

From: [Cyrus Sanai](#)
To: [AO Code and Conduct Rules](#)
Cc: [REDACTED]
Subject: Re: Responding to your email today re your request to testify on the proposed changes to the Code of Conduct for U.S. Judges and the Judicial Conduct and Disability Rules
Date: Tuesday, November 13, 2018 10:54:29 AM
Attachments: [Comment Letter 2d v2.pdf](#)

Another witness just pointed out a typographical error which was easily correct. Please distribute this copy of the November 12, 2018 letter instead.

SANAIS

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On Nov 13, 2018, at 7:01 AM, Cyrus Sanai <cyrus@sanaislaw.com> wrote:

Attached hereto is an additional comment letter. This letter is solely on my own behalf, and addresses the issue and fact pattern brought up by the first witness, Judge O'Neill.

<Comment Letter 2d.pdf>

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On Oct 25, 2018, at 2:42 PM, Cyrus Sanai <cyrus@sanaislaw.com>

Due to a strange interaction of MS Word footnoting and pdf printing functions, the footnote on page 2 was cut off. I have to rewrite the sentence to match the pagination. PLEASE POST AND DISTRIBUTE THIS VERSION OF THE COMMENTS.

<Comment Letter Final.pdf>

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On Oct 25, 2018, at 12:46 PM, Cyrus Sanai <cyrus@sanaislaw.com> wrote:

Attached are my comments made on behalf of myself and L. Ralph Mecham, former Director of the Administrative Office of the United States Courts.

<Comment Letter 2.pdf>

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On Oct 25, 2018, at 12:45 PM, Cyrus Sanai <cyrus@sanaislaw.com> wrote:

Thank you.

I have two other issues that I need resolved.

First, I am no longer speaking just on behalf of myself. I am delivering joint comments on behalf of myself and L. Ralph Mecham, Mr. Duff's predecessor.

Second and much more time sensitive, I was put on last. I don't if that was a compliment or an insult, but I have a plane to catch. I need to be heard in the morning or immediately after lunch ends.

I sent this information to the

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On Oct 17, 2018, at 2:33 PM, Cyrus Sanai <cyrus@sanaislaw.com> wrote:

I just heard back. Thank you for your attention.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: Cyrus Sanai <cyrus@sanaislaw.com>

Date: October 17, 2018 at 1:14:31 PM EDT

[REDACTED]

Subject: Fwd: I request the opportunity to testify on the proposed changes to the Code of Conduct for U.S. Judges and the Judicial Conduct and Disability Rules

Mr. Duff:

I am forwarding to you my request to testify on October 30 2018 regarding the proposed changes to the Judicial Code of Conduct and the Rules. I have sent repeated emails requesting confirmation of receipt of my request, with no response. My concern arises because of a note stating that requests to testify made prior to October 10, 2018 might not have been received. See the "Notice" box at <http://www.uscourts.gov/rules-policies/judiciary-policies/proposed-changes-code-conduct-judges-judicial-conduct-disability-rules>. Obviously if there were issues that arose initially, there is no guarantee they have been solved.

I have spent over an hour spread over three days trying to find out the person who is handling this hearing, but no one I speak to knows anything about it or will take responsibility for assisting me, other than a [REDACTED]. Eventually she named [REDACTED] as the relevant contact point, but he is out of the office for an indeterminate period of time and has not returned my calls.

Since you formed the working group, testified about it, and have a public email address, I believe making the request to you should qualify. Please confirm receipt of this email and its forwarding to the relevant person so that I may cease my efforts contacting your staff.

Thank you for your assistance.

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Begin forwarded message:

From: Cy Borg <cyborgOO9@roadrunner.com>

Subject: Re: I request the opportunity to testify on the proposed changes to the Code of Conduct for U.S. Judges and the Judicial Conduct and Disability Rules

Date: October 12, 2018 at 12:24:08 PM PDT

To: CodeandConductRules@ao.uscourts.gov

I, Cyrus Sanai, request the opportunity to testify on the proposed changes to the Code of Conduct for U.S. Judges and the Judicial Conduct and Disability Rules on October 30, 2018.

I am commenting on my own behalf and a group of other persons who are not in a formal organization.

I will separately submit comments by the deadline.

Please confirm receipt of this request. I submitted my request prior to October 10, 2018. I requested confirmation and got none. I now see the note stating that such requests may not have been received.

Since I have to arrange bicoastal travel, please let me know when I would learn whether my request has been accepted.

Thank you for your time and attention.

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November 12, 2018

BY EMAIL

Honorable Ralph R. Erickson
Chair
Committee on Codes of Conduct

Honorable Anthony J. Scirica
Chair
Committee on Judicial Conduct and Disability
Judicial Conference of the United States

Re: Proposed Changes to Code of Conduct for U.S. Judges and
Rules for Judicial-Conduct and Judicial-Disability Proceedings

Dear Judge Erickson and Judge Scirica:

This letter follows up on the October 25, 2018 letter I submitted to the Committees on behalf of myself and L. Ralph Mecham. Unlike that previous letter, this letter is submitted only by myself, as it relates to issues raised by the testimony of the Hon. Lawrence J. O'Neill, Chief Judge, U.S. District Court, Eastern District of California that are not directly of interest to Mr. Mecham.

