From: Schultz, Vicki
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November 13, 2018

The Honorable Ralph R. Erickson
Chair, Judicial Conference Committee on Codes of Conduct

Dear Judge Erickson and colleagues:

Attached please find my public comments, as an individual law professor, on the proposed changes to the Code of Conduct for U. S. Judges and Rules for Judicial-Conduct and Judicial-Disability Proceedings. My comments refer at times to the public comment submitted by Yale Law Students under separate cover.

Thank you for undertaking this important effort.

All best,

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

Public Comment of Professor Vicki Schultz as an individual law professor
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November 13, 2018

Recently, the Judicial Conference Committees on Codes of Conduct and on Judicial Conduct and Disability ("JC Committees") issued proposed changes to the Code of Conduct for U.S. Judges ("Code") and the Rules for Judicial-Conduct and Judicial-Disability Proceedings ("Rules") and requested public comment. I am submitting this comment as a Yale Law School professor with expertise in harassment law, employment discrimination law, and employment law because of my concern for the welfare of my students who will become law clerks, for the integrity and public regard for the judiciary, and for the development of effective rules and norms about harassment as they relate to the judiciary.

I have been teaching and writing about sex-based harassment for over twenty years. My published works include two widely-cited articles published years ago in the Yale Law Journal[1] and two recent articles published in June 2018 as part of a joint symposium on sexual harassment law in the #MeToo era published by the Yale Law Journal Forum and the Stanford Law Review Online.[2] One of these articles, the *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars,* has been signed by many prominent law professors from leading law schools.[3] I am familiar with the social science literature on sexual harassment, on which much of my work is based. My research is more fully described in my faculty entry on the Yale Law School website.[4]

A. Summary

As the Workplace Conduct Working Group report recognized, law clerks may be particularly vulnerable to harassment and abuse as a result of structural features of clerkships and judicial appointments.[5] To protect law clerks and the judiciary as a whole, it is important to (1) bolster existing protections against sex-based, other legally impermissible, and generalized forms of harassment and abuse, to (2) encourage prevention and establish mechanisms for reporting and remedying such misconduct, and to (3) collect more information about the current working climate and conditions for judicial law clerks and other employees.

My comments focus primarily on the proposed changes to the definition of misconduct that focus on harassment and abuse. I commend the Committees for highlighting harassment in the proposed changes, and make suggestions for revising and clarifying the definition used in the Code and Rules to align better with newer developments in the law and insights from social science.

Like the Yale law students, first, I would urge the Committees to define harassment more specifically to include all legally prohibited bases, not just conduct of a sexual nature. Second, I

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[1] Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

[2] Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 22 (2018); Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, STANFORD L. REV. ONLINE (2018) [hereinafter "*Open Statement"*].

[3] *See* Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, UNLEASH EQUALITY (2018), *available at* https://www.unleashequality.com/manifesto/.

[4] Yale Law School, Vicki Schultz, Ford Foundation Professor of Law and Social Sciences, https://law.yale.edu/vicki-schultz.

[5] Federal Judiciary Workplace Conduct Working Group, *Report to the Judicial Conference of the United States* 16 (June 1, 2018), http://www.uscourts.gov/sites/default/files/workplace_conduct_working_group_final_report_0.pdf [hereinafter "Working Group Report"].

urge the Committees to clarify that the Rule includes generally abusive behavior (*i.e.*, behavior that may not be on the basis of sex, race, or other legally impermissible factors). Third, I agree that the Committees should define the term "retaliation." These points are addressed more fully below.

B. Harassing or Abusive Behavior

I believe the Rules and Code would benefit from revising the definition of "abusive or harassing behavior" that cognizable misconduct along a few key dimensions, as follows.

1. Clarify Rule 4(a)(2)(A) to include not only "unwanted sexual conduct," but *all* harassment based on sex, including harassment based on pregnancy, sex/gender stereotyping, sexual orientation, and gender identity, regardless of whether the conduct is "sexual" in content or motivation.

It is true that many recent reports have focused on explicitly sexual forms of harassment (including unwanted sexual conduct). Such misconduct should be addressed, but it is better enumerated as a subtype of the broader category of sex-based harassment, rather than being singled out for special prohibition.

