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

Public Hearing on Proposed Changes to Code of Conduct for U.S. Judges and Rules for Judicial-Conduct and Judicial-Disability Proceedings

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Written Testimony of Chief District Judge Lawrence O'Neill
United States District Court, Eastern District of California,
on behalf of the Judicial Council of the Ninth Circuit,
Chief Circuit Judge Sidney R. Thomas, and himself

I would like to thank the Committee on Codes of Conduct and the Committee on Judicial Conduct and Disability for this opportunity to testify regarding proposed changes to the Code of Conduct for United States Judges and the Rules for Judicial-Conduct and Judicial-Disability Proceedings. My name is Lawrence O'Neill, and I am privileged to serve as the Chief District Judge of the Eastern District of California. I testify on behalf of myself, Chief Circuit Judge Sidney R. Thomas, and the Judicial Council of the Ninth Circuit ("the Council").

I have reviewed the Committees' proposed changes to the Code and Judicial-Conduct Rules. Many of the proposed changes are improvements, and generally speaking, the addition of abusive or harassing behavior and discrimination as specific examples of cognizable misconduct are positive changes. However, I am concerned about other proposed changes, particularly proposed Judicial-Conduct Rule 4(a)(6), which imposes a mandatory disclosure requirement on any judge who receives information "reasonably likely to constitute judicial misconduct or disability." Many informal but highly effective resolutions of workplace issues depend heavily on promises of confidentiality, which are often requested by the reporting party. For this reason, I am concerned that proposed Rule 4(a)(6) will have the unintended consequence of *discouraging* reports of potential misconduct or disability.

I am also concerned that proposed Judicial-Conduct Rule 4(a)(6) has the potential to turn what has been a collegial body working cordially with one another into a body of workplace informers, who feel obliged to report on one another concerning any perceived misstep that could conceivably fall under an elastic definition of "misconduct."

Chief Judge Thomas, the Council, and I share several concerns about the proposed changes to the Code and Judicial-Conduct rules, which are outlined in more detail below.

I. <u>Proposed Judicial-Conduct Rule 4(a)(6)</u>

The proposed rule states:

> (6) Failure to Report or Disclose. Cognizable misconduct includes failing to call to the attention of the relevant chief

> district judge *and* chief circuit judge information reasonably likely to constitute judicial misconduct or disability. A judge who receives such information shall respect a request for confidentiality but *shall disclose the information to the chief district judge and chief circuit judge*, who shall also treat the information as confidential. Some information will be protected from disclosure by statute or rule. A judge's promise of confidentiality may necessarily yield when there is information of misconduct that is serious or egregious and thus threatens the integrity and proper functioning of the judiciary. This duty to report is included within every judge's obligation to assist in addressing allegations of misconduct or disability and to take appropriate corrective action as necessary. (Emphasis added).

The Council discussed this proposed language at its October 18, 2018 meeting. The Council is concerned that this mandatory disclosure requirement could have a significant "chilling" effect on court personnel and other parties who wish to report misconduct or disability, but only on condition of confidentiality. If chambers staff and court employees are advised that strict confidentiality is not an option, and that any shared misconduct or disability concerns *must* be disclosed to both the chief district judge and the chief circuit judge, many would-be reporters may opt not to share their observations or concerns at an early stage. Indeed, one of the most common themes throughout the responses to the national and circuit workplace environment questionnaires conducted last spring was that employees want options and discretion over to whom they report misconduct. This decision is often based on an assessment of who they think can best resolve their issue while keeping the matter discreet (and not triggering what has been described by employees as the "nuclear option"). The current proposal runs directly counter to the spirit and intent of the proposed changes, and to the efforts of the national workplace conduct committee which has aimed to create a more comfortable reporting environment.

Along with the chilling effect this could have on reporting misconduct, imposing a "mandatory reporter" duty on judges could have a detrimental effect on a judge's ability to resolve informally allegations of misconduct or disability.

