

From: [Paul Horvitz](#)
To: [AO Code and Conduct Rules](#)
Subject: REVISED comments on Rules
Date: Friday, November 09, 2018 8:55:36 AM
Attachments: [Horvitz Revised Comments on Rules.pdf](#)

Comments from: Paul Horvitz.

I am not commenting on behalf of any entity.

Attached are REVISED comments on the Rules (I previously submitted separate comments on the Code, which stand). The revision to my Rules comments is only to section 3, "Political Activity." Please replace my prior Rules comments with the attached.

Thank you.

Comments: Rules for Judicial-Conduct and Judicial-Disability Proceedings

Submitted by:

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The comments are not submitted on behalf of any entity.

Rules for Judicial-Conduct and Judicial-Disability Proceedings

1. Applicability

Article 1. 1 (b). Covered Judge. A covered judge is defined under the Act and is limited to judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363. Any judge nominated to the Supreme Court of the United States is expressly covered by these rules during the period prior to being sworn in.

Argument:

On October 6, 2018, Judge Karen LeCraft Henderson, the acting Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, issued an official statement regarding complaints against a circuit judge, Brett M. Kavanaugh, who had been nominated to the Supreme Court. Within the brief statement, she wrote: “The complaints do not pertain to any conduct in which Judge Kavanaugh engaged as a judge. The complaints seek investigations only of the public statements he has made as a nominee to the Supreme Court of the United States.” Any implication that a nominee’s public statements during testimony before the Senate do not pertain to conduct “as a judge” should be expressly eliminated within the Rules. A reasonable person would conclude from Judge Henderson’s statement that she considered the complaints either moot or otherwise outside the bounds of a traditional federal judicial misconduct complaint. A judge does not cease to be a judge or exit into a misconduct no-man’s-land merely because he or she has been nominated to a court whose members are not officially subject to the Code or Rules of conduct by U.S. judges.

2. Administration of the Courts

Misconduct and Disability Definitions, (a). Misconduct Generally. Cognizable

Misconduct: is conduct prejudicial to the effective and expeditious administration of ~~the~~ business of the courts.

Argument:

The phrase “the business of” is redundant and should be stricken in all instances. The phrase may be misconstrued to mean that the Rules apply only in matters involving the operational, bureaucratic, and mechanistic aspects of our system of justice. “Administration” implies all aspects of the court’s work. The Rules should not be construed to apply to a narrower subset of the courts’ work but to all of the courts’ work. No workplace misconduct complaint should be

brushed aside because alleged misconduct did not affect the narrow “business” of running the courts.

3. Political Activity

Misconduct and Disability Definitions. A(1)(D) engaging in partisan political activity, or making inappropriately partisan statements, or, in the case of a nominee subject to Senate confirmation, including a Supreme Court nominee, engaging in any effort at persuasion via the mass media related to confirmation or coordinating confirmation efforts with any political party or any official of the executive or legislative branches, or withholding authorization for the release of any public document relevant to the Senate’s fact-finding process;

Argument:

Judges nominated to appellate and Supreme Court seats, in violation of the core principle of the Code of Conduct, are currently acquiescing in a highly politicized Senate confirmation process that is damaging the integrity of the courts. The legislative and executive branches pursue a political process. Nominated judges need not follow the script. The nature of our politics has changed. The Code is based on real-world scenarios, and reality has caught up with it. Let the President and Senate exert their political will. But do not let judges join the fray. If a federal judge cannot stand on his own record and his own character without coaching on what to say and how to act, he or she is simply not fit to advance. In addition, the Rules should not ignore the realities of modern information campaigns and their potential impact on persons who would otherwise bring a complaint of workplace misconduct but are fearful of being subjected to politically based or other broad campaigns, such as those generated through social media.

4. Treating Others

Misconduct and Disability Definitions A (2) (B). treating litigants, attorneys, federal employees or federal elected officials~~judicial employees~~, or others in a demonstrably egregious and hostile manner;

Argument:

Millions of Americans witnessed several instances of impatient, undignified, disrespectful, and demonstrably egregious and hostile behavior by a nominated federal judge as the judge was questioned by U.S. Senators during a confirmation hearing before the Senate Judiciary Committee on September 27, 2018. After being questioned by one female Senator, for example, the judge later apologized for one instance of behavior he himself belatedly recognized as hostile. There were many more instances during testimony for which the judge did not apologize. Publicly addressing a female U.S. Senator in a hostile manner does not signal the kind of respectful gender relationships that workplace conduct rules envision. Because federal judges on rare occasions testify before Congress and, during a confirmation process and other rare occasions, may come into frequent contact with Executive and Legislative Branch employees, there is no reason to restrict the field of personnel to those in the Judicial Branch.