I am concerned that highlighting and prohibiting "sexual conduct, including sexual harassment or assault" on its own, however well intentioned, may lead decisionmakers to construe the Rule to cover only (or mostly) conduct that is sexual in nature or is driven by sexual desire. Historically, the EEOC's 1980 guideline on sexual harassment, which contained similar language,[6] led to enormous problems of underinclusiveness in sexual harassment law and policy, with courts and employers failing to address sex- and gender-based misconduct that was not explicitly sexual.[7] In the wake of scholarly criticism, both the Supreme Court and the EEOC clarified that unlawful sexual harassment need not be sexual in nature or motivated by sexual desire.[8] This was an important clarification, because research has consistently shown that non-sexual forms of sexism and hostility directed at people because of their sex or gender are far more pervasive than explicitly sexual forms.[9] In addition, even explicitly "sexual" misconduct is often accompanied by non-sexual forms of sexism and hostility,[10] or is attributable to sex-based considerations other than sexual gratification,[11] such as reinforcing a sense of superior gender status or identity. Furthermore, LGBT people experience disproportionately high rates of harassment.[12] It is important that *all* forms of sex-based conduct and considerations be

[6] *See* EEOC Guidelines on Discrimination Because of Sex, 62 Fed. Reg. 63,622 (1980) (codified at 29 C.FR. § 1604.11 (1997)).
[7] *See, generally,* Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 1.
[8] *See* Oncale v. Sundowner Offshore Services, Inc. et al., 523 U.S. 75, 80 (1998); U.S. Equal Employment Opportunity Commission, "Sexual Harassment," https://www.eeoc.gov/laws/types/sexual_harassment.cfm.
[9] *See* Schultz, *Open Statement*, *supra* note 2, at 21 n. 10 and accompanying text.
[10] *Id*. at 21 n. 11; *id.* at 26 nn. 24, 25; *id.* at 30 nn. 44-47.
[11] *See* Schultz, *Reconceptualizing Sexual Harassment, Again*, *supra* note 2, at 47-48 nn. 113-120 and accompanying text.
[12] *See id*. at 46 n. 111.

considered together and not artificially disaggregated,[13] and that all people subjected to sex-or gender-based harassment, including LGBTQ individuals, be extended protection.

> Suggested language: "engaging in hostile, abusive, demeaning, or intimidating conduct based on sex, including pregnancy, sexual orientation, gender identity, or sex/gender stereotyping, including unwanted sexual advances and intersectional conduct based on more than one ground enumerated here or in subsection (b)."

2. Expand Rule 4(a)(2)(A) or add a new subsection (B) to cover not only all harassment based on sex, but all harassment based on other grounds prohibited by federal law, including harassment based on race, national origin, religion, disability, and age, as well as intersectional harassment based on more than one such ground.

Although the major impetus for the rules change may be sex-based misconduct, harassment predicated on other legally impermissible grounds should also be expressly covered under the new rules. I acknowledge that proposed Rule 4(a)(3) prohibits "discrimination" based on these additional grounds. But Title VII caselaw suggests that the prohibition on "discrimination" might be limited to tangible employment decisions, such as hiring, firing, or assignment decisions, and not applied to harassing behavior that may contribute to a hostile work environment.[14] To avoid any such problems, the rules should clarify that not only discrimination, but also *harassment* based on any of these grounds is cognizable misconduct, as is intersectional harassment based on more than one ground. Just as any and all sexual and non-sexual harassment should be considered together, rather than artificially disaggregated, so too should race- and sex-based harassment, for example, as federal law recognizes.[15] There are good policy reasons why such intersectional phenomena should be specifically addressed.[16]

> Suggested language: "engaging in hostile, abusive, demeaning, intimidating, or undermining conduct based on race, national origin, religion, disability, and age, including intersectional conduct based on more than one ground enumerated here or in subsection (a)."

3. Clarify that cognizable conduct covers not only such discriminatory harassment, but also includes all *generally* hostile, abusive, demeaning, or intimidating conduct, regardless of whether the motivation or means of expression are discriminatory.

It appears that Rule 4(a)(2), proposed subsections (B) and (C), are designed to cover generally abusive conduct. Like the Yale law students, I applaud the Committees' attention to generalized forms of abuse. I agree with the Workplace Conduct Working Group that judges should strive to promote a general tone and climate of civility, respect, and inclusion for all employees, lawyers, and litigants.[17] Not only does evidence suggest that curbing general

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[13] *See id.* at 43 nn. 98, 99. For examples of caselaw holding to this effect, see O'Rourke v. City of Providence, 235 F.3d 713, 730 & n.5 (1st Cir. 2001) (citing Schultz, *Reconceptualizing Sexual Harassment*, supra note 1, for this proposition); Durham Life Ins. Co. v. Evans, 166 F.3d 139, 149 (3d Cir. 1999) (same).

[14] For work documenting how harassment which is not specifically prohibited but which contributes to a hostile work environment can fall through the cracks and escape legal scrutiny altogether if it does not lead to a tangible employment decision, see Schultz, *Reconceptualizing Sexual Harassment*, supra note 1, at 1721-29.

[15] *See, e.g.*, Hicks v. Gates Rubber, 833 F.2d 1406, 1417 (10th Cir. 1987).