Peer-to-peer resolution is one of the most effective tools among judges to discuss and correct potential issues of misconduct and disability. The flexibility to address issues informally and discreetly—without necessarily elevating them to the Chief Judges—results in a preferable and more expeditious outcome for all parties involved. Indeed, it is the Council's position that this mandatory disclosure requirement would frustrate one of the specific goals outlined in the proposed Commentary to Rule 4: to allow for "effective, prompt resolution through informal corrective action."

It also concerns the Council that disability would be included with misconduct in the reporting requirement. "Disability" is defined as "a temporary or permanent impairment, physical or mental, rendering a judge unable to discharge the duties of the particular judicial office." Carried to its logical conclusion, this provision would require judges to report to the Chief Circuit Judge every case of temporary illness that kept a judge off the bench, or face misconduct charges. It should not be an act of misconduct to fail to report any disability; at the very least, the reporting requirement should be restricted to permanent disabilities.

However well meaning, the adoption of a system that requires a judge, under penalty of judicial misconduct charges, to inform about any possible wrongdoing by another judge has potential consequences that may not be an appropriate component of the rules governing judicial conduct. Please note that the ABA Model Rules of Professional Conduct have rejected such a broad approach with regard to the legal profession's reporting requirements. Rule 8.3(a) on Reporting Professional Misconduct provides "[A] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." Comment 3 to Rule 8.3(a) specifically discusses why such a requirement needs to be limited, stating:

> If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a

> self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

We thus recommend that the rule should be restricted to requiring reporting only in the most substantial or serious of offenses "that a self-regulating profession must vigorously endeavor to prevent." Further, we note that there is currently little guidance to chief judges on how they might enforce the newly proposed reporting requirement

Another concern is that proposed Rule 4(a)(6) lacks any guidance as to whether this duty to report "reasonably likely" misconduct or disability applies retroactively. Chief Judge Thomas and Circuit Executive staff have both requested clarification from the AO on this topic, and have received conflicting responses. It is the Council's position that applying this rule retroactively—essentially imposing an ex post facto duty to disclose information which may have been shared in confidence—would give rise to unfair exposure to misconduct complaints.

We propose some alternative language for Rule 4(a)(6) that would allay some of these concerns by allowing reporting to the chief circuit judge or the chief district judge, and by adding a "good cause" exception.

> Alternative to Proposed Rule 4(a)(6)
> Cognizable misconduct includes failing to call to the attention of the relevant chief district judge **or** chief circuit judge information reasonably likely to constitute judicial misconduct or disability, **except for good cause (such as the information being protected from disclosure by statute, rule, or promise of confidentiality)**.

We suggest moving the remainder of the Committee's Proposed Rule into the Commentary section, and propose some additional language to clarify when reporting may be impracticable or unwise.

> Proposed Additions to Commentary of Rule 4: This duty to report is included within every judge's obligation to assist in addressing allegations of misconduct or disability and to take appropriate corrective action as necessary. A judge who receives such information shall respect a request for confidentiality but shall disclose the information to the chief district judge **or** chief circuit judge, who shall also treat the information as confidential. A judge's promise of confidentiality may necessarily yield when there is information of misconduct that is serious or egregious and thus threatens the integrity and proper functioning of the judiciary. **In some cases, however, reporting may be impracticable, unnecessary, or contrary to the public interest. In such cases, the chief circuit judge may decide what constitutes good cause for not reporting, which may include emergencies or situations in which reporting would have subverted the underlying purpose and scheme of these Rules.**

II. Proposed Judicial-Conduct Rule 4(a)(3)

The proposed rule states:

> (3) Discrimination. Cognizable misconduct includes discrimination on the basis of race, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability[.]

The Council is concerned by the lack of specificity in the above language as to what constitutes "discrimination." For example, as applied to law clerks and other chambers staff, it is unclear whether cognizable misconduct would include discrimination only during the course of employment, or would extend to the recruiting and hiring process. In turn, it is unclear whether the proposed rule applies only to *intentional* discrimination (*i.e.*, disparate treatment claims), or would also apply to allegations of disparate impact in the recruiting process and other contexts.

