



# Federal Bar Association

November 9, 2018

Committees on Codes of Conduct and Judicial Conduct and Disability  
Judicial Conference of the United States  
One Columbus Circle, N.E.  
Washington, D.C. 20544

## **Re: Comments on Proposed Changes to the Code of Conduct for U.S. Judges and the Judicial Conduct and Disability Rules**

Dear Members of the Committees on the Code of Conduct and the Judicial Conduct and Disability Rules:

The Federal Bar Association provides these comments on the proposed changes to the Code of Conduct for U.S. Judges and the Judicial Conduct and Disability Rules. The changes under consideration respond to recommendations in the June 1, 2018 report of the Federal Judiciary Workplace Conduct Working Group.

The Federal Bar Association, in its September 6, 2018 letter to Director James Duff, expressed strong support for the Working Group's thoughtful report and systemic recommendations aimed at the prevention and elimination of inappropriate conduct, including harassment, in the Judicial Branch workplace. Our interest in these assurances is both personal and institutional: federal judges, clerks and deputy clerks of court, law clerks, legal interns, and other court personnel are among the nineteen-thousand members of the Federal Bar Association. The Association's endorsement of the Working Group's report reflects our strong desire to ensure that appropriate safeguards are in place to protect every court employee from inappropriate workplace conduct.

The greater sensitivity to judicial misconduct underlying these changes is related to the preservation of public confidence in the courts. This is notably demonstrated by the proposed change to Rules Article II 4(a)(7) in eliminating the requirement that the erosion in public confidence be "substantial and widespread" before the prejudicial effect of cognizable misconduct by a judge outside the performance of the judge's official duties is considered. We support this change. Overall, we believe that the proposed changes to the Code of Conduct for U.S. Judges and the changes to the Judicial Conduct and Disability Rules reflect positive changes to better assure the necessary expectations and procedures are in place to guard against inappropriate conduct.

The Code changes primarily focus on revisions to Canon 3B(4) and 3B(5). The commentary to the Code changes on pp. 11-12 of the draft is particularly instructive in its

new and inclusive interpretation of “harassment” directed at judicial employees and others. These changes correlate to changes in the Conduct and Disability proceedings rules that broadly define “cognizable misconduct” to include “unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault.” In addition, they also recognize “cognizable misconduct” for the first time as “treating litigants, attorneys, judicial employees or others in a demonstrably egregious and hostile manner.”

The primary changes to the Conduct/Disability proceedings rules involve changes to Rule 4(a)(6) (pp. 12-18) and correspond to commentary on the changes to Judicial Code Canon 3B(5). They recognize that “cognizable misconduct” now includes retaliation for reporting or disclosing judicial misconduct, interference or failure to comply with the complaint process, and the failure to report or disclose to the relevant chief judge information reasonably likely to constitute judicial misconduct or disability. They also deal with the confidentiality of the information and realistically suggest that 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.”

The comments of the Federal Bar Association on the proposed changes to the Code of Conduct for U.S. Judges and the Judicial Conduct and Disability Rules are directed to four proposed provisions in the Judicial Conduct and Disability Rules and one related change to the Judicial Code of Conduct.

**1. The proposed amendment to Article II. 4(a)(2)(B) provides: “ ... (B) treating litigants, attorneys, judicial employees or others in a demonstrably egregious and hostile manner;”**

The proposed amendment to Article II elevates the standard for “cognizable misconduct” in its relationship to “Abusive or Harassing Behavior” to require the demonstration of “demonstrably egregious and hostile” behavior in the treatment of litigants, attorneys, judicial employees or others. We believe this standard is unnecessarily high and recommend that the standard for a judge’s unacceptable misconduct in the treatment of litigants, attorneys, judicial employees or others be grounded upon behavior that projects a “demonstrably hostile manner.”

Thus, we recommend that the proposed amendment provide:

*“(B) treating litigants, attorneys, judicial employees, or others in a demonstrably hostile manner;” (Italics added)*

Similarly, we recommend revision of the proposed commentary to Canon 3B(4) of the Code of Conduct (in the first complete paragraph of page 12) to delete “egregious and” from the pertinent sentence describing “cognizable misconduct.” Thus we recommend that the proposed commentary be revised to provide:

“... Rule 4(a)(2) (providing that cognizable misconduct includes:  
... (B) treating litigants, attorneys, judicial employees, or others  
in a demonstrably hostile manner.” (Italics added)

**2. The proposed commentary on Rule 4(a)(4) (beginning at page 15, line 26) provides that “a judge’s efforts to retaliate against any person for reporting or disclosing misconduct, or otherwise participating in the complaint process may constitute cognizable misconduct.”**

This proposed amendment of the commentary on Rule 4(a)(4) (at page 15, line 26) is not clear as to whether “cognizable misconduct” by a judge includes retaliation against a person for reporting or disclosing alleged misconduct by another judge. We believe the rule should make it clear to assure that retaliation includes a response against a person for reporting or disclosing alleged misconduct by another judge. Thus, we recommend that the commentary be revised to read:

*“Under Rule (4(a)(4) a judge’s efforts retaliate against any person for reporting or disclosing misconduct of that judge or any other judge, or otherwise participating in the complaint process, may constitute cognizable misconduct.” (Italics added)*

**3. The proposed commentary on Rule (4(a)(5) (on page 16, line 22) provides that “The formal procedures outlined in these Rules are intended to address serious issues of judicial misconduct and disability.”**

We recommend that the qualifying word “serious” be removed from the commentary language. The procedures of review and the expectations of behavior created by this series of amendments should not be qualified by a regard for the rules that considers their application to arise only in connection with “serious” issues of judicial misconduct and disability, however “serious” is defined. Thus, we recommend that the commentary be revised to provide:

*“The formal procedures outlined in these Rules are intended to address issues of judicial misconduct and disability.” (Italics added)*

**4. Finally, the commentary on Rule 4(b)(1) (on page 17, line 23) notes that “Similarly, an allegation that a judge incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard.”**

We believe that a judge’s decision to deny or reduce a Criminal Justice Act voucher not be considered “merits-based” if the decision is based on reasons associated with misconduct or violation under the Rules, including discrimination against an attorney because of the attorney’s race, sex, gender or gender identity, pregnancy, sexual orientation, religion, national origin, age or disability. To guard against this outcome, we recommend that the commentary be revised to provide:

*“Similarly, an allegation that a judge incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard, unless the judge denied or*

*reduced the voucher in connection with any misconduct or violation under the Rules. ”*  
(Italics added)

Thank you for your leadership and commitment to assuring a zero-tolerance approach by the Federal Judiciary toward unwanted and inappropriate conduct in federal courthouses and judicial facilities. In the event of questions, our point of contact is Bruce Moyer, FBA Counsel for Government Relations, 301-452-1111, [grc@fedbar.org](mailto:grc@fedbar.org).

Sincerely yours,



Maria Z. Vathis  
President