earned income, and financial disclosure obligations . . . ." The Committee might consider amending this reference to "when specific mandatory rules exist by reason of statutes and other regulations that the Code encourages judges to obey."

Rule 4 (b) (1) defining "merits-related"

Although the proposed Commentary to Rule 4 at 17:11-38 makes clear when complaints involving judicial decisions are not merits related, the Committee might consider at least a brief explanation in the proposed rule itself, viz., Rule 4 (b) (1) at 14:20. The Committee might add,

after "decision" in line 20: ", but is cognizable if it attacks the propriety of basing a ruling on an illicit or improper motive," and add to the Rules an abbreviated version of the Commentary text at 17:26-38.

Rules 6 and 8--Shielding complainant's identify from subject judge

The Working Group's report states that "[t]he most significant challenge for accountability . . . arises from the reluctance of victims to report misconduct . . . for a variety of reasons. . . [including] concern that a complaint will subject them to retaliatory action or affect future job prospect" (at 11). The Committee might consider amending the Rules to authorize a complainant to request that the circuit clerk redact the complainant's identity in the copy of the complaint provided to the subject judge, but direct the clerk and chief judge to advise the complainant that such redaction may seriously limit or even prevent an inquiry into the allegation.

Rule 6 (d), at 21:26, says the complainant must identify him/herself by signing the complaint and providing a contract address. By its terms, it does not authorize anonymous complaints. Proposed Rule 3 (c) (1), at 5:16-19, however, authorizes organizations to file complaints on behalf of individuals and seems to suggest that the individuals need not be identified. And unamended Rule 5 (b) at 19:19-22 directs chief judges to consider whether to identify a complaint based on a submission not in compliance with the rules. The Commentary at 20:34-37 explains that upon receipt of an unsigned complaint, "a chief judge *must* nevertheless consider the allegations as known information and *as a possible basis* for the identification of a complaint . . ." (emphases added).

Because the rules allow the chief judge to identify a complaint based on anonymous information and allow organizations to file complaints on behalf of unidentified persons, it is not a large step to permit the chief judge or circuit clerk to shield the complainant's identify from the subject judge. A potential complainant might not trust the chief judge to use his/her discretion to identify a complaint based on information provided anonymously. A potential complainant might not have or trust an organization to pursue his/her complaint adequately. Allowing the complainant to have his or her identity shielded from the subject judge is less likely to impede the chief judge's or special committee's investigation than would an entirely anonymous complaint. At the same time, it may encourage complainants to come forward by mitigating fears of recriminatory action by the subject judge. To be sure, such a provision would likely be more workable at the chief judge stage than at the special committee stage and beyond. The complainant who requests redaction should be made aware that if the complainant reaches the special committee stage, the complainant may either have to waive anonymity or see the investigation come to an end. Such a complainant, however, may want confidentiality simply to see if the chief judge's limited inquiry suggests a special committee investigation, and if so, be willing to waive anonymity then.

To effect these changes, the Committee could amend Rule 6 (d) by adding after "Rule 5(b)" (at 21:30):

> "The complainant may specify any personal identifying information that the complainant wishes the circuit clerk to redact in the copy of the complaint provided to the subject judge pursuant to Rule 8 (b)."

The Committee could also amend Rule 6's now-sparse Commentary at 22:1-4 by recognizing this Rule language. Perhaps:

> "Rule 6 (d) authorizes the complainant to specify personal identifying information that the circuit clerk should redact in the copy of the complaint that the clerk provides to the subject judge. The most obvious candidates for redaction are the complainant's name, address, and signature. The chief judge or circuit clerk should inform complainants who wish to have their identity shielded from the subject judge that partial anonymity may make a thorough investigation impossible and certainly more difficult than investigation of an unredacted complaint. This is especially so for complaints that move to and beyond the special committee stage."

Such a change in Rule 6 requires a change to Rule 8 (b), viz., inserting after "subject judge." at 23:23:

> "If the complainant so requests, the clerk must redact from the complaint copy provided the subject judge such personal identifying information as the complainant requests be redacted."

Finally, I agree with Professor Hellman's suggestion at Section V.A.2 of his statement that the Committee encourage some circuits to experiment with a "portal" as an alternative means of calling alleged misconduct to the chief judge's attention, perhaps with the option of anonymous submissions.

