

Written Statement from

Carol A. Needham

Emanuel Myers Professor of Law, Saint Louis University School of Law

Comments on the Proposed Changes released on September 13, 2018 to
the Code of Conduct for United States Judges and
the Rules for Judicial Conduct and Judicial Disability Proceedings

October 30, 2018 Hearing

Judicial Conference Committee on Codes of Conduct and
Judicial Conference Committee on Judicial Conduct and Disability
Thurgood Marshall Federal Judiciary Building

I am currently the Emanuel Myers Professor of Law at Saint Louis University School of Law in Saint Louis, Missouri. As a law school professor I have taught and published on issues arising in Civil Procedure, Remedies and Professional Responsibility.

After graduating from law school, I clerked for a federal judge nominated by Ronald Reagan and practiced law at Gibson, Dunn & Crutcher in Los Angeles.

I have been involved in drafting and revision of Codes of Conduct (both substantive and procedural aspects) in various settings. I have also been a member of the Editorial Board for the ABA/BNA Lawyers' Manual on Professional Conduct, Chair of the Association of American Law Schools (AALS) Section on Professional Responsibility and Liaison from the AALS Section to the ABA Standing Committee for Ethics and Professional Responsibility (SCEPR). I am also an Advisor to the ABA Standing Committee on International Trade in Legal Services (ITILS) and involved as a subject matter expert in drafting and reviewing questions for the Multistate Professional Responsibility Examination (MPRE).

Comments regarding Chapter 2: Code of Conduct for U.S. Judges

In key places in the proposed draft, wording in Canon 3 is merely aspirational. The language in these provisions should be revised to set out actionable standards.

1. On page 6, for example, the second sentence of Canon 3 states, “The judge *should* perform those duties with respect for others, and *should* not engage in behavior that is harassing, abusive, prejudiced, or biased.”

Why not state those obligations in the declarative? Setting out a requirement would be preferable. The wording at that point in Canon 3 would then be:

“The judge shall perform those duties with respect for others, and shall not engage in behavior that is harassing, abusive, prejudiced, or biased.”

Unless there is support for the view that Canon 3 should officially allow judges to engage in behavior that is harassing, abusive, prejudiced or biased without consequences for that behavior, the aspirational language in the current draft is fatally imprecise. Replace the word “should” with “shall” so that the Canon contains an actionable requirement for the standard of behavior.

2. Similarly, it would be preferable to replace the word “should” with “shall” (or “must”) in the sections related to two additional key areas:

Canon 3A(3) “A judge shall be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.”

Canon 3B(4) “A judge shall practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff. A judge shall not engage in any form of harassment of court personnel. A judge shall not engage in retaliation for reporting of allegations of such misconduct.

What purpose is served by using the word “should” and weakening these elements?

Rather than using the merely aspirational “should,” the wording must be changed to a requirement as indicated in the above revision to both Canon 3A(3) and Canon 3B(4).

3. In the Commentary to Canon 3B(4) on page 11 – 12 in the proposed draft, replace “should” with “shall” so that the wording will be:

“A judge shall neither engage in, nor tolerate, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct. The duty to refrain from retaliation reaches retaliation against former as well as current judiciary personnel.”

4. Consider whether some of the activities addressed in Canon 4 would also be more clearly addressed by moving from “should” to “shall.”

Canon 4 (A)(4) “A judge shall not act as an arbitrator or mediator ...” on page 14, for example.

In connection with the proposed changes to Chapter 3: Rules for Judicial Conduct and Judicial Disability Proceedings, I will highlight eight concerns:

- 1) The proposal should be revised to specify the standards that the Chief Judges are to apply in their exercise of discretion at key points in the procedures.

For example, specify the standard which a Chief Judge is to use in distinguishing between (i) a report of an action that is so minor that it will be subject to informal resolution and (ii) an action that is egregious or part of a pattern which should be handled formally.

- 2) It is important that the final language in the Rules provide clear guidance for the length of time during which an investigation can be “in progress” without resolution.

It would be highly problematic for the Rules to permit a procedurally correct investigation to be stretched out for months or years without resolution. Timely movement forward in investigations would be particularly important in areas in which no standards are given for key determinations which are left within the discretion of the Chief Judge.

- 3) The provisions related to maintaining confidentiality remain problematic. Further discussion of this point will be included in the additional comments to be filed after the hearing.

- 4) Throughout the Rules, specify a time frame when doing so would be clarify the intended application of the Rules. For example, not enough guidance is given in the Commentary on Rule 4(a)(5), at page 16 lines 26-3:

“In practice, however, not all allegations of misconduct or disability will warrant resort to the formal procedures outlined in these Rules because they appear likely to yield to effective, prompt resolution through informal corrective action. In such cases, allegations may initially be addressed to the chief district judge or the chief circuit judge to determine whether informal corrective action will suffice and to initiate such steps as promptly as is reasonable under the circumstances.”

Add a time frame here, such as: “generally in a matter of days or weeks.”

The last phrase quoted in the Commentary on Rule 4 (a)(5) would then read, “. . . and to initiate such steps as promptly as is reasonable under the circumstances, generally in a matter of days or weeks.”

5) The assessment of potential institutional issues referred to in the Commentary on Rule 11 (e) should always be undertaken. If systems can be put into place to make future misconduct less likely, they certainly should be considered.

- (i) Therefore, delete the word “might” on page 32, line 28 and add an “s” to the word “include.” The sentence will then read, “Such an assessment includes an analysis of what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence.”
- (ii) In connection with this point, include the proposed language in the Commentary on Rule 20(b)(1)(B) at page 49, lines 11-18. “Even if intervening events make action on the complaint no longer necessary, the judicial council may nonetheless be able to take action on potential institutional issues related to the complaint (such as an analysis of what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence). 28 U.S.C. 352(b)(2)”

6) The proposed new language in Rule 23 (c), on page 56 at lines 8 to 13 should be adopted as proposed.

“Nothing in these Rules and Commentary concerning the confidentiality of the complaint process, or in the Code of Conduct for Judicial Employees concerning the use or disclosure of confidential information received in the course of official duties, prevents a judicial employee from reporting or disclosing misconduct.”

The Commentary to Rule 23(c) at page 58 lines 29 to 40 which underlines the importance of this point and should also be adopted as proposed.

7) I strongly urge the Judicial Conference Committee to include the new language proposed for Rule 13 (a) at page 35 line 35 to 39 in the draft:

“In investigating the alleged misconduct or disability, the special committee should take steps to determine the full scope of the potential misconduct or disability, including whether a pattern of misconduct or broader disability exists.”

8) I also support the language proposed for inclusion in the Commentary on Rule 24(b) on page 61 at lines 34-36:

“Individual circuits should seek ways to make decisions on complaints filed in their courts more readily accessible to the public through searchable electronic indices.”

Thank you for granting my request to testify and to provide these comments on the changes to the Code of Conduct for U.S. Judges and the Rules for Judicial Conduct and Judicial Disability Proceedings proposed in the draft released on September 13, 2018.