As you know, Mr. Mecham and myself pointed out that the proposed rule changes are a failure. The Working Group which proposed the rules was assembled after another exposure of the sexually-harassing behavior of former Chief Judge of the Ninth Circuit Alex Kozinski. Rather than assemble a group to investigate and report on how Judge Kozinski managed to evade any meaningful discipline on his open and notorious behavior, the Administrative Office of the Courts placed one of Judge Kozinski's most fervent defenders and enablers, Judge M. Margaret McKeown, on the working group. Judge McKeown served on the Ninth Circuit Judicial Council while Judge Kozinski was facing multiple misconduct complaints arising from his use of his personal server as a tool for sexual harassment and other wrongs. Along with former Ninth Circuit Judge Mary Schroeder, Judge McKeown quashed all efforts to bring Judge Kozinski to account.

Likewise, Judge Scirica, who heads the Committee on Judicial Conduct and Disability, was the person directly responsible for ensuring that when misconduct complaints against

Kozinski arising from information I leaked to the Los Angeles Times were addressed, the only witness was Judge Kozinski, and all information and witnesses who would have shown the other aspects of Kozinski's misconduct were suppressed and whitewashed.

Judge Kozinski's flagrant misconduct, and the institutional failures to stop him, are strikingly similar to the Michigan State University's handling of convicted pedophile Larry Nassar. See Kerry Howley, "Everyone Believed Larry Nassar The predatory trainer may have just taken down USA Gymnastics. How did he deceive so many for so long?" New York Magazine, November 12, 2018, online version at <https://www.thecut.com/2018/11/how-did-larry-nassar-deceive-so-many-for-so-long.html>.

White unites the Kozinski and Nassar cases are that both were absolutely brazen in their sexually deviant behavior, and there were decades of complaints about the conduct of both. I should know—Mr. Mecham and I directly addressed these issues to Judge Scirica, both as to the porn server and other acts of misconduct. The result of Judge Scirica's investigation, in which Judge Kozinski was the only witness, was a de facto cover-up.

The handling of Judge Kozinski's misconduct complaints should be the case study for determining what changes should be made. However, the testimony before the Committees, with one exception, was limited to abstract discussions of rules, without looking at actual instances of the operations of the federal judicial misconduct process.

That one exception was Judge O'Neill. Notwithstanding the Committees' instructions to public speakers barring the discussion of any specific cases, Judge O'Neill started the hearings with two anonymous anecdotes concerning his informal efforts to address judicial misconduct and disability issues while he has been chief judge of the Eastern District of California. However, Judge O'Neill's first example is not an argument for allowing informal resolutions of judicial misconduct and disability claims; it is instead an indictment of this practice, and yet another example of the Ninth Circuit ignoring all interests other than the reputation and emotional-well being of its judges.

Judge O'Neill presented "two very short scenarios both of which occurred...they are indicative and illustrative of what I am trying to accomplish hear today in focus of local discretion, in other words leaving it intact." Hearing Video, October 30, 2018 at 16:00 et seq. Judge O'Neill left out the names of the persons involved.

In the first anecdote, a long-term law clerk for the District Court approached Judge O'Neill to complain about "a lewd remark" aimed at her by a male District Court judge (called 'Judge So and So' by Judge O'Neill) who Judge O'Neill "had known for years". Hearing Video, October 30, 2018 at 17:15 et seq. Judge O'Neill asked the clerk for one day to get to the bottom of this as a "favor." Judge O'Neill immediately spoke to the senior staff attorney for 'Judge So and So' who said of him: "He's losing his mind." Judge O'Neill, who had now "confirmed that there was something terribly wrong" then spoke to the 'Judge So and So's wife, who told Judge O'Neill that her husband was suffering from "dementia...Alzheimer's." So what were Judge

O'Neill's concerns on hearing this?

And I said we several things to deal with here. One is a serious, serious, complaint based on a comment that cannot be ignored. And secondly we have his long-term stellar spotless reputation to deal with too.

Hearing Video, October 30, 2018 at 20:00 et seq.

Judge O'Neill that same day visited Judge 'So and So' at this home and after a "difficult conversation" convinced Judge So and So to resign without disclosing his disability; he died two years later of complications from Alzheimer's Syndrome. *Id.*

Judge O'Neill presented this case as an example of why judicial discretion must be preserved. In fact, it is, alongside with the example of Judge Kozinski, an illustration of why any discretion to report judicial misconduct and disability issues must be eliminated, and all judicial misconduct and disability issues must be reported in writing and where necessary disclosed in public.