Rule 6 and Rule 3—Electronic complaint submission, electronic document distribution

A. Electronic Complaint Filing—Making it easier to file complaints is consistent with the tenor of the Working Group report. Rules 6 (d) and (e) at 21:25-38, however, demand a paper-envelope-photocopy procedure for submitting complaints and related documents, even in this era of electronic filing of litigation, taxes and other documents (such as comments on the proposed rules) in all aspects of commerce and government. In fact, Rule 22(a) at 53:8 specifically authorizes email submissions to the Conduct Committee of petitions to review some judicial council decisions.

   I suggest amending Rule 6 by adding a new subsection:

   > "(f) Judicial councils may provide by local rule for the submission of complaints by email or by complaint forms completed and submitted on-line."

   Consistent with that change, the Committee might amend the Commentary to Rule 2 at 4:36-37 by inserting after "may authorize" at line 36 "submission of complaints electronically or".

   Allowing individual circuits to accept electronic submission of complaints does not commit the entire judicial branch to that course but may encourage experimentation to inform the feasibility of wider application. Such a rule should make clear that electronic filing is an option, not a requirement. It may be unavailable, for one example, to prisoners.

   The National Center for State Courts' Center for Judicial Ethics recognizes that some state judicial discipline commissions allow complainants to fax or email their complaints. See Cynthia Gray, "On-Line Complaints," May 22, 2018, at https://ncscjudicialethicsblog.org/2018/05/22/on-line-complaints-2/

   The Center also identified eight commissions that provide forms that complainants can fill out and submit on line, and reports that those commissions "noted no confidentiality or security breaches or any more problems than with written complaints. . . .Several reported an increase in the number of complaints since they added the on-line option but concluded that

increase was outweighed by the benefits, such as more legible complaints, reduced costs for processing, and more comprehensive information." The report and links to the eight commissions' on-line forms are available through the link cited above. They include Oregon's on-line complaint form (which also has a checkbox menu of likely complaints), and Washington's, which allows anonymous complaints.

Professor Hellman at his Section V.B. endorses the option of electronic filing.

B. Electronic Document Distribution—On the same general subject, especially because Rule 22(a) (noted above) specifically authorizes email submission of some petitions for Conduct Committee review of council decisions, the Committee might consider whether the rules should provide a blanket authorization of email transmission of other mandated distributions. (Such distribution most likely occurs already despite the rules references to "distribut[ing] copies".) Commentary at 4:36-37 notes for example that local rules may authorize the circuit clerk's electronic distribution of the complaint and related materials pursuant to Rules 8 (b) at 23:18. But a new Rule 3(h) on definitions could provide a blanket authorization: "'Distribution' and related terms such as 'send a copy,' 'give to,' and 'provide to' mean distribution by postal or internal mail or electronically." That would cover rules 12 (d) at 34:6-9; 15 (b) at 39:16-18; 18 (a) at 44:22; 18 (c) (2) and (3) at 43:1-15; 19 (a) at 44:22-30; 19 (c) at 45:2; and 23 (b) (5) at 55:1-2.

Rule 23—Disclosure of complaints and related material to prosecutorial authorities

Rule 23 (b) (8), at 55:22-38, authorizes the Conference, the Conduct Committee, councils or chief judges to disclose "information about the consideration of the complaint" if justified by "special circumstances" and not prohibited by the Act. It gives as an example disclosure to judicial researchers with appropriate approvals. The Commentary at 57:39 gives other examples, including disclosure (to prosecutors, one presumes) of possible perjury committed during disciplinary proceedings or to licensing authorities for disciplinary action.

First, it seems somewhat strange for the rules to relegate to the commentary examples of arguably more serious disclosures than examples in the rule itself (disclosure of possible criminal conduct in the commentary and disclosure to researchers in the rules).

Second, and more important, the Working Group recounted correspondents' "concern about seeming lack of punishment for a judge who, under allegations of serious misconduct, retires or resigns and thereby terminates the disciplinary proceeding" (at 11). The Committee might consider making clear, in the Rule, that it authorizes disclosure, to prosecuting authorities, of alleged misconduct by former judges that may also constitute criminal or civil violations. One possibility is to relegate the judicial research example to the Commentary and replace it with "disclosure be made to law enforcement authorities about alleged misconduct that may constitute criminal or civil violations, including allegations about judges who have since resigned or retired under 28 U.S.C. § 371 (a)." See, in this regard, the June 2013 order (12-900069-jm) of the Second Circuit Judicial Council, available at http://www.ca2.uscourts.gov/Docs/12-90069-jm.pdf.

