PROPOSED REVISIONS TO CODE OF CONDUCT FOR U.S. JUDGES

Public Comments

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Thank you for the opportunity to comment on the Proposed Revised Code of Conduct for United States Judges. My comments are brief because the proposed revisions represent a noteworthy step forward in the evolution of the standards of conduct for federal judges.

The importance of the proposed changes, however, is undercut by the use of "should" rather than "shall" throughout the Proposed Revised Code. In 1990, the American Bar Association amended its *Model Code of Judicial Conduct* to create mandatory requirements, not just hortatory canons. Most states followed, and the federal judiciary should do so as well. Part of the purpose of a code of judicial conduct is to demonstrate to the public the high ethical standards and conduct restrictions the judiciary is willing to impose on itself in order to maintain its integrity and justify public confidence. The common understanding of "should," however, is that it is a strong suggestion, not a requirement. As currently written, the Proposed Revised Code presents the responsibility, for example, to resist the temptation to base decisions on family, social, political, financial, or other relationships or interests as less than a mandatory obligation, giving the wrong impression to the public. The code would be greatly strengthened if "shall" were substituted for "should" in its core rules.

The changes proposed to Canon 3A(6) also raise some concerns. The current restriction on any "public comment on the merits of a pending or impending action" is broad but very clear, a crucial requirement for any ethical rule. In contrast, the proposed change to prohibit only comments that "might reasonably be expected to affect the outcome or impair the fairness of a matter" would require judges to undertake the difficult, if not impossible, task of assessing the impact on an unknown audience. By refraining from all extra-judicial comment on the merits of pending cases, as required by the current version, judges reassure the public that cases are being tried, not in the press or law review articles, but in the public forum created by the courts and devoted to that purpose.

If it is necessary to narrow the current rule, a more effective way would be to create an exception for comments on cases pending outside the judge's court or to clarify the exceptions for explaining court procedures and making scholarly presentations. For example, the North Carolina code of judicial conduct provides: "A judge should abstain from public comment about the merits of a pending proceeding in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law." The California code has an exception that states: "Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials, cases and issues pending in appellate courts."

Moreover, the possibly unintentional effect of the proposed change on the exception for scholarly presentation seems to allow a judge to comment on a pending case in a scholarly presentation even if the comment "might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court." The Canon should be redrafted to eliminate that contradiction.

Furthermore, the Proposed Revised Code does not eliminate an important gap that the ABA filled with Rule 2.10(B), prohibiting a judge from making "in connection with cases, controversies, or issues that are likely to come before the court, . . . pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." The ABA also adopted a requirement of disqualification if "the judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy." As ABA commentary explains, these canons reflect the principle that "restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary," and indeed most judges already practice self-restraint in speaking on controversial issues in recognition of that
principle. In light of the substantial problems that arise when judges fail to refrain from speaking on inappropriate subjects, it is important that the standard be explicitly incorporated in the code of judicial conduct, both as a reminder to judges and an explanation to the public.

Given the attention judicial attendance at tuition-waived and expense-paid seminars and similar events has received, it would be appropriate for the Code of Conduct for U.S. Judges to address the issue directly by incorporating some of the thorough discussion in this Committee's Advisory Opinion No. 67 or at least referring to that opinion. As a primer for new judges, the code should remind them of the issue and give them guidance or direct them to where their questions can be answered.

Finally, the Committee should consider adopting guidance for nominees to the federal bench. The ABA *Model Code of Judicial Conduct* contains restrictions that apply to judicial nominees. Such rules help prevent political or other inappropriate conduct in the periods between nomination, confirmation, and swearing-in that might have repercussions once a new judge begins to serve. Furthermore, making some canons applicable as soon as possible would be a timely, effective introduction for potential judges to some of their new ethical responsibilities.

I hope these comments are helpful. If you have any questions, please let me know. I look forward to seeing the final product of the Committee's thoughtful work. The Committee is free to make my comments public on the judiciary's web-site.