There are many situations in the recruitment context alone in which this lack of clarity could be problematic. For example, if a judge were to hire only female law clerks for one particular term, would this hiring decision give rise to a cognizable claim of sex discrimination under proposed Rule 4(a)(3)? As another example, the Ninth Circuit is undertaking significant efforts to increase the ethnic, cultural, and socioeconomic diversity of its law clerk applicant pool. Under the proposed rule, these efforts could potentially give rise to a cognizable allegation of misconduct.

Also, as stated, it is unclear whether the proposed rule covers only *intentional* discrimination, or whether it also extends to *unintentional* discrimination or "disparate impact" allegations. The idea that unintentional conduct or unintended results of a well-intentioned policy may constitute misconduct is concerning for obvious reasons, and is inconsistent with the definitions of misconduct currently provided by the Rules, which uniformly anticipate some type of intentional or willful misconduct. *See*, *e.g.*, current Rule 3(h)(1)(A)–(I) (listing as examples of misconduct: nepotism, acceptance of bribes, ex parte communications, treating litigants in an egregiously hostile manner, partisan political activity, soliciting funds, retaliation, impeding an investigation, and violating restrictions on outside income or financial disclosure).

In sum, without a more specific definition of "discrimination," or more guidance in the Commentary as to when the rule applies and whether it includes both disparate treatment and disparate impact, the Council is concerned that proposed Rule 4(a)(3) will be applied more broadly than intended, and in a manner that is contrary to the intent of the proposed changes. To allay some of these concerns, we suggest, at the least, the addition of the word "intentional" to the proposed rule as follows:

> Alternative to Proposed Rule 4(a)(3)
> Discrimination. Cognizable misconduct includes **intentional** discrimination on the basis of race, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability[.]

III. Proposed Judicial Conduct Rule 2(A)

The proposed new rule states:

> (2)Abusive or Harassing Behavior. Cognizable misconduct includes: (A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault[.]

The Council approves of this proposed change to the extent that it includes unwanted sexual conduct, offensive sexual conduct, and abusive sexual conduct under the definition of cognizable misconduct. However, the Council has raised a concern that selectively read and parsed, this subsection could be interpreted to state: "Cognizable misconduct includes . . . engaging in unwanted . . . conduct," which is an extremely broad category. For example, a judge who asks difficult questions at oral argument could be engaging in "unwanted conduct" from counsel's perspective. The Council recommends that this proposed language be clarified if (as suspected) the intent is to define cognizable misconduct to include "engaging in *sexual* conduct that is unwanted, offensive or abusive."

IV. Proposed Judicial Conduct Rule 2(C)

The proposed new rule states:

> (2) Abusive or Harassing Behavior. Cognizable misconduct includes . . . (C) creating a hostile work environment for judicial employees[.]

The Council approves of the decision to include "creating a hostile work environment" under the definition of cognizable misconduct. However, the Council believes that the term "hostile work environment" itself should be further defined, either in the rule itself or in the accompanying Commentary. For example, it may be helpful to provide specific examples of the type of conduct that may constitute a hostile work environment, such as slurs, insults, jokes, or other verbal comments or physical contact or intimidation that is based on race, sex, or another protected characteristic. Conversely, it may be helpful to provide examples of what does *not* constitute a hostile work environment, such as a judge addressing a law clerk's poor performance or punctuality issues, or otherwise

expressing frustration or disappointment with chambers or court staff when it is warranted.

V. Conclusion

While several of the proposed changes improve the Judicial-Conduct Rules, we are seriously concerned about other proposed changes identified above, most significantly the chilling effect of the "mandatory reporter" duty under proposed Rule 4(a)(6), and the lack of clarity on what may constitute discrimination under Rule 4(a)(3). We believe that the proposed changes, while well-intentioned, raise serious issues and require further discussion, input, and deliberation prior to finalization and enactment. As currently drafted, the proposed changes are susceptible to abuse by vexatious complainants, and may have other unintended antithetical consequences.

On behalf of Chief Circuit Judge Thomas and the Ninth Circuit Judicial Council, I thank the Committees for their consideration of our views. We welcome the opportunity to provide any further input as needed.