POSSIBLE REWORDINGS AND OTHER USAGE MATTERS

Below I call attention to what I believe are confused or inconsistent wordings, mainly but not exclusively in proposed amendments.

3:9-13 Proposed rule 1(b) identifies covered judges—except magistrate judges—by the court on which they serve: "judges of the . . . courts of appeals, judges of . . . district courts, judges of . . . bankruptcy courts, . . . magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.I") The proposed Commentary at 4:10 asserts that the proposed rule "tracks" the statute, but it does so only loosely. 28 U.S.C. § 351(d) refers to "a circuit judge, district judge, bankruptcy judge, or magistrate judge." The proposed language leaves the inference that magistrate judges serve on no particular court, when in fact they are part of the district courts.

I suggest the more precise and shorter: "Covered judges are circuit judges, district judges, bankruptcy judges, magistrate judges, and judges of the courts specified in 28 U.S.C. § 363."

13:26-27 Proposed rule 4(a) (6) refers to "information reasonably likely to constitute" misconduct or disability. "Information" is not conduct. The Committee might substitute "describe" for "constitute," or adopt Professor Hellman's more extensive revision in Section II.G.

13:36-14:1 Proposed Rule 4(a)(6) at 13:36-14:1 says that judges' duty to report misconduct is "included within every judge's obligation to assist in addressing allegations of misconduct or disability *and to take appropriate corrective action*" (emphasis added), implying an obligation to correct misconduct of another judge.

"Corrective action," in the context of the Act and the Rules, means action taken by the subject judge. Proposed Rule 11(d) (at 27:4-5) and Commentary at 31:29 stress that "'[c]orrective action' must be voluntary action taken by the subject judge," quoting the Breyer Committee report.

Instead of "corrective action" in the proposed rule, the Committee might consider a phrase such as "in taking steps to avoid harm to those affected."

14:11-14 The following sentence from proposed rule 14 (b) (1) probably should be corrected to: "~~Cognizable misconduct does not include an~~ An allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related." Or the Committee could retain the struck words but strike the end-of-sentence words "is merits-related".

14:27 Proposed Rule 4(c) defines "disability" as "a temporary or permanent impairment, physical or mental, rendering the judge unable . . . ." The Committee might consider replacing ", rendering" with "that renders" (as in line 30), or at least delete the comma before "rendering". As written, line 27 may leave the inference that *any* impairment renders a judge unable to discharge the duties of the office.

16:26 The proposed Commentary to Rule 4, by stating that "*not all* allegations of misconduct or disability will warrant resort to the formal procedures outlined in these Rules" (emphasis added), may leave the inference that "most but not all" allegations will warrant such resort. Such an inference runs counter to the accumulated experience under the Act and to the understanding of the act's sponsors ("'the informal, collegial resolution of the great majority of meritorious disciplinary matters

is to be the rule rather than the exception'", quoted in Breyer Committee Report at 100 [standalone edition]).

Adding "meritorious" as a modifier to "allegation" would not minimize the concerns about sexual harassment allegations that generally motivated these proposed amendments.

17:14-15 In the proposed Commentary to rule 4, concerning complaints about judicial decisions, consider this revision: "by ~~ensuring~~ making clear that the complaint procedure is not to be used to collaterally attack . . . ." It is beyond the power of any conceivable language to "ensure" disappointed litigants will not seek reversal through the Act.

23:28-32 Rule 8(d) at 23:28-32 directs the clerk, upon receipt of a single complaint against a judge and a person not covered by the Act, to "accept the complaint only with regard to the judge and . . .so inform the complainant." Rule 10(b) at 24:29-31 directs the clerk to send—to persons whose complaints were not accepted pursuant to a council order limiting acceptance of orchestrated complaints—a copy of such order. Rule 8 (c) at 23:25-27, however, does not direct the clerk to inform a complainant that the clerk has not accepted that person's complaint about someone not covered by the Act. I suggest adding to 8 (c) "and must so inform the person who submitted the rejected complaint."

52:15, 19 The (unamended) Commentary to Rule 21 says that 21(a) "is intended to clarify that the delegation . . ." and 21 (b) (1) (B) "are intended to fill a jurisdictional gap . . . ." I suggest the Commentary simply say that the Rules do what the Committee intends: 21 (a) "clarifies that the delegation . . ." and 21 (b) (1) (B) "fill a jurisdictional gap . . . ."