5. Supreme Court Nominees

Commentary on Rule 11(e). As long as the subject of a complaint retains the judicial office, even during the confirmation process with respect to a nominee to the Supreme

Court, a complaint alleging judicial misconduct must be addressed.

Argument:

Explained above.

6. Confidentiality

Confidentiality. 23 (b)(8). [Add wording at end] Any existing, non-public complaint against a judge who has been nominated to an Appeals Court or the Supreme Court, or any new complaint involving conduct during the confirmation process, represents Special Circumstances that require prompt public disclosure unless the Chief Judge expeditiously dismisses the complaint under Article IV. 11 (c) (1).

Argument:

No potentially valid prior or new complaint of workplace misconduct (or any other misconduct under the Code and Rules) should remain out of public view during a judge's confirmation process. Any frivolous or similarly invalid complaints may be dismissed expeditiously by the Chief Judge, so long as the normal, eventual disclosure of a dismissal order is maintained.

7. Disclosure of Name

24. (a) . [Add (6).] In the case of a complaint involving a nominee to the Supreme Court, the name of the subject judge shall be promptly disclosed to the public except in cases where Rule 11(c) applies.

Argument:

Given that appointment to the Supreme Court carries a lifetime tenure, and given the seriousness with which workplace misconduct must be treated by the judicial system, non-frivolous complaints must be made public so that proper investigation and consideration can be given during the confirmation process.

8. Judicial Council Participation

25 (f). Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the council, except that any council member who is the sole subject of a complaint and is a nominee to the Supreme Court may not participate in the determination under any circumstances.

Argument:

Self-explanatory.

9. Treatment of Misconduct Complaints

Article II. 4. A (1)

Add (H) making public statements that, in fact or appearance, seek to improperly influence the outcome of a pending misconduct complaint against a subject judge.

Argument:

On October 16, 2018, Chief Justice John G. Roberts Jr. was a featured speaker at the

University of Minnesota Law School. In brief opening prepared remarks, he addressed the court's need to remain independent and to work in a collegial manner. He noted that the tradition of justices shaking hands before entering the conference room to discuss a case offered "a repeated reminder that, as our newest colleague put it, we do not sit on the opposite sides of an aisle, we do not caucus in separate rooms..." (Video available on C-SPAN). The phrase "our newest colleague" referred to Associate Justice Brett Kavanaugh, who was at the time the subject of at least 15 misconduct complaints that the Chief Justice was personally aware of, having forwarded them from the District of Columbia Circuit to the Tenth Circuit for review. Wittingly or not, Justice Roberts erred in publicly citing a judge alleged in pending complaints to have made prohibited partisan statements as an authority on or exemplar of impartiality and non-partisan behavior. As a complainant against the same subject judge, I was genuinely troubled that the Chief Justice would appear to display prejudgment by implying that the judge understood with exemplary wisdom the meaning of prohibited partisanship.

10. Disclosure of Judicial Council Members

Article VIII. 28. Availability of Rules and Forms

These Rules and copies of the complaint form as provided in Rule 6(a) must be available without charge in the office of the circuit clerk of each court of appeals, district court, bankruptcy court, or other federal court whose judges are subject to the Act. Each court must also make these Rules, the complaint form, ~~and~~ complaint-filing instructions, and the names of judges currently sitting on the Judicial Council, available on the court's website, or provide an Internet link to these items on the appropriate court of appeals website or on www.uscourts.gov.

Argument:

Some Appellate Court websites publicly disclose the names of the sitting Judicial Council of the circuit. Others do not. By way of example, when I telephoned the clerk's office of the Tenth Circuit and asked which judges were on the Judicial Council, I was told that the names could not be provided because "I think they pick a Council for each complaint." As a simple matter of appropriate transparency, all circuit websites should disclose the current membership of the Judicial Council and promptly update the list when the membership of the council changes. Whatever the course of a complaint, complainants and the general public should have access to this information.

Thank you for your consideration.

End comments.