[16] *See* Schultz, "Principle #5," *Open Statement*, *supra* note 2, at 28-31.

[17] Working Group Report, *supra* note 5, at 2.

workplace incivility may help alleviate sex-based harassment.[18] Generalized abuse toward employees, lawyers, litigants, and others can itself cause psychic and professional harms similar to those caused by discriminatory harassment, and can undermine public confidence in the judiciary as well.

Protection against such abuse can be strengthened by revising and clarifying operative terms. Although the rules should not cover isolated or trivial incidents, I am concerned that prohibiting only "egregious" treatment and/or behavior that creates "a hostile work environment" may set too high a bar. Numerous commentators have called attention to, and criticized, federal judicial decisions exonerating serious misconduct under the latter standard, particularly the severity or pervasiveness requirement.[19] For this reason, I would encourage the Committees to avoid requiring that conduct rise to the level of being sufficiently "severe or pervasive" to create a "hostile work environment" before it is proscribed.

I am not sure what considerations moved the Committees to separate current sections (B) and (C). For the sake of simplicity, the Committees might consider unifying those into a single provision that proscribes conduct subjecting employees, lawyers, litigants, or others to demonstrably hostile, abusive, demeaning, intimidating, or exclusionary treatment. The use of the word "demonstrably" is fine, as it not a term of art in the literature or caselaw and thus permits decisionmakers to avoid unduly narrow (or potentially overly broad) past interpretations.

> Suggested language: "Treating employees, lawyers, litigants or others in a demonstrably hostile, abusive, demeaning, or intimidating manner."'

4. Clarify the meaning of Rule 4 by adding a range of examples to demonstrate what constitutes prohibited abusive or harassing behavior.

I agree with the Yale law students that the current drafts do not provide adequate detail as to what conduct is proscribed. Failure to do so may raise problems of notice and fairness to accused judges, while also failing to adequately apprise law clerks and other employees of their rights. The commentary on Rule 4(a)(2) can help resolve such concerns by including examples of cognizable conduct involving diverse forms and types of abusive or harassing behavior. Examples should include not only sexual assault and unwanted sexual advances and other explicitly sexual misconduct; it should also include examples of non-sexual physically assaultive or intimidating behavior, derogatory slurs, remarks, or behavior reflecting discriminatory stereotypes, and generally hostile, abusive, demeaning, or intimidating conduct (such as repeatedly yelling at law clerks and insulting their intelligence or competence).

C. Retaliation.

It is commendable that retaliation is explicitly prohibited in the Rules and Code of Conduct, and that the purpose of this prohibition is clear. But the term "retaliation" is ambiguous and has been interpreted narrowly, on some dimensions, within the federal court system. Commentators have called attention to, and criticized, such decisions for failing to provide

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[18] *See* Select Task Force on the Study of Harassment in the Workplace, "Part 3(D): Workplace Civility and Bystander Intervention Training," *Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf ("EEOC Taskforce Report");

[19] *See* Schultz, *Open Statement*, *supra* note 2, at 43 nn. 100-102 and accompanying text.

adequate protection both to those who oppose or report discrimination and to the allies who stand up for them.[20] Furthermore, retaliation may be difficult to define in the context of the judge-law clerk relationship.

For these reasons, it is advisable that the Committees add a definition of retaliation that avoids some of the ambiguities and shortcomings of current federal caselaw.

> opposes, reports, alleges, complains about, resists, or participates in any manner in an investigation, proceeding, or hearing conducted under this Rules or by a government agency about any incident of subjectively perceived harassment or discrimination, provided that the employee has a good faith belief that the conduct violates the law.
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> supports, defends, associates with, or resists adverse actions against such a person, regardless of whether the supporters are managers, supervisors, coworkers, or subordinates of the complainants, and regardless of whether the complainants share the sex, gender, race, or other group-based affiliation of the people they support.

D. Conclusion

The federal judiciary is among the most rewarding workplaces that my students enter each year, due in large part to the strong professional relationships that most build with the judges for whom they clerk. It is my hope that this unique opportunity provides them with an intellectually challenging, equitable environment in which to develop as lawyers. Clear, fair workplace protections that reflect contemporary understanding of what constitutes abusive and harassing behavior will provide them the security to thrive as law clerks and lawyers. Like the Yale law students submitting public comment, I greatly appreciate the time, effort, and thoughfulness the Committees have put into the project of strengthening these protections for law clerks and other employees in the federal judiciary.

[20] For criticisms, see *id.* at 39-40 nn. 79, 85-92 and accompanying text.
[21] *Id.* at 41.
[22] The latter paragraph draws on language contained in the Washington Supreme Court's new "Harassment-Free Workplace" policy. Washington Supreme Court, "Harassment-Free Workplace Policy," (April 2018).