By facilitating the secret resignation of a mentally impaired colleague, Judge O'Neill ensured the violation of the constitutional rights of all litigants before 'Judge So and So.' As the United States Supreme Court held, "Due process implies a tribunal both impartial and mentally competent to afford a hearing." *Jordan v. Massachusetts*, 225 U.S. 167, 176, 32 S.Ct. 651, 56 L.Ed. 1038 (1912). This rule applies to juries and judges. *See, e.g. Summerlin v. Stewart*, 267 F. 3d 926, 948 (9th Cir. 2001)(*aff'd* en banc on different grounds, 341 F.3d 1082); *but see diss.*, Kozinski, J., 267 F. 3d at 957 (concurring that a litigant is "entitled to a tribunal that is both impartial and mentally competent" but arguing that a party not to discovery to show lack of competence).

'Judge So and So' was, at the time Judge O'Neill was approached, in the throes of dementia or other mental disability that was obvious to everyone who dealt with him on a personal level. It was sufficiently advanced to cause a radical alteration in his personality. However, his disability was kept secret from the people who had a constitutional right to have all decisions of his made while mentally unfit vacated and reheard.

By keeping the facts of 'Judge So and So's dementia a secret, Judge O'Neill ensured that the constitutional rights of the litigants before 'Judge So and So' were injured, perhaps irrevocably so. It is hard to imagine conduct more "prejudicial to the effective and expeditious administration of the business of the courts" than keeping a fellow colleague's dementia hidden from the persons injured by the disability, but that is what Judge O'Neill did.

This example was presented to the Committees as an example of why local discretion to address judicial misconduct and disability issues should be allowed to continue. In fact it is evidence that any discretion will be misused, and that there is a separate important issue of judicial disability that must be addressed by the proposed changes.

Where a judge has been mentally disabled but continues to hear cases, the interests of all litigants before the judge are constitutionally violated. However, neither the Canons nor the Judicial Misconduct and Disability Rules address the protection of the interests of litigants to be informed that a judge presiding over their cases is not mentally competent. These issues might have been perceived as outside the scope of the Working Group's tasks, but Judge O'Neill has brought such issues front and center by his testimony. The Committees clearly knew this when they gave Judge O'Neill the inaugural witness position. Yet not a single member of the Committees present at the hearing suggested that what Judge O'Neill had done was wrong. Indeed, even under the current rules, every single member of the Committee appears to have violated Canon 3 by failing to take action when apprised what Judge O'Neill had secretly facilitated.

So what else needs to be done? First, the Committees need to show that they take the issue of judicial reporting seriously, and initiate judicial misconduct complaints against each other for failing to take action when informed of Judge O'Neill's misconduct. If the Committees wishes the rest of the judiciary to take the reporting requirement seriously, they need to start out by reporting each other. The purpose of such complaints will be to obtain an order outlining the duties of every judge to report misconduct immediately upon learning about it. The only way for the Committees to make other judges take this obligation seriously is to report themselves.

Second, the Committees should file a misconduct complaint against Judge O'Neill for engineering the retirement of a senile District Court judge without informing the litigants before him that their constitutional rights had been compromised. I stress that the conduct prejudicial to the administration of the justice was not getting the judge to resign, but getting him to resign secretly, without informing litigants who had cases before him at the time or at any earlier time in which he was not mentally competent.

Third, Judge O'Neill should conduct an investigation to determine the approximate starting date of 'Judge So and So's mental decline, then issue an order which instructs the clerk to notify all parties in such cases of the facts and setting a deadline for filing a Rule 60 motion to vacate any orders or judgments that might have been prejudiced.

Fourth, the request of "local discretion" should be rejected, and all judicial discretion for filing of misconduct and disability reports eliminated. Judge O'Neill's first anecdote, combined with the Committees' head-nodding approval of Judge O'Neill's approach, shows that "local discretion" will always result in miscarriages of justice. The reason for this came out of Judge O'Neill's mouth: the only two considerations he had were putting an end to the immediately accusation without considering the wider ramifications, and 'Judge So and So's "spotless reputation." The interests of litigants or the public simply could not enter the mind of Judge O'Neill or the Committees.

Fifth, Canon 3 should have a separate obligation imposed on a Chief Judge to investigate the time period in which a judge has become mentally incompetent, and then inform the public and the litigants involved that they have a right to vacate any adverse orders or judgment

Honorable Ralph R. Erickson
Honorable Anthony J. Scirica
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potentially prejudiced by the mental infirmity of the Judge.

Judge O'Neill committed a grievous wrong against the public, attorneys and litigants when he reflexively decided that the interests of a judge's "spotless reputation" trumped the "the effective and expeditious. administration of the business of the courts." The Committees' reaction to Judge O'Neill's testimony shows that the attitudes which allowed Judge Kozinski to fly his sexually-harassing freak flag inside the Courts and in the Internet have in no way been altered; the reputational interests of a judge and the judiciary, in the minds of Judge O'Neill and the Committees, continue to outweigh every single other consideration. The federal judiciary must take a different path, and self-reporting judicial misconduct is a start.

Very truly yours,

SANAIS

By

A handwritten signature in black ink, appearing to read "Cyrus Sanai", written in a cursive style.

Cyrus Sanai